The Case for Defamatory Opinion

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ADAM LAMPARELLO*

“Society has a pervasive and strong interest in preventing and redressing attacks upon reputation,”¹ and “the policies underlying the immunization of opinion do not outweigh the plaintiff’s interest in reputation.”²

“Well-known Nazi war criminal.”³

“Looks like someone accused of child molestation … [a] pervert to look out for.”⁴

“Self-serving fraud.”⁵

“Charles Manson wannabe.”⁶

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If you believe the above statements contribute to the marketplace of ideas and foster uninhibited public debate, then you must believe that *Citizens United v. Federal Election Commission*⁷ was a victory for middle-class families who can only donate $200 to their favorite

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² *See* Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL RTS. J. 467, 585 (1994) (discussing the difference between evaluative opinions, which reflect the speaker’s value judgments, and deductive opinions, which make a “factual inference from established facts”). Professor Sowle summarized Judge Friendly’s approach as follows:

A statement asserting as an opinion that another has engaged in criminal conduct does not qualify as opinion for the purpose of First Amendment immunity or the common law privilege of fair comment, whether or not the factual basis for the opinion is stated along with the opinion. Judge Friendly’s justification for this conclusion was that immunizing an opinion that another has committed a crime would be “destructive of the law of libel;” virtually all criminal accusations could be immunized under this approach. *Id. (quoting Cianci v. New Times Publishing*, 639 F.2d 54, 64 (2d Cir. 1980)).

³ *Koch v. Goldway*, 817 F.2d 507, 508–10 (9th Cir. 1987).


⁶ *Crowe v. County of San Diego*, 593 F.3d 841, 877-80 (9th Cir. 2010).

⁷ 557 U.S. 310 (2010) (invalidating federal limits on corporate expenditures within 30 and 60 days of general and primary elections, respectively).
presidential candidate, that Bush v. Gore vindicated the rights of voters who mistakenly selected Pat Buchanan on the infamous butterfly ballot, and that Griswold v. Connecticut was properly anchored in those invisible penumbras that rise from the dead like some nutcase from a 1980’s slasher flick. In defamation law, decisions protecting as free speech statements like “well-known Nazi war criminal” is tantamount to legalizing verbal attacks that can—and do—cause reputational harm. This article argues that statements like those above can, and in narrow circumstances are, defamatory.

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In Milkovich v. Loraine Journal Co., the Supreme Court held that a statement “must be provable as false before there can be liability under state defamation law.” A speaker’s opinion, “[h]owever pernicious … [it] may seem,” is protected under the First Amendment unless it implies underlying facts. Thus, for defamation purposes, courts distinguish between

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10 See Jonathan N. Wand, et al., The Butterfly Did It: The Aberrant Vote for Pat Buchanan in Palm Beach County, Florida, 95 AMER. POL. SCI. REV. 793 (2001), available at http://www.law.berkeley.edu/faculty/rubinfeld/thebutterflydidit.pdf. (In the 2000 presidential election, thousands of voters in Palm Beach County, Florida were confused by the county’s butterfly-shaped ballot and claimed that they intended to vote for Al Gore but mistakenly punched the hole for Pat Buchanan).
11 381 U.S. 479, 484 (1965) (invalidating a Connecticut law banning contraception under an implied right of privacy under the Fourteenth Amendment, and stating that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”).
12 Koch, 817 F.2d at 508-510.
13 See Christopher P. Guzelian, True and False Speech, 51 B.C. L. REV. 669, 687 (2010) (stating that “not all bullshit is false. Some of it happens, fortuitously or intentionally, to result in true audience perceptions”).
14 497 U.S. 1.
15 Id. at 19. (emphasis added); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (“[h]owever 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”).
16 Gertz, 418 U.S. at 339. (In Gertz, the Court determined that “the New York Times test [actual malice] should apply to criticism of ‘public figures' as well as ‘public officials’”) id. at 336–337 (quoting Curtis Publishing Co., v. Butts,388 U.S. 130, 164 (1967) (Warren, C.J., concurring)) (brackets added) (“[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of ‘public officials’); see also New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)) (holding that, to recover damages for defamatory statements, public figures must show that the statement were made with actual malice, namely, with knowledge that the statements were false or with reckless disregard for evidence of their falsity).
three types of statements: provably false facts, opinions that imply underlying facts, and pure opinions, the last of which cannot be the basis for a defamation action. What’s worse, the courts have characterized statements such as “a pervert to look out for”\textsuperscript{17} and “walking, pus bloated sphincter”\textsuperscript{18} as pure opinion that amounts to little more than “rhetorical hyperbole”\textsuperscript{19} or a “vicious slur.”\textsuperscript{20} Put simply, to be defamatory a statement \textit{must} be verifiably false. That view is mistaken.

First, few, if any, statements are entirely separable from facts. To varying degrees, a speaker’s opinion is based on beliefs or perceptions that arise from factual events, and that “state, argue, opine, criticize, conjecture, and hypothesize.”\textsuperscript{21} Furthermore, opinions “make judgments about aspects of the world independent of a speaker,”\textsuperscript{22} and “call attention to the opinion, and not simply to the state of mind of the speaker.”\textsuperscript{23} In other words, there is no such thing as a ‘pure’ opinion.

Additionally, many factors independent of verifiability can influence an audience\textsuperscript{24} and cause reputational harm.\textsuperscript{25} An audience’s reaction does not turn solely on whether a statement

\begin{thebibliography}{9}
\bibitem{Purcell} Purcell, 560 F. Supp. 2d 337, 342.
\bibitem{Leidholt} Leidholt v. L.F.P. 860 F.2d 890, 894 (9th Cir. 1988).
\bibitem{Old Dominion} Old Dominion Branch No. 496, Nat. Ass’n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 286 (1974).
\bibitem{Koch} Koch, 817 F.2d at 510. (It is unfortunate that the legal category of opinion must be used to describe a statement that is no more than “a vicious slur” but “[b]ase and malignant speech is not necessarily actionable”); Milkovich, 497 U.S. at 20).
\bibitem{Sowle} Sowle, supra note 2, at 495 (discussing the difference between evaluative opinions, which reflect the speaker’s value judgments, and deductive opinions, which make a “factual” inference from established facts”). Professor Sowle summarizes Judge Henry Friendly’s approach as follows:

A statement asserting as an opinion that another has engaged in criminal conduct does not qualify as opinion for the purpose of First Amendment immunity or the common law privilege of fair comment, whether or not the factual basis for the opinion is stated along with the opinion. Judge Friendly's justification for this conclusion was that immunizing an opinion that another has committed a crime would be “destructive of the law of libel;” virtually all criminal accusations could be immunized under this approach. \textit{Id.} (quoting Cianci, 639 F.2d at 64).

\bibitem{Sowle2} Sowle, supra note 2, at 586 (citation omitted).
\bibitem{Id} Id. at 587.
\bibitem{Milkovich} Milkovich, 497 U.S. at 9. Chief Justice Rehnquist discussed the difference between pure opinions and opinions that imply underlying facts:

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expresses or implies verifiably false facts, but upon the perception that a statement sets forth credible beliefs, judgments, or assessments about a person. If, for example, the President of the United States calls an attorney “sleazy” and “untrustworthy” on national television, a portion of listeners may be influenced by these words. If these words are spoken by a flamboyant talk show host or a business competitor, the reaction would likely be different. Indeed, the value audiences give to any statement, regardless of its verifiability, depends on the identity and intent of the speaker, and whether the opinion expresses a point of view or merely a preference. As one commentator notes, “the use to which the audience understands the speaker to be putting the statement . . . [is] [a]n important factor in deciding what truth criteria an audience is likely to associate with a statement.” Of course, when statements are satirical or so utterly unbelievable

If a speaker says, “In my opinion John Jones is a liar,” he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, “In my opinion Jones is a liar,” can cause as much damage to reputation as the statement, “Jones is a liar.” As Judge Friendly aptly stated: “[I]t would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words ‘I think.’” Id. at 18-19 (quoting Restatement (Second) of Torts, § 566, Comment a (1977)); see also Miracle v. New Yorker Magazine, 190 F.Supp.2d 1192, 1198 (D. Hawaii 2001) (“opinions that do not imply facts capable of being proved true or false are protected by the First Amendment, and are not actionable”).

25 See Gertz, 418 U.S. at 350. In Gertz, the Court defined reputational harm as “actual injury,” but did not provide specific examples of the types of harm that would constitute actual injury. For purposes of this article, reputation harm is defined as causing actual pecuniary harm.
26 See generally RESTATEMENT (SECOND) OF TORTS § 559 (1976) (“[a] statement has defamatory meaning when it tends to ‘harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him’”).
27 See, e.g., Seanna Valentine Shiffrin, Speech, Death, and Double Take, 78 N.Y.U. L. REV. 1135, 1159 (2003) (“[a] large part of what we value about speech is located in the speaker's intentions to communicate to an audience and to influence, through the transmission of content and its uptake, that audience's perceptions, beliefs, and plans”).
28 Id. (brackets in original). Professor Sowle discusses the approach taken by language philosophers when examining the effects of speech on its audience.

The performative theorists, who rejected logical positivism, have focused upon the functional aspects of speech J.L. Austin, a leading performative theorist, initially distinguished performative utterances from constatives, or statements. Under Austin's analysis, performative utterances are those “whose truth adhere[s] in the simple act of their utterance.” Examples are the statements “‘I do’ in a wedding ceremony, and ‘I accept’ in contractual dealings.” They also include other speech
that no audience would take them seriously, the speaker’s identity will be irrelevant. Satire, however, is not always synonymous with opinion.

Furthermore, facts can discredit pure opinions. If a woman is called a “slut,” she may be able to produce evidence that she is a virgin or has been married and monogamous for her entire life. A lawyer criticized as a “crook,” may be able to demonstrate that he or she has never broken a law, violated an ethics provision, or been the subject of complaints by former clients. Thus, courts should not focus exclusively on verifiability, but on whether “a substantial degree of consensus within the relevant community or audience over the kinds of facts that would support finding the challenged statement to be true or false.” Of course, defamation law cannot be interpreted so broadly that it threatens to hold individuals liable for unpopular speech or undermine uninhibited debate on matters of political and social importance. As one commentator explains, “individual autonomy and choice require the freedom to espouse ideas

acts such as bets, warnings, and advice. Performatives have “felicity conditions,” but not the trait of being true or false. Hansen seems to imply that statements of opinion, if clearly understood as such, are performatives. Id.

29 See Fiber Systems Intern., Inc. v. Roehrs, 470 F.3d 1150, 1162 (5th Cir. 2006) (“when the word ‘crook’ is used in a context imputing theft, it is also defamatory per se”).
30 Sowle, supra note 2, at 582.

[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.” If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual. Id. (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).
and to choose among those espoused by others, unencumbered by the government's enforcement of civility rules.”

To strike the proper balance between actionable opinions and distasteful speech, this article proposes a four-part test permitting recovery for defamatory opinions where a statement: (1) is intentionally directed at and verbally attacks a private individual; (2) relates to a private matter; (3) is negligently made; and (4) causes tangible reputational harm. The reputational harm prong would require actual pecuniary harm, and plaintiffs would not be able to recover for statements that merely cause emotional distress. Additionally, an absolute privilege should be created for satirical commentary (or parody), which typically consists of cartoons, caricatures, or outlandish statements that mock, poke fun at, or embarrass public figures.

This framework would protect unpopular, distasteful, or offensive speech, and provide a civil remedy for “personal verbal assault[s] on … vulnerable private figure[s]” that subjects

34 See, e.g., Hustler Magazine v. Falwell, 485 U.S. 46 (1985) (holding that a parody of former Reverend Jerry Falwell, which depicted Falwell having sex with his mother in an outhouse, would not be interpreted as stating or implying actual facts about an individual); cf. Joseph H. King, Defamation Claims Based on Parody and Other Fanciful Communications Not Intended to Be Understood As Fact, 2008 UTAH L. REV. 875, 944 (2008). Professor King explains that, although parody may injure an individual’s reputation, it is not actionable unless a plaintiff can demonstrate that it has an underlying factual basis:

In some types of communication, the author contends that her words were not intended to be understood as representing that the events portrayed actually occurred. Such communications commonly take the form of parody, cartoons, caricature, or similar types of communication. Sometimes parodies and similar types of speech will be the bases of claims for defamation. The problem is that while a parody may often exact a severe emotional toll on its victim, it may or may not adversely affect the victim’s reputation. A victim’s reputation can be harmed only if falsely depicted or implied events change the recipients’ perception of the events that make up the victim’s life history that determines the victim’s standing. Whether parodies should be potentially actionable as defamation depends on whether the statement is deemed factual and thus potentially actionable, or is a matter of protected opinion and not actionable. Id.

35 See, e.g., FCC v. Pacifica Foundation, 438 U.S. 726, 745-46 (1978). In Pacifica, the Court stated:

[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according
them to “scorn, hatred, or ridicule or contempt, in the minds of … respectable segment[s] in the community.”  Of course, this test would not apply to legitimate criticism of private figures, such as speech evaluating an individual’s or corporation’s behavior, performance, or product. At bottom, the speech must be particularly vituperative and add no value to the public debate, although this is not, in itself, sufficient to impose liability.

As illustrated in the Table below, the lower courts’ attempts to distinguish pure opinion from opinions that imply underlying facts has resulted in a muddled and unprincipled jurisprudence.

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<td>“Self-serving fraud,” a “criminal” and acted “illegally”</td>
<td>Alleging that plaintiff had “homicidal tendencies.”</td>
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<td>“Traitor” and “union scab”</td>
<td>What kind of communist do we have up there that thinks it’s improper to protect your interests?</td>
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<td>“Pus bloated, walking sphincter,” a “wacko” suffering from “bizarre paranoia”</td>
<td>Stating that plaintiff “is an incompetent surgeon and needs more training”</td>
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<td>Calling plaintiff a “fat, failed, former sheriff’s deputy”</td>
<td>“These shameless shitholes (whose main allegiance is to money) are eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets. The latest of these hemorrhoidal types to make this page is Jackson, Wyoming.”</td>
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37 Stanton v. Metro Corp., 438 F.3d 119, 125 (1st Cir. 2006) (quoting Amrak Prods., Inc. v. Morton, 410 F.3d 69, 72 (1st Cir.2005)).
38 Nocosia, 72 F.Supp. 2d at 1104.
42 Leidholt, 860 F.2d at 894.
| attorney Gerry Spence, our Asshole of the Month for July” |
| Statement that plaintiff “engages in sexual escapades at churches and children’s playgrounds” and is a “racist liar” |

| “Skank and Ho,” “Intellectual gigolo.” |

Exposing Kevin Padrick Corrupt Oregon Attorney and Obsidian Finance LLC and ALL their Corrupt Illegal Activity EVER. Every Illegal Act, Every Indiscretion and Flat Out Lie. Cover Up. Back Alley Deal and Sexapades will be EXPOSED on Kevin Padrick—Obsidian Finance. Your illegal, immortal Activity RUINS lives.

Many of the above statements could fall into either category, as there is no principled way to explain, for example, why “slut” is a pure opinion, but “skank and ho” is an opinion that implies underlying facts. Likewise, plaintiffs may prove they are not communists by showing

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45 *Spence v. Flynt*, 816 P.2d 771, 773 (Wyo. 1991), cert. denied, 112 S.Ct. 1668 (1992). In *Spence v. Flynt*, the Wyoming Supreme Court found *Hustler Magazine* liable for seventy-five million in damages for naming attorney Gerry Spence “Asshole of the Month” for representing Andrea Dworkin in her invasion of privacy action against *Hustler*. One judge dissented, arguing that the statement was similar to the criticisms that lawyers receive from the general public. *Id.* at 786-88 (Golden, J., concurring in part, and dissenting in part).


48 *Obsidian Finance Corp. v. Cox*, 740 F.3d 1284, 1293 (9th Cir. 2014).


51 See *Sowle, supra* note 2, at 498-99. Professor Sowle highlights the varied approach taken by the lower courts after the Court decided *Milkovich*:

Since *Milkovich*, the lower courts’ decisions in opinion cases fall roughly into eight categories: (1) applications of the *Milkovich* holding that statements are actionable if they state or imply false statements of fact; (2) applications of the *Restatement* pure opinion rule, without distinguishing between deductive and evaluative opinions; (3) the use of a multifactor analysis that, expressly or by implication, immunizes statements reasonably understood as expressing the speaker’s point of view, even if supporting facts are not stated or available to the recipients; (4) use of a multifactor analysis that immunizes statements because reliable evidence is unavailable on the issue of falsity;
that they are lifetime members of the Republican Party and have a record of voting exclusively for free market political candidates. Additionally, plaintiffs may be able to demonstrate they are not felons by obtaining a copy of their criminal history, just as a corporation could prove that it did not engage in illegal activity by disclosing financial statements and accounting methods to investors. Ultimately, there is a reason that “[n]o area of modern libel law can be murkier than the cavernous depths of this inquiry [between fact and opinion].” The distinction itself is a legal fiction.

Of course, the overwhelming majority of speech many would consider offensive will—and should—remain beyond the reach of defamation law. Political commentators, comedians, online bloggers, and satirists can freely mock public figures like the late Reverend Jerry Falwell, call presidential candidates a “bunch of pussies,” and sharply criticize private figures. Citizens can burn American flags, hang confederate flags in the town square, and, march down Main Street with crosses wearing white hoods and chanting “Ku Klux Klan.” This speech is highly offensive to many and, in some cases, causes emotional distress, but it is not directed at private citizens and arguably relates to matters of public concern.

(5) use of a multifactor analysis that immunizes ambiguous statements; (6) use of a multifactor analysis to hold that statements are factual; (7) the immunization of hyperbole and invective; and, (8) conclusory holdings that statements are opinion, without accompanying analysis. Some cases fall into more than one of these categories, and for some the category is uncertain because of the brevity of the analysis. In addition, a given state’s decisions may fall into more than one category.

52 Levin v. McPhee, 119 F.3d 189, 196 (2d Cir. 1997) (quoting Sanford, Libel and Privacy § 5.1 (Supp.1997)).
55 See Snyder, 131 U.S. at 1228.
56 Id. at 1216. In Snyder, the Court explained the difference between matters of public and private concern:

Deciding whether speech is of public or private concern requires us to examine the “‘content, form, and context’” of that speech, “‘as revealed by the whole record.’” As in other First Amendment cases, the court is obligated “to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’” In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it
At the same time, “[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation,”57 and “the policies underlying the immunization of opinion do not outweigh the plaintiff's interest in reputation.”58 Perhaps that is why the Milkovich Court eschewed “the creation of an artificial dichotomy between ‘opinion’ and fact,”59 and refused to create a “wholesale defamation exemption for anything that might be labeled ‘opinion.’”60 What the Milkovich Court did not say is that some opinions, regardless of whether they imply facts, can be defamatory.

Part II challenges the long-recognized distinction between fact and opinion, and proposes a more sensible distinction between actionable opinion and non-actionable satire. Part III examines doctrines that limit defamation suits involving public figures and public issues, and argues that laws allowing citizens to recover for defamatory opinions would be consistent with these limitations. Part III also discusses the Supreme Court’s decision in Dun and Bradstreet v. Green moss Builders, Inc.,61 and contends that the Court’s reasoning permits states to adopt such laws. It concludes by discussing the recent holding in Armstrong v. Shrivell,62 in which the

was said, and how it was said. Id. (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (internal citations omitted).

57 Milkovich, 497 U.S. at 22 (quoting Rosenblatt, 383 U.S. at 86).
58 Sowle, supra note 2, at 495. (See Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 13 (1970); see also Rodney W. Ott, Fact and Opinion in Defamation: Recognizing the Formative Power of Context, 58 FORDHAM L. REV. 761, 794 (1991). The distinction between fact and opinion is elusive, and based largely on the context within which a statement is made:

[Emphasizing verifiability or drawing a bright-line distinction between fact and opinion, confines opinion to an artificial and abstract category and defeats the first amendment's goal of encouraging beneficial and harmless speech. Fact can be separated from opinion only by a conscious and explicit examination of context, with all the uncertainties which that involves There are no easy formulas. Id.

59 Milkovich, 497 U.S. at 18.
Eastern District of Michigan upheld a jury award of $4.5 million in punitive damages to a University of Michigan law student for verbal attacks made by a former Assistant Attorney General. The district court’s decision turned in large part on the derogatory nature of the comments, the plaintiff’s status as a private figure, and the fact that the comments related to matters of private concern.

**PART II**

**FALSE IDEAS DO EXIST: THE FALLACY OF THE FACT VERSUS OPINION DISTINCTION**

At common law, plaintiffs were required only to allege “an unprivileged publication of false and defamatory matter to state a cause of action for defamation.” Accordingly, statements could be actionable regardless of whether they were provably false or opinion. In *Milkovich*, the Court explained the common law approach:

Under the law of defamation, an expression of opinion could be defamatory if the expression was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him … The expression of opinion was also actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory… This position was maintained even though the truth or falsity of an opinion—as distinguished from a statement of fact—is not a matter that can be objectively determined and truth is a complete defense to a suit for defamation.

Concerned that broad defamation laws would inhibit public debate, the Court sought to re-balance “the need for vigorous public discourse … [with] the need to redress injury to citizens

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64 *Armstrong*, 2013 WL 4833948 at *2.
66 Id. (emphasis added).
67 Id. (quoting Restatement of Torts § 566, comment a (1938)) (emphasis added).
68 *See, e.g., Abrams v. United States*, 250 U.S. 616, 630 (1919) (“[T]he ultimate good desired is better reached by free trade in ideas ... the best test of truth is the power of the thought to get itself accepted in the competition of the market”) (Holmes, J., dissenting).
wrought by invidious or irresponsible speech.”

This resulted in an almost exclusive focus on whether a statement was provably false, thus insulating a substantial portion of opinion from liability, even if it did not refer to a public figure or relate to a matter of public concern.

A. THE UNWORKABLE DISTINCTION AMONG PROVABLY FALSE FACTS, PURE OPINION, AND OPINIONS THAT IMPLY UNDERLYING FACTS

A significant limitation on the types of speech that could be defamatory came in Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, where the Court characterized statements calling a negotiator’s position “blackmail” as “rhetorical hyperbole” and therefore not provably false. In Milkovich, the Court solidified the distinction between actionable facts and non-actionable opinions:

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.

The Milkovich Court recognized, however, that “[s]imply couching … statements in terms of opinion” does not insulate them from liability. Rather, opinions may imply underlying facts “if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous.”

The difference between fact-based and pure opinion turns on whether “a reasonable factfinder [could] conclude that the alleged defamatory statements were based upon an undisclosed fact capable of being proven

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69 Milkovich, 497 U.S. at 14.
70 398 U.S. 6.
71 Id. at 13-14; see also Letter Carriers, 418 U.S. at 284–286 (the words “traitor” and union “scab” were not defamatory because they were used “in a loose, figurative sense” and reflect a “lusty and imaginative expression of the contempt felt by union members”).
73 Gertz, 418 U.S. at 339-40.
74 Milkovich, 497 U.S. at 19.
75 Id. at 18-19.
false.”\textsuperscript{76} This analysis is performed “from the perspective of an ‘ordinary reader’ of the statement.”\textsuperscript{77} A statement cannot be defamatory if “even the most careless reader must have perceived that the word was no more than ‘name calling, exaggeration, ridicule, imaginative expression, subjective evaluation…rhetorical hyperbole [or] vigorous epithet.’”\textsuperscript{78}

Although the Court examines the context in which a statement is made, it does so primarily to assess verifiability, not to consider the status and intent of the speaker, or the actual effect of particular statements on a plaintiff’s reputation. In \textit{Milkovich}, the Court held that, “[w]hether a statement constitutes actionable fact or protected opinion depends on: (1) the specific language used”; (2) “whether the statement is verifiable”; (3) “the general context of the statement”; and (4) “the broader context in which the statement appeared.”\textsuperscript{79} Under this test, the reasonable expectations of an audience depend primarily on an interpretation of the statement’s meaning, not on the speaker’s credibility or intent.

This framework has resulted in an unprincipled and unworkable jurisprudence. To begin with, distinguishing fact from opinion is largely a standardless exercise, requiring courts to identify and make questionable assumptions about an audience’s \textit{reasonable} expectations, even though they may be contrary to the audience’s \textit{actual} expectations. In addition, whether it is ‘reasonable’ to interpret a statement as ‘sufficiently factual,’\textsuperscript{80} depends on a subjective

\textsuperscript{77} \textit{Mr. Chow of New York v. Ste. Jour Azur S.A.}, 759 F.2d 219, 224 (2d Cir.1985).
\textsuperscript{78} \textit{Greenbelt Cooperative Publishing Assn.}, 398 U.S. at 13-14 (brackets added).
\textsuperscript{79} \textit{Milkovich}, 497 U.S. at 9; see also \textit{Obsidian Finance Group}, 740 F.3d at 1293-94. The Ninth Circuit uses a similar analysis when assessing verifiability:

(1) Whether in the broad context, the general tenor of the entire work, including the subject of the statements, the setting, and the format, negates the impression that the defendant was asserting an objective fact; (2) Whether the context and content of the specific statements, including the use of figurative and hyperbolic language, and the reasonable expectations of the audience, negate that impression; and (3) Whether the statement is sufficiently factual to be susceptible of being proved true or false.
assessment of a statement’s believability. This standard may have value when courts examine satirical commentary, parody, or caricature, which is so extreme that no reasonable reader would interpret it as asserting or implying facts, but it provides no guidance when a speaker combines hyperbole with beliefs and judgments about a private figure. For example, calling someone a “pervert to look out for”\textsuperscript{81} is an opinion, but it reflects the speaker’s belief that someone has engaged in reprehensible criminal conduct. The speaker does not provide a factual basis for this belief, but readers are likely to assume that the speaker has an \textit{undisclosed} factual basis. Where the speaker is, among other things, a credible member of the community, there is certainly a possibility that the statement can cause reputational harm. As one commentator explains, “it is often very difficult to decide whether those or some of those who receive a published statement will regard a charge of misconduct as an inference drawn solely from information set forth or known to both parties or drawn in part from other information not disclosed or not assumed to be known by those receiving the communication.”\textsuperscript{82}

In other words, readers cannot easily distinguish between provably false statements and pure opinions, particularly because the vast majority of opinions rest, to varying degrees, on an underlying factual predicate. Without considering the \textit{actual} impact of a statement on an audience’s perception, how can a court, apart from the obvious examples of satire and parody, reliably conclude that a statement is \textit{too} hyperbolic, \textit{too} imaginative, or \textit{too} figurative? Stated simply, a verifiability-centered framework has “an inherent subjectiveness … [that] allow[s] a jury [and courts] to impose liability on the basis of the jurors' tastes or views, or perhaps on the

\textsuperscript{80} See Obsidian Finance Group, 740 F.3d at 1294.
\textsuperscript{81} Purcell, 560 F. Supp. 2d at 342.
\textsuperscript{82} Sowle, supra note 2, at 577 (quoting W. Page Keeton, Defamation and Freedom of the Press, 54 TEX. L. REV. 1221, 1249-59 (1976)).
basis of their dislike of a particular expression."

It depends largely on an unprincipled assessment of whether a statement “signal[s] ... to readers or listeners that what is being read or heard is likely to be opinion, not fact.”

In addition, while it is fairly easy to conclude that a statement is verifiable, e.g., “Mike was convicted of armed robbery last month,” it is far more difficult to determine that a statement is not verifiable. If a speaker says, “Mike is the worst lawyer in California,” most would say that this is an opinion. At the same time, the statement may be provably false if Mike produces evidence showing that he has been listed in the Top 100 Super Lawyers for the last ten years, has a stellar reputation among his peers, and has garnered excellent testimonials from his clients. The question in this case should not be whether a statement is verifiable, and but whether objective criteria exist to assess whether Mike is, in fact, the worst lawyer in California. If the court can identify such criteria, Mike should have the opportunity to prove that the statement is false and caused reputational harm. Put differently, courts and juries should not focus on whether a statement “would cause readers to understand that the charge was conjectural” but on whether “the context would tend to cause them to believe that the conjectural charge was true.”

83 *Hustler*, 485 U.S. at 55 (brackets added).

1. “an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous”;
2. “a determination of whether the statement is capable of being objectively characterized as true or false”;
3. “an examination of the full context of the communication in which the statement appears”; and
4. “a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might signal to readers or listeners that what is being read or heard is likely to be opinion, not fact.” *Ollman v. Evans*, 750 F.2d 1970, 1976 (D.C. Cir. 1984) (en banc)

85 Sowle, *supra* note2, at 588.
86 *Id.*
After all, a statement need not have an express or implied factual basis to be “sufficiently derogatory of another”87 and to subject a private citizen to “hatred, contempt, or ridicule.”88

A recent Ninth Circuit case illustrates the arbitrariness of distinguishing fact from opinion. In Obsidian Finance Group v. Cox,89 the plaintiffs, Kevin Padrick and Obsidian Finance Corporation, sued an online blogger for allegedly defamatory comments made on an internet blog.90 The blogger posted statements accusing the plaintiffs of, among other things, “corruption,” “fraud,” “deceit on the government,” “money laundering,” “harassment,” “tax crimes,” and “fraud against the government.”91 The plaintiffs were also called “thugs” and “evil doers”92

The Ninth Circuit held that these statements, considering the context in which they were made, were constitutionally protected opinion. The court applied a three-part test that examined whether: (1) the general tenor of the entire work negated the impression that the defendant was asserting an objective fact; (2) the defendant used figurative or hyperbolic language to negate that impression; and (3) the statements in question were susceptible of being proved true or false.93

With respect to the “general tenor” of the blog, the Ninth Circuit held that the name “obsidianfinancesucks.com” would lead readers to view the statements with “a certain amount of skepticism and with an understanding that they will likely present one-sided viewpoints rather

87 Milkovich, 497 U.S. at 9 (quoting Restatement of Torts § 566, comment (a)).
88 Gertz, 418 U.S. at 370 (White, J., dissenting); see also Milkovich, 497 U.S. at 9 (quoting Restatement of Torts § 566, comment a) (“lower him in the estimation of the community or to deter third persons from associating or dealing with him”).
89 740 F.3d at 1287.
90 Id.
91 Id. at 1293.
92 Id. at 1294.
93 Id. at 1293.
than assertions of provable facts.”
Furthermore, the “occasional and somewhat run-on[,] almost ‘stream of consciousness'-like sentences read more like a journal or diary entry revealing [Cox’s] feelings rather than assertions of fact.” The Ninth Circuit also concluded that the “consistent use of extreme language negates the impression that the blog posts assert objective facts,” and that the blogger’s “hyperbolic language … [was] “not sufficiently factual to be proved true or false.”

The Ninth Circuit did not, however, identify or discuss the reasons supporting these conclusions. For example, the Ninth Circuit did not explain why the blogger’s allegations of severe criminal conduct would not cause some readers to conclude that the statements implied the assertion of underlying or undisclosed facts. This is particularly troublesome given that one of the blog posts charged plaintiffs with committing ”tax fraud while administering the assets of a company in a Chapter 11 reorganization,” and called for the “IRS and the Oregon Department of Revenue to look’ into the matter.” Another post stated that plaintiff Kevin Padrick “hired a ‘hit man’ to kill her [the blogger].”

Thus, although a portion of the blog posts consisted of hyperbolic language, such as calling the plaintiffs “immoral” and accusing plaintiffs of engaging in “sexapades,” they were also riddled with a number of provably false statements, such as allegations of money laundering money tax fraud. Apart from its conclusory holding that the statements were not

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94 Id. (brackets added).
95 Id. at 1294.
96 Id. at 1294-92.
97 Id. at 1291-92.
98 Id. at 1294 (brackets added)
99 Id.
“sufficiently factual to be proved true or false,”\textsuperscript{103} the Ninth Circuit’s decision failed to make any meaningful distinction between fact and opinion, particularly where, as in \textit{Obsidian Finance}, hyperbolic statements were interspersed with allegations of criminal conduct that other courts have found to be defamatory \textit{per se}.\textsuperscript{104}

This Ninth Circuit’s decision underscores the problems courts face when trying to differentiate between statements that imply provably false facts, and those that reflect the speaker’s pure opinion. This was not a case where the blog and accompanying statements were so extreme that no audience member would take them seriously. Instead, the defendant’s statements fell into the proverbial gray area, and whether they could be construed as implying underlying facts depends on standards that are broad and relative. Indeed, distinguishing fact from opinion is difficult, if not impossible where the alleged defamatory statements are susceptible to multiple interpretations. Professor Sowle explains:

Ambiguous language poses special problems in First Amendment jurisprudence. First is the practical problem of how a plaintiff can prove falsity when the defamatory charge is broad and has multiple meanings. Some courts hold that ambiguous language cannot be proved false because to succeed, the plaintiff would have to prove false all possible meanings of the charge. This position is unsound. In some cases, the plaintiff should be able to reach the jury on the issue of falsity, despite the ambiguity of the charge.\textsuperscript{105}

Of course, although liability for ambiguous statements would raise First Amendment concerns, “[a] fault requirement on the meaning the language conveys should minimize these risks.”\textsuperscript{106}

\textsuperscript{103} \textit{Obsidian Finance Group}, 740 F.3d at 1294.
\textsuperscript{104} \textit{See, e.g.}, \textit{Spence}, 816 P.2d 771.
\textsuperscript{105} Sowle, \textit{supra} note 2, at 589.
\textsuperscript{106} \textit{Id.} at 594.

On the one hand, protecting the deliberate defamer because she has chosen ambiguous language would allow harm to reputation without adequate First Amendment justification. On the other hand, penalizing the critic because her passionate, creative, or even mistaken use of language was
The *Milkovich* Court’s emphasis on verifiability misperceives how readers react to and process information, and ignores the influence that opinions have on shaping audience perception. One commentator states:

Although people are in a position to judge for themselves whether an opinion is justified so long as the alleged facts utilized as a basis for the opinion are proven to be true and are available to them, most, if not all, people are often influenced by others, especially by the press and the media, in formulating their opinions. Moreover, the reader of a book or an article may have difficulty in assimilating all the facts set forth as the basis for an opinion; as a result, the reader is apt to be more influenced by the opinion than the facts set forth to justify it.\textsuperscript{107}

Furthermore, the “view that damage to reputation may be minimized by the recipients' ability to judge the soundness of the opinion is naïve … defamatory deductive opinions may be *just as damaging to reputation* as other defamatory facts.”\textsuperscript{108} Reputational damage can occur regardless of whether readers identify the precise facts underlying the speaker’s opinion:

Consider a hypothetical assertion in an editorial about John Doe, a candidate for city attorney: “In my opinion, John Doe is an incompetent lawyer because he was accepted into law school under an affirmative action program and would not have been admitted under the school's standards for whites.” Even if the premises of this statement are true, a false assertion that Doe is an incompetent lawyer can be very damaging, causing readers to make judgments based on false premises. In part this pure deductive opinion may be persuasive because readers are ill informed; some may assume that the writer is correct that only those who entered law school under the standards applied to “whites” can be competent lawyers.\textsuperscript{109}

Moreover, these types of opinions “do not advance free speech values, and because it is not the type of public discourse that contributes to intelligent decision making or promotes a multicultural society that is both dynamic and durable.”\textsuperscript{110}

\textsuperscript{107} *Id.* at 576.
\textsuperscript{108} *Id.* (emphasis added).
\textsuperscript{109} *Id.* at 579.
\textsuperscript{110} *Id.*
To be sure, most readers do not spend time trying to distinguish fact from opinion, and most courts that do have struggled to identify a meaningful distinction between them. The reason is that there is no magical line demarcating statements that can be verified and those that cannot. Not surprisingly, the courts’ adherence to this standard has resulted in a confusing, conclusory, and unprincipled jurisprudence. The distinction that the Hustler and Milkovich Courts should have made was between actionable opinion and non-actionable satirical commentary.

B. A Skit on Saturday Night Live is Different from Statements Verbally Attacking Private Citizens: The Distinction Between Satire and Opinion, and Emotional Distress and Reputational Harm.

In Hustler, the late Reverend Jerry Falwell sued Hustler Magazine for the intentional infliction of emotional distress, which requires a plaintiff to show that the defendant's conduct was “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”

The suit was based on an article that, among other things, depicted Falwell having sex with his mother in an outhouse. The Court described the parody as follows:

The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, “ad parody—not to be taken seriously.” The magazine's table of contents also lists the ad as “Fiction; Ad and Personality Parody.”

The Court unanimously held that, absent a showing of actual malice, Falwell could not recover damages. First, the Court distinguished satire (and parody) from opinion by providing

111 Snyder 131 S.Ct. at 1223 (Alito, J., dissenting).
112 Hustler, 485 U.S. at 56-57.
113 Id. at 48.
114 Id. at 56 (stating that Falwell could not recover for emotional distress “by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with “actual malice, i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true”).
examples where satirical commentary contributed to public debate on matters of political importance:

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of Presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as “The Royal Feast of Belshazzar,” and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.\(^{115}\)

Likewise, statements that mock or caricature public figures, such as calling Andrew Jackson a “slave-trading, gambling, brawling murderer,”\(^{116}\) are fully protected by the First Amendment.\(^{117}\)

As the Court’s discussion shows, satire differs from opinion because the intent of the speaker is to mock and poke fun at public officials concerning public issues, not to verbally attack private individuals about matters that have no political or social importance. Also, the parodies and caricatures that typically characterize satire, such as depicting Jerry Falwell committing incest in an outhouse with his mother, lie so far outside the bounds of decency that one would not think that the speaker intended to do anything but humiliate and degrade

\(^{115}\) Id. at 55.


\(^{117}\) See, e.g., Susan B. Anthony List v. Ohio Election Commission, Case No. 1:10-CV-720 (Spp. 11, 2014) available at http://www.sba-list.org/sites/default/files/content/shared/doc_139_order_grantingpermanent_injunction_0.pdf. (enjoining enforcement of an Ohio law making it a crime to “[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate”) (quoting OHIO REV. CODE 3517.21 (B)(10)).
Falwell.\textsuperscript{118} Accusing someone of fraud and money laundering does not allow readers to make the same inference.\textsuperscript{119}

Second, the \textit{Hustler} Court refused to apply the “outrageousness” standard because of its inherent subjectivity. Although acknowledging that the caricature of respondent having sex with his mother was “at best a distant cousin”\textsuperscript{120} of “traditional political cartoons,”\textsuperscript{121} the Court recognized that there was no principled way to distinguish them as a matter of law. That reasoning applies with equal force when determining if an opinion is “sufficiently factual”\textsuperscript{122} to imply provably false facts. That, in a nutshell, is the problem with trying separate fact from opinion. Finally, allowing Falwell to recover damages for “outrageous” speech, would contravene the “longstanding refusal to allow damages to be awarded because the speech in question may have an adverse \textit{emotional} impact on the audience.”\textsuperscript{123} Reputational harm, however, impacts more than an individual’s emotions. It can have a devastating impact on the individual’s ability to earn a living.

Put bluntly, \textit{Falwell} was correctly decided, but \textit{Milkovich} was not. If the media could face liability simply because a statement or depiction of a public figure caused emotional distress, then public debate would surely be compromised. Citizens would lack meaningful guidance regarding the types of speech that could be considered outrageous, and unpopular speakers might hesitate before expressing a viewpoint for fear that it might provoke a lawsuit. Conversely, speech that defames private citizens on private matters and causes reputational harm would not present the same First Amendment concerns or inhibit public debate. In fact, the Court

\begin{itemize}
\item \textsuperscript{118} \textit{Hustler}, 485 U.S. at 48, 57 (accepting the lower court’s finding that the parody about Falwell “was not reasonably believable”).
\item \textsuperscript{119} \textit{See Obsidian Finance Corp.}, 740 F.3d at 1293.
\item \textsuperscript{120} \textit{Hustler}, 465 U.S. at 55.
\item \textsuperscript{121} \textit{Id}.
\item \textsuperscript{122} \textit{Obsidian Finance Group}, 740 F.3d at 1293-94.
\item \textsuperscript{123} \textit{Hustler}, 485 U.S. at 55 (emphasis added).
\end{itemize}
has repeatedly held that “where matters of purely private significance are at issue, First Amendment protections are often less rigorous.”\textsuperscript{124}

Importantly, the \textit{Hustler} Court suggested that, “[i]f it were possible by laying down a principled standard to separate the one [actionable satire] from the other [non-actionable satire], public discourse \textit{would probably suffer little or no harm.”\textsuperscript{125} The Court erred by conceiving of the distinction as between different types of satire, rather than satire and opinion. Furthermore, in \textit{Milkovich}, the Court’s decision to distinguish fact from opinion Court invited the very problem it sought to avoid when rejecting the “outrageousness” standard.

Interestingly, the Court has found other ways to restrict injurious and opinion-based speech. For example, the “secondary effects doctrine “permits the government to suppress speech because of its “adverse side effects,”\textsuperscript{126} which typically requires states to show that otherwise-protected speech is accompanied by conduct that the government may legally proscribe.\textsuperscript{127} For example, although cross-burning is protected in some circumstances, it can be prohibited when the speaker intends to intimidate or harass\textsuperscript{128} By way of analogy, although many

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{124} \textit{Snyder}, 131 S.Ct., at 1215.
\item \textsuperscript{125} \textit{Hustler}, 485 U.S. at 55 (emphasis added) (brackets added).
\item \textsuperscript{126} David L. Hudson, Jr., \textit{The Secondary Effects Doctrine: Stripping Away First Amendment Freedoms}, 23 \textit{Stan. L. & Pol'y Rev.} 19, 20 (2012); \textit{see also} \textit{R.A.V. v. City of St. Paul}, 505 U.S. 377, 389 (1992) (stating in \textit{dicta} that a law restricting speech based on its secondary effects does not violate the First Amendment, provided that the law can be justified “without reference to the content of the ... speech”) (\textit{quoting Renton v. Playtime Theaters,}, 475 U.S. 41, 48 (1986)) (\textit{quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.}, 425 U.S. 748, 771 (1986)); \textit{R.A.V.}, 505 U.S. at 383-384 (some types of speech “can be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) ... [but cannot] be made the vehicles for content discrimination unrelated to their distinctively proscribable content”) (brackets added) (emphasis in original).
\item \textsuperscript{127} \textit{See}, Hudson, \textit{supra} note 126, at 20-21.
\item \textsuperscript{128} \textit{See}, e.g., \textit{Virginia v. Black}, 538 U.S. 343 (2003). The Court explained the rule as follows:

| The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a \textit{particularly virulent form of intimidation}. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. \textit{Id. at 365; see also Moore v. Hoff}, 821 N.W.2d 591, 599 (Minn. Ct. App. 2012) (stating that, when constitutionally protected speech is arguably intertwined with tortious

\end{enumerate}
\end{footnotesize}
opinions on private matters are not intertwined with proscribable conduct, they can become proscribable—and justify a civil remedy—if directed at private citizens and the cause of reputational harm.

This approach is entirely consistent with the distinctions that the Court has made in other contexts involving the status of the plaintiff (public versus private), the type of speech (private or public concern), and the level of fault required (public figures must show that the alleged defamatory statements were made with actual malice). These doctrines ensure that citizens can express views critical of public officials, thus safeguarding the “freedom to speak one's mind [which] is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.” 129 A statute permitting recovery for defamatory opinions vindicates, rather than restricts liberty by respecting a citizen’s right to freely express his or her opinions and to be free from injurious speech that has no relevance to public issues or officials.

PART III
DEFAMATORY OPINION AND PUBLIC DEBATE

To preserve First Amendment freedoms, the Court has developed stricter evidentiary standards in defamation actions where the plaintiff is a public figure and the speech relates to a matter of public concern.

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129 Bose Corp., 466 U.S. at 503-504 (brackets added).
A. *The Status of the Plaintiff: Public and Limited Purpose Public Figures*

Public and limited purpose figures face substantial obstacles when suing for defamation.

In *Gertz*, the Court explained the circumstances under which an individual attains public-figure status:

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.\(^{130}\)

Such individuals are typically “intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.”\(^{131}\) A limited purpose public figure “voluntarily injects himself or is drawn into a particular public controversy,”\(^ {132} \) and are only considered public figures “for a limited range of issues.”\(^ {133} \)

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\(^{130}\) *Gertz*, 418 U.S. at 323; *see also Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976) (refusing to extend the actual malice standard to private figures, and holding that involvement in a judicial proceeding does not make someone a public figure). Writing for the majority, Chief Justice Rehnquist stated:

[W]hile participants in some litigation may be legitimate “public figures,” either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom. *Time, Inc.*, 424 U.S. at 457.


\(^{132}\) *Gertz*, 418 U.S. at 351.

\(^{133}\) *Id.*
B. THE NATURE OF THE CONTROVERSY: MATTERS OF PUBLIC AND PRIVATE CONCERN

1. STATEMENTS ON MATTERS OF PUBLIC CONCERN ARE ENTITLED TO FULL FIRST AMENDMENT PROTECTION

Although the “boundaries of the public concern test are not well defined,” speech is considered to be of public concern when it relates “to any matter of political, social, or other concern to the community,” or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” Moreover, the “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.”

2. STATEMENTS ON MATTERS OF PRIVATE CONCERN RECEIVE LESS FIRST AMENDMENT PROTECTION

Unlike speech on public concern, which “is the essence of self-government,” statements concerning private matters, particularly when directed at private citizens, do not implicate the same First Amendment concerns and thus engender less protection. Specifically, unlike speech touching matters of public concern, “there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas”; and the ‘threat of liability’ does not pose the risk of ‘a reaction of self-censorship’ on matters of public import.

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134 Snyder, 131 S.Ct. at 1216 (quoting San Diego v. Roe, 543 U.S. 77, 83 (2004)) (per curiam).
135 Snyder, 131 S.Ct. at 1216 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).
136 Snyder, 131 S.Ct. at 1216.
137 Id. (quoting Rankin v. McPherson, 483 U.S. 378, 387 (1987)).

139 Snyder, 131 S.Ct. at 1215-16 (quoting Dun & Bradstreet, 472 U.S. at 761) (citation omitted).
As the Court has recognized, restricting speech on matters of private concern does not interfere with “a meaningful dialogue of ideas”\textsuperscript{140} or pose the risk of “a reaction of self-censorship” on matters of public import.\textsuperscript{141} To the contrary, allowing private citizens’ to recover for defamatory statements that would be protected if directed at public officials “recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation”\textsuperscript{142}

In determining whether statements are of public or private concern, the Court examines the “‘content, form, and context’ of that speech ‘as revealed by the whole record.’”\textsuperscript{143} This necessitates a careful balancing whereby “no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.”\textsuperscript{144} Indeed, the Court has had difficulty developing a framework to distinguish between matters of public and private concern and, as is the case when separating actionable fact from non-actionable, typically resolves this issue on a case-by-case basis.

C. THE LEVEL OF FAULT: ACTUAL MALICE VERSUS NEGLIGENCE

Public and limited purpose public figures must demonstrate by clear and convincing evidence that the speaker made the alleged defamatory statements with actual malice.\textsuperscript{145} This standard requires proof that a speaker knew the statements were false, or that the speaker made the statement “with reckless disregard of whether it was false or not.”\textsuperscript{146} Although “reckless

\textsuperscript{140} Id.
\textsuperscript{141} Id. (internal citation omitted).
\textsuperscript{142} Gertz, 418 U.S. at 347-348.
\textsuperscript{143} Id.
\textsuperscript{144} Snyder, 131 S.Ct. at 1216.
\textsuperscript{145} See, e.g., New York Times, 376 U.S. at 279-80 (public officials are prohibited from “recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not”).
\textsuperscript{146} New York Times, Co., 376 U.S. at 279-80.
disregard” cannot be defined with precision, the Court has held that a defendant must have made the false publication with a “high degree of awareness of ... probable falsity.”\[^{147}\]

The actual malice standard reflects the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”\[^{148}\] Indeed, a requirement “compelling the critic of official conduct to guarantee the truth of all his factual assertions' would deter protected speech,”\[^{149}\] and compromise each citizen’s “right to criticize public men and measures.”\[^{150}\] Immunizing opinions in this context fosters a robust democracy where citizens are free to express diverse and unpopular viewpoints “on matters of public interest and concern,”\[^{151}\] and therefore holds public officials accountable. For this reason, opinions on matters of public concern are “First Amendment value[s] … of the highest order,”\[^{152}\] because opinions ensure that “the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry ‘Foul!’ when an opponent or an industrious reporter attempts to demonstrate the contrary.”\[^{153}\]

Private figures, however, need only demonstrate that a speaker was negligent when making the alleged defamatory statements, even on matters of public concern.\[^{154}\] In *Gertz*, the

\[^{147}\] *Harte-Hanks Communications, Inc.*, (quoting *Garrison v. State of La.*, 379 U.S. at 74); see also *Gertz*, 418 U.S. at 340 (“a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship”); *Milkovich*, 497 U.S. at 20 (“on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth”).

\[^{150}\] Id.
\[^{151}\] *Hustler*, 485 U.S. at 50.
\[^{152}\] Sowle, *supra* note 2, at 577.
\[^{154}\] See *Gertz*, 418 U.S. at 346
Court overruled *Rosenbloom v. Metromedia, Inc.*,\(^{155}\) which held that the actual malice standard applied to private figures if the alleged defamatory statements related to a public issue.\(^{156}\) Specifically, whereas “public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them … [n]o such assumption is justified with respect to a private individual.”\(^{157}\) Furthermore, “[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.”\(^{158}\) To recover presumed or punitive damages, however, private plaintiffs must prove actual malice.\(^{159}\)

The Table below summarizes the Court’s defamation jurisprudence, and includes the proposed category for defamatory opinion.

### TABLE II

**The Defamation Categories**

<table>
<thead>
<tr>
<th>Status of Plaintiff</th>
<th>Type of Statement</th>
<th>Nature of Controversy</th>
<th>Level of Fault</th>
<th>Type of Harm</th>
<th>Outcome</th>
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<tr>
<td>Public Figure</td>
<td>Provably False Fact or Opinion that Implies Underlying Facts</td>
<td>Matter of Public or Private Concern</td>
<td>Actual Malice</td>
<td>Reputational Harm</td>
<td>Actionable</td>
</tr>
<tr>
<td>Limited Purpose Public Figure</td>
<td>Provably False Facts or Opinion that Implies Underlying</td>
<td>Matter of Public or Private Concern</td>
<td>Actual Malice</td>
<td>Reputational Harm</td>
<td>Actionable</td>
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155 403 U.S. 29 (1971) (holding that private figures must satisfy the actual malice standard when the alleged defamatory statement involves a matter of public concern).

156 *Gertz*, 418 U.S. at 346 (stating that the “extension of the New York Times test proposed by the *Rosenbloom* plurality would abridge (a) legitimate state interest to a degree that we find unacceptable”).

157 *Id.* (“[u]nder typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule”). *Id.* at 370 (White, J., dissenting).

158 *Id.* at 346.

159 *Milkovich*, 497 U.S. at 16.
D.  *Dun and Bradstreet*: Providing a Basis for Opinion-Based Defamation

In *Dun and Bradstreet*, the Court arguably provided a basis upon which to justify a civil remedy for defamatory opinion. The facts of *Dun and Bradstreet*, which involved a contractor suing a credit reporting agency for issuing a false report to the contractor’s creditors,\(^{160}\) underscore the different public policy issues at stake when speech concerns private citizens and issues. The jury awarded $50,000 in compensatory damages and $300,000 in punitive damages, even though plaintiff could not demonstrate that the statements were made with actual malice.\(^{161}\)

The Court upheld the award, and refused to extend *Gertz* to speech about private figures. Although the opinion in *Gertz* reflected an “accommodation between [First Amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons,”\(^{162}\) the Court did not suggest that “this same balance would be struck regardless of the type of speech involved.”\(^{163}\) Unlike *Gertz*, where a newspaper made statement regarding the murder trial of a Chicago policeman\(^ {164}\) the speech at issues in *Dun and Bradstreet* related to a private individual and transaction. Thus, it was entitled to less First Amendment protection.\(^ {165}\)

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\(^{160}\) *Dun and Bradstreet*, 472 U.S. at 751. (the credit report “was false and grossly misrepresented respondent's assets and liabilities”).

\(^{161}\) *Id.*

\(^{162}\) *Id.* at 756.

\(^{163}\) *Id.* at 757.

\(^{164}\) *Gertz*, 418 U.S. at 326.

\(^{165}\) *Id.* at 759 (“speech on matters of purely private concern is of less First Amendment concern”).
It is speech on matters of ‘public concern’ that is ‘at the heart of the First Amendment's protection. The First Amendment ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people … [and] the Court has frequently reaffirmed that speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values’ and is entitled to special protection. In contrast, speech on matters of purely private concern is of less First Amendment concern … In such a case, “[t]here is no threat to the free and robust debate of public issues … and there is no threat of liability causing a reaction of self-censorship by the press.”\footnote{166}

To be sure, “[t]he role of the Constitution in regulating state libel law is far more limited when the concerns that activated \textit{New York Times} and \textit{Gertz} are absent.”\footnote{167} Furthermore, the state’s interest in awarding damages for defamatory statements is “relative to the incidental effect these remedies may have on speech of significantly less constitutional interest.”\footnote{168} The impact of the false report on plaintiff’s reputation was undisputed, while the effect on the credit report agency, if any, would be to exercise due diligence before issuing reports to the public. For these reasons, the Court’s affirmed the damage award.

The \textit{Dun and Bradstreet} Court’s reasoning gives states the power to enact statutes authorizing recovery for defamatory opinions or, at the very least, suggests that the Court must weigh the value of speech against the harm that it causes to reputation. Where speech relates to public issues, the balance will tip in favor of the First Amendment absent a showing that the speaker knew the statements were false or recklessly disregarded evidence of falsity. On the other hand, where speech about private issues causes tangible reputation harm, regardless of whether it constitutes fact or opinion, the balance shifts in favor of providing a civil remedy.

\footnote{166} \textit{Id.} at 759-60 (internal citations omitted).  
\footnote{167} \textit{Id.} at 759.  
\footnote{168} \textit{Id.} at 760.
The social benefit of protecting statements such as “fat, failed, former sheriff’s deputy”\textsuperscript{169} and “pus bloated, walking sphincter,”\textsuperscript{170} is dubious, at best, but the interest in deterring speech that damages an individual’s standing in the community is substantial. A civil remedy in this context is as much about encouraging free speech as it is about prohibiting degrading verbal attacks on private citizens. After all, citizens might hesitate before speaking on any matter, no matter how private, if they can be subject to vicious verbal attacks by members of the community. This is particularly true in the digital era, when online blog posts make information available to anyone around the world. As Supreme Court Justice Antonin Scalia states, the states should have the author to develop standards addressing this problem:

Now the old libel law used to be (that) you’re responsible, you say something false that harms somebody’s reputation, we don’t care if it was told to you by nine bishops, you are liable,” Scalia continued. “New York Times v. Sullivan just cast that aside because the Court thought in modern society, it’d be a good idea if the press could say a lot of stuff about public figures without having to worry. And that may be correct, that may be right, but if it was right it should have been adopted by the people.\textsuperscript{171}

Stated simply, the common law rule permitting recovery “if the expression was sufficiently derogatory of another as to cause harm to his reputation”\textsuperscript{172} can—and should—be applied to speech on private figures and issues.

E. \textsc{Armstrong v. Shrivell: The First Step to Protecting Private Individuals and Preserving Core Freedoms}

In \textit{Armstrong v. Shrivell},\textsuperscript{173} the United States District Court for the Eastern District of Michigan upheld a jury award of $4.5 million against former Assistant Attorney General Andrew

\begin{thebibliography}{9}
\bibitem{Jewell} Jewell, 23 F. Supp.2d at 356.
\bibitem{Leidholt} Leidholt, 860 F.2d at 894.
\bibitem{Milkovich} Milkovich, 497 U.S. at 9.
\bibitem{Armstrong} 2013 WL 4833948.
\end{thebibliography}
Shrivell, which used an online blog to relentlessly criticize Christopher Armstrong, a gay University of Michigan law student. The comments included allegations that Armstrong “engages in sexual escapades at churches & children’s playgrounds,”174 “laughs at minority students’ concerns,”175 and was a “racist liar.”176

The United States District Court for the Eastern District of Michigan upheld the jury’s damage award. First, the court held that the plaintiff, who was the first openly gay student at the University of Michigan, was a private figure.177 In addition, the court found that this was a matter of private concern,178 and that plaintiff’s “advocacy on behalf of lesbian, gay, bisexual, and transgender people, and his open identification of his own sexual orientation … has “thrust [plaintiff] into public controversy.”179 Finally, the court summarily rejected the defendant’s argument that the statements were mere “rhetorical hyperbole” and therefore protected under the First Amendment.180 Although the court did not describe in detail why it rejected the defendant’s arguments, its decision suggests that the impact of the defendant’s statements, not merely their verifiability, was a critical factor. The court’s decision intimates that the artificial distinction between fact and opinion, governed defamation law should give way to an objective analysis of reputational harm.

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175 Id.
176 Id.
177 Armstrong, 2013 WL 4833948 at *2. The court explained as follows:

Specifically, Defendant argues that the election of Plaintiff Armstrong as the student body president at the University of Michigan, mention of Armstrong's name in news publications as the first openly gay student president, and Armstrong's public statements openly identifying his sexual orientation render Plaintiff Armstrong a public figure … [T]his Court does not find Defendant's arguments persuasive. The mention of Plaintiff Armstrong in a limited number of mostly local news publications does not render Armstrong a “household word[ ].” Id. (citation omitted).

178 Id.
179 Id.
180 Id.
The need to change defamation law reflects, in part, the realities of the moment. Currently, bloggers can hide behind the cloak of anonymity and with launch vicious verbal assaults accusing private citizens and corporations of blackmail, "sexapades and back alley deals," and "illegal, anti-competitive business activities." Citizens can protest outside of a private funeral with signs stating "God Hates Fags," and "Thank God for 9/11." The latest manifestation of extraordinarily degrading speech is "revenge porn," which involves online posting of naked pictures of former sexual partners, mostly women. Some commentators, such as Andrew Napolitano, a former superior court judge, have defended revenge porn and argued that "the First Amendment is not the guardian of taste." The American Civil Liberties Union has also stated that "[t]he posting of otherwise lawful speech or images even if offensive

Revenge porn is the term for the distribution of images of nude or semi-nude individuals--usually women--without the consent of the person(s) present in the photo … Given the availability of other forms of pornography and the context of revenge porn sites, the primary motivation for submitting revenge porn is likely the humiliation of former romantic partners. The distinguishing feature is the implication that the humiliation of the individuals featured in the images is fair retribution for wrongs committed against their exes. Former romantic partners are presumably the primary sources for the images that appear on revenge porn sites. However, there is no discernible guarantee that any particular image actually came from an ex-partner, or that the individual appearing in the image performed the act or acts a site's hosts and patrons propose deserve such exposure. Other possible sources for the images include individuals sharing images of themselves, or hackers and other individuals who come into possession of nude photos and submit them to the site. Id.; see also Business Insider, Here’s What the Constitution Says About Posting Naked Pictures of Your Ex to the Internet, (Oct. 1, 2013), available at http://www.businessinsider.com/is-revenge-porn-protected-by-the-first-amendment-2013-9.

or emotionally distressing is constitutionally protected.”¹⁸⁸ They are correct—unless that speech is directed a private individuals and causes reputational harm.

No one is arguing that the First Amendment should regulate taste, or that private citizens should recover damages for speech that causes emotional distress. The above examples, however, have nothing to do with taste. Speakers who post statements such as “well-known Nazi war criminal”¹⁸⁹ and “[a] pervert to look out for”¹⁹⁰ or pictures of nude do not contribute to the unfettered exchange of ideas or to the “continued vitality of a government responsive to the will of the people.”¹⁹¹ Instead, they intentionally engage in conduct that is “no essential part of any exposition of ideas, and … of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”¹⁹²

This is not to say that well-intentioned laws and attempts to regulate speech cannot present a legitimate threat to First Amendment freedoms. Public universities, for example, have penalized and even fired professors for posting comments on social media that relate directly to matters of public concern.¹⁹³ Similarly, the Kansas Board of Regents recently adopted a policy authorizing disciplinary action for speech expressed on social media that is, among other things, “contrary to the best interests of the employer.”¹⁹⁴ Additionally, the University of Illinois School

¹⁸⁸ Id.
¹⁸⁹ Koch, 817 F.2d at 508–10.
¹⁹⁰ Purcell, 560 F. Supp. 2d at 342.
¹⁹⁴ See Kansas Board of Regents, Use of Social Media By Faculty and Staff, available at http://www.kansasregents.org/policy_chapter_ii_f_use_of_social_media. The policy also states:

The chief executive officer of a state university, or the chief executive officer's delegate, has the authority to make use of progressive discipline measures pursuant to Board or university policy, up to and including suspension, dismissal and termination, with respect to any faculty or non-student staff member who is found to have made an improper use of social media.
of Law recently revoked a tenured job offer to a professor who posted comments on Twitter that criticized Israel.\textsuperscript{195} This type of conduct, which penalizes individuals for expressing unpopular political views, should alarm anyone who values a diverse and uninhibited marketplace of ideas. Speech that humiliates, degrades, \textit{and} harms private citizens is of an entirely different character. Immunizing this speech by characterizing it as pure opinion does not further First Amendment freedoms. It allows speakers to tarnish someone’s reputation and then hide behind the First Amendment, claiming that this was all just a matter of taste. If degrading speech is considered a matter of taste, it is difficult to see how any speech can ever be considered a violation of law.

Strangely, by protecting all but the most obscene forms of speech,\textsuperscript{196} the courts have sent the following message: the more disgusting, hyperbolic, and inflammatory your speech, the \textit{more} first amendment protection you receive.\textsuperscript{197} To avoid liability, just be so despicable that a ‘reasonable reader’ would not view the statements as ‘sufficiently factual.’ Imagine if the law operated this way in other areas. The grosser the negligence, the lower the damages a plaintiff receives. The more premeditated a murder, the more lenient penalty a defendant receives. Well, in defamation jurisprudence that is exactly how the law operates. The likelihood of recovering harm is inversely related to the egregiousness of the speaker’s conduct.

To be sure, allowing recovery for injurious speech directed at private citizens on matters of private concern will not lead us down a slippery slope resulting in the suppression of


\textsuperscript{196} See \textit{Miller}, 413 U.S. at 27. In \textit{Miller}, the Court provided two examples of obscene speech: (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.” \textit{Id}.

unpopular speech, nor will it inhibit robust debate on matters of public importance. First, it
does not apply to public figures, or to matters of public concern. Second, the reputational harm
prong limits the type of speech that can be construed as defamatory because it requires concrete
proof of harm, and does not involve the malleable standard (“outrageousness”) that governs a
finding of emotional distress. Third, the satirical commentary component protects speech that
no reasonable person would believe is intended to defame another individual.

Collapsing the fact/opinion distinction would not infringe protected speech would allow
states to provide a remedy for injurious speech, but would not lead courts down a slippery slope
that results in the suppression of unpopular speech. Imagine if a slippery slope argument won
the day in *Loving v. Virginia*, and the Court, fearful that a ruling invalidating laws against
inter racial marriage would lead to the legalization of polygamy, upheld these laws. Imagine if
that argument won the day in *Lawrence v. Texas*, and the Court, fearful that invalidating anti-
sodomy laws would lead to the legalization of bestiality, permitted Texas to prosecute same-sex
couples for consensual sexual conduct in the privacy of their homes. Imagine if it led the Court,
in *Miller v. California*, to say that no speech could ever be considered obscene because it
feared that some protected speech might be restricted. The Court reached the opposite result in
all of these cases, even though the best the Court could come up with when defining obscenity
was, “you know it when you see it.” Well, we also know it when we hear it. We know it when

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dissenting) (noting “our country’s core values--democratic self-governance, as well as a commitment to uninhibited,
robust, and wide-open” debate”).
199 See, e.g., *Hustler* 486 U.S. at 55.
200 See id.
201 388 U.S. 1 (1967) (outlawing bans on interracial marriage).
202 539 U.S. 558 (2003); see also *United States v. Windsor*, 133 S.Ct. 2675 (2013) (invalidating the Defense of
Marriage Act’s provision defining marriage as exclusively between a man and woman).
203 413 U.S. 15 (1973) (establishing a four part test to determine whether speech is obscene and therefore not
protected under the First Amendment).
we read it. And it does not matter whether speech that is labeled fact or opinion. It matters that it causes tangible reputational harm and adds no value to the public discourse.

**CONCLUSION**

The law should not allow revenge porn in the name of the First Amendment, just as it should not allow private citizens to purchase AK-47’s in the name of the Second Amendment. Citizens can abuse fundamental rights just as governments can infringe them. At some point, courts have to acknowledge that the First Amendment was not intended to give people a fundamental right to trash an individual’s reputation while seeking cover under the self-serving blanket of opinion and taste. It is one thing to stroll into a courthouse with a shirt that says *Fuck the Draft*, but quite another to calls someone a Nazi War Criminal. Statements like this poison the marketplace of ideas with the vitriol of immodest jackasses and can, in some circumstances, cause reputational harm.

For too long, courts and commentators have reacted in knee-jerk fashion to any attempts to regulate or provide remedies for speech that causes severe and lasting injury. At the same time, however, the courts have founds ways, such as through the “secondary effects” doctrine, to uphold statutes that, as a practical matter, restrict speech. The courts need not go through such legal gymnastics to restrict in one breath what should be regulated in the next.

Justice Anthony Kennedy has stated that “[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.”*205* Truth is not considered a remedy when courts classify a statement as pure opinion, and pure opinions involving private issues and citizens should not receive the First Amendment’s blessing.

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Simply put, where truth cannot provide a remedy, the law should.