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The Fact-Conjecture Framework in U.S. Libel Law: Four Problems

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Introduction

A recent spate of high-profile United States media cases reveals continuing judicial struggle with the task of distinguishing factual from non-factual statements in libel law. Noting that judges in the same case frequently disagree on the classification of challenged statements, this Article re-examines the framework established by the Supreme Court in the 1990 case of *Milkovich v. Lorain Journal Co.*[1] While important defamation cases of an earlier era focused on multiple aspects of a public plaintiff's burden of proving actual malice in a suit on a matter of public concern,[2] *Milkovich* and the cases reviewed herein involve a different dynamic: the libel defendant's effort to characterize a statement as non-factual in nature as a means of canceling litigation at the stage of a motion to dismiss, thereby avoiding the often high and chilling costs of a suit's discovery and defense.[3] However, although *Milkovich* produced a framework for deciding whether a challenged writing amounts to an actionable statement of fact or a privileged non-factual assertion, the framework has produced a doctrinally uncertain body of cases. The Article explores four issues in fact-opinion cases that have been particularly troublesome for

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[1] 497 U.S. 1 (1990).

[2] E.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (setting actual malice requirement for public official plaintiffs), Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967) (setting actual malice requirement for public figure plaintiffs), Bose Corp. v. Consumers Union of the United States, 466 U.S. 485 (1984) (establishing de novo appellate review of findings of actual malice).

[3] Ollman v. Evans, 750 F.2d 970, 996-98 (D.C. Cir. 1984) (Bork, J., concurring) (citing Anthony Lewis, New York Times Co. v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment", 83 Colum. L. Rev. 603 (1983)).

courts since *Milkovich*: the problems of intent, context, conjecture, and hyperbole.

As explored in Part I, the matter of a speaker's intent has been an undercurrent in case law for years but has never become part of formal doctrine. In determining whether a statement amounts to factual or non-factual expression, courts have been content to ask what the statement means to the "average reader"[4] or "reasonable factfinder."[5] However, language in several prominent cases[6] has broached the relevance of the speaker's purpose, particularly whether the speaker has sought to deceive readers or listeners by cloaking a defamatory assertion of fact in an expression of privileged opinion.[7] This Article takes the position (a) that judges understandably query a speaker's state of mind in ascertaining whether a challenged statement has factual or non-factual content, but (b) that a focus on intent to deceive is misplaced. Part I urges that courts adopt the more appropriate form of intent analysis proffered by Justice Brennan in his *Milkovich* dissent. Under that approach, courts would ask what intended meaning the reasonable reader would attribute to the speaker.

Part II explores a second problem: the role of genre or setting in the determination of a speaker's intended meaning. An especially difficult question for courts has been the interpretation of seemingly concrete statements in genres that are generally non-factual in content. Courts in *Moldea v. New York Times Co.*,[8] involving statements made in a book review, and *Knievel v. ESPN*,[9] involving language on a sports website, confronted precisely this question but found no satisfying answer. Instead, they shifted emphasis from the fact-opinion question to

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[4] Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984).
[5] Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990).
[6] E.g., Moldea v. New York Times Co.,15 F.3d 1137, 1156 (D.C. Cir. 1994) (Mikva, J., dissenting), modified, 22 F.3d. 310 (D.C. Cir. 1994); Ramsey v. Fox News Network, 351 F. Supp. 2d 1145, 1153 (D. Colo. 2005).
[7] Id.
[8] 22 F.3d 310 (D.C. Cir. 1994), modifying Moldea v. New York Times Co., 15 F.3d 1137 (D.C. Cir. 1994).
[9] 393 F.3d 1068 (9th Cir. 2005).

the issue of falsity. Part II suggests that Justice Brennan's approach in *Milkovich* would allow courts to refrain from abandoning the question of factual or non-factual meaning in difficult cases.

Part III reviews a third puzzling task: defining and identifying "conjecture." For Justice Brennan, the contested statements in *Milkovich* amounted to privileged conjecture,[10] yet he was unable to convince a majority of the Court that the case involved anything other than factual allegations of criminal conduct. A federal appellate court similarly divided in the recent case of *Hatfill v. New York Times Co.*,[11] where an op-ed columnist criticized the FBI's stalled inquiry into the 2001 anthrax mailing crimes. In raising serious questions about a "person of interest" and his possible connection to the crimes, the columnist included statements that traditional physical evidence against the suspect was lacking and that the suspect must be presumed innocent until proved guilty.[12] When the suspect sued for libel, alleging false imputation of terrorism and murder, a key question was whether the court should characterize the columns as conjecture or factual accusations of criminal wrongdoing. Part III proposes that court treat the question based on a concept of balanced journalistic presentation.

Part IV examines the problem of hyperbole. In *CACI Premier Technology, Inc. v. Rhodes*,[13] a military contractor sued a talk-radio host for falsely accusing it of murder, torture, rape and other crimes at the Abu Ghraib prison in Iraq.[14] The host defended on the ground that her statements were merely exaggerated flights of rhetoric that no "reasonable" listener would

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[10] 497 U.S. at 28 (Brennan, J., dissenting).
[11] 416 F.3d 3320 (4th Cir. 2005), rehearing en banc denied, 427 F.3d 253 (4th Cir. 2005), dismissed, 2007 WL 404856 (E.D. Va. 2006).
[12] 416 F.3d at 327.
[13] 2006 U.S. Dist. LEXIS 96057 (E.D. Va. 2006).
[14] Id. at *5.

interpret as factual statements about the plaintiff.[15] The argument prevailed, yet the court's receptivity highlighted a curious question: whether the judicial tendency to protect hyperbolic statements by minimizing their injurious content has an unintended pernicious effect. Part IV urges courts to give voice to the positive role played by exaggeration, satire, and other forms of non-literal political speech.

In addressing these four areas of current difficulty, the Article asks whether the Supreme Court's framework, which has received no doctrinal elaboration from the Justices since *Milkovich*, can be rendered more predictable in use and more faithful to the desired balance between interests of reputation and free speech.

1. The Problem of Intent

In determining whether a challenged statement is privileged non-factual speech or an actionable assertion of fact, courts have developed several analytic frameworks.[16] As noted in the Introduction, none has included explicit consideration of the speaker's knowledge or purpose. However, intent has surfaced in judicial and scholarly discussion. This Part traces some of that discussion and suggests a viable consideration of intent in difficult cases.

Surely the most celebrated fact-opinion case in the U.S. federal appellate courts is *Ollman v. Evans*,[17] decided by the U.S. Court of Appeals for the D.C. Circuit in 1984, not long after the twentieth anniversary of *New York Times Co. v. Sullivan*.[18] Praised in its time as "the

[15] Id. at *44.
[16] Robert D. Sack, 1 Sack on Defamation, § 4.2.3, at 4-10 (3d ed. 2007).
[17] 750 F.2d 970 (D.C. Cir. 1984).
[18] 376 U.S. 254 (1964).

best and most important [decision] ever produced in the realm of freedom of speech,"[19] *Sullivan* revised the libel tort in America. By adding the element of "actual malice" to a public official's prima facie case, *Sullivan* increased the public plaintiff's difficulty of prevailing against a "citizen critic" of government.[20] However, by 1984, libel actions against the press were surging and defense costs had spiraled, prompting media defendants to develop arguments for dismissing libel cases in advance of discovery and trial.[21] *Ollman* was a case in point. A self-described Marxist professor of philosophy, under consideration for a departmental chair at a state university, sued conservative pundits Roland Evans and Robert Novak for their unflattering co-authored references to the professor's academic standing.[22] In a syndicated op-ed column, the pundits urged the academic world to question what they understood to be the professor's ideas of using the classroom to "indoctrinate" students in Marxist thought.[23]

When the case came before the full U.S. Court of Appeals for the D.C. Circuit, the eleven-member court included noted veterans and rising stars of the American judiciary: Skelly Wright, Spotswood W. Robinson III, Harry Edwards, Patricia Wald, Antonin Scalia, Robert Bork, Ruth Ginsburg, Kenneth Starr. Writing for a plurality, Judge Starr announced a four-factor analytic framework asking whether the "average reader" would interpret a challenged statement to be a factual assertion, express or implied, or non-factual commentary.[24] The factors were: first, the common usage or meaning of the challenged words, that is, whether the words were precise terms "likely to give rise to clear factual implications," or loose, figurative terms

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[19] Harry Kalven, Jr., The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 194.
[20] 376 U.S. at 279-80.
[21] 750 F.2d 996-98 (Bork, J., concurring).
[22] Id. at 992-93 (plurality opinion) (reproducing column).
[23] Id.
[24] Id at 979.

indicative of non-factual meaning;[25] second, the verifiability of the statement;[26] third, the specific context of the words within the writing,[27] and fourth, the "broader social context or setting," or whether the statement belonged to a type of writing with known conventions signaling "the likelihood of [its] being either fact or opinion."[28]

Whether the speaker intended to assert a factual statement was not part of the test. To the extent a speaker's intent was even considered, its omission may have reflected a judgment that libel law is properly indifferent, at least on the fact-opinion issue, to a speaker's purpose or awareness. On this view, the state's interest in an individual's reputation assigns responsibility for meaning actually communicated, and a speaker's First Amendment interest is served by the requirement that state of mind be convincingly established on the issue of actual malice. Such a view might also assume, from the vantage point of human behavior, that nailing down a speaker's intent to express pure fact, a blend of fact and opinion, or undiluted opinion is too difficult a task, too elusive a goal. And from a perspective of legal practicality, whether a speaker intended to assert a factual or non-factual statement may simply be impossible to resolve with any degree of confidence on a motion to dismiss, generally the procedural moment at which the fact-opinion question arises.

Although these arguments are not without force, it would be surprising if a speaker's intent were considered altogether immaterial to the question of factual or non-factual meaning. Perhaps the *Ollman* plurality believed that its four-factor framework had the effect of taking the speaker's design into account without making it central. A few scholars have been explicit in

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[25] Id. at 980.
[26] Id. at 979.
[27] Id.
[28] Id.

proposing an intent requirement on the issue of factual or non-factual meaning; *Sullivan*'s requirement of awareness or recklessness regarding falsity, they argue, necessarily includes consideration of a speaker's awareness or recklessness regarding the factual nature of his challenged statement.[29] Perhaps recalling the common law's rule that the fair comment privilege was defeasable on a showing of common-law malice,[30] U.S. commentators have noted the phenomenon of the "clever defamer" who seeks to "deliberately cast a grossly defamatory imputation in ambiguous language" and thereby elude liability.[31]

Three of the judges in *Ollman* considered the speakers' intent in precisely the latter sense, appearing troubled by the specter of deceptive intent. Judge Wald, then-Judge Scalia, and Judge Edwards, each of whom dissented from dismissing the case, intimated that a close reading of the column would lead to the conclusion that Evans and Novak desired to state disparaging, injurious facts yet to obscure them carefully in comment.[32] The dissenters thus implied that at least some fact-opinion cases are "really" about deception through discourse, and that the proper inquiry for courts is not whether a reasonable reader would perceive factual or non-factual

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[29] Marc A. Anderson & Daniel J. Bussel, The Plaintiff's Burden in Defamation: Awareness and Falsity, 25 Wm. & Mary L. Rev. 825, 886 (1984); *see also* Kathryn Dix Sowle, A Matter of Opinion: Milkovich Four Years later, 3 Wm. & Mary Bill of Rts. J. 467, 596 (1994). Others have argued for a fault requirement with respect to defamatory meaning. C. Thomas Dienes & Lee Levine, Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan, 78 Iowa L. Rev. 237 (1993).

[30] Robert Sack, 1 Sack on Defamation, 4.4.6, at 4-68 (2007).

[31] Sowle, supra note 29, at 592 n.694 (quoting MacLeod v. Trib. Pub. Co., 343 P.2d 36, 44 (Cal. 1959)). For a discussion of the fair comment privilege in England and Hong Kong, with specific reference to developments on the meaning of malice and the role of honest belief in libel litigation, *see* Jill Cottrell, Fair Comment, Judges and Politics in Hong Kong, 27 Melbourne U. L. Rev. 33 (2003).

[32] Judge Scalia wrote that the column "seems to me a classic and coolly crafted libel," and that to immunize it as opinion would be "to mistake a freedom to enliven discourse for a freedom to destroy reputation." He continued: "The libel that 'Smith is an incompetent carpenter' is not converted into harmless and non-actionable word-play by merely embellishing it into the statement that 'Smith is the worst carpenter this side of the Mississippi," 750 F.2d at 1036. Judge Wald wrote that "the article as a whole, while it purports merely to raise questions about Ollman's qualifications, promotes itself as a call to sanity and objectivity and away from mere polemics. Thus, the immediate context in which [the offending] statement is made does little to warn a reader to regard with skepticism what might otherwise appear to be an assertion of fact." *Id.* at 1034. And Judge Edwards stated that he was "taken aback by the notion that one's reputation within the profession (easily verifiable) may be so freely and glibly libeled" by such "loose muckraking." *Id.* at 1036.

meaning but whether that reader could be duped into thinking he was reading non-factual commentary rather than facts that had been artfully disguised. An approach of this kind, however, has obvious shortcomings: it appears based on undue suspicion of the purposes and strategies of polemical writing, it suggests readers are helpless before the techniques of such writing, it makes far too many inferences concerning state of mind to be plausible at the preliminary moment of a motion to dismiss, and it conflates a speaker's purpose to state facts with a purpose to defame.

A similar focus on deceptive intent, this time raised in favor of a speaker, appears in one of the opinions in *Moldea v. New York Times Co.*,[33] where a panel of the U.S. Court of Appeals for the D.C. Circuit first found that a challenged statement expressed facts – and then famously reversed itself. Dissenting from the panel's first decision, Judge Mikva upbraided the majority for failing to give weight to the challenged statement's setting, a book review.[34] Judge Mikva wrote that "[literary] reviewers should escape defamation unless they attempt to smuggle defamatory and verifiable facts about the author under the guise of criticism."[35] On this view, the fact-opinion inquiry apparently encompasses whether a book reviewer intended to deceive the reader and defame the defendant.

Reference to deceptive intent surfaced more recently in *Ramsey v. Fox News Network*,[36] where a U.S. district court held not actionable a television news report's suggestion that John and Patsy Ramsey were involved in their daughter's unsolved murder. The court found that a Fox Television report on the crime did not "make any judgment as to who was involved in the

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[33] 15 F.3d 1137 (D.C. Cir. 1994), modified, 22 F.3d 310 (D.C. Cir. 1994).
[34] 15 F.3d at 1152-58 (Mikva, J., dissenting).
[35] Id. at 1156. For a similar view of defamation cases arising from postings on electronic bulletin boards, see Lyrissa Barnett Lidsky, Silencing John Doe: Defamation & Discourse in Cyperspace, 49 Duke L.J. 855, 943 (2000).
[36] 351 F. Supp. 2d 1145 (D. Colo. 2005).

murder and did not urge any provably false factual connotation suggesting that [the Ramseys] were complicit in any crime."[37] The court touched on the intent theme by emphasizing that the report was "not a sly nod towards plaintiffs as evildoers."[38]

Thus, a range of judges have indicated that intent *is* relevant in fact-opinion controversies, but they have focused on behavior such as "coolly crafting," "smuggling," "sly nodding," and the like – red herrings all, at least in U.S. libel law. To emphasize deceptive purpose is to misconceive the enterprise of distinguishing factual from non-factual content. Worse, such emphasis invites a trier of fact to confuse factual content with expression that the trier merely disfavors. It was not until *Milkovich* that a sensible incorporation of intent was proposed, but the proposal came in Justice Brennan's dissent and has been little noticed. Justice Brennan's innovation was to connect the "reasonable reader" test with an inquiry into intent by posing the relevant question as "what a reasonable reader would have understood the author to have said."[39] The formulation properly brings intent into the inquiry by asking what the reasonable reader would have understood the speaker intended to say.

At issue in *Milkovich* was a sports column addressing the behavior of the coach of a high school wrestling team.[40] A brawl broke out on school property when Coach Milkovich's team wrestled the team of a rival school. When a state athletic board put the team on probation and declared it ineligible for a state tournament, parents sought an order from a local court enjoining the board's decision. Testifying at both hearings, Milkovich downplayed his own behavior at the meet, which some thought had encouraged the disorder. The local court overturned the athletic

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[37] Id. at 1152.
[38] Id. at 1153.
[39] Milkovich, 497 U.S. at 24 (Brennan, J., dissenting).
[40] Id. at 3 (majority opinion).

board on due process grounds. When the sports columnist learned of the court's decision, he wrote a column casting doubt on Milkovich's veracity,[41] even though the effect of the coach's testimony on the court's due process decision was probably nil. The columnist wrote: "Anyone who attended the meet ... knows in his heart that Milkovich and [the school superintendent] lied at the hearing after each having given his solemn oath to tell the truth. But they got away with it. Is that the kind of lesson we want our young people learning from their high school administrators and coaches? I think not."[42] The coach sued the columnist and paper for the implication that he had committed "the crime of perjury, an indictable offense."[43]

The question for the Supreme Court was whether the lower court correctly granted summary judgment on the ground that the column constituted opinion rather than an assertion of fact. In establishing an analytic framework, the Court took pains to say it disfavored "a wholesale defamation exemption for anything that might be labeled 'opinion,'"[44] and disavowed any grounding of privilege in Justice Powell's dictum, sixteen years before, that "there is no such thing as a false idea."[45] The proper basis for treating non-factual assertions, the Court ruled, was the actual malice requirement of *Sullivan* and its progeny, which already mandated that an actionable "statement on matters of public concern must be provable as false before there can be liability under state defamation law."[46] Therefore, "an additional separate constitutional privilege for 'opinion'" was simply not required.[47]

Writing for the majority, Chief Justice Rehnquist explained that the relevant question was

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[41] Id. at 5.
[42] Id.
[43] Id. at 6.
[44] Id. at 18 (citing Cianci v. New York Times Pub. Co., 639 F.2d 54, 61 (2d Cir. 1980)).
[45] Id. at 18-19 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)).
[46] Id. at 19.
[47] Id. at 21.

whether "a reasonable factfinder" could find that challenged statements were factual assertions. This inquiry, the Court believed, would assure "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."[48] Applying its framework to the column, the Court echoed at least three of the four *Ollman* factors by asking whether the column contained "loose, figurative, or hyperbolic language," whether the implied meaning of the statement was "sufficiently factual to be susceptible of being proved true or false," and whether "the general tenor of the article" indicated that the columnist alleged facts.[49] Chief Justice Rehnquist concluded that a reasonable factfinder could indeed find that the column implicitly asserted that the coach committed perjury and that the assertion was "sufficiently factual to be susceptible of being proved true or false."[50]

In a careful dissent, Justice Brennan noted that he differed from the majority not in terms of the framework – which he said the Chief Justice had articulated "cogently and almost entirely correctly"[51] – but in terms of its application to the language in question. Close inspection of the Brennan dissent, however, shows that the Justice did differ from Chief Justice Rehnquist in formulating a substantial part of the framework. While the Chief Justice referred to the meaning perceived by a "reasonable factfinder," Justice Brennan referred to "what a reasonable reader would have understood the author to have said."[52] The dissent phrased the test as what the reader would understand "an author [was] purporting to state or imply."[53] Thus, while the Chief Justice's focus was the factfinder's task of interpreting meaning regardless of the speaker's likely intent, Justice Brennan's concern was the reader's communicative engagement in discerning

[48] Id. at 20.
[49] Id. at 21.
[50] Id. at 21.
[51] Id. at 23 (Justice Brennan, J., dissenting).
[52] Id. at 24.
[53] Id. at 25.

what the speaker sought to convey. The Chief Justice relied on text while Justice Brennan supplemented textual clues with regard for the author's probable design.[54] Readers of the column would understand, the dissent concluded, that the writer intended to raise questions about the coach's veracity and that the questions reflected "conjecture," "belief," or "guess[work]."[55]

Was there a practical difference between the two approaches? Early in his dissent, Justice Brennan called for more "solicitous and thorough evaluation" of whether a particular statement implied facts or simply engaged in exaggeration or hyperbole.[56] He thereby signaled his main concern: "to confine the perimeters of an unprotected category within acceptably narrow limits in order to ensure that protected expression will not be inhibited."[57] It is likely that Justice Brennan's approach would reduce the set of instances in which statements could be said to imply facts rather than to articulate conjecture, belief, or guesswork. In *Milkovich* itself, Justice Brennan concluded that no jury question was presented – that readers would clearly conclude that the speaker's intention was to offer conjecture. In sum, although Justice Brennan maintained that he was applying the majority's own factors, borrowed at least in part from *Ollman*, it turned out that the factors pointed to a different ultimate question, which on the facts of the case Justice Brennan answered in favor of the defendant.

What deeper explanations, if any, might account for differences in defining the fact-opinion framework? The Rehnquist approach appears propelled by the self-governance value of the First Amendment.[58] That value regards speech as an indispensable instrument of citizen self-

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[54] Thus, Justice Brennan repeatedly referred to communication as a two-way street. He referenced what "readers would have understood the author to mean," *id.* at 25, what "an audience" believed "the speaker" was "putting forward," *id.* at 28 n.5, and what "readers could see" that the columnist was emphasizing, *id.* at 30.
[55] Id. at 28.
[56] Id. at 26.
[57] Id.
[58] *See generally* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877 (1963)

rule and militates in favor of a wide scope of protected speech for discussion of matters of public concern.[59] In *Hustler Magazine, Inc. v. Falwell*,[60] for example, the Chief Justice affirmed the First Amendment's nearly complete protection for "public debate about public figures,"[61] with liability for the emotional distress tort limited to the publication of false statements with actual malice. The *Falwell* Court unapologetically affirmed the *Sullivan* principle that caustic, defamatory speech about public figures was inevitable in a free society and should be subject to damages only in rare instances of calculated lies, which fall outside the scope of protection because they fail to contribute to "the free interchange of ideas and the ascertainment of truth."[62] *Falwell* noted that the First Amendment "encourages" a climate of "robust political debate."[63]

Falwell, then, like *Sullivan*, expanded the citizen's negative liberty to engage in public speech in order to encourage receivers of speech to engage in forms of political participation, which can be viewed as exercises of positive liberty.[64] Both decisions share a notion of the self-governance value of speech: that negative liberty for speakers can create conditions for exercises of positive liberty by receivers of a wide range of public speech. The self-governance value, then, contemplates a speech dynamic composed of interactive liberties, negative and positive, as

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(detailing First Amendment values of self-realization, self-governance, truth-seeking, and social cohesion); Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 Wm. & Mary L. Rev. 653 (1988) (detailing early twentieth century judicial commitment to self-rule as central value of free expression); Brian C. Murchison, *Speech and the Self-Governance Value*, 14 Wm. & Mary Bill of Rts. J. 1251 (exploring theme of participatory democracy in current speech cases).

[59] Geoffrey Stone et al., The First Amendment 19 (2003).

[60] 485 U.S. 46 (1988).

[61] *Id.* at 53.

[62] *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 73 (1964).

[63] *Id.* at 51. Reviewing Chief Justice Rehnquist's First Amendment decisions, Professor Stone concludes that his "record with respect to 'the freedom of speech, or of the press' has been quite dismal," with *Falwell* a notable exception in which the Chief Justice "boldly defended a core speech principle." Geoffrey R. Stone, "The Hustler: Justice Rehnquist and 'The Freedom of Speech, or Of the Press," in The Rehnquist Legacy (Craig M. Bradley, ed. 2006), at 21, 23-24.

[64] For a discussion of the interaction of negative and positive liberties, *see* Murchison, *Speech and the Self-Governance Value*, supra note 58, at 1273-75.

prime resources for a functioning democracy.[65] At the same time, the speech process cannot be wholly unconstrained; the desired dynamic only works if negative liberties are in some way limited in order to maintain citizens' trust in the process itself. Thus, in *Sullivan*, Justice Brennan's majority decision stopped short of recognizing an absolute license to defame public officials.[66] The range of negative liberty protected in *Sullivan* did not include calculated lies, a limitation meant to ensure that citizens are attracted to public dialogue and actively engage in it.

Chief Justice Rehnquist's opinion in *Milkovich* was consistent with the idea of limitation recognized in *Sullivan* – that the Court's expansion of negative liberty of speech and press must be limited in order to encourage civic participation in politics and governance. *Milkovich* reflected the sense that a speaker could not only defame another individual but also discourage citizen participation in societal debate by muddying, intentionally or not, "opinion" with language construable as fact. On this view, the desired effect of negative liberty – the exercise of positive liberty by receivers of public speech – would be harder to achieve without the "reasonable factfinder" test articulated by the *Milkovich* majority. What, then, of Justice Brennan's dissent? Was the Chief Justice's opinion, setting limits on negative liberty in order to prompt exercises of positive liberty, more faithful to *Sullivan* than the dissent of *Sullivan*'s own author?

At work in the dissent were arguably two First Amendment values. In Justice Brennan's agreement with much of the majority's framework, we see the dynamic of negative and positive liberties, which the Court espoused in *Sullivan* and which arguably constitutes the heart of the First Amendment's self-governance value. But in Justice Brennan's speech-protective

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[65] Id. at 1279 (discussing a "dynamic of liberty" in which legal protection of negative liberty promotes opportunities for moral agency).
[66] *See* Sullivan, 376 U.S. at 293-97 (Black, J., concurring); id. at 297-305 (Goldberg, J., concurring).

formulation of the reasonableness test, we see another value entering the conceptual framework – the "safety valve" or "social cohesion" function of freedom of speech.[67] If the First Amendment protects the capacity of citizens in charged moments of political stress to unleash viewpoints and emotional responses to events, they are enabled to remain within a community of discussion rather than finding themselves outcast. As Professor Emerson explained, "The principle of open discussion is a method of achieving a more adaptable and at the same time more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus."[68] Protection of speech in such moments keeps opposition from going entirely underground, strives for legitimacy of political outcomes, and preserves a measure of social cohesion without forcing identical viewpoints on the civic community.[69] Immunity of this expression also contributes to the "net effect of a robust free-speech tradition" by making audiences "more familiar and more comfortable with complexity" and possibly more receptive and adaptable to change.[70] In *Milkovich*, Justice Brennan clearly preferred that courts not over-regulate expression of viewpoints on controversial matters in close cases. By his test, courts would assess a receiver's likely construction of a challenged statement, with the court basing its assessment on the *Ollman* factors and regard for the intent-laden communicative interaction between speaker and receiver. This framework would likely reduce the set of cases subject to the regulatory regime of libel law: by asking what a reasonable reader would infer about a speaker's communicative intent, the Brennan approach insists on specific consideration of the speech process as a dialogue among minds, each instinctively looking for the meaning intended

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[67] Emerson, Toward a General Theory, *supra* note 58, at 884-86.
[68] *Id.* at 884.
[69] *Id.*
[70] Vincent Blasi, "Free Speech and Good Character: From Milton to Brandeis to the Present," in Eternally Vigilant: Free Speech in the Modern Era (Lee C. Bollinger & Geoffrey R. Stone, eds. 2002), at 88-89.

by the other. Thus, following the Brennan approach in the recent case of *State v. Carpenter*,[71] the Alaska Supreme Court asked whether listeners of a radio show that customarily featured "sex-related jokes" would conclude that the show's host – who had made disparaging remarks about the sexual habits of a particular listener who had complained about the show's content – was "purporting to state actual, known facts" about the listener.[72] Taking context into explicit account and implicitly considering the communicative process between speaker and listeners, the court concluded as a matter of law that no audience would interpret the disparagement as intended to be factual in nature.[73]

The two Justices writing in *Milkovich*, then, parted ways in their guidance by First Amendment values. The Chief Justice followed the interactive liberties framework of *Sullivan*, devising a rule that generously promoted liberty of speech with sufficient limitation to promote moral agency among the citizens at large. Justice Brennan followed the same spirit of *Sullivan* to a point – but then implicitly invoked the "social cohesion" value, counseling a narrower exposure to liability for expression at the crossroads of factual and non-factual expression. Both Justices sought a balance of freedom and constraint, and both relied on commonly recognized doctrine and values. Can either approach be considered superior?

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[71] 2007 WL 3121658 (Alaska 2007).

[72] *Id.* at *5.

[73] For another opinion following the Brennan approach and thus asking what intended meaning the reasonable reader would attribute to the speaker, *see* Gannett Co., Inc. v. Kanaga, 750 A.2d 1174, 1193 (Del. 2000) (Chandler, C., dissenting). In a recent English case, Assoc. Newspapers Ltd. v. Burstein, [2007] EWCA Civ. 600, in which the author of a theatrical work sued a negative reviewer, the Court of Appeal for England and Wales concluded that a challenged sentence in the review "was patently intended" as a summary and evaluation of preceding factual statements and hence not a statement of fact. The Court of Appeal regarded the review as containing value judgments which "are not something which a writer shall be required to prove are objectively valid, as the Strasbourg Court has pointed out when dealing with Article 10 rights in *Nilsen and Johnsen v. Norway* [2000] 30 EHRR 878, para. 50." For a discussion of Strasbourg jurisprudence on the legal immunity of value judgments, *see generally* Helen Fenwick & Gavin Phillipson, Media Freedom under the Human Rights Act 1054-64 (2007). *See also* Eric Barendt, *Human Rights Act and Libel Law: Brave New World?*," 6 Media & Arts L. Rev. 1 (2001) (noting that European Court of Human Rights in *Nilsen and Johnsen* emphasized the speakers' "intention to express their own opinion" on the issue involved in the case.

Political theory is no stranger to American libel law,[74] and perhaps it may help answer the question. In separate works, Bryan Garsten of Yale University and Bernard Yack of Brandeis University have recently explored the value of speech in modern political theory. They take issue with proponents of deliberative democracy who dismiss certain forms of political speech as too disruptive, passionate, or self-interested to be acceptable in discussion of public issues. In his 2006 book, *Saving Persuasion: A Defense of Rhetoric and Judgment*,[75] Professor Garsten considers "opinion" in the context of the history of "persuasion, or the art of rhetoric."[76] Garsten points out that this art was a "fundamental part of a democratic citizen's education throughout much of Western history," conveying the message that "a well-functioning republican polity required citizens who could articulate arguments on either side of a controversy, link those arguments to the particular opinions and prejudices of their fellow citizens, and thereby facilitate the arguing and deliberating that constituted healthy political life."[77] Today, however, "rhetoric" is regarded suspiciously as endangering democratic deliberation. Perhaps a version of that suspicion can be found in the *Ollman* dissents. Garsten traces suspicion of passionate speech to the work of Hobbes, Rousseau, and Kant, who in Garsten's analysis shared a distrust of widespread expressive participation by citizens in public controversy.[78] Their distrust was fueled by fear of religious divisions that worsened in contexts of dogmatic religious oratory. While citizens need always be vigilant for demagogic extremes that persuasive speech can promote, Garsten criticizes the early modern theorists' extension of their distrust of demagoguery to distrust of citizens' independent thought and engagement in political argument. He summons the

[74] Justice Brennan recognized the contribution of Alexander Meiklejohn to his own thinking. William J. Brennan, Jr., The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965).
[75] Bryan Garsten, Saving Persuasion: A Defense of Rhetoric and Judgment (2006).
[76] *Id.* at 3.
[77] *Id.*
[78] *Id.* at 182.

thought of Aristotle and Cicero to support a renewed preference for a politics of persuasion, in which speakers strive to persuade fellow citizens on public affairs, and in which persuasive speech can include a broad scope of passionate proclamations of "opinion."

For Garsten, persuasion was once understood as an appeal to the citizen's "capacity for judgment,"[79] thereby drawing participants into public discourse. From this perspective, "[c]itizens who can use speech to draw one another into exercising this capacity for judgment will find themselves more attentive to one another's points of view, more engaged in the process of deliberation, and more attached to its outcome."[80] Historically speaking, theoretical and political efforts to stifle or coerce individual expressions of opinion and exercises of judgment, while intended to promote social peace, usually end up producing reactions of dogmatism.[81] Garsten calls for an understanding of politics as reliant on "direct and deep ethical engagement among citizens in the political realm."[82]

Garsten's analysis points towards the importance of strong legal protection for expressions of opinion and other non-factual speech. He demonstrates how emotion-based opinion can work for, rather than against, deliberative decision-making: emotions propel the speaker to pinpoint "the relevant features of a situation or argument;" they motivate thought; they "give us a stake" in self-assertion; and they "stimulate reflection or judgment by disrupting ordinary habits of response."[83]

Professor Yack covers some of the same themes in defending an understanding of public

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[79] *Id.* at 13.
[80] *Id.* at 175.
[81] *Id.*
[82] *Id.* at 183.
[83] *Id.* at 195-96.

reasoning that he dubs "Aristotelian."[84] This model values wide rhetorical participation in public discussion and "relies heavily on appeals to character and emotion."[85] Political life centers on social relationships and recognizes that public reasoning is not simply an exercise in reason giving but also a "contest for attention and allegiance,"[86] necessitating a wide scope of tolerance of diverse forms of expression. Yack stresses the Aristotelian model's interest in protecting "social relationships between public speakers and public listeners" by reducing constraints on arguments addressing issues of public deliberation.[87] The model recognizes as well that good public decisions "draw on an inseparable mix of desire and intellect, emotion and reasons."[88]

Both Garsten and Yack contemplate a fully expressive range of deliberative language that more closely resembles Justice Brennan's approach to fact-opinion controversies than that of the Chief Justice, although to be sure there is far from a gaping divide between the Justices' approaches. Garsten's and Yack's ideas of course are not meant to translate smoothly into legal thought. But they do suggest that a system of regulating public speech should not proceed from a position of suspicion among elites that speakers will smuggle facts into public discourse in the guise of non-factual expression, but should recognize the complex interactive character of public speech and incorporate the speaker-audience relationship in any calculus of regulation. The theorists would likely see Justice Brennan's framework as closer to the Aristotelian model, with its more than tolerant understanding of the value of highly diverse forms of speech in charged political and cultural arenas.

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[84] Bernard Yack, *Rhetoric and Public Reasoning*, 34 Pol. Theory 417 (2006).
[85] *Id.* at 418.
[86] *Id.* at 427.
[87] *Id.* at 428.
[88] *Id.* at 432.

2. The Problem of Context

In distinguishing factual from non-factual expression, courts and commentators have noted the importance of context, not simply context within a challenged writing but the "broader social context" of a statement, including the genre of writing in which it appears.[89] Thus, in *Ollman*, Judge Starr contrasted the context of corruption charges made by a "soapbox orator," and the same charges contained in a "research monograph detailing the causes and cures of corruption in public service."[90] Noting that "some types of writing or speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact,"[91] Judge Starr offered the example of editorial writers who "frequently 'resort to the type of caustic bombast traditionally used in editorial writing to stimulate public reaction.'"[92] Judge Starr's focus on the reader's understanding of the speaker's intent is consistent with Justice Brennan's formulation of the fact-opinion inquiry in *Milkovich*.

The *Milkovich* majority, however, was enigmatic on whether it endorsed consideration of social context at all in fact-opinion controversies. On the one hand, the majority made ample reference to social context in setting forth the legal landscape: "We have also recognized constitutional limits on the *type* of speech which may be the subject of state defamation claims," the Court wrote, before explicitly approving cases in which the Court had emphasized the relevance of "circumstances" in the determination of meaning,[93] and at least one case in which genre of writing had been decisive.[94] On the other hand, in applying law to facts, the Court made no mention of the sports column as a type of writing with generally understood conventions.

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[89] *E.g.*, Ollman v. Evans, 750 F.2d 970, 983-84 (D.C. Cir. 1984) (discussing factor of broad social context).
[90] *Id.* at 983.
[91] *Id.*
[92] *Id.*
[93] Milkovich, 497 U.S. at 16.
[94] *Id.* at 17 (referring to "ad parody" in Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)).

Muddying matters further, the Court in a footnote addressed and rejected a specific argument pertaining to social context although it did not rule that such arguments were outside the scope of analysis.[95] In the end, the case was simply unclear on the role, if any, of social context.[96]

In *Moldea v. New York Times Co.*,[97] a federal appellate panel considered press arguments that social context, specifically a genre of writing, was highly relevant in a case involving statements made in a newspaper's book review section. In an opinion for the majority, Judge Edwards noted the absence of genre analysis in *Milkovich* [98] and determined that the capacity of book reviews to inflict significant reputational harm militated against according special treatment to reviews.[99] The panel later reversed itself on whether genre analysis was required,[100] and the subsequent practice of state and federal courts has been to take social context seriously.[101] The courts assume it belongs in the framework and have put it there.

The problem is how the analysis should work. While courts like to say that social context matters, they are not sure what consideration of this factor should entail. Consider *Moldea*. In *Moldea I*, the court examined a book reviewer's negative evaluation of a book that probed a possible connection between sports and organized crime. The review's sharpest criticism was that the book contained "too much sloppy journalism."[102] The book author sued the newspaper for libel, arguing that the review was a fact-laden attack on his professional competence. In

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[95] *Id.* at 22 n.9.
[96] For an interesting account of *Milkovich* as considered by the Court on "a somewhat telescoped schedule" and perhaps written in haste at the end of the Court's term, *see* Robert D. Sack, *Protection of Opinion under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy Under the First Amendment*, 100 Colum. L. Rev. 294, 322 n.145 (2000).
[97] 15 F.3d 1137 (D.C. Cir. 1994), modified, 22 F.3d 310 (D.C. Cir. 1994).
[98] 15 F.3d at 1146.
[99] *Id.*
[100] 22 F.3d at 314-15.
[101] Robert D. Sack, 1 Sack on Defamation § 4.3, at 4-28 (3d ed. 2007).
[102] 15 F.3d at 1145.

Moldea I, a split panel found that the phrase "too much sloppy journalism" implied certain facts: that the author "plays fast and loose with his sources, [and] that his allegations are not to be believed."[103] Writing for the majority, Judge Edwards also found that certain examples offered by the reviewer to support his overall critique were "essentially factual,"[104] in the sense that they purported to restate claims made in the book itself. But on reconsideration, Judge Edwards in *Moldea II* conceded that the panel's first decision "failed to take sufficient account of the fact that the statements at issue appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations."[105] Reviews "must be judged," he wrote, "with an eye towards readers' expectations and understandings" of the genre.[106] But even recognizing the necessity to give "latitude" to evaluative works,[107] how should a court gauge the average reader's expectations of factual content in a book review? Does a review's average reader expect to encounter factual content? If so, how much, and in what kinds of statements? Do readers expect a blend of the factual and non-factual, and if so, how do they differentiate between the two? Perhaps *Moldea II* did not delve deeply enough into the questions, but its efforts to decide the case honestly and pragmatically were heroic.

Abandoning its original holding that the review's charge of "sloppy journalism" was a "verifiable assessment of the book," the court in *Moldea II* declared that, in light of the genre, "it is highly debatable whether this statement is sufficiently verifiable to be actionable in

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[103] *Id.*
[104] *Id.* at 1147.
[105] 22 F.3d at 311.
[106] *Id.* at 315.
[107] *Id.*

defamation."[108] In effect, the court recognized what the dissenting judge in the earlier round had urged it to see: that terms "denoting concepts such as carelessness and soundness" are "typically evaluative judgments that will differ from person to person."[109] On this view, readers approach book reviews in mass media with an expectation of diversity, that is, with an understanding that one review represents one response, that a range of other responses may appear elsewhere in the media, and that the point of a review is to spark or continue dialogue, not to end it. Under an expectations model, a broad evaluative statement like "too much sloppy journalism" cannot be considered an assertion of fact, and apparently it cannot be read as implying other facts as long as supporting examples are laid out, as they were in the defendant's review.

But those examples presented the much tougher problem in *Moldea II*.. One statement "supporting" the complaint of sloppy journalism had charged the book author with "reviving" an old, discredited rumor in the sports world. In *Moldea I*, Judge Edwards had ruled that a jury could find this specific charge to be factual,[110] although Judge Mikva, dissenting, had noted that "revive" is a "non-verifiable" term of evaluation.[111] In fact, the book did bring up the old rumor but refuted it thirty-five pages later – a redeeming point entirely omitted from the review. It is therefore easy to see how Judge Edwards in *Moldea I* found that the reviewer's charge was capable of being proved false: having accused the book author of bad journalism, the reviewer gave a concrete example that could be checked. In *Moldea II*, Judge Edwards could not wholly back away from his own quite sensible prior analysis: reasonable readers could see the charge of

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[108] *Id.* at 317.
[109] 15 F.3d at 1155 (Mikva, J., dissenting). For a brief insightful essay by Judge Mikva on the *Moldea* litigation, *see* Abner J. Mikva, In My Opinion, These Are Not Facts, 11 Ga. St. U. L. Rev. 291 (1995).
[110] 15 F.3d at 1147-48.
[111] *Id.* at 1157 (Mikva, J., dissenting).

"reviving the rumor" as conveying fact.[112] But since broad social context – the genre of writing – was now to be considered, the pivotal question was how that factor would alter the court's assessment of specific lines in the review. After all, a broad context "does not indiscriminately immunize every statement contained therein."[113]

For Judge Edwards, the effect of considering context in *Moldea II* was to change the question – from the fact-opinion inquiry to the question of falsity. Instead of asking whether the *reasonable reader* would understand the statement about "reviving the rumor" to be an assertion of fact, the court now asked whether *any reasonable person* would find the statement to be a "rational interpretation" of specific passages in the book being reviewed.[114] Interestingly, the court did not acknowledge changing the question from fact-opinion to falsity, but its analysis made the shift quite clear. The court said that the review's specific statement was privileged because a reasonable person could compare the statement to relevant passages of the book itself and assess the review as a rational interpretation (even if other interpretations of the book could be rational as well). This was a shift in question because in fact-opinion analysis, the reasonable *reader* is contemplated as simply interpreting the meaning of the review, whereas in falsity analysis the *reasonable person* is contemplated as comparing the review to the book itself. For Judge Edwards, consideration of context in cases of evaluative statements simply yielded a more defensible answer on the issue of falsity than on the fact-opinion issue. In effect, the court decided that even if the "reviving the rumor" statement were factual in nature, the book-review context mandated a conclusion that the statement was not false.

The court's dilemma may have been less difficult with Justice Brennan's approach in

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[112] 22 F.3d at 318.
[113] Weyrich v. The New Republic, 235 F.3d 617, 626 (4th Cir. 2001).
[114] Moldea II, 22 F.3d at 317-18.

play. Judge Edwards might have concluded that that the reasonable reader of this review, with its extremely negative thesis and tone, would understand the reviewer's purpose as marshaling language to support the thesis even to the point of partially slanting statements that in isolation would be considered factual.

The *Moldea* saga teaches several things about the factor of social context. First, courts see that reasonable readers probably do not bring unitary expectations to a genre of expression: readers anticipate that some statements will have factual content and that others will be non-factual. Second, the hardest question in book review cases is whether a statement that appears to be a factual summary is indeed factual. *Moldea II* suggests that fact-opinion analysis may not persuasively answer the question one way or the other, and that the court must proceed to a generously phrased question of falsity: does the reviewer's summary refer to an actual passage and is the summary one that could be rationally entertained? If so, it is protected expression.

A more recent case, *Knievel v. ESPN*,[115] involved a similarly difficult question but with a different method of decision. ESPN, a sports network offered on cable television, also has an internet presence that includes a website, EXPN.com, catering to fans of "extreme sports."[116] After an ESPN "action sports and music awards" show, the EXPN.com website published a photograph gallery of celebrities who attended the event.[117] The website's main page – "lighthearted, jocular, and intended for a youthful audience" – offered a "behind the scenes look at all the cool kids, EXPN-style," and directed viewers to "check out what the rockstars and prom queens were wearing."[118] A visitor to the site could click through a gallery of seventeen

[115] 393 F.3d 1068 (9th Cir. 2005).
[116] *Id.* at 1071.
[117] *Id.*
[118] *Id.* at 1077.

photographs, each with a caption that poked vulgar fun at the depicted persons. For example, a caption under a photograph of a man in sunglasses announced, "Ben Hinkley rocks the shades so the ladies can't see him scoping," and a photograph of two women had a caption stating, "Shannon Dunn and Leslee Olson make it look easy to be cheesy."[119] After clicking through the first nine photographs, the viewer would encounter a photograph of famed motorcyclist-daredevil Evel Knievel, wearing tinted sunglasses and with his arms around two unnamed women (one was his wife). The caption stated, "Evel Knievel proves that you're never too old to be a pimp."[120] Taking offense with the network that had invited him to the show and posted his picture, Knievel sued ESPN for libel, claiming that the caption alleged that he was a "pimp in the criminal sense," that he engaged in immoral conduct such as soliciting prostitutes, and that his wife was a prostitute.[121]

On whether the caption consisted of an actionable factual assertion, the U.S. Court of Appeals lost no time stating the importance of "broad context," which it defined as including "the general tenor of the entire work, the subject of the statements, the setting, and the format of the work."[122] The court took chief account of the introductory page of the website, particularly its tone and subject matter, both of which were focused, said the court, on the slang and culture of young people. The court concluded that "a reasonable viewer exposed to the main page would expect to find precisely that type of youthful, non-literal language on the rest of the site," and noted that indeed the rest of the site contained "satirical, risqué, and sophomoric slang."[123] Thus, as in *Ollman* and *Moldea*, the broad context militated in favor of ruling that the challenged

[119] *Id.* at 1071, 1078.
[120] *Id.* at 1071.
[121] *Id.* at 1070-71.
[122] *Id.* at 1075, 1077.
[123] *Id.* at 1077-78.

statement was non-factual.

However, as in those cases, language reflecting context and indicating subjectivity surrounded a statement that was arguably more concrete, thus raising the principal problem of broad context analysis: how does broad context affect the law's assessment of a narrow accusation? And the accusation in *Knievel* was marginally more compelling than in *Ollman* or *Moldea* due to the plaintiff's insistence that a criminal accusation had been made. Citing libel law's traditional treatment of criminal allegations as defamatory per se, Knievel argued that the website's overall context, satirically subjective though it was, could not negate the factual inference that he was engaged in criminal behavior.[124]

The court first noted that "not all statements that could be interpreted in the abstract as criminal accusations are defamatory,"[125] thus clarifying that some allegations of criminal behavior resist classification as fact. The court then held that the overall context indicated that the reference to Knievel as a pimp was "intended for a youthful audience," and that "a reasonable viewer ... would expect" edgy but non-literal speech on the website.[126] If we look closely at these differently framed references to the court's inquiry – what the defendant intended to convey, and what a reasonable viewer would expect – we see the elements that Justice Brennan combined into a guiding question: what would the reasonable reader or viewer assume that the speaker was attempting to say? The court's clear answer was that, as a matter of law, the statement was neither intended nor received as a factual allegation of criminal misconduct.

Because the dissent in *Knievel* was emphatic that the defendant's use of "pimp" could be

[124] *Id.* at 1071.
[125] *Id.* at 1075.
[126] *Id.* at 1077.

seen by some reasonable viewers as implying criminal conduct,[127] the majority considered a literal interpretation. "Even if a viewer had interpreted the word 'pimp' literally," the court wrote, "he or she would have certainly interpreted the photograph and caption, in the context in which they were published, as an attempt at humor."[128] Thus, the court produced alternative holdings: first, that the statement was non-factual, in large part due to the type of overall subjective communication that contained it, and second, that even if factual, the statement was out of place, i.e., it appeared in the wrong context for such an allegation, and so would not be taken seriously as anything other than "an attempt at humor" or an "obvious joke."[129] This second holding recalls the conclusion of *Moldea II*, that a concededly factual statement was non-actionable because it was a rational interpretation of another statement – in effect that it was "not false enough." In *Knievel*'s alternative holding, the court stated that a factual statement was non-actionable as an obvious joke, in effect, that it was "too false." Broad context, then, does not wave a magic wand in fact-opinion cases, providing automatic immunity for concrete statements. Rather, courts give effect to broad context in subtle ways, sometimes by turning to the falsity issue as the situs of other analytical options and more persuasive doctrinal solutions.

3. The Problem of Conjecture

In fact-opinion controversies, plaintiffs often point to seemingly concrete statements, arguing that the statements accuse them, explicitly or implicitly, of criminal behavior, while defendants respond that the statement merely engages in conjecture. Words become crucial in these disputes; proof of conjecture becomes a matter of auxiliary verbs, e.g., "may" and "might,"

[127] *Id.* at 1083 n.5 (Bea, J., dissenting).
[128] *Id.* at 1078 (majority opinion).
[129] *Id.*

and of interrogative rather than declarative sentences. In *Ollman*, Judge Starr had indicated that arguments concerning speech as conjecture could take place within analysis of specific context – the third prong of the *Ollman* analysis. "The First Amendment is served," he noted, "not only by articles and columns that purport to be definitive but by those articles that, more modestly, raise questions and prompt investigation or debate."[130] Judge Starr added, "By giving weight on the opinion side of the scale to cautionary and interrogative language, courts provide greater leeway to journalists and other writers and commentators in bringing issues of public importance to the public's attention and scrutiny."[131] However, the focus on conjectural words and phrases poses a problem for courts: in determining whether a statement accuses or surmises, the court can find itself inching towards literalism, creating the risk of neglecting other factors that point to other conclusions. And some judges may worry that solicitude for conjecture will only benefit "clever defamers" by encouraging their resort to subtle wordplay.

Milkovich itself was a battle over conjecture. Coach Milkovich vigorously maintained that the sports column accused him of indictable perjury, while the newspaper depicted the statements as surmise. Other than recounting arguments made by the parties to the state courts, the Supreme Court's majority opinion did not address any arguments concerning conjecture before holding that a reasonable factfinder could conclude that the column connoted an allegation of perjury. The Court's own application of law to fact consisted of two brisk paragraphs that twice quoted and approved the lower court's analysis of the challenged column but did not revisit any specific language.[132] Having noted earlier that speakers are not exempt

[130] Ollman, 750 F.2d at 983.
[131] *Id.*
[132] Milkovich, 497 U.S. at 21-23.

from liability by "simply couching [statements that imply false facts] in terms of opinion,"[133] Chief Justice Rehnquist evinced little inclination to engage in close textual analysis. He closed by stating that remanding the case to the state courts "holds the balance true,"[134] referencing the balance between freedom of expression and the tort's reputational interest.

Justice Brennan, however, based his dissent on a judgment that the column's "assumption that Milkovich must have lied at the court hearing is patently conjecture."[135] In Justice Brennan's judgment, the columnist not only "reveals the facts upon which [the columnist] is relying but he makes it clear at which point he runs out of facts and is simply guessing."[136] "Conjecture, when recognizable as such," he noted, "alerts the audience that the statement is one of belief, not fact. The audience understands that the speaker is merely putting forward a hypothesis."[137] Justice Brennan then detailed numerous instances of qualifying language that signaled the author's intent "to surmise," and he noted the column's pointed, emotional terms that produced the same effect.[138] For Justice Brennan, "conjecture [serves] as a means of fueling a national discourse on [political, social, or cultural] questions and stimulating public pressure for answers from those who know more."[139] Unfortunately, the majority gave no response to this theory of the "intrinsic" importance of conjectural speech to "'the free flow of ideas and opinions on matters of public interest and concern' that is at the heart of the First Amendment."[140]

In 2007, the Supreme Court had another opportunity – in the case of *Hatfill v. New York*

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[133] *Id.* at 19.
[134] *Id.* at 23.
[135] *Id.* at 28 (Brennan, J., dissenting).
[136] *Id.*
[137] *Id.* at 28 n.5.
[138] *Id* at 28-33.
[139] *Id.* at 34.
[140] *Id.*

Times Co.[141] – to take up questions of the value and contours of conjectural speech. In that case, a germ warfare expert who had worked in the U.S. Defense Department sued the New York Times for libel arising from statements written by Nicholas Kristof in op-ed columns in the spring and summer of 2002.[142] Kristof wrote the columns some six months after the mysterious anthrax mailings that caused widespread fear in the U.S. shortly after the events of September 11, 2001. The federal government had made no arrests in the anthrax matter, and Kristof's columns strongly criticized the Federal Bureau of Investigation for a lax, inept investigation. The columns repeatedly provided information about government questioning of a likely suspect, whom the columnist called "Mr. Z," and pointedly asked why the FBI had not completed its query into Mr. Z's possible involvement. Kristof gave background information about Mr. Z and noted that experts in the bioterrorism field suspected him. Kristof finally named Mr. Z as Dr. Stephen Hatfill but only after Hatfill had come forward, identified himself as a "person of interest" in the matter, and strongly denied involvement.[143] Later Hatfill sued the Times for accusing him of committing the anthrax murders. Indeed, Kristof had expressed a view that Hatfill could be responsible and listed reasons for this possibility, but Kristof also stated that Hatfill "denies any involvement" and that Hatfill's "friends are heartsick at suspicions directed against a man they regard as a patriot." In addition, Kristof noted that "it must be a genuine assumption that [Hatfill] is an innocent man caught in a nightmare," and he stated that "there is not a shred of traditional physical evidence linking [Hatfill] to the attacks."[144]

Kristof was not the only writer addressing the crimes. In October 2003, Vanity Fair

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[141] 416 F.3d 3320 (4th Cir. 2005), rehearing en banc denied, 427 F.3d 253 (4th Cir. 2005), dismissed, 2007 WL 404856 (E.D. Va. 2006).
[142] 416 F.3d at 324-28.
[143] *Id.*
[144] *Id.* at 325-27.

magazine published an article by a Vassar College professor, Donald Foster, who applied a method he called "literary forensics" to suggest a profile for the anthrax killer.[145] The article named Hatfill as the author's suspect and provided copious detail about Hatfill's background. Reader's Digest magazine subsequently published a shorter version of Foster's article. Hatfill sued Kristof and the Times in the Eastern District of Virginia, and sued Foster and the respective publishers of Vanity Fair and Reader's Digest in the Southern District of New York.

Hatfill claimed that all the defendants had falsely accused him, even if by implication, of committing the anthrax crimes. He relied on traditional doctrine that an accusation of criminal wrongdoing is defamatory per se.[146] In the first case, the Times moved immediately for dismissal, arguing that its columnist had "merely reported on an ongoing investigation that targeted Hatfill,"[147] without drawing or conveying a conclusion about guilt. According to the Times, the thrust of the columns was "to call attention to what [Kristof] believed was grossly deficient performance by the government" in its investigation.[148] In the second case, Hatfill similarly claimed that Foster's article falsely "accused [him] of the anthrax murders by implication." Foster and the magazine publishers argued that the article merely hypothesized about the killer's profile and the closeness of Hatfill's match with the profile.[149]

The trial judge in the New York Times case dismissed the complaint in November 2004. The court did not discuss *Milkovich*, the fact-opinion issue, *Ollman*'s concept of "raising questions," or Justice Brennan's concept of conjecture. Instead the court focused on whether the columns reasonably could be read as conveying defamatory meaning, and its conclusion was that

[145] Hatfill v. Foster, 401 F.Supp.2d 320, 323 (S.D.N.Y. 2005).
[146] Hatfill v. New York Times Co., 416 F.3d at 330; Hatfill v. Foster, 401 F.Supp.2d at 327.
[147] Hatfill v. New York Times Co., 416 F.3d at 329.
[148] New York Times Co., Petition for Writ of Certiorari, at *3 (Jan. 17, 2006).
[149] Hatfill v. Foster, 401 F.Supp.2d at 323, 334.

they could not. According to the court, the columns merely stated that Hatfull was under investigation, and such meaning was not defamatory.[150] A panel of the U.S. Court of Appeals for the Fourth Circuit reversed, focusing on the same issue – defamatory meaning – yet concluding that under applicable state law, the columns were indeed capable of conveying defamatory meaning to a reasonable reader. In addition, the panel found that numerous discrete assertions in the columns were individually "capable of incriminating Hatfill in the anthrax mailings" and could be found defamatory.[151]

Oddly, the *Milkovich* question – whether the columns contained assertions of factual content – did not figure prominently in the panel's discussion, although the fact-opinion question seems logically prior to the question of defamatory meaning.[152] But as noted earlier, courts ruling on an early motion look for a manageable issue, and in this instance, the issue was defamatory meaning. However, the fact-opinion issue was not wholly ignored: in a footnote, the panel noted that although *Milkovich* had "declined to create a rigid distinction between statements of fact and expressions of opinion," the Supreme Court had required that a statement be provably false in order to be subject to liability.[153] The panel then provided one sentence of analysis: "The allegedly defamatory charge in this case – that Hatfill was responsible for the anthrax mailings – is provable as false and thus may be the subject of a defamation claim under *Milkovich*."[154] The panel reinstated the action, holding that the statements could be found to imply factual, defamatory assertions about the plaintiff.

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[150] Hatfill v. New York Times Co., 2004 WL 3023003 *7 (E.D. Va 2004).
[151] 416 F.3d at 333, 335.
[152] *See, e.g.*, Doe v. Cahill, 884 A.2d 451, 463 (Del. 2005), where the Delaware Supreme Court stated the question of defamatory meaning is a two-part inquiry in which the court determines "first, whether the alleged defamatory statements are expressions of fact or protected expressions of opinion; and second, whether the challenged statements are capable of a defamatory meaning."
[153] 416 F.3d at 334 n.6.
[154] *Id.*

Meanwhile, in Hatfill's action against the magazine publishers, the federal trial judge in New York provided marginally more analysis of the *Milkovich* question and reached the same conclusion as the Fourth Circuit panel. Addressing the "opinion defense," the New York federal trial judge first recounted the defendants' argument: "[Defendants assert] that the article is nothing more than an expression of opinion – specifically Foster's opinion about where the evidence in the anthrax investigation points. And indeed when Foster climaxes his article with its most daunting claim – 'Hatfill is no Richard Jewell' – he takes care to begin the sentence with the words, 'In my opinion…'"[155] The argument was unavailing. Finding the article "clearly actionable," the court held that its message was a "flat out statement that Hatfill, unlike Jewell, is not wrongly suspected of committing a heinous and highly publicized crime."[156] As for Foster's suggestion that Hatfill was "unfit to have security clearance or to work in the field of bioterrorism research," the court found the statement "demonstrably true or false, and [therefore] actionable."[157] The Second Circuit did not have the opportunity to review these conclusions because the case later settled.[158]

Meanwhile, in the Fourth Circuit, the Times' petition for rehearing en banc was denied without majority opinion in October 2005.[159] Dissenting, Judge Wilkinson strongly maintained that the columns were not defamatory: in his judgment, they merely urged the FBI to intensify its probe and did not amount to an accusation of guilt. Citing *Milkovich* for the proposition that certain "types" of speech must be protected, Judge Wilkinson voiced concern that a failure to dismiss the case would have the effect of condoning "protracted litigation" for "public

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[155] 401 F. Supp.2d at 338-39.
[156] *Id.* at 339.
[157] *Id.*
[158] Josh Gerstein, *Hatfill Settles $10M Libel Lawsuit*, The New York Sun, February 27, 2007.
[159] Hatfill v. New York Times Co., 427 F.3d 253 (4th Cir. 2005).

commentary" on a grave matter of "public, indeed national concern."[160] Judge Wilkinson's tone and perspective recalled Justice Brennan's concern in *Sullivan* to guard the negative liberty of public commentators in order to encourage exercises of positive liberty by citizens – engagement in participatory speech and action that mark a vital democracy. Judge Wilkinson concluded that the columns "were hard-hitting, to be sure, but they did not forsake the essential balance that our law requires."[161] The balance that Judge Wilkinson extolled was a journalistic sense of duty "to insist that [government] agencies get off the dime," and to warn the public when government "malfunction[s],"[162] without engaging in "premature accusation" of individuals.[163] Judge Wilkinson found nothing to support the notion that Kristof's qualifying language was mere wordplay to stave off litigation; on the contrary, the columns epitomized fair professional scrutiny. Put more plainly, "the defendant was simply doing its job."[164] It was this sense of responsible "balance" that Judge Wilkinson believed had been too quickly dismissed by the panel.

The Times unsuccessfully sought review by the Supreme Court in January 2006.[165] The newspaper argued that the case presented an issue of libel by implication and that the panel erred by holding that a reasonable factfinder could read the columns as implying an accusation of criminal misconduct, especially when the columns had expressly disavowed that meaning.[166] In an amicus brief supporting a grant of certiorari, media groups pointed out to the Court that its libel jurisprudence required clarity on the scope of protection for press accounts of government

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[160] *Id.* at 254-55 (Wilkinson, J., dissenting from denial of rehearing en banc).
[161] *Id.* at 259.
[162] *Id.* at 258.
[163] *Id.* at 257.
[164] *Id.* at 259.
[165] New York Times Co. v. Hatfill, 547 U.S. 1040 (2006) (denying petition for writ of certiorari).
[166] Petition for Writ of Certiorari, New York Times Co., in New York Times Co. v. Hatfill, at **11-12 (Jan. 17, 2006).

investigations. The amici noted that "some courts treat media accounts of criminal investigations or other controversial issues as non-actionable opinion," but that "this approach is inconsistently applied and has been explicitly repudiated by some courts."[167]

The Court denied certiorari in the case, and the parties prepared for trial. In January 2007, the federal judge in Virginia granted a motion for summary judgment on the grounds that Dr. Hatfill was a limited purpose public figure and that he would be unable to prove actual malice on the part of the Times with the requisite convincing clarity.[168] The case is now back before the Fourth Circuit on appeal, and briefs have been filed on the issues of plaintiff status and fault. Thus, the case has moved well beyond the *Milkovich* moment – the early preliminary motion to dismiss in which a court can rule as a matter of law that the statements at issue are not actionable.

If the Supreme Court had taken *Hatfill*, the question of conjecture may well have been argued and decided. A relevant precedent would surely have been the case of *Riley v. Harr*,[169] a federal appellate case decided in 2002. In *Riley*, the author and publisher of *A Civil Action*, a best-selling work of non-fiction, were sued by one of the individuals discussed in key sections of the book. *A Civil Action* detailed an extraordinary toxic tort lawsuit brought by residents of a Massachusetts town against corporate defendants accused of contaminating municipal water wells and causing serious illness and deaths in a number of families. The plaintiff in *Riley* was the owner of a tannery which, according to the book, was suspected of dumping toxic chemicals on land near the wells.[170] The plaintiff alleged that the book contained defamatory factual

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[167] Brief Amici Curiae of the Hearst Corp. et al., in New York Times Co. v. Hatfill (Feb. 21, 2006).
[168] Hatfill v. New York Times Co., 2007 WL 404856 (E.D. Va. 2007).
[169] 292 F.3d 282 (1st Cir. 2002).
[170] *Id.* at 286-87.

statements imputing to him the crimes of illegal dumping, perjury, and murder, as well as other crimes and offenses. The defendants maintained that many of the statements consisted of conjecture on the part of various figures in the book, and that the basis of each statement was set forth clearly so that the reader could form his own conclusions while encountering those of the author.[171] The First Circuit interpreted *Milkovich* as holding the sports column actionable for a clear reason: the columnist had indicated that he had been in a "'unique position' to know that the coach had lied because he had personally observed the relevant events," whereas an article or book that signals that "the reader is free to draw his or her own conclusions based on [given] facts" would be privileged.[172] This approach interprets "opinion" or non-factual expression as part of a dialogue in which the citizen can choose to participate by receiving underlying information, assessing an author's evaluation of such information, and then drawing the same or different conclusions depending on the citizen's own judgment. Thus, if *A Civil Action* signaled an intent that "only one conclusion [about the plaintiff] was possible," the statements could not be considered opinions but factual assertions, whereas if "readers implicitly were invited to draw their own conclusions from the mixed information provided," the statements would be privileged non-factual expressions.[173] "Of greatest importance," said the First Circuit, "is the breadth of the [writing], which not only discussed all the facts underlying [the author's] views but also gave information from which readers might draw contrary conclusions. In effect, the [writing] offered a self-contained give-and-take, a kind of verbal debate...."[174] These quotations recall Judge Starr's invocation of the First Amendment interest in protecting articles that "raise questions and

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[171] *Id.* at 291-98.
[172] *Id.* at 290-91.
[173] *Id.* at 290.
[174] *Id.* (quoting Phantom Touring, Inc. v. Affil. Pubs., 953 F.2d 724 (1st Cir. 1992).

prompt investigation or debate,"[175] and Judge Wilkinson's invocation of a journalist's "duty" to call government to account by reporting investigations in a way that preserves an essential "balance" between expressive liberty and reputation.[176]

Some may doubt that courts are proper institutions for determining whether a particular writing engages in sufficient "give-and-take" or "verbal debate" to be a privileged "public commentary" on a government investigation or other proceeding. Recalling Justice Brennan's dissent in *Milkovich*, was his close textual analysis, his line-by-line search for linguistic evidence of conjecture, an appropriate undertaking for the court, however benign the task in that instance? This Article proposes that the Brennan approach is indeed appropriate because its mission – discerning "breadth" of comment that makes a point but does not preclude other views – comports with a policy of permitting robust speech about government processes without neglecting the importance of reputation. The Brennan approach enables speakers to report and opine on matters that previously have been legally off-limits, at least in some jurisdictions, at the same time signaling to members of the public that other views are possible, that a story is unfolding. Chief Justice Rehnquist might demur that clever defamers could manipulate "public commentary" under such an approach, and this may well be so. However, the "breadth" extolled in *Riley* would require more than transparent wordplay, and the qualifying language in Kristof's columns is a case in point. Kristof's statements about Dr. Hatfill were forceful, but they did not present themselves as definitive. Writing of this kind is of the highest public importance and should be protected under the First Amendment. Certainly adoption of the Brennan test of reasonableness in *Milkovich* would go a long way to providing this immunity.

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[175] Ollman, 750 F.2d at 314.
[176] Hatfill, 427 F.3d at 258 (Wilkinson, J., dissenting from denial of rehearing en banc).

4. The Problem of Hyperbole

A final problem that is no stranger to fact-opinion controversies is the problem of hyperbole. But is there a problem? Isn't the strong protection of rhetorical hyperbole one of the glories of American libel law? Haven't the federal courts uniformly accepted "the reality that exaggeration and non-literal commentary have become an integral part of social discourse"?[177] To deny plaintiffs the right to sue for statements too exaggerated to be taken seriously is surely one of the current strengths of any jurisprudence of free speech and press, permitting speakers a wide range of expressive license. One need only recall *Hustler Magazine, Inc. v. Falwell*,[178] where the Supreme Court declared that the pornographic magazine's outlandish account of the fundamentalist preacher's encounter with his mother was immune from civil suit because it "could not reasonably have been interpreted as stating actual facts"[179] about the preacher.

A more recent example is *Horsley v. Rivera*,[180] where television host Geraldo Rivera told an on-air guest, pro-life activist Neal Horsley, that Horsley was an "accomplice to murder."[181] Horsley operated anti-abortion websites, including one that listed names, addresses, and social security numbers of abortion-providing medical doctors. The list did not originally include Dr. Bernard Slepian, a doctor whose practice included performing abortions, but when Slepian was shot and killed by gunfire through his kitchen window, Horsley's website posted his name and

[177] Horsley v. Rivera, 292 F.3d 695, 701 (11th Cir. 2002).
[178] 485 U.S. 46 (1988).
[179] *Id.* at 50.
[180] Horsley, 292 F.3d 695.
[181] *Id.* at 699.

struck an "X" through it.[182] Geraldo Rivera invited Horsley on the air, accused him of encouraging violence, and said, "You are an accomplice to murder."[183] Horsley responded that he did not condone murder of the doctor or anyone else. Rivera said, "People want to see the real face of a – of an accomplice to homicide, and they're looking at your face now. And they understand what you are doing."[184]

Horsley sued for libel, alleging that Rivera accused him on national television of being chargeable with a felony. Rivera moved to dismiss on the ground that the challenged statement was rhetorical hyperbole fully protected by the First Amendment, "an imaginative and figurative expression that could not have been taken by a reasonable viewer of the program as a literal assertion of facts."[185] The Eleventh Circuit granted the defendant's motion for judgment, agreeing that the statement was rhetorical hyperbole and that "a reasonable viewer would have understood Rivera's comments merely as expressing his belief that Horsley shared in the moral culpability for Dr. Slepian's death...."[186] From this account, the problem of hyperbole becomes apparent. Although the party invoking the First Amendment won the case, he did so only by denigrating his own speech. The "defense" of rhetorical hyperbole forces the defendant into the bizarre position of arguing that he "merely" engaged in hyperbole, thus disavowing not simply the words he spoke but his statement's intended power and impact.

In fact, both sides' arguments in *Horsley* are strikingly artificial. The plaintiff in all likelihood did not take literally Rivera's accusation of being an accomplice to murder, since the doctor's name and address had not been on the website before the murder. But Horsley crafted

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[182] *Id.* at 697-98.
[183] *Id.* at 699.
[184] *Id.*
[185] *Id.* at 701.
[186] *Id.* at 702.

his libel complaint as if he did take literally the charge, his obvious purpose to take advantage of libel law's reflexive tendency to permit survival of claims based on accusations of criminal misconduct. But even more artificial was Rivera's defense: he completely backtracked from the force of his words, and the court in giving him the victory labeled his words "more an expression of outrage than an accusation of fact."[187] This may be true, but it has the effect of minimizing Rivera's speech at the same time that it accords the speech maximum First Amendment protection. The privilege dilutes the expression it elevates, confusing the value at stake and sending no clear message about the First Amendment.

A recent and more graphic example is *CACI Premier Technology v. Rhodes*,[188] dismissed by a federal district court in September 2006 and now pending on appeal in the Fourth Circuit Court of Appeals. Rhodes was an on-air talk show host of Air America Radio, which featured liberal conversation on current issues. Following publication in April 2004 of highly disturbing images of humiliation and abuse at the Abu Ghraib detention facility in Iraq, Rhodes made on-air statements about several private contractors that had provided interrogators and other personnel to the U.S. military at the prison, including CACI Premier Technology, Inc. and CACI International, Inc. CACI sued Rhodes for libel, alleging that in fifteen specific statements in August 2005 she accused CACI of murder, rape, torture, and other crimes in Iraq.[189] Among the statements cited in CACI's complaint was Rhodes's comment that "unless we actually apologize for these, unless we have a president of the United States who says – look what's been done here and I know who did it and this is who did it and it was CACI and it was Titan and it was Blackwater and it was Halliburton and it was Bechtel and it was Dyncorp…and it was Triple –

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[187] *Id.*
[188] 2006 U.S. Dist. LEXIS 96057 (E.D. Va. 2006).
[189] *Id.* at **5-6.

whoever it was, and he actually says these people are going to be put on trial and they will be charged with murder, and … rape, and molesting children. And crimes against humanity…the recruitment for Al Qaeda is going to surpass our recruitment capabilities here in the United States."[190] In another statement, Rhodes told a caller who had asked about contractors at Abu Ghraib, "Don't call them contractors, call them what they are, they're hired killers, they're mercenaries…they're from everywhere, they're from DynCour and CACI and Titan in the prisons…"[191]

Rhodes originally defended on the ground that the statements were true.[192] She later took the position that she had not accused CACI of rape, torture, or murder at the detention facility, but had only stated that private contractors had "set conditions" for abusive acts to take place.[193] Citing *Milkovich* and *Horsley* for the general protection of hyperbolic speech, the federal district court in Virginia held in September 2006 that the allegations of rape and murder were non-actionable rhetorical hyperbole, as were allegations that CACI had fought on the side of apartheid in South Africa. The court also held that allegations of torture were not defamatory because they were not demonstrably false, and that the allegations of other crimes were not demonstrably false.[194]

The court's findings of rhetorical hyperbole centered on a finding that Rhodes's statements concerning CACI's role in rape and murder were "loose, figurative, and hyperbolic," and "not intended to be an objective reporting of the news."[195] Then, addressing the social context of talk radio in the United States, the court provided its sense of the type of speech to be

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[190] *Id.* at *10.
[191] *Id.* at **14-15.
[192] Brief of Appellants, U.S. Court of Appeals for the Fourth Circuit, Mar. 15, 2007, at 13.
[193] *Id.* at 14.
[194] CACI Premier Technology, Inc., 2006 U.S. Dist. LEXIS, at **30-63.
[195] *Id.* at **48-57.

found in that context. "Talk radio," the court stated, "is a forum for dialogue, heated discussion of issues of the day, and the venting of often bombastic and extravagant opinions of 'talking heads' like Ms. Rhodes and their diverse audience of callers. Talk radio, and Ms. Rhodes's show, is more a form of commentary and entertainment than so-called objective news reporting."[196] As a result, the host's allegations of murder and rape "'cannot reasonably be interpreted as stating actual facts' about CACI."[197] The court made similar findings about the allegations of collaboration with apartheid leaders.[198] When CACI filed an appeal before the Fourth Circuit, Rhodes argued that the district court had correctly characterized her allegations of rape and murder as statements no reasonable person could view as factual.[199]

Rhodes declared in her brief that she is an "entertainer, not a journalist," and that she "never said – and never intended to say – that CACI employees directly committed the crimes of rape, murder, or impersonation of officers, or that CACI itself worked for any pro-apartheid regime."[200] She maintained that her speech about murder and rape consisted of "overstated opinion," but that she "did not literally accuse CACI of committing the crimes of rape, murder, or torture, or of fighting for Apartheid governments," and that her statements could not be taken as "descriptive of factual matters."[201]

These statements are understandable but disturbing: they show Rhodes downplaying her own statements in order to fit the legal pigeon-hole of hyperbole. Of course, her keen interest in winning the case and not paying millions of dollars in damages to CACI provides strong practical justification for making whatever non-frivolous argument will assist her defense.

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[196] *Id.* at *54.
[197] *Id.* at *54 (murder), *57 (rape).
[198] *Id.* at **44-45.
[199] Brief of Appellees, U.S Court of Appeals for the Fourth Circuit, May 29, 2007, at 31.
[200] *Id.* at 5.
[201] *Id.* at 18, 19, 23.

However, it is unfortunate that First Amendment jurisprudence in such a case appears to require that speakers neutralize, even denigrate, their speech in order to secure its protection. Is there no other way to make an argument based on rhetorical hyperbole than to label one's challenged comments on vital public matters as nothing but the "overstated opinions" of an "entertainer" or "talking head" who had no purpose to be "descriptive"?

The First Amendment protection of verbal exaggeration on matters of public concern should find different vocabulary. If speech of that kind merits core protection, its connection to core values should be stated without apology or confusion. Although a new vocabulary is unlikely to come easily to judges and lawyers, trained to be linguistically precise and to avoid exaggeration at all cost, the jurisprudence of libel law should provide non-dismissive reasons for immunizing hyperbole. Moral speech, especially political invective, is privileged because, as Professor Lidsky has noted, "public debate entails appeals to the emotions as well as appeals to reason, and appeals to the emotions are often couched in loose, figurative, or hyperbolic language."[202] Lidsky adds that "the privilege for nonfactual expression is designed to protect the richness and texture of public discourse."[203] Professors Garsten and Yack also provide useful justifications for largely unconstrained appeals to emotion and character in public deliberation. Garsten notes that because political judgment "emerges from and draws upon a whole complex of emotions, dispositions, and tacit knowledge," speakers often seek to engage judgment "by appealing to passions and images as well as reasons."[204] This is not to equate the slanted, often angry observations of a talk-radio host to the eloquence of Cicero or the cadences of Martin Luther King. But as Professor Yack explains, public reasoning is less like a seminar and "more

[202] Lidsky, *Silencing John Doe, supra* note 35, at 939.
[203] *Id.*
[204] Garsten, Saving Persuasion, supra note 75, at 9.

like a contest for attention and allegiance."[205] Hyperbole allows a wide range of imaginative verbal participation in the moral, cultural, and political contest, speech that succeeds or fails in the marketplace of persuasion.

In *CACI v. Rhodes*, the court was forced to decide whether talk of criminal conduct was hyperbolic or factual. The Brennan approach to fact-opinion controversies may assist the court in determining an answer. What would the reasonable listener believe that the talk show host was intending to communicate? The literal charges were seemingly verifiable, and the mention of video-recorded acts gave concreteness to the charges, even if the video-recorded acts were not linked to CACI. Yet given the social context of on-air political talk, with its convention of imparting strongly held views to a like-minded audience, and given the host's repeated words of political and moral condemnation, and the internal context – a list of contractors without specific linkage to specific crimes – the district court was probably correct to conclude that the host primarily intended to cast serious moral opprobrium, rather than pinpointed conclusions of criminal guilt, on CACI and others.

Conclusion.

The *Milkovich* moment in a libel case comes early. Defendants raise the fact-opinion issue in order to shut down a suit soon after it is filed. Justice Brennan saw that a proper use of mental state could be introduced into fact-opinion analysis, as the ultimate query to which the *Ollman* factors point. This Article has argued for the good sense of the Brennan framework: it reflects a realistic understanding of how receivers of speech grasp what they have received, and it would likely extend the range of immunity for speech on matters of public concern. It would

[205] Yack, Rhetoric and Public Reasoning, supra note 84, at 427.

further the negative liberty of civic speech and thereby encourage the exercise of positive liberty by citizens at large. Once the problem of intent is solved, the remaining problems discussed in this Article may be closer to solutions. Issues of context, conjecture, and hyperbole can be sorted through more wisely once legal doctrine recognizes that public speech is not simply reducible to text but is the product of communication – the give-and-take, often vividly direct and verbally harsh, of a complex process of public reasoning.