Suppose... 

... that a newspaper columnist writes about a school board hearing that is investigating possible neglect or wrongdoing on the part of school employees. The column contains accusations that some people lied at the hearing. One of the accused, believing that the statement was false and damaged his reputation, sues the columnist and his newspaper for libel. The defendants claim the column is an expression of opinion and the First Amendment protects their opinion. These were the circumstances in Milkovich v. Lorain Journal Co., discussed in this chapter and excerpted at the end.

Parties sued for libel can use many defenses, any of which has the potential to be successful, depending on the circumstances of the case. There is one important difference between the plaintiff’s case and the defendant’s challenges: Although the plaintiff must prove every element of her case, a successful defendant needs only one suitable defense. The libel defense attorney is like a carpenter who must choose the right tool for a given job. A carpenter has many tools to choose from, yet it is crucial to choose the proper one to get the job done. The libel defense attorney is no different.

Truth

Defending a libel suit may consist of merely taking the elements of the plaintiff’s case, explained in Chapter 4, and proving their opposite. A libel defendant may be able to demonstrate that there is no liability for publishing the statement at issue if it is not
defamatory, it was not published or the plaintiff was not identified or does not meet the elements of a libel case. Truth or substantial truth is the appropriate counterargument to the plaintiff’s claim that the material at issue is false. Truth is sometimes viewed as the most basic and ironclad of all libel defenses. The plaintiff is responsible for demonstrating that the statement at issue is false rather than the defendant proving the statement is true.

As noted in Chapter 4, historically this was reversed: The burden of proof to show a statement is true was placed on the defendant. This was the case in English common law. Today, libel law in the United States clearly places the burden of proof regarding falsity on the plaintiff. Additionally, minor error or discrepancy does not necessarily make a statement false. As long as the statement is substantially true, it cannot meet the standard for falsity and therefore cannot be libelous.

As part of a defense strategy, a libel defendant may attempt to demonstrate to a court that it conducted itself in a responsible way in gathering and reporting the news. The defendant is then more likely to garner support for its argument that it should not be found legally responsible for committing libel. The media defendant, for example, may need to disprove the plaintiff’s claim that its employees acted with reckless disregard for the truth or that they were negligent.

In attempting to prove that a libel defendant acted with reckless disregard, a plaintiff is likely to attempt to build a case bit by bit, demonstrating a series of irresponsible or careless acts in the newsgathering and publishing process. Courts have said that no single element is sufficient to prove clearly and convincingly that a defendant acted with reckless disregard, but each can be used as evidence to build a case.

LANDMARK CASES IN CONTEXT

1900

- 1941 U.S. enters World War II
- 1963 MLK Jr. gives “I Have a Dream” speech
- 1977 Hudson v. National Audubon Society
- 1984 Ollman v. Evans
- 1989 Fall of the Berlin Wall
- 1996 Congress passes Telecommunications Act of 1996
- 1996 Ollman v. Evans

2000

- 2007 Apple unveils iPhone
- 2010 Arab Spring begins in Tunisia
- 2013 Boston Marathon terrorist bomb
- 2013 The U.K. overhauls its defamation laws
- 2014 Air Wts. Airlines Corp. v. Hoeper
A libel defendant wants to strengthen his or her position by showing as many of the following as possible:

- The story was investigated thoroughly.
- Interviews were conducted with people who had knowledge of facts related to the story, including the subject of the report.
- Previously published material was not relied on.
- Biased stories were not relied on.
- The reporting was careful, systematic and painstaking.
- Multiple viewpoints were sought and, when possible, included in the report.
- There was a willingness to retract or correct if facts warranted such action.
- If applicable, there was a demonstrable deadline.
- There was no ill will or hatred toward the plaintiff.

In addition to defending a libel case on the elements, those accused of libel have several defenses at their disposal that may not directly correspond with any element of the plaintiff’s case.

**ANTI-SLAPP PROTECTION**

Chilling speech is the goal of some defamation lawsuits. In those cases, libel law is used not as a shield against threatened harms or as a means of correcting them, but as a weapon to prevent speech from occurring in the first place. These are called **SLAPPs** (strategic lawsuits against public participation). They are meant to silence critics.

Plaintiffs rarely win these cases. Noting that SLAPPs are often used to suppress a party’s First Amendment rights, some states have enacted anti-SLAPP legislation. Courts have upheld the constitutionality of these laws. Thirty-one states, the District of Columbia and one U.S. territory (Guam) have either enacted an anti-SLAPP statute or have state courts that recognize anti-SLAPP protections as a matter of case law. State courts consider new anti-SLAPP statutes as they emerge.

In the past few years, some plaintiffs have brought anti-SLAPP claims in federal court, and the outcome is mixed. The First, Fifth and Ninth U.S. Circuit Courts have applied anti-SLAPP acts in part or in whole. The Eleventh U.S. Circuit Court in 2014 rejected the application of Georgia’s anti-SLAPP law, noting that a part of the Georgia law conflicted with the Federal Rules of Civil Procedure and therefore could not apply in federal court.
Chapter 5 • Libel

The D.C. Circuit Court ruled similarly in 2015 that a federal court could not apply a state or locality’s anti-SLAPP provisions because federal courts are required to follow the Federal Rules and applying the anti-SLAPP statute was too burdensome on courts. Even though the circuit court would not apply the D.C. anti-SLAPP statute, it still found that the defamation claim brought by the son of current Palestinian leader Mahmoud Abbas should be dismissed because his case was not based on factual representations.

In a more recent D.C. Circuit court case, a different panel of judges held that the Abbas ruling got it wrong, noting instead that the burden is the same, whether applying the Federal Rules or the D.C. anti-SLAPP statute. Additionally, the court held that the denial of an anti-SLAPP motion is immediately appealable. The case originated when noted climate scientist Michael Mann filed a libel suit against the National Review and Competitive Enterprise Institute. Dr. Mann claimed that their articles criticizing his conclusions about global warming and accusing him of deception and academic and scientific misconduct defamed him. The D.C. Circuit Court applied the D.C. anti-SLAPP statute and concluded that Dr. Mann “hurdled the Anti-SLAPP statute’s threshold, showing likelihood of success on the merits” because he presented legally sufficient evidence to support the fact that the articles were defamatory and published with actual malice.
In 2016, the Ninth Circuit upheld an anti-SLAPP motion in a case involving a variety of state law claims. In another decision, the court upheld the application of the anti-SLAPP motion, but one of the judges noted in his concurrence that anti-SLAPP motions do not belong in federal court because they directly conflict with the Federal Rules. Given the different applications of anti-SLAPP statutes and motions in various federal courts, legal experts suggest this issue is ripe for hearing by the U.S. Supreme Court.

FAIR REPORT PRIVILEGE

The fair report privilege is based on the idea that keeping citizens informed about matters of public concern is sometimes more important than avoiding occasional damage to individual reputations. It gives reporters some breathing room to report on official governmental conduct without having to first prove the truth of what the government says. How does the privilege work? When a journalist relies on official government records or proceedings, the privilege may apply. Even if a contributor to an official proceeding makes a statement that is false and defamatory—or if an official government record does the same—a news organization whose report is based exclusively on the statement will not be liable for defamation as long as the story accurately and fairly reflects the content of the report or proceeding.

POINTS OF LAW

Success on the Merits

The phrase “success on the merits” is a term that courts use to describe one factor when evaluating whether to grant a preliminary injunction, which is central to an anti-SLAPP motion. The party that wants the injunction “has to be able to convince the court, on a preliminary basis—meaning before the record is fully developed—that one of the reasons it is entitled to temporary relief is that it will probably win the case anyway,” according to the American Bar Association.1


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POINTS OF LAW

Fair Report Privilege

1. The information must be obtained from a record or proceeding recognized as “official.”
2. The news report must fairly and accurately reflect what is in the public record or what was said during the official proceeding.
3. The source of the statement should be clearly noted in the news report.
4. Not all states recognize the fair report privilege.
A few courts have considered whether a reporter’s intent to harm a person’s reputation may terminate the fair report privilege. This question surfaced in a Minnesota case in which a citizen mentioned the name of a police officer during a city council meeting. The citizen accused the officer of dealing drugs. The reporter who covered the meeting did not report the accusation immediately but instead investigated the situation. When the reporter published several articles, the officer sued, claiming that the articles were inaccurate and were written with ill will. (This is not the same as actual malice, discussed in Chapter 4.) Lower courts said the fair report privilege could be lost if the defendants were motivated by ill will, but ultimately the Minnesota court ruled that the reporter in this case had no intent to injure the plaintiff. Nevertheless, the question of whether ill will could possibly eliminate the privilege in some jurisdictions remains.

The fair report privilege covers officials and proceedings in the executive, judicial and legislative branches of state, local and federal governments and, often, private individuals communicating with the government. Law enforcement agencies are also covered, including reports of police activity. For example, a former Belleville, Ill., police chief sued the local newspaper for libel after the newspaper reported that he was the subject of a rape investigation. A three-judge panel of the state appellate court unanimously dismissed the case, ruling that the newspaper was protected by the fair report privilege because its article was a fair and accurate report based on a local prosecutor’s comments.

Not every statement by a police officer is privileged, however. This generally is determined on a case-by-case fact basis with different outcomes in different states. One state supreme court, for example, refused to apply the fair report privilege to statements made by a police officer to a reporter during an interview. The court ruled that the officer’s participation in the interview and his remarks were not considered to be part of his official duties—a key determinant in deciding whether the privilege applies.

More recent decisions have taken a different approach. In South Carolina, a court held that the fair report privilege applied to an email the sheriff’s department sent to a newspaper and was not limited to official records and press releases. In Michigan, a U.S. district court applied the privilege to unofficial statements made to the press by police officers. The Sixth Circuit, applying Tennessee law, upheld a summary judgment in favor of a local TV news station that videotaped a story based on a ride-along with the U.S. Marshals Service during which the marshals erroneously arrested an individual with the same name as the fugitive. A day after the ride-along, the station aired its report of the arrest. Although the arrest itself was in error, the court held that the television report was a fair and accurate account of an official government action. Because the station didn’t know the marshals had arrested the wrong person, the court found no evidence of actual malice to overcome the privilege.

More recently, a Massachusetts court did not recognize the fair report privilege in the “BAG MEN” case (noted in Chapter 4). In the manhunt that ensued after the 2013 Boston Marathon bombing, the New York Post published a picture of two young men who attended the Boston Marathon on the front page under the headline “BAG MEN.” The New York Post argued that the fair report privilege applied because the photograph it used came from an FBI email. The court said the article had not fairly and accurately reported the information, so the fair report privilege did not apply. The case was ultimately settled out of court. Journalists should note that different outcomes, including failure...
to recognize privilege, occur in different states and court systems. This happened recently when a federal court in Maine noted that the state does not recognize the fair report privilege.20

The justification for the fair report privilege stems from another kind of privileged situation. Within various government processes, for example, it is so vitally important that people be allowed to speak and communicate information without fear of being sued for libel that they are granted immunity from liability. The rationale is that citizens in a participatory democracy are entitled to such information.21 As a Massachusetts judge, Oliver Wendell Holmes Jr. was among those who reasoned that the public should be provided with information about judicial proceedings because “those who administer justice should act under a sense of public responsibility.”22 Nearly a century later, another Massachusetts court echoed Holmes and held that the value of granting privilege to media reports about the courts is “the security which publicity gives for the proper administration of justice.”23

This privilege—called absolute privilege—typically occurs within the context of carrying out the business of government. An open society demands that members of the public have access to information relating to government proceedings. It logically follows that people reporting on these proceedings or information related to these proceedings also have some protection. That protection, though, is only available when the news report is fair and accurate. Thus, in addition to this protection sometimes being referred to as the fair report privilege, it is called conditional (or qualified) privilege.

Reports about judicial activities—the courts—are conditionally privileged. Therefore, media accounts of testimony, depositions, attorney arguments, trials, verdicts, opinions and orders—those aspects that are typically open or available to the public—are among the proceedings covered. Also, documents that relate to the judicial branch are typically privileged. For example, the New Jersey Supreme Court ruled that journalists who report accurately from court filings, including pretrial documents, are protected from libel claims.24 In Maryland, a state court in 2012 applied the fair report privilege to a newspaper’s coverage of a murder trial that included reporting based on a discovery memo in the case file that was not offered as evidence at trial.25

In 2013, a Pennsylvania state court applied the fair report privilege to an article about a convicted drug dealer, even though there was a minor discrepancy between the news account and the court record. The newspaper said the plaintiff owned the car in which he was arrested, but the court report stated that the plaintiff was actually a passenger. The court said the fact difference was minor and immaterial.26 A New York court came to a similar decision when it held that minor inaccuracies, including when those errors are about the precise legal significance of court orders and filings, are protected by the state’s fair report privilege.27
The fair report privilege is important to the news media given that much of what they do is report on the activities, people, records and documents of the various levels of government. The privilege can be forfeited if the allegedly defamatory material is published with significant inaccuracies or if reported unfairly. This unfair reporting can include ill will toward the plaintiff, if the gist of the article is not substantially true, or if the author draws conclusions or adds comments to the official report. For example, in 2015 a Connecticut court did not uphold the application of the state’s fair report privilege when a newspaper implied that a plaintiff’s lawsuits were frivolous. The court said the publication was not immune simply because it republished comments from a waiver-of-court-fees amendment that described the plaintiff as someone who frequently files frivolous lawsuits. Instead, the court said the claim of frivolousness amounted to opinion and was not defamatory. On the flip side, the same court held that other republished statements about the plaintiff’s litigation history were protected by the fair report privilege because they accurately reported official proceedings about a matter of public concern.28

The fair report privilege protects media reports of official government actions, regardless of possible defamatory elements within those reports and proceedings. The Detroit News, for example, successfully used the fair report privilege when it was sued for libel for printing the names of convicted felons working in Detroit public schools. The newspaper had obtained the names from state records. One of the people named sued for libel, claiming the felony charges against her would soon be dismissed. “The privilege precludes damages in a libel suit,” the Michigan Court of Appeals ruled, “where a defendant engages in the publication of the contents of a public record, provided the defendant presents a ‘fair and true’ report of the public record.”29

In 2014, various media outlets, including the celebrity gossip website TMZ, accurately reported information from a press conference held by the attorney general of New York. In that press conference and in a subsequent press release the attorney general discussed the arrest of a woman for her alleged involvement in a drug and prostitution ring. TMZ’s headline for its story read, “Super Bowl Prostitution Bust Was Asian Invasion.”

The problem: The attorney general indicted and arrested the wrong person, and the woman identified by TMZ and others sued for defamation and negligent, reckless and intentional infliction of emotional distress. In 2015, a federal court in New Jersey dismissed the libel and other claims because it applied that state’s fair report privilege. The court held that the media defendants accurately reported the information from the attorney general’s press conference and press release, even though the attorney general presented inaccurate information at the press conference.1

The court also highlighted that the media organizations did not imply that the woman had been convicted of the allegations. The woman has appealed the decision to the Third Circuit.2

FAIR COMMENT AND CRITICISM

Fair comment and criticism is a common law privilege that protects critics from lawsuits brought by individuals in the public eye. As noted in the chapter opening, the Supreme Court has held that, “under the First Amendment there is no such thing as a false idea. . . . But there is no constitutional value in false statements of fact.” The key to this common law defense and the stronger constitutional opinion defense (explained in detail below) is the separation of fact and opinion. A critic can be anyone who comments on these individuals and their work. Being in the public eye is not the same as being a public figure for purposes of actual malice. A person in the public eye is anyone who enters a public sphere: artists, entertainers, dramatists, writers, members of the clergy, teachers—anyone who moves in and out of the public eye, either professionally or as an amateur. By placing their work products or services into the public sphere, these individuals invite criticism.

The privilege also protects commentary on institutions whose activities are of interest to the public or where matters of public interest are concerned. Thus, not only are written works subject to fair comment and criticism, but so are works of art and other products of businesses such as restaurants that implicitly invite reviews of their offerings.

A libel suit involving a book review is instructive: An author sued The New York Times for a reviewer’s criticisms of his book. Among other things, the reviewer wrote that the book contained “too much sloppy journalism to trust the bulk of [its] 512 pages including its whopping 64 pages of footnotes.” A federal appeals court held that the review was not defamatory, ruling that the genre of the writing and the context within which it appeared must be considered. “The statements at issue in the instant case are assessments of a book, rather than direct assaults on [the author’s] character, reputation, or competence as a journalist,” the court wrote. “. . . While a critic’s latitude is not unlimited, he or she must be given the constitutional ‘breathing space’ appropriate to the genre.”

Historically, the fair comment and criticism privilege was incorporated into the common law to afford legal immunity for the honest expression of opinion on matters of legitimate public interest based on a true or privileged statement of fact. Comment was generally privileged when it addressed a matter of public concern, was based on true or privileged facts, represented the actual opinion of the speaker and was not made solely for the purpose of causing harm. The privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion. As the U.S. Supreme Court has stated, “The privilege of ‘fair comment’ was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech.”

In 1898, a well-known stage act, the Cherry Sisters, sued for libel after a bad review from an Iowa newspaper.
With the rise in popularity of user-created reviews on websites like Yelp and Angie's List, opportunities for lawsuits about criticism are increasing. Especially notable is a steady stream of defamation lawsuits brought by businesses that argue they are sustaining damages in the form of lost future customers. One example is a case involving Jane Perez, who wrote a Yelp and an Angie's List review criticizing a contractor who she said failed to deliver promised services. Perez also implied he might be responsible for jewelry missing from her home.

The contractor filed a defamation lawsuit seeking $750,000. In 2012, a county circuit court in Virginia ordered a preliminary injunction, instructing Perez to remove portions of her negative review, including references she had made to an earlier lawsuit in which she won a judgment against the contractor for unpaid bills. The court also barred her from repeating her accusations in future posts. The Virginia Supreme Court quickly overturned the injunction, saying it amounted to an unreasonable prior restraint of Perez's right to free speech. The court noted that the contractor also had adequate remedy by suing Perez for damages.

In 2014, a Virginia state court resolved the defamation lawsuit. A jury found that Perez had defamed the contractor—but the jury also determined that comments the contractor posted on Yelp and Angie's List in direct response to Perez's accusations were also defamatory. As a result, neither party received damages in the case. Legal experts say lawsuits tied to user-generated reviews on websites such as Yelp remain unpredictable with variable outcomes from jurisdiction to jurisdiction.

**OPINION**

Although similar to fair comment and criticism, the libel defense of opinion is distinct. The primary difference is that fair comment and criticism is rooted in the common law. Opinion stems from the First Amendment and is therefore a constitutional defense and thus stronger and more effective. It is considered to be an unqualified defense in that, once proved, it cannot be lost. The question, however, becomes whether specific case circumstances permit the application of the opinion defense.

Holding and expressing opinions is a right guaranteed by the First Amendment. “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,” wrote U.S. Supreme Court Justice Lewis Powell. The First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” Moreover, as Justice Louis Brandeis wrote early in the 20th century, “[F]reedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth.” Thus, a libel defendant may put forth an argument that, in part, echoes Justice William Brennan’s opinion in *New York Times Co. v. Sullivan*. The question becomes, “Does the speech contribute to the ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open’?” At a fundamental level, a libel defense may be constructed on constitutional grounds—a claim that limiting ability to convey information is an abridgment of the First Amendment guarantees of free speech and press. Denying an individual the opportunity to express an opinion would be such an abridgment.
The challenge comes in attempting to distinguish statements of fact from statements of opinion. To attempt to separate fact from opinion is to venture onto one of the law's slipperiest of slopes. Yet to do so is vital in establishing the boundaries of the opinion defense's protection. Stating an opinion involves far more than attaching “In my opinion,” “I believe” or similar qualifiers to a statement. The distinguishing attributes of opinion were developed and ultimately solidified by a federal appeals court. That court articulated a four-part test to determine whether a statement was one of fact or an expression of opinion. Not all of the test's elements need to be satisfied; rather, the answers to its questions are to be evaluated in total.

The Ollman test (named for the case from which it stems, Ollman v. Evans, excerpted at the end of this chapter) appeared to provide a sound and relatively straightforward instrument, in four parts, to assess opinion:

1. Is the statement verifiable—objectively capable of proof or disproof? In other words, can the statement be proved either true or false? Opinion is indirectly linked to the falsity/truth element of libel. That is, if a statement cannot be proved true or false, then it may satisfy the legal definition of an expression of opinion.

2. What is the common usage or meaning of the words?

3. What is the journalistic context in which the statement occurs? This element is especially important for the media. It provides added weight for an opinion defense when the material in question appears in a part of a publication (or, e.g., a broadcast or website) traditionally reserved for opinions—for example, the op-ed pages, personal columns, social media or a blog. The material must be considered as a whole. The language of an entire opinion column, for example, may signal that a specific statement, standing alone, which would appear to be factual, is in fact an expression of opinion.

4. What is the broader social context into which the statement fits? For example, was the statement at issue made within a context or in a place where the expression of opinions is common or expected? Or was it made within a context in which opinion is not commonplace and, instead, statements are presumed to be statements of fact?

Over time, opinion was granted a wide berth of protection. Newsweek magazine, for example, was vindicated in publishing a reference to a false accusation that a former South Dakota governor had sexually assaulted a teenage girl. The words appeared to some people to constitute a statement of fact, but the court found them to be “imprecise, unverifiable” and “presented in a forum where spirited writing is expected and involves criticism of the motives and intentions of a public official.” Other plaintiffs who sued because they were called unscrupulous charlatans, neo-Nazis, sleazebags and ignorant and spineless politicians lost their cases because these charges were determined to be expressions of opinion rather than statements of fact.

The latitude afforded to opinion was extensive, but then came a case that put the “no such thing as a false idea” doctrine to the test. Six years after the Ollman test was created, the U.S. Supreme Court reframed what had appeared to be a nearly absolute opinion
defense. The case involved a high school wrestling team that brawled with a competing team during a match. Several people were injured. After a hearing, the coach of one team was censured, and his team was placed on probation. A lawsuit was filed in an attempt to prevent the team probation.

At a hearing, the coach, Michael Milkovich, denied that he had incited the brawl. In the next day’s newspaper, a local sports columnist wrote that Milkovich, along with a

REAL WORLD LAW

Has “Truthiness” Changed Our View of the Law?

On the debut episode of “The Colbert Report” in 2005, Stephen Colbert’s satirical character introduced the concept of “truthiness”: A truth that a person making an argument claims to know intuitively or because it “feels right”—even if the claim is without evidence. Colbert suggested truthiness comes from “the gut,” and said, “I don’t trust books. They’re all fact and no heart. And that’s exactly what’s pulling the country apart today. Face it folks, we are a divided nation... divided between those who think with their head and those who know with their heart.”

In a 2006 interview, Colbert said, “It doesn’t seem to matter what facts are. It used to be everyone was entitled to their own opinion, but not their own facts. But that’s not the case anymore. Facts matter not at all. Perception is everything.”

Since 2005, the word “truthiness” has made it into the dictionary, been featured in a lengthy entry on Wikipedia and become a part of U.S. political discourse. In a recent analysis of a case involving a challenge to an Ohio statute that “criminalizes making false statements about a political candidate” with actual malice, Slate.com’s legal analyst asked, “What’s scarier than truthiness in politics? A law banning it.”

At issue was an effort by the Susan B. Anthony List (SBA List) to put up a billboard that would have read “Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion.” The SBA List distributed this message through other channels, but the billboard company refused to post the ad, fearing it was in violation of the Ohio law. The SBA List made its claim about Driehaus based on the pro-life Democrat running for re-election to the U.S. House of Representatives voting for the Affordable Care Act (also called Obamacare).

A federal court found that the SBA List wasn’t harmed by the billboard company’s actions and dismissed the suit for lack of standing because Driehaus withdrew his complaint about the ad to the Ohio Elections Commission. The Ohio statute and the subsequent SBA List lawsuit shows that although “truthiness” is a made-up word, it may well remain a staple of our discussions about the increasing fuzziness between fact and opinion and how that fuzziness plays out in the political arena.

4. Id.
school superintendent, misrepresented the truth in an effort to keep the team from being placed on probation. “Anyone who attended the meet . . . knows in his heart that [they] lied at the hearing after each having given his solemn oath to tell the truth,” the column read. “But they got away with it.” The columnist added that the entire episode provided a lesson for the student body: “If you get in a jam, lie your way out.”

The coach sued for libel. After 15 years and several appeals, the Ohio Court of Appeals held that the column was constitutionally protected opinion, but the U.S. Supreme Court reversed. The Court rejected the broad application of the concept that there is “no such thing as a false idea.” “[T]his passage has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion,” wrote Chief Justice William Rehnquist, “even though [the original] case did not remotely concern the question.” The passage was not intended to create a wholesale defamation exemption for anything that might be labeled “opinion,” he continued. “Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of ‘opinion’ may often imply an assertion of objective fact.

Chief Justice Rehnquist wrote that facts can disguise themselves as opinions, and, when they do, they imply knowledge of hidden facts that led to the opinion. Merely embedding statements of fact in a column does not transform those statements into expressions of opinion. They remain statements of fact and, if false, may be the basis of a libel suit. Whether the material is verifiable—whether it can be proved true or false—is paramount. The Supreme Court said the key question in this case was whether a reasonable reader could conclude that the statements in the column implied that Milkovich had lied in the judicial proceeding. The Court believed that such an implication had been made and ruled for Milkovich. Even though the material was in a column and thus satisfied the “journalistic context” part of the Ollman test, the Court said it was not opinion.

Letters to the Editor and Online Comments

The approach that courts take to applying protection to online comments is based substantially on earlier cases that focused on letters to the editor of a newspaper. Letters to the editor are typically viewed as expressions of opinion rather than statements of fact. For that reason, historically, newspapers and magazines have won most cases based on the publication of such letters. Courts have sought to provide protection for the publication
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REAL WORLD LAW

Modern Application of *Milkovich*

More than two decades since the *Milkovich* ruling, court decisions involving the opinion defense continue to distinguish fact from opinion. In 2012, a New York trial court dismissed a libel case on the grounds that criticism published on an online review website amounted to pure opinion and did not include provable defamatory facts. In that case, a medical doctor sued over comments that claimed she was “a terrible doctor” and was “mentally unstable and has poor skills.” The court held that the comments were opinion in the context of the internet and said that anonymous comments on the Web “can be understood as a platform for unsupported and often baseless assertions of opinion” rather than fact.2

That same year, an appellate court in California affirmed the dismissal of a libel case against the Gizmodo tech blog. In that case, the plaintiff challenged an article that criticized him for overhyping his startups and new tech products. Gizmodo’s use of the word “scam” was central to the plaintiff’s argument, but the court looked at the article as a whole and said it was opinion that had “the tone and style of a sarcastic product or movie review.”3 The court also noted that Gizmodo allowed readers to draw their own conclusions about the plaintiff’s products through links to product source materials.4

| 2.  | Id. |
| 4.  | Id. |

of letters, often viewing them as part of an open forum for the general public. Today, based on the same rationale, courts generally offer the same protection for opinions published as opinion blogs or as comments on review or comment-based websites as well as comments that appear below news articles on newspaper or related websites.

Where a letter appears within a publication is likely to have a significant bearing in determining whether it qualifies as opinion. This stems directly from the “journalistic context” element of the *Ollman* test. That is, by appearing within a section of a publication that is clearly set aside for the expression of opinions—including opinions from readers—a letter (versus an article) or an online comment (that appears below an article) is much more likely to be viewed by a court as an expression of opinion. The same is true in the context of publication on specific websites. For example, a court in New York recently held that two women who called an ex-boyfriend a liar and a cheater were expressing opinion because their words appeared in the context of a website whose sole purpose is to air complaints about dishonest romantic partners.5

An example of the idea that authors of letters to the editor enjoy the same constitutional protection for their opinions as newspaper reporters was provided by an early 21st-century case. In the ruling, a state court said, “The robust exchange of ideas that occurs each day on the editorial pages of our state’s newspapers could indeed suffer if the nonmedia authors of letters to the editor published in these forums were denied the same constitutional protections enjoyed by the editors themselves.”55 Thus, the authors of letters or online comments that the news media publish are as shielded as the media themselves.
In cases in which letters were not protected as opinion, courts have held that those letters combined opinion and facts. Often cases based on such expressions are resolved in favor of libel plaintiffs. For example, a Florida appellate court ruled that a letter questioning a child psychologist’s qualifications was defamatory because it was just such a mixed expression and therefore not privileged.56

Rhetorical Hyperbole, Parody and Satire

The history of successful libel defense includes this premise: If the material on which a libel claim is based is so outrageous that no reasonable person could believe it, damage to the plaintiff’s reputation could not have happened. The most infamous example lies within the circumstances of Hustler Magazine Inc. v. Falwell,57 discussed in Chapter 4.

As with other libel defenses, context can be a critical element when it comes to the defense of rhetorical hyperbole, parody and satire. The context of the material in question can play a big role in determining whether a reasonable person would believe it to be a statement of fact.

The U.S. Supreme Court first recognized rhetorical hyperbole as protected speech—and therefore a libel defense—when a developer sued the publisher of a newspaper after the newspaper printed articles reporting that some people characterized the developer’s
negotiating tactics as blackmail. The developer argued that the word “blackmail” implied that the developer had committed the crime of blackmail. The Supreme Court rejected the developer’s argument, holding that the word “blackmail” was not slander when spoken and not libel when reported because “even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer’s] negotiating position extremely unreasonable.”

Rhetorical hyperbole is rampant on the internet. For example, would you stay at a hotel labeled the No. 1 Dirtiest Hotel of the year by online reviewers? When the Grand Resort Hotel and Convention Center in Pigeon Forge, Tenn., nabbed this top spot on a 2011 list, major television news outlets and websites reported the distinction. The list on TripAdvisor.com included a link to the hotel with a photograph of a ripped bedspread and a user quote that read, “There was dirt at least ½ inch thick in the bathtub which was filled with lots of dark hair.”

The Grand Resort took issue with a system of online reviews that resulted in this ranking. It argued that such a distinction “maliciously” caused customers to lose confidence in the resort and the TripAdvisor rating caused “great injury and irreparable damage to . . . destroy [its] business and reputation by false and misleading means.” The hotel sued TripAdvisor for libel and said the numerical ranking system the site used to determine each year’s top 10 dirtiest hotels was based solely on customer reviews.

A federal district court in Tennessee dismissed the hotel’s libel suit, holding that the online ranking was clearly rhetorical hyperbole, even though it offered a numerical ranking system based on user reviews. The appeals court agreed: “TripAdvisor’s placement of Grand Resort on the ‘2011 Dirtiest Hotels’ list is not capable of being defamatory.” The court added that the list is protected opinion because “the list employs loose, hyperbolic language and its general tenor undermines any assertion . . . that the list communicates anything more than the opinions of TripAdvisor’s users.”

Similar to rhetorical hyperbole, satire or parody meant to be humorous or offer social commentary is often not libelous. For example, an artist was sued for libel because one of his paintings portrayed the plaintiffs holding knives and attacking a young woman. The artist knew the plaintiffs, also artists, but had become embroiled in a spat with them over their views on art. The painting was meant to satirize the views of those depicted. An appellate court considered the context and identified it as symbolic expression with no accusation of criminal conduct.

Compare that to a situation in which a newspaper published a fictional article describing a Texas juvenile court judge who ordered the detention of a first grader for making a threat in a book report. The fictional student was described as appearing
before the judge in handcuffs and ankle shackles. The problem arose because the judge named in this otherwise made-up story was real. The satirical article came out after a real court case in which that same judge had ordered the detention of a 13-year-old student who wrote a Halloween horror story depicting the shooting death of a teacher and two students.

The newspaper did not dispute that its article on the first grader was completely made-up. It was meant to be a commentary on the judge and his heavy-handed justice. But the judge and a district attorney sued for libel, claiming that the article could be understood by a reasonable reader as making false statements of fact about them and that they were made with actual malice. The newspaper defended itself by claiming the article was satire and parody and therefore protected by the First Amendment. Ultimately, the Texas Supreme Court ruled for the newspaper. The court cited clues in the article that would alert a reasonable reader that the article was not a statement of fact but instead a criticism or opinion. Though the article did have a superficial degree of plausibility, the court said, that is the hallmark of satire.

SECTION 230 IMMUNITY

Media and technology attorneys and experts suggest that Section 230 of the federal Communications Decency Act (CDA) of 1996 is critical to the functioning of the internet. As mentioned in Chapter 4, Section 230 offers immunity to websites in libel claims, although the protection is not absolute. Section 230 generally provides legal protection to website operators and internet service providers when issues arise from the content created by others. For 20 years, courts have rejected attempts to limit the application of Section 230 to only “traditional” ISPs like Verizon or AOL. Instead, they have extended protection to the many diverse entities commonly called “interactive computer service providers.” Under this broader definition, blog sites and other interactive services like YouTube, Facebook, or Twitter that rely on user-generated content, information provided from third-party RSS feeds or reader comments also may receive immunity from libel claims under Section 230.

The key to determining whether Section 230 protects against a libel claim is to identify the source of the content and the extent to which the ISP interacted directly with the content. For example, courts have ruled that when bloggers allow third parties to add readers’ comments or other materials to their blogs, then Section 230 protects them. What is less clear is whether those who edit comments or selectively publish reader comments also would fall under Section 230 immunity.

In 2011, a California state court considered whether Facebook qualified for immunity under Section 230 for its “Sponsored Story” advertising system. Five plaintiffs sued Facebook for placing their usernames and profile pictures in Sponsored Stories on friends’ Facebook pages. For example, plaintiff Angel Fraley “liked” Rosetta Stone’s Facebook profile in order to receive a free software demonstration. Subsequently, Fraley’s friends’ Facebook pages showed a Sponsored Story advertisement with the Rosetta Stone logo and her “like” for Rosetta Stone.

Facebook argued that it is protected under Section 230 because it is an “interactive computer service” with content provided by third parties. But, the court disagreed in the
context of the Sponsored Story feature, saying that because Facebook creates and develops the commercial content without user consent, Facebook is not immune. “Although Facebook meets the definition of an interactive computer service under the CDA . . . it also meets the statutory definition of an information content provider. . . . Furthermore, ‘[the fact that members] are information content providers does not preclude [Facebook] from also being an information content provider by helping “develop” at least “in part” the information’ posted in the form of Sponsored Stories.”71 In this case, the court is making a clear distinction between content creation and distribution.

A 2014 ruling by the Sixth Circuit Court of Appeals further extends Section 230 protection if the operator of a website creates or adds content to a post that is potentially libelous. In a case that involved TheDirty.com, a U.S. district court in Kentucky held that the website should not receive immunity for potentially defamatory comments third-party posters made on the website. TheDirty.com is a popular website that allows users to “anonymously upload comments, photographs, and video, which [the website owner] then selects and publishes along with his own distinct, editorial comments. In short, the website is a user-generated tabloid primarily targeting non-public figures.”72

The Sixth Circuit panel reversed the lower court decision, holding that the website owner’s additional comments did not materially contribute to the defamatory content of the third-party statements. This means that Section 230 immunity remains for an ISP
Section 230 Immunity

Social Media and Defamation

According to legal experts, defamation cases tied to social media are on the rise, "reflect[ing] the growing impact and importance of new media compared with traditional news providers." Lawsuits against individuals are becoming more common because Section 230 makes it difficult for a plaintiff who has suffered online defamation to recover damages from an internet service provider or website, like Facebook or Twitter. Many years ago, plaintiffs were inclined to sue an ISP or a website because these companies are wealthy and could afford to pay damages. But, as court decisions increasingly apply Section 230 immunity to a variety of website functions, lawsuits against individuals offer a more likely avenue for remedy.

An example from 2014 is the first Twitter libel case to ever go before a jury. In that California case, rock musician Courtney Love's former attorney sued her for a tweet suggesting he had been "bought off." But the attorney did not prevail because he could not meet the actual malice standard.

Today, many businesses and professional organizations offer "best practices" guides for using social media. These guides often highlight the challenges that social media bring to the area of defamation, including real-time interaction or the ability to post a comment quickly "on the fly," which can lead to less careful or precise use of language.

If you frequently use social media or produce user-generated content online, experts say you should always ensure that the information you post or retweet either is truthful or would not injure a person’s reputation. Additionally, recognize that modified photos and videos can defame a person or a business and the "less obvious and absurd the modification, the more likely it is that a court will find it defamatory."

5. Id.
Although Section 230 is a robust defense for ISPs and information content providers, it is far from ironclad. In 2016, the Ninth Circuit Court of Appeals refused to grant immunity under Section 230 to Internet Brands Inc. in a case that involved the Model Mayhem networking website it operated for people in the modeling industry. The plaintiff in the case, identified only as Jane Doe, posted her information to the site and was then contacted by two men posing as talent scouts who lured her to a fake audition where they drugged her, raped her and recorded the rape for sale and distribution as pornography. Doe sued Internet Brands under a California law that requires a warning of harm when a person has a “special relationship to either the person whose conduct needs to be controlled or . . . to the foreseeable victim of that conduct.” Doe asserted that Internet Brands knew its website was being used by sexual predators and failed to warn users. “The duty to warn allegedly imposed by California law would not require Internet Brands to remove any user content or otherwise affect how it publishes or monitors such content,” according to the Ninth Circuit. “Any alleged obligation to warn could have been satisfied without changes to the content posted by the website’s users and without conducting a detailed investigation. Internet Brands could have given a warning to Model Mayhem users, perhaps by posting a notice on the website or by informing users by email what it knew.” For now, this ruling applies only under state law in California.

OTHER DEFENSES

Neutral Reportage

As explained in Chapter 4, someone who repeats libelous information is as potentially responsible as the originator of that same information. Republication is not a valid libel defense. But that longtime rule of libel law was loosened somewhat by the doctrine of neutral reportage.

Neutral reportage recognizes that the First Amendment principle of the free flow of information and ideas is important. The doctrine suggests that among the kinds of information that should be free to reach people are accusations made by one individual about another. In some circumstances, the news value lies not in whether the accusation is true but simply in the fact that the accusation was made or who made it. According to neutral reportage, the news media should not be restrained from merely reporting an accusation as long as the reporting is done in a fair, objective and balanced (i.e., neutral) manner. Even if the publisher of the reported accusations has serious doubts about their veracity, the neutral reportage doctrine could provide a successful defense.

The neutral reportage defense was established in 1977 and only applied to cases involving public figures. Since then, the scope of that application has sometimes expanded beyond public figures, but the nation’s courts have not uniformly embraced neutral reportage. Its recognition, in fact, has been spotty. One obstacle to more widespread acceptance is that the U.S. Supreme Court has had virtually nothing to say about neutral reportage. Because it has been left to individual state and federal districts to determine how to handle neutral reportage, the legal landscape is uncertain. Thus, while neutral reportage remains an option in the libel defendant’s arsenal, the inconsistent manner in which courts have
Gaps in Section 230 Immunity?

While Section 230 immunity has expanded over the past two decades, in 2016 the outcome in several cases suggested gaps exist. One case to watch is Hassell v. Bird, which at the time of publication of this text was on appeal at the California Supreme Court. The case involves an attorney (Hassell) who sued a former client (Bird) for defamation for a negative review she posted on Yelp. When Bird failed to show up in court twice for the defamation claim, the court awarded Hassell more than a half-million dollars in damages and ordered Bird to remove the negative reviews. As noted in Chapter 4, courts have seen a surge of defamation cases in which plaintiffs seek not only damages but also a court-ordered prohibition (called injunctive relief) to stop future publication of defamatory content on the internet and/or the removal of defamatory content.

When Hassell approached Yelp to remove the reviews, Yelp attempted to intervene in the case arguing that it was protected under Section 230. The case is procedurally complicated because Yelp was never a party in the original lawsuit. The court rejected Yelp’s First Amendment argument that it was a content curator. Instead, the court said it was unprotected as a passive technology conduit required to comply with an injunction against speech already deemed to be defamatory, and therefore unprotected.

Eric Goldman, a legal expert on Section 230, wrote that the decision “rips a [big] hole” in Section 230 immunity and effectively becomes an easy way for people to “scrub” unflattering content from the internet.

More than 40 organizations, companies and law professors decried the decision. “The decision has already been used to try to expand the law in dangerous ways,” Google wrote. Glassdoor, a jobs and recruiting site, noted, “Since Hassell was published, we have begun receiving demand letters citing the opinion as grounds for demanding that Glassdoor remove content and reviews deemed objectionable.”

POINTS OF LAW

Neutral Reportage

The First Amendment is a defense in a libel case if the following apply:

- The story is newsworthy and related to a public controversy.
- The accusation is made by a responsible person or group.
- The charge is about a public official, public figure or public organization.
- The story is accurate, containing denials or other views.
- The reporting is neutral.
accepted it makes its application in a specific case questionable. Much depends on how a court in a given jurisdiction may have ruled on neutral reportage previously.

**Wire Service Defense**

The wire service defense is related to the neutral reportage doctrine. It is similar to neutral reportage in that it provides a defense for republication on the condition that the reporting meets certain standards. The wire service defense reflects and acknowledges the extent to which news media are dependent on news services, particularly for nonlocal news. To expect verification of every report is unreasonable. This defense holds that the accurate republication of a story provided by a reputable news agency does not constitute fault as a matter of law. The wire defense is available to libel defendants if four factors are met: (1) The defendant received material containing the defamatory statements from a reputable newsgathering agency, (2) the defendant did not know the story was false, (3) nothing on the face of the story reasonably could have alerted the defendant that it may have been incorrect, and (4) the original wire service story was republished without substantial change.

The wire service defense has succeeded even when a newspaper published a story that relied on past wire service articles and when a network affiliate broadcast news reports of its parent network. Also, like the neutral reportage privilege, the wire service defense has been accepted in a limited number of jurisdictions.

**Single-Publication Rule**

Another issue related to republication is the availability of an article subsequent to its initial publication. Does the republication of a work weeks, months or years after its original publication constitute a publication, therefore subjecting it to additional, separate libel claims? According to the single-publication rule, no. The rule states that the entire edition of a newspaper or magazine is a single publication. Subsequent sales or reissues are not new publications. Courts across the United States also apply the single-publication rule to internet publications and to emerging online publishing platforms as well as with digital archiving. Thus, a new libel suit with merit is not possible in any of these circumstances. However, if in the republication process, content changes in a way that creates a new libel, the single-publication rule is unlikely to apply.

**POINTS OF LAW**

**The Wire Service Defense**

The wire service defense may be applied as long as the following are present:

1. The defendant received material containing the defamatory statements from a reputable newsgathering agency.
2. The defendant did not know the story was false.
3. Nothing on the face of the story reasonably could have alerted the defendant that it may have been incorrect.
4. The original wire service story was republished without substantial change.
The Libel-Proof Plaintiff

When an individual’s reputation is already so bad that additional false accusations could not harm it further, the individual may be without the ability to win a defamation suit. Under these circumstances, a libel defendant may be able to invoke the concept of the libel-proof plaintiff. Since the concept was first articulated as a libel defense, two different ways to implement it have emerged.

One way stipulates that any reputational harm to the plaintiff caused by a false accusation only incrementally injures the reputation beyond its already damaged condition. Suppose, for example, that an individual is identified in an article as a thief, child molester, and tax evader. If all of those charges are true, does it make any difference if the article also falsely identifies the individual as a kidnapper? No—in such a case, the publisher could probably win, arguing that the single false statement causes harm that is negligible (or incremental) beyond what already exists and therefore is not grounds for a libel suit. The plaintiff is libel-proof. Under these kinds of circumstances, the false statement causes very little harm to the plaintiff’s reputation beyond where it stood prior to the most recent publication.

Like other common law libel privileges, the acceptance of this part of the doctrine has not been universal. For example, a federal appeals court rejected the libel-proof plaintiff doctrine in 1984. A journalist described the founder of an organization as a racist, fascist, anti-Semitic neo-Nazi and wrote that he had founded the organization to pursue his

REAL WORLD LAW

Managing Your Reputation Online

The internet allows for a permanent record of our past, and search engines and social media facilitate the easy spread of blog posts, images, commentary, status updates and other information. Other than going to court to seek an injunction to remove negative content or to try to prevent the sharing of defamatory content (an emerging area of law), what can you do to help protect your reputation online?

“Set up a Google alert for yourself. Contribute things that are of professional interest, and do it occasionally,” according to the founder of Reputation.com. "You don’t have to tweet every day—doing it a few times a month is a good idea, especially if it is relevant to what you do. And don’t use Facebook a lot; if you do, maximize your privacy settings. Also, don’t post a lot of photos to social media, in general, about your families. Basically, don’t over-share.”

The founder of another reputation management company, Metal Rabbit Media, equates a person’s online reputation to his or her credit score: “Americans have had to learn to manage their credit cards and bills to maintain a good credit score. The Web . . . contains the modern day version of inaccurate credit reports.”

goals. The defense argued that previous publications had already so irreparably tarnished the plaintiff’s reputation that the libel-proof doctrine should apply. In an opinion written by then-Judge Antonin Scalia, an appellate court rejected the claim, ruling that “we cannot envision how a court would go about determining that someone’s reputation had already been ‘irreparably’ damaged—i.e., that no new reader could be reached by the freshest libel.” In writing that no matter how bad one’s reputation is, it can always be worsened, Scalia offered an analogy: “It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity.”

Courts may also recognize the second aspect of the libel-proof doctrine, which says that libel plaintiffs with tarnished reputations with regard to a particular issue are libel-proof only with respect to that issue. Libel claims pursued in this context present the question of whether previous publicity and the issue before the court are within the same framework.

INTERNATIONAL LAW

International Jurisdiction in Libel Actions

Because U.S. libel law is more protective of defendants than are laws in other countries, U.S. citizens have historically been more susceptible to libel verdicts against them in foreign courts. International plaintiffs have been known to engage in “libel tourism,” shopping for a country other than the United States in which to file a libel claim.

The U.S. Congress passed a libel tourism bill in 2010. The law prevents federal courts from enforcing a foreign libel judgment against an American journalist, author or publisher if it is inconsistent with the protections afforded by the First Amendment. It also allows individuals who have a foreign judgment levied against them to demonstrate that it is not enforceable in the United States.1

For many years, London was considered the “libel capital of the world,” but the enactment of the U.K. Defamation Bill, which became law in 2013, largely put an end to libel tourism in the U.K. The law now includes a requirement that plaintiffs prove serious harm; it removes presumption in favor of a jury trial; it introduces the defenses of “responsible publication on matters of public interest,” truth and opinion; and it provides more protection for websites that host user-generated content. It also adopts the single-publication rule.2

What about libel actions that cross the U.S. borders? In 2016 the Texas Supreme Court held that a Mexican recording artist who lived in Texas could exercise specific personal jurisdiction in Texas, even though broadcasts at the center of her complaint originated in Mexico. Specific personal jurisdiction refers to jurisdiction based on a person’s minimum contact with a state when a legal claim is related to that contact. The Court said that the defendant, TV Azteca, intentionally targeted the Texas market and that it was not unreasonable or burdensome for foreign nationals to have to comply with the laws of the jurisdiction in which they do business and in which the Mexican recording artist lived.3

For example, a plaintiff challenged a newspaper report that he had tested positive for drug use. The court found that although the report was incorrect, the plaintiff was libel-proof regarding this specific issue because he had previously admitted using drugs. Had the new report falsely damaged his reputation regarding a topic unrelated to drug use, the libel-proof plaintiff doctrine could not have been invoked. The plaintiff still had a positive reputation to protect in those other areas.

Thus, the doctrine of the libel-proof plaintiff may serve a defendant who has published otherwise defamatory statements about an individual whose reputation is already so sullied as to render additional accusations moot, regardless of their falsity. Depending on the circumstances, the doctrine may apply to accusations of any nature or to those that relate only to a specific issue.

The libel-proof plaintiff doctrine remains a valuable defense weapon, particularly against frivolous libel suits and especially given the U.S. Supreme Court’s opinion that states are free to adopt the doctrine as they see fit.

**ADDITIONAL DEFENSE CONSIDERATIONS**

**Summary Judgment**

A libel defendant can ask a court to dismiss a lawsuit by filing a motion for summary judgment. As noted in Chapter 1, a summary judgment is just what the name implies: A judge promptly decides certain points of a case and grants the motion to dismiss the case. It can occur at any of several points in litigation but usually occurs prior to trial.

A judge may issue a summary judgment on grounds that there is no genuine dispute about any material fact. With libel, this generally means a plaintiff is clearly unable to meet at least one element in his or her burden of proof. On numerous occasions, the U.S. Supreme Court said that when considering motions for summary judgment, courts “must view the facts and inferences to be drawn from them in the light most favorable to the opposing party.” Particularly in libel cases, this means that courts must take into account the burden the plaintiff must meet at trial. The rationale behind this view is that if the summary judgment is granted, the plaintiff’s opportunity to prove a case ends, but if a defendant’s motion for summary judgment is denied, the defendant still has an opportunity to prove his or her case at trial.

Summary judgments can be important tools for protecting free expression, particularly in an environment in which plaintiffs have harassed the media by filing frivolous lawsuits (e.g., see the description of SLAPPs earlier in this chapter). One federal judge wrote that in the First Amendment area, summary procedures are even more essential. Free debate is at stake if the harassment succeeds. One purpose of the *New York Times Co. v. Sullivan* actual malice principle, the judge wrote, is to prevent people from being discouraged in the full and free exercise of First Amendment rights with respect to the conduct of their government.

**Motion to Dismiss for Actual Malice**

Until 1979, summary judgment was a preferred method of dealing with libel cases involving actual malice. When the defense submitted a motion for summary judgment—based
on the contention that the plaintiff could not prove actual malice—the judge would either grant or deny it. If granted, the case was over. In 1979, the U.S. Supreme Court cast doubt on the appropriateness of summary judgment in libel cases because any examination of actual malice “calls a defendant’s state of mind into question.” Such a circumstance “does not readily lend itself to summary disposition.” Although some lower courts took the admonition to heart—using it as a basis for denying summary judgment—motions for summary judgment are still granted more often than not. In 1986, the Court ruled that in deciding whether to grant motions for summary judgment, trial judges should decide whether public plaintiffs who file lawsuits claiming they have been libeled can meet the actual malice standard by “clear and convincing evidence.” If not, summary judgment for the party they have sued should be granted.

This issue was revisited by the Supreme Court about a decade ago. In 2007, the U.S. Supreme Court significantly changed the standard for the motion to dismiss in *Bell Atlantic Corp. v. Twombly*.

Two years later, it affirmed its decision in *Ashcroft v. Iqbal*. Since then, a new standard has emerged—called the *Iqbal/Twombly* Rule—that has, in essence, made a motion to dismiss equivalent to a motion for summary judgment. Under the *Iqbal/Twombly* Rule, judges should use “judicial common sense” to determine the plausibility of a claim and the sufficiency of the evidence. The Supreme Court justified the change by noting the increasing legal costs to defendants. One study suggests that, since the decision, more motions to dismiss have succeeded in courts across the country in many different areas of the law.

In 2012, two federal appeals courts applied the *Iqbal/Twombly* Rule to actual malice proceedings. The First Circuit became the first to apply the standard to actual malice and granted a motion to dismiss in a case involving a political candidate’s complaint that a political attack ad defamed him. The court said that the use of “actual malice buzzwords” was not sufficient to make a claim and that the candidate must “lay out enough facts from which [actual] malice might reasonably be inferred.”

In the Fourth Circuit, the court granted a motion to dismiss a case involving NASCAR driver Jeremy Mayfield, who sued NASCAR for reporting that he tested positive for recreational or performance-enhancing drugs. Mayfield said NASCAR knew the test result was a false positive because he was taking prescription medication at the time. The court said Mayfield’s evidence was insufficient.

Legal experts now consider the *Iqbal/Twombly* Rule another form of defense for defamation claims. In 2016, the Eleventh Circuit Court of Appeals joined six other circuits in holding that the standard from *Iqbal/Twombly* applies to the actual malice element in defamation cases.

**Jurisdiction**

A court may dismiss a lawsuit on the grounds that the court lacks jurisdiction. Traditionally in libel, the standard has been that wherever the material in question could be seen or heard, a court in any of those locales would have jurisdiction.
Thus, a plaintiff could go “forum shopping” in an attempt to find a jurisdiction most favorable to his or her case.

Given that statements published on the internet can potentially be seen anywhere, any court could claim jurisdiction. A plaintiff could initiate the lawsuit in any court, including those that might be most favorable. But early in the 21st century, significant restrictions were placed on this practice. The U.S. Court of Appeals for the Fourth Circuit applied a three-pronged test for determining the exercise of jurisdiction: (1) whether the defendant purposefully conducted activities in the state, (2) whether the plaintiff’s claim arises out of the defendant’s activities there and (3) whether the exercise of jurisdiction would be constitutionally reasonable.100

To understand the test, it is helpful to examine the circumstances surrounding the case in which it was first applied. Two Connecticut newspapers were investigating conditions of confinement at a Virginia prison. The story was relevant in Connecticut because some of the overflow prison population in Connecticut was being transferred to a Virginia facility. Articles that included content critical of the Virginia prison and its management appeared in the newspaper in both its print and online editions. The Virginia prison warden sued in federal court in Virginia, claiming that the online content was seen in Virginia and had defamed him there. The appeals court ruled that because the newspapers did not direct their website content to a Virginia audience, courts there had no jurisdiction. The court

\[ \text{\textbf{EMERGING LAW}} \]

\begin{center}
\begin{quote}
"Dance like nobody is watching, but email like it may one day be subpoenaed and read aloud in a deposition." This good, general advice returned front-of-mind for journalists after a North Carolina jury handed down a $9 million libel verdict ($7.5 million punitive) against The [Raleigh] News & Observer. The damages were later reduced to $6 million by a state law cap that limits punitive damages.\(^1\)

The case involved a state firearms agent who sued the newspaper, claiming that a 2010 front-page investigative series about questionable practices at the State Bureau of Investigation defamed her. Email correspondence between the reporter and an editor played a role in the outcome. While the story in question relied on multiple sources, all of the sources testified that they were misquoted.

While plaintiffs have had the opportunity to subpoena journalists’ emails and notes in the past (see Chapter 7), legal experts note that litigants are increasingly turning to work-related emails as well as publicly available social media feeds to scrutinize journalists’ comments outside of their stories to potentially support a defamation claim. The connection to defamation claims is a newer trend.\(^2\)

In light of the allegations surrounding Russian hacking of political campaign emails in 2016, many are encouraging journalists and other communication professionals to remember that comments and posts on social media are public and that they should never assume that work-related emails might not be read by outsiders, including the courts.\(^3\)
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\item Tom Hentoff, Defamation and Related Claims, COMM. L. IN THE DIGITAL AGE (2016).
\item Id.
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carefully reviewed the articles and determined they were aimed at a local (Connecticut) audience.\textsuperscript{101} Placing content online, the court ruled, is not sufficient by itself to subject a person to the jurisdiction in another state just because the information could be accessed there.\textsuperscript{102} Otherwise, a person who places information on the internet could be sued anywhere the information could be accessed. The bottom line, according to this ruling, is that jurisdiction rests where the publication’s intended audience is located.

**Statutes of Limitations**

Statutes of limitations apply for virtually all crimes and civil actions. Charges of most criminal activity and civil actions can be filed only during a limited time after the alleged violation of the law. Courts do not like old claims. While not a defense per se, delay in filing a libel lawsuit can work to the benefit of a defendant, sometimes requiring dismissal where the lawsuit is barred by the statute of limitations.

In libel, the length of statutes of limitations is one, two or three years, depending on the state. The clock begins ticking on the date the material was made available to the public. With some printed publications, this can be prior to the date of publication on the cover. Many monthly magazines, for example, are mailed to subscribers and appear on newsstands or online well before the official publication date.

On a related note, the single-publication rule also applies to statutes of limitations. The reissue of a printed publication or a post online does not restart the statute of limitations calendar as a truly new publication would. A modification to a website—when the modification is unrelated to the allegedly defamatory statement—does not amount to a new publication. For purposes of libel claims and statutes of limitations, the date of publication remains the date on which the material was originally posted.

**Retractions**

While not a libel defense per se, retractions and corrections published to correct content can play a role in helping libel defendants by mitigating the damage to the plaintiff that resulted from the libelous publication. The degree to which a retraction is offered promptly, is displayed prominently and is plainly stated will likely help the defendant’s cause. The rationale for this is that a retraction can help reduce the damage to the plaintiff’s reputation; the defendant therefore should be required to pay less in damages.

While issuing a retraction is certainly the responsible action to undertake, doing so may work against the defendant if the offended party files a lawsuit. Depending on their wording,

### POINTS OF LAW

**A Test for Jurisdiction**

1. Whether the defendant purposefully conducted activities in the state,
2. Whether the plaintiff’s claim arises out of the defendant’s activities there and
3. Whether the exercise of jurisdiction would be constitutionally reasonable
retractions may be viewed as an admission of guilt. Consequently, libel defense attorneys may advise against issuing them in the first place. In part as a response to this paradox, a majority of states have adopted retraction statutes. Increasingly, these laws prevent plaintiffs from recovering some damages after publication of a retraction. Retraction statutes vary in their strength and coverage. The protection they offer differs in many ways, from prohibitions on punitive damages to restricting damages to out-of-pocket losses. Most of these statutes look favorably on media defendants who issue retractions. Rather than penalizing media organizations that indirectly acknowledge some degree of negligence, these statutes offer a kind of compensation by reducing their obligation to pay damages.

Retraction statutes do not always fare well under judicial review in their respective states. Some have been ruled unconstitutional. The Arizona Supreme Court, for example, ruled that the retraction statute in that state violated the state constitution. The law limited plaintiffs to recovering only special damages when retractions were published. But the Arizona Constitution holds that “[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.” Because the law conflicted with the Arizona Constitution, it did not survive judicial scrutiny. However, although a retraction or correction of a news report in Arizona may no longer immunize a libel defendant from all punitive damage claims, it may serve to reduce those damages.

Map 5.2  ■ Length of Statutes of Limitations in Libel Actions

*The Statute of Limitations in Libel Actions in Washington, D.C., is one year.

retraction statutes

In libel law, state laws that limit the damages a plaintiff may receive if the defendant had issued a retraction of the material at issue. Retraction statutes are meant to discourage the punishment of any good-faith effort of admitting a mistake.
CHAPTER SUMMARY

Those sued for libel have several defense options from which to choose, any one of which can lead to success. Truth is one of the most straightforward defenses, given that material must be false to be libelous. Even material that is less than completely accurate may be regarded as substantially true. Chilling speech is the goal of some defamation lawsuits. In those cases, libel law is used not as a shield against threatened harms or as a means of correcting them, but as a weapon to prevent speech from occurring in the first place. These are called SLAPPs (strategic lawsuits against public participation). Noting that SLAPPs are often used to suppress a party’s First Amendment rights, some states have enacted anti-SLAPP legislation. The constitutionality of these laws has been upheld.

Journalists are able to report on certain events without fear of libel as long as their reporting is fair and accurate. The fair report privilege generally applies to reporting on official government proceedings (e.g., hearings, trials) or records, but not all states recognize this privilege. Another defense, fair comment and criticism, pertains to honest evaluation of works of legitimate public interest.

Expressing an opinion is regarded as a basic First Amendment right. Opinion is protected speech not susceptible to a libel claim. However, for material to qualify as protected opinion, it must satisfy the four-part Ollman test. Published letters to the editor, online comments and websites or blogs purely used to express opinions are typically viewed as protected opinion because of context. If a statement is unbelievable, then it cannot be libelous. Thus, parody, satire and rhetorical hyperbole can be used as libel defenses when it is clear to a reasonable person that their use is not to be taken seriously.

Section 230 of the Communications Decency Act offers immunity to websites and internet service providers in libel claims, although the protection is not absolute. The key to determining whether Section 230 protects against a libel claim is to identify the source of the content and the extent to which the service provider or website interacted directly with the content. Correcting, editing, adding or removing content does not strip a website or an ISP of Section 230 immunity so long as it doesn’t substantially alter the meaning of the content.

Some libel defenses allow for a kind of republication. These include neutral reportage and the wire service defense. Under the single-publication rule, multiple issues of the same publication do not make the defendant vulnerable to multiple libel claims. Courts across the United States also apply the single-publication rule to internet publications and to emerging online publishing platforms.

Sometimes false, defamatory material is published about someone whose reputation cannot be lowered beyond its current level. Under those circumstances, a defendant may argue the plaintiff is libel-proof. Additional defense considerations include summary judgment, motion to dismiss for actual malice, jurisdiction, statutes of limitations and retractions.
JUDGE KENNETH STARR delivered the court’s opinion:
This defamation action arises out of the publication of a syndicated column by Rowland Evans and Robert Novak in May 1978. The question before us is whether the allegedly defamatory statements set forth in the column are constitutionally protected expressions of opinion or, as appellant contends, actionable assertions of fact. We conclude, as did the District Court, that the challenged statements are entitled to absolute First Amendment protection as expressions of opinion. . . .

The plaintiff, Bertell Ollman, is a professor of political science at New York University. . . . In March 1978, Mr. Ollman was nominated by a departmental search committee to head the Department of Government and Politics at the University of Maryland. The committee’s recommendation was “duly approved by the Provost of the University and the Chancellor of the College Park campus.”

With this professional move from Washington Square to College Park, Maryland thus in the offing, the Evans and Novak article appeared. . . .

This case presents us with the delicate and sensitive task of accommodating the First Amendment’s protection of free expression of ideas with the common law’s protection of an individual’s interest in reputation. It is a truism that the free flow of ideas and opinions is integral to our democratic system of government. Thomas Jefferson well expressed this principle in his First Inaugural Address, when the Nation’s memory was fresh with the passage of the notorious Alien and Sedition Acts:

If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.

At the same time, an individual’s interest in his or her reputation is of the highest order. Its protection is an eloquent expression of the respect historically afforded the dignity of the individual in Anglo-American legal culture. A defamatory statement may destroy an individual’s livelihood, wreck
his standing in the community, and seriously impair his sense of dignity and self-esteem. . . .

... In *Gertz*, the Supreme Court in *dicta* seemed to provide absolute immunity from defamation actions for all opinions and to discern the basis for this immunity in the First Amendment. The Court began its analysis of the case by stating:

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. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open debate on the public issues." . . .

... *Gertz*'s implicit command thus imposes upon both state and federal courts the duty as a matter of constitutional adjudication to distinguish facts from opinions in order to provide opinions with the requisite, absolute First Amendment protection. At the same time, however, the Supreme Court provided little guidance in *Gertz* itself as to the manner in which the distinction between fact and opinion is to be discerned. . . .

... With largely uncharted seas having been left in *Gertz*’s wake, the lower federal courts and state courts have, not surprisingly, fashioned various approaches in attempting to articulate the *Gertz*-mandated distinction between fact and opinion. . . .

In formulating a test to distinguish between fact and opinion, courts are admittedly faced with a dilemma. Because 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. . . . While this dilemma admits of no easy resolution, we think it obliges us to state plainly the factors that guide us in distinguishing fact from opinion and to demonstrate how these factors lead to a proper accommodation between the competing interests in free expression of opinion and in an individual's reputation. . . .

While courts are divided in their methods of distinguishing between assertions of fact and expressions of opinion, they are universally agreed that the task is a difficult one. . . .

The degree to which such kinds of statements have real factual content can, of course, vary greatly. We believe, in consequence, that courts should analyze the totality of the circumstances in which the statements are made to decide whether they merit the absolute First Amendment protection enjoyed by opinion. To evaluate the totality of the circumstances of an allegedly defamatory statement, we will consider four factors in assessing whether the average reader would view the statement as fact or, conversely, opinion. . . .

First, we will analyze the common usage or meaning of the specific language of the challenged statement itself. Our analysis of the specific language under scrutiny will be aimed at determining whether the statement has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous. . . .

Second, we will consider the statement’s verifiability—is the statement capable of being objectively characterized as true or false? . . . Third, moving from the challenged language itself, we will consider the full context of the statement—the entire article or column, for example—inasmuch as other, unchallenged language surrounding the allegedly defamatory statement will influence the average reader’s readiness to infer that a particular statement has factual content. . . . Finally, we will consider the broader context or setting in which the statement appears. Different types of writing have, as we shall more fully see, widely varying social conventions which signal to the reader the likelihood of a statement’s being either fact or opinion. . . .

... [O]nce our inquiry into whether the statement is an assertion of fact or expression of opinion has concluded, the factors militating either in favor of or against the drawing of factual implications from any statement have already been identified. A separate inquiry into whether a statement, already classified in this painstaking way as opinion, implies allegedly defamatory facts would, in our view, be superfluous.
In short, we believe that the application of the four-factor analysis set forth above, and drawn from the considerable judicial teaching on the subject, will identify those statements so “factually laden” that they should not receive the benefit of the opinion privilege.

Now we turn to the case at hand to apply the foregoing analysis. As we have seen, Mr. Ollman alleges various instances of defamation in the Evans and Novak column. Before analyzing each such instance, we will first examine the context (the third and fourth factors in our approach) in which the alleged defamations arise. We will then assess the manner in which this context would influence the average reader in interpreting the alleged defamations as an assertion of fact or an expression of opinion.

From the earliest days of the Republic, individuals have published and circulated short, frequently sharp and biting writings on issues of social and political interest. From the pamphleteers urging revolution to abolitionists condemning the evils of slavery, American authors have sought through pamphlets and tracts both to stimulate debate and to persuade. Today among the inheritors of this lively tradition are the columnists and opinion writers whose works appear on the editorial and Op-Ed pages of the Nation’s newspapers. The column at issue here is plainly part and parcel of this tradition of social and political criticism.

The reasonable reader who peruses an Evans and Novak column on the editorial or Op-Ed page is fully aware that the statements found there are not “hard” news like those printed on the front page or elsewhere in the news sections of the newspaper. Readers expect that columnists will make strong statements, sometimes phrased in a polemical manner that would hardly be considered balanced or fair elsewhere in the newspaper. That proposition is inherent in the very notion of an “Op-Ed page.” Because of obvious space limitations, it is also manifest that columnists or commentators will express themselves in condensed fashion without providing what might be considered the full picture. Columnists are, after all, writing a column, not a full-length scholarly article or a book. This broad understanding of the traditional function of a column like Evans and Novak will therefore predispose the average reader to regard what is found there to be opinion.

. . . Evans and Novak made it clear that they were not purporting to set forth definitive conclusions, but instead meant to ventilate what in their view constituted the central questions raised by Mr. Ollman’s prospective appointment. . . . Prominently displayed in the Evans and Novak column, therefore, is interrogatory or cautionary language that militates in favor of treating statements as opinion.

Nor is the statement that “[Mr. Ollman] is widely viewed in his profession as a political activist” a representation or assertion of fact. . . . While Mr. Ollman argues that this assertion is defamatory since it implies that he has no reputation as a scholar, we are rather skeptical of the strength of that implication, particularly in the context of this column.

Next we turn to Mr. Ollman’s complaints about the column’s quotations from and remarks about his writings. . . . When a critic is commenting about a book, the reader is on notice that the critic is engaging in interpretation, an inherently subjective enterprise, and therefore realizes that others, including the author, may utterly disagree with the critic’s interpretation. . . . The reader is thus predisposed to view what the critic writes as opinion.

Evans’ and Novak’s statements about Mr. Ollman’s article clearly do not fall into the category of misquotation or misrepresentation.

Professor Ollman also objects to the column’s posing the question, prompted in Evans’ and Novak’s view by Mr. Ollman’s article, of whether he intended to use the classroom for indoctrination. As we noted previously, the column in no wise affirmatively stated that Mr. Ollman was indoctrinating his students. Moreover, indoctrination is not, at least as used here in the setting of academia, a word with a well-defined meaning.

Finally, we turn to the most troublesome statement in the column. In the third-to-last paragraph, an anonymous political science professor is quoted as saying: “Ollman has no status within the profession but is a pure and simple activist.” . . .

Certainly a scholar’s academic reputation among his peers is crucial to his or her career.

We are of the view, however, that under the constitutionally based opinion privilege announced in Gertz, this quotation, under the circumstances before
us, is protected. . . . [H]ere we deal with statements by well-known, nationally syndicated columnists on the Op-Ed page of a newspaper, the well-recognized home of opinion and comment. In addition, the thrust of the column, taken as a whole, is to raise questions about Mr. Ollman’s scholarship and intentions, not to state conclusively from Evans’ and Novak’s first-hand knowledge that Professor Ollman is not a scholar or that his colleagues do not regard him as such. . . .

. . . [W]e are reminded that in the accommodation of the conflicting concerns reflected in the First Amendment and the law of defamation, the deep-seated constitutional values embodied in the Bill of Rights require that we not engage, without bearing clearly in mind the context before us, in a Talmudic parsing of a single sentence or two, as if we were occupied with a philosophical enterprise or linguistic analysis. Ours is a practical task, with elemental constitutional values of freedom looming large as we go about our work. And in that undertaking, we are reminded by Gertz itself of our duty “to assure to the freedoms of speech and press that ‘breathing space’ essential to their fruitful exercise.” For the contraction of liberty’s “breathing space” can only mean inhibition of the scope of public discussion on matters of general interest and concern. The provision of breathing space counsels strongly against straining to squeeze factual content from a single sentence in a column that is otherwise clearly opinion. . . .

The judgment of the District Court is therefore Affirmed.

Judge Robert Bork, concurring:

. . . [T]he statement challenged in this lawsuit, in terms of the policies of the First Amendment, is functionally more like an “opinion” than a “fact” and should not be actionable. It thus falls within the category the Supreme Court calls “rhetorical hyperbole.” . . .

. . . Ollman, by his own actions, entered a political arena in which heated discourse was to be expected and must be protected; the “fact” proposed to be tried is in truth wholly unsuitable for trial, which further imperils free discussion; the statement is not of the kind that would usually be accepted as one of hard fact and appeared in a context that further indicated it was rhetorical hyperbole.

Plaintiff Ollman, as will be shown, placed himself in the political arena and became the subject of heated political debate. . . .

. . . [I]n order to protect a vigorous marketplace in political ideas and contentions, we ought to accept the proposition that those who place themselves in a political arena must accept a degree of derogation that others need not. . . .

. . . [T]he core function of the First Amendment is the preservation of that freedom to think and speak as one please which is the “means indispensable to the discovery and spread of political truth.” Necessary to the preservation of that freedom, of course, is the willingness of those who would speak to be spoken to and, as in this case, to be spoken about. . . .

. . . Ollman has, as is his undoubted right, gone well beyond the role of the cloistered scholar, and he did so before Evans and Novak wrote about him. . . . Professor Ollman was an active proponent not just of Marxist scholarship but of Marxist politics. . . . It was plain that Ollman was a political activist and that he saw his academic post as, among other things, a means of advancing his political goals. . . .

. . . Ollman was not simply a scholar who was suddenly singled out by the press or by Evans and Novak. . . . He had entered the political arena before he put himself forward for the department chairmanship. . . . [H]e must accept the banging and jostling of political debate, in ways that a private person need not, in order to keep the political arena free and vital. . . .

. . . Ollman entered a first amendment arena and had to accept the rough treatment that arena affords. . . .

. . . [I]t is indisputable that this swirling public debate provided a strong context in which charges and countercharges should be assessed. In my view, that context made it much less likely that what Evans and Novak said would be regarded as an assertion of plain fact rather than as part of the judgments expressed by each side on the merits of the proposed appointment. . . .

When we come to the context in which this statement occurred, it becomes even more apparent that few people were likely to perceive it as a direct assertion of fact, to be taken at face value. That context was one of controversy and opinion, and it is known to be such
by readers. It is significant, in the first place, that the column appeared on the Op-Ed pages of newspapers. These are pages reserved for the expression of opinion, much of it highly controversial opinion. That does not convert every assertion of fact on the Op-Ed pages into an expression of opinion merely by its placement there. It does alert the reader that he is in the context of controversy and politics, and that what he reads does not even purport to be as balanced, objective, and fair-minded as he has a right to hope to be the case with what is contained in the news columns of the paper. . . .  

. . . I am persuaded that Ollman may not rest a libel action on the statement contained in the Evans and Novak column.

Judge Antonin Scalia, dissenting:

More plaintiffs should bear in mind that it is a normal human reaction, after painstakingly examining and rejecting thirty invalid and almost absurd contentions, to reject the thirty-first contention as well, and make a clean sweep of the matter. I have no other explanation for the majority’s affirmance of summary judgment dismissing what seems to me a classic and coolly crafted libel, Evans and Novak’s disparagement of Ollman’s professional reputation. . . .  

. . . [T]o say, as the concurrence does, that hyperbole excuses not merely the exaggeration but the fact sought to be vividly conveyed by the exaggeration is to mistake a freedom to enliven discourse for a freedom to destroy reputation. The libel that “Smith is an incompetent carpenter” is not converted into harmless and nonactionable word-play by merely embellishing it into the statement that “Smith is the worst carpenter this side of the Mississippi.” . . .

Appendix

“The Marxist Professor’s Intentions”

by Rowland Evans and Robert Novak

The Washington Post

May 4, 1978

What is in danger of becoming a frivolous public debate over the appointment of a Marxist to head the University of Maryland’s department of politics and government has so far ignored this unspoken concern within the academic community: the avowed desire of many political activists to use higher education for indoctrination.

The proposal to name Bertell Ollman, professor at New York University, as department head has generated wrong-headed debate. Politicians who jumped in to oppose Ollman simply for his Marxist philosophy have received a justifiable going-over from defenders of academic freedom in the press and the university. Academic Prince Valiants seem arrayed against McCarythite [sic] know-nothings.

But neither side approaches the central question: not Ollman’s beliefs, but his intentions. His candid writings avow his desire to use the classroom as an instrument for preparing what he calls “the revolution.” Whether this is a form of indoctrination that could transform the real function of a university and transcend limits of academic freedom is a concern to academicians who are neither McCarthyite nor know-nothing.

To protect academic freedom, that question should be posed not by politicians but by professors. But professors throughout the country troubled by the nomination, clearly a minority, dare not say a word in today’s campus climate.

While Ollman is described in news accounts as a “respected Marxist scholar,” he is widely viewed in his profession as a political activist. Amid the increasingly popular Marxist movement in university life, he is distinct from philosophical Marxists. Rather, he is an outspoken proponent of “political Marxism.”

He twice sought election to the council of the American Political Science Association as a candidate of the “Caucus for a New Political Science” and finished last out of 16 candidates each time. Whether or not that represents a professional judgment by his colleagues, as some critics contend, the verdict clearly rejected his campaign pledge: “If elected . . . I shall use every means at my disposal to promote the study of Marxism and Marxist approaches to politics throughout the profession.”

Ollman’s intentions become explicit in “On Teaching Marxism and Building the Movement,”
his article in the Winter 1978 issue of New Political Science. Most students, he claims, conclude his course with a “Marxist outlook.” Ollman concedes that will be seen “as an admission that the purpose of my course is to convert students to socialism.”

That bothers him not at all because “a correct understanding of Marxism (as indeed of any body of scientific truths) leads automatically to its acceptance.” Non-Marxist students are defined as those “who do not yet understand Marxism.” The “classroom” is a place where the students’ “bourgeois ideology is being dismantled.” “Our prior task” before the revolution, he writes, “is to make more revolutionaries. The revolution will only occur when there are enough of us to make it.”

He concludes by stressing the importance to “the movement” of “radical professors.” If approved for his new post, Ollman will have a major voice in filling a new professorship promised him. A leading prospect is fellow Marxist Alan Wolfe; he is notorious for his book “The Seamy Side of Democracy,” whose celebration of communist China extols the beneficial nature of “brainwashing.”

Ollman’s principal scholarly work, “Alienation: Marx’s Conception of Man in Capitalist Society,” is a ponderous tome in adoration of the master (Marxism “is like a magnificently rich tapestry”). Published in 1971, it does not abandon hope for the revolution forecast by Karl Marx in 1848. “The present youth rebellion,” he writes, by “helping to change the workers of tomorrow” will, along with other factors, make possible “a socialist revolution.”

Such pamphleteering is hooted at by one political scientist in a major eastern university, whose scholarship and reputation as a liberal are well known. “Ollman has no status within the profession, but is a pure and simple activist,” he said. Would he say that publicly? “No chance of it. Our academic culture does not permit the raising of such questions.”

“Such questions” would include these: What is the true measurement of Ollman’s scholarship? Does he intend to use the classroom for indoctrination? Will he indeed be followed by other Marxist professors? Could the department in time be closed to non-Marxists, following the tendency at several English universities?

Even if “such questions” cannot be raised by the faculty, they certainly should not be raised by politicians. While dissatisfaction with pragmatism by many liberal professors has renewed interest in the comprehensive dogma of the Marxists, there is little tolerance for confronting the value of that dogma. Here are the makings of a crisis that, to protect its integrity and true academic freedom, academia itself must resolve.

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**Milkovich v. Lorain Journal Co.**

**SUPREME COURT OF THE UNITED STATES**

497 U.S. 1 (1990)

**CHIEF JUSTICE WILLIAM REHNQUIST**

*delivered the Court’s opinion:*

Respondent J. Theodore Diadiun authored an article in an Ohio newspaper implying that petitioner Michael Milkovich, a local high school wrestling coach, lied under oath in a judicial proceeding about an incident involving petitioner and his team which occurred at a wrestling match. Petitioner sued Diadiun and the newspaper for libel, and the Ohio Court of Appeals affirmed a lower court entry of summary judgment against petitioner. This judgment was based in part on the grounds that the article constituted an “opinion” protected from the reach of state defamation law by the First Amendment to the United States Constitution. We hold that the First Amendment does not prohibit the application of Ohio’s libel laws to the alleged defamations contained in the article.

This case is before us for the third time in an odyssey of litigation spanning nearly 15 years. Petitioner Milkovich, now retired, was the wrestling coach at Maple Heights High School in Maple Heights, Ohio.
In 1974, his team was involved in an altercation at a home wrestling match with a team from Mentor High School. Several people were injured. In response to the incident, the Ohio High School Athletic Association (OHSAA) held a hearing at which Milkovich and H. Don Scott, the Superintendent of Maple Heights Public Schools, testified. Following the hearing, OHSAA placed the Maple Heights team on probation for a year and declared the team ineligible for the 1975 state tournament. OHSAA also censured Milkovich for his actions during the altercation. Thereafter, several parents and wrestlers sued OHSAA in the Court of Common Pleas of Franklin County, Ohio, seeking a restraining order against OHSAA’s ruling on the grounds that they had been denied due process in the OHSAA proceeding. Both Milkovich and Scott testified in that proceeding. The court overturned OHSAA’s probation and ineligibility orders on due process grounds.

The day after the court rendered its decision, respondent Diadiun’s column appeared in the News-Herald, a newspaper which circulates in Lake County, Ohio, and is owned by respondent Lorain Journal Co. The column bore the heading “Maple beat the law with the ‘big lie,’” beneath which appeared Diadiun’s photograph and the words “TD Says.” The carryover page headline announced “...Diadiun says Maple told a lie.” The column contained the following passages:

. . . [A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

A lesson which, sadly, in view of the events of the past year, is well they learned early.

It is simply this: If you get in a jam, lie your way out.

If you’re successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott.

. . .

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.

Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not.109

Petitioner commenced a defamation action against respondents in the Court of Common Pleas of Lake County, Ohio, alleging that the headline of Diadiun’s article and the nine passages quoted above “accused plaintiff of committing the crime of perjury, an indictable offense in the State of Ohio, and damaged plaintiff directly in his life-time occupation of coach and teacher, and constituted libel per se.” The action proceeded to trial, and the court granted a directed verdict to respondents on the ground that the evidence failed to establish the article was published with “actual malice” as required by New York Times Co. v. Sullivan. The Ohio Court of Appeals for the Eleventh Appellate District reversed and remanded, holding that there was sufficient evidence of actual malice to go to the jury. The Ohio Supreme Court dismissed the ensuing appeal for want of a substantial constitutional question, and this Court denied certiorari.

On remand, relying in part on our decision in Gertz v. Robert Welch Inc. (1974), the trial court granted summary judgment to respondents on the grounds that the article was an opinion protected from a libel action by “constitutional law,” and alternatively, as a public figure, petitioner had failed to make out a prima facie case of actual malice. The Ohio Court of Appeals affirmed both determinations. On appeal, the Supreme Court of Ohio reversed and remanded. The court first decided that petitioner was neither a public figure nor a public official under
the relevant decisions of this Court. The court then found that “the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer. . . . The plain import of the author’s assertions is that Milkovich, inter alia, committed the crime of perjury in a court of law.” This Court again denied certiorari.

Meanwhile, Superintendent Scott had been pursuing a separate defamation action through the Ohio courts. Two years after its Milkovich decision, in considering Scott’s appeal, the Ohio Supreme Court reversed its position on Diadiun’s article, concluding that the column was “constitutionally protected opinion.” Consequently, the court upheld a lower court’s grant of summary judgment against Scott.

The Scott court decided that the proper analysis for determining whether utterances are fact or opinion was set forth in the decision of the United States Court of Appeals for the District of Columbia Circuit in Ollman v. Evans (1984). Under that analysis, four factors are considered to ascertain whether, under the “totality of circumstances,” a statement is fact or opinion. These factors are: (1) “the specific language used”; (2) “whether the statement is verifiable”; (3) “the general context of the statement”; and (4) “the broader context in which the statement appeared.” The court found that application of the first two factors to the column militated in favor of deeming the challenged statements actionable assertions of fact. That potential outcome was trumped, however, by the court’s consideration of the third and fourth factors. With respect to the third factor, the general context, the court explained that “the large caption ‘TD Says’ . . . would indicate to even the most gullible reader that the article was, in fact, opinion.” As for the fourth factor, the “broader context,” the court reasoned that because the article appeared on a sports page—“a traditional haven for cajoling, invective, and hyperbole”—the article would probably be construed as opinion.

Subsequently, considering itself bound by the Ohio Supreme Court’s decision in Scott, the Ohio Court of Appeals in the instant proceedings affirmed a trial court’s grant of summary judgment in favor of respondents, concluding that “it has been decided, as a matter of law, that the article in question was constitutionally protected opinion.” The Supreme Court of Ohio dismissed petitioner’s ensuing appeal for want of a substantial constitutional question. We granted certiorari, to consider the important questions raised by the Ohio courts’ recognition of a constitutionally required “opinion” exception to the application of its defamation laws. We now reverse. . . .

Respondents would have us recognize, in addition to the established safeguards discussed above, still another First-Amendment-based protection for defamatory statements which are categorized as “opinion” as opposed to “fact.” For this proposition they rely principally on the following dictum from our opinion in Gertz:

“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.”

Judge Friendly appropriately observed that this passage “has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question.” Read in context, though, the fair meaning of the passage is to equate the word “opinion” in the second sentence with the word “idea” in the first sentence. Under this view, the language was merely a reiteration of Justice Holmes’ classic “marketplace of ideas” concept. . . . (“[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market”).

Thus, we do not think this passage from Gertz was intended to create a wholesale defamation exemption for anything that might be labeled “opinion.” . . . (The “marketplace of ideas” origin of this passage “points strongly to the view that the ‘opinions’ held to be constitutionally protected were the sort of thing that could be corrected by discussion”). Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of “opinion” may often imply an assertion of objective fact.

If a speaker says, “In my opinion John Jones is a liar,” he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the
speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, “In my opinion Jones is a liar,” can cause as much damage to reputation as the statement, “Jones is a liar.” As Judge Friendly aptly stated: “[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words ‘I think.’” It is worthy of note that, at common law, even the privilege of fair comment did not extend to “a false statement of fact, whether it was expressly stated or implied from an expression of opinion.”

. . . [R]espondents do not really contend that a statement such as, “In my opinion John Jones is a liar,” should be protected by a separate privilege for “opinion” under the First Amendment. But they do contend that in every defamation case the First Amendment mandates an inquiry into whether a statement is “opinion” or “fact,” and that only the latter statements may be actionable. They propose that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the Gertz dictum) be considered in deciding which is which. But we think the “breathing space” which “freedoms of expression require in order to survive” is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between “opinion” and fact.

Foremost, we think [precedent] stands for the proposition 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, like the present, where a media defendant is involved. Thus, unlike the statement, “In my opinion Mayor Jones is a liar,” the statement, “In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,” would not be actionable. [Precedent] ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection. . . .

We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for “opinion” is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadion column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. As the Ohio Supreme Court itself observed, “The clear impact in some nine sentences and a caption is that [Milkovich] ‘lied at the hearing after . . . having given his solemn oath to tell the truth.’” This is not the sort of loose, figuative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination whether petitioner lied in this instance can be made on a core of objective evidence by comparing, inter alia, petitioner’s testimony before the OHSAA board with his subsequent testimony before the trial court. As the Scott court noted regarding the plaintiff in that case, “Whether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at the hearing. Unlike a subjective assertion, the averred defamatory language is an articulation of an objectively verifiable event.” So too with petitioner Milkovich.

[Previous] decisions . . . establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court’s recognition of the Amendment’s vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the “important social values which underlie the law of defamation,” and recognized that “[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation.” . . .

We believe our decision in the present case holds the balance true. The judgment of the Ohio Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. Reversed.
Modern cellphones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans “the privacies of life.” The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.

—Supreme Court Chief Justice John Roberts

In a recent U.S. Supreme Court ruling about cellphone privacy, Chief Justice John Roberts remarked, “The proverbial visitor from Mars might conclude [cellphones] were an important feature of human anatomy.”