Nine Characters in Search of an Author: The Supreme Court's Approach to "Falsity" in Defamation and Its Implications for Fiction

Glenn J. Blumstein*

I. INTRODUCTION

In a 1983 parody, Larry Flynt put words in Jerry Falwell's mouth to "assassinate" his reputation.[1] Twenty-five centuries earlier,[2] Aristophanes employed the same technique, but with greater success. Not only was Socrates fatally poisoned by the playwright's words,[3] but, graciously enough, never sued for defamation. Socrates was a sport: "I am twitted in the theater as I would be at a drinking party."[4] Spoken like a philosopher, perhaps, but again we have Socrates the puppet, this time with a biographer, Plutarch, at the strings. Plutarch's intent here is, of course, quite different. The biographer aims for his work to be taken as a conscientious reconstruction of

---

* Associate, Davis Wright Tremaine, Seattle, Washington. Stanford Law School (J.D. 1993) (associate editor, Stanford Law Review); Playwright's Workshop, University of Iowa (M.F.A. 1987); Amherst College (B.A. 1981) (magna cum laude).

1 Joint Appendix on Appeal 898 (cited in Brief for Respondent, Hustler Magazine Inc., v. Falwell, 485 U.S. 46 (1988)).

2 423 B.C., THE CLOUDS.

3 This bit of overstatement is drawn from Plato's *Apology* where the author effectively charged Aristophanes with malicious slander that "directly or indirectly, created the formal accusation brought against Sokrates in 399 B.C." resulting in his being put to death. WILLIAM ARROWSMITH, *The Clouds* 4-5, in THREE COMEDIES BY ARISTOPHANES (William Arrowsmith, ed., 1969).

4 PLUTARCH, DE EDUCATIONE PUERORUM XIV.

historical truth, an accurate portrayal, though informed with an ineluctable degree of subjectivity. Non-fiction, generally, hopes to be believed, taken literally, found consistent with the outside world, its details taken as fact. If fiction asks for belief, it is certainly not in its details, in its accurate correspondence to actual events or persons in the world.[5]

The consistency valued in a work of fiction is a *non*-referential consistency, an internal consistency of style, perspective, or voice. The rules it must live by are of its own construction and those of its genre. It is, by definition, non-literal. In our defamation law, however, this divergence of authorial intention is a distinction without a difference. Journalistic reporting, "inventive" biography, and works of fiction are all judged by the same standard: falsity.

How one applies this standard to works which, by self-definition, do not make descriptive truth claims, is far from obvious. This past decade saw a rash of law review articles and notes parsing the divergent approaches of lower courts. As these cases demonstrate, the chosen analytical approach to "falsity" has profound consequences. It determines both the type of speech that will find protection and the cost of that

---

[5] Fiction may, of course, employ realism as a *style* to achieve verisimiltude, but does so to enhance an illusion of reality, not to describe an acutality. This point is well made by John Barth in his short story "Lost in the Funhouse." Having identified one of the characters as "Magda G_____" who lived on "B_____ Street in the town of D_____, Maryland," the narrator turns to the reader and deadpans:

> Initials, blanks, or both were often substituted for proper names in nineteenth-century fiction to enhance the illusion of reality. It is as if the author felt it necessary to delete the names for reasons of tact or legal liability. Interestingly, as with other aspects of realism, it is an *illusion* that is being enhanced, by purely artificial means.

JOHN BARTH, LOST IN THE FUNHOUSE 69-70 (Bantum Books, 8th prtg. 1978) (originally appearing in THE ATLANTIC MONTHLY, Nov. 1967).

protection, financially for the litigation defendant and "informationally"--in lost (chilled) speech--for society. Though the Supreme Court has not, to this day, explicitly addressed the issue of defamation in fiction, two fairly recent cases, *Hustler Magazine, Inc., v. Falwell*[6] and *Milkovich v. Lorain Journal, Co.*[7] provide, at minimum, a model of analysis. Despite the Court's unwillingness to so label it, Flynt's satire of Falwell is, as a satiric fantasy,[8] essentially fiction. It makes no descriptive truth claims.[9] The mode of analysis the Court applies in *Hustler*, and the Court's more explicit shaping of this "falsity" analysis in *Milkovich*, is instructive. Though the analytical framework, as this Article will argue, fails to adequately account for the distinctions between fiction and non-fiction, it likely represents the limit of protection the Supreme Court is ready to grant fiction.

II. THE FALSITY REQUIREMENT

At common law, the burden of proof fell on the defendant of a libel action to demonstrate that what he published was true.[10] The Supreme Court's constitutionalization of libel law has altered this for all but a small minority of cases. First, in *New York Times Co. v. Sullivan*, the Court declared that the constitutional guarantee of

---

6 485 U.S. 46 (1988).

7 497 U.S. 1 (1990).

8 *See infra* note 108, and accompanying text.

9 *See infra* Part III.B.2, and accompanying text.

10 Unless, of course, he could find protection in an alternative, merely "qualified" or "conditional" privilege, such as "fair and accurate report." Truth, on the other hand, was an absolute privilege and was usually a complete defense to a libel action even if the defendant thought the statement false at time of publication. *See, e.g.*, Craig v. Wright, 76 P.2d 248 (Okla. 1938). *But see*, Hutchins v. Page, 72 A. 689 (N.H. 1909).

"uninhibited, robust, and wide-open" debate on public issues required that a "public official" alleging defamation prove that "the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[11] Public officials, then, as a threshold matter, have the burden of proving the statement false. The burden of proving falsity was soon extended to public figures,[12] and then to non-public persons "intimately involved in the resolution of important public questions or [who], by reason of their fame, shape events in areas of concern to society at large."[13] Finally, it was extended to *all* plaintiffs seeking damages for speech of "public concern."[14] While the Court has found a limit to what it will consider of "public concern,"[15] the lower courts have interpreted the phrase broadly to include such matters as the authenticity of stained glass windows[16] and the efficacy of rain repellent.[17]

---

[11] 376 U.S. 254, 270, 279-80 (1964).

[12] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[13] Gertz v. Robert Welch, Inc., 418 U.S. 323, 336-37 (1974) (quoting *Butts* at 164). The latter category is commonly referred to as a limited-purpose public figure.

[14] Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986). Although *Hepps* extended the burden of proving the falsity of speech of public concern to purely private plaintiffs, Justice O'Connor's majority opinion is limited to media defendants. *Id.* at 779, n.4. There was no majority, however, to support that limitation. *Id.* at 779-80 (Brennan, J., concurring).

[15] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (holding that a confidential credit report to five subscribers, mistakenly reporting a business bankruptcy, is not of "public concern"). The Court offered no standard for judging the question of what constitutes "public concern," saying only that it must be "determined by [the expression's] content, form, and context . . . as revealed by the whole record." *Id.* at 761 (alteration in original) (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983)).

[16] McNally v. Yarnall, 764 F. Supp. 838, 847 (S.D.N.Y. 1991) (generalizing the issue to one of valuation in the art market and the tax implications of art donation).

[17] Unelko Corp. v. Rooney, 912 F.2d 1049, 1056 (9th Cir. 1990), *cert denied*, 499 U.S. 961 (1991) (generalizing the issue to one of product warranties).

The Supreme Court has demarked two types of expression which are, by force of the falsity requirement, constitutionally immune from liability:

> A) statements that do not "contain a provably false factual connotation;"[18] and
>
> B) statements that "cannot 'reasonably [be] interpreted as stating *actual facts*' about an individual."[19]

Before looking at how the Court employs these purportedly distinct categories, whether they can function independently, and what they might mean, it is important to first note their profound procedural meaning: uniquely inexpensive summary judgment for the defendant.

A. *Chill of Litigation Costs*

How inhibiting a shadow libel law casts on would-be speakers can be viewed as a function of the likelihood of suit multiplied by the potential costs of litigating a defense. The plaintiff's burden of proving falsity does, generally, reduce the likelihood of her bringing suit in much the same way as does her burden of proving fault. For the defendant, however, the two exemptions to liability borne of the falsity requirement (set forth in the previous paragraph), is an initial question of law that is far less expensive to litigate. Compared to "disproving" fault, these two grounds for summary judgment require de minimis discovery, and hence minimal time and cost, because the inquiry focuses on the language of the statement, as opposed

---

[18] *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, at 19-20 (1990) (citing Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)).

[19] *Milkovich*, 497 U.S. at 20 (alteration in original) (emphasis added) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. at 50) (emphasis added).

to author's state of mind.[20] The cost disparity has particularly widened since the Supreme Court's holding in *Herbert v. Lando*,[21] that it is reasonable for a plaintiff to conduct extensive discovery of the editorial process on the question of fault, making a defense on that question not only increasingly costly and time consuming, but a far less fertile ground for summary judgment.[22] The availability of inexpensive summary judgment on the basis of the two exceptions borne of the falsity requirement has, accordingly, grown in importance. Additionally, it is more widely available than defending on "fault," for the latter is not available where the plaintiff is a non-public figure.

III. THE SUPREME COURT'S FALSITY DOCTRINE

The two types of statements that the Court has defined as immune to falsity claims are best described by the cases from which they were drawn.

---

[20] *See* Jeffrey E. Thomas, Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CAL. L. REV. 1001, 1028 (1986).

[21] 441 U.S. 153 (1979) (holding that there is no First Amendment privilege inhibiting extensive pretrial discovery of a defamation defendant's editorial process, while recognizing that the mushrooming of litigation costs is commonly traceable to pretrial discovery). See also Cendali, *Of Things to Come--The Actual Impact of Herbert v. Lando and a Proposed National Correction Statute*, 22 HARV. J. ON LEGIS. 441, 465-72 (1985) (examining the chilling effect on investigative journalism from *Herbert*'s boost of discovery costs). *See also*, Massing, *The Libel Chill: How Cold* Is *It Out There*, COLUM. JOURNALISM REV., 31-43 (May-June 1985).

[22] *See* Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979) (holding that actual malice's fault requirement "does not readily lend itself to summary disposition"); HENRY R. KAUFMAN, *Trends in Damage Awards, Insurance Premiums and the Cost of Media Libel Litigation*, in THE COST OF LIBEL 1, 8 (E. Dennis & E. Noam eds., 1989) ("[T]here is little question that inquiry into the subjective state of mind of the journalist or publisher has substantially increased the extent, duration and cost of libel litigation--not to mention its intrusiveness--even when that litigation can be disposed of on pretrial motion.").

A. *Without a "provably false factual connotation"*[23]

For the sixteen years prior to its decision in *Milkovich*, the Supreme Court, and lower state and federal courts, had employed the term "opinion" to distinguish those statements that, unlike statements of "fact," were immune from being found false. This analytical approach grew from the invariably cited authority of Justice Powell's dictum, writing for the Court in *Gertz v. Robert Welch, Inc.*:

> 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.[24]

"Opinion" came to be used as a conclusory label of immunity for statements that, either by the qualified manner in which they were expressed or by the very nature of the assertion made, implicated little more than the author's subjective view. Typical of the former were statements qualified by signals of conjecture such as "I think . . . ."[25] Typical of the latter were statements

---

[23] *See supra*, note 18.

[24] 418 U.S. 323, 339-340 (1974) (finding it constitutionally required that even private plaintiffs prove fault, though not "actual malice's" reckless or intentional state of mind required of public plaintiffs.) This "ha[d] become the opening salvo in all arguments for protection from defamation actions on the ground of opinion" despite the fact that *Gertz* itself in no way raised the question. *Milkovich*, 497 U.S. at 18 (quoting Cianci v. New Times Publishing Co., 639 F.2d 54, 61 (2d Cir. 1980).

[25] *See, e.g.*, Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980) (citing the introductory qualifier "[In] the opinion of Genesis' management" as mitigating the statement's factual nature). *But see Cianci*, 639 F.2d at 64 ("It would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words

either:

a) too "loosely definable" or "variously interpretable" to carry certain meaning;[26] or

b) expressing only personal preference (e.g. like, dislike, admiration, contempt).[27]

In the case of type "a" statements, disproof is frustrated for want of a fixed meaning.[28] In type "b" comments, the only fact susceptible to disproof is whether the statement accurately portrays the author's actual preference. Hence the defendant can only be shown to have lied about himself, not about the plaintiff.

In *Milkovich*, the Supreme Court declared this approach

'I think'.") (quoted, with the significantly broadening substitution of "defamatory conduct" for the term "crime," by Justice Rehnquist's majority opinion in *Milkovich*, 497 U.S. at 19.

[26] Buckley v. Littell, 539 F.2d 882, 895 (2d Cir. 1976), *cert. denied* 429 U.S. 1062 (1977) (declaring the author's description of William F. Buckley as a "fellow traveler" of "fascists" too imprecise in meaning to support a libel claim). For other terms whose impression has been found to render them immune to disproof *see* Fudge v. Penthouse Int'l Ltd., 840 F.2d 1012, 1015-17 (1st Cir.), *cert. denied*, 488 U.S. 821 (1988) (holding the word "amazon," even if taken simply to mean "masculine woman," is too imprecise a term to be provably false); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, *cert. denied*, 434 U.S. 969 (1977) (declaring that in contrast to the term "corrupt," the adjective "incompetent" when applied to a judge was insufficiently imprecise). These have been described as "paradigm" opinions for their merely reflecting "the author's political, moral, or aesthetic views." Ollman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985) (offering as the example of such a paradigm opinion--"Mr. Jones is a despicable politician.").

[27] The Ninth Circuit captured the point by citing the old adage, "You should not say it is not good. You should say you do not like it, and then, you know, you're perfectly safe." Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 n.2 (9th Cir. 1990), *cert. denied* 499 U.S. 961 (1991) (quoting JAMES MACNEIL WHISTLER, WORKMAN QUOTE-A-DAY CALENDER at June 26, 1990). *See also*, Mr. Chow of New York v. Ste. Jour Azur, 759 F.2d 219, 226 (2d Cir. 1985) (finding restaurant reviewer's derision of dishes incapable of defamatory falsehood).

[28] "[W]e do not think plaintiffs are entitled to pick and choose from among the various possible definitions. . . ." *Fudge*, 840 F.2d at 1016.

analytically flawed and a misconstruing of Powell's dictum in *Gertz*. That passage was not "intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'"[29] Rather, the Court asserted, the term "opinion" was meant only in the narrow sense as a synonym for "idea" in the sentence preceding it. Hence, the passage was "merely a reiteration of Justice Holmes' classic 'marketplace of ideas' concept"[30] and encompassed only those statements "that could be corrected by discussion."[31]

The statements at issue in *Milkovich* had been published in a sports column of a daily newspaper[32] under author J. Theodore Diadiun's photo and caption "TD Says." Milkovich, the local high school wrestling coach, had, following a hearing, been censured and his team suspended from the state tournament because of a brawl at a recent meet. Milkovich testified at the hearing, and again in a suit to enjoin the suspension. The author, having witnessed both the fight and the hearing, wrote that the coach had taught his students a "sad" lesson: "If you get in a jam, lie your way out. . . . Anyone who attended the meet . . . knows in his heart that Milkovich . . . lied at the hearing after . . . having given his solemn oath to tell the truth."[33]

Citing *Gertz*, the trial court granted the defendants summary judgment on the grounds that the column was

---

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

30 *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--that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .")).

31 Id. (quoting *Cianci*, at 62 n.10). Implicitly, then, the Court is asserting that false *facts* are not "correctable," but fails to explain what it is that makes them more resistent to counterstatements and proofs. The Court makes no effort to show that the difficulties inherent in proving a negative are any less present in countering statements of opinion than statements of fact.

32 *The News-Herald*, circulating in Lake County, Ohio.

33 *See Milkovich*, 497 U.S. at 4-5.

constitutionally protected opinion.[34] The Ohio Supreme Court ultimately affirmed,[35] analyzing the statements under the "test" that dominated the lower courts prior to *Milkovich*, developed, en banc, by the D.C. Circuit in *Ollman v. Evans*.[36] It disaggregates the "totality of the circumstances"[37] into four parts, considering: 1) the precision of meaning carried by the allegedly defamatory words themselves;[38] 2) the degree to which the statements are verifiable;[39] 3) the full textual context of the statement;[40] and 4) the broader social context.[41] This final factor is sensitive to a reasonable reader's discriminating responses to distinct genres of writing: editorial versus reportage, lampoon versus research monograph.[42]

Though the Ohio Supreme Court found that factors one and two favored treating Diadiun's statements as factual assertions,[43] factors three and four "trumped"[44] them to render the statements protected opinion. The court cited, per factor three, the column's caption "TD Says"[45] as signaling to "even the most gullible reader" that the article was mere "opinion."[46] Considering factor four, the court referred to the sports page as "a traditional haven for cajoling, invective, and hyperbole."[47]

---

34 An unreported opinion summarized at *Milkovich*, 497 U.S. 1, 8.

35 Scott v. The News-Herald, 25 Ohio St. 3rd 243 (1986).

36 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

37 *Id.* at 979.

38 *Id.* at 979-80.

39 *Id.* at 979, 981.

40 *Id.* at 979, 982.

41 *Id.* at 979, 983.

42 *Id.* at 983-84.

43 *Scott*, Ohio St. 3d at 251.

44 This term, ringing of disapproval, is *Milkovich*'s. 497 U.S. at 9.

45 *Scott*, 45 Ohio St. 3d at 252.

46 *Id.*

47 *Id.* at 253.

Without specifically addressing either of these last two considerations, the Supreme Court implicitly disapproved of both by refusing to broaden the scope of its contextual considerations any wider than "the general tenor of the article."[48] In stark contrast to the dissent,[49] it gave absolutely no effect to the author's op-ed type self-labeling ("TD says") or to any genre signaling (sports columns).[50] The obvious implication of this approach for works of self-proclaimed fiction is explored below.

Regarding cautionary or conjectural language generally, the Court explicitly denied it any weight in construing falsity. Its analysis on this point constitutes, in fact, *Milkovich*'s chief semantic and analytical instruction. Semantically, the Court made clear the term "opinion" has no constitutional import.[51]

---

[48] *Milkovich*, 497 U.S. at 21.

[49] Justice Brennan, joined by Justice Marshall in dissent, gave explicit weight to the genre of speech as it affects a reasonable reader's expectations: "Certain formats-editorials, reviews, political cartoons, letters to the editor-signal to the reader to anticipate a departure from what is actually known by the author as fact." *Id.* at 32.

[50] In Immuno v. Moor-Jankowski, 497 U.S. 1021 (1990), the Supreme Court vacated a state appellate court's granting defendants summary judgment, and remanded for further consideration in light of *Milkovich*. On remand, the New York Court of Appeals read *Milkovich* to foreclose consideration of *Ollman* factors three and four. Immuno v. Moor-Jankowski, 77 N.Y.2d 235, 244-45 (1991), *cert. denied* 500 U.S. 954 (1991) ("The Supreme Court's failure to mention either point becomes particularly telling when its writing is laid against the State court opinion and Justice Brennan's dissent."). The court felt obliged to resort to *state* constitutional law in order to consider the mitigating fact that the statements at issue were in a letter to the editor. *But see* Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 729 n.9 (1st Cir. 1992) (weighing the fact that statements appeared in a theater column and asserting "[w]e do not understand [*Milkovich*] to have rejected the relevance of format, but simply to have discounted it in the circumstances of that case").

[51] After *Milkovich*, "the threshold question in defamation suits is [no longer] whether a statement 'might be labeled 'opinion,'' but rather whether a reasonable factfinder could conclude that the statement 'implies an assertion of objective fact.'" Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991) (affirming the district court's grant of summary judgment, and finding

Analytically, the labels "opinion" and "fact" effect "an artificial dichotomy,"[52] because the former often "impl[ies] an assertion of objective fact."[53] By example, the Court offers the statement "In my opinion John Jones is a liar," as implying the speaker knows facts which make the belief reasonable.[54] The addition of qualifying, conditional language does not diminish the factual nature of the underlying assertion.[55]

Applying this analytical approach, the Court gave no mitigating effect to the column's conjectural qualifiers, such as "seemed," "probably," or "apparently," in its finding that the statements at issue could reasonably be read to imply that

---

that the comment of the defendant, "60 Minutes" commentator Andy Rooney, that plaintiff's product "didn't work" was protected as "opinion"). One commentator has gone so far as to characterize *Milkovich* as affecting *solely* a semantic change. EDWARD M. SUSSMAN, MILKOVICH REVISITED: "SAVING" THE OPINION PRIVILEGE, 41 DUKE L.J. 415, 417 (1992).

[52] *Milkovich*, 497 U.S. at 19. *See*, White v. Fraternal Order of Police, 909 F.2d 512, 522 (D.C. Cir. 1990) ("[T]he [*Milkovich*] Court rejected the practice, developed by lower courts, of applying a strict dichotomy between assertions of fact and assertions of opinion") (citing the practice in *Ollman*, 750 F.2d 970).

[53] *Milkovich*, 497 U.S. at 18. *See White*, 909 F.2d at 523 ("A defamation by implication . . . is not treated any differently than a direct defamation once the publication has been found capable of a defamatory meaning").

[54] *Milkovich*, 497 U.S. at 18. The Court here takes this a step further than lower courts which had followed the Restatement Second of Torts on this point. Where the Restatement found the statement actionable unless it fully stated the fact on which it was based, the Milkovich Court asserts that, even if the speaker's assessment of accurate facts is "erroneous," the speaker is still liable.

[55] "Simply couching such statements in terms of opinion does not dispel these implications" or mitigate their potential "damage to reputation." *Id.* at 19. Contrast the claim in *Ollman*, which Brennan cites in his *Milkovich* dissent, *Id.* at 24, that "when the reasonable reader encounters cautionary language, he tends to 'discount that which follows.'" 750 F.2d 970, 983 (quoting Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1360 (Colo. 1983)). Unlike Justice Brennan, however, the *Ollman* majority allows that such discounting can be undone by the nature of the assertion being qualified: "When a statement is as 'factually laden' as the accusation of a crime,. . .cautionary languages is by and large unavailing to dilute the statement's factual implications." *Ollman*, 750 F.2d at 983.

Milkovich committed perjury.[56]

Isolating the factual assertion a statement carries is but the first step of the two step falsity analysis *Milkovich* outlines.[57] The court must then look to the nature of that assertion to determine if it is "susceptible of being proven true or false."[58] Where, as in *Milkovich*, a court can characterize the assertion as charging a crime--here perjury--the answer is preordained. Perjury, like all crimes, comes with definitional criteria ready made by the state and familiar to the court. Hence, *Milkovich* wasted little time concluding that perjury was sufficiently disprovable.[59] Unfortunately, the Court gives no guidance beyond contrasting the "objectively verifiable event" resting on a "core of objective evidence" at issue in this case, with a merely "subjective assertion."[60] The most significant aspect of the Court's analysis here, given this Article's concerns, is that the Court seems to think this second step is inapplicable to an entire category of speech which it

---

[56] *Milkovich*, 497 U.S. at 21. In contrast, Justice Brennan, in dissent, while agreeing that there was no such thing as an "opinion privilege" per se, found the author's qualifiers clearly signaled the statements as mere conjecture. *Id.* at 29-30.

[57] It is a step that can been seen as merely an elaboration on the common law doctrine that requires the court to make, as a question of law, the threshold determination of whether the statement at issue can reasonably be read to carry the meaning which the plaintiff ascribes to it. (If so, then it is for the trier of fact to determine if it does indeed carry that meaning and, if it finds it does, whether that meaning is defamatory.)

[58] Id. at 21. This requirement emanates simply from the plaintiff's burden of proving falsity. *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986). This is, in essence, the second *Ollman* factor: verifiability.

[59] *Milkovich*, 497 U.S. at 21-22.

[60] The court offers as an example of such a statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teaching of Marx and Lenin." *Id.* at 2706. Presumably, the insufficiently disprovable assertion the Court is referring to is *not* whether the Mayor accepts the teachings of Marx and Lenin, for which past, recorded, public statements could counter, but whether this constitutes "abysmal ignorance." *See* MARC A. FRANKLIN & DAVID A. ANDERSON, MASS MEDIA LAW (4th edition, 1990), (unpublished "Supplemental Materials" at 27 n.2 (1992)).

characterizes as not stating "actual facts."[61]

B. *Not "reasonably interpreted as stating actual facts"*[62]

In *Milkovich*, the Court cites *Greenbelt Cooperative Publishing Assoc. v. Bresler*,[63] *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*,[64] and *Hustler Magazine Inc. v. Falwell*[65] as comprising a "line of cases"[66] providing constitutional protection for a "type of speech"[67] that cannot "reasonably [be] interpreted as stating actual facts."[68] The Court goes on to identify such speech as "loose, figurative or hyperbolic language which. . . negate[s] the impression that the writer was seriously" asserting the literal meaning of her statement.[69] At first blush, this seems sensible enough. A plaintiff cannot satisfy his burden of proving falsity by disproving an assertion which no reasonable reader took the statement to be making in the first place.[70] There are, however, two fundamental problems with this bit of doctrine:

---

61 *Milkovich*, 497 U.S. at 20 (quoting *Falwell*, 485 U.S. at 50) (emphasis added).

62 *Id.*

63 398 U.S. 6 (1970).

64 418 U.S. 264 (1974).

65 485 U.S. 46 (1988).

66 *Milkovich*, 497 U.S. at 20.

67 *Id.* at 16 ("We have also recognized constitutional limits on the *type* of speech which may be the subject of state defamation actions.")

68 *Id.* at 20 (alteration in original) (quoting *Falwell*, 485 U.S. at 50).

69 *Id.* at 21 (finding that sports column's assertion, "Anyone who attended the [wrestling] meet . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth," was not such a statement). *Id.* at 5.

70 This can be seen as merely the constitutionalization of the widely accepted common law doctrine that it is a "question of *law*" whether the statement at issue can be reasonably read to bear the meaning which the libel plaintiff alleges. If so, then it goes to the jury to decide if the statement does indeed bear that meaning and, if so, whether that meaning is defamatory.

1) it conflates non-literal and non-factual, thereby contradicting the very logic of *Milkovich* itself; and 2) by its very breadth, it fails to distinguish between two discrete types of "non-literal" speech, hyperbole and fiction, the latter of which cannot be protected by the First Amendment rationale the Court articulates.

1. Non-literal v. Non-factual: The Logic of *Milkovich*

Milkovich can be said to stand for the proposition that the particular language used by an author will not blind the court to implicit assertions of fact lurking within it. The author will be liable for the meaning a reader can reasonably draw from the work, where that meaning is of a nature susceptible to disproof.

Inexplicably, however, the Court appears quite willing to so blind itself when that language is "rhetorical hyperbole."[71] Here the Court, having declared it unreasonable to take the statement at issue literally, fails to subject what meaning it *does* reasonably convey to the second analytical step--judging its susceptibility to disproof.

In *Bresler*, the defendant had accurately reported that citizens at a heated city council meeting had referred to the plaintiff's position in a pending land negotiation as "blackmail."[72] The Court found that, given the article's full portrayal of events, it was "impossible" for a reader to understand the term "blackmail" as anything "more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable."[73] The thrust of the opinion makes clear, however, that the Court locates this meaning only to

---

[71] *Bressler*, 398 U.S. at 13-14.

[72] *Id.* at 12-14. The plaintiff was seeking zoning variances as a quid pro quo for agreeing to sell the city other tracts he owned.

[73] *Id.* at 14.

demonstrate what "blackmail" does *not* connote: the commission of a crime. This is indeed the point to which it keeps returning and on which it finally concludes the discussion.[74] By contrast, the Court finds it unnecessary to reach the question of whether or not "extremely unreasonable" negotiator or some sharper variant, is itself either non-factual or non-defamatory.[75]

In *Letter Carriers*, the conflation of non-literal and non-factual is clearer still. The defendant, a union publication, had referred to plaintiffs as "scabs" and followed with Jack London's oft quoted definition of a scab as "a traitor to his God, his country, his family and his class."[76] Citing *Bresler*, the Court characterized the quote as "merely rhetorical hyperbole, a lusty and imaginative expression of . . . contempt" that no reader could possibly take as charging the criminal offense of treason.[77] The plaintiffs, however, did not simply claim the statement literally charged them with being traitors, but, in the alternative, that it could be more generally read to characterize them as having "rotten principles" and lacking "character."[78] The Court, however, found it necessary only to discredit the literal charge of a crime. It simply dismisses any other connotations as expressing mere "opinion," which it

---

74 *Id.* ("Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.").

75 *Id.* Though one might argue that the meaning is implicitly unsusceptible disproof, Justice Brennan, making a different point, translates "blackmail" to have meant Bresler was "manipulative and extremely unreasonable." *Milkovich*, 497 U.S. at 25 (Brennan, J., dissenting) (discussing *Bressler*). The term, in this context, might just as reasonably be taken to imply Bresler was greedily taking advantage of the City.

76 *Letter Carriers*, 418 U.S. at 268.

77 *Id.* at 285-86.

78 *Id.* at 283. Indeed, the Court has since described the quote as asserting that the plaintiffs' actions were "reprehensible and destructive to the social fabric. . . ." *Milkovich*, 497 U.S. at 26 (Brennan, J., dissenting) (discussing *Bressler*). The question then, per *Milkovich*'s analysis, should be whether *this* meaning is sufficiently factual and susceptible to disproof.

declares privileged--employing the very reading of Justice Powell's dictum in *Gertz* that *Milkovich* explicitly disapproves![79]

In *Falwell*, the Court most clearly demonstrates its treatment of "rhetorical hyperbole" as per se non-factual. Here, it doesn't even bother to derive what defendants' statements do reasonably connote. At issue was a *Hustler* magazine ad parody which "quoted" Jerry Falwell describing how he lost his virginity to his mother in an outhouse and has had intercourse with her since.[80] Without analyzing what meaning, if any, a reader *could* reasonably draw from the parody, the Court simply quotes the jury's finding that the parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated."[81] This, the Court takes as dispositive of the question of falsity.

Given that *Milkovich* found it "destructive of the law of libel if a writer could escape liability . . . simply by using" qualifying phrases like "I think,"[82] it is inexplicable that the Court finds it any less "destructive" to grant immunity to defamatory meaning when it is couched in rhetorical hyperbole. Playing on Chief Justice Rehnquist's example in *Milkovich*,[83] surely the statement "John Jones is the biggest liar in the world," just as clearly contains the assertion that "John Jones is

---

[79] *Letter Carriers* 418 U.S. at 284 (quoting *Gertz*, 418 U.S. at 339-40). *See supra* note 24 and accompanying text.

[80] *Falwell*, 485 U.S. at 46.

[81] *Falwell*, 485 U.S. at 57 (alteration in original) (quoting Appendix to Petition for Certiorari at C1).

[82] *Milkovich*, 497 U.S. at 19 (quoting the "aptly stated" observation of Judge Friendly in Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980). *See supra* notes 24-25.

[83] *Milkovich*, 497 U.S. at 26.

a liar."[84] Similarly, in *Falwell*, if the parody can be reasonably read to assert that "Jerry Falwell is a hypocrite"[85] the Court should then ask whether this assertion is sufficiently factual to be capable of being shown to be false.[86] As one commentator put it,

> The concept of rhetorical hyperbole requires us to recognize that even if traditions of satiric exaggeration do not permit us to read the assertions of the *Hustler* parody literally to say that Falwell actually had intercourse with his mother in an outhouse, these assertions can nevertheless be understood to convey a different

---

[84] As then Judge Scalia complained in his *Ollman* dissent,

> [T]o say, as the concurrence [Judge Bork] does, that hyperbole excuses not merely the exaggeration but *the fact sought to be vividly conveyed by the exaggeration* is to mistake a freedom to enliven discourse for a freedom to destroy reputation. The libel that "Smith is an incompetent carpenter" is not converted into harmless and nonactionable word-play by merely embellishing it into the statement that "Smith is the worst carpenter this side of the Mississippi."

750 F.2d at 1036.

[85] This is what respondent Falwell took the brief of the petitioner, Hustler, to be asserting. Flynt himself, in a variation on this, contended that the parody was intended to mean "that Falwell's message is b.s. . . . [and] that his teachings are nonsense." Brief for Petitioners, *Falwell*, at 20.

[86] Given that the moral outlines of Falwell's teachings are fairly clear, the implied meaning of "hypocrite" in this context might well carry a sufficiently factual connotation. In a context offering only a vague referent, it might not. *See, e.g.*, Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977) ("hypocrite" too vague to be actionable when referring to a generalized personality trait). An illustration of the importance of having a referent to establish the concreteness of meaning can be seen by contrasting the vividness of applying the term "incompetent" to a carpenter (*see supra* note 83) with the same term as applied to a profession with less objectively testable skills (e.g. a judge--*see* Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, *cert. denied*, 434 U.S. 969 (1977) (finding the term "incompetent" too vague to be actionable as applied to a judge).

> message. . . . [T]he precise question would then be whether *this* message is [actionable].[87]

But can it really be that *Bresler*, *Letter Carriers*, and *Falwell* stand for the proposition that "rhetorical hyperbole" is immune from liability whether or not it can be reasonably read to implicitly convey an assertion of fact?[88] This misreading and its anomalous result stems from the gloss *Milkovich* puts on these three cases in asserting they define a "line." Doing so serves the Court in two ways. It recasts *Bresler* and *Letter Carriers*, which would otherwise have to be repudiated for

---

[87] Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 652 (1990). Such was the approach in the pre-*Hustler*, appellate court decision of Keller v. Miami Herald Publishing Co., 778 F.2d 711 (11th Cir. 1985). In *Keller*, defendant's cartoon depicted gangsters, standing within the crumbling walls of the nursing home which plaintiff owned, holding bags full of money and talking of how how their "Boss" can still make money by reopening the place as a haunted house. The court did not find it dispositive that the cartoon could not be read as a literal depiction of physical squalor or illegal activity. Rather, having found its only reasonable meaning to be that plaintiff's profiting on the elderly was objectionable, it went on to ask, first, whether that meaning was capable of being defamatory, *id.* at 716, and then, whether it was susceptible to disproof. *Id.* at 717 (concluding that no, "[t]he statement was not capable of verification; ordinarily, an individual's morality or immorality is not subject to empirical proof").

[88] *See*, for example, Hannon v. Timberline Publishing, Inc., 1991 WL 237874 *2 (Colo. Dist. Ct. 1991) (protecting defamatory "fictional" story within an otherwise factual news article).

> Contrary to plaintiff's position, this type of speech is protected *even if it is apparently based on undisclosed facts* . . . . In *Falwell*, the plaintiff was portrayed as having sex with his mother in an outhouse. This appears ridiculous on its face but there could be an implied assertion that the author knows of sexual improprieties by the plaintiff. However, this parody was held to be protected speech."

Id. at *2 (emphasis added). *See also* Flip Side, Inc. v. Chicago Tribune Co., 206 Ill. App. 3d 641, 654, (1990) (citing *Falwell* and *Milkovich* in finding comic strip portrayal precluded finding factual falsity).

resting on the very "opinion privilege" *Milkovich* discredits.[89] It also allows the Court to avoid having to make literary judgments as to what genres certain speech belongs and what "falsity" means in those genres. To this end, it inaccurately treats the *Hustler* parody as "rhetorical hyperbole" when it is, in fact, no such thing.

2. Conflating Hyperbole with Fiction

Hyperbole is "overstatement" and, by definition, contains within it a kernel assertion--that which is being overstated--which can be put plainly. It is this core assertion that the Court uncovered and discarded without analysis in *Bresler*.[90] Tellingly, the *Falwell* Court fails to unveil any such core meaning. Contrary to its grouping by *Milkovich*, *Falwell* cites neither *Bresler* nor *Letter Carriers* as support or authority. Instead, it simply cites the *jury* finding that the parody is not "reasonably interpreted as stating actual facts."[91] *Milkovich* adopts this definition as expressing what has been a constitutional question of law for the Court, since *Bresler*.[92] Oddly, however, the *Falwell* Court makes no finding on this question; the definition is merely a verbatim lift from the jury finding.[93] The Court cites the jury finding and then, as if it

---

89 *See supra* note 51 and accompanying text.

90 *See supra* notes 71-74 and accompanying text.

91 *Falwell*, 485 U.S. at 57 (White, J., concurring).

92 *Milkovich*, 497 U.S. at 7 ("[In *Bresler* we] recognized constitutional limits on the *type* of speech which may be the subject of state defamation actions.") *See Bresler*, 398 U.S. at 13 ("[W]e hold that imposition of liability on such a basis was constitutionally impermissible--that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported . . . ."); *see also* Mr. Chow of New York, 759 F.2d at 224; *Ollman*, 750 F.2d at 1033.

93 This jury finding was in response to the first interrogatory of the Special Verdict Form. Joint Appendix on Appeal at 540 (No. 86-1278).

were a question of *fact*, and not, as it actually is, a question of law, concludes by saying it must defer to the jury finding "in accordance with our custom."[94] This slight of hand allows the Court to avoid defining what kernel assertion the parody can be reasonably read to be making. Such a desire is understandable, because there is no kernel assertion. This is what distinguishes hyperbole from fiction.[95]

Hyperbole is the use of exaggeration to amplify a descriptive truth claim.[96] When hyperbole moves from description to demonstration, it becomes "caricature."[97] At the core of both lie a claim of descriptive truth.[98] Mislabeling the *Hustler* piece "caricature,"[99] the Court defines the genre as

---

[94] *Falwell*, 485 U.S. at 57 (White, J., concurring). The Court tries to finesse this by referring to the Court of Appeals' interpretation of the jury finding. The Court of Appeals, however, made no independent finding on this point, but merely deferred to the jury finding.

[95] "Fiction" here is meant not in the narrow sense of the novel, but as that which can be distinguished from certain discrete types of "non-fiction" along a few, limited axes germane to libel law. This Article in no way attempts a comprehensive or stable definition of "fiction." Such definitions offered by law review articles on libel have left this author unsatisfied and duly warned. *See, e.g.*, Daniel Smirlock, Note: *"Clear and Convincing" Libel: Fiction and the Law of Defamation*, 92 YALE L. J. 520, 535-36 (1983) (defining fiction as synecdoche--a "slice of life . . . that reflects on reality generally by presenting one aspect of reality."); Isidore Silver, *Libel the 'Higher Truths' of Art, and the First Amendment*, 126 U. PA. L. REV. 1065, 1069 (fiction as author's subjective view, author's higher truth).

[96] Often, this "exaggeration" also communicates the author's personal preference. The verbal excess at issue in *Letter Carriers*, see text accompanying notes 75-78, for instance, is reasonably read as both "Your actions are contemptible," and "I hold you in contempt." The former is unactionable for being too imprecise for disproof; the latter is merely a preference expression.

[97] It is hyperbole to describe an actor in a PBS historical drama as having less life than the dead figure he portrays. It is caricature to demonstrate this by reenacting a scene by replacing him with a George Segal sculpture.

[98] In the previous note's example, the descriptive truth claim would be "His acting was lifeless."

[99] *Falwell*, 485 U.S. at 55.

"exaggerating features or mannerisms for satirical effect."[100] The political cartoons cited by the Court illustrate the difference between caricature and the *Hustler* piece.[101] At the core of the cartoonist's exaggeration of Lincoln's height to absurd proportion[102] lies the descriptive truth claim "Lincoln is very tall." At the core of one of Thomas Nast's typical renderings of "Boss" Tweed and the Tweed Ring, one depicting them as vultures with the bones of New York taxpayers littering their roost, lies the truth claim that they are in fact rapacious. In a more familiar example not cited by the Court, Gary Trudeau's rendering of George Bush as forever invisible, contains the descriptive claim that Bush lacks substance.

By contrast, what quality of Falwell's can the *Hustler* piece be said to be exaggerating? What reasonable inference lies at its core? Is it reasonable to read it as asserting, perhaps, that Falwell had intercourse with his mother, but only once and not in an outhouse? Or, more modestly, that he has fondled her?[103] Or, more modestly still, that he is racked with Freudian fantasies?

All of these are unsatisfactory descriptions. So are the

---

[100] *Id.* at 53 (quoting Webster's New Unabridged Twentieth Century Dictionary of the English Language 275 (2d ed. 1979)).

[101] This is the distinction the Court senses, but can't quite put its finger on when it remarks:

> There is no doubt that the caricature . . . in *Hustler* is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative "outrageous" does not supply one.

Id. at 55.

[102] *Id.* at 54.

[103] *See* Hannon v. Timberline Publishing, Inc., 1991 WL 237874 *2 (Colo. Dist. Ct. 1991) (citing *Falwell* as having been granted immunity despite the *Hustler* piece being interpretable as asserting "sexual improprieties").

ones that Flynt himself has offered, because the piece contains no underlying truth claim.[104] This is not to say it is gratuitous. Rather, the piece employs a literary technique distinct from hyperbole and caricature. Whatever comic effect *Hustler* achieves, it achieves not through exaggeration, but through *incongruity*. Such would be operating in a portrayal of Lincoln as a dwarf, "Boss" Tweed as an ascetic, or George Bush as standing on principle.[105] The humor of comic incongruity is relatively witless and quickly dissipates, as the *Hustler* piece demonstrates. But its turning reality on its head is the key to its literary usefulness. In short, it marks the literature of disorientation known as "satiric fantasy." This is where we can locate the *Hustler* piece, and the fiction at issue in the line of cases in which *Falwell* truly belongs.[106]

The absence of a moral point of view, like the one so palpable in Nast's cartoon, is fundamental to satiric fantasy. While other forms of satire may evince a moral standard,[107] "satiric fantasy" creates and revels in a sensual world of riotous chaos. It extinguishes all social conventions and distinctions. In identifying how this genre functions, the critic Northrope Frye observed that the preservation of social conventions

---

[104] The *Hustler* piece clearly invites the reader to enjoy an imagined picture of Falwell as a grotesque hypocrite. But while this invitation may be most quickly accepted by readers suspecting Falwell of actual hypocrisy, the piece cannot be fairly read to assert such an actuality. Of course, the grotesque quality of the piece might be fairly read to contain a clear assertion of the author's contempt for the subject; *see supra* note 27 and accompanying text regarding statements of personal preference.

[105] This final incongruity is found in the unintentionally comic effect of much political advertising.

[106] While the brevity of the *Hustler* piece makes it a rather truncated example of the genre, classifying it as such is consistent with this Article's use of the term "fiction" as embracing both narrative and non-narrative works.

[107] "The satiric commonly takes a high moral line." Northrope Frye, *Anatomy of Criticism: Four Essays* 235 (1957).

> . . . demands that the dignity of some men and the beauty of some women should be thought of apart from excretion, copulation, and similar embarrassments. [This genre's] [c]onstant reference to these latter [embarrassments] brings us down to a bodily democracy . . . .[108]

Like the works of Rabelais and Petronius's *Sytiricon*, Flynt's magazine strips humanity of its social mores to reveal a riot of sensual appetites.[109] By including in its portrayals those who, like Falwell, most strongly symbolize those mores, it can achieve its effect most economically.[110] This is also true in the financial sense--drawings like the Falwell satire having lower production costs than the magazine's more common method of: photographing the common man and woman, forever nude and humping.

"Satirical fantasy's" only necessary relation to "actual facts" is that it depends upon and assumes the reader's awareness of the common perception of descriptive truth. In this case, Flynt assumes the reader is familiar with Falwell's preachings and personal moral posture--his image as physically and morally well-scrubbed--a Disney update of Father Caughlin.

---

[108] *Id.* at 234 (labeling this as the "third phase of satire, the satire of the high norm). For the protective First Amendment rationale that might value speech portraying this "bodily democracy," *see infra* notes 160-163 and accompanying text.

[109] The roots of satiric fantasy are found in the Greek satyr play and the bacchanal. See OSCAR G. BROCKETT, HISTORY OF THE THEATRE 16-18 (Allyn & Bacon 1968).

[110] See also *Hustler*'s similar portrayal of Andrea Dworkin which the court explicitly labels a "satiric fantasy," Andrea Dworkin v. Hustler Magazine, 668 F. Supp. 1408, 1416 (C.D. Cal. 1987) *aff'd* 817 F.2d 1188 (9th Cir. 1989), *cert. denied*, 493 U.S. 812 (1989), and Penthouse Magazine's satiric fantasy, turning the Miss America Pageant's celebration of wholesomeness into a bacchanal, Pring v. Penthouse Int'l Ltd., 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983). Both cases are discussed below, beginning at note 117.

But like fiction generally, it does not itself make truth claims.

While it is clearly on this score that fiction should find its greatest claim to immunity from libel, it is, ironically, also its greatest vulnerability to it. That vulnerability comes on two flanks. First, the absence of descriptive truth can be equated with "intentional falsity," thereby making all authors of fiction guilty, per se, of both "falsity" and "actual malice." Second, it makes rationalizing First Amendment protection more elusive. The Court's analysis in *Falwell* and *Milkovich* can be seen as exposing the limits of constitutional protection that the Court is ready to afford fiction on both of these fronts. This is best demonstrated by locating the line of cases into which *Falwell* more properly falls.

IV. FICTION AND THE FIRST AMENDMENT

Falwell does not grant constitutional immunity from libel to self-labeled 'fictional' works. Just as *Milkovich* ignored all cues exterior to the text itself,[111] the Court here gives no weight to *Hustler*'s disclaimer at the bottom of the page ("ad parody--not to be taken seriously") or to its listing the piece in the table of contents as "Fiction: Ad and Personality Parody." Rather, *Falwell* stands for the proposition that you can portray a public plaintiff as engaging in defamatory acts so long as the acts themselves or the manner of portrayal makes them clearly unbelievable. Its approach constitutionalizes the Tenth Circuit's analysis in *Pring v. Penthouse*.[112]

In *Pring*, the court reversed a twenty-six million dollar jury verdict against Penthouse Magazine for a satiric fantasy in which a recent Miss Wyoming could be identified. The story

---

111 *See supra* notes 48-56 and accompanying text.

112 695 F.2d at 438.

involved a similarly baton twirling Miss Wyoming who performs fellatio on her baton, and then upon her coach, causing all to levitate. She performs a final fellatio/levitation on the Miss America contest stage, bringing the pageant to a halt and the sight of her coach, lifting off the stage, to a national television audience.[113]

Citing its description of something "physically impossible in an impossible setting," the appellate court found the story was "obviously a complete fantasy."[114] The court made its reasoning clear:

> The test is not whether the story is or is not characterized as "fiction," "humor," or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated.[115]

In *Pring*, the approach of *Falwell* and *Milkovich* is made explicit. Two principles shape the contour of the protection this approach offers.

First, not only will the disclaimer "fiction" not grant the author license to defame, the court will refuse to give it any weight at all in assessing the reasonable reader's experience of the work. The burden must be carried by the writing itself. As *Milkovich* put it, either the "language" or "general tenor" of the work must "negate the impression that the writer was seriously maintaining petitioner committed" the acts depicted.[116]

Second, just as *Falwell,* as echoed more explicitly by *Milkovich*, finds the *Hustler* piece devoid of *any* believable

---

113 *Id.*

114 *Id.* at 443.

115 *Id.* at 442.

116 *Milkovich*, 497 U.S. at 21.

factual assertion, the *Pring* majority refuses to join its dissent's disaggregation of the work. "Levitation," the dissent parses, is fiction, but "[f]ellatio is not."[117] As the quoted passage above makes clear, the majority requires that the "charged portions" be read in "context."[118] *Milkovich* affirms this approach, finding that even where isolated statements are written in language which fails to negate serious factual inference, that inference can be negated by the work's "general tenor."[119]

If we are willing, then, to narrowly define "fiction," as that which by verbal style ("language") and/or content ("general tenor") defeats all factual inference,[120] we can blithly conclude that "fiction" will not be equated with the "falsity" *Hepps* constitutionally requires for libel.[121] Its intentional, descriptive "non-truth" will be distinguished from "actual malice." This was the rational with which the Southern District of New York court employed the term "fiction" in *Dworkin v. Hustler Magazine*.[122] In what the court denoted a "satiric fantasy,"[123] *Hustler* had portrayed the feminist Andrea Dworkin throwing aside an anti-pornography picketing placard to join in a violent sexual assault and orgy on the public

---

117 *Pring*, 695 F.2d at 443 (Breitenstein, J, dissenting).

118 *Id.* at 442.

119 497 U.S. at 21.

120 Such a definition converts the absence of "making truth claims," which this Article employed as *sufficient* to identify the Falwell piece as fiction, to a *necessary* condition. In short, it constructs a limiting principle. To use the terms fiction and fact less dichotomously, the proposition would be phrased as whether a work is sufficiently fictional to render inferences of fact unreasonable.

121 Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986). *See supra* note 19 and accompanying text. To use the terms fiction and fact less dichotomously, the question could be phrased: "What will make the work 'insufficiently fictional.'" Avoiding the terms entirely, the distinction is most clearly drawn by asking, as this Article has attempted, whether the work can be read to be making descriptive truth claims.

122 668 F. Supp. at 1408.

123 *Id.* at 1416.

sidewalk. The court found that while the portrayal was, of course, "untrue," it was only so "in the sense that it was fictional."[124] This, the court held, precluded Dworkin from showing falsity or actual malice and granted *Hustler* summary judgment.[125]

The scope of protection this formulation of "falsity" offers, however, is wildly malleable. It is dependent on the fundamental question *Milkovich* and *Hustler* avoided: What elements of style or content can an author rely on to negate factual inference? The only textual clue is *Milkovich*'s cryptic reference to "loose, figurative, or hyperbolic" language.[126] The *Falwell* piece, however, is clearly not an example of figurative language. Rather, its language is declarative and concrete--not at all figurative in the literary sense.[127] Similarly, the language in *Pring* and *Dworkin* is declarative and not figurative. What immunizes all three is not their prose, but, rather, that the events they describe are so incongruous as to be unbelievable.

Must the "general tenor" of a work rise to this level of

---

[124] *Id.* at 1419, (citing Guglielmi v. Spelling Goldberg Prod., 25 Cal. 3d 860, 871 (1979)). *See also* Marc A. Franklin, *Fiction, Libel, and the First Amendment,* 51 BROOK. L. REV. 269, 273 (1985):

> Language that does not purport to be reportorial is not automatically to be deprecated as "false." Language may properly be called false, and misleading, if it induces reasonable readers to believe that it is true when in fact it is not true. The essence of the matter, however, is misrepresentation, not falsity."

The term "misrepresentation" here injects an added assumption, however, that "fault" can automatically be attributed to the writer. Whether or not a reader's reasonable inference of factual portrayal satisfies, per se, the fault requirement of *Gertz* (negligence) or "actual malice" (intentional or reckless disregard), is a severable question.

[125] 668 F. Supp. at 1418, 1419.

[126] 497 U.S. at 21.

[127] *Hustler*'s claim that the piece amounted to no more than assaulting Falwell with the figurative epithet "motherfucker," even if persuasive, does nothing to recast the prose style actually employed. Brief for Petitioners, *Falwell* (No. 86-1278).

fantasy in order to qualify for constitutional protection? The Supreme Court has failed to provide any clues as to what more subtle literary forms it might credit. The Court's eagerness to avoid playing the role of literary critic and determining appropriate genre classifications is understandable.[128] But the present formulation offers so little guidance to lower courts that they continue, unsurprisingly, to arrive at wildly inconsistent results.[129]

The unpredictability sown here is inevitably chilling.[130] As the Court itself warned, clarity "in the area of free speech [is particularly essential] for precisely the same reason that the actual malice standard is itself necessary. Uncertainty as to the scope of the constitutional protection can only dissuade protected speech--the more elusive the standard, the less protection it affords."[131]

The uncertainty bred of the broad discretion left to lower

---

[128] For an explicit renouncing of this role, *see* Mitchell v. Globe Int'l Publishing, 773 F. Supp. 1235, 1239 (W.D. Ark. 1991) ("Nor do we believe the court should act as a literary critic and determine to what genre a particular publication belongs").

[129] *Cf.* Welch v. Penguin Books USA, Inc., 1991 N.Y. Misc. LEXIS 225, 9-10 (Sup. Ct. NY, 1991) (granting summary judgment to publisher of naturalistic novel, as plaintiff unable to "overcome the presumption of invention" by showing that a reader would be "totally convinced that the book in *all* its aspects [relating to the plaintiff] is not fiction at all") (emphasis added) *with* Ford v. Rowland, 562 So. 2d 731, 734-35 (Fla. Dist. Ct. App. 1990) (vacating summary judgment for poem which, despite being chiefly "fiction and fantasy" (e.g., describing plaintiff as a witch on a broomstick riding through the night), contained one description, "hooker," susceptible to factual inference: "If a publication reasonably asserts a factual charge which is defamatory, even in a humorous or satirical vein, we are unaware of any first amendment protection") (distinguishing *Falwell* and *Dworkin*).

[130] *See* Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 1-5 (1983) (arguing that the level of self-censorship is directly proportional to the level of uncertainty engendered by the applicable legal standard).

[131] Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 686 (1989).

courts by the Court's "falsity" formulation is compounded by the lack of guidance offered on the question of "fault." With a work of fiction employing merely a superficial degree of realism, a court still could, as it did in *Bindrim v. Mitchell*, equate any conscious deviation from known fact, be it a work of fiction or non-fiction, with "actual malice."[132] Nothing in *Milkovich* or *Falwell* prevents a court from employing the term "fiction" as narrowly defined above[133] and declaring such a work merely an "alleged novel" that is simply "not fiction." These are, in fact, the terms the Ninth Circuit recently used to approvingly characterize the holding in *Bindrim*.[134] This literal application of "actual malice" to fiction has been roundly criticized by commentators[135] and eloquently disapproved of by a number of courts,[136] but proffered reformulations offer

---

[132] 92 Cal. App. 3d 61, 71-73, *cert. denied*, 444 U.S. 984 (1979). In *Bindrim*, the defendant author had depicted a nude encounter group in her novel *Touching* after attending one with the plaintiff/psychologist. The court concluded that, despite their being no similarity between the psychologist in her novel and the plaintiff, the author's "reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter and the literary portrayals of that encounter." *Id.* at 72-73.

[133] *See supra* note 120 and accompanying text.

[134] Masson v. New Yorker Magazine, Inc., 881 F.2d 1452, 1455 (1990) *rev'd on other grounds*, 501 U.S. 496 (1991).

[135] *See, e.g.*, R. Bruce Rich & Livia D. Brilliant, *Defamation-in-Fiction: The Limited Viability of Alternative Causes of Action*, 52 BROOK. L. REV. 1, 6 (1986) (literal application of "actual malice" as formulated for non-fiction to fiction produces the "unintended and perverse result" of depriving all fiction of a fault defense).

[136] *See, e.g.*, Mitchell v. Globe International, 773 F. Supp. 1235, 1238 (W.D. Ark. 1991); Miss America Pageant, Inc. v. Penthouse Int'l, Ltd. (Pring II), 524 F. Supp. 1280, 1285 (D. N.J. 1981); Hoppe v. The Hearst Corporation, 53 Wash. App. 668 (1989).

In a passage often quoted by courts declining to find "actual malice" in works of fiction, the Supreme Court of California observed:

> [I]n defamation cases, the concern is with defamatory lies masquerading as truth. In contrast, the author who denotes his work as fiction proclaims his literary license and indifference to the "the facts." There is no pretense. All fiction, by definition,

little added protection.[137] Any work of purported fiction, then, that satisfies the *Falwell-Milkovich* falsity formulation, is left unprotected by the "fault" requirement *Sullivan* and *Gertz* found essential to "wide open and robust debate."[138]

One obvious solution to all this chilling uncertainty is the one *Falwell* and *Milkovich* rejected: take the author's disclaimer at its word. If the work is labeled "fiction," conclude it unreasonable to read it as fact. The Court's unwillingness to do so likely stems, in part, from a fear of writers employing the label on works of thinly disguised character assassination.[139] There, the disclaimer might be understood by the reader as a mere wink, indicating the absence not of factual truth, but of legal resources. Even accepting for the sake of argument, however, that such an "understanding" is likely or common

---

> eschews an obligation to be faithful to historical truth. Every fiction writer knows his creation is in some sense "false." That is the nature of the art. Therefore, when fiction is the medium . . . it is meaningless to charge that the author "knew" his work was false.

Guglielmi v. Spelling-Goldberg Productions, 25 Cal. 3d 860, 871 (1979) (en banc) (Bird, J., concurring) (rejecting contention that fictionalization in film constituted "actual malice").

[137] One such reformulation adopted in light of *Falwell* and *Milkovich*, asks whether the defendant has recklessly failed to anticipate that readers could construe the publicized matter as conveying actual facts. *See* Peoples Bank & Trust Co. of Mountain Home v. Globe International, Inc., 786 F. Supp. 791 (W.D. Ark. 1992); Hoppe v. The Hearst Corporation, 53 Wash. App. 668 (1989) (citing SMOLLA, LAW OF DEFAMATION, Sec. 4.09[7][c] (1988)). Any author of a work satisfying the Falwell-Milkovich falsity test, who either consciously models a character on an actual person or explicitly employs a known figure, will certainly satisfy this formulation of "actual malice" as well.

[138] *See supra* note 11 and accompanying text.

[139] *See, e.g.,* Corrigan v. Bobbs-Merril Co., 228 N.Y. 58 (1920) (corrupt judge in novel sits in same courtroom as plaintiff-judge and the character's name differs by only two letters).

enough to warrant consideration,[140] it fails to justify the Court's giving the disclaimer *no* weight at all. The label "fiction" still proclaims that the author eschews any obligation to descriptive truth.[141] An ineluctable degree of doubt must therefore accompany the reading of even the most "believable" details. "Facts" inferred from fiction are, thereby, qualitatively attenuated compared to facts explicitly asserted in non-fiction.[142] The greater the specificity of those details, moreover, the less reasonable it becomes to read them as effecting anything more than a hypothetical reconstruction.[143]

The Court has recently acknowledged the effect a disclaimer can have on the reasonableness of factual inference. In *Masson v. New Yorker Magazine, Inc.*, the Court noted that, in contrast to their use in journalism, quotation marks found in works acknowledged as "historical fiction . . . might indicate that the quotation should not be interpreted as the actual

---

140 As a predictive concern, Richard Posner's forecast that if we grant immunity to works labeled fiction, "[j]ournalists would become novelists and short story writers," is itself probably best read as alarmist fiction. RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 327 (1988).

141 *See Guglielmi*, 25 Cal.3d at 871 (as quoted at *supra* note 136).

142 As the "fictional context negates, to a large extent, any possibly defamatory meaning, there is a reduced potential for damage to reputation occasioned by libelous fiction as opposed to libelous nonfiction." Martin Garbus & Richard Kurnit, *Libel Claims Based on Fiction Should be Lightly Dismissed*, 51 BROOK. L. REV. 401, 403 (1985) (footnote omitted). *See also*, Diane Leenheer Zimmerman, *Real People in Fiction: Cautionary Words about Troublesome Old Torts Poured into New Jugs*, 51 BROOK. L. REV. 355, 362 (asserting that even in works blurring the line between fiction and non-fiction, "the denomination of the work as fiction serves to imbue the reasonable reader with a substantial sense of skepticism about taking the work too literally").

143 Typical of such details are renderings of what the plaintiff privately thought or said. As Liz Taylor complained, unwittingly undercutting her own argument, of a planned television docudrama on her life, "The only way this can be accurate is if, unbeknownst to me, someone's been hiding under my bed these past 25 years." Schwartz, *Docudrama Liability*, 4 L.A. LAWYER 111 (1985).

statements of the speaker to whom they are attributed."[144] "Writers often use quotation marks, yet no reasonable reader would assume that such punctuation automatically implies the truth of the quoted material."[145] The court, thereby, distinguishes fiction as a context in which certain intentional non-truths should not be equated with falsity or "actual malice." While this bit of dictum obviously carries limited precedential weight, it casts doubt generally on the easy equation of a "fact" inferred from a work of fiction, and one explicitly asserted in a work of non-fiction. No lesser a light than Judge Learned Hand recognized the importance, in the First Amendment context, of distinguishing between words which directly instruct from those that merely have a "reasonable tendency" to being similarly understood.[146] In recognition of the distinction, the Court might at least afford all works disclaimed as fiction a

---

[144] 501 U.S. 496 (1991) (addressing the concerns raised in the Amici Curiae Brief of *Home Box Office, Inc.* (No. 89-1799), in support of Respondents (The New Yorker Magazine)). The central holding in *Masson*, limited to purported non-fiction, is that "deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of [actual malice] unless the alteration results in a material change in the meaning conveyed by the statement." *Id.* at 517.

[145] *Id.* at 512 (quoting Baker v. Los Angeles Examiner, 42 Cal. 3d 254, 263 (1986) (en banc)).

[146] *See* Masses Publishing Co. v. Patten, 244 Fed. 535 (S.D.N.Y.. 1917) (distinguishing expression that merely permits the inference of a message, from the explicit and direct communication of that same message). While recognizing that the distinction may be genuinely only one of degree, Judge Hand drew the line of first amendment protection between the two. To do otherwise, he wrote, is to "give to Tomdickandharry, D.J., so much latitude" as to allow him to mistake "his own fears" for cognizable harm. Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921) quoted in Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 770 (1975). While employing Judge Hand's distinction here brings it quite a distance from the "incitement" context in which it was enunciated, the broad point here is that First Amendment doctrine that leaves great discretion to judge and jury risks protecting speech inadequately. This is borne out in the wildly inconsistent application of the *Falwell-Milkovich* falsity formulation by lower courts, as allowed by the broad discretion that formulation affords.

presumption of non-fact that a libel plaintiff would have to overcome.[147] The *Milkovich-Falwell* falsity formulation presently put the burden on the language or general tenor to negate reading it as literal truth. Shifting that burden, a court would ask if the plaintiff has overcome the presumption of invention afforded fiction.

It is unlikely, however, that even this very modest proposal would be countenanced by the current Supreme Court. The *Falwell-Milkovich* falsity formulation likely represents the limit of protection it is prepared to grant fiction, in light of the Court's having come to rely, more and more exclusively, upon a single First Amendment rationale: a narrow reading of what speech is important to "self-governance."[148] The First Amendment jurisprudence of the Rehnquist Court maps an increasingly precipitous drop-off in the value ascribed to speech as it wanders from making substantive contributions to political debate. The *Falwell* opinion itself amply demonstrates this.

In *Falwell*, the Court finds the type of speech typified by the *Hustler* piece to have no, or at most, de minimis value. It contrasts it to the value of traditional political cartoons, which, the Court notes, have contributed "considerably" to the "robust political debate encouraged by the First Amendment."[149] The

---

[147] *See* Welch v. Penguin Books USA, Inc., 1991 N.Y. Misc. LEXIS 225, 9-10 (N.Y. Sup. Ct.).

[148] The rationale is most often associated with Alexander Meiklejohn's formulation of it. *See, e.g.,* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (stating that the First Amendment does not guarantee a "freedom to speak," but rather it "protects the freedom of those activities of thought and communication by which we 'govern.'"). Unlike the current Court, however, Meiklejohn fully included literature and the arts here because, like more explicitly political speech, they are "forms of thought and expression . . . from which the voter derives . . . the capacity for sane and objective judgment." *Id.* at 257.

[149] *Falwell*, 485 U.S. at 51. It is worth noting Rehnquist's injection of "political" into Justice Brennan's *Sullivan* maxim, and the narrowing it effects. "From the viewpoint of history it is clear that our political discourse would have been considerably poorer without [those cartoons]." Id. at 55. *See supra* note 102 and

Court continues, "[i]f it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm."[150] This confident eye for discriminating what does and does not contribute to public discourse contrasts sharply with more inclusive and generous pronouncements from past Courts more skeptical of their ability to place speech on a divined hierarchy of First Amendment value. Even in the early, nascent years of First Amendment jurisprudence the Court cautioned, "[t]he line between the informing and the entertaining is too elusive for the protection of the basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another doctrine."[151]

The current Court puts a steep premium on both a rhetorical manner of expression, and the content of that expression's constituting a substantive contribution to social, especially political, debate. When the speech in question dares to embody neither, as in *Barnes v. Glen Theatre, Inc.*, it is only "*marginally*" within the "*outer perimeters* of the First Amendment."[152] The diminution in constitutional protection

---

accompanying text.

150 *Id.*

151 Winters v. New York, 333 U.S. 507, 510 (1948).

152 501 U.S. 560, 565 (1991) (holding constitutional the application of public indecency statute to enjoin nude bar-room dancing) (emphasis added). The devaluing of non-rhetorical expression can be seen by contrasting the Court's holding here with that in FCC v. Pacifica Foundation, 483 U.S. 726 (1978). In *Barnes*, the Court held that banning a few terms from a dancer's anatomical lexicon by requiring a G-string and pasties is a de minimis infringement merely making the "message slightly less graphic." *Barnes*, 501 U.S. at 571. By contrast, the *Pacifica* Court declared that the "indecent" verbal equivalent of these anatomical terms--"cunt" and "tits"--were constitutionally regulatable only when communicated by media intrusive into the home. *Pacifica*, 483 U.S. at 729. More generally, contrast *Barnes* with the Burger Court holding in Schad v. Mt. Ephraim, 452 U.S. 61 (1981) (striking down as unconstitutional a zoning ordinance effecting a flat ban on nude dancing and all live entertainment). In *Schad*, the Court writes, "[e]ntertainment, as well as political and

out on that "perimeter" is profound. Here, "morality" is a sufficiently substantial state interest.[153] In *Falwell*, by contrast, where the speech cannot be "principly distinguished" from core, political commentary, the state's interest in "morality"[154] is declared constitutionally flawed for the "inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views."[155] The worry about majoritarian impositions of taste[156] seems, for this Court, confined to speech bearing at least a superficial similarity to political commentary.[157]

While one can descriptively maintain that "political" speech is, "by wide agreement, most clearly within the First Amendment;"[158] it certainly does not necessarily follow that the Court should blind itself to the insidious effects of countenancing certain government interests whenever the speech sought to be regulated does not make as obvious a contribution to public debate. In doing so, the Court seems to have abandoned all alternative protective rationales other than a

---

ideological speech, is protected. [Nor] may an entertainment program be prohibited solely because it displays the nude human figure." *Id.* at 70.

153 *Barnes*, 501 U.S. at 569.

154 The second prong of the Virginia law under which Falwell's suit was brought, turns on the speech's offending "generally accepted standards of decency or morality." *Falwell*, 485 U.S. at 50 n.3.

155 *Id.* at 55.

156 *See* Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 951 (1978) ("[I]f offensiveness were the test, majority rule would replace the first amendment.").

157 *Falwell*'s protection of the *Hustler* piece is testimony to the talismanic power even superficially political speech has in this Court's jurisprudence. Were it not for the Court's additional prudity in the face of graphic sexuality, one might well claim that constitutional protection would have been found in *Barnes* if, in lieu of the pasties and G-strings which the Court suggested, the dancers had simply donned Jerry Falwell masks.

158 GERALD GUNTHER, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 665 (5th ed. 1992).

narrow version of "self-governance."[159] Alternative rationales that would more fully value fiction, including those emphasizing human dignity,[160] self-fulfillment,[161] and the expression of non-cognitive meaning,[162] *had* found a place in the Court's jurisprudence. Such notions, however, have become conspicuously absent from the current Court's First Amendment opinions.

This is not to say that, perforce of its not making descriptive truth claims, *all* fiction is devoid of pointed political and social statement. There is of course the genre of didactic fiction which does have a reasonable claim to protection under the even a narrow "self-governance" rationale.[163] The *Hustler*

---

[159] *See supra* note 148.

[160] *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971), in which the Court discusses the values of free expression and concludes that "no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *See also* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-881 (1963) ("[S]upression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature").

[161] "Those who won our independence . . . valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty." Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring). *See also*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 601 (1982) ("The constitutional guarantee of free speech ultimately serves only one true value, . . . 'individual self-realization.'"

[162] As the Court said in *Cohen*,

> [M]uch linguistic expression . . . conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well . . . We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be [communicated].

403 U.S. 15, 19 (1971).

[163] Works devoted to pointed political/social commentary can be found running the spectrum of literary styles. *See, e.g.*, HARRIET BEECHER STOWE, UNCLE TOM'S CABIN (1852) (slavery/melodrama), ALFRED JARRY, UBU ROI (1896) (despotism/absurdism), BERTOLT BRECHT, THE RESISTIBLE RISE OF ARTURO UI

piece, however, like most fictional works, is not of this type.

Fictional works like the *Hustler* piece, which incorporate public and political figures, can be said, though, to make a significant non-substantive contribution to "self-governance" that is usually overlooked. They help mitigate the sense of propriety and fear that can intimidate others from setting up booths at the marketplace of ideas or from voicing those ideas more forcefully.[164] Judge Wilkinson touched on this when he wrote, in his dissent from the Fourth Circuit's denial of rehearing en banc in *Falwell*, "By cutting through the constraints imposed by pomp and ceremony, [such works are] a form of irreverence as welcome as fresh air . . . Nothing is more thoroughly democratic than to have the high-and-mighty lampooned and spoofed."[165] This is what might be called the "anti-honorific" function of works that "pointlessly" satirize public officials and persons.

"Honor" here refers not to either the core of human respect all can claim ("dignity") or the regard due for achievements earned. It refers, rather, to the deference given solely by virtue of social position.[166] This is the near ceremonial deference given government officials, clergy, and

---

(1941) (fascism/epic theatre), GEORGE ORWELL, ANIMAL FARM (1946) (Soviet socialism/allegory), ATHOL FUGARD, SIZWE BANSI IS DEAD (1972) (apartheid/realism), and MARGARET ATWOOD, THE HANDMAID'S TALE (1985) (patriarchy/fantasy). *See also* RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 321-22 (1988) (distinguishing "truth claims" from "social comment" as relevant to defamation in fiction).

164 The rationale is generally traced to Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616, 630 (1919):

> [T]he ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market.

165 Falwell v. Flynt, 805 F.2d 484, 487 (4th Cir. 1986).

166 "An individual . . . claims a right to [honor] by virtue of the status with which society endows his social role." Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 700 (1986).

select others not for who they are, but what they are--their social status. The notion of "honor" posits and reinforces social hierarchy and is, in that sense, deeply anti-egalitarian. More particularly, it is the very dynamic the Court in *New York Times v. Sullivan* found incompatible with "uninhibited, robust and wide open" debate.[167] *Sullivan*'s rejection of seditious libel "is predicated upon an implicit rejection of the honorific status of government officials."[168]

Satire implicitly attacks that honorific status. It loudly proclaims the freedom to do so. The particular political message a satire may carry can be seen as merely incidental to this central and omnipresent function. In its swift talent at reminding us what all our little emperors look like without clothes, it serves the central meaning of *New York Times*. Satire invites the more factually minded speakers among us to come raise their voices.

The "falsity" analysis that the Court has developed in *Falwell* and *Milkovich* fails to take account of the fundamental distinctions between fiction and non-fiction. The rather modest alterations to that analysis suggested by this Article are prompted by the belief that that analysis fails to adequtely protect works of fiction. While such works, this Article maintains, do indeed fail to make claims to descriptive truth, they have no lesser claim to First Amendment protection.

---

167 376 U.S. 254 (1964).

168 Post, *supra* note 166, at 724. *See also*, Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204-210.