University of Dayton Law Review

Volume 12 | Number 3 Article 6

4-1-1987

Constitutional Law: Classification of an Alleged Defamation as an Actionaable Statement of Fact or as a Constitutionally Protected Expression of Opinion: Determined by the Totality of the Circumstances or by the Predilections of the Judge

Jeffrey Maxwell Jacobson
University of Dayton

CASENOTES

CONSTITUTIONAL LAW: CLASSIFICATION OF AN ALLEGED DEFAMATION AS AN ACTIONABLE STATEMENT OF FACT OR AS A CONSTITUTIONALLY PROTECTED EXPRESSION OF OPINION: DETERMINED BY THE "TOTALITY OF THE CIRCUMSTANCES" OR BY THE PREDILECTIONS OF THE JUDGE?—*Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986) (4-3 decision).

I. INTRODUCTION

In libel law the distinction between fact and opinion remains a gray area. Since the United States Supreme Court's decision in *Gertz v. Robert Welch, Inc.*,[1] opinion has been entitled to strong first amendment protection.[2] The publisher of an alleged defamation usually escapes liability when the statement is held to be an expression of opinion.[3] Thus, in defamation cases, a decision as to the classification of the statement as fact or opinion is often dispositive.

The Ohio Supreme Court recently considered the distinction between fact and opinion in the case of *Scott v. News-Herald*[4] and, in so doing, adopted a new, four-part "totality of the circumstances" test.[5] In the process, four members of the court held as expression of opinion a newspaper article which, just two years earlier, a different four justices of the court had characterized as statement of fact.[6] Moreover, neither the reversal nor the adoption of the new test changed the outcome of the plaintiff's appeal.[7]

This casenote discusses "public official" status and fact/opinion

---

1. 418 U.S. 323 (1974).

2. *See, e.g., id.* at 339–40; Janklow v. Newsweek, 788 F.2d 1300, 1302 (8th Cir.) (en banc), *cert. denied*, 107 S. Ct. 272 (1986); Orr v. Argus-Press Co., 586 F.2d 1108, 1114 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979).

3. *See, e.g.*, Buckley v. Littell, 539 F.2d 882, 893–96 (2d Cir. 1976) (liability for statements considered factual but not for those classified as opinions), *cert. denied*, 429 U.S. 1062 (1977).

4. 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986) (4-3 decision).

5. *Id.* at 250, 496 N.E.2d at 706; *see also infra* text accompanying note 40.

6. *Scott*, 25 Ohio St. 3d at 244, 496 N.E.2d at 701 (overruling in part Milkovich v. News-Herald, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984) (per curiam) (4-3 decision), *cert. denied*, 106 S. Ct. 322 (interim ed. 1985)).

7. *See id.* at 263, 496 N.E.2d at 717 (Celebrezze, C.J., concurring in judgment only, dissenting in part); *id.* at 270, 496 N.E.2d at 721 (Brown, J., concurring in judgment only, dissenting in part).

distinctions under both the law of Ohio and that of other states. This note also analyzes the factors considered by the Ohio Supreme Court in conferring the status of "public official," examines the role accorded to stare decisis by the court in deciding to reverse its previous characterization of the article as factual, and analyzes the four factors used by the court to form the "totality of the circumstances" test. Finally, this note considers whether the new test, both as described and as implemented, is so malleable as to be useless as a standard for future decisions.

II. FACTS AND HOLDING

Both *Scott v. News-Herald*[8] and the earlier-decided *Milkovich v. News-Herald*[9] were libel cases in which the alleged defamatory communication involved a newspaper column[10] written by *News-Herald* reporter J. Theodore Diadiun about a controversy involving the Maple Heights, Ohio, high school wrestling team; Michael Milkovich, Sr., its coach; and H. Don Scott, the superintendent of the Maple Heights school system.[11]

On February 9, 1974, Mentor and Maple Heights high schools met in a regular season wrestling match.[12] During the meet, fights broke out among those in the crowd as well as between members of the teams.[13] In the months that followed, the Ohio High School Athletic Association (OHSAA) held hearings concerning the altercation,[14] censured Coach Milkovich for his conduct at the match,[15] suspended the Maple Heights team from all 1975 tournament play,[16] and put the team and its coach on a one-year probation.[17]

Some of the wrestlers and their parents then brought suit against OHSAA, alleging that the team's suspension from state competition was a violation of the fourteenth amendment guarantee against depri-

---

8. 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986) (4-3 decision).

9. 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984) (per curiam) (4-3 decision), *cert. denied*, 106 S. Ct. 322 (interim ed. 1985), *overruled in part in* Scott v. News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986) (4-3 decision).

10. *Scott*, 25 Ohio St. 3d at 243, 496 N.E.2d at 700–01; *see also* Diadiun, *Maple Beat the Law with the 'Big Lie'*, News-Herald, Jan. 8, 1975, *reprinted in Scott*, 25 Ohio St. 3d at 277–78, 496 N.E.2d at 727–28.

11. *Scott*, 25 Ohio St. 3d at 243, 496 N.E.2d at 700–01.

12. *Milkovich*, 15 Ohio St. 3d at 292, 473 N.E.2d at 1191–92.

13. *Scott*, 25 Ohio St. 3d at 243, 496 N.E.2d at 700.

14. *Milkovich*, 15 Ohio St. 3d at 292, 473 N.E.2d at 1192.

15. *Id.*

16. *Scott*, 25 Ohio St. 3d at 243, 496 N.E.2d at 700.

17. *Id.* The Diadiun column referred to a two-year probation period. Diadiun, *supra* note 10, at 39.

vation of property without due process of law.[18] At trial in the Franklin County Court of Common Pleas, both Scott and Milkovich testified about the altercation and their own conduct.[19] Nearly two months later, on January 7, 1975, the court reversed the OHSAA ruling on procedural grounds.[20]

The day after the court decision was announced, Diadiun, who had attended both the match and the OHSAA hearings, wrote a column headlined "Maple Beat the Law with the 'Big Lie' " which appeared in the *News-Herald's* sports pages.[21] In the article, Diadiun accused Scott and Milkovich of lying at the OHSAA hearings and then changing their story to become more believable, but still not truthful, at the trial.[22] Diadiun, who claimed to be the only disinterested party at both the match and the OHSAA hearings,[23] wrote: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."[24]

Scott and Milkovich each filed lawsuits against Diadiun and the newspaper,[25] alleging that the defendants had falsely accused them of the crime of perjury.[26] In *Milkovich* the Ohio Supreme Court reversed lower court holdings that had barred Coach Milkovich from recovery.[27] Milkovich was found to be neither a "public official" nor a "public figure," and therefore was not required to prove "actual malice" under *New York Times v. Sullivan*[28] in order to recover for defamation.[29] Furthermore, the *Milkovich* court rejected lower court decisions that the article was opinion, stating that it contained unprotected "factual

---

18. *Scott*, 25 Ohio St. 3d at 243, 496 N.E.2d at 700.

19. *Id.*

20. *Milkovich*, 15 Ohio St. 3d at 292, 473 N.E.2d at 1192.

21. *Id.*

22. Diadiun, *supra* note 10, at 39.

23. However, Diadiun did not attend the Franklin County trial, even though it was the court decision which prompted his column. *See* Scott v. News-Herald, No. 9-128, slip op. at 2 (Ohio Ct. App., Lake County Dec. 30, 1983) (LEXIS, States library, Ohio file), *aff'd*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986) (4-3 decision).

24. Diadiun, *supra* note 10, at 39, *quoted in Scott*, 25 Ohio St. 3d at 244, 496 N.E.2d at 701.

25. *Scott*, 25 Ohio St. 3d at 244, 496 N.E.2d at 701.

26. *See, e.g., id.* at 251, 496 N.E.2d at 707.

27. *Milkovich*, 15 Ohio St. 3d at 297, 473 N.E.2d at 1196 (reversing Milkovich v. News-Herald, No. 9-012 (Ohio Ct. App., Lake County Oct. 3, 1983) (LEXIS, States library, Ohio file)).

28. 376 U.S. 254 (1964). In *New York Times*, the Court held that plaintiffs who are public officials or public figures, *see infra* notes 43–68 and accompanying text, must prove that the defamation was published with actual malice—"knowledge of the falsity of the statement or in reckless disregard of its truth or falsity." 376 U.S. at 279–80; *see also infra* notes 44–47 and accompanying text.

29. *Milkovich*, 15 Ohio St. 3d at 297, 473 N.E.2d at 1196.

assertions."[30] Finally, the case was remanded for determination of whether Diadiun had acted negligently, the standard of defendant culpability under Ohio law for recovery by plaintiffs who are neither public officials nor public figures.[31]

Like the lower courts in the *Milkovich* case, the trial court in the *Scott* case, the Lake County Court of Common Pleas, granted summary judgment to defendants. The court held that Scott was a public official and that the article was constitutionally protected opinion.[32] This decision was affirmed by the Eleventh District Court of Appeals.[33] After the *Milkovich* decision in which Diadiun's article was found to consist of unprotected statements of fact, Scott based his appeal to the Ohio Supreme Court on the argument that he was not a public official, and therefore should be required only to prove negligence.[34]

In *Scott,* the Ohio Supreme Court not only affirmed that Scott was a public official,[35] but also partially overruled *Milkovich* by holding that the Diadiun column was opinion and entitled to constitutional protection.[36] The court first held that, as a matter of law, superintendents of public schools are public officials.[37] Having decided that Scott was a public official, the court concluded that he had failed to prove actual malice.[38]

Although failure to prove actual malice would have been sufficient grounds upon which to affirm the lower court's decision,[39] the Ohio Supreme Court went further. The court adopted a four-part "totality of the circumstances" test for distinguishing between actionable statement of fact and constitutionally protected opinion: "First is the specific language used, second is whether the statement is verifiable, third is the general context of the statement and fourth is the broader context in which the statement appeared."[40] Finding no one factor to be determi-

---

30. *Id.* at 298–99, 473 N.E.2d at 1196–97.

31. *Id.* at 297, 473 N.E.2d at 1196; *see also infra* note 70 (Ohio's negligence standard).

32. *Scott,* 25 Ohio St. 3d at 244, 496 N.E.2d at 701.

33. Scott v. News-Herald, No. 9-128, slip op. at 7–8 (Ohio Ct. App., Lake County Dec. 30, 1983) (LEXIS, States library, Ohio file), *aff'd,* 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986) (4-3 decision).

34. *Scott,* 25 Ohio St. 3d at 245, 496 N.E.2d at 702.

35. *Id.* at 248, 496 N.E.2d at 704.

36. *Id.* at 254, 496 N.E.2d at 709.

37. *Id.* at 248, 496 N.E.2d at 704.

38. *Id.* at 249, 496 N.E.2d at 705.

39. New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964); *see also Scott,* 25 Ohio St. 3d at 263, 496 N.E.2d at 717 (Celebrezze, C.J., concurring in judgment only, dissenting in part); *id.* at 266, 496 N.E.2d at 718 (Sweeney, J., concurring in judgment only, dissenting in part); *id.* at 269–70, 496 N.E.2d at 721 (Brown, J., concurring in judgment only, dissenting in part).

40. *Scott,* 25 Ohio St. 3d at 250, 496 N.E.2d at 706 (citing Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc), *cert. denied,* 471 U.S. 1127 (1985)).

native,[41] the court held the Diadiun column to be constitutionally protected opinion.[42]

III. BACKGROUND

A. *"Public Official"/"Public Figure" Classification*

The level of culpability that must be shown in a defamation action depends on whether the plaintiff can be classified as a "public official" or "public figure," or whether he must be considered as a private citizen.[43] A plaintiff who is a public official or a public figure must show that the alleged defamatory communication was made with "actual malice," defined by the United States Supreme Court in *New York Times v. Sullivan*[44] as "knowledge of the falsity of the statement or in reckless disregard of its truth or falsity."[45] "Reckless disregard" is not judged by an objective standard; rather, this requirement is met by a finding that "defendant in fact entertained serious doubts as to the truth of his publication."[46] In approving the higher standard for public officials, the Supreme Court pointed to the need for free comment on government action, to the inherent risks one assumes by becoming a public official, and to the ability of such a plaintiff to command the public attention necessary to set the record straight.[47] Plaintiffs who are not public officials or public figures are not held to the actual malice standard but may recover upon a showing of the level of culpability required by the local jurisdiction, so long as the state law "do[es] not impose liability without fault."[48]

1. Public Official Characterization

The actual malice test was originally limited by the United States Supreme Court to cases in which the plaintiff was a public official.[49] In *New York Times,* the Court did not articulate a standard for determining which government employees should be considered public officials;[50]

---

41. *Id.* at 251–54, 496 N.E.2d at 706–09 (by implication); *cf.* Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir.) (en banc) (in applying the "totality of the circumstances" test, no one factor is dispositive), *cert. denied,* 107 S. Ct. 272 (1986).

42. *Scott,* 25 Ohio St. 3d at 254, 496 N.E.2d at 709.

43. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974) (states may determine for themselves the standard of culpability for defamation actions by private citizens); *New York Times,* 376 U.S. at 279–80 (establishing the standard applicable when the plaintiff is public official).

44. 376 U.S. 254 (1964).

45. *Id.* at 279–80.

46. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

47. *Gertz,* 418 U.S. at 344–45.

48. *Id.* at 346–47.

49. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 150–55 (1966) (plurality opinion).

50. *New York Times,* 376 U.S. at 283 n.23.

however, in *Rosenblatt v. Baer*,[51] the Court stated that the public official classification included, "at the very least, . . . employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs."[52] The test was not based mechanically on plaintiff's rank or title;[53] rather, the Court declared that "public official" status includes any person whose "position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in [qualified public servants]."[54]

2. Public Figure Status

In *Curtis Publishing Co. v. Butts*,[55] the United States Supreme Court extended the actual malice test to cover cases involving defamation of public figures, persons who were not public officials but who were the subject of "independent public interest."[56] The Court held that public-figure status can be attained by "position alone"[57] or by "purposeful activity amounting to a thrusting of [one's] personality into the 'vortex' of an important public controversy,"[58] reasoning that plaintiffs who are public figures are not unlike public officials in that they too would have "access" to forums in which to rebut false accusations.[59] Some years later, in *Gertz v. Robert Welch, Inc.*,[60] the Court listed two types of individuals who might be categorized as public figures: one who "achieves such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts";[61] and one who "voluntarily injects himself or is drawn into a particular controversy and thereby becomes a public official for a limited range of issues."[62] The Court has also held that whether the plaintiff is a public figure does not depend upon the size of the "public" that is interested in the controversy when the communication is directed specifically to that interested group.[63]

---

51. 383 U.S. 75 (1966).
52. *Id.* at 85.
53. Lorain Journal Co. v. Milkovich, 106 S. Ct. 322, 325 (interim ed. 1985) (Brennan, J., dissenting) (citing *Rosenblatt*, 383 U.S. at 85–86).
54. *Rosenblatt*, 383 U.S. at 86.
55. 388 U.S. 130 (1966) (plurality opinion).
56. *Id.* at 154–55.
57. *Id.* at 155.
58. *Id.*
59. *Id.* at 154–55.
60. 418 U.S. 323 (1974).
61. *Id.* at 351.
62. *Id.*
63. *Rosenblatt*, 383 U.S. at 87.

The United States Supreme Court later narrowed public figure status in *Hutchinson v. Proxmire*.[64] In *Hutchinson*, the Court considered whether the plaintiff, a recipient of a government research grant, had become a public figure in the more limited sense when Senator Proxmire mentioned his name and attacked his grant as wasteful and unnecessary while conferring a "Golden Fleece" award.[65] The Court held that a plaintiff could not become a public figure merely through a defendant's activity.[66] The Court has also limited public figure status to controversies regarding issues properly of public concern, holding in *Time, Inc. v. Firestone*[67] that the plaintiff did not become a public figure merely through the publicity surrounding her divorce.[68]

3. Pre-*Scott* Ohio Law on Public Official/Public Figure Characterization

Ohio has expressly adopted the *New York Times* standard for defamation actions brought by public officials or public figures.[69] In cases involving private citizens, Ohio law provides that negligence is sufficient to establish culpability.[70]

In *Milkovich v. News-Herald*,[71] the Ohio Supreme Court considered whether a wrestling coach and teacher could be classified as a public official or a public figure.[72] Defendants argued that the lower courts were correct in holding that Milkovich's extensive list of awards and citations[73] and prominent status as a coach made his case similar to a case involving the University of Georgia's athletic director, who was held to be a public figure in *Butts*.[74] Rejecting the *Butts* analogy

---

64. 443 U.S. 111 (1979).

65. *Id.* at 134–36. The "Golden Fleece" award is announced monthly by Senator William Proxmire (D-Wis.) to point out what he believes to be particularly egregious examples of wasteful spending by the government. *Id.* at 114.

66. *Id.* at 135.

67. 424 U.S. 448 (1976).

68. *Id.* at 454.

69. Dupler v. Mansfield Journal Co., 64 Ohio St. 2d 116, 118–19, 413 N.E.2d 1187, 1190–91 (1980), *cited with approval in Scott*, 25 Ohio St. 3d at 248, 496 N.E.2d at 704.

70. Embers Supper Club, Inc. v. Scripps-Howard Broadcasting Co., 9 Ohio St. 3d 22, 25, 457 N.E.2d 1164, 1167 (1984) (standard is "whether the defendant acted reasonably in attempting to discover the truth or falsity or defamatory character of the publication"), *cited with approval in Scott*, 25 Ohio St. 3d at 248, 496 N.E.2d at 704, *modified in* Landsdowne v. Beacon Journal Publishing Co., 32 Ohio St. 3d 176, 512 N.E.2d 979 (1987).

71. 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984) (per curiam) (4-3 decision), *cert. denied*, 106 S. Ct. 322 (interim ed. 1985), *overruled in part in* Scott v. News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986) (4-3 decision).

72. *Milkovich*, 15 Ohio St. 3d at 293–97, 473 N.E.2d at 1193–96.

73. *See id.* at 296 n.1, 473 N.E.2d at 1194 n.1.

74. *Id.* at 296, 473 N.E.2d at 1195 (citing Curtis Publishing Co. v. Butts, 388 U.S. 130, 154–55 (1966) (plurality opinion)).

by pointing to what it saw as a retreat by the United States Supreme Court in *Gertz*, the Ohio Supreme Court limited the public figure designation to one who "occup[ies] a position of persuasive power and influence,"[75] or one "whose position in his community . . . put[s] him at the forefront of public controversies."[76] While agreeing that Milkovich was a part of the instant controversy, the court pointed out that he had not "thrust himself to the forefront" of the debate.[77] After deciding that Milkovich's teaching position also failed to qualify him as a public official, the Ohio Supreme Court held that the actual malice standard of *New York Times* was inapplicable.[78]

B. The Fact/Opinion Distinction

Most courts look to *Gertz* in holding that expressions of opinion are entitled to constitutional protection.[79] The oft-quoted portion of *Gertz* states:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.[80]

The Court in *Gertz* seems to suggest that defamation actions are not the proper means for redressing harm caused by expressions of opinion. However, wrestling with the fact that the *Gertz* statement was merely dicta, some courts have tried to ground the opinion privilege in other Supreme Court decisions.[81] Unfortunately, the United States Supreme Court has not provided lower courts much help in distinguishing statements of fact from expressions of opinion.[82] In *Greenbelt Coopera-*

---

75. *Id.* at 297, 473 N.E.2d at 1195.

76. *Id.*

77. *Id.*

78. *Id.* at 297, 473 N.E.2d at 1195–96.

79. *See, e.g.*, Orr v. Argus-Press Co., 586 F.2d 1108, 1114 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979); Buckley v. Littell, 539 F.2d 882, 893 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

80. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974) (footnote omitted) (dicta).

81. *See, e.g.*, Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 600, 552 P.2d 425, 427, 131 Cal. Rptr. 641, 643 (1976) (quoting Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974) ("Before the test of reckless or knowing falsity can be met, there must be a false statement of fact.")).

82. Ollman v. Evans, 713 F.2d 838, 844 (D.C. Cir. 1983) (Robinson, J., concurring) (the Supreme Court has been "virtually silent" on the fact/opinion distinction), *modified on rehearing en banc*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); *see also* Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule*, 72 GEO. L.J. 1817, 1822–25 (1984).

tive Publishing Association v. Bresler,[83] the Court held that an using the word "blackmail" to describe a public figure's bargaining position was not actionable, "as a matter of constitutional law."[84] Pointing to the context of the statement, a news article discussing some observers' perception of Mr. Bresler's conduct, the court held that readers would not have considered the statement to be an accusation of a crime.[85] While some courts have looked to *Greenbelt* for help in characterizing statements as fact or opinion,[86] at least one commentator has suggested that the Court's comments did not provide any single workable standard, but were mere dicta for whose proper application widely divergent conclusions could be drawn.[87] Similarly, in *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*,[88] the Supreme Court characterized the alleged libel both as "factually true"[89] and as an "[e]xpression of . . . opinion";[90] however, since the Court's disposition of the appeal was based on federal labor law, its alternative characterizations of the alleged libel were, once again, simply dicta.[91]

With little assistance from the Supreme Court, judges have filled the void with a myriad of standards. Some courts have looked to the characterization that the average reader would make;[92] some have considered whether the statements were of a provable nature;[93] some have labelled opinion any statement capable of more than one interpretation;[94] and some courts have adopted more complex, contextual tests[95]—such as a "totality of the circumstances" test[96]—which include

---

83. 398 U.S. 6 (1970).

84. *Id.* at 13.

85. *Id.*

86. *See, e.g.*, Pring v. Penthouse Int'l, 695 F.2d 438, 440–42 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

87. *See* Note, *supra* note 82, at 1823 & n.49. *Compare id.* at 1831 (*Greenbelt* "support[s] the use of a reader-oriented approach to the characterization of allegedly libelous statements") *with id.* at 1836 (*Greenbelt* "provide[s] support for contextual analysis").

88. 418 U.S. 264 (1974).

89. *Id.* at 283.

90. *Id.* at 284.

91. *Id.* at 283. For a helpful discussion of *Austin*, see Note, *supra* note 82, at 1823–24.

92. *E.g.*, Buckley v. Littell, 539 F.2d 882, 894 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); Mashburn v. Collin, 355 So. 2d 879, 885 (La. 1977).

93. *See, e.g.*, Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); Goodrich v. Waterbury Republican Am., 188 Conn. 107, 131, 448 A.2d 1317, 1330 (1982).

94. *See, e.g., Buckley*, 539 F.2d at 892 (courts must characterize as protected expressions of opinion any allegedly defamatory statements which are capable of multiple interpretations).

95. *See, e.g.*, Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 783–84 (9th Cir. 1980).

96. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985); Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir.) (en banc), *cert. denied*, 107 S. Ct. 272 (1986).

many of the above factors and other factors as well.[97]

In addition, some courts, while agreeing that opinion is entitled to some constitutional protection, have determined such protection to be qualified rather than absolute, holding that accusations of criminal conduct, even when phrased as opinions, are entitled to no constitutional privilege.[98]

While the Ohio Supreme Court had held opinion entitled to some protection prior[99] to its *Scott v. News-Herald*[100] decision, it had never set down any guidelines for distinguishing fact from opinion.[101] In addition, although the court held in *Milkovich* that the Diadiun article was not opinion,[102] it nonetheless declined to lay out any standards for lower state courts to follow.[103]

IV. ANALYSIS

A. *Public Official/Public Figure Classification*

In *Scott v. News-Herald*,[104] while all seven justices of the Ohio Supreme Court agreed that Scott was a "public official" by virtue of his position as school district superintendent,[105] the majority went even further and expressly overruled what it called the *Milkovich v. News-Herald*[106] court's "restrictive view of public officials."[107] In its analysis

---

97. For a more complete discussion of contextual tests, see Note, *supra* note 82, at 1836–45.

98. *See, e.g.*, Cianci v. New Times Publishing Co., 639 F.2d 54, 63 (2d Cir. 1980); Gregory v. McDonnel Douglas Corp., 17 Cal. 3d 596, 604, 552 P.2d 425, 430, 131 Cal. Rptr. 641, 646 (1976); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 381, 366 N.E.2d 1299, 1306, 397 N.Y.S.2d 943, 951, *cert. denied*, 434 U.S. 969 (1977). In *Rinaldi*, a state trial court judge sued for defamation. 42 N.Y.2d at 372, 366 N.E.2d at 1301, 397 N.Y.S.2d at 945. While granting absolute protection to opinion regarding the judge's fitness for, and performance in, office, *id.* at 380–81, 366 N.E.2d at 1306–07, 397 N.Y.S.2d at 950–51, the New York Court of Appeals held that statements that plaintiff was "probably corrupt" and that he gave out suspiciously mild sentences did not fit within the Supreme Court's definition of constitutionally protected opinion. *Id.* at 381–82, 366 N.E.2d at 1307, 397 N.Y.S.2d at 951.

99. *See* Yeager v. Local Union 20, Int'l Bhd of Teamsters, 6 Ohio St. 3d 369, 372, 453 N.E.2d 666, 669 (1983), *cited in Milkovich*, 15 Ohio St. 3d at 298, 473 N.E.2d at 1196.

100. 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986) (4-3 decision).

101. *Id.* at 249, 496 N.E.2d at 705 (discussing the *Milkovich* holding).

102. *Milkovich*, 15 Ohio St. 3d at 298–99, 473 N.E.2d at 1196–97.

103. *Scott*, 25 Ohio St. 3d at 249, 496 N.E.2d at 705. *But see id.* at 270, 496 N.E.2d at 721 (Brown, J., concurring in judgment only, dissenting in part) (asserting that the *Milkovich* opinion did establish such a test), *discussed infra* notes 141–46 and accompanying text.

104. 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986) (4-3 decision).

105. *Id.* at 248, 496 N.E.2d at 704 (Locher, J., majority); *id.* at 263, 496 N.E.2d at 716 (Celebrezze, C.J., concurring in judgment only, dissenting in part); *id.* at 266, 496 N.E.2d at 718 (Sweeney, J., concurring in judgment only, dissenting in part); *id.* at 269–70, 496 N.E.2d at 721 (Brown, J., concurring in judgment only, dissenting in part).

106. 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984) (per curiam) (4-3 decision), *cert. denied*, 106 S. Ct. 322 (interim ed. 1986), *overruled in part in* Scott v. News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986) (4-3 decision).

107. *Scott*, 25 Ohio St. 3d at 247–48, 496 N.E.2d at 704.

the *Scott* court borrowed liberally from United States Supreme Court Justice William Brennan's reasoning in his dissent from denial of certiorari in *Lorain Journal Co. v. Milkovich*[108] and accepted the Justice's criticism that the *Milkovich* court had misapplied the relevant United States Supreme Court cases.[109]

1. Public Official Characterization

In *Lorain Journal Co.*, Justice Brennan took issue with the *Milkovich* court's characterization of Coach Milkovich as neither a public official nor a public figure.[110] Justice Brennan first contended that the Ohio court misapplied the United States Supreme Court's characterization of public officials in *Rosenblatt v. Baer*[111] by limiting public official status to "officials who set governmental policy."[112] He argued instead that "it is self-evident" that teachers are the kind of government employees whose "qualifications and performance" are of "independent interest" to the public "beyond the general public interest in the qualifications and performance of all government employees."[113]

In *Scott*, the Ohio Supreme Court responded to Scott's contention that he did not meet the definition of public official given in *Milkovich* by citing as controlling the portion of *Rosenblatt* suggested by Justice Brennan.[114] The court then applied the *Rosenblatt* standards, first determining that a municipal school system superintendent does have "substantial [governmental] responsibilit[y]."[115] Concluding that the Maple Heights public had a "substantial interest in the qualifications and performance of the person appointed as its superintendent,"[116] the court held that Scott satisfied the *Rosenblatt* standard.[117] Finally, overruling the *Milkovich* "standards" for determining public-official status, the court held public school superintendents to be public officials as a matter of law.[118]

Scott had also argued that even if he was found to be a public

108. 106 S. Ct. 322, 323 (interim ed. 1985) (Brennan, J., dissenting), *denying cert. to* Milkovich v. News-Herald, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984) (per curiam) (4-3 decision).

109. *Lorain Journal Co.*, 106 S. Ct. at 325–28 (1985) (Brennan, J., dissenting), *cited in Scott*, 25 Ohio St. 3d at 247, 496 N.E.2d at 703–04.

110. *Lorain Journal Co.*, 106 S. Ct. at 325–30 (Brennan, J., dissenting).

111. 383 U.S. 75 (1966).

112. *Lorain Journal Co.*, 106 S. Ct. at 326 (Brennan, J., dissenting) (discussing *Milkovich*, 15 Ohio St. 3d at 296–97, 473 N.E.2d at 1195–96).

113. *Id.* at 327 (Brennan, J., dissenting) (quoting *Rosenblatt*, 383 U.S. at 86).

114. *Scott*, 25 Ohio St. 3d at 245, 496 N.E.2d at 702.

115. *Id.* at 246, 496 N.E.2d at 702–03.

116. *Id.* at 246, 496 N.E.2d at 703.

117. *Id.*

118. *Id.* at 247–48, 496 N.E.2d at 704.

official, the defamation was unrelated to his official conduct and therefore was not protected under the actual malice standard.[119] In holding that the alleged defamation did concern Scott's role as a public official, the court cited its belief that "the public school teacher exerts a substantial role in shaping a community through his . . . impact on the students both as role model and educator"[120] and pointed to the premise of Diadiun's column—that both Milkovich and Scott were examples for school children.[121]

None of the justices of the Ohio Supreme Court disagreed with the finding that Scott was a public official.[122] Scott, as superintendent, satisfied even the *Milkovich* court's standards for characterization as a public official because he did have "substantial [governmental] responsibilit[y]."[123] The overruling of those standards drew no response from the dissenting justices in *Scott,* even though they had supported the adoption of the standards in *Milkovich.*[124] In fact, the *Milkovich* finding that Coach Milkovich was not a public official, even though he was a teacher and a coach, was a decision which conflicted with numerous decisions of other state courts.[125] In adopting Justice Brennan's suggestions, the Ohio Supreme Court in *Scott* overruled by implication its own prior characterization of Milkovich as a private citizen.

2. Public Figure Characterization

The Ohio Supreme Court's approval of Justice Brennan's comments in *Lorain Journal Co.* may signal not only its willingness to reconsider the status of Milkovich himself, but also its agreement with the Justice's criticisms of the *Milkovich* court's general standards for determining public figure status.

In *Lorain Journal Co.,* Justice Brennan argued that Milkovich could be characterized as a "limited purpose public figure" even if not held to be a public official.[126] First, he pointed out that the "categories [in which plaintiff can be classified a public figure] are merely descriptive; they are not, as the Ohio Supreme Court assumed, rigid, technical

119. *Id.* at 246, 496 N.E.2d at 703.

120. *Id.* at 247, 496 N.E.2d at 703.

121. *Id.* at 246, 496 N.E.2d at 703.

122. *Id.* at 248, 496 N.E.2d at 704 (Locher, J., majority); *id.* at 263, 496 N.E.2d at 716 (Celebrezze, C.J., concurring in judgment only, dissenting in part); *id.* at 266, 496 N.E.2d at 718 (Sweeney, J., concurring in judgment only, dissenting in part); *id.* at 269–70, 496 N.E.2d at 721 (Brown, J., concurring in judgment only, dissenting in part).

123. *Id.* at 246, 496 N.E.2d at 702–03.

124. *See Milkovich,* 15 Ohio St. 3d at 292, 473 N.E.2d at 1191.

125. *See, e.g.,* Palm Beach Newspapers, Inc., v. Early, 334 So. 2d 50 (Fla. Dist. Ct. App. 1976), *cert. denied,* 354 So. 2d 351 (Fla. 1977); State v. Defley, 395 So. 2d 759 (La. 1981).

126. 106 S. Ct. at 328–30 (Brennan, J., dissenting).

standards."[127] Quoting the *Gertz v. Robert Welch, Inc.*[128] Court's finding that a public figure is also one who "*is drawn* into a particular public controversy,"[129] Justice Brennan contended that the Ohio court was mistaken in holding that Milkovich was not a public figure because he had not "thrust himself to the forefront of [the] controversy."[130]

Furthermore, pointing out that important public concerns arise when students are injured in fighting between rival high schools, Justice Brennan concluded that "[t]o say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense."[131]

The continued validity of the *Milkovich* court's definition of public figure status is questionable. While the *Scott* court did not have to consider the issue, its acceptance of Justice Brennan's premises on public-official status suggests that the court may be sympathetic to a reevaluation of the *Milkovich* characterization of public figure status as well.

B. Did the Court Need to Go Further?

As a public official, Scott had to show actual malice to recover. However, not only the *Scott* majority and all dissenting justices,[132] but also almost every other lower court which considered the issue in either the *Milkovich* or *Scott* litigation,[133] concluded that actual malice could not be established. There was some question as to whether Diadiun investigated comments which he attributed to an observer at the Columbus trial,[134] but the Ohio Supreme Court has held that such "fail[ure]

---

127. *Id.* at 328.

128. 418 U.S. 323 (1974).

129. *Id.* at 351 (emphasis added), *quoted in Lorain Journal Co.*, 106 S. Ct. at 329–30 (Brennan, J., dissenting).

130. *Lorain Journal Co.*, 106 S. Ct. at 329 (Brennan, J., dissenting) (quoting *Milkovich*, 15 Ohio St. 3d at 297, 473 N.E.2d at 1195).

131. *Id.* at 330 (Brennan, J., dissenting).

132. *Scott*, 25 Ohio St. 3d at 249, 496 N.E.2d at 705 (Locher, J., majority); *id.* at 263, 496 N.E.2d at 716 (Celebrezze, C.J., concurring in judgment only, dissenting in part); *id.* at 266, 496 N.E.2d at 718 (Sweeney, J., concurring in judgment only, dissenting in part); *id.* at 270, 496 N.E.2d at 721 (Brown, J., concurring in judgment only, dissenting in part).

133. *See, e.g., id.* at 244, 496 N.E.2d at 701 (discussing disposition of the *Scott* case in the lower courts); *Milkovich*, 15 Ohio St. 3d at 293–94, 473 N.E.2d at 1192–93 (discussing disposition in the lower courts). *But cf.* Milkovich v. Lorain Journal Co., 65 Ohio App. 2d 143, 148, 416 N.E.2d 662, 666 (1979) (whether "news article written either as fact as news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth" constitutes "actual malice" is a question of fact for jury), *cert. overruled*, No. 80-107 (Ohio Sup. Ct. Mar. 20, 1980), *cert. denied*, 449 U.S. 966 (1980). No subsequent court considering the *Milkovich* or *Scott* cases accepted this lower court's unusual reasoning. *See, e.g.*, Lorain Journal Co. v. Milkovich, 449 U.S. 966, 969–70 (1980) (Brennan, J., dissenting), *denying cert. to* 65 Ohio App. 2d 143, 148, 416 N.E.2d 662, 666 (1979).

134. *Scott*, 25 Ohio St. 3d at 258, 496 N.E.2d at 711–12; *see also infra* notes 175–77 and accompanying text.

to investigate" does not establish actual malice[135] and therefore could not support liability. Since the court's characterization of Scott as a public official would effectively preclude him from recovery, the court could have ended its opinion at this point.

The *Scott* court, however, went further and reconsidered the distinction between fact and opinion both as a general, definitional standard and in the classification of the Diadiun article. The court set down a four-part test for distinguishing fact from opinion[136] and then applied the test to characterize the Diadiun article as opinion,[137] even though, less than two years previously, the *Milkovich* court had held the same article to be statements of fact.[138]

In so doing, the Ohio Supreme Court first had to explain why the doctrine of stare decisis did not preclude reconsideration of the article's classification. Noting that the purpose of stare decisis is to provide society with "principles" of law that are not likely to be reversed,[139] the court pointed out that the *Milkovich* court had failed to set down standards or even commentary that might be helpful to lower courts trying to distinguish between fact and opinion.[140] As a result of this failure, the court concluded that application of the principles of stare decisis was "inappropriate" in the instant case.[141]

Justice Clifford Brown dissented from the court's decision to ignore stare decisis by pointing to a "test" which he argued was established by the *Milkovich* court's findings that the column contained no language cautioning the reader that the statements were opinion and that the allegedly defamatory construction of the statements was within the column's "plain meaning." [142] While examination of the *Milkovich* opinion might suggest that the court was attempting to lay down a test, there are some problems with such a conclusion. The portion of the *Milkovich* decision quoted by Justice Brown follows a discussion of rules adopted in other jurisdictions and the statement that the *Milkovich* court was refusing to establish a "*per se*" rule.[143] Taking the decision on its face, it is easily arguable that the *Milkovich* court was simply comparing the instant facts to some of the standards applied in

135. Dupler v. Mansfield Journal Co., 64 Ohio St. 2d 116, 119, 413 N.E.2d 1187, 1191 (1980), *cited with approval in Scott*, 25 Ohio St. 3d at 248, 496 N.E.2d at 704.

136. *Scott*, 25 Ohio St. 3d at 250, 496 N.E.2d at 706.

137. *Id.* at 254, 496 N.E.2d at 709.

138. *Milkovich*, 15 Ohio St. 3d at 298–99, 473 N.E.2d at 1196–97.

139. *Scott*, 25 Ohio St. 3d at 249, 496 N.E.2d at 705.

140. *Id.*

141. *Id.*

142. *Id.* at 270, 496 N.E.2d 721 (Brown, J., concurring in judgment only, dissenting in part) (citing *Milkovich*, 15 Ohio St. 3d at 298–99, 473 N.E.2d at 1196–97).

143. *Milkovich*, 15 Ohio St. 3d at 298–99, 473 N.E.2d at 1196.

other jurisdictions while refusing to adopt any of those standards.[144] Furthermore, the *Milkovich* decision concluded by quoting a well-known opinion authored by Judge Henry Friendly of the United States Court of Appeals in which a panel of the Second Circuit held that no one should be able to avoid a libel judgment merely by "using, explicitly or implicitly, the words 'I think.' "[145] Dissenting Justice Brown asserted that the Diadium column was held to be factual in *Milkovich* because it failed to caution the reader as required under the alleged "test."[146] However, if the court had been applying the "test," then Judge Friendly's comments that such cautioning does not insulate a libel defendant from liability would have been rejected by the *Milkovich* court instead of being found "persua[sive]," as the court in fact stated.[147]

Construing the court's rejection of stare decisis in *Scott* as a wholesale abandonment of the principle by the court's majority faction is probably unwise. While previous dissents may have charged that the "only change" prompting a reversal of a previous holding was the election of new justices,[148] the prudent observer would be wise to assume that the *Scott* opinion's treatment of stare decisis is limited to situations in which the Ohio Supreme Court has failed to provide adequate guidance to lower courts.[149]

---

144. *Id.*

145. *Id.* at 299, 473 N.E.2d at 1197 (quoting Cianci v. New York Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980)).

146. *Scott*, 25 Ohio St. 3d at 270, 496 N.E.2d at 721 (Brown, J., concurring in judgment only, dissenting in part).

147. *Milkovich*, 15 Ohio St. 3d at 299, 473 N.E.2d at 1197 (citing with approval *Cianci*, 639 F.2d at 64).

148. Wilfong v. Batdorf, 6 Ohio St. 3d 100, 109, 451 N.E.2d 1185, 1193 (1983) (Holmes, J., dissenting), *cited in Scott*, 25 Ohio St. 3d at 275, 496 N.E.2d at 724 (Brown, J., concurring in judgment only, dissenting in part); *see also* Saunders v. Clark County Zoning Dep't, 66 Ohio St. 2d 259, 265, 421 N.E.2d 152, 157 (1981) (Holmes, J., dissenting) ("It would seem that the law of this state will now be governed by what might be the personnel of the court."), *cited in Scott*, 25 Ohio St. 3d at 273, 496 N.E.2d at 724 (Brown, J., concurring in judgment only, dissenting in part).

149. To dissenting Justice Clifford Brown's conclusion that Justice Robert Holmes was "hypocritical" in concurring in the instant decision to bypass stare decisis, *Scott*, 25 Ohio St. 3d at 273 n.13, 496 N.E.2d at 723 n.13 (Brown, J., concurring in judgment only, dissenting in part), Justice Holmes answered:

> I shall not at any length answer Justice Brown's very energetic exercise of his First Amendment rights other than to say that I . . . dissented in *Milkovich* . . . . It does no violence to the legal doctrine of *stare decisis* to right that which is clearly wrong. It serves no valid public purpose to allow incorrect opinions to remain in the body of our law.

Id. at 254, 496 N.E.2d at 709 (Holmes, J., concurring).

Given their often-vehement substantive disagreements, it is remarkable how similarly Justice Holmes and former Justice Brown defended themselves on occasions when they have declined to apply stare decisis. *Compare id.* (Justice Holmes' reasoning for declining to apply stare decisis) *with* Baker v. McKnight, 4 Ohio St. 3d 125, 130, 447 N.E.2d 104, 108 (1983) (Brown, J., concur-

C. *Analysis of the Fact/Opinion Distinction*

If the Ohio Supreme Court rejected stare decisis in *Scott* to ensure that the public would have a clear and consistent standard for distinguishing between fact and opinion, it is questionable whether the test adopted achieves the court's goal. While the four-part "totality of the circumstances" test enunciated by the court[150] provides a loose framework for considering the fact/opinion distinction, the court's own application of the test betrays its potential for abuse.

1. The First Factor: The Ordinary Meaning

The *Scott* court first examined the specific language of the alleged libel and concluded that while there was no express accusation of perjury, the ordinary meaning of the words would suggest that Scott "lied at the hearing after . . . having given his solemn oath to tell the truth."[151] The court noted that Scott would have stated a justiciable claim if the analysis had stopped at that point.[152]

Testing the ordinary meaning of the alleged defamation is appropriate to fact/opinion analysis[153] and its application in the instant case would seem to be at least arguably correct. However, searching for the ordinary meaning of an alleged libel merely restates the question when the comment is capable of multiple interpretations.[154] For example, as one commentator has suggested, the statement that "*X* is a bastard" can be seen as a vague insult or as a specific accusation that *X's* parents were not married.[155] If the former meaning is found by the judge to be the "ordinary" meaning, then the comment is opinion; if the latter is chosen, the comment is factual.

---

ring) (Justice Brown's reasoning).

With the retirement of Justice Brown and the defeat of Chief Justice Celebrezze in the 1986 election, there will probably be a majority of justices who oppose nearly all of the Celebrezze court's most controversial precedents. It will be interesting to see how the majority deals with the question of stare decisis. The *Scott* decision would seem to limit the circumstances under which the Ohio Supreme Court will refuse to apply stare decisis, *see Scott*, 25 Ohio St. 3d at 249, 496 N.E.2d at 705 ("[a]pplication of *stare decisis* . . . is . . . inappropriate" when "no test was offered [in the previous decision,] . . . no analysis was given for reaching the [court's] conclusion," and "[n]o rule was articulated to support the majority position"), but Justice Holmes' concurrence is more expansive. *See id.* at 254, 496 N.E.2d at 709 (stare decisis may be disregarded whenever the earlier decision was "clearly wrong" or "incorrect").

150. *Scott*, 25 Ohio St. at 250, 496 N.E.2d at 706.

151. *Id.* at 251, 496 N.E.2d at 707 (quoting Diadiun, *supra* note 10, at 39).

152. *Id.*

153. *See* Note, *supra* note 82, at 1823.

154. *Id.* at 1832.

155. *Id.* at 1825.

2. The Second Factor: Verifiability

Under the second factor, the court considered the verifiability of the alleged libel.[156] It pointed out that no one would accept as fact a statement which is inherently not provable.[157] Since perjury is objectively provable in court, the court found the second factor to support characterization of the alleged defamatory comments as statements of fact.[158] Some courts have adopted this test;[159] others have looked instead to the related, *Restatement (Second) of Torts* test of whether the alleged libel sets out the basis for its conclusion.[160] The *Restatement (Second)* test is based upon the idea that a person with all the facts does not need to rely on whether the statement is objectively a verifiable one but can determine for himself the validity of the speaker's conclusion.[161]

Again, there is no real problem with application of this factor to the alleged defamation in the *Scott* case. Again, as well, a problem does arise when the allegedly defamatory statement is capable of two meanings.[162] Using the previous example, support for characterizing as factual the statement that "*X* is a bastard" because the marital status of his parents is subject to proof is dependent upon a finding that the statement was meant as an evaluation of *X's* parentage, and not simply as a vague insult.[163]

When the meaning of a statement is clear and unambiguous, the first two factors are easy to apply and helpful to characterization. When the meaning is vague and capable of multiple interpretations, however, these factors merely invite judges to draw whatever conclusion they desire by ascribing a chosen meaning to the alleged defamation. Perhaps, then, adopting the Second Circuit Court of Appeals' conclusion in *Buckley v. Littell*[164] that statements capable of more than

156. *Scott*, 25 Ohio St. 3d at 251–52, 496 N.E.2d at 707.

157. *Id.* (citing Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985)).

158. *Id.* at 252, 496 N.E.2d at 707.

159. *E.g.*, Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *see also* Mr. Chow of New York v. Ste. Jour Azur, 759 F.2d 219, 226 (2d Cir. 1985) (applying the *Restatement (Second)* test and the "totality of the circumstances" test as well).

160. RESTATEMENT (SECOND) OF TORTS § 566 & § 566 comment b (1977), *cited with approval in* Orr v. Argus-Press Co., 586 F.2d 1108, 1115 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979).

161. RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977); *see also* Note, *supra* note 82, at 1828.

162. *See* Note, *supra* note 82, at 1834 ("The [verifiability] approach does little to advance the characterization analysis because a court must first determine what a statement *means* before it can determine whether that statement is 'true' or 'false.' ").

163. *Id.* at 1834 n.145.

164. 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

one interpretation are expressions of opinion[165] would help to narrow the room for judicial subjectivity and discretion.

3. The Third Factor: General Context in the Column

The third factor adopted by the Ohio Supreme Court required the court to look at the alleged defamation in the context of the column as a whole.[166] While agreeing that phrasing or labelling a statement as an opinion is not necessarily determinative of the fact/opinion issue, the court nonetheless pointed to the "large caption 'TD says' " on the first page of the article and to the second-page heading "*Diadiun says* Maple told a lie" and concluded that anyone, no matter how naive, would know that the column was opinion, not fact.[167] The court also noted the subjective nature of Diadiun's most stringent comment: that people who were at the wrestling match "kn[ew] in [their] heart[s]" that the coach and the superintendent were lying.[168] The court concluded that it would have been clear to the column's readers that Diadiun was a biased observer arguing his opinion.[169]

The effect of the captions in labelling the column opinion seems inherently disputable. As one dissent suggested, "the caption 'TD Says' " could be merely a "catchy" way of designating the author, and not a warning that what follows is opinion.[170] The second-page headline "Diadiun says Maple told a lie" could similarly have been the News-Herald's way of identifying the writer.[171] Furthermore, the disputable nature of the caption and second-page headline makes them poor support for the court's finding that the statement was opinion,[172] especially in light of the court's reluctance to treat express "opinion," labels as determinative for fear of "abuse."[173]

On the other hand, the court's contention that Diadiun's bias was

---

165. *Buckley*, 539 F.2d at 892; *see also* Note, *Fact and Opinion after* Gertz v. Robert Welch, Inc.: *The Evolution of a Privilege*, 34 RUTGERS L. REV. 81, 105–06 (1981). *But see* Note, *supra* note 82, at 1835–36 & n.157 ("In cases where the statement is reasonably capable of two constructions, one vague and one concrete, the *Buckley* approach does not advance the characterization analysis.").

166. *Scott*, 25 Ohio St. 3d at 250, 496 N.E.2d at 706.

167. *Id.* at 252, 496 N.E.2d at 707.

168. *Id.* at 253, 496 N.E.2d at 708 (emphasis omitted) (quoting Diadun, *supra* note 10, at 39).

169. *Id.*

170. *Id.* at 272, 496 N.E.2d at 723 (Brown, J., concurring in judgment only, dissenting in part).

171. *Id.* at 273, 496 N.E.2d at 723 (Brown, J., concurring in judgment only, dissenting in part).

172. *Id.* at 272–73, 496 N.E.2d at 723 (Brown, J., concurring in judgment only, dissenting in part).

173. *Id.* at 252, 496 N.E.2d at 707.

clear to his readers is a reasonable one, as is its characterization as subjective argument of the column's strongest statement, that any observer "*knows in his heart*"[174] that the men were lying. The problem, however, comes not from Diadiun's clear bias and subjectivity but from the column's lack of specific allegations. Diadiun did not cite any specific statements which he believed to be lies; in fact, his only support for the opinion, other than his mere assertions,[175] was a quotation he attributed to OHSAA Commissioner Dr. Harold Meyer, a participant at both the OHSAA hearing and the trial, which implied that the testimony Scott and Milkovich gave at in court was different than their statements in the earlier hearing.[176] Diadiun did not provide any facts to support Dr. Meyer's allegation, nor did he quote the Commissioner as to the specific basis for his alleged statement: "*alleged* statement" is the proper description, since Dr. Meyer denied making the comments.[177] Since opinions based even on false facts are protected when the false factual statements are not made with actual malice,[178] the problem is not that Diadiun's column is based on false facts but that the column's lack of specific factual allegations invites his readers to infer unstated, defamatory facts.

Had Diadiun charged, for example, that Milkovich had lied at the OHSAA hearing by testifying that he was not present at the meet, or that he had said one specific thing at the hearing and then had said something contradictory in court, then any reader would have been able to judge for himself whether such testimony would be false and could have drawn his own conclusion about whether the Coach had lied. However, Diadiun's basis for calling the men liars may not have been any specific false testimony at the hearing but merely, as the *Scott* court suggested, a contention that "any position represented by Milkovich and Scott less than a full admission of culpability was . . . a

---

174. *Id.* at 253, 496 N.E.2d at 708 (quoting Diadun, *supra* note 10, at 39).

175. Diadiun did not report what the men said at the trial, he just stated that they lied. *Id.* at 251, 496 N.E.2d at 707.

176. Diadiun, *supra* note 10, at 39. Dr. Meyer was quoted as saying "I can say that some of the stories told to the judge sounded pretty darned unfamiliar . . . . It certainly sounded different from what they told us." *Id.*

177. *See id.* at 267, 496 N.E.2d at 718 (Sweeney, J., concurring in judgment only, dissenting in part). Calling the fact that there was "some question" as to the authenticity of the statements attributed to Dr. Meyer "troubling," the court said that Diadiun did not base his article on the comments and suggested that this might be a "falsehood" left undisturbed to protect "speech that matters" contained within the same discussion. *Id.* at 252–54, 496 N.E.2d at 708 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974)).

178. New York Times v. Sullivan, 376 U.S. 254, 292 n.30 (1964) (since privilege must be recognized for "honest misstatements of facts," then a defense must also be recognized for "opinion[s] based upon privileged, as well as true, statements of fact.").

lie."[179] With no specific facts alleged, how were his readers to have discerned which meaning was the intended one?

This is precisely the problem which the American Law Institute addressed in the *Restatement (Second) of Torts* by stating that an opinion could be a "defamatory communication" when it "implies the allegation of undisclosed defamatory facts as [its] basis . . . ."[180] Unable to determine whether the column factually accused the men of lying under oath or merely contended that the men were liars for not confessing their misconduct, Diadiun's readers were left to make their own interpretations. Diadiun's column should not have been protected as opinion when it allowed them to infer that Milkovich and Scott made specific statements of falsehood under oath at the OHSAA hearing.[181]

Furthermore, in some jurisdictions, constitutional protection for expressions of opinion is available only when the alleged defamation could not be construed as an accusation of criminal conduct.[182] The lack of specific facts in Diadiun's column, coupled with the comments attributed to Dr. Meyer, allowed readers to infer that the men gave false testimony under oath in an official proceding—which is tantamount to an accusation of the crime of perjury.[183] Characterization of the column as opinion should not have protected the accusation of criminal conduct that followed from Diadiun's failure to lay out the facts behind his accusation.

4. The Fourth Factor: "Broader Context"

An even more questionable portion of the *Scott* opinion concerns

---

179. *Scott*, 25 Ohio St. 3d at 252, 496 N.E.2d at 708.

180. RESTATEMENT (SECOND) OF TORTS § 566 (1977), *cited with approval in* Orr v. Argus-Press Co., 586 F.2d 1108, 1114 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979).

181. The authors of the *Restatement (Second) of Torts* explained the distinction between opinions based on disclosed facts and those based on unrevealed facts as follows:

> A simple expression of opinion based on disclosed or assumed non-defamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication.

RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977), *quoted with approval in Orr*, 586 F.2d at 1115. *But cf. Scott*, 25 Ohio St. 3d at 262 & n.5, 496 N.E.2d at 715 & n.5 (Wright, J., concurring) (approving of the majority's "rejection" of the *Restatement (Second)* "standard") ("The reader-oriented approach obviously provides little or no assistance to the bar or bench as to how one may gauge the reaction of readers, what sampling is necessary, or which readers to consult.").

182. *See* cases cited *supra* note 97 and accompanying text.

183. *Scott*, 25 Ohio St. 3d at 251, 496 N.E.2d at 707. *See generally* 42 O. JUR. 2D *Perjury* § 2 (1960).

the application by the court of the fourth factor: the "broader context in which the statement appeared."[184] Discussing the kind of column involved and its location within the newspaper,[185] the court noted its placement in the sports pages—"a traditional haven for cajoling, invective, and hyperbole"[186]—and held that the average reader would not give as much credence to legal conclusions reached by someone whose byline read "Sports Writer" as he or she would give to someone whose byline read "Law Correspondent."[187]

The dissenting justices of the Ohio Supreme Court responded with strong criticisms of the conclusions suggested by the court's fourth factor analysis. Former Chief Justice Frank Celebrezze argued that "[s]ports writers are as accountable for the accuracy of their reporting as are . . . news journalists."[188] Justice A. William Sweeney pointed out that the court's reasoning would seem to create a "veritable *per se* rule . . . whereby anything defamatory that appears in the sports pages is automatically non-actionable."[189]

One cannot help but agree with the dissenting justices on this point. The majority misses a crucial point: Where is a sports figure to be libeled if not in the sports pages? If location of a defamatory statement in a particular section of the newspaper determines its actionability, it would seem to follow that defamation in publications generally regarded as less credible than daily newspapers would be automatically nonactionable. Supermarket tabloids are arguably an even more "traditional haven for . . . invective. [] and hyperbole"[190] than newspaper

---

184. *Scott*, 25 Ohio St. 3d at 251, 496 N.E.2d at 706.

185. *Id.* at 253–54, 496 N.E.2d at 708–09.

186. *Id.* at 253, 496 N.E.2d at 708.

187. *Id.* at 253–54, 496 N.E.2d at 708.

188. *Id.* at 264, 496 N.E.2d at 716–17 (Celebrezze, C.J., concurring in judgment only, dissenting in part).

189. *Id.* at 267, 496 N.E.2d at 719 (Sweeney, J., concurring in judgment only, dissenting in part). Dissenting Justice Brown's characterization of the majority's rule goes further: "[I]n a libel case, *the newspaper always wins.*" *Id.* at 271 n.10, 496 N.E.2d at 721 n.10 (Brown, J., concurring in judgment only, dissenting in part). For one possible explanation of Justice Brown's often vitrolic statements in this case, see *Balance of Power on Court Changing*, Columbus Dispatch, August 24, 1986, at B5, col. 1. Perhaps Justice Brown was just reacting to seeing a new 4-3 majority overturn one of the many controversial precedents set by a previous one-vote majority faction in which he had consistently joined. *See, e.g.*, Wilfong v. Batdorf, 6 Ohio St. 3d 100, 451 N.E.2d 1185 (1983) (4-3 decision) (reversing the holding the court had made three times within the previous two years that the Ohio comparative negligence statute should be applied only prospectively); Ady v. West Am. Ins. Co., 69 Ohio St. 2d 593, 433 N.E.2d 547 (1981) (4-3 decision) (overruling by implication a previous Ohio Supreme Court decision which had upheld an exclusionary clause in an uninsured motorist provision of an insurance policy).

190. *See, e.g.*, Burnett v. Nat'l Enquirer, Inc., 144 Cal. App. 3d 991, 998–99, 193 Cal. Rptr. 206, 209–10 (1983) (item in *National Enquirer's* gossip column contained exaggerations and outright fabrications), *hearing denied* (Cal. Oct. 6, 1983), *appeal dismissed for want of jurisdiction*, 465 U.S. 1014 (1983).

sports pages. Allowing characterization as fact or opinion to depend on the location of the alleged libel would seem to have great potential for abuse.

In addition, in concluding that the judgments of sports writers on legal issues are less credible, the court misses the counterargument that since sports writers are more familiar with the people they write about than are their readers, these readers are more likely to rely on the sports writers' assertions and even to assume that any statements the writers make are based on first-hand knowledge.[191]

Moreover, the court would seem to be applying a double standard by concluding that a sports writer's assertions are not credible when the alleged defamation involves a legal conclusion. Under its second factor, the court implicitly accepted the idea that readers could have sufficient familiarity with the law to be able to determine that the alleged defamation—an accusation of perjury—was of a verifiable nature.[192] If the court believes that readers of the sports pages are capable of making their own legal conclusions from assertions contained in newspapers, then it cannot consistently assert that they are incapable of evaluating a sports writer's legal conclusions or of drawing their own such conclusions from facts that appear in the sports pages. Statements which are apparently factual and upon which legal conclusions may be based are no less apparently factual when proffered by sports writers than when proffered by news writers. No journalist, whether sports writer or "law correspondent," is excused from his duty to adhere to the truth.[193]

Perhaps the issue of a sports writer's credibility may be more satisfactorily resolved by characterizing the court's evaluation of the alleged libel as an evaluation of a statement regarding the legal implication of plaintiff's alleged act of lying under oath. Since no one would disagree with the statement that the lies alleged were made while under oath, the libel would seem to turn on whether the allegation that Scott and Milkovich lied was meant as a statement of fact or as an expression of opinion. This characterization of Diadiun's comments would avoid the court's fourth-factor concern about sports writers drawing legal conclusions:[194] the sports writer was not making a legal judgment that the testimony constituted the crime of perjury, but rather was stating that

---

191. *Cf.* Note, *supra* note 82, at 1828 (If the reader would discount the possibility that the writer is "foolish," the reader "will likely infer the existence of additional defamatory facts justifying [the writer's] conclusion.").

192. *See supra* notes 156–58 and accompanying text.

193. *Scott*, 25 Ohio St. 3d at 264, 496 N.E.2d at 716–17 (Celebrezze, C.J., concurring in judgment only, dissenting in part).

194. *Id.* at 253–54, 496 N.E.2d at 708–09.

the comments made by the men at the trial were lies.[195] Certainly a sports writer is as believable as any other reporter on the issue of whether a statement is truth or falsehood. He is more believable, perhaps, on such a point because of the deference he may be accorded by readers less familiar with Scott and Milkovich or the sports world in general. Readers might have concluded that Diadiun, who attended the meet and observed the coach's conduct, would know more about proper decorum at wrestling matches; they might give greater credence to Diadiun's allegation that the coach's behavior at the meet did not match his subsequent description of the incident in his testimony.

5. The Totality of the Circumstances Test: Does It Lead to Predictable Conclusions?

The "totality of the circumstances" test fails to provide much concrete guidance to judges. When the alleged defamation is capable of two meanings, one more precise and the other more vague, courts may use the first two factors in support of either characterization.[196] Even if the statement in question is capable of only one meaning, a court can always defend a decision which ignores any support factors one and two give to characterization of the statement as fact by citing to the *Scott* court's similar disregard.[197]

In the *Scott* case, the third and fourth factors seem to be consciously manipulated to support the court's finding that the article is opinion. The court's arguments and conclusions are questionable[198] and are used by the *Scott* court to overcome the support for characterization as fact given by the much less questionable conclusions reached under the first two factors.[199] Perhaps the modification to the "totality

195. The Diadiun article did say, in fact, only that the men lied under oath. Not once did Diadiun explicitly say that either Scott or Milkovich committed perjury. *See id.* at 251, 496 N.E.2d at 707. *But see id.* at 252, 496 N.E.2d at 708 (suggesting that Diadiun's accusation may have been based more upon his principled disagreement with their conduct than upon their actual misstatements). For one possible stumbling block to this suggestion, see Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 285 n. 16 (1974) (Supreme Court examined only the specific defamation alleged in plaintiff's complaint and was unwilling to consider any other possible defamatory statements or connotations).

196. *See supra* notes 154–55 & 162–63 and accompanying text.

197. *See Scott*, 25 Ohio St. 3d at 251, 496 N.E.2d at 707.

198. *Id.* at 265 n.8, 496 N.E.2d at 717 n.8 (Celebrezze, C.J., concurring in judgment only, dissenting in part); *id.* at 267, 496 N.E.2d at 718–19 (Sweeney, J., concurring in judgment only, dissenting in part); *id.* at 273, 496 N.E.2d at 723 (Brown, J., concurring in judgment only, dissenting in part); *see also* Janklow v. Newsweek, Inc., 788 F.2d 1300, 1307 (8th Cir.) (en banc) (Bowman, J., dissenting) (result of using the "totality of the circumstances" test "is in the eye of the judge"), *cert. denied*, 107 S. Ct. 272 (1986). For an intriguing argument that adoption of judicial tests leads more to judicial discretion than to predictable consequences, see Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

199. *Scott*, 25 Ohio St. 3d at 251–52, 496 N.W.2d at 707.

of the circumstances" test originally suggested by Judge Robert Bork in his *Ollman v. Evans*[200] concurrence[201] and adopted by the Court of Appeals for the Eighth Circuit sitting en banc in *Janklow v. Newsweek, Inc.*[202] would provide a more credible definition of the test's third and fourth factors.[203] The *Janklow* court included "the category of publication, its style of writing and [its] intended audience" in its third factor, which the court called "social context."[204] The fourth factor the court reserved for an analysis of the "public context," under which the court would "consider the public or political arena in which the statement is made and whether the statement implicates core values of the First Amendment."[205] Perhaps Diadiun's column should have been protected as opinion in part because, under the *Janklow* court's fourth factor, it implicated a "core value[ ]": the public's interest in the "qualifications and performance" of those who instruct its youth."[206] In any case, the column should not have been held to be opinion merely through an exercise of judicial sleight of hand.

Although the "totality of the circumstances" test has been used in decisions favoring the media,[207] one cannot assume that this will always be the result. A court with a very different bias than the *Scott* court could have found strong arguments under this test to label the Diadiun column factual.[208] Given the inherent weaknesses of the test, perhaps the only way to protect the media from the threat of having statements of opinion characterized as factual by unsympathetic judges is to adopt a "bright line" test.[209] Justice Craig Wright, in his concurring opinion in *Scott*, did in fact argue for the establishment of such a test, whereby labelling an article "opinion" would be definitive on the question of fact

---

200. 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

201. *Id.* at 1002–05 (Bork, J., concurring).

202. 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 107 S. Ct. 272 (1986).

203. *See id.* at 1303.

204. *Id.*

205. *Id.* (citing *Ollman*, 750 F.2d at 1002–05 (Bork, J., concurring)).

206. *See, e.g.*, Lorain Journal Co. v. Milkovich, 106 S. Ct. 322, 325 (interim ed. 1985) (Brennan, J., dissenting); Rosenblatt v. Baer, 383 U.S. 75, 86 (1966); *see also Scott*, 25 Ohio St. 3d at 254, 496 N.E.2d at 708–09 (" '[W]e protect some falsehood in order to protect speech that matters,' . . . particularly where, as in the instant case, the issues involved are of importance to the community and the vehicle for dissemination of the ideas is opinion.") (citation omitted) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974)).

207. *See, e.g., Janklow*, 788 F.2d at 1303–06; *Ollman*, 750 F.2d at 986–92; *Scott*, 25 Ohio St. 3d at 250–54, 496 N.E.2d at 706–09.

208. The first and second factors strongly support a finding that the article was factual. *See Scott*, 25 Ohio St. 3d at 250–52, 496 N.E.2d at 706–07. For arguments under the third and fourth factors supporting a finding that the article was factual, see *supra* notes 170–83 & 188–95 and accompanying text.

209. *See* Note, *supra* note 82, at 1849–53 (arguing for the establishment of a "bright-line" test).

versus opinion and would shield the article with constitutional protection.[210] However, Justice Wright's suggestion is open to criticism[211] as contravening Judge Friendly's near axiom in *Cianci v. New Times Publishing*[212] that one cannot make himself immune from liability for a defamatory accusation of criminal behavior merely by using the words "I think."[213] Labelling an article "opinion" does nothing to alleviate the concern that such absolute protection would cover even clearly injurious falsehoods made under the banner "opinion." However, a "bright line" rule would, at least, help to guarantee what the Ohio Supreme Court's adoption of the four-part "totality of the circumstances" test does not: some measure of protection against a shift in the court's personnel and attitude.

V. CONCLUSION

After the *Scott* decision, any statement characterized by a court as opinion is completely protected, even if the injured party is accused of committing a crime.[214] Distinctions between fact and opinion will be made as a matter of law[215] by considering the "totality of the circumstances" surrounding the published statements. The test does not require that all four factors point to the same conclusion; it merely requires the judge determining characterization to consider the plain meaning of the statement, its verifiability, the textual context in which the statement appears, and the context in which the alleged defamation is published in. The extent to which support for characterization as fact may be disregarded by the court seems to be great.

Since numerous, relatively recent dissenting opinions by Ohio Supreme Court justices have pointed to decisions suggesting that reliance on stare decisis depends upon personal sympathy with the interests at issue, it is conceivable that stare decisis would not prevent the test from being changed again if a faction with the views of the *Scott* dissenters regains control of the Ohio Supreme Court. However, changing the test would not really be necessary: There is enough flexibility in the four-part test to allow a judge to reach any desired characterization.

With four justices elected within the past three years, and with

---

210. *Scott*, 25 Ohio St. 3d at 262, 496 N.E.2d at 715 (Wright, J., concurring).

211. *Id.* at 266, 496 N.E.2d at 718 (Sweeney, J., concurring in judgment only, dissenting in part).

212. 639 F.2d 54 (2d Cir. 1980).

213. *Id.* at 64.

214. *See Scott*, 25 Ohio St. 3d at 250–54, 496 N.E.2d at 706–09 (acknowledging that accusations of crime have been found actionable by other courts, determining that the alleged libel in the instant case was an accusation of perjury, and yet holding that the instant statements were protected expressions of opinion).

215. *Id.* at 244, 496 N.E.2d at 701.

two of the three holdover justices having disagreed with many opinions of the Celebrezze court, decisions of the Ohio Supreme Court on whether to follow the principle of stare decisis and thereby uphold precedents set by the Celebrezze court will continue to be interesting—if never quite predictable.

Jeffrey Maxwell Jacobson