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COMMENT

AN ARGUMENT FOR AN ABSOLUTE PRIVILEGE FOR LETTERS TO THE EDITOR AFTER *IMMUNO* *AG v. MOOR-JANKOWSKI**

[W]hen a citizen is troubled by things going wrong, he should be free "to write to the newspaper": and the newspaper should be free to publish his letter. It is often the only way to get things put right . . . [Neither the writer nor the newspaper] should . . . be deterred by fear of libel actions.¹

INTRODUCTION

Citizen participation in public debate has shaped American history. From the Federalist Papers arguing for the ratification of the United States Constitution² to the pleas of conscience of the civil rights movement,³ letters to the editor have provided a medium for that participation. A letter to the editor is a "town meeting in print"⁴ that gives citizen-critics a First Amendment

* 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991).

¹ Pollnow v. Poughkeepsie Newspapers, Inc., 107 A.D.2d 10, 16, 486 N.Y.S.2d 11, 16 (2d Dep't 1985), *aff'd*, 67 N.Y.2d 778, 492 N.E.2d 125, 501 N.Y.S.2d 17 (1986) (neither a newspaper publisher nor a writer was liable for a letter to the editor accusing a 17-year-old of criminal conduct) (quoting *Slim v. Daily Telegraph*, 1 All E.R. 497, 503 (1963)).

² ALEXANDER HAMILTON ET AL., *THE FEDERALIST PAPERS* (Edward M. Earle ed., 1937)(1788). Publius's letters were published in a number of newspapers. HERBERT BRUCKER, *COMMUNICATION IS POWER* 297 (1973).

³ Martin Luther King's *Letter from Birmingham Jail*, written in response to a newspaper statement by eight fellow clergymen, was published in a number of periodicals. See MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 76-95 (1964); STEPHEN B. OATES, *LET THE TRUMPET SOUND: THE LIFE OF MARTIN LUTHER KING, JR.* 222 (1982).

⁴ TALKING BACK TO THE NEW YORK TIMES: LETTERS TO THE EDITOR 1851-1971 9 (Kalmán Seigel ed., 1972) [hereinafter TALKING BACK]. Since few citizens pamphlet or attend town meetings today, letters to the editor provide a forum for town meeting-like discussions. In *Kotlikoff v. Community News*, 444 A.2d 1086 (N.J. 1982), the court found a letter to the editor alleging that a city mayor might be "engaged in a huge cover up" for failing to disclose property owners delinquent in their tax payments to be constitution-

forum to engage in the "unfettered interchange of ideas."⁵

Letters to the editor have also been the subject of an increasing number of libel lawsuits.⁶ More than one in ten newspaper editors report being sued in the past decade over a published letter to the editor.⁷ A dramatic example of the modern letter to the editor libel suit is *Immuno AG v. J. Moor-Jankowski*.⁸ The nine-year odyssey began in December, 1982 when an animal rights advocate submitted to the editor of a small, scientific journal a letter criticizing a multi-national corporation's plans to use apes in hepatitis research in West Africa. The multi-national corporation brought a libel action against the journal's editor for publishing the letter to the editor. The *Immuno* case exemplifies the need for the media to have an absolute privilege to reprint letters to the editor.⁹ While most media libel defendants in such cases ultimately win,¹⁰ current libel law encourages the media to censor themselves and discourages them from publishing contro-

ally protected opinion because of the context of the accusations. *Id.* In so holding, the court reasoned:

The pace and structure of the contemporary American scene are such that today, public debate is seldom found in village squares and town meetings. One of its few available outlets is the "letters to the editor" section of our newspapers . . . [,] one of the last remaining public forums. If letters of this sort were defamatory, newspapers surely would be reluctant to continue publishing strongly worded letters to the editor. We are loath to discourage that robust and uninhibited commentary on public issues that is part of our national heritage.

Id. at 1091-92.

⁵ *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)); see *infra* notes 65-71 and accompanying text.

⁶ See Ted Gest, *A Chilling Flurry of Lawsuits*, U.S. NEWS & WORLD REP., May 23, 1988, at 64-65 (noting the growing trend of letter to the editor "intimidation suits" against citizen-critics); Nat Hentoff, *A Special Type of Expression—A Letter to the Editor*, WASH. POST, Jan. 13, 1990, at A21 (commenting on the increasing number of libel suits arising out of letters to the editor).

⁷ Marc A. Franklin, *Libel and Letters to the Editor: Toward an Open Forum*, 57 U. COLO. L. REV. 651, 656 (1986).

⁸ 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991). *New York Times* columnist Anthony Lewis would award the *Immuno* lawsuit the "prize in outrageousness." Anthony Lewis, *Abusing the Law*, N.Y. TIMES, May 10, 1991, at A31 (editorial).

⁹ An absolute privilege from legal action is a complete immunization of defendants for statements made in certain defined circumstances, in this case as reprinters of letters to the editor. See RODNEY A. SMOLLA, *THE LAW OF DEFAMATION* § 9.13[4][c], at 9-61 (1992); see *infra* notes 256-309 and accompanying text.

¹⁰ Steve Pasternack, *Editors and the Risk of Libel in Letters*, 60 JOURNALISM Q. 311, 311 (1983) ("the vast majority of letter-generated libel suits result in summary judgment or some other outcome favorable to the defendant publisher").

versial letters to the editor by citizen-critics.

Part I of this Comment provides the background to the *Immuno* decision by examining letters to the editor and the First Amendment functions served by them. In addition, this Comment briefly reviews the evolution of defamation law and the current legal treatment of letters to the editor under libel law. In particular, under existing defamation law, the First Amendment protection afforded letters to the editor is inadequate because the terms and the corresponding legal tests are unclear and provide little judicial guidance. Part II reviews the *Immuno* facts as well as the majority and concurring opinions which exemplify the need for more First Amendment protection for letters to the editor.

Part III of this Comment argues that the New York Court of Appeals in *Immuno* stopped short in its analysis. While the court reasoned that the allegedly libelous letter to the editor was constitutionally protected, it failed to establish a broad privilege to insulate newspapers and journals that reprint letters to the editor from the First Amendment chill of current libel law. First, current law, including *Immuno*, encourages the media to continue censoring themselves under the threat of prohibitive damage awards and potential defense costs. Moreover, the media's censorship of themselves as republishers is exacerbated by the lack of newspaper competition and the limited access to remaining newspapers. Second, similar privileges have been created when the protection of free speech is deemed paramount; thus, forging an absolute privilege for letters to the editor would be a natural extension of existing protections. Specifically, the "fair report privilege" is similar to that of an absolute privilege for letters to the editor: when the media reprint letters to the editor accurately, they cannot be held liable when the underlying letters include false statements of fact. With adequate safeguards, including that the letterwriters themselves remain liable, an absolute privilege for the reprinters of letters to the editor can function to stem the impetus for self-censorship, thus encouraging the media to reprint controversial letters to the editor.

I. BACKGROUND: LETTERS TO THE EDITOR, THE FIRST AMENDMENT AND DEFAMATION LAW

A. *Letters to the Editor*

Today, the media assume three roles.¹¹ First, the media are "originators" when they report and investigate the news. Second, the media act as commentators when they engage in criticism. Finally, newspapers and journals play the part of "bulletin boards" by transmitting the views of readers to other readers through letters to the editor.¹²

Letters to the editor are written by non-reporters and reflect the opinions of individual citizen-critics only.¹³ Such letters comment upon the publication's coverage, or lack thereof, and provide readers an opportunity to "talk back."¹⁴ A 1934 *New York Times* editorial stated the following purpose of such letters: "Letters to the editor are a valued part of every newspaper. Their variety of topic is endless. They correct—and make—errors. They reflect a multitude of views and moods. They abound in curious information. They constitute a debating society that never adjourns, in which everything knowable is discovered."¹⁵

Newspapers published letters to the editor only sporadically

¹¹ Franklin, *supra* note 7, at 651.

¹² See LOIS G. FORER, *A CHILLING EFFECT: THE MOUNTING THREAT OF LIBEL AND INVASION OF PRIVACY ACTIONS TO THE FIRST AMENDMENT* 180-81 (1987) (arguing that liability should be limited for the media that act as "bulletin boards").

¹³ See *Immuno AG v. Moor-Jankowski*, 74 N.Y.2d 548, 557-58, 549 N.E.2d 129, 133, 549 N.Y.S.2d 938, 942 (1989); see also Robert Martin, *Libel and Letters to the Editor*, 9 *QUEENS L.J.* 188, 189 (1988) (letters to the editor are an expression of the writer's, not the publication's, opinion). *But see Weaver v. Pryor Jeffersonian*, 569 P.2d 967 (Okla. 1977) (no authority to distinguish a newspaper's duty regarding a third party's letter to the editor and an article written by a staff member).

¹⁴ See JOHN L. HULTENG, *THE OPINION FUNCTION: EDITORIAL AND INTERPRETIVE WRITING FOR THE NEWS MEDIA* 149 (1973) (Letters to the editor represent a way to "talk back to the information machines."); TALKING BACK, *supra* note 4, at 3 (Letters to the editor "add up to an opportunity for a reader to 'talk back' to a paper . . .").

¹⁵ Irving Rosenthal, *Who Writes the "Letters to the Editor"?*, in *JOURNALISM: READINGS IN THE MASS MEDIA* 135, 142 (Allen & Linda Kirschner eds., 1971) (letters to the editor are a way to measure a newspaper's effect on its readers). In 1896 then in-coming *New York Times* publisher Adolph S. Ochs announced that the paper's letters to the editor section was to provide "a forum for the consideration of all questions of public importance, and to that end to invite intelligent discussion from all shades of opinion." TALKING BACK, *supra* note 4, at 3-4.

until the early twentieth century.¹⁶ The first known lawsuit involving a letter to the editor occurred in 1798 under the Sedition Act. Enacted soon after the 1791 ratification of the First Amendment, the Sedition Act criminalized the publication of false and malicious comments about the President or Congress.¹⁷ Matthew Lyon, a Vermont Representative, wrote a letter to the editor of a Vermont paper saying that President Adams was engaged in "a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation and selfish avarice."¹⁸ Lyon was charged with writing "scurrilous, feigned, false, scandalous, seditious and malicious" words.¹⁹ He was convicted, sentenced to four months in prison and fined \$1000.

The predecessors of letter writers were pamphleteers, individuals with "highly biased opinions," who succeeded in influencing public opinion by distributing materials printed on their own presses.²⁰ In the eighteenth century letters from political parties became a regular part of newspapers and were the most influential news-opinion writings.²¹ At the same time, letters written by citizens settling the West—"frontier correspondents"—were often printed by eastern newspapers as articles.²²

By the end of the nineteenth century letters from readers began appearing more regularly in newspapers on a set editorial page.²³ The Great Depression and the rise of fascism in Europe prompted a rise in the number of letters received, which in turn provided the impetus for newspapers to establish a regular letters to the editor section.²⁴ Not until 1931 did the *New York Times* establish the first permanent letters to the editor section after printing such letters off and on since its inception in

¹⁶ Pamela M. Terrell, *Letters Pages Flourish as Never Before*, *PRESSTIME*, Apr. 1989, at 6.

¹⁷ Anthony Lewis, *Staving Off the Silencers*, *N.Y. TIMES*, Dec. 1, 1991 (magazine) at 72.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ JIM A. HART, *THE DEVELOPING VIEWS ON THE NEWS: EDITORIAL SYNDROME 1500-1800*, at 198 (1970).

²¹ *Id.* at 200.

²² Steven R. Pasternack, *Dear Editor: A Study of People Who Write Letters to the Des Moines Register and Tribune 2* (1978) (unpublished M. Sci. thesis, Iowa State University). With the advent of the telegraph and wire services in the nineteenth century, however, these correspondents gradually disappeared. *Id.* at 3.

²³ *Id.* at 4.

²⁴ Terrell, *supra* note 16, at 6; Pasternack, *supra* note 22, at 5.

1851.²⁵ Newspapers across the country followed suit.²⁶

Another "boom" in letters was experienced by newspapers in the 1970s, fueled by such issues as the Vietnam War, Watergate, abortion and gun control.²⁷ Newspapers reported an eighty-four percent increase in letters received in that decade.²⁸ Moreover, many Americans read them.²⁹

Today, letters to the editor are a distinct, important and popular component of newspapers.³⁰ Although more letters to the editors are received by newspapers than ever before, the actual number of letters eligible for publishing is reduced after newspapers "weed out" potentially libelous letters for fear of lawsuits.³¹

B. *Letters to the Editor and the First Amendment*

Letters to the editor embody and promote five competing, yet often complementary, purposes of the First Amendment: (1) the marketplace of ideas; (2) self-governance; (3) self-actualiza-

²⁵ Pasternack, *supra* note 22, at 5; TALKING BACK, *supra* note 4, at 7. The *New York Times* ran its first letter to the editor five days after its first issue appeared on September 18, 1851. Rosenthal, *supra* note 15, at 135.

²⁶ Pasternack, *supra* note 22, at 6.

²⁷ Terrell, *supra* note 16, at 6; see generally HULTENG, *supra* note 14, at 151.

²⁸ Terrell, *supra* note 16, at 6. As newspapers began providing more space for letters to the editor, readers expected more letters. *Id.*

²⁹ Yet only one in ten Americans will write a letter to the editor. Pasternack, *supra* note 22, at 23. The few studies attempting to determine who writes letters to the editor are dated. A 1965 study found that letter writers in Kansas newspapers were elderly or middle-aged, well-educated and male. HULTENG, *supra* note 14, at 151. A 1978 review of the literature found that letter writers tended to be older, better educated, wealthier and more conservative. Pasternack, *supra* note 22, at 14-17. Yet there is a distinction to be drawn between those who write letters to the editor and those whose letters are selected to be reprinted by the editors. Since "most of the 30 years of research on letters-to-the-editor has been based on only those published, it may be that the profile which has emerged reflects less the writers themselves than the selection of editors." HULTENG, *supra* note 14, at 152, quoting David L. Grey & Trevor R. Brown, *Letters to the Editor: Hazy Recollections of Public Opinion*, JOURNALISM Q., Autumn 1970, at 450-56, 471.

³⁰ See HULTENG, *supra* note 14, at 152 (1973) (letters to the editor are one of the "best-read" parts of the newspaper); ERNEST HYND, AMERICAN NEWSPAPERS IN THE 1970S 203 (1975) (letters to the editor columns are well-read); LUCY M. SALMON, THE NEWSPAPER AND THE HISTORIAN 57 (1976) (letters to the editor are among the most interesting sections of any newspaper).

In a 1987 newspaper survey, 55% of all readers read letters to the editor, a higher readership than the 51% reported for sports or the 46% readership for business. However, local news was read by 75% and national news was read by 72% of readers. Terrell, *supra* note 16, at 7.

³¹ See *id.* at 6 & 8.

tion; (4) a safety-valve of discontent; and (5) a check on government.³² Each purpose is promoted by the media when they publish letters to the editor.

First, letters to the editor embody the notion of the marketplace of ideas because through the exchange of letters to the editor truth will emerge. As Justice Holmes opined, "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."³³ Despite much criticism of the parallel drawn between the marketplace of economics with that of ideas,³⁴ the United States Supreme Court and the New York courts have reaffirmed this approach time and again as the First Amendment's primary underlying purpose.³⁵ In essence, letters to the editor help meet demand for public debate by supplying

³² Although there are conflicts among these five approaches, "[a]ny adequate conception of freedom of speech must [rely] upon several strands of theory in order to protect a rich variety of expressional modes." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 579 (1978).

³³ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (upholding the conviction of American socialists under the Espionage Act for their anti-war leaflets attacking the United States's production and supply of arms to be used against Russia).

The origins of this marketplace theory can be found in John Milton's *Arcopagitica*, written in opposition to England's licensing scheme: "Let [Truth] and Falsehood grapple; who ever know Truth put to the worse, in a free and open encounter?" THOMAS L. TEDFORD, *FREEDOM OF SPEECH IN THE UNITED STATES* 18 (1985) (quoting JOHN MILTON, *AREOPAGITICA, A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND* (1644)). Since truth is not always easily recognizable, all speech must be presented to the public to determine its falsity or truth. TEDFORD, *supra*, at 18 (citing JOHN S. MILL, *ON LIBERTY* (1859)). Mill reaffirmed the ideas of Milton and argued that freedom of speech was needed because: (1) the censored opinion may be true and, conversely, the accepted opinion wrong; (2) even truth needs to be challenged; and (3) there is, to some extent, truth in all opinions. *Id.*

³⁴ See, e.g., C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974-78 (1978) ([T]he marketplace concept is "implausible" because (1) the notion assumes that people use rationality "to eliminate distortion caused by the form and frequency of message presentation" and (2) the marketplace of ideas is dominated by the powerful status quo.); JEROME A. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* (1973) (the market has failed); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (just as critics of laissez-faire economics demand state intervention to correct market failure, such intervention is needed to correct the communicative market failure because of media monopoly control and limited access to the media by powerless or disfavored groups).

³⁵ For Supreme Court cases, see, e.g., *FCC v. League of Women Voters*, 463 U.S. 364, 377-78 (1984); *FCC v. Pacifica*, 438 U.S. 726, 745-46 (1978); *NAACP v. Button*, 371 U.S. 415, 437 (1963). For New York cases, see, e.g., *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 255, 567 N.E.2d 1270, 1281, 566 N.Y.S.2d 906, 917 (1991); *Schermerhorn v. Rosenberg*, 73 A.D.2d 276, 282-83, 426 N.Y.S.2d 274, 283 (2d Dep't 1980).

ideas in the marketplace. When the marketplace is open, letter writers compete with one another as merchants for the better idea or "product." Thus, letters to the editor promote this spirited competition under the First Amendment.

Second, letters to the editor promote self-governance.³⁶ This notion, closely associated with Professor Alexander Meiklejohn, is premised upon the idea that the political process is similar to a town meeting.³⁷ The traditional self-governance concept protects expression used by citizens in the public deliberation process only.³⁸ As at a town meeting, citizens have the "right and duty to think [their] own thoughts, to express them, and to listen to the arguments of others" to identify the community's general welfare.³⁹ In response to criticism of the traditional self-governance notion,⁴⁰ Meiklejohn provided a broader view of self-governing speech to extend beyond electoral matters to those exchanges that contribute to the "continued building of our politics."⁴¹ This broader notion of politics includes education, philosophy and the sciences, literature and the arts, and general discussion of public issues concerning the common weal.⁴² This,

³⁶ Franklin, *supra* note 7, at 667-72; *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

³⁷ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 24 (1960); see *TALKING BACK*, *supra* note 4, at 9 (a letter to the editor is a "town meeting in print").

³⁸ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25-27 (1948) (arguing that the First Amendment is absolute in its protection of political discourse while providing only minimal protection to other speech).

³⁹ MEIKLEJOHN, *supra* note 37, at 24; see *Whitney v. California*, 274 U.S. 354, 375-76 (1927) (Brandeis, J., concurring).

⁴⁰ Some disagree with Professor Meiklejohn's distinction between political and non-political expression. Zechariah Chafee, Book Review, 62 *HARV. L. REV.* 891, 899-900 (1949) (suggesting that "there are public aspects to practically every subject," including art and literature). Others disagree with Meiklejohn's notion of politics as a town meeting. See RONALD DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961) (arguing that the political process is not a town meeting in a system in which private interests gain power at the expense of others).

⁴¹ *City of Chicago Police Dep't v. Mosely*, 408 U.S. 92, 95 (1972).

⁴² Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 *SUP. CT. REV.* 245, 255-57; see, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (none of the Court's cases ever suggested that "expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection"); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government").

in turn, has generated other criticism.⁴³ Ultimately, under either the narrow or broad notion of self-governance, letters to the editor are today's "town meeting in print."⁴⁴ Such letters inform the electorate about who and what to vote for, educate the elected about the opinions of voters and foster public discussion. Letters to the editor are, therefore, a fundamental vehicle for an expanded notion of representative democracy.

Third, letters to the editor promote the First Amendment's value of self-realization. Rejecting the distinction between political and non-political speech inherent in the notion of self-governance, self-realizing speech includes all speech based on the implied value of individual worth that underlies democracy.⁴⁵ Letters to the editor allow individuals to express "the basic human desire for recognition."⁴⁶ The letter writer's attempt to persuade others is a basic form of self-realizing speech even when the speaker has no real hope that the audience will be persuaded by the writer's viewpoint.⁴⁷ Therefore, letters to the editor are, in and of themselves, vehicles for self-actualization.

Fourth, letters to the editor provide society with a "safety valve" for discontent. The safety-valve rationale was articulated by Justice Brandeis in his influential concurring opinion in *Whitney v. California*:⁴⁸

[I]t is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate means unstable government; that the *path of safety* lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that

⁴³ See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26-28 (1971) (arguing that the First Amendment should protect only "explicitly and predominately political" speech and that "freedom of non-political speech rests . . . upon the enlightenment of society and its elected representatives," not on the federal Constitution).

⁴⁴ See TALKING BACK, *supra* note 4, at 9.

⁴⁵ See Baker, *supra* note 34, at 966; see also ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 33 (1948) (self-realization is a people's need "to express [its] opinions on matters vital to [it] if life is to be worth living"); MELVILLE NIMMER, *NIMMER ON FREEDOM OF SPEECH* § 1.03, at 1-49 (1984) ("[t]he nature of man is such that he can realize the fulfillment of self only if he is able to speak without restraint"). *But see* Bork, *supra* note 43, at 25 (the self-actualization concept fails to "distinguish speech from any other human activity"); Chafee, *supra* note 40, at 899-900; Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 604 (1982).

⁴⁶ See CHAFEE, *supra* note 45, at 33.

⁴⁷ See SMOLLA, *supra* note 9, § 1.07[2], at 1-19.

⁴⁸ 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

the fitting remedy for evil counsels is good ones.⁴⁹

This safety valve allows angered citizen-critics to voice their dissatisfaction through discussion rather than violence.⁵⁰ Letters provide a forum for individuals to voice criticisms and in doing so, reduce the possibility of more harmful forms of expressive discontent.

Lastly, letters to the editor are an important "check" on the government. As Justice Black wrote, "The press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people . . ." ⁵¹ The "checking value" of the First Amendment is to expose government tyranny, thereby curbing its abuses.⁵² Letters to the editor are a vehicle for both the press and individual citizens to fulfill their roles as watchdogs of governmental abuse of power. On the transmitting end, letters to the editor provide citizen-critics an opportunity to expose policies and programs to public debate. On the receiving end, such letters allow the populace a forum to question authority.

Under all five of these First Amendment theories, letters to the editor should be encouraged. Instead, current libel law discourages the media from reprinting letters to the editor that

⁴⁹ *Id.* at 375 (Brandeis, J., concurring) (emphasis added); see also TALKING BACK, *supra* note 4, at 3 (letters to the editor are "a safety valve through which the public's capacity for indignation can find expression in a harmless, but useful way"); HULTENG, *supra* note 14, at 149 ("the letters section is a safety valve").

⁵⁰ *But see* NOAM CHOMSKY, *MANUFACTURING CONSENT* (1988) (arguing that liberal democracy serves only to legitimate the dominance of the entrenched power structure by creating an image of consensus through free speech that undermines real change).

⁵¹ *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (striking down a state statute on First Amendment grounds because it imposed criminal sanctions for publication of newspaper editorials on election day urging people to vote a certain way).

⁵² See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523, 542 (1977) ("[T]he role of the ordinary citizen is not so much to contribute on a continuing basis to the formation of public policy [as in the marketplace of ideas notion] as to retain a veto power to be employed when the decisions of officials pass certain bounds."). *But see* Bork, *supra* note 43, at 25-26 ("It seems plain that decisions involving only judgments of expediency are for the political branches and not for the judiciary."); Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 18 n.86 (1990) (arguing that Blasi's checking value of free speech rests upon questionable premises, including that: (1) individuals have access to meaningful channels of communications with wide dissemination; (2) the populace is willing to question authority; and (3) there is a basis for evaluating the wisdom and propriety of governmental actions).

carry any risk of a suit. By maintaining a multi-factor approach, which is subject to various applications, to determine whether a statement in a letter to the editor is libelous instead of employing a First Amendment analysis, the law impedes the realization of First Amendment values.

C. *Letters to the Editor and Defamation Law*

Defamation law imposes liability for the publication of false information that injures the reputation of another. Courts have long recognized that every increase in the scope of protection of the criticized individual under defamation law circumscribes free debate and an informed polity under the First Amendment.⁵³ Generally, to establish whether a challenged statement is libelous, a court determines whether the statement, which is "of and concerning" the plaintiff, resulted in damage to a plaintiff's reputation in a defendant's publication to third parties. Specifically, in determining whether a reprinter is responsible for an allegedly libelous statement in letters to the editor, courts analyze a number of issues, such as whether the statement: (1) involves fact or opinion; (2) is directed at a public figure, public official or private figure as plaintiff; and (3) involves a matter of public or private concern. These factors under current defamation law fail to protect adequately the First Amendment functions of letters to the editor since the legal balancing involves analyzing amorphous terms and their correspondingly unclear tests.

1. Pre-1964: Defamation Common Law

Historically, defamation law was part of state common law and free expression was given very modest protection.⁵⁴ The individual's right to protect his or her name was found to reflect "no more than our basic concept of the essential dignity and worth of every human being. . . . The protection of private personality, like the protection of life itself, is left primarily to the

⁵³ See *Sweeney v. Patterson*, 128 F.2d. 457, 458 (D.C. Cir. 1942); Floyd Abrams, *Why We Should Change the Libel Law*, N.Y. TIMES, Sept. 29, 1985, (magazine) at 92 (arguing that the current balancing achieves the worst of two worlds because current libel law does little to protect reputations and much to deter speech).

⁵⁴ See SMOLLA, *supra* note 9, § 1.01, at 1-3.

individual States."⁵⁵ Generally, there was an almost irrebuttable presumption of injury in any defamation action. Plaintiffs had to establish only that the defendant was responsible for expressing a derogatory statement that exposed the plaintiff to shame and did not have to establish a reputational injury caused by the defamatory statement.⁵⁶ An allegedly defamatory statement was actionable whether the statement was fact or opinion.⁵⁷ Furthermore, the plaintiff did not have to establish that the statement was false or that the defendant knew of its falsity.⁵⁸ The common law tradition provided adequate protection for neither the person who originated an allegedly libelous statement nor the defendant who accurately repeated the originator's defamatory statement.⁵⁹ Under the "republication doctrine," an accurate repetition was no defense. A publisher could be held liable for the subsequent republication of a defamatory statement by another when it happened with the publisher's consent, either implicit or explicit.⁶⁰ This doctrine also created other defendants—the media—to be sued by the injured party.

The privilege of "fair comment" was carved out of state defamation law to counterbalance the recognized burden libel placed on public debate. The central purpose of the privilege was to protect both "the right to comment on public affairs" and "the public's access to important information."⁶¹ Under the fair

⁵⁵ *Rosenblatt v. Baer*, 383 U.S. 75, 91 (1966) (Stewart, J., concurring). Six purposes have been delineated for the protection of reputation: (1) to maintain the "relational interest" that an individual has in his personal esteem in the eyes of others; (2) to compensate for economic injury; (3) to compensate for emotional injury; (4) to promote human dignity; (5) to deter the publication of false and injurious speech; and (6) to provide a check and balance on the media's great power by making them accountable. SMOLLA, *supra* note 9, § 1.06[1]-[6], at 1-15 to -18.

⁵⁶ *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370 (1974) (White, J., dissenting).

⁵⁷ *See id.* at 370 (White, J., dissenting) ("[T]he defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule."); *see also* RESTATEMENT (SECOND) OF TORTS §§ 565-67 cmt. a (1977).

⁵⁸ *See* SMOLLA, *supra* note 9, § 1.03[2], at 1-7 to 1-8.

⁵⁹ *Harris v. Minivielle*, 19 So. 925, 928 (La. Ct. App. 1896) ("Talebearers are as bad as talemakers.").

⁶⁰ Robert D. Sack & Stuart D. Karle, *Common Law Libel and the Press: A Primer*, in COMMUNICATIONS LAW, 1991, at 7, 30-34 (PLI Patents, Copyrights, Trademarks & Literary Prop. Course Handbook Series No. 323, 1991); RESTATEMENT (SECOND) OF TORTS § 578 (1977) ("[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it"); *see generally* William H. Painter, *Republication Problems in the Law of Defamation*, 47 VA. L. REV. 1131 (1961).

⁶¹ *Immuno AG v. Moor-Jankowski*, 74 N.Y.2d 548, 556, 549 N.E.2d 129, 132, 549

comment privilege, which is still in use today, a statement is only privileged when it is a statement of opinion and public interest, and not a misstatement of fact.⁶² The doctrine has four elements. The published critical statement must: (1) concern a matter of legitimate public interest; (2) be based on true or privileged facts set forth in the publication or known to the public; (3) present the actual facts relied upon by the critic; and (4) not be made for the sole purpose of causing harm.⁶³ The fair comment privilege gave rise to the first distinction between fact and opinion in American libel law, and highlighted the special protection afforded to matters involving public affairs. Notwithstanding the fair comment privilege, courts held many letters to the editor actionable under the pre-1964 defamation law.⁶⁴

2. 1964: The Constitutionalization of Defamation Law in *New York Times v. Sullivan*

In *New York Times v. Sullivan*⁶⁵ the United States Supreme Court first brought libel law within the scope of the First Amendment. In *Sullivan* the police commissioner of Montgomery, Alabama brought a libel action against the *New York Times*

N.Y.S.2d 938, 941 (1989). In New York the fair comment privilege dates back to 1840 with the libel suit against a journalist for his denunciation of a James Fenimore Cooper book. *Cooper v. Stone*, 24 Wend. 434 (1840).

⁶² See RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977); 1 FOWLER V HARPER & FLEMING JAMES, JR., LAW OF TORTS § 5.28, at 456 (1956); see *infra* notes 284-89 and accompanying text.

⁶³ See RESTATEMENT OF TORTS § 606 (1938). The Second Restatement notes that section 606 has been omitted since "a statement of opinion that does not imply a defamatory statement of fact is no longer actionable and no privilege is needed." *Id.*

⁶⁴ See, e.g., *Pfizinger v. Dubs*, 64 F. 696 (7th Cir. 1894) (minister accused of being a "rotten egg" in letter to editor wins); *Hake v. Brames*, 95 Ind. 161 (1883) (letter to editor calling man a "liar" actionable); *Hamilton v. Eno*, 81 N.Y. 116 (1890) (letter to editor accusing a public official of questionable awarding of paving contracts actionable). At the same time, pre-1964 defendants in letters to the editors did sometimes win. See, e.g., *Mosler v. Whelan*, 147 A.2d 7 (N.J. 1958) (holding letter accusing a man of holding beliefs "alien to the American way" not actionable because it could not be interpreted as labeling the man a Communist); *Morey v. Barnes*, 2 N.W.2d 829 (Minn. 1942) (finding letter calling cafe a "brothel" not actionable since brothel did not necessarily refer to prostitution, but merely drinking and gambling); see generally Donald M. Zupanc, Annotation, *Defamation: Publication of "Letters to Editor" in Newspaper as Actionable*, 99 A.L.R.3d 573 (1990) (reviewing cases that involve allegedly libelous letters to the editor).

⁶⁵ 376 U.S. 254 (1964); see generally ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991) (discussing the history of the *Sullivan* decision).

and four Alabama clergy for a full-page advertisement taken out to raise funds for the civil rights efforts of Martin Luther King, Jr. Police Commissioner Sullivan argued the advertisement was defamatory because it alleged police mistreatment of King and protesting students, and was factually incorrect. The Court held that the First Amendment prohibits a public official from recovering damages for a defamatory statement relating to his or her official conduct unless the official proves that the statement was made with actual malice. The Court defined actual malice as "knowledge that [the statements] were false or reckless disregard" by the defendant of the truth of his statements.⁶⁶ The *Sullivan* Court found that the proof of actual malice was not of "convincing clarity," that the *Times's* failure to check the facts in the allegedly defamatory advertisement did not constitute actual malice, and that the alleged attack on Sullivan was too abstract to be found "of and concerning" him because he was not identified by name.⁶⁷

The *Sullivan* Court reasoned that the First Amendment's central meaning was the nation's "profound . . . commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government."⁶⁸ Accordingly, the defamation law's requirement that critics of official conduct guarantee the truth of their assertions would not lead to free debate, but to self-censorship of both the press and the "citizen-critic of government."⁶⁹ The *Sullivan* decision established a "constitutional privilege for good faith critics of government officials."⁷⁰ In so doing, the *Sullivan* case rev-

⁶⁶ 376 U.S. at 279-80.

⁶⁷ *Id.* at 285-91.

⁶⁸ *Id.* at 270.

⁶⁹ *Id.* at 279. The *Sullivan* Court said that state libel law's affirmative defense of truth chilled the First Amendment. The Court asserted: "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticisms, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id.* The *Sullivan* Court found that Alabama's defamation law "dampen[ed] the vigor and limit[ed] the variety of public debate." *Id.*

⁷⁰ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-12, at 864 (2d ed. 1988). At the same time, the *Sullivan* Court rejected the establishment of an absolute privilege to protect newspapers from libel actions brought by public officials. 376 U.S. at 293 (Black & Douglas, JJ., concurring); 376 U.S. at 297-305 (Goldberg & Douglas, JJ., concurring); LEWIS, *supra* note 65, at 118-20.

olutionized defamation law by making it subject to the constraints of the First Amendment. Under the *Sullivan* actual malice test, then, a number of pre-1964 letters to the editor would no longer be actionable.⁷¹

3. After 1964: Building on *Sullivan*

In the wake of *Sullivan*, the Supreme Court and lower courts worked to refine the incorporation of libel law under the First Amendment. The work most relevant to letters to the editor involves determining whether an allegedly libelous statement involves fact or opinion, is directed at a public figure, public official or private figure as plaintiff, and involves a matter of public concern.

a. *Fact v. Opinion*

The *Sullivan* decision merely suggested a constitutional distinction between fact and opinion by noting that "a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact."⁷² Attempts to clarify the distinction between fact and opinion were made in *Gertz v. Robert Welch, Inc.*⁷³ and *Ollman v. Evans.*⁷⁴ The recent Supreme Court *Milkovich v. Lorain Journal Co.*⁷⁵ decision has left this libel law landscape, including the judicial distinction between fact and opinion, "essentially unchanged."⁷⁶

The *Gertz* Court reconsidered the fact versus opinion distinction in 1967. *Gertz* was a lawyer representing the family of a murder victim in a lawsuit against a Chicago policeman. A John Birch Society publication alleged that *Gertz* was a "Leninist" and a "Communist fronter." The *Gertz* Court never addressed whether the defendant's statements alleging the plaintiff was a "Communist" was one of fact or opinion. Yet the Court alluded

⁷¹ See, e.g., *Stanton v. Sentinel Printing Co.*, 84 N.E.2d 461 (Mass. 1949) (finding letter accusing mayor of using his public employees to clear snow from his home libelous); *Scofield v. Milwaukee Free Press*, 105 N.W. 227 (Wis. 1905) (holding letter about former public official in a political campaign libelous).

⁷² 376 U.S. at 292 n.30.

⁷³ 418 U.S. 323 (1974).

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

⁷⁵ 479 U.S. 1 (1990).

⁷⁶ *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 268, 567 N.E.2d 1270, 1290, 566 N.Y.S.2d 906, 926 (1991) (Hancock, J., concurring).

to the fair comment privilege's distinction between fact and opinion by seeming to provide an absolute First Amendment immunity from defamation actions for all opinions.⁷⁷ The *Gertz* Court announced in *dicta*: "[U]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."⁷⁸

Generally, courts understood this passage to mean that statements characterized as opinions were constitutionally immune from libel actions. Facts may be proven true or false. However, "[a]n assertion that cannot be proved false cannot be held libelous. A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be."⁷⁹ The Supreme Court has cited the *Gertz dicta* approvingly for the proposition that there is an absolute immunity for opinions on other occasions.⁸⁰ This *dicta* also has been adopted by most circuits and many state courts, including those of New York.⁸¹

Nor was *Gertz* the only Supreme Court case to find opinions protected by the First Amendment's shelter. Hyperbole, rhetoric and satirical opinions are given strong protection by the Court. In *Greenbelt Cooperative Publishing Association, Inc. v. Bres-*

⁷⁷ See *Ollman v. Evans*, 750 F.2d 970, 975 (D.C. Cir. 1984) (The "*Gertz* [Court] elevated to constitutional principle the distinction between fact and opinion, which at common law had formed the basis of the doctrine of fair comment."), *cert. denied*, 471 U.S. 1127 (1985). *But see* *Miskovsky v. Oklahoma Publishing Co.*, 654 P.2d 587 (Okla.), *cert. denied*, 459 U.S. 923, 925 (1982) (Rehnquist, J., dissenting) ("[T]he problem of defamatory opinion was not remotely an issue in *Gertz* and there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem.").

⁷⁸ 418 U.S. at 323, 339-40.

⁷⁹ *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977).

⁸⁰ See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 504 (1984); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 283-84 (1974). *But see* *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) ("Thus we do not think this passage from *Gertz* . . . create[d] a wholesale defamation exemption for anything that might be labelled opinion.").

⁸¹ See *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 380-81, 366 N.E.2d 1299, 1306, 397 N.Y.S.2d 943, 950, *cert. denied*, 434 U.S. 969 (1977). For a review of other state and circuit courts that adopted the *Gertz dicta*, see SMOLLA, *supra* note 9, § 6.03[3], at 6-15 n.71.

ler⁸² the Court found the characterization of a developer's negotiating tactics as "blackmail" to be constitutionally protected because "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole" and "vigorous epithet."⁸³ Again, in *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*,⁸⁴ decided the same day as *Gertz*, the Court held that a newsletter that called a union "scab" a "traitor" was protected without referring to *Gertz*. The Court reasoned that "traitor" was used "in a loose, figurative sense . . . merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members."⁸⁵ Similarly, in *Hustler Magazine, Inc. v. Falwell*⁸⁶ the Court held that an advertisement parody of conservative religious leader Jerry Falwell was also constitutionally protected. The advertisement suggested that Falwell had a "drunken incestuous rendezvous with his mother in an outhouse."⁸⁷ The Court found the statement so unbelievable that it "could not reasonably have been interpreted as stating actual facts about the public figure involved."⁸⁸

In *Ollman v. Evans*⁸⁹ the United States Circuit Court of Appeals for the District of Columbia translated the *Gertz* fact-versus-opinion distinction into a "totality of circumstances" test.⁹⁰ The four-part test involved an examination of: (1) the specificity of the statement; (2) its verifiability; (3) its literary context; and (4) its public context. The issue in *Ollman* was whether an editorial written by conservative columnists Rowland Evans and Robert Novak labeling a professor a "dogmatic Marxist lacking academic standing" was constitutionally pro-

⁸² 398 U.S. 6 (1970).

⁸³ *Id.* at 13-14.

⁸⁴ 418 U.S. 264 (1974).

⁸⁵ *Id.* at 284 & 286.

⁸⁶ 485 U.S. 46 (1988).

⁸⁷ *Id.* at 48.

⁸⁸ *Id.* at 50. The Court also rejected Falwell's action in tort for intentional infliction of emotional distress.

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

⁹⁰ Other tests exist to determine whether a libelous statement is that of fact or opinion. See, e.g., RESTATEMENT (SECOND) OF TORTS § 566 (1977) ("[A] statement is actionable only if it implies the allegation of undisclosed defamatory facts as the basis of opinion."); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980) (The court must "examine the statement's totality in the context in which it was uttered or published.").

tected opinion. The *en banc* court held that the statements were protected because of the immediate and broader social context of the piece. As the *Ollman* majority waxed eloquent about the context of the op-ed piece:

[W]e cannot forget that the public has an interest in receiving information on issues of public importance even if the trustworthiness of the information is not absolutely certain. The First Amendment is served not only by articles and columns that purport to be definitive but by those articles that, more modestly, raise questions and prompt investigation or debate. By giving weight on the opinion side of the scale to cautionary and interrogative language, courts provide greater leeway to journalists and other writers and commentators in bringing issues of public importance to the public's attention and scrutiny.⁹¹

The *Ollman* test has been embraced by numerous circuit and state courts, including those of New York, as an analytical framework for applying the *Gertz* distinction between fact and opinion to determine whether an allegedly libelous statement is actionable.⁹²

In 1990 the Supreme Court reexamined the fact versus opinion distinction in *Milkovich v. Lorain Journal Co.*⁹³ While many hailed *Milkovich* as the death of opinion protection under

⁹¹ 750 F.2d at 983.

⁹² For examples of New York cases adopting *Ollman*, see, e.g., *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 296, 501 N.E.2d 550, 556, 508 N.Y.S.2d 901, 905 (1986) (former union member's defamation action against defendant dismissed because statement in banner and taped telephone message referring to plaintiff as "scab" and lacking in talent and ambition were protected opinion under *Ollman*); *Parks v. Steinbrenner*, 131 A.D.2d 60, 63-65, 520 N.Y.S.2d 374, 376-78 (1st Dep't 1987) (baseball umpire's defamation action against major league baseball team owner for press releases in which owner criticized umpire as incompetent and biased regarding certain calls were opinion under *Ollman*). For a review of other state and circuit courts that have adopted the *Ollman* totality of the circumstances test, see Sack & Karle, *supra* note 60, at 52-53, 55.

Accusations of criminal activity, however, even if in the form of opinion, are not protected in New York. See, e.g., *Siltsdorf v. Levine*, 59 N.Y.2d 8, 16, 449 N.E.2d 716, 720, 462 N.Y.S.2d 822, 826 ("[A]lthough expressions of opinion are constitutionally protected, accusations of criminal or illegal activity, even in the form of opinion, are not."), *cert. denied*, 464 U.S. 831 (1983); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (libel suit by judge against journalist and publisher stemming from allegations that judge was "probably corrupt" and should be removed from office did not support a defamation claim), *cert. denied*, 434 U.S. 969 (1977). For a review of the treatment of criminal charges in libel by different courts, see John B. McCrory & Robert C. Bernius, *Constitutional Privilege in Libel Law*, in COMMUNICATIONS LAW 1991, at 138-40 (Robert D. Sack & Stuart D. Karle eds., 1991) (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. 323, 1991).

⁹³ 497 U.S. 1 (1990).

the First Amendment,⁹⁴ the *Milkovich* Court did not radically change, but merely retained, the existing federal opinion privilege.⁹⁵ In *Milkovich* a sports columnist allegedly defamed a high school wrestling coach in his column by suggesting that the coach had lied under oath in a judicial proceeding about a wrestling match altercation. The *Milkovich* Court reversed the Ohio Supreme Court, holding that the columnist's "opinion" could be interpreted by a reasonable factfinder as asserting a verifiable fact.⁹⁶ The Court found that the First Amendment did not preclude a defamation action under Ohio law.

In reaching this outcome, the Court explicitly rejected the well-established *dicta* of *Gertz*, arguing that *Gertz* was not meant to be "a wholesale defamation exemption for anything that might be labeled 'opinion'."⁹⁷ Yet the Court asserted that such a separate privilege was not required because free expression was "adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact."⁹⁸ In so doing, the Court noted the First Amendment's "vital guarantee of free and uninhibited discussion of public issues"⁹⁹ as well as other "significant constitutional protections"¹⁰⁰

⁹⁴ *Is it Opinion or Is It Fact? Libel Ruling is a Huge Setback for Speech*, L.A. TIMES, June 23, 1990, at B6 (editorial); Lewis R. Clayton, *High Court: No Federal Privilege for "Opinion" Found Defamatory*, NAT'L L.J., Aug. 27, 1990, at 27 (suggesting that the *Milkovich* decision "radically changed the direction of libel law"); see generally T.R. Hager, Recent Developments, *Milkovich v. Lorain Journal Co.: Lost Breathing Space—Supreme Court Stifles Freedom of Expression by Eliminating First Amendment Opinion Privilege*, 65 TUL. L. REV. 944 (1991) (arguing that the *Milkovich* Court chipped away at the protection of opinions).

⁹⁵ Harvard Law Review Association, *The Supreme Court 1989 Term: Leading Cases*, 104 HARV. L. REV. 129, 223 (1990) (proposing that the *Milkovich* Court "simply reformulated the opinion privilege"); Nat Stern, *Defamation, Epistemology, and the Erosion (but not Destruction) of the Opinion Privilege*, 57 TENN. L. REV. 595, 613 (1990) (arguing that the fact-opinion distinction is flawed and that *Milkovich* did not compel a radical revision of this existing flawed doctrine); SMOLLA, *supra* note 9, § 6.01[2], at 6-4 to 6-5.

⁹⁶ 497 U.S. at 21-23. Some commentators have noted that the accusation of criminal activity in *Milkovich*—perjury on the part of the coach—played an "unacknowledged" role in the *Milkovich* Court's decision to find the allegedly libelous statements an implied assertion of fact. McCrory & Bernius, *supra* note 92, at 138 (reviewing the treatment of accusations of criminal activity).

⁹⁷ 497 U.S. at 18. The *Milkovich* Court stated that no *Gertz*-like "separate" federal opinion privilege existed. *Id.* at 19.

⁹⁸ *Id.*

⁹⁹ *Id.* at 22.

¹⁰⁰ *Id.* at 15.

and "established safeguards"¹⁰¹ to avoid the "danger of media self-censorship."¹⁰² Accordingly, the *Milkovich* Court recognized that a statement that cannot be interpreted reasonably as stating actual facts about an individual is protected.¹⁰³ Thus, the Court concluded that because of existing protections, an additional separate constitutional privilege for opinion was unnecessary.¹⁰⁴

Justice Brennan's *Milkovich* dissent reaffirms that the majority opinion does not narrow existing federal opinion privileges. As Justice Brennan wrote: "[W]hile the Court today dispels any misimpression that there is a so-called opinion privilege *wholly* in addition to the protections we have already found to be guaranteed by the First Amendment, it determines that a protection for statements of pure opinion is dictated by *existing* First Amendment doctrine."¹⁰⁵ The dissent observed that the Court had simply restated the law that "lower courts have been relying on for the past decade," that is, the *Ollman* totality of the circumstances approach.¹⁰⁶ Justice Brennan disagreed only with the majority's application of the analysis to the facts of *Milkovich*, finding the columnist's statements incapable of being read as implying defamatory facts and therefore constitutionally protected opinion.

In *Milkovich* the Court merely rephrased the constitutional distinction of "fact" from "opinion" to "fact" and "non-fact."¹⁰⁷ Yet the terms distinguishing fact from opinion embodied in state defamation law remain relevant.¹⁰⁸ While the terminology is different at the federal level, the substance remains the same. And so, after *Milkovich*, federal constitutional protections of opinion continue, notwithstanding the understandable confusion among lower courts.¹⁰⁹ Therefore, the fact and opinion distinc-

¹⁰¹ *Id.* at 17.

¹⁰² *Id.* at 15.

¹⁰³ *Id.* at 22.

¹⁰⁴ "We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment." *Id.* at 20.

¹⁰⁵ *Id.* at 24 (Brennan, J. dissenting).

¹⁰⁶ *Id.*

¹⁰⁷ SMOLLA, *supra* note 9, § 6.02[1], at 6-5, § 6.03[7][d][iii], at 6-16.12.

¹⁰⁸ *Id.* § 6.01[2], at 6-4.1.

¹⁰⁹ The confusion about *Milkovich* among lower courts is reflected by the spectrum of *Immuno* opinions. See *infra* notes 202-220 and accompanying text. The *Immuno* ma-

tion continues to be an important component in analyzing letters to the editor.

b. *Status of the Plaintiff*

In *Curtis Publishing Co. v. Butts*¹¹⁰ a *Saturday Evening Post* article accused university football coach Butts of "fixing" a football game. In considering the matter, the 1967 Court extended the *Sullivan* actual malice standard established for public officials to public figures. In 1974, however, the Court refused to extend the *Sullivan* actual malice standard to private figures in *Gertz*. The *Gertz* Court held that the plaintiff, an attorney, was a private rather than public figure and therefore was not bound by the *Sullivan* actual malice standard.¹¹¹ Consequently, he had to prove only that the statements at issue were negligently made, since private figures lack the access that public figures and public officials have to channels of communication.¹¹²

majority interpreted *Milkovich* as ultimately narrowing the federal opinion privilege because a provable false fact will probably be actionable unless the situation involves loose, hyperbolic language. 77 N.Y.2d 235, 245, 567 N.E.2d 1270, 1275, 566 N.Y.S.2d 906, 911 (1991). Judge Hancock's concurrence argued that *Milkovich* left federal opinion protection "essentially unchanged." *Id.* at 268, 567 N.E.2d at 1290, 566 N.Y.S.2d at 926 (Hancock, J., concurring). Judge Simons's concurring opinion also found the *Immuno* majority's interpretation of *Milkovich* "far more constricted than the Supreme Court intended." *Id.* at 257, 567 N.E.2d at 1283, 566 N.Y.S.2d at 919 (Simons, J., concurring).

For other New York courts confused by *Milkovich*, compare *Zion v. Bense*, N.Y. L.J., Aug. 17, 1990, at 18 (Baer, J.) (The New York Supreme Court noted that *Milkovich* "changed the landscape of the fact-opinion privilege area.") with *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 778, 782 (S.D.N.Y. 1990) (The "framework of privilege and protections" in *Milkovich* is "considerably broader than might be imagined from a reading of popular reports of the opinion privilege's demise."). For a review of the non-New York lower courts' interpretation of *Milkovich*, see McCrory & Bernius, *supra* note 92, at 121-30.

¹¹⁰ 388 U.S. 130 (1967).

¹¹¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974); see *supra* notes 73-81 and accompanying text.

¹¹² 418 U.S. at 345. The Court's ruling allowed states to determine whether to apply negligence, recklessness or knowing falsity as the standard in libel actions brought by private figures but precluded the imposition of strict liability. *Id.* at 345-46. States responded with a number of approaches including negligence, actual malice and an intermediate gross negligence standard in private figure cases. A majority of states—39—have opted for some form of a negligence standard. SMOLLA, *supra* note 9, § 3.10, at 3-22 to -27. Only four states have adopted the *Sullivan* actual malice standard in private figure cases. *Id.* § 3.11, at 3-27 to -28. New York adopted a "gross irresponsibility" standard, which is mid-way between the actual malice and negligence standards in private figure cases. *Id.* § 3.12[1], at 3-28; *Chapadeau v. Utica Observer-Dispatch, Inc.*, 33 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975).

Accordingly, in *Time, Inc. v. Firestone*¹¹³ the Court held that a *Time* magazine article which published an account of the divorce of an heir to the wealthy Firestone family, including charges of adultery, was not constitutionally protected opinion. In so doing, the Court held that the plaintiff was not a public figure because her litigation was not voluntary. Therefore, the determination of whether plaintiff is a public or private figure is essential to determining which constitutional standard of protection is applicable in letter to the editor cases. With the extension of the actual malice standard to public figures, some letter to the editor cases pre-*Curtis Publishing* might turn out differently; however, a court could still determine that a seemingly public figure defendant is really a private figure under *Gertz-Firestone*.¹¹⁴

c. Matters of Public Concern

Related to, yet distinct from, plaintiff's status is the statement's subject matter. While the *Sullivan* Court suggested that constitutional protection was needed to protect speech that matters,¹¹⁵ the Supreme Court has since adopted, rejected and resurrected the use of the public concern criteria to determine whether a statement is libelous.¹¹⁶ In *Rosenbloom v. Me-*

¹¹³ 424 U.S. 448 (1976). The alleged falsehood was the statement that the divorce was granted on the grounds of adultery. The article noted that "[t]he 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.'" *Id.* at 452.

¹¹⁴ For example, in *De Meo v. Community Newspapers, Inc.*, 47 Misc. 2d 822, 263 N.Y.S.2d 244 (1965), the court held actionable letters critical of an officer of a local voter association for his involvement in local school affairs. However, the plaintiff in *De Meo* would seemingly be categorized as a public figure under *Curtis Publishing*. See also *Mosler v. Whelan*, 147 A.2d 7 (N.J. 1958) (letter commenting on political philosophy of local political leader found actionable).

¹¹⁵ 376 U.S. 254, 279 (1964).

¹¹⁶ The matters of public concern test was first articulated in *Pickering v. Board of Education*. 391 U.S. 563 (1968). The *Pickering* Court held that a letter to the editor written by a government employee criticizing a school board's handling of its financing was protected opinion because the employee-citizen was commenting upon a matter of public concern which outweighed the interest of the government as employer in promoting the efficiency of its public services. See generally Don Lewis, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., Philadelphia Newspapers, Inc. v. Hepps, and Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law*, 20 IND. L. REV. 767, 768 (1987) (asserting that recent Supreme Court cases have discarded *Gertz* in First Amendment defamation law and reclaimed the test of whether the speech at issue is of public concern).

*tromedia, Inc.*¹¹⁷ the distributor of nudist magazines sued a radio company after he was arrested and subsequently acquitted of selling allegedly obscene materials. The Court held that the critical factor was not whether Rosenbloom was a public or private figure, but whether his case implicated matters of "public or general concern."¹¹⁸ As Justice Brennan opined:

We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous. . . . [W]e think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern.¹¹⁹

In *Rosenbloom* the plurality opinion extended the *Sullivan* actual malice standard to private figures where the libelous statement involved a matter of public or general interest.

While the *Gertz* Court viewed the subject-matter test of *Rosenbloom* as too "difficult" for lower courts to apply and the delegation of such power to lower courts unwise,¹²⁰ the public concern factor has been resurrected by the Court in *Philadelphia Newspapers, Inc. v. Hepps*¹²¹ and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*¹²² In *Hepps* a corporate stockholder who franchised convenience stores sued a newspaper for defamation based on articles claiming that the plaintiff was involved in organized crime and had used his connections to get favors for his business from state government officials. The *Hepps* Court held that private figure plaintiffs bear the burden of proof as to the falsity of a statement when a media defendant publishes a defamatory statement involving speech of "public concern."¹²³ The *Hepps* Court found that although Hepps was a private figure, the challenged articles were on subjects of public concern

¹¹⁷ 403 U.S. 29 (1971) (plurality).

¹¹⁸ *Id.* at 43-44. The radio reported the police action against Rosenbloom, labeling him a "girlie book peddler" and part of the "smut literature racket." *Id.* at 34.

¹¹⁹ *Id.*

¹²⁰ See 418 U.S. 323, 346 (1974).

¹²¹ 475 U.S. 767 (1986).

¹²² 472 U.S. 749 (1985).

¹²³ 475 U.S. at 778.

because they implicated "the legitimacy of the political process."¹²⁴

In *Dun & Bradstreet*¹²⁵ a magazine published an erroneous credit report which falsely stated that defendant Greenmoss had filed for bankruptcy. The Court held that recovery by private figures in defamation suits was allowable without a showing of actual malice where the challenged speech was not of public concern. To determine whether the statement was of public concern, the Court looked to the statement's "content, form and context . . . as revealed by the whole record."¹²⁶ The Court found that the credit report's "form and context" was not a public matter because the report went to five subscribers only. Thus, the Court concluded, the suit did not involve a matter of public concern. In so doing, the Court reasoned that "matters of public concern" are "at the heart of the First Amendment's protection."¹²⁷ Numerous courts, including those of New York, have adopted the subject-matter criteria.¹²⁸ Arguably, some letters considered actionable before *Rosenbloom-Hepps-Dun & Bradstreet* would now be found to be protected opinion.¹²⁹

¹²⁴ *Id.*

¹²⁵ 472 U.S. 749 (1985).

¹²⁶ *Id.* at 761 (quoting *Connick v. Meyers*, 461 U.S. 138, 147-48 (1983)).

¹²⁷ *Id.* at 758-59 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), citing *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940)).

¹²⁸ In *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975), a newspaper reported plaintiff's arrest for possessing a dangerous drug and a hypodermic instrument. The *Chapadeau* court held that a plaintiff in a libel action must establish gross irresponsibility on the part of the defendant where the article concerned a matter of "legitimate public concern." *Id.* at 199. The *Chapadeau* court found "the sphere of legitimate public concern" was "reasonably related to matters warranting public exposition." *Id.* Similarly, in *Gaeta v. New York News, Inc.*, 62 N.Y.2d 340, 465 N.E.2d 802, 477 N.Y.S.2d 82 (1984), the former wife of a patient in a state mental health facility brought an action against a newspaper for a series of articles which stated that the wife's extramarital affairs exacerbated her husband's mental condition. The *Gaeta* court held that the defamatory statements involved "at least arguably a matter of legitimate public interest" and thus were protected opinion. *Id.* at 350, 465 N.E.2d at 806, 477 N.Y.S.2d at 86.

¹²⁹ For example, in *Hamilton v. Eno*, 81 N.Y. 116 (1880), a letter to the editor accusing a public official of questionable practices in the awarding of paving contracts was found actionable. The letter would probably not be found actionable under the *Sullivan* actual malice standard. Additionally, the awarding of a paving city contract would most likely not be found actionable under *Rosenbloom-Hepps-Dun & Bradstreet* because the contracting process is arguably a matter of public concern.

D. *The Current Treatment of Letters to the Editor under Existing Defamation Law*

Generally, courts consider three existing criteria—fact versus opinion, plaintiff status and matter of public concern—to determine whether a letter to the editor is constitutionally protected opinion. Ultimately, most newspapers eventually win letter to the editor libel suits under these existing criteria.¹³⁰ In part, this is because libel plaintiffs are often unable to establish a defendant's actual malice under *Sullivan*.¹³¹ In part, this is because "[m]ost letters written to newspapers . . . deal with public persons and public issues" under *Curtis Publishing* and the *Rosenbloom-Hepps-Dun & Bradstreet* cases.¹³² Nevertheless, the vagueness of existing libel legal tests and their uncertain judicial characterization also discourage the media from reprinting such letters.

1. The Fact-Opinion Distinction

The *Ollman* distinction between fact and opinion, which remains viable after *Milkovich*, provides little guidance in analyz-

¹³⁰ In a survey of 27 post-1964 libel cases against newspapers for their publication of letters to the editor, only one plaintiff ultimately received money. Franklin, *supra* note 7, at 658-59.

¹³¹ *Id.* at 656-57; see, e.g., Pasculli v. Jersey Journal, 7 Media L. Rep. (BNA) 2575 (1982) (under actual malice standard, newspaper's failure to check letter accusing a state assemblyman of living off public taxes was non-libelous), *cert. denied*, 446 A.2d 152 (N.J. 1982); Sparks v. Boone, 560 S.W.2d 236 (Ky. Ct. App. 1977) (under actual malice standard, action by former state university president who was running for state senate failed against letter writer criticizing his presidency); LaPrade v. H.S. Gere & Sons, Inc., 360 N.E.2d 915 (Mass. App. Ct. 1977) (under actual malice standard, candidate for town moderator failed in an action against newspaper for printing a letter from his opponent attacking the candidate as a public figure).

But see Wright v. Haas, 586 P.2d 1093 (Okla. 1978) (under actual malice standard, letter actionable in rebutting prior letters written by plaintiff about utility rate controversy because defendant letter writer used information from security officials). Compare Weaver v. Pryor Jeffersonian, 569 P.2d 967 (Okla. 1977) (under actual malice standard, letter criticizing the county sheriff candidate for his performance during his prior term as sheriff published in the final edition of defendants' newspaper actionable because the newspaper failed to inquire about the letter writer or letter and one of the newspaper defendants was related by marriage to the plaintiff candidate's opponent), *with* Shiver v. Apalachee Publishing Co., 425 So. 2d 1173 (Fla. Dist. Ct. App. 1983) (under actual malice standard, letter published one day before election criticizing candidate who was the former officeholder not defamatory because it constituted opinion even though candidate lost election).

¹³² See Pasternack, *supra* note 10, at 312.

ing a letter to the editor. The distinction between the fact and opinion is, "at best, one of degree";¹³³ at worst, the words become merely "familiar terms in to which one can pour whatever meaning is desired."¹³⁴ The vagueness of the distinction is well-established.¹³⁵ As some commentators have noted, "All statements in language are statements of opinion, i.e., statements of mental processes or perceptions. So-called 'statements of fact' are only more specific statements of opinion."¹³⁶ Requiring a distinction between "the various shades of fact/opinion" is "inevitably arbitrary."¹³⁷ Accordingly, an editorial has been granted constitutional protection, in part, because of the tenuous distinction between fact and opinion.¹³⁸ Therefore, under *Ollman*, a court's ability to label a statement fact or opinion leads to uncertain judicial characterization of letters to the editor. As one judge noted, since "[b]eauty is in the eye of the beholder . . . it would appear that the result to be obtained through application of the *Ollman* factors is in the eye of the judge."¹³⁹

Different courts characterize similar allegedly libelous statements differently. On the one hand, in *Kotlikoff v. Community News*¹⁴⁰ the Supreme Court of New Jersey held that a letter to the editor criticizing the mayor and town tax collector for engag-

¹³³ *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 168 (1988).

¹³⁴ See Herbert W. Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203, 1205-06 (1962).

¹³⁵ See, e.g., *Stevens v. Tillman*, 855 F.2d 394, 399 (7th Cir. 1988) ("Courts trying to find one formula to separate 'fact' from 'opinion' . . . are engaged in a snipe hunt."), *cert. denied*, 489 U.S. 1065 (1989); *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) ("many statements . . . do not clearly fit into either category"); *id.* at 994 (Bork, J., concurring) (While judges will articulate "such things as four-factor frameworks, three-pronged tests, and two-tiered analyses in an effort, laudable by and large, to bring order to a universe of unruly happenings and to give guidance for the future . . . life will bring up cases whose facts simply cannot be handled by purely verbal formulas, or at least not handled with any sophistication and feeling for the underlying values at stake."), *cert. denied*, 471 U.S. 1127 (1985).

¹³⁶ W. KING & D. PILLINGER, *OPINION EVIDENCE IN ILLINOIS* 4 (1942), *quoted in* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* § 701[01], at 701-06 (1988).

¹³⁷ *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 154 (1988).

¹³⁸ See *Pearson v. Fairbanks Publishing Co.*, 413 P.2d 711, 714 (Alaska 1966) (libel action by newspaper columnist against defendant who wrote newspaper editorial calling plaintiff columnist a "garbage man" and his column "garbage" failed because statement was constitutionally protected opinion).

¹³⁹ *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1307 (8th Cir.) (Bowman, J., dissenting), *cert. denied*, 479 U.S. 883 (1986).

¹⁴⁰ 444 A.2d 1086 (N.J. 1982).

ing in a "cover up" leading to a decline in property tax revenues was constitutionally protected opinion. The *Kotlikoff* court characterized "cover up" and "conspiracy" not as specific accusations of criminal activity, but rather as rhetoric.¹⁴¹ On the other hand, in *Rinaldi v. Holt, Rinehart & Winston*¹⁴² the New York Court of Appeals ruled that a chapter of a book highly critical of a judge's performance—entitled "The Ten Worst Judges in New York"—which charged that a judge was "probably corrupt" and "suspiciously lenient" was not found to be protected expression.

Similarly, different courts identify the same challenged statement in one case in opposite ways. In *Immuno AG v. Moor-Jankowski*¹⁴³ a New York supreme court viewed a letter to the editor that attacked a corporation's proposed plan to research hepatitis using captured wild chimpanzees as factual. The court found that the "defendant was making factual charges disparaging plaintiff's scientific activities. . . . It would be playing a game of semantics to endow these factual charges with the cloak of opinion."¹⁴⁴ However, the appellate division in *Immuno* found the challenged statements in the letter to be opinion. The court reasoned that it was "plain" that the challenged letter's "ultimate objective was to express certain opinions" even though it "did contain some assertions of a factual sort."¹⁴⁵

Indeed, in one case the Ohio Supreme Court managed to characterize differently the same allegedly defamatory statement. In *Milkovich v. News-Herald*¹⁴⁶ the court held that a sports columnist's statement that "anyone who attended the [event] knows in his heart that [plaintiff] lied at the hearing after . . . having given his solemn oath to tell the truth" was factual.¹⁴⁷ The court found the statements "not constitutionally protected as the opinions of the writer" because "[t]he plain import of the author's assertions is that Milkovich . . . committed

¹⁴¹ "Taken as a whole the letter could not reasonably be interpreted as charging the plaintiff with committing a criminal offense." 444 A.2d at 1091.

¹⁴² 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, cert. denied, 434 U.S. 969 (1977).

¹⁴³ 14 Media L. Rep. (BNA) 1821 (N.Y. Sup. Ct. 1987).

¹⁴⁴ *Id.* at 1825.

¹⁴⁵ *Immuno AG v. Moor-Jankowski*, 145 A.D.2d 114, 122, 537 N.Y.S.2d 129, 134 (1st Dep't 1989).

¹⁴⁶ 473 N.E.2d 1191 (Ohio 1984), cert. denied, 474 U.S. 953 (1985).

¹⁴⁷ 473 N.E.2d at 1192.

the crime of perjury in a court of law."¹⁴⁸ Two years later the same court, with a different membership, declared that the challenged statement was opinion in *Scott v. News-Herald*.¹⁴⁹ Under the *Ollman* four-factor test, the court reasoned that the statement was opinion partly because of the column's caption and the article's placement on a sports page.

A court's emphasis on specific factors of the *Ollman* test tends to determine the outcome of the case.¹⁵⁰ Like the formula used to transform Dr. Jekyll into Mr. Hyde, the *Ollman* test can be used to transform opinion to fact and vice-versa.¹⁵¹ A court that emphasizes contextual factors (literary and social) is more likely to find letters to the editor an easily recognizable literary genre by "the average reader" and therefore constitutionally protected opinion.¹⁵² Accordingly, courts rely on the ability of

¹⁴⁸ *Id.* at 1197.

¹⁴⁹ 496 N.E.2d 699, 706-07 (Ohio 1986).

¹⁵⁰ Rodney W. Ott, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 *FORDHAM L. REV.* 761, 764, 781 (1990) (arguing that the context in which a statement appears determines whether it is constitutionally protected opinion).

¹⁵¹ See *Scott*, 496 N.E.2d at 716 (Celebrezze, J., dissenting) (The *Ollman* test is "used to complete the Jekyll and Hyde transformation of [the sports column] from fact to opinion.").

¹⁵² See generally Ott, *supra* note 150, at 781. See, e.g., *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1432-33 (8th Cir. 1989) (literary context signals the average reader to expect either opinion or fact while social context shapes the ways in which statements are understood), *cert. denied*, 493 U.S. 1036 (1990); *Hay v. Independent Newspapers*, 450 So. 2d 293, 295-96 (Fla. Dist. Ct. App. 1984) (letter criticizing a state prosecutor's intentions regarding the prosecution of plaintiff was found to be constitutionally protected because of its editorial context); *Kotlikoff v. Community News*, 444 A.2d 1086, 1092 (N.J. 1982) (allegation of mayoral property tax cover-up in a letter to the editor was opinion because of the "public forum"); *Epstein v. Board of Trustees of Dowling College*, 152 A.D.2d 534, 536, 543 N.Y.S.2d 691, 692 (1989) (letter written by student criticizing a professor's teaching in a student newspaper was held constitutionally protected because of the "broader social context"); *Seldon v. Shanken*, 143 A.D.2d 3, 5, 531 N.Y.S.2d 264, 266 (1988) (letters criticizing a competing newspaper's wine expert and his magazine's policies were found constitutionally protected because of their "context"); *Pollnow v. Poughkeepsie Newspapers, Inc.*, 107 A.D.2d 10, 16, 486 N.Y.S.2d 11, 16 (1985) (letter to the editor criticizing a police investigation and grand jury proceeding regarding a rape victim—the daughter of the letter writer—were found constitutionally protected opinion because, in part, of the letter's "medium"), *aff'd*, 67 N.Y.2d 778, 492 N.E.2d 125, 501 N.Y.S.2d 17 (1986).

For a critique of the *Ollman* approach, specifically the overinclusiveness of the contextual prongs of the test, see Jeffrey E. Thomas, *Statements of Fact and Opinion*, 74 *CAL. L. REV.* 1001, 1040-56 (1986) (arguing that the totality of the circumstances test is inconsistent with the First Amendment because it relies on the persuasiveness of the speech in deciding whether the statement should be protected and is unpredictable and costly).

the average reader to protect the literary and social contexts of opinion in magazine articles,¹⁶³ opinion-editorials,¹⁶⁴ sports columns,¹⁶⁵ restaurant reviews¹⁶⁶ and satire.¹⁶⁷ A court's use of contextual analysis tends to emphasize the underlying First Amendment purposes of the literary genre, although the distinction remains unpredictable, depending on the judicial characterization of the text and the text's persuasiveness.¹⁶⁸ On the other hand, a court that stresses the first two factors of the *Ollman* test (precision and verifiability) will generally find an allegedly libelous statement unprotected opinion, with the literary and social factors used as "exculpatory factor[s]" only.¹⁶⁹ In conclusion,

¹⁶³ See, e.g., *Janklow v. Newsweek*, 788 F.2d 1300, 1304 (8th Cir. 1986) (en banc) (a *Newsweek* magazine article is allowed a "freer style" and the reader is signalled when the piece is "transparently one-sided"), *rev'g in part*, 759 F.2d 644 (8th Cir. 1985), *cert. denied*, 479 U.S. 883 (1986); *Pring v. Penthouse, Inc.*, 695 F.2d 438, 441 (10th Cir. 1982) (insinuation that plaintiff committed sex acts during Miss America contest on stage not libelous because writing was a "fantasy"), *cert. denied*, 462 U.S. 1132 (1983).

¹⁶⁴ See, e.g., *Ollman v. Evans*, 750 F.2d 970, 986 (D.C. Cir. 1984) (en banc) (an "op-ed" piece is presumed to be one of opinion), *cert. denied*, 471 U.S. 1127 (1985); *National Rifle Ass'n v. Dayton Newspapers, Inc.*, 555 F. Supp. 1299, 1301, 1314 (S.D. Ohio 1983) (statement alleging that the National Rifle Association "happily encourages . . . murders and robberies" was protected opinion because it appeared on the editorial page); *Loeb v. Globe Newspaper Co.*, 489 F. Supp. 481, 486-88 (D. Mass. 1980) (article criticizing publisher of competing newspaper protected opinion because on editorial page). *But see* *McHale v. Lake Charles American Press*, 390 So. 2d 556, 560 (La. Ct. App. 1980) (editorial that no bond buyer "would buy a nickel's worth of securities" on the city attorney's opinion where earlier editorial stated that he had reaped thousands of dollars in fees was actionable), *cert. denied*, 452 U.S. 941 (1981).

¹⁶⁵ See, e.g., *Henderson v. Times Mirror Co.*, 669 F. Supp. 356, 360 (D. Colo. 1987) (article criticizing professional football players' agent by calling him a "sleaze-bag" who "slimed up from the bayou" protected opinion as sports news), *aff'd*, 876 F.2d 103 (10th Cir. 1989); *Scott v. News-Herald*, 496 N.E.2d 699, 708 (Ohio 1986) (sports columns are often "a traditional haven for cajoling, invective, and hyperbole").

¹⁶⁶ See, e.g., *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 227 (2d Cir. 1985) ("The natural function of the review is to convey the critic's opinion of the restaurant reviewed."); *Greer v. Columbus Monthly Publishing Corp.*, 448 N.E.2d 157, 161 (Ohio Ct. App. 1982) ("[A]n article commenting upon the quality of a restaurant or its food, like a review of a play or a movie, constitutes the opinion of the reviewer.").

¹⁶⁷ See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (a satirical advertisement portraying the Reverend Jerry Falwell as a drunk who had sex with his mother was a "parody"); see *supra* notes 86-88 and accompanying text.

¹⁶⁸ See *Thomas*, *supra* note 152, at 1040-56.

¹⁶⁹ *Ott*, *supra* note 150, at 781; see, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21-22 (1990) (the specificity and verifiability of the words in a sports column made it fact, not opinion); *Southern Air Transp., Inc. v. American Broadcasting Co.*, 877 F.2d 1010, 1016-17 (D.C. Cir. 1989) (company brought action against a television reporter for announcing South African involvement in supplying weapons to the Nicaraguan contras); *Secrist v. Harkin*, 874 F.2d 1244, 1248-51 (8th Cir.) (former marine officer who worked as

the emphasis on the fact-opinion distinction, in general, and the *Ollman* test, in particular, undermines the goal of robust debate under the First Amendment that is promoted by letters to the editor.

2. Matters of Public Concern

Like the fact-opinion distinction, the "matters of public concern" concept is problematic: its definition is unclear.¹⁶⁰ As Justice Marshall noted, "[A]ll human events are arguably within the area of 'public or general concern'."¹⁶¹ Only skimpy interpretations of the public concern test exist. The Court has noted that all Supreme Court decisions before 1985 involved matters of public concern.¹⁶² The Court has also defined "matters of public concern" as those where free expression "is essential to the common quest for truth and the vitality of society as a whole,"¹⁶³ and as that "information [which] is needed or appropriate to enable the members of society to cope with the exigencies of their period," including statements of "truth, science, morality, and arts in general."¹⁶⁴ Moreover, whatever the definition of matters of public concern adopted, its application raises the specter of regulating speech according to its content, a prohibited exercise under the First Amendment.¹⁶⁵

a personnel manager for a senator brought libel action against senatorial candidate challenging his employer for false allegations in press releases during the campaign), *cert. denied*, 493 U.S. 933 (1989).

¹⁶⁰ See *Kurtz v. Vickrey*, 855 F.2d 723, 726 (11th Cir. 1988); Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988).

¹⁶¹ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting); see *supra* notes 117-19 and accompanying text.

¹⁶² *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985); see *supra* notes 122-27 and accompanying text.

¹⁶³ *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984).

¹⁶⁴ *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

¹⁶⁵ See generally Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of An Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990) (arguing that the matters of public concern criteria comprise a content-based threshold test that undermines the First Amendment, threatening the very language the test seeks to protect and raising the specter of impermissible content regulation). In addition, Estlund notes that only speech that is "closely tied" to the political process has thus far survived the Court's public concern test. *Id.* at 35; see also Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law*, 49 U. PITT. L. REV. 91 (1987) (reasoning that the notion of public

Generally, courts analyze letters to the editor as involving "matters of public concern" together with the letter's literary genre to deem them constitutionally protected.¹⁶⁶ In a few cases, however, courts rely on the matters of public concern approach only.¹⁶⁷ In other words, the public concern test provides little help in determining whether a letter to the editor should be protected opinion. This is especially true since, to some extent, the very publication of a letter to the editor transforms its content into a matter of public concern. Few newspapers or journals would publish a letter that did not have an impact on the social and political climate for fear of jeopardizing their reputation. As the Court explained, the media themselves define what constitutes matters of public concern:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial

concern is incompatible with the very democratic self-governance it seeks to facilitate since it excludes speech from public discourse).

¹⁶⁶ See, e.g., *Okun v. Superior Court of L.A. County*, 629 P.2d 1369, 1379 (Cal.) (letter criticizing a real estate developer's condominium plans as well as the city council was protected because, in part, of the "context" of public debate), *cert. denied*, 454 U.S. 1099 (1981); *Desert Sun Publishing Co. v. Superior Court of L.A. County*, 158 Cal. Rptr. 519, 521 (Cal. App. Ct. 1979) (letter criticizing a hospital board of directors' candidate was protected because of the political context); *Sall v. Barber*, 782 P.2d 1216, 1219 (Colo. Ct. App. 1989) (letter criticizing reported ethnic harassment was protected because of the "context" of the letter to the editor and the on-going controversy); *Della-Donna v. Yardley*, 512 So. 2d 294, 296 (Fla. Dist. Ct. App. 1987) (letter criticizing a local university's attorney was protected because of its "context" as a letter to the editor and because it was a component of an on-going public debate); *Alleman v. Vermilion Publishing Corp.*, 316 So. 2d 837, 840 (La. Ct. App. 1975) (letter attacking a doctor for declining to treat a child taken to a hospital emergency room was protected as a matter of public concern).

¹⁶⁷ See, e.g., *Reddick v. Craig*, 719 P.2d 340, 341 (Colo. Ct. App. 1985) (letter against county landowners association chair and newspaper by land-use planning company and its chief operating officer was not libelous because letter addressed matter of public concern); *Karnell v. Campbell*, 501 A.2d 1029, 1036 (N.J. Super. Ct. App. Div. 1985) (letter criticizing real estate developers for having "duped" the town regarding the value of former school property was protected because it dealt with a public issue); *Safarets, Inc. v. Gannett Co.*, 80 Misc. 2d 109, 113, 361 N.Y.S.2d 276, 280-81 (N.Y. Sup. Ct. 1974) (letter to the editor criticizing the treatment of animals and birds by animal store was protected opinion because it was a subject of general public concern), *aff'd*, 49 A.D.2d 666, 373 N.Y.S.2d 858 (3d Dep't 1975).

process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.¹⁶⁸

The distinction between matters of public and private concern is similarly circular in New York where the media determines whether a topic is a "legitimate matter of public concern."¹⁶⁹

3. Plaintiff's Status

Like the fuzziness of the matters of public concern approach, the distinction between public and private figures is also unclear. Distinguishing between public and private figures has been described by one judge as akin to "trying to nail a jellyfish to the wall."¹⁷⁰ While the *Gertz* Court rejected the *Rosenbloom* matters of public concern test, the majority defined "public figures" as, to some degree, dependent on the existence of a public controversy.¹⁷¹ The parameters of who qualifies as a public

¹⁶⁸ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

¹⁶⁹ See *supra* note 128. In New York the *Gaeta* court's reasoning reflects that of the Court in *Miami Herald Publishing*: "The press, acting responsibly, and not the courts must make the ad hoc decisions as to what are matters of genuine public concern, and while subject to review, editorial judgments as to news content will not be second-guessed so long as they are sustainable." 62 N.Y.2d 340, 349, 465 N.E.2d 802, 805, 477 N.Y.S.2d 82, 85 (1984); see also *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 595, 549 N.E.2d 453, 457, 550 N.Y.S.2d 251, 255 (distinguishing "legitimate public concern" from "the realm of mere gossip and prurient interest . . . is best left to the judgment of journalists and editors, which we will not second-guess absent clear abuse"), *cert. denied*, 495 U.S. 930 (1980).

The parameters of a "legitimate matter of public concern" in New York remain unclear. New York courts have found a number of topics of public concern. See, e.g., *Friedan v. Friedan*, 414 F. Supp. 77 (S.D.N.Y. 1976) (a past relationship with a feminist); *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 416 N.E.2d 557, 435 N.Y.S.2d 556 (1980) (drug use); *Twenty-Five East 40th Street Restaurant Corp. v. Forbes, Inc.*, 30 N.Y.2d 595, 282 N.E.2d 118, 331 N.Y.S.2d 29 (1972) (the quality of food in a restaurant); *D'Agrosa v. Newsday, Inc.*, 158 A.D.2d 229, 558 N.Y.S.2d 961 (1990) (a "miracle baby" malpractice suit).

¹⁷⁰ *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978); see also *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162-63 (1967) (Warren, C.J., concurring) (The difference between public and private figures has "no basis in law, logic, or First Amendment policy."); Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 624 (1983) (in determining whether a statement is libelous, judges should not rely "on the abstract definition of 'public figure'").

¹⁷¹ *Gertz*, 418 U.S. 323, 351 (1974). While the *Gertz* Court explicitly rejected the subject-matter test, the Court and lower courts arguably employ the matters of public concern analysis because to determine whether a plaintiff is a public figure often involves determining whether the party is involved in a "public controversy." See *Harris v. Tomczak*, 94 F.R.D. 687, 698 (E.D. Cal. 1982) (defining *Gertz* public figure test as circu-

figure are fluid. Neither a well-known private attorney¹⁷² nor a socially prominent family member involved in a notorious divorce qualified as a public figure.¹⁷³

The test, however, is less applicable to letters to the editors in part because letters selected by newspapers and journals tend to involve public figures or public officials who have mass appeal. In addition, the very publication of a letter often transforms a plaintiff into a public figure.¹⁷⁴ The range of plaintiffs deemed public figures in letters to the editor cases include: a developer involved in city water wells and treatment plants;¹⁷⁵ a citizen engaged in a utility-rate debate;¹⁷⁶ and chiropractors who appeared on a television show.¹⁷⁷

In the end, these three legal considerations—whether a statement is fact or opinion, whether it involves a matter of public concern, and whether a statement involves a public figure—are merely “shorthand for the determination that the principles embodied in the first amendment . . . would be vindicated by forbidding the defamation suit to proceed.”¹⁷⁸ These existing

lar because it requires a court to define “public” figure by referring to “public controversy”). For example, the *Firestone* Court found a socially prominent divorcee not a public figure because the “[d]issolution of a marriage through judicial proceeding is not the sort of ‘public controversy’ referred to in *Gertz*.” *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (Marshall, J., dissenting); see *supra* notes 113-14 and accompanying text. As Justice Marshall noted, “Having thus rejected the appropriateness of judicial inquiry to ‘the legitimacy of interest in a particular event or subject,’ . . . *Gertz* obviously did not intend to sanction any such inquiry by its use of the term ‘public controversy.’ Yet that is precisely how I understand the Court’s opinion to interpret *Gertz*.” *Id.* at 489.

¹⁷² *Gertz*, 418 U.S. at 323; see *Hotchner v. Castillo-Puche*, 404 F. Supp. 1041, 1044 (S.D.N.Y. 1975) (“[I]f attorney *Gertz* was not a public figure, nobody is.”).

¹⁷³ *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

¹⁷⁴ See *Pasternack*, *supra* note 10, at 312 (“[L]ibel plaintiffs suing for libel regarding a letter to the editor have constitutionally been adjudged public persons.”).

¹⁷⁵ *Okun v. Superior Court of L.A. County*, 629 P.2d 1369 (Cal.), *cert. denied*, 454 U.S. 1099 (1981).

¹⁷⁶ *Wright v. Haas*, 586 P.2d 1093 (Okla. 1978).

¹⁷⁷ *Cera v. Mulligan*, 79 Misc. 2d 400, 358 N.Y.S.2d 642 (Sup. Ct. Monroe County), *aff’d*, 47 A.D.2d 798, 367 N.Y.S.2d 1019 (4th Dep’t 1975). Notwithstanding the classification of a plaintiff as a public figure, however, some plaintiffs do prevail in letters to the editor cases. See, e.g., *DeLoach v. Maurer*, 204 S.E.2d 776 (Ga. Ct. App. 1974) (letter found libelous that accused mayor of using his public status for personal profit); *Wright v. Haas*, 586 P.2d 1093 (Okla. 1978) (published reply letter by a city attorney in a university newspaper that attacked the “radical” political views and questioned the motivations of a member of a civic organization found libelous); *Weaver v. Pryor Jeffersonian*, 569 P.2d 967 (Okla. 1977) (letter that accused political candidate of embezzling funds printed in final paper before election found libelous).

¹⁷⁸ *Stern*, *supra* note 95, at 613.

legal tests and their applications discourage the media from reprinting more controversial letters to the editor. Therefore, an absolute privilege for such reprinters would encourage more direct, robust debate, notwithstanding that most newspapers eventually win letter to the editor libel cases brought against them. In New York the most recent case exemplifying the need for an absolute privilege for letters to the editor is *Immuno AG v. Moor-Jankowski*.¹⁷⁹

II. IMMUNO AG V. MOOR-JANKOWSKI

A. Facts

In 1982 defendant Moor-Jankowski,¹⁸⁰ the unpaid editor-in-chief of the *Journal of Medical Primatology*,¹⁸¹ received a letter to the editor criticizing the plaintiff Immuno AG ("Immuno"), a multinational corporation,¹⁸² for its plans to establish a West African hepatitis research facility where experiments would be conducted on captured chimpanzees. The letter was written by Dr. Shirley McGreal, Chair of the International Primate Protection League ("IPPL"), an advocacy organization aimed at protecting primates involved in biomedical research.¹⁸³ The letter criticized Immuno's research facility proposal because it: (1) circumvented international policies protecting chimpanzees as an endangered species; (2) had the potential to eliminate the wild chimpanzee population because the capture of wild chimpanzees involved the killing of their mothers; and (3) involved returning experimental animals to the wild, which created the danger of spreading hepatitis to other chimpanzees.

Moor-Jankowski contacted Immuno regarding the receipt of

¹⁷⁹ 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 111 S. Ct. 2261 (1991).

¹⁸⁰ Dr. Moor-Jankowski is a professor of medical research at New York University School of Medicine and director of the Laboratory for Experimental Medicine and Surgery in Primates of New York University Medical Center. 77 N.Y.2d at 240, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908.

¹⁸¹ The *Journal* reports on primate research in academia and has a circulation of 300. Gest, *supra* note 6, at 64.

¹⁸² Immuno AG is an Austrian multinational corporation that manufactures biological products from blood and operates in approximately 30 countries. Nat Hentoff, *The Quicksands of Libel*, WASH. POST, Apr. 1, 1989, at A23.

¹⁸³ 77 N.Y.2d at 240, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908.

McGreal's letter.¹⁸⁴ While the plaintiffs admitted receipt of the letter and offered no comment, Immuno's attorneys wrote to the defendant challenging the accuracy of the letter. The defendant responded by extending the deadline for plaintiff's reply by two months and indicated that the plaintiff should obtain the documentation from McGreal directly.

The letter to the editor was published almost a year after its receipt. Moor-Jankowski wrote an editorial note prefacing McGreal's letter, identifying the author and explaining that the letter had been held for nearly a year, yet Immuno had failed to comment.¹⁸⁵

Also at issue between Immuno and Moor-Jankowski was the latter's comments in a scientific magazine before the publication of McGreal's letter in the *Journal*. In a *New Scientist* article, Moor-Jankowski was quoted as saying that: (1) there was an adequate supply of chimpanzees for research without capturing new ones; (2) Immuno's efforts to capture wild chimpanzees was "scientific imperialism"; and (3) Immuno's attempts to capture wild chimpanzees would jeopardize "people like me involved in the bona fide use of chimpanzees" for research.¹⁸⁶

B. Procedure

In December, 1984 Immuno sued Moor-Jankowski and seven other defendants in New York supreme court for the allegedly libelous letter to the editor authored by McGreal and for Moor-Jankowski's statements in *New Scientist*.¹⁸⁷ Immuno claimed four million dollars in damages.¹⁸⁸ By 1991 all defendants except Moor-Jankowski had settled with plaintiff for "substantial sums" of money.¹⁸⁹

After "extensive discovery," Moor-Jankowski moved for

¹⁸⁴ *Id.* at 241, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*, 567 N.E.2d at 1273, 566 N.Y.S.2d at 908-09.

¹⁸⁷ *Id.*, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909. The seven other defendants included McGreal and the publishers and distributors of the *Journal of Medical Primatology* and *New Scientist* magazine.

¹⁸⁸ Lewis, *supra* note 8, at A31.

¹⁸⁹ 77 N.Y.2d at 241, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909. The appellate division commented that Immuno "succeeded in coercing" substantial settlements out of the defendants "for the obvious reason that the costs of continuing to defend the action were prohibitive." 145 A.D.2d 114, 128, 537 N.Y.S.2d 129, 138 (1st Dep't 1989).

summary judgment to dismiss the libel action.¹⁹⁰ In August, 1987 the New York supreme court denied defendant's motion for summary judgment, finding that the statements in the letter to the editor were factual and therefore triable as to whether defendant acted with actual malice in either making or publishing the statements. However, the court did dismiss the *prima facie* tort action against Moor-Jankowski for his statements in *New Scientist*.¹⁹¹

Moor-Jankowski appealed and in January, 1989 the appellate division reversed the supreme court.¹⁹² The court granted summary judgment and dismissed the suit, finding "that the statements contained in the letter and *New Scientist* article [we]re not actionable and that the defendant [wa]s entitled to summary judgment dismissing the complaint."¹⁹³ The court identified the bulk of the letter as that of opinion. As to the "underlying factual propositions" upon which the author elaborated with opinion, the court held that the plaintiff had failed to meet its burden of proving those statements false.¹⁹⁴ The court recognized that the "common expectation of a letter to the editor is not that it will serve as a vehicle for the rigorous and comprehensive presentation of factual matter but as one principally for the expression of individual opinion."¹⁹⁵

The New York Court of Appeals then granted Immuno's request for leave to appeal.¹⁹⁶ In December, 1989 the court affirmed the appellate division's dismissal of plaintiff's libel ac-

¹⁹⁰ 77 N.Y.2d at 242, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909. Immuno's status as a public figure was raised, but not directly addressed in the New York supreme court opinion. *Immuno*, 14 Media L. Rep. (BNA) 1821 (N.Y. Sup. Ct. 1987).

¹⁹¹ *Prima facie* tort is the infliction of intentional harm that results in damage with neither excuse nor justification, through an act or acts that would otherwise be lawful. *ATI, Inc. v. Ruder & Finn, Inc.*, 42 N.Y.2d 454, 458, 368 N.E.2d 1230, 1232, 398 N.Y.S.2d 864, 866 (1977). To establish the tort, a plaintiff must prove special damages. *Curiano v. Suozzi*, 63 N.Y.2d 113, 469 N.E.2d 1324, 480 N.Y.S.2d 466 (1984). The court held that Immuno failed to specify the special damages with sufficient particularity. Therefore, it granted the defendant's summary judgment motion and dismissed the plaintiff's cause of action for *prima facie* tort. *Immuno*, 14 Media L. Rep. (BNA) at 1827.

¹⁹² *Immuno*, 145 A.D.2d 114, 537 N.Y.S.2d 129 (1st Dep't 1989).

¹⁹³ *Id.* at 121, 537 N.Y.S.2d at 133.

¹⁹⁴ *Id.* Indeed, the court found most of the factual assertions in the publications to be "demonstrably true" or, at least, "insusceptible of being proved false." *Id.* at 130, 537 N.Y.S.2d at 139.

¹⁹⁵ *Id.* at 129, 537 N.Y.S.2d at 138.

¹⁹⁶ 74 N.Y.2d 602, 539 N.E.2d 1113, 541 N.Y.S.2d 985 (1989).

tion.¹⁹⁷ It held that the challenged items were constitutionally privileged opinion under both the state and federal free speech guarantees, and that no triable issues of fact in the letter existed. In February, 1990 the court denied Immuno's motion to reargue.¹⁹⁸ The plaintiff then appealed to the United States Supreme Court.

Subsequent to the New York Court of Appeals decision, the Supreme Court had granted *certiorari* to review a grant of summary judgment dismissing a libel action in *Milkovich v. Lorain Journal Co.*¹⁹⁹ In light of this decision, the Court granted Immuno *certiorari*, vacated the judgment of the New York Court of Appeals and remanded the case for further consideration.²⁰⁰

Finally, in January, 1991—eight years after the suit was filed—the New York Court of Appeals, on reconsideration, reaffirmed its earlier ruling by dismissing the plaintiff's complaint on the grounds that the letter to the editor was protected opinion.²⁰¹

C. *The Immuno Decision*

1. The Majority Opinion

In *Immuno* the majority opinion held that McGreal's letter to the editor qualified for protection under both state and federal constitutional law and New York common law as an expression of conservationist concern over the use of endangered species for medical research. In finding the letter to the editor protected opinion, the court emphasized its context and content.

First, the majority analyzed *Milkovich*. The *Immuno* court interpreted *Milkovich* as narrowing the federal opinion privilege: "[I]t appears that the following balance has been struck between First Amendment protection for media defendants and protection for individual reputation: except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of probably false fact will likely be actiona-

¹⁹⁷ 74 N.Y.2d 548, 549 N.E.2d 129, 549 N.Y.S.2d 938 (1989).

¹⁹⁸ 75 N.Y.2d 866, 552 N.E.2d 179, 552 N.Y.S.2d 931 (1990).

¹⁹⁹ 497 U.S. 1 (1990); see *supra* notes 93-107 and accompanying text.

²⁰⁰ 497 U.S. 1021 (1990).

²⁰¹ 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991). Immuno's appeal of the 1991 New York Court of Appeals decision was denied by the Supreme Court. 111 S. Ct. 2261 (1991).

ble."²⁰² Despite the New York court's reading of *Milkovich*, however, it still found the letter to the editor privileged opinion. The court found two assertions of implied fact in the letter under *Milkovich*—that there is no method for determining if a chimpanzee has been exposed and that Immuno may release infected chimps into the wild. Nevertheless, it found the letter protected under federal law because Immuno failed to meet its burden of proof.²⁰³

Second, the majority reasoned that the letter to the editor was protected opinion, whatever the outcome under *Milkovich*, under the New York Constitution. The court found its constitution's free speech guarantee more expansive than the First Amendment as interpreted by the Supreme Court.²⁰⁴ The court

²⁰² 77 N.Y.2d at 245, 567 N.E.2d at 1275, 566 N.Y.S.2d at 911.

²⁰³ *Id.* at 246, 567 N.E.2d at 1276, 566 N.Y.S.2d at 912. A libel plaintiff has the burden of proof to establish the falsity of factual assertions. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). Furthermore, there is a strong tradition of using summary judgment to dispose of libel suits. *Immuno*, 77 N.Y.2d at 256, 567 N.E.2d at 1282, 566 N.Y.S.2d at 918; see *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 416 N.E.2d 557, 435 N.Y.S.2d 556 (1980) (encouraging the use of summary judgments in meritless libel suits); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) (same).

²⁰⁴ The state constitution's free speech provision provides, in part, that: "Every citizen may freely speak, write and publish his sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. CONST. art. I, § 8; see generally *Immuno*, 77 N.Y.2d at 248-53, 567 N.E.2d at 1277-80, 566 N.Y.S.2d at 913-16; Richard J. Tofel, "Every Citizen May Freely . . . Publish": *Protecting the Press Under the New York State Constitution*, 40 SYRACUSE L. REV. 1040 (1989) (reviewing the development and expansion of the New York Constitution's free speech guarantee).

It is well established that a state constitution may be more expansive than the federal Constitution's corresponding provisions. In *Michigan v. Long*, 463 U.S. 1032 (1983), the Supreme Court found a challenged search and seizure to be constitutional under federal law. The Court held, however, that "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent state grounds, this Court will not undertake to review the decision." *Id.* at 1033. In *People v. Class*, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986), the New York Court of Appeals held that the simple parallel citation of federal and state constitutional provisions may provide such an independent and adequate state ground for a decision. The *Immuno* court clearly stated that the letter to the editor was protected opinion under separate and independent state grounds. 77 N.Y.2d at 248, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913.

More controversial is under what circumstances a state constitution should be relied upon. This topic is a source of much discussion, including among judges on the New York Court of Appeals. See, e.g., Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 402-04 (1987) (arguing that states are the ultimate guarantors and generators of individual rights); Vito J. Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea*, 61 ST. JOHN'S L. REV.

noted that the federal Constitution sets only minimum standards while states have an additional responsibility to meet state needs and expectations.²⁰⁵ In the end, the *Immuno* court found the letter to the editor protected under the state constitution.

Accordingly, the court interpreted the McGreal letter by examining the *Ollman* factors. The *Immuno* court criticized the *Milkovich* Court for collapsing the *Ollman* factors of the literary and social contexts and rejected the "fine parsing" of fact from opinion in *Milkovich*.²⁰⁶ The court noted that isolating the allegedly libelous statements from the letter's context "may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context."²⁰⁷ Accordingly, the majority relied on *Steinhilber v. Alphonse*,²⁰⁸ in which New York adopted *Ollman*, to undertake a contextual analysis of the letter.²⁰⁹ The majority noted in examining the

431, 436-38 (1987) (arguing that there should be strict limits on the state judiciary's role regarding state constitutional construction questions).

New York courts have relied on the state constitution to protect its citizens' civil liberties since 1856. See *Wynehamer v. People*, 13 N.Y. 378 (1856) (striking down a state statute making unlawful the possession and sale of "intoxicating liquors" because it deprived individuals of property without due process of law). This reliance on the New York Constitution has continued. See, e.g., *O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 531, 523 N.E.2d 277, 289, 528 N.Y.S.2d 1, 6 (1989) (Kaye, J., concurring) (nonconfidential photograph taken by reporter in newsgathering and kept as a resource was protected from compelled disclosure under both the federal and state constitutions); *Matter of Beach v. Shanley*, 62 N.Y.2d 241, 255, 465 N.E.2d 304, 311, 476 N.Y.S.2d 765, 772 (1984) (Wachtler, J., concurring) (reporter's testimonial privilege not only constitutional under the First Amendment but also under state constitutional free speech clause); *Belanca v. New York State Liquor Auth.*, 54 N.Y.2d 228, 429 N.E.2d 765, 445 N.Y.S.2d 87 (1981) (state statute prohibiting topless dancing in bar was unconstitutional under state free speech guarantee), *cert. denied*, 456 U.S. 1006 (1982).

²⁰⁵ *Immuno*, 77 N.Y.2d at 248, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913.

²⁰⁶ *Id.* at 244, 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

²⁰⁷ *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

²⁰⁸ 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986); see also *McGill v. Parker*, 179 A.D.2d 98, 109, 582 N.Y.S.2d 91, 98 (1st Dep't 1992) (interpreting *Immuno* as reaffirming *Steinhilber's* adoption of *Ollman*); NYCLU Amicus Brief at 3 n.1, *Immuno*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (No. 23545-84) (arguing that the *Steinhilber* court was acting as a "common law tribunal" in its contextual analysis).

²⁰⁹ [W]e believe that an analysis that begins by looking at the context of the whole communication, its tone and apparent purpose . . . better balances the values at stake than an analysis that first examines the challenged statements for express and implied factual assertions, and finds them actionable unless couched in loose, figurative or hyperbolic language in charged circumstances. . . . [S]tatements must first be viewed in their context in order for courts to de-

broader social context of letters to the editor that such letters offer both initial letter writers and respondents a forum to persuade readers and the broader community; such letters persuade not because they may appear in any particular publication, but because the writer is persuasive. The majority stated that a letter to the editor provides an important public forum

not only because it allows persons or groups with views on a subject of public interest to reach and persuade the broader community but also because it allows the readership to learn about grievances, both from the original writers and from those who respond, that perhaps had previously circulated only as rumor; such a forum can advance an issue beyond invective.²¹⁰

Next, the *Immuno* court examined the literary context of the letter. In so doing, it noted that the letter involved the public controversy around animal testing and that an average reader would understand the letter's meaning, given the specificity of the letter's language and the literary genre of such letters.²¹¹ The court concluded that the letter was protected opinion under the state common law's adoption of *Ollman*. It noted that the letter was not placed on the front page but rather the editorial page—a recognizable context. The court reasoned that, even without an editorial note, the average *Journal* reader would understand the letter to be of opinion, not fact, resting on the authority of the letter writer, not the *Journal*. It was "plain to the reasonable reader of this scientific publication that McGreal was voicing no more than a highly partisan point of view."²¹² In the

termine whether a reasonable person would view them as expressing or implying any facts.

77 N.Y.2d at 254, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917 (citations omitted).

²¹⁰ *Id.* at 253, 567 N.E.2d at 1280, 566 N.Y.S.2d at 916.

²¹¹ *Id.* at 252-55, 567 N.E.2d at 1278-81, 566 N.Y.S.2d at 916-17. The majority categorized the animal rights topic as one of "public interest," *id.* at 253, 567 N.E.2d at 1280, 566 N.Y.S.2d at 916, and a matter of "public controversy," *id.* at 254, 567 N.E.2d at 1280, 566 N.Y.S.2d at 916. Therefore, the piece was protected to ensure "the full and vigorous exposition and expression of opinion on matters of public interest." *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917 (quoting *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 384, 366 N.E.2d 1299, 1309, 397 N.Y.S.2d 943, 953, *cert. denied*, 434 U.S. 969 (1977)).

²¹² 77 N.Y.2d at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917. This was especially true because the *Journal of Medical Primatology* is read by a "highly specialized group of readers." *Id.* at 253, 567 N.E.2d at 1280, 566 N.Y.S.2d at 916. Thus, the average *Journal* reader has a "well-developed understanding of the issues." *Id.* (quoting *Immuno*, 145 A.D.2d 114, 129, 537 N.Y.S.2d 129, 138 (1st Dep't 1989)).

end, the court ruled that the letter to the editor was protected to assure the preservation of the free speech function of letters to the editor.²¹³

2. Concurring Opinions

Judge Simons agreed with the majority's decision to grant summary judgment to Moor-Jankowski. He contended, however, that the letter to the editor should be protected opinion on federal grounds only and that the majority erred in its state analysis since *Immuno* failed to meet its burden of proof under federal law.²¹⁴ Judge Simons observed that whether *Milkovich* was read as narrowing or maintaining current federal opinion protections, the majority's contextual analysis of the letter to the editor was irrelevant since *Immuno* failed to establish that the assertions of fact in the letter were false. Therefore, "a narrow view of *Milkovich* in which context is not controlling, is inconsistent with the discussion on State law in which context becomes critical."²¹⁵ Additionally, Judge Simons found that because the majority decided *Immuno* on an independent, state basis, it circumvented judicial procedure by foreclosing a subsequent appeal to the United States Supreme Court, thereby violating established rules of judicial restraint and uniformity.²¹⁶

Judge Hancock also agreed with the majority that summary judgment was properly granted. Like Judge Simons, he reasoned that the appeal should have been resolved under federal law only.²¹⁷ Yet, Judge Hancock concluded that because *Milkovich* and its discussion of context left federal law "undiminished," a

²¹³ The court stated that in holding the letter to the editor protected opinion, "the cherished constitutional guarantee of free speech is preserved." 77 N.Y.2d at 256, 567 N.E.2d at 1282, 566 N.Y.S.2d at 918. The *Immuno* court viewed letters to the editor as contributing to the marketplace of ideas. *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917; *see supra* notes 33-35 and accompanying text. The court also viewed letters to the editor as promoting democratic self-government. 77 N.Y.2d at 255, 567 N.E.2d at 1282, 566 N.Y.S.2d at 918; *see supra* notes 36-44 and accompanying text.

²¹⁴ 77 N.Y.2d at 259-60, 567 N.E.2d at 1284-85, 566 N.Y.S.2d at 920-21 (Simons, J., concurring).

²¹⁵ *Id.* at 260, 567 N.E.2d at 1285, 566 N.Y.S.2d at 921 (Simons, J., concurring).

²¹⁶ *Id.* at 261, 567 N.E.2d at 1285, 566 N.Y.S.2d 921 (Simons, J., concurring).

²¹⁷ 77 N.Y.2d at 268, 567 N.E.2d at 1290, 566 N.Y.S.2d at 926 (Hancock, J., concurring). While Judge Hancock argued that there are some cases where a decision based on both federal and state constitutional grounds is appropriate, *Immuno* was not one of those cases. *Id.*

contextual analysis to determine the average readers's response to McGreal's letter was appropriate.²¹⁸

Finally, Judge Titone also concurred with the majority's granting of summary judgment. He contended, however, that the *Immuno* decision should rest on state common law grounds only and, more specifically, on the fair comment privilege.²¹⁹ At the same time, Judge Titone noted that the majority's contextual analysis under *Ollman* remained appropriate under New York's fair comment privilege.²²⁰

III. AN ABSOLUTE PRIVILEGE FOR THE MEDIA REPRINTERS OF LETTERS TO THE EDITOR

While the New York Court of Appeals disagreed about whether letters to the editor should be analyzed under state law (either constitutional or common law) or federal law in *Immuno*, all agreed that letters to the editor are a special type of expression deserving special protection. In *Immuno* the values of free expression were "best effectuated" by providing Moor-Jankowski "some latitude to publish a letter to the editor on a matter of legitimate public concern—the letter's author, affiliation, bias and premises fully disclosed, rebuttal openly invited—free of defamation litigation."²²¹ However, the New York Court of Appeals declined to create an absolute privilege for letters to the editor.²²² Yet "[u]nder any standard other than an absolute privilege, the threat of a lawsuit hangs over the head of a publisher like the sword of Damocles; the danger is not that the sword drops but merely that it hangs."²²³ When the media act as bill-

²¹⁸ *Id.* Judge Hancock therefore disagreed with both the majority's and Judge Simons's opinions that the *Ollman* contextual analysis had changed under *Milkovich*.

²¹⁹ *Id.* at 263, 266, 567 N.E.2d at 1286, 1288, 566 N.Y.S.2d at 922, 924 (Titone, J., concurring) (quoting *Immuno*, 74 N.Y.2d 548, 556, 549 N.E.2d 129, 132, 549 N.Y.S.2d 938, 941 (1989)).

²²⁰ 77 N.Y.2d at 266, 567 N.E.2d at 1288, 566 N.Y.S.2d at 924 (Titone, J., concurring).

²²¹ *Immuno*, 77 N.Y.2d at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917 (1991).

²²² *Id.* at 245, 567 N.E.2d at 1275, 566 N.Y.S.2d at 911 ("not . . . all letters to the editor are absolutely immune from defamation actions"). The New York Civil Liberties Union ("NYCLU") submitted an Amicus Brief on behalf of Moor-Jankowski proposing such a privilege. NYCLU Amicus Brief at 19-24, *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1992) (No. 23545-84).

²²³ See Alexander D. Del Russo, *Freedom of the Press and Defamation: Attacking the Bastion of New York Times v. Sullivan*, 25 Sr. Louis U. L.J. 501, 533 (1981).

boards, providing a forum for free expression, the print media and their readers should not risk being penalized. Such a privilege would immunize from liability journals and newspapers that reprint letters to the editor and encourage the publication of such special types of expression, reflecting the *Immuno* court's recognition of the unique role letters to the editor play in fostering public debate.

A. *The Need for an Absolute Privilege: The Media's Censorship of Letters to the Editor*

Current libel law encourages the media to censor themselves in their reprinting of letters to the editor.²²⁴ Such censorship occurs whenever an editor rejects a letter for its possible legal implications rather than for journalistic reasons.²²⁵ Admittedly, the media defendant tends to win letters to the editor libel suits eventually.²²⁶ Yet the uncertainty created by the existing multi-factor approach, the likelihood of paying defense costs and the risk of paying large libel judgments fosters potential censorship.²²⁷ One of every eight letters is rejected by editors due to

²²⁴ As one commentator noted:

If the media are to be held responsible in libel actions for the content of these communications, they must exercise control. Such control unwisely gives the media the right to censor paid advertisements, letters, and signed columns. Placing responsibility on the media for these pieces ignores the essential role the press plays in providing access to the public and segments of it to exercise their rights of free expression.

FORER, *supra* note 12, at 181.

²²⁵ See David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 430-31 (1975); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 365-66 (1974) (Brennan, J., dissenting) (recognizing that requiring a guarantee of truthfulness leads to "self-censorship when publishers, fearful of being unable to prove truth or unable to bear the expense of attempting to do so, simply eschew printing controversial articles").

²²⁶ See Marc A. Franklin, *A Critique of Libel Law*, 18 U.S.F. L. REV. 1, 14-18 (1993) (while the media win almost all the suits against them for publishing letters to the editor, the threat is that editors are fearful of taking risks by publishing non-mainstream views in this libel-sensitive climate).

²²⁷ See, e.g., *McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 717 F.2d 1460, 1466 (D.C. Cir. 1983) ("Even if many [libel] actions fail, the risks and high costs of litigation may lead to undesirable forms of [press] self-censorship."); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone' and thus create the danger that the legitimate utterance will be penalized.") (citations omitted). *But see* *Herbert v. Lando*, 568 F.2d 974, 997 (2d Cir. 1977) (Meskill, J., dissenting) ("The mere existence of a libel cause of action chills the exercise of the editorial judgment. That is the whole idea."),

libel concerns.²²⁸ One survey found that approximately twelve percent of responding newspapers had been sued over a letter to the editor and sixty-three percent of the editors surveyed said that the risk of a libel suit in the letters section was quite high, with twenty-six percent responding that the risk is higher in the letters section than elsewhere in the newspaper.²²⁹

These numbers, while not staggering, are evidence that editorial choices are shaped by fear of libel, thus undermining the free speech purposes served by letters to the editor. Furthermore, even the ultimate victory in letter to the editor libel suits by a journal or newspaper does not encourage the media to publish letters to the editor. When the choice is between publishing a controversial letter that raises the possibility of libel litigation or reprinting a "safe" letter, editors will "steer clear" of risk and practice editorial caution.²³⁰ An absolute privilege for the media to reprint letters to the editor can effectively reduce the free speech chill created by potential libel litigation, notwithstanding the potential dangers posed by such a privilege.

1. The Financial Cost

The libel lawsuit tests the financial resources of defendants as reflected in defense costs, court awards and insurance premiums. Pretrial defense costs alone may involve tremendous

rev'd, 441 U.S. 153 (1979); Michael Massing, *The Libel Chill: How Cold Is It Out There?*, COLUM. JOURNALISM REV. May-June 1985, at 2 (arguing that the chilling effect concept has been overused and, like crying wolf too often, rings hollow); Lewis, *supra* note 170, at 603 (The American press "often cries that doom is at hand.").

²²⁸ Pasternack, *supra* note 10, at 314.

²²⁹ *Id.* A 1979 survey by the Ontario press council revealed that 19 of 28 daily newspapers were influenced by Canadian libel law in that they were "more cautious" in their handling of letters to the editor. Martin, *supra* note 13, at 193. *But see* Branzburg v. Hayes, 408 U.S. 665, 694 (1972) (The Court rejected evidence presented by the press to support the establishment of a confidentiality privilege since the surveys "must be viewed in the light of the professional self-interest of the interviewees.").

²³⁰ See *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (self-censorship will make the press "steer far wider of the unlawful zone"). The experience of Moor-Jankowski in *Immuno* is a telling example. He exercised a high degree of editorial caution: he extended a right of reply option; he prefaced the letter with an editorial note; the letter writer was a well-known advocate; and the *Journal* held the letter for close to a year before publishing it. Notwithstanding these cautionary steps, Moor-Jankowski was sued for libel. The *Immuno* court noted that "[t]he chilling effect of protracted litigation can be especially severe for scholarly journals, such as defendant's, whose editors will likely have more than a passing familiarity with the subject matter of the specialized materials they publish." 77 N.Y.2d 235, 256, 567 N.E.2d 1270, 1281, 566 N.Y.S.2d 906, 917 (1991).

amounts of money. The high costs are due to both discovery and pretrial legal actions. The average cost of a libel case before trial hovers around \$150,000 in legal fees.²³¹ While roughly ninety percent of libel suits are dropped, settled or dismissed, the average figure for awards in libel trials in 1990 and 1991 was approximately \$5.2 million.²³² Yet almost all of these judgments were overturned on appeal or given a directed verdict.²³³ In *Immuno* the lawsuit cost Moor-Jankowski over one million dollars to defend—and he “won” eight years later.²³⁴

²³¹ Abrams, *supra* note 53, at 90; see *Herbert v. Lando*, 441 U.S. 153, 176-77 (1979) (the First Amendment does not provide a privilege for the editorial process and extensive, in-depth discovery of a defendant's editorial process is appropriate). Eighty-three percent of media libel cases “involve a formal judicial proceeding on the merits of the libel claim before” trial. Seth Goodchild, *Media Counteractions: Restoring the Balance to Modern Libel Law*, 75 GEO. L.J. 315, 322 n.45 (1986) (quoting unpublished Iowa Research Project Study findings).

²³² *Libel Case Awards Found Increasing*, N.Y. TIMES, Sept. 20, 1992, at A34 [hereinafter *Libel Case Awards*]. When libel suits reached trial in 1989 and 1990, newspapers lost two-thirds of the cases and the average award was about \$4.5 million. Alex S. Jones, *News Media's Libel Costs Rising, Study Says*, N.Y. TIMES, Sept. 26, 1991, at A28. From 1981 to 1984 the average damage award was \$2 million. In 1985-1986 the average was \$1.2 million. In 1987-1988 media defendants won one-half of all libel trials and the average award was \$432,000. Fewer libel actions—about 15—went to trial in 1989-1990 compared to the average of 30 in the early 1980s. *Id.* However, the decline is not necessarily a reflection of fewer libel actions, but may be a “greater willingness” on the part of (1) judges to dismiss such cases, (2) newspapers to settle, or (3) less aggressive news coverage for fear of libel action. *Id.* (emphasis added). Million-dollar awards continue. In 1990 there were two decisions in libel trials awarding \$58 million and \$34 million. *Libel Case Awards, supra*, at A34.

²³³ See *supra* note 130; see also Fred Friendly, *Is Our Libel Law a Threat to Free Speech?*, WASH. POST, Jan. 15, 1984, at D1 (Most of the 10 largest punitive awards granted at trial court level in libel suits ranging from \$37 million to \$1.3 million were reduced or reversed on appeal; however, the publicity attending the original awards encouraged new suits, making it likely that “news organizations [will] be bankrupted by interminable legal maneuvering and decent journalists [will] be hamstrung in their decision-making.”).

²³⁴ Dr. J. Moor-Jankowski wrote a letter to the editor to *The New York Times* about the “real-life effects” of the *Immuno* lawsuit. He penned:

I am a full-time research professor at the New York University School of Medicine and the unpaid editor of the small, international Journal of Medical Primatology. For the last seven years (10 percent of life expectancy of an American male) I have been sued. . . . So far, my legal expenses exceed \$1 million . . . [T]he seven years of proceedings consumed most of my time, curtailing my scientific activities. *The court victory may still not effectively protect me or other editors of small professional journals from the chilling effect of suits by wealthy corporations using our legal system to discourage criticism of their activities. We need a legal deterrent to prohibitively costly, meritless libel suits that misuse the court system to undermine our First Amendment*

Win or lose, libel insurance premiums increase for the few who can afford such coverage in the first place.²³⁶ Insurers ask potential insureds if they run letters to the editors; those that do are more likely to pay higher insurance premiums than those who do not have such a section.²³⁶ Increasing premiums will make journal and newspaper editors even more wary about publishing controversial letters to the editor as well as more inclined to settle those suits that do arise. Moreover, insurance companies put great pressure on defendants to settle: in *Immuno* letter writer McGreal's insurer settled the case with *Immuno*, over her objections, for \$100,000—leaving her to bear another \$35,000 in legal fees.²³⁷ Thus, the specter of a libel lawsuit raised by a controversial letter to the editor can be costly and undermines the First Amendment purposes served by such letters.

2. The Lack of Newspaper Competition

Furthermore, there is a media monopoly. As the Supreme Court has noted, "Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential."²³⁸ There are fewer truly competitive newspapers per community, in particular, and fewer independent owners of mass media outlets, in general.²³⁹ In 1900 there were 2042 daily papers and 2023 owners

rights.

Moor-Jankowski, *View from Inside a Landmark Libel Case*, N.Y. TIMES, Jan. 25, 1991, at A28 (letter to the editor) (emphasis added).

²³⁶ See Goodchild, *supra* note 231, at 325. This hurts smaller publications the most. One major libel insurer requires that insureds bear 20 percent of all legal expenses generated whether the case is won or lost. See Michael Massing, *Libel Insurance: Scrambling for Coverage*, COLUM. JOURNALISM REV., Jan-Feb 1986, at 35.

²³⁶ Franklin, *supra* note 7, at 656 n.37, 659 n.65.

²³⁷ Gest, *supra* note 6, at 64. McGreal reported that her insurance company spent \$250,000 to defend her. Hentoff, *supra* note 182, at A23.

²³⁸ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 249 (1974); see generally BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (1983). In 1983 50 corporations controlled most of the country's media. *Id.* at xv-xvi. By 1988 the number had declined to 26. *Id.*; see Richard Pollack, *The Media Monopoly*, THE NATION, Feb. 13, 1988, at 209 (book review of second edition).

²³⁹ The number of cities with competing newspapers declined from 502 in 1923 to 35 in 1978. James N. Rosse, *The Decline of Direct Newspaper Competition*, J. COMM., Spring 1980, at 63, 64. The same decline is mirrored in communities. In 1980 there were 172 communities with two or more daily newspapers while in 1990 that number stood at

while in the 1980s there were approximately 1700 daily newspapers owned by only 760 owners.²⁴⁰ With the increase in one-newspaper towns and the rising cost of running a paper, there are fewer newspapers and, correspondingly, less space for letters to the editor sections. Before, when a letter to the editor was not published by one paper, a letter writer could go to another newspaper.²⁴¹ This is no longer the case.²⁴² Accordingly, there are fewer opportunities for citizen-critics to exercise their First Amendment rights via letters to the editor. A privilege that protects the media from potential libel liability will encourage remaining newspapers and journals to publish controversial letters.

3. Limited Access

With limited print media competition and the specter of huge litigation costs, media outlets are tempted not to print controversial letters to the editor. As one commentator suggested: "Even among competing newspapers, a monopoly situation may exist for letter writers because only one of the papers may have carried the story that triggered the letter. It is not likely that the other paper would carry letters that addressed an issue it had not reported upon."²⁴³ In general, letters to the editor are a way for non-majority groups to reach the media.²⁴⁴ But for letters to the editor, "[f]reedom of the press is guaranteed only to those who own one."²⁴⁵ As Justice Black noted, this is especially true for the disenfranchised who "do not have enough money to own or control publishing plants, newspapers, radios . . ."²⁴⁶ More-

63. Alex S. Jones, *At Many Papers, Competition is at Best an Illusion*, *NY TIMES*, Sept. 22, 1991, at 18. In 1991 only 12 of 63 community papers had separately owned, truly competitive rivals. *Id.*

²⁴⁰ BAGDIKIAN, *supra* note 238, at 8.

²⁴¹ Franklin, *supra* note 7, at 662.

²⁴² *Id.* at 662 n.78. And so it is easy for management with no print competition to select letters to the editor with the aim of reducing the risk of libel litigation. See Franklin, *supra* note 226, at 15.

²⁴³ Franklin, *supra* note 7, at 662 n.78; see FORER, *supra* note 12, at 181-82 ("If the media are held responsible for libelous statements by those who sign their letters . . . it will seriously limit access to the public and correspondingly restrict the public's ability to read and hear any voices other than those vetted by the media.").

²⁴⁴ See TALKING BACK, *supra* note 4, at 6; BARRON, *supra* note 34, at 44-52.

²⁴⁵ A.J. Liebling, *The Wayward Press: Do You Belong to the New Journalism?*, *NEW YORKER*, May 14, 1960, at 105, 109.

²⁴⁶ *Kovacs v. Cooper*, 336 U.S. 77, 102 (1949) (Black, J., dissenting).

over, letter writers voicing controversial and unpopular opinions have less access to the media than those expressing more mainstream views. In *Immuno* the letter to the editor was written by McGreal, a respected advocate of primate rights in academic medicine with a track record of effective leadership.²⁴⁷ The publishing of a letter signed by this well-known advocate frightened the defendant editor enough to delay its publication for a year. This bodes poorly for less well-known letter writers in publications with editors less expert in the specific area of controversy.²⁴⁸ Often letters authored by political outsiders with controversial, non-mainstream positions use more "potentially libelous speech" and are more likely to be rejected, therefore reducing the diversity of views exchanged on the editorial page.²⁴⁹ Efforts to mandate access to the press have failed.²⁵⁰

²⁴⁷ See Hentoff, *supra* note 182, at A23. McGreal "is a persistent, effective paladin of primates at risk, having, for instance, convinced the late Indira Gandhi to ban the exportation of rhesus monkeys. She has also changed the practices of several American university primate animal programs that she considered inhumane." *Id.*

²⁴⁸ On the other hand, perhaps a letter penned by a less-known advocate will have a better chance of being reprinted if being a better-known advocate and letter writer decreases those chances.

²⁴⁹ See Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 DUKE L.J. 283 (arguing that offensiveness of speech unwittingly serves a useful role in society). Less acceptable views, or those views that run counter to the "capitalistic goals of privately-owned, for-profit media," are therefore suspect. Dominic Caristi, *The Concept of a Right to Access to the Media: A Workable Alternative*, 22 SUFFOLK U. L. REV. 103, 108 (1988) ("In this age of intense media competition for advertising revenue, politically controversial sparks will be avoided for fear customers may turn to less 'offensive' material.").

²⁵⁰ See generally BARRON, *supra* note 34. Barron proposes that the government step in and establish "gateways" to ensure access to the marketplace to promote diversity of coverage. See also Ingber, *supra* note 34, at 5 (intervention in the market is needed because of media monopoly control and limited access to the media by powerless or disfavored groups). There have been legal efforts to establish a right of access to letter to the editor sections. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court struck down as unconstitutional a statute that required newspaper publishers to provide right-of-reply space to a political candidate criticized by the newspaper. The statute interfered with editorial autonomy because "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decision made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.* at 258; see also *Lord v. Winchester*, 190 N.E.2d 875 (Mass. 1963) (letter writer unsuccessfully sued paper when it refused to publish his letter opposing the paper's editorial position), *appeal dismissed and cert. denied*, 376 U.S. 221 (1964); *Wall v. World Publishing Co.*, 263 P.2d 1010 (Okla. 1953) (reader unsuccessfully sued newspaper for refusing to publish his letter based on a breach of contract argument).

Controversial letter writers' lack of access to the media, in turn, denies the polity the opportunity to be informed about non-mainstream ideas. Therefore, to enhance the First Amendment value of an informed populace, legal obstacles that discourage the print media from publishing a diverse selection of submitted letters to the editor should be eliminated.

4. Libel as an Ideological "Sledgehammer"

The *Immuno* case also exemplifies the misuse of defamation law by corporations seeking to silence public criticism through letters to the editor. As one civil liberties letter writer penned: "[I]t is the libel laws themselves which are most often brandished as weapons. Far from being a means for the little person to stand up to powerful interests, they are most often invoked by the powerful to protect those interests."²⁵¹ Instead of libel being a vehicle to discern the truthfulness of facts and to guard against harm caused through the media, it is a way for the powerful to silence competing ideologies. Small newspapers and journals, like the *Journal of Medical Primatology*, are particularly vulnerable.²⁵² In *Immuno* the multi-national corporation used libel law as a "sledgehammer to crack the tiny nut of a letter to the editor."²⁵³ Clearly, the *Journal's* 300 subscribers did not pose an actual threat to *Immuno*. Nor did McGreal. As the

²⁵¹ Gara LaMarche, Associate Director, New York Civil Liberties Union, *Libel Laws in the Service of Power Interests*, N.Y. TIMES, Aug. 16, 1983, at A22 (letter to the editor). Similarly, in *Karnell v. Campbell*, 501 A.2d 1029 (N.J. Super. Ct. App. Div. 1935), the court expressed its "deep concern" with a lawsuit by developers against letter writers because of "the chilling effect that plaintiff's lawsuit in these rather unremarkable circumstances may have on other citizens who would ordinarily speak out on behalf of what they perceive to be the public good." *Id.* at 1036. One commentator noted that "[t]he modern way to silence criticism is to price it out of existence with protracted libel litigation." LEWIS, *supra* note 65, at 221. The use of libel law as a tool for potential harassment was recognized in *New York Times v. Sullivan*, 376 U.S. 254, 294 (1964) (Black, J., concurring). Such "intimidation" lawsuits by corporations, primarily directed against citizen-critics, are on the rise. For a discussion of intimidation suits, see Gest, *supra* note 6, at 64; Bryan Holzberg, *Defamation Suits "Chill" Activists; Developers File Against Protesters*, NAT'L L.J., July 25, 1988, at 3; Amy Dockser Marcus, *Intimidation Lawsuits Creep Up On Critics*, WALL ST. J., Feb. 21, 1990, at B1; Eve Pell, *Libel as a Political Weapon*, THE NATION, June 6, 1981, at 1.

²⁵² The *Journal* is not a "hardy publisher," easily able to engage in unpopular or controversial issues under the current system of libel law. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 360 (1974) (Douglas, J., dissenting).

²⁵³ See LEWIS, *supra* note 65, at 216.

appellate division commented in *Immuno*, "to enhance the value of such [libel] actions as instruments of harassment and coercion [is] inimical to the exercise of First Amendment rights" and was used by *Immuno* "as an instrument for . . . suppression."²⁵⁴ Furthermore, *Immuno* has employed similar libel tactics to silence public criticism internationally.²⁵⁵ A media privilege to reprint letters to the editor would insulate publications, including smaller, more vulnerable media outlets, from liability and allow them to foster public debate.

B. *A Proposal for an Absolute Privilege for Reprinters of Letters to the Editor*

The First Amendment value of public debate by citizen-critics demands the creation of a libel-free zone—an absolute privilege—to ensure that the media has adequate "breathing space" to publish diverse letters.²⁵⁶ Privileges are created to balance the competing interests of freedom of expression and the prevention of attacks on reputations. Courts and legislatures grant privileges to foster free expression when the speech is highly valued: "[C]onduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation."²⁵⁷ There are two kinds of privileges: absolute and qualified. For reprinters of letters to the editor, an absolute privilege best effectuates First Amendment values and the dual goals of *Sullivan*: to avoid censorship by the media due to the threat of libel and to foster public debate. Furthermore, its creation is merely an extension of existing common law privileges generally and the fair report privilege specifically. While a

²⁵⁴ *Immuno*, 145 A.D.2d 114, 128, 143, 537 N.Y.S.2d 129, 137, 147 (1st Dep't 1989).

²⁵⁵ See Hentoff, *supra* note 6, at A21 ("Immuno . . . has filed libel suits against its critics in a number of countries."); see also Sierra Club et al., Amicus Brief at 9-10, *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991) (No. 23545-84) (noting that the release of *Immuno*'s plan to do hepatitis research in West Africa generated much debate in Europe and "Immuno responded to the criticism generated during these debates with a barrage of libel lawsuits against individuals, conservation organizations and publications").

²⁵⁶ See *NAACP v. Button*, 371 U.S. 415, 433 (1963).

²⁵⁷ W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 114, at 815 (5th ed. 1988).

privilege raises the specter of potential abuses, without such a privilege the pall cast over the First Amendment will continue to silence the exchange of diverse views in the publication of letters to the editor.

1. The Weaknesses of a Qualified Privilege

A qualified or conditional privilege is a rebuttable presumption that protects speech when public policy demands such enhanced treatment, but that can be lost if abused.²⁵⁸ Qualified privileges apply to protect publishers, the interests of others, the common interest, communications of one who may act in the public interest, and fair comment on matters of public concern.²⁵⁹

A qualified privilege for letters to the editors is an ineffective privilege. The very nature of a qualified privilege involves judicial balancing, thus raising the specter of media censorship for fear of potential libel suits. The same criticism levied against current defamation law—the criteria of fact versus opinion, the matter of public concern and the plaintiff's status—can be used against the creation and application of a qualified privilege for letters to the editor. These obstacles are, in part, the catalyst for creating such an absolute privilege. As Chief Justice Burger said in discussing the application of the attorney-client privilege, when a court fails to clarify the scope of a privilege, it “neither minimizes the consequences of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging that uncertainty while declining to clarify it.”²⁶⁰ An unclear privilege is scarcely better than no privilege at all.

2. The Strengths of an Absolute Privilege

Unlike a qualified privilege, an absolute privilege precludes defamation actions, regardless of the content of the statement. Generally, absolute privileges are geared toward the identity of the speaker or the forum of the speech.²⁶¹ Such privileges are

²⁵⁸ RESTATEMENT (SECOND) OF TORTS § 599 (1977); Deborah Daniloff, *Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace*, 40 HASTINGS L.J. 687, 709 (1989).

²⁵⁹ KEETON, *supra* note 257, § 115, at 824-32.

²⁶⁰ *UpJohn Co. v. United States*, 449 U.S. 383, 404 (1981) (Burger, C.J., concurring).

²⁶¹ SMOLLA, *supra* note 9, §§ 8.02-.06, at 8-15 to -19.

granted in very specific situations when there is an important societal need to protect the communication. Absolute privileges have protected defamatory statements made in judicial proceedings, in legislative proceedings, in certain executive communications, with the consent of plaintiff and where mandated by law, such as interspousal tort immunity.²⁶²

An absolute privilege was embraced by Justices Black, Douglas and Goldberg in two concurring opinions in *Sullivan*. As Justice Black penned in his *Sullivan* concurrence: "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment. I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction."²⁶³ The "stopgap measure" adopted by the Court in *Sullivan*—the actual malice standard—fails to avoid litigation or the threats it poses in the letters to the editor context.²⁶⁴ Moreover,

²⁶² KEETON, *supra* note 257, § 114, at 815-24; RESTATEMENT (SECOND) OF TORTS §§ 583-92 (1977).

²⁶³ *New York Times v. Sullivan*, 376 U.S. 254, 297 (1964) (Black and Douglas, JJ., concurring); *see id.* at 297-305 (Goldberg and Douglas, JJ., concurring); *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 359 (1974) (Douglas, J., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 57 (1971) (Black, J., concurring); *see generally* Edmond Cahn, *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962) (interviewing Justice Black on his position that there are absolutes in the Bill of Rights); Del Russo, *supra* note 223, at 501 (absolute privilege for the press should apply when the matter discussed is one of public or general concern); Lewis, *supra* note 167, at 619-21 (speech relevant to public affairs should be absolutely privileged); Franklin, *supra* note 7, at 667-68 (proposing absolute privilege for letters to the editors dealing with issues of self-governance).

One proposal is for an "absolute" privilege for statements about (1) a public official and matters related to his or her public position; (2) a public figure on matters related to his or her public status; and (3) anyone (public or private) on a matter of public concern. *See* Gilbert Cranberg, *ACLU Moves to Protect All Speech on Public Issues from Libel Suits*, CIVIL LIBERTIES, Feb. 1983, at 2; Gilbert Cranberg, *ACLU: Second Thoughts on Libel*, COLUMB. JOURNALISM REVIEW Jan.-Feb. 1983, at 43 [hereinafter *Second Thoughts*]. On the one hand, limiting the application of the privilege to letters involving a "subject of public concern" only is, in essence, an absolute privilege, since the policy defines public concern as "anything having an impact on the social or political system or climate," and thus is arguably all-inclusive. *SECOND THOUGHTS*, *supra*, at 42. On the other hand, this is a broad qualified privilege because it limits the privilege to letters involving "legitimate matters of public concern" which creates the same uncertain mire exacerbated by the weakness of the public concern factor previously discussed. *See supra* notes 160-69 and accompanying text.

²⁶⁴ *Sullivan*, 376 U.S. at 294-95 (Black, J., concurring) (establishing the actual malice standard has not stopped the potentially "huge verdicts lurking just around the corner for the Times or any other newspaper . . . which might dare to criticize public

an absolute privilege avoids the post-*Sullivan* pitfalls of the existing multi-factor approach that persist after *Milkovich* in determining whether a statement in an allegedly libelous letter to the editor is protected.

First, an absolute privilege provides the "outcome predictability" needed to encourage the media to take the risk of publishing controversial letters to the editor.²⁶⁵ It avoids the involvement of the court or the media in the vagaries of multi-factor approaches. Without an absolute privilege publishers of letters to the editors will avoid the risk inherent in that balancing.

Second, such a privilege will not necessarily change the different levels of credibility granted various publications.²⁶⁶ Some argue that any kind of absolute privilege undermines the effect of libel law to deter "scandal mongering and other lower forms of journalism."²⁶⁷ Yet the lack of an absolute privilege has not stopped some publications from publishing malicious letters to the editor. As the Court noted, "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."²⁶⁸ Moreover, there is the possibility that those editors that step over the line will be subject to professional and community criticism.²⁶⁹ For example, take the situation where a letter is submitted and an editor knows the letter contains a damaging, blatant falsehood. This situation will be very rare because, generally, editors will not know if such a falsehood exists. If the paper is to maintain its reputation, the paper will, most likely, exercise its editorial discretion and not publish the letter. In comparison, under *Sullivan* and its progeny, the many chinks in the wall of existing defamation law would allow a court to entertain a libel action in which the republisher had no direct knowledge of the falsehood.

officials").

²⁶⁵ See Leslye deRoos Rood & Ann K. Grossman, *The Case for a Federal Journalist's Testimonial Shield Statute*, 18 HASTINGS CONST. L.Q. 779, 803 (1991).

²⁶⁶ See FRANKLYN SAUL HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 51-52 (1981) (arguing that an absolute privilege will have little effect on the credibility of the press).

²⁶⁷ *Second Thoughts*, *supra* note 263, at 43; see also Del Russo, *supra* note 223, at 543 (decreasing competition among the media may result in "less incentive to correct mistakes if libel laws are unduly protective of the press").

²⁶⁸ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

²⁶⁹ *Franklin*, *supra* note 7, at 665-66.

Third, a letter to the editor reflects the letter writer's, not the reprinter's, beliefs and, therefore, the media should not be held liable for the letter writer's beliefs. The media cannot publish a letter with reckless disregard of the truth because only the letter writer possesses that knowledge.²⁷⁰

Fourth, republishers are no more likely to abuse this privilege than others afforded such immunity, such as elected officials, who already enjoy an absolute privilege.²⁷¹

Finally, an absolute privilege provides both a defense and a cure for chilling speech. Generally, in letters to the editor, more speech cures an individual's reputation. Recourse should be rebuttal, not litigation, because speech is "a highly effective weapon in reply to criticism."²⁷² As Justice Brandeis eloquently stated, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."²⁷³ It would be in the interests of editors, then, to publish replies to controversial letters.

There are, of course, potential dangers posed by creating such a privilege. No one can ignore that "some people *are* badly damaged by false and reckless speech."²⁷⁴ As the Court has eloquently explained in its denial of an absolute privilege to critics of public officials:

[T]he use of the known lie as a tool is at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." . . . Hence the knowingly false statement and the false statement made with reckless

²⁷⁰ "Neither the publisher nor the editor can, by definition, claim to possess an honest belief in the opinion expressed in the letter. It is not their opinion. The opinion expressed in a letter to the editor is the opinion of the letter writer alone." Martin, *supra* note 13, at 189. This is arguably why a letter writer should remain liable. See *infra* note 309 and accompanying text.

²⁷¹ Franklin, *supra* note 7, at 665-66.

²⁷² See Lewis, *supra* note 170, at 621.

²⁷³ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., joined by Holmes, J., concurring).

²⁷⁴ Nat Hentoff, *Free Speech: The Price is Going Up*, THE PROGRESSIVE, May 1983, at 34 (supporting an absolute media privilege).

disregard of the truth, do not enjoy constitutional protection.²⁷⁵

A difficult scenario that highlights the potential dangers of an absolute privilege to reprinters of letters is the phenomenon of "outing." "Outing" is a controversial practice of publicly revealing the gay or lesbian sexual orientation of individuals.²⁷⁶ Some describe "outing" as a "vicious invasion of a subject's privacy," while others find it an act which "help[s] the gay cause by increasing the number of gay role models."²⁷⁷ Assume a writer submits a letter to the editor disclosing *falsely* that an individual is gay.²⁷⁸ Should the media be liable for reprinting such a letter?

It is important to note that current defamation law does not clearly protect the reputational interests of the injured plaintiff under its existing legal categories. Is the "outing" a statement of opinion or a statement of fact? On the one hand, "outing" is an opinion about a person's sexual orientation. On the other hand, involuntary outing clearly injures an individual's reputation. Is the "outed" individual a public or private figure? Proponents of outing may argue that the very act of "outing" concerns an individual's public character and that an individual's participation in a particular controversy—to be gay and not be out of the closet—transforms a private figure into a public figure.²⁷⁹ Arguably, this is especially true where the individual is involved in making policy decisions on gay and lesbian issues, such as when

²⁷⁵ *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (citations omitted); see also *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

²⁷⁶ Ronald F. Wick, *Out of the Closet and Into the Headlines: "Outing" and the Private Facts Tort*, 80 GEO. L.J. 413, 413 (1991) (defining "outing" as "making public allegations of homosexuality in an effort to force the subject to come 'out of the closet' and go public with his lifestyle"); see generally David H. Pollack, *Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of "Outing"*, 46 U. MIAMI L. REV. 711 (1992).

²⁷⁷ Wick, *supra* note 276, at 414.

²⁷⁸ If the letter's allegations were true, the letter would probably not be found libelous. First, truth is a defense against a libel cause of action. However, there is the issue of defining the term "gay" and accompanying issues of verification. Jon E. Grant, Note, *"Outing" and Freedom of the Press: Sexual Orientation's Challenge to the Supreme Court's Categorical Jurisprudence*, 77 CORNELL L. REV. 103, 122-23 (1991). Second, it is unlikely that courts will determine that a truthful allegation of homosexuality is defamatory. Wick, *supra* note 276, at 415. Third, under the public-private figure dichotomy, the very nature of outing may transform a private figure into a public one. Grant, *supra*, at 126.

²⁷⁹ Grant, *supra* note 278, at 126.

a high-level Pentagon official is gay and enforces the ban against gay men and lesbians in the military. Opponents of outing may argue that sexual orientation, whether a private or public figure, plays no part in defining the public character of an individual.²⁸⁰ Will courts view outing as a matter of public concern, thereby supporting efforts by some in the gay rights movement to force people to accept the position of role models? Or will outing be considered a private issue, implicating an individual's sexuality only?

An absolute privilege arguably creates an atmosphere that may encourage such false accusations. Yet an absolute privilege will not necessarily encourage false attacks on reputations. In the "outing" example, injured plaintiffs could still bring an action against the letter writer, thereby creating a disincentive for the letter writer to submit a "false" outing letter to the media.²⁸¹ Furthermore, the media have their reputations as well as their editorial discretion to consider.²⁸² In the end, even under an absolute privilege, strong disincentives exist that discourage the republication of letters constituting "utterly gratuitous attacks."²⁸³ Therefore, a privilege will not encourage more potential abuses when the media are merely acting as bulletin boards in reprinting letters to the editor than those already present under existing defamation law. Moreover, the absolute privilege offsets the vagaries of existing legal categories in most letter to the editor cases.

3. The Foundation for an Absolute Privilege: An Extension of Existing Privileges

While a qualified privilege fails to protect adequately re-printers of letters to the editor, existing qualified privileges do provide the building blocks to an absolute privilege for letters to the editor. When a certain type of expression is deemed important, a privilege is created to protect such expression. In general, the law offers such protections to the media to encourage their republication of certain types of expression under the fair com-

²⁸⁰ *Id.*

²⁸¹ See *infra* note 309 & *supra* note 270 and accompanying text.

²⁸² See *supra* notes 266-69 and accompanying text.

²⁸³ NYCLU Amicus Brief at 24, *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991) (No. 23545-84).

ment, neutral reportage and fair report privileges. In particular, just as the fair report privilege encourages the media to reprint official proceedings as long as the reporting is accurate, fair and not motivated by ill will, so would an absolute privilege encourage them to reprint letters to the editor.

a. *Fair Comment*

Courts initially recognized the importance of public debate by creating the conditional fair comment privilege. The privilege—an affirmative defense—initially attached only to matters of legitimate concern based on true facts that were reported fairly.²⁸⁴ Recently, the privilege has been extended to a variety of matters of public interest, including comments regarding individuals and institutions involved in community matters, such as churches, charities and private organizations involved in public service.²⁸⁵ At the same time, that qualified privilege is easily lost if the defendant has “bad motive” or “ill will” in the republication.²⁸⁶ While the fair comment privilege remains in use today,²⁸⁷ it is too limited to protect reprinters of letters to the editor.²⁸⁸

²⁸⁴ SMOLLA, *supra* note 9, § 6.02[1], at 6-6; *see supra* notes 61-64 and accompanying text.

²⁸⁵ *See Mashburn v. Collin*, 355 So. 2d 879, 882 (La. 1977) (The privilege covers comments involving “persons, institutions or groups who voluntarily injected themselves into the public scene or affected the community’s welfare, such as public officials, political candidates, community leaders from the private sector or private enterprises which affected public welfare, persons taking a public position on a matter of public concern, and those who offered their creations for public approval such as artists, performers and athletes.”); *see also Dairy Stores v. Sentinel Publishing Co.*, 516 A.2d 220 (N.J. 1986); *Kotlikoff v. Community News*, 444 A.2d 1086 (N.J. 1982).

²⁸⁶ *Dairy Stores*, 516 A.2d at 232.

²⁸⁷ *See, e.g., Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 253, 266, 567 N.E.2d 1270, 1288, 566 N.Y.S.2d 906, 924 (1991) (Titone, J., concurring); *Turbeville v. Abernathy*, 367 F. Supp. 1081 (W.D. N.C. 1973) (letter critical of a counselor’s discharge protected under fair comment privilege); *Sparks v. Boone*, 560 S.W.2d 236 (Ky. Ct. App. 1977) (criticism of former university president running for public office in letter protected under fair comment privilege); *Alleman v. Vermilion Publishing Corp.*, 316 So. 2d 837 (La. Ct. App. 1975) (letter to the editor charging a doctor with failing to treat a child in a hospital emergency room not libelous, and newspaper not liable, because the statement was conditionally privileged as fair comment on a matter of public concern).

²⁸⁸ The *Immuno* court noted that common law fair comment defense was limited. 74 N.Y.2d 548, 556, 549 N.E.2d 129, 132, 549 N.Y.S.2d 938, 941 (1990); *see Cahill Gordon & Reindel, Amicus Brief at 10, Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 253, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991) (No. 23545-84) (fair comment defense is extremely limited and would fail to protect much criticism); *Triggs v. Sun Printing & Publishing Ass’n*, 179 N.Y. 144, 155-56 (1904) (presented with a newspaper article critical of a professor, the

Letters to the editor may misstate facts. Also, to determine whether a letter concerns a "matter of legitimate interest" raises the specter of conflicting judicial characterizations. The outcome would depend, in part, on whether the court determined that the press reprinted a letter even though the opinion expressed in the letter was not sincerely held by the media reprinter and whether the strength of the language made an otherwise "fair" comment "unfair."²⁸⁹ Therefore, the fair comment doctrine faces the same limitations in requiring the separation of fact from opinion as under *Ollman*. At the same time, the privilege is important because it is a well-recognized, albeit narrow, judicially-created protection of free speech. It provides a building block in the creation of an absolute privilege for the republication of letters to the editor.

b. *Neutral Reportage*

In 1977 the Second Circuit in *Edwards v. National Audubon Soc'y, Inc.*²⁹⁰ created the neutral reportage privilege. The court created this privilege because there is a public interest in newsworthy statements by prominent persons, notwithstanding the press's doubts regarding their truth.²⁹¹ The *Edwards* court established four prerequisites for the privilege. First, the charges must relate to a pre-existing public controversy or generate a public controversy in their own right. Second, the charges must

court distinguished criticism and defamation, with criticism protecting only public subject matter that avoids indulging in personalities). *But see* SMOLLA, *supra* note 9, § 6.02[2], at 6-7 ("[T]he fair comment privilege came to embrace a range of plaintiffs at least as broad as, and arguably, broader than, the modern constitutional protections defined in *Gertz v. Robert Welch, Inc.*").

²⁸⁹ Sack & Karle, *supra* note 60, at 59.

²⁹⁰ 556 F.2d 113 (2d Cir.), *cert. denied sub nom.*, *Edwards v. New York Times*, 434 U.S. 1002 (1977). In *Edwards* the National Audubon Society was sued for charging a public figure with being a paid liar in the context of a controversy over whether DDT adversely affected bird life.

²⁹¹ The Second Circuit stated that it did

not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation. The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.

556 F.2d at 120 (citation omitted).

be made by a prominent organization, public official or public figure. The *Edwards* court further qualified the chargers with the need to be responsible. Third, the charges must be made about a public figure or official. Fourth, the reported charges must be "neutral," that is, not republished with an unbalanced, interested report.²⁹² Commentators and courts are divided on whether the privilege is a significant or helpful contribution to the exchange of information about public controversies.²⁹³ New York courts are similarly split.²⁹⁴

The neutral reportage privilege is not useful to most citizen letter writers since it only amplifies the voices of public figures already heard by the media. Yet letters to the editor penned by citizen-critics remain newsworthy despite the media's doubts regarding their truth. Moreover, the *Edwards* multi-factor approach suffers from the same achilles heel as the *Ollman* test: since it is unclear what, if any, limits exist on "newsworthiness," the approach is subject to a variety of judicial characterizations.²⁹⁵ The right of citizens to be fully informed by letters to

²⁹² *Id.*; see also *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 69 (2d Cir. 1980) (libel action by mayor against magazine that printed article stating that the mayor had once been accused of rape, had gotten the charges dropped, and had paid the accuser; the article was not covered by the neutral reportage privilege because the article did not simply report the charges, but concurred in them).

²⁹³ For critiques of the neutral reportage privilege, see SMOLLA, *supra* note 9, § 4.14[4], at 4-70; James E. Boasberg, *With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage*, 13 HASTINGS COMM. & ENT. L.J. 455 (1991) (proposing an expanded privilege to protect all accurately republished defamatory statements made by or about public figures); Ray W. Cambell, Note, *The Developing Privilege of Neutral Reportage*, 69 VA. L. REV. 853 (1983) (asserting that the basis for the privilege within the First Amendment is limited and should be narrowly construed); Mark W. Page, Comment, *Price v. Viking Penguin, Inc.: The Neutral Reportage Privilege and Robust, Wide Open Debate*, 75 MINN. L. REV. 157 (1990) (arguing that the neutral reportage privilege should provide stronger First Amendment protections). For a review of courts that have adopted or rejected the privilege or that remain undecided, see Cambell, *supra*, at 859 & nn. 55-57.

²⁹⁴ See *Hogan v. Herald Co.*, 84 A.D.2d 470, 478-479, 446 N.Y.S.2d 836, 842 (4th Dep't) (rejecting privilege), *aff'd*, 58 N.Y.2d 630, 458 N.Y.S.2d 538 (1982); *Russo v. Padovano*, 84 A.D.2d 925, 926, 446 N.Y.S.2d 645, 647 (4th Dep't 1981) (upholding privilege); *Schermerhorn v. Rosenberg*, 73 A.D.2d 276, 288, 426 N.Y.S.2d 274, 284 (2d Dep't 1980) (upholding privilege); *Orr v. Lynch*, 60 A.D.2d 949, 950, 401 N.Y.S.2d 897, 899 (3d Dep't) (supporting privilege), *aff'd*, 45 N.Y.2d 903, 411 N.Y.S.2d 10 (1978); *Hellman v. McCarthy*, 10 Media L. Rep. (BNA) 1789, 1794 (N.Y. Sup. 1984) (rejecting privilege).

²⁹⁵ See Note, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722, 725-26 (1963) (exploring the impact of the notion of newsworthiness and its potential for undermining invasion of privacy actions). Prosser noted that "news" included "all events and items of information which

the editor, then, requires the press to be free from liability in publishing them. Even though the neutral reportage privilege does not cover letters to the editors by many citizen-critics, it provides yet another example of judicially-created protections for speech deemed important. Similar reasoning can provide a basis for the creation of an absolute privilege for the media in reprinting letters to the editor.

c. *Fair Report*

Like the fair comment and neutral reportage privileges, the fair report privilege is an exception to the republication doctrine. The qualified privilege of fair report, or official report, was created to encourage the media to report on proceedings of official bodies and official documents by immunizing them from liability. The privilege was created by English Courts in 1796 to protect accurate news coverage of trials.²⁹⁶ It was adopted by American courts as early as 1856.²⁹⁷ The fair report privilege permits the publisher of material from proceedings to repeat defamatory statements made at those proceedings without reprinter liability and even with knowledge that the publication's defamatory statement is false.²⁹⁸ At the same time, this privilege is applicable only to those reports that are accurate and unmotivated by ill-will.²⁹⁹ The fair report privilege encompasses legislative, administrative and executive official proceedings.³⁰⁰ In ad-

are out of the ordinary humdrum routine" and that have an "indefinable quality of information which arouses public attention." KEETON, *supra* note 257, at 860 (emphasis added).

²⁹⁶ *Curry v. Walter*, 126 Eng. Rep. 1046 (C.P. 1796) (creating privilege); *The King v. Wright*, 101 Eng. Rep. 1396, 1398-99 (K.B. 1799) (extending privilege to republication of parliamentary reports); *Wason v. Walter*, 4 L.R.-Q.B. 73, 96 (1868) (extending privilege to republication of parliamentary debates).

²⁹⁷ *Barrows v. Bell*, 73 Mass. (7 Gray) 301 (1856) (published medical society disciplinary proceedings found privileged).

²⁹⁸ RESTATEMENT (SECOND) OF TORTS § 611 (1977) ("The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported."); *Beary v. West Publishing Co.*, 763 F.2d 66 (2d Cir.) (fair report privilege is an absolute privilege), *cert. denied*, 474 U.S. 903 (1985).

²⁹⁹ *Sack & Karle*, *supra* note 60, at 31-32.

³⁰⁰ *See, e.g.*, *Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850, 854 (8th Cir. 1979) (publication of grand jury indictments protected under the fair report privilege since the article was a fair and accurate reporting of judicial proceeding about charges

dition, the privilege recognizes that the public has a right to know about non-government activities and thus includes public meetings.³⁰¹ This privilege has been adopted in New York and includes the reporting of non-public meetings.³⁰²

The fair report privilege is the most helpful model in creating an absolute privilege for reprinters of letters to the editor. Just as a republisher is not liable for printing any falsehoods uttered during an underlying governmental or public proceeding, a republisher should be protected from liability for a falsehood in an underlying letter. In both cases the republisher merely has to transmit the information accurately. Furthermore, the same rationale underlies the fair report and the letters to the editor privileges: just as newspaper and journal readers have the "right to know" about public proceedings, so readers have a right to know citizens' criticisms of official and non-official activities through letters to the editor. Unlike the fair report privilege, however, the proposed absolute privilege for letters to the editor would be truer to the First Amendment.³⁰³

against plaintiffs for smuggling and selling drugs); *Medico v. Time, Inc.*, 643 F.2d 134 (3d Cir.) (publication by *Time* magazine of summary of F.B.I. documents identifying plaintiff as member of organized crime protected under the fair report privilege), *cert. denied*, 454 U.S. 836 (1981).

³⁰¹ See, e.g., *American Pet Motels, Inc. v. Chicago Veterinary Medical Ass'n*, 435 N.E.2d 1297, 1303 (Ill. App. Ct. 1982) (veterinary medical association); *Borg v. Boas*, 231 F.2d 788, 794 (9th Cir. 1956) (local law enforcement public meeting). Therefore, there is an intersection between the fair report and neutral reportage privileges.

³⁰² N.Y. CIV. RIGHTS LAW § 74 (McKinney 1992); see also *Lee v. Brooklyn Union Publishing Co.*, 209 N.Y. 245, 247 (1913). The statute grants, in part, an absolute privilege to editors and publishers to provide "a fair and true report" of a government proceeding. See, e.g., *Freeze Right Refrigeration v. City of New York*, 101 A.D.2d 175, 475 N.Y.S.2d 383 (1st Dep't 1984) (libel action against newspaper and city government for article about non-public investigation by city agency into practices of air conditioning repair shop privileged under fair report immunity); *Gurda v. Orange County Publications Div. of Ottaway Newspapers, Inc.*, 56 N.Y.2d 705, 706, 436 N.E.2d 1326, 451 N.Y.S.2d 724 (1982) (newspaper that reported on judicial proceedings protected under the fair report privilege). For a review of different state fair report privileges, see Sack & Karle, *supra* note 60, at 31-32.

³⁰³ See generally Kathryn Dix Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 NYU L. REV. 469 (1979) (proposing a constitutional fair report privilege that is consistent with the First Amendment); Note, *Privilege to Republish Defamation*, 64 COLUM. L. REV. 1102 (1964) (arguing that under *Sullivan*, the fair report privilege must meet First Amendment standards).

4. The Absolute Privilege Proposal

An absolute privilege, extending the fair report privilege, is necessary to protect adequately the First Amendment purposes of letters to the editor, despite the potential dangers posed by such a privilege. An absolute privilege for the media would immunize the media from liability when they accurately reprint letters to the editor, notwithstanding their knowledge of a false fact. To ensure that the media does not abuse such a privilege, however, minimal conditions must apply.

First, the letter should be signed.³⁰⁴ A signature requirement will help ensure the exclusion of anonymous attacks, help identify the letter for the reader and make the writer assume responsibility, including potential liability, for the content of the letter. Therefore, if an editor published an anonymous letter to the editor, the editor would remain liable.³⁰⁵

Second, the publication should ensure the authenticity of the letter by confirming the identity of the author and, where appropriate, the author's affiliation.³⁰⁶ Such an investigation will help readers more fully understand the perspective of the letter writer. At the same time, an editor should not have the responsibility of investigating each and every letter for falsity.³⁰⁷

³⁰⁴ Franklin, *supra* note 7, at 666; NYCLU Amicus Brief at 24, *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991) (No. 23545-84). This does not appear to be a heavy, or new, burden, since most newspapers already reject letters from anonymous sources. Steve Pasternack & Suraj Kapoor, *The Letters Boom*, THE MASTHEAD, Fall 1980, at 24 (ninety-seven percent of surveyed editors automatically reject anonymous letters).

³⁰⁵ See, e.g., *DiBernardo v. Tonawanda Publishing Corp.*, 117 A.D.2d 1009, 1011, 499 N.Y.S.2d 553, 555 (4th Dep't 1986) (newspaper liable for publishing anonymous letter to the editor).

³⁰⁶ Franklin, *supra* note 7, at 666. Again, this condition is not difficult for newspaper editors since most tend to do so already. Pasternack, *supra* note 10, at 314 (eighty-eight percent of the newspapers surveyed said they verified letters to the editor). In *Mazart v. State*, 109 Misc. 2d 1092, 441 N.Y.S.2d 600 (Ct. Cl. 1981), university trustees were not found agents of a student newspaper that published a letter to the editor without verifying the falsely signed letter writers. The court noted that "the need to verify the authorship of a letter wherein the purported author appears to be libeled is rudimentary." *Id.* at 1102, 441 N.Y.S.2d at 607.

³⁰⁷ As Professor Marc Franklin observed:

Some argue that society would benefit if the paper helped the public determine truth and falsity on all published matters because the public has no independent basis for deciding what side is right. The difficulty is that this will surely discourage the press from printing many matters that warrant early airing before the editor can learn enough about the merits to take a stand.

Third, a publication would remain liable as an originator if it endorsed, adopted or solicited the allegedly libelous letter to the editor.³⁰⁸

Finally, letter writers should remain potential defendants.³⁰⁹ There may be less of an incentive on the part of plaintiffs to sue individual letter writers who, in general, will be more judgment proof than media entities. At the same time, money is not always the motivating factor: in *Immuno* the corporation sued the journal for silence, not money. Letter writer liability, however, will discourage false, gratuitous letters from being submitted to editors, especially since the media will be immune from liability.

CONCLUSION

Immuno AG v. Moor-Jankowski is the latest and most disturbing example of the dangers posed by not having an absolute privilege for the special type of expression embodied in letters to the editor. The outcome in *Immuno* by the New York Court of Appeals would remain the same under the proposed absolute privilege. An absolute privilege, however, avoids the amorphous distinctions and the vagaries of changing courts and is more reflective of the First Amendment values that letters to the editor embody. Letters to the editor are a way for "outsiders" to participate in public debate. Since current libel law only exacerbates media censorship of controversial letters to the editor, the privilege must be more securely anchored in the First Amendment. The media should be encouraged, not discouraged, by the law to reprint editorial letters. Therefore, to promote the First

Franklin, *supra* note 7, at 664. Courts differ as to whether a newspaper's failure to ascertain the accuracy of assertions made in a letter to the editor constitutes actual malice. Current newspaper practice tends to include fact-checking of potentially libelous letters. See Pasternack, *supra* note 10, at 314 (sixty-eight percent of newspaper editors are likely to contact the letter writer to discuss content and the same percentage is likely to assign a staff person to fact-check the letter's contents.)

³⁰⁸ Franklin, *supra* note 7, at 665-66; NYCLU Amicus Brief at 24, *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991) (No. 23545-84).

³⁰⁹ Franklin, *supra* note 7, at 665 (an absolute privilege for letters to the editor should not absolve the defendant letter writer of liability).

Amendment purposes of letters to the editor, an absolute privilege should be created to provide access to the print soapbox and to encourage robust debate among citizens.

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