THE INTRINSIC CHARACTER OF DEFAMATORY CONTENT AS GROUNDS FOR A UNIFORM REGIME OF PROVING LIBEL

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One of the odd ambiguities of defamation doctrine is the Supreme Court’s enduring silence on the exact scope of plaintiffs’ constitutional burden to demonstrate falsity. Most notably, the Court in *Milkovich v. Lorain Journal Co.*\(^1\) described its decision in *Philadelphia Newspapers, Inc. v. Hepps*\(^2\) as holding that “a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations . . . where a media defendant is involved.”\(^3\) The proposition’s twofold qualification, extending its reach only to expression by media defendants on subjects of public concern, implies that the absence of either element may eliminate the plaintiff’s obligation to show that the statement in question contains a factually false assertion. Admittedly, the notion of variable standards of proof has played a central part in the development of defamation standards under the First Amendment.\(^4\) This Article contends, however, that the logic justifying contingent burdens elsewhere in libel law should not apply to the underlying question of whether a defendant falsely maligned the plaintiff. In particular, the Article argues that adjustments to the evidentiary barriers faced by defamation plaintiffs have been shaped by considerations beyond the inherent nature of defamation, whereas provably false content should be recognized as an integral feature of actionable libel. Accordingly, neither the subject matter of the expression at issue nor the identity of the defendant should affect the requirement that the plaintiff establish falsity.

Part I of the Article reviews the evolution of constitutional principles governing defamation through the prism of external and intrinsic factors. Part II explores the apparent rationale for the suggestion in *Milkovich* and other cases that demonstration of falsity may be waived in certain circumstances, and argues that this position rests on failure to recognize the intrinsic character of defamatory content. An examination in Part III of lower court decisions since *Milkovich* underscores the irrelevance of public concern classification and media status to the determination of falsity.

I. THE PREDOMINANCE OF EXTRINSIC FORCES
IN THE FORMATION OF LIBEL DOCTRINE UNDER THE FIRST AMENDMENT

Since according libel First Amendment recognition in *New York Times Co. v. Sullivan*,\(^5\) the Supreme Court has pursued a “proper accommodation”\(^6\) between society’s interest in the free dissemination of ideas and information and the state interest in redressing harm to reputation.\(^7\)

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1 497 U.S. 1 (1990). The case is discussed at Part II-A *infra*.
4 See notes 9-20 *infra* and accompanying text.
5 376 U.S. 254 (1964). The case is discussed at Part I-A *infra*.
That balance has been struck primarily through evidentiary standards rooted in values external to the nature of defamatory expression itself. In launching modern constitutional libel doctrine, the *New York Times* opinion epitomized the Court’s emphasis on extrinsic reasoning. Still, a distinct strain of rulings has revolved around the threshold question of whether the disputed statement can be shown to qualify as actionable defamation at all. In these instances, the Court has focused on aspects of the speech in question that may be properly regarded as intrinsic: i.e., whether the speech possesses the properties of constitutionally unprotected defamation.\(^8\)

\[\text{A. New York Times, the Constitutionalization of Libel Law, and the Extrinsic Thrust of Defamation Doctrine}\]

*New York Times* launched the Court’s project of fashioning a regime of constitutional principles to govern defamation law.\(^9\) Prior to 1964, the Court had categorically excluded libel from the realm of protected expression.\(^10\) Libel defendants could therefore look only to the meager safeguards afforded by state common law. In most jurisdictions, defendants were subjected to strict liability unless they could prove that the statement was either true or actions for damages from defamatory falsehoods reflect “no more than our basic concept of the essential dignity and worth of every human being”): William L. Prosser, *Handbook of the Law of Torts* 737 (4th ed. 1971) (noting individual's interest in redressing “invasion of the interest in reputation and good name”).

\(^8\) See Robert Francescotti, *How to Define Intrinsic Properties*, 33 NOUS 590, 590 (1999) (describing intrinsic property as “a property that is internal in the sense that whether an object has it depends entirely upon what the object is like in itself”); Peter Kirschenmann, “Intrinsically” or Just ’Instrumentally’ Valuable? On Structural Types of Values of Scientific Knowledge, 32 J. GENL. PHIL. SCIENCE 237, 243 (2001) (stating that “things possess intrinsic value on the ground that the source of their value lies in them: they are valued in themselves”); David Lewis, *Intrinsic Properties*, 44 PHILO. STUD. INTL. J. 197, 197 (1983) (characterizing “[a] sentence or statement or proposition that ascribes intrinsic properties to something as “entirely about that thing”)


\(^10\) See, e.g., Times Film Corp. v. Chicago, 365 U.S. 43, 48 (1961); Beauchains v. Illinois, 343 U.S. 250, 256-57, 266 (1952) (stating that libelous speech is not “within the area of constitutionally protected speech”); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (stating in dictum that libelous statements “are of such slight social value … that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”).
privileged. Rejecting any premise of libel’s “talismanic immunity from constitutional limitations,” New York Times dramatically altered the landscape of defamation law by granting formidable protection to criticism of public officials. Under the decision's “actual malice” requirement, an official could recover damages for a defamatory falsehood relating to official conduct only upon a showing that the defendant either knew that the statement was false or acted with reckless disregard of whether it was false. In addition, the Court fortified this imposing evidentiary barrier by demanding that the official establish actual malice with “convincing clarity” rather than simply by a preponderance of the evidence.

The Court’s promulgation of the actual malice standard did not rest on principles peculiar to the nature of defamatory expression. On the contrary, the Court announced at the outset of its discussion a refusal to be bound by “mere labels” such as “libel.” Rather, the Court repeatedly emphasized the larger importance of preserving citizens’ ability to criticize the official conduct of public officials. Citing the authority of Madison, the Court ascribed to him the view that “[t]he right of free public discussion of the stewardship of public officials” is “a fundamental principle of the American form of government.” Indeed, in an oft-quoted passage, the Court discerned in this right “the central meaning of the First Amendment.” Thus, the burden of showing actual malice was deemed necessary to safeguard the liberty and duties of the “citizen-critic of government.” Absent such protection, those who would criticize official conduct “may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.”

The actual malice requirement, then, emerged as an instrument to foster “public debate,” not as an inevitable outgrowth of defamation’s essence. In framing its adoption of the rule against the backdrop of “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” the Court voiced a theme that has long transcended the context of libel. The idea that speech on public matters lies at the heart of the First Amendment has been invoked to overturn restrictions based on a variety of rationales.

13 Id. at 279-80.
14 Id. at 285-86.
15 Id. at 269.
16 Id. at 268, 273, 279, 282.
17 Id. at 275.
18 Id. at 273.
19 Id. at 282.
20 Id. at 279; see id. at 278 (raising specter that succession of judgments for libel would cast a “pall of fear and timidity . . . upon those who would give voice to public criticism”).
21 Id.
22 Id. at 270.
23 Much scholarly commentary has also endorsed the proposition that speech on matters of public importance occupies a privileged position under the First Amendment. Lillian R. BeVier, The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, 30 STAN L. REV. 299, 300-01 (1978) (asserting that
Thus, the aims of insulating broadcast stations from political pressure and avoiding misleading impressions of government endorsement could not justify a ban on editorials by stations receiving federal funds;\textsuperscript{24} invalidating the prohibition, the Court observed that communication regarding matters of public importance “is entitled to the most exacting degree of First Amendment protection.”\textsuperscript{25} Similarly, in \textit{First Nat’l Bank v. Bellotti},\textsuperscript{26} the Court found Massachusetts’s aim of curbing inordinate corporate influence insufficient to sustain its sweeping restrictions on corporations’ spending to influence state referendums.\textsuperscript{27} This limitation on discussion on governmental affairs struck at “speech indispensable to decisionmaking in a democracy.”\textsuperscript{28} The rejection of restraints on speech of public moment in other settings, as well, points to an origin of actual malice outside the distinctive features of libel.\textsuperscript{29}

Expanded application of the actual malice requirement in the wake of \textit{New York Times} underscores the standard’s roots in solicitude for speech on public topics rather than in libel’s organic nature. The Court ruled in \textit{Garrison v. Louisiana}\textsuperscript{30} that, like the civil action in \textit{New York

\begin{quote}
\textit{First Amendment “in principle” protects only “political speech”}; Patrick M. Garry, \textit{The First Amendment and Non-political Speech: Exploring a Constitutional Model that Focuses on the Existence of Alternative Channels of Communication}, 72 MO. L. REV. 477, 514-17 (2007); Harry Kalven, Jr., \textit{The New York Times Case: A Note on “The Central Meaning of the First Amendment”}, 1964 SUP CT. REV. 191, 208 (noting the historical importance of free public speech regarding “the stewardship of public officials”); Alexander Meiklejohn, \textit{The First Amendment is an Absolute}, 1961 SUP. CT. REV. 245, 255-57 (identifying freedom to discuss public issues as crucial to the informed judgment that is necessary for voting, which is the process by which the public governs).
\end{quote}

\textsuperscript{24} FCC v. League of Women Voters, 468 U.S. 364, 395 (1984) (concluding that the “broad ban on all editorializing by every station that receives [federal] funds far exceeds what is necessary to protect against the risk of governmental interference or to prevent the public from assuming that editorials by public broadcasting stations represent the official view of government”).

\textsuperscript{25} Id. at 375-76.

\textsuperscript{26} 435 U.S. 765 (1978).

\textsuperscript{27} Id. at 789.

\textsuperscript{28} Id. at 777.

\textsuperscript{29} See, e.g., Citizens United v. Federal Election Com’n, No. 08-205, 2010 WL 183856, at *36 (Jan. 21, 2010) (striking down federal statute prohibiting independent corporate expenditures for “electioneering communications” within 30 days of a primary election or 60 days of general election for federal office); id. at *18 (stating that “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it”); Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999) (invalidating certain restrictions on circulation of ballot-initiative petitions); id. at 211 (asserting that the First Amendment “guards against the State’s efforts to restrict free discussions about matters of public concern”); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) (finding that floating buffer zones imposed by district court around people entering abortion clinics excessively burdened speech); id. at 377 (observing that “[l]eafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment”); Carey v. Brown, 447 U.S. 455 (1980) (striking down statute forbidding picketing of residences but providing exemption for “the peaceful picketing of a place of employment involved in a labor dispute”); id. at 466 (characterizing “[p]ublic issue picketing” as “‘an exercise of... basic constitutional rights in their most pristine and classic form’” (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963))); Pickering v. Board of Educ., 391 U.S. 563 (1968) (holding that overturning dismissal of public school teacher for letter to newspaper criticizing school board’s manner of addressing proposals to raise revenue for schools); id. at 573 (referring to the “public interest in having free and unhindered debate on matters of public importance” as the “core value” of Free Speech Clause); Mills v. Alabama, 384 U.S. 214 (1966) (invalidating invalidating ban on publishing editorial on election day urging citizens to vote certain way on issues on ballot); id. at 218 (declaring that a “major purpose” of First Amendment was “to protect the free discussion of governmental affairs”); Stromberg v. California, 283 U.S. 359 (1931) (reversing conviction under statute that banned public display of red flag as, \textit{inter alia}, a “sign, symbol or emblem of opposition to organized government”); id. at 369 (describing “maintenance of the opportunity for free political discussion” as a “fundamental principle of our constitutional system”).

\textsuperscript{30} 379 U.S. 64, 72-73 (1964).
Times, criminal prosecutions for libel must also demonstrate that the defendant acted with knowledge or reckless disregard of falsity.\textsuperscript{31} Again, the Court’s imposition of this evidentiary obstacle where the falsehood pertains to official conduct sprang from its wider philosophy of shielding speech concerning public affairs. Such speech, declared the Court, “is more than self-expression; it is the essence of self-government.”\textsuperscript{32} This democratic rationale also informed the Garrison Court’s far-reaching conception of speech regarding officials falling within the ambit of the actual malice standard. Because the New York Times rule was designed to protect “the paramount public interest in a free flow of information to the people concerning public officials,” the Court deemed “anything which might touch on an official’s fitness for office” sufficient to trigger the rule.\textsuperscript{33}

Further extension of the actual malice standard in Curtis Publishing Co. v. Butts\textsuperscript{34} to libel plaintiffs deemed “public figures”\textsuperscript{35} likewise revolved around the vital need to preserve discourse on significant public matters. Justice Harlan’s plurality opinion rejected the assumption that “‘criticism of private citizens who seek to lead in the determination of . . . policy will be less important to the public interest than will criticism of government officials.’”\textsuperscript{36} Rather, the opinion indicated, public figures could derive their status from either having attained a position that commands public interest or having thrust their personality “into the ‘vortex’ of an important public controversy.”\textsuperscript{37} In his crucial concurring opinion,\textsuperscript{38} Chief Justice Warren similarly repudiated a wholesale distinction between public officials and private individuals. Private persons designated as public figures, he noted, “often play an influential role in ordering society” comparable to that of public officials.\textsuperscript{39} Accordingly, adherence to the actual malice standard in libel suits by such individuals is needed to vindicate citizens’ interest in “uninhibited debate about [public figures’] involvement in public issues and events.”\textsuperscript{40}

The Court’s subsequent decision in Monitor Patriot Co. v. Roy\textsuperscript{41} confirmed that the scope of the actual malice standard would be shaped by imperatives of core free speech tenets rather

\textsuperscript{31} Id. at 74.
\textsuperscript{32} Id. at 74-75; see also id. at 75 (indicating that “calculated falsehood” would not enjoy protection because “the use of the known like as a tool [for political ends] is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected”).
\textsuperscript{33} Id. at 77; see Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971) (holding that public official or candidate for office bringing libel suit over a charge of criminal conduct must always show actual malice); Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 300 (1971) (same).
\textsuperscript{34} 388 U.S. 130 (1967). The Court also handed down a decision in the companion case of Associated Press v. Walker. Id. at 130, 140-42 (plurality opinion of Harlan, J.) (noting companion case of Walker and discussing facts of Walker).
\textsuperscript{35} Id. at 164 (Warren, C.J., concurring in result) (stating that actual malice requirement should apply to “public figures”). No opinion in Butts commanded a majority of Justices; the establishment of the actual malice standard for public figures resulted from a somewhat intricate aggregation of opinions. See Harry Kalven, Jr., The Reasonable Man and the First Amendment: Hill, Butts, and Walker, 1967 SUP. CT. REV. 267, 275-78 (1967) (explaining how combination of separate opinions produced this holding).
\textsuperscript{36} 388 U.S. at 147-48 (plurality opinion of Harlan, J.) (quoting Pauling v. Globe-Democrat Pub. Co., 362 F.2d 188, 196 (8th Cir. 1966)).
\textsuperscript{37} Id. at 155 (citation omitted).
\textsuperscript{38} See Kalven, supra note 35, at 277 (noting that Chief Justice Warren’s concurrence “save[d] the plaintiff's verdict”).
\textsuperscript{39} 388 U.S. at 164 (Warren, C.J., concurring in result); see id. at 163-64 (noting individuals outside of government who are “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”).
\textsuperscript{40} Id. at 164.
\textsuperscript{41} 401 U.S. 265 (1971).
than internal constraints of defamation doctrine. Roy brought his libel suit over an attack against him in his capacity as a candidate for elective public office. In determining whether Roy would be subjected to the actual malice requirement, the Court professed indifference as to classification of his formal status as a public official or public figure.\footnote{See id. at 271.} Rather, his constitutional burden would be governed by the fundamental principle that the First Amendment was “‘fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,’”\footnote{Id. at 271-72 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).} and by its corollary that “‘it is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages.’”\footnote{Id. at 271 n.3 (quoting Coleman v. MacLennan, 724, 98 P. 281, 286 (Kan. 1908)).}

Understood in this light, \textit{Garrison}’s rationale for a capacious view of “official conduct” under the \textit{New York Times} ruling\footnote{See supra notes 13-16 and accompanying text.} obtained “with special force” in the case of expression bearing on the fitness of candidates.\footnote{Id. at 274; accord Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 300-01 (1971) (stating that “[p]ublic discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case” for applying actual malice requirement).} Indeed, the Court hesitated to exclude any aspect of a candidate’s life from the reach of the actual malice standard.\footnote{See id. at 275 (stating that “it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks”). An earlier decision, \textit{Time, Inc. v. Hill}, 385 U.S. 374 (1967), demonstrated perhaps even more vividly that the actual malice rule did not arise from intrinsic aspects of defamation by extending the rule beyond the confines of libel itself. Plaintiff Hill brought suit over a magazine’s account of a play based in part on his family’s ordeal as hostages of escaped convicts. While the family in the play was depicted as suffering harsher treatment and exhibiting greater heroism than did the Hills, \textit{Id.}, 385 U.S. 377-78, the magazine’s account was found to have “‘portrayed [the play] as a re-enactment of the Hills’ experience.’” \textit{Id.} at 379 (citation omitted). Hill’s successful claim in state court lay in false light invasion of privacy rather than defamation. \textit{See id.} at 386-87; \textsc{Restatement (Second) of Torts} § 652B (1977) (describing this tort as occurring through public disclosure of false and “highly offensive” facts about an individual). In overturning Hill’s damage award, the Court ruled that recovery for “false reports of matters of public interest” must be supported by proof that the defendant published the report with actual malice. \textit{Id.} at 387-88.}

Other Court pronouncements during this period clarified the actual malice requirement without altering its function as a strategic device to effectuate protection of speech on subjects of public import. In addition to extending the \textit{New York Times} rule to the criminal context, the \textit{Garrison} Court addressed whether evidence that the defendant’s defamatory statement was motivated by hostility toward the complainant qualifies as actual malice. Concerned that “[d]ebate on public issues” would be dampened by allowing malice in this ordinary sense to suffice,\footnote{Id. at 73; see \textit{id.} at 72-73 (asserting that in cases of criticism of public officials’ conduct of public business, “the interest in private reputation is overborne by the larger public interest . . . in the dissemination of truth”).} the Court insisted on proof of knowledge of falsity or thoroughgoing indifference or deep doubt about the truth of the publication.\footnote{\textit{Id.} at 73 (ruling that “the great principles of the Constitution which secure freedom of expression . . . preclude attaching adverse consequences to any except the knowing or reckless falsehood”).} The Court further reinforced a rigorous standard for actual malice, and its underpinnings in the promotion of discourse on public issues, in \textit{St. Amant v. Thompson}.\footnote{390 U.S. 727 (1968).} There, the Court explained that recklessness is not gauged by “whether a reasonably prudent man would have published, or would have investigated before publishing” the defendant’s defamatory falsehood.\footnote{\textit{Id.} at 731.} Allowing recovery on such a showing would induce “self-censorship” and thus fail adequately to safeguard “the stake of the people in public business
and the conduct of public officials.”

Rather, only proof that “the defendant in fact entertained serious doubts as to the truth of his publication” could “insure the ascertainment and publication of the truth about public affairs.”

A decade after New York Times, the Court’s decision in Gertz v. Robert Welch, Inc. deflected the expansionist trajectory of decisions like Monitor Patriot and St. Amant, but continued their reliance on extrinsic factors in calibrating evidentiary burdens. In particular, Gertz placed the Court’s solicitude for the public dimensions of defamatory speech in a new framework. Overruling an earlier decision, the Court held that plaintiffs characterized as private figures were exempted from the burden of showing actual malice to recover actual damages. Rather, a private figure could establish liability by proving that the defendant who committed the defamatory falsehood had acted with negligence.

Under this new regime, only private figures seeking to recover presumed or punitive damages would be required to demonstrate actual malice.

The Court’s explanation for easing recovery by private figures again lay beyond the threshold question of whether the speech in question constituted defamation. As a major rationale, the Court determined that private figures as a rule have relatively little capacity to pursue self-help. While public figures and public officials usually have access to the media, private individuals typically lack comparable means of counteracting false accusations. This heightened vulnerability to injury thus renders the state’s interest in protecting private persons’ reputation commensurately greater. Even more important to the Court was the “compelling normative consideration” that public officials and public figures have effectively assumed the risk of harm from defamatory falsehoods by “invit[ing] attention and comment.” Private individuals, by contrast, have not placed themselves in this position and thus have “relinquished no part of [their] interest in the protection of [their] own good name.”

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52 Id. at 731-32.
53 Id.
56 Gertz, 418 U.S. at 347.
57 Id. at 349.
58 See id. at 344.
59 See id.
60 See id.
61 See id.
62 Id. at 344-45.
63 Id. at 345; see id. (describing private individuals as “more deserving of recovery” than public officials and public figures). Similarly, the Court’s scheme for classifying various types of public figures did not grapple with concerns over the defamatory content of the expression involved. On its face, the Gertz opinion recognizes three categories of public figures: all-purpose public figures, limited public figures, and involuntary public figures. See id. at 344-45. In practice, however, the status most frequently implicated in litigation is the limited public figure. See William M. Krogh, Comment, The Anonymous Public Figure: Influence Without Notoriety And The Defamation Plaintiff, 15 GEO. MASON L. REV. 839, 846-847 (2008). Whatever the designation in a given case, questions of the plaintiff’s proper classification presuppose the defamatory nature of the speech at issue. See, e.g., Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 166-67 (1979) (finding that plaintiff falsely referred to as Soviet spy was private figure); Hutchinson v. Proxmire, 443 U.S. 111, 135-36 (1979) (concluding that scientist bringing suit for allegedly false statements regarding his research performed with government funding was not public figure); Time, Inc. v. Firestone, 424 U.S. 448, 454-57 (1976) (holding that prominent socialite involved in highly publicized divorce proceedings was private figure in suit over false report that husband’s divorce petition has been granted on ground of socialite’s adultery).
When the Court further enhanced private figures’ ability to recover in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,\(^\text{64}\) considerations of truth and falsity were once more subordinated to ascertaining defendants’ mindset. *Dun & Bradstreet* held that private figures could obtain presumed or punitive damages for speech not involving a matter of public concern without showing actual malice.\(^\text{65}\) The decision rested squarely on the higher plane in First Amendment jurisprudence occupied by speech addressing matters of public concern.\(^\text{66}\) Conversely, the “reduced constitutional value” of expression addressing matters of private concern affords states broader latitude to redress injury to reputation caused by defamation.\(^\text{67}\)

A set of ancillary procedural rules developed by the Court further reflects an emphasis on defendants’ awareness of falsity rather than its existence. Unsurprisingly, these rules have principally involved the question of actual malice. For example, a defendant is entitled to summary judgment when a public figure’s opposing affidavit fails to support a reasonable inference of actual malice by clear and convincing evidence.\(^\text{68}\) If a public figure or public official prevails at trial, the appellate court must make an independent examination of the entire record to assure that a finding of actual malice is supported by such evidence.\(^\text{69}\) Thus, the question of whether the evidence presented in a defamation case supports a finding of actual malice is ultimately a question of law.\(^\text{70}\) Moreover, given the frequent centrality of the actual malice determination, the Court has sought to ensure libel plaintiffs’ access to potentially relevant evidence. Most notably, the Court has authorized vigorous inquiry into the editorial processes of media defendants by plaintiffs seeking proof of knowledge of falsity or reckless disregard.\(^\text{71}\)

**B. Intrinsic Strains of Constitutional Defamation Doctrine**

The prominence of the actual malice requirement in the *New York Times* opinion, with that standard’s roots in larger First Amendment themes, did not thwart development of a substantive jurisprudence of libel. Indeed, the *New York Times* opinion contains seeds of interpretive principles governing the question of whether a statement amounts to actionable libel. These principles stand in contrast to the elaborate set of contingent evidentiary burdens based on plaintiffs’ status, subject matter of the alleged libel, and state interest in protecting reputation. Rather, they represent limitations on libel suits inherent in the Court’s understanding of libel itself.

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\(^{64}\) 472 U.S. 749 (1985).

\(^{65}\) *Id.* at 761 (Powell, J., plurality opinion). The case involved a credit report issued by Dun & Bradstreet falsely stating that Greenmoss had filed for bankruptcy. Taking into account the “‘content, form, and context’” of the report, Justice Powell’s plurality opinion concluded that it did not involve a matter of public concern. *Id.* at 761-63 (citation omitted). The Court found the limitation on recovery of presumed and punitive damages in *Gertz* inapplicable on the ground that *Gertz* involved defamation of a private individual on a matter of public concern. *Id.* at 751, 756-57; *id.* at 751 (Burger, C.J., concurring in judgment); *id.* at 756 (White, J., concurring in judgment).

\(^{66}\) “The First Amendment interest…is less important than the one weighed in *Gertz*. We have long recognized that not all speech is of equal First Amendment importance. It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection.’” *Id.* at 758-59 (plurality opinion) (citations and inner quotation marks omitted).

\(^{67}\) *Id.* at 761.


The most obvious internal constraint on libel suits emerging from *New York Times* is the requirement that a defendant’s statement be reasonably understood as referring to the plaintiff. Sullivan, a commissioner of Montgomery, Alabama, alleged that he had been libeled by an advertisement charging “Southern violators” with reprisals against civil rights demonstrators in the city.  

Although the advertisement did not explicitly mention Sullivan, he contended that inaccurate accusations of misconduct against the police implicated him in his supervisory capacity over the Montgomery Police Department.  

Apart from Sullivan’s failure to show actual malice, the Court rejected the notion that the erroneous statements could be regarded as “‘of and concerning’” Sullivan.  

Two years later, in *Rosenblatt v. Baer*, the Court reaffirmed that the “of and concerning” criterion forbids liability based on equivocal references to the plaintiff. While both cases involved claims by government officials, the Court’s logic was not confined to concern that their theory of liability could transform “an otherwise impersonal attack on governmental operations” into “a libel of those administering the operations.” Rather, it was the effort to construe alleged falsehoods about an indefinite part of a group as specific accusations against the plaintiff that proved fundamentally deficient.  

The *New York Times* opinion also intimated a more far-reaching intrinsic restraint on the range of content susceptible to libel suits: the protection of speech that cannot fairly be characterized as asserting facts. Though immunity for expressions of opinion was later qualified in *Milkovich*, *New York Times*’s reasoning implied a conception of libel’s essential nature that remains substantially intact. By requiring the presence of a “defamatory falsehood,” the actual malice standard appeared to shield statements that could not be shown to be factually untrue. Moreover, the opinion cast its holding as granting constitutional protection for “honest misstatements of fact” while distinguishing “statements of fact” from “expression of opinion.” 

The impact of these passages on the intrinsic scope of actionable libel was limited by the case’s focus on public official plaintiffs, and by the absence of a fully articulated doctrine of opinion. Nevertheless, their underlying logic supports the Court’s subsequent repeated insistence on demonstrable factual falsity as a touchstone of libel. 

The first such indication of this theme appeared in *Greenbelt Cooperative Publishing Co. v. Bresler*, when the Court dismissed a libel verdict against a newspaper for reporting statements that a real estate developer’s negotiating strategy in seeking to extract concessions

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73 Id. at 258.  
74 Id. at 288-92.  
76 Id. at 82-83.  
77 Id. at 180 (citing *New York Times*, 376 U.S. at 290-92).  
79 See text accompanying notes 130-34 infra.  
80 See text accompanying notes 220-43 infra (discussing limited impact of *Milkovich* on lower courts’ recognition of opinion privilege).  
81 376 U.S. at 279 (emphasis added).  
82 Id. at 292 n.30.  
from the city represented “blackmail.” Noting that the newspaper’s reports of the city council sessions where the statements were made were “accurate and full,” the Court rejected the contention that readers would understand the article to be charging the developer with the criminal offense of blackmail. Rather, given the context in which the term was reported, they would have “perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler’s negotiating position extremely unreasonable.”

Admittedly, here as in New York Times, the public context of Bresler provides grounds for resisting a sweeping interpretation of a universal requirement of definite factual content. As the Court observed, the pejorative language in question was uttered in the course of “heated” public debates over a “controversial issue[]” that was “of substantial concern to all who lived in the community.” Thus, the holding could conceivably be construed to protect only statements made in fair reports of significant public meetings. However, while the fevered atmosphere of the meetings may have increased the likelihood that readers would ascribe a non-legal meaning to “blackmail,” nothing inherent in the idea of “rhetorical hyperbole” confines its application to exchanges Bresler over matters of public importance. Rather, the reasoning by which the Court found the presence of hyperbole—“[a] figure of speech in which exaggeration is used for emphasis or effect”—can be transplanted to any context suggesting that the speaker did not intend a literal meaning of a derogatory term. In deeming such subjective expression beyond the reach of libel suits, the Court bolstered the proposition that factually rebuttable assertions are an essential element of actionable defamation.

A similar outcome in Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, notwithstanding its statutory basis, lends further credence to an intrinsic requirement of verifiable falsehood. Letter Carriers overturned a state judgment against a union for publishing a newsletter that described non-union members of the bargaining unit as “scabs” and “traitors.” As a formal matter, the Court held that federal labor law preempted the state’s award of damages for these statements. The Court’s construction of that law, however, had inferred “‘a congressional intent to encourage free debate on issues dividing labor and management.’” Thus incorporating free speech principles under the First Amendment, the Court determined that the “existence of falsehood” is the “sine qua non of recovery for defamation.” The absence of this crucial feature defeated the plaintiffs’ claim, for readers would recognize that the newsletter had merely employed “rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join.” When used in “a loose, figurative sense” to register the union’s disapproval of non-

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84 Id. at 13.
85 Id. at 13-14.
86 Id. at 14.
87 Id. at 13.
91 Id. at 285.
92 Id. at 283-86.
93 Id. at 272 (quoting Linn v. Plant Guard Workers Local 114, 383 U.S. 53, 62 (1966)).
94 Id. at 280-82 (applying actual malice standard and imposing “same obligation” of independent examination of record as in First Amendment cases).
95 Id. at 283.
96 Id. at 285-86.
union workers, words like “traitor” could not plausibly be regarded as “representations of fact.”
As in Letter Carriers, a heated dispute of high visibility fostered a climate in which words conveying factual charges elsewhere would be viewed as only reflecting the speaker’s harsh value judgment. Still, the contrast drawn by Letter Carriers between “[e]xpression of such an opinion” as the union’s and statements that “‘falsify facts’” can be drawn in a multitude of other settings as well. While ascertaining meaning may sometimes pose interpretive challenges, the vast reach of this distinction is consistent with the theory that provable factual falsity is an indispensable component of constitutionally cognizable libel.

Two other decisions, while addressing suits by public figures, rest on reasoning that buttress a wider First Amendment requirement of definite factual misstatement as a predicate for recovery in libel. Hustler Magazine, Inc. v. Falwell, did not formally present a defamation issue at all, but rather involved a claim for infliction of emotional distress by “a nationally known minister who has been active as a commentator on politics and public affairs.” However, the opinion relied heavily on libel jurisprudence to dispose of the suit. Falwell had brought his complaint over an apocryphal “interview” with him that Hustler had obviously and expressly meant as a parody. In overturning the award of damages to Falwell, the Court held that public figures and public officials could recover for infliction of emotional distress caused by publications like Hustler’s parody only by showing that “the publication contains a false statement of fact which was made with ‘actual malice’. . . .” The Court’s holding is thus formally confined to public figure and public official plaintiffs, and its analysis likewise underscores the First Amendment’s encouragement of “robust political debate.” However, these features of the Court’s opinion appear more relevant to its state of mind requirement than to the deeper principle implicated. At bottom, it was the intangible nature of the injury’s source that upset First Amendment tenets. Rather than question the authenticity of Falwell’s asserted emotional harm, the Court rejected “outrageousness” of speech as the standard by which liability could be measured. The Court’s objection to the “inherent subjectiveness” of this standard throws into sharp relief the burden that it placed on plaintiffs to show a false statement of fact. By imposing this burden for a cause of action that traditionally omitted proof of falsehood, the

\(^{97}\) Id. at 284.
\(^{98}\) Id. (quoting Cafeteria Employees Local 302 v. Angelos, 320 U.S. 293, 295 (1943)).
\(^{100}\) 485 U.S. 46 (1988).
\(^{101}\) Id. at 47-48. The plaintiff had also brought a cause of action in defamation, but the jury found against him on this claim. Id. at 48.
\(^{102}\) See id. at 51-53 (citing, inter alia, Monitor Patriot Co., Garrison, and New York Times).
\(^{103}\) Id. at 48. In this parody of a well-known advertising campaign, Falwell was quoted to say that his “first time” had occurred in an outhouse during a drunken rendezvous with his mother. Id.
\(^{104}\) Id. at 56.
\(^{105}\) Id. at 51.
\(^{106}\) Id. at 55 (stating that such a standard “runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience” (citation omitted)).
\(^{107}\) Id.
\(^{108}\) See Amsden v. Grinnell Mut. Reinsurance Co., 203 N.W.2d 252, 255 (Iowa 1972) (describing as elements of prima facie case intentional infliction of emotional distress “(1) Outrageous conduct by the defendant; (2) The defendant's intention of causing, or reckless disregard of the probability of causing emotional distress; (3) The
Court implicitly strengthened the case for treating demonstration of falsity as an integral aspect of actions for libel.

Masson v. New Yorker Magazine, Inc.\textsuperscript{109} also indirectly validates the centrality of proven factual falsehood to the intrinsic character of constitutionally permissible libel suits. Masson complained that an article based on his recorded interviews with a New Yorker reporter had “deliberately fabricat[ed] quotations ascribed to him.”\textsuperscript{110} Because Masson was designated a public figure, he was required to meet the actual malice standard.\textsuperscript{111} He contended that the defendants acted with the requisite intent by presenting as quotations substantially paraphrased versions of statements that he had made during the interviews.\textsuperscript{112} Addressing the broader issue, the Court declined to regard alteration of a speaker’s words alone as sufficient evidence of actual malice.\textsuperscript{113} Instead, deliberate alteration of the plaintiff’s words amounts to knowledge of falsity only when the alteration materially changes the meaning of the statement.\textsuperscript{114} This standard obviously affords more latitude for interpretation than factual determinations of whether Greenmoss Builders had filed for bankruptcy\textsuperscript{115} or Elmer Gertz had belonged to the Marxist League for Industrial Democracy and participated in planning an attack on police at the 1968 Democratic Convention.\textsuperscript{116} Nevertheless, the touchstone of liability under the Masson standard remains falsity, and the Court’s refusal to equate deviation from a speaker’s words with per se proof of actual malice reflects a conception of falsity that is functional rather than formalist.\textsuperscript{117} Such a functionalist approach suggests that demonstration of falsity should not hinge on the identities of defendants or the subject matter of their defamatory speech.

Finally, and somewhat paradoxically, a passage in the Court’s opinion in Gertz\textsuperscript{118} has been prominently invoked as grounds for treating false factual assertion as necessary to recovery in libel. Writing for the Court, Justice Powell observed:

plaintiff’s suffering severe or extreme emotional distress; and (4) Actual and proximate causation of the emotional distress by the defendant” (citations and inner quotations omitted); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 12, AT 64 (5th ed. 1984) (setting forth elements to be established for recovery in action for intentional infliction of emotional distress intent or recklessness, outrageous conduct, and severe mental distress).\textsuperscript{109} 501 U.S. 496 (1991).
\textsuperscript{111} Id. at 510.
\textsuperscript{112} See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), discussed at text accompanying supra notes 64-67. The suit arose from a credit report issued by Dun & Bradstreet erroneously stating that Greenmoss had filed for bankruptcy.
\textsuperscript{113} See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), discussed at text accompanying supra notes 64-67. The suit arose from a credit report issued by Dun & Bradstreet erroneously stating that Greenmoss had filed for bankruptcy.
\textsuperscript{114} These were two of the inaccurate assertions about Gertz contained in the article that formed the basis of his defamation suit. Gertz, 418 U.S. at 326.
\textsuperscript{115} The contrast between these two philosophies of constitutional constraints is typically applied to the principle of separation of powers. See, e.g., William N. Eskridge, Jr., Relationships Between Formalism and Functionalism in Separation of Powers Cases, 22 HARV. J.L. & PUB. POL’Y 21 (1998); Peter L. Strauss, Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency? 72 CORNELL L. REV. 488 (1987). However, the debate over whether to resolve constitutional issues by reference to bright-line boundaries informs free speech questions as well. Indeed, the Milkovich Court’s rejection of a wholesale fact-opinion dichotomy, see note 125 infra and accompanying text, may be characterized as a functionalist position.
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.\textsuperscript{118}

The paradox stems from two sources. First is the incongruity between the original significance of the passage and the magnitude of its impact on lower courts. As noted earlier, the holding of \textit{Gertz} governs the constitutional fault requirement for private plaintiffs and the circumstances under which they may recover presumed and punitive damages.\textsuperscript{119} Thus, Justice Powell’s pronouncement on the constitutional standing of opinions and false statements of fact amounts to dictum. Still, it inspired a wide body of federal and state court doctrine premised on a constitutional distinction between privileged opinion and unprotected fact.\textsuperscript{120} That development, in turn, led to the second paradox in the persistent significance of the \textit{Gertz} dictum: the \textit{Milkovich} Court’s formal repudiation of an “artificial dichotomy” between fact and opinion.\textsuperscript{121} As will be discussed, however, the Court’s rejection of more expansive implications drawn from \textit{Gertz} did not dispel the underlying principle that factual accusation lies at the core of actionable libel.\textsuperscript{122}

\textbf{II. MILKOVICH, HEPPS, AND THE FLAWED SUGGESTION OF RELIEF FROM THE PLAINTIFF’S BURDEN OF PROVING FALSITY}

The \textit{Milkovich} Court recited \textit{Hepps}’s requirement that private figures prove falsity when suing media defendants for speech of public concern\textsuperscript{123} as part of a broader explication of its holding. The Court pointed to \textit{Hepps} and other decisions to show that “existing constitutional doctrine adequately protects speech” without drawing a categorical distinction between opinion and fact.\textsuperscript{124} While the Court’s conclusion that \textit{Gertz} did not “create a wholesale defamation

\textsuperscript{118} 418 U.S. at 339-40.
\textsuperscript{119}  See \textit{supra} notes 55-58 and accompanying text; \textit{supra} notes 65-67 and accompanying text (discussing qualification of \textit{Gertz} holding in \textit{Dun & Bradstreet}).
\textsuperscript{121} \textit{Milkovich}, 497 U.S. at 19. The Court’s opinion in \textit{Milkovich} is discussed at text accompanying notes 127-45 \textit{infra}.
\textsuperscript{122} See text accompanying notes 146-50 \textit{infra}.
\textsuperscript{123} \textit{Milkovich}, 497 U.S. at 16.
\textsuperscript{124} \textit{Id.} at 19.
exemption for anything that might be labeled ‘opinion’” is unexceptionable, its uncritical repetition of the limitations of Hepps is not. The Court’s focus on one intrinsic aspect of defamation obscured its continued failure to explore the proper reach of another.

A. The Significance of Hepps in the Milkovich Decision

The Milkovich decision culminated a protracted suit rooted in events that began fifteen years earlier. At the heart of the litigation was a sportswriter’s column that appeared under the heading “Maple Beat the Law with the ‘Big Lie.’” The headline referred to a court’s suspension of sanctions imposed by a state athletic association against Maple Heights High School for a fracas at a wrestling match between Maple and a rival. Plaintiffs Milkovich, then Maple’s wrestling coach, and Scott, its superintendent, had testified at the judicial hearing. Offering as the “lesson” taught by this episode that “[i]f you get in a jam, lie your way out,” the column asserted that “[a]nyone who attended the meet … knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.”

The impetus for the Court’s disquisition on the putative fact-opinion distinction was the Ohio Supreme Court’s holding that the column was “constitutionally protected opinion.” The Court acknowledged widespread reliance on the Gertz dictum for the existence of a privilege for expressions of opinion. Understood in context, however, the passage was seen as simply restating the longstanding First Amendment tenet that government may not act as the arbiter of truth among competing ideas. In particular, the Court objected to the immunity that a blanket privilege for “opinion” would confer on expression couched in the form of opinion but implying assertions of fact. The Court viewed the case before it as illustrating this fallacy. Though the language of the column could be characterized as opinion, a factfinder could reasonably “conclude that the statements in the … column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding.”

The Court’s broader ruling, however, did not rest merely on disavowal of lower courts’ construction of the Gertz pronouncement; rather, the Court declared the sufficiency of its “established safeguards” for speech. “Foremost” among these, in the Court’s assessment, was Hepps’s requirement that statements subjected to liability in defamation actions be provable as

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125 Id. at 18.
126 The two dissenters indicated their agreement with the Court’s correction of “any misimpression 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,” id. at 24 (Brennan, J., dissenting); they confined their dispute to the Court’s application of the principles that it had articulated to the statements at issue in the case, id. at 25. See Edward M. Sussman, Note, Milkovich Revisited: “Saving” the Opinion Privilege, 41 DUKE L.J. 415, 428 (1991) 428: (asserting that privilege for opinion as recognized prior to Milkovich “never created such a wholesale exemption” for opinion and that Milkovich therefore “removed nothing from existing doctrine by refusing to find content in the Gertz dictum).
128 See Milkovich, 497 U.S. at 3-4.
129 Id. at 18-19.
130 Id. at 21.
131 See id. at 21.
132 Id. at 17.
While reiterating Hepps’s two qualifications, the Milkovich formulation appeared to entrench the public concern criterion but expressly reserved the question of defendants’ media status. In addition, the Court distinguished “opinions” that may imply factual assertions and those that cannot reasonably be characterized as provably false. As example, the Court contrasted two hypothetical statements. Saying “In my opinion Mayor Jones is a liar” implies the speaker’s knowledge that Jones told an untruth, whereas stating “In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin” does not set forth a provably false proposition.

The Court also found that a cluster of other decisions complemented Hepps’s protection by ensuring against inappropriate construction of language that was not meant to communicate a factual charge against the plaintiff. Having earlier canvassed its holdings in Bresler, Letter Carriers, and Falwell, the Court extracted from these cases First Amendment protection of “that cannot ‘reasonably [be] interpreted as stating actual facts’” about the plaintiff. Without expressly restricting this protection to speech on public matters, the Court endorsed its value of assuring that “public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our Nation.”

The Court further noted that the intent requirements of New York Times, Butts, and Gertz would help to “ensure that debate on public issues remains ‘uninhibited, robust, and wide-open.’” Thus, even a statement of opinion implying a false defamatory fact would be shielded from liability if the libeled plaintiff could not surmount the applicable fault requirement.

Moreover, the requirement of independent appellate review assures that courts will administer these standards “in a manner so as not to ‘constitute a forbidden intrusion of the field of free expression.’”

In ranking Hepps as the “[f]oremost” source of protection in this area, the Milkovich Court supplanted the farrago of tests for the fact-opinion distinction with a core criterion of verifiability. As a threshold matter, a court must determine as a matter of law “whether a reasonable factfinder could conclude” that the defendant’s speech implies a derogatory assertion.

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136 Id. at 19-20.
137 Id. at 20 n.6.
138 Id. at 18-20.
139 Id. at 16-17.
140 Id. at 20 (quoting Falwell, 485 U.S. at 50).
141 Id. (citation omitted).
143 Id. at 20-21.
144 See supra note 69 and accompanying text.
about the plaintiff.\textsuperscript{147} If so, the court must also find as a matter of law that the proposition implied is “sufficiently factual to be susceptible of being proved true or false” before allowing consideration of the claim by a jury.\textsuperscript{148} Commentators have differed over whether this approach substantially reduces the protection that defendants enjoyed under the opinion privilege.\textsuperscript{149} Two decades of lower court decisions, however, suggest that \textit{Milkovich} altered the form more than the substance of the expression to which its qualified formulation applies.\textsuperscript{150} Again, however, it is

\textsuperscript{147} \textit{Milkovich}, 497 U.S. at 21.

\textsuperscript{148} \textit{Id.}; see \textit{Hatfill v. New York Times Co.}, 416 F.3d 320, 330 (4th Cir.2005) (stating that “[t]he question whether a statement is capable of having a defamatory meaning is a question of law to be decided by the court”); \textit{Amtrak Prods., Inc. v. Morton}, 410 F.3d 69, 72 (1st Cir.2005) (same); Finebaum v. Coulter, 854 So.2d 1120, 1128 (Ala. 2003) (same).


\textsuperscript{150} See \textit{ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 4.2, 14-16 through 14-23 (3d ed. 2009); Jeanine A. Graham, Freedom of Speech—Separate Right to an Opinion? The Ohio Constitution’s Separate and Independent Protection for Opinions Applies to Members of the Media as Well as to Private Citizens. Wampler v. Higgins, 752 N.E.2D 962 (Ohio 2001).}, 33 RUTGERS L.J. 1158, 1171-73 (2002); Pruitt, \textit{supra} note 149, at 452-53; Robert D. Sack, \textit{Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, “Defamation and Privacy under the First Amendment,” 100 COLUM. L. REV. 294, 322 (2000) (stating that most courts have “reached the result that they likely would have before the Supreme Court decided” \textit{Milkovich}); Thomas, \textit{supra} note 99, at 395 (observing that “[t]he \textit{Milkovich} opinion has been interpreted by most courts to continue the substance of the fact/opinion distinction with different terminology”)}. The continuity of lower courts’ approaches with pre-\textit{Milkovich} standards is discussed at notes 220-43 \textit{infra} and accompanying text.

In addition, some state courts have construed state law to confer independent protection of opinion. \textit{See}, e.g., \textit{Immuno AG v. Moor-Jankowski}, 567 N.E.2d 1270, 1280 (N.Y. 1991) (setting forth state standard for “separating actionable fact from protected opinion” and noting that the ‘protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution” (citation omitted)); Wampler v. Higgins, 752 N.E.2d 962, 965 (Ohio 2001) (stating that “[r]egardless of the outcome in \textit{Milkovich}… [t]he Ohio Constitution provides a separate and independent guarant...
those qualifications—the references to speech of public concern and media defendants—that call into question whether this cabined principle collides with the larger logic of intrinsic limitations on actionable libel.

B. The Need for a Uniform Burden of Proving Falsity

In citing *Hepps* as part of the panoply of protections rendering an opinion privilege unnecessary, the *Milkovich* Court presumably incorporated that decision’s reasoning as well as its holding. The *Hepps* opinion, however, did not adequately explain why it framed its ruling as applicable to speech by media defendants on matters of public concern. Indeed, the Court’s reference to media defendants appears wholly gratuitous. Moreover, while the Court did address the significance that it attached to expression on public matters, it misapplied this external consideration to the intrinsic element of falsity. In so doing, the *Hepps* Court preserved an ominous suggestion from its previous term in *Dun & Bradstreet: viz.*, that the lesser importance of speech on private concern justifies a regime of strict liability in suits by private figures over such speech.151 Neither individually nor together, however, do the opinions in these cases rebut the logic of a comprehensive requirement for plaintiffs to show falsity.

1. *Hepps*: Limited Revision of the Common-law Landscape.—On its face, the Court’s decision in *Hepps* extended First Amendment protection of defamatory speech. Plaintiff Hepps was the principal stockholder of a corporation that franchised convenience stores. The Philadelphia Inquirer ran a series of articles indicating that Hepps and others had connections to organized crime, and that they had utilized those links to influence state officials to give favorable treatment to his business.152 Litigation in the Pennsylvania courts centered on the constitutionality of a state statute placing on the defendant the burden of as to the truth of the publication. Reversing the trial court on this point, the Pennsylvania Supreme Court upheld the statute and remanded the case for a new trial at which the defendants would bear the burden of

for opinion ancillary to freedom of the press” (quoting Vail v. Plain Dealer Publishing Co., 649 N.E.2d 182, 185 (Ohio 1995)); see also Lapkoff v. Wilks, 969 F.2d 78, 81 (4th Cir.1992) (finding statements at issue not defamatory under Virginia law and therefore not reaching the federal constitutional question); Seidl v. Greentree Mortg. Co., 30 F.Supp.2d 1292, 1316 (D.Colo. 1998 (construing Colorado law as synthesizing *Milkovich* and existing Colorado precedent to produce framework for determining whether statement is protected); Riggs v. Clark County School Dist., 19 F.Supp.2d 1177, 1180 (D. Nev. 1998) (finding under Nevada law that “[s]eparating factual statements from opinions is a critical issue in defamation cases” (inner quotations and citations omitted)); Lyons v. Globe Newspaper Co., 612 N.E.2d 1158, 1165 (Mass. 1993) (stating that “the independent protections of freedom of speech which are found in our common law and in [Massachusetts Declaration of Rights] would lead us to reach the same result even if there existed no Federal constitutional support for principles which we applied”); Beattie v. Fleet Nat. Bank, 746 A.2d 717, 724 (R.I. 2000) (ruling that even if statement at issue was not entitled to First Amendment protection under *Milkovich*, “our own Rhode Island Constitution affords adequate and independent grounds for us to afford ‘full constitutional protection’ to this type of communication” (citation omitted)); but see Rodriguez v. Panayiotou, 314 F.3d 979, 986-87 (9th Cir. 2002) (noting that California courts “have…rejected the argument that a categorical exemption for opinions, or broader protection for freedom of speech and defamation defendants than that granted by the United States Constitution, as set forth in *Milkovich*, exists independently under California law”); Beasley v. St. Mary's Hospital of Centralia, 558 N.E.2d 677, 683 (Ill. App. Ct. 1990) (declining to construe Illinois constitution as affording protection beyond that provided by United States Constitution).

151 See notes 170-74 infra and accompanying text.

152 *Hepps*, 475 U.S. at 769.
showing that their allegations were true. The Supreme Court, in turn, held that a state could not require defendants to prove the truth of their statements under the circumstances of this case. The Court’s explanation of the principle established by its holding identified the pertinent circumstances: “To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.”

Justice O'Connor’s majority opinion left ambiguous the weight accorded the defendant’s media status. Though noting that status in its holding, the Court stated—almost as an aside in a final footnote—that the case did not give occasion to consider whether suits against nonmedia defendants would be governed by the same principle. Nor did the Court elaborate on nonmedia speakers might merit less constitutional protection. At the same time, however, the opinion’s pervasive use of the term “media defendant” tacitly endorses heightened solicitude for that class of speaker. This phenomenon is perhaps most striking in the way that the Hepps Court characterized its earlier decisions in New York Times, Butts, and Gertz. The holdings in these cases grew out of the status of libel plaintiffs rather than that of their libelers. As recast by in the Hepps opinion, however, Gertz represents the principle that “a private figure who brings a suit for defamation cannot recover without some showing that the media defendant was at fault in publishing the statements at issue.” Similarly, New York Times and Butts are distilled to embody the principle that public officials and public figures defamed on matters of public concern must “surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law.” By contrast, the Hepps Court was far less reticent about the rationale for tying its holding to the presence of speech of public concern. For the Court, whether disputed speech addresses a public concern and the plaintiff’s public or private status constitute the “two forces” determining the extent to which the First Amendment “may reshape the common-law landscape.” The Court therefore took both of these elements into account in formulating a principle to govern cases like the one before it: viz., a private figure bringing suit over expression of public concern. With status and subject matter tugging in opposite directions, the Court assessed this permutation as occupying an intermediate plane of protection. As Justice O'Connor wrote, “When the speech is of public concern but the plaintiff is a private figure … the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern.” Applying this nuanced perspective to the question of falsity, the Court acknowledged that imposing the burden of proof on either party would inevitably produce unfair results in some instances. Plaintiffs charged with proving falsity would sometimes fail to muster sufficient evidence even where speech is untrue;

153 Hepps v. Philadelphia Newspapers, Inc., 485 A.2d 374, 387 (Pa. 1984), rev'd 475 U.S. 767 (1986). The jury had found in favor of the defendants after being instructed that the plaintiff must prove the falsity of the defamatory publication. Id. at 377.
154 475 U.S. at 776-77.
155 See id. at 779 n.4.
156 See supra notes 12-14, 35-36, 56 and accompanying text.
157 Id. at 768 (emphasis added).
158 Id. at 775 (emphasis added); see also id. at 773 (observing that New York Times standards “apply not only when a public official sues a newspaper, but also when a ‘public figure’ sues a magazine or news service”).
159 Id. at 775.
160 Id. at 776; id. at 778 (stating that articles about plaintiffs “concern[] the legitimacy of the political process”).
161 Id. at 775.
conversely, defendants with the burden of showing truth would be unable to meet their burden in some cases despite the fact that their speech was true.\textsuperscript{162} Accordingly, the Court was called upon to break the tie between these competing sets of imperfect scenarios: “In a case presenting a configuration of speech and plaintiff like the one we face here, and where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech.”\textsuperscript{163}

Pursuing its balancing exercise, the Court noted that requiring plaintiffs to demonstrate falsity “adds only marginally” to their established burden of showing fault.\textsuperscript{164} Proof of the defendant’s inadequate investigation of the published statement’s truth, reasoned the Court, would typically entail evidence that the statement was false.\textsuperscript{165} This modest incremental impact markedly contrasts with the deterrence of speech of public concern that the Court feared would result from placing the burden of proving truth on defendants.\textsuperscript{166} In the Court’s eyes, “such a ‘chilling’ effect would be antithetical to the First Amendment's protection of true speech on matters of public concern.”\textsuperscript{167} Thus, the “need to encourage debate on public issues”\textsuperscript{168} proved decisive in the Court’s recognition of a “constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.”\textsuperscript{169}

2. Doctrinal Support for the Hepps Qualifications: The Broader Implications of Dun & Bradstreet.—While flawed,\textsuperscript{170} the suggestion in Hepps that plaintiffs’ burden of showing falsity excludes defamation by nonmedia speakers or on matters of private concern was not an entirely novel idea. As noted earlier, the Court’s decision in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. the previous term had exempted private figures libeled on matters of private concern from Gertz’s requirement that plaintiffs show actual malice to recover presumed or punitive damages.\textsuperscript{171} The central rationale of Justice Powell’s plurality opinion, however, makes plausible a wider exemption of this type of libel from ordinary First Amendment safeguards. By treating expression on private matters as less worthy of constitutional recognition than speech of public concern,\textsuperscript{172} the plurality opinion left open the possibility that common law standards like the presumption of falsity would remain intact for this category of speech. The Hepps Court expressly acknowledged this possibility: “When the speech is of exclusively private concern and the plaintiff is a private figure, as in Dun & Bradstreet, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.”\textsuperscript{173} Indeed, this logic could countenance a regime of strict liability in such cases.\textsuperscript{174}

\begin{footnotes}
\item[162] Id. at 776.
\item[163] Id.
\item[164] Id. at 778.
\item[165] Id.
\item[166] Id. at 777.
\item[167] Id.
\item[168] Id.
\item[169] Id. at 776.
\item[170] See II-B-2 infra.
\item[171] See supra note 65 and accompanying text.
\item[172] See supra notes 66-67 and accompanying text.
\item[173] Hepps, 475 U.S. at 775.
\end{footnotes}
A distinction between media and nonmedia speakers also appears in *Dun & Bradstreet*, but more tenuously than the explicit embrace of diminished protection for libel on private matters. In the decision below, the Vermont Supreme Court had withheld the protections of *Gertz* to *Dun & Bradstreet* on the ground that they applied only to media defendants. Because the Court’s decision hinged on the private nature of *Dun & Bradstreet*’s credit report, Justice Powell’s opinion did not address whether the credit agency’s nonmedia status could have supplied an alternative ground for its ruling. Five Justices, however, squarely rejected greater protection of media defendants under *Gertz*.

3. The Discredited Notion of Media Privilege.—Hepps’s resurrection of a media-nonmedia distinction was surprising not simply because the idea had been slighted so recently in *Dun & Bradstreet*. Though Justice Stewart famously wrote that the Free Press Clause confers distinct rights on the institutional media, the Court had rebuffed arguments in favor of disparate levels of protection. In *First National Bank v. Bellotti*, the Court emphatically observed that “the press does not have a monopoly on either the First Amendment or the ability to enlighten.” Even more pointedly, the Court in *Branzburg v. Hayes* refused to recognize a privilege for reporters to resist a subpoena to testify before a grand jury. Likewise, the Court held in *Pell v. Procunier* that the media do not possess greater access to prisons or inmates than the general public. Even in the realm of defamation, the Court has conferred the protection of

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*472 U.S. at 761-63*. *Dun & Bradstreet* issued a credit report falsely reporting that Greenmoss Builders had filed for bankruptcy. *Id.* at 751.

See *id.* at 784 n.10 (Brennan, J., dissenting) (observing that plurality opinion “does not expressly reject the media-nonmedia distinction, but does expressly decline to apply that distinction to resolve this case”).

*Id.* at 773 (White, J., concurring in judgment); *id.* at 781 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting).


*See Potter Stewart, “Or of the Press,” 26 HASTINGS L.J. 631 (1975).*

*435 U.S. 765 (1978).*

*Id.* at 782 (invalidating state law forbidding corporations to make political contributions or otherwise assist any political campaign).

*408 U.S. 665 (1972).*

*Id.* at 702-04; *see id.* at 705 (observing that “informative function” of organized press “is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists”); George C. Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43, 57 (1976) (asserting that *Branzburg* rejected special protection for media “on the only occasion when the issue has been specifically addressed”).

*417 U.S. 817 (1974).*

*Id.* at 834; *see also* Herbert v. Lando, 441 U.S. 153, 165 (1979) (stating that evidentiary rules relevant to state of mind of defendant in defamation suit “are applicable to the press and to other defendants alike”); *but see*
the actual malice standard on nonmedia defendants sued by public plaintiffs. Neither Hepps nor Dun & Bradstreet identifies features of defamation that might compel a departure from the Court’s otherwise even treatment of media and nonmedia speakers under the First Amendment.

Nor do opinions in these cases respond to the weight of commentary condemning differential protection as impractical and unprincipled. Some observers have noted the complication and confusion that a media/nonmedia distinction would add to an already complex body of doctrine. Many others have questioned the very feasibility of the distinction, echoing Justice Brennan’s concern in Dun & Bradstreet with the “First Amendment difficulties lurk[ing] in the definitional questions” posed by special rights for media. The recent proliferation of electronic modes of communication compounds this problem of identification. Moreover, even assuming that the burden of proof should be linked to the public significance of speech, media identity operates as a poor proxy for this element. Traditional arguments for

Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979) (reserving question of whether actual malice standard can apply to nonmedia defendant sued by public official or public figure).


See, e.g., Smolla, supra note 9, at 1564 (asserting that addition of media/nonmedia distinction would “complicate matters beyond all manageability”); Taylor, supra note 149, at 154 (stating that adoption of distinction would “further complicate[] the already unclear body of defamation jurisprudence”); Walden, supra note 174, at 12.

Dun & Bradstreet, 472 U.S. at 782 (Brennan, J., dissenting); see, e.g., Thomas D. Brooks, Catching Jellyfish in the Internet: The Public-figure Doctrine and Defamation on Computer Bulletin Boards, 21 RUTGERS COMPUTER & TECH. L.J. 461, 479 (1995) (stating that reliance on whether defendant belongs to media “would confront the Court with the slippery-slope task of defining ‘the media’”); Christie, supra note 184, at 58 (predicting that attempt to extend enhanced protection to media under Free Press Clause “will almost certainly flounder in practice when it comes time to decide what is covered by the term ‘the press’”); Anthony Lewis, A Preferred Position for Journalism?, 7 HOFFSTRA L. REV. 595, 605-07 (1979); Shiffrin, Defamatory Non-Media Speech and First Amendment Methodology, 25 UCLA L. REV. 915, 935 (1978) (stating that affording less First Amendment protection to nonmedia defendants “would require difficult determinations as to which communications would and would not merit the label ‘press’ or ‘media’”); William W. Van Alstyne, The Hazards to the Press of Claiming a Preferred Position, 28 HASTINGS L.J. 761, 770 (1977).


See notes 197-200 infra and accompanying text for argument against such a link.

See Hepps, 475 U.S. at 780 (Brennan, J., concurring) (asserting that distinguishing between media and nonmedia defendants is “irreconcilable with the fundamental First Amendment principle that ‘the inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union or individual’”); (quoting Dun & Bradstreet, 472 U.S. at 781 (Brennan, J., dissenting) (quoting First Nat’l Bank v. Bellotti, 435 U.S. 765, 777 (1978))); Benaroya, supra note 190, at 1293 (arguing that according nonmedia defendants less protection would fail to protect the speech interests of the myriad citizen-critic
differential protection based on media’s dissemination of information to the public, already problematic, have been rendered obsolete by today’s multifarious modes of communication. Ultimately, all these critiques can be traced to the intrinsic nature of defamatory speech. The property of untruth inheres in libel irrespective of the status of the speaker. Thus, unlike the rationales in \textit{Gertz} for variable scienter standards based on the plaintiff’s station in society, defendants’ designation as media or nonmedia has no bearing on the alleged falsity of their statements. The inability to equate expression’s importance with its source, as well as the intractable problems of classification, underscore that the crucial feature of falsity does not vary by speaker. Accordingly, the burden of demonstrating that the statement in question falsely besmirched the plaintiff should not vary either. The Court’s own cost-benefit analysis in \textit{Hepps}—concluding that the price of penalizing some true speech exceeds the price of impunity for some falsity—applies to media and nonmedia alike. Perhaps the most compelling evidence that the constant nature of factual falsity calls for a uniform burden of its proof arises when a media defendant reprints a statement made by a private figure co-defendant. The anomaly of differential protection that would result in this circumstance from a media-nonmedia distinction highlights the clash between preference for media defendants and the centrality of falsity to libel actions.

4. \textit{The Subtle Fallacy of a Public Concern Criterion}.—Admittedly, a distinction between public and private concerns has a more substantial pedigree in the Court’s First Amendment jurisprudence. The outcome in \textit{Dun & Bradstreet} flowed directly from this distinction, which in turn tapped into a long-running theme of free speech doctrine. Only recently the Court affirmed the extraordinary protection enjoyed by political expression under the Constitution. Nevertheless, the role of subject matter in shaping the required showing of fault should not be extended to the question of falsity. It is one thing to employ a general balancing test to calibrate the level of defendants’ awareness for damages in light of the type of speech involved. No such balance should be struck, however, with respect to the threshold issue of falsity. Like publication to a third party, factual falsity forms part of the irreducible minimum of any.
successful libel action. Reversing the burden of proving its presence by requiring defendants to establish truth conflicts with basic premises of the civil litigation system.  

Ironically, a comparison of cases in which the Court categorized the libelous statements against private plaintiffs—Hepps, Dun & Bradstreet, and Gertz—supports a uniform burden of proving falsity. Because Hepps and Gertz both involved matters of public concern, both plaintiffs confronted the facially formidable challenge of proving a negative: Gertz’s non-affiliation with a Marxist organization and non-involvement with an attack on police six years later, Hepps’s lack of association with organized crime and improper exercise of influence over state officials. Conversely, while it appeared fairly easy for Dun & Bradstreet to prove falsity by showing the agency’s solvency, exempting speech on private matters from Hepps’s evidentiary requirement would relieve the agency of even this minimal burden. It seems incongruous to grant leniency to a plaintiff in relatively small need of it merely because the court has placed the libel in question on the private side of a blurry divide. Indeed, the Court in Gertz had recognized the danger of making plaintiffs’ burden in libel cases contingent on a distinction so lacking in consistency. Abandoning an application of the actual malice standard
based on subject matter,206 the Court noted the difficulty occasioned by “forcing state and federal judges to decide on an ad hoc basis which publications address issues of ‘general or public interest’ and which do not.”207 Imposing on all plaintiffs the burden of showing the intrinsic element of falsity would avoid unnecessary reliance on this inevitably uncertain exercise.

The holding in *Milkovich* especially points to the inaptness of a subject matter test for plaintiffs’ burden of proving factual falsity. Though *Milkovich* rejected a categorical fact-opinion dichotomy, the Court primarily invoked *Hepps* as grounds for deeming an opinion privilege unnecessary.208 Yet, the question of whether a statement implies a false factual assertion bears no logical relation to the statement’s classification as addressing a public or private concern. In *Milkovich* itself, the references to the plaintiffs’ alleged lies were published in commentary on a matter of concern. If the controversy had had a less public cast, however, the analytical framework of whether the columnist had charged the plaintiffs with perjury would have been identical.209 The burden of persuasion on this interpretive issue should be identical as well.

III. PROVING DEFAMATORY FALSEHOOD IN THE POST-*MILKOVICH* ERA: TACIT DEMONSTRATION OF THE FALLACY OF BRIGHT-LINE BURDENS

Two decades of lower court decisions since *Milkovich* confirm that neither nonmedia status nor private concern should eliminate plaintiffs’ burden of proving falsity. In confronting libel’s intrinsic element of falsity, courts have inevitably addressed a variety of considerations that cannot be captured by rigid categories of defendants’ identity and subject matter. In a sense, the *Milkovich* opinion contains seeds for eroding its suggestion that proof of factual falsehood can be cabined by these two criteria. By rejecting an “artificial dichotomy” between fact and opinion,210 the *Milkovich* Court acknowledged that actionable libel cannot be reduced to wholesale distinctions when assessing complex realities of expression.

The fluid nature of provable falsity extends to the concept itself. The *Milkovich* opinion sets forth as separate safeguards the requisites that an actionable statement “must be provable as false”211 and that it can “reasonably be interpreted as stating actual facts’ about an individual.”212 As speech is actually conducted, however, these two features frequently overlap. Indeed, a statement that cannot be regarded as “stating actual facts” about someone does not contain a provably false proposition about that person. However framed, the questions of whether a statement is susceptible to objective determination and whether it is “capable of carrying a defamatory meaning”213 are inextricably intertwined.214 Both are comprehended by the

207 Gertz, 418 U.S. at 346 (citing Rosenbloom, 403 U.S. at 43 (1971)).
208 See supra notes 135-38 and accompanying text.
209 For a discussion of considering public concern as providing context for interpretation rather than as altering the fundamental approach to disputed expression, see notes 347-53 and accompanying text.
210 Milkovich, 497 U.S. at 19.
211 Id. at 19. Of course the opinion includes the qualifications regarding media defendants and public concern. Id. at 19-20.
212 Id. at 20 (citation omitted).
213 Jolliff v. NLRB, 513 F.3d 600, 611 (6th Cir. 2008); see Thomas, supra note 88.
214 See Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir.1993) (stating that “if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable” (emphasis added)); Cochran v. NYP Holdings, Inc., 58 F.Supp.2d 1113, 1121 (C.D. Cal. 1998) (stating that “standard for evaluating the threshold
Milkovich Court’s overarching “constitutional distinction between ‘fact’ and ‘non-fact.’” This analysis does not lend themselves to facile compartmentalization along the lines of defendants’ media designation or public importance of the disputed speech. It is unsurprising, then, that the experience of courts since Milkovich suggests the unsoundness of encumbering courts’ inquiry into actionability with an inflexible classification scheme. Rather, the post-Milkovich landscape points to the wisdom of a uniform requirement that plaintiffs bear the burden of showing factual falsity.

A. The Persistence of Multi-factor Approaches

In denying the existence of a constitutional privilege for opinion, the Milkovich Court rejected multi-factor tests developed by lower courts to discern the side of the fact-opinion divide on which a statement falls. The Court’s opinion specifically noted the Ohio Supreme Court’s reliance on the most prominent of these: the four-factor analysis of the D.C. Court of Appeals in Ollman v. Evans. The Ollman approach considered whether: (1) the words as commonly used have a meaning that expresses a specific message, (2) the statement was verifiable, (3) the context in which the statement colored the understanding of the statement, (4) the “social context” in which the statement transformed readers’ perception of literally factual assertions. Notably, this standard and similar contemporary tests did not include litmus tests with respect to subject matter or the defendant’s membership in the media.

Notwithstanding the Court’s formal disavowal of multi-factor tests under the discredited fact-opinion distinction, however, many lower courts have continued to rely on multi-factor analyses to gauge the actionability of alleged defamatory falsehoods. To a considerable extent, their reliance echoes Justice Brennan’s assertion that the considerations deemed pertinent by the Milkovich majority “are the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion.” The refusal to abandon this type of scrutiny reflects a more fundamental phenomenon as well: ascertaining whether a statement communicates defamatory facts about the plaintiff is an inherently particularized exercise. Thus, examination of a number of factors in each case is an impulse that even the Milkovich Court could not entirely resist. A stark dichotomy between the evidentiary

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218 See id. at 779-84.
220 Milkovich, 497 U.S. at 24 (Brennan, J., dissenting); see also Lisa Herskowitz, Comment, One Bad Bit of Dictum Deserves Another: Gertz and Milkovich, 24 CONN. L. REV. 1159, 1160 (1992) (contending that Milkovich Court’s analysis of defamatory statements before it “employed the very same factors the lower courts used in the fact/opinion tests they developed in ‘mistaken reliance on the Gertz dictum’” (quoting Milkovich, 497 U.S. at 19)).
standards governing speech by media defendants on matters of public concern and those that apply when one of these elements is absent, therefore, philosophically if not formally clashes with the Court’s denial of a bifurcation between fact and opinion. Plaintiffs of every stripe should be charged with the burden of showing that the speech about which they complain bears libel’s intrinsic hallmark of provable falsity.

The lack of analytical upheaval in the wake of *Milkovich* is especially striking in courts’ insistence that previous doctrinal frameworks remain essentially unaffected by the Court’s holding. The First Circuit issued a stark pronouncement of this view in *Phantom Touring, Inc. v. Affiliated Publications*.221 After carefully reciting the *Milkovich* Court’s description of existing safeguards for speech, the *Phantom Touring* court concluded that “while eschewing the fact/opinion terminology, *Milkovich* did not depart from the multifactored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and non-actionable opinion.”222 A number of state courts have voiced skepticism of the impact of *Milkovich* on multi-pronged tests that had been inspired by the *Gertz* dictum. The Minnesota Court of Appeals, for example, promptly affirmed that “[t]he test used in *Milkovich* to identify protected opinions is very similar to the four-factor inquiry used by the circuit courts to distinguish fact from opinion.”223 In nearly identical language, the Nebraska Supreme Court likewise observed that the approach taken in *Milkovich* “is similar to pre-*Milkovich* cases using the fact-opinion analysis.”224 For the Colorado Supreme Court, the logic of the *Milkovich* opinion “strongly support[s] the conclusion that the factors identified” in the multi-factor test that the court had employed “remain applicable under *Milkovich*.”225 In 2000, the District of Columbia’s highest court unequivocally declared that “the constitutional principles that animate the *Ollman* court’s analysis of the Op-Ed column at issue in that case “remain equally compelling and equally good law today.”226 Moreover, California courts have been notably forthright in affirming the continued relevance of the state’s pre-*Milkovich* “totality of the circumstances”227 test in the post-*Milkovich* era. Reviewing the operation of that test, one California court averred that “*Milkovich* did not substantially change these principles.”228

Indeed, in spite of the *Milkovich* Court’s emphatic dismissal of a First Amendment fact-opinion distinction, some courts have gone so far as to indicate that it remains substantially intact. Again, the First Circuit has been conspicuously outspoken in this area. Drawing on its

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221 953 F.2d 724 (1st Cir.1992).
222 Id. at 727 see also: Weinstein v. Friedman, No. 94 Civ. 6803, 1996 WL 137313, at *18 (S.D.N.Y., March 26, 1996) (stating that *Milkovich* Court “applied an analysis largely similar to that in *Ollman*”).
223 Hunt v. Univ. of Minn., 465 N.W.2d 88, 94 (Minn.Ct.App.1991); see also Huyen v. Driscoll, 479 N.W.2d 76, 80 (Minn.App.1991) (stating that “the similarity between the Supreme Court’s definition of protected opinion and the circuit courts’ fact/opinion analysis” mean that decisions applying the multi-factor test of *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302-03 (8th Cir.1986), “are still instructive under *Milkovich*”). Three years after *Hunt* and *Huyen*, the Eighth Circuit cited both *Janklow* and *Milkovich* in the course of determining whether the statements in question could be regarded as assertions of false facts. See *Beverly Hills Foodland, Inc.*, v. *Union*, 39 F.3d 191, 195-96 (8th Cir.1994).
224 Wheeler v. Nebraska State Bar Ass’n, 508 N.W.2d 917, 921 (Neb. 1993)
228 Moyer v. Amador Valley Joint Union High Sch. Dist., 275 Cal.Rptr. 494, 497 (Ct.App.1990); see also Franklin v. Dynamic Details, Inc., 10 Cal.Rptr.3d 429, 436-37 (Cal.App. 4 Dist. 2004) (stating that “[a]fter *Milkovich*, the same totality of the circumstances test is used to determine whether the statement in question communicates or implies a provably false statement of fact”).
earlier interpretation of *Milkovich* in *Phantom Touring*, the court in *Riley v. Harr* viewed the issue presented there as whether the challenged statements “qualify as protected opinion under” those two decisions. In a similar vein, the Tenth Circuit in *Jefferson County School Dist. No. R-1 v. Moody's Investor's Services, Inc.* considered four factors to determine whether the challenged statement represented an “evaluative” or “deductive” opinion under *Milkovich*. More bluntly, another court simply asserted that “the basic distinction between fact and opinion appears to have survived *Milkovich*.”

Other courts, without expressly denying the impact of *Milkovich* on previous doctrine, have conducted their view of alleged libel on the tacit premise that the Court’s opinion condoned a multi-factor analysis. The decisions of the Ninth Circuit particularly illustrate this philosophy. The Ninth Circuit in *Unelko Corp. v. Andy Rooney* addressed whether a statement by the television commentator Andy Rooney that the plaintiff’s product “didn't work” was potentially subject to liability. Stating that “we apply the analysis required by *Milkovich*,” the court proceeded to examine a number of factors: the likely impression created by the language used by Rooney, the general tenor of Rooney’s broadcast segment as a whole, and the susceptibility of Rooney’s assertion to being proved true or false. Three years later, while acknowledging that the *Milkovich* Court had “found the opinion/fact dichotomy too simplistic,” the Ninth Circuit in *Partington v. Bugliosi* proclaimed its adherence to “*Unelko*’s basic framework.” The following year, in *Underwager v. Channel 9 Australia*, the court formalized this standard as an examination of the “totality of the circumstances.”

Nor has the Ninth Circuit been alone in seeking to preserve the essence of multifactor standards in the face of *Milkovich’s* command. The Eighth Circuit in *McClure v. American Family Mutual Insurance Co.*, ostensibly applying the interpretation of Minnesota courts, displayed both sympathy for multifactor tests and that their natural affinity for a required proof of falsity uncluttered by references to media status or subject matter. Observing that “[i]t is well-recognized in Minnesota that the First Amendment absolutely protects opinion that lacks ‘a provably false statement of fact,’” the *McClure* court went on to apply a four-factor approach devised by the Eighth Circuit prior to *Milkovich* and still used by Minnesota courts. The Sixth Circuit, purporting to rely on construction of *Milkovich*, has twice in recent years endorsed a four-factor system for ascertaining whether a statement amounts to actionable defamation.

229 292 F.3d 282, 290 (1st Cir. 2002).
230 175 F.3d 848, 853 (10th Cir. 1999); see also Cochran v. NYP Holdings, Inc., 58 F.Supp.2d 1113, 1121(C.D. Cal. 1998) (noting Ninth Circuit’s protection of “[p]ure opinions” (citation omitted)).
232 912 F.2d 1049 (9th Cir. 1990); cert. denied, 499 U.S. 961 (1991).
233 Id. at 1053.
234 Id. at 1053-57.
235 56 F.3d 1147 (9th Cir.1994).
236 Id. at 1152-53.
237 69 F.3d 361, 366 (9th Cir. 1995).
238 Id. at 366; see Gilbrook v. City of Westminster, 177 F.3d 839, 862 (9th Cir. 1999) (confirming approach announced in *Underwager*).
239 223 F.3d 845, 853 (8th Cir. 2000).
240 Id. at 853 (quoting Geraci v. Eckankar, 526 N.W.2d 391, 397 (Minn.App.1995) (quoting Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302-03 (8th Cir.1986))).
241 Ogle v. Hocker, 279 Fed. Appx. 391, 397 (6th Cir. 2008) (summarizing factors as “(1) The common usage or meaning of the allegedly defamatory words themselves, whether they are commonly understood to be loose, figurative, or hyperbolic words; / (2) The degree to which the statements are verifiable, whether the statement is
Tellingly, while Milkovich singled out the Ollman test as a salient example of misguided doctrine,\textsuperscript{242} belief in the test’s post-Milkovich utility remains common. As one court explained, “the Ollman four-part test is ‘still helpful for determining whether a statement implies actual facts that can be proven false.’”\textsuperscript{243}

Another approach that is untethered to subject matter or defendant identity and which continues to offer guidance under the Milkovich regime is set forth in the Restatement (Second) of Torts § 566: “A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.”\textsuperscript{244} This provision distinguishes between “pure” and “mixed” expressions of opinion under the First Amendment.\textsuperscript{245} While the pure version is protected,\textsuperscript{246} the mixed type is vulnerable because it insinuates the existence of undisclosed facts to support the defendant’s derogatory opinion of the plaintiff.\textsuperscript{247} Prior to Milkovich, § 566 had been routinely invoked by courts in evaluating allegedly defamatory statements defended as expressions of opinion.\textsuperscript{248} While Milkovich spurned the nomenclature of opinion privilege, the Court made only oblique reference to § 566,\textsuperscript{249} whose substance appeared objectively capable of proof or disproof; / (3) The immediate context in which the statement occurs; and / (4) The broader social context into which the statement fits”); Jolliff v. NLRB, 513 F.3d 600, 611 (6th Cir. 2008); see also Lee v. Bankers Trust Co., 166 F.3d 540, 546 (2d Cir. 1999) (applying three-factor analysis under New Jersey law but also citing Milkovich).

\textsuperscript{242} See supra notes 216-17 and accompanying text.


\textsuperscript{244} RESTATEMENT (SECOND) OF TORTS § 566, at 170 (1977).

\textsuperscript{245} See id. at § 566(c).

\textsuperscript{246} Id.

\textsuperscript{247} Id. at § 566(b).


\textsuperscript{249} See Milkovich, 497 U.S. at 19 (noting common law’s refusal to confer fair comment privilege on “a false statement of fact, whether it was expressly stated or implied from an expression of opinion”) (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977)).
to survive the holding unscathed.\textsuperscript{250} Numerous lower courts appear to have adopted this view in their treatment of \S\ 566 as pertinent authority.\textsuperscript{251}

Finally, even where courts find that \textit{Milkovich} has supplanted their previously established multifactor test, they tend to minimize the degree of analytical revision involved. The experience of the Fourth Circuit is instructive in this regard. Prior to \textit{Milkovich}, the court had embraced a variation of the \textit{Ollman} test in \textit{Potomac Valve \& Fitting, Inc. v. Crawford Fitting Co.}.\textsuperscript{252} Later confronted with the question of whether a magazine column about the corporate plaintiff was susceptible to suit, the court acknowledged that “it is the \textit{Milkovich} analysis, not that of \textit{Potomac Valve}, that we apply here.”\textsuperscript{253} Nevertheless, the court underlined the overlap between \textit{Milkovich} and the prior Fourth Circuit standard, noting that “\textit{Milkovich}, like \textit{Potomac Valve}, placed ‘primary emphasis ... on verifiability of the statement’ and examined the statement’s language and context to determine if it could be interpreted as asserting a fact.”\textsuperscript{254} Applying its understanding of \textit{Milkovich}, the court reached a conclusion consistent with any version of the \textit{Ollman} test: \textit{viz.}, that “any reasonable person” reading the column in question “would recognize, based on the tenor, language, and context of the article, that the challenged statements constitute a subjective view, not a factual statement.”\textsuperscript{255}

Courts’ continued reliance on multifactor analyses, then, appears to reflect the resistance of actionability—including provable falsity—to reductionist formulas. Given the myriad forms and settings of alleged libel,\textsuperscript{256} this avoidance of conceptual straitjackets is unsurprising. Meaning, verifiability, context: in practice, these criteria are frequently intertwined and mutually reinforcing. These considerations for assessing libel’s threshold issue not only interconnect, but also transcend the frequently murky boundaries between media and nonmedia defendants and between public and private concerns. To extract and isolate the element of provable falsity, subjecting it to rigid burden-shifting rules, thus conflicts with the complex and integrated nature of this inquiry. A review of the way in which courts address these factors points to the dangers of excessive compartmentalization.

\textbf{B. The Fusion of Verifiability and Meaning}

\begin{itemize}
  \item \textsuperscript{250} See Todd Love, Note, \textit{Milkovich v. Lorrain Journal Co.: Rejection of the Constitutional Fact-Opinion Dichotomy in Defamation Law}, 36 S.D. L. REV. 764, 780 (1991) (asserting that “[t]he question asked in \textit{Milkovich} is the same question which would be asked under the Restatement (Second) interpretation of the \textit{Gertz} dictum”).
  \item \textsuperscript{251} See, \textit{e.g.}, Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman, 55 F.3d 1430, 1439 (9th Cir. 1995) (asserting that “nothing in \textit{Milkovich} altered the constitutional principles [\S\ 566] articulates”); Agora, Inc. v. Axxess, Inc., 90 F.Supp.2d 697, 704 (D. Md. 2000) (grounding analysis in both \S\ 566 and \textit{Milkovich}); Hopewell v. Vitullo, 701 N.E.2d 99, 103 (Ill. App. 1 Dist. 1998); Peroutka v. Streng, 695 A.2d 1287, 1299 (Md. App. 1997) (stating that “[a]lthough the rule set out in the Restatement at first glance may seem to contradict the analysis established by the Supreme Court in \textit{Milkovich}, upon further analysis the two can be construed to be consistent”); Beattie v. Fleet Nat. Bank, 746 A.2d 717, 723 (R.I. 2000) (asserting that \textit{Milkovich} “did not purport to disagree with [\S\ 566]”); \textit{see also} Milsap v. Journal/Sentinel, Inc., 100 F.3d 1265, 1268 (7th Cir.1996) (referring to both \S\ \textit{566} and \textit{Milkovich} as representing comparable principles governing implied assertions of facts).
  \item \textsuperscript{252} See 829 F.2d 1280, 1288 (4th Cir.1987).
  \item \textsuperscript{253} Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir. 1998).
  \item \textsuperscript{254} \textit{Id.} at 184 (quoting Chapin v. Knight-Riddler, Inc., 993 F.2d 1087, 1093 (4th Cir.1993)).
  \item \textsuperscript{255} \textit{Id.} at 186.
  \item \textsuperscript{256} Recognition of this vast range of circumstances underlay the \textit{Ollman} court’s multifactor approach to distinguishing actionable fact from protected opinion. \textit{See} \textit{Ollman v. Evans}, 750 F.2d 970, 997-98 (D.C.Cir.1984) (en banc), \textit{cert. denied}, 471 U.S. 1127 (1985) (observing that “[b]ecause of the richness and diversity of language, as evidenced by the capacity of the same words to convey different meanings in different contexts, it is quite impossible to lay down a bright-line or mechanical distinction”).
\end{itemize}
The Court permitted Milkovich’s suit to go forward upon finding that “the connotation that [Milkovich] committed perjury is sufficiently factual to be susceptible of being proved true or false.” As predicate for this proposition, the Court had determined that the column in question could reasonably be understood as charging Milkovich with perjury.

Milkovich itself thus exemplifies the routinely integrated nature of a disputed statement’s meaning and its susceptibility to verification or falsification. Whether a statement can be proven false hinges on the content that a reasonable factfinder could ascribe to the statement—an issue frequently at the heart of the dispute between the parties. Accordingly, plaintiffs should not be excused from the burden of proving falsity while retaining the burden of showing defamatory meaning. To confine that burden to speech involving media defendants or matters of public concern ignores the holistic character of determining whether the speech may be subject to suit.

Defamation’s hybrid blend of meaning and verifiability is perhaps displayed most vividly by judicial treatment of actions for insults. Courts since Milkovich have generally agreed that “[n]ame calling, epithets, and abusive language, no matter how vulgar or offensive, are not actionable.” Thus, a defendant’s characterization of the plaintiff as a “bully” was held to lack sufficiently definite meaning to furnish grounds for a libel suit; since the term was “totally subjective,” its application to the plaintiff was deemed not provably false. Likewise, a suit based in part on the defendant’s description of the plaintiff as a “moral crusader” was dismissed because that term as used in the defendant’s book “cannot be objectively proven to be true or false.” Even a statement suggesting that the plaintiffs had been corrupted was protected where it was apparent that the defendant meant to refer to “power’s tendency to make a person arbitrary,

257 Milkovich, 497 U.S. at 21 (emphasis added).
258 See id.
259 Eric Scott Fulcher, Note, Rhetorical Hyperbole and the Reasonable Person Standard: Drawing the Line Between Figurative Expression and Factual Defamation, 38 GA. L. REV. 717, 753 (2004) (citing Milkovich for principle that “the key to determining whether a statement is rhetorical hyperbole is whether a reasonable person would view it as stating objective facts” (citing Milkovich, 497 U.S. at 20)); see also Pruitt, supra note 149, at 523 (arguing that courts should not extend automatic immunity to hyperbolic statements but rather “consider what meaning is being perceived by…reasonable persons”); accord Glenn J. Blumstein, Nine Characters in Search of an Author: The Supreme Court’s Approach to “Falsity” in Defamation and its Implications for Fiction, 3 UCLA ENT. L. REV. 1, SUM (1995); Sandra Davidson Scott, From Satirical to Satyrical: When is a Joke Actionable?, 13 HASTINGS COMM. & ENT. L.J. 141, 174 (1991).
262 Id.
aloof, and indifferent to the effects of his actions on others.” The statement about corruption was therefore “not capable of objective characterization as either true or false.”

The oft-cited case of Levinsky’s, Inc. v. Wal-Mart Stores, Inc. reflects the difference between verifiable fact and mere derogation, with the determination of both dependent on the meaning assigned. In an interview with a magazine writer, a store manager for Wal-Mart had described a Levinsky’s store as “trashy.” Rejecting a libel claim over this comment, the First Circuit noted that a word can be considered defamatory under the First Amendment only if it “reasonably can be understood as having an easily ascertainable and objectively verifiable meaning.” The word “trashy” failed this touchstone because it “possesses a multitude of fairly ascribable meanings.” By contrast, a second remark that callers to Levinsky’s were “sometimes put on hold for 20 minutes—or the phone is never picked up at all” was ruled a valid basis of a claim. Rejecting Wal-Mart’s defense that the statement should be regarded as simply an exaggeration, the court found that the reference to “20 minutes” could be understood as a literal timeframe and was therefore “sufficiently factual to be proved true or false.”

As Levinsky’s illustrates, business provides a fertile setting for the interdependent relationship of statements’ meaning and their verifiability. The potential financial harm from criticism gives companies and other commercial actors strong incentive to allege that they have been defamed. In these instances, the question of whether disparagement amounts to falsifiable assertion hinges on judicial interpretation of the content of the criticism. Thus, a court dismissed a claim arising from an article on the author’s experience with his insurance company and claims adjuster and stating, inter alia, that the adjuster “hinted that I had stolen my own car.” To the court, such statements represented to readers an “expression of outrage” rather than factual assertions whose falsity could be proved. Conversely, a column accusing a hospital of seeking to “rob the insurance company” was construed as attributing specific dishonest practices to the hospital, so understood, the statement was “subject to proof of truth or falsity.” Similarly, a court allowed a subcontractor’s suit to proceed when its employees had been charged with showing “a blatant disrespect for knowledge and craftsmanship in the sheet metal industry.”

The court found the statement to convey enough objective content to be “factually verified” through review of the training records of the subcontractor’s employees.

265 Id. at 1217; but see Tuan J. Pham v. Thang Dinh Le, No. A06-1127, 2007 WL 2363853, at *5 (finding statements that plaintiff was “Communist lackey controlled by the Vietnamese Communists” sufficiently specific to be factually proven true or false).
266 127 F.3d 122 (1st Cir. 1997).
267 Id. at 129.
268 Id. at 130.
269 Id. at 126.
270 Id. at 131. The court explained that the assertion could be “verified or rebutted by objective evidence of how Levinsky’s staff handled telephone calls.” Id.
273 Id.
274 J & J Sheet Metal Works, Inc. v. Picarazzi, 793 F.Supp. 1104, 1109 (N.D.N.Y. 1992); see also Sigal Const. Corp. v. Stanbury, 586 A.2d 1204, 1206, 1212 (D.C. 1991) (permitting suit by construction project manager where project executive stated that manager “seemed detail oriented to the point of losing sight of the big picture” because statement as construed by court “could be objectively evaluated and thus verified”).
Treatment of criticism of other professional performance also hinges on whether verifiable meaning can be divined, but here as in business situations questions of media status and public concern add little to the analysis. Attacks on a lawyer’s trial strategy, for example—however they may reflect on the lawyer’s competence—seem to enjoy virtually per se immunity from suit. As the Ninth Circuit put it in Partington v. Bugliosi, “negative statements concerning a lawyer’s performance during trial, even if made explicitly, are generally not actionable since they are not ordinarily “susceptible of being proved true or false.”

In other professional contexts, suits by a doctor reported to have given “excessive” treatment, an author deemed “guilty of misleading the American public” by his account of President Kennedy’s assassination, a basketball coach said to “usually find[] a way to screw things up,” and a university graduate assistant accused of “unprofessional behavior” all foundered on judicial reluctance to discern in these charges assertions that could be objectively gauged. Even a newspaper editor’s ostensibly concrete declaration that the newspaper’s former CEO had wrought “damage…[t]o our finances” was construed as too indefinite for “a reasonable person would go about proving or disproving.”

Moreover, rejection of claims that fall short of establishing verifiable content has hardly been confined to epithets and critiques of professional performance. The very range of suits defeated for failure to show a provably false assertion suggests the aptness of a universal burden of proof on this question. Language found not to lend itself to objective refutation has included matters of both official conduct and domestic care: both a description of a mayor’s negotiating tactic as “legalized blackmail” and an accusation that a woman “was not a fit mother.”

It spans a comment that a restaurant “denigrated” the building in which it was located and a reviewer’s reference to a musical-comedy production with the same name as a more popular

275 66 F.3d 1147, 1157 (9th Cir. 1995) (citing Milkovich, 497 U.S. at 21); see Cochran v. NYP Holdings, Inc., 58 F.Supp.2d 1113, 1125 (C.D. Cal. 1998) (defendant’s comment that plaintiff trial attorney would “say or do just about anything to win, typically at the expense of the truth” viewed as comment on plaintiff’s strategy at famous trial and therefore “is not provably true or false because there is no core of objective evidence upon which this Court could verify the allegation”).

276 Woodward v. Weiss, 932 F.Supp. 723, 726 (D. S.C. 1996) (finding that this and other statements contained in medical consultant report were “not capable of being verified as false” because “[t]here is no standard which could be used to render an objective, verifiable, factual answer” to questions about treatment raised by report) ; but see Kanaga v. Gannett Co., Inc., 687 A.2d 173, 180-81 (Del. 1996) (permitting suit based on patient’s claim that physician had recommended unnecessary surgery). 277 Lane v. Random House, Inc., 985 F.Supp. 141, 150 (D. D.C. 1995) (ruling that statement “cannot be proven true or false”).


show as “fake” and “phony.” Over this broad expanse of circumstances, the crucial determinant should be whether the plaintiff has shown that the disputed statement communicated a demonstrably false message—not whether certain defendants can show that it did not.

C. The Pervasive Problem of Implication

Ironically, the focus of *Milkovich* itself highlights the case for a uniform burden of proof of falsity. The Court’s opinion dwelt on the phenomenon of speech that falls short of outright factual accusation but which may be perceived as implying false facts about the plaintiff. With meaning so often hinging on implication, and verifiability bound up with meaning, a variable burden of proof for one of these intermingled elements makes little sense. As with related aspects of defamatory content, the question of implication arises in far too many forms and settings to be straitjacketed by categories of defendant identity and subject matter. Rather, a plaintiff who seeks to recover on the ground that a statement expresses more than it actually says should always be required to show that the statement had that effect.

Sometimes an alleged defamatory implication lies in the distortion that the plaintiff contends was engendered by omission of material facts. Two well-known cases illustrate the prospects for success of this theory, as well as the fairness of requiring plaintiffs to bear the initial burden in such instances. In *Memphis Publishing Co. v. Nichols*, a newspaper reported that a wife shot her husband another woman after discovering them together in the woman’s home. Though the account was accurate, it omitted mention of the presence of other persons in the same room during the shooting. Accordingly, the Tennessee Supreme Court found actionable defamation in the “clear implication” that the husband and woman were conducting an adulterous relationship. By contrast, the plaintiff in *Mohr v. Grant* failed to meet the significant burden of showing materiality imposed by the Washington Supreme Court. The suit arose from a series of televised news broadcasts about a man with Down’s syndrome. In one

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284 See Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 728 (1st Cir. 1992) (calling these terms “unprovable”).
285 See *Milkovich*, 497 U.S. at 20-23; Blumstein, supra note 259, at 15 (describing *Milkovich* as “stand[ing] for the proposition that the particular language used by an author will not blind the court to implicit assertions of fact lurking within it”); Lidsky, supra note 190, at 926 (noting doctrines identified in *Milkovich* of provable falsity and statement of actual facts about plaintiff as “being relevant to whether a defamatory statement implies an assertion of objective fact”).
286 See Taylor, supra note 149, at 194: Thus, in determining the potential liability of the statements at issue, the crucial inquiry for the *Milkovich* Court was whether listeners could reasonably understand such statements to imply assertions of objective fact and, if so, whether such assertions were provable as false.
287 David M. Cohn, Comment, *The Problem of Indirect Defamation: Omission of Material Facts, Implication, and Innuendo*, 1993 U. CHI. LEGAL F. 233, 233 (1993) (stating that “[a] factually correct article may omit or falsely imply a material fact that makes the article just as harmful as a blatantly false report”); David A. Elder, “Hostile Environment” Charges and the ABA/AALS Accreditation/Membership Imbroglio, Post-Modernism’s “No Country for Old Men”: Why Defamed Law Professors Should “not go Gentle into that Good Night,” 6 RUTGERS J. L. & PUB. POL’Y 434, 488 (2009) (proposing that that in allegation against professor as homophobic or racist, “[c]ourts may and should look at the correctness of the facts stated, what was omitted and, equally importantly, whether the assessment of those disclosed was in error”).
288 569 S.W.2d 412 (Tenn. 1978).
289 Id. at 419. The court opined that “[t]he proper question is whether the Meaning [sic] reasonably conveyed by the published words is defamatory, ‘whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’” Id. at 420 (citation omitted).
290 108 P.3d 768 (Wash. 2005).
broadcast, the man told the interviewer that Mohr had hit him and told him to “go away.” 291 This report, however, did not note that Mohr and his wife had filed complaints on three previous occasions in response to the man’s allegedly aggressive behavior toward them. The lower court agreed that Mohr had a cause of action grounded in the omission of facts whose context could have made the couple’s conduct “appear less arbitrary and insensitive than in the story as broadcast.” 292 Reversing, however, the high court took into account later newscasts reporting Mohr’s version of events. 293 Thus, Mohr had failed to “[make] a prima facie showing that the communication left a false impression that would be contradicted by the inclusion of omitted facts.” 294

More broadly, the very notion of defamation by implication rests on alleged inferences that reasonable readers would draw from the speech in question. Here—absent the sort of conspicuous omission found in Nichols—courts have generally been loath to credit the contention that defamatory falsehoods will be extrapolated from admittedly truthful statements. Thus, courts have displayed scant sympathy for suits based on defendants’ construction of stated facts. 295 Even characterizations that in isolation could be thought to insinuate damning facts about the plaintiff are immune when their factual predicates are adequately disclosed. In Biospherics, Inc. v. Forbes, Inc., 296 for example, the Fourth Circuit dismissed an action against the author of an article on stock tips that recommended selling Biospherics stock. The article, expressing skepticism about the company’s development of a low-calorie sweetener known as “Sugaree,” predicted that “‘[i]nvestors will sour on Biospherics when they realize that Sugaree isn’t up to the company’s claims.’” 297 Rejecting the contention that readers would infer a charge of dishonesty against Biospherics, the court pointed out that the article “clearly disclosed the factual bases for its view that ‘investors will sour on’ Sugaree” and that each of them was uncontested. 298 Similarly, in Locricchio v. Evening News Ass’n, the developers of a resort could not persuade the Michigan Supreme Court that readers would infer from “the entire tenor” of the articles at issue that the plaintiffs were members or associates of organized crime. 299 Having failed to demonstrate inaccuracy in the facts explicitly set forth in the article, they failed to surmount the “severe constitutional hurdle” 300 they faced in meeting their burden of proving falsity by implication. 301

291 Id. at 770.
293 108 P.3d at 777.
294 Id.
295 David C. Vogel, Note, You Have the Right to Criticize this Casenote; Protecting Negative Reviews Within the Law of Defamation and the First Amendment, 60 Mo. L. Rev. 445, 454-55 (1995) (asserting judicial consensus that “when a statement was merely an interpretation of a set of objective facts, it could not be sued upon as defamatory”); id. at 455 n. 105 (collecting cases).
296 151 F.3d 180 (4th Cir. 1998).
297 Id. at 185.
298 Id.
300 Id. at 129.
301 Id. at 134; Chapin v. Greve, 787 F.Supp. 557, 566 (E.D. Va. 1992) (rejecting action based on newspaper article questioning efficacy of charitable project to send holiday care packages to military personnel on ground that defendant reporter “is not responsible for every defamatory implication a reader might draw from his report of true facts”); Bellemead, LLC v. Stoker, 631 S.E.2d 693, 773 (Ga. 2006) (dismissing suit for statement that termination of plaintiff racing dog kennel’s booking contract was due to plaintiff’s “substandard and poor” performance where “that assessment is supported by stated facts that are true”); see also Riley v. Harr, 292 F.3d 282, 292 (1st Cir. 2002)
Both *Biospherics* and *Locricchio* involved media defendants writing on matters of public concern; yet both of these features seem incidental to the central principle that libel plaintiffs must prove that truthful speech yields a false inference. That same principle should apply when plaintiffs’ allegation of an adverse factual inference is rooted in semantic construction of a key term or phrase. If certain words lack the concrete precision from which a definite inference can be drawn, it should not matter to what topic the words were addressed or by whom. Thus, the Tenth Circuit ruled that a bond rating service’s references to the “negative outlook” and “ongoing financial pressures” faced by a school district did not give rise to inferences of false assertions about the School District’s financial condition.\(^{302}\) Rather, in the absence of specific false assertions, the court found these phrases “too indefinite” to implicitly convey a false statement of fact.\(^{303}\) A suit based on part on the defendant’s account of having been spoken to “in a Gestapo voice” was similarly dismissed as the court acknowledged its inability to identify “what [the defendant] means by a ‘Gestapo’ voice or what such a voice would sound like.”\(^{304}\)

Of course, not every libel suit grounded in a theory of implied falsity fails to survive summary judgment. In successful actions, however, the implication of defamatory facts is sufficiently pronounced that plaintiffs typically can be said to have met an initial burden. For example, unlike diffuse charges of corruption, specific imputations of bribery are deemed actionable where they deviate from unequivocal accusation mainly in form. In *Keohane v. Stewart*,\(^{305}\) the plaintiff was a judge who had presided at a trial in which a psychiatrist was found not guilty of sexually assaulting a patient by reason of impaired mental condition. Afterward, a city council member discussing the verdict remarked to a reporter: “Do you think he was paid off in cash or cocaine?”\(^{306}\) Since the defendant had also asked the reporter whether the plaintiff had been “paid in drugs or money,” the court had little hesitation discerning a thinly veiled assertion beneath the surface of speculative inquiry.\(^{307}\) As the court noted, the defendant’s questions “implied that Judge Keohane had accepted a bribe and the only unresolved issue was how Judge Keohane had been paid.”\(^{308}\) Similarly, a town official seeking reelection complained to the state elections commission of an opponent’s campaign brochure portraying a hand holding cash under a table.\(^{309}\) Barring categorical immunity for cartoons, here too the court effectively found satisfaction of the commission’s burden in ruling that the cartoon “implied to the reasonable reader that Gonzalez actually accepted cash for his vote to award” the contract to which the brochure referred.\(^{310}\) Nor has authorization of suits where plaintiffs have adequately shown defamation by implication been confined to speech impugning public officials. A suit against a television broadcaster for announcing that the plaintiff “may be armed and dangerous,” was “most wanted,” and was a “fugitive,” was allowed because of the ominous implications of this language.\(^{311}\) In a very different setting, individual defendants allegedly said that the plaintiff, an

\(^{302}\) Jefferson County School Dist. No. R-1 v. Moody’s Investor’s Services, Inc., 175 F.3d 848, 855-56 (10th Cir. 1999).

\(^{303}\) Id. at 156.


\(^{305}\) 882 P.2d 1293 (Colo. 1994).

\(^{306}\) Id. at 1302.

\(^{307}\) Id.

\(^{308}\) Id. at 1302.


\(^{310}\) Id. at 372.

\(^{311}\) Hale v. City of Billings, Police Dept., 986 P.2d 413, 419-20 (Mont. 1999).

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employee of a medical clinic, had “released confidential information about her husband…obtained by her in her employment” by the clinic. 312 There, the plaintiff had no difficulty demonstrating the alleged statement’s imputation of impropriety. 313

D. The Inevitable Consideration of Context

The intersection of verifiability, meaning, and implication is underscored by the inability to assess these elements without appreciating the context of the speech in which they are contested. The Ollman test regarded perspective as so important that its four factors included both context and “social context.” 314 In Milkovich, the Court offered no explicit analysis of the relevance of context. 315 In examining the circumstances surrounding the disputed statements there, however, the Court appeared to tacitly evaluate context. 316 More broadly, the Court’s opinion opposed rigid dichotomies while encouraging consultation of all information that might

313 See id. at 20 (holding that statement “implies that [the plaintiff] disclosed information about [her husband’s] condition which she had gained from the medical files” in the clinic).

In some instances, courts have consented to actions for implied defamation whose theory may have been somewhat less compelling. These decisions, however, can be plausibly reconciled with the principle that plaintiffs bear the burden of demonstrating that the disputed expression contains implicit factual assertion. See, e.g., Flamm v. Amer. Ass’n of Univ. Women, 201 F.3d 144, 151 (2d Cir. 2000) (finding that report of statement by prior client of plaintiff in directory of lawyers describing plaintiff as “ambulance chaser” interested only in “slam dunk” cases “reasonably implies that he has engaged in unethical solicitation”); Riggs v. Clark County School Dist., 19 F.Supp.2d 1177, 1181, 1183 (D. Nev. 1998) (asserting that school officials, in commenting upon discharge of high school volleyball coach that “[w]hen it all comes out in the open, you parents would not want [plaintiff] as volleyball coach,” had “by innuendo stated the worst”); Paint Brush Corp., Parts Brush Div. v. Neu, 599 N.W.2d 384, 388 n.1, 397 (S.D. 1999) (holding that defendant manufacturer’s reference to plaintiff retailer’s having “lifted” its advertising copy from defendant’s advertising material in a “flagrantly deceptive” manner “implies that [defendant] has knowledge of facts which lead to a conclusion that [plaintiff] is deceptively dishonest, or some other equivalent”); see also Toney v. WCCO Television, Midwest Cable and Satellite, Inc., 85 F.3d 383, 388-89 (8th 1996) (permitting suit based on television broadcast on sale of stolen dogs for medical research where plaintiff alleged defamation by implication of his involvement); Weller v. American Broadcasting Companies, Inc., 283 Cal.Rptr. 644, 651 (Cal. App. 1 Dist. 1991) (ruling that television report on origin and plaintiff’s sale of antique silver candelabra to museum “‘could have been understood as implying that Weller had, at worst, knowingly sold stolen property to the de Young Museum and, at best, had lied about the Texas origin and had sold them at a ‘grossly inflated price’”). Conversely, judicial license to a dubious claim of defamation by implication may stem more from flawed application of this concept than refusal to impose the burden of proof on the plaintiff. Barnes v. Horan, 841 So.2d 472 (Fla. App. Dist. 3 2002), for example, involved a public figure suing on a matter of public concern: a candidate for state attorney asserting that he had been defamed in a political advertisement. Still, the court permitted the plaintiff to bring a claim based on the advertisement’s statement (among others found actionable) that ‘Mr. Barnes' conduct in court has earned him somewhat unanimous disdain and contempt from most of the Monroe County Attorneys and nearly all of our judges.” Id. at 475. According to the court, the statement “gives the impression of an insider's knowledge of undisclosed facts.” Id. at 477.

315 Martin F. Hansen, Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech, 62 GEO. WASH. L. REV. 43, 46 (1993) (arguing that Court “failed to address how-or whether-contextual features surrounding a statement's publication necessarily affect the verifiability inquiry”); Lidsky, supra note 190, at 928 (asserting that Court “failed to specify what role, if any, context plays in interpreting allegedly defamatory statements”).

bear on the question of whether the speech at issue conveyed falsifiable fact.\(^{317}\) Accordingly, the larger philosophy that animates \textit{Milkovich} appears to support individualized consideration of context not dictated by rigid constraints of defendant identity or subject matter. Decisions since \textit{Milkovich} suggest the inherent appeal of this approach, as courts have continued the pre-\textit{Milkovich} practice of weighing context across a vast range of circumstances.

At a general level, certain modes of expression are sufficiently known as vehicles for viewpoints as to signal that some ostensibly factual assertions are not to be understood as stating unequivocal facts.\(^{318}\) Readers of a sports preview magazine, for example, “understand that a considerable portion of the magazine’s content is subjective opinion.”\(^{319}\) Likewise, the recipient of an attorney’s demand letter should recognize that the letter “represents the opening salvo of what became litigation by an interested party and that the letter is that party’s position, or opinion.”\(^{320}\) The audience for an emotional religious sermon, as well, should appreciate that at least some otherwise factual statements can be “considered as rhetorical flourishes.”\(^{321}\) Even accusations of criminal fraud may enjoy protection in light of their mode of delivery. Thus, charges of a company’s “insider selling” and “cooking the books” lose much of their resonance when they are issued by “neutronbomb” on an Internet message board.\(^{322}\) Conversely, an article expressing an accusatory tone toward a hospital’s administration was deemed to convey defamatory facts when it appeared in a newspaper column entitled “Your Business” and appearing next to other business news stories.\(^{323}\)

Some genres are so clearly platforms for subjective expression as to create a powerful presumption against factual certainty if not a quasi-safe harbor against libel suits. The meaning ascribed to statements in letters to the editor will be colored by the purpose of that forum.\(^{324}\) Obviously, readers will also have different expectations of self-proclaimed columns of opinion—whether of political matters\(^{325}\) or the arts\(^{326}\)—than of ordinary news reports. Perhaps the best-known acknowledgement of this understanding, and its continuity with pre-\textit{Milkovich} doctrine,


\(^{318}\) See \textit{Ollman}, 750 F.2d at 979 (stating that “[d]ifferent types of writing have ... widely varying social conventions which signal to the reader the likelihood of a statement’s being either fact or opinion”).


\(^{322}\) See SPX Corp. v. Doe, 253 F.Supp.2d 974, 977, 981 (N.D.Ohio 2003) ; compare Overstock.com, Inc. v. Gradient Analytics, Inc., 61 Cal.Rptr.3d 29, 43-44 (Cal.App. 1 2007) (holding actionable statements in defendant’s analytic reports on plaintiff company that “we do not believe that [plaintiff’s] accounting choice is compliant with current accounting practice” and that “we believe that the company has materially overstated its sales since July 1, 2003 and that its assertions about the economic activity of the firm are misleading” (original emphasis omitted)).


\(^{324}\) See, e.g., Faltas v. State Newspaper, 928 F.Supp. 637, 641, 649 (D. S.C. 1996) (dismissing suit based on assertions in letter to editor that plaintiff “offered no statistics to back up her claim and showed us how much she will lie to suit her” and “present[s] lies as truth” (original emphasis omitted)).


\(^{326}\) See Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 729 (1st Cir. 1992) (observing that theater column is “a type of article generally known to contain more opinionated writing than the typical news report”).

(“Moldea II”). The plaintiff had complained that a newspaper’s review of his book had contended that “there is too much sloppy journalism to trust the bulk of this book's 512 pages—including its whopping 64 pages of footnotes.” In originally holding the statement actionable, the D.C. Circuit had discounted the significance of its appearance in a book review in light of the ruling in *Milkovich.*

Upon reconsideration, however, the court admitted its earlier failure “to take sufficient account of the fact that the statements at issue appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer’s description and assessment of texts that are capable of a number of possible rational interpretations.”

Other genres may entail different considerations, but still share these forms’ fundamental trait of presenting a context for interpretation that courts should not ignore. In the case of works of fiction, a plaintiff may claim that what purports to be an imagined tale effectively amounts to “thinly disguised character assassination.”

Commentators offer various approaches to the weight to be assigned the fiction label. Still, it would be startling for a court to full equate the treatment of a work denominated as fiction with its analysis of conventional journalistic reports. Similarly, though docudramas generally present themselves as more grounded in reality, the Court itself has recognized that viewers will not necessarily assume that words spoken by persons represented in these programs were actually uttered by them in life.

In some instances, it is not so much the nature of the genre as the particular vehicle of speech that furnishes the pertinent context. The *Milkovich* Court looked to the “general tenor” of the disputed article to determine whether the assertion that Milkovich “lied at the hearing” could reasonably be understood to convey a factual charge of perjury. In similar fashion, courts

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327 22 F.3d 310 (D.C. Cir. 1994).
328 See 15 F.3d 1137, 1145-46 (D.C. Cir. 1994) (“Moldea I”).
329 *Moldea II,* 22 F.3d at 312; see John Hershey, *Casenote, If You Can’t Say Something Nice, Can You Say Anything at All?* *Moldea v. New York Times Co. and the Importance of Context in First Amendment Law,* 67 U. COLO. L. REV. 705, 716 (1996) (describing *Moldea II* as holding that “expressions of subjective evaluation, especially in contexts like book reviews, are just as immune from libel suits after Milkovich as they were before”).
333 *Milkovich,* 497 U.S. at 21.
have scrutinized the communication in which the allegedly libelous statement appears for the manner in which it conditions readers’ expectations. Thus, what might otherwise be perceived as accusation of financial impropriety against a departing corporate officer assumes less sinister overtones in the context of a “mean-spirited sendoff” of the officer.”

In a comparable analysis, statements critical of a corporation were found not to project defamatory facts when appearing in an article with a “breezy rather than solemn tone.” By contrast, an attorney representing accused criminals was allowed to sue over a book’s portrayal of him in view of the “context of the book as a whole.” That context—narrating numerous episodes of corruption in the Chicago area, including within the judicial system—imparted an “allu[sion] to bribery and corruption of the judicial system”—to what in other contexts could have been seen as a tribute to the plaintiff’s legal skills. Where judges themselves are impugned, however, context may transform the meaning conveyed to a more subjective sense. Thus, suits failed where a judge’s description as “dishonest” formed part of a “string of colorful adjectives” used by the defendant to express his scorn, and where an arguable insinuation of a judge’s bribery was contained in a letter “replete with speculative and conjectural language.” Elsewhere, too, specific context is routinely invoked to resolve ambiguity in favor of either factual implications or their absence.

The setting in which alleged defamation takes place may also figure prominently in the Court’s consideration of context. A conspicuous example is defamation actions that arise out of employment relationships.

While claims of workplace defamation do not lend themselves to blanket treatment under *Milkovich*, courts have frequently taken employment conditions into consideration. For instance, in *Rose v. Hollinger Intern., Inc.*, 889 N.E.2d 644, 653 (Ill. App. 2008), a plaintiff brought a suit based on a statement that the plaintiff had “wrought damage to our finances”; see also *Morningstar, Inc. v. Superior Court*, 29 Cal.Rptr.2d 547, 553 (Cal. App. 2 Dist. 1994), involving an article in a financial newsletter entitled “Lies, Damn Lies, and Fund Advertisements” where “[t]he imaginative title and its hint of upcoming criticism of statistics was not likely lost on the readers of petitioners’ commentary—the relatively sophisticated subscribers to the financial newsletter” (inner quotation and citation omitted).


*Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman*, 55 F.3d 1430, 1441 (9th Cir. 1995).


*Bennett v. Hendrix*, (No. 07-12314), 2009 WL 826837, at *14 (11th Cir. March 31, 2009) (determining under “context-driven inquiry” that juxtaposition in campaign brochure of plaintiff’s mug shot and phrase “convicted criminals” constituted unprotected false factual assertion); *Ireland v. Edwards*, 584 N.W.2d 632, 638 (Mich. App. 1998) (disparaging assertions about plaintiff’s conduct as mother “read or heard in context, could not reasonably be understood as stating actual facts” about plaintiff).

*See generally John Bruce Lewis & Gregory V. Mersol, Opinion and Rhetorical Hyperbole in Workplace Defamation Actions: The Continuing Quest for Meaningful Standards, 52 DEPAUL L. REV. 19 (2002).*

*See id. at 21 (concluding that “while the *Milkovich* decision has done little harm, it has failed to provide clear, workable tests for identifying statements of opinion or rhetorical hyperbole in the workplace”).*
account in determining whether disputed expression amounts to defamatory falsehood.\footnote{444} In many instances, dismissal of actions reflects an appreciation of the heated rhetoric often generated by collective bargaining issues and other labor matters.\footnote{345} Though of course courts do not reject every claim originating in an employment context, even a successful plaintiff is likely to proceed because of countervailing contextual considerations.\footnote{346}

The countless ways in which context shapes meaning not only counsels against a rigidly compartmentalized burden of proof, but also illuminates a proper role for the subject matter of alleged libel. A public concern, rather than dictating who must show provable falsity, should simply represent a significant context for interpreting the language in question. The Court implicitly recognized this dynamic as long ago as \textit{Greenbelt}, observing that the reference to the plaintiff’s “blackmail” occurred in the course of “public debates … [that] were heated, as debates about controversial issues usually are.”\footnote{347} Prior to \textit{Milkovich}, courts had identified the context of public debate as a relevant factor in fixing reasonable meaning,\footnote{348} and commentators since have urged continued consideration of this circumstance.\footnote{349} Post-\textit{Milkovich} courts appear to have followed suit. In ruling that statements in an organization’s letter opposing a proposed neighborhood development did not constitute libel, a court—explicitly invoking \textit{Milkovich}—pointed out that the letter “addresses issues that were at the center of a heated debate,” and that “[i]n this type of public debate, an audience expects opposing sides to use persuasive force to convince others to adopt their position and is less likely to perceive statements as objective assertions of truth.”\footnote{350} A plaintiff charged with “illegal” behavior at a public hearing on its building permit application was likewise met with the court’s observation that the defendant had not spoken as “someone inviting reasonable persons at a heated public hearing to find specific factual allegations in his remarks.”\footnote{351} When a conservative political leader brought suit over his asserted “paranoia,” the court cited the description’s presence in an article of “political commentary” in finding that the term was used in “a popular, not clinical” sense.\footnote{352} In numerous

other instances as well, the presence of a public concern has apparently colored judicial perception that the disputed statement should not be construed as a defamatory factual assertion.  

IV. CONCLUSION

The Supreme Court should dispel the lingering possibility left open by *Milkovich* and *Hepps* that libel defendants’ nonmedia status or speech on private concerns relieves plaintiffs of their burden of proving falsity. Neither feature is germane to the inherent character of defamation, and should therefore have no bearing on plaintiffs’ threshold burden of proof. The notion of a privileged position for institutional media is not only far removed from considerations informing the determination of actionability in libel suits, but also contradicts the Court’s own pronouncements. By contrast, a preferred position for defamatory expression on matters of public concern has figured prominently in the Court’s jurisprudence. The weight accorded public concern, however, has arisen in the course of categorical balancing pertaining to questions of intent rather than to the intrinsic nature of the disputed speech. Developments in the lower courts since *Milkovich* suggest the appropriateness of a uniform requirement that plaintiffs show falsity without regard to who defendants are or how their speech is labeled.  

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353 See, e.g., CACI Premier Technology, Inc. v. Rhodes, 536 F.3d 280, 301-02 (4th Cir. 2008) (ruling that reference to plaintiff government contractor providing support to Army intelligence brigade at Abu Ghraib prison as “hired killers” was protected because statements that included reference “‘make [ ] clear to all reasonable listeners that [they] are offered ... not as fact [s],’ but as exaggerated rhetoric intended to spark the debate about the wisdom of the use of contractors in Iraq” (citation omitted)); Cochran v. NYP Holdings, Inc., 58 F.Supp.2d 1113, 1122-23 (C.D. Cal. 1998) (protecting statement that plaintiff criminal defense attorney would “say or do just about anything to win, typically at the expense of the truth” while noting that O.J. Simpson criminal trial, in which plaintiff served as Simpson’s attorney, “has been thoroughly critiqued and debated in the public arena”); Chapin v. Greve, 787 F.Supp. 557, 561 (E.D. Va. 1992); Fasi v. Gannett Co., Inc., 930 F.Supp. 1403, 1409-10 (D. Haw. 1995); Maynard v. Daily Gazette Co., 447 S.E.2d 293 (W.Va. 1994).