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## The Importance of a Contextual Approach to Libel Law: The Impact of Immuno AG. V. Moor-Jankowski and Milkovich v. Lorain Journal Co.

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# THE IMPORTANCE OF A CONTEXTUAL APPROACH TO LIBEL LAW: THE IMPACT OF IMMUNO AG. v. MOOR-JANKOWSKI AND MILKOVICH v. LORAIN JOURNAL CO.

## INTRODUCTION

In *Milkovich v. Lorain Journal Co.*,<sup>1</sup> the United States Supreme Court rejected the widely held perception that its decision in *Gertz v. Robert Welch, Inc.*<sup>2</sup> “creat[ed] a wholesale defamation exemption [under the First Amendment of the United States Constitution]<sup>3</sup> for anything that might be labeled ‘opinion.’”<sup>4</sup> As a result, the New York Court of Appeals relied upon the New York State Constitution<sup>5</sup> and laws concerning freedom of speech when *Immuno AG. v. Moor-Jankowski*<sup>6</sup> (*Immuno*) was vacated and remanded by the Supreme Court to the New York Court of Appeals for further consideration.<sup>7</sup> On remand, the New York Court of Appeals had to determine whether, after *Milkovich*, a “letter writer’s statements of opinion published in a magazine were entitled to the absolute protection of the State and Federal constitutional free speech guarantees . . . .”<sup>8</sup>

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

2. 418 U.S. 323, 339-40 (1974). *See infra* note 26 and accompanying text (dictum in *Gertz*).

3. 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.*

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

5. N.Y. CONST. art. I, § 8. The provision provides in pertinent part: “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.” *Id.*

6. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991), *on remand from* 497 U.S. 1021 (1990), *rev’g* 74 N.Y.2d 548, 549 N.E.2d 129, 549 N.Y.S.2d 938 (1989).

7. *Id.*

8. *Id.* at 239, 567 N.E.2d at 1271, 566 N.Y.S.2d at 907.

This Comment compares federal and state standards governing libel law. Part I reviews the evolution of libel law. Part II discusses the standard for analyzing defamatory statements set forth by the United States Supreme Court in *Milkovich*, and considers the New York Court of Appeals' application of *Milkovich* and New York law in *Immuno*. Part III explores the premise that federal law dominates the interpretation of freedom of speech rights as applied to libel cases, and the reasons therefor. Part III also discusses the broader rights offered by the New York State Constitution in this area. In conclusion, this Comment suggests that in light of *Immuno* and *Milkovich*, the New York bar and bench should continue to rely on the New York State Constitution, moving away from its federal counterpart, in order to afford greater freedom of speech protection.

## I. BACKGROUND

### A. *New York Times v. Sullivan*

Courts generally have applied the rules set forth in *New York Times v. Sullivan*,<sup>9</sup> and *Gertz v. Robert Welch, Inc.*<sup>10</sup> to decide libel issues. Prior to these two decisions, the common law defense of fair comment governed actions in libel.<sup>11</sup> Privileged

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9. 376 U.S. 254 (1964).

10. 418 U.S. 323 (1974).

11. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13-14 (1990); *Ollman v. Evans*, 750 F.2d 970, 974 n.5 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985). The *Ollman* court explained:

To establish the defense of fair comment, the defendant had to show (1) that the published criticism was one of legitimate public interest, (2) that the criticism was based on facts either stated or otherwise known to the reader, (3) that the criticism represented the actual opinion of the critic, and (4) that the criticism was not made solely for the purpose of causing harm to the person criticized.

*Id.* (citing RESTATEMENT (SECOND) OF TORTS § 606 (1938)). See also Charles H. Carman, *Hutchinson v. Proxmire and the Neglected Fair Comment Defense: An Alternative to "Actual Malice,"* 30 DE PAUL L. REV. 1, 13 (1980)).

statements of "opinion" were those that concerned public interest, and had to be based on the true belief of the speaker without the intention of harming the plaintiff.<sup>12</sup> To bring a successful action for defamation, the plaintiff needed only to show that there was "an unprivileged publication of false and defamatory matter . . . ."<sup>13</sup> Truth was a defense that the defendant had the burden of proving.<sup>14</sup>

In *New York Times v. Sullivan*,<sup>15</sup> the United States Supreme Court drastically reformed common law defamation holding that in a civil libel action the First Amendment of the United States Constitution requires that a public official plaintiff has the burden of proving that an alleged defamatory statement was false and that it was made with actual malice or reckless disregard of its truth or falsity.<sup>16</sup> In so holding, the Court also observed that

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12. *Ollman*, 750 F.2d at 974. See also Seth A. Kaplan, Note, *Fact and Opinion after Gertz v. Robert Welch Inc. - The Evolution of a Privilege*, 34 RUTGERS L. REV. 81, 84 (1981) (discussing common law privilege of fair comment).

13. See *Milkovich*, 497 U.S. at 12, 13-14. (citing RESTATEMENT (SECOND) OF TORTS § 558 (1938)).

14. See RESTATEMENT (SECOND) OF TORTS § 582 cmt. e (1938).

15. 376 U.S. 254 (1964). Sullivan, the Commissioner of Public Affairs, sued the *New York Times* for defaming him by printing an advertisement that described the acts of the Alabama police during a demonstration by African-American students. *Id.* at 256. The Court held that the publication was an editorial advertisement conveying a message of public concern, *id.* at 266, and that Sullivan, a public official, had to prove the statement was false and was made with actual malice. *Id.* at 279-80.

Prior to *New York Times* it was unclear whether the First Amendment protected libelous publications because libel was governed by state law. *Id.* at 268. This ambiguity was caused in part by statements made by the Court in prior decisions. *Id.* at 268 n.6. Examples of this ambiguity given by the Court included: *Konigsberg v. State Bar of California*, 365 U.S. 36, 49 n.10 (1961) (rejecting the notion that "freedom of speech and association as protected by the First and Fourteenth Amendments, are 'absolutes'" (citations omitted)); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 48 (1961) (stating that prevention and punishment of libel did not "raise a Constitutional problem"); *Roth v. United States*, 354 U.S. 476, 486-87 n.6 (1957) (stating "'libelous utterances [are not] . . . within the area of constitutionally protected speech'" (quoting *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952))).

16. *New York Times*, 376 U.S. at 279-80.

“breathing space”<sup>17</sup> should be afforded to the freedom of speech to promote and protect our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .”<sup>18</sup>

The *New York Times* actual malice standard of proof for public officials was extended to apply to public figures.<sup>19</sup> However, in *Gertz v. Robert Welch, Inc.*,<sup>20</sup> the Court ruled that the actual malice standard was limited to public officials and public figures and did not extend to private individuals.<sup>21</sup> The Court held that as long as states did “not impose liability without fault, . . . [they] may define for themselves the appropriate standard of liability” in a defamation suit brought by a private individual against a publisher or broadcaster for allegedly defamatory statements.<sup>22</sup> The Court reasoned that the *New York Times* standard should not pertain to private individual plaintiffs because they do not have accessibility to the media to rebut the challenged statements, as do public officials and public figures, and, therefore, are more vulnerable to such statements than are public officials and public figures.<sup>23</sup> Additionally, the Court noted that private individuals, unlike public officials, did not “thrust themselves to the forefront of . . . public controversies.”<sup>24</sup> Accordingly, the Court concluded that because private individuals were more deserving of recovery additional protection for reputation should be afforded to private plaintiffs in defamation suits.<sup>25</sup>

*Gertz* also marked another significant development in the area of libel law when the Court stated:

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17. *Id.* at 272.

18. *Id.* at 270.

19. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164-65 (1967) (Warren, C.J., concurring).

20. 418 U.S. 323 (1974).

21. *Id.* at 343.

22. *Id.* at 347.

23. *Id.* at 344.

24. *Id.* at 344-45.

25. *Id.*

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. But there is no constitutional value in false statements of fact.<sup>26</sup>

In meeting the standard of protecting and promoting freedom of expression espoused by *New York Times*, this dictum in *Gertz* was used as a separate federal constitutional protection for statements labeled "opinions."<sup>27</sup> The cases that followed *New York Times* and *Gertz* developed different tests and standards to distinguish between fact and opinion,<sup>28</sup> to determine what was

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26. *Id.* at 339-40 (footnote omitted).

27. Following *Gertz*, the Restatement of Torts defined opinion as: "A defamatory communication [that] 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." RESTATEMENT (SECOND) OF TORTS § 566 (1977). Expressions of opinion can be found in two forms, pure opinion and mixed opinion. *Id.* at § 566 cmt. b. Pure opinion "occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character;" or when the facts on which the speaker's opinion is based are clearly assumed by both parties and do not need to be disclosed. *Id.* The second type of opinion, mixed opinion, is an "expression of . . . opinion [based upon] . . . undisclosed facts that justify the forming of the opinion expressed by the defendant." *Id.*

The Restatement of Torts explained the dictum in *Gertz* as follows:

[A]n expression of opinion cannot be the basis of a defamation action which involves public communications on matters of public concern. Although it is thus possible that private communications on private matters will be treated differently the logic of the constitutional principle would appear to apply to all expressions of opinion of the . . . pure type."

*Id.* at § 566 cmt. c. As for mixed opinion, the Restatement provides that if the recipient of the communication can reasonably infer undisclosed defamatory facts, it is not constitutionally protected. *Id.*

28. See, e.g., *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985). In *Ollman*, the court articulated four factors that should be considered to determine whether an objective reader would view a statement as fact or opinion: (1) the "common usage" of the statement; (2) the "verifiability" of the statement; (3) the "context of the statement"; and (4) the "broader context or setting" of the statement. *Id.* at 979.

protected speech and what was not.<sup>29</sup> These tests and standards were developed with the goal of fostering the principles previously set forth by the Supreme Court. This supposedly settled law<sup>30</sup> was re-examined by the United States Supreme Court in *Milkovich v. Lorain Journal Co.*

### *B. Milkovich v. Lorain Journal Co.*

In *Milkovich v. Lorain Journal Co.*,<sup>31</sup> the Supreme Court granted certiorari<sup>32</sup> to address the issue of whether the Ohio Court of Appeals was correct in recognizing a federal constitutional protection of "opinions."<sup>33</sup> The Court held that

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Similarly, in *Information Control v. Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980), the Ninth Circuit stated that the following three factors should be considered to determine whether a publication constitutes a statement of fact or opinion: (1) the "facts surrounding the publication;" (2) the circumstances in which the statement is made, (i.e. public debate); and (3) the "language of the . . . statement." *Id.* at 783-84.

29. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (holding that *Hustler Magazine's* parody depicting public figure, Reverend Falwell, having sex with his mother in an outhouse could not be construed as fact, and thus was constitutionally protected); *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) (concluding that labor union's application of the word "traitor" and other derogatory statements directed at workers who crossed picket line were protected because they were used in "loose figurative tense"); *Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6, 13 (1970) (finding that no reader could have thought the word "blackmail," as it appeared in the article, was used to charge respondent with commission of criminal offense).

30. See, e.g., *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 504 (1984) (quoting dictum in *Gertz* as right protected under Constitution).

31. 497 U.S. 1 (1990).

32. 493 U.S. 1055 (1990).

33. *Milkovich*, 497 U.S. at 10. The plaintiff, a high school wrestling coach, sued a local newspaper and the author of an article reporting that he lied under oath at a judicial hearing. *Id.* at 3. The Ohio Court of Appeals affirmed the granting of a motion for summary judgment against the plaintiff on the grounds that the defamatory statements were "opinions," and thus, protected by the First Amendment of the United States Constitution. *Milkovich v. News Herald*, 545 N.E.2d 1320, 1324 (Ohio Ct. App. 1989), *rev'd sub nom.*

"the First Amendment [did] not prohibit the application of Ohio's libel laws to the alleged defamation contained in the article."<sup>34</sup> *Milkovich* declined to follow the dictum in *Gertz*, stating that "we do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'"<sup>35</sup>

The *Milkovich* Court stated that "a statement of opinion relating to matters of public concern which do not contain a provably false factual connotation will receive full constitutional protection."<sup>36</sup> The Court further explained that case law suggested that a statement that does not contain a provably false factual connotation is one that cannot reasonably be construed as stating actual facts<sup>37</sup> or is "rhetorical hyperbole."<sup>38</sup> The Court found that these "established safeguards" protected First Amendment rights, and stated that freedom of expression was "adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and

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*Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1989). This precluded application of state libel laws. *Id.*

34. *Milkovich*, 497 U.S. at 3. Justice Brennan in a dissenting opinion in which Justice Marshall joined, succinctly explained the majority's holding as follows:

[W]hile the Court today dispels any mis-impression that there is a so-called opinion privilege *wholly in addition* to the protections we have already found to be guaranteed by the First Amendment, it determines that a protection for statements of pure opinion is dictated by *existing* First Amendment doctrine.

*Id.* at 24 (Brennan, J., dissenting).

35. *Id.* at 18.

36. *Id.* at 20 (footnote omitted).

37. *Id.* (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (concluding ad parody depicting Reverend Falwell in an incestuous encounter with his mother could not be taken seriously or as an actual fact)); *see also* *Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970) (holding that a reasonable reader could not have construed the word "blackmail" as suggesting that a real estate developer had been charged with a crime).

38. *Milkovich*, 497 U.S. at 15 (citing *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974) (finding that the use of the words "scabs" and "traitor" was mere rhetorical hyperbole)).

fact.”<sup>39</sup> The Court concluded that “an additional separate constitutional privilege for ‘opinion’” was not required.<sup>40</sup>

The majority’s approach to First Amendment free speech protection requires a court to make the following inquiries: 1) whether the “statements address[ed] matters of public concern;”<sup>41</sup> 2) whether the statements were “expressed in a matter that is provably true or false; and if so, 3) whether they reasonably [could] be interpreted as intended to convey actual facts about a person.”<sup>42</sup>

The Court stated that to determine whether a statement was defamatory the following factors must be considered: the common usage of the words at issue; its verifiability; the “type of speech;” and the “general tenor” of the statements.<sup>43</sup> The first two factors used by the Court were taken from the four-part *Ollman* test.<sup>44</sup> However, the second two prongs of the *Ollman* test were omitted.<sup>45</sup> That is, the Court failed to analyze the statement in its broader context and setting.<sup>46</sup>

Essentially, the majority isolated the challenged statements for analysis from the context in which the article appeared. They did not look at the context of the statement or see how a reasonable audience would view the statement in a particular setting. The majority’s silence regarding the contextual analysis suggests that the present Court is unwilling to expand freedom of speech protection under the First Amendment.

The dissenters, Justices Brennan and Marshall, agreed with the majority that there was no additional constitutional protection for

39. *Id.* at 19. See also *The Supreme Court 1989 Term - Leading Cases*, 104 HARV. L. REV. 219 (1990) (discussing *Milkovich*).

40. *Milkovich*, 487 U.S. at 24.

41. *McNally v. Yarnall*, 764 F. Supp. 838, 846-47 (S.D.N.Y. 1991) (discussing *Milkovich*, 497 U.S. at 16-17).

42. *Id.* at 847.

43. *Milkovich*, 487 U.S. at 16, 21.

44. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1984).

45. *Milkovich*, 487 U.S. at 21. See *supra* note 28 and accompanying text for a discussion of the *Ollman* test.

46. *Milkovich*, 487 U.S. at 21; *Immuno*, 77 N.Y.2d at 243-45, 567 N.E.2d 1270, 1274-75, 566 N.Y.S.2d 906, 910-11.

opinion.<sup>47</sup> However, they parted company with the majority in discussing the way a challenged statement should be interpreted.<sup>48</sup> Justice Brennan considered the format of the article, which appeared in the sports column with a signed photograph of the author under the logo "TD Says," to be a signal to the reader that this was a commentary.<sup>49</sup> The dissent stated that "[w]hile signed columns may certainly include statements of fact, they are also the 'well recognized home of opinion and comment.'"<sup>50</sup> The dissent also considered the entire context of the column and concluded that "the tone [was] pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage,"<sup>51</sup> all indicative of an opinion rather than a statement of fact.<sup>52</sup>

An illustration of the Court's narrow interpretation of First Amendment rights in defamation suits can be seen in *Masson v. New Yorker Magazine*.<sup>53</sup> In *Masson*, the petitioner Jeffrey Masson, a noted psychoanalyst and undisputed public figure, sued the *New Yorker Magazine*, its publishers, and the author of an article for allegedly defamatory statements contained in an article and subsequent book regarding the petitioner's position as Projects Director of the Sigmund Freud Archives.<sup>54</sup> The sources of the author's work primarily consisted of taped interviews that the author conducted with Masson.<sup>55</sup> However, there were some portions of the interviews that were handwritten.<sup>56</sup> The challenged statements consisted of six misquotations, which Masson claimed made "him appear 'unscholarly, irresponsible,

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47. *Milkovich*, 497 U.S. at 24-25 (Brennan, J., dissenting).

48. *Id.* at 25 (Brennan, J., dissenting).

49. *Id.* at 32 (Brennan, J., dissenting).

50. *Id.* (Brennan, J., dissenting) (quoting *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 227 (2d Cir. 1985)).

51. *Id.* (Brennan, J., dissenting).

52. *Id.* (Brennan, J., dissenting).

53. 111 S. Ct. 2419 (1991), *rev'g* 895 F.2d 1535 (9th Cir. 1989).

54. *Id.* at 2424.

55. *Id.* at 2424-25.

56. *Id.* at 2428 (original handwritten notes were discarded once they were typed; the typed notes were not admitted into evidence).

vain, [and] lacking impersonal [sic] honesty and moral integrity.”<sup>57</sup>

When the case was before the circuit court, it found that the statements contained in the article were not actionable on the grounds that the misquotations were either rational interpretations of Masson’s statements or substantively consistent with Masson’s statements.<sup>58</sup> Based on this finding, the circuit court held that the defendants did not act with actual malice.<sup>59</sup> The court concluded that actual malice could be inferred “from a fabricated quotation when the language attributed to the plaintiff is wholly the product of the author’s imagination.”<sup>60</sup> The circuit court noted, however, that an author may “fictionalize quotations ‘to some extent,’”<sup>61</sup> and determined that the quotations were “either ‘rational interpretations’ of ambiguous remarks . . . or [did] not ‘alter the substantive content’ of unambiguous remarks actually made by the public figure.”<sup>62</sup>

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57. *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1536 (9th Cir. 1989), *rev’d*, 111 S. Ct. 2419 (1991). For example, the author quoted Masson as saying that he was like an “intellectual gigolo.” *Id.* at 1540. However, on the tape recorded portion of the interview Masson stated “I had managed to worm my way into the good graces of Eissler and Anna Freud and Muriel Gardner through charm and this had worked on them, and they had like fallen into a spell. I had mesmerized them . . . .” *Id.* at 1540 n.4.

58. *Id.* at 1539-46. Another example referred to Masson’s changing of his middle name. He was quoted as saying “it sounded better.” What Masson said was that he “just liked it.” The circuit court stated that it did not see any substantive difference between the phrases. *Id.* at 1540. The United States Supreme Court agreed with the circuit court’s finding on this particular quote. *Masson*, 111 S. Ct. at 2436. In another instance the author quoted Masson as describing himself as “the greatest analyst who ever lived” after Freud. *Masson*, 895 F.2d at 1542. Again the circuit court found that the author’s statements were reflective of Masson’s actual statements which included the following: “analysis stands or falls with me now,” and “it’s me and Freud against the rest of the analytic world . . . .” *Id.*

59. *Masson*, 895 F.2d at 1546.

60. *Id.* at 1539 (citing *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976)).

61. *Id.* (quoting *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir. 1976), *cert. denied*, 434 U.S. 834 (1977)).

62. *Id.* (citations omitted).

As an alternative holding the circuit court relied upon the “incremental harm test,” which measures the incremental harm to reputation caused by the challenged statements.<sup>63</sup> Applying this test the circuit court found that based on the many provocative statements made by Masson “the additional harm caused by the ‘intellectual gigolo’ quote was nominal or nonexistent, rendering the defamation claim as to [that] quote nonactionable.”<sup>64</sup>

The United States Supreme Court reversed and remanded,<sup>65</sup> finding that the lower court’s application of the “rational interpretation” and the “incremental harm” tests went one step beyond constitutional protection.<sup>66</sup> Although the Court believed that the First Amendment permitted the author to have some interpretive license, the Court determined that when quotation marks are used a reasonable reader would conclude that the quotation was “a verbatim repetition of a statement by the speaker” and the principle does not apply.<sup>67</sup> The Court concluded that if the author made a deliberate alteration that resulted in a material change in the meaning of the statement, then the defendant would be liable.<sup>68</sup> The Court applied the “material change” rule rigidly. For example, when analyzing the misquote referring to Masson as an “intellectual gigolo” the Court failed to consider Masson’s statement in light of the other remarks that he made during the lengthy interviews.<sup>69</sup> Therefore, the Court did not look to the surrounding statements to get the whole story in determining whether the statements were actionable.<sup>70</sup> The

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63. *Id.* at 1541.

64. *Id.* After analyzing each challenged statement independently, the court concluded that Masson did not present sufficient evidence to support a finding of malice and therefore affirmed the district court’s dismissal on summary judgment. *Id.* at 1546, 1548.

65. *Masson*, 111 S. Ct. at 2437.

66. *Id.* at 2434.

67. *Id.* at 2424.

68. *Id.* at 2433.

69. *Id.* at 2435-36.

70. See Richard N. Winfield, *Altered Quotes and Incremental Harm*, N.Y. St. B.J., Jan. 1992, at 16. The author stated that by “[f]ocusing microscopically only on the challenged statements, the Supreme Court cast a blind eye on the unchallenged quotations . . . .” *Id.* at 18.

Court's narrow focus of matching the written words to the taped interview therefore limited the author's artistic expression.<sup>71</sup>

## II. IMMUNO AG. V. MOOR-JANKOWSKI

### A. Background

Prior to the Supreme Court decision in *Milkovich*, the New York Court of Appeals affirmed the dismissal of a libel suit based on the "opinion privilege," in *Immuno AG. v. Moor-Jankowski*.<sup>72</sup> However, *Immuno* was vacated by the Supreme Court, and remanded with instructions to apply *Milkovich*.<sup>73</sup>

In *Immuno*, the defamatory article at issue was a letter to the editor published in the *Journal of Medical Primatology* written by Dr. Shirley McGreal, a known animal rights activist.<sup>74</sup> In the letter, she criticized Immuno, a biological product manufacturer based in Austria, for its plan to establish a facility in Sierra Leone, West Africa for purposes of doing hepatitis research using chimpanzees.<sup>75</sup>

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71. See *id.* at 18. ("Seen in geometric terms, . . . the Court [was confronted] with the burden of attempting to reconcile the curves of non-fiction literature with the straight lines of the law.").

72. *Immuno AG. v. Moor-Jankowski*, 74 N.Y.2d 548, 549 N.E.2d 129, 549 N.Y.S.2d 938 (1989), *cert. granted and judgment vacated*, 497 U.S. 1021 (1990), *aff'd on reh'g*, 77 N.Y.2d 535, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991); *cert. denied*, 111 S. Ct. 2261 (1991).

73. 497 U.S. 1021 (1990).

74. *Immuno*, 77 N.Y.2d at 240, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908.

75. *Id.* Dr. McGreal asserted that Immuno's proposal was a way to circumvent the legal restrictions placed on the importation of endangered animals, and that the present population of captured chimpanzees should suffice for Immuno's purposes. *Id.* The letter also stated that Immuno's plan on capturing chimpanzees would most likely require the killing of their mothers, and that Immuno's plan of returning the chimpanzees to the wild after the experiments would run the risk of spreading the disease to other chimpanzees. *Id.*

The letter was published in the *Journal of Medical Primatology* after it was submitted to Dr. Moor-Jankowski, the editor of the journal.<sup>76</sup> Prior to publication, the letter was forwarded to Immuno for their comment or rebuttal.<sup>77</sup> Immuno notified defendant that the matter was being referred to their New York lawyer.<sup>78</sup> After the letter was printed, Immuno brought a libel action against Dr. Moor-Jankowski, Dr. Shirley McGreal, and other defendants including the publishers and distributors of the *Journal of Medical Primatology* and the *New Scientist*.<sup>79</sup> All the defendants settled with plaintiff except Dr. Moor-Jankowski.<sup>80</sup>

### *B. Application of Milkovich to Immuno*

Applying the *Milkovich* standard to determine whether the letter written by Dr. McGreal was actionable, the New York Court of Appeals stated that following *Milkovich* "[t]he key inquiry [was] whether the challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact."<sup>81</sup> Therefore, in light of *Milkovich* the court of appeals was faced with the following questions: 1) whether the statements about Immuno addressed matters of public concern;<sup>82</sup> 2) whether the statements were expressed in a matter that was provably true or false; and 3) if so, whether they reasonably could be interpreted as intended to convey actual facts about Immuno.<sup>83</sup> Applying these standards, the court of appeals found, as it did prior to the remand from the Supreme Court, that the letter by Dr. McGreal "was provoked by a certain state of affairs, that it set out limited points of factual reference, and that to the extent that letter contained defamatory factual statements

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76. *Id.* at 240, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908.

77. *Id.* at 240-41, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908.

78. *Id.* at 241, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908.

79. *Id.* at 241, 567 N.E.2d at 1272-73, 566 N.Y.S.2d at 909.

80. *Id.* at 241, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909.

81. *Id.* at 243, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909.

82. *Id.* at 242-43, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909 (discussing Supreme Court's decision in *Milkovich*, 497 U.S. at 16-17).

83. *Id.* at 245-46, 567 N.E.2d at 1275-76, 566 N.Y.S.2d at 911-12.

about plaintiff, they would be actionable if false.”<sup>84</sup> The court therefore reached the same conclusion as it had prior to the remand from the Supreme Court.<sup>85</sup>

The court of appeals noted that the *Milkovich* Court “resolved ‘type of speech’ considerations in two sentences: ‘This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.’”<sup>86</sup> The court of appeals in *Immuno* found the defamatory statements to be neither rhetorical hyperbole nor the type of speech that could not reasonably be interpreted as factual to be protected under *Milkovich*.<sup>87</sup> Therefore, the court determined that the statements were set in a factual tone and were not protected under *Milkovich*.<sup>88</sup> However, the court affirmed their prior holding, granting summary judgment in favor of Dr. Moor-Jankowski, because Immuno failed to satisfy its burden of proving the factual falsity of the defamatory statement, a necessary element of plaintiff’s prima facie case.<sup>89</sup>

### C. Applying State Law

The New York Court of Appeals proceeded to consider the case on separate and independent grounds based upon the New

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84. *Id.* at 245, 567 N.E.2d at 1275, 566 N.Y.S.2d at 911 (citation omitted).

85. *Id.* at 245-46, 567 N.E.2d at 1275-76, 566 N.Y.S.2d at 911-12.

86. *Id.* at 244, 567 N.E.2d at 1274-75, 566 N.Y.S.2d at 910-11 (quoting *Milkovich*, 497 U.S. at 21).

87. *Id.* at 244-45, 567 N.E.2d at 1274-75, 566 N.Y.S.2d at 910-11. The court of appeals provided the following interpretation of the Supreme Court’s decision in *Milkovich*:

[I]t appears that the following balance has been struck between First Amendment protection for media defendants and protection for individual reputation: except for special situations or loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable.

*Id.* at 245, 567 N.E.2d at 1275, 566 N.Y.S.2d at 911.

88. *Id.*

89. *Id.* at 245-48, 567 N.E.2d at 1276, 566 N.Y.S.2d at 912.

York State Constitution.<sup>90</sup> The court of appeals reviewed the case under state law for two reasons: first, “because the nature of the issue in controversy — liberty of the press — [is] where this State has its own exceptional history and rich tradition;”<sup>91</sup> and “second, . . . [because] *Milkovich* may leave an area of uncertainty for future litigation.” The court noted its obligation to settle the law of this state.<sup>92</sup>

This reasoning given by the court was an example of how, under the principles of federalism, states are not limited to rights and protections provided by the First Amendment of the United States Constitution.<sup>93</sup> The First Amendment merely establishes a

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90. *Id.* at 248, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913. The court of appeals stated that matters regarding freedom of expression “are particularly suited to resolution as a matter of State common law and State constitutional law . . . .” *Id.*

91. *Id.* at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914 (citations omitted). *See, e.g.,* O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 528-29, 523 N.E.2d 277, 280-81, 528 N.Y.S.2d 1, 4-5, (1988) (New York reporter's qualified privilege under First Amendment of United States Constitution and article I of State Constitution protected non-party newspaper's confidential photographs from discovery by plaintiff). *Compare* Branzburg v. Hayes, 408 U.S. 665, 682-83 (1972) (there is no reporter's privilege under federal law) and New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) (holding state statute prohibiting topless dancing in premises licensed to sell alcohol is permitted under Twenty-first Amendment of United States Constitution), *rev'g* 50 N.Y.2d 524, 407 N.E.2d 460, 429 N.Y.S.2d 616 (1980) with Bellanca v. State Liquor Auth., 54 N.Y.2d 228, 230 429 N.E.2d 765, 766, 445 N.Y.S.2d 87, 88 (1981) (statute prohibiting topless dancing in premises licensed to sell liquor was found to be protected expression under the freedom of speech provisions of New York State Constitution), *on remand from* 452 U.S. 714 (1981), *cert. denied*, 456 U.S. 1006 (1982) and *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557-59, 503 N.E.2d 492, 494, 495, 510 N.Y.S.2d 844, 846-47 (1986) (statute providing for closure of adult bookstore due to lewd gestures of patrons was found to incidentally affect right to freedom of expression under New York State Constitution), *on remand from* 478 U.S. 697 (1986).

92. *Immuno*, 77 N.Y.2d at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

93. *See* *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 307, 501 N.E.2d 556, 563, 508 N.Y.S.2d 907, 914 (1986), *cert. denied*, 479 U.S. 1091 (1987) (“The States exist as sovereign entities independent of the national Government and the Tenth Amendment reserves to them and the people ‘[t]he powers not

floor below which states cannot go.<sup>94</sup> While states may not limit rights to less than the federally established standards, they may expand them.<sup>95</sup> The court indicated that there were two approaches that the New York courts may use in choosing whether to apply state law or federal law.<sup>96</sup> One approach is the "interpretive approach."<sup>97</sup> Under this approach, a state may rely on its own state constitution when the language of its federal counterpart is different from its own version.<sup>98</sup> Factors to consider in this approach are whether the state constitution: confers more rights; is phrased in such a way as to convey a broad interpretation; was adopted with the intention to convey equal or greater rights than its federal counterpart; or affirmatively conveys a certain right.<sup>99</sup>

The alternative approach for relying on state law rather than federal law is the "non-interpretive" approach.<sup>100</sup> This approach considers the following: "preexisting State statutory or common

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delegated to the United States by the Constitution, nor prohibited by it to the States.") (citing U.S. CONST. amend. X).

94. See *People ex rel. Arcara*, 68 N.Y.2d at 557, 503 N.E.2d at 494, 510 N.Y.S.2d at 846 (the First Amendment of the Federal Constitution provides a minimal national standard of freedom of speech rights); see also Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165, 174 (1980) ("The First Amendment, like all provisions of the Bill of Rights, merely sets minimum federal standards, and does not preclude States from providing greater protection to expressive activity within their borders.") (footnote omitted); *Developments in the Law -- The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1351 (1982) ("the Constitution provides the minimum guarantees of fundamental rights . . .") [hereinafter *Developments*].

95. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (state courts may use their sovereign powers to expand rights to their own citizens); *P.J. Video*, 68 N.Y.2d at 299, 501 N.E.2d at 558, 508 N.Y.S.2d 909 (New York Court of Appeals applying article I, § 8 of the New York State Constitution to afford greater protection from searches and seizure than the Fourth Amendment of the Federal Constitution).

96. *P.J. Video*, 68 N.Y.2d at 302-03, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

97. *Id.*

98. *Id.*

99. *Id.*

100. See *id.* at 303, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

law defining the scope of the individual right in question;" the state's "history and traditions;" the state's policies regarding the particular law; and the state citizen's attitudes toward such laws and policies.<sup>101</sup> Because, New Yorkers pride themselves on their "freedom of expression" and on their reputation as the nation's cultural center, New York's own laws often take into account its own character with more insight than can the federal laws.<sup>102</sup>

In turning to state constitutional analysis, the New York Court of Appeals maintained the standard it set forth in *Steinhilber v. Alphonse*.<sup>103</sup> That standard considers the challenged statement in the context of the whole communication and in the circumstances in which it was made to distinguish between actionable fact and protected opinion.<sup>104</sup> New York courts do not adhere to any rigid tests,<sup>105</sup> such as the one found in *Ollman v. Evans*,<sup>106</sup> although the *Ollman* test is helpful.<sup>107</sup> Rather, the New York Court of Appeals has reviewed articles with flexibility considering "the circumstances surrounding their use, . . . manner, tone, and style . . . ."<sup>108</sup> The approach is a contextual one<sup>109</sup> rather than the "fine parsing" as may now be required under federal law as announced in *Milkovich*.<sup>110</sup> Under the New York State Constitution the proper analysis requires an approach that "takes into account the full context of the challenged speech . . . ."<sup>111</sup>

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101. *Id.*

102. *Id.* at 303, 308-09, 501 N.E.2d at 560-61, 564, 508 N.Y.S.2d at 911-12, 915-16.

103. 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986). *See also Immuno*, 77 N.Y.2d at 251, 567 N.E.2d at 1280, 566 N.Y.S.2d at 916.

104. *Steinhilber*, 68 N.Y.2d at 290, 501 N.E.2d at 553, 508 N.Y.S.2d at 904.

105. *Id.* at 291, 501 N.E.2d at 554, 508 N.Y.S.2d at 905.

106. 750 F.2d 970, 979 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985). *See supra* note 28 for *Ollman* test.

107. *Steinhilber*, 68 N.Y.2d at 292, 501 N.E.2d at 554, 508 N.Y.S.2d at 905.

108. *Id.*

109. *See, e.g., Immuno*, 77 N.Y.2d at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

110. *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

111. *Id.*

The *Immuno* court reasoned that a letter to the editor was an opportunity for citizens to air their views on a particular subject.<sup>112</sup> Therefore, the court noted that because such letters do not necessarily reflect the views of the publication, any damage caused to an individual reputation is a result of the individual person's knowledge and writing skills, and not because the statements must be true merely because they were published.<sup>113</sup> According to the court "[t]he common expectation of a letter to the editor is not that it will serve as a vehicle for the rigorous and comprehensive presentation of factual matter but as one principally for the expression of individual opinion."<sup>114</sup> An additional factor considered by the court was the type of audience that a publication targets.<sup>115</sup>

Turning to the facts of the instant case the court explained that because the average reader of the *Journal of Medical Primatology* was probably a medical researcher, doctor, scientist, or academic involved in medical primatology,<sup>116</sup> this audience would probably be aware of the issues involved and would understand that the article was the opinion of someone who is known as an animal rights activist.<sup>117</sup> Further, the court observed that the letter itself identified the author as chairwoman of the International Primate Protection League (IPPL), and this identification alone could lead a reasonable reader to infer which direction or position the letter would take before getting into the substance of the letter.<sup>118</sup> Moreover, the letter was prefaced by a note from the editor indicating that this was Dr. McGreal's view on the subject, and that *Immuno*, through its attorney, regarded

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112. *Id.* at 253, 567 N.E.2d at 1280, 566 N.Y.S.2d at 916.

113. *Id.* at 252-53, 567 N.E.2d at 1280, 566 N.Y.S.2d at 916.

114. *Id.* at 253, 567 N.E.2d 1280, 566 N.Y.S.2d at 196 (quoting *Immuno AG. v. Moor-Jankowski*, 145 A.D.2d 114, 129, 537 N.Y.S.2d 129, 138 (1st Dep't 1989)).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 254, 567 N.E.2d at 1280, 566 N.Y.S.2d at 916.

the letter to be “wholly inaccurate and reckless” and “not a fair comment” on their project.<sup>119</sup>

Taking all of these factors into account, the court concluded that, although the challenged statements might have contained implied factual assertions when viewed in isolation, viewed in the proper context the average reader would construe that the letter to the editor was simply one group’s point of view.<sup>120</sup> In so holding, the court clearly rejected any approach which first considers the challenged statements for express or implied factual assertions finding them nonactionable only if determined to be “loose, figurative or hyperbolic language.”<sup>121</sup> The court firmly re-established that the New York State Constitution assures the protection of “full and vigorous exposition and expression of opinion on matters of public interest.”<sup>122</sup>

If the court of appeals in *Immuno* had not looked at the context in which the defamatory statements were made, the result might have been the same as the outcome in *Milkovich*. With an increasingly conservative Supreme Court,<sup>123</sup> a letter to the editor to voice an opinion, or a column in a sports page will not be given constitutional protection unless it was written in a parody, or in rhetorical hyperbole, or in language that cannot reasonably be construed as true.<sup>124</sup>

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119. *Id.*

120. *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

121. *Id.* at 254, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917 (citation omitted).

122. *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917 (quoting *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 384, 366 N.E.2d 1299, 1309, 397 N.Y.S.2d 943, 953, *cert. denied*, 434 U.S. 969 (1977)).

123. See Steven A. Holmes, *Frustrated by Federal Courts, A.C.L.U. Looks to States on Individual Rights*, N.Y. TIMES, Sept. 30, 1991, at A14 (discussing the American Civil Liberties Union’s frustration with the conservative leaning of the federal courts, arguing that bringing constitutional issues before the Supreme Court is virtually a lost cause).

124. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (ad parody); *National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264 (1974) (rhetorical hyperbole); *Greenbelt Coop. Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970) (cannot reasonably be construed as true).

### III. A COMPARISON OF FEDERAL LAW WITH NEW YORK STATE LAW

#### A. Reliance on Federal Law

As the court of appeals noted in *Immuno*, if the defendant had presented the issue under independent and separate state law, this case would have been resolved a year earlier.<sup>125</sup> However, as this case reflects, federal law has dominated New York State freedom of speech cases.<sup>126</sup>

There are several compelling reasons why the First Amendment of the United States Constitution dominates the free speech arena. First and foremost, the Federal Constitution applies to all the states because there is a desire to foster uniformity.<sup>127</sup> Second, with ground-breaking cases such as *New York Times* and *Gertz*, state judges are more reticent about making an independent state constitution analysis,<sup>128</sup> especially when the federal law grants more rights than the common law.<sup>129</sup> Another reason may be that the courts' opinions are often written by their clerks who are

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125. *Immuno*, 77 N.Y.2d at 249, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

126. See Todd F. Simon, *Independent But Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 KAN. L. REV. 305, 312 (1985) (stating that since adoption of First Amendment, states have applied federal provision in almost all free expression cases while state provisions were all but ignored).

127. See *id.* at 337-38. But see Peter P. Miller, Note, *Freedom of Expression Under State Constitutions*, 20 STAN. L. REV. 318, 332 (1968) (the area of freedom of expression is complex making uniformity difficult to achieve in federal courts as evidenced by diverse views of Supreme Court).

128. See Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 964 (1982). The author notes that a State judges' notion that a Supreme Court decision is the "absolute, final truth" is understandable. *Id.* Therefore, "[i]t is easier for state judges and for lawyers to go along with the United States Supreme Court than to strike out on their own to analyze the state constitution." *Id.*

129. See, e.g., *Developments*, *supra* note 94, at 1409.

usually recruited fresh out of federally-oriented law schools.<sup>130</sup> Most law students are familiar with federal cases and therefore more inclined to use them. Additionally, counsel litigating libel cases often raise only federal issues thus setting the course that the courts will take.<sup>131</sup> In order to avoid federal judicial review of constitutional issues, state court decisions that cite both federal and state laws are required to declare "clearly and expressly" when their decisions are based on "bona fide separate, adequate, and independent grounds."<sup>132</sup> An additional reason for federal constitutional dominance in libel law may be the complexity of state constitutions. They are detailed, and "have the literary quality of yellow pages."<sup>133</sup> Furthermore, interpretation of state constitutions is localized and does not have the impetus of achieving national recognition.<sup>134</sup>

Although the foregoing are valid reasons explaining the attraction that the Federal Constitution holds for resolving freedom of speech issues, it is important to not forget Justice Brennan's observation:

The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law - for without it, the full realization of our liberties cannot be guaranteed.<sup>135</sup>

With the narrow approach adopted by the Supreme Court in *Milkovich*, the granting of broader personal freedoms that may be found under state law should override any non-compulsory reasons for using federal law to ensure the continued protection of the individual freedom of speech rights.

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130. See Hans E. Linde, *E Pluribus, Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 177 n.27 (1984) (citing Charles G. Douglas, III, *State Judicial Activism - The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1140 (1978)).

131. See *id.* at 175.

132. See *id.* at 176 (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)).

133. See *id.* at 197.

134. *Id.* at 196.

135. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

*B. The New York State Constitution Prior to Milkovich and Immuno*

In the area of freedom of speech, state law may be preferable to federal law because states are more attuned to the peculiarities and traditions of their citizens and heritage.<sup>136</sup> New York, with its commitment to cultural, artistic, intellectual, and scientific interchange promotes and encourages the exchange of ideas and diverse viewpoints.<sup>137</sup> Although the United States Constitution was ratified thirty years before the New York Constitutional Convention of 1821, the drafters of the New York Constitution at that Convention did not adopt the language of the First Amendment when formulating the New York State free speech provision.<sup>138</sup>

Article I, section 8 of the New York State Constitution reads as follows: "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>139</sup> The language in the federal freedom of speech provision states as follows: "Congress shall make no law . . . abridging the freedom of speech, or of the

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136. See *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 250, 567 N.E.2d 1270, 1278, 566 N.Y.S.2d 906, 914, *cert. denied* 111 S. Ct. 2261 (1991); *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 308-09, 501 N.E.2d 556, 564, 508 N.Y.S.2d 907, 915-16 (1986), *cert. denied*, 479 U.S. 1091 (1987).

137. See, e.g., *P.J. Video*, 68 N.Y.2d at 309, 501 N.E.2d at 564, 508 N.Y.S.2d at 915-16. The court noted:

This perception of "the average New Yorker" involves a mix of factors peculiar to this State, including our legal traditions and our cultural and historical position as a leader in the educational, scientific and artistic life of our country, as well as a recognition that New York is a State where freedom of expression and experimentation has not only been tolerated, but encouraged.

*Id.*

138. See *SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 510, 488 N.E.2d 1211, 1220, 498 N.Y.S.2d 99, 108 (1985) (Wachtler, C.J., dissenting).

139. N.Y. CONST. art. I, § 8.

press . . . .”<sup>140</sup> The important distinction between these two provisions is that the freedom of speech provision of the New York State Constitution confers an affirmative right of freedom of speech, while the federal counterpart restrains governmental restrictions on the right.<sup>141</sup> Therefore, the language of the New York State Constitution provides broader protection than the First Amendment of the Federal Constitution. In fact, the New York State judiciary has provided the broadest possible protections in the areas of free press and the gathering and disseminating of information which is crucial to the conveyance of ideas on matters of public concern.<sup>142</sup>

Evidence of New York’s history of broad protection of free speech and free press can be seen as early as 1735 in the *Case of John Peter Zenger*.<sup>143</sup> Zenger was arrested for publishing articles in his newspaper, *The New York Weekly Journal*, that opposed and attacked the governor of New York.<sup>144</sup> His attorney argued truth as a defense even though precedents held otherwise.<sup>145</sup> The jury was instructed to decide only whether the words at issue were “libelous.”<sup>146</sup> Despite the judge’s instructions, the jury found in favor of Zenger because they believed the statements against the governor were true.<sup>147</sup>

As a result, the *Case of John Peter Zenger* allowed the press more “breathing space.”<sup>148</sup> Although Zenger did not directly set

140. U.S. CONST. amend. I.

141. See *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 249, 567 N.E.2d 1270, 1277, 566 N.Y.S.2d 906, 913 (1991); *O’Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 528-29, 523 N.E.2d 277, 280-81, 528 N.Y.S.2d 1, 4-5 (1988); *Beach v. Shanley*, 62 N.Y.2d 241, 255, 465 N.E.2d 304, 312, 476 N.Y.S.2d 765, 773 (1984) (Wachtler, J., concurring).

142. *O’Neill*, 71 N.Y.2d at 529, 523 N.E.2d at 280-81, 528 N.Y.S.2d at 4-5.

143. See Morris D. Forkosch, *Freedom of the Press: Croswell’s Case*, 33 *FORDHAM L. REV.* 415 (1965) [hereinafter Forkosch].

144. *Id.* at 443.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 444 n.121.

a major precedent because it never reached the appellate level,<sup>149</sup> it provided the foundation for what was to become the affirmative guarantee of freedom to speak, write and publish, guaranteed by the New York State Constitution.<sup>150</sup>

In 1804, *Croswell's Case*<sup>151</sup> compelled the New York legislature to adopt into statutes the principles set forth in *Zenger*.<sup>152</sup> Similar to the *Case of John Peter Zenger*, *Croswell's Case* was a action for defamation for statements concerning President Jefferson, published in *The Wasp*, a Federalist newspaper.<sup>153</sup> The great Federalist, Alexander Hamilton, was lead defense counsel in the case. He argued that "the function of a free press was to be on guard against any attempts at usurpation of power, so that the people might protect themselves in their liberties."<sup>154</sup> He believed that this goal could only be effectuated through a law allowing a jury to determine the law and the facts in libel cases, with truth as a recognized defense.<sup>155</sup> While *Croswell's Case* was still pending the New York State Legislature enacted a statute declaring as law the principles advocated by Hamilton.<sup>156</sup> The legislative promulgation of this principle ultimately resulted in the adoption of the freedom of speech provision of the New York State Constitution, article VII, section 8, at the Constitutional Convention of 1821.<sup>157</sup> Today, article I, section 8 of the New York State Constitution is identical to the language of the freedom of speech provision of 1821.<sup>158</sup>

A modern illustration of New York's ardent effort of conferring on its citizens greater constitutional rights in freedom

149. *Id.*

150. *Id.* at 444 n.121, 447.

151. *People v. Croswell*, 3 Johns. Cas. 337 (1804), reprinted in 1 N.Y. Common Law Rep. App. 717 (1883).

152. See Forkosch, *supra* note 143, at 446-47.

153. *Id.* at 418.

154. *Id.* at 444.

155. *Id.* at 447-48.

156. *Id.* at 447 (citing 1805 N.Y. Laws 90, § 1).

157. *Id.* at 447-48.

158. *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 249, 567 N.E.2d 1270, 1277, 566 N.Y.S.2d 906, 913 (1991); Forkosch, *supra* note 143, at 448 n.145.

of speech and freedom of expression is *People ex rel. Arcara v. Cloud Books, Inc.*<sup>159</sup> In *Arcara*, the United States Supreme Court upheld enforcement of a New York State public health nuisance statute<sup>160</sup> which forced the closing of a bookstore that sold adult books and showed explicit sexual movies.<sup>161</sup> The bookstore owner argued *inter alia*, that the First Amendment of the United States Constitution protected his right to sell books on the premises and the closure of the premises would interfere with that right in violation of the Federal Constitution.<sup>162</sup> The Supreme Court rejected this argument and held that the enforcement of the statute did not violate the bookstore's First Amendment right of freedom of expression.<sup>163</sup> The Court reasoned that the statute was aimed at curtailing unlawful conduct within the bookstore "having nothing to do with books or other expressive

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159. 478 U.S. 697 (1986).

160. N.Y. PUB. HEALTH LAW § 2320 (McKinney 1985). Section 2320 provides:

1. Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance.
2. The building, erection, or place, or the ground itself, in or upon which any lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and movable property used in conduction or maintaining such nuisance, are hereby declared to be a nuisance and shall be enjoined and abated as hereafter provided.

*Id.* Section 2329 provides for the closure of any building determined to be a public health nuisance pursuant to section 2320:

1. If the existence of the nuisance be admitted or established in an action as provided in this article, or in a criminal proceeding in any court, an order of abatement shall be entered as part of the judgment in the case, which order . . . shall direct the effectual closing of the building, erection or place against its use for any purpose, and so keeping it closed for a period of one year . . . .

N. Y. PUB. HEALTH LAW § 2329 (McKinney 1985).

161. *People ex rel. Arcara*, 478 U.S. at 698-700.

162. *Id.* at 700.

163. *Id.* at 707.

activity.”<sup>164</sup> Therefore, the court concluded that the First Amendment did not protect the illegal use of the bookstore.<sup>165</sup>

On remand,<sup>166</sup> the New York Court of Appeals acknowledged that it was bound by the Supreme Court’s interpretation of the Federal Constitution but noted that it was additionally charged with the responsibility of determining “the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York . . . [through the] exercise [of] its independent judgment . . . .”<sup>167</sup> Therefore, the court of appeals proceeded to analyze the case on New York State constitutional grounds.

The court of appeals reasoned that under state law, even if the order to close the bookstore was aimed at abating the illegal activities of the customers,<sup>168</sup> “[t]he crucial factor in determining whether State action affects freedom of expression is the impact of the action on the protected action activity and not the nature of the activity which prompted the government to act. The test . . . is not who is aimed at but who is hit.”<sup>169</sup>

Turning to the facts of the case, the court determined that although the statute was intended to curtail illegal activity, it incidentally impacted the bookstore’s First Amendment right of freedom of expression.<sup>170</sup> Therefore, the court determined that under established state law in order for the government to pursue an action that incidentally impinges on freedom of expression, it must show that its means were not broader than needed to achieve its end.<sup>171</sup> It is apparent from this decision that the New York judiciary has taken great pains to protect freedom of speech

164. *Id.*

165. *Id.*

166. *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).

167. *Id.* at 557, 503 N.E.2d at 494, 510 N.Y.S.2d at 846.

168. *Id.* at 558, 503 N.E.2d at 495, 510 N.Y.S.2d at 847.

169. *Id.*

170. *Id.*

171. *Id.* (citing *Nicholson v. State Comm’n on Judicial Conduct*, 50 N.Y.2d 597, 409 N.E.2d 818, 431 N.Y.S.2d 340 (1980) and *People v. Taub*, 37 N.Y.2d 530, 337 N.E.2d 754, 375 N.Y.S.2d 303 (1975)).

and expression under New York state law, which is clearly greater protection than the protection afforded under federal law.

*C. The New York State Constitution Following Milkovich and Immuno*

In post *Milkovich* and post *Immuno* defamation actions that have come before New York courts, the state judiciary has continued to apply the New York State Constitution to resolve defamation actions.<sup>172</sup> Following the decision in *Immuno*, the court of appeals had occasion to review freedom of speech guarantees under the state and federal constitutions in *600 West 115th Street Corp. v. Von Gutfeld*.<sup>173</sup> Following its interpretation of *Milkovich*, the court of appeals found that the defendant's alleged defamatory statements were nonactionable under federal analysis and since the statements passed federal constitutional muster, it determined that it was also nonactionable under the state constitution without performing a state law based analysis.<sup>174</sup> The New York Court of Appeals dismissed the action holding that the challenged statements were protected speech under both the State and Federal Constitutions.<sup>175</sup>

In *Von Gutfeld* the challenged statements were made by the defendant in opposition to plaintiff's application for a building permit during a public hearing conducted by a New York City community board. Plaintiff owned a restaurant on the ground floor of the building consisting of commercial condominiums and

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172. See 600 W. 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 603 N.E.2d 930, 589 N.Y.S.2d 825 (1992) (dismissing action for defamation under state and federal constitutions); John Grace & Co., Inc. v. Todd Assoc., Inc., 591 N.Y.S.2d 477 (2d Dep't 1992) (affirming dismissal of defamation action under New York State Constitution); Gross v. New York Times, 180 A.D.2d 308, 587 N.Y.S.2d 293 (1st Dep't 1992) (applying *Steinhilber* and *Immuno* in defamation action under New York State Constitution); Behr v. Weber, 172 A.D.2d 441, 568 N.Y.S.2d 948 (1st Dep't 1991) (applying *Steinhilber* and *Immuno* to review alleged defamatory statements under New York State Constitution).

173. 80 N.Y.2d 130, 603 N.E.2d 930, 589 N.Y.S.2d 825 (1992).

174. *Id.* at 136, 603 N.E.2d at 932-33, 589 N.Y.S.2d at 827-28.

175. *Id.* at 133, 603 N.E.2d at 931, 589 N.Y.S.2d at 826.

residential cooperatives.<sup>176</sup> Defendant, a community board member, lived in the building for over thirty years.<sup>177</sup> Plaintiff proposed to open a sidewalk cafe next to its restaurant and applied to the City Department of Consumer Affairs for a permit to do so.<sup>178</sup> The challenged statements made by defendant at the hearing were that the restaurant "denigrated" the building,<sup>179</sup> that "[plaintiff's] entire lease and proposition [were] fraudulent . . . and smell[ed] of bribery and corruption,"<sup>180</sup> and that plaintiff's lease was illegal.<sup>181</sup>

The test applied by the court of appeals was the first two prongs of the *Ollman* test plus the "type of speech" test and the "general tenor" analysis.<sup>182</sup> In applying the 'common usage' and the 'verifiability' prongs of the *Ollman* test, the court found the word 'denigrate' to be unverifiable, but found the other statements referring to the lease to have factual connotations.<sup>183</sup> The statements that could be verified would not be actionable if they could be negated by the general tenor of the speech, or if the statements were the type of speech that is "loose, figurative or hyperbolic."<sup>184</sup> The statements were then analyzed under the "general tenor" analysis required by the Federal Constitution in accordance with *Milkovich*.<sup>185</sup> In analyzing the general tenor of the statements, the court found "the relevant circumstances were that (1) . . . the speakers were citizens, (2) the debate was heated, and (3) the forum was an official governmental session."<sup>186</sup> In this situation, the court held that it is generally

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176. *Id.* at 133-34, 603 N.E.2d at 931, 589 N.Y.S.2d at 826.

177. *Id.* at 134, 603 N.E.2d at 931, 589 N.Y.S.2d at 826.

178. *Id.* at 133-34, 603 N.E.2d at 931, 589 N.Y.S.2d at 826.

179. *Id.* at 134, 603 N.E.2d at 931, 589 N.Y.S.2d at 826.

180. *Id.* at 135, 603 N.E.2d at 932, 589 N.Y.S.2d at 827.

181. *Id.* at 134, 603 N.E.2d at 931, 589 N.Y.S.2d at 826.

182. *See supra* note 28 (discussing the *Ollman* test).

183. *Von Gutfeld*, 80 N.Y.2d at 142-43, 603 N.E.2d at 936-37, 589 N.Y.S.2d at 831-32.

184. *Id.* at 143, 603 N.E.2d at 937, 589 N.Y.S.2d at 832 (quoting *Milkovich*, 497 U.S. at 34-35).

185. *Id.* at 140, 603 N.E.2d at 935, 589 N.Y.S.2d at 830.

186. *Von Gutfeld*, 80 N.Y.2d at 141, 603 N.E.2d at 936, 589 N.Y.S.2d at 831.

understood that the purpose of this type of governmental hearing is to allow ordinary citizens to vigorously espouse their views regarding governmental actions that affect them. It is also generally understood that these citizens would engage in debates without researching the subject, and that such debates may be “product[s] of passionate advocacy.”<sup>187</sup> Under this general tenor analysis, the court found that listeners would conclude that these statements are opinions of the speakers<sup>188</sup> and held the statements were not actionable.<sup>189</sup>

Finding that the statements were protected under the Federal Constitution, the court concluded that they were also protected under the New York State Constitution.<sup>190</sup> The court reaffirmed that the analysis in New York State is guided by *Steinhilber v. Alphonse*, which considers the communication as a whole, and thus, affords greater freedom of speech rights than the federal law.<sup>191</sup> This greater protection is achieved by considering the “content of the whole communication, its tone, and apparent purpose”<sup>192</sup> instead of the “fine parsing” approach that the Supreme Court formulated in *Milkovich*.<sup>193</sup>

The appellate division has recently reviewed a defamation claim under the State Constitution in *Gross v. New York Times*.<sup>194</sup> In *Gross*, Dr. Gross, New York City’s former chief medical examiner, sued the *New York Times* for the publication of a series of articles criticizing his performance on certain autopsies, including allegations of misconduct.<sup>195</sup> The court considered all the articles and held that the criticisms and accusations were opinions given by medical professionals that did not rise to the level of accusing Dr. Gross of criminal

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187. *Id.*

188. *Id.*

189. *Id.* at 142, 603 N.E.2d at 936, 589 N.Y.S.2d at 831.

190. *Id.*

191. *Id.* at 145, 603 N.E.2d at 938, 589 N.Y.S.2d at 833.

192. *Id.* (quoting *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 254, 567 N.E.2d 1270, 1281, 566 N.Y.S.2d 906, 917 (1991)).

193. *Id.* See also *Immuno*, 77 N.Y.2d at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

194. 180 A.D.2d 308, 587 N.Y.S.2d 293 (1st Dep’t 1992).

195. *Id.* at 313, 587 N.Y.S.2d at 297.

misconduct.<sup>196</sup> Additionally, the court, following the court of appeals' instructions in *Immuno*, adhered to the standard established in *Steinhilber*, stating that "a statement of opinion . . . accompanied by a recitation of facts upon which it is based" is pure opinion and is protected speech under the New York State Constitution.<sup>197</sup> The court determined that the challenged statements would only be actionable if the facts were distorted, misrepresented, or the statement "implied that it is based upon facts."<sup>198</sup>

Even when the New York judiciary does apply federal law, its application is not rigid. For example, in *DRT Construction Co., Inc. v. Lenkei*,<sup>199</sup> a construction company sued the president of a homeowners' association for distributing flyers describing the company as "*profit hungry land abusers*."<sup>200</sup> The appellate division applied *Milkovich* and found that there were no actionable statements. The court held that the challenged statements did not contain provably false factual connotations and the cartoons in the flyers were "the sort of 'loose, figurative, or hyperbolic language' that is constitutionally protected opinion," under the Federal Constitution.<sup>201</sup>

Other jurisdictions, however, have applied *Milkovich* more rigidly.<sup>202</sup> One such application is *Spence v. Flynt*.<sup>203</sup> In *Spence*,

196. *Id.* at 318, 587 N.Y.S.2d at 300.

197. *Id.* at 311, 587 N.Y.S.2d at 295 (citing *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289, 501 N.E.2d 550, 552, 508 N.Y.S.2d 901, 903 (1986)).

198. *Id.* at 311, 587 N.Y.S.2d at 295-96.

199. 176 A.D.2d 1229, 576 N.Y.S.2d 724 (4th Dep't 1991)

200. *Id.* at 1229, 576 N.Y.S.2d at 725. Defendant distributed the flyers because plaintiffs intended to construct 700 residences on a 288 acre plot of land. *Id.* Another flyer had a cartoon of three men with Hitler style mustaches, money brimming from pockets, ax in hand, running over a deer with a bulldozer. *Id.*

201. *Id.* at 1229-30, 576 N.Y.S.2d at 725 (quoting *Milkovich v. Lorain Journal Co.*, 476 U.S. 1, 21 (1990)).

202. Compare *Edwards v. Hall*, 234 Cal.App.3d 886, 285 Cal.Rptr. 810 (1991) (Arsenio Hall, a talk show host, had angrily called Edwards, president of the Beverly Hills Chapter of the National Association for the Advancement of Colored People (NAACP), an extortionist when Edwards allegedly demanded that Hall donate \$40,000 to the NAACP. *Id.* at 890-91, 285 Cal.Rptr. at 812). The court found Mr. Hall liable libel under *Milkovich*

the defamatory statements were similar to those in *Hustler Magazine v. Falwell*.<sup>204</sup> In *Falwell*, the Supreme Court held that *Hustler Magazine's* ad parody of Falwell having sex with his mother in an outhouse was a type of speech that was rhetorical hyperbole and not actionable.<sup>205</sup> In *Spence*, however, the Wyoming Supreme Court held that naming Spence, an attorney, "Asshole of the Month of July" as published in *Hustler Magazine* was defamatory. The court arrived at this conclusion by applying Wyoming common law and *Milkovich*.<sup>206</sup>

With the broader application and interpretation of both federal and state laws, New York State continues to remain in the forefront in defending and protecting freedom of speech and expression. This is illustrated by other post-*Milkovich* defamation actions that have come before other state tribunals which were mostly decided according to federal law.<sup>207</sup> In fact, some state courts have determined that their own state constitutions did not provide privileges and protection greater than the Federal

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standard. *Id.* at 903, 234 Cal.Rptr. at 820. *Mr. Hall with Greenbelt Pub. Ass'n, Inc. v. Bresler*, 398 U.S. 6, 7 (1970) (A pre-*Milkovich* case in which a real estate developer was described as using blackmail tactics in a bargaining session. The Supreme Court did not find the use of the term blackmail would be understood as charging plaintiff with the actual crime. *Id.* at 206).

203. 816 P.2d 771 (Wyo. 1991), *cert. denied*, 112 S. Ct. 1668 (1992).

204. 485 U.S. 46 (1988).

205. *Id.* at 57.

206. *Spence*, 816 P.2d at 775, 777. The court noted that "[*Milkovich*] is the most important decision in this area of law since *New York Times*" *Id.* (footnote omitted). The court then quoted from *Milkovich* stating that under the principle of fair comment a statement "was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm." *Id.* (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13-14 (1990)). Upon reviewing the comments published by *Hustler Magazine*, the court found the statements to be defamatory and therefore actionable upon a finding that the statements were not protected defamatory criticism of a public figure. *Id.*

207. *See Dodson v. Dicker*, 812 S.W.2d 97 (Ark. 1991); *Kahn v. Bower*, 284 Cal. Rptr. 244 (Cal. Ct. App. 1991); *Rosner v. Field Enter., Inc.*, 564 N.E.2d 131 (Ill. App. Ct. 1990).

Constitution.<sup>208</sup> Interestingly, some of these state constitutional provisions are worded virtually the same as the freedom of speech provision in the New York Constitution.<sup>209</sup>

## CONCLUSION

A state court should depart from following the Federal Constitution when the level of protection provided is inadequate, when the Federal Constitution's national standard is not appropriate for the unique nature of the state, or when the state constitution has distinctive constitutional rights.<sup>210</sup>

*Milkovich* did more than declare the *Gertz* "opinion" dictum as not controlling. It narrowed the types of speech protected by the First Amendment<sup>211</sup> to rhetorical hyperbole, or statements that a reasonable reader would not construe as true.<sup>212</sup> Isolating and

208. See, e.g., *Yetman v. English*, 811 P.2d 323 (Ariz. 1991) (the Supreme Court of Arizona concluded "article 2, § 6 of the Arizona Constitution provides no greater privilege for otherwise defamatory statements than the First Amendment of the United States Constitution"); *Spence v. Flynt*, 816 P.2d 771, 773 (Wyo. 1991). (Wyoming's highest court stated that "[a]t the outset we must agree . . . that article I, § 20 of the Wyoming Constitution does not provide any avenue of relief that supersedes well-established First Amendment law . . .").

209. Compare ARIZ. CONST. art. I, § 6 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.") and CAL CONST. art. I, § 2 ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.") with N.Y. CONST. art. I, § 8 ("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.").

210. See *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 302-03, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986), cert. denied, 479 U.S. 1091 (1987).

211. Contra Note, *The Supreme Court, 1989 Term-Leading Cases*, 104 HARV. L. REV. 219, 223 (1990) (stating that the Court in *Milkovich* only reformulated the opinion privilege and limited the protection for opinion to statements that can not be reasonably interpreted as an assertion of fact).

212. *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 245, 567 N.E.2d 1270, 1275, 566 N.Y.S.2d 906, 911 (1991).

scrutinizing the alleged defamatory statement without looking at its context cannot take into account a reasonable reader's perception of whether the statement can be construed as fact or opinion.<sup>213</sup> Taking a sentence out of context may subject it to interpretations other than that which the author intended. *Milkovich's* perspective of looking at the statement in and of itself to determine whether it is libelous is analogous to looking at a leaf while attempting to see the forest.

The *Immuno* decision rendered by the New York Court of Appeals reaffirmed that the New York State Constitution provides greater free speech protection than the United States Constitution. The contextual approach adopted in New York makes the right to freedom of speech more meaningful. Given the tapered standard of analysis and the narrow approach taken by the Supreme Court in *Milkovich*, New York should continue to follow the principles set out in *Steinhilber*, as affirmed in *Immuno*, and continue its history and tradition of affording greater freedom of speech protections.

*Margaret Chan*

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213. *Id.* at 252-54, 567 N.E.2d at 1280-81, 566 N.Y.S.2d at 916-17.

