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# Ambiguity in the Realm of Defamation: Rhetorical Hyperbole or Provable Falsity? - Gorilla Coffee, Inc. v. New York Times Co.

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**Cover Page Footnote**

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**AMBIGUITY IN THE REALM OF DEFAMATION:  
RHETORICAL HYPERBOLE OR PROVABLE FALSITY?**

**SUPREME COURT OF NEW YORK  
KINGS COUNTY**

Gorilla Coffee, Inc. v. New York Times Co.<sup>1</sup>  
(decided August 8, 2011)

**I. FACTUAL BACKGROUND**

In *Gorilla Coffee, Inc. v. New York Times Co.*,<sup>2</sup> the Supreme Court of Kings County held that statements made by employees concerning their work environment were not defamatory because the statements, which appeared on an online blog of the New York Times website, when viewed in the context of the entire post were “too subjective and vague to be considered anything more than an opinion.”<sup>3</sup> The court reasoned that a reasonable reader of the employees’ statements, which criticized their work environment as being “perpetually malicious, hostile, and demeaning,” would conclude that the statements were based on the employees’ own perception as opposed to an external source of information.<sup>4</sup> Moreover, nothing included in the statements was “capable of being objectively shown to be true or false.”<sup>5</sup> Furthermore, the contention that the statement was merely a subjective grievance by disgruntled employees became even more obvious when coupled with the context of the post—an ongoing labor dispute.<sup>6</sup>

Plaintiff, Gorilla Coffee, a wholesale seller of coffee located in the Park Slope section of Brooklyn, and Daren Scherer, its sole

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<sup>1</sup> No. 25520/2010, 2011 WL 3502777 (N.Y. Sup. Ct. Aug. 8, 2011).

<sup>2</sup> *Id.* at \*5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Gorilla*, 2011 WL 3502777, at \*5.

shareholder, brought an action for defamation against its former employees, the New York Times, and Oliver Strand, a columnist for the Times, for defamatory statements made by the employees that were published on the website's blog, "the City Room."<sup>7</sup> The dispute began when the Times posted an article by Oliver Strand on the City Room blog regarding a dispute that resulted in the closing of Park Slope coffee shop.<sup>8</sup> This post was followed by an additional article written by Strand that included statements made by former employees of Gorilla Coffee and was later updated to include the allegedly defamatory statements.<sup>9</sup>

The Supreme Court of Kings County indicated that in order to establish an actionable claim for defamation, it is first necessary to assess "whether the statements were defamatory in the first place."<sup>10</sup> If the statements are defamatory, then it must be determined "whether the statements constituted such an attack on the corporation's business reputation so as to be actionable without proof of special damages."<sup>11</sup> According to the court, defamation is "the making of a false statement of fact which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace."<sup>12</sup> In order for statements to be defamatory, it must be established that a reasonable "reader would perceive the alleged defamatory statements made were statements of fact" and not opinion, because it is well established that expressions of opinion "are constitutionally protected."<sup>13</sup>

<sup>7</sup> *Id.* at \*1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at \*1-2. The alleged defamatory statement made by employees and posted on the blog by Strand stated:

We the workers would have preferred to keep this between the people involved, thus our silence towards the press. However, we do feel it is important to clarify the situation for the friends and patrons of Gorilla Coffee. The issues brought up with the owners of Gorilla Coffee yesterday are issues that they have been aware of for some time. These issues which have repeatedly been brushed aside and ignored have created a perpetually malicious, hostile, and demeaning work environment that was not only unhealthy, but also, as our actions have clearly shown, unworkable.

*Id.*

<sup>10</sup> *Gorilla*, 2011 WL 3502777, at \*2.

<sup>11</sup> *Id.* (citing *First Nat'l Bank of Waverly, N.Y. v. Winters*, 121 N.E. 459, 460-61 (N.Y. 1918)).

<sup>12</sup> *Id.* (quoting *Rinaldi v. Holt, Rinehart & Winston*, 366 N.E.2d 1299, 1311 (N.Y. 1977)).

<sup>13</sup> *Id.* at \*3 (citing *Steinhilber v. Alphonse*, 501 N.E.2d 550, 550-53 (N.Y. 1986)).

In articulating the standard to be applied for determining whether a statement is defamatory, the court referred to *Immuno AG v. Moor Jankowski*,<sup>14</sup> which emphasizes that the New York Constitution provides even broader protection of free speech than the United States Constitution.<sup>15</sup> The court in *Immuno* retraced New York's "[early] history of a constitutionally guaranteed liberty of the press" and its "tradition . . . of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news.'" <sup>16</sup>

In evaluating whether the statements made were defamatory, the court relied on precedent set by the New York Court of Appeals in *Steinhilber v. Alphonse*,<sup>17</sup> which provided four factors to consider in distinguishing fact from opinion.<sup>18</sup> These factors include:

- (1) [A]n assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might "signal to readers or listeners that what is being read or

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In *Steinhilber*, the court stated that an opinion "receives the Federal constitutional protection accorded to the expression of ideas, no matter how vituperative or unreasonable it may be." *Steinhilber*, 501 N.E.2d at 552.

<sup>14</sup> 567 N.E.2d 1270 (N.Y. 1991).

<sup>15</sup> *Id.* at 1278. Compare N.Y. CONST. art. I, § 8 (McKinney's 2002) ("Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in the evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."), with U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for redress of grievances.").

<sup>16</sup> *Immuno*, 567 N.E.2d at 1277.

<sup>17</sup> 501 N.E.2d 550, 554 (N.Y. 1986).

<sup>18</sup> *Id.*

heard is likely to be opinion, not fact.”<sup>19</sup>

Moreover, the court distinguished between pure opinions and mixed opinions, the latter of which are opinions based upon undisclosed facts that insinuate that the opinion is really an assertion of fact.<sup>20</sup> While opinions are constitutionally protected, mixed opinions may be actionable.<sup>21</sup> According to the court, the rigorous task of determining whether a statement constitutes opinion or mixed opinion is accomplished by considering the context of the statement in its entirety and asking whether a reasonable person would infer “the assertion of undisclosed facts justifying the opinion.”<sup>22</sup> In applying this test, the court considered *Gross v. New York Times Co.*,<sup>23</sup> where the New York Court of Appeals held that statements made in articles published in the New York Times concerning Elliot Gross, the City’s Chief Medical Examiner, were actionable because they included “ ‘defamatory assertions that a reasonable reader would understand to be advanced as statements of fact.’ ”<sup>24</sup> The court reasoned that where undisclosed facts form the basis of a statement, the reader is less likely to question the integrity of the statement, automatically perceiving it as the truth.<sup>25</sup> The court exemplified this notion by explaining that “the statement ‘John is a thief’ ” is no more or less actionable than the statement “ ‘I believe John is a thief.’ ”<sup>26</sup> Thus, camouflaging a statement in the form of an opinion does not necessarily shield it from being found defamatory.<sup>27</sup> Relying on this precedent the court

<sup>19</sup> *Id.* (quoting *Ollman v. Evans*, 750 F.2d 970, 979-80 (D.C. Cir. 1984)).

<sup>20</sup> *Gorilla*, 2011 WL 3502777, at \*4.

<sup>21</sup> *Steinhilber*, 501 N.E.2d at 552-53 (“The actionable element of a ‘mixed opinion’ is not the false opinion itself—it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking.” (citing *Rand v. New York Times Co.*, 430 N.Y.S.2d 271, 274 (App. Div. 1st Dep’t 1980))).

<sup>22</sup> *Gorilla*, 2011 WL 3502777, at \*4 (quoting *Steinhilber*, 501 N.E.2d at 553).

<sup>23</sup> 623 N.E.2d 1163 (N.Y. 1993).

<sup>24</sup> *Gorilla*, 2011 WL 3502777, at \*4 (quoting *Gross*, 623 N.E.2d at 1166). The facts in the article included accusations that Gross took part in “cover-ups, directed the creation of ‘misleading’ autopsy reports and was guilty of ‘possibly illegal’ conduct—that, although couched in the language of hypothesis or conclusion, actually would be understood by the reasonable reader as assertions of fact.” *Gross*, 623 N.E.2d at 1168.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1169.

<sup>27</sup> *Id.*; see *People ex rel. Spitzer v. Grasso*, 801 N.Y.S.2d 584, 586 (App. Div. 1st Dep’t 2005) (finding statements actionable where a Chairman of the New York Stock Exchange made statements alluding to a particular undisclosed report); *Guerrero v. Carva*, 779

in *Gorilla* concluded that a reasonable reader would not perceive the statements made by employees as being based on any undisclosed facts.<sup>28</sup> To the contrary, a reasonable reader would infer that the statements were merely an expression of the employees' discernment with working conditions.<sup>29</sup>

## II. THE FEDERAL APPROACH TO DEFAMATION

### A. Heightening the Standard: From Public Officials to Matters of Public Concern

In *New York Times v. Sullivan*,<sup>30</sup> the United States Supreme Court for the first time imposed constitutional limits on state libel laws by restricting public officials from recovering on libel actions unless they demonstrate by clear and convincing evidence that the defamatory statement was made with knowledge of its falsity or reckless disregard for its truth or falsity.<sup>31</sup> In *Sullivan*, a Commissioner of the City of Montgomery, Alabama, whose duties included supervising the police department, brought an action for civil libel against the *New York Times* for statements made concerning alleged events during the Civil Rights Movement in a full-page advertisement contained in the newspaper.<sup>32</sup> While none of the statements mentioned

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N.Y.S.2d 12, 20 (App. Div. 1st Dep't 2004) (finding that defendants' statements were actionable because they made general accusations using assertions and provided no basis for those assertions).

<sup>28</sup> *Gorilla*, 2011 WL 3502777, at \*5.

<sup>29</sup> *Id.*

<sup>30</sup> 376 U.S. 254 (1964).

<sup>31</sup> *Id.* at 279-80.

<sup>32</sup> *Id.* at 256. The advertisement entitled "Heed Their Rising Voices" concerned the efforts of Southern Negro students engaging in non-violent demonstrations "in positive affirmation of the right to live in human dignity as guaranteed by the United States Constitution and Bill of Rights." *Id.* The advertisement further described how the efforts of the innocent demonstrators were being ransacked by "an unprecedented wave of terror." *Id.* Two portions of the text contained the alleged libelous statements. *Sullivan*, 376 U.S. at 256. The first portion stated:

In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school and truckloads of police armed with shotguns and tear gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

the Commissioner by name, he asserted that the reference to police implicated him because it was his duty to supervise the Montgomery Police Department.<sup>33</sup> The Court conceded that some statements were inaccurate portrayals of events that occurred in Montgomery.<sup>34</sup> At trial, the judge instructed the jury that the statements were “libelous per se” and that the newspaper should be held liable if it was found that the statements were “of and concerning” the Commissioner.<sup>35</sup> Hence, because the statements were libelous per se, falsity and malice were presumed.<sup>36</sup> The Supreme Court of Alabama affirmed the ruling.<sup>37</sup> However, the United States Supreme Court reversed, holding

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*Id.* at 257.

The second portion stated:

Again and again the Southern violators have answered Dr. King’s peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times- for ‘speeding,’ ‘loitering’ and similar ‘offenses.’ And now they have charged him with ‘perjury’—a felony under which they could imprison him for ten years. . . .

*Id.* at 257-58.

<sup>33</sup> *Id.* at 258. Thus, according to the Commissioner he was implicitly accused of “‘ringing’ the campus with police” and of “padlocking the dining hall in order to starve students into submission.” *Id.* He also contended that he was accused of arresting Dr. King seven times, answering protests “with ‘intimidation and violence,’ bombing his home, assaulting his person, and charging him with perjury.” *Sullivan*, 376 U.S. at 258.

<sup>34</sup> *Id.* The students who sang on the Capital steps did not sing ‘My Country, ‘Tis of Thee,’ but sang the National Anthem; students were expelled not for taking part in the demonstration but for demanding service at a lunch counter in the Montgomery County Courthouse on a different occasion; the boycott by students was carried out by them skipping classes for one day and did not involve a refusal to register for classes; and the dining hall was never padlocked. *Id.* at 258-59.

<sup>35</sup> *Id.* at 267. Under Alabama law, a statement is libelous per se if the words used “injure [the public official] in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust.” *Id.* In order to state a valid claim, the jury must ordinarily find that the statement concerns the plaintiff, however, if the plaintiff were a government official, then his position would be sufficient “to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge.” *Sullivan*, 376 U.S. at 267. Once this is established, the only defense the defendant has is to prove that the statements made were true. *Id.*

<sup>36</sup> *Id.* at 262. The trial judge rejected the argument that the findings violated the First and Fourteenth Amendments mandate of freedom of speech and freedom of the press. *Id.* at 262-63.

<sup>37</sup> *Id.* at 263. The Supreme Court of Alabama stated that “‘[w]here the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt,’ they are ‘libelous per se.’” *Sullivan*, 376 U.S. at 263 (alteration in original). The Court agreed with the jury’s finding that the statements made were of and concerning the Commissioner because “the average person knows that municipal agents, such as police . . . are under



that Alabama law inadequately protects freedom of speech and freedom of the press afforded by the First and Fourteenth Amendments in libel actions brought by public officials.<sup>38</sup> The Court declared that “libel can claim no talismanic immunity from constitutional limitations” and asserted that “[i]t must be measured by standards that satisfy the First Amendment.”<sup>39</sup> The Court reasoned that the advertisement at issue was “an expression of grievance and protest on a significant public issue of our time”; thus, it should be protected under the First Amendment because the interest of the public in voicing its concerns outweighs the interest of protecting a public official’s reputation.<sup>40</sup> Moreover, the Court asserted that along with the title of official comes expected criticism.<sup>41</sup> The Court declared, “If judges

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the control and direction . . . of a single commissioner.” *Id.*

<sup>38</sup> *Id.* at 264.

<sup>39</sup> *Id.* at 269. The Supreme Court retraced the historical roots of the freedom of expression and indicated that the constitutional safeguard of the First Amendment “‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)); see *Bridges v. California*, 314 U.S. 252, 270 (1941) (“[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.”); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”); *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444 (1969). The Court in *Whitney* stated:

Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression, that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

*Id.* at 375-76. The United States’ strong commitment to freedom of speech is further evidenced by its condemnation of the Sedition Act of 1798, which made it a crime to “write, print, utter or publish any false, scandalous and malicious writing or writings against the government of the United States.” *Sullivan*, 276 U.S. at 273-74.

<sup>40</sup> *Id.* at 271-73.

<sup>41</sup> *Id.* at 299 (Black, J., concurring) (“In a democratic society, one who assumes to act for

are to be treated as ‘men of fortitude, able to thrive in a hardy climate,’ surely the same must be true of other government officials, such as elected city commissioners.”<sup>42</sup> Consequently, the Court reasoned that a rule which mandates that all critics of official conduct must prove the truth of all factual assertions in order to escape liability in libel actions will stifle freedom of speech by deterring criticism due to fear that truth cannot be proven in a court of law.<sup>43</sup> Essentially, the Court provided that in order to afford citizens adequate constitutional protection there must be “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>44</sup>

In *Curtis Publishing Co. v. Butts*,<sup>45</sup> the United States Supreme Court extended the constitutional protection implemented for public officials to public figures.<sup>46</sup> Although the defamatory statements concerned a college football coach, the Court reasoned that the views and actions of “‘public figures’ . . . with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of ‘public officials’ with respect to the same issues and

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the citizens in an executive, legislative, or judicial capacity must expect that his officials acts will be commented upon and criticized.”).

<sup>42</sup> *Id.* at 273 (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

<sup>43</sup> *Id.* at 279 n.19. (“Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’ ” (quoting JOHN STEWART MILL, ON LIBERTY 15 (Oxford: Blackwell, 1947))).

<sup>44</sup> *Sullivan*, 276 U.S. at 279-80. Based on the assertion, the Court found that there was no evidence that the statements in the New York Times concerning the commissioner were made with malice; thus, the Court found no constitutional support for any judgment against the defendants. *Id.* at 285-86. The Court clarified that although the New York Times failed to check the accuracy of the statements, this at most constituted a finding of negligence, which is not sufficient to demonstrate the recklessness necessary to sustain a finding of actual malice. *Id.* at 287-88.

<sup>45</sup> 388 U.S. 130 (1967). *Butts* involved alleged defamatory statements published in the Post that charged Coach Wally Butts of the University of Georgia with conspiring to fix a football game. *Id.* at 135. Because Butts was a college coach paid by a private alumni association, he did not qualify as a public official under *Sullivan*. *Id.* However, the Court allowed the constitutional protection for critics to extend to statements made concerning public figures. *Id.* at 146.

<sup>46</sup> *Id.* at 155. According to the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974), “Those who, by reason of notoriety of their achievements or vigor and success with which they seek the public’s attention, are properly classed as public figures . . . .”

events.”<sup>47</sup> Therefore, the protection of the *New York Times* privilege is applicable to defamatory statements concerning public officials and public figures.<sup>48</sup>

Later in *Gertz v. Welch, Inc.*,<sup>49</sup> the United States Supreme Court distinguished between public and private individuals, emphasizing the need for a balance between safeguarding an individual’s right to freedom of speech and safeguarding an individual’s right to the protection of his own good reputation.<sup>50</sup> The Court asserted that private individuals are more deserving of recovery because they have not voluntarily availed themselves to the spotlight and are more vulnerable to injury due to lack of opportunity to rebut false statements through the effective channels of communication that are afforded to public individuals.<sup>51</sup> However, the Court also proclaimed that when the plaintiff is a private individual, the alleged defamatory speech involves a matter of public concern, and the defendant is a media publisher, the plaintiff must meet a higher burden by demonstrating that the statements were made with some level of culpability.<sup>52</sup> Nevertheless, the Court concluded that a different rule should be applied to de-

<sup>47</sup> *Curtis*, 388 U.S. at 162; *see id.* at 164 (Warren, C.J., concurring);

[A]lthough . . . not subject to the restraints of the political process, “public figures,” like “public officials,” often play an influential role in ordering society. And surely as a class these “public figures” have as ready access as “public officials” to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of “public officials.” The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

I therefore adhere to the *New York Times* standard in the case of “public figures” as well as “public officials.”

*Id.*

<sup>48</sup> *Gertz*, 418 U.S. at 342-43; *see Curtis*, 388 U.S. at 164 (Warren, C.J., concurring) (“All of us agree that the basic considerations underlying the First Amendment require that some limitations be placed on the application of state libel laws to ‘public figures’ as well as ‘public officials.’”).

<sup>49</sup> 418 U.S. 323 (1974).

<sup>50</sup> *Id.* at 348.

<sup>51</sup> *Id.* at 344-45.

<sup>52</sup> *Id.* at 351. The Court also ruled that states may not permit recovery through liability without fault, which presumes damages, or imposes punitive damages. *Id.* at 349.

famatory statements concerning private individuals due to the significant state interest in compensating injury to their reputation, and held that states may define for themselves the appropriate standard of liability for a publisher of “defamatory falsehood injurious to the reputation of a private individual.”<sup>53</sup>

### B. The Fruition of the Barricade: Separating Fact and Opinion

The United States Supreme Court in *Gertz* considered the extent of First Amendment protection against liability for defamation stemming from statements regarding private citizens and through dicta “elevated to constitutional principle the distinction between fact and opinion.”<sup>54</sup> Thus, the Court in *Gertz* “confirm[ed] the existence of an absolute privilege for expressions of opinion.”<sup>55</sup> While the Court acknowledged the value of even pernicious opinions in society, it emphasized the lack of constitutional value in false statements of fact, emphasizing that “[n]either the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide open’ debate on public issues.”<sup>56</sup>

Although the Court’s holding did not explicitly state that a court must distinguish fact from opinion, through dicta it implicitly suggested that both federal and state courts have “the duty as a matter of constitutional adjudication to distinguish facts from opinions in order to provide opinions with the requisite, absolute First Amendment protection.”<sup>57</sup> However, *Gertz* did little to clarify how the distinction between fact and opinion should be drawn.<sup>58</sup> Despite lack of

<sup>53</sup> *Gertz*, 418 U.S. at 345-46; see *infra* note 90 (extending the heightened burden for media defendants on matters of public concern to non-media defendants).

<sup>54</sup> *Ollman*, 750 F.2d at 975; see *Gertz*, 418 U.S. at 325.

<sup>55</sup> *Ollman*, 750 F.2d at 1017, 1020 (“*Gertz*’ pronouncement that the First Amendment confers an absolute privilege on expressions of opinion stands as one of the cardinal principles of free speech and press.”).

<sup>56</sup> *Gertz*, 418 U.S. at 340.

<sup>57</sup> *Ollman*, 750 F.2d at 975. Thus, *Gertz* “elevated to constitutional principle the distinction between fact and opinion, which at common law had formed the basis of the doctrine of fair comment.” *Id.* at 975. At common law, the doctrine of fair comment “bestowed qualified immunity from libel actions as to certain types of opinions” to allow writers to freely express their views about subjects of public significance. *Id.* at 974.

<sup>58</sup> *Id.* at 975. While the Court in *Gertz* failed to provide a distinction between fact and opinion, in *Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264 (1974), a case decided on the same day, the Court attempted to provide some guidance. *Letter Carriers* involved a la-

guidance, the majority of federal circuit courts have accepted *Gertz*'s protection of opinion as controlling law, but have grappled to define standards for separating fact from opinion.<sup>59</sup>

In the aftermath of *Gertz*, both federal and state courts struggle to navigate in "largely uncharted seas" through adopting various approaches for distinguishing between fact and opinion.<sup>60</sup> For example, in *Ollman v. Evans*,<sup>61</sup> the United States Court of Appeals for the D.C. Circuit, articulated a four-factor test for deciphering between actionable facts and protected opinions.<sup>62</sup> The four elements articulated by the court include: (1) the common usage or meaning of the specific language of the challenged statement itself; (2) the degree to which the statements are verifiable; (3) the context in which the statement occurs; and (4) a consideration of the broader social context into which the statement fits.<sup>63</sup> The court also noted that after determining that a statement is opinion it is often procedure to consider

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bor dispute that escalated when a newsletter was distributed which referenced the plaintiffs as "scabs," which it defined as "a traitor to his God, his country, his family and his class." *Id.* at 267-68. In analyzing whether the statements made were constitutionally protected, the Court considered the context of the communication and the typical language that would be used in the particular setting of a labor dispute. *Id.* at 272. Ultimately, the Court concluded that a reasonable reader would not have taken the statements made literally and would have understood that the words were "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join." *Id.* at 285.

<sup>59</sup> *Ollman*, 758 F.2d at 974 n.6; see *McBride v. Merrell Dow and Pharms., Inc.*, 717 F.2d 1460, 1464 (D.C. Cir. 1983); *Lewis v. Time Inc.*, 710 F.2d 549, 552-53 (9th Cir. 1983); *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983); *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 40 (2d Cir. 1983); *Bose Corp. v. Consumers Union, Inc.*, 692 F.2d 189, 193 (1st Cir. 1982), *aff'd on other grounds*, 466 U.S. 485 (1984); *Church of Scientology v. Cazares*, 638 F.2d 1272, 1286 (5th Cir. 1981); *Avins v. White*, 627 F.2d 637, 642 (3d Cir. 1980); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1114 (6th Cir. 1978).

<sup>60</sup> *Ollman*, 750 F.2d at 977. Courts have engaged in various techniques in an effort to distinguish fact from opinion. Some courts have merely treated the distinction as a judgment call and avoided the need to create any particular theory, while other courts have focused on a single factor. Compare *Shiver v. Apalachee Publ'g Co.*, 425 So. 2d 1175 (Fla. D.C. 1983) (determining that statements constituted opinion without utilizing any specific test in coming to its conclusion), with *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977) (adopting a single-factor test to verify the alleged defamatory statement). However, other courts have adopted multi-factor tests that attempt to consider the totality of the circumstances surrounding the defamatory statement. See, e.g., *Info. Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783-84 (9th Cir. 1980) (articulating three factors for determining whether a statement was a fact or opinion).

<sup>61</sup> 750 F.2d 970 (D.C. Cir. 1984).

<sup>62</sup> *Id.* at 979.

<sup>63</sup> *Id.*

whether the opinion implies that it is based on undisclosed facts, because if so, it should not be wrapped “in the mantle of the First Amendment’s opinion privilege.”<sup>64</sup>

However, the court stated that this second inquiry concerning whether a statement is based on underlying undisclosed facts is superfluous because factors one and two of the *Ollman* Test “bear on the ability of a statement to carry factual implications.”<sup>65</sup> Moreover, factors three and four also affect whether a reasonable reader will infer that the statement is based on undisclosed facts.<sup>66</sup> After a thorough analysis under the factors set forth, the court concluded that the statements made constituted opinion.<sup>67</sup> The court emphasized the duty “‘to assure to the freedoms of speech and press that ‘breathing space’ essential to their fruitful exercise,’ ” which is impeded upon when one strives to “squeeze factual content from a single sentence in a column that is otherwise clearly opinion.”<sup>68</sup>

In *Milkovich v. Lorain Journal Co.*,<sup>69</sup> the Supreme Court clarified that “[there is no] wholesale defamation exemption for anything that might be labeled opinion.”<sup>70</sup> Thus, a defamatory statement masquerading under the disguise of an opinion earns no greater pro-

<sup>64</sup> *Id.* at 984; see RESTATEMENT (SECOND) OF TORTS § 566 (2011) (“A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.”).

<sup>65</sup> *Ollman*, 750 F.2d at 985.

<sup>66</sup> *Id.* In applying this test, the court found that the allegedly defamatory statements made by two newspaper columnists regarding a political science professor that appeared in the Washington Post and other newspapers across the nation were opinion, and thus constitutionally protected. *Id.* at 971. In its analysis, first, the court indicated that the column appeared on the Op-Ed page of the newspaper, which is understood by the average reader as a forum of opinion and is not viewed as “hard news like those printed on the front page or elsewhere in the news sections of the newspaper.” *Id.* at 986. Moreover, the court indicated, that the entire column viewed as a whole provided the impression that the columnists merely questioned the intentions of the professor; it did not suggest the columnists’ conclusive firsthand knowledge. *Id.* at 987.

<sup>67</sup> *Ollman*, 750 F.2d. at 990.

<sup>68</sup> *Id.* at 991 (quoting *Gertz*, 418 U.S. at 342).

<sup>69</sup> 497 U.S. 1 (1990). The case concerned alleged defamatory statements made by a columnist for an Ohio Newspaper concerning a high school wrestling coach, regarding a brawl at a match that resulted in the hospitalization of multiple team members and suspension of the school from participation in future tournaments. *Id.* at 3-4. The allegations were that the coach lied under oath in a judicial proceeding about the incident. *Id.* *Milkovich* filed suit for defamation, and the Supreme Court granted certiorari to consider the recognition of a constitutionally required opinion exception to the application of defamation laws. *Id.* at 6-7.

<sup>70</sup> *Id.* at 18.

tection simply because a speaker presents it as an opinion.<sup>71</sup> However, the Court rejected the contention that the First Amendment requires a separate opinion privilege limiting the application of state defamation and reasoned that the “ ‘breathing space’ which ‘[f]reedoms of expression require in order to survive,’ is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between ‘opinion’ and fact.”<sup>72</sup> After rejecting the notion that “in every defamation case the First Amendment mandates an inquiry into whether a statement is ‘opinion’ or ‘fact,’ ” the Court indicated that henceforth, the inquiry should be whether the defendant’s statements are false accusations.<sup>73</sup> Hence, courts should not assess whether the alleged defamatory statements constitute opinion, but instead whether the statements made contain “the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed” the acts being alleged.<sup>74</sup> Thus, after *Milkovich*, statements that contain or imply assertions of provably false-fact will likely be actionable for defamation.<sup>75</sup> While *Milkovich* presented an opportunity for the Supreme Court to clarify the extent to which opinions can be expressed without fear of future litigation, the Court did little to resolve the issue, prompting state courts to independently implement their own jurisdictional standards.

### III. The New York Approach to Defamation: Fortifying the Protection of Free Speech

It is well established that matters of free expression are a matter of state common law and state constitutional law, leaving the Supreme Court under the federal constitution to fix only the minimum

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<sup>71</sup> *Id.* at 18-19 (“[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words ‘I think.’ ”).

<sup>72</sup> *Milkovich*, 497 U.S. at 19 (quoting *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986)).

<sup>73</sup> *See id.* at 21 (stating that lower courts have mistakenly relied on the dictum of *Gertz*).

<sup>74</sup> *Id.*

<sup>75</sup> Ultimately, the Court found that the column strongly suggested that *Milkovich* perjured himself because it was not presented in any way that would lead a reasonable reader to believe it was not true. *Id.* at 21. Thus, because the connotation of the column that *Milkovich* committed perjury was sufficiently capable of being proven true or false, the statement was actionable. *Id.*

standards applicable to the states, and allowing state courts to supplement those standards however they see fit.<sup>76</sup> New York State has adopted a broader protection of free speech than required under the First Amendment.<sup>77</sup> This broad protection is embodied in the New York State Constitution, which states that “[e]very citizen may freely speak, write, and publish . . . sentiments on all subjects,”<sup>78</sup> and reflects the deliberate choice of the New York State Constitutional Convention to articulate a more affirmative declaration of liberty of the press rather than merely adopting the language of the First Amendment.<sup>79</sup> It is a long tradition of New York State courts in defamation actions to consider statements in their context and examine their effect on a reasonable reader rather than viewing them in isolation.<sup>80</sup>

#### A. Adopting the Requirement of Actual Malice: Public Officials and Public Matters

New York Courts follow the precedent set by *Sullivan* in weighing claims for defamation regarding public officials. In *Rinaldi v. Holt, Rinehart, & Winston*,<sup>81</sup> the New York Court of Appeals used the standard announced in *Sullivan*, which prevents a public official from recovering damages for defamatory falsehoods relating to his official misconduct unless he proves that the statement was made

<sup>76</sup> *Immuno*, 567 N.E.2d at 1277.

<sup>77</sup> *Id.* at 1278.

<sup>78</sup> N.Y. CONST. art I. § 8.

<sup>79</sup> *Immuno*, 567 N.E.2d at 1277-78; see *O’Neill v. Oakgrove Constr., Inc.*, 523 N.E.2d 277, 280-81 (N.Y. 1988);

The expansive language of our State constitutional guarantee, its formulation and adoption prior to the Supreme Court’s application of the First Amendment to the States, the recognition in very early New York history of a constitutionally guaranteed liberty of the press, and the consistent tradition in this State of providing the broadest possible protection to “the sensitive role of gathering and disseminating news of public events,” all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference.

*O’Neill*, 523 N.E.2d at 280-81.

<sup>80</sup> *Immuno*, 567 N.E.2d at 1281; see, e.g., *James v. Gannett Co.*, 353 N.E.2d 834, 837-38 (1976) (indicating that the statement should be examined in the context of the entire publication).

<sup>81</sup> 366 N.E.2d 1299 (1977).



with actual malice.<sup>82</sup> The plaintiff, a New York Supreme Court Justice, brought an action for defamation claiming he was libeled in the book “Cruel and Unusual Justice,” which was authored by Jack Newfield and published by Holt, Rinehart & Winston.<sup>83</sup> In the book, the Justice was described as being “very tough on long-haired attorneys and black defendants, especially on questions of bail, probation, and sentencing.”<sup>84</sup> It went on to charge that the Justice’s “judicial temper softens remarkably before heroin dealers and organized crime figures.”<sup>85</sup> Despite the defamatory nature of the statements, the court asserted that because a public official “runs the risk of closer public scrutiny than might otherwise be the case,” the Justice could not recover from the defendants “for simply expressing their opinion of his judicial performance, no matter how unreasonable, extreme or erroneous these opinions might be.”<sup>86</sup> Thus, through most of his criticism the author merely set forth the basis for his belief that the Justice was incompetent and should be removed from office, allowing each reader to draw his own conclusion.<sup>87</sup>

Further, in *Chapadeau v. Utica Observer-Dispatch, Inc.*,<sup>88</sup> the New York Court of Appeals held that on matters of public concern, a plaintiff may only recover if he or she establishes “that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.”<sup>89</sup> Although the language in *Chapadeau* suggests that the fault standard only applies to media defendants, courts have implemented it in cases involving matters of public concern for non-media defendants.<sup>90</sup> However, neither the Supreme

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<sup>82</sup> *Id.* at 1305.

<sup>83</sup> *Id.* at 1303.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Rinaldi*, 366 N.E.2d at 1306.

<sup>87</sup> *Id.* According to the court, the assertions in the book claiming that the Justice was “probably corrupt,” were likely to portray to the reader that the Justice had committed illegal and unethical actions of criminal activity, and therefore were not part of the constitutionally protected opinion. *Id.* at 1307. Moreover, because the burden of proof lies upon the plaintiff, the court concluded that the Justice failed to present sufficient evidence as to the falsity and maliciousness of the accusations. *Id.*

<sup>88</sup> 341 N.E.2d 569 (N.Y. 1975).

<sup>89</sup> *Id.* at 571.

<sup>90</sup> *See, e.g.,* *McGill v. Parker*, 582 N.Y.S.2d 91, 97-98 (App. Div. 1st Dep’t 1992) (“There is no reason, however, why the Constitution should be construed to provide greater protection to the media in defamation suits than to others exercising their freedom of

Court nor the New York Court of Appeals has addressed the issue “of whether the constitutional limitations apply to nonmedia defendants.”<sup>91</sup>

### B. Actionable Fact Versus Protected Opinion

The *Gertz* precedent—stating expressions of pure opinion are not actionable—is followed by New York courts, which have attempted to distinguish protected pure opinions from actionable mixed opinions.<sup>92</sup> In *Steinhilber*, the New York Court of Appeals emphasized that in distinguishing fact from opinion courts must refrain from adopting a rigid set of criteria and instead maintain “the flexibility to consider the relevant factors and to accord each the degree of importance which the specific circumstances warrant.”<sup>93</sup> In evaluating the statement made by defendants, which labeled the plaintiff, a member of a union who violated its rules by continuing to work while the union was on strike, as a scab that lacked “talent, ambition, and initiative,” the court articulated its own broad standard for distinguishing protected expressions of opinion from actionable assertions of fact.<sup>94</sup> The court stated:

A “pure opinion” is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be “pure opinion” if it does not imply that it is based upon undisclosed facts. When, however, the statement of opinion implied that it is based upon facts which justify the opi-

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speech . . . .”); *Pollnow v. Poughkeepsie Newspapers, Inc.*, 486 N.Y.S.2d 11, 15-16 (App. Div. 2d Dep’t 1985) (concluding that “a nonmedia individual defendant who utilizes a public medium for the publication of matter deemed defamatory should be accorded the same constitutional privilege as the medium itself”).

<sup>91</sup> *Pollnow*, 486 N.Y.S.2d at 16.

<sup>92</sup> *Steinhilber*, 501 N.E.2d at 552.

<sup>93</sup> *Id.* at 554. Although the court advocated a formulistic approach in distinguishing fact from opinion, it noted that other courts have eschewed from this approach adopting a specific criteria and setting forth general guidelines. *See, e.g.*, *Mr. Chow of N.Y. v. Ste. Jour Azur S.A.*, 759 F.2d 219, 226 (2d Cir. 1985) (adopting the *Ollman* Test); *Control Corp.*, 611 F.2d at 784 (adopting a multifactor totality of the circumstances test); *Buckley v. Littell*, 539 F.2d 882, 895-96 (2d Cir. 1976) (looking at the context of the statement and whether the statement conveyed could be interpreted in multiple ways and was “loosely definable”).

<sup>94</sup> *Steinhilber*, 502 N.E.2d at 552.

nion but are unknown to those reading or hearing it, it is a ‘mixed opinion’ and is actionable. The actionable element of a “mixed opinion” is not the false opinion itself—it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking.<sup>95</sup>

Ultimately, the court concluded that the criticism of the plaintiff union worker was “expressed in the form of heavy-handed and nonsensical humor,” and therefore, the statement “was not intended to be understood as an assertion of fact or as opinion based on undisclosed facts.”<sup>96</sup> Moreover, the court concluded that the circumstances and broader social context of the statement, an ongoing dispute in which the union sought to punish a former member, confirmed the conclusion that the statement would not be taken literally.<sup>97</sup>

In *Sandals Resorts International Ltd. v. Google, Inc.*,<sup>98</sup> the Appellate Division, First Department, applied the standard articulated in *Steinhilber*.<sup>99</sup> Sandals Resorts International, a corporation that operates multiple resorts in Jamaica, sought disclosure of information that would enable it to bring an action for defamation against the holder of a Google Gmail account who sent an email criticizing the corporation’s treatment of native Jamaican employees.<sup>100</sup> Essentially,

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<sup>95</sup> *Id.* at 552-53. Subsequently, in *Immuno*, the New York Court of Appeals clarified that the New York State Constitution provides broader speech protections than the United States Constitution under *Milkovich*, and announced that “the standard articulated and applied in *Steinhilber*, furnishes the operative standard in this State for separating actionable fact from protected opinion.” *Immuno*, 567 N.E.2d at 1280.

<sup>96</sup> *Steinhilber*, 501 N.E.2d at 555.

<sup>97</sup> *Id.* Compare *Springer v. Almontaser*, 904 N.Y.S.2d 765, 767 (App. Div. 2d Dep’t 2010) (concluding that a reasonable person would not view the alleged defamatory statements as conveying facts about the plaintiffs, but rather as mere opinion because the statements were made in the context of a public campaign); *Brian v. Richardson*, 660 N.E.2d 1126, 1131 (N.Y. 1995) (concluding that the defamation claim against the defendant was properly dismissed because the purpose of the article was to advocate an independent governmental investigation and a reasonable reader would understand the statements “as mere allegations to be investigated rather than facts”), with *Gross*, 623 N.E.2d at 1166 (finding plaintiff’s complaint had both actionable assertions of fact as well as non-actionable opinions and conclusions because the articles contained defamatory assertions that a reasonable reader would understand to be advanced as statements of fact).

<sup>98</sup> 925 N.Y.S.2d 407 (App. Div. 1st Dep’t 2011).

<sup>99</sup> *Id.* at 413.

<sup>100</sup> *Id.* at 409.

the email stated that the foreign corporation which owns the resort company limits hiring to foreigners for its senior positions and hires natives only for menial jobs at the resorts despite the subsidies paid to the Sandals resorts by Jamaican taxpayers.<sup>101</sup>

Although the court agreed that the connotation of the email conveyed that Sandals engaged in racist hiring practices, it declared that the determination of whether there is a valid action for defamation does not simply turn on whether statements made in the writing may be understood to state facts.<sup>102</sup> The court stated that “[e]ven apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole.”<sup>103</sup> Alternatively, the court insisted that the writing must be construed as a whole and considered in the overall context of the publication to determine “whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.”<sup>104</sup> Moreover, it advised that courts should consider the communication in its entirety, paying special attention to the tone in which the message is conveyed.<sup>105</sup>

In following these criteria, the court found that the email was merely an exercise in rhetoric that sought to raise questions in the mind of the reader regarding the role of Jamaican nationals in Sandal’s resorts.<sup>106</sup> The court further indicated that the underlying tone of the email exposed the “anger and resentment” of the writer, conveying that it was purely an expression of personal views.<sup>107</sup> In fact, the email did not imply it was based on undisclosed facts; rather, it provided hyperlinks to demonstrate the facts upon which it was based, further affirming that it constituted pure opinion.<sup>108</sup> Finally, the broader context of the email involved the “freewheeling, anything-goes” nature of the Internet, which is a typical forum for voicing opinions through techniques such as blogging, further confirming

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 414.

<sup>103</sup> *Sandals*, 925 N.Y.S.2d at 414.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 415.

<sup>107</sup> *Id.*

<sup>108</sup> *Sandals*, 925 N.Y.S.2d at 415.

the conclusion that the email was purely an expression of opinion.<sup>109</sup>

#### IV. CONCLUSION

*Gorilla v. New York Times* highlights a prominent issue in litigation—whether alleged defamatory statements constitute fact or opinion: a distinction that determines the fate of any plaintiff who seeks compensation for damage caused to their forever-tainted reputation. The Supreme Court has implemented “constitutional limits on the type of speech that may be actionable under state defamation law.”<sup>110</sup> There are three types of speech that do not constitute actionable claims for defamation: rhetorical hyperbole or imaginative expression, pure opinion that does not imply a provably false fact, and statements that cannot be reasonably interpreted as conveying facts about the plaintiff.<sup>111</sup>

However, the New York State Constitution provides greater protection for statements of opinion than is required under federal law.<sup>112</sup> The New York Court of Appeals articulated the standard to distinguish between fact and protected opinion, mandating that courts assess whether a reasonable reader would have believed that the challenged statements were conveying facts about the plaintiff.<sup>113</sup> Thus, the disparity between the New York standard and the federal standard is that New York courts analyze “the full context of the challenged speech whereas the federal approach [articulated in *Milkovich* merely] requires a determination as to whether the precise words express or imply a provably false fact.”<sup>114</sup> Thus, under the New York State Constitution, courts have adopted a more flexible test that is emphatically more defensive of “the cherished constitutional guarantee of

<sup>109</sup> *Id.* at 415; see Eirik Cheverud, *Cohen v. Google, Inc.*, 55 N.Y.L. SCH. L. REV. 333, 335-36 (2011) (stating that the conflict between First Amendment rights and defamatory speech arises more frequently due to the distinct culture of internet communications).

<sup>110</sup> NEW YORK PATTERN JURY INSTRUCTIONS – Civil 3:24 (2011).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See *supra* note 95.

<sup>114</sup> NEW YORK PATTERN JURY INSTRUCTIONS – Civil 3:24, *supra* note 110. Compare *Milkovich*, 497 U.S. at 19-20 (“[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.”), with *Brian*, 660 N.E.2d at 1131 (analyzing the full context of the challenged speech).

free speech” than that of the Supreme Court.<sup>115</sup>

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<sup>115</sup> *Immuno*, 567 N.E.2d at 1282.

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