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In this issue

Facts, Nonfacts, and Academic Libel: The Jurisprudence of Reputation in the Ivory Tower

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In 2008, Dr. Karin Calvo-Goller, a legal scholar teaching in Israel, filed a criminal libel action against Professor Joseph Weiler, editor-in-chief of the *European Journal of International Law* and a professor at New York University's School of Law, for a review of her book published on the journal's website.[1] Calvo-Goller felt the review was defamatory and asked that it be taken down, which the journal refused to do. The journal offered her an opportunity to post a response, but instead she filed suit in France, where she was a citizen.

Ultimately, Professor Weiler won the case before the Tribunal de Grande Instance de Paris.[2] According to the *Chronicle of Higher Education*, the court "said the review expressed a scientific opinion of the book and did not go beyond the kind of criticism to which all authors of intellectual work subject themselves when they publish."[3] Despite this victory, many viewed the case as an alarming development for free expression and academic freedom.

The academic world, by its very nature, is supposed to be an incubator for thought and counter-thought. More than just a marketplace of ideas, campuses have always been a veritable playground for the open mind. Perhaps as a result of the increasingly litigious trend in our society, however, bullies and their lawyers now stalk the playground.

More and more, academics have sued—and been sued—for defamation. Their cases arise in a variety of contexts that have created perplexing puzzles for judges, accustomed to resolving factual disputes squarely in favor of one litigant or the other. But as any experienced scholar knows, the "truth" of research claims rarely emerges from lecture halls and laboratories without further challenge.

For this reason, U.S. defamation law, which considers individual reputation, on the one hand, and the pressing need to preserve an "uninhibited, robust, and wide-open" debate on public issues on the other, is not easy to superimpose on the academic setting. The protection of the governed from oppression by their governors, the key value preserved by the U.S. Supreme Court in the landmark *New York Times Co. v. Sullivan*[4] and its progeny, is completely compatible with the academic mission. Classrooms and courtrooms both are venues committed to the search for truth through the clash of ideas. Yet the courts struggle to tailor the language of academic libel rulings to the traditional free speech vocabulary.

As media law scholar Amy Gajda has noted, "claims arising from scholarship and academic debate are a relatively recent phenomenon."[5] The issues that have arisen—and the judicial reasoning deployed to deal with those issues—are both important and underexplored. This article will first explicate the legal background of defamation claims.

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Next, it will explore how courts have avoided finding defamatory meaning in academic defamation. It will then analyze how other courts have attempted to apply the fact/opinion dichotomy to academic libel cases. The article will also examine how some courts have applied the "common interest" privilege in academic defamation settings. Finally, the article offers concluding perspectives on this challenging area of the law.

A Primer on the Law of Defamation

Pre–First Amendment Doctrine

Proscriptions against speech about others find deep roots in the Judeo-Christian legal tradition, which discouraged gossip. The Old Testament warns, "Thou shalt not go up and down as a talebearer among thy people,"[6] and "A good name is rather to be chosen than great riches."[7] The *Talmud* describes the Hebrew sin of *lashon ha-ra*—or "evil tongue"—which condemns even truthful gossip about others.[8]

Early American governments demonstrated as much censorial tendency as the British crown.

The protection of reputation carried forward from ecclesiastical doctrine into the development of common-law societies. Seventeenth-century English philosopher Thomas Hobbes equated a person's esteem to an economic value of sorts, regulated by the marketplace of social interaction.

> The "value," or "worth," of a man is, as of all other things, his price; that is to say, so much as would be given for the use of his power; and therefore is not absolute, but a thing dependent on the need and judgment of another. . . . And, as in other things so in men, not the seller but the buyer determines the price. For let a man, as most men do, rate themselves [himself] at the highest value they [he] can, yet their [his] true value is no more than it is esteemed by others.[9]

Through the Middle Ages, the Renaissance, and into colonial America, defamation was punishable in the courts as a jailable offense,[10] a civil wrong,[11] and a sin.[12] For the most part, it was a "strict liability" offense, with punishment meted out solely on the basis of proof that the defendant published the defamation.[13]

Historians point to the 1735 libel trial of New York publisher John Peter Zenger as the first watershed moment for the infusion of more modern, Western notions of free expression into defamation jurisprudence.[14] Zenger published a column critical of the colonial governor, who then charged Zenger with the crime of seditious libel. After the governor disbarred Zenger's team of lawyers, famed attorney Andrew Hamilton undertook the defense pro bono, and, prohibited from arguing the truth of the publication, instead asked jurors to nullify colonial libel law:

> But to conclude[:] The question before the Court and you, Gentlemen of the jury, is not of small or private concern. It is not the cause of one poor printer, nor of New York alone, which you are now trying. No! It may in its consequence affect every free man that lives under a British government on the main of America. It is the best cause. It is the cause of liberty . . . that to which nature and the laws of our country have given us a right to liberty of both exposing and opposing arbitrary power (in these parts of the world at least) by speaking and writing truth.[15]

Jurors took less than 10 minutes to return a verdict of acquittal for Zenger.

While the text of the First Amendment to the U.S. Constitution, adopted a half-century after Zenger's acquittal, gave hope to the ideal of free expression in the fledgling United States, early American governments demonstrated as much censorial tendency as the British crown. A succession of presidents decried opposition newspaper publishers as political heretics.[16] Congress doled out lucrative printing contracts in exchange for favorable coverage.[17] Federalist President John Adams signed the Alien and Sedition Acts in 1798 aiming to silence supporters of his Democratic-Republican Party rival Thomas Jefferson.[18] Newspaper publishers and correspondents were frequently prosecuted and jailed for seditious libel.[19]

Public Figures and Officials

The First Amendment would not come to constrain the common law of libel, as a matter of national constitutional jurisprudence, until the Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*. The *Sullivan* case, arising out of a newspaper advertisement published by Civil Rights Era protestors and critical of the Montgomery police, was tried before an Alabama jury instructed to follow traditional principles of libel law.20 Without constitutional constraints, under the common-law regime where publication sufficed to warrant a verdict and damages were presumed—and, of course, with the hostility in the South at the time to outsiders determined to bring racial reform—the $500,000 verdict was hardly surprising.

Fortunately, the case and its timing set the ideal backdrop for Justice William Brennan's eloquent recognition in *Sullivan* that the protest advertisement, "as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify" for protection under the First Amendment, given our "profound

national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[21] Brennan's solution for defamation claims arising out of allegedly false statements of *fact* about public officials was the "actual malice" test. It forbids defamation verdicts for public officials unless the plaintiff establishes by clear and convincing evidence that the publisher knew the statements were false or recklessly disregarded the truth.[22]

The Court extended actual malice to protect expressions about public figures a few years later in *Curtis Publishing Co. v. Butts*,[23] and *Associated Press v. Walker*.[24] In these cases, the Court decided that while neither plaintiff—a college athletic director in *Butts* and a retired Army officer in *Walker*—was a "public official," each was a "public figure" subject to the elevated actual malice standard.

The defining case in public figure doctrine, however, came six years later in *Gertz v. Robert Welch, Inc.*[25] Elmer Gertz, a prominent civil rights lawyer, sued the John Birch Society for a publication about Gertz's representation of a client. The Court attempted to clarify which plaintiffs would fall under the "public figure" classification. Justice Lewis Powell, writing for the Court, recognized two types of public figures. First, plaintiffs become public figures by voluntarily injecting themselves into public controversies and become "limited purpose" or "vortex" public figures for narrow issues.[26] Second are individuals who "achieve such pervasive fame or notoriety" in the community that they become all-purpose public figures.[27] The Court justified the elevated protection for publications concerning these plaintiffs, in part, by reasoning that these individuals "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."[28]

False "Ideas," Verifiable "Truths"

But the *Sullivan-Butts-Walker-Gertz* rubric settled the law only for a narrow band of defamation problems coming before the courts. While the cases squarely held that statements of *fact* about public officials and public figures deserved elevated protections, to this day the Court wrestles with other, unsettled permutations.[29] The precise protections for what most colloquially call "*opinions*"—a now-disfavored nomenclature in the Supreme Court—remains one of the thorniest branches of libel law.

The Court seemed to place expression of opinion outside of the reach of juries in 1974, in *Gertz*,[30] when Justice Powell used that very word to signal a boundary between "pernicious opinions" that were not actionable and "false statements of fact" for which recovery may be had.

> 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. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.[31]

Lower courts struggled for decades to apply the fact/opinion dichotomy that *Gertz* seemed to suggest. Perhaps most notably, Judge Kenneth Starr, writing for the en banc majority of the U.S. Court of Appeals for the District of Columbia Circuit, expressed how difficult many jurists found that task.

> *Gertz*'s implicit command thus imposes upon both state and federal courts the duty as a matter of constitutional adjudication to distinguish facts from opinions in order to provide opinions with the requisite, absolute First Amendment protection. At the same time, however, the Supreme Court provided little guidance in *Gertz* itself as to the manner in which the distinction between fact and opinion is to be discerned. That, as we shall see, is by no means as easy a question as might appear at first blush.[32]

The Supreme Court in 1990, in *Milkovich v. Lorain Journal Co.*,[33] attempted to clear up the confusion. *Milkovich* concerned a signed newspaper column about an administrative proceeding arising out of a brawl at a high school wrestling match. In the columnist's view, the team's coach, Milkovich, had "lied" in his testimony during the proceeding.

Chief Justice William Rehnquist wrote for the majority that *Gertz* did not "create a wholesale defamation exemption for anything that might be labeled 'opinion.'"[34] Rather, minimizing the breadth of that passage in *Gertz*, the *Milkovich* Court characterized it as "merely a reiteration of Justice Holmes' classic 'marketplace of ideas' concept."[35] The Court rejected a "separate constitutional privilege for 'opinion'" and, instead, held:

> The dispositive question in the present case then becomes whether a reasonable fact-finder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. . . . This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.
>
> We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false.[36]

Rather than labels of "fact" or "opinion," the actionability of a statement, according to the *Milkovich* Court, will turn on whether it is "susceptible of being proved true or false" through a "core of objective evidence."[37]

Confronting Academic Defamation

The courts' continuing difficulty in applying the Supreme Court's defamation tests finds no better illustrations than in cases arising out of criticism of scholars' work. Several reported decisions have interesting, if somewhat idiosyncratic, reasoning

as to whether a statement in a scholarly controversy was defamatory at all. Some of these courts strain to confront the *Milkovich* analysis of whether a "core of objective evidence" would render the statements verifiable, and thus actionable. Other courts seem to abandon applying precedent altogether, essentially throwing up their judicial hands and declaring that academic criticism is a libel-proof zone.

Academic Criticism and the Absence of Defamatory Meaning

A number of courts considering academic libel disputes have held, sometimes implausibly, that academic critiques simply do not rise to the level of defamation. Consider Judge Richard Posner's holding, in a widely cited opinion for the U.S. Court of Appeals for the Seventh Circuit, that the use of the word "crank" in an academic dispute was not actionable. Posner himself has been a highly esteemed and prolific legal scholar, both before and after his elevation to the federal bench.[38] In *Dilworth v. Dudley*,[39] decided in 1996, Professor Underwood Dudley had attacked the mathematical work of one William Dilworth, an engineer who had published several articles in mathematics journals, in a book titled *Mathematical Cranks*. Dudley wrote that one of Dilworth's articles, which purported to refute a principle of set theory, was so clearly incorrect that the proper understanding of the matter "usually elicits an 'Oh' after a few seconds' thought from bright undergraduates."[40] Dudley went on to assert that Dilworth's "article reads as if it is by someone convinced, whose mind it not going to be changed by anything. It is, in two words, a crank . . . ."[41]

Although not seemingly necessary to the court's analysis, the Seventh Circuit found that Dilworth, while an "obscure engineer," was nonetheless a public figure: "But anyone who publishes becomes a public figure in the world bounded by the readership of the literature to which he has contributed."[42] The court also examined in detail the author's hierarchy of "cranks" among math theorists, determining that Dilworth resided "in about the midpoint of this spectrum—the medium 'crank' in Dudley's system of classification."[43]

However, to Judge Posner, "crank" was not mere hyperbole, like calling a union nonsupporter a "scab."[44] Instead, "[a] crank is a person inexplicably obsessed by an obviously unsound idea . . . . To call a person a crank is to say that because of some quirk of temperament he is wasting his time pursuing a line of thought that is plainly without merit or promise."[45] The court concluded that the word "crank"—"especially . . . where, as in this case, the word is used in a work of scholarship,"—is "just a colorful and insulting way of expressing disagreement with his master idea, and it therefore belongs to the language of controversy rather than to the language of defamation."[46] Perhaps borrowing from *Gertz*'s exhortation that public figures have superior access to media outlets, the *Dilworth* court advises that, rather than bringing defamation claims, "scholars have their own remedies for unfair criticisms of their work—the publication of a rebuttal. Unlike the ordinary citizen, a scholar generally has ready access to the same media by which he is allegedly defamed."[47]

The court's dichotomy between the language of academic controversy and the language of defamation is difficult to square with more standard models for analysis of libel claims. As desirable as the result in the *Dilworth* case may be, Judge Posner appears to be stating a conclusion here with little precedential support. Charges of incompetency in other professions, medicine[48] or the law,[49] for example, are frequently actionable. Why is calling a scholar incompetent, as Dudley appears to have done here, different? Perhaps Posner answers that, although incompletely, when he notes in *Dilworth* that "judges are not well equipped to resolve academic controversies."[50]

These assertions are interesting for several reasons. First, Judge Posner seems to make an institutional competence argument—judges are incompetent to decide these cases—in support of his conclusion that the statements were not capable of defamatory meaning. But this is in reality a non sequitur. U.S. courts regularly take on hideously complex litigation with daunting factual issues. There is simply no doctrine in libel law that suggests words are not actionable because of the complexity courts face in interpreting them. Equally inexplicably, the *Dilworth* court traverses settled Supreme Court First Amendment doctrine in finding that Dilworth was a public figure, had superior access to media channels for rebuttal, and was attacked in a literary context that suggests subjective criticism and not objective fact finding. Yet the Seventh Circuit court does not ground its decision in actual malice doctrine, and it expressly disclaims any *Milkovich*-type analysis.

The court's observation about access to outlets for self-help raises its own set of questions. While *Gertz* recognized the ability for self-help as a hallmark of public figures, it did not introduce that factor to support a finding, as the court in *Dilworth* seems to have concluded, of the absence of defamation in the first instance. Put another way, a statement can be defamatory regardless of the plaintiff's opportunities to launch a counterattack. Otherwise, celebrities and other media personalities should similarly be relegated to self-help rather than the courts in cases of potential defamation, something that is plainly not the case.[51] Judge Posner is citing policy arguments for a position of judicial noninterference in scholarly disputes, but those arguments are of questionable doctrinal relevance to the issue at hand.[52]

Another important determination of defamatory meaning in scholarship was that of *Lott v. Levitt*[53] in 2009, also decided by the Seventh Circuit. In this case, economist John Lott sued Steven Levitt, coauthor of the bestseller *Freakonomics*. Levitt criticized Lott's research, which claimed that permitting citizens to carry guns lowered crime rates. One of Lott's claims focused on this sentence in *Freakonomics*: "When other scholars have tried to replicate his results, they found that right-to-carry laws simply don't bring down crime."[54] Lott regarded this as suggesting either academic fraud or incompetence. He pointed to the prevailing definition of "replicate" in scientific research, which, to Lott, meant that other researchers used the exact same data set and methods and did not produce the same results. A lower court

dismissed the claim, reasoning "that the statements could reasonably be read as a description of an academic dispute regarding controversial theories, not an accusation of academic dishonesty."[55]

On appeal, the Seventh Circuit—without citing *Sullivan*, *Gertz*, or even *Milkovich*—agreed that this innocent interpretation of the term "replicate" was reasonable.[56] The context of *Freakonomics*, the court found, was that of a popular book with scholarly complexity toned down for a general audience. The sentence in question could mean that other scholars attempted to test Lott's conclusions but did not succeed. This would not necessarily impute either fraud or incompetence to Lott in his original research, the Seventh Circuit reasoned. As well, the paragraph in which the sentence was found did not mention particulars about the data Lott used or the methods he applied. Finally, the Seventh Circuit cited Dilworth for the proposition that this was a dispute about ideas, not character: "The remedy for this kind of dispute is the publication of a rebuttal, not an award of damages."[57]

Like *Dilworth*, the court in *Lott* seemed to brush by the models of defamation analysis the Supreme Court has constructed. Although it makes glancing reference to "context" and the "natural" reading of the book's language, the *Lott* decision contains no mention of verifiability through a "core of objective facts." And while, like *Dilworth*, the *Lott* court discusses rebuttal as the plaintiff's chief remedy, unlike *Dilworth*, the decision contains no discussion of the plaintiff's public/private figure status, let alone touching upon actual malice law.

Yet another academic libel case resting on the absence of defamatory meaning is *Katz v. Gladstone*, decided by a federal district court in 1987.[58] Here, the offending work was a book review of Katz's book of photographs of General George Custer. Gladstone, the reviewer, was critical of the lack of explanatory text and of errors in the photo credits in the book. While the reviewer described the gathering of the photos themselves as "impressive," he also wrote that the "captions and documentation leave much to be desired. There is virtually no analysis or text of the photographs themselves. The scholar cannot use the book with ease for there is no index, footnotes or bibliography."[59] Gladstone suggested that the author miscounted the number of photographers who had captured images of Custer and mislabeled captions. Katz, the author, claimed that the effect of the review was to suggest that he was not qualified as a historian of the period.

The *Katz* court rejected this characterization, holding that the statements were not capable of defamatory meaning. The criticism was of the work rather than the author, the court reasoned. Moreover, although the court admitted that the statements about the errors and other limitations of the book did reflect on the author to some degree, the court questioned the actual effect of the innuendo. The critical statements suggested only "[t]hat the author is capable of making mistakes, and that he has chosen to produce a book of one sort rather than of another sort, or perhaps that he has not achieved his own ambitions for the book."[60] The court declined to read the critique to suggest that "the author is not qualified to produce a book of the sort he produced, or to do so with fewer errors, or even to produce a book of the sort which the reviewer would have preferred."[61] The *Katz* court seemed heavily driven by policy concerns about protecting literary criticism: "If such language is capable of defamatory meaning, it is difficult to imagine what kind of review, except an unreserved 'rave,' would not be subject to harassing law suits."[62]

Searching for a Core of Objective Meaning under Milkovich

Other courts, rather than elide traditional defamation analysis, at least purport to embrace and apply it in academic libel cases. For example, in *Fikes v. Furst*, a decision by the Supreme Court of New Mexico in 2003, the court found that seemingly fact-laden negative statements were actually statements of opinion in the academic community.[63] *Fikes* arose out of a protracted and bitter scholarly feud between two anthropologists, both of whom studied an Indian community in Mexico. One aspect of the case involved statements by Peter Furst to an academic colleague offering various reasons why Jay Fikes was unqualified to work on a particular project. Furst had also told two colleagues that the University of Michigan, which had granted Fikes his Ph.D., had "disowned" him and was "sorry they had ever given him or provided him with a doctor's degree."[64]

These statements on their face appear factual in nature, at least according the Milkovich standard that statements capable of being proven true or false are fact rather than opinion.[65] Both Fikes's qualifications for a particular project and his status vis-à-vis the University of Michigan would appear to be capable of being proven true or false. However, the New Mexico high court found—based largely on the deposition testimony of other academics—that, at least as to the recipients of the statements, they were opinion. As the court put it: "Dr. Furst does not argue that he should not be liable because the recipients did not believe his statements. Rather, he argues the recipients thought that he was trying to convey something different than the ordinary meaning of his words."[66]

A statement can be defamatory regardless of opportunities to launch a counterattack.

In other words, to the recipients, Furst was not actually stating facts about Fikes's qualifications or Fikes's alma mater's attitude toward him, but Furst's general low opinion of Fikes. The court noted that one of the recipients claimed the statements had not affected his view of Fikes and that Furst's statements were "typical of what he hears in the anthropological community."[67] The other recipient testified that "I would say some of [the

statements] are extreme, but they are not outside the range of what goes on in academic talk."[68]

As a result, the court ruled that the statements were not taken literally and thus fell within the range of opinion. As the court reasoned: "Criticism of the work of scholars is generally commonplace and acceptable in academic circles. Thus, statements that may appear in isolation to be defamatory may in fact be particularly appropriate or acceptable criticism when made in an academic setting."[69]

Fikes is a fascinating case. The decision in places seems to suggest that the statements are not defamatory at all, based on how they were received, yet it expressly invokes *Milkovich* (and even the D.C. Circuit's decision in *Ollman v. Evans*[70]) to protect the statements. But how well the New Mexico court's reasoning can be squared with *Milkovich* is debatable. Recall that *Milkovich* based the determination of whether a statement was protected on its sheer provability of the statement, almost akin to the "synthetic" statements of the logical positivists that were meaningful by virtue of empirical testability.[71] Thus, the *Fikes* court's in-depth analysis of how the recipients regarded the statements, in their professional context, could be questioned post-*Milkovich.*[72]

Caustic attacks that seem very personal are merely reflections on the work and are beyond the reach of defamation law.

Fikes arguably instead rests on a similar foundation to *Dilworth* and *Lott*—that scholars' criticisms of each other occupy an alternate linguistic universe. Caustic attacks that seem very personal are merely reflections on the work, and such attacks are beyond the reach of defamation law. The effect on the average reader is replaced by the effect on the average scholar. The only available remedy is another publication, not litigation.

Despite the nagging doctrinal questions that surround the finding of opinion in the *Fikes* case, media law scholar Amy Gajda astutely points out that "the court's opinion captures a sense of rough justice in resolving the feud . . . . Whether this is achieved by redefining what is considered 'defamatory' in academia, as the court did, or by recognizing an independent privilege for academic debate is of secondary concern."[73]

Yet another case applied the verifiability concept of *Milkovich,* while at the same time mirroring the *Dilworth* concept (although without citation to that decision) that scholarly disputes lie outside of the province of defamation courts. In *Arthur v. Offit,* decided by a federal district court in 2010,[74] the plaintiff Barbara Loe Arthur, president of the National Vaccine Information Center, challenged a statement in a *Wired* magazine article. The statement was made by Dr. Paul A. Offit, a practicing physician and professor at the University of Pennsylvania School of Medicine and coinventor of a vaccine for rotavirus. Arthur's organization had opposed mandatory childhood vaccinations for, among other reasons, allegedly causing autism. Offit believed the antivaccination faction was seriously misguided. In the course of an interview, Offit said of Arthur, "She lies," which became the basis for the defamation suit.

Because the vaccine controversy is an important matter of public concern, the court noted that "the constitutional and common law protections—under both Commonwealth and federal law—here are at their zenith."[75] Considering both the plain meaning of the words and the context, the *Arthur* court noted that, prior to the "she lies" quote, Dr. Offit had stated that his opponents in the vaccination debate made him "want to scream" and described their views as "Kaflooey theories."[76] This, the court found, was "precisely the kind of 'loose, figurative' language that tends to 'negate[ ] any impression that the speaker is asserting actual facts.'"[77] In this context, the court reasoned, "she lies" was less a statement of fact than an expression of outrage and frustration over the sad intellectual state of the debate. Further, the court invoked *Milkovich* to note, "That is hardly the sort of issue that would be subject to verification based upon a 'core of objective evidence.'"[78]

At the same time, the *Arthur* court pointed out that treating the statement "she lies" as factual would put the court in the position of determining the truth of complex scientific claims about vaccination. Echoing Judge Posner in *Dilworth*, the court declined to enter this highly technical terrain: "Courts have a justifiable reticence about venturing into the thicket of scientific debate, especially in the defamation context."[79]

However, even in highly contentious areas of scientific disagreement, courts are sometimes willing to view statements challenging research as stating objective facts. Consider, for example, *Mann v. National Review, Inc.,* a trial court decision from the District of Columbia in 2013.[80] In this case, the *National Review* and other defendants attacked the plaintiff, Michael E. Mann, a professor at Penn State and a prominent climate change scientist. Mann was the coauthor of the "hockey stick graph," an important model of global warming. Mann had also become embroiled in questions raised about the validity of climate science as a result of e-mails misappropriated from the University of East Anglia's Climate Research Unit.

The *National Review* published a blog post that referenced and linked to another piece metaphorically comparing Mann to Jerry Sandusky, the former football coach and convicted child molester (both were at Penn State and had been the subject of university investigations—Mann for his scientific work). The *National Review*'s post also stated: "Michael Mann was the man behind the fraudulent climate-change hockey stick graph, the very ringmaster of the tree-ring circus."[81] As part of an anti-SLAPP motion, the court considered whether Mann was likely to succeed on the merits of his defamation claim.

The *National Review* argued that the statements were not actionable because in their context, under *Milkovich*, "Plaintiff's work and theories are not provably false because they are propositions based on data that is not properly verifiable."[82] The

court, although it found the question to be a close one, rejected this characterization, and held instead that the allegations of scientific fraud were conclusions based on facts. Moreover, the court held, these conclusions "rely upon facts that are provably false particularly in light of the fact that [Mann] has been investigated by several bodies (including the EPA) and determined that [Mann's] research and conclusions are sound and not based on misleading information."[83] The court further found factual a statement by the *National Review* that Mann's work was "intellectually bogus": "To call his work a sham or to question his intellect and reasoning is tantamount to an accusation of fraud (taken in the context and knowing that [Mann's] work has been investigated and substantiated on numerous occasions)."[84]

In a later decision in the same case on an amended complaint, the D.C. court found that an assertion that Mann had "molested and tortured data" was not rhetorical hyperbole.[85] The court analyzed the phrase at length and determined that "[a]ccusing plaintiff of working 'in the service of politicized science' is arguably a protected statement of opinion, but accusing a scientist of 'molest[ing] and tortur[ing] data' is an assertion of fact" because the latter statement implies scientific fraud.[86]

Mann is unquestionably a more extreme case than *Fikes* or *Arthur*. The comparison of the plaintiff to a notorious child molester is particularly distasteful rhetoric. Yet, as to the claim about the plaintiff's academic work or scientific claims, the cases are at least similar. The statements in *Fikes*—on their face—did not allege research fraud, but they cast serious doubt on the credentials of the plaintiff. The statement in *Arthur* ("she lies") is not that different than what the court found to be assertions of fraud in *Mann*, although it is certainly less specific about the precise nature of the untruths involved. Moreover, the *Arthur* court's point about the other language surrounding "she lies" is not altogether convincing. The fact that extravagant language (e.g., "Kaflooey theories" and "want to scream") surrounded the central claim is not a particularly strong reason to conclude that "she lies" is not a factual statement. While by itself "Kaflooey theories" may appear to be simply an elaborate or slangy way of suggesting a theory that is spurious or a sham, its mere presence in a longer phrase is a weak basis to conclude that "she lies" was not intended as a statement of fact.

The other key distinction between *Arthur* and *Mann*—although the procedural posture of the two cases is also quite different—is the level of uncertainty about the underlying intellectual disputes. The *Mann* court placed a great deal of emphasis on the fact that Mann had been repeatedly cleared of fraud by reputable scientific organizations, while the *Arthur* court emphasized the ultimate scientific uncertainty about the dangers, if any, of childhood vaccinations. Whether these epistemological issues should carry quite the weight they appear to in these cases is unclear.

Deploying the Common Interest Privilege in Academic Disputes

Another group of academic libel cases have been decided under the so-called "common interest" privilege.[87] Commentator Ameet Kaur Nagra maintains that use of the common interest privilege is a superior method of resolving academic defamation disputes, particularly because of its conceptual clarity compared to the rest of defamation doctrine.[88] Nagra argues that "[h]aving a definite protection such as the common interest privilege will likely help scholars avoid defamation suits to begin with."[89]

An example of the privilege in action is a recent 2014 federal district court decision in *Critical Care Diagnostics, Inc. v. American Ass'n for Clinical Chemistry*.[90] The plaintiff was the patent holder of an assay, or investigative laboratory procedure, for patients with heart problems. The defendants wrote a peer-reviewed scholarly article that the plaintiff claimed was defamatory and damaged its business.

On an anti-SLAPP motion, the court considered whether the plaintiff had a reasonable probability of prevailing on the merits. The court concluded that California's statutory common interest privilege,[91] which is "recognized where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest,"[92] applied to scholarly activity such as that of the defendants. The "interest" in question, the court noted, is normally a private or proprietary one, and thus the privilege protects scholarly communications in media such as refereed journals that are not aimed at the general public but at an interested audience of scholars. Because the privilege applied, the court was not required to determine either defamatory meaning or whether the statements were fact or nonfact under *Milkovich*.

Instead, the court reasoned, statements falling under the privilege were protected in California in the absence of either actual malice or common-law malice, the latter consisting of hatred or ill will toward the plaintiff. The plaintiff bears the burden of establishing either type of malice. In the case at bar, the court found that the plaintiff had not met that burden and thus struck the libel claims.

The common interest privilege affords some unique advantages to scholarly defendants, particularly because courts are not required to wade into the murky waters of defamatory meaning or *Milkovich*. However, not every jurisdiction recognizes the privilege. Nagra's research found that some 13 states and the District of Columbia recognize the privilege, although not all of those have actually applied it in a scholarly context.[93] Moreover, even where it is recognized, at least as the *Critical Care Diagnostics* court interpreted California law, it applies only to statements made in relatively narrow channels such as refereed journals intended for specialists. It therefore may not apply to statements made to a broader public. However, even with that limitation, the privilege is, as Nagra suggests, enormously appealing under the proper circumstances. For purported defamatory statements in scholarly journals and the like, it provides a degree of certitude unavailable in most of defamation doctrine. It is defeasible in cases of common-law or actual malice, but presumably those instances would

be rare in serious scholarship and difficult for plaintiffs to establish.

Perspectives on the Academic Libel Approaches

Most of the cases examined here share an important common theme: Courts are reluctant to enter into academic disputes and prefer to let scholars settle their differences in the marketplace of ideas. Yet, as has been demonstrated, the judicial attempts to avoid these disputes are sometimes achieved through unconvincing doctrinal analyses. The ends appear worthy, but the means seem somewhat poorly executed.

The common interest privilege is a solid method of resolving scholarly defamation cases, although not all jurisdictions recognize the privilege. As well, it is limited to statements communicated to a relatively narrow and specialized audience. Where applicable, however, it could be an enormously useful means of adjudicating such disputes. It has the advantage of being a relatively determinate doctrine that is also capable of ending unsupportable disputes at a relatively early stage in the proceedings, thus ameliorating the often enormous costs of libel litigation.

Courts are reluctant to enter into academic disputes and prefer to let scholars settle their differences.

The cases declining to find defamatory meaning at all seem, by and large, sound in their results. However, some portions of Judge Posner's opinion in *Dilworth*, the "crank" case, contain questionable analytical moves. For one thing, it is not clear that the simple demarcation that Judge Posner asserts between statements about the scholar and statements about the scholar's work can be maintained. A critique of a scholar's research, no less than of a lawyer's legal acumen or a physician's surgical skills, may reflect both upon the work and upon the competence of the person performing it. While the authors of this article are by no means in favor of increased litigation over book reviews and other scholarly criticism, it is nonetheless the case that Judge Posner's exposition of the law seems questionable here.

Moreover, while superb policy purely from a marketplace-of-ideas standpoint, Judge Posner's suggestion that courts should abdicate responsibility for scholarly disputes in favor of self-help simply does not comport with standard defamation doctrine. As noted earlier, while *Gertz* cited the possibility of self-help as a factor justifying public figure status, at no point has the Court relegated any group of potential libel plaintiffs entirely to self-help in the marketplace. Judge Posner's advocacy of judicial noninterference in academic disputes thus does not reflect settled law. The precedent may have the effect of creating confusion and uncertainty as to exactly what classes of disputes are not actionable at all and when more standard modes of legal analysis should be operative.

The scholarly defamation cases following *Milkovich* are clearly a mixed bag. In one sense, that may simply reflect the generalized confusion in lower courts post-*Milkovich*. Numerous scholars have noted the chaotic landscape of opinion doctrine since *Milkovich* was decided, including many courts that continue to use approaches that Milkovich clearly rejected. As noted commentator Judge Robert D. Sack put it: "Most courts considering opinion since *Milkovich* have . . . reached the result they likely would have before the Supreme Court decided the case. . . . Even the Ollman-type factors used to identify statements of opinion survived *Milkovich* despite *Milkovich*'s explicit disapproval of them."[94] Moreover, there is still some doctrinal confusion about the use of *Milkovich* in cases of nonmedia defendants;[95] *Milkovich* itself reserved judgment on whether its rule applied to them.96 Nonetheless, as commentators have noted, lower courts continue to cite *Milkovich* as controlling in nonmedia cases, even if applying its actual standard somewhat erratically.[97]

Assuming the *Milkovich* fact/nonfact distinction should apply in academic defamation cases, we propose that courts proceed with epistemological humility into contested factual questions, but not necessarily abandon altogether the notion that there is some fact of the matter in academic disputes. Our view is that the Posnerian approach proceeds with a bit too much skepticism about the possibility of ascertainable knowledge underlying academic disputes. This is perhaps not surprising, given that Judge Posner, a philosophical pragmatist, is himself a skeptic in this regard.

There are certainly academic disputes that concern contested areas of science or the humanities in which the factual status of claims about another's work are indeterminate, because knowledge may be highly provisional. In such cases, courts do well not to wade into the epistemological thicket and to treat the contested claims as "nonfacts" for purposes of a *Milkovich*-style analysis. However, questions that involve the empirics underlying the scholarship, and the scholar's dishonesty in presenting them accurately, should be much more susceptible to adjudication. Climate change, for example, remains contested in the political sphere, but is not an open question among knowledgeable scientists.[98] Accusing the climate-change denier of political bias is, in the proper context, not likely to be actionable under *Milkovich*.[99] Intentionally falsely accusing him or her of materially distorting empirical studies of CO^2 emissions likely would be actionable.

For courts to avoid all such questions, even those with significant scholarly consensus, seems an overabundance of caution that is not warranted by the state of knowledge in various fields. As the courts in the *Mann* case correctly reasoned, not all scholarly claims are simply open questions that can be declared "nonfacts" under the *Milkovich* analysis.

One helpful approach might be a closer study of the words and context of supposedly defamatory statements to determine if a claim akin to scholarly fraud or intentional falsification is being alleged. Certainly courts should afford breathing room to critiques of scholarship, no less than

is afforded in the context of political speech. On the other hand, the current approach of near judicial abdication in the face of academic controversy seems flawed, as discussed in prior sections.

Conclusion

While the authors are by no means encouraging increased litigation among scholars and their critics, the current state of the academic libel doctrine seems confused at the very least. By introducing a nuanced and careful examination of the scholarly credibility of claims at the center of defamation cases, the doctrinal disconnect between academic libel cases and more standard defamation scenarios could be lessened.

Endnotes

1. Zoe Corbyn, *Scholar vs Scholar: Libel Case's "Disturbing Implications" for Free Speech*, Times Higher Educ. (Feb. 25, 2010), http://www.timeshighereducation.co.uk/410542.article.

2. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Mar. 3, 2011, Pub. Prosecutor v. Weiler (Fr.), *available at* http://www.ejiltalk.org/in-the-dock-in-paris-%E2%80%93-the-judgment-by-joseph-weiler-2/.

3. Jennifer Howard, *French Court Finds in Favor of Journal Editor Sued for Libel over Book Review*, Chron. Higher Educ. (Mar. 2, 2011), http://chronicle.com/article/French-Court-Finds-in-Favor-of/126599/.

4. 376 U.S. 254, 270 (1964).

5. Amy Gajda, The Trials of Academe: The New Era of Campus Litigation 161 (2009). Gajda's book is one of the few works to explore academic libel in depth.

6. *Leviticus* 19:16 (King James).

7. *Proverbs* 22:1 (King James).

8. *Arakhin* 15b.

9. Thomas Hobbes, Leviathan 42 (1651).

10. *E.g.*, 12 Rich. 2, c. 11 (1388) (Eng.); 3 Edw., c. 34 (1275) (Eng.). These statutes proscribed scandalum magnatum, the crime of spreading false reports about the magnates of the realm.

11. *E.g.*, Ogden v. Turner, (1703) 87 Eng. Rep. 862 (K.B.); Davies v. Gardiner, (1593) 79 Eng. Rep. 1155 (K.B.).

12. R.B. Outhwaite, The Rise and Fall of the English Ecclesiastical Courts, 1500–1860 (2006). Defamation cases in ecclesiastical courts typically concerned statements about alleged sexual improprieties.

13. James A. Henderson & Richard N. Pearson, The Torts Process 847 (1975).

14. Peter Charles Hoffer, The Free Press Crisis of 1800, at 10–16 (2011).

15. *Trial Record from Zenger's* A Brief Narrative of the Case and Trial of John Peter Zenger (1736), Univ. Mo.-Kan. City, http://law2.umkc.edu/faculty/projects/ftrials/zenger/zengerrecord.html (last visited Feb. 26, 2015).

16. Hoffer, *supra* note 14, at 2–4.

17. Donald A. Ritchie, Press Gallery 1–34 (1991).

18. Hoffer, *supra* note 14, at 27–50.

19. *Id.* at 1–8, 89–112.

20. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Cal. L. Rev. 691, 732 (1986).

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

22. *Id.* at 280, 285–86.

23. 388 U.S. 130 (1967).

24. 388 U.S. 130, 162 (1967).

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

26. *Id.* at 351–52.

27. *Id.* at 351.

28. *Id.* at 344.

29. Indeed, the Court only recently settled the long-pending question of whether a falsehood itself, *vel non*, falls entirely outside of constitutional protection. In *United States v. Alvarez,* 132 S. Ct. 2537 (2012), a 6–3 majority of the Court held the Stolen Valor Act, which criminalized false statements about receiving military decorations, was unconstitutional. The majority concluded that, under the First Amendment, the falsity of the statement by itself was insufficient to warrant conviction. Justice Anthony Kennedy's controlling decision also notes that counterspeech provides sufficient antidote to the poisonous claims of false war heroes: "It is a fair assumption that any true holders of the Medal who had heard of Alvarez's false claims would have been fully vindicated by the community's expression of outrage . . . . Truth needs neither handcuffs nor a badge for its vindication." *Id.* at 2550–51.

30. 418 U.S. at 339–40.

31. *Id.* at 339–40 (footnote omitted) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

32. Ollman v. Evans, 750 F.2d 970, 975 (D.C. Cir. 1984) (en banc). The D.C. Circuit problem-solved through the dichotomy by applying a "totality of the circumstances" test to discern opinion from fact. The factors the court examined were: (1) "the common usage or meaning of the specific language of the challenged statement itself"; (2) "the statement's verifiability—is the statement capable of being objectively characterized as true or false?"; (3) "the full context of the statement—the entire article or column"; and (4) "the broader context or setting in which the statement appears." *Id.* at 979. Earlier, the fair comment privilege had protected statements of opinion. *See, e.g.*, Note, *Fair Comment*, 62 Harv. L. Rev. 1207 (1949).

33. 497 U.S. 1 (1990).

34. *Id.* at 18.

35. *Id.* (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas— . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.")).

36. *Id.* at 21. The Supreme Court, in a pair of cases, held that "rhetorical hyperbole"—metaphoric condemning phrases that in context clearly do not mean what they literally say—are not actionable. *See* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264 (1974) (holding that "traitor" not actionable in describing anti-union conduct); Greenbelt Coop. Publishers Ass'n v. Bresler, 398 U.S. 6 (1970) (holding "blackmail" not actionable in describing developer's aggressive negotiations with municipality). In both cases, the Court held the offending words, in context, did not convey a factual allegation of criminal conduct.

37. *Id.*

38. *See, e.g.*, Richard A. Posner, How Judges Think (2010); Richard A. Posner, The Problems of Jurisprudence (1990); Richard A. Posner, The Economics of Justice (1983).

39. 75 F.3d 307 (7th Cir. 1996).

40. *Id.* at 308.

41. *Id.* at 309.

42. *Id.* For an early treatment of the potential impact of the Internet on public figure jurisprudence, *see* Matthew D. Bunker & Charles D. Tobin, *Pervasive Public Figure Status and Local or Topical Fame in Light of Evolving Media Audiences*, 75 Journalism & Mass Comm. Q. 112 (1998).

43. *Dilworth*, 75 F.3d at 309.

44. *See* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264 (1974).

45. *Dilworth*, 75 F.3d at 310.

46. *Id*.

47. *Id*.; *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

48. *See, e.g*., Gill v. Hughes, 278 Cal. Rptr. 306, 311 (Ct. App. 1991) (finding statement that plaintiff was an incompetent surgeon was actionable, although ultimately proven to be true); Restatement (Second) of Torts § 573 cmt. c (1977) (noting that "statements that a physician . . . is incompetent or negligent in the practice of his profession, are actionable").

49. *See, e.g*., Restatement (Second) of Torts § 573; Debra T. Landis, Annotation, *Criticism or Disparagement of Attorney's Character, Competence, or Conduct as Defamation,* 46 A.L.R.4th 326 (1991). *But see* Sullivan v. Conway, 157 F.3d 1092, 1097 (7th Cir. 1998) (Posner, J.) (holding that statement that a lawyer was "a very poor lawyer is to an express an opinion that is so difficult to verify or refute that it cannot feasibly be made a subject of inquiry by a jury").

50. *Dilworth*, 75 F.3d at 310.

51. *See, e.g*., Victoria Cioppettini, *Modern Difficulties in Resolving Old Problems: Does the Actual Malice Standard Apply to Celebrity Gossip Blogs?*, 19 Seton Hall J. Sports & Ent. L. 221, 228–30 (2009) (documenting successful celebrity defamation cases).

52. For another case in which policy arguments trump standard analysis of defamatory meaning, *see* Ezrailson v. Rohrich, 65 S.W.3d 373 (Tex. App. 2001). In this case, involving a medical journal article that at least implicitly criticized the plaintiff's scientific work, the court concluded there was no defamatory meaning as a matter of law. The court's rationale was straightforward:

> Certainly statements are not immune from the control of defamation law merely because they appear in medical science articles. However, in the area of medical science research, criticism of the creative research ideas of other medical scientists should not be restrained by fear of a defamation claim in the event the criticism itself also ultimately fails for lack of merit. We believe calling the medical science research article here defamatory would serve to unduly restrict the free flow of ideas essential to medical science discourse.

Id. at 382. Thus, the state appellate court, citing Judge Posner in *Dilworth*, simply declared an absence of defamatory meaning in the article.

53. 556 F.3d 564 (7th Cir. 2009).

54. *Id*. at 567.

55. *Id*.

56. The Seventh Circuit followed Illinois substantive defamation law in interpreting the offending phrase. Under Illinois law, if a court may find an "innocent construction" in the alleged defamation, it is bound to apply it and hold that the phrasing is nonactionable. Bryson v. News Am. Publ'ns, Inc., 672 N.E.2d 1207, 1215 (1996). Illinois is unique in this interpretation. Under most states' laws, the court decides if the phrase is capable of defamatory construction, and if it is, the jury then decides if that is how the phrase was, in fact, interpreted. Robert D. Sack, Sack on Defamation § 2:4.16 (4th ed. 2013).

57. *Lott*, 556 F.3d at 570 (citing Dilworth v. Dudley, 75 F.3d 307, 310 (7th Cir. 1996)).

58. 673 F. Supp. 76 (D. Conn. 1987).

59. *Id.* at 78.

60. *Id.* at 82.

61. *Id.*

62. *Id.* at 83.

63. 81 P.3d 545 (N.M. 2003); *see* Johnson v. Schmitz, 119 F. Supp. 2d 90, 101–02 (D. Conn. 2000) (holding that calling a graduate student's academic ideas "ridiculous and unoriginal" and stating that his thinking was flawed and that "he could not see the big picture" were statements of opinion because an ordinary person would understand that to be the case in the context of an academic evaluation of the work); El-Ghori v. Grimes, 23 F. Supp. 2d 1259, 1269 (D. Kan. 1998) (holding that calling a scholar's work "amateurish" was a statement of opinion because all facts upon which the evaluation was based were disclosed). *But see* Madsen v. Buie, 454 So. 2d 727, 729 (Fla. Dist. Ct. App. 1984) (holding statements that psychology professor's parenting techniques were similar to those used to brainwash prisoners of war and were destructive to children were not opinion and were defamatory); Mehta v. Ohio Univ., 958 N.E.2d 598, 609–14 (Ohio Ct. App. 2011) (holding statements asserting that faculty member contributed to a culture of plagiarism among graduate students were not opinion).

64. *Fikes*, 81 P.3d at 548.

65. Of course, states under their own common law or constitution can protect potentially defamatory statements at a higher level than that provided by *Milkovich*.

66. *Fikes*, 81 P.3d at 550.

67. *Id*.

68. *Id*. (alteration in original).

69. *Id*. at 551.

70. *Id.* (*citing* Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984)).

71. For an explication of the connection between logical positivism and the *Milkovich* rule, see Martin F. Hansen, *Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech*, 62 Geo. Wash. L. Rev. 43, 57–66 (1993).

72. *Fikes* is also a somewhat idiosyncratic fact pattern, because the statements discussed were communicated only to two recipients who could be individually deposed to determine their reaction to the statements. However, the court's reasoning about how such communications would be received in academic circles generally would seem equally applicable to statements that went out to large numbers of persons, assuming those persons were members of the academic community.

73. Gajda, supra note 5, at 181.

74. No. 01:09-cv-1398, 2010 U.S. Dist. LEXIS 2194 (E.D. Va. Mar. 10, 2010).

75. *Id*. at *10.

76. *Id*. at *15.

77. *Id*. (alteration in original).

78. *Id*.

79. *Id*. at *17; see ONY, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490 (2d Cir. 2013) (deciding a false advertising case involving scientific findings about medical products and citing *Milkovich* standard in finding that statements interpreting accurate data in disputed scientific areas are opinion rather than statements of fact).

80. No. 2012 CA 8263 B, 2013 D.C. Super. LEXIS 8 (July 19, 2013).

81. *Id*. at *6.

82. *Id*. at *19.

83. *Id*. at *23 (internal quotation marks omitted).

84. *Id*.

85. Mann v. Nat'l Review, Inc., No. 2012 CA 8263 B (D.C. Super. Ct. Jan. 22, 2014).

86. *Id*., slip op. at 3 n.6.

87. For historical background on the privilege and its instantiation in California statutory law, see Fred H. Cate, Note, *Defining California Civil Code Section 47(3): The Resurgence of Self-Governance*, 39 Stan. L. Rev. 1201 (1987).

88. Ameet Kaur Nagra, Note, A

Higher Protection for Scholars Faced with Defamation Suits, 41 Hastings Const. L.Q. 175 (2013).

89. *Id.* at 204.

90. No. 13cv1308, 2014 U.S. Dist. LEXIS 20711 (S.D. Cal. Feb. 18, 2014); *see* Harkonen v. Fleming, 880 F. Supp. 2d 1071 (N.D. Cal. 2012) (dismissing, on anti-SLAPP motion, libel claim arising from peer-reviewed article and lectures under common interest privilege).

91. Cal. Civ. Code § 45.

92. *Critical Care Diagnostics*, 2014 U.S. Dist. LEXIS 20711, at *15 (quoting Hawran v. Hixon, 147 Cal. Rptr. 3d 88, 114 (Ct. App. 2012)).

93. Nagra, *supra* note 88, at 197.

94. Robert D. Sack, *Protection of Opinion under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy under the First Amendment*," 100 Colum. L. Rev. 294, 322–24 (2000).

95. Many jurisdictions have decided to abolish the distinction between media and nonmedia defendants in defamation cases. Most recently, the Iowa Supreme Court declined to do that. Bierman v. Weier, 826 N.W.2d 436, 457–59 (Iowa 2013).

96. Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 n.6 (1990).

97. John Bruce Lewis & Gregory V. Mersol, *Opinion and Rhetorical Hyperbole in Workplace Defamation Actions: The Continuing Quest for Meaningful Standards*, 52 DePaul L. Rev. 19, 56 (2002).

98. According to NASA, "Ninety-seven percent of climate scientists agree that climate-warming trends over the past century are very likely due to human activities, and most of the leading scientific organizations worldwide have issued public statements endorsing this position." *Facts: Consensus*, NASA Global Climate Change, http://climate.nasa.gov/scientific-consensus (last visited Feb. 26, 2015) (footnote omitted).

99. Courts typically hold that even nefarious speculations as to motive are not actionable. *E.g.*, Barter v. Wilson, 512 N.E.2d 816 (Ill. Ct. App. 1987) (holding that newspaper's suggestion that developer's influence at city hall accounted for his success at winning permits was not actionable); West v. Thompson Newspapers, 872 P.2d 999 (Utah 1994) (holding that newspaper's statements implying candidate had misrepresented his position in order to get elected, because he changed it immediately after winning office, is not "sufficiently factual to be susceptible of being proven true or false"); Maynard v. Daily Gazette Co., 447 S.E.2d 293 (W. Va. 1994) (holding that charges of nepotism cannot be confirmed by "independent or objective evidence" and therefore are not actionable).

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