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Costello v. Capital Cities Communication, Inc.: Ignoring the First Amendment Privilege

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Costello v. Capital Cities Communications, Inc.: Ignoring the First Amendment Privilege

> [I]t must be obvious to the plainest minds, that opinions and inferences, and conjectural observations, are not only in many cases inseparable from the facts, but may often be more the objects of prosecution than the facts themselves . . . . [I]t is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures . . . .
>
> James Madison[1]

I. INTRODUCTION

"The public will be shocked to learn . . . that . . . in the United States of America a local politician could collect hundreds of thousands of dollars in a libel case solely because he was criticized harshly and called a liar by a local newspaper."[2] Yet this nearly came to pass in *Costello v. Capital Cities Communications, Inc.*[3] The manner in which the Illinois Supreme Court prevented this result, however, has raised confusing and alarming constitutional questions.

This Note examines the important background cases that shaped the first amendment issues raised in *Costello*. The appellate and supreme court opinions in *Costello* are then discussed and analyzed. Additionally, this Note examines the recent United States Supreme Court decision in *Milkovich v. Lorain Journal Co.*[4] and assesses its impact. Finally, this Note concludes that the decisions in *Costello* and *Milkovich* fail to recognize key issues central to freedoms guaranteed under the first amendment.

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1. Madison's Report on the Virginia Resolutions, *in* 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 575 (2d ed. 1836) (*quoted in* Costello v. Capital Cities Communications, Inc., 153 Ill. App. 3d 956, 976-77, 505 N.E.2d 701, 714 (5th Dist. 1987) (Steigmann, J., dissenting), *rev'd*, 125 Ill. 2d 402, 532 N.E.2d 790 (1988)).

2. *Costello*, 153 Ill. App. 3d at 1000, 505 N.E.2d at 728 (Steigmann, J., dissenting).

3. 153 Ill. App. 3d 956, 972-73, 505 N.E.2d 701, 711 (5th Dist. 1987), *rev'd*, 125 Ill. 2d 402, 532 N.E.2d 790 (1988).

4. 110 S. Ct. 2695 (1990).

II. BACKGROUND

A. Defamation and the First Amendment

A defamatory communication is one that tends to harm another's reputation in the eyes of the community or deters third persons from associating with him.[5] Defamation consists of the twin torts of libel and slander.[6] Historically, slander involved utterances, whereas libel concerned written or printed words.[7] Libel has since been expanded to include physical embodiment, such as hanging a person in effigy.[8]

The first amendment limits a plaintiff's right to recover in a defamation action.[9] Thus, a defamation plaintiff's common law rights necessarily must collide with his critic's constitutional privilege.[10] This constitutional question is especially acute when a publication criticizes a government official's performance of duty.[11]

B. The Actual Malice Standard

The competing interests of a defamation plaintiff and his critics were at issue in the landmark case *New York Times Co. v. Sullivan*.[12] In *New York Times*, an Alabama official brought a libel action against the newspaper and several civil rights leaders.[13] A full-page newspaper advertisement sponsored by an African-American political group criticized Montgomery city officials for their handling of several racial incidents.[14] The advertisement referred

5. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

6. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th ed. 1984) [hereinafter PROSSER & KEETON].

7. *Id.* § 112.

8. *Id.*

9. The first amendment provides in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. This protection has been extended to state governments by incorporation under the fourteenth amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

10. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 325 (1974) (noting the Court's lengthy struggle to reconcile defamation law and the first amendment); *see also infra* text accompanying notes 41-60.

11. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 282 (1964) ("[i]t is as much [the citizen-critic's] duty to criticize as it is the official's duty to administer"); *see also infra* text accompanying notes 12-40. The common law defense of fair comment and criticism historically has afforded great protection to critical opinions about matters of public interest, including criticism of public officials. As long as the opinion had a basis in fact and was not made with an intent to harm, the opinion was protected. *See* RESTATEMENT (SECOND) OF TORTS § 566 comment a (1977).

12. 376 U.S. 254 (1964).

13. *Id.* at 256.

14. *Id.* at 256-57. The complete text of the advertisement, as it originally appeared in

to Sullivan, a city commissioner, only indirectly,[15] and contained numerous factual errors.[16]

The trial judge instructed the jury that the published statements were libelous per se.[17] Under these circumstances, the plaintiff was required neither to plead nor to prove general damages to his reputation, because such damages were presumed under Alabama law.[18] Therefore, the jury was limited to determining whether the defendants published the advertisement and, if so, whether the statements were "of and concerning" the plaintiff.[19] The jury decided both of these issues in Sullivan's favor and awarded him $500,000 in damages.[20] The Alabama Supreme Court affirmed.[21]

Justice Brennan's majority opinion in *New York Times*[22] stated that libel can claim no "talismanic immunity" from first amendment standards.[23] Rather, the first amendment was fashioned to ensure the uninhibited exchange of ideas in the political realm.[24] This purpose, according to Justice Brennan, is based upon the underlying assumption that " 'right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of

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the New York Times on March 29, 1960, is included as an appendix to the majority opinion. *Id.* at 292.

15. *Id.* at 257-58. Specifically, the advertisement criticized local police activity, including several arrests of Dr. Martin Luther King and the disruption of a nonviolent student demonstration. *Id.* at 256-58. The plaintiff, who supervised the Montgomery police department, alleged that the words "police" and "arrest" referred to him in his official capacity. *Id.* at 257-58.

16. *Id.* at 257-59. For example, the advertisement claimed that Dr. King had been arrested seven times for minor offenses. In fact, he had only been arrested four times. *Id.* at 258-59. Additionally, the advertisement alleged that students sang "My Country, 'Tis of Thee" on the steps of the capitol building during a demonstration. In fact, the students sang the National Anthem. *Id.*

17. *Id.* at 262-63. Under Alabama law, published words that tended to injure a person's reputation, charged him with a criminal offense, or tended to bring him into public contempt, were libelous per se. *Id.* at 263 (citing *New York Times*, 273 Ala. 656, 673, 676, 144 So.2d 25, 37, 41 (1962)).

18. *Id.* at 262.

19. *Id.*

20. *Id.* at 256.

21. *New York Times*, 273 Ala. 656, 687, 144 So. 2d 25, 52 (1962).

22. Before proceeding to the basis of its decision, the majority first disposed of two contentions asserted to insulate the lower court decisions from constitutional scrutiny. *New York Times*, 376 U.S. at 265. First, the Court held that a state rule of law which purports to destroy a party's first amendment rights is unconstitutional, even in a civil case. *Id.* Second, allegedly libelous statements that are constitutionally protected do not lose that protection merely because they were made in the form of a published advertisement. *Id.* at 266.

23. *Id.* at 269.

24. *Id.*

authoritative selection.' "[25] Therefore, the case was considered in the context of the nation's profound commitment to uninhibited debate on public issues.[26] Although such discussion often produces sharp, caustic attacks on public officials, defamatory content cannot dissolve the constitutional privilege afforded a critic of official conduct.[27]

Similarly, factual error in an allegedly defamatory statement does not diminish its constitutional protection.[28] Any rule requiring a critic of government to guarantee the truth of his assertions would undermine the foundations of the first amendment, foster self-censorship and thereby lessen the effectiveness of public debate.[29]

In consideration of these principles, the Court concluded that a public official seeking damages for defamation must prove that the statements at issue were made with actual malice.[30] It defined actual malice as "knowledge that [a statement] was false or reckless disregard whether it was false or not."[31] Therefore, the case was reversed and remanded because it was not clear whether the Alabama courts applied this standard.[32]

C. The Constitutional Privilege

1. Absolute Protection

In his concurring opinion in *New York Times*,[33] Justice Black stated that the first amendment provides more protection to the

25. *Id.* at 270 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.)).

26. *Id.*

27. *Id.* at 273.

28. *Id.*

29. *Id.* at 279.

30. *Id.* at 279-80.

31. *Id.* at 280. Four years later, in St. Amant v. Thompson, 390 U.S. 727 (1968), the Court refined the actual malice standard. Justice White, writing for the majority, explained that "reckless disregard" is determined, not by what a reasonably prudent person would do, but rather by whether the defamation defendant subjectively "entertained serious doubts" as to the veracity of his published statements. *Id.* at 731.

32. *New York Times*, 376 U.S. at 284. Specifically, the trial judge failed to instruct the jury to differentiate between general and punitive damages. *Id.* Therefore, the Court was unable to determine whether the damage award was punitive or compensatory, and thus, whether actual malice had been proven or merely presumed. *Id.* However, the Court's independent review indicated that the evidence: (1) failed to show actual malice with "the convincing clarity which the constitutional standard demands," and (2) did not support the "finding that the allegedly libelous statements were made 'of and concerning' [the plaintiff]." *Id.* at 286, 288.

33. *Id.* at 293-97 (Black, J., concurring). Justice Douglas joined in the concurrence. *Id.* at 293.

press than the majority conceded.[34] Specifically, he stated that the first and fourteenth amendments prohibit state interference with a citizen's right to criticize official conduct.[35] The concurrence characterized the criticism of government officials as an "absolute, unconditional constitutional right."[36] Moreover, Justice Black considered discussion of public affairs and officials precisely the type of speech that the first amendment was designed to protect.[37] "To punish the exercise of this right . . . or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed."[38]

Justice Black reasoned that a more faithful first amendment interpretation required a holding that left the people and press free to discuss public issues with impunity.[39] He concluded that the first amendment, at minimum, guarantees an absolute right to freely discuss government and public affairs.[40]

2. Shifting the Standard

Ten years later, however, in *Gertz v. Robert Welch, Inc.*,[41] the Court limited the constitutional privilege recognized by the majority in *New York Times*. In *Gertz*, a Chicago policeman shot and killed a youth.[42] The officer was convicted of second degree murder.[43] The youth's family retained Gertz to represent them in civil litigation against the policeman.[44]

A politically conservative magazine reported that Gertz was part of a "frame up" of the policeman in his criminal trial.[45] The

34. *Id.* at 293 (Black, J., concurring).
35. *Id.* (Black, J., concurring).
36. *Id.* (Black, J., concurring).
37. *Id.* at 296-97 (Black, J., concurring).
38. *Id.* at 297 (Black, J., concurring).
39. *Id.* at 296 (Black, J., concurring).
40. *Id.* at 297 (Black, J., concurring). In the decade following *New York Times*, the Court wrestled with the issue raised by Justice Black: the extent of the first amendment privilege. In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), a majority of the Justices agreed that the actual malice standard should extend beyond public officials to "public figures." *Id.* at 162-63 (Warren, C.J., concurring). Later, in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43-44 (1971), a plurality of the Court extended the actual malice standard to defamation actions brought by private individuals, provided the matter at issue was one of public or general interest, but this notion was subsequently rejected. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43 (1974); *see also infra* text accompanying notes 41-60.
41. 418 U.S. 323 (1974).
42. *Id.* at 325.
43. *Id.*
44. *Id.*
45. *Id.*

magazine alleged that Gertz was involved with communist organizations, and that the frame-up, which included false testimony at the officer's trial, was part of a conspiracy to undermine the authority of the Chicago police.[46] Gertz filed suit against the magazine's publisher in federal court, alleging that the article injured his reputation as a lawyer and citizen.[47] Although a jury awarded Gertz $50,000,[48] the district court entered judgment notwithstanding the verdict in favor of the publisher, because the court determined that the allegedly libelous statements were not made with actual malice.[49] The Court of Appeals for the Seventh Circuit affirmed,[50] and the Supreme Court granted certiorari to reconsider the extent of a publisher's constitutional privilege.[51]

The Supreme Court concluded that the actual malice standard applies only when the person allegedly defamed is a public official or public figure.[52] Justice Powell, writing for the majority, reasoned that public persons have access to the media and may thus counteract false statements, whereas private individuals ordinarily are accorded no such protection.[53] Moreover, because a public official or figure voluntarily subjects himself to close scrutiny, he accepts a greater risk of defamatory injury.[54] A private individual accepts no such risk, thus foreclosing any first amendment privilege otherwise afforded a publisher or broadcaster.[55]

Therefore, the Court held that, short of imposing liability with-

46. *Id.*

47. *Id.* at 327.

48. *Gertz*, 322 F. Supp. 997, 998 (N.D. Ill. 1970).

49. *Id.* at 1000. The district court applied the actual malice standard even though Gertz was not a public official or public figure. *Id.* The court apparently anticipated the reasoning of the plurality in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43-44 (1971). *See supra* note 40. But the Supreme Court in *Gertz* disagreed with the *Rosenbloom* plurality, and held that the actual malice standard applies only to defamation plaintiffs who are public officials or public figures. *Gertz*, 418 U.S. at 345-46.

50. *Gertz*, 471 F.2d 801, 808 (7th Cir. 1972).

51. *Gertz*, 418 U.S. at 325.

52. *Id.* at 342-43. The Court defined a public official as one who holds a government office. *Id.* at 342. A public figure is determined by "the notoriety of [one's] achievements or the vigor and success with which [one] seek[s] the public's attention . . . ." *Id.*

53. *Id.* at 344.

54. *Id.*

55. *Id.* at 345. Although the plaintiff was a former Chicago city official and appeared at the coroner's inquest following the shooting, the Court did not consider him a to be public official or figure: "We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes." *Id.* at 352. This is an apparent departure from precedent. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (football coach at the University of Georgia was a "public figure" for purposes of recovering damages for a defamation alleging that he was involved in fixing a football game). In a case consolidated for decision with *Butts*, Associated Press

out fault, states may define appropriate standards of liability for defamatory statements made by a publisher or broadcaster about a private individual.[56] States cannot, however, allow recovery of presumed or punitive damages in such a case without a showing of actual malice.[57]

Although *Gertz* apparently limited the media's first amendment protection in defamation actions by private individuals, it may have expanded constitutional protection under a new standard. In dicta, the Court stated, "[w]e 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, but on the competition of other ideas."[58] Subsequent lower courts have gleaned from this statement the proposition that the first amendment unconditionally protects statements of opinion.[59] Thus, only if the court finds an allegedly defamatory statement to be an assertion of fact must it apply the actual malice test and inquire into the subjective state of mind of the statement's publisher.[60]

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v. Walker, the Justices unanimously agreed that a politically active former Army general was a "public figure" for purposes of applying the actual malice standard).

Nevertheless, subsequent cases originating in Illinois indicate that "public official or figure" is a rather broad category, encompassing a wide variety of individuals. *See, e.g.*, Stevens v. Tillman, 855 F.2d 394, 403 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1339 (1989) (elementary school principal); Reed v. Northwestern Publishing Co., 124 Ill. 2d 495, 508, 530 N.E.2d 474, 480 (1988) (police officer); Wanless v. Rothballer, 115 Ill. 2d 158, 167, 503 N.E.2d 316, 320 (1986), *cert. denied*, 482 U.S. 929 (1987) (village attorney); Catalano v. Pechous, 83 Ill. 2d 146, 149, 155, 419 N.E.2d 350, 352, 355 (1980), *cert. denied*, 451 U.S. 911 (1981) (aldermen); Weinel v. Monken, 134 Ill. App. 3d 1039, 1042, 481 N.E.2d 776, 778 (5th Dist. 1985) (owner of engineering firm having public works contract with township); Matchett v. Chicago Bar Ass'n, 125 Ill. App. 3d 1004, 1011, 467 N.E.2d 271, 277 (1st Dist. 1984), *appeal denied* (not published), *cert. denied*, 471 U.S. 929 (1987) (candidate for public office). *But see*, Van Duyn v. Smith, 173 Ill. App. 3d 523, 532, 527 N.E.2d 1005, 1011 (3d Dist. 1988), *appeal denied*, 124 Ill. 2d 562, 535 N.E.2d 922 (1989), *cert. denied*, 109 S. Ct. 3217 (1989) (executive director of an abortion clinic was not a public official or figure).

56. *Gertz*, 418 U.S. at 347.

57. *Id.* at 349.

58. *Id.* at 339-40. The "common ground" referred to an area in which the Justices all apparently agreed: absolute constitutional protection for statements of opinion. *See id.* at 338-39.

59. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 974 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985); Owen v. Carr, 113 Ill. 2d 273, 280, 497 N.E.2d 1145, 1148 (1986). *But see* Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2707 (1990) (explicitly rejecting absolute constitutional protection of opinion). All three of these cases are discussed extensively in this Note. *See infra* text accompanying notes: 61-69, 86-99, 174-204.

60. *See supra* note 31 for an explanation of the United States Supreme Court's "actual malice" test. The High Court has decided several other cases dealing with statements of opinion that bear mention. In Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), a newspaper accused the plaintiff of "blackmailing" a municipality in order to get

3. Determining the Boundaries

In *Ollman v. Evans*,[61] the Court of Appeals for the District of Columbia Circuit attempted to define the boundaries of this new standard.[62] The *Ollman* court found that *Gertz* "fundamentally changed" the privilege accorded written opinions on areas of public interest.[63] Specifically, the court recognized that the *Gertz* dicta provided statements of opinion with absolute constitutional immunity from defamation actions.[64] Thus, *Gertz* required courts to distinguish opinion from fact in order to fulfill this first amendment mandate.[65]

The *Ollman* court noted, however, that distinguishing opinion from fact was a difficult task, and *Gertz* provided no guidance on how to make this distinction.[66] Accordingly, the court developed four factors to determine whether an "average reader" would consider a statement to be an opinion.[67] The *Ollman* factors examine a statement's precision; verifiability, i.e., whether the statement is capable of being objectively characterized as true or false; literary context; and broader, social context.[68] Despite the difficulty in de-

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zoning variances. The Court stated that a statement of opinion does not lose constitutional protection if it is in the form of a rhetorical hyperbole or a vigorous epithet. *Id.* at 14. Similarly, in Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974), the Court held that a labor union's use of the word "scab" with reference to letters carriers who refused to join the union was merely loose, figurative language and not intended to be fact.

61. 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

62. Ollman, a political science professor at New York University, brought this defamation action against two nationally syndicated columnists. *Id.* at 971-72. The columnists, Rowland Evans and Robert Novak, co-wrote an article alleging that Ollman was a Marxist who used the classroom to indoctrinate students in the coming "revolution." *Id.* at 972. The issue, according to the court, was whether the column was constitutionally protected opinion. *Id.* at 971.

63. *Id.* at 974.

64. *Id.*

65. *Id.* at 975. It is not always an easy task to distinguish a given statement as opinion. Two commentators have suggested that "[a] statement can be protected as opinion if the meaning is so vague and imprecise that it is subject to many interpretations. However, if the meaning of a statement is sufficiently definite to convey fact, the statement cannot be considered to be an opinion." K. MIDDLETON & B. CHAMBERLIN, THE LAW OF PUBLIC COMMUNICATION 157 (1988).

66. *Id.*

67. *Id.* at 979.

68. *Id.* Judge Bork, concurring in the result, rejected the "rigid doctrinal framework" adopted by the court. *Id.* at 993 (Bork, J., concurring). In his estimation, statements such as those made by the defendants in *Ollman* do not always fit into "compartments labelled 'opinion' and 'fact' . . . ." *Id.* at 994 (Bork, J., concurring). Rather, such statements should be subjected to "strict judicial scrutiny to ensure that cases about the types of speech and writing essential to a vigorous first amendment do not reach the jury." *Id.* at 997 (Bork, J., concurring). Under Judge Bork's "balancing test," a court would examine

termining what an opinion actually is, most courts follow the dicta in *Gertz* and afford broad deference to statements of opinion.[69]

4. Fact Versus Opinion in Illinois

The Illinois courts have also struggled with the opinion versus fact dichotomy. In *Catalano v. Pechous*,[70] the Illinois Supreme Court discussed constitutional and common law issues that frequently arise in a defamation setting. In *Catalano*, seven of eight Berwyn, Illinois alderman brought a defamation suit against three defendants, including Pechous, a city clerk, for statements allegedly made during a council meeting.[71] At the meeting in question, Pechous purportedly remarked to third persons that, in awarding a municipal trash collection contract, "two hundred forty pieces of silver changed hands—thirty for each alderman."[72] The statement was subsequently published in the *Chicago Sun-Times*.[73] The trial court granted the defendants' motions for summary judgment, but the appellate court reversed as to Pechous.[74]

On appeal, the supreme court stated that a public official may recover in a defamation suit only if he establishes that the allegedly defamatory statement was false and was made with actual malice.[75] Pechous made no representations regarding the truth of his statement.[76] He did contend, however, that his statement was not defamatory, because the plaintiffs failed adequately to prove actual malice.[77]

In assessing the defamatory nature of Pechous' statement, the court applied two tests. First, it examined whether the statement was susceptible to an innocent construction.[78] The court ruled

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the totality of circumstances to determine whether making the statement in question actionable would unduly burden free speech or press. *Id.* (Bork, J., concurring).

69. *See* K. MIDDLETON & B. CHAMBERLIN, *supra* note 65, at 163.

70. 83 Ill. 2d 146, 419 N.E.2d 350 (1980), *cert. denied*, 451 U.S. 911 (1981).

71. *Id.* at 149, 419 N.E.2d at 352.

72. *Id.* at 151, 419 N.E.2d at 353.

73. *Id.*

74. *Id.* at 149-50, 419 N.E.2d at 352.

75. *Id.* at 155, 419 N.E.2d at 355 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)); *see also supra* text accompanying notes 30-32.

76. *Catalano*, 83 Ill. 2d at 155, 419 N.E.2d at 355.

77. *Id.* at 156, 419 N.E.2d at 355.

78. *Id.* at 157, 419 N.E.2d at 356. For a discussion of the Illinois "innocent construction rule" see Note, *Chapski v. Copley Press: Modification of the Illinois Innocent Construction Rule*, 17 J. MARSHALL L. REV. 233 (1984). Briefly, under this rule, if a statement can be interpreted either innocently or as referring to someone else, it will not be defamatory per se. *See also infra* text accompanying notes 86-99 for an extended discussion of the rule.

that, because the defendant offered no alternative, plausible interpretation to his obvious allusion to Judas' betrayal of Christ, his statement could not be innocently construed.[79]

The court then addressed whether the statement at issue was constitutionally protected opinion.[80] Specifically, the court recognized that a statement of opinion concerning a public figure generally receives absolute constitutional protection under *Gertz*, "quite apart" from the *New York Times* standard.[81] The court also indicated, however, that statements imputing criminal activity are not protected opinions, but rather statements of fact.[82]

The court concluded that Pechous' comment was a statement of fact imputing criminal activity to the plaintiffs, and was therefore not entitled to absolute constitutional protection.[83] Moreover, the court found that the defendant's statement was made, at minimum, with reckless disregard for its accuracy, thus satisfying the actual malice requirement.[84] Accordingly, the defendant's remark was not constitutionally privileged under either *Gertz* or *New York Times*.[85]

D. The Innocent Construction Rule

The Illinois Supreme Court, in *Owen v. Carr*,[86] readdressed the standards to be applied in a common law defamation action.[87] In *Owen*, an attorney filed a libel action against a law journal pub-

79. *Catalano*, 83 Ill. 2d at 157, 419 N.E.2d at 355-56.

80. *Id.* at 159, 419 N.E.2d at 356-57.

81. *Id.* at 159-61, 419 N.E.2d at 356-57 (quoting Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980)).

82. *Id.* at 161, 419 N.E.2d at 357 (citing Cianci v. New York Times Publishing Co., 639 F.2d 54 (2d Cir. 1980)). Thus, the court implied that statements in the form of an opinion may be construed as facts, thereby depriving such statements of absolute constitutional protection. *See id.* at 159, 419 N.E.2d at 356.

83. *Id.* at 164, 419 N.E.2d at 359.

84. *Id.* at 166, 419 N.E.2d at 360.

85. *Id.* Although *Catalano* discussed the fact versus opinion dichotomy, it did not propose criteria for making this determination. The appellate courts, however, have occasionally resorted to the following analysis: " '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.' " *See, e.g.*, Stewart v. Chicago Title Ins. Co., 151 Ill. App. 3d 888, 891-92, 503 N.E.2d 580, 582 (4th Dist. 1987) (quoting RESTATEMENT (SECOND) OF TORTS § 566 (1977)) (statement in letter from title insurer to bank, characterizing mortgagor as member of militant farmers' group, constitutionally was protected opinion under the Restatement test, and therefore was not actionable).

86. 113 Ill. 2d 273, 497 N.E.2d 1145 (1986).

87. *Id.* at 278, 280, 497 N.E.2d at 1147, 1148.

lisher.[88] A journal article quoted remarks, allegedly made by the publisher, that characterized the plaintiff as "trying deliberately to intimidate" judges in cases involving the plaintiff's corporate client.[89] The plaintiff contended that, because the statements were naturally harmful to his professional reputation, they constituted libel per se and were therefore actionable without proof of special damages.[90]

Without first exploring the defamatory nature of the defendant's statements, the court examined whether those statements could be innocently construed.[91] Under the innocent construction rule, the court considers a statement in context and gives its words and implications their "natural and obvious meanings."[92] Under such a construction, a statement will not be actionable per se if it reasonably may be interpreted innocently or deemed to refer to someone other than the plaintiff.[93]

The *Owen* court concluded that the defendant's statements were not libelous per se.[94] The court reasoned that the article, considered in its entirety, could reasonably be construed as an attorney's biased statement of his client's view of pending litigation, thereby satisfying the innocent construction rule.[95] Additionally, the court recognized the first amendment protection afforded statements of opinion under *Gertz*.[96] Although the court mandated that "the involved language must be considered in context to determine whether the statement [is] an expression of opinion," it did not further explore the fact versus opinion dichotomy.[97] Rather, using essentially the same reasoning it had applied in determining that the statements could be innocently construed, the court summarily concluded that the defendant's remarks were opinions.[98] Accordingly, the court held that the statements at issue were entitled to

88. *Id.* at 275, 497 N.E.2d at 1146.
89. *Id.*
90. *Id.* at 277, 497 N.E.2d at 1147. Illinois has adopted the common law model in which four classes of statements are actionable per se: (1) words imputing commission of a criminal offense, (2) words imputing infection with a communicable disease, (3) words imputing inability to perform or lack of professional integrity in discharging the duties of public office or employment and (4) words prejudicing an individual in his profession or trade. Fried v. Jacobson, 99 Ill. 2d 24, 27, 457 N.E.2d 392, 394 (1983).
91. *Owen*, 113 Ill. 2d at 278, 497 N.E.2d at 1147.
92. *Id.* at 279, 497 N.E.2d at 1147-48.
93. *Id.* at 279, 497 N.E.2d at 1148.
94. *Id.* at 282, 497 N.E.2d at 1149.
95. *Id.* at 280, 497 N.E.2d at 1148.
96. *Id.*
97. *Id.*
98. *Id.* at 280-81, 497 N.E.2d at 1148.

constitutional protection and susceptible to an innocent construction, thereby precluding recovery.[99] Approximately two years after deciding *Owen*, the Illinois Supreme Court reconsidered these questions in *Costello v. Capital Cities Communications, Inc.*[100]

III. DISCUSSION

A. The Factual Setting of Costello

A 1980 amendment to the Local Mass Transit District Act[101] granted the governing boards of St. Clair, Madison, and Monroe Counties authority to create transit districts.[102] County retail sales taxes of up to 0.25% were to fund these districts.[103]

A local newspaper, the *News-Democrat*, vehemently opposed the creation of a transit district in St. Clair County without a public referendum on the sales tax issue.[104] Accordingly, the *News-Democrat* sought to endorse a candidate who shared these views in the upcoming election for county board chairman.[105]

Jerry Costello, a candidate for chairman, met with the newspaper's editorial board in September, 1980, to discuss his political views and the possible endorsement of his candidacy.[106] At this meeting, Costello told the editorial board that he would oppose "any new tax during his first term without a referendum."[107] Apparently satisfied with Costello's views on the transit issue, the *News-Democrat* endorsed his candidacy for county board chairman. An October 17, 1980, editorial praised Costello's overall ability and stated that he pledged to oppose the imposition of any new tax absent a referendum.[108] Costello won the November

99. *Id.* at 282, 497 N.E.2d at 1149.

100. 125 Ill. 2d 402, 532 N.E.2d 790 (1988), *rev'g*, 153 Ill. App. 3d 956, 505 N.E.2d 701 (5th Dist. 1987).

101. ILL. REV. STAT. ch. 111 2/3, paras. 351-59 (1987).

102. *Id.* paras. 352(i), 353; *Costello*, 125 Ill. 2d at 407, 532 N.E.2d at 791-92. A mass transit district is defined by the Act as a municipal corporation having right of eminent domain and power to contract for public mass transportation. ILL. REV. STAT. ch. 111 2/3, para. 353 (1987).

103. *Id.*; *Costello*, 125 Ill. 2d at 407, 532 N.E.2d at 792.

104. *Costello*, 125 Ill. 2d at 407, 532 N.E.2d at 792. An editorial in the September 15, 1980, edition of the *News-Democrat* expressed this view. *Costello*, 153 Ill. App. 3d at 959, 505 N.E.2d at 702-03.

105. *Costello*, 125 Ill. 2d at 407-08, 532 N.E.2d at 792.

106. *Id.*

107. *Id.* at 408, 532 N.E.2d at 792. The facts surrounding this meeting were disputed at trial. Two defendants testified that Costello promised to "vigorously use [his] political influence" and "do everything possible" to oppose the transit tax. *Id.*

108. *Id.* at 408-09, 532 N.E.2d at 792.

election.[109]

The hotly disputed transit issue was on the agenda of Costello's first meeting as chairman on December 29, 1980.[110] Prior to the meeting, Costello arranged to have a motion presented and seconded which, if carried, would table the transit district question until the county board held an advisory referendum in the spring.[111] But Costello's ploy failed. The board overwhelmingly defeated the motion to table the transit issue and subsequently adopted a resolution creating a transit district.[112] Costello did not vote against the resolution and made no statements in opposition.[113]

When *News-Democrat* officials learned of the resolution to create a transit district, Richard Hargraves, the editorial page editor, prepared two columns criticizing the board's decision.[114] These editorials were published December 31, 1980, on the "OPINIONS" page within a box labelled "Our Viewpoint."[115] The second editorial carried the headline "Costello Blew his First Chance" and read as follows:

> Jerry Costello lied to us. There's no nicer way to put it; he simply lied. And, when he lied to us, he lied to you. He said he was going to be a tough county board chairman, especially when board members wanted to spend taxpayers' money. He said he would militantly oppose the implementation of any new tax without first seeking the voters' approval through a referendum. He said he would lead the County Board down the proper paths, protecting the rights of the taxpayers. Well, he lied. He didn't do any of those things Monday night, thereby breaking his most sacred campaign promise at his very first meeting. The County Board had an opportunity to conduct a binding referendum, asking you if you wanted to pay a new sales tax to support the Bi-State bus system. That's the very thing Costello pledged he would do. He had promised, in the strongest possible terms, that

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109. *Id.* at 409, 532 N.E.2d at 792.

110. *Id.* A *News-Democrat* reporter was present at the meeting. *Id.* at 409, 532 N.E.2d at 793.

111. *Id.* at 409, 532 N.E.2d at 792-93.

112. *Id.* at 409-10, 532 N.E.2d at 793. The motion to table was defeated by a vote of 22 to 6. The resolution creating a transit district was adopted by the same margin. *Id.*

113. *Id.* at 410, 532 N.E.2d at 793. Costello testified at trial that the board chairman was restricted to the role of parliamentarian and thus was prohibited from speaking out on substantive matters before the board. *Id.* at 409-10, 532 N.E.2d at 793. Additionally, Costello testified that, prior to the meeting, he urged at least nine board members to reject the transit district resolution. Seven of the board members verified this testimony at trial. *Id.* at 418, 532 N.E.2d at 797.

114. *Id.* at 410, 532 N.E.2d at 793.

115. *Id.* at 411, 532 N.E.2d at 793.

> he would let the voters decide. But when the time came to make a decision, he was up there sitting on his gavel.
>
> Some leader! You couldn't tell him from any other politician in the bunch. He did absolutely nothing to protect your interests. To say we're disappointed is too mild; we're irate. We supported Costello's election because of what he said to us. We told you what he said and how we thought he was different from the run-of-the-mill, Touchette-dominated Democrats of the past. Now we wonder if he didn't lie to you. Maybe Costello isn't different. Maybe Costello didn't mean any of the things he said. Maybe his opponent, Republican Larry Reinneck, was right when he said Jerry Costello was nothing more than another patronage-oriented political hack. How are we supposed to tell otherwise? Jerry Costello asked for a chance to prove himself and, in his very first meeting, he blew it. Just think, we've got two more years of the Costello brand of lying leadership. Doesn't that thrill you?
>
> Richard N. Hargraves[116]

One week after the *News-Democrat* published this editorial, Costello filed a libel action against Hargraves and the publishing company, alleging that the following statements in the editorial were defamatory:

> (1) 'Jerry Costello lied to us'; (2) 'There's no nicer way to put it, he [Costello] simply lied'; (3) 'And when he [Costello] lied to us, he lied to you'; (4) 'Well, he [Costello] lied'; (5) 'But when the time came to make a decision, he [Costello] was up there sitting on his gavel'; (6) 'He [Costello] did absolutely nothing to protect your interests'; (7) 'Just think, we've got two more years of the Costello brand of lying leadership.'[117]

The circuit court dismissed Costello's complaint for failure to state a cause of action.[118] The appellate court reversed and remanded, holding that Costello's complaint sufficiently stated a

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116. *Id.* at 411-12, 532 N.E.2d at 794. The entire "OPINIONS" page of the December 31, 1980, edition of the *News-Democrat*, as it originally appeared, is reprinted at *Costello*, 153 Ill. App. 3d at 1002, 505 N.E.2d at 730 (Steigmann, J., dissenting).

Hargraves' initial draft was relatively tame. *Costello*, 125 Ill. 2d at 411, 532 N.E.2d at 793. The editorial appeared in its final form at the insistence of the publisher, Darwin Wiles, who characterized Costello as a liar and wanted Hargraves to make the editorial "more vigorously critical," so that Costello "would not think he 'could get away with this type of thing . . . again.' " *Id.*

Five days after publication, Costello sent a letter to the editor justifying his inaction at the board meeting. *Id.* at 412, 532 N.E.2d at 794. The *News-Democrat* elected not to publish Costello's rebuttal because he threatened a lawsuit against the newspaper. *Id.* at 413, 532 N.E.2d at 794.

117. *Id.*

118. *Id.* at 406, 532 N.E.2d at 791.

cause of action for libel per se.[119] On remand, the trial judge awarded Costello $450,000 in actual damages against both defendants and $600,000 in punitive damages against the publishing company.[120] The defendants appealed.[121]

B. The Appellate Court Opinions

1. The Majority

On appeal, the defendants argued that the editorial was constitutionally protected opinion,[122] The majority, however, rejected this contention.[123] The court stated that the *Ollman* reasoning did not simplify or improve the reliability of judicial analysis in a defamation case because it is difficult to draw a "bright line" between fact and opinion.[124]

Instead, the court chose to apply the innocent construction rule, and stated two reasons for preferring this approach.[125] First, the court found that Illinois Supreme Court precedent did not support absolute constitutional protection of opinion.[126] For example, according to the court, *Catalano v. Pechous*[127] may be read as critical of this standard.[128] Further, the court contended that *Owen v. Carr*[129] was decided solely on the basis of the innocent construction rule; *Owen*'s apparent approval of absolute constitutional protection for statements of opinion was mere dicta.[130] Finally, the court criticized the foundation of absolute protection for opinions, finding the standard unrealistic vis-à-vis the innocent construction rule.[131]

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119. Costello v. Capital Cities Media, Inc., 111 Ill. App. 3d 1009, 1016-17, 445 N.E.2d 13, 19 (5th Dist. 1982).

120. Costello v. Capital Cities Communications, Inc., 125 Ill. 2d at 406, 532 N.E.2d at 791.

121. *Id.* at 407, 532 N.E.2d at 791.

122. *Costello*, 153 Ill. App. 3d at 963-65, 505 N.E.2d at 705-06 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) and Ollman v. Evans, 750 F.2d 970, 974 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985)).

123. *Id.* at 966, 505 N.E.2d at 708.

124. *Id.* at 964-65, 505 N.E.2d at 706.

125. *Id.* at 966, 505 N.E.2d at 707.

126. *Id.* at 965, 505 N.E.2d at 706-07.

127. 83 Ill. 2d 146, 419 N.E.2d 350 (1980), *cert. denied*, 451 U.S. 911 (1981); *see also supra* text accompanying notes 70-85.

128. *Costello*, 153 Ill. App. 3d at 965, 505 N.E.2d at 707.

129. 113 Ill. 2d 273, 497 N.E.2d 1145 (1986); *see also supra* text accompanying notes 86-99.

130. *Costello*, 153 Ill. App. 3d at 966, 505 N.E.2d at 707.

131. *Id.* at 967, 505 N.E.2d at 708. The court pointed out a potential downfall of the opinion versus fact test: "Any defendant in any defamation suit . . . can always say, 'Why, I was only expressing an opinion, and that's privileged.' We do not believe the law of

After reviewing the evidence, the majority reaffirmed its earlier opinion[132] that the editorial was libelous per se.[133] Additionally, the court held that the defendants' statements were made with actual malice and characterized the defendant's language as "a vicious and unwarranted attack" on Costello.[134] However, the court reversed the trial judge's award of punitive damages[135] and reduced the compensatory damage judgment from $450,000 to $200,000.[136]

2. The Dissent

A vigorous dissent by Justice Steigmann criticized the majority's failure to recognize absolute constitutional protection for statements of opinion.[137] According to the dissent, *Owen* mandated that courts afford this protection to defamation defendants.[138] Thus, Justice Steigmann contended, *Owen* required courts to dis-

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defamation should digress so far . . . . The innocent construction rule does not permit such an extreme digression." *Id.*

Although the court rejected the notion of absolute protection for expressions of opinion, it explicitly recognized the actual malice standard. *Id.* However, the defendants in *Costello* could not claim this constitutional privilege because their statements went "well beyond the bounds of protected criticism." *Id.*

132. Costello v. Capital Cities Media, Inc., 111 Ill. App. 3d 1009, 1014, 445 N.E.2d 13, 17 (5th Dist. 1982).

133. Costello v. Capital Cities Communications, Inc., 153 Ill. App. 3d at 967, 505 N.E.2d at 708. The editorial was libelous per se because it imputed to Costello an inability to perform or lack of integrity in the discharge of his official duties. *Id.* This is one of four common law categories of words which, if falsely communicated, constitute libel per se. *Id.* at 967-68, 505 N.E.2d at 708-09; *see also supra* note 90.

134. *Id.* at 972-73, 505 N.E.2d at 711.

135. *Id.* at 974, 505 N.E.2d at 713. An award of both compensatory and punitive damages is impermissible when the factors used to determine the appropriateness of punitive damages are identical to the elements required for recovery of compensatory damages. *Id.* at 974, 505 N.E.2d at 712-13 (citing Hammond v. North Am. Asbestos Corp., 111 Ill. 2d 350, 489 N.E.2d 1374 (1986) and Dethloff v. Ziegler Coal Co., 82 Ill. 2d 393, 412 N.E.2d 526 (1980)). Punitive damages normally are appropriate for torts committed with actual malice. *Id.* at 974, 505 N.E.2d at 712. However, because actual malice is essential to a libel action brought by a public official, punitive damages are not permitted in such a case. *Id.* at 976, 505 N.E.2d at 713.

136. *Id.* at 976, 505 N.E.2d at 713-14. Compensatory damages awarded must be reasonably related to the actual harm suffered. *Id.* at 976, 505 N.E.2d at 713. At trial, Costello did not testify on the issue of whether he incurred any actual harm. *Id.* However, Costello's wife stated that he was distraught and humiliated by the defendants' editorial. *Id.* at 976, 505 N.E.2d at 713-14. Other witnesses testified regarding Costello's reputation in the community. *Id.* at 976, 505 N.E.2d at 714. Based on this testimony, the court reduced Costello's damage award to more accurately reflect the extent of harm he actually suffered. *Id.*

137. *Id.* at 976-77, 505 N.E.2d at 714 (Steigmann, J., dissenting).

138. *Id.* at 979, 505 N.E.2d at 715 (Steigmann, J., dissenting) (citing *Owen*, 113 Ill. 2d at 280, 497 N.E.2d at 1148).

tinguish opinion from fact, despite the difficulty of the task.[139] Because Illinois precedent did not provide clear guidelines on the mechanics of separating opinion from fact, the dissent advocated adopting the *Ollman* factors.[140] Applying these factors to the facts in *Costello*, the dissent determined that the editorial was opinion[141] entitled to absolute constitutional protection.[142]

C. *The Illinois Supreme Court Opinion*

The supreme court in *Costello* first considered whether the defendants' editorial statements were libelous per se.[143] The court stated that statements accusing the plaintiff of incapacity or wrongdoing "in words so obviously and naturally harmful that they are actionable without proof of special damages" are libelous per se.[144] This rule does not apply, however, to statements reasonably susceptible to an innocent construction.[145] The court applied these principles and concluded that the editorial was libelous per se, because it charged Costello with a lack of integrity in discharging his public duties and could not be innocently construed.[146]

The court then rejected the defendants' contention that the editorial's allegations were substantially true.[147] Specifically, the editorial alleged that the county board was authorized to conduct a binding referendum on the transit district issue; in fact, the board had the power to conduct only an advisory referendum.[148] Addi-

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139. *Id.* at 979-80, 505 N.E.2d at 715-16 (Steigmann, J., dissenting).

140. *Id.* at 983, 505 N.E.2d at 718 (Steigmann, J., dissenting). Whether a statement is constitutionally protected opinion depends upon its: (1) precision, (2) verifiability, (3) literary context, and (4) public context. *Ollman*, 750 F.2d at 979; *see also supra* text accompanying note 68.

141. *Costello*, 153 Ill. App. 3d at 990-93, 505 N.E.2d at 723-24 (Steigmann, J., dissenting). Justice Steigmann found that a statement's presence on an editorial page, although not dispositive, is a highly significant factor in determining whether it is protected opinion. *Id.* at 991-92, 505 N.E.2d at 723 (Steigmann, J., dissenting).

142. *Id.* at 1001, 505 N.E.2d at 729 (Steigmann, J., dissenting). Justice Steigmann concluded, "The *Belleville News-Democrat* may be a scandal sheet . . . and the investigation and reporting that lead [sic] to the litigation in this case may be a disgrace to journalism; however, as long as the allegedly defamatory statements in this case are opinion, not fact, none of these other factors matter." *Id.* (Steigmann, J., dissenting).

143. *Costello*, 125 Ill. 2d at 414, 532 N.E.2d at 795.

144. *Id.*

145. *Id.*

146. *Id.* at 417, 532 N.E.2d at 796; *see also supra* note 90.

147. *Costello*, 125 Ill. 2d at 417, 532 N.E.2d at 796; *see also* Curtis Publishing Co. v. Butts, 388 U.S. 130, 151 (1967) ("[t]ruth has become an absolute defense in almost all [libel] cases"); American Int'l Hosp. v. Chicago Tribune Co., 136 Ill. App. 3d 1019, 1022, 483 N.E.2d 965, 968 (1st Dist. 1985) ("[t]ruth is a valid defense in a defamation action").

148. *Costello*, 125 Ill. 2d at 417, 532 N.E.2d at 796. A county board has the authority to initiate a referendum. ILL. REV. STAT. ch. 46, para. 28-5 (1987). However,

tionally, the editorial erroneously reported that the board voted to impose a sales tax; in truth, the board vote merely created a transit district.[149] The court also found that Costello exerted considerable effort to defeat the transit district resolution, contrary to the editorial's assertion that he had done "absolutely nothing" to protect the taxpayers' interests.[150] Thus, the court found convincing evidence that the statements in the editorial were, in fact, false.[151]

The court acknowledged the defendants' contention that opinions receive absolute first amendment protection.[152] The court determined, however, that it need not address this issue, because Costello, a public official, failed to prove actual malice with clear and convincing evidence.[153] The court reasoned that the actual malice standard is subjective, and therefore requires proof that the defamation defendant actually knew that his statements were false, or at least seriously doubted their validity.[154] Thus, the trial court's finding that the defendants subjectively believed that Costello had lied, contradicted its conclusion that the defendants acted with actual malice.[155]

The supreme court concluded that Costello failed to establish with clear and convincing evidence that the defendants knew or entertained serious doubts regarding the veracity of their assertions.[156] Because a public official must prove actual malice with convincing clarity to recover damages in a defamation action, the court reversed the judgments below.[157]

IV. ANALYSIS

A. Costello Implicitly Rejects Absolute Protection of Opinion

The appellate court in *Costello* disregarded the Illinois Supreme

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"[q]uestions of public policy which have any legal effect shall be submitted to referendum only as authorized by a statute which so provides or by the [Illinois] Constitution." *Id.* para. 28-1. A referendum not so authorized is merely advisory. *Id.*

149. *Costello*, 125 Ill. 2d at 417, 532 N.E.2d at 796.

150. *Id.* at 418, 532 N.E.2d at 797.

151. *Id.* at 417-18, 532 N.E.2d at 797.

152. *Id.* at 418, 532 N.E.2d at 797.

153. *Id.* at 418-19, 532 N.E.2d at 797 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)); *see also supra* note 32.

154. *Costello*, 125 Ill. 2d at 418-19, 532 N.E.2d at 797.

155. *Id.* at 421, 532 N.E.2d at 798.

156. *Id.* at 425-26, 532 N.E.2d at 800. Specifically, the plaintiff failed to demonstrate convincingly that, prior to publishing the editorial, the defendants knew about Costello's efforts to table the transit district resolution. Without such knowledge, the defendants could not have published the editorial with actual malice. *Id.*

157. *Id.* at 426, 532 N.E.2d at 801.

Court's mandate, announced less than six months earlier in *Owen v. Carr*,[158] that defamation defendants must be afforded absolute constitutional protection for statements of opinion.[159] Obviously, the appellate court could not reconcile its conclusion that the editorial was libelous per se with the *Owen* court's directive that all opinions are constitutionally privileged. This left the appellate court with two options: reexamining its reasoning or ignoring the directive. It chose the latter.[160]

The appellate court justified its conclusion by finding the "line" between fact and opinion difficult to define and, therefore, not worth defining.[161] Further, the court dismissed the constitutional basis of *Owen* as mere dicta.[162] In effect, the opinion below challenged the Illinois Supreme Court to reaffirm its recognition in *Owen* that opinion is afforded absolute constitutional protection.

The supreme court, however, completely skirted this issue.[163] Had the court merely acknowledged the difficulty of resolving the opinion versus fact dichotomy, it would have preserved the integrity of its decision in *Owen*. By its silence, the court implied that constitutional protection of opinion remains a debatable issue in Illinois. If so, this conclusion contradicts the United States Supreme Court's interpretation of the first amendment[164] and ignores the court's duty to enforce constitutional standards.[165]

Ultimately, *Costello* will adversely affect the public's ability to monitor and criticize elected officials. The right to speak freely on issues of public concern[166] and to use the press as a medium for political discussion[167] are the tools with which citizens perform their necessary function. These rights are not implied merely from

158. 113 Ill. 2d 273, 280, 497 N.E.2d 1145, 1148 (1986).

159. *Id.* at 280, 497 N.E.2d at 1147. "[T]he Supreme Court has recognized a constitutional privilege for expressions of opinion. . . . [T]he involved language *must* be considered in context to determine whether the statement should be construed to be an expression of opinion." *Id.* (emphasis added).

160. *See Costello*, 153 Ill. App. 3d at 965-67, 505 N.E.2d at 707-08.

161. *Id.* at 965, 505 N.E.2d at 706.

162. *Id.* at 966, 505 N.E.2d at 707; *see also supra* note 159.

163. *See Costello*, 125 Ill. 2d at 418, 532 N.E.2d at 797.

164. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (extending absolute protection to statements of opinion under the first amendment); *see also supra* text accompanying notes 58-60.

165. *Costello*, 153 Ill. App. 3d at 997, 505 N.E.2d at 727 (Steigmann, J., dissenting).

166. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (suggesting that an allegedly defamatory communication discussing an issue of public interest and concern does not lose constitutional protection merely because it is made in the form of a paid advertisement).

167. *See New York Times*, 376 U.S. at 293 (Black, J., concurring) (individuals and publishers have an absolute right to criticize public officials and discuss public affairs).

constitutional language; freedom of speech and the press are enumerated explicitly in the first amendment.[168]

Further, the first amendment's protection of public criticism serves as a quid pro quo for the absolute privilege afforded many federal and state officials for utterances made within the confines of their official duties.[169] Assuming that the corresponding first amendment privilege of the citizen-critic is limited to expressions of opinion,[170] judicial difficulty in defining the proper standard as to what constitutes an opinion does not justify denying a constitutional right. The factors enunciated in *Ollman* provide significant guidance to courts in making this determination.[171] As courts ad-

But see Gertz, 418 U.S. at 339-40 (limiting the actual malice standard to statements directed toward public officials and public figures).

168. The first amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. Courts seem reluctant to enforce these explicit guarantees of citizenship, yet are quite willing to infer other rights whose origins are not readily apparent. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (discovering a right to "privacy" within the "penumbra" created by the Bill of Rights).

169. Article I of the Constitution provides in pertinent part, "Senators and Representatives shall . . . be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House they shall not be questioned in any other Place." U.S. CONST. art. I, § 6. The Supreme Court has extended this "absolute" privilege to judges, Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871), and executive officers exercising appropriate discretion, Barr v. Matteo, 360 U.S. 564, 574-75 (1959). Executive officials receive only "limited" immunity, however, in suits alleging constitutional violations. Butz v. Economou, 438 U.S. 478, 505-08 (1978).

The Illinois Constitution abolished sovereign immunity "[e]xcept as the General Assembly may provide by law." ILL. CONST. art. XIII, § 4. The Local Governmental and Governmental Employees Tort Immunity Act, ILL. REV. STAT. ch. 85, paras. 1-101 to 10-101 (1987), was designed "to protect local public entities and public employees from liability arising from the operation of government." *Id.* para. 1-101.1(a). Specifically, the Act insulates local public entities from all defamation actions. *Id.* para. 2-107. Additionally, local public entities may defend or indemnify any employee for an act or omission occurring within the scope of his employment. *Id.* para. 2-302.

170. *Gertz*, 418 U.S. at 339-40. *But see New York Times*, 376 U.S. at 293 (Black, J., concurring) (characterizing criticism of government officials as an "absolute, unconditional constitutional right," regardless of whether a such criticism is labeled "opinion" or "fact").

171. *See* Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985); *see also supra* text accompanying notes 60-68. Admittedly, some doubts must be raised regarding standards which afford an imprecise, unverifiable statement greater constitutional protection than a well crafted one. The *New York Times* court stated, "Criticism of . . . official conduct does not lose its constitutional protection merely because it is effective criticism . . . ." *New York Times*, 376 U.S. at 273. This argument, however, fails to recognize that truth is generally accepted as an absolute defense in a defamation action. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 151 (1967); *see also*

dress cases with varying fact patterns, these flexible factors can be adjusted to enhance their reliability in determining whether a statement is opinion or fact in a given situation.

Freedom to discuss public affairs and the performance of public officials lies at the very heart of the first amendment.[172] The Constitution expressly prohibits state courts from limiting these rights.[173] Because *Costello* effectively chills these first amendment privileges by casting doubt upon the protection afforded statements of opinion, it violates the spirit, if not the letter, of the Constitution.

B. The Impact of Milkovich v. Lorain Journal Co.

A "survey" of the law is merely a snapshot in the legal develop-

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supra note 147. Thus, as a statement's precision increases, it may lose the constitutional protection accorded an "opinion" but gain truth as an absolute common law defense.

Nevertheless, the *Ollman* factors are flexible enough to at least provide courts with a starting point for analysis. Thus, in applying these factors to an allegedly defamatory newspaper editorial, a court may give the literary and public contexts of the writing greater weight than its precision and verifiability. Under such a construction, it is difficult to imagine that a newspaper editorial, printed on a page labelled "OPINIONS" and "Our Viewpoint," could be construed by an "average reader" as anything other than an opinion. *See Ollman*, 750 F.2d at 979. *But see Costello*, 125 Ill. 2d at 417, 532 N.E.2d at 796. For a detailed analysis of the *Ollman* factors and possible variations, see Note, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809 (1988).

172. *See New York Times*, 276 U.S. at 296-97 (Black, J., concurring) ("[f]reedom to discuss public affairs and public officials is unquestionably . . . the kind of speech the First Amendment was designed to keep within the area of free discussion"). Indeed, the *Costello* decision becomes even more untenable when one considers the importance the Founders placed on a free press. Although initially critical of newspapers, Thomas Jefferson came to believe that

> [t]he basis of our government being the opinion of the people, the very first should be to keep that right; and were it left to me to decide whether we should have a government without newpapers or newspapers without government, I should not hesitate a moment to prefer the latter.

Letter from Thomas Jefferson to Edward Carrington, January 16, 1787, in 11 PAPERS OF THOMAS JEFFERSON 48-49 (J. Boyd, ed. 1955).

Benjamin Franklin convinced Andrew Hamilton to defend the immigrant printer John Peter Zenger, who was being tried under the sedition laws for printing a criticism of the governor. One commentator suggests that Hamilton's successful defense served as a foundation for the drafting of the first amendment. *See* Introduction, PRESS FREEDOMS UNDER PRESSURE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE GOVERNMENT AND THE PRESS 4 (1972).

173. Article VI of the Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bounded thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI.

ment of a jurisdiction. The significance of a particular case that was decided during the survey period may seem to diminish with time, its issues left dormant until reawakened by a new set of circumstances. Such circumstances found themselves before the Supreme Court of the United States this past summer in *Milkovich v. Lorain Journal Co.*[174]

In *Milkovich*, plaintiff was a high school wrestling coach whose team and its fans were involved in an altercation with members of an opposing team.[175] Plaintiff's actions during the meet allegedly caused the fracas.[176] Following an administrative hearing before Ohio High School Athletic Association ("OHSAA"), plaintiff's team was placed on probation.[177] A state court, however, found that the administrative hearing violated due process requirements and the court enjoined OHSAA from enforcing the penalty against plaintiff's team.[178] Plaintiff testified at both the administrative and court hearings.[179]

The day after the court issued its injunction, an editorial in defendants' newspaper accused plaintiff of lying.[180] Plaintiff brought a defamation action, alleging that the editorial accused him of perjury.[181] Following complex litigation that extended over a fourteen year period,[182] the Ohio Court of Appeals affirmed the trial court's

174. 110 S. Ct. 2695 (1990).

175. *Id.* at 2698 n.2.

176. *Id.* at 2698.

177. *Id.*

178. Barrett v. Ohio High School Athletic Ass'n, No. 74 Civ. 09-3390 (Ohio C.P. Franklin Jan. 7, 1975).

179. *Milkovich*, 110 S. Ct. at 2698.

180. *Id.* A photograph of the editorial's author appeared in the column, along with the caption, "TD says." The headline read, " 'Maple beat the law with the big lie.' " The article stated: " '[A] lesson was learned . . . yesterday by the students of Maple Heights High School. . . . If you get in a jam, lie your way out. . . . Milkovich . . . lied at the [court] hearing after . . . having given his solemn oath to tell the truth.' " *Id.* n.2.

181. *Id.* at 2699.

182. *See id.* at 2698-2701. The Ohio Court of Common Pleas initially directed a verdict for defendants on the grounds that plaintiff failed to prove actual malice. The Ohio Court of Appeals reversed and remanded, holding that plaintiff made a sufficient showing of actual malice. Milkovich v. Lorain Journal Co., 65 Ohio App. 2d 143, 416 N.E.2d 662 (1979). The Ohio Supreme Court dismissed defendants' subsequent appeal for lack of a substantial constitutional question, and the United States Supreme Court denied certiorari. Lorain Journal Co. v. Milkovich, 449 U.S. 966 (1980).

On remand, the trial court granted summary judgment for defendants, holding both that the editorial was constitutionally protected opinion and that plaintiff failed to make a prima facie showing of actual malice. The Ohio Court of Appeals affirmed. The Ohio Supreme Court, however, reversed and remanded, holding as a matter of law that the statements in the editorial were "factual assertions," and thus were not constitutionally protected. Milkovich v. News-Herald, 15 Ohio St. 292, 473 N.E.2d 1191, 1196-97 (1984). Further, the court held that plaintiff was not a public official or figure, and there-

summary judgment for defendants.[183] The appellate court based its ruling on the *Gertz* dicta, finding that "as a matter of law . . . the article was constitutionally protected opinion."[184] The Ohio Supreme Court dismissed plaintiff's appeal,[185] and the United States Supreme Court granted certiorari.[186]

Chief Justice Rehnquist, writing for the majority, traced the history of constitutional limitations on state defamation law. This historical discourse yielded six "established safeguards" under the first amendment.[187] First, the majority confirmed the requirement that public officials and figures must prove actual malice in order to recover in a defamation action.[188] Additionally, the Court reiterated that states cannot impose liability for defamation without a showing of fault.[189] Third, the Court stated that presumed or punitive damages are unavailable to a defamation plaintiff absent a showing of actual malice.[190] Fourth, the majority reaffirmed that a defamation plaintiff bears the burden of proving both fault *and falsity* against a media defendant.[191] Fifth, certain "types" of speech, such as " 'rhetorical hyperbole,' " parody, and language used " 'in a loose, figurative sense,' " are immune from defamation actions.[192] Finally, the Court emphasized that first amendment issues require an appellate court to review independently the entire record as an

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fore was not subject to the actual malice standard. *Id.* at 294-99, 473 N.E.2d at 1193-96. The United States Supreme Court again denied certiorari. Lorain Journal Co. v. Milkovich, 474 U.S. 953 (1985).

In the interim, H. Donald Scott, the superintendent of schools at the time of the wrestling meet incident, was pursuing his own defamation action in the Ohio courts. Scott allegedly had been defamed in the same editorial as that at issue in *Milkovich*. In Scott's case, however, the Ohio Supreme Court ultimately determined that defendants' editorial *was* constitutionally protected opinion, and affirmed the trial court's summary judgment against Scott. Scott v. News-Herald, 25 Ohio St. 243, 496 N.E.2d 699 (1986). The Ohio Court of Appeals thus "consider[ed] itself bound by the . . . decision in *Scott*" when it rendered its final decision in the *Milkovich* case. *See* Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2701 (1990).

183. Milkovich v. News-Herald, 46 Ohio App. 3d 20, 545 N.E.2d 1320 (1989).

184. *Id.* at 23, 545 N.E.2d at 1324.

185. *See* Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2701 (1990).

186. *Milkovich*, 110 S. Ct. 863 (1990).

187. *Milkovich*, 110 S. Ct. at 2703-05.

188. *Id.* at 2703-04 (citing New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) and Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring)).

189. *Id.* at 2704 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974)).

190. *Id.* (citing *Gertz*, 418 U.S. at 350).

191. *Id.* (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986)).

192. *Id.* at 2704-05 (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988), and quoting Letter Carriers v. Austin, 418 U.S. 264, 284-86 (1974) and Greenbelt Coop. Publishing Ass'n v. Bresler, 395 U.S. 6, 13-14 (1970)).

additional safeguard to free expression.[193]

The majority concluded that these six rules "adequately secure[]" an individual's first amendment freedoms, thereby rendering it unnecessary to "create a wholesale defamation exemption for anything that might be labeled 'opinion.' "[194] Thus, according to the Court, the dispositive issue in *Milkovich* was not whether the allegedly defamatory statements in the editorial were opinions, but rather "whether . . . a reasonable factfinder could conclude that the statements in the . . . column could *imply* an assertion that . . . Milkovich perjured himself . . . ."[195] Because such an inference reasonably could be drawn from the editorial at issue, and because such an inference was "sufficiently *factual* to be susceptible of being proved true or false," the Court reversed and remanded.[196]

C. *Tracking the Elusive "False Idea"*

It follows from Chief Justice Rehnquist's analysis in *Milkovich* that the emphasis in determining the scope of first amendment protection afforded the press has shifted. No longer will courts struggle to determine whether an allegedly defamatory statement is constitutionally protected opinion. Rather, they will struggle to ascertain whether or not "a statement of opinion relating to matters of public concern . . . contain[s] a *provably false factual connotation* . . . ."[197] Additionally, *Milkovich* makes clear that when a factual assertion reasonably can be *inferred* from a statement — even a statement of opinion — a cause of action for defamation will not be deemed constitutionally repugnant.[198]

As pointed out by Justice Brennan in his dissenting opinion, however, the majority reached its decision in *Milkovich* by using the very same analysis previously used by many courts in unlocking the fact versus opinion dichotomy.[199] Specifically, the dissent stated:

> Among the circumstances to be scrutinized by a court in ascertaining whether a statement purports to state or imply facts about an individual, as shown by the Court's analysis of the state-

193. *Id.* at 2705 (citing Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984)).

194. *Id.*

195. *Id.* at 2707 (emphasis added).

196. *Id.* (emphasis added).

197. *See id.* at 2706 (emphasis added).

198. "[E]xpressions of 'opinion' may often imply an assertion of objective fact." *Id.* at 2705.

199. *Id.* at 2708-09 (Brennan, J., dissenting).

> ments at issue here, . . . are the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made.[200]

Justice Brennan's reference to the *Ollman* factors is evidence that *Milkovich* decided nothing. Rather, the Court merely changed the form of the constitutional inquiry without changing its substance. Courts, instead of protecting statements of "opinion," are now required to protect statements that are "not provably false,"[201] and that do not state or imply defamatory "facts."[202] Thus, the focus will be on finding an actionable "fact," rather than a protected "opinion."

The danger of *Milkovich* is its emphasis on facts that reasonably may be *inferred* from statements of opinion. Any well-written opinion relies upon underlying facts. The conscientious critic now faces the possibility of a defamation action not only for the ideas he actually expresses, but for the factual foundations of those ideas. According to *Milkovich*, if an author's factual foundations ultimately prove to be incorrect, the opinions expressed in his writing are actionable.[203] Thus, under the *Milkovich* rationale, there can be "such a thing as a false idea."[204]

V. CONCLUSION

Costello's implicit rejection of absolute protection of opinion under the first amendment seems — at first glance — unimportant in light of the *Milkovich* decsion. Under *Milkovich*, whether a statement is one of "opinion" is irrelevant in the constitutional analysis. Thus, *Costello*'s decision to ignore the fact versus opinion dichotomy appears to be correct.

As this Note points out, however, *Milkovich* merely changes the focus of the constitutional inquiry. A court must now seek an actionable "fact," rather than a protected "opinion," in assessing

200. *Id.* at 2709 (Brennan, J., dissenting) (citing, *e.g.*, Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985)).

201. The plaintiff bears the burden of proving the falsity of allegedly defamatory statements made by a media defendant. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986). Justice Brennan asserted that this rule should apply in all defamation cases, not just those brought against a media defendant. *Id.* at 780 (Brennan, J., concurring).

202. *See Milkovich*, 110 S. Ct. at 2707.

203. *See id.*

204. *But see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

whether speech is privileged under the first amendment. As Justice Brennan stated in his dissent in *Mikovich*, the analysis used in this assessment is identical to that used previously in unraveling the fact versus opinion dichotomy. Thus, *Milkovich* changes only the form, not the substance, of first amendment protection.

More importantly, however, the rationale underlying *Costello* and *Milkovich* demonstrates a failure to understand the concerns expressed by James Madison and quoted at the opening of this Note.[205] Free expression of one's opinions on issues of public concern is a central first amendment right. Such opinions are often inseparable from the facts upon which they are based. *Costello*, however, simply ignores the fact versus opinion dichotomy; *Milkovich* permits actionable facts to be inferred from statements of opinion. Both cases set dangerous precedents that erode crucial first amendment freedoms.

THOMAS J. PAULOSKI

205. *See infra* text accompanying note 1.