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## The First Amendment Degraded: Milkovich v. Lorain and A Continuing Sense of Loss on its 20th Birthday

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**THE FIRST AMENDMENT DEGRADED: *MILKOVICH V. LORAIN* AND A  
CONTINUING SENSE OF LOSS ON ITS 20TH BIRTHDAY**

RICHARD H. WEISBERG\*

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For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.<sup>1</sup>

[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . . [E]rroneous statement is inevitable in free debate, and . . . must be protected . . . .<sup>2</sup>

The basis of the contention for a more liberal indulgence lies in the modern conditions which govern the collection of news items and the insistent popular expectation that newspapers will expose, and the popular demand that they shall expose, actual and suspected fraud, graft, greed, malfeasance, and corruption in public affairs and questionable conduct on the part of public men and candidates for office without stint, leaving to the people themselves the final verdict as to whether [factual] charges made or opinions expressed were justified.<sup>3</sup>

Criticism of so much of another’s activities as are matters of public concern is privileged if the criticism, although defamatory, (a) is upon, (i) a true or privileged statement of fact, or (ii) upon facts otherwise known or available to the recipient as a member of the public . . . .<sup>4</sup>

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1. Letter from Thomas Jefferson to William Roscoe (Dec. 27, 1820), in 15 THE WRITINGS OF THOMAS JEFFERSON 302, 303 (Andrew A. Lipscomb ed., Monticello ed. 1904).

2. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–71 (1964).

3. Coleman v. MacLennan, 98 P. 281, 286 (Kan. 1908).

4. RESTATEMENT (FIRST) OF TORTS § 606(1) (1938).

But there is no constitutional value in false statements of fact.<sup>5</sup>

We are not persuaded that, . . . 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 [defendant’s] column imply an assertion that [the plaintiff] perjured himself in a judicial proceeding . . . . This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that [the plaintiff] committed the crime of perjury.<sup>6</sup>

## I. INTRODUCTION

Exactly twenty years ago, the Supreme Court handed down a decision whose narrow question belied its broader effect on the First Amendment.<sup>7</sup> In *Milkovich v. Lorain Journal Co.*,<sup>8</sup> Chief Justice Rehnquist, writing for the majority, held that defendants to defamation actions would no longer be protected by a finding that their statement was “opinion” as opposed to “fact.”<sup>9</sup> Given the linguistic difficulty of dichotomizing statements that way, the Court declined to exonerate otherwise defamatory utterances just because the speaker might place the words “I think” or “in my opinion” before such contentious words as “Jones is a liar,” “Smith is a thief,” etc.<sup>10</sup> The few commentators on the case, both at the time and on other anniversaries of *Milkovich* since then, agreed that the narrow holding made good sense, not only as a matter of language, but also of common law precedent and of First Amendment doctrine.<sup>11</sup> Although New York’s state court went on to afford protection to opinions under its own constitution,<sup>12</sup> some

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5. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

6. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990).

7. See *Milkovich*, 497 U.S. 1.

8. *Id.*

9. *Id.* at 19.

10. See *id.*

11. After a flurry of immediate scholarly attention, which this Article cites piecemeal throughout, there have been several retrospectives. See, e.g., Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL RTS. J. 467, 478–98 (1994) (discussing the facts of *Milkovich* and the Court’s opinion); M. Eric Eversole, Note, *Eight Years After Milkovich: Applying a Constitutional Privilege for Opinions Under the Wrong Constitution*, 31 IND. L. REV. 1107, 1116–28 (1998) (examining the holding of *Milkovich* and its treatment in lower courts).

12. See *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270, 1277–82 (N.Y. 1991), cert. denied, 500 U.S. 954 (1991). See generally Nancy K. Bowman, *Milkovich Meets Modern Federalism in Libel Law: The Lost Opinion Privilege Gives Birth to Enhanced State Constitutional Protection*, 42 DEPAUL L. REV. 583, 615 (1992) (“[T]he *Immuno* state law method can insulate its opinion analysis from federal review and provide a safe harbor for media defendants.”). For a more recent appraisal of New York’s greater constitutional protection for opinion, see Justice Schlesinger,

commentators saw *Milkovich*'s clarification of some confusion in the lower federal courts on this issue as salutary.<sup>13</sup>

This Article springboards from an acceptance of the dissolution of the fact/opinion dichotomy to a far broader inquiry about the implications of *Milkovich* for key First Amendment principles. I contend that the decision precisely reverses the constitutional logic of breaking down the distinction between fact and opinion—instead of worrying that opinions might hide factual falsehoods as the Court does in *Milkovich*, the First Amendment confidently expects informed listeners to interpret even false factual statements as nothing more than the opinion of the speaker. I argue that the 1990 reasoning thus utterly deflates the aspirations of one of its purported precedents, *New York Times Co. v. Sullivan*,<sup>14</sup> and expands a trend already present in some post-*Sullivan* cases—to strip the Warren Court's masterpiece bare of all but its well-known “actual malice” holding,<sup>15</sup> namely that a public official suing for defamation must prove that the speaker knew the statement was false or uttered it with reckless disregard for its truth or falsity.<sup>16</sup> Especially at risk under Justice Rehnquist's reasoning in *Milkovich* is the First Amendment's *faith in the audience*, in listeners' ability to decide for themselves, without judicial guidance or protection, both the meaning and the import of a statement, particularly a statement about matters of public concern. I argue that the twenty-year-old precedent joins with other cases before and since to create the image of a passive audience, capable of gathering, but not assessing, new information and needful of the paternalistic hand of judges to avoid the pitfalls of ordinary human communication. We are still suffering in 2010 from *Milkovich*'s pessimistic bypath.<sup>17</sup>

Lost to us today, I argue, is the notion of the *interpreting audience* that pervades the pages of *Sullivan*.<sup>18</sup> With its roots in excellent common law sources cited by the Warren Court,<sup>19</sup> this focus on the audience needs to be revived in every generation. The First Amendment, in this view, encourages audiences as much as speakers. For this Internet age, where the acquisition of raw data has become a universal hobby but the assumption is often that

*Statements in Newspaper Articles Deemed Protected Opinion When Viewed in 'Context,'* N.Y. L.J., May 13, 2005, at 19 (providing a summary of a New York defamation case).

13. See, e.g., Catherine Calhoun, Case Comment, *First Amendment Does Not Provide Absolute Protection for Statements of Opinion in Libel Actions: Milkovich v. Lorain Journal Co.*, 25 SUFFOLK U. L. REV. 221, 227 (1991) (“By stating that *Gertz* did not create an absolute privilege for opinions, the Court [in *Milkovich*] corrects the lower courts' mistaken reliance on its dicta.”).

14. 376 U.S. 254 (1964).

15. See *infra* Part III.

16. *Sullivan*, 376 U.S. at 279–80 (discussing the standard for actual malice).

17. See *infra* Part VIII.

18. See *Sullivan*, 376 U.S. at 270 (“[I]t is hazardous to discourage thought, hope and imagination.” (quoting *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring))).

19. See *id.* at 280 n.20 (citing a number of state court decisions adopting variations of the “actual malice” standard).

audiences are incapable of digesting the data in any but the most simplistic ways, this Article also seeks to reinvigorate the citizen–interpreter—one who can parry, through thought and action, both the sheer mass of data and the piling on of huge amounts of corporate dollars.<sup>20</sup>

In setting *Milkovich* as dramatically opposed both to *Sullivan* and the common law, this Article reconstructs a citizenry that zestfully learns about and reflects upon matters of public importance and then reverses the flow of discourse that it considers false or otherwise ill-advised. I endeavor to recapture *Sullivan*’s insistence—now long since abandoned—that factual falsehoods play a special and constitutionally protected role in moving audiences to assess and improve the informational flow on matters of public concern.<sup>21</sup> This Article, in so doing, endeavors to answer such influential critics of *Sullivan* as Robert Post<sup>22</sup> and Richard Epstein.<sup>23</sup> In different ways, these critics—who do not spill much ink on *Milkovich*’s dubious doctrine<sup>24</sup>—have lost sight of the acquisitive interpreter and her self-protecting citizen role.

20. For a brief discussion of the recently decided *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), see *infra* Part VIII. I cast a vote for the outcome on the basis of this entire Article’s reasoning, and therefore my endorsement of the extension to corporate dollars of free political speech has nothing to do with the corporate speaker’s rights and everything to do with the First Amendment aspiration that audiences can field and interpret for themselves all public discourse. Nonetheless, critics of the new case may well fear the audience’s ability in 2010 to weigh, as opposed to receive, information. “Over the past year, Americans have spent an average of 11.8 hours a day consuming information, sucking up, in aggregate, 3.6 zettabytes of data and 10,845 trillion words.” William Falk, Op-Ed, *Should Old Articles Be Forgotten*, N.Y. TIMES, Dec. 29, 2009, at A31. A far more conservative monthly estimate is Nielsen//NetRatings’s 13.73 hours of Internet usage. Press Release, Nielsen//NetRatings, U.S. Internet Usage Shows Mature Growth, Forcing Innovation of New Web Offerings, According to Nielsen//NetRatings 1 (Mar. 18, 2005), [http://www.nielsen-online.com/pr/pr\\_050318.pdf](http://www.nielsen-online.com/pr/pr_050318.pdf). But data acquisition for its own sake does not guarantee careful political balancing as is indicated by the increasing trend to choose sites already aligned with the citizen’s preconceived interpretations. See, e.g., John Harwood, *If Fox Is Partisan, It Is Not Alone*, N.Y. TIMES, Nov. 2, 2009, at A12. For an interesting take on the downside of mere data, see GEOFFREY HARTMAN, SCARS OF THE SPIRIT 85–99 (2002). Data acquisition is in the service of “simple themes” as opposed to interpretive thought. See Richard W. Stevenson, *The Muddled Selling of the President*, N.Y. TIMES, Jan. 31, 2010 at WK1.

21. See *Sullivan*, 376 U.S. at 271 (“[E]rroneous statement is inevitable in free debate, and . . . it must be protected . . .”).

22. See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 612 & n.47 (1990) [hereinafter Post, *Constitutional Concept*]; Robert C. Post, *Defaming Public Officials: On Doctrine and Legal History*, 1987 AM. B. FOUND. RES. J. 539, 556 [hereinafter Post, *Review Essay*] (book review).

23. See Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 817–18 (1986) [hereinafter Epstein, *Was Times Wrong?*].

24. Professor Post does highlight the rhetorical slipperiness of the *Milkovich* majority: “Chief Justice Rehnquist’s opinion is rhetorically adept . . . . But the argumentative structure of the opinion is obscure, making it difficult to discern a crisp course of reasoning.” See Post, *Constitutional Concept*, *supra* note 22 at 612. I return to this key aspect of the Chief Justice’s performance in Part II, having written about his rhetorical legerdemain in a different constitutional context. See Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd*,

This Article proceeds by reverse chronology through three paradigmatic First Amendment cases, beginning with a thorough discussion of *Milkovich*. Next, *Milkovich*'s most influential precedent, *Gertz v. Robert Welch, Inc.*,<sup>25</sup> is shown to have departed from the basic First Amendment spirit of *Sullivan*, so that the move made twenty years ago becomes almost inevitable once we understand that the seminal Warren Court aspirations had already been abandoned. Then, this Article contrasts *Sullivan* and its explicitly emphasized common law roots in the privilege of fair comment on matters of public concern with the approach in the later cases. Here, this Article foregrounds the common law so vital to the 1964 decision in three varieties: English cases providing a privilege to libel where audiences are assumed to have a sufficient interpretive capacity; the *Restatement (First) of Torts* and *Restatement (Second) of Torts* in the United States; and American state court "majority rule" decisions, which for awhile departed from the *Restatements*' interpreting audience model but then were corrected by *Sullivan*'s formal elevation of the "minority" approach within the states regarding the privilege. Remarkably, mainstream First Amendment analysis has utterly lost this formal co-holding of the 1964 decision almost from the start,<sup>26</sup> and *Milkovich* compounds the confusion. The Article then contextualizes the highly relevant *Sullivan*-progeny cases on hyperbole and exaggerated speech, and it concludes by expanding on its central notion of the *interpreting audience*—the conjuration for the year 2010 of an aggressive, publicly oriented listener and speaker who is not distracted by gossip, satire, or the onslaught of raw data for its own sake, but rather seeks to understand and contextualize information with the aim of becoming a more knowledgeable and active citizen.

## II. MILKOVICH REHEARSED

A dispute that preoccupied the Cleveland suburbs of Mentor and Maple Heights, Ohio, for many months originated when two high school wrestling teams started to brawl during a scheduled match.<sup>27</sup> Differences of opinion quickly ensued as to whether the Maple Heights High School's coach, Milkovich, had goaded his team to fight the other wrestlers or, in his version,

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Sailor with an Application to Justice Rehnquist, 57 N.Y.U. L. REV. 1, 42–58 (1982). My article was cited on the floor of the Senate by then Senator Joseph Biden in an attempt to block Rehnquist's ascent to Chief Justice. 132 CONG. REC. 23,759 1986 (statement of Senator Biden).

25. 418 U.S. 323 (1974).

26. See *infra* Part IV. However, for an early and brilliant exception, see Harry Kalven, Jr., *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 193–94.

27. See David Margolick, *How a '74 Fracas Led to a High Court Libel Case*, N.Y. TIMES, Apr. 20, 1990, at B8 (discussing the aftermath of the melee on the communities including "a series of house-to-house bottle drives and spaghetti dinners" to raise money to appeal Maple's suspension).

had ordered them to return to the bench and cease the extracurricular hostilities.<sup>28</sup> One of Coach Milkovich's critics was J. Theodore Diadiun, a reporter for *The News-Herald* of Willoughby, Ohio.<sup>29</sup> After the coach formally testified at a School Board hearing into the fracas, Diadiun wrote a column in which he opined that Milkovich had lied to the Board about his role in the incident.<sup>30</sup> Among Diadiun's allegedly defamatory statements, which also implicated Maple Heights's Superintendent of Schools, H. Donald Scott, were the following:

I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing . . . so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.

Any resemblance between the two occurrences [*sic*] is purely coincidental.

. . . .

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.<sup>31</sup>

The lawsuit bounced back and forth for more than a decade from a variety of Ohio court First Amendment decisions to two separate denials of certiorari by the United States Supreme Court.<sup>32</sup> Finally, the Ohio courts having dismissed

28. See *id.* ("Contrary to the coach's account, the columnist asserted, Mr. Milkovich had baited officials, egged on the excited crowd and finally stood by when the fight erupted.").

29. See *id.*

30. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 4–5 (1989).

31. *Id.* at 6–7 n.2 (alteration in original) (internal quotations marks omitted).

32. Diadiun's article led to two subsequent libel actions—one involving Coach Milkovich and another involving Superintendent Scott. For Milkovich's action, the trial court initially entered a directed verdict, holding that Milkovich failed to satisfy the *Sullivan* "actual malice" test. See *Milkovich v. Lorain Journal Co.*, 416 N.E.2d 662, 665–66 (Ohio Ct. App. 1979). The Ohio Court of Appeals held, however, that the trial court should have allowed the jury to consider whether the defendants "acted upon a reliable source"; thus, it reversed and remanded. *Id.* at 667, *cert. denied*, 449 U.S. 966 (1980). On remand, the trial court entered summary judgment for the newspaper, finding that the article was an expression of opinion; the Ohio Court of Appeals affirmed. *Milkovich v. News-Herald*, 473 N.E.2d 1191, 1193 (Ohio 1984), *cert. denied*, 474 U.S. 953 (1985). The Supreme Court of Ohio reversed and remanded, however, finding Diadiun's statements to be "factual" in nature. *Id.* at 1196–97. Shortly thereafter, in Superintendent Scott's libel action, the Supreme Court of Ohio once again determined whether Diadiun's statements were "factual." *Scott v. News-Herald*, 496 N.E.2d 699, 701 (Ohio 1986). This time, the court held that they were "opinion." *Id.* Thus, when the Ohio Court of Appeals decided *Milkovich* on remand, it relied on the precedent created by Superintendent Scott's action and held that the statements were "opinion." *Milkovich v. News-Herald*, 545 N.E.2d 1320, 1324 (Ohio Ct. App. 1989), *cert. granted*, 493 U.S. 1055 (1990). It was this holding that led to the famous Supreme Court appeal twenty years ago. See *id.* For a succinct history of the events leading to the Supreme Court's *Milkovich* opinion, see



the complaint because the column was constitutionally protected “opinion,” the Supreme Court reversed.<sup>33</sup> The majority decision by Chief Justice Rehnquist essentially found that facts are difficult to separate from opinions,<sup>34</sup> that audiences need to be wary when the latter hide factual falsehoods,<sup>35</sup> and that there was never meant to be a blanket First Amendment protection of “opinions.”<sup>36</sup>

Key to understanding the speech act Milkovich claimed to be libelous is its context—virtually everyone in the community who saw Diadiun’s column already knew about the event.<sup>37</sup> It was a classic common law<sup>38</sup> and First Amendment “matter[] of public concern.”<sup>39</sup> Regarding libel cases brought

Daniel Anker, Case Comment, *Milkovich v. Lorain Journal Co.: The Balance Tips*, 41 CASE W. RES. L. REV. 613, 614–16 (1991).

33. *Milkovich*, 497 U.S. at 23.

34. *See id.* at 18–19.

35. *See id.* at 19.

36. *See id.* The dissenting opinion by Justice Brennan, joined only by Justice Marshall, has been found wanting by at least one commentator because it essentially “agrees with the majority opinion in rejecting [an exemption for opinions]” and disagrees only with the majority’s finding that Diadiun had implied a false factual basis for his conclusion about Milkovich. Anker, *supra* note 32 at 625 (citing *Milkovich*, 497 U.S. at 26–33 (Brennan, J., dissenting)). On the terms of this Article, the dissent basically joins forces with the majority’s idea that the audience always needs judicial help to fetter out any factual falsehood. *See infra* Part IV.B. Still, the dissent quite significantly stresses the audience in finding that “[n]o reasonable reader could understand Diadiun to be impliedly asserting—as fact—that Milkovich had perjured himself.” *Milkovich*, 497 U.S. at 30 (Brennan, J., dissenting). As I shall discuss, this dissenting language comports with the “hyperbole” cases, such as *Greenbelt Cooperative Publishing Ass’n v. Bresler*, 398 U.S. 6 (1970), and attempts—albeit weakly—to redeem the “interpreting audience” concept I stress throughout this Article.

37. *See* Margolick, *supra* note 27, at B8.

38. *See* RESTATEMENT (FIRST) OF TORTS § 566 cmt.a (1938) (“[D]efamation may consist of a comment upon some act or omission of another which is accurately stated by the person making the comment or which, because of its notoriety or otherwise, is known to the recipient. If such comment expresses a sufficiently derogatory opinion as to the conduct in question, it is defamatory and, unless it is privileged as fair comment, is actionable.” (citation omitted)). According to the *Restatement (First) of Torts*, “Criticism of so much of another’s activities as are matters of public concern is privileged if the criticism, although defamatory, (a) is upon, (i) a true or privileged statement of fact, or (ii) upon facts otherwise known or available to the recipient as a member of the public . . . .” RESTATEMENT (FIRST) OF TORTS § 606(1) (1938) (emphasis added). *Sullivan* elevated (a)(ii) above (a)(i) through its use of *Coleman v. MacLennan*. *See* N.Y. Times Co. v. *Sullivan*, 376 U.S. 254, 279–282 (1964) (citing and quoting *Coleman v. MacLennan*, 98 P. 281, 281–82, 285–86 (1908)). The key phrase “available to the recipient as a member of the public,” adequately encapsulates the long tradition of what I call here the “interpreting audience.” *See infra* Part IV.B.3. For further discussion of this proposition, see W. BLAKE ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER 192–93 (4th ed. 1905). The *Restatement (Second) of Torts* is fully in accord, categorizing the fair comment privilege and statements made on fully revealed facts as “opinion.” *See* RESTATEMENT (SECOND) OF TORTS § 566 cmt.a (1977).

39. *See* Rosebloom v. Metromedia, Inc., 403 U.S. 46 (1971); *Sullivan*, 376 U.S. at 270–71. Despite a misstep in *Gertz* to which I will return, more recent cases have made clear that statements on matters of public concern always get greater First Amendment protection. *See* Phila. Newspapers, Inc. v. *Hepps*, 475 U.S. 767, 776 (1986) (requiring a private figure plaintiff to prove falsity if suing upon a matter of public concern); *Dun & Bradstreet, Inc. v. Greenmoss Builders*,

against utterances in this context, the law had for a century and a half granted significant latitude to defendants whose remarks—otherwise false and tending to lower the plaintiff’s reputation—concerned issues *already accessible and of great interest to* the intended audience of the remark.<sup>40</sup> The idea, ensconced in England and America long prior to the constitutionalizing of the tort of libel,<sup>41</sup> seems to be subtly nuanced from the obvious goal of encouraging the *speaker* to debate key issues;<sup>42</sup> as important as that liberalization of libel law had been, I argue that the goal was even greater of encouraging the *audience* to be actively acquisitive of knowledge where public issues were involved. No single remark added to the verbal turmoil could so manipulate the knowledgeable audience as to divert it from its own consistent search for the truth. On the contrary, factual falsehoods, by provoking informed citizens, goad them to reexamine the issue and to move the discourse correctly forward.

Seen this way, Diadiun’s column and its allegation that Milkovich was a “liar” would be relatively insignificant compared to the wealth of information and comment that was already available to an audience presumptively trusted to do its own homework about the fracas. Some lower courts had so found, including in a collateral case in Ohio brought on roughly the same facts by Maple Heights’s school superintendent, Scott.<sup>43</sup> Despite the Supreme Court of Ohio’s holding that Milkovich was a private figure,<sup>44</sup> on remand the court of appeals protected the libelous reporter largely because it recognized that Diadiun’s article qualified as “opinion.”<sup>45</sup> The public discourse stakes required a

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Inc., 472 U.S. 749, 759–61 (1985) (implying that little or nothing of the First Amendment continues to control in the absence of a public concern utterance where a private figure sues a non-media defendant).

40. See RESTATEMENT (FIRST) OF TORTS § 606 cmt.a (1938); *infra* Part IV.

41. See Post, *Constitutional Concept*, *supra* note 22, at 627 (citing and quoting Tabart v. Tipper, (1808) 170 Eng. Rep. 981 (K.B.) 983–85 n.\*; 1 Camp. 349, 354–59 n.\*) (discussing the history of “public discourse” and expanding on an early English case involving book reviews that defined the privilege). For a far more extensive discussion of that case and others like it, see *infra* Part IV.A.2.

42. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ([T]he ultimate good desired is better reached by free trade ideas.”).

43. See *Scott v. News-Herald*, 496 N.E.2d 699, 708–09 (Ohio 1986) (noting that both the trial court and the court of appeals held that the Diadiun article was constitutionally protected speech and reasoning that “the allegations that Milkovich or Scott ‘lied’ . . . would appear to fall into the area of law where we protect some falsehood in order to protect speech that matters, particularly where, as in the instant case, the issues involved are of importance to the community and the vehicle for dissemination of the ideas is opinion” (citation omitted) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (internal quotation marks omitted))). For the facts of the *Scott* case, see *id.* at 700–701.

44. See *Milkovich v. News-Herald*, 473 N.E.2d 1191, 1195–96 (Ohio 1984) (“[W]e hold that for the purposes of defamation law and analysis . . . [Milkovich] is not a public figure or public official as a matter of law.”).

45. See *Milkovich v. News-Herald*, 545 N.E.2d 1320, 1324–25 (1989). The court did not elaborate on its decision to categorize the article as “constitutionally protected opinion,” but rather relied on the Supreme Court of Ohio’s consideration of the piece in *Scott*. See *id.* at 1324. In *Scott*, the court discussed “the broader context of the allegedly defamatory remarks” and implied that

defendant-favorable approach given, as they saw it, the state of constitutional law.<sup>46</sup>

The United States Supreme Court reversed.<sup>47</sup> It decided to utilize the dispute to focus on a single troubling subset of the rhetorical context cases sounding in libel. Were the lower courts correct, Chief Justice Rehnquist asked in his majority opinion, when they specifically exonerated *Diadium* and the newspaper by finding the column to be “opinion” as opposed to “fact”?<sup>48</sup> Although this narrowing of the categories of context-based libel jurisprudence under common law and First Amendment precedents was of course legitimate, and even perhaps necessary to correct some erroneous assumptions about the pristine nature of opinion statements, the analysis of *Diadium*’s remarks and the Court’s conclusion that *Milkovich* could proceed with his case<sup>49</sup> threaten the fabric of respect for the audience woven into years of common law and First Amendment jurisprudence.

After taking a shot at the thorny distinction linguistically examined in prior decades,<sup>50</sup> the Court decided that there was no sufficient First Amendment reason, when libel cases are brought, to immunize statements that appear to be opinion as opposed to fact.<sup>51</sup> In so doing, the Court explicitly sought to console the First Amendment community by citing (although distinguishing) what it saw

informed audiences would be perfectly capable of fielding the column’s inaccuracies. See *Scott*, 496 N.E.2d at 708–09.

46. See *Milkovich*, 545 N.E.2d at 1324.

47. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 23 (1990).

48. See *id.* at 10 (“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.” (citation omitted)). For the full list of rhetorical context cases that the *Milkovich* majority utilizes, including such leading libel cases as *New York Times Co. v. Sullivan*, 367 U.S. 254 (1964), *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), see *Milkovich*, 497 U.S. at 14–21.

49. See *id.* at 23 (remanding the case “for further proceedings”).

50. See *id.* at 17–23. Given the sophistication of the common law’s linguistic struggle with fact and opinion, Rehnquist’s analysis could be accurate but fairly rudimentary: “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.” *Id.* at 18. On the other hand, given the precedents on matters of public concern, Rehnquist’s analysis could be misleading: “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.” *Id.* at 18–19. The common law rule is best understood as protecting—absent some kind of malice—a factual falsehood, as long as it is fully articulated or presumptively available to the audience. See RESTATEMENT (SECOND) OF TORTS § 566 (1977) (“A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.”); RESTATEMENT (FIRST) OF TORTS § 606 cmt. c (1938) (“[T]he fact that the comment or criticism is one which is not reasonably warranted by the facts upon which it is based is immaterial.”); *Kalven*, *supra* note 26, at 195 n.18 (“It is arguable that the fair-comment concept has been awkwardly put in the [majority-rule] common-law decisions and that what is really involved is the degree to which the underlying facts are disclosed when the opinion is expressed and the inference drawn.”).

51. See *Milkovich*, 497 U.S. at 19.

as sufficient precedential protection for speakers under *Sullivan* and its progeny.<sup>52</sup>

As we shall now see, the Court—correct in setting straight at least a small part of a confusing dictum in its 1974 *Gertz* case<sup>53</sup>—made several highly questionable analytical moves under the First Amendment. One, it effectively reversed the reasoning of *Sullivan* by fearing factual falsehoods masked as opinions,<sup>54</sup> when *Sullivan* in fact protected most factual falsehoods and implicitly saw them as statements that knowledgeable audiences would understand to be just the opinion of the speaker.<sup>55</sup> Two, it failed to see that its precedents dealing with “hyperbole”<sup>56</sup> directly related to the issue before it and did not occupy a discrete, separate “box” apart from the issues in *Milkovich*,<sup>57</sup> hence, it missed (perhaps wilfully) its best opportunity to test the effect upon audiences of speech in certain overheated or debate-inspiring contexts. Three, it badly misconstrued the common law of fair comment on matters of public concern that *Sullivan* had deliberately invoked to protect the factual falsehoods in that case.<sup>58</sup> In this, perhaps its most crucial “mistake,” *Milkovich* either

52. See *id.* at 18. Arguing that the Court should protect its speech, the *Lorain Journal Company* relied on dictum from *Gertz*: “[T]here is no constitutional value in false statements of fact.” *Id.* (quoting *Gertz*, 418 U.S. at 340) (internal quotation marks omitted). The Court, however, distinguished *Gertz*: “[W]e do not think . . . *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled ‘opinion.’” *Id.*

53. *Id.* at 17–19. For the confusing dicta in *Gertz*, see *Gertz*, 418 U.S. at 339–340. Also, for further discussion of the *Gertz* clarification in *Milkovich*, see *infra* Part III.

54. See *Milkovich*, 497 U.S. at 18–19.

55. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964).

56. See *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 285–86 (1974); *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 14 (1969). For further discussion on both of these cases, see *infra* Part V.

57. See *Milkovich*, 497 U.S. at 16–17, 20.

58. See *id.* at 11–14. Perhaps distracted by the Chief Justice’s dexterous rhetoric, even authoritative readers of this tradition miss or downplay greatly the place falsehoods hold in testing the audience that the tradition had previously deemed trustworthy. For example, Professor Post in his article, *The Constitutional Concept of Public Discourse*, acknowledges what he calls the “curious and muddy distinction between fact and opinion,” Post, *Constitutional Concept*, *supra* note 22, at 605, but then accepts without much consistency the idea that “[f]alse statements of fact are particularly valueless,” Post, *Constitutional Concept*, *supra* note 22, at 613 (alteration in original) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988)) (internal quotation marks omitted). Furthermore, Post, in a 1987 essay, relies on the very dichotomy created by *Gertz* that Rehnquist undermines in *Milkovich* by stating, “Not that untrue statements of fact have inherent First Amendment value . . .” Post, *Review Essay*, *supra* note 22, at 550. But in *Sullivan*, after discussing the common law minority rule protecting “honest misstatements of fact,” *Sullivan*, 376 U.S. at 282 n.21, the Court explicitly adopted the rule, *id.* at 283, and integrated almost all of *Coleman*. See *Sullivan*, 376 U.S. at 280–82 (“In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office.” (quoting *Coleman v. MacLennan*, 98 P. 281, 285 (Kan. 1908))). Professor Post, however, also accepts the skepticism explicit in *Gertz*—but not extended beyond that case—to the whole idea of courts defining “matters of public concern,” see Post, *Constitutional Concept*, *supra* note 22, at 679 (quoting *Dun & Bradstreet, Inc. v.*

overruled *Sullivan* while always pretending to preserve it or—at best—stripped its reasoning down to the well-known actual malice rule and that alone. Four, it furthered a skeptical and patronizing view of the audience’s capacity to field potential libels on its own and without the intervention of courts, thus reversing a profound and longstanding contribution of common law and First Amendment thought. Five, it set state courts to the task of reconciling pre-*Milkovich* cases with the fear of audiences that the Court expounded in its majority decision.<sup>59</sup>

### III. THE USE AND ABUSE OF *GERTZ* IN *MILKOVICH*

*Gertz v. Robert Welch, Inc.*, decided exactly a decade after *Sullivan*, handed down a comprehensive reassessment of the First Amendment regarding the law of libel. A whole new mix of Justices started to fiddle with the master case of ten years before and provided a precedent this Article sees fulfilled in *Milkovich*: pay lip service to (and retain the narrow holding of) *Sullivan*, while essentially debunking the rest of that precedent.<sup>60</sup> Interestingly, Chief Justice Rehnquist, a relative newcomer to the *Gertz* Court of 1974,<sup>61</sup> correctly perceives in his *Milkovich* opinion one—but only one—of the *Gertz* errors.<sup>62</sup> In a famous—or better, infamous—dictum, *Gertz* threw off the following dubious remarks:

We begin with the common ground. 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

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Greenmoss Builders, Inc. 472 U.S. 749, 761 (1985)), and this even though Post approvingly cites the common law approach originating in the book review cases, *id.* at 627–29. In Part VI, I will discuss this paradox briefly. Professor Post gives surprisingly short shrift to the minority rule of *Coleman* in *The Constitutional Concept of Public Discourse*, see *id.* at 627 n.44, and in his later *Review Essay*, see Post, *Review Essay*, *supra* note 22, at 544 (citing *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908)). For his part, Professor Epstein similarly disparages, through the extreme brevity of his treatment, the crucial common law source of constitutional doctrine, and this is even more provocative because he concludes that the common law would largely have sufficed to resolve the conflict in *Sullivan*! See Epstein, *Was Times Wrong?*, *supra* note 22, at 795–796.

59. See Bowman, *supra* note 12, at 613 (citing *Immuno AG v. Moor-Jankowski*, 567 N.E.2d 1270, 1277–80 (N.Y. 1991)) (discussing New York courts’ use of their state constitution to protect opinions left unprotected after *Milkovich*). For a more recent appraisal of New York’s greater constitutional protection for “opinion,” see Justice Schlesinger, *supra* note 12, at 19.

60. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–50 (1974) (“Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*.”).

61. See PETER CHARLES HOFFER ET AL., *THE SUPREME COURT: AN ESSENTIAL HISTORY* 373–74 (2007) (noting that Rehnquist joined the court in January of 1972).

62. See *Milkovich*, 497 U.S. at 18–19.

and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.<sup>63</sup>

Judges across the country inferred the following syllogism from the *Gertz* dictum: a defamatory utterance is actionable only if it contains a statement of fact that is proven false; opinions (*Gertz*'s "ideas") cannot be proven false; therefore, opinions—no matter how derogatory—can never be actionable.<sup>64</sup> By the time the Court decided *Milkovich*, "every federal circuit and the courts of at least thirty-six states and the District of Columbia had held that opinion is constitutionally protected . . . ."<sup>65</sup>

The leading case was *Ollman v. Evans*,<sup>66</sup> which tried to provide guidelines so that courts might distinguish opinion statements from factual assertions and then move to immunize the former.<sup>67</sup> The liberal desire to protect opinions and castigate facts as though they were separable was (as we have seen) not really consistent with the common law's urge to protect and occasionally conflate both;<sup>68</sup> a rich mine worked to finer or grosser effect in the Chief Justice's *Milkovich* opinion.

*Ollman* scrutinized statements as to their "full context," their "verifiability," and their specific language's "common usage or meaning."<sup>69</sup> *Ollman*'s fourth additional factor is particularly important, as it endeavors to reestablish in this new, somewhat artificial, fact-opinion bifurcated world the idea of *faith in the audience*: "[The court] consider[s] the broader context or setting in which the statement appears. Different types of writing have, . . . widely varying social

63. *Gertz*, 418 U.S. at 339–40 (footnote omitted). Geoffrey Stone, in a fine, recent book about other aspects of the First Amendment—and without commenting on the concluding sentence of the dictum cited above—refers to the Court's opening gambit as "perhaps its single most important sentence on the freedom of speech . . . ." GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 75 (2004). The Court's second sentence does seem to recapitulate the spirit of both *Sullivan*, see *Sullivan*, 376 U.S. at 269–70, and a whole tradition of free speech thought. See Thomas Jefferson, First Inaugural Address in Washington, D.C. (March 4, 1801), reprinted in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES* 13, 15 (U.S. Gov't Printing Office, Bicentennial ed. 1989) ("[E]very difference of opinion is not a difference of principle."). But trouble lay directly ahead in the dictum for everything within that very tradition. Without "passing go," so to speak, the *Gertz* Court put that tradition in jail.

64. See ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* § 4.2.3.1 (3d ed. 2009) ("Court after court employed the *Gertz* language as a mandate for a constitutionally based rule providing immunity for all expressions of opinion.").

65. *Id.*

66. 750 F.2d 970 (D.C. Cir. 1984) (en banc).

67. *Id.* at 1020–26.

68. Compare RESTATEMENT (FIRST) OF TORTS § 606 (1938) (stating that criticisms are protected if they are based upon facts known to the public or if they are the actual opinion of the critic), with SACK, *supra* note 64, at § 4.2.3.2 ("The post-*Gertz* cases left courts with a single though by no means easy task: deciding what was an assertion of fact, and therefore potentially actionable, rather than an opinion, which was necessarily protected.").

69. *Ollman*, 750 F.2d at 979.

conventions which signal to the reader the likelihood of a statement's being either fact or opinion."<sup>70</sup>

Other courts after *Gertz* also emphasized this idea of the audience's ability to figure out from context how to understand language that might (otherwise) seem literally factual and defamatory.<sup>71</sup> These courts varied slightly, if at all, from *Ollman*'s manner of separating opinion from fact—the Ninth Circuit, in *Underwager v. Channel 9 Australia*, covered almost identical ground but added an unfortunate concluding emphasis that hints at the fact-aversion of the Supreme Court during that confusing period:

First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format . . . . Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.<sup>72</sup>

*Underwager*'s final prong shows the baleful legacy of the *Gertz* dictum. For, despite its opening flourish—a trap for the unwary—*Gertz* on the whole had not furthered what would ordinarily be understood as *Sullivan*'s “liberal” First Amendment agenda.<sup>73</sup> Yes, criticism of public officials and—as the case law had already long held—public figures were protected by *Sullivan*'s “actual malice” rule.<sup>74</sup> But, as opposed to the mechanical rule, the heart and soul of the great case were falling by the wayside, and the key departure lay in two aspects of the dubious dictum in *Gertz* that gave rise to *Underwager* and its sister cases

70. *Id.*

71. See *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 366 (9th Cir. 1995); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302–03 (8th Cir. 1986).

72. *Underwager*, 69 F.3d at 366. See also *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1287–88 (4th Cir. 1987) (citing *Ollman*, 750 F.2d at 979–84) (adopting an analysis similar to *Ollman*).

73. Compare *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”), with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“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 public issues.” (quoting *Sullivan*, 376 U.S. at 270)). For examples of decisions grasping to maintain the *Sullivan* tradition during the *Gertz* to *Milkovich* period, see *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 685 (4th Cir. 1989) (citing *Potomac Valve*, 829 F.2d at 1287–88; *Ollman*, 750 F.2d at 970); *Deupree v. Iliff*, 860 F.2d 300, 303 (8th Cir. 1988) (citing *Janklow*, 788 F.2d at 1302–03); *Janklow*, 788 F.2d at 1302 (citing *Ollman*, 750 F.2d at 970); *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 341 (Tex. App. 1988) (citing *Ollman*, 750 F.2d at 978–84).

74. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154–55 (1967).

in the lower federal courts: One, a perceived distinction between fact and opinion strongly privileging the latter and dubious about the former; and two, the implication that any statement seemingly containing a factual element (i.e., most expository human discourse) was to be distrusted and its content closely scrutinized against any possible falsehood. Many lower courts embraced the first element here,<sup>75</sup> hence finding an audience-sensitive tool to protect “opinion.” In the process, however, they left alive and well the other part of the *Gertz* dictum<sup>76</sup>: “[T]here is no constitutional value in false statements of fact.”<sup>77</sup>

Yet, *Sullivan* precisely had held that the challenged ad’s factual errors contributed to the kind of debates needed on issues of public concern:

The question is whether [the advertisement] forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . and especially one that puts the burden of proving truth on the speaker . . . .

. . . .

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.<sup>78</sup>

Furthermore (and concurrently), *Sullivan* had drawn from American common law cases the rule that factual falsehoods on matters of public concern were *equally* as protected as were opinions and comments, or *Gertz*’s “ideas.”<sup>79</sup>

Thus, there were paradoxical outgrowths of the *Ollman* era. On one hand, courts liberally protected—while they still had the toy that *Milkovich* grabbed from their judicial hands—any statement that looked like an “opinion”;<sup>80</sup> on the

75. See SACK, *supra* note 64, § 4.2.3.1 (citing more than thirty-six state court decisions holding opinion to be constitutionally protected after *Gertz*).

76. See *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1114 (6th Cir. 1978) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974)); *Miss. Gay Alliance v. Goudelock*, 536 F.2d 1073, 1079 n.10 (5th Cir. 1976) (quoting *Gertz*, 418 U.S. at 340).

77. *Gertz*, 418 U.S. at 340.

78. *Sullivan*, 376 U.S. at 271–73. For a discussion of the second holding of *Sullivan*, see *infra* Part IV.B.2.

79. See *Sullivan*, 376 U.S. at 271–80.

80. See *Potomac Valve & Fitting Co. v. Crawford Fitting Co.*, 829 F.2d 1280, 1288 (4th Cir. 1987) (“We hold that a verifiable statement, . . . nevertheless qualifies as an ‘opinion’ if it is clear from *any* of the three remaining *Ollman* factors, individually or in conjunction, that a reasonable reader or listener would recognize its weakly substantiated or subjective character—and discount it accordingly.”); *Mr. Chow of N.Y. v. Ste. Jour Azur S.A.*, 759 F.2d 219, 226–27 (2d Cir. 1985) (applying *Ollman* to find that five of the six statements involved in the suit were opinions).



other hand, they furthered, in that very process, a debilitating distrust of statements that could not be thought of as other than “factual.”<sup>81</sup> In so doing, particularly regarding utterances on matters of public concern, courts fell into the *Gertz* dictum trap by gradually eliminating *Sullivan*’s protection of factual falsehoods,<sup>82</sup> which were seen not only as benign and inevitable in all zesty debates, but also useful to knowledgeable audiences within that context.<sup>83</sup> Under *Sullivan*, only actual malice, rare and very hard to prove, would curtail the willingness of courts to tolerate opinion and factual sloppiness where vigorous debate was mandated; this was the very rule from *Coleman v. MacLennan* that was constitutionalized.<sup>84</sup>

When *Milkovich* corrected the first *Gertz* dictum misstep, the Court should have gone all the way—particularly since it purported to safeguard *Sullivan* and certain audience-sensitive progeny<sup>85</sup>—and corrected the second indefensible statement: “[T]here is no constitutional value in false statements of fact.”<sup>86</sup> But this is seemingly not what the Chief Justice wanted. Distrustful of the audience’s ability to field most factual falsehoods, the Court lamentably continued the momentum from *Gertz* and insisted that all utterances about matters of public concern henceforth be scrutinized to detect the possibility of some factual falsehood lurking under the surface of an apparent opinion.<sup>87</sup>

It is time to develop further the strong speech-protective common law tradition explicitly seized by *Sullivan* to protect not only opinions, but false statements of fact as well. This tradition, emphasized quite differently by prominent commentators like Post and Epstein,<sup>88</sup> stresses actual or presumed audience foreknowledge as key to libel suit actionability: where the speaker

81. See *Potomac Valve*, 829 F.2d at 1286 (“Ideas and opinions bear the personal imprint of the men and women who hold them. It is therefore particularly important to protect their unfettered expression, and a rule that chills statements of fact may be acceptable where a rule chilling opinions would not be.”); *Mr. Chow*, 759 F.2d at 229 (“The statement is not metaphorical of[r] hyperbolic; it clearly is laden with factual content. Moreover, the statement contains allegations that are seemingly capable of being proved true or false.”).

82. See, e.g., *Potomac Valve*, 829 F.2d at 1286.

83. See, e.g., *Dunlap v. Wayne*, 716 P.2d 842, 849 (Wash. 1986) (“Arguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statement themselves.”).

84. See *Sullivan*, 376 U.S. at 279–80 (citing *Coleman v. MacLennan*, 98 P. 281, 285 (Kan. 1908)).

85. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (“The *New York Times–Butts–Gertz* culpability requirements further ensure that debate on public issues remains ‘uninhibited, robust, and wide-open.’” (quoting *Sullivan*, 376 U.S. at 270)).

86. *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 340 (1974); see also Lisa Herskowitz, *One Bad Bit of Dictum Deserves Another: Gertz and Milkovich*, 24 CONN. L. REV. 1159, 1160 (1992) (rehearsing Rehnquist’s fatal incompleteness in eradicating *Gertz*’s dictum).

87. See *Milkovich*, 497 U.S. at 19–20.

88. Both commentators will be examined further in Part IV. For an additional work by Epstein, see Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003 (2000) [hereinafter Epstein, *The Dangers of First Amendment*].

either provides a factual predicate for the libelous utterance, *or* where the audience is assumed to have such knowledge or be capable of attaining it easily—especially regarding matters of public concern—opinions are protected.<sup>89</sup> The next step taken in *Sullivan* is to protect even *false* statements of fact where, again, the Court presumes the audience is responsible for attaining a knowledge base adequate to offset the last marginal falsehood thrown at it by a speaker adding to the cauldron of debate—as say in *Milkovich*—on matters of public concern.<sup>90</sup>

#### IV. *SULLIVAN*'S NEGLECTED SECOND HOLDING AND ITS COMMON LAW FAITH IN THE INTERPRETING AUDIENCE

##### A. *The Plaintiff-Friendly Common Law of Defamation and its Exception Regarding Matters of Common Knowledge*

###### 1. *Ordinary Defamation Suits*

The common law of defamation, as significantly reflected, for example, in the lower courts of Alabama<sup>91</sup> whose rulings provoked constitutional scrutiny in *Sullivan*, was remarkably helpful to plaintiffs, especially when their suit sounded in written libel as opposed to spoken slander.<sup>92</sup> The burden of proof, at least at the outset of the case, was satisfied by a showing of a defamatory utterance of and concerning the plaintiff that was published to at least one person besides the plaintiff.<sup>93</sup> With some exceptions generally sounding in slander cases, there was no requirement to show fault of any kind, damages of any kind, or even the falsity of the utterance.<sup>94</sup> The defendant was vouchsafed merely a “justification,” namely a showing that the utterance was substantially true, a burden imposed on the speaker and not his target.<sup>95</sup>

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89. See RESTATEMENT (FIRST) OF TORTS § 606 cmt. b (1938).

90. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72, 279–80 (1964).

91. See *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 37 Ala. 1962 (citing *White v. Birmingham Post Co.*, 172 So. 649, 652 (Ala. 1937); *Iron Age Pub. Co. v. Crudup*, 5 So. 332, 333 (Ala. 1889)).

92. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 776 (5th ed. 1984).

93. See *id.* § 111, at 771. On the general subject of this paper, this fifth edition, which of course could not have foreseen *Milkovich*, fairly confidently assumed that the “constitutional privileges are likely to encompass all *pure* opinions [e.g., those upon a fully stated factual predicate or regarding the privilege of fair comment], even those that have heretofore been regarded as false and actionable, that would make the expression of pure opinions non-actionable.” *Id.* § 113A, at 813.

94. *Id.* § 112, at 795. An exception for many slander (as opposed to libel) cases existed, but even here courts presumed damages for many merely slanderous utterances. *Id.* § 112, at 788.

95. See *id.* § 116, at 840.

## 2. *In Certain Subject Areas, a Defendant is Nonetheless Protected*

Long before *Sullivan*, however, British and American judges (or occasionally legislators) had framed broad exceptions for libel utterances that aimed at subject matters already known or knowable to their audiences.<sup>96</sup> As to core political speech—utterances having to do with public officials or government policies—many authorities listed such comments as non-defamatory, holding that every individual had a *right*, and not merely a privilege, to make them.<sup>97</sup> Similarly, vituperative literary criticism received strong protection.<sup>98</sup>

No doubt, of course, vitriol and exaggerated criticism poured upon a government official or a published book might well have a detrimental effect on a plaintiff's reputation; just as often (to this day), political commentators or reviewers of books may harm themselves more than the subject reviewed by making extreme and negative statements.<sup>99</sup> Those interested in finding something out for themselves need merely to refer to the data freely available. After all, a political issue or a book under review is optimally indicative of what we more generally call a “matter[] of public concern”<sup>100</sup>: it is a self-contained universe of all the information the interpreting audience will ever need. *They will make up their minds not through litigation, but through investigation.* The

96. See RESTATEMENT (FIRST) OF TORTS § 606 cmt. b (1938); Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1229 (1976) (citing *Popham v. Pickburn*, (1862) 158 Eng. Rep. 730 (Ex.) 733).

97. See, e.g., ODGERS, *supra* note 38, at 185 (“Fair reports are privileged, while fair comments, if on matters of public interest, are not libels at all.”).

98. See *Tabart v. Tipper*, (1808) 170 Eng. Rep. 981 (K.B.) 983 (“[I]t is not libelous to ridicule a literary composition, or the author of it, in as far as he has embodied himself with his work; and that if he is not followed into domestic life for the purposes of personal slander, he cannot maintain an action for any damage he may suffer in consequence of being thus rendered ridiculous.”). For a brief survey of some of these early English book review cases, see Post, *Constitutional Concept*, *supra* note 22, at 627 and John E. Hallen, *Fair Comment*, 8 TEX. L. REV. 41, 44–45 (1929). Remarkably similar in analysis and effect is the much more recent American case of *Moldea v. N.Y. Times Co.*, 22 F.3d 310 (D.C. Cir. 1994), where the D.C. Circuit held commentary in a book review was not actionable: “[W]hen a reviewer offers commentary that is tied to the work being reviewed, and that is a supportable interpretation of the author’s work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation.” *Id.* at 313.

99. See Douglas R. Robideaux, *A Longitudinal Examination of Negative Political Advertising and Advertisement Attitudes: A North American Example*, 10 J. MARKETING COMM. 213, 220 (2004) (“The affective response to negative advertisements was negative in the earlier 1992 study and continued to be, but at a much greater level.”).

100. See RESTATEMENT (FIRST) OF TORTS § 606 cmt. a (1938) (“Typical facts which, as matters of public concern, may be commented upon . . . are the public acts and qualifications of public officers and candidates for office, the management of educational, charitable and religious institutions, literary, artistic and scientific productions, and the conduct of persons who, by special appeal or otherwise, have offered their conduct or product to the public for approval.” (citations omitted)).

courts can step aside and let the “marketplace of ideas”<sup>101</sup> resonate and work its will.

Well into the twentieth century, there was debate in the United Kingdom and in the United States about whether comments on matters of public concern were so to be encouraged that—even if false and defamatory—they might be thought of as the speaker’s “right.”<sup>102</sup> But by the end of the nineteenth century, the common law in both countries largely saw comments on publicly important matters to provide a *qualified privilege* to defendants who could not “justify” their defamatory utterances by proving their substantial truth.<sup>103</sup> The privilege of “fair comment,” which in England has been embodied statutorily,<sup>104</sup> was generally called the privilege of fair comment on matters of public concern.<sup>105</sup> A non-justifying defendant asserting this privilege might prevail (despite the inability to prove substantial truth) unless the plaintiff defeated the privilege by showing one form or another of “malice.”<sup>106</sup>

However, a major issue remained unsettled, one that in a real sense awaited *Sullivan* for its ultimate resolution: Did the privilege of fair comment help a defendant who based his “comment” (or opinion) on a fully stated but ultimately

101. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For further discussion of this concept, see *infra* note 184.

102. See, e.g., *S. Hetton Coal Co. v. Ne. News Ass’n*, [1894] 1 Q.B. 133 (C.A.) 143 (appeal taken from Eng.) (“I am clearly of opinion that a matter like this now before the Court may be made the subject of hostile criticism and of hostile animadversion, provided the language of the writer is kept within the limits of an honest intention to discharge a public duty.”); Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 877 (1949) (“There is controversy as to whether fair comment is to be regarded as privileged defamation or as entirely outside the scope of actionable defamation.”). Note, however, that the “right-not privilege” approach—now generally discarded—was a double-edged sword for some defendants, and perhaps particularly those who could not prove the factual predicates on which they laid their “right” to comment. At this point, for some authorities, the “right” disappeared altogether! See, e.g., RESTATEMENT (SECOND) OF TORTS § 566 cmt. b (1977) (“It was the first, or pure, type of expression of opinion to which the privilege of fair comment [on matters of public concern] was held to apply. [However, s]ome courts and commentators took the position that the true explanation of the defense of fair comment was not that the statement was made on a privileged occasion but that, not being actually a false statement of fact, it could not be a defamatory communication. [The Restatement (First) of Torts] set out the principles of the privilege of fair comment in §§ 606–10; it did not espouse this position.”). The “right,” in other words, ended exactly where the majority privilege jurisdictions placed it prior to *Sullivan*—at the first appearance of a factual error. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964).

103. See Noel, *supra* note 102, at 877–78. A leading British book review case, after finding little practical difference between the right and the privilege, opted for the latter. See *McQuire v. W. Morning News Co.*, [1903] 2 K.B. 100 (Eng.) 112.

104. See Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66, § 6 (Eng.) (“In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defen[s]e of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.”).

105. See RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977); RESTATEMENT (FIRST) OF TORTS § 606 cmt. a (1938).

106. See KEETON ET. AL., *supra* note 92, § 115, at 832–35.

false factual predicate? Although at least one court held that “harmless” or “minute” factual errors did not obliterate the privilege,<sup>107</sup> a real split occurred—especially in the United States—as to whether factual falsehoods closely tied to the defamatory opinion either would receive protection (the “minority rule”) or would utterly destroy the privilege *ab initio* (the “majority rule”).<sup>108</sup>

## B. Sullivan’s Second Holding, *All but Forgotten in Milkovich*

### 1. *The Old Way: Factual Falsehoods Actionable*

If the privilege created by common law had been understood to give safe harbor to the kinds of utterances litigated in *Sullivan*, for example, Professor Epstein would have been correct when he suggested in a famous article—published a score of years after that case—that the Warren Court overreached by not relying on available common law privileges.<sup>109</sup> But in one such area scanted by Professor Epstein, although absolutely crucial to an eventual understanding of the First Amendment (and *Milkovich*’s warping of doctrine to narrow its protections), a majority of American states had—prior to *Sullivan*—unprotected *factual falsehoods* predicated defamatory opinions.<sup>110</sup> Although in England there was always voice for the idea that the audience should work its way through to the truth on matters of public importance, as long as the speaker states or the audience generally knows the full factual record (true *or* with some significant errors),<sup>111</sup> even in the early book review cases, the privilege

107. See *S. Hetton Coal Co. v. Ne. News Ass’n*, [1894] 1 Q.B. 133 (C.A.) 143–44 (appeal taken from Eng.).

108. Noel, *supra* note 102, at 891 (“A definite majority of courts hold that there is no conditional privilege, with the result that immunity extends only to comment and opinion; but a number of jurisdictions have come to the opposite conclusion, and most of the scholars who have considered the question have followed this minority view.” (footnotes omitted) (citing George Chase, *Criticism of Public Officers and Candidates for Office*, 23 AM. L. REV. 346, 350–67 (1889); Hallen, *supra* note 98, at 61; Jeremiah Smith, *Are Charges Against the Moral Character of a Candidate for an Elective Office Conditionally Privileged?*, 18 MICH. L. REV. 104, 115 (1919))).

109. Epstein, *Was Times Wrong?*, *supra* note 22, at 791. Epstein locates two narrow areas in which the *Sullivan* Court might have less intrusively reversed the Alabama courts: (1) “the Court could have constitutionalized the ‘of and concerning’ requirement,” *id.* at 792, or (2) the Court could have struck down the Alabama verdict on grounds that the state court misapplied the law of damages because the court awarded \$500,000 in general and punitive when the Plaintiff only demonstrated slight actual damages, *id.* at 793–94. The Supreme Court was mindful of both these problems above. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 263–65 (1964). However, it explicitly sought resolution of the more portentous common law question discussed throughout this Article and especially in this Part. See *id.* at 267–68. Remarkably enough, in his brief discussion of relevant common law privileges, Professor Epstein minimizes fair comment, see *id.* at 785–86, the privilege most at play in *Sullivan*, see *Sullivan*, 376 U.S. at 292 n.30. For the implications of Epstein’s various forays into *Sullivan* and its progeny, see *infra* Part VI.

110. See Noel, *supra* note 102, at 891. For an authoritative count of “majority” versus “minority” jurisdictions, see *id.* at 891–97.

111. For example, British scholar W. Blake Odgers stated the following in his 1905 article:

disappeared if the defendant departed from a virtually error-free factual basis for the comment or opinion.<sup>112</sup> Since this meant that the privilege still required largely what the separate defense of proving truth had already imposed on defendants, going beyond a fully accurate factual base and springboarding to a defamatory comment usually eliminated the defendant's privilege.<sup>113</sup> So the mainstream common law approach to the privilege of fair comment on matters of public concern eventually did *not* protect comments based upon false statements of fact, and it was this so-called American "majority rule" that prevailed in the courts of Alabama against the *Times*.<sup>114</sup> If *Sullivan* had not corrected this and explicitly adopted the "minority rule" of *Coleman*,<sup>115</sup> almost all of the First Amendment juice—both doctrinal as to matters of public concern, and aspirational as to zesty debate and knowledgeable audiences—would have been sapped from the decision. It would not have done anywhere near the same work

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Sometimes, however, it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that "such conduct is disgraceful," this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. *In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded*; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defen[s]e but privilege or truth.

ODGERS, *supra* note 38, at 192–93 (emphasis added). Note, of course, that in *Milkovich*, as in *Sullivan*, the full factual predicate had been set out by the defendant, albeit making some errors. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 4–5 (1990); *Sullivan*, 376 U.S. at 256–59. *Sullivan* understood that the errors should be part of the evidence weighed by the audience about the defendant's ultimate judgments, *see id.* at 270–72; the twenty-year-old case fell off from that idea, *see Milkovich*, 497 U.S. at 17–23.

112. For example, in the British book review cases, if a reviewer went outside the book, it meant trouble. See *Merivale v. Carson*, [1888] 20 Q.B. 275 at 276–77 (Eng.) (recounting a jury decision for the plaintiffs in a case where the defendant reviewer's account allegedly included factual discrepancies).

113. See Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66, § 6 (Eng.) (suggesting that the defendant must prove at least the factual basis relevant to the alleged defamation).

114. See *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 37 (Ala. 1962) (citing *White v. Birmingham Post Co.*, 172 So. 649, 652 (Ala. 1937); *Iron Age Pub. Co. v. Crudup*, 5 So. 332, 333 (Ala. 1889)). The majority rule in effect replicated for matters of public concern the traditional necessity for a defendant to "justify"—to prove the substantial truth of the statement. See KEETON ET. AL., *supra* note 92, § 111, at 776. It is to this version of the rule—and not *Sullivan*'s correction of it—that Rehnquist cites in *Milkovich*. See *Milkovich* 497 U.S. at 12–15.

115. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). In *Coleman*, the defendant newspaper had misstated certain facts about the plaintiff, who was running for public office. *Coleman v. MacLennan*, 98 P. 281, 281 (Kan. 1908). Judge Burch paradoxically foreshadowed Chief Justice Rehnquist by seeing no bright-line distinction between fact and opinion, *id.* at 290; however, he concluded—and *Sullivan* constitutionalized, *see Sullivan*, 376 U.S. at 279–80,—that the absence of such a bright line meant that factual statements eventually seen to be false should be *protected* where audiences have the capacity to figure things out themselves, *see Coleman*, 98 P. at 291–92.

if the Court had corrected, on the analysis offered by Professor Epstein, only the “of and concerning” and “damages” components of the Alabama judgments.<sup>116</sup>

The advertisement in *Sullivan*—famously or infamously, depending on one’s perspective—was replete with *factual falsehood*.<sup>117</sup> Unable to “justify the inaccuracies,” the *Times*’s lawyers tried out the privilege of fair comment on matters of public concern.<sup>118</sup> But on the understanding of the common law—faulty, as we shall see, not only in Alabama but in most American courts as well—no privilege was available even upon stated (but false) factual premises.<sup>119</sup> Thus, in the courts below, the newspaper had no central free speech argument to make. This had to be corrected, and there was no need to write on a blank slate.

## 2. *Understanding Sullivan’s Common Law: Articulated False Statements of Fact Protected*

When the Warren Court handed down the *Sullivan* decision, it had a wealth of common law defamation knowledge and caselaw at its disposal, and it used these tools well.<sup>120</sup> The Court did not need to address the troubling issue of whether one can easily separate facts and opinions for free speech purposes (this awaited the infamous *Gertz* dictum and the strange speech-limiting logic of the dissolution of the dichotomy in *Milkovich*), for there simply was no getting around the record below: the newspaper had predicated its critique of Alabama’s law enforcement on several directly relevant factual errors.<sup>121</sup> Would the Court protect this erroneous predicate as much as the comment or opinion on the civil rights movement that formed the heart of the advertisement?<sup>122</sup> The Court’s reasoning made actionable whatever factual errors there may have been in reporter Diadiun’s discussion of Coach Milkovich (whereas the *N.Y. Times Co.*

116. For a discussion of the political implications of Epstein’s missing this point in his later analysis of libel law in *Was New York Times v. Sullivan Wrong?*, see *infra* Part IV.

117. See *Sullivan*, 376 U.S. at 257–59. Such factual falsehoods included the following: the students sang the National Anthem, not the reported “My Country, ‘Tis of Thee”; the school board expelled nine students for demanding service at a lunch counter, not for the reported leading of the demonstration; most of the student body, rather than the entire student body as reported, protested the expulsion by boycotting classes, not by refusing to register for classes; no one ever padlocked the dining hall as reported; the police arrested Dr. King four times, not the reported seven times; the police attempted to find those responsible for bombing Dr. King’s house, not the reported suggestion that the police were responsible for bombing the home of Dr. King. *Id.*

118. See *id.* at 261–64.

119. See *id.* at 262 (“The trial judge submitted the case to the jury under instructions that the statements in the advertisement were ‘libelous per se’ and were not privileged, so that [the *Times*] might be held liable if the jury found that they had published the advertisement and that the statements were made ‘of and concerning’ [Sullivan.]”); Kalven, *supra* note 26, at 195 (“The Alabama law of defamation appears to have been the same as that of the vast majority of American jurisdictions.”).

120. See Kalven, *supra* note 26, at 212–15.

121. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 257–59 (1964).

122. See *id.* at 263–64. Note that in *Milkovich*, the Court explicitly made Diadiun’s factual errors vulnerable to a jury award. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 23 (1990).

*v. Sullivan* tradition would have shielded those errors on matters of public knowledge and concern from any libel judgment). Much of the common law sophistication as to the nature of language and as to the way even seeming defamation loses its sting in some contexts where knowledgeable audiences can deflect the power of literal language—a fortuitous melding of First Amendment and longstanding rules of defamation—has disappeared in the years following *Sullivan*, but it was essential to the reasoning and to the holding of that case. Because the Supreme Court’s personnel shifted so radically within ten years of the decision,<sup>123</sup> *Gertz* paid homage to the great case by limiting that holding to the famous one everybody knows: a defamation plaintiff who is a public official must prove that the speaker made an allegedly defamatory utterance either “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>124</sup>

When *Milkovich* went out of its way to console the First Amendment defense bar that it was not tampering with the *Sullivan* holding,<sup>125</sup> it disingenuously preserved only the first “actual malice” rule while severing the equally vital protection of factual falsehood in public debates that *Sullivan* had constitutionalized.<sup>126</sup> Missing altogether, despite the nature of the fact/opinion question and its utter proximity to the rest of the *Sullivan* case, was the *second* holding in the seminal Warren Court opinion, the one that took up the common law of Kansas and raised its “minority” rule on matters of public concern to the status of a First Amendment icon: factual falsehoods as well as comments or opinions are protected unless the defendant’s malice is proven.<sup>127</sup>

### 3. *The Integration by Sullivan of the Audience-Trusting Free Speech Tradition*

The key to understanding the pre-*Milkovich*, fully constitutionalized minority common law rule returns us, again, to the *audience* to potentially defamatory utterances. The common law, first in deciding whether “opinions” could ever be actionable, concluded negatively if the opinion was “pure”—i.e., if the speaker based his or her statement on fully disclosed or ascertainable facts, false *or* true, or on a fully ascertainable record, such as a book under review or a matter of general public concern within a given community,<sup>128</sup> such as Coach Milkovich’s obsessed Cleveland suburb.<sup>129</sup> It permitted opinions to be

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123. Between the *Sullivan* and *Gertz* decisions, Justice Warren, Justice Black, Justice Clark, and Justice Harlan retired, and Justice Goldberg resigned. They were replaced by Justice Burger, Justice Marshall, Justice Blackmun, Justice Rehnquist, and Justice Powell. THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 452–53 (Christopher Tomlins ed. 2005).

124. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

125. See *Milkovich* 497 U.S. at 20 (quoting *Sullivan*, 376 U.S. at 270).

126. See *id.*

127. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–83 (1964).

128. See RESTATEMENT (SECOND) OF TORTS § 566 cmt. b (1977).

129. See Margolick, *supra* note 27, at B8.



actionable only if the opinion was based on *undisclosed* factual predicates.<sup>130</sup> These latter “mixed opinion” statements are problematic precisely and solely because the audience has no knowledge on which to judge the opinion; the speaker has withheld some or all of the statement’s factual predicate.<sup>131</sup> Once the speaker reveals the factual predicates—irrespective of the truth or falsity of such predicates, the statement is protected.<sup>132</sup> The audience is capable now of judging the full statement. Nothing has been left out. It was not relevant to those restating the law of libel, particularly as to matters of public concern, whether the factual predicate was false or true—the *audience* would do the interpretive work: “Criticism of so much of another’s activities as are matters of public concern is privileged if the criticism, although defamatory, (a) is upon, (i) a true or privileged statement of fact, or (ii) upon facts otherwise *known or available to the recipient as a member of the public*.”<sup>133</sup>

Many American courts misunderstood this authoritative essence of the common law privilege and went on to require *factual truth*,<sup>134</sup> precisely the requirement already present in the defense of justification (and hence adding nothing at all to the defendant’s arsenal). *Sullivan*—far from finding fully revealed, yet false, factual predicates to be harmful or even regrettable—reinstated the best wisdom from the common law: audiences do the work and factual falsehoods move them to even further research and a greater zeal to correct the present record.<sup>135</sup>

130. RESTATEMENT (SECOND) OF TORTS § 566 cmt. b (1977); KEETON ET AL., *supra* note 92, § 113A, at 814.

131. See KEETON ET AL., *supra* note 92, § 114, at 814. For example, the *Restatement (Second) of Torts* offers this actionable hypothetical: “A writes to B about his neighbor C: ‘I think he must be an alcoholic.’ A jury might find that this was not just an expression of opinion but that it implied that A knew undisclosed facts that would justify this opinion.” RESTATEMENT (SECOND) OF TORTS § 566 illus. 3 (1977). For a post-*Sullivan* but pre-*Milkovich* case following this approach and allowing further libel action for a statement upon *undisclosed* facts, see *Falls v. Sporting News Publishing Co.*, 834 F.2d 611, 614–16 (6th Cir. 1987). This case remains consistent with *Sullivan* and the audience policies therein. See *id.* at 615.

132. See RESTATEMENT (SECOND) OF TORTS § 566 cmt. b (1977). The *Restatement (Second) of Torts* provides the following illustration to demonstrate this proposition:

A writes to B about his neighbor C: “He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.” The statement indicates the facts on which the expression of opinion was based and does not imply others. These facts are not defamatory and A is not liable for defamation.

*Id.* at § 566 illus. 4. Note that this example is almost identical to the situation in *Milkovich* that produced the climactic statement. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3–7 (1990).

133. RESTATEMENT (FIRST) OF TORTS § 606(1)(a) (1938) (emphasis added). In celebrating *Sullivan*, Professor Kalven, who had his ear to the pulse of this great audience-reliant tradition, stated, “what is really involved is the degree to which the underlying facts are disclosed when the opinion is expressed and the inference drawn.” Kalven, *supra* note 26, at 195 n.18.

134. See Noel, *supra* note 102, at 891 (“A definite majority of courts hold that there is no conditional privilege, with the result that immunity extends only to comment and opinion . . .”).

135. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19, 279–83 (1964).

4. *Covertly, Milkovich Opts to Overrule Sullivan's Constitutionalizing of the Minority Rule on Matters of Public Concern*

At least since the early nineteenth-century English cases on literary criticism, there should have been little doubt that the judges reduced the probability of successful libel suits because they expected informed readers of book reviews to do the work themselves of testing the reviewer's statements, no matter how outrageous or even false.<sup>136</sup> A relevant example from the fall of 2009 are the "town hall meetings" on healthcare which have produced inflated and often false rhetoric;<sup>137</sup> yet the town hall meeting is a quintessential First Amendment medium, and no listener on healthcare is presumed not to have the ability to field even factually erroneous statements on such an expansive and public matter.<sup>138</sup>

However, a majority of American courts gradually came to misunderstand something about the privilege,<sup>139</sup> and Chief Justice Rehnquist—deliberately or negligently—reasserted the misunderstanding in *Milkovich*, a misunderstanding that was by then of constitutional dimension.

The Chief Justice disingenuously said:<sup>140</sup> "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.'"<sup>141</sup>

136. See *supra* notes 41 and 98 and accompanying text.

137. See, e.g., *Report: Fox News' Town Hall Coverage Amplifies Opponents of Health Care Reform, Ignores Supporters*, MEDIA MATTERS FOR AM. (Sep. 8, 2009, 9:00 AM), <http://mediamatters.org/research/200909080004> (discussing the possible media distortion of one outlet concerning the health care reform town hall meetings).

138. See *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13 (1970) (holding that the utterance of "blackmail" at a city ordinance meeting, when the speaker knew the statement to be untrue, was protected speech under the First Amendment). For a further discussion of speech in the town hall context, see *infra* Part V.

139. See Noel, *supra* note 102, at 891.

140. Rehnquist's restatement of prior law is typically double-tongued. See *supra* notes 24, 57 and accompanying text. The minority rule, constitutionalized by the very precedent he purports to retain, fails to appear and is violated by the discussion and the holding. For a detailed analysis of a similar distortion by Rehnquist of a different aspect of libel law in the earlier case of *Paul v. Davis*, 424 U.S. 693 (1976), see Weisberg, *supra* note 23, at 43–58. He does not choose to rely on *Milkovich* being a private figure and hence needing to show less than *Sullivan* malice; rather, he fully depends on a "majority" approach to the privilege on matters of public concern, see *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–20 (1990), that he knew had been rebuffed forever in that seminal earlier case. This is somewhat akin to Rehnquist citing Iago's infamous statement to Othello on reputation, *id.* at 12 (quoting WILLIAM SHAKESPEARE, *OTHELLO* act 2, sc. 3), without revealing something just as obvious: Iago is one of Shakespeare's most deviously articulate villains! See Karl F. Zender, *The Humiliation of Iago*, 34 *STUD. ENG. LITERATURE* 1500–1900 323, 327 (1994) ("In every dimension of his identity—metaphysical, psychological, social—Iago asserts an absolute separation between language and meaning.").

141. *Milkovich*, 497 U.S. at 19 (citing RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977)).

The statement, at a crucial juncture in the opinion, rhetorically disregards two crucial aspects of the common law it cites: First, common law judges utilizing the privilege were divided on whether it also protected factual falsehoods.<sup>142</sup> Second, *Sullivan* had dipped down into a key strand of that very common law to protect fully revealed, if ultimately inaccurate, *factual* predicates for comments on matters known to the audience.<sup>143</sup> The *Milkovich* opinion artfully admits the first while negating the latter:

[D]ue to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of “fair comment” was incorporated into the common law as an affirmative defense to an action for defamation. “The principle of ‘fair comment’ afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact.” As this statement implies, comment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm. “According to the majority rule, 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.” Thus under the common law, 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.<sup>144</sup>

A more forthright exposition from the latter passage to the situation before the *Milkovich* courts should have thoroughly rehearsed the minority rule that existed in Rehnquist’s formulation only by negative pregnant—by the mention of the “majority rule” and that rule alone.<sup>145</sup> But where there is a majority rule, as we have seen exemplified already as to the fact/opinion conundrum regarding matters of public concern, there is also a minority rule.<sup>146</sup> No decision preserving *Sullivan* as a precedent should have overlooked its adoption—as a matter of constitutional law—of that very minority rule. As put by the Court in *Sullivan*, “[W]e consider this case against the backdrop of a profound national commitment to the principle that debate on public issues should be uninhibited,

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142. See *supra* note 108 and accompanying text.

143. See *supra* notes 114–115 and accompanying text.

144. *Milkovich*, 497 U.S. at 13–14 (alteration in original) (citations omitted) (quoting 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 456 (1956); RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977)).

145. See *id.*

146. See *supra* Part IV.B.1.

robust, and wide-open, . . . . [E]rroneous statement is inevitable in free debate, and . . . must be protected . . . .”<sup>147</sup>

Instead, the Chief Justice’s conclusions roll back the clock to the pre-*Sullivan* and *Coleman* “majority” rule, reinstating what *Sullivan* had changed so that, as per the discarded rule: one, the common law privilege of fair comment does not protect utterances on matters of public concern containing at least one express false statement of fact;<sup>148</sup> two, more generally, opinions lacking such a false factual predicate may still imply a false statement of fact and hence be unprotected;<sup>149</sup> and three, on matters of public concern, one should not presume that the audience is capable of finding the full factual record and hence deflecting the defamatory effect of either one or two above.<sup>150</sup> These assertions, nested in an opinion ostensibly safeguarding *Sullivan*’s First Amendment reasoning,<sup>151</sup> negligently or wilfully reinstated the Alabama courts’ approach to freedom of speech when *Sullivan* first brought his lawsuit.

## V. THE “HYPERBOLE CASES” WRONGFULLY DISTINGUISHED

### A. *Rehnquist’s Neglect of the Audience in the Hyperbole Cases*

Perhaps no First Amendment doctrine more explicitly relies on what I have called the “interpreting audience” than a series of post-*Sullivan* cases sounding in hyperbolic or utterly unrealistic utterances accused of being defamatory. *Milkovich* wrongfully distinguished these cases from the one at hand and badly compartmentalized them, hence reducing their value to vital First Amendment discourse. Although, of course, they did not involve the *precise* fact/opinion dichotomy resolved in *Milkovich*, their logic should have protected reporter Diadiun’s statement on grounds fully related to that dichotomy. So while the Chief Justice’s rhetoric reassures by purportedly safeguarding *Sullivan* and these progeny cases, supposedly providing sufficient “breathing space” for “freedoms of expression,”<sup>152</sup> his focus on detecting any possible factual component that can be proven false cabins, if not eliminates, the hyperbole exemptions. The majority—as it had with *Sullivan* itself—thus strips the hyperbole precedents of much of their meaning.

In *Greenbelt Publishing Ass’n v. Bresler*,<sup>153</sup> the word “blackmail” was used on the floor of a town hall meeting during a fiery debate on the plaintiff’s request for a zoning variance so he could build commercial property.<sup>154</sup> The town

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147. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964).

148. *See Milkovich*, 497 U.S. at 18–19.

149. *See id.* at 20.

150. *See id.* at 22–23.

151. *See id.* at 18–21.

152. *Id.* at 19 (quoting *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986)).

153. 398 U.S. 6 (1970).

154. *Id.* at 7–8, 13.

looked like it would give him the variance in exchange for other property he owned.<sup>155</sup> The local newspaper, the *Greenbelt News Review*, reported on the city council's meetings, and "[t]wo news articles in consecutive weekly editions of the paper stated that at the public meetings some people had characterized Bresler's negotiating position as 'blackmail.'"<sup>156</sup>

Now blackmail, like reporter Diadiun's lying under oath,<sup>157</sup> looks like the primal eldest sin that defendants can commit against defamation plaintiffs: the (false) accusation of a serious crime.<sup>158</sup> But Justice Stewart, unlike his colleague and future Chief Justice, had faith in the audience. After running through the (then) boilerplate language about the constitutional usefulness of false statements of fact,<sup>159</sup> the Court dismissed Bresler's complaint on First Amendment grounds as follows:

It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, 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 Bresler's negotiating position extremely unreasonable.<sup>160</sup>

Three years later, in a comparable case arising during a labor dispute, Justice Marshall found that the "ordinarily heated" atmosphere of strikes and unrest<sup>161</sup> protected even more extensive attacks on character.<sup>162</sup> Defendants had labeled plaintiffs "scabs" and then embellished by citing Jack London's scurrilous definition,<sup>163</sup> which involved treachery and worse:

Vigorous exercise of [labor's] right "to persuade other employees to join" must not be stifled by the threat of liability for the overenthusiastic use of rhetoric or the innocent mistake of fact. . . . [S]tatements of fact or opinion relevant to a union organizing campaign are protected by § 7

155. *Id.* at 7.

156. *Id.*

157. *Milkovich*, 497 U.S. at 4–5.

158. See RESTATEMENT (SECOND) OF TORTS § 571 (1977).

159. *Bresler*, 398 U.S. at 9–13.

160. *Id.* at 14 (footnote omitted).

161. *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 272 (1973) (quoting *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58 (1966)).

162. *Id.* at 277–78.

163. *Id.* at 267–68.

[of the NLRA], even if they are defamatory and prove to be erroneous . . . .<sup>164</sup>

In such a context, the Court found that:

It is similarly impossible to believe that any reader of the [defendants' newsletter] would have understood the newsletter to be charging the appellees with committing the criminal offense of treason . . . . [Instead the reader would view this as] a lusty and imaginative expression of the contempt felt by union members towards those who refuse[d] to join.<sup>165</sup>

These cases explicitly give full faith and credit to the audience to do its own interpretive work and to sort the wheat from the chaff, whether in the domain of fact or opinion. Although he retains these cases, the Chief Justice's *Milkovich* rationale never explains why the audience can "do the work" with rhetorical hyperbole cases yet cannot engage in the same discerning process with statements regarding matters of public concern.<sup>166</sup> Even the dissenting Justices' confidence in the audience to interpret public concern utterances on its own is, at best, mixed.<sup>167</sup>

The *Milkovich* majority also explores and distinguishes a variation on the hyperbole precedent, *Hustler Magazine, Inc., v. Falwell*.<sup>168</sup> In that case, authored by Chief Justice Rehnquist, the Court held that the absence of "factual"

164. *Id.* at 277–78.

165. *Austin*, 418 U.S. at 285–86 (footnote omitted).

166. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–23 (1990).

167. The dissent at least recognizes the close connection between Diadiun's sports column and the hyperbole cases, see *id.* at 33–34 (Brennan, J., dissenting) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–51 (1988)), and then tries to add a new category of expression by calling Diadiun's utterance "conjecture," see *id.* at 28. The dissent makes its major point perhaps in stressing the audience's sensitivity to the context and tone of Diadiun's column:

Diadiun's assumption that *Milkovich* must have lied at the court hearing is patently conjecture. . . . Diadiun not only reveals the facts upon which he is relying but he makes it clear at which point he runs out of facts and is simply guessing. . . .

. . . .

Furthermore, the tone and format of the piece notify readers to expect speculation and personal judgment. The tone is pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage.

*Id.* at 28–32 (footnote omitted). Yet the two-justice dissent is ultimately disappointing, see *supra* note 36 and accompanying text, because it accepts fully the majority's process of searching for and then making actionable anything that might look like a factual falsehood. See *Milkovich*, 497 U.S. at 24–25 (Brennan, J., dissenting). This is, as I have been arguing, not only bad doctrine, but also a fundamental reversal of *Sullivan*, which never saw potential or actual error as scary to an informed listener.

168. See *Milkovich*, 497 U.S. at 20 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48–50 (1988) (addressing an ad-parody portraying Falwell sleeping with his mother in an outhouse with the title, "Jerry Falwell talks about his first time." (internal quotation marks omitted))).

material in an ad parody prevented the plaintiff from satisfying the *Sullivan* malice burden in a suit sounding in intentional infliction of emotional distress.<sup>169</sup> That case marked a subtle departure from the mainstream hyperbole doctrine,<sup>170</sup> which was less interested in whether there was a realistic-sounding factual component to the utterance that could be proven false than it was in the audience's ability to interpret within certain contexts the meaning of both factual and non-factual statements.<sup>171</sup> Even given this important and unfortunate move towards "factual policing" as I call it, the Chief Justice might have better explained why a reasonable audience could discount *Falwell*'s crude Campari ad ("Jerry Falwell talks about his first time")<sup>172</sup> as parody,<sup>173</sup> but could not interpret for themselves the believability of statements made in Diadiun's article regarding a matter with which the whole community was conversant.<sup>174</sup>

*Milkovich* finds that the statements made in the article were "not the sort of loose, figurative, or hyperbolic language" that would find constitutional protection.<sup>175</sup> In order to do this, the majority shifts from an audience-based analysis to one predicated on Diadiun's intention: the defendant, says the Court, "seriously maintain[ed]" that Coach Milkovich committed perjury during his questioning.<sup>176</sup> But this analysis as to intention transmogrifies Justice Stewart's audience-sensitive approach to "blackmail"<sup>177</sup> or Justice Marshall's similar sense of "scab"<sup>178</sup> into a scary communication ("liar"—or even "liar under oath") that the audience simply cannot field without judicial assistance; Rehnquist's own reasoning in *Falwell*—where the question for the courts was whether the

169. *Falwell*, 485 U.S. at 56–57.

170. Interestingly, *Falwell* at one point hints at the audience-interpreter's powers, but these are limited to the reader's ability to interpret the advertisement as a parody, not an assertion of fact. *Id.* at 53–56. The shifting, fact-skeptical, First Amendment conjured by the Court in *Falwell* begins to draw a fearful line wherever a court might see an utterance as attempting to convey "facts," see Brief for the Law & Humanities Institute as Amicus Curiae Supporting Petitioners at 3–4, *Falwell*, 485 U.S. 46 (No. 86-1278), 1987 WL 881311, instead of trusting the audience to use the context to parry even realistic and factually false statements. The Law and Humanities Institute's brief, co-authored by the present writer, sought a rule protecting not only wildly unbelievable imaginative depictions, but also *realistic* expressions of the imagination that more likely gave the appearance of communicating "facts." *Id.* To this day, realistic films and novels, for example, do not enjoy constitutional protection, see *Bindrim v. Mitchell*, 155 Cal. Rptr. 29, 39 (Cal. Ct. App. 1979), though audiences recognize that the medium of imaginative, however "realistic," is unlikely to harm clearly identifiable plaintiffs. See Brief for Petitioners at 43–44, *Falwell*, 485 U.S. 46 (No. 86-1278), 1987 WL 881311.

171. See *Falwell*, 485 U.S. at 52.

172. *Id.* at 48.

173. See *id.* at 57.

174. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3–7 (1990).

175. *Id.* at 21.

176. See *id.*

177. See *supra* notes 158–65 and accompanying text.

178. See *supra* notes 166–72 and accompanying text.

statements made would “reasonably [be] interpreted as stating actual facts”<sup>179</sup>—also limits his reasoning in *Milkovich*.<sup>180</sup> Although the *Falwell* formulation fatally stigmatized factual utterances, it at least had the merit of focusing less on the intention of the writer than the ability of the audience to interpret the statements.

In *Milkovich*, then, there is considerably less deference to the audience than in the *Bresler–Falwell* precedents. The majority is flatly uninterested in the audience’s own foreknowledge of the Cleveland-area dispute. Presuming a defamatory intent,<sup>181</sup> and looking only at the uncontextualized allegation that the coach is a liar, the Court finds an absence of “loose, figurative, or hyperbolic language.”<sup>182</sup> It progresses to the provability of factual-seeming words like “liar,” hence redirecting analysis of statements or misstatements of fact away from audience cognition towards a “plain meaning” determination of whether a statement or word can be verifiably false.<sup>183</sup> This is inconsistent with all earlier Supreme Court doctrine—even including the Chief Justice’s own contribution—which welcomed even factual falsehoods to the debate once in the interpretive hands of a knowledgeable audience.

#### B. *Milkovich’s Move Towards “Quality Control” and “Fact Policing”*

The constitutional value of a robust, wide-open public debate and its acceptance of even false statements of fact depends largely on the First Amendment community’s judgments at any given time about both the speaker’s freedom of speech and the audience’s ability to listen, to interpret, and to re-engage in public debate.<sup>184</sup> There is no theoretical difference between an

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179. *Milkovich*, 497 U.S. at 20 (alteration in original) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

180. *See id.*

181. *See id.* at 21.

182. *Id.*

183. *Id.* at 21–22.

184. This theory has its origins in Justice Holmes’s dissent in *Abrams v. United States*, 250 U.S. 616 (1919), in which Holmes stated:

[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death . . . .

*Id.* at 630 (Holmes, J., dissenting). Numerous constitutional scholars have supported Holmes’s marketplace of ideas. *See generally* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 829 (2008) (“[T]he ‘marketplace of ideas’ metaphor, . . . had as major an impact as any Supreme Court decision on popular and academic thinking about the First Amendment. . . . Scholars and commentators have generally conceptualized the metaphor as invoking the perfect competition of an idealized neoclassical free market.”); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 3 (1995) (“[T]he search for truth provides a unifying theory of both the Speech and Religion Clauses and . . . remains a viable



audience that can distinguish rhetorical hyperbole and an audience that participates in a robust debate on public matters of concern—the audience is the same. Furthermore, an audience that already has a knowledge base has the informed ability to judge for itself the merit of each new related utterance. Yet we have seen *Milkovich* strip earlier doctrine clean by adopting a patronizing judicial control over the vast majority of utterances—those that do not indulge in fantastical or exaggerated speech.

*Milkovich* makes judgments about the “quality” of contentious speech,<sup>185</sup> however, this is inconsistent with *Sullivan*’s notion that the audience, and not the courts, should make such judgments.<sup>186</sup> Under Chief Justice Rehnquist, the courts have become the “fact-police.” They have been instructed to ferret out potential factual statements and punish them.

As we have seen, Chief Justice Rehnquist’s pervasive methodology in *Milkovich* is to pigeonhole the Court’s leading First Amendment precedents and to put them in a “lock-box” as though they had little or nothing to do with the free speech issues central to the case at hand.<sup>187</sup> Thus, *Sullivan* is relegated virtually to its narrow (if admittedly key) “actual malice” rule, while bottled and corked are all its common law juices about the audience and its ability to field factual falsehoods as well as defamatory opinions.<sup>188</sup> Similarly, and in some ways more surprisingly still, *Milkovich* diminishes the leading cases on hyperbole and intrinsically non-factual utterances,<sup>189</sup> and their obvious audience-related lessons for the instant case go unexplored or are ground down.

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First Amendment justification.”); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, (2005) (“[A] large number of the widely accepted justifications for freedom of speech are about the social and not individual value of granting to individuals an instrumental right to freedom of speech.” (footnote omitted)). For my discussion on why protecting false statements of fact enhances both the citizen and the community, see *infra* Part VI.A.

185. See *Milkovich*, 497 U.S. at 22 (“[N]umerous decisions . . . surely demonstrate the Court’s recognition of the [First] 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.’” (second alteration in original) (quoting *Rosenblatt v. Baer* 383 U.S. 75, 86 (1966))). For a discussion of Professor Epstein’s adoption of this fallacy, see *infra* Part VII.

186. See *supra* notes 88–90 and accompanying text.

187. See *supra* Part IV.B.4 and accompanying text.

188. See *supra* Part IV.B.4 and accompanying text.

189. See *supra* Part V.A and accompanying text.

## VI. THE CITIZEN VALUE BEHIND THE INTERPRETING AUDIENCE APPROACH: AN ANSWER TO POST AND EPSTEIN

### A. *Why Projecting False Statements into the Public Discourse Enhances Both Citizen and Community*

#### 1. *A Tradition of Speech as “Venting”*

The struggle at common law and within free speech (and First Amendment) theory and doctrine to preserve a valued place for factual falsehood goes back to Milton and Mill:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?<sup>190</sup>

Of course twentieth-century history has put us on our guard about truth’s capacity to withstand and defeat factual falsehood, or indeed other kinds of verbal falsity.<sup>191</sup> The liberal speech orthodoxies are challenged by models of a kinder and gentler discursive universe in which falsehoods are punished and everyone just feels a lot better.<sup>192</sup> Nonetheless, it is of the utmost importance, in my view, both to resist incursions on the traditional welcoming of the statements we abhor and to be very skeptical that communal hatred arises largely through hateful words as opposed to negative values that are inculcated in people early in their lives and need little verbal prodding thereafter. Some prejudicial inculcation is ethnic and religious, and if one were to hope for improvement through regulating linguistic falsehoods, one would have to start with texts that are too “sacred” to censor. But the main point remains that it is better to deal with hateful speech (and certainly with the more venial categories of speech that

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190. JOHN MILTON, AREOPAGITICA 58 (AMS Press Inc. 1971) (1644); *see also* JOHN STUART MILL, ON LIBERTY 20 (Albert Anderson & Lieselotte Anderson eds., Agora Publ’ns, Inc. 2003) (1859) (“We can never be sure that the opinion we are trying to stifle is a false opinion; and even if we were sure, stifling it would still be an evil.”) Although Mill (unlike Milton) speaks pervasively of opinions, it is clear that factual falsehoods are embedded in the generalized liberal argument: “Very few facts are able to tell their own story without comments to bring out their meaning.” *Id.* at 24. As though reflecting the then developing common law of fair comment on matters of public concern, *see supra* notes 37–40 and Part IV, Mill sees the reciprocity between a factual predicate (true or false) and the “story” derived from that base in the form of an opinion (right or wrong).

191. *See, e.g.*, FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 19–29 (1982), *as reprinted in* JOHN H. GARVEY & FREDERICK SCHAUER, THE FIRST AMENDMENT: A READER 66 (2d ed. 1996) (“The survival theory of truth is alluringly uncomplicated; but as the basis for the principle of free speech it suffers from crippling weaknesses.”).

192. *See, e.g., id.* at 28 (“[U]npleasant side effects may accompany the expression of erroneous views . . . . [P]eople may be offended, violence or disorder may ensue, or reputations may be damaged.”).

we have seen in these cases) than to suppress it and let wrong ideas simmer until they reach physically violent dimensions.<sup>193</sup>

The notion that “bad” speech should generally be uncensored and that audiences normatively discount the effect of speech in figuring things out is part of our founding heritage. Thomas Jefferson spoke of criticism of government through freedom of the press as an efficient way to effectuate reform: “This formidable [verbal] censor of the public functionaries, by arraigning them at the tribunal of public opinion, produces reform peaceably, which must otherwise be done by revolution.”<sup>194</sup>

## 2. *Speech as a “Cloudy Medium”*

Furthermore, our Framers had a precise view of the effect of language on audiences and articulated that view early on. In *Federalist No. 37*, Madison discusses the difficulty of communicating facts and opinions regarding the proposed Constitution even to audiences rationally disposed to hear them.<sup>195</sup> The problem, however, lay not with the audiences but with the confusing nature of the language itself:

Besides the obscurity arising from the complexity of objects and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The *use of words is to express ideas*. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and

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193. As a scholar both of the Holocaust and of the First Amendment, I am convinced that Hitler and his allies in various European countries came to power because of ingrained attitudes inflamed by economic crisis or professional weakness and not by the latest speech acts of bad men, no matter how pernicious. See RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* 265 (1996). Attempts to paper over longstanding underlying attitudes of racial or ethnic hatred by piecemeal regulation of hateful speech acts, see RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?* 10–11 (1997) (arguing that lack of societal reinforcement for racist behavior will eventually change the attitudes underlying that behavior and citing “a tort for racial slurs [as] a promising vehicle for the eradication of racism”), are badly misguided, in my opinion.

194. Letter from Thomas Jefferson to A. Coray (Oct. 31, 1823), in 15 *THE WRITINGS OF THOMAS JEFFERSON* 480, 483 (1904). Such sentiments may explain Jefferson’s antipathy to anything like Seditious Libel statutes, see GARRY WILLS, *A NECESSARY EVIL* 134–36 (1999), and imply that he likely would have admired the *Sullivan* opinion. Thomas Emerson later restated Jefferson’s view and cited the cheapness of speech as the reason to liberate it: “[E]xpression is normally conceived as doing less injury to other social goals than action.” Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 881 (1963).

195. *THE FEDERALIST NO. 37*, at 225, 229 (James Madison) (Clinton Rossiter ed., 1961).

however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the *cloudy medium* through which it is communicated.<sup>196</sup>

Audiences would figure things out, but on far less than perfect information. This theory, which prefigures similar modern and postmodern approaches to language that this Article can do no more than reference, holds speech out both as cheap in some sense and indeterminate in all senses.<sup>197</sup>

Judges, on these views of language, should fear not one whit a citizen–audience’s response to defamatory speech acts. Such a fear, everywhere identifiable from *Gertz* through *Milkovich*, assumes both that somehow language can be clarified and placed into boxes to make it more or less palatable, and that audiences are incapable of determining meanings appropriate to a speech-act context without assistance from judges and even from constitutional law.<sup>198</sup>

Instead, courts should trust the citizen conjured in the first four footnotes to this Article to reach “the final verdict” on the accuracy and the expediency of a statement. In 2010, we do not need constitutional doctrine that drives people into a passive sense that they cannot do as well as experts or judges in clarifying, through contextual interpretation, the inevitably “cloudy medium” of language.

#### VII. PROFESSORS POST AND EPSTEIN: FEARFUL OF SPEECH, SKEPTICAL OF THE “INTERPRETING AUDIENCE”

Some superb constitutional thinkers have lost their way, in my view, on the basic inspirational elements of *Sullivan* and its progeny either by accepting those “false prophets”—*Gertz* and *Milkovich*—or by retreating to ancillary areas of

196. *Id.* at 229 (emphasis added).

197. See, e.g., Jeremy Cohen et al., *Perceived Impact of Defamation: An Experiment on Third-Person Effects*, 52 PUB. OPINION Q. 161, 165–166 (1988) (discussing an empirical study of the effects of libel); Sowle, *supra* note 11, at 584–586 (commenting on theories about whether “point of view” opinions should be actionable); Jeffery E. Thomas, *A Pragmatic Approach to Meaning in Defamation Law*, 34 WAKE FOREST L. REV. 333, 337–339 (1999) (describing various theories “that focus[] on the way language is used”). See generally JACQUES DERRIDA, *OF GRAMMATOLOGY*, 28–29 (Gayatri Chakravorty Spivak trans., 1976) (discussing the study of grammatology and linguistics); DENIS MCQUAIL, *AUDIENCE ANALYSIS* (1997) (discussing the multiple aspects of audience analysis and research).

198. See generally Lyrrisa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 850 (2010) (“If we the people are incapable of rationally choosing our collective fates, then democracy is doomed to failure. On a more practical level, the failure to apply a rational audience assumption would inevitably lead to a dumbing down of public discourse, making speakers responsible if they failed to predict the interpretation placed on their speech by less sophisticated audience members.”).

common law doctrine while slighting those areas this Article (through *Sullivan*) has emphasized.<sup>199</sup> Throughout this Article I have argued against their positions on the doctrinal level, piece by piece. But more globally, I believe their positions construct a citizen–audience incapable of figuring things out on its own.

For Professor Epstein, the constructed citizen–audience is a passive receiver of information needing firmer rules (mostly plaintiff-favorable) to find its way to truth or falsehood:

Indeed it is not surprising that the plaintiff’s level of frustration is so great in defamation cases precisely because of the frequency with which the defendant avoids the only issue that matters to the plaintiff—falsehood, which could allow rehabilitation of the plaintiff’s reputation. The public, too, is a loser because the present system places systematic roadblocks against the correction of error.<sup>200</sup>

In fact, the citizen–listener disappears from Epstein’s analysis after a very quick and dismissive mention of “a third party” to the defamatory utterance itself.<sup>201</sup> He does allow, as to group libel, that the “audience will know or at least intuit” the falsity of a statement made about a class of persons.<sup>202</sup> Inexplicably, this faith in the informed listener (or just maybe the intuitively sound listener) does not carry over to the mainline tradition of cases we have been discussing.

So it falls to a strongly enforced set of legal rules to assure a higher quality of speech—“the best kind of public debate”<sup>203</sup>—or so the rulemakers have decided. But instead, we might better rely less on quality than on quantity (particularly in an Internet age) and trust the citizen–listener to know, learn more, correct, and decide.

Professor Post’s citizen–listener is different from Professor Epstein’s, but his skepticism towards the audience-trusting *Sullivan* model is just as palpable. *Sullivan*’s and *Coleman*’s identification of factual falsehood as a key element in discussing matters of public concern troubles Post greatly, and he gives the tradition short shrift.<sup>204</sup> Defamatory falsehoods, for Post, can destroy individuals and communities, which are often incapable of self protection and hence need

199. For my discussion on the common law doctrine, see *supra* Part IV.A.2.

200. Epstein, *Was Times Wrong?*, *supra* note 23 at 814 (footnote omitted).

201. *Id.* at 785.

202. *Id.* at 793.

203. *Id.* at 799; see *supra* Part V.B.

204. See *supra* note 57. Professor Post also wonders if courts have a good grasp on how to identify matters of public concern at all, reflecting a misplaced skepticism that began in the disastrous *Gertz* case. See Post, *Constitutional Concept*, *supra* note 22, at 679. But there is little evidence that judges across the centuries have had real difficulty spotting what counts as public discourse as opposed to what is merely trash talk, gossip, or some other form of merely privatized verbiage.

the occasional help of legislators and courts.<sup>205</sup> This top-down punishing of discourse deemed to be threatening is served by Professor Post's support for the "majority rule" on the privilege of fair comment on matters of public concern, which in that form "subordinated [public] discourse to community notions of propriety and decency."<sup>206</sup> There is no room for factual falsehood in this vision, and there is a consequential downplaying of the role of the interpreting citizen, similar to the diminution we have seen in *Gertz*,<sup>207</sup> and then in *Milkovich*.<sup>208</sup>

Post wants a kinder, gentler world of words.<sup>209</sup> He seems to want to make speech "better," but, unlike Epstein, his polestar is less about restoring the individual plaintiff's reputation by punishing falsity than it is about instilling "community norms" of "constructive public debate."<sup>210</sup> To this extent, he is a worthy representative of those who balance speech with notions of community, equality, and especially dignity.<sup>211</sup> Those noble abstractions vie with the individual's unlimited right to speak aggressively and sometimes falsely, which creates a First Amendment "paradox," at least for Professor Post:

The real problem with contemporary doctrine is . . . that it fails to articulate with sufficient clarity what is actually at stake in the definition of public discourse. We need to establish a domain of public discourse that is amply sufficient to the needs of democratic self-governance, but that is also reasonably sensitive to competing value commitments, to the pre-existing social norms that define the genre of public speech, and to the social consequences implied by the paradox of public discourse. . . .

. . . .

The [F]irst [A]mendment preserves the independence of public discourse so that a democratic will within a culturally heterogeneous state can emerge under conditions of neutrality, and so that individuals can use the medium of public discourse to persuade others to experiment in new forms of community life. The ultimate dependence of public

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205. See Post, *Constitutional Concept*, *supra* note 22, at 684–86. Post interestingly, and predictably, supports the group libel decision in *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding an Illinois statute that made it unlawful to publish an unflattering depiction of a class of citizens). See Post, *Constitutional Concept*, *supra* note 22, at 680.

206. *Id.* at 629.

207. See *supra* Part III.

208. See *supra* Part IV.B.

209. See Post, *Constitutional Concept*, *supra* note 22, at 604–05.

210. *Id.*

211. For example, Article 10 of the European Convention on Human Rights implies that a certain dignity must attach to the freedom of expression. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222. I have tried to suggest earlier in this Section that dignity, especially as conceived after World War II, will not be reconstructed through regulation of speech, no matter how bad, false, or hateful. Dignity will arise through rehabilitation of underlying attitudes learned early, often from texts (some Biblical in proportion) that will never be censored.

discourse upon community life, however, suggests that this neutrality and freedom is always limited, for the very boundaries of public discourse must be located in a manner that is sensitive to ensuring the continued viability of the community norms that inculcate the ideal of rational deliberation.<sup>212</sup>

The paradigmatically reformist voice found in this passage constructs an ideal of “community” while deflating at the same time a confident picture of the individuals within the community. The citizen–audience cannot have a debate inclusive of factual falsehoods because these may disrupt the values of tolerance and dignity.<sup>213</sup> My redirection from the individual speaker to the audience, however, reinserts precisely the notion of “community” that I believe resolves Post’s paradox. *Sullivan*’s and *Coleman*’s community is not one of relatively passive speech-consumers, but one of thoughtful, interpreting speech activists. This community, debating as a community, easily parries the kinds of false speech especially feared by Post (his specific referent is the distasteful ad parody in *Falwell*).<sup>214</sup> If mainstream readers, particularly grouped together as an audience, cannot contextualize falsehoods generated by overheated, opinionated speech, then most challenging speech acts, including all varieties of imaginative expression, will be seen as intolerable threats.<sup>215</sup> More generally, Professor Post’s “paradox” disappears once *Sullivan*’s audience-trusting First Amendment values are reinvigorated. Faith in the audience to absorb and weigh public speech is entirely consistent with “community,” and not at loggerheads with it.

#### VIII. CONCLUSION AND PARTING GLIMPSES AT *CURTIS PUBLISHING* AND *CITIZENS UNITED*

The combination of *Sullivan* and the common law it drew on so accurately and inspirationally suffices decades later to help construct and motivate an alert and acquisitive citizen; one who—using any and all technologies and even those unforeseeable to judges of an earlier era—aggressively seeks information, interprets it, and is not easily distracted by exaggeration of opinion or falsity of fact. Together with a community of such listeners and readers, this citizen reaches out to gain new information and to add its voice to the mix of facts and opinions about matters of public concern. Impatient, too, with the early and overhasty move to impose *Sullivan*’s malice test on “public figures,” hence liberating speech about celebrities as though this were as important as speech about public officials (and public matters generally),<sup>216</sup> this citizen–community

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212. Post, *Constitutional Concept*, *supra* note 22, at 683–84.

213. *See id.* at 604–05.

214. *See id.* at 605–626.

215. For a discussion of realistic fiction, see *supra* note 170 and accompanying text.

216. *See Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 154 (1967).

will gradually redirect its interpretive energies to the business of being a self-governor, and not a passive and helpless recipient of information.

Such a norm, present at some times and absent at others, aspires to a First Amendment jurisprudence protective not only of speakers and their targets, but also of citizens whose duty it is to interpret public speech, a key responsibility of the self-governed. On this view, a legitimate opposition to the explosive outcome in *Citizens United v. Federal Election Commission*<sup>217</sup> might well resist protecting corporations as speakers. Once the Court foregrounds the audience, as throughout this Article, however, such fears are offset—the audience–interpreter should easily parry even the most massive influx of corporate propaganda.

#### IX. AN EPILOGUE ON *SNYDER V. PHELPS*

As this Article goes to press, the Supreme Court is considering the most recent case to appraise the meaning of *Milkovich*, the Fourth Circuit’s decision in *Snyder v. Phelps*.<sup>218</sup> Relying heavily on the twenty-year-old precedent,<sup>219</sup> the appeals court reversed a multi-million dollar judgment in favor of a bereaved family that, while trying quietly to bury a son who had died in the Iraq War, had been berated by abusive language from a group of anti-gay zealots.<sup>220</sup> Disturbed by the country’s willingness to allow gays to serve in the military, the defendants protested at the funeral and then used their website to continue their assault on the family and further publicize their message.<sup>221</sup> Even though Snyder, the war hero, was not gay,<sup>222</sup> he was associated in death with such ideas as “God Hates the USA,” “Fag troops,” “Thank God for dead soldiers,”<sup>223</sup> and perhaps of special significance, “Albert Snyder and his ex-wife ‘taught Matthew to defy his creator,’ ‘raised him for the devil,’ and ‘taught him that God was a liar.’”<sup>224</sup> Although the district court granted summary judgment on the family’s defamation claim, various claims—most notably that of intentional infliction of emotional distress—survived,<sup>225</sup> prevailed,<sup>226</sup> and were then overturned by the Fourth Circuit.<sup>227</sup>

As I have written elsewhere, the Fourth Circuit’s heavy reliance on *Milkovich* to do the work of upholding defendants’ First Amendment rights in an

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217. 130 S. Ct. 876 (2010).

218. 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010).

219. *See id.* at 218–20.

220. *See id.* at 210–12.

221. *See id.* at 212 (quoting *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571–72 (D. Md. 2008)).

222. Joan Biskupic, *Protest at Military Funeral Ignites a Test of Free Speech*, USA TODAY, Aug. 30, 2010, at 1A.

223. *Snyder*, 533 F. Supp. 2d at 572 (internal quotation marks omitted).

224. *Id.*

225. *Id.*

226. *Id.* at 215–16.

227. *Id.* at 226.



emotional distress case is doubly suspect.<sup>228</sup> First, *Milkovich* stands as one of the major *plaintiff*-favorable First Amendment cases of the past quarter-century;<sup>229</sup> it is odd to see such a speech-limiting precedent being used as the primary means for reversing a pro-plaintiff verdict.<sup>230</sup> Second, as a libel case, *Milkovich* does not seem to provide much of a precedent for an analysis of Snyder's surviving successful claims<sup>231</sup>—and, most notably, the family's successful claim for intentional infliction of emotional distress.

The main lines of the Fourth Circuit's jurisprudential approach in *Snyder* are supported by the pre-*Milkovich* tradition rehearsed throughout the present Article<sup>232</sup> and, therefore, are largely contradicted by the twenty-year-old Rehnquist decision, which I have argued here is an outlier to that great tradition.<sup>233</sup> But the two pre-*Milkovich* decisions cited importantly by the Fourth Circuit<sup>234</sup> are inapposite to *Snyder* because they both involved a public figure plaintiff.<sup>235</sup> Most significantly, the *Milkovich* approach to detecting whether a statement is sufficiently "factual" to be actionable cannot fairly be used against the *Snyder* plaintiffs.

Relying as well on its own precedents in *Biospherics, Inc. v. Forbes, Inc.*<sup>236</sup> and *CACI Premier Technology, Inc. v. Rhodes*,<sup>237</sup> which are (again) defamation cases,<sup>238</sup> the Fourth Circuit opines:

228. Richard Weisberg, *Two Wrongs Almost Make a "Right": The 4th Circuit's Bizarre Use of the Already Bizarre "Milkovich" Case in Snyder v. Phelps*, 2010 CARDOZO L. REV. DE NOVO 345, 348 [hereinafter Weisberg, *Two Wrongs*].

229. *See id.*

230. *See id.* at 348 n.23.

231. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3 (1990).

232. *Compare Snyder*, 580 F.3d at 226 ("Notwithstanding the distasteful and repugnant nature of the words being challenged in these proceedings, we are constrained to conclude that the Defendants' signs and . . . [web site] are constitutionally protected."), with *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." (alteration in original) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)) (internal quotation marks omitted)).

233. *See supra* Part IV.B.4.

234. In *Snyder*, the Fourth Circuit cites both to *Milkovich* and to *Falwell* for the proposition "that there are constitutional limits on the *type* of speech to which state tort liability may attach." *Snyder*, 580 F.3d at 218 (citing *Milkovich*, 497 U.S. at 16; *Falwell*, 485 U.S. at 50). The court also cites to the statement at issue in *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 13–14 (1970), in its discussion of "rhetorical statements employing 'loose, figurative, or hyperbolic lanaguage.'" *Snyder*, 580 F.3d at 220 (quoting *Milkovich*, 497 U.S. at 21).

235. *See Falwell*, 485 U.S. at 57 n.5 (noting that Falwell, "the host of a nationally syndicated television show," is undisputedly a public figure); *Bresler*, 398 U.S. at 8 ("Bresler's counsel conceded . . . that Bresler was a public figure in the community.").

236. *See Snyder*, 580 F.3d at 219 (citing *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 184 (4th Cir. 1998)).

237. *Id.* at 220 (quoting *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 301 (4th Cir. 2008)).

238. *See CACI*, 536 F.3d at 283; *Biospherics, Inc.*, 151 F.3d at 182.

[*Milkovich* found] that the “dispositive question” was “whether a reasonable factfinder could conclude that the statements in the [newspaper] column impl[ied] an assertion that [the coach] perjured himself in a judicial proceeding.” Concluding that the column’s assertions were “susceptible of being proved true or false,” the Court determined that they were not protected by the First Amendment.

In light of *Milkovich*, and as carefully explained by Judge Motz in our *Biospherics* decision, we are obliged to assess how an objective, reasonable reader would understand a challenged statement by focusing on the plain language of the statement and the context and general tenor of its message.

....

... [R]hetorical statements employing “loose, figurative, or hyperbolic language” are entitled to First Amendment protection . . . .<sup>239</sup>

There are three problems with this key passage, even before we emphasize that *Milkovich* and the Fourth Circuit’s own cited precedents lie in defamation and not in intentional infliction of emotional distress. First, *Milkovich* announces to lower courts the task of scrutinizing statements thoroughly, not at all to protect them, but rather to find wherever possible some actionable, factual component within them.<sup>240</sup> Second, *Milkovich* did find—questionably, as I have argued in this Article—that statements in that case not dissimilar to ones in *Snyder* indeed contained elements susceptible of a true/false test and were not rhetorical hyperbole.<sup>241</sup> Third, perhaps mindful of these anomalies, the Fourth Circuit’s reasoning shifts uneasily to Supreme Court precedents more directly on point than *Milkovich*,<sup>242</sup> all of which have been discussed in this Article, as well as its own *CACI* precedent, where “CACI claimed that it had been defamed by a talk radio host . . . .”<sup>243</sup> The Fourth Circuit held that the host’s statements “could not reasonably be interpreted as stating actual facts about CACI . . . . [T]he host had simply used ‘loose and hyperbolic terms’ to press her case against the government’s use of military contractors.”<sup>244</sup>

If *Milkovich* were fairly applied to Phelps’s statements, several components of the extreme group’s statements would have been found “factual”—meaning open to a true/false proof test. Had the case lay in defamation instead of intentional infliction of emotional distress, the judgment below would have been

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239. *Snyder*, 580 F.3d at 219–20 (second & fourth alterations in original) (internal citations omitted) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20–21 (1990)).

240. See *supra* notes 85–87 and accompanying text.

241. See *Milkovich*, 497 U.S. at 21. For a summary of the facts of *Milkovich*, see *supra* Part II.

242. See *Snyder*, 580 F.3d at 217–21.

243. *Id.* at 220.

244. *Id.* at 221 (quoting *CACI*, 536 F.3d at 302).

affirmed. The word “liar”—common to both cases—provides one example: *Milkovich* found the reporter’s use of the word “liar” unprotected, even in the overheated atmosphere of the community’s debate about the fracas at the wrestling match.<sup>245</sup> Analogously, the lower court here would have been more than justified in affirming, under the First Amendment, a jury verdict against the speaker of the following statements: “Albert Snyder and his ex-wife ‘taught Matthew to defy his creator,’ ‘raised him for the devil,’ and ‘taught him that God was a liar.’”<sup>246</sup>

On *Milkovich*’s reasoning, these statements at least can be proven or disproven, and it is interesting that the word “liar” links the cases in a pro-plaintiff manner awkwardly avoided by the Fourth Circuit. Exactly how *did* the Snyders bring up their son? Is this not precisely analogous to the question of whether Coach Milkovich lied under oath?

As this Article has centrally argued,<sup>247</sup> and as the Fourth Circuit recognizes in citing its own precedents that were so reliant on the pre-*Milkovich* speech-enhancing progeny that flowed from *New York Times Co. v. Sullivan*, Justice Rehnquist wanted courts to probe and find, wherever possible, the lurking factual falsehood his Court (and not the great precedents) so feared.<sup>248</sup> *Milkovich* is simply not the peg on which to hang a defendant-favorable verdict based on a supposed absence of factual material!<sup>249</sup> Again, the *Milkovich* Chief Justice’s primary instruction to the lower courts as to whether a statement contained a provable factual element was “Seek and ye shall find!” And thus the Fourth Circuit, if it was faithfully adhering to the precedent it cites so centrally, should have and would have found factually-fraught statements within Phelps’s extended communications about Snyder.

Furthermore, courts cannot convincingly use *Milkovich* as precedent in the actual arena of intentional infliction of emotional distress, which must instead hearken to *Falwell*.<sup>250</sup> Having certified that question,<sup>251</sup> it is likely the Supreme Court will focus on whether a *private* family so calumniated should be bound by a defendant-favorable precedent against Jerry Falwell, one of the most visible *public* figures of his generation.<sup>252</sup>

245. See *supra* Part II.

246. *Snyder*, 580 F.3d at 212 (quoting *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572 (D. Md. 2008)).

247. See *supra* Part IV.B.

248. See *supra* notes 72–73.

249. See *supra* notes 85–87 and accompanying text.

250. For a full discussion of *Falwell*, see *supra* notes 175–88 and accompanying text.

251. The Court certified the question on March 8, 2010. See *Snyder v. Phelps*, 130 S. Ct. 1737 (2010). The Snyder’s petition presented the following question: “Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?” Petition for Writ of Certiorari at i, *Snyder v. Phelps*, No. 09-751 (argued Oct. 6, 2010).

252. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988); *supra* notes 168–80 and accompanying text.

But should the court have sustained the Snyders' award on normative First Amendment grounds? As I have stated elsewhere, the Fourth Circuit's "little wrong" in misinterpreting *Milkovich* endeavors to do the "great right"<sup>253</sup> of redeeming the audience-trusting traditions of *Sullivan* and its pre-*Milkovich* progeny. Were this a libel case, I would have no hesitation in applauding the Fourth Circuit's attempt, in essence, to redeem *Rosenbloom v. Metromedia* from *Gertz*'s axing,<sup>254</sup> and to hold for all purposes that once a matter of public concern is involved (here, gays in the military, religious belief, etc.), *Sullivan*'s difficult burden is imposed even on private figure plaintiffs, and that the most that might be pleaded about Phelps's utterances is that they were negligently uttered or stood as *Bresler*-type hyperbole,<sup>255</sup> despite their detectable factual nature. Like the trial court, I would dismiss the defamation claim altogether.<sup>256</sup>

On the other hand, here we have the sustained and outrageous bullying of a private family wishing nothing but its privacy and a period of grieving for its son.<sup>257</sup> In my view, the First Amendment under the appropriate precedents, and also normatively, does not protect such speech from an intentional infliction of emotional distress claim.

The verdict should have been sustained on appeal. If the Supreme Court so finds, no harm will have been done to the majestic speech-inspiring traditions that are at the heart of this Article and that *Milkovich* so betrayed. For the twenty-year-old case failed to continue the insistence of *Sullivan* and its progeny that the audience can sort the wheat from the chaff where factual falsehoods invade debate on matters of public concern. But in *Snyder* the primary, private, and direct audience was Snyder and his family, which unlike Jerry Falwell, stands entitled to nurse its now exacerbated, private wounds in court.

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253. Weisberg, *Two Wrongs*, *supra* note 228, at 346 (quoting WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1).

254. *Id.* at 281. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), had too short of a life. Another disastrous move made in *Gertz* was to overrule the *Rosenbloom* plurality opinion holding even private figure plaintiffs to the *Sullivan* burden where the utterance was on a matter of public concern. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

255. See *supra* Part V.

256. See *Snyder v. Phelps*, 533 F. Supp. 2d 567, 573 (D. Md. 2008) ("Defendants' motions for summary judgment were granted as to the defamation claim.").

257. See *id.* at 571–72.

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