ONCE MORE INTO THE BREACH: FACT VERSUS OPINION REVISITED AFTER *MILKOVICH v. LORAIN JOURNAL CO.*

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I. INTRODUCTION

In *Milkovich v. Lorain Journal Co.*,[1] the United States Supreme Court sent a wave of anxiety throughout the organized press with its facially sweeping statement that the first amendment does not create a "separate constitutional privilege for 'opinion.'"[2] By holding that a sports columnist's implication of perjury against a high school wrestling coach was not automatically protected by the first amendment, the Court rejected a burgeoning number of lower court decisions that dismissed defamation actions upon a finding that the challenged statement qualified under one of several tests crafted to identify opinion.[3] In attempting to narrow what had become a useful defense for defamation defendants, Chief Justice Rehnquist added that the "'breathing space' which 'freedoms of expression require in order to survive' . . . is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and 'fact.'"[4]

The immediate reaction from the media community has been predictably hostile. Variously characterized as a "huge setback for speech,"[5] "astonishing recklessness,"[6] and "chilling,"[7] *Milkovich*, say its critics, will "spawn at least a decade of expensive and extraordinarily time-consuming litigation for the courts."[8]

As other media commentators were quick to note, however, the decision was "a loss for the press but hardly a disaster,"[9] and it would be premature to characterize *Milkovich* as indicating a change in first assumptions about legal treatment of defamation defendants. Certainly, media concern should not stem from any fear that plaintiffs will have much more eventual success in defamation actions than they did previously, given the panoply of protections provided by the various

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[1] 110 S. Ct. 2695 (1990).

[2] *Id.* at 2707.

[3] *Id.*

[4] *Id.* at 2706.

[5] Editorial, L.A. Times, June 23, 1990, at B6, col. 1.

[6] *Id.*

[7] Bronner, *Justices Reduce Libel Shield for Columnists*, Boston Globe, June 22, 1990, at 11, col. 1.

[8] Streitfeld, *Author Sues Over Negative Review*, The Washington Post, Aug. 24, 1990, § C, at 1, col. 1 (quoting media lawyer Bruce Sanford).

[9] Goodale, *Milkovich: A Modest Loss for the Press*, N.Y.L.J., June 27, 1990, at 1, col. 1.

culpability requirements.[10] Yet it is often the cost of litigating the presence or absence of actual malice[11] that is the most daunting and eventually chilling task facing even the largest media defendants. *Milkovich*, therefore, may foreshadow a new aggressiveness in private regulation of the media through civil litigation because, in a discrete but significant class of cases, the ability to dismiss a defamation action at an early stage will be lost, subjecting the media defendant to the inevitable financial and emotional toll of litigating its state of mind.

This article will first separate the various strains of "opinion" that were given protection prior to *Milkovich*, and demonstrate how the various tests developed to deal with them inevitably resulted in confusion. It will then analyze the effect of *Milkovich*, and note those forms of speech formerly covered under the umbrella of opinion that are now relegated to common law protection. Finally, this article will suggest a solution to the question that *Milkovich* left unresolved: how to distinguish pure evaluative opinion from other forms of opinion that are now constitutionally unprotected, particularly when the accusation is directed toward the subject's state of mind.

II. THE HISTORY OF OPINION

A. THREE CATEGORIES OF "OPINION"

Most discussion drawing distinctions between fact and opinion was spawned by the famous dictum in *Gertz v. Robert Welch, Inc.*:[12]

> Under the First Amendment there is no such thing as a false

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[10] New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Public figures must prove that the defendant acted with "actual malice" in order to prevail.); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (Private plaintiffs, although constitutionally required to show negligence, are often required to show enhanced degrees of culpability under state common law.); Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975) (In matters of public concern, the media is liable only for grossly irresponsible conduct taken without due consideration for journalistic standards, a test that is significantly more weighty than mere negligence.); Sisler v. Gannett Co., 104 N.J. 256, 516 A.2d 1083 (1986) (Where plaintiff, although not a public figure, conducted his personal affairs in such a way that a reasonable person in his position would expect to implicate legitimate public interest and the attendant risk of publicity, such a plaintiff would be required, as a matter of state constitutional and common law, to show actual malice.).

[11] *See* Herbert v. Lando, 441 U.S. 153 (1979) (no constitutional privilege from disclosure of editorial process).

[12] 418 U.S. 323 (1974).

> idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.[13]

Thus, for the next sixteen years, the courts were launched on what often seemed to be a quixotic search for the functional definition of "opinion," spawning a surplus of judicial tests,[14] as well as intense attention from commentators.[15] Nevertheless, the concept of opinion did not spring fully grown from *Gertz*'s head. Indeed, we are told by Professor Prosser that English-American law has always made the distinction between the publication of fact and the publication of opinion.[16] While such a distinction is subject to qualification,[17] there was developing, prior to *Gertz*, some analogous form of protection at common law, usually within the context of the "fair comment" defense. Unfortunately, the label of "opinion" was applied to several different situations where prudence might otherwise have dictated that concepts remain separate.

1. Evaluative Opinion

In evaluative opinion,[18] the speaker makes a normative judgment

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[13] *Id.* at 339-40 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[14] *See infra* notes 94-121 and accompanying text.

[15] *See* Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CALIF. L. REV. 1001 (1986); Note, *Fact and Opinion after* Gertz v. Robert Welch, Inc.: *The Evolution of a Privilege*, 34 RUTGERS L. REV. 81 (1981) [hereinafter Note, *The Evolution of a Privilege*]; Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule*, 72 GEO. L.J. 1817 (1984) [hereinafter Note, *The Fact-Opinion Distinction*]; Note, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809 (1988) [hereinafter Note, *The Fact-Opinion Determination*].

[16] W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS § 113A, at 813 (5th ed. 1984). *See also* Comment, *supra* note 15, at 1002.

[17] *See infra* note 27 and accompanying text.

[18] The terminology used here is essentially the same as that employed by Prosser and Keeton. PROSSER & KEETON, *supra* note 16, § 113A, at 813.

An effort will be made hereafter to avoid the term "pure opinion," since the term is used loosely to embrace several meanings. *See, e.g., infra* note 82. Most authorities, for instance, including Justice Brennan in *Milkovich*, apparently construe the term to include both evaluative and deductive opinion, and use the term merely to distinguish "mixed" opinion that implies undisclosed defamatory facts. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2708 (1990) (Brennan, J., dissenting). *See also* Dairy Stores, Inc.

based on facts known, and assumed to be true, by the parties to the communication.[19] Adjectival epithets generally fall into this category. To say that "Picasso was a lousy artist," when such an evaluation was clearly based on works publicly attributable to him, constitutes such opinion.[20] Likewise, to say "X supports legalized abortion; X is no better than a murderer," assuming both parties thought that X did in fact support abortion, is no more than an expression of the moral equivalence with a criminal act, and not an implication of the criminal act itself. Evaluative opinion therefore also constitutes a shorthand description of some part of the value system to which the speaker or author subscribes.

2. Deductive Opinion

Deductive opinion, or what might otherwise be labeled "speculation," is an opinion in which the speaker announces that a certain body of known facts, plus the speaker's own deductive skills, combine to lead to the inference of a new fact. For example: "I see X and Y together frequently at a bar; I think they are having an affair." Assuming the truth of the predicate statement, the inferred fact that X and Y were having an affair would amount to deductive "opinion." The deductive process is either explicitly described in the communication or clear from the nature of the expression. Like evaluative opinion,[21] the truth of the substrate facts is not a dispositive issue, so long as both speaker and recipient assumed they were true at the time of the communication. For instance, a statement by a member of the public that "I think President Nixon had prior knowledge of the Watergate break-in" would be

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v. Sentinel Publishing Co., 104 N.J. 125, 147, 516 A.2d 220, 231 (1986) ("Pure" opinion based on stated, known or assumed facts is absolutely protected.); RESTATEMENT (SECOND) OF TORTS § 566 comment b (1977) ("The pure type of expression of opinion may also occur when the maker of the comment does not himself express the alleged facts on which he bases the expression of opinion.").

[19] PROSSER & KEETON, *supra* note 16, § 113A, at 813; RESTATEMENT (SECOND) OF TORTS § 566 comment b (1977).

[20] The substrate facts do not necessarily have to be true in order for the communication to be evaluative opinion; it is sufficient that the facts were assumed to be true by the parties to the communication. Thus, if A and B were discussing a newspaper report that X had been abusing his children, a comment by either one of them that X was "no better than a criminal" is opinion, regardless of whether the newspaper account turned out to be true. *See* RESTATEMENT (SECOND) OF TORTS § 566 comment c, illustration 5 (1977). In such a case, the speaker does not "publish" the underlying facts to the recipient, and thus is not responsible for their falsity.

[21] *See supra* note 20.

presumed, without more, to be a personal deduction stemming from the corpus of public information about the Watergate affair, even if not explicitly stated as such and even if that public corpus contained misstatements of fact.

Initially, one may question whether such deductions constitute "opinion" at all. A statement such as "I think X is an ax murderer," whether or not the product of a deductive process (e.g., "X's fingerprints were on the bloodied ax; therefore I think X is an ax murderer"), communicates little of the speaker's hierarchy of values, but rather appears to comprise objective and verifiable fact. Clearly, such statements do not fall within the definition of evaluative opinion, and only an alternate and more expansive explanation will even raise a constitutional issue. Such expansion of the concept of opinion to include the process of inference and deduction, however, has support. Rules of evidence, for instance, envision inference and deduction as the exclusive manner of expressing "opinion."[22] An expert witness could therefore be called precisely to state his opinion that "I think X is an ax murderer," based on processes of deduction sanctioned by some field of expertise, such as forensics or psychiatry. Indeed, it would be a rare situation in which evaluative opinion would be relevant in litigation. The question then becomes whether use of the word "opinion" to describe both the evaluative process and the deductive process is merely semantic coincidence, or does its use indicate some common thread.

There may well be something holier about deductive opinion that separates it from ordinary communication. The particular processes of deduction to which a speaker adheres form a significant element of self-identification and definition.[23] As a form of expression, the resulting deduction may be, in fact, less important than the values indirectly expressed by the selection of the process. On an individual level, such deduction characterizes a person's "intuition." On a community level, specific rules of evidence existed in part to prevent usurpation of the general supremacy of the jury, as the surrogate of the community, to determine for itself which deductions to accept and which to reject. Vesting juries with this ultimate power was not only a consequence of the functional requirement that there be some final trier of fact, but at times took a more mystical quality, although abated

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[22] *See, e.g.*, FED. R. EVID. 701 (opinion testimony by lay witnesses); FED. R. EVID. 702 (testimony by experts); FED. R. EVID. 703 (bases of opinion testimony by experts); FED. R. EVID. 704 (opinion on ultimate issue).

[23] *See infra* notes 216-19 and accompanying text.

recently,[24] that the jury existed to impart the community's core beliefs, including beliefs on appropriate deductive processes.

By identifying the speaker's chosen set of intuitive processes, deductive opinion is self-expression more than mere exposition. Nevertheless, it would require a fair amount of generalization to harmonize a justification for this form of expression with protection for evaluative opinion. Perhaps one could define opinion as anything more than a recollection of prior sensory perceptions, i.e., a contribution, of whatever sort, from the internal mental forum. Both evaluative opinion and deductive opinion, therefore, are impressed with some threshold element of the individual personality, and reduce the unique mental processes of the speaker to actual expression. This level of generalization does not make for useful analysis, however, and as will be demonstrated, can lead to confusion.

3. Mixed Opinion

The term "mixed" opinion has been pressed into service when either an evaluative or deductive opinion suggests the existence of undisclosed facts.[25] Thus, the statement "President Nixon had prior knowledge of the Watergate break-in," when coming from John Dean or G. Gordon Liddy, might imply some particular undisclosed facts of which only the speaker was aware that supported the conclusion. Unsubstantiated factual conclusions where the deductive process is neither apparent nor assumed, such as "X is a thief," also imply some undisclosed particular facts that support the statement, such as a particular incident of theft. Furthermore, expressions of judgment, such as "I as a parent would not leave my young child be alone with X," may also imply the existence of undisclosed defamatory facts that underlie the judgment. Especially in the case of evaluative opinions, the field of possible undisclosed facts that might underlie the judgment is wide, and, beyond their mere existence, may never be further articulated or described.[26]

As a matter of terminology, each of these three concepts has been grouped within a composite understanding of "opinion," despite their

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[24] *See generally* FED. R. EVID. 704 (allowing opinion on ultimate issue).

[25] PROSSER & KEETON, *supra* note 16, § 113A, at 813.

[26] *See* Pritsker v. Brudnoy, 389 Mass. 776, 777-78, 452 N.E.2d 227, 228 (1983), in which a restaurant critic called owners "PIGS" and described them as being "unconscionably rude and vulgar." In finding for defendants, the court stated that it is "unclear that any undisclosed facts are implied, or if any are implied, it is unclear what they are. Finally, it is unclear—even assuming that facts are implied—that they are defamatory facts." *Id.*

very different logical bases. The uncritical assumption then follows that on the other side of the dichotomy of opinion lies "fact." But from the prior descriptions, it is apparent that "fact" and "opinion" need not be mutually exclusive in all cases. Deductive opinion, for instance, can be completely factual in nature and still qualify under the definition discussed above. Much of the labor that has been devoted by the courts in fashioning their preferred tests separating fact from opinion could have been avoided had there been more imaginative use of a thesaurus at the outset. Thus, the statement that there has always existed in American law a distinction between fact and opinion[27] is of limited use when one considers the breadth of the territory that the term "opinion" was forced to traverse.

B. PROTECTION OF OPINION PRIOR TO *GERTZ*

The case can be made that in each of the three definitions of opinion, the speaker is entitled to *some* form of protection from liability. It does not necessarily follow that such protection must be identical for all cases.

The nature of such protections can be linked to the four main premises upon which freedom of expression rests: (1) expression as a means of self-fulfillment and individual realization, (2) expression as a means to discover truth—the "marketplace of ideas" theory, (3) expression as a means of public participation in decision-making, and (4) expression as a "safety valve" to maintain a balance between stability and social change.[28] An intuitive hierarchy would then place evaluative opinion in a position of ascendancy. Freedom to express personal judgment has the most emotive appeal as the essence of self-fulfillment, and such evaluative communications, being devoid of overt defamatory fact, are thought to be less injurious to reputation,[29] as well as to the

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[27] *See* J. TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER & LIBEL § 259, at 467 (4th ed. 1890); PROSSER & KEETON, *supra* note 16, § 113A, at 813.

[28] T.I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970).

[29] Some may question, however, whether a negative evaluative opinion has on the whole less deleterious effect on reputation than deductive opinion. It is pleasant to believe that each member of a community, while perhaps relying on others for factual information, comes to an independent decision on whether to associate with someone else based on a self-created normative scale, without reference to a third party's evaluative opinion. In reality, however, another's viewpoint, even one as simple as "I don't like X," can have great influence on the subject's ability to interact with the community. The contrary argument would be that, relative to deductive opinion, objectionable evaluative opinions are more susceptible to the corrective process of

integrity of the marketplace of ideas. Evaluative judgments also have a vital role in individual participation in the process of public decision-making. Indeed, in republican forms of government, one relies on the public not so much for providing expertise or tangible knowledge—for which we depend on chosen representatives—but for supplying the normative scale upon which the worth of public action can be assessed. Lastly, expression of evaluative opinions serves as a "safety valve" by providing an alternative to more forceful methods of dissent.

The status of the other two forms of opinion is less clear. As stated resoundingly in *Gertz*,[30] under the marketplace theory, false facts have no value, and thus incorrect deductions would constitute a less protectable form of expression.[31] Nevertheless, protection for deductive opinion might be justified, even though it conveyed defamatory fact, on the basis that expression of one's own deductions is nevertheless an important element of self-definition and realization.[32] Furthermore, where the speculative nature of the factual deduction is facially apparent, the damage to reputation and the marketplace of ideas is at least mitigated.[33]

Protection for "mixed" opinions based on undisclosed facts would seem to be the least warranted, relative to the other two forms, because the speaker is not engaging in any explicit deductive expression, and therefore protection is not warranted even under the "self-definition"

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competing ideas than false deductions. *See* Cianci v. New Times Publishing Co., 639 F.2d 54, 62 & n.10 (2d Cir. 1980) (*Gertz's* reliance on the marketplace of ideas concept "points strongly to the view that the 'opinions' held to be constitutionally protected were the sort of thing that could be corrected by discussion.").

This article does not take a position on whether evaluative opinion is qualitatively less harmful than deductive opinion, since a hierarchy that distinguishes between the two can be justified independently on the grounds that, regardless of its effect on reputation, evaluative opinion is the most valued form of expression under any of the alternative explanations for the first amendment. *See supra* text accompanying note 28.

[30] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).

[31] For a refutation of the assumption that false speech has no value to the marketplace, see Lively, *The Supreme Court's Emerging Vision of False Speech*, 38 RUTGERS L. REV. 479 (1986). As Justice Brennan commented in his dissent in *Milkovich*, "Conjecture is a means of fueling a national discourse on such questions and stimulating public pressure for answers from those who know more." Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2714 (1990). Presumably, the stimulation provided by conjecture is present whether the conjecture in the end is true or not.

[32] *See supra* notes 22-24 and accompanying text.

[33] *See* Lauderback v. American Broadcasting Co., 741 F.2d 193, 195-96 (8th Cir. 1984) (Where underlying facts are disclosed, a listener can evaluate and discount outrageous opinions.).

theory of free speech. Moreover, the recipient has no way to assess the appropriate effect on the subject's reputation when the deductive process is not apparent, and thus mixed opinion represents a greater threat to the integrity of the marketplace. For such expression, the defendant may still resort to common law privileges related to factual statements, and often to constitutional protections dependent upon defendant's state of mind.

Antecedent common law, such as that embodied in the first *Restatement of Torts* (First Restatement), contained no blanket exemption for "opinion," in whatever form. Indeed, it explicitly provided that a "defamatory communication may consist of a statement of opinion based on facts known or assumed by both parties to the communication."[34] Evaluative opinion did receive some protection, but only under a somewhat cautiously worded articulation of the fair comment privilege.[35] "Criticism" of another on a matter of public concern was protected only if: (1) the statement was based on true, privileged, or mutually assumed facts, (2) it represented the actual opinion of the critic, and (3) it was made not solely for the purpose of causing harm to the other.[36] Criticism on matters of private concern, however, was privileged only if the same conditions were met, and in addition, only if the private conduct criticized affected the public conduct of the plaintiff. Moreover, the criticism must have been one which a "man of reasonable intelligence and judgment might make."[37]

While it is beyond the scope of this article to engage in a comprehensive historical study of how this articulation of fair comment worked in the past, its implementation today would be a matter of some concern to the mass media. As an affirmative defense, burdens of pleading, proof and persuasion would fall on the defendant to show the genuineness, non-spitefulness, and in many cases reasonableness of the criticism, as well as the relation of the criticism to a matter of public concern.[38] Such an inquiry could be exhaustive and certainly exhausting, even to a defendant who ultimately prevailed. Moreover, limiting the protection to matters either of public concern, or matters

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[34] RESTATEMENT OF TORTS § 566 (1938). Thus, the First Restatement provides as an example of defamation a case of pure evaluative opinion in which a political opponent who blocked certain reform measures advocated by defendant is described as "no better than a murderer." *Id.* § 566 comment c, illustration 1.

[35] *Id.* §§ 606-11.

[36] *Id.* § 606.

[37] *Id.* § 606(b).

[38] *See* Comment, *supra* note 15, at 1002 & n.11.

affecting the public conduct of the plaintiff, would allow recovery for purely private evaluative judgments (e.g., "X [a private figure] is a horrible father"),[39] in which the defendant may not even have access to the defense of truth.[40]

With regard to evaluative opinion, there is very little that would be covered under such a narrow definition of fair comment that today would not also be protected, albeit on an alternate theory, under the "actual malice" rule of *New York Times Co. v. Sullivan*,[41] where at least the evidentiary burdens fall on the plaintiff.[42] The constitutional point is moot, however, since *Milkovich* itself preserves first amendment protection for this form of opinion.[43]

Deductive opinion, however, was treated under the common law in the same way as any other communication of fact[44] because, at least pursuant to the majority view, the affirmative defense of fair comment did not apply to factual statements.[45] According to the First

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[39] Such a statement, of course, must have a defamatory meaning in the first instance. Many purely private evaluative judgments ("X is a lousy cook") may not have the negative effect on reputation required to be actionable.

[40] *See* RESTATEMENT (SECOND) OF TORTS § 566 comment a (1977) (The common law allowed an action even for opinion that is not a matter that can be objectively determined to be true or false.); Note, *The Fact-Opinion Determination, supra* note 15, at 811 & n.9.

[41] New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

[42] *See infra* notes 70-72 and accompanying text.

Although *New York Times* applies only to public figure plaintiffs, *Gertz* forbids recovery by private figure plaintiffs absent a showing of fault. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). Every state has translated this to a requirement that at least negligence be shown. *Gertz* was later limited to matters arguably of public concern. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). Nevertheless, the requirement that plaintiff in a private plaintiff/public issue case show negligence would, for all practical purposes, also invite inquiry into the reasonableness of the opinion, in much the same way as the First Restatement.

[43] *See infra* note 203 and accompanying text.

[44] The First Restatement provided simply that "[a] defamatory communication may consist of a statement of fact." RESTATEMENT OF TORTS § 565 (1938).

[45] *See generally* Dairy Stores, Inc. v. Sentinel Publ. Co., 104 N.J. 125, 146, 516 A.2d 220, 231 (1986) (citing majority and minority views on applicability of fair comment to factual statements). *See also* Note, *The Fact-Opinion Determination, supra* note 15, at 812 n.15.

Prosser and Keeton, however, apparently maintain the possibility that fair comment would apply to deductive opinions. PROSSER & KEETON, *supra* note 16, § 113A, at 815; *id.* § 115, at 831.

Restatement, fair comment only gave protection to "criticism,"[46] and focused on, although was not limited to, the examination of the performance of public figures, such as politicians,[47] public institutions,[48] and those engaged in art or science,[49] where adverse comments were somewhat more likely to be evaluative rather than deductive. Although perhaps not explicit in the language, the "criticism" protected by common law fair comment logically extended only to evaluative opinion.[50] As the commentary explained, "[t]he truth or falsity of an accusation of reprehensible conduct is a matter of fact, provable as such. The propriety of the opinion, as fair comment thereon, is a matter of judgment."[51] Thus, to say that "I see X and Y together frequently at a bar; I think they are having an affair," would be treated simply as two factual communications: a statement that X and Y were seen together, and that they were engaging in intimate relations. Any defenses and privileges that would apply were those that applied generally to all factual statements.[52]

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[46] RESTATEMENT OF TORTS § 606 (1938).

[47] *Id.* § 607.

[48] *Id.* § 608.

[49] *Id.* § 609.

[50] *See* Cianci v. New Times Publishing Co., 639 F.2d 54, 66 (2d Cir. 1980). In *Cianci*, Judge Friendly noted:

> [I]t is unlikely that an expression in the form "I think Cianci raped Redick at gunpoint" would be considered a "comment" so as to come within the fair comment privilege. It is far from the usual sort of evaluative judgment with which the privilege has traditionally been concerned. . . . The problems with an extension of the privilege of fair comment to include specific allegations of fact were articulated long ago and have not lost their validity . . . .

Id.

[51] RESTATEMENT OF TORTS § 566 comment a (1938).

[52] *Id.* § 567 comment b.

The First Restatement also provided that a "defamatory communication may consist of a statement of opinion upon undisclosed facts," *id.* § 567, thus apparently denying separate protection to the third form of "mixed" opinion. In the accompanying commentary, the distinction was made between evaluative opinions ("X is a hypocrite") and deductive opinions ("X is a thief") that implied such undisclosed facts. *See id.* § 582 comment b. Presumably, in the latter situation, assuming the undisclosed facts were true, the speaker was referred to the privileges afforded to communications of fact with regard to the deduction. *Id.* Moreover, a general deduction drawn from undisclosed specific facts was protected if there existed some set of undisclosed underlying facts that were true. *Id. Accord* RESTATEMENT (SECOND) OF TORTS § 581A comment c (1977). The evaluation contained in the former situation would be given the limited protection

There is much that would be in need of repair if this manner of protection for opinion prevailed today. Its language was itself internally contradictory to the extent it allowed evaluative opinion to be actionable.[53] In stating the elements of the tort, the First Restatement provided that "[t]o create liability for defamation there must be an unprivileged publication of *false* and defamatory matter. . . ."[54] Section 558 of the First Restatement was thus in conflict with section 566, in which evaluative opinion based on true or assumed facts could nevertheless be actionable even though not itself a "matter of fact." The philosophical and semantic difficulties within the First Restatement made its application a difficult exercise.[55]

The common law's limited protection of opinion, i.e., the prevailing rejection of protection for deductive opinion,[56] is admittedly consistent with the hierarchy that placed evaluative opinion above other forms of communication. Insofar as its affirmative defense of fair comment covered evaluative opinion, however,[57] the common law was unduly confined in scope. By limiting fair comment to matters touching upon public concern or community debate, the First Restatement seemed to place transcendental importance on one model of free expression, namely, speech as a method of participation by the public in decision-making and self-governance. The commentary to the First Restatement notes that "[i]f the public is to be aided in forming its judgment upon matters of public interest by a free interchange of opinion, it is essential that honest criticism and comment, no matter how foolish or prejudiced, be privileged."[58] Under this theory, speech serves as a necessary fuel for a liberal democracy, and comment on matters of public concern is therefore entitled to some protection solely as a prerequisite to such self-governance. Speech that is not about a matter

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under fair comment.

[53] *See* Christie, *Defamatory Opinions and the Restatement (Second) of Torts*, 75 MICH. L. REV. 1621, 1625-28 (1977).

[54] RESTATEMENT OF TORTS § 558 (1938) (emphasis added).

[55] Indeed, there is some question whether the First Restatement, as a general matter, ever accurately portrayed the state of defamation law. Christie, *supra* note 53, at 1640 n.74. *But see* RESTATEMENT (SECOND) OF TORTS § 566 (Tent. Draft No. 20, 1974) (citing cases in support of First Restatement rule on opinion). *See also* Owens v. Scott Publishing Co., 46 Wash. 2d 666, 284 P.2d 296 (1955).

[56] *See supra* note 45 and accompanying text.

[57] *See supra* notes 35-43 and accompanying text.

[58] RESTATEMENT OF TORTS § 606 comment c (1938).

of public concern,[59] or that does not represent the true opinion of the speaker,[60] or that is motivated solely by personal animus rather than civic concern[61] would have little value under this participatory scheme, thus suggesting the historical limitations on fair comment.[62]

This self-governance model of free speech has a significant role in judicial thinking.[63] Nevertheless, usually it has seemed more useful as a rule of emphasis rather than a rule of definition. Even some of its proponents have relaxed their distinctions between political and non-political speech—distinctions that are often impossible to maintain.[64] To the extent that the First Restatement treatment of fair

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[59] *Id.* § 606(1) & (2).

[60] *Id.* § 606(1)(b).

[61] *Id.* § 606(1)(c). *See also id.* comment d.

[62] Another argument in favor of the "public concern" limitation on fair comment is that only one who voluntarily engages in public affairs assumes the risk of unfavorable commentary. This rationale, also often heard in justifying the "public figure" limitation on the actual malice rule, is probably more rhetorical than useful, since such contrived "consent" seems always to mirror exactly the need for the particular speech at issue in public discourse.

[63] *See* Ollman v. Evans, 750 F.2d 970, 1002-10 (D.C. Cir. 1984) (Bork, J., concurring). *See also* T.I. EMERSON, *supra* note 28, at 7 (1970). Professor Emerson noted:

> [T]he governed must, in order to exercise their right of consent [to government], have full freedom of expression both in forming individual judgments and in forming the common judgment. The principle also carries beyond the political realm. It embraces the right to participate in the building of the whole culture, and includes freedom of expression in religion, literature, art, science, and all areas of human learning and knowledge.

Id.

[64] The leading proponent of the exclusively political nature of first amendment rights, Alexander Meiklejohn, later mitigated his argument somewhat by observing that non-political speech nevertheless affects those called upon to participate in the political process. *See* Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263. Another noted proponent, Judge Bork, adhered to the view even after Meiklejohn had admitted this nuance. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 26 (1971). Judge Bork's current position, much publicized during his confirmation hearings, is that the views expressed in the *Indiana Law Review* article regarding the political provenance of free speech were "theoretical, tentative, and speculative," but nevertheless were still mostly correct. R. BORK, THE TEMPTING OF AMERICA 333, 347 (1990).

Some recent support for this self-governance theory has reemerged in Supreme Court decisions. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). In *Greenmoss*, a plurality of the Court found that a commercial credit report did not implicate "a public issue," or "an issue of public concern," and thus was not entitled

comment embodied such an impractical distinction, it called for reexamination.

C. THE SECOND RESTATEMENT

In 1977, three years after *Gertz*, the American Law Institute (ALI) published its long awaited final volume of the *Restatement (Second) of Torts* (Second Restatement), including the sections on defamation. As described below, the protection for opinion in the Second Restatement is quite expansive when compared to its predecessor.

It might have been more convenient for subsequent commentators if it could truthfully be said that, after publication of the First Restatement, its limited definition of "fair comment" evolved naturally into a more encompassing protection for opinion that existed prior to *Milkovich*. Common law protection of the various forms of opinion would then become essentially co-extensive with the constitutional privilege thought to exist after *Gertz* and before *Milkovich*. Under this scenario, the commotion over the *Gertz* dictum, and the recent pruning of that dictum in *Milkovich*, would at most have demonstrated the wisdom of withholding constitutional intervention possible and allowing state law to develop on its own. The future impact of *Milkovich* would also be negligible, since it could accurately be stated that the common law creates independent state grounds outside of the first amendment that provide protections for opinion similar to those rejected by the *Milkovich* Court.

As noted by others,[65] however, the history of the sections of the Second Restatement dealing with defamation, and particularly of those sections addressing the concept of opinion, indicates that it was only with much resistance and hesitation that the ALI acknowledged any protection for opinion beyond that previously contained in the First Restatement.[66] A mere two months before *Gertz* was announced, the ALI was still proposing to reenact the exact language of section 566 of the First Restatement: "A defamatory communication may consist of a statement of opinion based upon facts known or assumed by both parties

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to the constitutional protections previously established in *Gertz* requiring a showing of fault. *Id.* at 761-62.

[65] Christie, *supra* note 53, at 1630-32; Comment, *supra* note 15, at 1012-13.

[66] Indeed, in some ways, the drafters of the Second Restatement contemplated expanded liability by proposing § 567A that explicitly made "ridicule" actionable. Christie, *supra* note 53, at 1629. This section was dropped in the aftermath of *Gertz*.

to the communication."[67]

Strangely, this reluctance was maintained despite repeated indications from the Supreme Court that the first amendment was about to intervene. As the ALI apologetically noted, the work was completed twelve years after it was begun.[68] Coincidentally, the same twelve years, beginning in 1964 with *New York Times Co. v. Sullivan*,[69] established the constitutional limitations on defamation that soon overwhelmed common law protections. Constitutional "actual malice," as applied to public figures,[70] required that a defamation plaintiff prove by clear and convincing evidence that either the defendant knew the statement was false or that it was published in reckless disregard of the truth.[71] Because any finding of actual malice requires a predicate showing of falsity, the framers of the Second Restatement certainly were aware that the burden now necessarily fell on the plaintiff to plead and prove such falsity. Statements that were inherently unverifiable, and thus not provably false, logically could not be actionable.[72]

Further evidence of the constitutional restrictions on defamation was supplied during the course of the ALI's deliberations by *Greenbelt Cooperative Publishing Ass'n v. Bresler*,[73] in which a real estate developer had been seeking a zoning variance at the same time he was negotiating with the city on other land the city wished to purchase from him. A local newspaper published certain articles stating that some people had characterized the developer's negotiating position as "blackmail." Rejecting a contention that liability could be premised on the notion that the word "blackmail" implied the developer had committed the actual crime of blackmail, the Court reasoned that the factual elements of the

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[67] RESTATEMENT (SECOND) OF TORTS § 566 (Tent. Draft No. 20, 1974). *Gertz* was decided on June 25, 1974. Gertz v. Robert Welch, Inc., 418 U.S. 323, 323 (1974).

[68] RESTATEMENT (SECOND) OF TORTS, at vii-viii (1977).

[69] 376 U.S. 254 (1964).

[70] For much of the time during which the ALI was deliberating about the sections on defamation, the prevailing view (until overruled by *Gertz*) was that the actual malice rule applied not only to public figures, but to any public controversy. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43-44 (1971).

[71] The latter prong of "reckless disregard" was further defined in St. Amant v. Thompson, 390 U.S. 727 (1968), as "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. *See also* Garrison v. Louisiana, 379 U.S. 64, 74 (1964) ("[O]nly those false statements made with the high degree of awareness of their probable falsity" satisfy the actual malice requirement.).

[72] *See* Comment, *supra* note 15, at 1005-06.

[73] 398 U.S. 6 (1970).

report "were accurate and full," and that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable."[74] The term "blackmail" in this case merely communicated the speakers' normative judgments about the propriety of the developer's actions and not speculation about actual acts of illegality.

New York Times and *Greenbelt* both provided a basis for the conclusion that constitutional protection was to turn on the concept of verifiability. Since one such class of statements that ostensibly defies such verification is evaluative opinion, which by definition communicates personal judgment rather than extrinsic fact,[75] it should have been a simple enough matter in drafting the Second Restatement for the definition of actionable language to be revised to exclude this single form of opinion in order to meet the new constitutional requirements.

Such language might have been similar to the following: "A defamatory communication may consist of a statement of opinion, but a statement of this nature is actionable only if it alleges defamatory facts that either constitute or form the basis for the opinion." The initial parsing of this language, in which "facts" could "constitute" an "opinion," would highlight the treatment of deductive opinion as actionable, while affording absolute protection to evaluative opinion that by its nature does not constitute fact, so long as it did not also imply undisclosed defamatory facts. The alternative reading that defamatory facts could "form the basis" of the opinion describes the more conventional situation of mixed opinion that implies a defamatory fact.

After *Gertz* was decided, however, the ALI's response to its dictum was somewhat radical. Despite its prior tenacity in adhering to the First Restatement's articulation, not only did the ALI now revise section 566 in order to make evaluative opinion absolutely protected, it also expanded the scope of absolute protection to include deductive opinion as well. The Second Restatement states, "A defamatory opinion may

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[74] *Id.* at 13-14. *See also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (The first amendment precluded recovery under state emotional distress action for parody that "could not reasonably have been interpreted as stating actual facts about the public figure involved."); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 284-86 (1974) (Use of the word "traitor" in literary definition of a union "scab" is not a basis for a defamation action under federal labor law since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members.").

[75] For a discussion of the limits to the concept of verifiability, see *infra* notes 233-45 and accompanying text.

consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis of the opinion."[76]

By addressing opinion in its definitional sections, rather than as an affirmative defense of fair comment, the Second Restatement eradicated one of the flaws that existed under the First Restatement that the opinion be on a matter of "public concern."[77] Indeed, because of its sweeping definition of opinion, the Second Restatement deleted as superfluous the sections that had contained the fair comment privilege.[78] In hindsight, that alteration, combined with absolute protection for evaluative opinion, is all that *Gertz* required.[79] The Second Restatement went much further, however.

The language of the Second Restatement has direct bearing on the treatment of both evaluative and deductive opinion. The key words that distinguish the actual words of the Second Restatement from the fictional language above that might have been sufficient to satisfy *New York Times* are the words "implied" and "undisclosed." Section 566 in one sentence purports to grant absolute protection both to evaluative opinion, where no new facts are communicated, and deductive opinion, where all the predicate facts are either true or previously known to the recipient, and the ultimate conclusion is derived exclusively from those disclosed predicates. Factual deduction is therefore protected so long as the bases for the deduction are revealed. Section 566 thus excludes from absolute protection only mixed opinions that imply new and undisclosed facts.

As further example of the protection granted deductive opinions, the framers of the Second Restatement included the following as an example:

> A writes to B about his neighbor C: "He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair

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[76] RESTATEMENT (SECOND) OF TORTS § 566 (1977).

[77] *See supra* notes 39-40 and accompanying text.

[78] RESTATEMENT (SECOND) OF TORTS §§ 606-10 (1977) (deleted sections).

[79] Although the argument was made that *Gertz* need only be applied to "public communications on matters of public concern," even the ALI recognized that "the logic of the constitutional principle would appear to apply to all expressions of opinion of the first, or pure type." RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977). Although drafts of § 566 that immediately followed *Gertz* contained the qualification "at least if it is on a matter of public concern," that language was dropped in the final version. Christie, *supra* note 53, at 1624, 1630.

> with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic." The statement indicates the facts on which the expression of opinion was based and does not imply others. These facts are not defamatory and A is not liable for defamation.[80]

Thus, even though the conclusion that C is an alcoholic might otherwise be deemed a statement of defamatory fact,[81] it is not actionable where the bases of the conclusion were fully stated and comprised of true or assumed facts.[82] Furthermore, there is no requirement that the deduction be one which a "man of reasonable intelligence and judgment might make."[83] Thus, stating that "X has shifty eyes; I think he cheats on his taxes" is protected, despite the weakness of the logical deduction, so long as the basis ("shifty eyes") is disclosed.

Section 566 also inserted the phrase "*in the form* of opinion," whereas its predecessor referred only to "a statement of opinion."[84] The apparent objective of this language was to stress linguistic usage (e.g., "I think" or "I believe") rather than to rely exclusively on functional definitions of opinion. Indeed, despite the radical changes it suggested, the Second Restatement did not attempt to provide such functional definitions, whether similar to or different from those described previously,[85] in cases where the proper characterization was in doubt. Rather, it simply used the terms "fact" or "opinion" as labels that were

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[80] RESTATEMENT (SECOND) OF TORTS § 566 comment c, illustration 4 (1977). Although one commentator views this illustration as an example of "mixed" opinion, Note, *The Fact-Opinion Distinction, supra* note 15, at 1827, the statement does not imply any undisclosed facts, and would seem to fall squarely within the definition of what the drafters of the Second Restatement considered to be "pure" and constitutionally protected opinion.

[81] Thus, the immediately preceding illustration provides: "A writes to B about his neighbor C: 'I think he must be an alcoholic.'" RESTATEMENT (SECOND) OF TORTS § 566 comment c, illustration 3 (1977). A jury might find that this was not merely an expression of opinion, but that it implied that A knew undisclosed facts that would justify this opinion.

[82] In its comments devoted to the effect of the Constitution, and *Gertz* in particular, on § 566, the Second Restatement engaged in a somewhat confusing discussion of "pure" opinion, which it now deemed absolutely protected under the first amendment. RESTATEMENT (SECOND) OF TORTS § 566 comments a-c (1977).

[83] *See* RESTATEMENT OF TORTS § 606(b) (1938).

[84] *Id.* § 566.

[85] *See supra* notes 18-26 and accompanying text.

presumably self-evident. Of course there are times when they are not.[86]

This dramatic expansion on protection for opinion was explained solely on the basis of the intervening decision in *Gertz*.[87] The apparent consensus by the ALI on the effect of *Gertz* is certainly somewhat surprising, given its prior recalcitrance on the effect of *New York Times*. Regarding evaluative opinion, however, the new principle gained fairly quick acceptance. In *Avins v. White*,[88] for instance, a statement by an ABA accreditation team that a law school was affected by "academic ennui" was held non-actionable, based on the prediction that Delaware would adopt the Second Restatement.

The effect of the Second Restatement on deductive opinion, on the other hand, has engendered the disbelief of some commentators,[89] and has had no clear application in case law.[90] One prominent commentator has roundly criticized the Second Restatement for protecting deductive opinion.[91] This article's criticism is more moderate. It is not that deductive opinion should not receive some protection; its expression does serve important constitutional values.[92] Any damage done by the Second Restatement to further progress in this area was caused by its identical treatment of evaluative and deductive opinion in the same breath. *Gertz* added to the confusion by fostering the conception that the first amendment effectively supplanted common

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[86] The Second Restatement has been criticized for continuing to omit such a general description of opinion. *See* Comment, *supra* note 15, at 1031. Nevertheless, it is not this omission that is the greatest flaw in the Restatement. Some distinctions are simply not amenable to semantic definitions and are better left to more fact sensitive methods that cannot easily be "restated."

[87] RESTATEMENT (SECOND) OF TORTS § 566 comment c.

[88] 627 F.2d 637 (3d Cir. 1980), *cert. denied*, 449 U.S. 982 (1980).

[89] *See* PROSSER & KEETON, *supra* note 16, § 113A, at 815; *id.* § 115, at 825.

[90] *Compare* Stevens v. Tillman, 855 F.2d 394, 401 (7th Cir. 1988) (citing Horowitz v. Baker, 168 Ill. App. 3d 603, 503 N.E.2d 580 (1987)), for the proposition that "sleazy," "cheap," "pull a fast one," "secret" and "rip-off," which might otherwise imply bribery, extortion or other illegality, were not actionable where newspaper had published facts upon which characterizations were based *with* Cianci v. New Times Publishing Co., 639 F.2d 54, 64-65 (2d Cir. 1980) (Opinion does not extend to factual inferences.).

[91] Keeton, *Defamation & Freedom of the Press*, 54 TEX. L. REV. 1221, 1254 (1976). *Accord*, Cianci v. New Times Publishing Co., 639 F.2d 54, 64-65 (2d Cir. 1980) (Friendly, J.).

[92] *See supra* text accompanying notes 23, 31.

law in protection of opinion, or at least made it redundant.[93] Thereafter, in order to be consistent, doctrinal developments, including constitutional treatments, would be coerced into taking into account both forms of opinion simultaneously in fashioning a comprehensive scheme. The task is unmanageable, and it was this fusion that was the central error engendering many of the enigmatic constitutional tests that have evolved.

III. THE CONSTITUTIONAL REACTION TO *GERTZ*

A. *OLLMAN* AND ITS REFLECTIONS

In the time between *Gertz* and *Milkovich*, it fell mainly on the federal courts of appeals to attempt to outline constitutional distinctions between fact and opinion in the wake of *Gertz*'s dictum. Little assistance could be expected from the Second Restatement, despite its facial surrender to first amendment intervention, since not only did it omit any functional test for opinion, but the intermingling of evaluative and deductive opinion affirmatively retarded further attempts at coherence.

The D.C. Circuit's plurality opinion in *Ollman v. Evans*,[94] set out a four factor test for distinguishing fact from opinion that was the model for most subsequent discussion. In *Ollman*, a Marxist political science professor was described by the syndicated columnists Evans and Novak as having "no status within the profession, but is a pure and simple activist."[95] In determining whether the statement was fact or opinion, the plurality advised that one should look to: (1) the common usage or meaning of the specific language of the challenged statement, to determine whether it has a precise core of meaning for which a consensus of understanding exists; (2) whether the subject matter of that statement is verifiable, i.e., capable of being objectively characterized as true or false; (3) whether, apart from the challenged language itself, the full context of the statement would influence the average reader's readiness to infer that the statement has factual content; and (4) whether the broader context or setting of the statement, including social

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[93] *See infra* notes 94-163 and accompanying text. *But see* Stevens v. Tillman, 855 F.2d 394, 404-05 (7th Cir. 1988), in which the Seventh Circuit preferred to rely on state common law, including § 566, rather than "declaim on the meaning of the Constitution."

[94] 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). The plurality opinion by Judge Starr was in fact the opinion of the court on all matters except disposition of the "no status" comment. *Id.*

[95] *Id.* Defendants also stated that plaintiff's "candid writings avow his desire to use the classroom as an instrument for what he calls 'the revolution.'" *Id.* at 972.

conventions that attach to different types of writing, signal to the reader that the statement is fact or opinion.[96]

Other courts subsequent to *Ollman* suggested their own refinements without enacting fundamental change. In *Mr. Chow of New York v. Ste. Jour Azur S.A.*,[97] the Second Circuit consolidated the four factors into three by combining the last two under the single heading of "context."[98] In *Janklow v. Newsweek, Inc.*,[99] the Eighth Circuit added a fifth factor of "public context," adopting the distinction between the "political arena" and private disputes, as suggested in Judge Bork's concurring opinion in *Ollman*.[100] The Seventh Circuit, however, wary of multi-factored and arguably indeterminate balancing tests when dealing with speech, avoided *Ollman* altogether and preferred to reach its results by application of the common law.[101] *Ollman* nevertheless merits discussion as the basis upon which most other courts have based their explorations of the fact/opinion dichotomy.[102]

The plurality opinion in *Ollman* is an articulate recitation of four perspectives by which human minds might differentiate facts from opinions. As other courts were quick to discover, however, these perspectives were not reducible to a common currency for purposes of comparison when not in complete agreement. In alluding to the *Ollman* tests, the Seventh Circuit observed: "Ever since [*Gertz*], courts have

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[96] *Id.* at 979. In a much noted concurring opinion, Judge Bork preferred to base the result more explicitly on the political nature of the dispute. *Id.* at 1004 (Bork, J., concurring). Rather than cataloging separate factors, Judge Bork employed a more general "totality of the circumstances" test. *Id.* at 1000 (Bork, J., concurring). Nevertheless, much of his argument was coterminous with the analytical and contextual factors outlined by the plurality:

> Ollman, by his own actions, entered a political arena in which heated discourse was to be expected and must be protected; the 'fact' proposed to be tried is in truth wholly unsuitable for trial, which further imperils free discussion; the statement is not of the kind that would usually be accepted as one of hard fact and appeared in a context that further indicated it was rhetorical hyperbole.

Id. at 1002 (Bork, J., concurring).

[97] 759 F.2d 219, 227 (2d Cir. 1985).

[98] *Id.*

[99] 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986).

[100] *Id.* at 1303. *See supra* note 96.

[101] *See* Stevens v. Tillman, 855 F.2d 394, 399-400 (7th Cir. 1988) (Easterbrook, J.).

[102] *See also* Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1015-17 (1st Cir. 1988); Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 446, 452-55 (3d Cir. 1987).

wrestled with the question 'what's an opinion?' and have come up with buckets full of factors to consider but no useful guidance on what to do when they look to opposite directions, as they always do."[103]

The difficulty with administering *Ollman* is the same problem that has affected the definition of opinion from the outset: it merges evaluative opinion and deductive opinion into one composite. Viewed together, the first and second *Ollman* factors combine to form a functional test for evaluative opinion. The first *Ollman* factor, concerning the specific language of the statement, determines whether the words are capable of determinate meaning. Adjectives that cater to a wide range of human taste, such as "good," "bad," "lousy," or "delicious," cannot progress to further consideration because they have no reasonably fixed position on any evaluative scale or index.[104] Conversely, the second *Ollman* factor of verifiability asks whether such a scale or index exists at all. Describing someone as "a one hundred percent hedonist," or as "utterly devoid of Christian virtue," fails this second test if one believes that hedonism or Christian values cannot be reduced to provable norms.[105]

The third and fourth *Ollman* factors, on the other hand, are better utilized to define deductive opinion. Both the internal context of the words relative to the entire statement, and the external context of the statement, signal to the reader whether the speaker is merely engaging in speculation, or instead intends to communicate a new substrate fact. Some language, for instance, may signal that the speaker is relying only upon the core of general knowledge, such as, "Only an idiot would believe X's story" or, "The world knows the truth about Y's death." Other language may indicate that the speaker is speaking from emotion, rather than knowledge, e.g., "The evidence may say he's innocent, but my heart tells me he pulled the trigger." Such language would be consistent with the third inquiry into whether the "full context of the statement would influence the average reader's readiness to infer that the

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[103] Stevens v. Tillman, 855 F.2d 394, 398 (7th Cir. 1988) (Easterbrook, J.).

[104] *But see infra* note 120 and accompanying text. The first *Ollman* factor might do double duty in identifying both evaluative and deductive opinion if examination of the precise language of the statement includes inquiry into whether the statement suggests deduction, such as "I believe," rather than straightforward exposition.

[105] *See also* National Foundation for Cancer Research Inc. v. Council of Better Business Bureaus, Inc., 705 F.2d 98, 99 (4th Cir. 1983) (A statement that plaintiff did not spend a "reasonable percentage of total income on program services" was a nonactionable opinion.), *cert. denied*, 464 U.S. 830 (1983).

statement has factual content."[106] Likewise, social conventions or other elements of the "broader context"[107] may label a statement as deductive opinion. Designating a newspaper story as an "editorial," "news analysis," or "commentary" informs the reader that the speaker is not imparting any new or undisclosed fact, but merely building upon facts already known or reported. Statements made in the context of public debate[108] or other arenas where speculation is more commonplace may also be presumed to be deductive.

It should have hardly been surprising, therefore, that the *Ollman* factors might on occasion be in internal disagreement, because they attempt to combine two independent theories of opinion into one. A pure evaluative opinion will be consistent with the first two *Ollman* factors, and will usually be responsive, or at least neutral, to the third and fourth.[109] A deductive opinion ("X is an alcoholic"),[110] however, may utterly fail the first two tests while passing the others. In this case, *Ollman* provides no guidance on how to break the apparent deadlock.

The difficulty in applying *Ollman* to deductive opinions was quickly discovered. In *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*,[111] the Fourth Circuit found an accusation in a flyer by a business competitor that a manufacturer's product test was a "purposely very poor test designed to snow the customer"[112] to be a constitutionally protected statement of opinion. Whether or not the test was "very poor" might be objectively verifiable; nevertheless, the actionable portion of the statement centered on whether the test was "purposely . . . designed to snow the customer," and therefore questioned the subjective state of

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

[107] *Id.*

[108] *See* Secrist v. Harkin, 874 F.2d 1244 (8th Cir. 1989) (A statement made on a press release by a political opponent was likely to be understood as speculative.); Potomac Valve & Fitting v. Crawford Fitting, 829 F.2d 1280, 1281 (4th Cir. 1987) (A statement made by business competitor was likely to be understood as speculative.).

[109] For instance, in Koch v. Goldway, 817 F.2d 507, 508 (9th Cir. 1987), plaintiff, who vocally opposed defendant's local political agenda, was compared to a notorious Nazi war criminal of the same name. *Id.* at 509. Then Circuit Judge Anthony Kennedy, applying the *Ollman* factors, found the statement to be vituperative but protected opinion. *Id.* No reasonable listener could have believed that plaintiff was actually the war criminal, since the reference merely amounted to a pungent simile for the purpose of berating the subject's character.

[110] *See supra* note 80 and accompanying text.

[111] 829 F.2d 1280 (4th Cir. 1987).

[112] *Id.* at 1283.

mind of the plaintiff.

Using the second *Ollman* factor first, the court concluded that such a statement concerning state of mind was verifiable.[113] Nevertheless, the court found that use of colloquial terms such as "to snow," rather than legal terms such as "with specific intent," "mislead," "deceive," or "defraud," as well as the contextual setting of a statement made by a business competitor, tended to alert the average listener that the statement was opinion. In particular, the court found that the statement did not imply the existence of any undisclosed facts.[114] The imputation of an intent to deceive by the plaintiff thus amounted to deductive opinion.

Applying *Ollman* to the facts of *Potomac*, therefore, rendered a score of two (and possibly three)[115] factors in favor of finding the communication "opinion," and one in favor of "fact." As the Fourth Circuit observed: "We agree that this thoughtfully elaborated list includes all the relevant factors. Unfortunately, the *Ollman* test and other tests like it leave considerable doubt as to the proper outcome when all of these factors are not in agreement."[116]

Potomac then bifurcated the *Ollman* analysis and constructed a new hierarchy by which to resolve such conflicts.[117] "We view the second *Ollman* factor—the verifiability of the statement in question—as a minimum threshold issue. If the defendant's words cannot be described as either true or false, they are not actionable, even if they are cautiously phrased and published in a learned treatise."[118] Adhering to its view that statements regarding human state of mind are provably true or false, *Potomac* nevertheless found that even if a statement survived the second *Ollman* test of verifiability, the statement was nevertheless opinion if "it is clear from any of the three remaining *Ollman* factors, individually or in conjunction, that a reasonable reader or listener would recognize its weakly substantiated or subjective character—and discount it accordingly."[119] Viewed as a whole, therefore, the court found that the statement merely indicated the speaker's own inferences about the

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[113] *Id.* at 1289. *See infra* notes 124-38 and accompanying text for discussion of cases regarding inquiry into "state of mind."

[114] *Potomac*, 829 F.2d at 1290 & n.34.

[115] For application of the first *Ollman* factor to deductive opinion, see *supra* note 104 and accompanying text.

[116] *Potomac*, 829 F.2d at 1288.

[117] *Id.*

[118] *Id.*

[119] *Id.*

shortcomings of the product test.

This bifurcation constructed a rough method by which *Ollman* could be separately made to service both the evaluative and deductive forms of opinion. An evaluative opinion would be identified through the "threshold" determination of verifiability, while a deductive opinion would be recognized by some combination of the other three.[120] Whether intentional or not, application of these multiple factors achieved, by constitutional means, much the same result as the Second Restatement suggested as a matter of common law, namely, protection for both evaluative and deductive opinions which did not imply undisclosed defamatory facts.[121]

B. FACTORING THE PLAINTIFF'S STATE OF MIND

Declarations concerning the plaintiff's state of mind have been among the most vexing applications of the *Ollman* tests. Since there is usually a limited amount of tangible data that can contribute to an understanding of someone else's mental state, such comments by their nature tend to be speculative and thus lead to deductive opinion, which in turn causes the *Ollman* factors to fragment and confuse.[122]

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[120] The method is "rough" since the first *Ollman* factor (the specific nature of the language at issue) can address evaluation more than deduction. *See supra* note 104 and accompanying text. Use of rhetorical language, however, is not only less likely to be capable of determinate (and verifiable) meaning, but adds to the contextual suggestion that the speaker is engaging in speculation.

[121] Similarly, in Secrist v. Harkin, 874 F.2d 1244 (8th Cir. 1989), the Eighth Circuit stressed the latter contextual components of *Ollman*, and found that a press release by a political candidate which stated that a military officer had been assigned to an incumbent senator's staff in order to solicit campaign funds from defense contractors (which would have been illegal under the Hatch Act), rather than to assist in procuring military contracts for constituent businesses, was opinion rather than fact.

Secrist presents a case in which the challenged language could be construed either as deductive opinion (speculation that the military officer had engaged in active solicitation), or as a general and inherently unverifiable evaluative judgment of the motivation of the incumbent senator and the colonel in making the appointment. The court found that "fund raising" is a vague term that does not necessarily imply active solicitation, and thus no defamatory facts were disclosed. *Id.* at 1250. Moreover, the political context of the controversy signaled that the press release was rhetorical speculation common to political campaigns. Such rhetoric at most amounts to deductive opinion, protected constitutionally before *Milkovich* and possibly by common law thereafter. Unverifiable descriptions of ulterior motivation, on the other hand, amount to protected evaluative opinion which this article contends remain completely protected even after *Milkovich*. *See infra* notes 147, 151-56 and accompanying text.

[122] *See supra* notes 104-11 and accompanying text.

Refinements such as the bifurcation utilized in *Potomac*, however, would in all likelihood be sufficient to lead to results that are at least consistent in cases of straightforward (non-mixed) deductive opinion. Absent access to the subject's personal diary or psychiatrist's files, allegations on state of mind would usually be found to be deductions and thus pass the second prong of a bifurcated test for opinion.

Assessing allegations of state of mind as evaluative opinion, however, engenders greater problems. At some point, depiction of someone else's mental disposition or processes ceases to be a literal exposition on cognitive or volitional state and becomes a shorthand characterization on the normative worth of the subject. To say "X is motivated by a desire for wealth" is little different from saying that "X is a greedy person," and thus approaches evaluative opinion. The statement "President Y wants war," although strictly a declarative statement on purpose, is, especially in the context of a public figure, more an evaluation of Y's place on a subjective scale of political norms than a conclusion about Y's actual desires. Even before *Milkovich*, and certainly thereafter, verifiability was recognized as the touchstone of determining whether the statement was protected opinion.[123] Where comments on a person's state of mind approach the periphery of evaluative opinion, however, resolution of some of the *Ollman* tests, and particular verifiability, becomes problematic.

Cases involving accusations of state of mind are fairly common. *Potomac*, for instance, directly addressed the argument that statements regarding a subjective state of mind—a purpose to "snow the customer"—fail the second *Ollman* test of verifiability and, on that basis alone, constitute opinion.[124] The Fourth Circuit's response was very energetic on this point, however:

> We emphatically reject this approach. The question of verifiability is ultimately relevant only insofar as it preserves the truth defense and protects statements which the ordinary reader or listener would recognize as incapable of positive proof. These purposes are not served by considering psychological and epistemological doubts that would ultimately threaten the entire concept of defamation. We hold that the [statement] is capable of being proved true or false.[125]

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[123] *See* Stevens v. Tillman, 855 F.2d 394, 399 (7th Cir. 1988).

[124] *Potomac*, 829 F.2d at 1289.

[125] *Id.*

Similarly, in the highly publicized case of *Brown & Williamson Tobacco Corp. v. Jacobson*,[126] plaintiff tobacco company prevailed based on an allegation by a television commentator that the company's advertising strategy was intended to entice children to smoke cigarettes by appealing to adolescent vulnerability and attraction to "illicit pleasures."[127] Brown & Williamson was therefore accused of having acted purposefully in waging an advertising campaign designed to exploit youthful weaknesses, a strategy that it claimed it had disavowed. Applying the *Ollman* factors, the court found that whether the plaintiff intended to adopt such a scheme was verifiable as true or false, and despite the rhetorical context in which the statement was presented, was actionable as fact.[128]

Two of the more celebrated libel cases in recent years also demonstrate attempts by public figure plaintiffs to vindicate their state of mind in the context of historically unpopular wars, although neither was decided on the fact/opinion distinction. In *Westmoreland v. CBS Inc.*,[129] the defendant aired a television documentary that suggested that General Westmoreland, while commander of American armed forces in Vietnam, intentionally misrepresented the strength of the enemy in order to affect public support for the war.[130] Although there was substantial evidence that the battle estimates were in error,[131] the central question was whether General Westmoreland knowingly lied to his superiors and the public. The trial court found that the statement was actionable.[132]

In *Sharon v. Time, Inc.*,[133] the inference concerning the plaintiff's

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[126] 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988).

[127] *Id.* at 1123. The victory was the largest libel judgment upheld on appeal up to that point.

[128] *Id.* at 1130.

[129] 596 F. Supp. 1170 (S.D.N.Y. 1984) (motion to dismiss).

[130] *Id.* at 1171.

[131] *See* N.Y. Times, Jan. 29, 1985, § A15, col. 1.

[132] *Westmoreland*, 596 F. Supp. at 1170. The case proceeded to trial, but the parties settled before the case was submitted to the jury, based upon a clarifying statement by CBS that it did not mean to suggest that General Westmoreland was "unpatriotic or disloyal in performing his duties as he saw them." N.Y. Times, Feb. 19, 1985, § A1, col. 6. This enigmatic statement leaves some doubt about the conclusions CBS intended to invite regarding Westmoreland's state of mind.

[133] *See* Sharon v. Time, Inc., 575 F. Supp. 1162 (S.D.N.Y. 1983) (motion to dismiss); Sharon v. Time, Inc., 599 F. Supp. 538 (S.D.N.Y. 1984) (motion for summary judgment).

It should be noted, by way of disclosure, that the author was one of the lawyers representing Time, Inc. in its defense against Sharon's libel suit.

state of mind was more indirect. The defendant reported that Ariel Sharon, while Defense Minister of Israel, had "discussed the need for revenge" with the Phalangists immediately after Bashir Gemayel, the Phalangist leader and the President-elect of Lebanon, had been assassinated.[134] The original contention was that this statement implied that Sharon "condoned" the subsequent massacre of Palestinian civilians committed by Phalangists forces in Beirut refugee camps after they had been allowed into the camps by the Israeli defense forces.[135] The meaning of "condone" however, could have imputed to Sharon a wide range of culpable states of mind, ranging from mere "recklessness" in disregarding the danger of such atrocities, to "purposeful" in consciously intending the murder of Palestinian refugees.[136] By the end of trial, however, the parties and trial judge had agreed on two, more specific, possible meanings to submit to the jury through special interrogatories: (1) that Sharon "consciously intended" the killing of Palestinian noncombatants, or (2) that he "actively encouraged" the Phalangists in their intention to carry out such killings.[137] While the latter meaning could imply tangible and provable actions of encouragement, the former meaning described an abstract mental state. Interestingly, the jury found

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[134] Sharon v. Time, Inc., 575 F. Supp. 1162, 1164-65 (S.D.N.Y. 1983). *Time* was reporting on the results of Israel's commission of inquiry that assessed responsibility for the massacre. The specific paragraph at issue stated:

> One section of the report, known as Appendix B, was not published at all, mainly for security reasons. That section contained the names of several intelligence agents referred to elsewhere in the report. Time has learned that it also contains further details about Sharon's visit to the Gemayel family on the day after Bashir Gemayel's assassination. Sharon reportedly told the Gemayels that the Israeli army would be moving into West Beirut and that he expected the Christian forces to go into the Palestinian refugee camps. Sharon also reportedly discussed with the Gemayels the need for the Phalangists to take revenge for the assassination of Bashir, but the details of the conversation are not known.

Id.

[135] *Id.* at 1166.

[136] Since Sharon had already been found culpable by a public investigatory commission of disregarding the danger of atrocities being committed, the trial court ruled that *Time* could not be liable simply for reporting the public findings of that commission. Tr. 4039, Sharon v. Time, Inc., No. 83-4660 (ADS) (S.D.N.Y. Jan. 14, 1985).

[137] *Id.*

that the statement by *Time* implied the first meaning, but not the second.[138] Sharon's lawsuit therefore ultimately rested upon the premise that a public plaintiff could recover for statements regarding the plaintiff's "conscious intent."

The dire predictions of an ultimate threat to "the entire concept of defamation" suggested by *Potomac*[139] no doubt refer, at least in part, to the consequences should a plaintiff's defamatory statement never be predicated upon an imputation to his form of culpable state of mind. Virtually all statements that are the subject of defamation lawsuits allege at least knowing action by the plaintiff. The defamatory impact of such an assertion would change dramatically if the charge was claimed instead to be merely one of negligence or recklessness, even though the action itself remained the same. Conversely, virtually all crimes contain a state of mind element,[140] and the accusation of criminality is one of the earliest historical bases of defamation.[141] A blanket rule that assertions about state of mind are unprovable, and thus non-actionable opinion, might, if taken to its ultimate extension, mean an end to most defamation claims. There is, furthermore, a venerable body of authority that the "state of a man's mind is as much a fact as the state of his digestion."[142] Nevertheless, complete surrender to the purported confidence of the "ordinary reader or listener"[143] that all such matters of mental state are provable as true or false requires unquestioned reliance upon a public understanding that is often hypothetical.

In contrast, in *Janklow v. Newsweek, Inc.*,[144] the Eighth Circuit found to be opinion an assertion that the plaintiff, while state attorney general, had pursued criminal prosecution of an American Indian activist out of revenge for the activist's false charge that the plaintiff had

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[138] Jury Verdict Form, Sharon v. Time, Inc., No. 83-4660 (ADS) (S.D.N.Y. Jan. 16 1985).

[139] *See supra* notes 124-25 and accompanying text.

[140] MODEL PENAL CODE § 2.02(1) (1985) (Criminal liability requires culpable state of mind with regard to each material element.).

[141] RESTATEMENT (SECOND) OF TORTS §§ 570-71 (1977). Imputation of a crime is one of the four categories of slander per se. *Id.*

Indeed, one court has been led to state that "even pure expressions of opinion are not constitutionally protected if they accuse one of engaging in criminal conduct." Sweeney v. Prisoners' Legal Services of New York, 146 A.D.2d 1, 5, 538 N.Y.S.2d 370, 372 (1989).

[142] Edgington v. Fitzmaurice, 29 Ch. D. 459, 483 (Ch. App. 1885).

[143] Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1289 (4th Cir. 1987).

[144] 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986).

previously raped a teen-aged Indian girl.[145] The essence of the case thus stemmed from an allegation of improper motivation on the part of the plaintiff. The court in *Janklow* found that all the *Ollman* factors favored a finding of opinion. In particular, applying the second prong of "verifiability," the court noted that "the singling out of impermissible motive is a subtle and slippery exercise, particularly when the activities of public officials are involved."[146]

Janklow is consistent with the modern consensus of cases that hold that statements about a person's "motivation" are non-actionable opinion.[147] Viewing motivation as a state of mind, however, puts these cases in apparent conflict with *Potomac, Brown & Williamson*, and other cases that would find state of mind issues to be at least verifiable, even if not ultimately actionable. Little sense can be made of these "state of mind" cases unless one divides state of mind further into more manageable classes. Some of the familiar categories described by the Model Penal Code provide a workable framework. Thus, a statement may allege that a defamation plaintiff acted: (1) "recklessly," when the actor consciously disregards a known and unjustifiable risk,[148] (2) "knowingly," when the actor is aware of the nature of his conduct or is practically certain that his conduct will cause the specified result,[149] and (3) "purposely," when it is the conscious object to engage in the conduct or cause a result.[150]

This continuum may furnish points of reference by which to determine whether a statement has crossed the boundary into evaluative opinion. For instance, the law generally does not deem itself competent to judge motivation, the ultimate extension of state of mind, and thus avoids its definition altogether. Motive is not described in the Model Penal Code and is often said to be immaterial in the substantive criminal

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[145] *Id.* at 1301.

[146] *Id.* at 1304.

[147] *See* Comment, *supra* note 15, at 1052 & n.248 (citing cases). This consensus represents a shift in position. Older cases suggested that questions of motivation were matters of fact that could be actionable. *See also* W. PROSSER, HANDBOOK ON THE LAW OF TORTS 843 & n.92 (1st ed. 1941); M. FRANKLIN & D. ANDERSON, MASS MEDIA LAW 257 (4th ed. 1990).

[148] MODEL PENAL CODE § 2.02(2)(c) (1985).

While it is also possible for a defamation action to be based on an accusation of the fourth culpable state of "negligence," allegations of isolated negligence are often found to be non-actionable under the "single instance" rule. *Id.* § 2.02(2)(d). *See* R. SACK, LIBEL, SLANDER & RELATED PROBLEMS 70-71 (1980).

[149] MODEL PENAL CODE § 2.02(2)(b) (1985).

[150] *Id.* § 2.02(2)(a).

law.[151] Contract law of course purports to avoid subjective state of mind altogether in determining contract formation,[152] and particularly eschews motivation.[153] Those instances in which motivation is relevant, notably in the area of employment discrimination,[154] have resulted in a set of continuously shifting burdens of persuasion and production which hardly provide general confidence in the law's ability to cope with what often appears to be an impossible factual inquiry. One may conclude, therefore, that motivation is a concept that is either not reasonably provable, or else provable only at a cost that in most cases outweighs the benefit involved.[155]

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[151] *See generally* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 204 (1972).

[152] *See generally* Skycom Corp. v. Telstar Corp., 813 F.2d 810, 814-15 (7th Cir. 1987); Embry v. Hardardine-McKittrick Dry Goods Co., 127 Mo. App. 383, 105 S.W. 777 (1907).

[153] Where the question arises, for instance, whether a party has been motivated to act by a promise of consideration, rather than some other inducement, it is often sufficient in order to find a bargain that the party merely *knew* of the promise at the time he acted. Such knowledge creates an irrebuttable presumption that the action was tendered in exchange for the promise and avoids substantive inquiry into which of several possible motives might have actually caused the act. Williams v. Carwardine, 4 Barnewall & Adolphus 621 (1833) (An informant who had notice of a reward offer was entitled to the reward even though she was motivated by desire to ease her conscience.); Simmons v. United States, 308 F.2d 160 (4th. Cir. 1962) (A fisherman who knew of a prize offer accepted the contract by catching fish even though he did so for reasons unrelated to offer.). As one of the judges noted simply in *Carwardine*, "we cannot go into plaintiff's motive." *Carwardine*, 4 Barnewall & Adolphus at 623.

[154] *See* Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing tripartite tests for determining discrimination); *see also* Wright Line, a Division of Wright Line, 251 N.L.R.B. 1083 (1980), *enforced as modified*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982) (establishing shifting burdens of proof in determining anti-union animus).

[155] Sometimes the distinctions are very fine. *Compare* Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988) (dismissing on state law grounds a claim that calling plaintiff school principal "racist" was defamatory) *with* Afro-American Publ. Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966) (defamatory to state that plaintiff pharmacy owner "appears to be a bigot"). For a general discussion on difficulties in litigating state of mind, see Sonesheim, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U.L. REV. 774 (1983).

Tillman found that the term "racist" had "been watered down by overuse, becoming common coin in political discourse," and therefore no longer carried an opprobrious connotation. 855 F.2d at 402. Calling plaintiff a "racist" was merely the equivalent of characterizing plaintiff's official acts as detrimental to the speaker's political goals, and therefore amounted to an evaluative judgment on the correctness of those actions. Possibly, the term "bigoted" as used in *Jaffe* implied a more coarse form of behavior, and

If motive is not readily provable, therefore, then cases such as *Janklow*, which hold that statements about a person's motivation are non-actionable opinion,[156] are readily explainable as protecting expression whose major component is evaluative rather than informational. At the other end of the continuum, there traditionally has been little difficulty in developing methodology to determine whether a subject has acted knowingly or recklessly. Both conditions are susceptible to more tangible forms of proof than motivation. The external stimuli that would form the basis of a person's knowledge, for instance, can often be empirically demonstrated, thus leaving for further proof only the assumption that the person analyzed those stimuli in a rational way.

One of the most notable examples of the law's confidence in its ability to ascertain whether a person has acted knowingly comes from defamation law itself—the constitutional requirement of actual malice. Actual malice, unlike common law malice, has nothing to do with malevolent motivation, such as ill will or spite, but asks whether a defamation defendant published a false statement "with *knowledge* that it was false or with reckless disregard of whether it was false or not."[157] "Reckless disregard," in turn, has been defined alternatively as the conclusion that the defendant "in fact entertained serious doubts as to the truth of his publication,"[158] or had a "high degree of awareness of . . . [its] probable falsity."[159] In either case, proof of actual malice depends in large part upon the body of tangible facts that had been palpably expressed to the defendant before the challenged statement was made.

Assuming that motivation is not generally provable, but that knowledge is, the border between verifiable and unverifiable statements for purposes of defamation law lies somewhere within what the Model Penal Code labels "purposely," or what is otherwise commonly called "intentional." "A person acts purposely [if] . . . it is his conscious object to engage in conduct of that nature or to cause such a result."[160]

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thus described conduct that is more amenable to objective proof. "Bigot" is also a word that is less likely to appear in political discourse, and therefore less likely to be understood as a normative judgment on plaintiff's actions rather than a literal description of plaintiff's state of mind.

[156] *See supra* note 147 and accompanying text.

[157] New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (emphasis added).

[158] St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

[159] Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

[160] MODEL PENAL CODE § 2.02(2)(a)(i) (1985).

Whether someone's "conscious object" is a matter that is verifiable by judicial methods of proof, however, is a question that does not yield a completely unqualified answer. In criminal law, "purpose" or "intent" does have an ascribed meaning and is a material inquiry in some cases.[161] For the most part, however, purpose is simply subsumed within the broader element of knowledge. The distinction between purpose and knowledge is inconsequential for most purposes of criminal liability because acting knowingly is ordinarily sufficient even for many of the more serious offenses.[162] In other instances the law resorts to convenient axioms such as "one is presumed to intend the natural and foreseeable consequences of his acts,"[163] by which intent is collapsed into lesser levels of culpability and fails to have any independent meaning. In either case, the situations in which a court will be required actually to determine whether it was the conscious desire of the defendant to cause a certain result are fairly few. Purpose, therefore, is apparently a state of mind that the law will verify on occasion, but with reluctance.[164]

Before *Milkovich*, separate analyses of allegations on the plaintiff's state of mind as either deductive or evaluative opinion would have been academic in most cases. Generally, such allegations would have qualified at least as deductive opinion, and thus, without more, received protection. If such cases had been analyzed separately as evaluative opinion, thus stressing the first two *Ollman* factors, then best speculation would be that those cases asserting motivation, such as *Janklow*, would probably remain opinion due to their inherently unverifiable nature. Cases asserting knowledge, such as *Westmoreland*, would become statements of verifiable fact. Cases asserting purpose or intent would

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[161] *See generally* LAFAVE & SCOTT, *supra* note 151, at 196. Specific intent is relevant in crimes such as common law burglary (breaking and entering with intent to commit a felony within), treason (intent to aid the enemy), as well as in conspiracy and attempt. *Id.*

[162] MODEL PENAL CODE § 2.02 comment 2 (1985).

[163] *See* PROSSER & KEETON, *supra* note 16, § 4, at 22.

[164] The First Restatement gives some indication that statements concerning someone's conscious intent are nonverifiable and nonactionable opinion. Illustration 4 to § 607 provides: "The A magazine publishes an article which criticizes B, an European dictator, for acts which in the opinion of the author are calculated to impair the peace of the world. The article is privileged criticism." RESTATEMENT OF TORTS § 607 illustration 4. Since at the time, fair comment applied only to nonfactual evaluative opinion, the implication is that statements regarding the "calculated" purpose of the dictator are beyond verification. Of course, the result in this hypothetical is affected by the overtly political nature of the statement.

remain problematic, although the weight of authority appears to militate in favor of finding them to be actionable fact.

IV. THE EFFECT OF *MILKOVICH*

Milkovich v. Lorain Journal Co.[165] arose from prosaic facts and a tortuous procedural history. Milkovich was a high school wrestling coach.[166] In 1974, his team was involved in an altercation at a home wrestling match with the opposing team at which several people were injured.[167] The high school athletic association, after hearing testimony from Milkovich, Mr. Scott (the school superintendent), and others, placed the wrestling team on probation and declared the team ineligible for state tournaments.[168] The association also censured Milkovich for his actions during the fight.[169] Thereafter, several parents and wrestlers sued the association in Ohio state court, seeking a restraining order against its ruling on the grounds that they had been denied due process.[170] Milkovich testified in that proceeding as well.[171] The state court overturned the probation and ineligibility orders on due process grounds.[172]

The day after the state court rendered its decision, Theodore Diadiun's column appeared in the News-Herald, a newspaper circulated in the local area. The text of the column, which is set forth below,[173]

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[165] 110 S. Ct. 2695 (1990).

[166] *Id.* at 2697.

[167] *Id.* at 2698.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

It's not final yet—the judge granted Maple only a temporary injunction against the ruling—but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.

When a person takes on a job in a school, whether it be as a teacher,

coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.

There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way—many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

A lesson which, sadly, in view of the events of the past year, is well they learned early.

It is simply this: If you get in a jam, lie your way out. If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott. "Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Metor [sic], and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

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

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

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

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

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

Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it. Probably as much in distasteful reaction to the chicanery of the two officials as

began with the headline "Maple beat the law with the 'big lie,'" beneath which appeared Diadiun's photograph and the words "TD Says." The carryover page headline announced "Diadiun says Maple told a lie." The column contained the following passage: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."

Milkovich brought a defamation action in state court, alleging that the headline of the column and several passages "accused plaintiff of committing the crime of perjury, an indictable offense in the State of Ohio, and damaged plaintiff directly in his life-time occupation of coach and teacher, and constituted libel per se."[174] The trial court granted a directed verdict for defendants on the grounds that the evidence failed to establish the article was published with "actual malice" as required by *New York Times*.[175] The state appellate court reversed and remanded, holding that there was sufficient evidence of actual malice to go to the jury.[176] On remand, relying in part on *Gertz*, the trial court granted summary judgment to defendants on the grounds that the article was an opinion or, alternatively, that as a public figure, petitioner had failed to make out a prima facie case of actual malice.[177] The Ohio Court of

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

But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them. "I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. "It certainly sounded different from what they told us."

Nevertheless, the judge bought their story, and ruled in their favor. Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth. "But they got away with it."

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

I think not.

[174] *Milkovich*, 110 S. Ct. at 2699-700.

[175] *Id.* at 2700.

[176] Milkovich v. Lorain Journal Co., 65 Ohio App. 2d 143, 416 N.E.2d 662 (1979), *cert. denied*, 449 U.S. 966 (1980).

[177] *Milkovich*, 110 S. Ct. at 2700.

Appeals affirmed both determinations.[178] On appeal, however, the Supreme Court of Ohio reversed.[179] The court first decided that petitioner was neither a public figure nor a public official.[180] The court then found that "the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer. . . . The plain import of the author's assertions is that Milkovich, inter alia, committed the crime of perjury in a court of law."[181]

Superintendent Scott, however, had been pursuing a separate defamation action. Two years after its original *Milkovich* decision, in considering Scott's appeal, the Ohio Supreme Court reversed its position and concluded that the column was "constitutionally protected opinion."[182] The *Scott* court was persuaded that the proper analysis for determining whether utterances are fact or opinion was set forth in the intervening decision in *Ollman v. Evans*.[183] The court found initially that application of the first two *Ollman* factors—the "specific language" of the statement and its "verifiability"—to the column weighed in favor of finding the challenged passages actionable assertions of fact.[184] Those factors were outweighed, however, by consideration of the third and fourth *Ollman* factors. With respect to the third factor of general context, *Scott* explained that "the large caption 'TD Says' . . . would indicate to even the most gullible reader that the article was, in fact, opinion."[185] As for the fourth factor, the "broader context," the court reasoned that because the article appeared on a sports page—"a traditional haven for cajoling, invective, and hyperbole"—the article would probably be construed as opinion.[186]

Subsequently, considering itself bound by the Ohio Supreme Court's decision in *Scott*, the Ohio Court of Appeals in *Milkovich* affirmed the trial court's grant of summary judgment for the defendants, concluding that "it has been decided, as a matter of law, that the article in question

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[178] *Id.*

[179] *Id.*

[180] Milkovich v. News-Herald, 15 Ohio St. 3d 292, 294-99, 473 N.E.2d 1191, 1193-96 (1984), *cert. denied*, 474 U.S. 953 (1985).

[181] *Id.* at 298-99, 473 N.E.2d at 1196-97.

[182] Scott v. News-Herald, 25 Ohio St. 3d 243, 254, 496 N.E.2d 699, 709 (1986).

[183] *See id.* at 254, 496 N.E.2d at 709.

[184] *Id.* at 250-52, 496 N.E.2d at 706-07.

[185] *Id.* at 252, 496 N.E.2d at 707.

[186] *Id.* at 253-254, 496 N.E.2d at 708.

was constitutionally protected opinion."[187] The United States Supreme Court subsequently granted certiorari.

In rejecting the defendants' contention that the statement was protected as opinion,[188] Chief Justice Rehnquist, writing for the majority, first catalogued the protections that already existed against impermissible intrusion into first amendment values.[189] These included: (1) common law fair comment, which was already the traditional device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech;[190] (2) *New York Times's* requirement that public officials, later extended to public figures,[191] prove actual malice[192] by clear and convincing evidence;[193] (3) *Gertz*'s holding that even in private figure cases, the states could not impose liability without requiring some showing of fault,[194] nor could they permit recovery of presumed or punitive damages on less than a showing of actual malice;[195] (4) the "constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages" announced in *Philadelphia Newspapers, Inc. v. Hepps*;[196] and (5) the requirement "that in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden

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

[188] Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2701-02 n.5 (1990). The Court initially rejected several preliminary contentions: (1) that the determination that Milkovich was not a public official or figure was overruled in *Scott*, and thus failure to establish actual malice precluded the action under *New York Times*; (2) that there was no negligence even if Milkovich were regarded as a private figure, and (3) that the Ohio decision rested on adequate and independent state constitutional grounds within the meaning of Michigan v. Long, 463 U.S. 1032 (1983). *Milkovich*, 110 S. Ct. at 2701-02 n.5.

[189] *Milkovich*, 110 S. Ct. at 2701-02 n.5.

[190] *Id.*

[191] Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

[192] New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

[193] Gertz v. Robert Welch, Inc., 418 U.S. 323, 362 (1974).

[194] *Id.* at 347-48.

[195] *Id.* at 350.

[196] 475 U.S. 767, 776 (1986).

intrusion on the field of free expression.'"[197]

In light of this inventory of constitutional protections, the Court expressed reluctance to recognize "still another First Amendment-based protection for defamatory statements which are categorized as 'opinion' as opposed to 'fact.'"[198] The Court found that no such additional protection exists. Any understanding to the contrary, we are told, was the result of an incorrect parsing of the *Gertz* dictum. In a clear reference to *Ollman*, the *Milkovich* Court rejected the invitation to inquire whether a statement was fact or opinion through application of "a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the *Gertz* dictum) . . . in deciding which is which."[199] The Court found that use of the word "opinion" in *Gertz* had been misinterpreted to create a new category of speech, when in fact it was merely intended to reiterate the "marketplace of ideas" concept. In stating that "there is no such thing as a false idea," therefore, *Gertz* should be construed as using the word "false" as a term of definition rather than merely one of description. Absolute protection is accorded only to "ideas," which in turn is defined as statements that are not provable as true or false.

This holding was not simply semantic barter in which the word "idea" was substituted for "opinion." *Gertz's*, and hence *Milkovich's* definition of "idea," and the concept of non-verifiability that accompanies it, is much the same as the definition of evaluative opinion. But as the Court noted, and has already been discussed previously in this article,[200] other forms of expressions which had been previously designated as "opinion" may often imply an assertion of objective fact.[201] Indeed, deductive opinion may not only imply objective fact, but expressly announce it. For these types of "opinion," *Milkovich* found no reason for protection:

> 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. *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. Simply couching such statements

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[197] Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964)).

[198] Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2705 (1990).

[199] *Id.* at 2706.

[200] *See supra* notes 22-24 and accompanying text.

[201] *Milkovich*, 110 S. Ct. at 2705.

> 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."[202]

As the highlighted passages make clear, the majority saw no reason for protection of deductive expression, regardless of whether the premises upon which the deduction was based were made explicit.

In contrast, *Milkovich* effectively retained absolute constitutional protection for evaluative opinion. "*Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection."[203] Moreover, the Court noted that statements that could not reasonably be construed as stating actual facts, but were merely hyperbole, such as rhetorical use of the terms "blackmail"[204] or "traitor,"[205] were constitutionally protected.[206]

Under this scheme, the Court found that the statement implying that Milkovich had actually committed perjury was actionable as a statement of verifiable fact. In identifying verifiability as the new touchstone by which actionability is to be assessed, the Court noted:

> We . . . think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination of whether petitioner lied in this instance can be made on a core of objective evidence. . . . As the *Scott* court noted regarding the plaintiff in that case, "[w]hether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at the hearing. Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event."[207] So too with petitioner

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[202] *Id.* (emphasis added).

[203] *Id.* at 2706. The Court continued: "Thus, unlike the statement, 'In my opinion Mayor Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable." *Id.* The Court qualified this protection of evaluative opinion as applying to "statements on matters of public concern." *Id. But see infra* note 229 and accompanying text.

[204] Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6 (1970).

[205] Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 284-86 (1974).

[206] *Id.*

[207] *Milkovich*, 110 S. Ct. at 2709 (citing Scott v. News-Herald, 25 Ohio St. 3d 243, 252, 496 N.E.2d 699, 707 (1986)).

Milkovich.[208]

In his dissent, Justice Brennan ostensibly expressed agreement with much that Chief Justice Rehnquist had stated, including the conclusion—as he interpreted the majority opinion—that "a protection for statements of pure opinion is dictated by *existing* First Amendment doctrine."[209] Justice Brennan disagreed, however, that the specific statement about Milkovich could be reasonably interpreted as stating or implying defamatory facts. Rather, Justice Brennan concluded that "Diadiun's assumption that Milkovich must have lied at the court hearing is patently conjecture."[210] The dissent essentially performed an analysis of the *Ollman* factors disapproved by the majority,[211] and concluded that "Diadiun not only reveals the facts upon which he is relying but he makes it clear at which point he runs out of facts and is simply guessing. Read in context, the statements cannot reasonably be interpreted as implying such an assertion as fact."[212]

Justice Brennan's disagreement with the majority, therefore, is somewhat more significant than he describes. Whereas the majority would limit constitutional protection to evaluative opinion, Justice Brennan would continue to extend it to deductive opinion. Because Diadiun laid out all the factual premises that undergird his ultimate statement, none of which premises were challenged,[213] his conclusion

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[208] *Id.*

[209] *Id.* at 2708 (Brennan, J., dissenting) (emphasis in original). Ironically, Justice Brennan described the majority reasoning as applying many of the same factors used by the lower courts in ascertaining whether a statement was opinion, despite the fact that the majority had repudiated those cases. *Id.* at 2709 (Brennan, J., dissenting).

[210] *Id.* at 2710 (Brennan, J., dissenting). The dissent elaborated on its distinction between fact and conjecture:

> Conjecture, when recognizable as such, alerts the audience that the statement is one of belief, not fact. The audience understands that the speaker is merely putting forward a hypothesis. Although the hypothesis involves a factual question, it is understood as the author's "best guess." Of course, if the speculative conclusion is preceded by stated factual premises, and one or more of them is false and defamatory, an action for libel may lie as to them. But the speculative conclusion itself is actionable only if it implies the existence of another false and defamatory fact.

Id. at 2710 n.5 (Brennan, J., dissenting).

[211] *But see supra* note 209.

[212] *Milkovich*, 110 S. Ct. at 2711 (Brennan, J., dissenting).

[213] *Id.* at 2713 n.9 (Brennan, J., dissenting).

that Milkovich must have lied in court was readily identifiable as "speculation and personal judgment."[214]

V. TREATMENT OF OPINION AFTER *MILKOVICH*

A. PROTECTIONS FOR DEDUCTIVE OPINION

In the aftermath of *Milkovich*, it is clear that statements that express or imply objective facts, including deductive opinions, no longer receive constitutional protection. The loss of separate protection for deductive opinion may give some pause. As noted earlier, deduction is certainly not devoid of first amendment value, even if the deduction turns out to be provably false.[215] Perhaps most notably, expression of deductive powers promotes the goal of self-definition and fulfillment.[216] As Justice Brandeis once observed, two of the benefits of free speech are "development of the faculties of the individual" and "happiness to be derived from engaging in such activity."[217] Demonstrations of one's deductive processes are an important part of what differentiates individuality. From such demonstrations, many adjectives describing one's personality are derived, such as trusting, cynical, suspicious, or naive.

While to some extent the same can be said about almost all types of speech and conduct,[218] mere expressions of fact that do not describe the process of deduction do less to create such impressions. To say simply that "Mother Teresa is the President of the United States" communicates little about the personality of the speaker apart from the obvious fact that he is ill-informed. Thus, the constitutional value in deductive opinion does not cover all forms of expression, but only those forms in which the deductive process is expressly communicated to the listener. In such cases, identification of the speaker's deductive processes often does much to describe one's political, intellectual, or moral affiliations. In short, such deductive processes are often associated with names: "liberal" (political), "scientific" (intellectual), "spiritual" (moral). These names are the heart of self-definition and

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[214] *Id.* at 2713 (Brennan, J., dissenting).

[215] *See supra* notes 22-24 and accompanying text.

[216] *See supra* note 23 and accompanying text.

[217] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[218] The arguments over whether the "liberty" or "self-definition" theories of the free speech are overinclusive have been much mooted elsewhere. *See* Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 599 (1982).

fulfillment. To call a law professor a "Crit," a psychiatrist a "Freudian," or an economist a "Keynesian" defines the deductive methodology to which the individual subscribes. When the individual describes his inferential processes, it is merely the reverse form of this expression and has equivalent value as self-realization.

Indeed, some have argued, under various terminology, that self-definition should be the primary defining force behind the first amendment.[219] It is not surprising, however, that such arguments are, by themselves, insufficient to justify constitutional protection. By far, the predominant modern justification for freedom of speech, both philosophical[220] and jurisprudential,[221] remains the "marketplace of ideas" theory.[222] Disagreement, debate and even pernicious speech is deemed necessary only to ensure the integrity of the truth-seeking process. Under this rationale, incorrect deductions lack affirmative constitutional value because they lack truth. Thus it may be true that, as a general proposition, the aggregate first amendment value of deductive opinion is insufficient to justify separate first amendment

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[219] *See generally id.* ("[I]ndividual self-realization" is the only true value of free speech.); Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's* The Value of Free Speech, 130 U. PA. L. REV. 646 (1982); Baker, *Scope of First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) ("individual development").

[220] *See* J.S. MILL, ON LIBERTY 20, 30-31 (S. Collini ed. 1989).

[221] *See* Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J.). *See generally* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

[222] Occasional support for the primacy of the self-realization justification, however, can be derived from the case law. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court struck down a state statute mandating that political candidates receive equal space to reply to criticisms and attacks by a newspaper. A strong argument was made that such a right of reply actually promoted the marketplace of ideas, given the modern concentration of media power and the effective inability of individual citizens to gain access to means of mass communication. *Id.* at 249-50. In response, the Court first hypothesized situations in which such a reply statute would cause a member of the media to avoid controversy and thus dampen debate. Perhaps because the likelihood of the media actually trying avoiding public attention is subject to some doubt, the Court also found that, even if such a dampening effect did not exist, forced reply statutes invaded the exercise of editorial control and judgment to determine what to print—and what not to print. *Id.* at 258.

The latter reasoning, which created "autonomy of the press" as a guarantee of constitutional dimension, comports more closely with a self-realization justification for the first amendment. Forced association with speech not of one's choosing and abridgment of the right to effectuate one's judgment—whether fair or unfair—about the propriety of publishing another's speech, interferes with the right of self-definition.

protection under current constitutional principles. As suggested below, however, it may be that the modicum of protectable values contained in deductive opinion is sufficient to trigger special protections in certain discrete cases.[223]

Of course, it does not follow that speculation, clearly identified as such, receives no protection at all. Insofar as deductive opinion is concerned, *Milkovich* merely remakes the inquiry into one of state law, and therefore resurrects the Second Restatement and common law protections. The statement, "I think John Jones is a liar," if not constitutionally protected, may still be shielded under section 566 of the Second Restatement, so long as the speaker states the facts upon which he bases his opinion. Given the history of the Second Restatement, however, one might assume that its framers, having been drawn reluctantly into granting protection for opinion in the first place, would now be more than willing to retract the scope of section 566 and abandon deductive opinion, now that it is constitutionally permissible to do so. One cannot predict with certainty what the current composition of the ALI will decide, but it does not necessarily follow that the states in general will follow suit. Indeed, even prior to *Milkovich*, some jurisdictions had been laying the groundwork for separate state law protection for deductive opinion that would survive both constitutional contractions and reconsideration by the ALI.

In *Dairy Stores, Inc. v. Sentinel Publishing Co.*,[224] for instance, a newspaper published an article concerning locally bottled water advertised as spring water which contained three arguably actionable statements: (1) a statement under the reporter's byline that, according to laboratory analysis, the bottled water did not contained pure spring water, (2) an assertion that pure spring water should not contain any chlorine, and (3) a quotation from a laboratory director that he "can't see how it could possibly be spring water unless the spring source was contaminated and chlorine was added at the source." Applying an expanded view of the doctrine of fair comment, the New Jersey Supreme Court concluded that "the director's opinion was made on the basis of stated facts, and is a statement of 'pure opinion,'[225] entitled to absolute

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[223] *See infra* notes 239-45 and accompanying text.

[224] 104 N.J. 125, 516 A.2d 220 (1986).

[225] *Id.* at 147, 516 A.2d at 231. The court defined "pure opinion" as "one that is based on stated facts or facts that are known to the parties or assumed by them to exist." *Id.*

immunity."[226] The first two statements, although assertions of fact, were given qualified immunity and protected so long as they are not published with actual malice.[227]

Dairy Stores therefore granted absolute protection, based on non-constitutional grounds, to the deductive opinion of the laboratory director based on the stated results of scientific tests. It also extended fair comment, albeit in a qualified form that could be defeated by a showing of malice, to statements of fact that were not the speaker's own deduction, such as the statement by the reporter that the product was not spring water. The line between absolute immunity and qualified immunity is apparently drawn when the statement conveys the deductive process as well as the deduction itself, as opposed to the reporter merely stating a conclusion without disclosing its basis.

In states that follow the pattern described in *Dairy Stores*, *Milkovich* may have limited effect. Protection for expressed deductive opinion will continue, albeit under the aegis of fair comment rather than the first amendment. For those jurisdictions that follow this course, much of the discussion contained in older cases applying the *Ollman* factors will still be relevant in identifying deductive opinion. For unexpressed deductions, i.e., for mixed opinions, the ample, albeit sometimes cumbersome protections of a state imposed actual malice rule would be available. Developments such as *Dairy Stores*, therefore, represent a welcome reintroduction of state law into protections for expression.

B. PROTECTIONS FOR EVALUATIVE OPINION

Because *Milkovich* retains constitutional protection for evaluative opinion, the same issues that were raised in the time between *Gertz* and *Milkovich* remain, namely, what is evaluative opinion and how does one identify it?

As a preliminary matter, the Court qualified this protection of evaluative opinion as applying to "statements on matters of public concern."[228] Whether it could also apply to purely private matters was

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[226] *Id.* at 139, 516 A.2d at 227. The court consciously decided to base its decision on state law grounds, rather than the first amendment. "Although 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." *Id.*

[227] *Id.* at 150, 516 A.2d at 233. The protection of actual malice was afforded as a matter of state law, regardless of whether the plaintiff was a public figure, so long as the matter was of public concern. *Id.*

[228] Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2706 (1990).

a matter that was unnecessary to decide. Logically, however, there should be no distinction between public and private issues in determining whether a statement is, or is not, provably false.[229] The statement "X is a mean person" contains no ascertainable standards regardless of whether X is a public figure or a purely private citizen. Historically, the truth defense, which the constitutional protections are ultimately designed to preserve,[230] was available to all defamation defendants coming after Peter Zenger. Moreover, values that undergird the first amendment—self-realization, the search for truth, and the safety valve concept—are all supported by private evaluative opinions as well as public ones. The only underlying first amendment value that may not be germane is the self-government rationale, and its absence hardly justifies the possibility of liability for the expression of private tastes and dislikes.

Because the marketplace theory of search for "truth" currently prevails, it is hardly surprising that attempts to define opinion now rest primarily on verifiability. *Milkovich* vigorously adopts this approach. Although *Milkovich* refers us to the concept of verifiability as the polestar to ascertain the nature of constitutional protection, it does not add any analytical tools to make that determination. For instance, the Court presumably deemed the "teachings of Marx and Lenin" to be concepts that were too amorphous to provide a scale by which truth or falsity could be measured,[231] a conclusion that may or may not be self-evident to scholars in political science. This leads to one of the major drawbacks in any scheme based on whether a statement is provably true or false: verifiability is often decided more by determining which methods of proof are acceptable than by anything inherent in the substance of the statement itself.[232]

This notion presents the possibility of a fascinating spectacle as

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[229] The public concern qualification was derived from a similar qualification in *Hepps*, which struck down the common law presumption that a defamatory statement is false, and placed the burden on plaintiffs to plead and prove falsity, at least in cases involving media defendants. *Id.* Even in a purely private case, however, the common law presumption of falsity is one that could be rebutted, and thus the truth defense was still available to defendant, albeit as an affirmative defense rather than a prima facie requirement of plaintiff's case. Protection for evaluative opinion is therefore still necessary to preserve the truth defense, whether affirmative or not.

[230] *See* Potomac Valve & Fitting v. Crawford Fitting, 829 F.2d 1280, 1286 & n.14 (4th Cir. 1987).

[231] *Milkovich*, 110 S. Ct. at 2706. *See supra* note 203.

[232] *See also* Note, *The Fact-Opinion Determination, supra* note 15, at 822 (The verifiability standard fails to consider what limitations the first amendment may impose on the ways and means of proof.).

various academic or professional disciplines vie for judicial legitimation as a reliable benchmark by which "truth" can be ascertained. "Truth," in social science, may be mysticism to a theologian; indeed, witchcraft and voodoo have a methodology that illuminates truth as their adherents understand it. Presumably, in this technological age, courts will prefer to rely on more scientific disciplines. Even if this judicial picking and choosing among competing methods of verification is proper, however, no single discipline will yield a method of inquiry that is both completely consistent and also acceptable to the entire community.

Given the indeterminate nature of the inquiry, some have questioned whether the concept of verifiability has any value at all. In *Tillman*, for instance, Judge Easterbrook noted that even among logical positivists, "no one can separate the 'verifiable' from the 'non-verifiable.'"[233] Thus, Judge Easterbrook observed:

> Courts trying to find one formula to separate "fact" from "opinion" . . . are engaging in a snipe hunt, paralleling the debates between positivist and deontological thinkers in philosophy. Perhaps the Constitution requires the search for this endangered species, but more likely the difference between "fact" and "opinion" in constitutional law responds to the pressure the threat of civil liability would place on kinds of speech that are harmless or useful, not on the ability to draw a line that has vexed philosophers for centuries. It is the cost of searching for "truth"—including the cost of error in condemning speech that is either harmless or in retrospect turns out to be useful, a cost both inevitable and high in our imprecise legal system—that justified the constitutional rule.[234]

It may be true that virtually any proposition is either verifiable or non-verifiable, depending on one's enthusiasm for a particular result,[235] and the analytical methods one is willing to embrace. That is not to say, however, that verifiability is a principle devoid of usefulness. It is probably more reasonable merely to conclude that the concept has

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[233] *See* Note, *The Evolution of a Privilege*, *supra* note 15, at 81.

[234] Stevens v. Tillman, 855 F.2d 394, 399 (7th Cir. 1988).

[235] For entertaining and elaborate demonstrations of refutations to facially irrefutable propositions, in an attempt to confront the concept of verifiability, see *Tillman*, 855 F.2d at 398-39.

limitations.[236] In most cases, one can identify a consensus of result among competing tests for truth, even if there is little agreement on method. The absence of a clear consensus, on the other hand, would indicate that a proposed fact-finding process should not be cast into writ by labelling it as a route to truth. In such cases, the balance would be struck in favor of finding the statement to be opinion. Lastly, in cases where verifiability is itself a close proposition, the better course is to seek alternate methods for determining constitutional protections.[237]

C. REANALYZING STATE OF MIND

Keeping in mind the limitations on the concept of verifiability, we return to the inquiry of statements alleging a particular state of mind. As noted previously, such statements are generally deductive opinion, and may or may not constitute evaluative opinion.[238] After *Milkovich*'s elevation of verifiability to the status of canon, such statements must now be analyzed constitutionally either as evaluative opinion or not at all.[239] *Milkovich* itself dealt with an implication of perjury, a crime that requires "knowing" falsity.[240] "Knowing," however, is a state of mind that we

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[236] *See* Comment, *supra* note 15, at 1030 ("[A]lthough there will always be some gray zone between verifiability and nonverifiability, there are many statements that will clearly fall into one category or another.").

[237] There will be times, of course, when determining whether such a consensus has been reached among competing disciplines and ideologies will itself turn on factors that cannot be calculated according to any articulable neutral principles. If it were possible to defame someone by stating that he was descended from apes rather than created by God, for instance, no consensus is possible between science and theology. Other statements, such as "God is dead," are framed exclusively within the terms of a particular discipline and may produce definite results from theology and silence from science, which has no evidence to contribute to the proposition one way or another.

[238] *See supra* notes 122-64 and accompanying text.

[239] *See supra* note 203 and accompanying text.

[240] Ohio's general perjury provision provides:

> (A) No person, in any official proceeding, shall *knowingly* make a false statement under oath or affirmation, or *knowingly* swear or affirm the truth of a false statement previously made, when either statement is material.
> (B) A falsification is material, regardless of its admissibility in evidence, if it can affect the course or outcome of the proceeding. It is no defense to a charge under this section that the offender mistakenly believed a falsification to be immaterial.

OHIO REV. CODE ANN. § 2921.11 (Anderson 1979) (emphasis added).

have already seen is considered provable without much argument.[241] Nor is there any reason, even after *Milkovich*, to doubt the nonverifiability of statements directed to ultimate motivation. Even after *Milkovich*, a court deciding facts such as in *Janklow v. Newsweek*[242] could reach the same result based solely on its finding that the plaintiff's motivation was not fathomable and thus constituted evaluative opinion.

Again, the troublesome issue arises with respect to "purpose." In *Potomac*, for instance, the Fourth Circuit vigorously defended the concept that a suitable methodology existed to determine an individual's intent, despite substantial doubt in many quarters on the validity of psychology as an exact science.[243] Other authorities suggest that the exercise of ascertaining an individual's intent is futile.[244] This is one area where the "gray zone" of verifiability confounds attempts at a unified response. In such cases, where verifiability lacks any utility, the entire justification of the marketplace of ideas and the search for truth also loses its vitality. Whichever answer this situation compels, it is going to have a negligible effect on the integrity of the marketplace. Echoing Judge Easterbrook's words, sometimes the cost of discovering truth outweighs the value of the truth itself.[245] Rather than engaging in unresolvable arguments about whether such specific intent is verifiable, it would be more appropriate in this instance to rely on other first amendment values to resolve any conflict.

In particular, where the verifiability of one's purpose is disputed, it might be more productive to apply the goals of self-realization and definition, and thereby restore deductive opinion to its prior constitutional protection in this limited instance. Since statements regarding another's subjective and unspoken intent will almost always be the result of personal deduction rather than empirical proof, protecting statements that suggest a culpable purpose serves the goal of promoting such self-actualization without polluting the marketplace with obviously provable falsities. Thus, if *Time* did in fact state that Ariel Sharon "consciously intended" the killing of innocent civilians in Beirut, or when it is suggested that a tobacco company's advertising intentionally lured adolescents to smoke cigarettes, it may be more prudent to recognize the futility of seeking a definitive resolution, and allow the statement as a form of self-definition, committing the larger question of plaintiff's

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[241] *See supra* notes 156-59 and accompanying text.

[242] 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986).

[243] Potomac Valve & Fitting v. Crawford Fitting, 829 F.2d 1280 (4th Cir. 1987).

[244] Stevens v. Tillman, 855 F.2d 394, 398-99 (7th Cir. 1988).

[245] *Id.* at 399.

morality to a non-judicial forum.

Thus, the conclusion of this analysis is that statements regarding a plaintiff's intent should not be actionable. Without resolving the unresolvable, specifically, without determining whether such statements are "verifiable," this result is suggested solely by the fact that inculcation of the deductive processes necessarily part of such a statement promotes self-realization and definition in sufficient degree to trigger constitutional protection.

VI. CONCLUSION

This article concludes that after *Milkovich v. Lorain Journal Co.*, it will be necessary to differentiate explicitly between evaluative and deductive opinion in order to determine the constitutional limitations on defamation actions. The former type of opinion retains absolute constitutional protection, while the latter is generally relegated to whatever state law protections might exist or develop under fair comment. In the particular instance of statements made concerning a plaintiff's state of mind, this article has attempted to separate out those statements that are clearly verifiable statements from those that clearly are not, and has suggested that in case of doubt, the courts should look beyond verifiability for insight regarding the proper constitutional balance.

But contrary to the Court's announced desire to eradicate the "artificial dichotomy between 'opinion' and 'fact,'"[246] *Milkovich* will, if anything, re-invigorate that discussion. Unfortunately, despite a surplus of judicial tests, as well as intense attention from commentators,[247] such discussion is still timely and necessary. The difficulty with the "fact versus opinion" dichotomy that existed prior to *Milkovich* was that it tried to accomplish too much by affording the same type of protection for unrelated forms of speech that had as their only common element the fact that they were predicated in some general way on the results of internal mental processes. *Milkovich* may therefore help unscramble an amalgam of concepts that had been fused into a composite definition of "opinion."

Much of defamation law has become a question not of who eventually won the litigation war, but at what cost. "[L]ibel law, particularly media libel law, has developed into a high-stakes game that

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[246] Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2706 (1990).

[247] *See supra* note 15.

serves the purposes of neither the parties nor the public."[248] Similarly, *Milkovich* is more a case about process rather than results. By channeling a greater number of defamation actions through analysis of the defendant's state of mind, the effect is not to reduce the number of media victories, but merely to make them on the whole more pyrrhic.

[248] *See* Franklin, A *Declaratory Judgment Alternative to Libel Law*, 75 CALIF. L. REV. 809, 810 (1986).