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## **How Does the New York Constitution Compare to the U.S. Constitution? (Annual Issue on New York State Law: Trends and Developments)**

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# HOW DOES THE NEW YORK CONSTITUTION COMPARE THE U.S. CONSTITUTION?

Eileen R. Kaufman\* and Leon Friedman\*\*

*Dean Eileen Kaufman:*

The name of this segment of the program should be "Sex, Lies and Videotapes." I will start out by talking about lies, and Leon Friedman will add to that discussion and then shift to sex and videotapes, and maybe shopping centers as well.

One of the most interesting, and certainly most litigated, defamation questions in this state is when constitutional protection should be afforded speech that arguably would be regarded as opinion. In resolving that question, the New York Court of Appeals has decided that the New York State Constitution affords greater protection for speech than does the federal constitution.

Until 1990, courts had generally resolved this issue by looking at the speech and deciding whether it fell on the fact or opinion side of the line. If it fell on the opinion side of the line, it was automatically constitutionally protected. Courts relied in large part on dictum in *Gertz v. Robert Welch, Inc.*,<sup>1</sup> where the

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<sup>1</sup> 418 U.S. 323 (1974). In *Gertz*, a family hired an attorney to represent them in civil litigation against the state after their son was killed by a police officer. *Id.* at 326. A magazine covering the trial described the attorney as a "Leninist" and a "Communist-fronter" and the attorney subsequently filed a libel action against the author and publisher. *Id.* at 326-27. The trial court and reviewing court of appeal had held the plaintiff to the standard of a public figure, thereby necessitating that he prove actual malice on the part of the

Supreme Court stated "under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction; not on the conscience of judges and juries, but on the competition of other ideas."<sup>2</sup>

To the surprise of many, the Supreme Court in *Milkovich v. Lorain Journal Co.*,<sup>3</sup> chided us for taking the *Gertz* language so literally, and said that, "it was not intended to create a wholesale defamation exemption for anything that might be labeled opinion."<sup>4</sup> So for example, if I were to say, "John Smith is a murderer," we would all agree that is defamatory. If instead I were to say, "In my opinion, John Smith is a murderer," that too would be defamatory. Those three words, "in my opinion," are treated as mere equivocation and do not serve to lessen the defamatory import of my words. However, if I change it and say, "John Smith supports the death penalty, John Smith is a murderer," that would not be actionable. That would be understood by the reader or the listener as an expression of a moral judgment rather than an assertion of a fact capable of being proved true or false. Therefore that statement would be constitutionally protected.

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publisher. *Id.* at 330. The Supreme Court reversed stating that the plaintiff was not a public figure and that the lower courts had erroneously held him to the higher standard imposed upon those so categorized. *Id.* at 352.

<sup>2</sup> *Id.* at 339-40 (quoting from Thomas Jefferson's First Inaugural Speech wherein he stated "[i]f there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.").

<sup>3</sup> 497 U.S. 1 (1990). In *Milkovich*, plaintiff had asserted a libel claim against a local newspaper that printed an article in which plaintiff was accused of lying at an investigatory hearing. *Id.* at 4. The lower courts had granted summary judgment against plaintiff stating that the article was "constitutionally protected opinion." *Id.* at 10. The Supreme Court reversed stating that "the dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements . . . imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding." *Id.* at 21. The Court stated that a balance must be struck between allowing "free and uninhibited discussion of public issues" with "preventing and redressing attacks upon reputation." *Id.* at 22 (citation omitted).

<sup>4</sup> *Id.* at 18.

In *Milkovich*, Chief Justice Rehnquist said that, rather than focus on an artificial dichotomy between fact and opinion, the approach focuses on the actual words that are challenged to see whether they assert or imply a provably false fact.<sup>5</sup> In other words, only defamatory statements that are capable of being proved false are subject to liability under state libel law.<sup>6</sup> Therefore, under *Milkovich*, the essential task is to disentangle assertions of fact from statements that do not assert or imply provably false facts.

Using its newly announced standard and applying it to the facts in *Milkovich*, the Court concluded that the speech at issue was not constitutionally protected. The plaintiff in *Milkovich* was a high school wrestling coach whose team had been involved in a fight during a match. Milkovich testified at a hearing held by the Ohio High School Athletic Association. Sanctions were imposed on the team and the coach, although the sanctions were subsequently set aside.<sup>7</sup> A newspaper ran an article that basically accused Milkovich of lying at that hearing. Coach Milkovich brought a defamation suit against the newspaper, arguing that the article accused him of perjury and thereby ruined his reputation.<sup>8</sup>

Although the lower courts had held that the statements in the article constituted constitutionally protected opinion,<sup>9</sup> the Supreme Court reversed, finding that the article accused him of perjury, which was a provably false fact, and therefore actionable.<sup>10</sup>

If the *Milkovich* Court had stopped there, it would undoubtedly have been a decision that sharply limited the constitutional protection afforded speech. However, the Court explicitly reaffirmed three earlier decisions of the Supreme Court that together stand for the proposition that statements that cannot be

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<sup>5</sup> *Id.* at 19.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 6-7.

<sup>9</sup> *Id.* at 7.

<sup>10</sup> *Id.*

reasonably understood as asserting actual facts are protected:<sup>11</sup> statements that could be characterized as rhetorical hyperbole, or imaginative expression, or mere name calling.<sup>12</sup>

The first of these three cases is *Greenbelt Cooperative Publishing Association v. Bresler*.<sup>13</sup> In *Greenbelt*, a newspaper characterized a real estate developer's negotiating position as "blackmail."<sup>14</sup> The Court described that as merely a vigorous epithet used by those who considered the developer's negotiating position to be extremely unreasonable.<sup>15</sup>

The second case expressly reaffirmed in *Milkovich* is *National Association of Letter Carriers v. Austin*.<sup>16</sup> In *Letter Carriers*, a local newspaper called a union scab a traitor.<sup>17</sup> The Court said that this was clearly loose figurative language expressing a lusty

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<sup>11</sup> See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970).

<sup>12</sup> *Id.*

<sup>13</sup> 398 U.S. 6. In *Greenbelt*, a local real estate developer sued for libel a newspaper that had reported on local town ordinance meetings and had labeled the developer's negotiating position as employing "blackmail." *Id.* at 7. Plaintiff was awarded damages following a jury trial. *Id.* at 8. The Supreme Court reversed finding fatal error in the jury charge given by the trial judge in that his instructions allowed the jury to find liability "merely on the basis of a combination of falsehood and general hostility." *Id.* at 10. The Supreme Court stated that for the charge to have been constitutionally sufficient, it should have stated that a public figure was entitled to a civil remedy "only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true." *Id.*

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.* at 14.

<sup>16</sup> 418 U.S. 264 (1974). In *Letter Carriers*, two postmen who had not joined the postman's union enacted defamation actions against a local newspaper that printed their names under a heading entitled "List of Scabs." *Id.* at 267. Plaintiffs prevailed at trial and were awarded compensatory and punitive damages. *Id.* at 269. The Supreme Court reversed holding that "no such factual representation can reasonably be inferred, and the publication is protected under the federal labor laws" as a "lusty and imaginative expression of the contempt felt by union members towards those who refuse to join." *Id.* at 286-87.

<sup>17</sup> *Id.* at 267.

and imaginative expression of the contempt felt by union members and was not actionable.<sup>18</sup>

The third, my favorite, although it is not really a defamation case but rather an intentional infliction of emotional distress case, is *Hustler Magazine v. Falwell*.<sup>19</sup> I am sure you remember that case. Hustler Magazine ran an ad parody based on a Campari Liqueur ad campaign employing a sexual innuendo about the "first time" someone tried Campari.<sup>20</sup> *Hustler Magazine*, taking off on that ad campaign, ran a cartoon that depicted Jerry Falwell having sex in an outhouse with his mother with a caption describing Jerry Falwell's "first time."<sup>21</sup> The Court had little trouble concluding that that was not actionable because no reader would look at that depiction and understand it to be asserting an actual fact about the plaintiff.<sup>22</sup>

There is no question that by reaffirming these three cases, *Greenbelt*, *Letter Carriers*, and *Hustler Magazine*, the Court blunted what would otherwise have been the sharp impact of the *Milkovich* ruling. Before one applies the *Milkovich* rule that requires the courts to parse the actual words and see whether they assert or imply a provably false fact, the court has to make an initial determination as to whether the challenged words are merely rhetorical hyperbole or loose figurative language that would not be understood as factual.<sup>23</sup>

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<sup>18</sup> *Id.* at 285-86.

<sup>19</sup> 485 U.S. 46 (1988). In *Hustler*, a popular religious leader instituted an action against the publisher of a magazine that printed an advertisement parody of a liquor ad in which the religious leader reminisces about his "first time" (having sex) as having been with his mother in an outhouse. *Id.* at 48. The Supreme Court held the speech was constitutionally protected as being part of "the free flow of ideas and opinions on matters of public interest and concern." *Id.* at 50.

<sup>20</sup> *Id.* at 48.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 57.

<sup>23</sup> See generally *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Greenbelt v. Cooperative Publishing Ass'n*, 398 U.S. 6 (1970).

How does this play out under the New York State Constitution? In *Immuno A.G. v. Moor-Jankowski*,<sup>24</sup> Chief Judge Kaye, writing for the majority, concluded that the New York State Constitution provides more protection for speech than does the First Amendment to the United States Constitution.<sup>25</sup> In reaching this conclusion, she relied on a number of factors. One was that New York, as the so called cultural center of the country, has a long tradition of providing a hospitable climate for the free exchange of ideas.<sup>26</sup> New York has consistently provided the broadest possible protection for freedom of the press.<sup>27</sup>

This idea was the focus of a concurring opinion written by Judge Wachtler some years earlier in *Beach v. Shanley*,<sup>28</sup> where he argued that the state constitution should be interpreted to provide more protection for speech than the federal constitution.<sup>29</sup> He based that conclusion on New York City's long tradition,

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<sup>24</sup> 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991). In *Immuno*, a corporation commenced a libel action against the author and publisher of a letter that appeared in a medical journal that was critical of the corporation's plan to establish a hepatitis research center that would use chimpanzees in its biomedical research. *Id.* at 240, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908.

<sup>25</sup> *Id.* at 249, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913. See U.S. CONST. amend. I. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." *Id.*

<sup>26</sup> *Immuno*, 77 N.Y.2d at 249, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913.

<sup>27</sup> *Id.*

<sup>28</sup> 62 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765 (1984). In *Beach*, a reporter sought to quash a subpoena duces tecum that called for his appearance at a Grand Jury to answer questions regarding the source of information that was leaked from a previous Grand Jury investigation. *Id.* at 246, 567 N.E.2d at 306, 566 N.Y.S.2d at 767. The reporter argued that forcing him to disclose the source of the information was violative of the "Shield Laws" enacted to protect the media from being held in contempt when protecting the identify of a news source. *Id.* at 245, 567 N.E.2d at 306, 566 N.Y.S.2d at 767. The Court of Appeals agreed and rejected the plaintiff's argument that application of the Shield Laws in this instance would impermissibly "impair or suspend" the Grand Jury's investigation. *Id.* at 254, 567 N.E.2d at 311, 566 N.Y.S.2d at 772. The Court of Appeals held that the statute was valid and operated to protect the source of the reporter's information. *Id.*

<sup>29</sup> *Id.* at 256, 567 N.E.2d at 312, 566 N.Y.S.2d at 773 (Wachtler, J., concurring).

dating back to colonial times, of protecting free speech.<sup>30</sup> He pointed to the acquittal of John Peter Zenger as illustrative of the state's long tradition of broadly protecting freedom of the press.<sup>31</sup>

In *Immuno*, Judge Kaye also relied on the differences in constitutional text.<sup>32</sup> The First Amendment<sup>33</sup> reads very differently from Article I, section 8 of the New York State Constitution.<sup>34</sup> Section 8, adopted in 1821, provides, "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."<sup>35</sup> Judge Kaye noted that the framers of that provision made a conscious choice not to use the language of the First Amendment,<sup>36</sup> preferring rather "to set forth a basic democratic ideal of liberty of the press in strong affirmative terms."<sup>37</sup>

Analyzing the issue under New York State constitutional law, the Court adopted a highly contextual approach, under which courts have to go beyond the *Milkovich* rule of parsing the precise words to determine whether they assert or imply a provably false fact.<sup>38</sup> Judge Kaye found that the *Milkovich* approach provided insufficient protection to the central values protected by Article I, section 8 of the New York State Constitution.<sup>39</sup>

The Court held that New York's constitutional free speech guarantee shields statements when made in a context that would lead a reasonable reader to consider the statements as an expression of opinion rather than a statement of fact.<sup>40</sup>

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<sup>30</sup> *Id.* at 255-56, 567 N.E.2d at 312, 566 N.Y.S.2d at 773 (Wachtler, J., concurring).

<sup>31</sup> *Id.* (Wachtler, J., concurring).

<sup>32</sup> *Immuno*, 77 N.Y.2d at 249, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913.

<sup>33</sup> U.S. CONST. amend I.

<sup>34</sup> N.Y. CONST. art. I, § 8.

<sup>35</sup> *Id.*

<sup>36</sup> *Immuno*, 77 N.Y.2d at 249, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913.

<sup>37</sup> *Id.*

<sup>38</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990).

<sup>39</sup> *Immuno*, 77 N.Y.2d at 249-50, 567 N.E.2d at 1277-78, 566 N.Y.S.2d at 913-14.

<sup>40</sup> *Id.*



In *Immuno*, the challenged statement appeared in a letter to the editor of a scientific journal.<sup>41</sup> The letter was written by an animal rights activist, and was highly critical of plaintiff's plan to establish a center in Africa for hepatitis research using chimpanzees.<sup>42</sup>

Judge Kaye articulated a three-step process for evaluating whether or not the statement was actionable.<sup>43</sup> First, courts should look at the words themselves to see if they are specific or ambiguous.<sup>44</sup> Next, courts should determine whether the words are objectively capable of being proved true or false.<sup>45</sup> Up until this point, the analysis is little different from *Milkovich*. However, the third step in the process requires courts to look at the full context of the communication in which the statement appeared,<sup>46</sup> as well as the broader social context and surrounding circumstances to see whether they signal to the audience that what is being read or heard is likely to be opinion, not fact.<sup>47</sup> Applying that approach to the statement at issue in *Immuno*, Judge Kaye concluded that the statement was constitutionally protected.<sup>48</sup> She relied in large part on the fact that the statement was contained in a letter to the editor published in a state long considered the home of true expression of opinion.<sup>49</sup>

Since 1991 when the Court decided *Immuno*, there have been at least five occasions where the New York Court of Appeals has determined whether challenged speech is fact or opinion.<sup>50</sup> In

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<sup>41</sup> *Id.* at 239, 567 N.E.2d at 1271, 566 N.Y.S.2d at 907.

<sup>42</sup> *Id.* at 240, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908.

<sup>43</sup> *Id.* at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

<sup>44</sup> *Id.* at 243, 567 N.E.2d at 1274, 566 N.Y.S.2d at 910.

<sup>45</sup> *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

<sup>46</sup> *Id.* at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

<sup>47</sup> *Id.* at 243, 567 N.E.2d at 1274, 566 N.Y.S.2d at 910.

<sup>48</sup> *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

<sup>49</sup> *Id.* at 252-53, 567 N.E.2d at 1280, 566 N.Y.S.2d at 916.

<sup>50</sup> See *Millus v. Newsday, Inc.*, 89 N.Y.2d 840, 675 N.E.2d 461, 652 N.Y.S.2d 726 (1996); *Brian v. Richardson*, 87 N.Y.2d 46, 660 N.E.2d 1126, 637 N.Y.S.2d 347 (1995); *600 West 115th Street Corp. v. Von Gutfield*, 80 N.Y.2d 130, 603 N.E.2d 930, 589 N.Y.S.2d 825 (1992); *Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 649 N.E.2d 825, 625 N.Y.S.2d 477 (1995);

three of those five occasions, the court has determined the speech to be constitutionally protected.<sup>51</sup>

The first case is *Millus v. Newsday, Inc.*,<sup>52</sup> involving an editorial that stated that the plaintiff, who was a candidate for political office, admitted that he did not expect to win, and was relieved by the prospect.<sup>53</sup> The Court of Appeals held this was nonactionable opinion due to its placement on the editorial page and its overall tenor, which would alert the reader that the article contained expressions of opinion.<sup>54</sup>

The second case is *Brian v. Richardson*,<sup>55</sup> involving an article entitled "A High-tech Watergate."<sup>56</sup> The article was written by Elliot Richardson, and it called for the appointment of a special prosecutor to investigate the plaintiff.<sup>57</sup> That too was considered to be nonactionable opinion because of its placement on the op-ed

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Gross v. New York Times Co., 82 N.Y.2d 146, 623 N.E.2d 1163, 603 N.Y.S.2d 813 (1993).

<sup>51</sup> See *Millus v. Newsday, Inc.*, 89 N.Y.2d 840, 675 N.E.2d 461, 652 N.Y.S.2d 726 (1996); *Brian v. Richardson*, 87 N.Y.2d 46, 660 N.E.2d 1126, 637 N.Y.S.2d 347 (1995); 600 West 115th Street Corp. v. Von Gutfield, 80 N.Y.2d 130, 603 N.E.2d 930, 589 N.Y.S.2d 825 (1992).

<sup>52</sup> 89 N.Y.2d 840, 675 N.E.2d 461, 652 N.Y.S.2d 726 (1996). In *Millus*, plaintiff was a political candidate and had commenced an action against a newspaper that had published, on the editorial page, a piece that stated that the candidate admitted "he doesn't expect to win." *Id.* at 842, 675 N.E.2d at 462, 652 N.Y.S.2d at 727. The Court of Appeals found that a reader coming across the editorial, "surrounded by other opinion pieces" was on notice that what they were reading were expressions of opinion, not facts. *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 842, 675 N.E.2d at 462, 652 N.Y.S.2d at 727.

<sup>55</sup> 87 N.Y.2d 46, 660 N.E.2d 1126, 637 N.Y.S.2d 347 (1995). In *Brian*, the article accused the plaintiff of pirating software designed to assist the Department of Justice with case tracking. *Id.* at 48, 660 N.E.2d at 1128, 637 N.Y.S.2d at 349. Applying the standard expressed in *Immuno*, the court found that the article's position in the newspaper and "the broader context in which the article was published" made it clear to a reader that its contents represented an asserted opinion rather than fact. *Id.* at 54, 660 N.E.2d at 1131, 637 N.Y.S.2d at 352.

<sup>56</sup> *Id.* at 48, 660 N.E.2d at 1128, 637 N.Y.S.2d at 349.

<sup>57</sup> *Id.*

page, the humorous, speculative tone of the article, and the fact that the article set out the basis of the author's view.<sup>58</sup>

The third case is *600 West 115th Street v. Von Gutfeld*.<sup>59</sup> This was a case involving a tenant who was very displeased by the fact that there was a proposal to expand the restaurant on the ground floor of the building where he lived.<sup>60</sup> The tenant spoke out at a public hearing in aggressive terms, and said the restaurant would denigrate the building, that the proposal was fraudulent and smelled of bribery and corruption, and the lease was illegal.<sup>61</sup> The statements were all held to be nonactionable, under *Milkovich*, because they would be understood to be loose, hyperbolic language, and, under *Immuno*, because of the statement's content, tone and purpose.<sup>62</sup>

One of the two cases where the Court of Appeals found the challenged statements to be actionable was *Gross v. New York Times Company*.<sup>63</sup> *Gross* was a case involving an assertion that

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<sup>58</sup> *Id.* at 54, 660 N.E.2d at 1131, 637 N.Y.S.2d at 352.

<sup>59</sup> 80 N.Y.2d 130, 603 N.E.2d 930, 589 N.Y.S.2d 825 (1992). In *Von Gutfeld*, remarks were made by defendant at a condominium's Board of Managers hearing that accused the plaintiff of entering into a sublease through fraudulent means. *Id.* at 135, 603 N.E.2d at 932, 589 N.Y.S.2d at 827. The Court of Appeals ruled the speech protected stating that after considering the "content, tone, and purpose" of the speech, a reader would have to conclude that the statement was "of opinion and advocacy and not a presentation alleging objective fact." *Id.* at 145, 603 N.E.2d at 938, 589 N.Y.S.2d at 833.

<sup>60</sup> *Id.* at 133-34, 603 N.E.2d at 931, 589 N.Y.S.2d at 826.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 145, 603 N.E.2d at 938, 589 N.Y.S.2d at 833.

<sup>63</sup> 82 N.Y.2d 146, 623 N.E.2d 1163, 603 N.Y.S.2d 813. In *Gross*, the Chief Medical Examiner for the City of New York brought a defamation action against the newspaper that published an article that stated that the plaintiff had produced "misleading or inaccurate autopsy reports on people who had died in custody of the police." *Id.* at 149, 623 N.E.2d at 1165, 603 N.Y.S.2d at 815. The Court of Appeals reviewed the sufficiency of plaintiff's claim to withstand a dismissal before an answer is served. *Id.* The Court of Appeals stated that "[t]he dispositive inquiry, under either Federal or New York law, is whether a reasonable [reader] could have concluded that [the articles were] conveying facts about the plaintiff." *Id.* at 152, 623 N.E.2d at 1167, 603 N.Y.S.2d at 817. The Court of Appeals found that the published statements contained both assertions of fact and opinion and ruled that

plaintiff had engaged in corrupt conduct in his capacity as chief medical examiner.<sup>64</sup> The Court concluded that the statement was actionable because it was made in a copiously documented newspaper series written after a purportedly thorough investigation and appeared in the news section, rather than in the editorial section.<sup>65</sup>

The second of these two cases is *Armstrong v. Simon & Schuster, Inc.*<sup>66</sup> There, the court found that a statement that the plaintiff, an attorney, deliberately presented a false affidavit for one client to sign in order to exculpate another client was actionable and not protected speech.<sup>67</sup>

In addition to the Court of Appeals cases described above, there have been at least a dozen cases in the Appellate Division where the courts, with very little difficulty, have found that the challenged speech was opinion and therefore, constitutionally protected under the *Immuno* standard.<sup>68</sup>

I want to conclude now because I am anxious to give Leon time to continue this theme. I just want to say that, in my opinion, while the New York standard seems to be far more generous in

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plaintiff's claim withstood the motion to dismiss. *Id.* at 157, 623 N.E.2d at 1170, 603 N.Y.S.2d at 820.

<sup>64</sup> *Id.* at 149, 623 N.E.2d at 1165, 603 N.Y.S.2d at 814.

<sup>65</sup> *Id.* at 156, 623 N.E.2d at 1169, 603 N.Y.S.2d at 819.

<sup>66</sup> 85 N.Y.2d 373, 649 N.E.2d 825, 625 N.Y.S.2d 477 (1995). In *Armstrong*, the publishers of a book entitled "Den of Thieves" was sued by an attorney who had represented several of the people discussed in the book. *Id.* at 376, 649 N.E.2d at 826, 625 N.Y.S.2d at 478. Plaintiff claimed to have been defamed by the author's statement that the attorney had submitted to his client an affidavit containing information known by the attorney to be false. *Id.* at 378, 649 N.E.2d at 828, 625 N.Y.S.2d at 480. The Court of Appeals affirmed the lower court's finding that the statement contained "allegedly false statements of verifiable fact" and held that the plaintiff must have the opportunity to prove the alleged falsity at trial." *Id.* at 381, 649 N.E.2d 829-30, 625 N.Y.S.2d 482-83.

<sup>67</sup> *Id.* at 381, 649 N.E.2d at 830, 625 N.Y.S.2d at 482.

<sup>68</sup> See *McGill v. Parker*, 179 A.D.2d 98, 109, 582 N.Y.S.2d 91, 99 (1st Dep't 1992); *Albano v. Sylvester*, 222 A.D.2d 472, 635 N.Y.S.2d 55 (2d Dep't 1995); *Daniel Goldreyer v. Van De Wetering*, 217 A.D.2d 434, 630 N.Y.S.2d 18 (1st Dep't 1995); *Trustco Bank v. Capital Newspaper*, 213 A.D.2d 940, 624 N.Y.S.2d 291 (3d Dep't 1995).

protecting speech than the federal standard, it may be that in the vast majority of cases, the outcomes would be the same under either state or federal analysis. The two standards use different routes to get to more or less the same place. Both standards ultimately focus on whether a reasonable reader would understand the statement to be asserting a fact about the plaintiff. I think that is ultimately the conclusion that the Second Circuit reached in a recent case that Leon litigated<sup>69</sup> and is about to discuss, a case involving real intrigue: Russia, the KGB, and murder, so I turn the podium over to Leon Friedman.

*Professor Leon Friedman:*

Professor Eileen Kaufman and I had to fight about who was to talk about the defamation cases, so we made a deal that she would give me a little piece the *Levin* case since I argued it in the Second Circuit. Later I will talk about some of the zoning cases and other New York State constitutional law cases.

The case that Professor Kaufman refers to, I will tell you, responding to your last comment about whether one gets the same result under the Federal Constitution and the New York Constitution; we litigated this case in the Second Circuit, *Levin v. McPhee*,<sup>70</sup> which was decided in July of 1997. As I look at my watch, today is the last day for a certiorari petition to be filed, so I do not know whether the case is over or not; although, I do not think the Supreme Court will take this case.<sup>71</sup>

I represented the author and the book publisher, and Coudert Brothers represented the *The New Yorker* author. We made a very conscious decision, we are going to rely on the New York Constitution. We read *Milkovich v. Lorain Journal*<sup>72</sup> as

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<sup>69</sup> See *Levin v. McPhee*, 119 F.3d 189, 196 (2d Cir. 1997) (noting statements by defendant author concerning plaintiff's role in the death of a famous Russian artist fell within "the category of rhetorical hyperbole or imaginative expression" and were not actionable because they could not "reasonably be interpreted as stating actual facts.").

<sup>70</sup> 119 F.3d 189 (2d Cir. 1997).

<sup>71</sup> Petition for certiorari was not filed.

<sup>72</sup> *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990).

restricting the defamation definition of "opinion." This is not going to work as a matter of the Federal Constitution, and I will explain why in a moment.

The case concerned a book written by John McPhee,<sup>73</sup> a very well known nonfiction writer who has written for *The New Yorker* for many years, and has written twenty or thirty books. His last book concerned dissident Russian artists. You all know that from 1917 to the 1990's, the only kind of art that was allowed in the Soviet Union was Soviet realism.<sup>74</sup> You had to show pictures of valiant workers and farmers doing their job with Stalin up there as the beneficent, not dictator, but father, sort of helping everybody. God forbid you would do anything that was abstract or modern or that somehow deviated from Soviet realism. Well, a number of Soviet artists felt impelled to engage in this dissident art.<sup>75</sup>

There was an American who went to the Soviet Union, and collected this art and spent millions and millions of dollars to collect this art,<sup>76</sup> ten thousand pieces which are now in a museum

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<sup>73</sup> *Id.* at 191 (referring to JOHN MCPHEE, *THE RANSOM OF RUSSIAN ART* [hereinafter *RANSOM*] (1994)). *RANSOM* portrays the saga of an American, Norton Dodge who traveled throughout the Soviet Union collecting the works of certain Russian artists who had been considered "nonconforming" and therefore "dissident" by the government. *Id.* at 191-92 n.1. See *RANSOM*, *supra* at 73.

<sup>74</sup> *Levin*, 119 F.3d at 191-92 n. 1. Artists whose works conformed to this style were considered by the government to be "[o]fficial artists." *Id.* at 192 n.1.

<sup>75</sup> *Id.* These "dissident" or "unofficial" artists were often "harassed," particularly those that did not have another occupation, and sometimes found themselves viewed as "unemployed parasites." *Id.* Some would be sent to "labor camps or mental hospitals." *Id.* While "official artists" had access to all the supplies necessary to engage in their craft, unofficial artists "had to wangle things one way or the other" using such supplies as "oilcloth," "wallboard," or "automobile Paint." See *RANSOM*, *supra* note 73, at 23.

<sup>76</sup> *Levin*, 119 F.3d at 191-92. The American referred to in the opinion is Norton Dodge who spent 30 years and \$3,000,000 to amass this collection. *Id.*

in Rutgers.<sup>77</sup> There was a leading Russian dissident artist whose name was Evgeny Rukhin.<sup>78</sup> He was a target for the KGB, there were all sorts of petty harassments, and one day his studio just burned down; he was killed and his girlfriend was killed.<sup>79</sup>

It was like terror had struck in the hearts of all the Russian dissident artists,<sup>80</sup> because this escalated the fight; this was murder and arson. There was a lot of speculation as to who did this terrible crime. McPhee wrote, I did not tell him to do this -- but he said the whole thing is "shrouded in mystery," and some lawyer friend of mine said that the shrouded in mystery defense wins again because, since everything is shrouded in mystery, no one really knows what happened.

In any event, there was speculation and there were five different theories as to why this artist's studio was burned down.<sup>81</sup> Someone said his wife did it because he had a lot of girlfriends; and someone else said it was some other artists who did it because they were jealous of his success; and there was another version that said it was an accident, he just had all these oily rags around there; and then another person speculated and said some people think "Ilya Levin did it for the KGB, it is a possibility."<sup>82</sup>

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<sup>77</sup> See Jo Ann Lewis, *Trove from the Underground: The Maryland Millionaire Who Saved the Art of a Soviet Era*, WASH. POST, May 14, 1995, at G1.

<sup>78</sup> Levin v. McPhee, 119 F.3d at 192 n.2 (noting that "by the mid-seventies, Rukhin was the Russian artist most widely known in the United States."). See RANSOM, *supra* note 73, at 50. Rukhin is described as "an unofficial artist of exceptional talent, who also—in his incautious, magnetic, unofficial way—was an organizer of other artists." See RANSOM, *supra* note 73, at 39.

<sup>79</sup> Levin, 119 F.3d at 192.

<sup>80</sup> *Id.* at 193. Sarah Burke, an American alleged to have been romantically involved with Rukhin, stated in an interview that after the fire "[a]rtists really ran scared." *Id.* at 192-93. See RANSOM, *supra* note 73, at 152.

<sup>81</sup> Levin, 119 F.3d at 192-94.

<sup>82</sup> *Id.* at 192-93. Sarah Burke, in her interview, offered three theories concerning the fire. *Id.* She explained that "some people [thought] that Ilya Levin did it for [the K.G.B.]," some people thought that Rukhin's wife did it and maybe it was just an accident because the studio was "full of vodka, cigarettes, and the chemically soaked rags" that "were always found on the stairs." *Id.* See RANSOM, *supra* note 73, at 152.

Now I must say, if they had given me the book to read beforehand, I would have said what are the chances of someone named Ilya Levin, who was in the Soviet Union in 1973, being in the United States in a position to bring a libel action within one year, one year because New York has a very short statute of limitations, and I must say I would have said minimal risk, let it go. Thank God it was the lawyer for *The New Yorker* who did that, because the article first appeared in *The New Yorker*<sup>83</sup> and he made the judgment to let it go, and he did not give me the book to vet.

Well, sure enough, you know the result, Ilya Levin is in the United States, working in Washington, and he sees this reference to himself "some people think Ilya Levin did it, it is a possibility." He brought a libel suit against *The New Yorker*, the book publisher for Farrar, Straus and John McPhee.<sup>84</sup>

We made the judgment, we never answered the complaint to make a motion to dismiss right on the face of the complaint.<sup>85</sup> We made the judgment that our best shot was New York,<sup>86</sup> under the New York Constitution.<sup>87</sup> In particular, the three cases that

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<sup>83</sup> *Levin*, 119 F.3d at 194. McPhee also wrote an article entitled *Ransom of Russian Art* which appeared in the October 17, 1994, issue of *The New Yorker* shortly before the book was published. *Id.* The article included excerpts from the book which Levin contended, although specifically not mentioning him by name, was capable of a defamatory meaning. *Id.*

<sup>84</sup> *Id.* at 194. See *Levin v. McPhee*, 917 F. Supp. 230 (S.D.N.Y. 1996).

<sup>85</sup> *Levin*, 119 F.3d at 194. Defendants moved under Fed. R. Civ. P. 12(b)(6) to dismiss the complaint on several grounds. *Id.* Defendants contended that the statements concerning Levin "were not susceptible to defamatory meaning, and . . . were statements of opinion, rather than statements of fact." *Id.*

<sup>86</sup> *Levin v. McPhee*, 917 F. Supp. 230, 235-36 (S.D.N.Y. 1996). The district court determined that New York law applied noting that "[t]he standard of tort liability . . . is determined according to the law of the state with the greatest interest in regulating the injurious conduct at issue." *Id.* at 235 (citing *Babcock v. Jackson*, 12 N.Y.2d 473, 481-82, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749-50 (1963)).

<sup>87</sup> N.Y. CONST. art. I, § 8. This section grants more expansive rights than those granted by the Federal Constitution, stating: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or the press." *Id.*



we talked about, *Immuno A.G. v. Moor-Jankowski*,<sup>88</sup> *Gross v. New York Times Company*,<sup>89</sup> and even though it went the other way, there is a marvelous sentence in *Gross*, or paragraph that said, "You can even accuse a person of criminality as long as all the facts that support your position are laid out in the book or in the statement."<sup>90</sup> Well, I liked that because all the facts relating to the speculation were laid out in the book. So *Immuno*, *Gross* and *Brian v. Richardson*,<sup>91</sup> which came down in the middle of the whole case, were extremely helpful to us. The case was dismissed by the district court,<sup>92</sup> and the Second Circuit affirmed

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<sup>88</sup> 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991).

<sup>89</sup> *Gross v. New York Times Co.*, 82 N.Y.2d 146, 623 N.E.2d 1163, 603 N.Y.S.2d 813 (1993). In *Gross*, the New York Court of Appeals considered a series of articles published by the *New York Times* concerning the alleged misconduct of the former Chief Medical Examiner of the City of New York. *Id.* at 149, 623 N.E.2d at 1165, 603 N.Y.S.2d at 815. The articles accused Doctor Gross of mishandling "several high profile cases" and using "his authority to protect police officers and other city officials " after certain individuals died in police custody. *Id.* The court held that "the plaintiff's complaint, which encompass[ed] actionable assertions of fact as well as nonactionable opinions and conclusions, [was] sufficient to withstand a motion to dismiss . . . ." *Id.*

<sup>90</sup> *Id.* at 155, 623 N.E.2d at 1169, 603 N.Y.S.2d at 819. The New York Court of Appeals stated that:

[A]ccusations of criminality could be regarded as mere hypothesis and therefore not actionable if the facts on which they are based are fully and accurately set forth and it is clear to the reasonable reader or listener that the accusation is merely a personal surmise built upon those facts.

*Id.*

<sup>91</sup> 87 N.Y.2d 46, 660 N.E.2d 1126, 637 N.Y.S.2d 347 (1995). The controversy in *Richardson* centered around an article published by the *New York Times* which appeared on the op-ed page. *Id.* at 48, 660 N.E.2d at 1127, 637 N.Y.S.2d at 349. The article, entitled "A High-Tech Watergate," made certain accusations directed at the plaintiff and the United States Department of Justice. *Id.* at 48, 660 N.E.2d at 1128, 637 N.Y.S.2d at 349. In dismissing the complaint, the New York Court of Appeals held that "it was sufficiently apparent to the reasonable reader" that the contents of the article "represented the opinion of the author and that [the] specific charges . . . were allegations and not demonstrable fact." *Id.* at 54, 660 N.E.2d at 1131, 637 N.Y.S.2d at 352.

<sup>92</sup> *Levin v. McPhee*, 917 F. Supp. 230, 243 (S.D.N.Y. 1996).

all on New York opinion law.<sup>93</sup> By the way, under federal law it might apply as well.<sup>94</sup>

There is a whole doctrine that the Second Circuit recognized in *Edwards v. National Audubon Society, Inc.*,<sup>95</sup> which we also thought might work here. But believe me, the theory was always the New York Constitution, that is what counts, and that is what the Second Circuit said.<sup>96</sup>

There is a difference in this particular area: New York opinion law has a much broader scope than Federal Constitutional opinion law,<sup>97</sup> what constitutes opinion as defined by the Supreme Court in *Milkovich*.<sup>98</sup> So there is a difference. I think that if you look at the whole string of cases, you will see the difference. I was also involved with Mike Armstrong, who was my classmate, but I wrote a brief on the other side in his case.<sup>99</sup> That one really had

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<sup>93</sup> 119 F.3d 189, 197 (2d Cir. 1997).

<sup>94</sup> *Id.* at 196. The Second Circuit noted that the "United States Constitution offers no wholesale protection for so-called 'expressions of opinion' if those expressions imply assertions of objective fact." *Id.* (citing *Milkovich v. Lorain Journal*, 497 U.S. 1, 18 (1990)). However when such statements fall within "the category of 'rhetorical hyperbole' or 'imaginative expression,' those statements are not actionable because they 'cannot be reasonably be interpreted as stating actual facts.'" *Id.* (citing *Milkovich*, 497 U.S. at 20).

<sup>95</sup> 556 F.2d 113 (2d Cir. 1977). In *Edwards*, the United States Court of Appeals for the Second Circuit dismissed a libel judgment against the *New York Times*. *Id.* at 115. The *New York Times* had published statements of the Audubon Society which had attacked scientists who had continued to support the use of DDT, a popular insecticide. *Id.* The court spoke of the "press's right of neutral reportage." *Id.* at 120. The court explained that the press need not report details with "literal accuracy," to be protected from defamation suits. *Id.* The journalist will be immune when he "believes, reasonably and in good faith, that his report accurately conveys the charges made." *Id.* (citing *Time, Inc. v. Pape*, 401 U.S. 279, 290-92 (1971)).

<sup>96</sup> *Levin v. McPhee*, 119 F.3d at 196-97.

<sup>97</sup> U.S. CONST. amend. I, § 3. This section provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . ." *Id.*

<sup>98</sup> *Id.* at 196-97. The Court in *Milkovich* stated that the First Amendment does not necessitate an inquiry into whether statements are opinion or fact because to do so would create "an artificial dichotomy between 'opinion' and fact." *Milkovich*, 497 U.S. at 19.

<sup>99</sup> *Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 649 N.E.2d 825, 625 N.Y.S.2d 477 (1995).

to do with an inference, I do not know that that was opinion law. However, New York law continues to, and there are a whole bunch of lower court cases in the last year, support the idea that you get more protection for freedom of speech and in the press, especially in the area of libel.<sup>100</sup> I mean there is absolutely no doubt. The practitioners in the field of libel law, we love New York, I mean there is no doubt about it when something like that happens.

Let me turn now to the other areas in which New York's First Amendment law, it is actually Article I, Section 8 of the New York Constitution, is different or more expansive or looks at a problem in a different way. The idea that the New York Constitution gives broader protection first appeared in *O'Neill v. Oakgrove Construction, Inc.*,<sup>101</sup> a case dealing with the issue of whether a reporter has a privilege under the New York State Constitution not to reveal his sources, and this was before the most recent version of the shield law was passed.<sup>102</sup>

The Federal Constitution does not allow a reporter not to disclose his sources, certainly in the criminal context before a federal grand jury,<sup>103</sup> and only under very limited circumstances

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<sup>100</sup> *Time Square Books, Inc. v. City of Rochester*, 223 A.D.2d, 270, 645 N.Y.S.2d 951 (4th Dep't 1996).

<sup>101</sup> 71 N.Y.2d 521, 523 N.E.2d 277, 528 N.Y.S.2d 1 (1988).

<sup>102</sup> *Id.* at 524, 523 N.E.2d at 277, 528 N.Y.S.2d at 1. In *O'Neill*, the law in effect at the time required "full disclosure of all evidence material and necessary in the prosecution or defense of an action," wherever "sufficient independent evidence is not obtainable." *Id.* at 526, 523 N.E.2d at 279, 528 N.Y.S.2d at 3 (citing *Cirale v. 80 Pine St. Corp.*, 35 N.Y.2d 113, 116-17, 316 N.E.2d 301, 302, 359 N.Y.S.2d 1, 4 (1974)). See N.Y. C.P.L.R. § 3101 McKinney (1996). This section provides: "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . . ." *Id.* The New York Court of Appeals stated that the "protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment." *O'Neill*, 71 N.Y.2d at 529 n.3, 523 N.E.2d at 280 n.3, 528 N.Y.S.2d at 4 n.3.

<sup>103</sup> *Id.* at 529 n.2, 523 N.E.2d at 280 n.2, 528 N.Y.S.2d at 4 n.2 (citing *Branzburg v. Hays*, 408 U.S. 665, 680-81 (1972)).

in a civil case.<sup>104</sup> However, in *O'Neill*, the Court of Appeals said, "The protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment."<sup>105</sup> I mean it is nice to rely on the different terminology contained in the New York Constitution than in the First Amendment. That does not mean it is always more expansive, and indeed, there are a number of cases in which the New York Court of Appeals has said they are going to come to the same conclusion as the Federal Constitution.

Just to remind you, the Supreme Court held some years ago that there is no right to free expression on private property. A private property owner may simply, this is the *SHAD Alliance v. Smith Haven Mall*<sup>106</sup> out here on Long Island, not want protesters there.<sup>107</sup> The New York Court of Appeals in *SHAD Alliance v. Smith Haven Mall* held that New York's guarantee of free speech did not allow people to go on private property to engage in protest.<sup>108</sup>

The California Supreme Court went the other way,<sup>109</sup> as did the New Jersey Supreme Court, at least in the context of a private university.<sup>110</sup> This was the Princeton University case, where the court said you must let people on the campus to distribute

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<sup>104</sup> See *United States v. Cuthbertson*, 630 F.2d 139 (2d Cir. 1980); see also *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 6 (2d Cir. 1982) (seeking discovery in an antitrust action).

<sup>105</sup> *Id.* at 529 n.3, 523 N.E.2d at 281 n.3, 528 N.Y.S.2d at 529 n.3.

<sup>106</sup> 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985).

<sup>107</sup> *Id.* at 498, 488 N.E.2d at 1212, 498 N.Y.S.2d at 101. The protestors in *SHAD Alliance* went onto mall property to hand out leaflets which encouraged people to oppose nuclear power and, in particular, the controversial Shoreham Nuclear Power Plant. *Id.* at 499, 488 N.E.2d at 1213, 498 N.Y.S.2d at 101. The court held that there was no constitutional right to freedom of expression on private property. *Id.* at 508, 488 N.E.2d at 1213, 498 N.Y.S.2d at 107.

<sup>108</sup> *Id.* at 508, 488 N.E.2d at 1213, 498 N.Y.S.2d at 107.

<sup>109</sup> *Robbins v. Prune Yard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74, 80 (1980). In *Prune Yard*, the California Supreme Court explained that the California State Constitution protected protestors at a private shopping center if they protested in a "reasonable" manner. *Id.* at 347.

<sup>110</sup> *State v. Schmid*, 423 A.2d 615, 633 (N.J. 1980), *appeal dismissed sub nom Princeton Univ. v. Schmid*, 455 U.S. 100 (1982).

leaflets.<sup>111</sup> Everyone had great hope that the New York Court of Appeals would expand it, but they did not. In *SHAD Alliance v. Smith Haven Mall*, the court went the other way.<sup>112</sup> Now in other cases they have expanded it.

There is a case called *Bellanca v. New York State Liquor Authority*,<sup>113</sup> involving topless dancing in a bar. When that case went to the United States Supreme Court, the Court decided that even though topless dancing may be expressive conduct, you have the Twenty-first Amendment,<sup>114</sup> which allows the states to ban all liquor even though the Twenty-first Amendment overruled the Eighteenth Amendment.<sup>115</sup>

There is a section of the amendment that says that any state may, for its own reason, ban the sale of intoxicating alcoholic beverages. The reasoning of the Supreme Court was that if you could ban liquor altogether in a bar, you can do something lesser, which is to ban topless dancing when liquor is sold.<sup>116</sup> In other words, the greater ability to prohibit the sale of liquor altogether carries with it the lesser power to attach conditions to the sale of alcohol.<sup>117</sup>

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

<sup>112</sup> *Shad Alliance*, 66 N.Y.2d at 508, 488 N.E.2d at 1219, 498 N.Y.S.2d at 107.

<sup>113</sup> 452 U.S. 714 (1981) (per curiam).

<sup>114</sup> U.S. CONST. amend. XXI, § 2. The Twenty-first Amendment provides in pertinent part: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." *Id.*

<sup>115</sup> U.S. CONST. amend. XXI, § 1. The Twenty-first Amendment provides in pertinent part: "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." *Id.*

<sup>116</sup> *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 717 (1981) (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975)).

<sup>117</sup> *Bellanca*, 452 U.S. at 717. The Supreme Court noted that the States had "broad powers" to regulate liquor sales by virtue of the Twenty-first Amendment which would outweigh any "interest in nude dancing" which might be conferred by the First Amendment. *Id.* The *Bellanca* Court noted that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." *Id.*

The New York Constitution does not have a Twenty-first Amendment, I mean there is nothing about banning alcohol. So the escape hatch that the Supreme Court had in the topless dancing case simply does not apply here, which is what the New York Court of Appeals held in the *Bellanca* case.<sup>118</sup> There have been a number of cases dealing with zoning, also dealing with the whole situation of First Amendment uses, and whether zoning ordinances can be used to block expressive conduct for example, adult book stores.

We are about to get a big case in the New York Court of Appeals,<sup>119</sup> and that is *Stringfellow's of New York, Ltd. v. City of New York*.<sup>120</sup> Stringfellow's is one of these adult places in New York.<sup>121</sup> New York City passed an amended zoning resolution on October 25, 1995.<sup>122</sup> We all know Times Square was open for a long period of time, there really was no specific zoning law; there certainly were other laws that dealt with adult establishments, but there was no zoning law. The Guiliani Administration pushed through a provision, I think in October of 1995, an amended zoning resolution.<sup>123</sup>

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<sup>118</sup> *Id.* at 718. The Supreme Court explained that :

Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts.

*Id.*

<sup>119</sup> See *Stringfellow's*, Nos. 17, 18, 19, 1998 WL 77749 (NY Ct. of Appeals Feb. 24, 1998) (holding that a city could enact zoning ordinances that restrict adult entertainment establishments in potential residential districts).

<sup>120</sup> 171 Misc. 2d 376, 653 N.Y.S.2d 801 (Sup. Ct. New York County 1996).

<sup>121</sup> *Id.* at 378, 653 N.Y.S.2d at 803.

<sup>122</sup> *Id.* at 380-81, 653 N.Y.S.2d at 804-05. The Amended Zoning Resolution placed "restrictions on the location, size and signage of specified types of adult establishments." *Id.* at 381, 653 N.Y.S.2d at 804 (explaining Amended Zoning Resolution §§ 32-01 (a) and 42-01 (a)).

<sup>123</sup> *Id.* The Amended Zoning Resolution was approved by the New York City Council on October 25, 1995. *Id.*

First, they allowed adult establishments defined in the statute only in certain districts of New York City.<sup>124</sup> Second, in the districts where such establishments are permitted, a new adult use must be located at least five hundred feet away from any other adult use.<sup>125</sup>

This is something that a lot of cities around the country did, which is to spread them out. Boston had the opposite theory, they put them all together; said everyone has to be here, and there was the combat zone or something down in downtown Boston, every adult establishment must be here, we do not want it to contaminate anywhere else. Well, other cities sort of spread them out. The Supreme Court in the case of *Young v. American Mini Theatres, Inc.*,<sup>126</sup> a zoning ordinance, said that was okay.<sup>127</sup>

In later Supreme Court cases, particularly a case called *Renton v. Playtime Theatres, Inc.*,<sup>128</sup> the Supreme Court said that a zoning ordinance, focusing on adult book stores, was superfluous.<sup>129</sup> If the store was conducting activities deemed to be obscene, you just bring a criminal action on obscenity and close them down.

New York did have a case called *Arcara v. Cloud Books, Inc.*,<sup>130</sup> which did go to the United States Supreme Court, in which an adult bookstore was closed down as a public

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<sup>124</sup> *Id.* at 381, 653 N.Y.S.2d at 805 (citing Amended Zoning Resolution §§ 32-01 (b) and 42-01 (b)).

<sup>125</sup> *Id.* at 382, 653 N.Y.S.2d at 805 (citing Amended Zoning Resolution §§ 32-01 (c) and 42-01 (c)).

<sup>126</sup> 427 U.S. 50 (1976).

<sup>127</sup> *Id.* at 62. The Supreme Court noted that a municipality may confine adult establishments "to certain specified commercial zones" or require them to be "dispersed throughout the city." *Id.*

<sup>128</sup> 475 U.S. 41 (1986).

<sup>129</sup> *Id.* at 54. The *Renton* Court found that a zoning ordinance that did not allow any adult movie theater to operate within 1,000 feet of a residential zone was a "valid governmental response to [an] 'admittedly serious problem[.]'" *Id.*

<sup>130</sup> 65 N.Y.2d 324, 480 N.E.2d 1089, 491 N.Y.S.2d 307 (1985), *rev'd*, 478 U.S. 697 (1986), *rev'd on other grounds*, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986).

nuisance.<sup>131</sup> After the case was remanded by the United States Supreme Court, the New York Court of Appeals had established a much more protective ruling.<sup>132</sup> The Supreme Court reversed.<sup>133</sup> On remand, the Court of Appeals said that an injunction against a public nuisance will not result because that is a prior restraint, and the court knocked that part of it out.<sup>134</sup>

But with zoning, the Supreme Court had held in *Renton* that as long as the zoning ordinance was after the secondary effects of the contents of the bookstore; in other words, you are not saying we hate adult magazines, newspapers, movies and so on, you can not do that.<sup>135</sup> If you focus on the content of what is sold, it is protected by the First Amendment.<sup>136</sup> But if you focus on the "secondary effects," restrictions are permissible. What does that mean?

Bad people hang around these places, it is dangerous, and unhealthy for children or anyone else.<sup>137</sup> If the zoning ordinance

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<sup>131</sup> *People ex rel. Arcara v. Cloud Books, Inc.*, 119 Misc.2d 505, 505-06, 465 N.Y.S.2d 633, 635 (1983).

<sup>132</sup> *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d. 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986).

<sup>133</sup> *Arcara*, 478 U.S. at 707. The Supreme Court explained that:

Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises. The legislature properly sought to protect the environment of the community by directing the sanction at premises knowingly used for lawless activities.

*Id.*

<sup>134</sup> *Arcara*, 68 N.Y.2d. 553, 558-59, 503 N.E.2d 492, 495, 510 N.Y.S.2d 844, 847 (explaining that the States "may not impose a prior restraint on freedom of expression to silence an unpopular view.").

<sup>135</sup> *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986). The Court stated that the zoning ordinance did not try to restrict the "message purveyed by adult theaters." *Id.* at 48.

<sup>136</sup> *Id.* at 47-48 (noting "regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment.").

<sup>137</sup> *Id.* at 51. The Court noted that the City of Renton was "entitled to rely on the experiences of Seattle and other cities . . . in enacting its adult theater zoning ordinance." *Id.* The Court then explained that adult theatres may have "adverse effects . . . on neighborhood children and community improvement



focuses on the secondary effects, then it is okay.<sup>138</sup> It is a little hard because you are dealing in some sort of metaphysics here. It is the content that creates the secondary effects; but as long as you focus on secondary effects, that is okay.<sup>139</sup> The New York Court of Appeals has not adopted the *Renton* test up until now.

In a case concerning the Town of Islip, *Town of Islip v. Caviglia*,<sup>140</sup> the New York State Court of Appeals said we are adopting the *Renton* test.<sup>141</sup> There was a zoning ordinance in Islip where all the town's adult bookstores and adult establishments had to be in the industrial zone.<sup>142</sup> The New York Court of Appeals upheld it.<sup>143</sup>

The *Stringfellow's*<sup>144</sup> case is a little more conjectural because in *Stringfellow's*, the Appellate Division affirmed,<sup>145</sup> and it is now up to the Court of Appeals.<sup>146</sup> I understand it is going to be

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efforts." *Id.* (quoting *Northend Cinema, Inc., v. Seattle*, 585 P.2d 1153, 1156 (Wash. 1978) (en banc)).

<sup>138</sup> *Id.* at 54-55.

<sup>139</sup> *Id.*

<sup>140</sup> 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989).

<sup>141</sup> *Id.* at 552, 540 N.E.2d at 218, 542 N.Y.S.2d at 142. The *Renton* test allows a municipality to use a zoning ordinance to regulate adult establishments providing:

[T]he "predominant purpose" of the ordinance is not to control the content of the material purveyed but to control the "secondary effects" of such uses on the community, the ordinance is designed to serve a substantial governmental interest, it is narrowly tailored to affect only the category of uses that produce the unwanted effects and it allows for reasonable alternative avenues of expression.

*Renton v. Platime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986).

<sup>142</sup> *Caviglia*, 73 N.Y.2d at 549, 540 N.E.2d at 217, 542 N.Y.S.2d at 140. The *Caviglia* court noted that even though the zoning ordinance concerns only "adult uses," there was no attempt by the town "to regulate speech, . . . its effect on expression is only incidental." *Id.* at 557, 540 N.E.2d at 222, 542 N.Y.S.2d at 146.

<sup>143</sup> *Id.* at 562, 540 N.E.2d at 224, 542 N.Y.S.2d at 149.

<sup>144</sup> 171 Misc. 2d 376, 653 N.Y.S.2d 801 (Sup. Ct. New York County 1996).

<sup>145</sup> 663 N.Y.S.2d 812, 812 (1st Dep't 1997).

<sup>146</sup> See *Stringfellow's*, Nos. 17, 18, 19, (NY Ct. of Appeals February 24, 1998) (holding that a city could enact zoning ordinances that restrict adult entertainment establishments in potential residential districts).

argued in January.<sup>147</sup> The opponents of the new resolution say that instead of one hundred seventy-one adult establishments in New York City, if this goes through it will be reduced to about twenty-eight.<sup>148</sup> So this really will have quite an effect on this whole area.

The lower court decision upheld the amended zoning ordinance on three grounds. First, the court found that the law did focus on secondary effects, and was not based on content.<sup>149</sup> Second, they said that there was a finding of adverse secondary effects, the plaintiffs in that case argued there is no finding, New York is not Islip or anywhere else.<sup>150</sup> You sort of expect these things when you go to Times Square and, you know, what are the bad secondary effects? But the City Council had done a very good job of making a record in the Zoning Board of the bad secondary effects created by this adult zone, and the court found that the secondary effects were supported by the record.<sup>151</sup>

The third requirement is whether there are alternative methods of communication.<sup>152</sup> That is to say assuming the zoning law goes into effect, are there other places theoretically where you could set up the shops, or similar shops.<sup>153</sup> The lower court

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at \*10 (noting that the amended zoning resolution's enforcement "will lead to the forced relocation of some 84% of the City's 177 adult businesses.").

<sup>149</sup> *Stringfellow's*, 171 Misc. 2d at 386, 653 N.Y.S.2d at 808-09 (Sup. Ct. New York County 1996).

<sup>150</sup> *Id.* at 388, 653 N.Y.S.2d at 809 (explaining that the City Council "was justified in finding that the present configuration of adult use establishments causes adverse secondary effects . . . which demonstrates that the Amended Zoning resolution was based on a compelling state interest related to combating such negative effects, rather than restricting speech.").

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 389, 653 N.Y.S.2d at 809-10 (stating that "[t]he last requirement that the Amended Zoning Resolution must meet to pass constitutional muster is whether it allows for 'reasonable alternative avenues of communication.'").

<sup>153</sup> *Id.* at 389, 653 N.Y.S.2d at 810 (explaining that "[t]he New York standard . . . is . . . whether or not 'there remains ample space available for adult uses.'" (citing *Caviglia*, 73 N.Y.2d at 555, 540 N.E.2d at 221, 542 N.Y.S.2d at 145).

found that there was.<sup>154</sup> The amended zoning ordinance met the three parts of the *Renton* test as adopted by New York in *Caviglia*, and the court upheld the law.<sup>155</sup> The case will be argued in January, and I am sure the Court of Appeals will have another chance to look at this zoning requirement.<sup>156</sup>

Let me tell you about one last case. The New York Court of Appeals in a case this year called *Rogers v. New York City Transportation Authority*,<sup>157</sup> dealing with handing out literature in the subways.<sup>158</sup> In that case, the Transit Authority had very limited rules on First Amendment activities in the subways.<sup>159</sup> You do not want people selling newspapers on the platforms.<sup>160</sup> There was somebody who was trying to sell a newsletter, not on the platform, but in some other area.<sup>161</sup>

There was a whole argument about whether the New York City subway system is a public forum, which is the magic phrase

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<sup>154</sup> *Id.* at 396, 653 N.Y.S.2d at 814 (stating that "[e]ven if the City's estimate overstates the number of potentially viable relocation cites, there still remains ample space for more than the existing number of adult establishments.").

<sup>155</sup> *Id.* See *Renton*, 475 U.S. at 47-48 (1986).

<sup>156</sup> See *Stringfellow's*, Nos. 17, 18, 19, 1998 WL 77749 (NY Ct. of Appeals Feb. 24, 1998). The New York Court of Appeals concluded that the "City's effort to address the negative secondary effects" of adult establishments "is not constitutionally objectionable under any of the standards set forth by the United States Supreme Court in . . . *Renton*." *Id.* at \*12. See *Renton*, 475 U.S. at 47-48.

<sup>157</sup> 89 N.Y.2d 692, 680 N.E.2d 142, 657 N.Y.S.2d 871 (1997).

<sup>158</sup> *Id.* at 696, 680 N.E.2d at 144, 657 N.Y.S.2d at 873. James Rogers received a fine of \$50 for selling a political organization's newspaper on a subway platform. *Id.* at 696, 680 N.E.2d at 144, 657 N.Y.S.2d at 873. Rogers sought review of the New York City Transit Authority's determination that he violated a regulation against selling such newspapers in the subway station. *Id.*

<sup>159</sup> *Id.* The Transit Authority's rule prohibits any person from engaging "in any commercial activity upon any facility or conveyance unless "duly authorized by the authority." N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6 (b) (1995). The statute defines "commercial activity" as "the advertising, display, sale, lease, or distribution of food, goods, services or entertainment (including the free distribution of promotional materials) . . . ." N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6 (b) (1) (1995).

<sup>160</sup> *Id.* at 702-05, 680 N.E.2d at 148-49, 657 N.Y.S.2d at 877-78.

<sup>161</sup> *Id.* at 696, 680 N.E.2d at 144, 657 N.Y.S.2d at 873.

under the First Amendment.<sup>162</sup> If it is a public forum, then other people must be given the same opportunity to sell the material.<sup>163</sup> Indeed, the New York Transit Authority had allowed some limited First Amendment activity within the subway, and this person said I should have the same opportunity. The New York Court of Appeals decided *Rogers* and held that they had adopted the federal rule.<sup>164</sup> The Supreme Court in a case called *International Society for Krishna Consciousness v. Lee*,<sup>165</sup> said that an airport<sup>166</sup> and therefore a subway station are not public forums. The New York Court of Appeals found that the rule was proper.<sup>167</sup>

Therefore, I think the *Stringfellow's* case, the zoning case, is a very important case and we will just have to see whether the New York Court of Appeals will apply the same kind of zoning rules as the federal system.<sup>168</sup> As you can see, in all these other areas,

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<sup>162</sup> *Id.* at 698-701, 680 N.E.2d at 145-48, 657 N.Y.S.2d at 874. The *Rogers* court noted:

Under the public forum doctrine, regulation of speech on government property that traditionally or by designation has been opened up for public expression and debate should be given the sharpest scrutiny. Regulations of time, place and manner of expression may be permitted only when they are content neutral and narrowly tailored to serve a significant government interest and allow for alternative modes and methods of communication.

*Id.* at 698, 680 N.E.2d at 145-46, 657 N.Y.S.2d at 874-75 (citing *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983)).

<sup>163</sup> *Id.* at 698, 680 N.E.2d at 145, 657 N.Y.S.2d at 874.

<sup>164</sup> *Id.* at 705, 680 N.E.2d at 150, 657 N.Y.S.2d at 879 (noting "[a] subway station is simply not a public forum . . . (citation omitted) and the rule should not be used as a boomerang to transform the Transit Authority's reasonably accommodating allowance into an 'Open Sesame' for a stampede of likely competitors.").

<sup>165</sup> 505 U.S. 672 (1992).

<sup>166</sup> *Id.* at 680 (noting that only in recent years have airports become a "forum" used by groups to distribute materials or solicit money).

<sup>167</sup> *Rogers*, 89 N.Y.2d at 705, 680 N.E.2d at 150, 657 N.Y.S.2d at 879.

<sup>168</sup> See *Stringfellow's*, Nos. 17, 18, 19, 1998 WL 77749 (NY Ct. of Appeals Feb. 24, 1998).

we love New York where the First Amendment is concerned.  
Thank you very much.