LDRC Libel Defense Resource Center

BULLETIN

ARGUING FOR THE PROTECTION OF OPINION

IN THE AFTERMATH OF *MILKOVICH V. LORAIN JOURNAL*

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I. INTRODUCTION

Whether the Supreme Court's holding in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), *that there exists no* separate federal privilege for statements of opinion, effected a substantive change in libel law the Milkovich decision has clearly emboldened libel plaintiffs. As was noted in the defendant's motion for summary judgment[1] in Moldea v. The New York Times (at 11), a libel action brought by an author in response to an unfavorable book review: "It is fair to say that before the Supreme Court's holding ... in Milkovich, this case never would have been considered."

In similar fashion to LDRC's post-Gertz surveys of arguments favoring the highest possible standards of fault for private-figure plaintiffs (see LDRC Bulletins nos. 6, 9, and 10), this article will offer examples of how attorneys for libel defendants have responded to Milkovich over the three-plus years since it was handed down. As a result of the creativity of defense counsel during this period, in briefs such as those excerpted herein, it is fair to say that publications of the kind that were once frequently considered to be constitutionally protected opinion under the First Amendment are still being given a broad measure of protection from liability for defamation -- albeit under a variety of new or recalibrated theories developed and articulated since Milkovich.

The group of briefs excerpted below in Part II reiterate the constitutional protections affirmed by Milkovich and argue that any change flowing from Milkovich is minimal, a change in form or terminology rather than substance.

The briefs collected in Part III offer alternative strategies for responding to arguments that Milkovich has narrowed the scope of protection afforded libel defendants.

In Part IV, a bibliographic listing of briefs on file at LDRC in post-Milkovich cases is provided to supplement the necessarily limited number of briefs that could be quoted at length in this Bulletin.

Finally, readers of this Bulletin should note that in the balance of this presentation editorial introductions and commentary accompanying the various briefs are set in boldface type. Editor's footnotes also appear in boldface type in arabic numerals. The briefs quoted appear in normal type and footnotes from quoted briefs are indicated sequentially using the symbols *, †, ‡, and ¶.

[1]Filed by Bruce Sanford, Leonard H. Freiman, and Anne R. Noble, of Baker & Hostetler, Washington, D.C., and George Freeman, of The New York Times.

II. FOCUSING ON THE CONSTITUTIONAL PROTECTIONS REAFFIRMED BY *MILKOVICH*

A. Demonstrating in General That *Milkovich* Does Not Represent a Drastic Change in the Law

Although Milkovich rejected a wholesale defamation exemption for statements that may be characterized as opinion, it reiterated and reaffirmed numerous constitutional protections already afforded speech that might be labeled "opinion." These general reaffirmations of vital constitutional protections are summarized in the defendant's memorandum in support of summary judgment[2] (March 30, 1992, at 44-47), in Johnson v. Maine Times, a case pending in Maine Superior Court. In Johnson, the defendant published an article in which it was asserted of the plaintiff that "This man's mistakes will cost us millions. Now he works for the state government."

Johnson v. Maine Times

Recently, the question of non-actionable opinion under federal constitutional law received a great deal of attention. In Milkovich v. Lorain Journal Co., 497 U.S. ---, 111 L. Ed. 2d. 1, 110 S. Ct. 2695 (1990), the U.S. Supreme Court attempted to clarify the principles governing the First Amendment's protection of statements of opinion. In Milkovich, the Supreme Court denied that there exists a "wholesale defamation exemption for anything that might be labelled 'opinion'." 110 S. Ct. at 2705. The Court concluded that the issue is not whether the challenged statement may be described as an opinion, but whether it reasonably would be understood to declare or imply provable assertions of fact. Id. at 2707.

Notwithstanding its rejection of a specific "privilege" for "opinions," the Milkovich court clearly indicated that opinions would continue to receive substantial constitutional protection under various First Amendment principles already in existence.

Milkovich reaffirms three important principles established by preceding decisions. The first, of "foremost" importance to the Milkovich court, was the principle established in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), that statements made by a media defendant "must be provable as false before there can be liability under state defamation law." 110 S. Ct. at 2706. The Milkovich decision reaffirmed that "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." Id. (footnote omitted). Thus, a statement continues to receive federal constitutional protection after Milkovich not because it carries the semantic label of "opinion," but because it is not "susceptible of being proved true or false." Id.

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[2]Filed by Jonathan S. Piper, Edward R. Benjamin, and Kelvin J. Beal, of Preti, Flaherty, Beliveau & Pachios, Portland, Maine.

In addition to reaffirming the Hepps principle, the Milkovich court emphasized a line of cases establishing federal constitutional protection for statements that "cannot 'reasonably [be] interpreted as stating actual facts' about an individual." 110 S. Ct. at 2706 (quoting Hustler Magazine., Inc. v. Falwell, 485 U.S. 46, 50 (1988) (involving ad parody). See also Letter Carriers v. Austin, 418 U.S. 264, 284-86 (1974) (use of the word "traitor" not basis for defamation action since used "in a loose, figurative sense"); Greenbelt Cooperative Publishing Ass'n. Inc. v. Bresler, 398 U.S. 6, 14 (1970) (the word "blackmail" is not actionable when seen in context).

Milkovich reaffirmed that this line of cases explicitly protects "rhetorical hyperbole," and other types of "imaginative expression" that writers use to enliven their prose. 110 S. Ct. at 2706. An example of this principle is that the publisher of a statement that someone is "committing highway robbery" would be immune from liability because no reasonable listener would understand the speaker to be accusing another of the actual crime of robbery. Phantom Touring, Inc. v. Affiliated Publications et al., (lst Cir., Jan. 10, 1992), slip op. at 7.*

In addition to requiring a court to consider whether challenged speech contained "loose, figurative, or hyperbolic language which would negate the impression" that a statement of fact was being asserted, 110 S. Ct. at 2707, the Milkovich court also indicated that the context in which language appears must be evaluated by the courts to determine whether "the general tenor of the article negate[s] this impression." Id. See, e.g., McCabe v. Rattiner, 814 F.2d 839, 842 (lst Cir. 1987) (adopting totality of the circumstances analysis); Ollman v. Evans, 750 F.2d 970, 974-75 (D.C. Cir. 1984) (same test).

* * * *

Even if a statement is arguably sufficiently factual to be proved true or false, and possibly vulnerable under Milkovich, it may still be privileged if the context of the entire article in which the statement is contained renders the language incapable of being reasonably interpreted as stating actual facts. If "[t]he sum effect of the format, tone and entire content of the articles is to make it unmistakably clear that [the speaker] was expressing a point of view only" then "the challenged language is immune from liability." Phantom Touring, Inc., slip op. at 12.

In addition to the tenor, tone, and context of the article, of critical importance is the existence of information in the article from which readers might draw contrary conclusions. If an article discloses all known facts, as well as the rationale for the author's view, the

*Judge Coffin's opinion in Phantom Touring is unquestionably the most complete and comprehensible analysis of Milkovich yet written. The analysis in this Memorandum borrows substantially from that opinion.

conclusions drawn from those facts by the author can only be understood as a "personal conclusion about the information presented, not as a statement of fact." Phantom Touring, Inc., slip op. at 13.

The supplemental brief on remand[3] in Jones v. ABC (August 23, 1991, at 22-24), offers an array of authority in support of its contention that Milkovich neither eliminated protection for opinion nor resulted in a significant alteration in existing libel law. In Jones, ABC broadcast a story on plaintiff's "rescue" and subsequent abandonment of a herd of elephants. The plaintiff charged that he was defamed by a report on "some baby elephants to whom a promise was not kept." The Eleventh Circuit affirmed the district court's dismissal on summary judgment, and the Supreme Court remanded for further consideration in light of Milkovich. On remand, the Eleventh Circuit reaffirmed, holding that, taken in context, the statements were not actionable because no reasonable person would have interpreted them as defamatory. See 961 F.2d 1546 (11th Cir. 1992), cert. denied, 113 S.Ct. 971 (1993).

Jones v. ABC

Milkovich clearly has not "eliminated" constitutional protection for opinion, contrary to Jones' contention. While pointing out that there is no separate "opinion privilege" in addition to existing protections of speech guaranteed by the First Amendment, the Supreme Court confirmed that statements of pure opinion, like the one here, are nonetheless fully protected by existing First Amendment doctrine. As the Court in Milkovich explained, there is "full constitutional protection" for "statement[s] of opinion relating to matters of public concern which do[] not contain a provably false factual connotation." Id. at 2706. Equally protected are "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." Id. The Supreme Court in Milkovich went on to review other of its decisions in which it similarly recognized constitutional limits, fully applicable in this case, on the type of speech which may be the subject of state defamation actions. See id. at 2704-06 (discussing Greenbelt Coop. Publishing Ass'n Inc. v. Bresler, 398 U.S. 6 (1970); National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); and Hustler Magazine v. Falwell, 485 U.S. 46 (1988). The court summarized the applicable principles this way:

> Foremost, we think [Philadelphia Newspapers, Inc. v.] Hepps, 475 U.S. 767 (1986)] stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like

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[3]**Filed by Gregory G. Jones of Carlton, Fields, Ward, Emmanuel, Smith, and Cutler, P.A., Tampa, Florida.**

> the present, where a media defendant is involved. 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. Hepps ensures that a statement of opinion relating to matters of public concern which does not contain provably false factual connotation will receive full constitutional protection.
>
> Next, the Bresler-Letter Carriers-Falwell line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. (citations omitted).

Milkovich -- once again contrary to Jones' insistence --does not represent a "drastic" change in the law. Milkovich, 110 S. Ct. at 2708-09 (Brennan, J., dissenting) (expressing essential agreement with the majority's holding that "protection for statements of pure opinion is dictated by existing First Amendment doctrine."); B. Sanford, Libel and Privacy, § 5.4.2.1, 149-51 (2d ed. 1991) ("There is . . . overwhelming support for the proposition that . . . pure opinion . . . is protected by the First Amendment. This support has continued unabated after the Milkovich opinion."); see Don King Productions, Inc. v. Douglas, 742 F. Supp. 778, 782 (S.D.N.Y. 1990) (constitutional protection available under Milkovich is considerably broader than reading of popular reports of the opinion privilege's demise might imply); R. Smolla, Law of Defamation, § 6.01(2), 6-4, 6-5 (1991); Leading Cases, 104 Harv. L. Rev. 129, 223 (1990) (The court simply "reformulated the opinion privilege while refusing to recognize a per se exemption from liability . . .. Because the criteria used by lower courts since Gertz [v. Robert Welch, Inc., 418 U.S. 323 (1974)] to distinguish fact from opinion are consistent with Milkovich's limitations, the law of defamation will remain essentially the same in many jurisdictions."). As one respected commentator put it:

> [T]he terminology distinguishing between "fact" and "opinion" was not rendered obsolete by Milkovich . . .. Similarly, Milkovich did not eliminate first amendment protection for "opinion." Rather, the Court chose to articulate the constitutional rules in terms of the requirement that state defamation actions be based upon statements of fact provable as false.

R. Smolla, supra, § 6.01(2), at 6-4, 6-5. See also Ward v. News Group Newspaper Inc., 18 Media L. Rep. (BNA) 1140, 1141-42 (C.D. Cal. 1990) ("[T]he Milkovich case only presents 'new' law in that it expands upon its prior line of analysis."); B. Sanford, supra, §5.3, at 143-45 ("[T]he Milkovich approach incorporates many of the same considerations as the more reasoned pre-Milkovich approaches to the fact/opinion issue . . . Thus, far from being obsolete, pre-Milkovich opinion cases -- particularly those which engaged in thoughtful analysis rather than superficial classification -- remain useful in analyzing the factual objectivity and verifiability of statements pursuant to the Milkovich test." (footnotes omitted)).

Under Milkovich, the inquiry is whether the statement implies a "provably false" assertion of "fact" and whether, if so, the statement can reasonably be interpreted as stating "actual facts" about a person. 110 S. Ct. at 2706. One court has summarized the Milkovich inquiry this way:

> The present inquiry therefore demands determination of whether [the defendant's] statements, to the extent they are opinions, (1) address matters of public concern, (2) are expressed in a manner that implies a factual connotation that is provably true or false and (3) . . . whether they reasonably can be interpreted as intended to convey actual facts about a person.

Don King Productions Inc., 742 F. Supp. at 782. See also Ward, 18 Media L. Rep. (BNA) at 1141-42.

The settled rules of the Eleventh Circuit mirror the principles announced in Milkovich. See Keller v. Miami Herald Publishing Co., 778 F.2d 711, 716-18 (11th Cir. 1986); Hallmark Builders, Inc. v. Gaylord Broadcasting, 733 F.2d 1461, 1463-64 (11th Cir. 1984).

As this Court put it in Hallmark Builders:

A false statement of fact is the sine qua non for recovery in a defamation action.

733 F.2d at 1464.

Similarly, in Keller, which is directly on point, this Court held:

In addition to being capable of defamatory meaning, however, a publication must be false and consist of a statement of fact . . . [which is] . . . subject to empirical proof.

778 F.2d at 717-18.

[The memorandum in support of defendant's motion for summary judgment in Moldea v. The New York Times (at 13) urged a similar conclusion:

> The sole impact of Milkovich on the litigation of "opinion" cases is that it has changed the predicate question from whether or not the words are opinion to whether or not the words are sufficiently factual to be susceptible of being proved true or false. Milkovich, 110 S.Ct. at 2704.]

B. Utilizing the *Hepps* Requirement That the Statement Must Be Provably False

The respondents' brief on appeal[4] in Miyata v. Bungei Shunju, Ltd. (February 25, 1991, at 12) examines the broad protection that flows from the mandate of Hepps, affirmed in Milkovich, that it is the libel plaintiff's burden to establish the existence of a provably false statement of fact. The Miyata brief suggested that any changes effected by Milkovich were ones of form rather than substance. In Miyata, the defendant published an article concerning the murder of the plaintiff's wife in which it was stated that "it is a little too long to take 21 minutes from the discovery of the body to the notice to the police." The plaintiff argued that the article was false and defamatory in that it implied that he had murdered his wife or was responsible for her murder. In an unpublished decision, see 19 Med. L. Rptr. 1400, the Second Appellate District of the California Court of Appeal held that the statement was not provably false and thus not actionable.

Miyata v. Bungei Shunju, Ltd.

In Milkovich, the United States Supreme Court reaffirmed its decision in Hepps, that statements "on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved," and that "opinion[s] relating to matters of public concern which do not contain a provably false factual connotation will receive full constitutional protection." Milkovich, 110 S. Ct. at 2706. In short, an assertion that cannot be proved false, cannot be held libelous. The Court also recognized that there already exists constitutional protection for "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual," as well as statements which are "'imaginative expression,'" or 'rhetorical hyperbole.'" Id.

The only significant change accompanying the Court's Milkovich decision is its holding that because much of what can be labelled "opinion" already is protected by the First Amendment, there is no need to carve out separate protection for opinion qua opinion. Id. at 2707. Milkovich expressly left intact the pre-existing First Amendment protection for subjective statements imparting ideas or beliefs -- such as the statements at issue here -- which are not sufficiently factual to be evaluated and found false by a reasonable fact finder.

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[4]Filed by Robert C. Vanderet, Wallace M. Allan, and Alec M. Barinholtz, of O'Melveny & Myers, Los Angeles, California.

C. Employing the Categorical Protection Still Applicable to Hyperbole, Epithet, and Parody

The brief on appeal of defendant-appellants[5] in Garvelink v. The Detroit News, Inc. (December 12, 1991, at 10-16), offers a discussion of the protection afforded self-evidently nonfactual speech, involving parody or "loose, figurative, or hyperbolic language" that, although susceptible to being proven false, may not "reasonably [be] interpreted as stating actual facts." In Garvelink, the defendant published a parody in the form of a mock interview with the plaintiff, a school superintendent, identified in the piece as "Roger Gravelhead."

Garvelink v. The Detroit News, Inc.

The Supreme Court has made abundantly clear that speech expressed as hyperbole, caricature, and parody simply cannot serve as the basis for a libel claim.

The Supreme Court initially announced this principle in Greenbelt Pub Ass'n v. Bresler, 398 U.S. 6 (1969). In that case, defendants' newspaper published a story that referred to plaintiff's negotiating position before the city council as "blackmail." The trial court and the Maryland Court of Appeals viewed the use of the word as charging plaintiff with the criminal offense of blackmail. The Supreme Court disagreed, concluding that the word was no more than "rhetorical hyperbole", and was a "vigorous epithet" that could not have been taken literally.

Similarly, in Letter Carriers v. Austin, 418 U.S. 264 (1974), a pamphlet included a listing of names of persons who had not joined a union. The publication described them as "scabs" and defined a "scab" as "a traitor to God [and] his country." The Supreme Court held that these statements were rhetorical hyperbole -- "lusty and imaginative expression" --that could not be taken literally. Id. at 286.

The Supreme Court next addressed these issues in Hustler Magazine v. Falwell, supra. In that case, evangelist Jerry Falwell sued Hustler Magazine over a parody interview with features similar to Mr. Moss' column here:

> The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled, "Jerry Falwell Talks About His First Time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first time." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double

[5]**Filed by James E. Stewart, Leonard M. Niehoff, and Kevin F. O'Shea, of Butzel Long, Detroit, Michigan.**

> entendre of the general subject of "first times." Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during the drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk.

Id. at 48. The Court discussed the importance of debate on public issues and the use of caricature in portraying public officials. Id. at 50-54. The Court concluded that plaintiff's claim could not, "consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature . . ." Id. at 57.

Just last year, the Supreme Court strongly reaffirmed what it described as "the Bresler-Letter Carriers-Falwell line of cases" in Milkovich v. Lorain Journal, 110 S. Ct. 2695, 2706 (1990). In that case, the Court held that an accusation that a wrestling coach had committed perjury was not a protected expression of opinion immune from a libel action. Nevertheless, the Court held as follows:

> [T]he Bresler-Letter Carriers-Falwell line of cases provide protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual . . . This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation.

Id. 110 S. S.Ct. at 2706. And, this year, the Michigan Supreme Court followed this line of authority when it held that a headline stating that plaintiffs were "stalked by Mafia hunters" fell into "the category of permissible rhetorical hyperbole." Locricchio v. Evening News Ass'n, 438 Mich. 84, 132 (1991).

Courts have consistently applied this principle to parodies and satires similar to the Moss column. One case of particular interest is Hoppe v. Hearst Corp., 16 Med. L. Rptr. (BNA) 2076 (Wash. App. 1989). In that case, a columnist for the Seattle Post-Intelligencer wrote a satirical column about a county assessor called "Hurley Herpes," who hired a private detective to follow county employees. The column suggested that "Herpes" misappropriated public funds and increased assessments in order to pay for the detective. The actual county assessor, one Harley Hoppe, sued the newspaper and the columnist for libel. The court affirmed summary judgment against the plaintiff on the grounds that the column could not "reasonably be understood as describing actual facts about the plaintiff":

> Considering the context of the column and its tone, we conclude as a matter of law that [the] column did not imply the allegation of defamatory facts or allege criminal conduct. Because the . . . column was not defamatory, the trial court correctly dismissed Hoppe's defamation claim.

Id. at 2078-2080.

See also King v. Globe Newspaper Co., 12 Med. L. Rptr. (BNA) 2361 (Mass. Super. Ct. 1986). In that case, a political columnist for The Boston Globe published a column containing a mock press release by the Massachusetts governor in which the governor criticized his press secretary and named himself as his new press secretary. In language directly applicable to this case, the Court held as follows:

> The plaintiff complains that he never issued the press release attributed to him or made any of the statements contained therein. Of course, he did not. Further, he argues that, since [the columnist] admits the falsity of the attributions made in his simulated press release, the statements as a result must be factual, since opinions cannot by definition be proven false. I do not agree with this argument.
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> * * * *
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> The context of [the columnist's] satirical column here makes clear that it could not reasonably be understood to imply the assertion of fact. An ordinary reader would immediately notice that the column appears under the title of [the columnist's] feature column ("Political Circuit") and under [the columnist's] by-line, both of which suggest that the following "Press release" was not actually a press release, as that term is commonly understood. The column was published on the Op-Ed page, a page devoted to syndicated, featured and free lance articles covering a broad spectrum of subjects, rather than among news reports. An unwary reader would be alerted to the sarcastic nature of the "press release" upon reading its opening two words -- "good riddance" -- and would certainly be disabused of any lingering tendency to read the column literally upon encountering the contents of the "press release" as it develops. There is surely a whiff of the ridiculous about the "press release" which would arouse in the reader "a measure of skepticism and an expectation of amusement."

Id. at 2372. The Massachusetts Supreme Judicial Court affirmed this decision in King v. Globe Newspaper Co., 400 Mass. 705, 512 N.E.2d 241 (1987) ("A reasonable reader could only have understood the column as [the writer's] own commentary on the plaintiff and his administration").

See also Hannon v. Timberline Publishing Inc., 19 Med. L. Rptr (BNA) 1245 (Colo. D. Ct. 1991). In that case, a newspaper published a column concerning the sale of a hotel to the plaintiff and regarding the plaintiff's likely termination of bar and restaurant leases. The column stated, inter alia, that the buyer of the hotel used the motto "We screw the other guy and pass the savings to you," that the buyer had certain bizarre plans for the hotel (a taco take-out, a halfway house for mental patients, a hang-out for terrorists), and that the buyer had drug-money partners. The court held that this "exaggerated scenario" was protected rhetorical hyperbole, noting that even the supposed name of the buyer -- Ruth Less Securities Company -- is "obviously fictional." The court concluded as follows:

> Some people could find this article funny, harmless and instructive. Others could find it unfair, vicious, lacking in all humor, uninstructive and just plain stupid. It is not for the Court to judge on these matters as that would amount to censorship. The Court can only judge whether the article is protected as free speech. The worth of the article is to be treated in "the market place of ideas," not in the courts.

Id. at 1297.

As in these cases, the column at issue here clearly does not describe an interview with an actual person. The obviously satirical name "Roger Gravelhead" unmistakably signals the reader that what is to follow is a humorous commentary and not a description of actual events. Moreover, Gravelhead's alleged answers to the questions posed confirm that the column could not reasonably be understood as describing actual events or making factual statements. For example, Gravelhead refers to voters as "the great unwashed," describes parents as "happy-go-lucky big kids," and observes that voters could not teach him a lesson because that would amount to "[t]eaching without a license" and because "[t]hey're not in the union." No reasonable reader could understand these comments to represent actual statements made by plaintiff or, for that matter, any other school administrator.

Furthermore, the tone of the column establishes that no reasonable reader could understand it to describe an actual interview. The column opens with references to "millages croaking, school boards being yanked and supervisors queueing up for resume services just as Leningradders do for toilet paper." Gravelhead is, at various times, described as "bark[ing]" and "gasp[ing]." The column ends with a deliberate pun on the word "recall." Significantly, the context of the column also prepares the reader for characterizations and rhetorical hyperbole, rather than strictly factual reporting. The column appeared on the editorial page of The Detroit News with two political cartoons, a number of letters to the editor, and several editorial commentaries. Indeed, the column at issue appears immediately above a parody interview with "Morty the Michigan DJ", written by a different free-lance columnist.

Election campaigns regularly spawn highly charged rhetoric that has given rise both to defamation actions and the defense that no reasonable listener could fail recognize these hyperbolic utterances as statements of opinion rather than assertions of fact, as is discussed in the amicus brief for appellees[6] in Price v. Walters (June 23, 1992, at 13-17) and the respondents' brief on appeal[7] in ServiceMaster v. California School Employees (May 3, 1991, at 10-11), respectively. In Price, the unsuccessful gubernatorial candidate sued the successful candidate for a press release issued during the campaign that stated that the

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[6]Filed by Robert D. Nelon, Gretchen A. Harris, and Laura B. Hood, of Andrews Davis Legg Bixler Milsten & Price, Oklahoma City, Oklahoma.

[7]Filed by Karl Olson and Patricia A. Perkins, of Cooper, White & Cooper, San Francisco, California.

plaintiff had "gouged consumers" while working as a federal lawyer. The case is pending in the Supreme Court of Oklahoma.

Price v. Walters

Given the nature of the press release -- a candidate's statement interpreting the meaning of litigation involving his opponent, made at the height of the campaign -- it should be recognized for what it is: political rhetoric. "[E]ven apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an 'audience may anticipate efforts by the parties to persuade others their positions by the use of epithets, fiery rhetoric or hyperbole.'" Ollman, supra, 750 F.2d at 1000 (quoting Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980)).

The Supreme Court has historically "recognized constitutional limits on the type of speech which may be the subject of state defamation actions." Milkovich, supra, 497 U.S. at ---, S.Ct. at 2704, citing Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970); Letter Carriers v. Austin, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); and Hustler Magazine Inc. v. Falwell, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). The Court in Milkovich nevertheless found the statement at issue there to be "sufficiently factual to be susceptible of being proven true or false," Milkovich, supra, 497 U.S. at ---, 110 S.Ct. at 2707, because it was "not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury." Id.*

The appellant argues that this case is analogous to Milkovich (Brief of Appellant, p. 19). It is not. Michael Milkovich was not a candidate for public office. Although the publication at issue involved a matter of public concern, so that the New York Times-Gertz structure† of libel

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*Although Milkovich appears to retreat from the recognition of opinion as not being actionable, it did not really change the substantive law of defamation. "[W]hile eschewing the fact/opinion terminology, Milkovich did not depart from the multi-factored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and non-actionable opinion." Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 727 (1st Cir. 1992). Accord "The Supreme Court -- Leading Cases," 104 Harv.L.Rev. 129, 223 (1990) ("[T]he Court simply reformulated the opinion privilege while refusing to recognize a per se exemption from liability. The standard articulated by the Milkovich Court for determining when a statement is an actionable assertion of fact is essentially the same as that the lower courts have used for years to distinguish between fact and opinion.")

†See, New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (actual malice must be proven by public official to recover for libel); and Gertz v. Robert

law applied, the speaker and the subject of the speech were not involved, as are the two gubernatorial candidates in this case, in the rough and tumble of a political campaign. Judge Bork spoke to that kind of distinction in Ollman, supra:

> [O]ne of the most important considerations is whether the person alleging defamation has in some real sense placed himself in an arena where he should expect to be jostled and bumped in a way that a private person need not expect. Where politics and ideas about politics contend, there is a first amendment arena. The individual who deliberately enters that arena must expect that the debate will sometimes be rough and personal.

750 F.2d at 1002. Milkovich was directly accused by the writer in the Lorain Journal of having perjured himself in a trial court by giving testimony different than that previously given in an athletic board hearing. The broader social context of the dispute in Milkovich did not give rise to the same expectations of interpretative or hyperbolic speech one would have in the midst of a political campaign. "[T]he existence of a political controversy is part of the total context that gives meaning to statements . . . When we read charges and countercharges about a person in the midst of such controversy we read them as hyperbolic, as part of the combat, and not as factual allegations whose truth we may assume." Ollman, supra, 750 F.2d at 1002.

To view the press release, in context, as non-actionable campaign rhetoric does no severe injustice either to the political process or the appellant. Our political ethic understands, if it does not always approve, that political campaigns are vigorous and robust, sometimes even unfair and cruel.[‡] Historically, however, we have trusted that the public will, through the process itself, sort out the accurate speech from that which is not. "In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of 'more speech, not enforced silence,' Whitney v. California, 274 U.S. 357, 377, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring), thus has special force." Brown, supra, 456 U.S. at 61.

For the candidate himself or herself, sharp criticism -- even that which, to the candidate, seems manifestly unjust -- must be accepted. "Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments. Perhaps it would be better if disputation were conducted in measured phases and calibrated assessments, and with strict avoidance of the ad hominem . . . But that is not the world in which we live, ever have lived, or are ever likely to

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Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (some fault, at least negligence, must be proved by private figure to recover for libel).

[‡]See, generally, K. Johnson-Cartee and G. Copeland, Negative Political Advertising: Coming of Age (Lawrence Erlbaum Assoc. 1991). The writers note, at page 30, "Although modern political commentators spend a great deal of time lamenting the rise of negative ads, negative campaigning is as old as the American republic."

know, and the law of the first amendment must not try to make public dispute safe and comfortable for all the participants. That would only stifle the debate." Ollman, supra, 750 F.2d at 993. Or, as the Supreme Court put it in Monitor Patriot Co., supra, 401 U.S. at 274:

> The principal activity of a candidate in our political system, his "office," so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him . . And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry "Foul!" when an opponent or an industrious reporter attempts to demonstrate the contrary.

The amicus respectfully submits that in the present case, the press release is contextually the kind of interpretive, rhetorical, even hyperbolic expression that is not actionable under the First Amendment.

In ServiceMaster, the plaintiff was a corporation that had entered into contracts with several California school districts. The defendants vigorously lobbied against the plaintiff and were sued for publishing such statements as "ServiceMaster is a Disaster." The trial court sustained the defendant's demurrer without leave to amend and the plaintiff appealed to the First Appellate District of the California Court of Appeal.

California School Employees Association v. ServiceMaster Co.

It is also settled, as this court recently held, that to state a claim for defamation, a plaintiff must plead and prove that a "provably false factual assertion" was made about him. Moyer v. Amador Valley Joint Union High School District (1990) 225 Cal. App. 3d 720, 724. "[S]*tatements that cannot be 'reasonably interpreted as stating actual facts' are still entitled to* constitutional protection.'" Ibid., citing Milkovich v. Lorain Journal Co. (1990) 497 U.S. ---, 110 S. Ct. 2695, 111 L.Ed.2d 1, 19. "In determining that issue, we consider the nature and meaning of the language used, including the verifiability of the statements, and the context in which the statements appeared." Moyer, supra, 225 Cal. App. 3d at 725.

Statements made in the context of a labor-management dispute, it has long been settled, are generally not factual. Gregory v. McDonnell Douglas Corp. (1976) 17 Cal. 3d 596, 601. *As Justice Richardson observed for the Supreme Court in* Gregory, *one expects a fair amount* of "fiery rhetoric or hyperbole" (id. at 601) in the often heated give-and-take of labor-management disputes. See also Morales v. Coastside Scavenger Co., 167 Cal. App. 3d 731, 734-735 (1985).*

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*The Milkovich case does nothing to change the law in this context. The Court in Milkovich notes, "We have also recognized constitutional limits on the type of speech which may be the subject of state defamation actions." 497 U.S. at ---, 111 L.Ed.2d at 16, 58 U.S.L.W. at 4850

Plaintiffs incorrectly assert, relying on Milkovich, that whether a statement is a provably false factual statement, rather than a non-actionable opinion, is invariably a question of fact for the jury. AOB at 31, 35. Milkovich, however, leaves unchanged the prior California law that this question is one for the court, and the only California case to have considered this issue since Milkovich (a First District case) states clearly that it remains a question of law. "[I]n this challenge to the sustaining of the demurrers, the question is one of law: whether the statements contain provably false factual assertions and thus fall outside the protection of the First Amendment." Moyer supra, 225 Cal. App. 3d at 725 fn. 2. As our Supreme Court has explained:

> "The critical determination of whether the allegedly defamatory statement constitutes fact or opinion is a question of law. [Citations.] The distinction frequently is a difficult one, and what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. Thus, where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." Gregory v. McDonnell Douglas Corp., supra, 17 Cal. 3d 596, 601 (emphasis added).

D. Establishing the Continued Relevance of the Context or "Tenor" of the Publication

Just as the language itself may alert listeners to the fact that an opinion rather than a fact is being advanced, so too may the context in which the statement is made, as is discussed in the defendant's motion for summary judgment in Moldea v. The New York Times, at 14-18. In Moldea, an author whose book was characterized as "sloppy journalism" sued the author and publisher of the review.

Moldea v. The New York Times

The use of the phrase "too much sloppy journalism" in a book review, moreover, is also important, for, as Supreme Court reaffirmed last term, the context, or the "tenor of the overall article," is crucial to a determination of whether or not the words or phrases may be said to be sufficiently "factual" to be libelous. See Milkovich, 110 S. Ct. at 2704-05 citing Greenbelt

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(emphasis in original). The Court cites approvingly Nat'l Ass'n. of Letter Carriers v. Austin, 418 U.S. 264, 284-86, 41 L.Ed.2d 745, 762-63 (1974), in which use of the word "traitor" in the literary definition of a "scab" was held protected under the First Amendment and federal labor law, since it was used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members." Ibid.

Cooperative Publishing Association, Inc. v. Bresler, 398 U.S. 6, 13 (1970); Letter Carriers v. Austin, 418 U.S. 264, 284-86 (1974).* As this Circuit noted in an opinion that has been widely followed by courts throughout this country: "[t]he reasonable reader . . . perus[ing] [a] column on the editorial or Op-Ed page is fully aware that the statements found there are not 'hard' news like those printed on the front page or elsewhere in the news sections of the newspaper[;]" for articles labeled as reviews "by custom or convention signal to readers . . . that what is being read . . . is likely to be opinion, not fact." Ollman, 750 F.2d at 983, 986.† See Mr. Chow of New York v. Ste. Jour Azur, S.A., 759 F.2d 219, 227 (2d Cir. 1985) ("The natural function of [a] review is to the convey the critic's opinion . . ."); Greer v. Columbus Monthly Publishing Company, 4 Ohio App.3d 235, 238, 448 N.E. 2d 157, 161 (1982) ("By its very nature, an article commenting upon the quality of a restaurant or its food, like a review of a play or movie, constitutes the opinion of the reviewer.")

Besides their placement, "opinion" columns are generally easily distinguishable from "hard news" columns as a result of the colorful language that usually peppers their text. This more theatrical prose enjoys protection for the simple reason that such protection "provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." Milkovich, 110 S. Ct. at 2706.‡ Indeed, "[t]o deny to the press the right to use hyperbole . . . would condemn

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*The case now before this Court is remarkably similar to a case whose vitality was reaffirmed by the Milkovich Court last term. In Letter Carriers, the United States Supreme Court held that, in the context of a labor dispute, the word "scab" was not defamatory because it was used in a "loose, figurative sense." 418 U.S. at 284-86 cited in Milkovich, 110 S. Ct. at 2705. "Scab" may in some ways be viewed as the union equivalent of "sloppy journalism," but of course here additional subjectivity was added to the opinion by the modifier "too much."

†In Ollman, the D.C. Circuit synthesized many years of confusing case law to develop a helpful test for courts to use in determining whether a statement is actionable. Unsurprisingly, other federal and state courts quickly adopted the decision's reasoning. See, e.g., Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1300 (8th Cir. 1986). Tests such as that in Ollman should be looked to for guidance in assessing whether a statement asserts an objective fact. Milkovich, 110 S. Ct. at 2709 (Brennan, J., dissenting).

‡During the same week that the Times published the Book Review at issue here, the non-verifiable word "sloppy" found its way into a variety of articles on a host of subjects, including: a movie review by the film critic for the Chicago Tribune ("Shot in casual, often sloppy long takes, 'Border Radio' satirizes as it rhapsodizes, envying the hip detachment of its heroes while underlining their pretensions . . .."); a review of a West Coast "heavy metal" group ("Seattle breeds loud, sloppy metal where Los Angeles breeds teen-age glamrockers in lipstick."); predictions about the stock market ("'I'm looking for a sloppy September here,' said technical analyst Jim McCarthy of PaineWebber Group"); and a review of a football game by the coach of the University of Minnesota Gophers ("'In the second half we started switching people around and things got a little sloppy.'") See Kehr, "Seven oddballs," Chicago Tribune,

the press to an arid, desiccated recital of bare facts[,]" Time, Inc. v. Johnston, 448 F.2d 378, 384 (4th Cir. 1971).[§]

To writers, "[t]he trade of critic," as Mark Twain opined, may be "the most degraded of all trades," but criticism itself tends to produce lively and memorable writing.[**] Indeed, from Dorothy Parker's cutting comment about Katharine Hepburn's acting ability ("She runs the gamut of emotions from A to B") to Walter Kerr's summation of what he found to be a particularly odious rendition of King Lear ("He played the King as though he were waiting for someone else to play the Ace") to the dyspeptic Louisiana restaurant reviewer who hated the food (and called his main course "yellow death on duck"), critics generally employ language rich with rhetorical flourish: the language of opinion.[††] The phrase "too much sloppy journalism" falls squarely within this category, and Moldea's Complaint must be dismissed.

[Ed.: A similar argument is advanced in the brief for Johnson v. Maine Times (at 44-46):

> In addition to requiring a court to consider whether challenged speech contained "loose, figurative, or hyperbolic language which would negate the impression" that a statement of fact was being asserted, 110 S.Ct. at 2707, the Milkovich court also indicated that the context in which language appears must be evaluated by the courts to determine whether "the general tenor of the article negate[s] this impression.' Id. See e.g., McCabe v. Rattiner, 814 F.2d 839, 842 (1st Cir. 1987) (adopting totality of the circumstances analysis); Ollman v. Evans, 750 F.2d 970, 974-75 (D.C. Cir. 1984) (same test).]

Sept. 7, 1989, at TempoArts Section, p. 7; Gold, "Sloppy, Sincere and Loud," L.A. Times, Sept. 4, 1989, at §6, p.3, col. 1; Satran, "Wall Street Has September Blues After Wild Summer," Reuters, Sept. 8, 1989; "Gophers score five TDs in scrimmage," United Press International, Sept. 8, 1989.

[§]Colorful commentary also has found its way into judicial opinion. In a stinging dissent to the Ohio Supreme Court's decision not to ban Henry Miller's Tropic of Cancer, Justice Musmanno described Miller's classic novel as "a cesspool, an open sewer, a pit of putrefaction, a slimy gathering of all that is rotten in the debris of human depravity" and speculated as to how the book could "remain stationary on the bookshelf [since one] would expect it to generate self-locomotion just as one sees a moldy, maggoty rock move because of the creepy, crawling creatures underneath it." Commonwealth v. Robin, 218 A.2d 546, 556-57 (Pa. 1966) (Musmanno, J., dissenting).

[**]M. Twain, Autobiography 69 (1924).

[††]An author's displeasure with a review of his work is not always a function of the expansiveness of the reviewer's vocabulary or his rhetorical flourishes, however. It is doubtful, for example, that Gustave Flaubert took pride in Le Figaro's 1856 review of his masterful Madame Bovary, which began: "M. Flaubert is not a writer."

Although it is evident that Milkovich requires an analysis of context; whether the inquiry into the "tenor of the article" may be equated with evaluative tools such as the four-part Ollman test remains unsettled, as is discussed in the following section.

III. ARTICULATING OTHER THEORIES, CONSISTENT WITH *MILKOVICH*, FOR PRESERVING OR EXPANDING PROTECTION FOR OPINION

A. Arguing for the Continued Application of Evaluative Tools Such as the Four-Part Test of Ollman v. Evans

Although a plaintiff's reliance on Milkovich will be unavailing when the alleged defamatory statement is insusceptible of being proven false or cannot reasonably be understood to state facts, a less sanguine view of the effect of Milkovich emerges when the statement is reasonably susceptible of verification and the language, even if full of moral outrage, is overtly neither hyperbolic, epithetic, nor parodic, as was learned by Diadiun, the author of the allegedly defamatory column in Milkovich.

Defendants must anticipate the argument that by eliminating a wholesale exemption for anything that might be characterized as opinion, Milkovich uprooted the four-part test for distinguished fact from opinion that was first proposed by the D.C. Circuit in Ollman v. Evans and was thereafter adopted by numerous other federal circuits and state courts. That decisions can turn on the court's approach to context may be seen by comparing the majority opinion with Justice Brennan's dissent in Milkovich. As was noted recently by the New York Court of Appeals in Immuno A.G. v. Moor-Jankowski (Immuno II):

> Isolating challenged speech and first extracting its express and implied factual statements, without knowing the full context in which they were uttered, indeed may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context.

566 N.Y.S.2d at 45, 77 N.Y.2d at 255.

Defendants have several options available to support the careful inquiry into context articulated by Ollman. The most straightforward approach flows from Justice Brennan's dissent in Milkovich, and that is to demonstrate that the Milkovich examination of the reasonableness of the belief that facts are being asserted is essentially the same as the Ollman test for distinguishing fact from opinion. Alternatively, defendants may argue that Ollman has been (or should be) independently incorporated into state law.

1. The Significance of Justice Brennan's Opinion in *Milkovich*

The defendant's motion for summary judgment in Moldea (at 11-12) relies upon

Justice Brennan's analysis of the Court's holding in Milkovich.

Moldea v. The New York Times

As Justice Brennan wrote in that section of his dissent dedicated to an explication of those portions of the majority's opinion with which he was in "essential agreement":

> In other words, while the Court today dispels any misimpression that there is a so-called opinion privilege wholly in addition to the protections we have already found to be guaranteed by the First Amendment, it determines that a protection for statements of pure opinion is dicatated by existing First Amendment doctrine.
>
> * * *
>
> Among the circumstances to be scrutinized by a court in ascertaining whether a statement purports to state or imply "actual facts about an individual," as shown by the Court's analysis of the statements at issue here, see ante, at 2707 and n.9, are the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion.

Milkovich, 110 S.Ct. at 2708-09 (Brennan, J., dissenting) (citing Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.), cert. denied, 479 U.S. 883 (1986); Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985).* Milkovich, then plowed little -- if any -- new ground in the libel landscape: The Court simply refused to engraft a new branch to the existing constitutional protections for opinion. The Court reasserted that: "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." Milkovich, 110 S.Ct. at 2695. Indeed, the sole impact of Milkovich on the litigation of "opinion" cases is that it has changed the predicate question from whether or not the words are opinion to whether or not the words are sufficiently factual to be susceptible of being proved true or false. Milkovich, 110 S.Ct. at 2704.

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*Justice Brennan's dissent arose not from the Court's sweeping reaffirmation of the constitutionalized law of libel -- which he found to be "cogent[]" and "almost entirely correct[]" -- but, rather, from its decision regarding "the statements at issue in this case." Milkovich, 110 S.Ct. at 2708 (Brennan, J., dissenting). (Emphasis added). The dissent parted company with the majority "at the point where it applie[d] these general rules to the statements at issue in this case because I find that the challenged statements cannot reasonably be interpreted as either stating or implying defamatory facts." Id. at 2709. The dissent, therefore, is an extremely narrow one and confined to the facts of Milkovich rather than its jurisprudence.

The brief for defendants-appellees[8] in Phantom Touring v. Affiliated Publications (August 29, 1991, at 45-46) also argued that Ollman was unaffected by Milkovich. In Phantom Touring, the plaintiff was the producer of a musical version of Phantom of the Opera, which had been written some years prior to the very successful Andrew Lloyd Webber production. The suit was based on the defendant's suggestion, in a theater review, that the plaintiff was trading on confusion between the two productions.

Phantom Touring Company v. Affiliated Publications

With respect to the analysis used to determine whether a given assertion represents opinion or fact, Milkovich represents no change from the status quo:

> [Existing precedent] 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.

110 S.Ct. at 2706. See also id. at 2709. (Brennan, J., dissenting.) See generally The Supreme Court -- Leading Cases, 104 Harvard L. Rev. 219, 223 (1990) (noting that Milkovich does not set a new standard for fact-opinion analysis); B. Sanford, Libel and Privacy, § 5.3 (1991) (same).

Post-Milkovich courts accordingly have continued to rely on the previous analytical framework. See, e.g., Hunt v. University of Minnesota, 465 N.W.2d 88 (Minn. App. 1991) (continuing to apply a four-factor test to distinguish fact from opinion, noting that it is "very similar" to the test used in Milkovich); Moyer v. Amador Valley, 225 Cal. App. 3d 720, 275 Cal. Rptr. 494 (1990) (continuing to apply the state's totality-of-circumstances test to the fact-opinion issue); Rosner v. Field Enterprises, Inc., 205 Ill. App. 3d 769, 564 N.E.2d 131 (1990) (continuing to apply an entrenched multifactor fact-opinion analysis, and denying Defendants' Petition for Rehearing after Milkovich).

A similar approach is to argue, as does the Miyata brief, at 18-20, that Milkovich accords with the state law approach to context.

There is no doubt that under California law the statements at issue here are non-actionable opinion. Remarkably, the "new" test articulated in Milkovich for determining whether a statement is sufficiently factual to be capable of being proved true or false employs essentially the same analysis long used by California courts to distinguish fact from opinion. Compare Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 260-61 (1986) (applying "totality of circumstances" test to distinguish fact from opinion), cert. denied, 479 U.S. 1032,

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[8]**Filed by E. Susan Garsh, Jonathan M. Albano, and Lisa A. Eichorn, of Bingham, Dana & Gould, Boston, Massachusetts.**

reh'g denied, 480 U.S. 912 (1987), with Moyer, 225 Cal. App. 3d at 724-25 (employing "totality of circumstances" approach to test statement's susceptibility of being proved true or false). The relevant factors under the "totality of circumstances" approach include: (1) whether the language is cautiously phrased in terms of appearance; (2) the context in which the statements were made; and (3) the character and content of the statements. See Gregory, 17 Cal. 3d at 601-03; Baker, 42 Cal. 3d at 260-61.

At its core, the "totality of circumstances" test used by California courts for distinguishing between fact and opinion is indistinguishable from the Milkovich test used to determine whether allegedly defamatory statements are susceptible of being proved true or false. Each is directed toward protecting statements -- whether they be called opinions or otherwise -- that cannot be proved true or false. Compare, e.g., Hoffman Co. v. E.I. DuPont de Nemours & Co., 202 Cal. App. 3d 390, 397 (1988) ("an opinion -- 'a view, judgment, or appraisal formed in the mind . . .' -- is the result of a mental process and not capable of proof in terms of truth or falsity" (emphasis added)) with Moyer, 225 Cal. App. 3d at 725 (statement imparting subjective judgment of speaker is not factual assertion capable of being proved true or false).

There is absolutely no liability under California law for opinions "based on disclosed or assumed non-defamatory facts . . . no mater how unjustified and unreasonable the opinion may be or how derogatory it is." Lewis, 710 F.2d at 555 (quoting the Restatement (Second) of Torts § 566 and comment c) (applying California law). See also Dong v. Board of Trustees of Leland Stanford University, 191 Cal. App. 3d 1572, 1584 (1987) (statements are non-actionable opinion when the facts supporting the opinion are disclosed), cert. denied, 484 U.S. 1019 (1988). Here, the opinion that it took "a little too long" for appellant to call police is based on the disclosed, undisputed fact that 21 minutes elapsed from the discovery of the body until the call was made. Accordingly, wholly apart from the federal constitutional protection afforded the article, California law provides an independent liability shield.

[Ed.: This argument prevailed in Phantom Touring, see 953 F.2d 724, 727 (1st Cir. 1992) (Milkovich "did not depart from the multifactored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and nonactionable opinion") but was not as well received by the D.C. and Ninth Circuits. See White v. Fraternal Order of Police, 909 F.2d 512, 522 (D.C. Cir. 1990) (Milkovich "rejected the practice, developed by lower courts, of applying a strict dichotomoy between assertions of fact and assertions of opinion in determining the scope of First Amendment protection"); Unelko v. Andy Rooney, 912 F.2d 1049, 1053 (9th Cir. 1990) ("cases on which the district court relied [to distinguish fact from opinion] have all been effectively overruled by ... Milkovich"), cert. denied, 111 S.Ct. 1586 (1991).]

2. The Significance of Prior State Acceptance of the *Ollman* Test

Defendants can also argue that state law has incorporated Ollman, either expressly or implicitly. In states with case law employing Ollman that have yet to examine context

in post-Milkovich cases, defendants can argue that Ollman has been implicitly embraced. This is the approach taken by the amicus brief[10] in Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 566 N.Y.S.2d 906 (1991) Immuno II (at 34-35). In Immuno, the publisher, editor in chief, and author of a letter to the editor were sued by a multinational drug company for questioning the propriety and suggesting possible dangers of the drug company's proposed research activities in West Africa utilizing chimpanzees. The New York Court of Appeals had affirmed a grant of summary judgment in favor of the defendant based in large part on the constitutional opinion privilege. The plaintiff's petition for certiorari was pending in the Supreme Court when Milkovich was decided. The Supreme Court vacated and remanded Immuno for consideration in light of Milkovich.

Immuno v. Moor-Jankowski

This Court has never had occasion to give extended consideration to the area of libel, under Article 1, Section 8, and has never specifically addressed the history and intent of the framers in that regard. However, the Court has already held the State Constitution to be a source of protection in libel actions coordinate to the First Amendment. Indeed, the Court's opinion in this very case held that "pure opinion" in libel actions "is entitled to the absolute protection of the State and Federal constitutional free speech guarantees," and also referred to "core values protected by the State and Federal Constitutions." Immuno AG v. Moor-Jankowski, supra, 74 N.Y.2d at 555, 560, 549 N.Y.S.2d at 941, 944 (emphasis added).*

In its decision on remand, the New York Court of Appeals accepted these arguments and explicitly stated its preference for the Ollman approach, which it had previously adopted in Steinhilber v. Alphonse, to the narrower, more grudging approach of Milkovich:

> Given the purpose of court review -- to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff -- we believe that an analysis that begins by looking at the content of the whole communication, its tone and apparent purpose (Steinhilber v. Alphonse,

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[10]Filed by Henry R. Kaufman, New York, New York.

*In recognizing coordinate state constitutional protection for opinion this Court cited Steinhilber v. Alphonse, supra, 68 N.Y.2d at 289, 508 N.Y.S.2d at 903. In turn, Steinhilber cited, at n.2, Rinaldi v. Holt Rinehart & Winston, supra, 42 N.Y.2d at 380, 397 N.Y.S.2d at 950. Neither Steinhilber nor Rinaldi expressly cited Article 1, Section 8. The reliance on these cases thus suggests this Court's view that the principle of constitutional protection for opinion has been so fully and consistently followed, over an extended period of time, that State law has implicitly embraced these principles so as effectively to make them a part of our law for these purposes.

68 N.Y.2d at 293, supra) better balances the values at stake than an analysis that first examines the challenged statement for express and implied factual assertions, and finds them actionable unless couched in loose figurative or hyperbolic language in charged circumstances.

Immuno II, 566 N.Y.S.2d at 43-44, 77 N.Y.2d at 254.

In those states that have explicitly adopted Ollman in post-Milkovich decisions, defendants' arguments for careful consideration of context rest securely on state law, as shown in the reply memorandum in further support of the motion for summary judgment[11] in the New York State case of Hall et al. v. English et al. (July 31, 1991, at 6-8). In Hall, the defendant was sued after issuing a refutation of plaintiff's written accusations during a dispute over legal fees and whether plaintiffs would continue to serve on defendant's board of directors. The court, in an unpublished decision, granted summary judgment on all the defamation claims.

Hall v. English

While the Supreme Court in Milkovich v. Lorain Journal Co., 110 S.Ct. 3266, 111 L.Ed.2d 776 (1990), seems to have defined the zone of protected opinion more narrowly under the First Amendment of the United States Constitution, the Court of Appeals of the State of New York has since then boldly enunciated a much broader zone of state constitutionally protected opinion. In doing so, the New York Court of Appeals adopted the four factor Ollman/Steinhilber test as its touchstone.

Under Ollman (at 979), Steinhilber (at 905), and Immuno (at 917), the four factors which should be considered in differentiating between fact and protected opinion are as follows:

1. "An assessment of whether the specific language in issue has precise meaning which is readily understood or whether it is indefinite and ambiguous";

2. "A determination of whether the statement is capable of being objectively characterized as true or false";

3. "An examination of the full context of the communication in which the statement appears"; and

4. "A consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might 'signal to readers or listeners that what is being read or heard is

[11]**Filed by David S. Korzenik of Miller & Korzenik, New York, New York.**

likely to be opinion, not fact."

Steinhilber, at 905.

In states that have yet to consider context, defendants can urge that the state court adopt the analysis of sister jurisdictions. Such an approach is taken in the brief of defendant-appellant[12] in Kolegas v. Heftel Broadcasting Corp. (March 1992, at 17-19). In Kolegas, the plaintiff was accused of "scamming" two radio personalities, who ran a call-in radio show, after he told them that both his wife and son suffered from neurofibratomosis.

[Ed.: The Illinois Supreme Court rejected this argument, however; see Kolegas v. Heftel Broadcasting Corp., 154 Ill.2d 1, 607 N.E.2d 201 (1992).]

Kolegas v. Heftel Broadcasting Corp.

The inherently ambiguous nature of the word "scamming" and the full and broader context in which the statements were made reveal them to be without factual import. See Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127, 105 S.Ct. 2662 (1985). In Ollman, the court analyzed the alleged language to determine whether it had "a precise core of meaning" or was "indefinite and ambiguous." 750 F.2d 970, 979. If the latter, the language is less likely to be considered a factual assertion. Id. The slang term "scamming" more reasonably can be construed as meaning "kidding" rather than defrauding. The context in which the statement was allegedly made supports the reasonableness of such a construction. At the very worst, then, the statement lacks, as the trial court correctly found, "a precise core of meaning." (C. 120). The Supreme Court in Milkovich reiterated that "loose, figurative or hyperbolic language" may negate the impression that the speaker is serious. 497 U.S. at ---, 110 S.Ct. at 2707. See also Immuno AG v. Moor-Jankowski, 567 N.E.2d 1270, 1275.

The entire context must be considered in determining whether the listener will infer that the remarks had factual content. Ollman, 750 F.2d 970, 979. The Milkovich opinion makes clear that the context "continues as a factor of undiminished significance" and is "an obvious and ordinarily indispensable consideration. . ." Immuno, 567 N.E.2d 1270, 1290 (J. Hancock, concurring). Further, as mentioned supra, the United States Supreme Court in Milkovich evaluated the facts to determine whether the "general tenor" of an article could "negate [the] impression" that the writer was serious. 497 U.S. at ---, 110 S.Ct. at 2707. The New York Court of Appeals recently cautioned against "hypertechnical parsing of a possible 'fact' from its plain context of 'opinion'[,]" [thereby losing] "sight of the objective of the entire exercise, which

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[12]**Filed by Francis D. Morrissey, Thomas F. Tobin, Michael A. Pollard, and John M. McGarry, of Baker & McKenzie, Chicago, Illinois.**

is to assure that - with due regard for the protection of individual reputation -- the cherished constitutional guarantee of free speech is preserved." Immuno, 567 N.E.2d 1270, 1282. For example, in Myers v. Boston Magazine Co. Inc., 403 N.E.2d 376 (Mass. 1980), a magazine article stated that a television sports reporter was "the only newscaster in town who is enrolled a course for remedial speaking." 403 N.E.2d 376, 377. Although the statement itself appears factual in nature, the court emphasized its "lampooning" context and deemed it non-actionable opinion. Id. at 379, 381.

The brief in opposition to the petition for appeal[13] in Cordelia v. Colson (November 20, 1990, at 13-16), offers the New York federal case of Don King as a persuasive authority for the proposition that under Milkovich the context of speech is as important as its verifiability. In Cordelia, the plaintiff was dismissed from his position with the Prison Fellowship, a religious group organized by one of the defendants, following unsubstantiated reports of his involvement with illegal drugs; at a public meeting the defendants stated that although they had been unable to confirm the rumors they feared he has lost his effectiveness. The plaintiff appealed from the court's grant of defendant's demurrer.

Cordelia v. Colson

An examination of cases construing the Milkovich decision confirms that the trial court correctly followed Milkovich in dismissing Cordelia's case. In a leading case, Don King Productions, Inc. v. Douglas, 742 F. Supp. 778 (S.D.N.Y. 1990),* James "Buster" Douglas, then-World Heavyweight Champion, countersued Don King for slander based on comments made by King during and after the Douglas-Tyson bout for the championship. Id. at 781. King was quoted as saying, in effect, that what the referee had ruled was a knockdown of Douglas by Tyson in the eighth round was actually a knockout, and that, consequently, Tyson was the rightful winner of the fight. Id.† In weighing King's claim that his statements were a constitutionally protected expression of opinion, the district court analyzed whether the statements were "expressed in a manner that implies a factual connotation that is provably true or false and . . . if so, whether they reasonably can be interpreted as intended to convey actual

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[13]Filed by Michael Horwatt, Barry Wm. Levine, and Frances A. Scibelli, of Dickstein, Shapiro & Morin, Vienna, Virginia.

*Compare Don King with Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990). (To say of a product, even in a humorous context, "it didn't work" is to imply a verifiable assertion of fact.)

†Don King was quoted as saying the following: Here's a fact. Mike Tyson knocked out James Buster Douglas . . . And the count went to thirteen. So now . . . And the referee I ran to immediately upon saying this. I issued a protest to Mr. Mendoza and Mr. Jose Sulaiman . . . . There is a grave misjustice here. There's an injustice here if the decision holds that Mike Tyson is knocked out.

facts about a person."[‡] Id. at 782.

Looking first to King's statement in the eighth round, after Douglas' knockdown, that the fight should be stopped, the court said, "These are not factual propositions about Douglas but rather, expressions of King's desires. Such exhortations to others to act in furtherance of a certain sought result ascribe no factual characteristics to Douglas and are therefore not actionable." Id. at 783.

In analyzing the second set of allegedly slanderous statements ascribed to King, which included the assertion that "the first knockout obliterated the second knockout," id., and that "Mike Tyson knocked out James Buster Douglas," id., the court stated that such statements "do appear literally to be factual statements capable of verification, and, indeed, to be verifiably false to the extent the words are presumed to be descriptive statements of the rulings of the referee or of other ringside officials, made at the time of the bout." Id. (emphasis in original). Nevertheless, continued the court,

> [S]uch a reading . . . divorces the remarks from the context in which they were uttered, and, in the process, badly distorts their semantic content. . . . [T]he reasonable contextual understanding of King's hyperbole . . . is as criticism of and challenge to the correctness and fairness of the official ringside determinations. As such, King's statements "cannot reasonably [be] interpreted as stating actual facts" that Douglas intends to prove are slanderously false.

Id. (quoting Milkovich, 110 S.Ct. at 2706).

In a corollary analysis, which included examining the implied factual underpinning of King's statements -- "that Douglas would not have been capable of resuming the fight in the eighth round had the referee's count not lasted too long," id. at 784 -- the court said that even the implication of King's statements was non-actionable because "it is not an assertion 'sufficiently factual to be susceptible of being proved true or false.'" Id. (quoting Milkovich, 110 S.Ct. at 43 2707). This is so not because Douglas' ability to rise from the canvas is "genuinely unknowable," but because "the question is hypothetical, inherently calling for speculation about what might have happened. . . . Given the transparently hypothetical nature of the question, persons receiving the benefit of King's implied wisdom on the subject could not reasonably regard it as anything more definite than that." Id. at 785. Accordingly, the court held that none of King's statements were both "unprotected by the First Amendment and yet actionable as slanderous." Id.

[‡]The court also analyzed whether the statements at issue addressed matters of public concern; although such an analysis comprises a portion of the standard for opinion under Milkovich, it alone is not determinative of whether a statement will be protected. Milkovich, 110 S.Ct. at 2706.

Don King provides as instructive comparison with the instant case. In the former case, the District Court for the Southern District of New York stressed the context of the speech as fully as it did the verifiability of the statements at issue. Even where King's allegedly slanderous statements could have been considered factually verifiable, their evaluative and speculative nature weighed determinatively in favor of according them protected status. Prison Fellowship maintains that the sermonic character of the purportedly defamatory speech gave it a flavor consistent with rhetorical hyperbole; Mr. Colson's portion of the speech in particular was loosely-used religious language not susceptible of being proved true or false. The combination of religious context and the impossibility of verifying subjective managerial judgments concerning Eddie Cordelia's efficacy within Prison Fellowship firmly supported a finding by the trial court, interpreting Milkovich, that Tom Pratt's and Mr. Colson's speech falls within the arena of constitutionally protected opinion. That ruling should be affirmed by this Court.

B. Arguing for the Protection of Opinion as a Matter of State Constitutional or Common Law

1. Articulating the Long-Standing Tradition of State Competence - Indeed Eminence - in the Libel Field

For the purposes of arguments favoring expansive protection for opinion as a matter of state common or constitutional law, Milkovich is best characterized not as a decision affirmatively governing or controlling the contours of state law with regard to privileges relating to opinion, but solely and simply as a decision that the First Amendment does not require a separate federal opinion privilege over and above the many other established First Amendment standards that already stringently limit aspects of defamation claims applicable to statements that could for other purposes be labeled opinion. Indeed, it is clear that a significant impetus leading the Supreme Court to back away from a full-blown federal opinion privilege was a reluctance among particularly a number of conservative Justices to federalize additional aspects of what had been traditionally considered a matter controlled by state common law. While the Supreme Court clearly recognized this, it is essential to remind state judges -- particularly after a period of two or three decades of Supreme Court leadership in reforming and defining many areas of defamation law -- that when the Supreme Court declines to adopt broader federal standards this should not be misinterpreted as determinative of the same issue for purposes of state law.

The amicus brief submitted to the New York Court of Appeals in Immuno II (at 29-33) on behalf of the World Wildlife Fund and a group of four other environmental and nine media organizations[14] attempted to articulate the subordinate posture of federal standards for such purposes by reference to the long-standing pre-Sullivan tradition of non-application of First Amendment principles to libellous utterances.

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[14]**Filed by Henry R. Kaufman, New York, New York.**

Despite its inconclusiveness regarding libel, the Supreme Court ultimately came to recognize, in New York Times v. Sullivan, supra, that even the First Amendment's generalized mandate for free expression could not be squared with the excessive enforcement of libel claims. In the more than 25 years since Sullivan, Federal constitutional principles bearing on libel issues, including protection for opinion, came to dominate the field.*

But history recalls that until 1964, and for 173 years, the First Amendment was held to have no role in limiting libel claims. The Federal Sedition Act of 1798, although bitterly attacked politically, expired in 1801 and was never successfully challenged. The Sedition Act was not expressly held to have represented a violation of the First Amendment, until Sullivan. State common law jurisdiction over libel was confirmed in 1812, when the Supreme Court invalidated a federal libel prosection, not under the First Amendment, but based on the absence of federal jurisdiction over common law crimes. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

As late as 1907, in Patterson v. Colorado, 205 U.S. 454, the Supreme Court, in an opinion by Justice Holmes, was still adhering to the "Blackstonian" notion that the First Amendment was no more than a bar against "prior restraints." The Court in Patterson rejected a claim that the First Amendment required truth to be permitted as a defense to a conviction for contempt of court. It was not until Gitlow v. New York, 268 U.S. 652, 666 (1925), that the Supreme Court assumed in dictum that the First Amendment would apply to the states through the 14th Amendment. And it was not until two years later, in Fiske v. Kansas, 274 U.S. 380 (1927), that the Supreme Court actually applied the First Amendment, through the 14th Amendment, to overturn an action by a state abridging free expression.

As to libel, even after Gitlow and Fiske the Supreme Court continued to hold that allegedly libelous publications were no part of the expression protected by the First Amendment as made applicable to the states by the 14th Amendment. See, e.g., Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include ... the libelous ... It has been well observed that such utterances are no essential part of any exposition of ideas ...").

Finally, in light of the recent hegemony of First Amendment versus State constitutional law in this field, it is generally forgotten that only a dozen years before Sullivan, in Beauharnais v. Illinois, 343 U.S. 250 (1952), the Supreme Court upheld, as against First Amendment

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*In only one major case since Sullivan, other than Milkovich, did the Supreme Court draw back from application of Federal principles, leaving an area of development to the States with regard to fault standards applicable to claims by private plaintiffs. Gertz v. Robert Welch, Inc., supra. It is noteworthy that, after Gertz, this Court adopted a standard more protective of liberty of expression than that held permissible under the First Amendment. Chapadeau v. Utica Observer-Dispatch, 38 N.Y.2d 196, 379 N.Y.S.2d 61 (1975).

challenge, an Illinois criminal group libel prosecution that had arguably not even accorded protections that would clearly have been required under the Hamiltonian libel clause.

Indeed, it was Justice Jackson, in his dissent in Beauharnais, who sought to prevail upon the Supreme Court in effect to incorporate New York Hamiltonian protections into the First Amendment: Justice Jackson based this reverse approach on the widespread influence of the standards defined by New York Article 1, Section 8 for press freedom in libel cases. As Justice Jackson observed, "It would not be an exaggeration to say that, basically, this provision of the New York State Constitution states the common sense of American criminal libel law." 343 U.S. at 297. In other words, to Justice Jackson the reversal of Croswell, and the adoption and later constitutionalization of the Hamiltonian libel clause -- and not the First Amendment as it had theretofore been interpreted by the Supreme Court -- symbolized the positive movement of American law away from "[o]ppressive application of English libel law." Id. at 296-98.

In sum, it was New York State that, since 1805 by statute and 1821 by constitutional provision, clearly recognized the intimate relation between the excesses of libel claims and the protection of liberty of expression under an approach that set the standard for much of the Nation. In contrast, the U.S. Supreme Court until 1964 had never limited libel claims under the First Amendment; and as late as 1952 a majority of the Court had held that protections expressly provided under Article 1, Section 8 of New York's Constitution went beyond the protections that could be implied under the First Amendment to the Federal Constitution.

2. Seeking to Establish Separate State Constitutional Protection for Opinion

a. The *Immuno* Case in New York

State constitutions offer fertile ground for establishing separate and entirely distinct protection for statements of opinion. In Immuno II, the New York Court of Appeals explained that the New York State constitution afforded more protection to speech than does the federal constitution and went on to hold that this added protection justifies separate and stronger protection for opinion than that arguably provided under Milkovich. Among the arguments advanced in support of this approach are found in the amicus brief in Immuno II (at 14-16, 23-26).

This Court has for some time now recognized the New York's State Constitution is to be construed independently of the Federal Bill of Rights. While it is clear that this Court is "bound by Supreme Court decisions defining and limiting Federal constitutional rights," People ex. rel. Arcara v. Cloud Books, 68 N.Y.2d 553, 556, 510 N.Y.S.2d 844, 846 (1986), this preclusion does not carry over into the realm of State constitutional interpretation. Quite the contrary, as Chief Judge Wachtler held in Arcara, "in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this Court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution

of the United States." Id.

Thus, for these purposes the Federal Bill of Rights can be seen as simply "establish[ing] minimal standards for individual rights applicable throughout the Nation." On the other hand, "[t]he function of the comparable provisions of the State Constitution, if they are not to be considered purely redundant, is to supplement those rights to meet the needs and expectations of the particular State." Id.

In previously performing this independent and vital function, this Court already found, in a variety of civil and criminal contexts, that New York's State Constitution is not "purely redundant," but that it "define[s] a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties." People v. P.J. Video, Inc., supra. See also Rivers v. Katz, 67 N.Y.2d 485, 504 N.Y.S.2d 74 (1986) (right of involuntarily confined mental patients to refuse antipsychotic medication); Sharrock v. Dell Buick-Cadillac, 45 N.Y.2d 152, 408 N.Y.S.2d 479, 384 N.Y.S.2d 419 (1976) (right to counsel); People v. Class, 67 N.Y.2d 431, 503 N.Y.S.2d 313 (1986) (limits on vehicle searches).

One of the important contexts in which the Court has previously recognized broader State constitutional protection is in cases involving the liberty of speech and press under Article 1, Section 8. O'Neill v. Oakgrove Construction, Inc., supra (reporters privilege under N.Y. Constitution for non-confidential materials; Bellanca v. New York State Liquor Auth., 54 N.Y.2d 228, 445 N.Y.S.2d 87 (blanket ban on topless dancing prohibited); People ex. rel. Arcara v. Cloud Books, supra (limits on public nuisance regulations affecting bookstore); People v. P.J. Video, supra (strict requirements for search warrants pertaining to obscenity).

* * *

In the modern libel context, such observations led one authority on the Croswell case to observe, a year after the Supreme Court's landmark ruling in the Sullivan case, that in fact "[t]he practical freedom of the press in the United States was not first established in 1964;" rather, it was cases like Zenger and Croswell, and the criminal and civil doctrines that these cases engendered, which "gradually broadened freedom of the press until the 1964 decision [in Sullivan]." Forkosch, supra, 33 Fordham L. Rev. at 415-16.

* * *

Given this history it is not surprising that unlike the broadly sweeping but non-specific First Amendment -- see Point I.C., infra -- the direct linkage between New York's constitutional protection for free expression and the quest for effective limitations on libel claims is apparent textually on the very face of Article 1, Section 8. That Section provides:

> "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."*

As can be seen Article 1, Section 8 has two sentences, the first addressing the general and overriding issue of freedom and liberty of expression and the second addressing the particular issue of libel as it relates to liberty of expression.

The first clause of the first sentence speaks in general and affirmative† terms about the right of "every citizen" to freedom of expression. The second, or "abuse" clause, indicates that citizens are "responsible" for "abuse of that right." The third clause of the first sentence is framed in seemingly absolute terms (much like the First Amendment), as a limitation on "use of official authority" which acts to "restrain or abridge the liberty of speech or of the press.‡

Immediately following the general guarantee of liberty of expression is the second sentence of Article 1, Section 8 -- based on New York's statute of 1805 -- which deals with libel. The first clause of the second sentence recognizes the defense of truth, thus fundamentally modifying the strict common law of England. The second clause of the second sentence limits the truth defense to the extent of also requiring "good motives" and "justifiable ends" (sometimes referred to as the "truth-plus" formulation); it also recognizes the jury's exclusive function in determining "truth-plus." The third clause of the second sentence clarifies the jury's role, eliminating the traditional power of English common law judges stringently to limit the jury's function in libel cases, both as to law and fact. (Hereafter, for brevity, the entire second sentence is referred to as the "Hamiltonian libel clause," or simply the "libel clause," of Article 1, Section 8.)

The obvious textual linkage between the first sentence dealing with general rights of freedom and liberty of expression, and the second sentence dealing with libel, is no accident.

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*The word "criminal" was added in 1846. Other than this technical revision the text has remained identical to the original. See, R. Carter, New York State Constitution: Sources of Legislative Intent 7-8 (1988); McKinney's Const. Art. 1, sec. 8 (Historical Note: Section was derived from Const. 1894, Art. 1, sec. 8; Const. 1846, Art. 1, sec. 8; Const. 1821, Art. VII, Sec. VIII).

†"Article 1, Section 8 . . . assures, *in affirmative terms*, the right of our citizens to "freely speak, write and publish." O'Neill v. Oakgrove Construction, supra, 71 N.Y.2d at 529, 528 N.Y.S.2d at 4 n.3. (emphasis added).

‡The quoted characterization is from the O'Neill opinion. Id.

It is the result of long experience with excesses in application of libel law during the colonial and early post-colonial period of our State's history. This experience led to the prevailing view that a proper understanding of liberty of expression would flow directly from the definition of limits on libel law. So understood, it is difficult to imagine a more pertinent or compelling message from the framers of our State's Constitution, in both spirit and original intent, to interpret Article 1, Section 8 expansively in order to protect expression from the excesses of libel claims.

The beginnings of an "interpretive" analysis of the Article 1, Section 8 with regard to libel have already been staked out by this Court, albeit in the context of the separate issue of "state action." In that context, the intimate linkage between libel and the general commands of Article 1, Section 8 has already been noted in the opinion of Judge Titone in SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 502, 498 N.Y.S.2d 99 n.4 (1985). Judge Titone observed that the Section was essentially "aimed at curbing legislation concerning defamation." And, as noted by Judge Wachtler, in his dissent in SHAD Alliance, the discussion by the framers of Article 1, Section 8 "was confined almost exclusively to . . . prosecutions for libels," id., 66 N.Y.2d at 510, 498 N.Y.S.2d at 108.

The textual focus on libel in Article 1, Section 8, is also reflected in the debates that surrounded its passage. Those debates make clear that the central and overriding preoccupation of the framers of the Constitution of 1821 was the actual and potential impact of libel on the liberty of speech and of the press in our then still young democracy. The hard lessons of the history of excessive libel claims, from Zenger to Croswell, are reflected in the mature and well articulated constitutional debate of 1821. What emerges is a clear and unambiguous intent by the framers to define liberty of expression in terms of the appropriate substantive limits on libels as well as in terms of the necessary procedures to effectuate those limits.

b. State Constitutional Arguments in Other States

Many state constitutions mirror the language of Article 1, Section 8 of the New York constitution. The respondents' brief[15] in Miyata (at 15-20) advances arguments similar to those accepted by the New York Court of Appeals.

[Ed.: Miyata was upheld on the basis of Milkovich and did not address the state constitutional arguments. It should be noted, however, that in Brown v. Kelly Broadcasting Co., 771 P.2d 406 (1989), the California Supreme Court declined under its state constitution to impose a higher level of fault for defamation involving a private plaintiff, public issue, and media defendant than is required under Gertz. The First Appellate District of the California Court of Appeal relied on Brown to hold that the state

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[15]Filed by Robert C. Vanderet, Wallace M. Allan, and Alec M. Barinholtz, of O'Melveny & Myers, Los Angeles, California.

constitution also does not provide greater protection to opinion than is afforded under Milkovich. See Weller v. American Broadcasting Companies, Inc., 19 Med. L Rptr. 1161 (1991). The California Supreme Court has yet to address this question.]

Miyata v. Bungei Shunju, Ltd.

Above and beyond the federal constitutional protection afforded the Article, the allegedly libelous statement is protected opinion as a matter of California constitutional law. This is entirely consonant with Milkovich, which recognized that independent state grounds may exist affording even greater protection for statements of opinion than the protection afforded by the First Amendment. Milkovich, 110 S.Ct. at 2701-02, n.5.

Long before the United States Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) first indicated that opinions are not actionable under the First Amendment, California's Supreme Court independently recognized the need to protect statements of opinion from liability. See Emde, 23 Cal. 2d at 155-56 (an "indispensable concomitant" of a labor dispute is the expression of differences of opinion on one side or another of the controversy); In re Blaney, 30 Cal. 2d 643, 649 (1947) (statement that management was "unfair to organized labor" was not an actionable "falsification of facts" but instead "'part of the conventional give-and-take in our economic and political controversies'").

Similarly, a number of pre-Gertz Court of Appeal decisions have distinguished between statements of "fact" and "opinion," and have shielded the latter from defamation liability. See, e.g., Scott v. McDonnell Douglas Corp., 37 Cal. App. 3d 277, 289-91 (1974) (councilmember's statements sharply criticizing and attacking city manager held non-actionable opinion); Yorty v. Chandler, 13 Cal. App. 3d 467, 472-73 (1971) (relying in part on former Cal. Const. art. I, § 9 (now Cal. Const. art. I, § 2) to hold that expression of opinion or severe criticism adversely reflecting on fitness of individual for public office not actionable under state and federal); Howard v. Southern California Associated Newspapers, 95 Cal. App. 2d 580, 584 (1950) (publications concerning matters of public interest are permitted "wide latitude," and "mere expressions of opinion or severe criticism are not libelous if they clearly go only to the merits or demerits of a condition, cause or controversy which is under public scrutiny"), disapproved on other grounds, Field Research Corp. v. Superior Court, 77 Cal. 2d 110 (1969); Taylor v. Lewis, 132 Cal. App. 381, 386 (1933) (defendant's statements reflecting adversely on the job performance and motivation of city councilman was non-actionable opinion).

These decisions rely, in part, on Article I, section 2 of California's Constitution, which provides, in relevant part:

> "(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

This provision of California's constitution provides greater protection for speech than does the First Amendment of the United States Constitution. In Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899 (1979), aff'd, 447 U.S. 74 (1980), the California Supreme Court relied upon Cal. Const. Art. I, § 2 to protect the rights of a group of high school students to solicit signatures and distribute handbills at a privately-owned shopping center. The Court observed that United States Supreme Court decisions interpreting the federal constitution did not "prevent California[] [from] providing greater protection than the First Amendment now seems to provide." Id. at 910. See also Blatty v. New York Times Co., 42 Cal. 3d 1033, 1041 (1986) (Cal. Const. Art. I, § 2 independently establishes zone of protection broader than First Amendment within which press may publish without fear of incurring liability), cert. denied, 485 U.S. 934 (1988); Spiritual Psychic Science Church of Truth v. City of Azusa, 39 Cal. 3d 501, 519 (1985) (relying on Cal. Const. Art. I, § 2 to invalidate city ordinance prohibiting 'fortune telling'); Wilson v. Superior Court, 13 Cal. 3d 652, 658 (1975) (relying on both First Amendment and 'more definitive and inclusively' terms of Cal. Const. Art. I, § 2 to annul an order preliminary enjoining publication and distribution of allegedly defamatory newsletter).

The amicus brief[16] in Price v. Walters (at 18-20) raises similar arguments.

Price v. Walters

The same conclusion results as well when the press release is examined under state constitutional principles. Article 2, Section 22, Oklahoma Constitution, provides:

> Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libel, the truth of the matter alleged to be libelous may be given in evidence to the jury, and if it shall appear to the jury that the matter be charged as libelous be true, and was written or published with good motives and for justifiable ends, the party shall be acquitted.

The state's constitutional provision for free speech has rarely been cited in the decided libel cases,* and the protections it may afford beyond the minimum requirements of the First Amendment remain to be explored. However, the text of our free speech provision is virtually

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[16]**Filed by Robert D. Nelon, Gretchen A. Harris, and Laura B. Hood, of Andrews Davis Legg Bixler Milsten & Price, Oklahoma City, Oklahoma.**

*Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976), and Matthews v. Oklahoma Pub. Co., 103 Okla 40, 219 P. 947 (1923), appear to be the only two, and neither case discusses the provision at any length.

identical to art. I, § 8 of New York's constitution, which was adopted in 1821.†

New York's highest court has construed the free speech guarantee in its state constitution expansively. In Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 566 N.Y.S.2d 906, 567 N.Ed.2d 1270 (1991), the Court of Appeals affirmed the grant of summary judgment in favor of the editor of a scientific journal, which published a letter to the editor critical of the plaintiff. While the court affirmed under the First Amendment, concluding that plaintiff had failed to prove the allegedly defamatory statements to be false, it also affirmed on the alternative ground that under art. I, § 8 of its constitution, the letter to the editor was not actionable because, in context, it was apparent to the reasonable reader that the letter "was voicing no more than a highly partisan point of view." 567 N.E.2d at 1281.

The court in Immuno recognized that Milkovich reaffirmed the principles of New York Times and the cases which followed but rejected "a wholesale defamation exemption for anything that might be labeled 'opinion.'" Milkovich, supra, 497 U.S. at ---, 110 S.Ct. at 2705. The New York court nevertheless said it was "concerned that--if indeed 'type of speech' is to be construed narrowly [as in Milkovich]--insufficient protection may be accorded to central values protected by the law of this State." 567 N.E.2d at 1278. Accordingly, assessing actionability of the letter to the editor before it under state law, the Court of Appeals said:

> [A]n analysis that begins by looking at the content of the whole communication, its tone and apparent purpose better balances the values at stake than an analysis that first examines the challenged statements for express and implied factual assertions, and finds them actionable unless couched in loose, figurative or hyperbolic language in charged circumstances. . . . . Thus, we conclude that an approach that takes into account the full context of challenged speech . . . accords with the central value of assuring "'full and vigorous exposition and expression of opinion on matters of public interest."

Id. at 1281 (citations omitted).

The amicus respectfully submits that this court, like the New York Court of Appeals, should apply this state's guarantee of free speech in a way that permits vigorous expression. In the present case, article 2, section 22 requires an approach "that takes into account the full context of challenged speech." For the same reasons expressed in part A above, the campaign

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†N.Y. Const., art. I, § 8, states:

> Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

press release at issue in this case should be viewed as non-actionable under the Oklahoma Constitution.

3. Pursuing Reinvigoration of State Common Law Principles Protecting Opinion

a. Protection for Opinion Under the *Restatement (Second) of Torts*

The following excerpt from the appellees' brief in Phantom Touring (at 38-41) argues that statements of opinion are protected under state common law as set forth in the Restatement (Second) of Torts.

Phantom Touring v. Affiliated Publications

The Supreme Judicial Court has made clear that the protections for free speech mandated by the common law of Massachusetts and Article 16 of the Declaration of Rights are not limited by the contours of the federal constitution. See, e.g., Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83, 87, 445 N.E.2d 590, 592 (1983); Bowe v. Sec'y of the Commonwealth, 320 Mass. 230, 249-50, 69 N.E.2d 115, 129 (1946).

More specifically, in the leading decision of National Ass'n of Gov't Employees, the Supreme Judicial Court explicitly stated that although statements of opinion appeared privileged under the First Amendment,

> [even] were it not constitutionally required, we would reach the same result, believing that the action is plainly without merit and the prospect of forcing the defendant to trial in such a case would put an unjustified and serious damper on freedom of expression.

379 Mass. at 233, 396 N.E.2d at 1004 (emphasis added).

The existence of an independent state law protection for opinion is clear not only from the text of the National Association decision itself, but also from subsequent commentary occurring in Myers, 380 Mass. at 340-41 n. 5, 403 N.E.2d at 379 n.5 (explaining that the court decided National Ass'n of Gov't Employees on grounds including the fact that "the allegedly libelous statement was an opinion based on disclosed facts," and was therefore nonactionable under the state standard). The Myers case itself emphasized state law, citing only Massachusetts cases and the adopted Restatement (Second) of Torts in its analysis of the factual content of the statement at issue. See 380 Mass. at 341, 403 N.E.2d at 378-79.

Similarly, in Fleming, the Supreme Judicial Court explained that Massachusetts had moved from the federal standards of Gertz v. Robert Welch Inc., 418 U.S. 323 (1974), toward its own more specific case law regarding the protection of opinion:

> Developing the 'common ground' surveyed in Gertz, [Massachusetts] decisions have recognized and adopted the view expressed in Restatement (Second) of Torts § 566 comment b (1977) [protecting opinions based on disclosed facts].

390 Mass. at 187, 454 N.E.2d at 103.

In addition, the Supreme Judicial Court in Pritsker, noting that Gertz bestowed protection on opinions, stated:

> However, [Massachusetts] cases also recognized the distinction, expressed in Restatement (Second) of Torts § 566 (1977), between "pure" opinions -- those based on disclosed or assumed nondefamatory facts -- and "mixed" opinions -- those opinions "apparently based on facts regarding the plaintiff or his conduct that have not been stated by the parties to the communication.

389 Mass. at 778, 452 N.E.2d at 228 (emphasis added).

Plaintiff has no basis for asserting that these bedrock principles of Massachusetts law have eroded. Indeed, at least two other states have refused to conform their common law libel protections to the constitutional meanderings of the Supreme Court. See Immuno AG v. Jan Moor-Jankowski, 77 N.Y.2d 235, 252, 567 N.E.2d 1270, 1279-80 (1991) (on remand from the U.S. Supreme Court with instructions to review its decision in light of Milkovich, the court upheld its decision on state grounds, noting that "[t]urning our back on the now developed, controlling state law issues would be no service to the Supreme Court, or the litigants, or the law of this state."); Cassidy v. Merin, 244 N.J. Super. 466, 48-81 n. 5, 582 A.2d 1039, 1046-47 n.5 (1990) ("[a]lthough constitutional considerations have dominated defamation law in recent years, the common law provides an alternative, and potentially more stable, framework for analyzing statements about matters of public interest."). Absent contrary indications from the Supreme Judicial Court (and there are none), this Court should apply Massachusetts law as it exists today, not as Plaintiff wishes it would become.

[Ed.: Judge Titone's concurrence in Immuno II, 77 N.Y.2d at 263, 566 N.Y.S.2d at 62, argues that constitutional restraint requires a court to base its decision on common rather than constitutional law whenever appropriate.]

Common law protection for statements of opinion premised on fully disclosed, nondefamatory facts is generally based on Section 566 of Restatement (Second) of Torts, as is noted in the respondents' answer to the petition for review[17] in Miyata (at 9-10) and

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[17]**Filed by Robert C. Vanderet, Wallace M. Allan, and Alec M. Barinholtz, of O'Melveny & Myers, Los Angeles, California.**

the defendant's motion for summary judgment[18] in Hickey v. Capital Cities/ABC (at 14-15).]

Miyata v. Bungei Shunju, Ltd.

The Court of Appeal likewise was correct in its additional holding that the statement was not actionable "for the further reason that the facts upon which it is based are disclosed." Opinion, at 10. Petitioner's claim that this holding is irrelevant misses the point. In reaching its conclusion, the Court of Appeal relied on settled California law that opinions premised on disclosed, nondefamatory facts are not actionable. For example, in Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254 (1986), cert. denied, 479 U.S. 1032, reh'g denied, 480 U.S. 912 (1987), this Court recognized that statements in the form of an opinion are actionable only if they imply allegations of undisclosed defamatory facts. Id. at 266. Conversely, such statements are not actionable when the facts supporting the opinion have been disclosed. Id. at 266, n.7. See also Dong v. Board of Trustees of Leland Stanford University, 191 Cal. App. 3d 1572, 1584 (1987) (same), cert. denied, 484 U.S. 1019 (1988); Restatement (Second) of Torts Section 566 and comment (c) (opinion based on disclosed, nondefamatory facts is not actionable, no matter how unjustified, unreasonable, or derogatory the opinion is).

The reason for the rule is no mystery. As the Court of Appeal explained:

> "'The rule derives from the statement's effect on the reader. If an expression of opinion follows from nondefamatory facts that are either stated or assumed, the reader is likely to take the opinion for what it is. Indeed, the reader is free to form another, perhaps contradictory opinion from the same facts.'"

Opinion, at 10-11 (quoting Lewis, 710 F.2d at 555).

Milkovich did not change this rule. See Kimura, 230 Cal. App. 3d at _ (characterization of college administrator's action as an attempt to punish Filipino students held nonactionable opinion based on disclosed facts); see also McNally v. Yarnall, No. 90 Civ. 3076 (RWS) (S.D.N.Y. May 8, 1991) (LEXIS Genfed library, Dist. file) (allegedly defamatory statements of opinion concerning authenticity of stained glass work, based on disclosed facts, held not actionable); Mathias v. Carpenter, 587 A.2d 1, 3 (Pa. Super. 1991) (applying Restatement (Second) of Torts Section 566, comment (c), and holding that a reasonable reader, having access to the facts on which opinion was based, could decide for himself or herself whether facts supported the writer's opinion).

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[18]Filed by Charles Hinkle of Stoel Rives Boley Jones & Grey, Portland, Oregon.

Hickey v. Capital Cities/ABC

As for ABC's use of the words "low" repulsive," and "rotten," those are obvious statements of opinion, and cannot be made a basis for a libel claim under Oregon common law. Under the common law of Oregon, "[e]xpressions of *** strong opinions [on a matter of public concern] are not libelous. King v. Menolascino, Or 501, 504, 555 P2d 442 (1976). Accord Haas v. Painter, 62 Or App 719, 724-727, 662 P2d 768, rev denied 295 Or 297 (1982) (libel claim cannot be based on editorial opinion criticizing district attorneys handling of notorious juvenile case).

These cases establish that expressions of opinion based on articulated facts are not actionable in Oregon, as a matter of common law. The fact that ABC expressed its opinion with strong adjectives ("low," "repulsive," "rotten") only underscores the fact that it was an opinion that those words were conveying. See Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 US 6, 13-14, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970) (use of word "blackmail" to describe real estate developer's negotiating position before city council was "rhetorical hyperbole" and therefore not actionable); Koch v. Goldway, 817 F.2d 507, 508-510 (9th Cir. 1987) (defendant's comparison of plaintiff to "a well-known Nazi war criminal" of the same name was "a vicious slur" but nonetheless "must be classified as opinion, nothing more," and therefore not actionable).

b. Protection for Fair Comment

Prior to being constitutionalized in New York Times v. Sullivan, the "fair comment" privilege offered libel defendants protection under state common law. As urged in the defendant's motion for summary judgment[19] in Moldea v. The New York Times (at 18-21), this privilege exists independently of federal constitutional law and should be considered undisturbed by Milkovich.

Moldea v. The New York Times

As the Supreme Court noted in Milkovich, the constitutional protection for opinion recognized in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) derives from the common law privilege of "fair comment," which has long been recognized in this jurisdiction as a complete defense to a defamation action. "'The principle of "fair comment" affords legal immunity for the honest expression of opinion in matters of legitimate public interest when based upon a true or privileged statement of fact.' 1 F. Harper and F. James, Law of Torts § 5.28, p. 456 (1956) (footnote omitted)." Milkovich, 110 S.Ct. at 2703. This is because, as one New

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[19]**Filed by Bruce Sanford, Leonard H. Freiman, and Anne R. Noble of Baker & Hostetler, Washington, D.C., and George Freeman, of The New York Times.**

York court reasoned, "If 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." Berg, 54 F. Supp. at 797. See Safe Site, Inc. v. National Rifle Association of America, 253 F. Supp. 418, 419 (D.D.C. 1966), aff'd, 141 F.2d 1022 (D.C. Cir. 1967).*

Since at least 1964, the "fair comment" privilege has enjoyed constitutional imprimatur. In the landmark New York Times Company v. Sullivan, 376 U.S. 254, 292 n. 30 (1964), the Supreme Court noted that: "a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact." The rationale for this constitutionally guaranteed common law privilege is that, so long as the reader is given the facts on which the publisher bases his opinion, the reader will have sufficient information upon which to agree or disagree with the conclusion. See Potomac Valve, 829 F.2d at 1290 ("The premises are explicit and the reader is by no means required to share [the author's] conclusion."); Dunlap v. Wayne, 716 P.2d 842, 849 (Wash. 1986) ("Arguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statement themselves." Indeed, as the United States District Court for the Southern District of New York noted a half-century ago:

> Criticism of so much of another's activities as are matters of public concern is fair, if the criticism . . . is based on facts truly stated, free from imputations of corrupt or dishonest motives on the part of the person whose work is criticized, is an honest expression of the writer's real opinion or belief, and is not made solely for the purpose of causing hurt to the other.

Berg, 54 F. Supp. at 797 (emphasis added). See, e.g., Safe Site, Inc., 253 F. Supp. at 419 (defendant's magazine's critical review of plaintiff's product not "patently untrue," and therefore privileged under the doctrine of fair comment; defendant's motion for summary judgment on plaintiff's libel suit granted).

These judicial opinions flow naturally from the stated beliefs of the Founding Fathers. As Thomas Jefferson noted in his first inaugural address: ". . . error of opinion need not and ought not be corrected by the courts 'where reason is left free to combat it.'" Milkovich, 110 S.Ct. at 2172 n. 7 citing Potomac Valve, 829 F.2d at 1288-89 (emphasis added). For these reasons, statements of opinion which are based on stated facts have enjoyed a privilege from

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*The "fair comment" privilege is based on long-standing English common law. See, e.g., Hill, Defamation and Privacy Under the First Amendment, 76 Colum. L. Rev. 1205, 1229 (1976) quoting Popham v. Pickburn, 158 Eng. Rep. 730, 733 (Ex. 1862) cited in Milkovich, 110 S.Ct. at 2712 n.7 (Brennan, J., dissenting) ("Where the reader knew or was told the factual foundation for a comment and could therefore independently judge whether the comment was reasonable, a defendant's unreasonable comment was held to defame '"himself rather than the subject of his remarks.'")

libel liability for decades.†

Oddly, Moldea's Complaint appears to concede this point, for at bottom the Complaint is grounded not only on the words "too much sloppy journalism," but, also, on the premise that the examples Eskenazi cited in support of this conclusion are not borne out by a reading of the book. Thus, assuming that Moldea cannot prove that the examples inaccurately reflect the book -- which is his burden -- the common law fair comment privilege, an independent but parallel protection to the constitutional doctrine insulating opinion, mandates that this case be dismissed. See Complaint at ¶ 21; Milkovich, 110 S.Ct. at 2704 quoting Hepps, 475 U.S. at 777 ("the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."); Liberty Lobby, 838 F.2d at 1292 ("Where a district court concludes upon motion . . . that no reasonable jury could find by a fair preponderance of the evidence that the statement complained of is false, summary judgment for the defendant should be granted. Where the question of truth or falsity is a close one, a court should err on the side of non-actionability.")‡

[Ed.: A similar argument is made in the brief[20] supporting the defendant's motion for summary judgment in Pesta v. CBS (March 12, 1992, at 5-6).]

Pesta v. CBS

Even if this Court finds that Milkovich does not protect Dr. Shope's statement as a matter of federal constitutional law, the Milkovich decision points to another, independent source that renders Dr. Shope's statement non-actionable: the common law "fair comment" privilege.

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†As one New York court noted, in dismissing a libel lawsuit brought on the basis of an article criticizing "two papers written by plaintiff": "Facts do not cease to be facts because they are mixed with the fair and expected comment of the story teller who adds to the recital a little touch of his piquant pen." Berg, 54 F. Supp. at 797. Thus, "[m]ere exaggeration, slight irony or wit, and all those delightful touches of style which go to make an article readable, do not push beyond the limits of fair comment." Id. (Emphasis added).

‡See generally, Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) cited in Liberty Lobby, 838 F.2d at 1292 (emphasis added) ("[T]he plain language of [Federal Rule of Civil Procedure] 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.").

[20]Filed by Richard Rassel, Leonard M. Niehoff, and Kevin F. O'Shea, of Butzel Long, Detroit, Michigan.

As noted previously, the Milkovich Court rejected the notion, long adhered to by lower courts, that its prior decision in Gertz v. Robert Welch Inc., 418 U.S. 323 (1974), had created a separate constitutional privilege for statements of opinion. 110 S.Ct. at 2705. Instead, the Court declared that an independent constitutional privilege for statements of opinion was unnecessary because existing libel doctrine and common law privileges provide sufficient protection to such statements:

> We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment.

110 S.Ct. at 2707.

The Milkovich court emphasized this point because, after Gertz, the lower courts had largely neglected the state common law "fair comment" privilege as a source of protection for allegedly defamatory statements. See, e.g., Ollman v. Evans, 750 F.2d 970, 974 (D.C. Cir. 1984); Nevada Independent Broadcasting Corp. v. Allen, 664 P.2d 337, 343 n.6 (nev. 1983). The Milkovich court specifically emphasized that the common law "fair comment" privilege protects certain statements of opinion on matters of public interest:

> [D]ue to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation. . . . Thus under the common law, the privilege of "fair comment" was the 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.

Id. at 2703.

In Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978), the Sixth Circuit Court of Appeals held that "a story about a matter of public concern . . . is protected under [Michigan] state law by the qualified privilege of 'fair comment.'" Id. at 1113 (citations omitted). The Orr court explained the scope of Michigan's fair comment privilege as follows:

> Everyone, citizen or reporter, has the right to comment on matters of public importance, and expressions of opinion and even misstatements of fact are not actionable in a libel suit unless made maliciously for the purpose of damaging another's reputation. Negligence . . . is not sufficient to establish liability. . . . As long as the defamatory opinion is honestly held or the misstatement of fact is believed in good faith to be true, the statements are protected by the privilege.

856 F.2d at 1113 (citations omitted). See also Dairy Stores, Inc. v. Sentinel Publishing Co., 516 A.2d 220, 232-234 (N.J. 1986) (fair comment privilege protects statements of fact: as well as statements of opinion).

The decision of the Michigan Supreme Court in Rouch v. Enquirer & News of Battle Creek, 427 Mich. 157, 398 N.W.2d 245 (1986), eliminated the public interest privilege in cases involving private figure plaintiffs, but left the other common law defamation privilege intact. Indeed, the Rouch court explicitly stated that the fair comment privilege "is a completely separate privilege which is inapplicable to this case and is unaffected by the analysis advanced here." 427 Mich. at 180 n.13; see also id. at 200 n.24.*

The Michigan Court of Appeals has continued to hold that, where Michigan's common law defamation privileges apply, the plaintiff must prove actual malice. In Smith v. Fergan, 181 Mich. App. 594, 597, 450 N.W.2d 3 (1989), for example, the court held that "[a] plaintiff may overcome a qualified privilege only by showing that the statement was uttered with actual malice, i.e., with knowledge of its falsity or reckless disregard of the truth." See also Dalton v. Herbruck Egg Sales Corp., 164 Mich. App. 543, 548, 417 N.W.2d 496 (1987).

It is clear, based on this Court's prior rulings, that Michigan's fair comment privilege bars Plaintiff's claim in this case. First, this Court has already ruled that the 60 MINUTES broadcast involved matters of legitimate public concern. (See Memorandum Opinion of November 24, 1986 at 6-10). Second, this Court has already ruled that Defendants did not act with actual malice in broadcasting Dr. Shope's statement. (Memorandum Opinion of November 24, 1986, at 15-16.)

Plaintiff is simply left without a colorable claim in the wake of Milkovich. In 1986, this Court dismissed this case in its entirety based on the common law public interest privilege and plaintiff's inability to prove actual malice. Rouch temporarily breathed life back into plaintiff's claims. Now, plaintiff's lawsuit can be dismissed once and for all based upon the law of "fair comment," a privilege of revitalized importance in light of the Milkovich decision.

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*A lone panel of the Michigan Court of Appeals seems to have found to the contrary soon after Rouch was decided. Dietz v. Wometco, 160 Mich. App. 367, 375-77; 407 N.W.2d 649 (1987). This is, however, utterly inconsistent with Rouch. Further, the more recently decided Michigan Court of Appeals cases discussed in the text -- Smith v. Fergan and Dalton v. Herbruck Eggs Sales -- support the proposition that Rouch did not affect the other privileges. Also, these more recent Court of Appeals cases take precedence over Dietz. See MCR 7.215(C)(2).

IV. BIBLIOGRAPHY OF POST-*MILKOVICH* CASES FOR WHICH BRIEFS ARE AVAILABLE AT LDRC[21]

Codelia v. Colson

Flip Slip v. Chicago Tribune

Florida Medical Center v. New York Post

Foretich v. Glamour

Garvelink v. Detroit News

Goddard v. Denver Post

Hall, Dickler v. English

Hannon v. Timberline Publishing, Inc.

Hayes v. Lamberton

Hickey v. Capital Cities/ABC

Immuno v. Moor-Jankowski (remand)

James v. San Jose Mercury News

James v. San Jose Mercury News

Johnson v. Maine Times

Jones v. American Broadcasting Companies, Inc.

Kolegas v. Heftel Broadcasting

Locricchio v. Evening News

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[21]**Readers of the Bulletin are urged to share their important briefs on this and related topics with LDRC. On the issue of opinion post-Milkovich, readers are particularly asked to draw LDRC's attention to briefs that develop arguments not covered or not fully covered in this Bulletin.**

Milkovich v. Lorain Journal (on remand)

Miyata v. Bungei Shunju, Ltd.

Moldea v. The New York Times

Pesta v. CBS

Phantom Touring v. Affiliated Publications

Price v. Walters

Ramistella v. Time Warner Inc.

Rosner v. Field Enterprises

Scheidler v. National Organization of Women

ServiceMaster v. California School Employees

Silver Screen Mgt. v. Forbes

Spence v. Flynt

Taucher v. Elder

Unelko v. Rooney

Weller v. ABC

White v. Fraternal Order of Police