The Rise In Press Criticism Of The Athlete And The Future Of Libel Litigation Involving Athletes And The Press

I. INTRODUCTION 527
II. EARLY LIBEL LAW 528
III. *NEW YORK TIMES* AND ITS PROGENY 530
IV. ARE ATHLETES PUBLIC FIGURES? 537
V. THE OPINION PRIVILEGE REVISITED 542
VI. PROTECTED OPINION: "I'LL KNOW WHEN I SEE IT" 550
VII. CONCLUSION 551

I. INTRODUCTION

Since the beginning of athletic contests, there are those who have had the job of criticizing and analyzing the performance of athletes.[1] In the past, these criticisms were limited to an athlete's work and performance on the field, allowing an athlete's private life from being revealed to the public.[2] In recent years, traditional analysis and criticism have turned to scathing attacks on an athlete's personal and professional escapades.[3] In an era of escalating salaries and closer scrutiny by the press, the fan has become knowledgeable in every aspect of an athletes' career and personal life.[4] One need only look at the increase in popularity and exposure of college and high school sports to see that the fan now has unprecedented exposure to athletes.[5]

Sports pages were traditionally viewed as a "haven for cajoling, invective and hyperbole."[6] The growth of television, cable, and oth-

---

1. Scott v. News-Herald, 496 N.E. 2d 699, 708 (Ohio 1986)

2. LARRY J. SABATO, FEEDING FRENZY: HOW ATTACK JOURNALISM HAS TRANSFORMED AMERICAN POLITICS 265 n.40 (1991). Babe Ruth's absence from baseball on account of venereal disease was once attributed by a knowing press to a bellyache. *Id.* In those days, the press served as a shield between the athletes and the fans, whereas today the press serves as a clearinghouse for "dirt" on athletes. *Id.*

3. RODNEY P. SMOLLA, SUING THE PRESS: LIBEL, THE MEDIA, AND POWER 130 (1986).

4. *Id.*

5. *Id.*

6. Scott v. News-Herald, 496 N.E. 2d 699, 708 (Ohio 1986). Sports pages have always been seen as a place where it is acceptable to use flattery, and alternatively denunciation, in

er forms of communication, as well as the American public's interest in every detail of others lives, has expanded the market for criticism of all public figures, including athletes.[7] Mirroring this phenomenon is a trend in libel law whereby the press has been given greater protection under the First Amendment of the United States Constitution to print anything concerning an athlete's life, both on and off the field.[8] As a prominent *Washington Post* official stated "there is virtually nothing we would not print, . . . if we had the goods."[9]

This Comment will set out the history of defamation cases from the seminal case in 1964 to the 1990 decision in *Milkovich v. Lorain Journal Co.*[10] This Comment will first discuss the history of libel in the United States and then answer the question of whether an athlete is a public figure, or whether his or her matters are of public concern. It will also address the future of libel litigation involving athletes and the press in light of the recent Supreme Court decision in *Milkovich*,[11] which appears to have eased the opinion privilege afforded to the press.

II. EARLY LIBEL LAW

Any discussion of libel law must begin with the Constitution. It is fundamental to the precepts of our society that Government not interfere with the freedom of the press.[12] Alternatively, and often in conflict with the First Amendment, is society's protection of an individual's privacy.[13] Libel law is an area where this conflict is often litigated, specifically, with the tort of defamation.[14] Defama-

---

larger than life forms to convey the triumphs and defeats of all athletes. *Id.*

7. SABATO, *supra* note 2, at 4.

8. *Id.* at 265.

9. *Id.* at 9.

10. 497 U.S. 1 (1990).

11. *Id.*

12. U.S. CONST. amend. I. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

13. U.S. CONST. amend. V The Fifth Amendment states that a state shall not "deprive any person of life, liberty, or property." *Id.* The Court has recognized, through the Fourteenth Amendment, the fundamental right of privacy for all citizens of the United States. Lars Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1411 (1974).

14. SMOLLA, *supra* note 3. The tort of defamation is "an intentional false communication either published or publicly spoken, that injures another's reputation or good name." BLACK'S LAW DICTIONARY 417 (6th ed. 1990).

tion has arisen as a counterbalance in the protection of an individual's reputation versus the Constitutional protection of speech and the press.[15]

There were many early cases that sought to give depth to the meaning of the First Amendment.[16] The intent of the Framers concerning the First Amendment freedom of the press was to proscribe prior restraint, but allow for punishment after publication.[17] This theory flows from the Framers' experiences with prior restraint under the British monarchy.[18] This literal approach recognized the evil as flowing from prior restraint but not subsequent punishment.[19] This naive view fails to take into account that subsequent punishment also acts as a form of censorship, simply at a later date.[20] In 1964, the literal approach was expanded and freedom of the press evolved in *New York Times v. Sullivan.*[21]

Before *New York Times,* reporters would think twice before writing an article that was critical of a political figure's,[22] or any public figure's,[23] character.[24] This hesitation arose because of the

---

15. Sisler v. Gannett Co., Inc., 104 N.J. 256, 262, 516 A.2d 1083, 1086 (1986).

16. *See* Whitney v. California, 274 U.S. 357 (1927); Abrams v. United States, 250 U.S. 616 (1919). These cases, in opinions by Justice Brandeis and Justice Holmes, respectively, espoused the view that the First Amendment was designed to allow people to develop their thoughts in a "marketplace of ideas." *Whitney,* 274 U.S. at 377; *Abrams,* 250 U.S. at 629.

17. L. LEVY, LEGACY OF SUPPRESSION-FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960); N. ROSENBERG, PROTECTING THE BEST MEN (1986); Philip B. Kurland, *The Original Understanding of the Freedom of the Press Provision of the First Amendment,* 55 MISS. L.J. 225, 234 (1985).

18. *Id.* The liberty of the press is essential to the nature of a free state; but this consists of laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151-52 (1854).

19. *Id.*

20. Gordon Shneider, *A Model for Relating Defamatory "Opinions" to First Amendment Protected "Ideas",* 43 ARK. L. REV. 57, 96 (1990).

21. 376 U.S. 254 (1964). *See infra* note 30 and accompanying text.

22. *New York Times,* 376 U.S. at 270. A political figure, or public official, is someone who executes public duties. Lisa M. Montpetit, *Constitutional Law-Changes in Defamation Law for the Eighth Circuit,* 17 WM. MITCHELL L. REV. 785, 802 (1991) (tracing defamation law from its inception through *New York Times* and providing an extensive analysis of Milkovich and its effect on public figure defamation suits and the opinion privilege).

23. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker, 388 U.S. 130 (1967). A public figure is defined as someone who as achieved notoriety or fame within the community. *Id.* By achieving prominence in the community these figures are thought to exercise significant authority over issues of societal importance. Montpetit, *supra* note 22, at 803.

24. SABATO, *supra* note 2, at 69. Sabato argued that the press, despite being protected by the Constitution, felt that defamation law constrained them prior to *New York Times. Id.*

newspapers' and editors' fears of a libel suit.[25] A publisher would have to prove, if sued, that what they had published was true.[26] Press defendants could only overcome the presumption of falsity by proving that their article was true in every respect.[27] In addition, the libel plaintiff never had to prove any actual injury, and damage was presumed.[28] Clearly, before 1964, the balance in libel law was tilted against the press and in favor of public and political figures.[29]

III. *NEW YORK TIMES* AND ITS PROGENY

The 1964 ruling in *New York Times v. Sullivan*[30] lessened the chilling effect of early libel law.[31] It is the landmark case to place defamation within the scope of First Amendment protection.[32] The

---

25. *Id.* Libel is a (1) published (2) defamatory statement (3) about the plaintiff where defamatory means tending to lower the plaintiff's reputation. RESTATEMENT (SECOND) OF TORTS § 558 (1977). *See* Corabi v. Curtis Publishing Co., 273 A.2d 899, 904 (Pa. 1971) (holding that the lower court was correct to find defamation where a newspaper printed articles that imputed actual guilt or involvement in crimes of moral turpitude and of immorality); Washer v. Bank of Am. Nat. Trust & Sav. Ass'n, 136 P.2d 297, 300 (Ca. 1943) (holding that where a fellow employee leaks innuendos to the press tending to harm the plaintiff's reputation and good name there is a valid cause of action for libel).

26. SABATO, *supra* note 2, at 69. Veteran journalist Jerry terHorst recalls the first question his supervisors would ask about an ambiguous and suggestive phrase that he wrote about a congressman. *Id.* The question was "[i]f we're sued, can you prove beyond a doubt what you just wrote?" *Id.*

27. ANTHONY J. LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT 32 (1991).

28. *Id.* at 33. With the question of falsity presumed and the question of damage assumed, the only questions remaining for the jury in the Alabama Sullivan case were whether the defendants published the advertisement, whether the statements in it were "of and concerning" Sullivan, and what amount the jury would award to Sullivan if the first two inquires were answered affirmatively. *Id.*

29. SABATO, *supra* note 2, at 69.

30. 376 U.S. 254 (1964). During a civil rights uprising in the south, the police commissioner brought a libel action against four Alabama clergymen and the New York Times. *Id.* The allegedly defamatory publication, a full page advertisement, contained inaccuracies regarding certain details of police conduct towards civil rights demonstrators. *Id.* The Court found the police commissioner to be a public official who therefore has to meet the standard of malice as set up by the United States Supreme Court. *Id.* at 279-80.

31. *Id. See* Steven Pressman, *Libel Law: Finding the Right Balance,* 2 EDITORIAL RESEARCH REP. 462-71 (1989) (arguing that the holding in *New York Times* made it easier for the press to print free from the restraints of possible libel suits). *See also* David Elder, *Defamation, Public Officialdom and the* Rosenblatt v. Baer Criteria-*A Proposal for Revivification: Two Decades After New York Times v. Sullivan,* 33 BUFF. L. REV. 579 (1984) (arguing that lower courts have extended public official status too far and thus hampered the Court's recent embrace of a pro-reputation stance).

32. Milkovich v. Lorain Journal, Co., 497 U.S. 1, 9 (1990). In *Milkovich,* the Court dis-

United States Supreme Court held that to win a defamation claim, a public official must now prove "that the statement was made with actual malice."[33] The majority reasoned that in a democratic society, criticism and robust wide-open debate of public officials were a necessary part of the American political process.[34] The result of the holding gave the press more breathing space in its criticisms of public officials.[35] Since 1964, all defamation cases have been reconciled back to the reasoning in *New York Times*.[36]

Two of the early cases to expand the *New York Times* standard were *Curtis Publishing Co. v. Butts*[37] and *Associated Press v. Walker*.[38] In these cases, the Court held that the actual malice standard should be extended to public figures.[39] The majority's rationale was that those who, through fame or notoriety, become public figures, could exercise significant authority on important societal issues.[40] As a result, open debate and criticism of their actions should be given the same leeway as afforded writings about public officials.[41] As a consequence of the decisions in *Butts* and *Walker*, the First Amendment does not differentiate amongst suits involving famous people, public figures, and public officials.[42]

---

cussed that prior to *New York Times*, libel was considered beyond the reach of the First Amendment. *Id.*

33. *New York Times*, 376 U.S. at 279-80. Actual malice means with knowledge that it is false or with reckless disregard of whether it is false or not. *Id.*

34. *Id.* at 270. The Court recognized how important it was for the press to be able to disseminate the facts with regards to how the government and its officials work. *Id.*

35. Montpetit, *supra* note 22, at 802.

36. *Id.* at 803. In a recent United States Supreme Court case, it was stated that "[t]oday, there is no question that public figure libel cases are controlled by the *New York Times* standard." Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 666 (1989).

37. 388 U.S. 130 (1967).

38. *Id. See generally* Henry Kalven, Jr., *The Reasonable Man and the First Amendment: Hill, Butts,* and *Walker*, 1967 SUP. CT. REV. 267 (providing an extensive analysis of the *Butts* decision and the *Walker* decision).

39. *Butts*, 388 U.S. at 155. In *Butts*, the *Saturday Evening Post* published an article that accused the plaintiff, the head football coach at the University of Georgia, of conspiring with Coach "Bear" Bryant, head football coach at the University of Alabama, to "fix" a football game. *Id.* at 136. In *Walker* a famous retired marshall was enforcing the court-ordered enrollment of the first blacks at the University of Mississippi. *Id.* at 140.

40. *Id.* at 163-64.

41. *Id.*

42. SMOLLA, *supra* note 3, at 54 (1986). The Court reasoned that the ideas of uninhibited debate, constructive criticism, and a citizen's need for information are just as important with regards to public figures as they are to public officials. Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967); Montpetit, *supra* note 22, at 803. *But see* Time, Inc. v. Firestone, 424 U.S. 448, 454-55, 461 (1976) (holding that the plaintiff was a private figure, even though she

The high-water mark for First Amendment protection for the press came in the 1971 decision, *Rosenbloom v. Metromedia, Inc.*[43] In this case, the *New York Times* standard was extended to include any matter of legitimate public concern or general interest.[44] As a result, a private individual, if the story related to something of public concern, would have to fulfill the actual malice standard to prevail in a libel suit against the press.[45] Justice Brennan's analysis shifted the focus from the status of the plaintiff to the content of the speech.[46] At this point in the history of defamation, it seemed as though the Court's protection of the press had become so broad that the law of libel would become extinct.[47]

In 1974, the Court began to back away from its seemingly unlimited protection of the press.[48] In *Gertz v. Robert Welch, Inc.*,[49] the United States Supreme Court shifted the focus back to the status of the plaintiff,[50] holding that a private figure did not have to meet the actual malice standard.[51] Justice Powell, writing for the Court, reasoned that in balancing the freedom of the press with the protection of reputation, the focus should be on whether the person harmed was a public or private figure.[52] It was assumed

---

was prominent in social circles, and at times even sought publicity).

43. 403 U.S. 29 (1971). *Rosenbloom* involved a radio news report of a police campaign to enforce an obscenity law. *Id.* at 30. The report ultimately resulted in the plaintiff's arrest for selling obscene material. *Id.* The plaintiff later sued for harm to his reputation when the material was judged not to be obscene. *Id.* at 35-36.

44. *Id.* at 44.

45. LEWIS, *supra* note 27, at 192. *See* Connick v. Meyers, 461 U.S. 138, 147-48 (1983) (holding that public concern is determined by the content, form, and context of the statements); Schalk v. Gallemore, 906 F.2d 491, 495 (10th Cir. 1990) (holding that the motive of the speaker can be determinative of whether it is of public concern); Koch v. City of Hutchingson, 847 F.2d 1436 (10th Cir. 1988) (holding that although comments appearing in a newspaper may suggest public interest, media publication is not determinative of First Amendment protection).

46. *Rosenbloom*, 403 U.S. at 44.

47. SMOLLA, *supra* note 3, at 57. One prominent author stated that "[l]aw professors and lawyers around the country were declaring that the Court had emasculated the law of libel to the point where it was essentially powerless." *Id.*

48. *Id.*

49. 418 U.S. 323 (1974).

50. *Id.* at 331, n.4. In *Gertz*, after a police officer had been convicted of murder, his attorney was discussed in a magazine article inaccurately. *Id.* at 324. The attorney sued the publisher for libel. *Id.* at 326.

51. *Id.* at 331.

52. *Id.* at 344. Justice Powell reasoned that:

> [m]ore important is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who de-

that a public figure would have better access to a forum for a reply to the alleged defamatory statement.[53] It added, that, although a private individual did not have to meet the actual malice standard, the individual did have to show that the publisher acted negligently in publishing a damaging falsehood about her.[54]

After *Gertz*, the Court continued to develop the protection afforded to personal privacy and reputation.[55] Twelve years later, in *Philadelphia Newspapers v. Hepps*,[56] the Court held that the private individual plaintiff bears the burden of proof when showing that a statement is false.[57] The Court, in *Gertz*, created a dichotomy between statements of fact and statements of opinion.[58] While *Gertz* restricted the freedom of the press regarding defamation suits, the distinction between fact and opinion served as a boost for the press.[59] Since *Gertz*, courts have consistently held opinions to be absolutely protected.[60] The problem then arose as to distinguishing between fact and opinion.[61] Also, the majority in *Gertz*

---

cides to seek government office must accept certain necessary consequences of that involvement in public affairs . . Those classed as public figures stand in a similar position. Hypothetically it may be possible for someone to become a public figure through no purposeful action of his own.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

53. *Id.* at 344. The Court stated that:

[p]ublic officials and public figures enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statement that private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1979).

54. *Id.*

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

56. *Id.* In *Hepps*, Philadelphia newspapers published a series of articles alleging that the plaintiff was linked to organized crime and used that alleged link to influence state government processes. *Id.* at 769.

57. *Id.* at 768-69. Common law libel placed the burden of proof on the defendant to prove that the statements were true. *Id.* at 777.

58. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974). The Court stated that "[h]owever 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." *Id.* For further discussion on the fact/opinion distinction, *see* Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc).

59. SMOLLA, *supra* note 3, at 59.

60. Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986). The court in *Janklow* held that where the alleged defamatory statements are found to constitute opinion and not fact, they are protected. *Id. See* Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (holding that calling someone a fascist was indefinite and therefore an absolutely protected opinion).

61. Montpetit, *supra* note 22, at 789. The difference between what is fact and what is

lifted the notion of "fair comment"[62] to a constitutionally protected level.[63] As a consequence, Justice Powell asserted that "[t]here is no such thing as a false idea."[64] In the wake of *Gertz,* opinion was given an absolute privilege requiring every court to distinguish libel claims on whether the printed matter was a fact or an opinion.[65] In sum, a false opinion would be protected, whereas a false fact would not.[66]

The need arose for a test to determine what is opinion and what is fact.[67] The United States Court of Appeals for the Eighth Circuit employed the *Restatement (Second) of Torts* test,[68] while a second test, the "totality of circumstances" test, was first enacted in *Ollman v. Evans.*[69] In *Janklow v. Newsweek, Inc.,*[70] the United States Court of Appeals for the Eighth Circuit modified the "totality

---

opinion proved easier to state than to apply. *Id.* Depending on the context, for example, the statement "Dr. Jones is a murderer" may be either a factual statement or strictly opinion. LEWIS, *supra* note 27, at 60.

62. *See* RESTATEMENT (SECOND) OF TORTS § 606 cmts. a-d (1938). The fair comment privilege requires the proof of four elements: (1) the statement must be of public concern; (2) the statement must be true, or based on fact; (3) the writer's actual opinion must be represented; and (4) the purpose of the statement must not be to harm. Montpetit, *supra* note 22, at 791. For a general discussion of the fair comment privilege, *see* Note, *Fair Comment,* 62 HARV. L. REV. 1207 (1949).

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

64. *Id.* (citing New York Times v. Sullivan, 376 U.S. 254, 269 (1964)).

65. Montpetit, *supra* note 22, at 792.

66. *Gertz,* 475 U.S. at 339-40 (citing *New York Times,* 376 U.S. at 269).

67. Montpetit, *supra* note 22, at 792.

68. *See* Lauderback v. American Broadcasting Corp., 741 F.2d 193, 195 (8th Cir. 1984), *cert. denied,* 469 U.S. 1990 (1985) ("[S]tatements clothed as opinion which imply that they are based on undisclosed defamatory facts are not protected.") For a complete discussion of the Restatement test and a list of cases that used it, *see* Comment, *Statements of Fact, Statements of Opinion, and First Amendment,* 74 CALIF. L. REV. 1001, 1004 (1986).

69. 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied,* 471 U.S. 1127 (1985). The totality of the circumstances test adopts four factors to distinguish between fact and opinion as follows:

> These four factors must be considered together ultimately the decision whether a statement is fact or opinion must be base on all the circumstances involved. The first relevant factor . was the precision and specificity of the disputed statement Tied to that concept is that of verifiability The third factor is the literary context Finally, we must consider the "public context"

Ollman v. Evans, 750 F.2d 970, 1060 (D.C. Cir. 1984) (en banc), *cert. denied,* 471 U.S. 1127 (1985).

70. 788 F.2d 1300 (8th Cir. 1985) (en banc), *cert. denied,* 479 U.S. 883 (1986). Janklow, the Governor of South Dakota, sued Newsweek for defamation based on an article about American Indian activist Dennis Banks. *Id.* at 1301. He claimed that the part of the article that dealt with Banks' false accusation of rape of a young girl against Janklow was libelous. *Id.*

of circumstances" test and developed a four-part test, taking into account all circumstances when determining if the statement was fact or opinion.[71] First, the court looked at the precision and specificity of the statement, noting that imprecise statements were more likely to be opinion.[72] Second, whether the statements were verifiable.[73] Third, the court focused on the style, language, and intended audience.[74] Fourth, whether the statement implicates core values of the First Amendment.[75] This four-part test gave courts great flexibility in protecting the press by simply classifying the disputed statements as opinion.[76] Since opinions were given absolute protection, the media was shielded from most libel cases.[77]

Most recently, the opinion privilege again became the topic of debate in *Milkovich v. Lorain Journal Co.*[78] In *Milkovich*, a high school wrestling coach and a school superintendent filed separate suits against an Ohio newspaper alleging that they were falsely accused of perjury in a newspaper column.[79] When both cases reached the Ohio Supreme Court, conflicting results occurred.[80] The Ohio Supreme Court, in one instance found the statements to be fact, and two years later, in another found the same statements to be protected opinion.[81] The opposite holdings prompted the United States Supreme Court to address the constitutional excep-

---

71. *Id.* at 1302.
72. *Id.* at 1305.
73. *Id.* at 1302.
74. *Id.*
75. Janklow v. Newsweek, Inc., 788 F.2d 1300, 1303 (8th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 883 (1986).
76. Montpetit, *supra* note 22, at 797. *See e.g.*, Note, *Classification of an Alleged Defamation As an Actionable Statement of Fact or As a Constitutionally Protected Expression of Opinion: Determined by the "Totality of the Circumstances" or by the Predilections of the Judge?*, 12 U. DAYTON L. REV. 597, 619-20 (1987) (discussing deference as an inherent weakness of the four-part test).
77. *Id. Gertz* became the "opening salvo" for every press defendant faced with a libel suit "even though the case [often] did not even remotely concern the question." Cianci v. New Times Publishing Co., 639 F.2d 54, 61 (2d Cir. 1980).
78. 497 U.S. 1 (1990). *See* Scheetz v. Morning Call Inc., 747 F. Supp. 1515, 1524 n.13 (E.D. Pa. 1990) (recognizing that *Milkovich* will act as a restraint on the media).
79. Milkovich v. News-Herald, 473 N.E. 2d 1191 (Ohio 1984) (per curiam) (4-3 decision), *cert. denied*, 474 U.S. 954 (1985) *overruled in part by* Scott v. News-Herald, 496 N.E.2d 699 (Ohio 1986).
80. *Milkovich*, 497 U.S. at 4. In 1984, the Ohio Supreme Court found the statements to be "factual assertions." *Milkovich*, 473 N.E.2d at 1196-97. While in 1986, the same court, less than two years later, albeit with a different ideological make-up, found the same statements to be "constitutionally protected opinion." *Scott*, 496 N.E.2d at 709.
81. *Id.*, *Milkovich*, 473 N.E.2d at 1196-97.

tion for opinions.[82]

The Court in *Milkovich* refused to create a separate constitutional privilege for opinions.[83] Instead, it pointed out that there were already sufficient protection for statements that reasonable people would not interpret as facts.[84] The Court held that statements of "imaginative expression" or "rhetorical hyperbole" would still be protected opinion.[85] Thus, opinions made in a figurative, loose sense are protected no matter how factual they seem, provided the statements are not proven false.[86]

The Court in *Abrams v. United States*[87] refused to acknowledge an absolute constitutional privilege for opinions.[88] Justice Holmes, writing for the dissent, embraced the "marketplace of ideas" concept, stressing that just because something is labelled opinion does not mean that it does not imply an assertion of fact.[89] Although the majority still sought to protect "pure" opinions, false assertions of fact whether stated or implied would no longer be constitutionally protected.[90]

The Court created the "reasonable fact finder" standard to determine whether statements convey an assertion of fact, or are simply opinions.[91] Under this standard the question is whether a

---

82. Milkovich v. Lorain Journal Co., 493 U.S. 1055 (1990). The United States Supreme Court granted certiorari to "consider the important questions raised by the Ohio courts' recognition of a Constitutionally required 'opinion' exception to the application of its defamation laws." *Id.*

83. Milkovich v. Lorain Journal Co., 497 U.S. 1, 11 (1990).

84. *Id.* at 20. *See generally* Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988); Old Dominion Branch No. 486, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); Greenbelt Cooperative Publishing Ass'n v. Bressler, 398 U.S. 6 (1970).

85. *Milkovich*, 497 U.S. at 20-21.

86. *Id.*

87. 250 U.S. 616, 630 (1919).

88. *Id.* at 617. In *Abrams*, five Russian immigrants had distributed leaflets protesting the combination of "German militarism" and "allied capitalism" to crush the Russian revolution. *Id.* The defendants were convicted under the Espionage Act and sentenced to twenty years in prison. *Id.*

89. Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990) (citing *Abrams* 250 U.S. at 630). The Court in *Abrams* stated that the "expression of 'opinion' may often imply an assertion of objective fact." *Abrams* 250 U.S. at 630. As Judge Friendly noted in Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980), "It would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly, or implicitly, the words 'I think.'" *Id.* at 64.

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

91. *Id.* at 21. The Court stated that "[t]he dispositive question in the present case then becomes whether a reasonable fact finder could conclude that the statements imply an assertion that Milkovich perjured himself in a judicial proceeding." *Id.*

reasonable fact finder could conclude that the statement implies a fact.[92] If the statements imply a fact, then they are not constitutionally privileged, and are consequently actionable.[93]

IV. ARE ATHLETES PUBLIC FIGURES?

New York Times articulates the modern standard for public official defamation.[94] In 1967, this standard was expanded to individuals who classify as public figures as well as public officials.[95] In *Gertz*, Justice Powell defined two types of public figures.[96] One is the person who is so prominent in society that they are obviously public figures.[97] The other is the individual who puts herself, or himself, at the forefront of a particular issue.[98] The latter is only a public figure with respect to matters concerning that particular issue.[99] The question remains whether an athlete or coach falls into one of these definitions of public figure.

In *Butts*, the case that expanded the defamation standard to include public figures,[100] a football coach at the University of Georgia sued a local newspaper when he was accused of "fixing" a game.[101] The Court found him to be a public figure and applied

92. *Id.* In *Milkovich*, the Court concluded that a reasonable fact finder could find that the Lorain Journal's column implied a factual assertion, and thus found for the plaintiff. *Id.*

93. *Id.*

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

95. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). *Gertz* further defined general purpose and limited purpose public figures. Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). A general purpose public figure is one who, independent of the suit, has attained fame and notoriety in the community. *Id.* A limited purpose figure is one who has not voluntarily put themselves in the public eye. *Id.* at 352. *See* Waldbaum v. Fairchild Publications, Inc., 627 F. 2d 1287, 1294, 1296 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 898 (1980) (finding the plaintiff, who was the president of the second largest corporation in the country and active in shaping its policies, to be a limited purpose public figure).

96. LEWIS, *supra* note 27, at 194 (citing *Gertz*, 418 U.S. at 351-52).

97. *Gertz*, 418 U.S. at 351-52. This type of public figure has attained such pervasive fame or notoriety that he or she is deemed a public figure in all situations and all contexts. *Id.*

98. *Id.* This public figure is either drawn into the public realm or injects himself into it. *Id.*

99. *Id.* The Court asserted that "[i]n either case such persons assume special prominence in the resolution of public questions." *Id.*

100. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967). The Court held that both Butts and Walker had "commanded sufficient continuing public interest" prior to the lawsuit to qualify them as public figures. *Id.* In finding the defendant's to be public figures, the Court extended the *New York Times* actual malice standard to them. *Id.* at 154. The Court recognized that persons other than public officials exercise authority over societal issues, and thus must be held to the *New York Times* standard. *Id.* at 163-64.

101. *Id.* at 136. In *Butts*, the Saturday Evening Post published an article that accused the

the actual malice standard.[102] Since *Butts*, athletic coaches have been held to the status of a public figure.[103]

Many athletes have become as much figures in the public eye as any Hollywood star.[104] In *Butts* and *Walker*, the actual malice standard was extended to all public figures.[105] Recently, in *Holt v. Cox Enterprises*,[106] the United States District Court for the Northern District of Georgia deemed a former college football player to be a public figure eighteen years after his playing days ended.[107] The court reasoned that, regarding his playing days in college and the events surrounding college football, Holt was a "limited purpose" public figure.[108] The court held that both professional and amateur sports figures must be considered public figures.[109] In addi-

---

plaintiff, the head football coach at the University of Georgia, of conspiring with Coach 'Bear' Bryant, head football coach at the University of Alabama, to 'fix' a game. *Id.*

102. *Id.* at 154. The Court concluded that both Butts and Walker had "commanded sufficient continuing public interest" to be deemed public figures. *Id.* at 155. As a result, under the actual malice standard, they would have to prove that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

103. Grayson v. Curtis Publishing Co., 436 P.2d 756, 761-62 (Wash. 1967) (en banc), *reh'g denied* (1968). Grayson, a college basketball coach, was criticized in the Saturday Evening Post for being 'explosive,' and thus contributing to the violence and 'rabble-rousing' that occurs at games. *Id.* The court held that Grayson was a public figure because, like Wallace Butts, who was a university football coach, and like Edwin Walker, who was a retired Army General, the public had a "justified and important interest" in them. *Id.* at 762.

104. SABATO, *supra* note 2, at 69.

105. *Id.* (citing Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)). The Court equated "Hollywood stars" with "prominent athletes." *Id.*

106. 590 F. Supp. 408, 411 (N.D. Ga. 1984).

107. *Id.* Holt sued Cox based on a series of five articles which appeared in the Sunday Atlanta Journal and Constitution which described the events surrounding a football game in November of 1961 between Georgia Institute of Technology and the University of Alabama. *Id.* at 409. In the game, Holt struck Georgia Tech's captain, Chick Granning, in the face with his forearm or elbow. *Id.* at 410. As a result Granning suffered a broken jaw, a broken nose, a concussion, and the loss of teeth. *Id.* Further, Georgia Tech decided to end its series of games with Alabama because of the play and the ensuing controversy. *Id.* Holt contended that the articles "placed him in a false light, are libelous and invade his right to privacy." *Id.*

108. *Id.* at 412. The defendant would thus be afforded the opportunity to criticize or analyze any and all aspects of Holt's playing days. *Id.* Limited purpose public figures can only have public comments directed at them on a limited range of issues. *Id.* They are only public figures with respect to the events surrounding their foray into the public realm. *Butts*, 388 U.S. at 351-52.

109. *Holt*, 590 F Supp. at 412 (citing Curtis Publishing v. Butts, 388 U.S. at 154). *See* Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979), *aff'g*, 431 F. Supp. 254 (E.D. Pa. 1977) (holding that Chuy, a professional football player, is a public figure because he had gained prominence both as an athlete and as a starter); Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971) (holding that Johnston was a public figure because he was a paid performer and had gained prominence as a professional basketball player); Cepeda v.

tion, an athlete who is a defamation plaintiff can be forced to meet the actual malice standard where the athlete's experiences are deemed a matter of public concern.[110]

Unquestionably, case law and academic opinion unquestionably support the view that athletes and coaches are public figures whose lives are a matter of public concern.[111] Before *Milkovich*, the press could easily win libel cases by simply cloaking their statements dealing with public figures in opinion.[112] With the decision in *Milkovich*, the opinion privilege appears to have been narrowed and the scope of actionable fact expanded.[113] Opinion is no longer afforded absolute constitutional privilege and protection.[114] Instead, a reasonable fact finder is employed to determine whether the statement asserts an objective fact.[115] If it does, it is actionable.[116] A statement is still absolutely protected if it only asserts an unverifiable opinion, is hyperbolic, or uses figurative language that a reasonable fact finder could only interpret as opinion.[117] To synthesize the holding in *Milkovich*; if the statements concerning the athlete are provable as false, they are not protected.[118]

Once an athlete litigating a libel suit sidesteps the opinion privilege, that athlete must still meet the actual malice standard to prevail.[119] Therefore, to successfully prove libel, the writer must have known that the statement was false, or printed it with a reck-

---

Cowles Magazine and Broadcasting, Inc., 392 F.2d 417, 419 (9th Cir. 1968) (holding that Cepeda was a public figure because of his fame as an extraordinary baseball player).

110. Rosenbloom v. Metromedia, 403 U.S. 29 (1971). The Court is shifting the focus from the status of the plaintiff to the content of the statement. *Id.* at 44. Under *Rosenbloom*, any matter of public or general interest is a matter of public concern, and thus subject to the actual malice standard. *Id.*

111. Curtis Publishing Co. v. Butts, 388 U.S. 130, 154 (1967); *Chuy*, 595 F.2d at 1265; *Time, Inc.*, 448 F.2d at 378; *Cepeda*, 392 F.2d at 419; Holt v. Cox Enterprises, 590 F Supp. 408, 411 (N.D. Ga. 1984); Grayson v. Curtis Publishing Co., 436 P.2d 756, 762 (Wash. 1967).

112. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986).

113. Montpetit, *supra* note 22, at 815.

114. Milkovich v. Lorain Journal Co., 497 U.S. at 10-11 (1990).

115. *Id.* at 12.

116. *Id.*

117. *Id.*

118. Florida Medical Ctr., Inc. v. New York Post, Co., 568 So.2d 454, 458 (Fla. Dist. Ct. App. 1990). In *Florida Medical Ctr.*, the New York Post wrote a column in the Business section saying that the plaintiff's purpose was to "rob" insurance companies of money thorough illegal scams, unnecessary tests, and over billing. *Id.* The court held that the defendant's speech was not protected because it imputed defamatory statements to the plaintiff. *Id.*

119. New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

less disregard of its falsity[120] Because of the decision in *Milkovich,* athletes can more easily reach this stage, and pretrial dispositive motions by the defendant relying on the opinion privilege will no longer be readily granted.[121] By shifting the fact-opinion determination from a question of law to a question of fact, more libel cases will go to a jury trial, but meeting the actual malice standard remains a substantial hurdle despite the decision in *Milkovich.*[122]

The most recent example of a press defendant being thwarted at the pretrial stage on a motion for summary judgment is *Moldea v. New York Times Co.*[123] Moldea wrote a book about the ties of organized crime to pro football.[124] After the book received a disparaging review in the New York Times, Moldea sued the paper and the author of the book review for defamation.[125] Moldea claimed that the reviewer defamed him by "assailing his competence as a journalist."[126]

At the trial stage, the United States District Court for the District of Columbia granted summary judgment for the New York Times.[127] The court held that Moldea's claim was not actionable as a matter of law.[128] The court based its ruling primarily on the reviewer's characterization of Moldea as a "sloppy journalist."[129] The court reasoned that the statement was "a description of a literary work from one's personal perspective", and thus not actionable.[130]

Moldea appealed to the United States Court of Appeals for the District of Columbia.[131] The question before the court was wheth-

---

120. *Id.*

121. Montpetit, *supra* note 22, at 824.

122. *Id.* Traditionally the fact-opinion determination was a question of law. RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1977) ("It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning ").

123. 15 F.3d 1137 (D.D.C. 1994).

124. *Id.*

125. *Id.* at 1139. The book, entitled *Interference: How Organized Crime Influences Pro Football,* was released in 1989. *Id.*

126. *Id.* Moldea contends that six statements made by the reviewer had defamed him by labeling him as an incompetent investigative journalist. *Id.* at 1141.

127. Moldea v. New York Times Co., 793 F. Supp. 338 (D.D.C. 1992).

128. *Id.* at 338.

129. *Id.* In the review, the reviewer wrote "[b]ut there is too much sloppy journalism to trust the bulk of this book's 512 pages-including its whopping 64 pages of notes." *Id.*

130. *Id.*

131. Moldea v. New York Times Co., 15 F.3d 1137 (1994).

er Moldea could state a valid claim for defamation, and thus whether the District Court erred in granting the summary judgment motion.[132] The court made it clear that the only question they were addressing was the propriety of the summary judgment motion and not the merits of Moldea's claim.[133] First, the court first took the position that the review could be interpreted by a reasonable jury as tending to injure Moldea's reputation as an investigative journalist.[134] Next, in addressing whether the statements were false,[135] the court cited *Milkovich*[136] and noted that the reviewer implied certain facts about Moldea.[137] It then held that four of the five statements challenged could be interpreted by a reasonable jury as either true or false.[138] In holding as a matter of law that the court could not find all the statements to be true, they remanded the case to the trial level to determine whether those statements were false.[139] The court concluded that it is up to the jury to determine whether the statements are false, and thus defamatory.[140] In its holding, the United States Court of Appeals for the District of Columbia stressed that the press need not worry about a chilling of freedom, as a result of this decision, because at trial Moldea must not only prove falsity, but also actual malice; as a result, although book reviews and restaurant reviews, like sports columns, are highly subjective and open to libel suit, the reality is that on the merits most public figure plaintiffs will have difficulty proving actual malice.[141]

---

132. *Id.* at 1142.

133. *Id.*

134. *Id.* at 1143. The court noted that characterizing a journalist as "sloppy" satisfies the first requirement of a defamation claim. *Id.*

135. *Id.*

136. Moldea v. New York Times Co., 15 F.3d 1137, 1143 (1994) (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990).

137. *Id.* at 1145. The reviewer implied that Moldea was inaccurate and that he "plays fast and loose" with his sources. *Id.*

138. *Id.* at 1146.

139. *Id.* at 1146-49. The Court assessed whether the truth of the reviewer's challenged statements could be true as a matter of law. *Id.* The court found two of the five statements to be verifiable and actionable as a result. *Id.*

140. *Id.* at 1150.

141. Moldea v. New York Times Co., 15 F.3d 1137, 1147 (1994).

V. THE OPINION PRIVILEGE REVISITED

The holding in *Milkovich* narrowed the scope of an opinion privilege and broadened the scope of an actionable fact.[142] *Milkovich* requires that a statement be verifiable to be actionable.[143] A statement is verifiable if it is quantifiable or if it alleges a specific act.[144] The Court in *Milkovich* held that a statement must be sufficiently factual to be able to be proven true of false.[145] Thus, if an alleged defamatory statement is capable of being proven false, it is not protected.[146] Additionally, even if it is not verifiable, one must inquire whether the statement can be interpreted as stating provable facts about an individual.[147] As a result, *Milkovich* restricts the category and scope of a protected opinion.[148]

Along with narrowing the applicability of the opinion privilege, the holding in *Milkovich* broadens the scope of actionable fact.[149] The Court in *Milkovich* reasoned that to be actionable, a statement need only imply facts.[150] The Court further stated that the context

---

142. Daniel Ankar, Milkovich v. Lorain Journal Co., *The Balance Tips*, 41 CASE W. RES. L. REV. 613 (1991) Ankar argued that *Milkovich* will result in a major defeat for First Amendment supporters. *Id. See* T.R. Hager, Note, Milkovich v. Lorain Journal Co., *Lost Breathing Space-Supreme Court Stifles Freedom of Expression by Eliminating First Amendment Opinion Privilege*, 65 TUL. L. REV. 944 (1991) (predicting that *Milkovich* will result in "rising libel litigation" and a "severe chilling impact" as well as stating that the Court has eliminated a useful tool for ensuring freedom of expression); Spence v. Flynt, 816 P.2d 771 (Wyo. 1991) (holding that Milkovich relies on the fair comment doctrine in it's holding).

143. Milkovich v. Lorain Journal Co., 497 U.S. 1, 13 (1990). A statement must be sufficiently factual to be capable of being proven true or false before protection will be afforded. *Id.* In *Milkovich*, the Court found the defendant's statements to be "sufficiently factual to be susceptible of being proven true of false. *Id.*

144. Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986). The court noted that "[a] statement regarding a potentially provable proposition can be phrased so that it is hard to establish, or it may intrinsically be unsuited to any sort of quantification." *Id. See* Stock v. Heiner, 696 F. Supp. 1253, 1260 (D. Minn. 1988) (holding that a specific accusation of wrongdoing could be verified).

145. *Milkovich*, 497 U.S. at 12.

146. Florida Medical Ctr., Inc. v. New York Post, Co., 568 So. 2d 454 (Fla. Dist. Ct. App. 1990) (synthesizing the holding in *Milkovich* into the following test: "[A]ssuming (the statements) are a subject of public concern, if the statements are capable of being proved false, they are not protected.")

147. Montpetit, *supra* note 22, at 815.

148. *Id.* The Court in *Milkovich* restricted protected opinion by focusing on whether the opinion is true or false. Milkovich v. Lorain Journal Co., 497 U.S. 1, 13 (1990). Further, the Court held that a per se opinion could be actionable if the statements could be reasonably understood as implying a fact. *Id.*

149. Montpetit, *supra* note 22, at 815.

150. *Milkovich*, 497 U.S. at 19. The Court noted that the context and location of the statement would bear little relevance to the character of the alleged defamatory statement. *Id.*

of the statement would play a limited role in any determination of defamation.[151] Courts have traditionally judged an alleged defamatory statement opinion, instead of fact, whenever the statements were printed in places like the op-ed page or the sports section.[152] *Milkovich*, by not taking context into full account, will alter future courts from that practice.[153] In addition, following *Milkovich*, the use of cautionary language to signal the coming of an opinion will not be relevant to the analysis.[154]

The decision in *Milkovich* additionally opens the door to defamation by implication.[155] The court need only find that a reasonable fact finder could see that the statement implies a fact.[156] In addition, an omission of facts may support a claim of implied defamation.[157] To be actionable, the implication must be able to be proven false.[158] Finally, if there is no expressed opinion in a statement, defamation by implication may arise.[159]

Despite the protests of our nation's media, and the warnings of the demise of free speech, the holding in *Milkovich* narrows the scope of protected opinion and expands actionable fact.[160] For those who view *Milkovich* as a fundamental altering of the opinion

---

151. *Id.*

152. Montpetit, *supra* note 17, at 820. *See generally* Silsdorf v. Levine, 449 N.E. 2d 716 (N.Y. 1983), *cert denied*, 464 U.S. 831 (1983); McHale v. Lake Charles American Press, 390 So. 2d 556 (La. Ct. App. 1980), *cert denied*, 452 U.S. 941 (1981).

153. *Compare* Milkovich v. Lorain Journal Co., 497 U.S 1, 12 (1990) (holding as irrelevant the fact that the statements appeared in a sports editorial) *with id.* at 32-33 (Brennan, J., dissenting) (including the tone and format of the article in his analysis).

154. *Milkovich*, 497 U.S. at 19. The Court noted that the use of cautionary language like "I think" or "In my opinion," or couching statements in terms of opinion does not dispel possible defamatory implications. *Id.*

155. Montpetit, *supra* note 22, at 822.

156. *Milkovich*, 497 U.S. at 19. This is similar to the positioning the Restatement that if the writer implies the existence of undisclosed facts, she is subject to libel. RESTATEMENT (SECOND) OF TORTS § 566, cmt. a (1977).

157. Montpetit, *supra* note 22, at 823.

158. Milkovich v. Lorain Journal Co., 497 U.S 1, 21 (1990). Other courts have gone so far as to say that even if all of the facts are accurately reported, the statement may still amount to actionable libel. *See e.g.* Forsher v. Bugliosi, 608 P.2d 716, 721 (Cal. Super. 1979) (holding that "[t]he individual sentences or phrases of a publication taken separately may not reveal any defamatory thrust, but, like the pieces of a jigsaw puzzle, taken together a picture of libel yet be revealed").

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

160. Montpetit, *supra* note 22, at 826. Traditionally, the courts have guided First Amendment litigation through the system, protecting it with numerous judicial principles, particularly with regards to press defendants. *Id.* In the hands of a jury, the First Amendment may not be held in such high regard. *Id.*

privilege, the holding should significantly impact athletes and their interaction with the press.[161]

Alternatively, legal commentators have argued that *Milkovich* is not a "radical revision of existing doctrine,"[162] but is simply a limit on the protection afforded to opinions.[163] They argue that the law of defamation will essentially remain unaltered, because the Court in *Milkovich* simply reformulated the privilege for opinions while refusing to grant an exemption from liability [164]

After *Milkovich*, some opinions will simply encompass an actionable factual assertion.[165] This will not alter the landscape of defamation litigation because of the *Milkovich* Court's affirmation of First Amendment principles in its holding.[166] An opinion, under the rule stated in *Milkovich*, which does not contain a false factual connotation, is still fully protected.[167] As a result, the core of the opinion privilege will still remain intact, and any expansion of liability will be minor.[168]

The holding in *Milkovich* is regarded by some as an affirmation, rather than an erosion, of existing libel law.[169] In substance, the opinion privilege remains identical.[170] Although the alleged defamatory statements in *Milkovich* were previously understood to be exempt from libel, the Court leaves undisturbed all pure opinion in the disputed article.[171]

---

161. *See supra* notes 93-95 and accompanying text.

162. Nat Stern, *Defamation, Epistemology, and the Erosion (but Not Destruction) of the Opinion Privilege*, 57 TENN. L. REV. 595 (1990); *See generally* Edward M. Sussman, *Milkovich Revisited: "Saving" the Opinion Privilege*, 41 DUKE L.J. 415 (1991); *Leading Cases: Constitutional Law* [hereinafter *Leading Cases*], 104 HARV. L. REV. 129, 219 (1990).

163. *Id.* Opinions will be protected provided they are not provable as false and reasonably cannot be interpreted as false assertions of fact. *Id.*

164. *Id.* at 223. The standard enunciated by the Court is essentially the same as used for years by lower courts to distinguish between fact and opinion. *Id. See e.g.*, Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1572 (D.C. Cir. 1984); Buckley v. Littell, 539 F.2d 882, 895 (2d Cir. 1976); Chalpin v. Amordian Press, 12 Med. L. Rep. (BNA) 1422, 1424 (N.Y. Sup. Ct. 1985).

165. *See* Stern, *supra* note 162.

166. *Id.* at 612. The author argues that the holding does not "presage a thoroughgoing assault on the bulk of expression long understood to enjoy protection under the privilege." *Id.*

167. *Id.* at 614 (citing *Milkovich*, 497 U.S. at 18).

168. *Id.* at 616.

169. Sussman, *supra* note 162, at 417. In *Milkovich*, the difference in the Court's articulation of the opinion privilege is minimal. *Id.*

170. *Id.*

171. *Id.* at 418. The term pure is not intended to encompass those statements that imply potentially libelous facts. *Id.* at 418 n.32. Rather, pure is used because it provides a conve-

In arguing that the Court did not intend to eliminate constitutional protection for opinion, authors point to the fact that the Court spent a considerable amount of time distinguishing between protected and unprotected statements.[172] The Court would not have spent so much time distinguishing between the two had it intended to eliminate any constitutional protection for some opinion.[173] The holding of *Milkovich* is an affirmation of constitutional protection for opinions.[174]

In addition to law review articles, there are several cases that support the position that *Milkovich* does not dramatically alter the scope of the opinion privilege.[175] In *Immuno AG v. Moor-Jankowski*,[176] the New York Court of Appeals interpreted *Milkovich* to hold that opinions are no less subject to protection, but that simply because something is labeled opinion does not automatically afford it protection.[177] Judge Kaye held that where the statement's "general tenor negates" a defamatory impression, or where the statements are loose, and figurative, protection is still afforded.[178] In *Foretich v. Glamour*,[179] the District Court for the District of Columbia found that some generalized opinions or rhetorical hyperbole are privileged even though they may place the plaintiff in an unfavorable or unfair light.[180]

In *Don King Productions, Inc. v. Douglas*,[181] a boxing promoter brought suit against James Buster Douglas, who had recently beaten Mike Tyson to become the new champion of the heavyweight division.[182] The boxer counterclaimed for slander based on certain

---

ment way to describe statements identified by *Milkovich* as not sufficiently factual to be reasonably labeled true or false. *Id.*

172. *Id.* at 419. *See generally* Milkovich v. Lorain Journal Co., 497 U.S. 1, 17-18 (1990).

173. Sussman, *supra* note 162, at 419.

174. *Id.* at 448.

175. Immuno AG v. Moor-Jankowski, 567 N.E. 2d 1270, 1273 (N.Y. 1991); Foretich v. Glamour, 753 F. Supp. 955, 966 (D.D.C. 1990); Don King Prods., Inc. v. Douglas, 742 F. Supp. 778, 781-85 (S.D.N.Y. 1990).

176. 567 N.E. 2d 1270 (N.Y. 1991).

177. *Id.* at 1273.

178. *Id.* at 1275.

179. 753 F. Supp. 955 (D.D.C. 1990).

180. *Id.* at 966. The ultimate fact must be that plaintiff can prove the falsity of the statements. *Id.*

181. 742 F. Supp. 778 (S.D.N.Y. 1990).

182. *Id.* Mike Tyson, the incumbent heavyweight champion, fought Buster Douglas in Tokyo for the Championship Belt. *Id.* at 781. Don King Prods. served both as the promoter of the fight and as Tyson's agent. *Id.* at 780. During the fight Tyson knocked Douglas down for an apparently slow ten count. *Id.* at 781. Douglas recovered and was declared the winner at

statements made by King both during and after the fight.[183] Douglas contended that King's statements that Tyson really won the fight and that Tyson should be declared the winner amounted to slander.[184] King argued that his statements were protected opinion and, if not, that the statements were not known to be false when he uttered them and not actionable.[185]

The court first reasoned that the statements were a matter of public concern and that Douglas was a public figure.[186] The court analyzed whether King's statements implied a factual connotation that could be proven true or false, and if so, whether they could be perceived as relating actual facts about Douglas.[187] The court concluded that King's statements "cannot reasonably [be] interpreted as stating actual facts."[188] It further reasoned that none of King's explicit statements attack the character or performance of Douglas.[189] With respect to King's implication of Douglas' professional performance, the facts were held equally not actionable.[190] The court concluded that King's statements were protected opinion and dismissed Douglas' counterclaim.[191]

The preceding cases point to the difficulty in assessing the effect of the *Milkovich* decision.[192] There are several primary factors why there has not been the anticipated rise in public figure, and specifically athlete, defamation cases.

First, the media has begun to use counteractions to libel cases more effectively.[193] The press' hope is that by using these counterac-

---

the end of the fight. *Id.*

183. *Id.* at 781. After the eighth round, King said that "the fight should be stopped and Mike Tyson declared the winner." *Id.* At the close of the fight King stated that "the first knockout (Tyson's) obliterated the second (Douglas')." *Id.* Finally, King made the following statements that were published in the *National Sports Daily*, "Here's a fact. Mike Tyson knocked out James Buster Douglas " *Id.* at 781 n.2.

184. *Id.*

185. *Id.* at 782.

186. Don King Prods., Inc. v. Douglas, 742 F. Supp. 778, 783-85 (S.D.N.Y. 1990).

187. *Id.* at 782. Although the plaintiff is a non-media defendant, the First Amendment appears to require a holding that all speakers, whether they are press members, or not, be afforded protection. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) ("First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech.")

188. *Id.* at 783.

189. *Id.* at 784.

190. *Id.*

191. Don King Prods., Inc. v. Douglas, 742 F. Supp. 778, 785 (S.D.N.Y. 1990).

192. Immuno AG v. Moor-Jankowski, 567 N.E. 2d 1270, 1273 (N.Y. 1991); Foretich v. Glamour, 753 F. Supp. 955, 966 (D.D.C. 1990); *Douglas*, 742 F. Supp. at 781-85.

193. Note, *Media Counteractions: Restoring the Balance to Modern Libel Law*, 75 GEO. L.

tions successfully they will discourage frivolous and meritless claims.[194]

Second, the costs of bringing a defamation claim against a large media defendant are prohibitive, even for the most highly compensated athletes.[195] Although a media defendant can still expect to spend more money than a plaintiff, a high profile public figure can expect to spend more than $1 million.[196]

Third, public figure defamation plaintiffs still have to prove actual malice by the defendant.[197] As a result, many public figures who feel they have been defamed will not sue because their prospects for victory are slim.[198]

Fourth, public figure defamation plaintiffs may be leery of filing suit because they still bear the burden of proving falsity.[199] Statements that the plaintiff cannot prove as false are still considered protected.[200] As a result, a plaintiff who does not know for certain whether he, or she, can prove the falsity of the defendant's statements may not sue.

Finally, much of the academic literature supports the notion that the "sports pages" are opinion, and accordingly are protected.[201] In sum, it is evident that the present state of confusion amongst academics and the various factors limiting the efficacy of public figure defamation suits has accounted for the lack of libel

---

REV. 315, 316 (1986). *See* Cutting & Levine, *Fighting Back-Media Lawyers Are Developing New Tactics to Discourage Libel Suits*, 3 COMM. LAW., Fall 1985, at 11 (discussing counteractions against libel plaintiffs by news media defendants); Sanford, *Libel Suit, Countersuit*, WASH. JOURNALISM REV., June 1985, at 16 (reporting that some news organizations have filed successful counteractions).

194. *Media Counteractions, supra* note 193 at 316.

195. David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 542 (1991).

196. *Id.* The plaintiff in Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir. 1987), is reported to have incurred attorneys' fees of two million dollars. *Id.* An attorney for Wayne Newton testified that his client had incurred expenses of "well over a million dollars" by the time of trial. Newton v. NBC, 930 F.2d 662 (9th Cir. 1990).

197. New York Times v. Sullivan, 376 U.S. 254, 280 (1964).

198. *Id. See* M. MAYER, THE LIBEL REVOLUTION: A NEW LOOK AT DEFAMATION AND PRIVACY 25 (1987) (remarking that for the plaintiff who does not have to prove actual malice, the path to trial is decidedly less thorny).

199. *Leading Cases, supra* note 162, at 222. At common law the burden was on the defendant to prove that the statements were true. Philadelphia Newspapers Inc. v. Hepps, 475 U.S. 767, 776 (1976). In *Hepps*, the Court reserved judgment on situations involving non-media defendants. *Id.* at 779 n.4.

200. Milkovich v. Lorain Journal Co., 497 U.S. 1, 17 (1990).

201. SPORT LAW 250 (1990).

suits by maligned athletes.

Recent examples of potential defamation suits that were never filed include the well publicized debates revolving around Michael Jackson,[202] Michael Jordan,[203] and Tonya Harding.[204] In all of these instances, there was ample opportunity for these public figures to file various suits alleging libel.[205] One can only wonder whether these public figures decided not to bring an action because of one or more of the factors listed.[206] These instances further illustrate the point that in the post-*Milkovich* era the forecasted chill of press freedom has not borne out. Generally, public figures tend not to sue for libel because of an unwillingness to expend the costs involved, to avoid dragging out the controversy, the difficulty in

---

202. Richard Corliss, *Facing the Music,* TIME, Dec. 27, 1993, at 67. A 13 year old boy filed a civil suit against Jackson alleging that the star molested him. *Id.* Jackson proclaimed his innocence insisting that it was all an unfair witch-hunt. *Id.* Jackson subsequently settled with his accuser for a reported $20 million, all the while maintaining his innocence. Richard Corliss, *The Price Is Right,* TIME, Feb. 7, 1994, at 60. It is important to remember that although Jackson is an entertainer, as a public figure he is in the same position as an athlete. *See supra* notes 94-111 and accompanying text (discussing the high degree of correlation between entertainers and athletes). The debate escalated after the settlement with many stories saying that Jackson's payment was evidence of his guilt or that he was buying the silence of his accuser. *See generally* Mike Royko, *Michael Jackson's Settlement Is Morally Bankrupt,* ORL. SENT., Jan. 28, 1994, at A13; Ellis Henican, *Rubba-Dub-Dub Many Boys in Tub,* NEW YORK NEWSDAY, Dec. 15, 1993, at 4.

203. Richard O'Brien, *Tarnished Image?,* SPORTS ILLUSTRATED, June 28, 1993, at 11. After allegations became public that Jordan was a gambler, often gambling high stakes, questions of his potentially tarnished image arose. *Id.* Subsequently, with the murder of his father under suspicious circumstances, many writers speculated that his gambling may have been linked to his father's death. *See generally* Mark Whicker, *Was James Jordan Killed Because of Son's Gambling,* SAN DIEGO UNION-TRIB., Aug. 15, 1993, at C14; Brian Schmitz, *Is Michael Somehow Tied to Dad's Bizarre Death,* ORLANDO SENTINEL, Aug. 14, 1993, at C1.

204. E.M. Swift, *On Thin Ice,* SPORTS ILLUSTRATED, Jan. 24, 1994, at 14. As facts began to emerge regarding the January 6 attack on Nancy Kerrigan in Detroit, people began to question whether Harding was a conspirator in the crime. *Id.* Subsequently, the United States Olympic Committee, and the United States Figure Skating Association, began proceedings to disqualify Harding from the Olympics. *The Kerrigan Assault,* SPORTS ILLUS., Feb. 14, 1994, at 29. In response Harding filed a $25 million lawsuit against the U.S.O.C. to keep her place on the team. E.M. Swift, *The Gutless Wonders,* SPORTS ILLUSTRATED, Feb. 21, 1994, at 90. The Olympic Committee canceled their hearing and allowed Harding to compete in Lillehammer. *Id.* Due in part to her poor showing at the Olympics and the media's depiction of her as a co-conspirator in the planning stages of the attack, Harding has been unable to reap the expected economic benefits. *See generally* Jim Proudfoot, *Harding Was Content to Benefit from Crime,* TORONTO STAR, Feb. 4, 1994, at E1; Steven Buckley, *Harding Approved Plot,* WASH. POST, Feb. 2, 1994, at A1.

205. *See generally* Royko, *supra* note 202; Henican, *supra* note 202; Whicker, *supra* note 203; Schmitz, *supra* note 203; Proudfoot, *supra* note 204; Buckley, *supra* note 204.

206. *See supra* notes 193-201 and accompanying text.

proving falsity and actual malice, and the confusion in the legal community over the effect of recent libel decisions.[207]

Specifically, in the case of Michael Jackson, it can be inferred that he did not sue the press for insinuating that the payment he made was an admission of guilt because of various factors.[208] Foremost among his reasons may be that he did not want to keep the story alive in the press, hoping that with time it would go away.[209] In addition, cynics would argue that he did not file suit because it is difficult to prove falsity when the allegations are truthful.[210]

In the instance of Michael Jordan, his reasons for not suing over statements connecting his gambling to his father's murder can be similarly inferred.[211] The cost of bringing a libel claim against increasingly aggressive press defendants, in both time and money, is prohibitive.[212] Like Michael Jackson, the hope is that by not prolonging the newsworthiness of a story it will dissipate more quickly.[213] Finally, despite the fact that Jordan's gambling probably had nothing to do with his father's death, he may not have wanted his private matters brought up at trial.[214]

The Tonya Harding case presents the most illustrative example of why public figures do not sue for libel, and how the freedom of the press remains sufficiently protected.[215] Despite her plea of guilty to charges stemming from the hindering of prosecution, she could have sued over the press' linking her to the planning and execution of the attack.[216] Unlike Jordan or Jackson, Harding is not wealthy, and her potential pecuniary loss from these allegations is both substantial and quantifiable.[217] Thus, one can infer that the reason that she did not file suit is because of the difficulty in proving actual malice and falsity in libel cases, combined with the high cost of litigation and a desire to avoid further embarrassment.[218]

---

207. *Id.*
208. *See generally supra* note 202.
209. *Id.*
210. *Id.*
211. *See generally supra* note 203.
212. *Id.*
213. *Id.*
214. *Id.*
215. *See generally supra* note 204.
216. *Id.*
217. *Id.*
218. *Id.*

VI. PROTECTED OPINION: "I'LL KNOW IT WHEN I SEE IT"

The prevailing view is that *Milkovich* has done little to help sort out the fact/opinion distinction.[219] This has resulted in literature and case law suggesting various protection for the media after the perceived loss of the absolute opinion privilege in *Milkovich*.[220] The question remains whether any further protection should be afforded the media, or whether a bright-line test is needed to differentiate between fact and opinion? In answering this query in the negative, a comparative analysis of First Amendment obscenity law will be used. Obscenity serves as a proper analogy because both defamation and obscenity pertain to First Amendment freedoms of speech and the press.

Like the debate over the fact/opinion distinction, the question of what amounts to obscenity has raged for years.[221] Freedom of speech, although a strong protection, is not absolute.[222] This is premised on the fact that absent some limitations on our freedoms the Republic would lapse into anarchy.[223] In *Roth v. United States*,[224] the Court held that obscenity is not protected speech.[225] The issue became: What is obscenity? In *Roth*, a three part test was established to determine the definition of obscenity.[226] In the wake of *Roth*, the Court struggled with the determination of what amounted to obscenity [227] This led to the following

---

219. Nancy K. Bowman, *Milkovich Meets Modern Federalism in Libel Law: The Lost Opinion Privilege Gives Birth to Enhanced State Constitutional Protection*, 42 DEPAUL L. REV. 583, 609 (1992).

220. Bowman, *supra* note 219, at 613 (suggesting enhanced State Constitutional protection for the media); Unelko Corp. v. Rooney, 919 F.2d 1049 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991) (holding that *Milkovich* did not change the standard of review in defamation cases); Moldea v. New York Times Co., 793 F.Supp. 335, 337 (D.D.C. 1992) (stating that *Milkovich* did not change prior First Amendment law).

221. *See* Paris Adult Theatre 1 v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); Ginzburg v. United States, 383 U.S. 463 (1966); Roth v. United States, 354 U.S. 476 (1957).

222. RANDALL W. BLAND, CONSTITUTIONAL LAW IN THE UNITED STATES 174 (1993).

223. *Id.*

224. 354 U.S. 476 (1957).

225. *Id.*

226. *Id.* (stating that obscenity is present if: a) the expression is utterly without redeeming social importance, b) the expression deals with sex appealing to prurient interests, c) the expression as a whole, applying contemporary community standards, appeals to prurient interests).

227. Jacobellis v. Ohio, 378 U.S. 184 (1964); Ginzburg v. United States, 383 U.S. 463 (1966); Redrup v. New York, 386 U.S. 767 (1967).

famous quote of Justice Stewart: "I can't define it but I know it when I see it."[228]

Finally in 1973, the Court agreed on a new definition of obscenity in the celebrated case of *Miller v. California*.[229] Contrary to the belief that this test would end confusion in this area of the law, uncertainty and confusion still reigned. In a number of cases that followed *Miller* the test was either revised, reworked, or altogether ignored, depending on the content and context of the work.[230] Despite attempts to define and categorize obscenity, there remains considerable ambiguity in this area of the law Even with this apparent uncertainty, the Court consistently relied on a balancing test, weighing the freedoms of the individual against the authority of the government to limit those freedoms.[231] This has proven to be as effective a means of categorizing obscenity as possible in the realm of the First Amendment.

VII. CONCLUSION

Like the free speech issue of obscenity, the freedom of the press debate over the fact/opinion distinction should be left to the United States Supreme Court. The Court, balancing individual freedoms with protection of the community, along with the numerous protection afforded the press, adequately serves the interests of both the media and potential defamation plaintiffs. Bright-line tests, more federal legislation, and state protection are not the answer. These "solutions" would only further confuse the issue. This will not lead to media self-censorship, nor will it lead to unchecked defamation of public figures and athletes. A continued balancing between what is actionable fact and what is protected opinion remains the most effi-

228. *Jacobellis*, 378 U.S. at 197.

229. 413 U.S. 13 (1973) (holding that obscenity is present if: a) the average person, applying contemporary community standards, would find that the words, taken as a whole, appeal to prurient interests; b) the work depicts or describes, in a patently offensive way sexual conduct specifically defined by the applicable state law; and c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value).

230. *See* Osborne v. Ohio, 495 U.S. 103 (1990) (narrowing *Stanley* by stating that child pornography is absolutely unprotected); Pope v. Illinois, 481 U.S. 497 (1987) (holding that the value of the work should be determined by a reasonable person standard); New York v. Ferber, 458 U.S. 747 (1982) (holding that material was obscene despite the fact that under *Miller* it would not be); F.C.C. v. Pacifica, 438 U.S. 726 (1978) (holding that indecent speech can be suspect to time, place, and manner restrictions); Stanley v. Georgia, 394 U.S. 557 (1968) (holding that private possession of obscene material may still be protected).

231. BLAND, *supra* note 222, at 175.

cacious way to settle libel suits.

At first glance, *Milkovich* is a pivotal case for athletes wishing to sue the press for defamation. It narrows the opinion privilege and broadens the scope of actionable fact.[232] Today, if an athlete wishes to sue for defamation based on criticisms of his play or revelations of his personal life, his suit will no longer be absolutely protected. Athletes will have the opportunity to show that a statement is false, or is a verifiable opinion, and that the writer knew it was false, or acted with reckless disregard for its falsity A substantial hurdle nonetheless, but at least one that is attainable.

Despite the lessening of the press' absolute protection for its statements, the chances of increased litigation are minimal. Professional athletes and coaches, as well as college and even high school stars, have attained such a level of recognition and prominence in our society that they must expect to have their lives dissected and scrutinized. In addition, an unfavorable public image as rich, spoiled and privileged members of society will further deter most athletes from pursuing a libel suit unless the alleged defamatory statements materially affect their careers or their earning capacity Therefore, everyday criticisms and details of the athlete's life will not likely result in more litigation.

Milkovich serves its purpose as a limit on the vindictive untrue and unsubstantiated attacks on athletes and other public figures. Although it will not open the floodgates of athlete libel litigation, it will allow the unfairly portrayed athlete an avenue of redress that was not present before 1990.

Andrew K. Craig

232. Montpetit, *supra* note 22, at 826.