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**MILKOVICH V. LORAIN JOURNAL TWENTY-FIVE YEARS
LATER: THE SLOW, QUIET, AND TROUBLED DEMISE OF
LIAR LIBEL**

Len Niehoff & Ashley Messenger*

In Milkovich v. Lorain Journal Co., the Supreme Court held that there is no separate constitutional protection for statements of opinion. It also held that an accusation that an individual lied is a statement of fact actionable in defamation. Lower courts have, correctly in our view, essentially ignored both holdings. In Part I we discuss Milkovich and the infirmities in its reasoning. In Part II we discuss the complex nature of lies and accusations of lies and argue that Milkovich failed to account for that complexity. In Part III we discuss the strategies the lower courts have used to steer around the problematic Milkovich decision. And in Part IV we offer suggestions for the future direction of jurisprudence in this complicated area of the law.

INTRODUCTION

This past year marked the twenty-fifth anniversary of *Milkovich v. Lorain Journal Co.*, in which the Supreme Court of the United States held that an accusation that an individual lied is a statement of fact actionable in defamation.¹ In the years that have followed, the lower courts have all but completely nullified this ruling. *Milkovich* announced a major doctrinal shift by disowning the lower courts' longstanding interpretation of *Gertz v. Robert Welch*² as creating a separate constitutional privilege for expressions of opinion. Scholars have noted that this shift actually had little if any practical impact on the disposition of defamation cases generally.³ In this Article we go further, demonstrating that for the most part *Milkovich* did not even have the narrow effect of persuading lower courts to find accusations of lying to be factual in nature.

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1. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).
2. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
3. See, e.g., Robert Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy Under the First Amendment,"* 100 COLUM. L. REV. 294, 322–25 (2000).

The failure of *Milkovich* to have even this limited precedential significance is enlightening in at least two respects. First, it offers some insight into the complex nature of accusations of lying (and, perhaps, of lying itself) and into the Court's failure in *Milkovich* to account for that complexity. This raises broader questions about whether the Court in other instances has brought—and will bring—a sufficiently nuanced approach to language, truth, and the relationship between them. A thorough exploration of those broader questions is beyond the scope of this article, but we hope through our analysis to prompt further discussion along those lines.⁴

Second, the post-*Milkovich* developments provide a case study in how the lower courts have used a variety of strategies to avoid the constraints of an ostensibly controlling Supreme Court opinion that is deeply and unworkably confused. The concept of controlling precedent has much to recommend it: recognition and reinforcement of structural authority; consistency; clarity; doctrinal stability. So whenever lower courts shrug off what appears to be a controlling opinion of the Supreme Court of the United States, we should pause to take note of how and why they did so. This may provide us—and the Court—with lessons that extend well beyond this case and the law of defamation.

I. MILKOVICH'S MESSY REASONING AND THE DOCTRINAL REVOLUTION THAT WASN'T

When *Milkovich* was argued before the Supreme Court of the United States in 1990 there was no reason to think that it would affect a significant change in the law of defamation. Indeed, there were two good reasons to think it would not.

First, the case arose from a fairly mundane series of events. In 1974, a wrestling match between two Ohio high school teams led to an altercation and some injuries.⁵ As a result, Coach Michael Milkovich's team from Maple Heights was placed on probation and deemed ineligible for the state tournament.⁶ A state athletic association held a public investigative hearing at which Milkovich testified

4. For a discussion of the Court's approach to language, truth, and libel law generally, see Ashley Messenger, *The Problem with New York Times Co. v. Sullivan: An Argument for Moving From a "Falsity Model" of Libel Law to a "Speech Act Model,"* 11 FIRST AMEND. L. REV. 172 (2012); Ashley Messenger, *Reflections on New York Times Co. v. Sullivan, 50 Years Later,* 12 FIRST AMEND. L. REV. 423 (2014).

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

6. *Id.*

under oath.⁷ After a court overturned the probation orders, reporter J. Theodore Diadiun wrote an exasperated column in the sports pages of a local newspaper under the heading “Maple beat the law with the ‘big lie.’”⁸ It featured a photograph of Diadiun and the words “TD says,” with a carryover headline reading, “Diadiun says Maple told a lie.”⁹ The column stated that anyone who had attended the meet knew that Milkovich had lied about the events at the hearing.¹⁰ Milkovich responded by suing for defama-

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 5 n.2. Throughout this Article we discuss the importance of the contextual analysis of speech. It may therefore be helpful to provide the broader context around Diadiun’s accusation of lying. In its entirety, his column stated as follows:

Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year’s state tournament. “It’s not final yet—the judge granted Maple only a temporary injunction against the ruling—but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless. But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction. When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator. There is scarcely a person concerned with school who doesn’t leave his mark in some way on the young people who pass his way—many are the lessons taken away from school by students which weren’t learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions. Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple–Mentor wrestling meet of last Feb. 8. A lesson which, sadly, in view of the events of the past year, is well they learned early. It is simply this: If you get in a jam, lie your way out. If you’re successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened. The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott. Last winter they were faced with a difficult situation. Milkovich’s ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Meteor [sic], and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital. Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident. But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich’s accomplishments and reputation would do, and one would certainly expect from a man with the responsible position [sic] of superintendent of schools. Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor. I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe

tion.¹¹ These circumstances—an editorial rant in a small newspaper about a dustup at a wrestling match and a high school coach’s denials—seemed an unlikely vehicle for a major First Amendment decision.

The second reason Court observers might have assumed that *Milkovich* would not be a case of great moment was that existing doctrine appeared to dispose rather tidily of the case. In *Gertz*, the Supreme Court had famously declared that “[u]nder the First Amendment there is no such thing as a false idea.”¹² No matter how “pernicious an opinion may seem,” the Court announced in an opinion authored by Justice Powell, “we depend for its correction” on “the competition of other ideas.”¹³ Numerous lower courts subsequently interpreted *Gertz* as standing for the proposition that the First Amendment bars a plaintiff from basing a libel case on an expression of opinion. Those courts developed a multi-part language and context-driven test for distinguishing opinions from facts.¹⁴

Applying this settled post-*Gertz* doctrine, the Ohio courts in *Milkovich* concluded that the statement in question qualified as an expression of opinion.¹⁵ This seemed reasonable enough. After all,

both the meet itself and the Milkovich–Scott version presented to the board. Any resemblance between the two occurrences [sic] is purely coincidental. To anyone who was at the meet, it need only be said that the Maple coach’s wild gestures during the events leading up to the brawl were passed off by the two as ‘shrugs,’ and that Milkovich claimed he was ‘Powerless to control the crowd’ before the melee. Fortunately, it seemed at the time, the Milkovich–Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it. Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year’s tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation. But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them. ‘I can say that some of the stories told to the judge sounded pretty darned unfamiliar,’ said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. ‘It certainly sounded different from what they told us.’ Nevertheless, the judge bought their story, and ruled in their favor. Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth. But they got away with it. Is that the kind of lesson we want our young people learning from their high school administrators and coaches? I think not.

Id.

11. *Id.* at 6.

12. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

13. *Id.* at 341.

14. This understanding of *Gertz* was so widely accepted that it was embodied in the Restatement (Second) of Torts § 566 cmt. c (1977). For a commonly applied version of the test for opinion, see, e.g., *Ollman v. Evans*, 750 F.2d 970, 979–84 (D.C. Cir. 1984).

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

the statement appeared in a column in the sports section, a context typically rich in subjective criticism and invective.¹⁶ And the column included a number of statements that seemed like expressions of a subjective viewpoint, such as: “If you get in a jam, lie your way out. If you’re successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.”¹⁷

Nevertheless, the Supreme Court of the United States agreed to review the case and reversed.¹⁸ In an opinion written by Chief Justice Rehnquist, the Court offered surprises both general and particular.

At a broad doctrinal level, the Court rejected the reading of *Gertz* that the lower courts had almost unanimously used for sixteen years and announced that the Constitution affords no separate and distinct protection for expressions of opinion.¹⁹ But the Court did not leave matters there. Relying on its decision in *Philadelphia Newspapers, Inc. v. Hepps*,²⁰ the Court observed that statements on matters of public concern must be provably false in order to be actionable²¹ and acknowledged that “imaginative expression,” “loose, figurative” language, and “rhetorical hyperbole” are *not* provably false.²² The Court used as an example the statement, “In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of

16. The editorial mentioned both Milkovich and the former superintendent of schools, H. Donald Scott. Scott also sued for libel, and his case was decided first. *Scott v. News-Herald*, 496 N.E. 2d 699 (Ohio 1986). The court ruled that the statements at issue were opinion, following the four-part test set forth in *Ollman*, 750 F.2d at 979. At the time, *Ollman* provided the most influential guidance on how to distinguish factual assertions from opinions. The court considered (1) the specific language used, (2) whether the statement was verifiable, (3) the general context of the statement, and (4) the broader context in which the statement appeared. *Id.* at 706. The *Scott* court determined that, “the large caption ‘TD Says’ . . . would indicate to even the most gullible reader that the article was, in fact, opinion.” *Id.* at 707. The court also noted that sports pages are “a traditional haven for cajoling, invective, and hyperbole.” *Id.* at 708. Thus, the court concluded that a reader would interpret the article as a whole as opinion and that—while Diadiun may have made up his mind—the reader was free to come to an alternate conclusion. *Id.* at 708. In light of its ruling in *Scott*, the Ohio Court of Appeals ruled that Milkovich’s case was likewise meritless. *See Milkovich*, 497 U.S. at 1. Milkovich then appealed to the U.S. Supreme Court.

17. *See supra* note 10.

18. *Milkovich*, 497 U.S. at 10.

19. *Id.* at 21.

20. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

21. *Milkovich*, 497 U.S. at 20; *see also* Nat Stern, *The Intrinsic Character of Defamatory Content as Grounds for a Uniform Regime of Proving Libel*, 80 Miss. L.J. 1 (2010) (evaluating the Court’s use of *Hepps* in *Milkovich* and discussing what should be required to prove defamatory falsehood).

22. *Milkovich*, 497 U.S. at 20–21.

Marx and Lenin.”²³ The Court found that this “would not be actionable” because it could not “reasonably [be] interpreted as stating actual facts about an individual.”²⁴

At a more granular level, the Court rather breezily concluded that the statement at issue in this case was an assertion of fact.²⁵ The Court’s analysis in this regard warrants quoting and discussing at some length, because in our view it explains much of the confusion and skepticism reflected in the subsequent lower court decisions:

If a speaker says, ‘In my opinion John Jones is a liar,’ he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, ‘In my opinion Jones is a liar,’ can cause as much damage to reputation as the statement, ‘Jones is a liar.’ As Judge Friendly aptly stated: ‘[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words “I think.”’²⁶

This analysis is problematic in a number of respects.

First, it is hard to know what to make of the Court’s observation that a statement might damage a person’s reputation even if modified by the phrase “in my opinion.”²⁷ This may be correct, but it is beside the point. Many types of statements that the law deems non-actionable (and that *Milkovich* recognizes as such)—including true statements and statements of “rhetorical hyperbole”²⁸—are capable of injuring someone’s reputation.²⁹ Besides, the post-*Gertz* lower court decisions did not immunize opinions on the basis that they

23. *Id.* at 20.

24. *Id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

25. *Id.* at 21.

26. *Id.* at 18–19.

27. *Id.* at 19.

28. *Id.* at 20.

29. For example, courts have protected statements referring to a person as a “loser” or a “skank.” *See, e.g., Seelig v. Infinity Broad. Corp.*, 119 Cal. Rptr. 2d 108, 117 (2002). Such name-calling undoubtedly casts the subject in a negative light and could cause harm to one’s reputation. Nevertheless, these terms have no definable meaning and cannot be proven true or false. They reflect only the opinion of the speaker, and there is no credible argument that they are quantifiable or measurable in any evidentiary manner. These kinds of statements are called “insults”—statements that hurt feelings and could potentially harm reputation, but

could do no harm. Rather, the courts did so on the basis that such statements express ideas instead of facts and that the First Amendment provides an extraordinarily high level of protection to the former.³⁰

Second, no one (including the defendants in *Milkovich*) interpreted *Gertz* as standing for the simple-minded proposition that adding the phrase “I think” or “in my opinion” to a sentence magically and in-and-of-itself transformed a statement of fact into something else. For example, standing on its own, “in my opinion, on December 2, 2014, John Jones committed an armed robbery of the bank on the corner of Main and Liberty streets” so reeks of factual significance as to raise questions about whether the initial disclaiming phrase has any meaning at all. When the Court declared that no linguistic alchemy was achieved through the simple addition, without more, of “in my opinion” it rebutted an argument that no advocate or scholarly commentator had seriously advanced.³¹

Third, the Court’s analysis seriously misstated the law of “fair comment,” under which conclusions are insulated from liability if the premises allegedly supporting them are fully disclosed and true.³² Under the fair comment doctrine, the following statement would be insulated from liability (if all the premises are correct) because the reader or listener would be free to make his or her own judgment and to agree or disagree with the conclusion:

I work with John Jones; I see him every morning at eight when he comes to work and every evening at five when he leaves; he always has with him a brown paper bag with some sort of bottle in it; his breath smells of alcohol when I see him; therefore, I think John has a drinking problem.

Some people might agree that these premises support the conclusion. Others might disagree, for example contending that John might be taking a rinse of alcohol-infused mouthwash at eight and

lack inherent meaning and reflect the hurtful motivations of the speaker. *See generally* WILLIAM B. IRVINE, *A SLAP IN THE FACE: WHY INSULTS HURT—AND WHY THEY SHOULDN’T* (Oxford Univ. Press 2013).

30. *See, e.g.,* *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984).

31. This is not to say that phrases like “in my opinion” or “I believe” are without significance. To the contrary, in certain contexts they can provide important clarity regarding the certainty with which speaker purports to be speaking. The Supreme Court recently recognized as much in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indust. Pension Fund*, 135 U.S. 1318 (2015) (holding in a Securities Act case that statements of belief regarding legal compliance were “pure statements of opinion” and not statements of objective fact).

32. *Milkovich*, 497 U.S. at 19.

five to keep his breath minty fresh. But it makes no sense to say, as the Court does, that the fair comment privilege turns on whether the speaker's "assessment" of the facts is "erroneous."³³ The whole point of the doctrine is to give speakers room to express their views when they tell us the bases for them and to protect those speakers from liability based on differing subjective judgments.³⁴

Fourth, and for purposes of this article most importantly, the Court's reasoning is troublesome because it suggests that all accusations of lying are identical and that all of them constitute assertions of fact. Consider the stark example that the Court chooses: "In my opinion John Jones is a liar."³⁵ The Court declares that this statement necessarily and inherently "implies" that the speaker knows of undisclosed facts supporting this opinion.³⁶ From this implication, the Court concludes that the statement is itself factual.³⁷

But this is profoundly confused. In order to understand what this statement implies (and what the audience would make of it) we would need to know more about its context. For example, it would not seem even remotely obvious that the statement implied a knowledge of specific underlying facts if the statement were made in response to John Jones's prediction that he will someday run for President of the United States, or to John Jones's criticism that someone under his supervision wears ugly ties, or to John Jones's boast that he is the best point guard on his neighborhood basketball team. To the contrary, in these contexts the opinion might rest on nothing more than hunches, guesses about probabilities, or even other opinions.

It is perhaps understandable that the *Milkovich* Court made such a sweeping generalization about the statement, "In my opinion John Jones is a liar."³⁸ After all, the Court had in mind the facts of the case before it, and Diadiun had stated in his column that he had attended both the wrestling meet and the athletic commission hearing and that this put him in the "unique position" of assessing what occurred.³⁹ Nevertheless, the generalization is wrong. Does "In my opinion John Jones is a liar"⁴⁰ imply knowledge of supporting

33. *Id.*

34. For a more complete analysis of this issue see Leonard M. Niehoff, *Opinions, Implications, and Confusions*, 28 COMM. LAW. 19, Nov. 2011, http://www.honigman.com/media/site_files/1601_Niehoff_opinions_implications_confusions.pdf.

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

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 5 n.2.

40. *Id.* at 18.

facts? Without more details about context the question is unanswerable—and the Supreme Court therefore should not have answered it.

Of course, in the end the Court concluded that Diadium’s accusation of lying was actionable.⁴¹ The Court held that a “reasonable factfinder could conclude that the statements in the Diadium column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding.”⁴² The Court reasoned that “This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury.”⁴³ “Nor,” the Court held, “does the general tenor of the article negate this impression.”⁴⁴

What became of *Milkovich*? Not much. Despite its broad and dramatic disavowal of the longstanding opinion doctrine, *Milkovich* made almost no difference to the trajectory of defamation law. After all, the Court’s recognition of protection for “imaginative expression,” “loose, figurative” language, and “rhetorical hyperbole”⁴⁵ offered an alternative strategy to defendants in defamation cases. In response to *Milkovich*, media lawyers resorted to the simple expedient of substituting “rhetorical hyperbole” for “opinion” in their briefs.⁴⁶ And most courts that later considered such cases applied the same standard they had previously applied and “reached the result that they likely would have before the Supreme Court decided [*Milkovich*].”⁴⁷ *Milkovich* thus had little, if any, effect on the broad contours of libel doctrine.

Additionally, and perhaps more surprisingly, the specific ruling in *Milkovich* that Diadium’s accusation of lying was a statement of fact has had virtually no precedential effect. And the same holds true for the Court’s broader suggestion that accusations of lying generally—like the decontextualized statement “In my opinion John Jones is liar”—are factual in nature.⁴⁸ Given that specific ruling, and that expansive suggestion, we might anticipate that lower courts would almost always conclude that accusations of lying were factual. After all, *Milkovich* reached this decision with respect to a

41. *Id.* at 21.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 20–21.

46. *See infra* Conclusion; *see also* discussion *infra* Part III.B.

47. Sack, *supra* note 3. Indeed, “[i]t could even be argued that *Milkovich* actually expanded First Amendment protections by adopting an analysis that embraced not just opinions, but also ‘imaginative expression’ and other forms of ‘loose, figurative, or hyperbolic language.’” Niehoff, *supra* note 34, at 20.

48. *Milkovich*, 497 U.S. at 2.

statement that (a) used fairly strident language, as editorials tend to do, (b) followed the caption “TD Says,” which signaled that it expressed one individual’s opinions, and (c) appeared in the sports pages, a context heavily populated by loose, figurative, and hyperbolic speech.⁴⁹ As we will show, however, things have not played out this way. To the contrary, since *Milkovich*, many courts have concluded that an accusation of lying was not an actionable statement of fact.

II. THE COMPLEX NATURE OF LIES AND ACCUSATIONS OF LIES

As noted above, the *Milkovich* Court’s suggestion that even a simple accusation of lying (such as “In my opinion John Jones is a liar”) is factual in nature⁵⁰ does not sufficiently attend to the importance of context. The meaning of an accusation of lying, perhaps even the meaning of lying itself, can change depending upon the speaker, the audience, the setting, the medium, the cultural environment, and a host of other factors. This is easily demonstrated by a review of three recent, conspicuous, and widely discussed examples of accusations of lying. In this respect, there is some irony to the fact that the years after *Milkovich* were a boom time for high profile accusations of lying.

In September 2009, Representative Joe Wilson attracted national attention when he interrupted President Barack Obama’s speech to a joint session of Congress by calling out, “You lie!”⁵¹ The House subsequently voted (along party lines) to admonish Wilson for his “breach of decorum,” but did not suggest that he had said something factually false about the President.⁵² Wilson apologized for his violation of “protocol,” but grumbled about the apparent double standard in light of instances where Democrats had booed President Bush.⁵³ Wilson thus saw his accusation of lying as being, in every relevant sense, just like any other boorish expression of disapproval. “You lie!” was the functional equivalent of hissing, turning his back, or sticking his thumbs in his ears and humming.

49. *Id.* at 9.

50. *Id.* at 2.

51. Kate Phillips, *House Admonishes Wilson on Outburst*, N.Y. TIMES: THE CAUCUS (Sept. 15, 2009, 9:30 PM), <http://thecaucus.blogs.nytimes.com/2009/09/15/blogging-the-house-action-on-wilson/>.

52. *Id.*

53. *Id.*

In September 2012, U.S. Supreme Court Justice Antonin Scalia accused Judge Richard Posner, who sits on the U.S. Court of Appeals for the Seventh Circuit, of lying in a book review.⁵⁴ This resulted in counter-charges of mischaracterizations. We discuss this example at length because the details help underscore the importance of context.

Scalia and co-author Bryan Garner published a book, *Reading Law: The Interpretation of Legal Texts*, discussing Scalia's approach to constitutional originalism.⁵⁵ Posner reviewed the book in the September 13, 2012 issue of *The New Republic*.⁵⁶ In the review, Posner said "when [Justice Scalia] looks for the original meaning of eighteenth-century constitutional provisions—as he did in *District of Columbia v. Heller*, holding that an ordinance forbidding people to own handguns even for the defense of their homes violated the Second Amendment—Scalia is doing legislative history."⁵⁷

In a later interview, when asked about this critique, Scalia said:

[O]nly in writing for a non-legal audience could [Posner] have made that argument. Because any legal audience knows what legislative history is. It's the history of the enactment of the bill. It's the floor speeches. It's the prior drafts of committees. That's what legislative history is. It isn't the history of the times. It's not what people thought it meant immediately after its enactment. It's not what laws were—were continued in effect despite this. That—that is simply not legislative history . . . And to say that I use legislative history in how—is—is simply, to put it bluntly, a lie. And—you can get away with it in the *New Republic* I suppose, but . . . not to a legal audience.⁵⁸

The New Republic published Posner's response on its website.⁵⁹ Posner alleged that Scalia's remarks were based on a

54. Terry Baynes, *Fanning furor, Justice Scalia says appeals court judge lied*, REUTERS (Sept. 17, 2012) <http://www.reuters.com/article/2012/09/18/us-usa-court-scalia-idUSBRE88H06X20120918>.

55. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

56. Richard A. Posner, *The Spirit Killeth, But the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012, at 18 (reviewing Antonin Scalia & Bryan A. Garner, *READING LAW* (2012)), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>.

57. *Id.*

58. Richard A. Posner, *Richard Posner Responds to Antonin Scalia's Accusation of Lying*, NEW REPUBLIC (Sept. 20, 2012), <http://www.newrepublic.com/article/107549/richard-posner-responds-antonin-scalias-accusation-lying>.

59. *Id.*

mischaracterization of what Posner had said.⁶⁰ But Posner further contended that, had he said such things, he would not have been lying:

Even if I accepted Scalia's narrow definition of "legislative history" and applied it to his opinion in *Heller*, I would not be telling a "lie." For Justice Scalia does discuss the "drafting history" (legislative history in its narrowest sense) of the Second Amendment. See 554 U.S. 598–599, 603–605.

So I would not have been lying, or even mistaken, had I said in my book review that in *Heller* Scalia "actually resorts" to "legislative history" in its narrowest sense ("drafting history"). But I did not say that.⁶¹

Of course, Posner's rebuttal can also be construed as an accusation of lying—a charge that Scalia had deliberately misstated the truth about his critique. But no reasonable person expected lawsuits and counterclaims to come from this exchange. Everyone understood that this is the sort of thing you get when outspoken and touchy judges get on each other's nerves.

Nor would it be fair to characterize either of these accusations of lying as carrying with them implications of undisclosed facts. To the contrary, both Scalia and Posner expressed their views and also their bases for them. And those bases included a wide array of non-factual matter, including competing opinions about what the word "history" means.⁶² Although this incident never resulted in litigation, we suspect that if it had, it would have been quickly disposed of on the grounds that the statements at issue are conclusions drawn from stated facts and therefore protected by the First Amendment—an approach that courts have used in many cases, as discussed further below.

Another drama that is playing out as this Article was being written includes countless charges and counter-charges of lying. In recent years, accusations have emerged that actor and comedian Bill Cosby drugged and raped numerous women.⁶³ In October 2014, comedian Hannibal Buress referred to Cosby as a rapist during the course of a stand-up routine and a video of that

60. See *id.*

61. *Id.*

62. *Id.*

63. Todd Leopold & Ben Brumfield, *Rape Allegations Haunt Bill Cosby in the Digital Age*, CNN (Nov. 15, 2014), <http://www.cnn.com/2014/11/14/showbiz/tv/bill-cosby-rape-allegations/>.

performance went viral on social media.⁶⁴ The allegations against Cosby had been the subject of a 2005 civil suit, and a couple of women had publicly made claims against him in the past, but he had never been charged with a crime and the public did not take much notice.⁶⁵ After the Bures video became popular, however, dozens of women came forward with similar stories about being drugged and raped by Cosby.⁶⁶ Cosby himself did not address the allegations, but his lawyer, Marty Singer, said that the accusations were an “inane yarn” of “fabricated stories”⁶⁷ and other Cosby supporters have made similar statements.⁶⁸ Cosby’s accusers have stood by their stories, which might reasonably be understood as a reciprocal charge that his supporters are lying. As of the writing of this Article, there are four separate defamation lawsuits filed by at least ten women, alleging that Cosby is liable for suggesting they are liars.⁶⁹ At least one of those cases has survived a defense motion to dismiss.⁷⁰

Of course, the Cosby accusations seem different from those of Wilson and Scalia. We might dismiss Wilson’s accusation as a burst of heated rhetoric. And we might shrug off Scalia’s (and Posner’s?) accusations as an overstated disagreement about the meaning of texts that are available to all of us to assess and evaluate on our own. (Did Posner lie? Read Scalia’s book and decide for yourself. Did Scalia lie? Read Posner’s rebuttal and see what you think.) In the Cosby case, however, it seems certain that someone *is* lying. And it seems clear that some people are in a better position than others to know *who* it is. The Cosby accusations are thus not only different from those at issue in the Wilson and Scalia/Posner cases: they are different as among themselves.

64. Dan McQuade, *Hannibal Bures on Bill Cosby: “You’re a Rapist,”* PHILA. MAG. (Oct. 17, 2014), <http://www.phillymag.com/ticket/2014/10/17/hannibal-bures-bill-cosby-rapist/#ZfGw7D5EsvUTRQ5l.01>.

65. Leopold & Brumfield, *supra* note 63.

66. Noreen Malone, *I’m No Longer Afraid: 35 Women Tell Their Stories About Bill Cosby, and the Culture That Wouldn’t Listen*, N.Y. MAG, July 27, 2015.

67. Aaron Couch, *Bill Cosby’s Lawyer Fires Back at Accusers: “This Is Utter Nonsense,”* HOLLYWOOD REP. (Nov. 20, 2014), <http://www.hollywoodreporter.com/news/bill-cosbys-lawyer-fires-back-751015>; Cynthia Littleton, *Bill Cosby Lawyer Disputes Janice Dickinson’s Rape Claim*, VARIETY (Nov. 19, 2014), <http://variety.com/2014/tv/news/bill-cosby-lawyer-disputes-janice-dickinsons-rape-claim-1201360149/>.

68. Lynette Rice, *Bill Cosby Breaks Silence to Thank Supporters*, PEOPLE (Dec. 3, 2014), <http://www.people.com/article/bill-cosby-thanks-whoopi-goldberg-jill-scott>.

69. See Sydney Ember & Graham Bowley, *Defamation Suits Against Cosby Point to Peril of Belittling Accusers*, N.Y. TIMES (Nov. 13, 2015), <http://www.nytimes.com/2015/11/14/business/media/defamation-suits-against-cosby-point-to-peril-of-belittling-accusers.html>.

70. See Graham Bowley & Sydney Ember, *Defamation Suit Against Bill Cosby Will Go Forward in Massachusetts*, N.Y. TIMES (Oct. 9, 2015), http://www.nytimes.com/2015/10/10/business/defamation-suit-against-cosby-will-go-forward-in-massachusetts.html?_r=0.

Cosby and the women who have accused him of drugging and raping them are in a position to know who is telling the truth. When one of those accusers charges that Cosby is lying we understand her to be saying, “I was there; I know; this man is not telling the truth about what happened.” On the other hand, Cosby’s lawyer, wife, and other defenders were not in the room(s) when the alleged events occurred. They cannot have a personal, empirical basis for charging Cosby’s accusers with lying—and we all get that. We recognize that when Cosby’s lawyer says these women have “fabricated stories”⁷¹ what he is *really* saying is that he believes his client’s version over the versions of his accusers (and, of course, we also recognize that he gets paid to do so). When the rest of us—spectators to these events—express our own views (“Cosby is lying” or “His accusers are in it for a shakedown”) we are doing the same thing.⁷²

Just as accusing someone of lying is a complicated enterprise, so is lying itself. A thorough taxonomy of lying is well beyond the scope of this Article, but it is appropriate to provide some sense of the wide array of activities we describe when we use the word “lie.” This helps account for some of the texture we discover in accusations of lying.

Lies obviously include deliberate misstatements of fact, where the speaker’s intention is to mislead—what Sissela Bok calls “clear-cut lies.”⁷³ If John accuses Jane of lying in this strong sense, then he is charging her with knowingly saying something false, perhaps to further her own agenda. A lie in this sense corresponds to our legal

71. Couch, *supra* note 67.

72. Another example is the statement “Bush lied” about weapons of mass destruction in Iraq. A speaker who makes such a statement is simply expressing his opinion that President Bush misrepresented facts in order to engage in a war in Iraq. The audience cannot reasonably believe the speaker (assuming it is not someone in the Bush administration who worked closely on this issue) would have any personal knowledge of the events. The speaker is drawing conclusions based on the publicly disclosed facts that are available to all to evaluate. Even if people draw different conclusions, one cannot infer that the speaker has specialized knowledge of Bush’s state of mind. See ASHLEY MESSENGER, A PRACTICAL GUIDE TO MEDIA LAW 33 (Pearson 2014). It should be noted that there is an additional issue with respect to libel cases based on allegations of rape or sexual assault: the question of consent may give rise to further defenses or considerations. Indeed, people have different opinions about what constitutes evidence of consent. See, e.g., Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> (discussing the difference between positive consent and implied consent and how power relationships affect the validity of consent).

73. SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 16 (1999) (describing “clear-cut lies” as “lies where the intention to mislead is obvious, where the liar knows that what he is communicating is not what he believes, and where he has not deluded himself into believing his own deceptions”).

concept of a fraud, an intentional misrepresentation made for some sort of gain.

But we may also use “lie” to describe statements that we know to be false, even if we are unsure about the motivations of the speaker. Say, for example, that John knows that Sam cannot drink alcohol for medical reasons. It has come to his attention that Jane made the following statement to their mutual supervisor: “You know Sam and that group from plant operations? I saw the guys drinking on the job.” In response, John goes to the boss and says: “I am not sure why she did it, but Jane lied about Sam.”

Of course, Jane might be able to explain her misstatement. Perhaps she mistook someone else for Sam or misspoke when she used Sam’s name or meant to convey that the men with Sam were drinking—not Sam himself. But when John makes his statement he does not know any of this. What he *does know* is that Sam cannot drink and what he *believes* is that anyone who says Sam is drinking on the job is acting irresponsibly—perhaps intentionally, perhaps negligently. Such a misstatement is a lie in John’s book, and he calls it such.

But it gets more complicated still, because while some lies are intentional and malicious, and some are sloppy or reckless, still others are morally neutral if not even virtuous. Under some circumstances speakers may consider their lies defensible, perhaps even morally compelled.⁷⁴ In such situations, a speaker intends to deceive, but believes that there are “good reasons” to do so.⁷⁵ This includes the category we call “white lies,”⁷⁶ which are usually offered in situations where a speaker determines that the deception is unlikely to cause harm.⁷⁷ At the far end of the spectrum, lies become not just excusable but justifiable, for example where they may relieve suffering or save a life.⁷⁸

74. *Id.* at xxxiii.

75. *Id.* at xxxiii (“Rather, I want to stress the more vexing dilemmas of ordinary life; dilemmas which beset those who think that their lies are too insignificant to matter much, and others who believe that lying can protect someone or benefit society. We need to look most searchingly, not at what we would all reject as unconscionable, but at those cases where many see *good reasons* to lie.”).

76. *Id.* at 58 (defining a white lie as “a falsehood not meant to injure anyone, and of little moral import”).

77. *Id.* at 58.

78. *See id.* at 91, 140–45, 108 (discussing the example of parents who might choose to lie to a terminally ill child in order to minimize the child’s anguish). *See also* Robert C. Solomon, *Is It Ever Right to Lie? The Philosophy of Deception*, CHRON. HIGHER EDUC., Feb. 27, 1998, at A60 (“Not all untruths are malicious. Telling the truth can complicate or destroy social relationships. It can undermine precious collective myths. Honesty can be cruel. Sometimes, deception is not a vice but a social virtue, and systematic deception is an essential part of the order of the (social) world. In many countries—Japan and Western Samoa, for example—

In addition, it is even possible to make a false statement, knowing it is false, that we do not label a lie. Philosopher Joel Marks gives this example:

Is it possible to utter a falsehood and yet not lie? Suppose I say to you, ‘The Earth is flat.’ This statement is false. But I am not lying. I know it’s false, and I know you know it’s false. I have only uttered it in order to make my point: It is possible to utter a falsehood and yet not lie.⁷⁹

He notes that lying is not really about literal truth or falsity.⁸⁰ It is about belief and intention.⁸¹

As this discussion shows, accusations of lying can differ dramatically in what they mean and how we understand them.⁸² They are not a category of speech but a collection of categories. Generalized pronouncements about them, like those offered in *Milkovich*, therefore do not adequately capture their complexity. As we will discuss, these nuances have not been lost on the lower courts.

This is not to say that what emerges from the lower court decisions is a body of doctrine that is entirely consistent, coherent, or correct. To the contrary, the lower court jurisprudence around this issue is less tidy than one might hope. But the lower court decisions cast considerable light on where *Milkovich* went wrong and on what it means—or the range of things it might mean—when someone says that someone else lied.

III. APRÈS *MILKOVICH* LE DÉLUGE: LIAR CASES IN THE LOWER COURTS

Lots of post-*Milkovich* defamation cases involved accusations that someone lied. In many of them, the court concluded that the statement was not actionable. The reasoning behind that conclusion varied and offers insight into how lower courts avoid problematic

social harmony is valued far more than truthfulness as such. To tell another person what he or she wants to hear, rather than what one might actually feel or believe, is not only permitted but expected.”).

79. Joel March, *The Truth About Lying*, PHIL. NOW, June/July 2000, https://philosophy now.org/issues/27/The_Truth_about_Lying.

80. *Id.*

81. *Id.*

82. Even among philosophers who have attempted to define “lying,” there is significant disagreement. See Andreas Stokke, *Lying, Deceiving, and Misleading*, 8 PHIL. COMPASS 348, 348–59 (2013) (giving examples of different views on lying); see also Don Fallis, *Lying and Deception*, 10 PHILOSOPHERS’ IMPRINT 1, 1–22 (2010) (discussing differing views on the conditions for lying).

Supreme Court precedent: by ignoring it; by co-opting it; and by distinguishing it. We can divide the cases into several categories along those lines.⁸³

A. Ignoring Milkovich: *The Opinion Cases*

The first category is remarkable because these cases proceed as though *Milkovich* did not exist. These courts apply the post-*Gertz* pre-*Milkovich* opinion analysis as if it had persisted uninterrupted. We will call these the “opinion cases.” They are relatively few in number.

Gill v. Delaware Park, LLC is a good example of an opinion case.⁸⁴ There, the owner of a large number of thoroughbred racehorses

83. We omit from our discussion those cases that do not engage with the substantive question of whether the accusation was factual in nature and that are resolved on other grounds. These decisions turn on other principles of libel law (for example that the statement was substantially true or that the plaintiff could not prove actual malice) and do not inform our analysis. *See, e.g.*, *Konrad v. Brown*, 937 N.Y.S.2d 190 (2012) (finding statements to be “substantially true”); *Swisher v. Collins*, No. 2009 WL 1658031 (D. Idaho June 11, 2009) (statements are true, or supported conclusions); *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128 (D.D.C. 2009) (no evidence of actual malice); *Foxworthy v. Buetow*, 492 F. Supp. 2d 974 (S.D. Ind. 2007) (statement is not defamation per se, and there is no evidence of special damages); *Carver v. Bonds*, 37 Cal. Rptr. 3d 480 (2005) (statements are either substantially true or supported by fair report privilege); *Gulrajaney v. Petricha*, 885 A.2d 496 (App. Div. 2005) (no evidence of actual malice); *S. Volkswagen, Inc. v. Centrix Fin., LLC*, 357 F. Supp. 2d 837 (D. Md. 2005) (dismissed on technical grounds); *Lowe v. City of Shelton*, 851 A.2d 1183 (2004) (statement was retracted); *Anderson v. The Augusta Chronicle*, 585 S.E.2d 506 (Ct. App. 2003) (no evidence of actual malice); *Kling v. Harris Teeter Inc.*, 338 F. Supp. 2d 667 (W.D.N.C. 2002) (not actionable because statement was not heard by a third party); *Ampleman v. Scheweppe*, 972 S.W.2d 329, 332 (Mo. Ct. App. 1998) (statement has innocent construction; saying that statement was “inaccurate” does not necessarily mean plaintiff lied; it could mean there was an error, which is not defamatory); *Curry v. Roman*, 217 A.D.2d 314 (N.Y. App. Div. 1995) (no evidence of actual malice); *Piersall v. SportsVision of Chicago*, 595 N.E.2d 103 (1992) (no evidence of actual malice). Perhaps the most important “liar” case decided on other grounds is *Edwards v. Nat’l Audubon Soc., Inc.*, 556 F.2d 113 (2d Cir. 1977). That case established the “neutral reportage” defense in the Second Circuit, and it was decided pre-*Milkovich*, so it is not relevant to our analysis here. *Id.* at 120. Nevertheless, it is consistent with the point we will make later that there are good reasons to protect allegations that one is a “liar.” This Article also does not discuss the decisions of those state courts that have invoked a state constitutional provision in rejecting the reasoning of *Milkovich* or applying greater protection to opinion. *See Wheeler v. Nebraska State Bar Ass’n*, 508 N.W.2d 917 (1993); *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270 (1991); *Vail v. The Plain Dealer Publ’g Co.*, 649 N.E.2d 182 (1995); *Magnusson v. New York Times Co.*, 2004 OK 53, 98 P.3d 1070; *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896 (Utah 1992). Again, those cases are not directly relevant to our thesis.

84. *Gill v. Delaware Park, LLC*, 294 F. Supp. 2d 638 (D. Del. 2003); *see also Mast v. Overson*, 971 P.2d 928, 932 (Utah Ct. App. 1998) (holding, without discussing *Milkovich*, that an accusation of misrepresentation in the context of a heated public debate would be taken “with a grain of salt”).

brought a defamation claim based on statements made in a *Washington Post* article about him and his controversial practices within the sport.⁸⁵ In the article, the plaintiff described an instance in which an official of the defendant track threatened to terminate the plaintiff's ability to race his horses at that facility if he persisted in those practices.⁸⁶ The track official denied that the conversation took place and called the plaintiff a "liar."⁸⁷ The plaintiff alleged he was defamed by this accusation.⁸⁸

Under a strict reading of *Milkovich*, the accusation might appear to be factual in nature. After all, the conversation either did or did not take place and the threat either was or was not made. Furthermore, the individual denying that it took place had personal knowledge of whether it had occurred.

But the lower court would have none of this. Using the pre-*Milkovich* language of "opinion" and the pre-*Milkovich* test and offering no discussion of *Milkovich* at all, the court concluded that in context the accusation was not actionable.⁸⁹ The court reasoned that readers of the article would understand that the plaintiff and the defendant were enmeshed in a heated disagreement over whether a particular conversation took place and what had been said in the course of it.⁹⁰ In this context, the court concluded, readers would be much more likely to view "liar" as an epithet than as a factual statement.⁹¹

The court's departure from the strict dictates of *Milkovich* seems appropriate here. After all, most of us would acknowledge that individual memories about specific conversations are often imperfect for a variety of reasons: there may have been a misunderstanding about what was being said and being heard right from the beginning; a variety of psychological and cognitive factors and biases may shape what we remember and how we remember it; self-interest may, consciously or unconsciously, move our recollection in one direction or another; and so on. When one person says that another "lied" about a conversation, we understand that this often means: "I sure don't remember that the same way he does and I think he is wrong." In calling it a "lie," the accuser is frequently making a claim to certainty that may be overstated and unwarranted, and the audience understands that. An accusation of lying

85. *Gill*, 294 F. Supp. 2d at 640–42.

86. *Id.* at 642.

87. *Id.*

88. *Id.*

89. *Id.* at 647.

90. *Id.*

91. *Id.*

in this context is an exaggerative argumentative device, as when lawyers in their briefs say that something is “clearly” or “obviously” true even though it is not nearly so plain.

B. Co-opting Milkovich: The Rhetorical Hyperbole Cases

The cases in the second category show a somewhat greater fealty to *Milkovich* than do the opinion cases. In these cases, the lower court cites *Milkovich*, invokes the concept of “rhetorical hyperbole,”⁹² and usually rules that in context the accusation of lying is not an assertion of fact capable of being proven true or false. We will call these the “rhetorical hyperbole cases.” They differ from the opinion cases more in form than in substance. Having given a tip of the hat to *Milkovich*’s shift from opinion to rhetorical hyperbole, the courts here generally proceed to apply exactly the same sort of contextual analysis employed after *Gertz*.

Consider, for example, *Wood v. Del Giorno*.⁹³ In that case, two individuals—Del Giorno, an avid outdoorsman, and Wood, an animal rights advocate—participated in a broadcast radio debate about “canned hunts.”⁹⁴ The conversation became heated and rude, voices were raised and sentences interrupted, and Del Giorno accused Wood of being a “fraud” (and, as if that were not enough, a “complete fraud”) who was “out-and-out lying.”⁹⁵ Wood sued, the trial court granted summary judgment to Del Giorno, and the Court of Appeals affirmed.⁹⁶ The Court of Appeals cited *Milkovich* in concluding that these accusations were “merely opinions or hyperbole, rather than facts” and that no “reasonable person listening to the show [would] believe that Del Giorno was actually accusing Wood of engaging in fraudulent behavior.”⁹⁷

One might wonder how a court could conclude that no reasonable person could believe that when you call someone a “complete fraud”⁹⁸ you are not charging them with, well, being a fraud—a “clear-cut liar” in the strong sense discussed above.⁹⁹ Taken literally, the accusation seems to do just that. And *Milkovich* certainly left enough room for a court to conclude that an accusation of fraud is

92. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

93. *Wood v. Del Giorno*, 974 So.2d 95 (La. Ct. App. 2007).

94. *Id.* at 97.

95. *Id.*

96. *Id.* at 97–98.

97. *Id.* at 99.

98. *Id.* at 97.

99. See *supra* text accompanying note 73.

factual in nature, charging the target with intentionally misleading others for the speaker's own advantage.

Nevertheless, it seems clear that this case was correctly decided. A review of the speech in context supports the court's conclusion that listeners of the program would have understood that they were hearing the sort of heated, overwrought debate in which such language is to be taken with a "grain of salt."¹⁰⁰ Debates over animal rights and hunting tend to get very hot very fast and are frequently driven by invective and overstatement. Surely no one tuning into a screaming match over the subject suffered from the illusion that they were listening to an exchange characterized by objective data and factual precision.¹⁰¹

The good news about the first and second category of cases is that they preserve the values of continuity and predictability within the jurisprudence. In both the opinion cases and the rhetorical hyperbole cases, the courts default to the language- and context-driven mode of analysis developed after *Gertz*. Thus, for example, in *Gill* the court relied upon a pre-*Milkovich* 1981 opinion case from California to analyze the statement before it.¹⁰² This reliance on the post-*Gertz* standard has resulted in more doctrinal consistency than we might have hoped for in light of the fact that *Milkovich* does not tell us much about what hyperbole is or how we know it when we see it.

C. Distinguishing Milkovich: Cases Involving Conclusions Based on Disclosed Facts

There is a third category of cases in which the courts have also overwhelmingly found accusations of lying to be non-actionable. In these cases, the courts found that the statements at issue were conclusions based on disclosed facts. Because the facts were known and the audience could decide for itself whether the speaker's conclusion was valid, the courts protected these statements as opinion under the fair comment doctrine discussed above.

100. See *Wood*, 974 So.2d at 99; *Mast v. Overson*, 971 P.2d 928, 932 (Utah Ct. App. 1998).

101. See also *Rocker Mgmt. LLC v. John Does 1 Through 20*, 2003 U.S. Dist. LEXIS 16277, at *6-8 (N.D. Cal. May 28, 2003) (subpoena to identify Doe plaintiffs in defamation case quashed because accusations of "lies" and "half truths" made on Yahoo message board were, in context, mere hyperbole); *LoBiondo v. Schwartz*, 733 A.2d 516, 528 (N.J. Super. Ct. App. Div. 1999) (commentary regarding plaintiff's "lies and deception" were rhetorical hyperbole).

102. *Okun v. Superior Court*, 629 P.2d 1369 (Cal. 1981).

An example is *Phantom Touring, Inc. v. Affiliated Publications*.¹⁰³ In that case, plaintiff, a touring company that produced a musical comedy version of “Phantom of the Opera,” sued defendant, publisher of the *Boston Globe*, over an article suggesting that the marketing of the production was intended to mislead potential attendees into believing that they would see the famously popular Andrew Lloyd Weber version of the story—which this decidedly was not.¹⁰⁴

The court noted that the author of the piece in question had disclosed all of the facts on which he based his conclusion and that those facts were true.¹⁰⁵ Consistent with the fair comment doctrine, the court held his conclusion to be non-actionable because the underlying facts were accessible to everyone and readers were invited to make their own judgment.¹⁰⁶ On this basis the court distinguished *Milkovich*. There, the reporter could reasonably have been understood to have factual bases for his view beyond those known by the reader.¹⁰⁷ It is notable that the lower courts have used the fair comment privilege correctly to dispose of some post-*Milkovich* cases, because, as discussed above, *Milkovich* almost certainly described that principle *incorrectly*.¹⁰⁸

D. Following Milkovich: Bad Law Making More Bad Law

The final category consists of those cases in which courts have followed *Milkovich*'s general lead in finding an accusation of lying to be factual in nature. *McNamee v. Clemens*¹⁰⁹ is a good example.¹¹⁰ McNamee was an athletic trainer for the New York Yankees.¹¹¹ He testified before Congress that he had injected famed baseball player Roger Clemens with performance enhancing drugs.¹¹² Clemens then called McNamee a “liar” and McNamee sued for libel.¹¹³ The

103. *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724 (1st Cir. 1992); *see also* *USA Technologies, Inc. v. Doe*, 713 F. Supp. 2d 901 (N.D. Cal. 2010); *Ferris v. Loyal Order of Moose Oneonta Lodge No. 465*, 686 N.Y.S.2d 884 (N.Y. 1999); *Krems v. Univ. Hosp. of Cleveland*, 726 N.E.2d 1016 (Ohio Ct. App. 1999).

104. *Phantom Touring, Inc.*, 953 F.2d at 725.

105. *Id.* at 730.

106. *Id.* at 730–31; *see also* *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–20 (1990).

107. *Phantom Touring, Inc.*, 953 F.2d at 730–31.

108. *See supra* text accompanying notes 29–31.

109. *McNamee v. Clemens*, 762 F. Supp. 2d 584 (E.D.N.Y. 2011).

110. *See also* *Leal v. Holtvogt*, 702 N.E.2d 1246 (Ohio Ct. App. 1998); *Kolegas v. Heftel Broad. Corp.*, 607 N.E.2d 201 (Ill. 1992); *Divet v. Reinisch*, 564 N.Y.S.2d 142 (N.Y. 1991).

111. *McNamee*, 762 F. Supp. 2d at 589–90.

112. *Id.* at 589–90, 592.

113. *Id.* at 599.

court reasoned that the accusation was factual: McNamee either did or did not inject Clemens with drugs, and thus the allegation that McNamee had lied could be proven true or false.¹¹⁴ There are several factors that distinguish these types of cases from the others: (1) the subject matter of the statement is, at least theoretically, quantifiable or provable, as opposed to a characterization of events or conclusion about events; (2) the parties to the case were the actual participants in the event and therefore should be in a position to know what happened and have a valid epistemological basis for their statements;¹¹⁵ and (3) there is little room for interpretation about what the meaning or motivation of the statement is—as opposed to statements that are hyperbolic or made in the heat of an argument.

Cases like *McNamee* are not particularly unsettling—but those that follow *Milkovich*'s more specific suggestion that an opinion is actionable if it implies knowledge of supporting facts are. Take, for instance, *Brach v. Congregation Yetev Lev D'Satmar, Inc.*, a case involving a dispute over the ownership of real estate.¹¹⁶ The court there held, without elaboration, that the defendant's statement that the plaintiff won the property through "lies and deceit" was actionable because it implied unstated facts.¹¹⁷ The statements at issue were part of a long-running and bitter dispute over property, and in this context the court could easily have found that the accusation was hyperbolic and not to be taken literally—as did the courts in the first and second categories discussed above—but it did not.¹¹⁸

This sort of wooden application of *Milkovich* is dangerous. While the basis for the speaker's statement was unknown to the audience,

114. *Id.* at 602. The case settled in March of 2015. See Nathaniel Vinton, Michael O'Keefe & Teri Thompson, *Roger Clemens pays Brian McNamee to settle defamation suit, putting end to seven-year war*, N.Y. DAILY NEWS (Mar. 19, 2015, 6:07 AM), <http://www.nydailynews.com/sports/i-team/brian-mcnamee-defamation-suit-roger-clemens-settled-article-1.2154565>.

115. We should note, however, that the fact that parties were participants in events does not guarantee that they have knowledge of what occurred or that the basis for their beliefs about what occurred is valid. A person could have been drunk or otherwise impaired, misheard a statement or misunderstood what was occurring, or simply have misremembered or confused events. In fact, it may be that the speaker may make an erroneous statement about an event in which he was involved and yet he may in good faith believe he is correct, and thus, he may not have acted with "actual malice" for the purposes of libel law. Our point is not that this factor should necessarily indicate liability, but that it is a pre-condition to liability. One cannot transfer "knowledge" that one does not have. Thus, if a person speaks about an event at which he was not present and the audience cannot plausibly believe the speaker has a basis for the statement, then a court should deem it to be "opinion" and non-actionable. See *infra* Part IV.A.

116. *Brach v. Congregation Yetev Lev D'Satmar, Inc.*, 265 A.D.2d 360 (N.Y. App. Div. 2d Dep't 1999).

117. *Id.* at 360–61.

118. See *id.* at 361.

one cannot assume that there must be some fact at issue (which would be provable as false) as opposed to a *characterization* of facts (which would be an opinion about which reasonable people can disagree). Such an approach ignores both the practical reality that speakers can be and often are hasty and imprecise, and also the obligation of the audience to evaluate the credibility of the speaker and ask for clarity in cases where statements and their factual basis are ambiguous.¹¹⁹ Most, perhaps all, accusations of lies will be found actionable if we pay no attention to the complexities of language, understanding, and context and if our analysis begins and ends with the question of whether someone might think that the accusation was informed by undisclosed facts. Indeed, it is a curious jurisprudence that suggests a speaker's best refuge might be to declare: "In my opinion Jones is a liar and—let me be clear—I have *no* facts to support that conclusion."

For reasons discussed above, to the extent that *Milkovich* suggests that *all* accusations of lying imply the existence of undisclosed facts, the decision is simply wrong. But there is still work to do even if we understand the Court to make the more limited claim that *some* such accusations do so. We need criteria for determining when an accusation of lying signals the existence of such facts and when it does not. *Milkovich* may provide an example even if it does not provide criteria—if everyone who was present at the wrestling match would have known that Milkovich was lying at the hearing, and if Diadiun was present at both the wrestling match and the hearing, then he has undisclosed, detailed information that supports his conclusion. Indeed, that is what Diadiun appeared to have claimed.¹²⁰ But under what other circumstances will the principle apply? Or, to put it differently, under what circumstances will the principle *not* apply, since we assume that almost every sane person has at least *some* factual basis for their opinions, including an opinion that someone is a liar?

Milkovich's lack of clarity on this point has prompted some interesting results in the lower courts. Consider, for example, *Greene v. State ex rel. Dept. of Corrections*.¹²¹ In that case, the defendant called the plaintiff a "pathological liar" with no context given.¹²² One could read *Milkovich* to suggest that such a statement necessarily

119. Messenger, *The Problem with New York Times Co. v. Sullivan*, *supra* note 4, at 221–22 (obligation of audience to not assume statements are true without basis), 229–32 (discussing presumptions that should be made and the obligation to ask for clarification when statements are ambiguous).

120. *See supra* note 10.

121. *Greene v. State ex rel. Dep't of Corr.*, 21 So. 3d 348 (La. Ct. App. 2009).

122. *Id.* at 350.

implies knowledge of facts supportive of the judgment. But the lower court ruled that—absent any evidence showing that the statement was based on facts—an audience would and should presume it is merely a “subjective” viewpoint.¹²³ In other words, the lower court constructed a default position: unless the statement claims a factual basis, we take it to be a subjective opinion that can be proven neither true nor false. We will return later to the *Greene* court’s approach in this regard.

IV. SUGGESTIONS FOR WAYS FORWARD

Milkovich suffers from a number of conceptual infirmities and has been roundly criticized for them.¹²⁴ In large measure, however, it has not wrought much mischief in the lower courts. As discussed, its major doctrinal shift (disclaiming the longstanding interpretation of *Gertz*) and its specific holding (that an accusation of lying is a statement of fact) have had very little influence on the substance and direction of defamation law. Nevertheless, concerns remain and the post-*Milkovich* jurisprudence of liar libel must be directed in ways that address them.

A. What Does the Accuser Know?

Consider the cases like *McNamee* where something either is or is not the case—either *McNamee* injected Clemens with drugs or he did not, and once we know the answer to that question then we will know who is lying. This is pretty in theory but problematic in application. Return to the example, cited at the beginning, of *Cosby*’s lawyer. Yes, *Cosby* either did or did not drug and rape his accusers. But many of the people offering opinions about those accusers—his lawyer, his wife, and his fans, for example—cannot possibly know the truth. Their accusation of lying means: “I know whom I believe and I do not believe the accusers.” It does not mean: “I know whom I believe because I know what happened.” This is a critical distinction because the latter opinion points toward facts; the former opinion just points to other opinions. We know the difference and we therefore credit them differently.

This distinction needs to be incorporated in the post-*Milkovich* jurisprudence of liar libel. It is critical that courts continue to apply

123. *Id.* at 352.

124. See, e.g., Richard H. Weisberg, *The First Amendment Degraded: Milkovich v. Lorain and A Continuing Sense of Loss on its 20th Birthday*, 62 S.C. L. REV. 157 (2010).

the sort of language- and context-driven analysis that was developed after *Gertz* and that, in doing so, they distinguish accusations by those who can claim personal knowledge from accusations by those who cannot.¹²⁵ A failure to embrace this distinction leaves law and language strangely, and dangerously, disconnected.

B. How Much Certainty Does the Accuser Claim?

As discussed above, *Milkovich* noted that the mere addition of the phrases “I think” or “in my opinion” does not transform statements that are clearly factual into subjective expressions of viewpoint. This is fine as far as it goes, but it does not go very far. After all, the addition of such phrases can confirm that something that presents as an opinion is indeed intended to be just that. For example, the statement, “In my opinion Calvin Coolidge was a lousy President,” *twice* signals that it is subjective—once by using the evaluative term “lousy” and once by expressly framing the statement as an opinion. Furthermore, the addition of such phrases can clarify that something that might—or might not—be an opinion is intended as such. The Supreme Court recently acknowledged as much in the different context of securities law. In *Omnicare, Inc. v. Laborers Dist. Council Constr. Industry Pension Fund*,¹²⁶ the Court held that the words “We believe” made clear that an affirmation of compliance with the law was subjective and tentative rather than objective and certain. The same analysis should apply in the defamation context, where the use of such phrases can provide dispositive clarification.

C. What Sort of Basis Does the Accuser Cite or Imply?

Courts should also proceed with caution in implementing *Milkovich*'s suggestion that an accusation of lying that indicates knowledge of supporting facts should be treated as a factual statement.¹²⁷ Granted, in cases that look just like *Milkovich*—that is, in cases where the speaker clearly indicates that a factual basis for the

125. Epistemologists generally agree that a person cannot convey knowledge of something unless they themselves have knowledge of it. *THE EPISTEMOLOGY OF TESTIMONY* 6 (Jennifer Lackey & Ernest Sosa eds., Oxford Univ. Press 2006). Although there may be a debate about what is required to obtain “knowledge,” we think that in the context of libel law, one cannot assume that a speaker has knowledge of facts unless they are affirmatively stated and supported with credible evidence. In the absence of such conditions, statements should be presumed to be mere opinion and protected speech.

126. 135 U.S. 1318 (2015).

127. See *supra* note 25 and accompanying text.

accusation exists—this may be the correct approach. But *Milkovich* must be limited to that narrow (and, we suspect, relatively rare) class of cases in order to keep it from undermining critical First Amendment values. Several considerations confirm that this is so.

As an initial matter, it must be recognized that in an expansive sense *all* accusations of lying imply that they have *some* basis. This characteristic alone does not, however, transform something that a reader or listener would take as an expression of opinion into a statement of fact. This is easily demonstrated by reference to other kinds of statements that clearly qualify as opinions. Statements that “Jane is an unpleasant person to be around” or that “Ted has bad taste in ties” are clearly subjective expressions of viewpoint that cannot be proven true or false. At the same time, in both cases the speaker believes—and implies—that he or she has some basis for holding the opinion expressed. Nevertheless, the basis for those statements is the speaker’s subjective interpretation of or judgments about facts, not the facts themselves. For example, if Ted consistently wears striped ties and the speaker thinks stripes are aesthetically displeasing, the statement has a factual basis (the fact that Ted wears striped ties), but whether that fact is disclosed or not is immaterial. Indeed, even if the speaker were to add “and I have reasons to think so” or “and if you knew what I knew I think you would agree” to their statement this would not morph them into declarations of fact.

This principle also needs to be incorporated into the post-*Milkovich* jurisprudence of liar libel. In assessing whether an accusation of lying is actionable, it is insufficient for the court to note that the speaker stated or implied that he or she had a basis for the accusation. The court must assess the *kind* of basis the speaker claimed. To the extent statements are based in judgments about facts, rather than facts *vel non*, the accusation should be deemed non-actionable.

Even where a speaker claims a factual basis for their accusation, however, courts will still need to look closely at context. As discussed above, where those factual bases are disclosed and are accurate then the conclusion should be non-actionable as a fair comment.¹²⁸ But even that should not end the court’s analysis.

There are many instances where an accusation of lying is just a subjective expression of opinion even though the speaker points to facts and even though some or all of those facts may be false. Take, for example, the speaker who makes the following statement: “I think John Jones lied about the number of times he has come to

128. See *supra* notes 32–34 and accompanying text.

work late. I have never seen him come in late or get chewed out by our boss, but Jane says he comes in late all the time.” Does this statement point toward a factual basis? Yes. Is the factual basis true? Let’s assume not—let’s assume that Jane was innocently wrong or maliciously deceitful in her description of John’s attendance. Would most listeners take this as an objective statement of fact rather than as a subjective evaluation? We seriously doubt it. In our view, this statement would and should be taken to mean what it says: “I’ve got a view on something, but it’s not particularly well-informed and it’s based on hearsay that might be bad.” If anyone takes such a statement as factual, then this says more about the gullibility of the listener than the meaning intended by the speaker.

A literal application of *Milkovich*, however, could result in the nonsensical decision that this mushy expression of a subjective viewpoint was both intended and understood to convey a fact-based demonstrable truth. Fortunately, the lower court decisions generally embody a more holistic, nuanced, and thoughtful approach to the complexities of language than a wooden application of *Milkovich* brings with it. It is critical that courts continue to follow that more complex model in the post-*Milkovich* jurisprudence of liar libel.

Given all of this complexity, it is also critical that courts take a cue from *Greene* and recognize the appropriate default position in cases of uncertainty.¹²⁹ Under *Hepps*, which shapes the better parts of the Court’s reasoning in *Milkovich*, the plaintiff has the burden of proving a materially false statement of fact.¹³⁰ In cases where it is unclear whether the statement at issue could be proven false, courts should err on the side of protecting speech and should conclude that the statement is not actionable. This principle follows straightforwardly from the allocation of the burden of proof.

CONCLUSION

Milkovich is a cautionary tale told in four acts. The first act occurred in the immediate aftermath of the decision. *Milkovich* might have been (mis)understood as effectuating a broad doctrinal shift away from the protection of opinions. It became evident early on, however, that the lower courts were not going to fall into this error.

129. See *supra* text accompanying note 121–124.

130. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 (1986).

Media defense lawyers reframed their opinion arguments as rhetorical hyperbole arguments and most courts simply continued to apply the same standard they had post-*Gertz*.

The second act played out as the lower courts encountered cases of liar libel. This could have yielded a critical mass of superficially reasoned lower court decisions finding that accusations of lying were statements of fact. This did not happen either. For the most part, lower courts have done a good job in bringing to the statements in question the sort of nuanced and context-driven analysis required.

The next act in this drama is being performed before us now, as public accusations of lying go through their heyday. Whether the lower courts can sustain the detailed and disciplined approach they have generally taken to this issue remains to be seen. We hope that this Article makes a modest contribution to their efforts to get it right.

The final act of the drama will come when the Supreme Court has its next opportunity to explore language, truth, and the connections between them in the law of defamation. The Court has struggled with this in the past, which has resulted in criticism not only of *Milkovich* but even of pro-speech decisions like *New York Times v. Sullivan*.¹³¹ In its next foray into this territory the Court needs to remain mindful of the complexities of speech and truth and of the dangers of making broad and generalized pronouncements of what the former means and of how we know when we are encountering a claim to the latter. And, of course, the Court must fashion its jurisprudence in a way that gives speech the necessary breathing space; that recognizes—in the words of Salman Rushdie—that “language is courage”;¹³² and that assiduously avoids creating rules or endorsing principles that encourage timidity, self-censorship, and that greatest enemy of democracy, silence.

131. Messenger, *supra* note 4.

132. SALMAN RUSHDIE, *THE SATANIC VERSES* 290 (1988)