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In Illinois, a party who publishes an arguably defamatory statement is subject to a cause of action for defamation. According to the Restatement (Second) of Torts § 559 (1977), there are four elements to a cause of action for defamation: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Id. § 558. Libel and slander are distinct causes of action. W. Prosser, Handbook of the Law of Torts 751 (4th ed. 1971). For purposes of this note, however, the term “defamation” includes both libel and slander.

Modern defamation law is a confusing mixture of archaic common law doctrines, constitutional limitations, and state law peculiarities. Professor Prosser introduces his chapter on defamation with this grim evaluation:

It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word . . . . No very comprehensive attempt ever has been made to overhaul and untangle this entire field of law, and, unhappily, there seems to be none in prospect. Id. at 737, 739.

The law of defamation has been further complicated by state legislation and both state and federal constitutional law. The United States Supreme Court first announced that defamation law was subject to constitutional limitations in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The Court held that a public official could not, consistent with the first amendment, recover damages without showing that the defamatory statements were published with “actual malice,” i.e., that the defendant published the statement with knowledge of its falsity or in reckless disregard for whether it was false. Id. at 279-80.

The Illinois legislature has also entered the field of defamation law, codifying the obvious fact that false charges of fornication, adultery, and perjury are defamatory. Ill. Rev. Stat. ch. 126, §§ 1, 2 (1985). In addition, the Illinois Constitution has two provisions relevant to defamation. First, it guarantees every person a certain remedy for injuries to his reputation, which would seem to require that a cause of action in defamation be available. Ill. Const. art. I, § 4. Second, it attempts to limit the common law absolute defense of truth by providing that “[a]ll persons may speak, write and publish freely being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.” Id. This latter section is probably unconstitutional because the Illinois Supreme Court struck down an identical provision in the 1870 constitution, holding that such a limitation on truth as a defense was “incompatible with the [United States] Supreme Court’s interpretation of the scope of . . . first amendment guarantees.” Farnsworth v. Tribune Co., 43 Ill. 2d 286, 290, 253 N.E.2d 408, 410 (1969).
statement can invoke at least two doctrines to avoid liability. Under the “innocent construction rule,” if the court can read the allegedly

For background information on the law of defamation, see generally L. ELDREDGE, THE LAW OF DEFAMATION (1978); M. POLELLE & B. OTTLEY, ILLINOIS TORT LAW 101-76 (1985); PROSSER, supra at 737-801.

2. The Illinois Supreme Court formally adopted the innocent construction rule in John v. Tribune Co., 24 Ill. 2d 437, 181 N.E.2d 105, cert. denied, 371 U.S. 877 (1962). Chicago police had raided an apartment and arrested the resident, reputed gangster “moll” Dorothy Clark, for “[keeping] a disorderly house and selling liquor without a license.” Id. at 438, 181 N.E.2d at 106. In two articles published in the Chicago Tribune, Clark was identified as “alias Eve Spiro and Eve John.” Id. In fact, however, Eve John was a respectable psychologist who lived in the apartment below Dorothy Clark and had no connection whatsoever with either Clark or her notorious activities. Id. Eve John, whose maiden name had been Eve Spiro, instituted a libel action against the Chicago Tribune, but the circuit court entered judgment on a verdict for the defendants. Id. at 438-39, 181 N.E.2d at 106. The appellate court reversed and remanded for a new trial, but the Illinois Supreme Court allowed defendant’s petition for leave to appeal. Id.

On the narrow issue of colloquium, i.e., whether the defamatory statement was made of and concerning the plaintiff, the supreme court held that the subject or “target” of the publication is the first name given (Dorothy Clark) and that the names identified as aliases are known to the reader, by virtue of common knowledge and understanding, to be assumed or false names. Id. at 442, 181 N.E.2d at 108.

In dicta, however, the supreme court observed that the articles were not libelous under the innocent construction rule, stating that the innocent construction rule “holds that the article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law.” Id. at 443, 181 N.E.2d at 108.


The innocent construction rule’s historical antecedent is a 16th century common law doctrine called mitior sensus. ELDREDGE, supra note 1, at 161. Judges originally justified the rule as a tool to cut down the number of defamation cases that were flooding the courts. Id. The Illinois Supreme Court today, however, says the best justification for the modern rule is that “it comports with the constitutional interests of free speech and free press and encourages the robust discussion of daily affairs.” Chapski v. Copley Press, 92 Ill. 2d 344, 349, 442 N.E.2d 195, 198 (1982).

In the years following John, Illinois courts began to apply the innocent construction rule to increasingly absurd situations, straining to find innocent meanings in even the most obviously defamatory statements. One of the most egregious examples of this practice was a 1973 case in which an appellate court dismissed an action filed by a mayor who had, according to the defendant newspaper, ordered a “ticket-writing spree” that brought in little money because the mayor had promised to “fix” the tickets. Watson v. Southwest Messenger Press, Inc., 12 Ill. App. 3d 968, 973, 299 N.E.2d 409, 413 (1973). The appellate court held that the article was capable of an innocent construction because the word “fix” could mean “repairing, mending, or putting in order.” Id.

The Illinois Appellate Court, in Van Tuil v. Carroll, 3 Ill. App. 3d 869, 279 N.E.2d 361 (1972), listed a host of Illinois decisions in which courts have dismissed cases based on the application of the innocent construction rule. The examples were updated somewhat by the supreme court in Chapski, 92 Ill. 2d at 348-49, 442 N.E.2d at 197. In Chapski, the court finally modified the rule to prevent such tortured constructions, holding that “a written or oral statement is to be considered in context,
defamatory material in an innocent manner, it must declare the material to be nonlibelous as a matter of law. The rule, which is peculiar to Illinois, makes this state the most difficult in which to suc-

with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be interpreted as referring to someone other than the plaintiff, it cannot be actionable per se.” Id. at 349, 442 N.E.2d at 199 (emphasis added). The Chapski court correctly noted that the modified rule was really a return to the original holding of John, which required that words be given their natural and obvious meaning. Id. at 351, 442 N.E.2d at 198.

Application of the innocent construction rule is not, however, limited only to the issue of colloquium that was before the court in both John and Chapski. Id. at 348-49, 442 N.E.2d at 197. It has also been used to dismiss cases on the issue of libel per se. See Fried v. Jacobson, 99 Ill. 2d 24, 457 N.E.2d 392 (1983). But see Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975) (there may be situations in which the question of whether the article was actually understood by readers as referring to the plaintiff should go to the jury). At least one commentator also suggests that whether the rule is applicable to defamation per quod is an open question. See Polelle & Ottley, supra note 1, at 131.

3. John, 24 Ill. 2d at 443, 181 N.E.2d at 108.

4. See Polelle & Ottley, supra note 1, at 127; Comment, The Illinois Doctrine of Innocent Construction: A Minority of One, 30 U. CHI. L. REV. 524 (1963). Montana, North Dakota, Ohio, and Oklahoma apply a type of innocent construction rule only if the plaintiff is seeking to recover without proof of special damages, i.e., for libel per se. Eldredge, supra note 1, at 160-61. Professors Polelle and Ottley conclude that this point is unsettled in Illinois law, but the broad language of the rule, as modified in Chapski, does not seem to allow an exception for libel per quod. Polelle & Ottley, supra note 1, at 131. For several years, California applied a rule that combined innocent construction with libel per se. Peabody v. Baham, 52 Cal. App. 2d 581, 126 P.2d 668 (1942). The rule was abandoned by the California Supreme Court in 1959. MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959) (en banc). The court used a hypothetical news report to explain that the rule was illogical:

[If the paper [had] reported that “Mrs. A, who was married last month, gave birth to a child last night,” [a] charge of immoral conduct is apparent to all from the language used, and the paper knows and is fully warned of the defamatory implication. Under the rule of the Peabody case, however, it would escape liability unless special damages are proved, for the language does not exclude the innocent possibility that Mrs. A was widowed or divorced a few months before her recent marriage and that the child is that of her former husband.

Id. at 543, 343 P.2d at 42.

The Illinois Supreme Court has generally treated the innocent construction rule as well-settled doctrine, usually applying the rule routinely, with little or no discussion of its validity. See, e.g., Catalano v. Pechous, 83 Ill. 2d 146, 419 N.E.2d 350 (1980) (statement by city clerk that aldermen accepted bribes in awarding a garbage contract held to be without a plausible innocent construction); Valentine v. North Am. Co., 60 Ill. 2d 168, 328 N.E.2d 265 (1974) (statement by insurance company that plaintiff had been “a lousy agent” held not actionable); Zeinfeld v. Hayes Freight Lines, Inc., 41 Ill. 2d 345, 243 N.E.2d 217 (1968) (statement by former employer that, when an employee left, “we discovered a large amount of money owed the company, which the employee compromised on when we traced him down,” was incapable of an innocent construction); see also Levinson v. Time, Inc., 87 Ill. App. 3d 338, 411 N.E.2d 1118 (1980) (noting that attempts to eliminate the innocent construction rule have been consistently rejected by courts in Illinois for many years).

The supreme court finally gave the rule a close examination in Chapski, 92 Ill. 2d at 392, 442 N.E.2d at 198, ultimately modifying it to prevent courts from straining to find innocent constructions. See supra note 2 for a discussion of Chapski. The supreme court applied the innocent construction rule most recently in Owen v. Carr, 113 Ill. 2d 273, 497 N.E.2d 1145 (1986). See infra notes 62-66 and accompanying text
for a more detailed discussion of Owen.

5. The innocent construction rule contradicts the traditional common law rule that statements reasonably capable of a defamatory meaning are questions of fact. Professors supra note 1, at 749. It is, therefore, the single largest reason that Illinois defamation plaintiffs rarely get to the jury or even a full bench trial. Polelle & Ottley supra note 1, at 127. A 1981 study indicates that Illinois media defendants won 93% of their defamation cases. Franklin, Suing Media for Libel: A Litigation Study, 1981 AM. B. FOUND. RES. J. 795, 828.

Because the rule is such a formidable barrier to defamation plaintiffs, it has generated a great deal of critical literature. No commentator favors retention of the rule in its present form. Critics emphasize some recurring themes: (1) the rule is a resurrection of the discredited and rejected common law rule of mitior sensus, see supra note 1; (2) the rule allows one who defames to escape liability by wrapping his otherwise libelous statements in intentionally ambiguous language; and (3) the rule improperly usurps the jury's role. See, e.g., Pollele, The Guilt of the "Innocent Construction Rule" in Illinois Defamation Law, 1 N. ILL. U. L. Rev. 181 (1981) (Illinois Supreme Court should abandon innocent construction rule in favor of the original reasonable construction rule); Stonecipher & Trager, The Impact of Gertz on the Law of Libel in Illinois, 1979 S. Ill. U.L.J. 73 (innocent construction rule remains a valuable and frequently used shield for defamation defendants); see also Johnson, Resolving the Paradox of the Innocent Construction Rule, 7 AM. J. TRIAL ADVOC. 481 (1984); Symposium, Libel and Slander in Illinois, 43 CHI. KENT L. Rev. 1 (1968). See generally Eldredge, supra note 1, at 161-62. For an accurate prediction of the absurd lengths courts would go to in finding a theoretically possible innocent construction, see Comment, The Illinois Doctrine of Innocent Construction: A Minority of One, 30 U. CHI. L. Rev. 524 (1963).


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."

Id. (quoting New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).


In order to implement this new constitutional privilege, different jurisdictions have developed or adopted various tests to distinguish privileged statements of opinion from actionable statements of fact. See, e.g., Ollman, 750 F.2d at 970 (nature and context of words balanced to decide whether statements are fact or opinion); Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980) (statements implying criminal acts are factual statements and not opinions); Costello v. Capital Cities Media, Inc., 111 Ill. App. 3d 1009, 445 N.E.2d 13 (1982) (derogatory remark, if laden with factual
where the court determines that a statement is defamatory, the defendant can escape liability by successfully arguing that the statement is an expression of opinion. In Costello v. Capital Cities Communications, Inc., the Illinois Appellate Court considered what standard to apply in determining whether an allegedly defamatory newspaper editorial constituted an expression of fact or opinion. The court held that the innocent construction rule provides the proper mode of analysis for making this determination. In so doing, the Costello court misinterpreted Illinois Supreme Court precedent and failed to recognize that editorial opinions enjoy a constitutional privilege that provides broader protection for political speech than does the innocent construction rule.

In 1980, the plaintiff, Jerry Costello, was a candidate for chairman of the St. Clair County Board. A local newspaper invited Costello to interview with its editorial board, which was considering an endorsement of his candidacy. Costello allegedly told the editorial board that during his first term of office he would militantly oppose any new taxes unless they were first approved by referendum. The newspaper subsequently endorsed Costello in an editorial, specifically noting Costello’s opposition to any new taxes absent a referendum of the people.

Costello easily won the election. At his first meeting, the county board voted to create a transit district that would have the power to tax. The transit measure passed with relative ease and

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content, is fact rather than opinion); see also Restatement (Second) of Torts § 566 (1977) (statements in the form of opinion that imply the existence of defamatory facts are actionable). See infra notes 83-89 and accompanying text for the various substantive tests that have been used to distinguish actionable fact from protected opinion in Illinois.

7. See supra note 6 for a discussion of the constitutional privilege of expression of opinion.
9. Id. at 966-67, 505 N.E.2d at 708.
10. Costello, 153 Ill. App. 3d at 959, 505 N.E.2d at 703.
11. The Belleville News-Democrat is a general circulation newspaper serving St. Clair County in southern Illinois. Id. at 958, 505 N.E.2d at 702.
12. Id., at 959, 505 N.E.2d at 703.
13. Costello testified that he merely said he was not in favor of new taxes for any reason during his first term. Id. at 959-60, 505 N.E.2d at 703. Defendant Har- graves, however, insisted that Costello promised to vigorously use his political clout as board chairman to oppose tax increases, and assured the board that he had “the ability to deliver” on such a promise. Id.
15. Costello, 153 Ill. App. 3d at 960, 505 N.E.2d at 703.
16. Id.
17. Id. Illinois and Missouri created the Bi-State Development Agency to allow affected counties in both states to develop a joint approach to problems in the St. Louis metropolitan area. See Ill. Rev. Stat. ch. 127, ¶¶ 63r-1 to 63s-12 (1985). A 1980 amendment to the Local Mass Transit Act gave the affected counties, including St.
without any public opposition by Costello. In a subsequent editorial, the newspaper concluded that Costello had lied to its editorial board, and that he had, therefore, also lied to the citizens of St. Clair County. The editorial also stated that the county would have two more years of Costello’s “brand of lying leadership.”

Clair County, the power to create transit districts, appoint trustees, and impose a property tax (up to ¼ of 1%) to subsidize public transportation. Ill. Rev. Stat. ch. 111 2/3, ¶ 355 (1985).

The measure passed by a vote of 22-6. Costello, 153 Ill. App. 3d at 961, 505 N.E.2d at 704.

The majority in Costello noted the “considerable efforts” of chairman Costello in opposing the transit measure, including the lobbying of fellow board members and the planning of parliamentary strategy to table the measure. As presiding officer, however, he was barred by law from either speaking to, or voting on, the measure. Id. at 960-61, 505 N.E.2d at 703-04.

The defendants, however, felt Costello’s efforts to oppose the transit measure were superficial at best. Taking exception to Costello’s claim that he met “with at least fifteen Board members” to urge defeat of the measure, Brief for Appellee, at 22, Costello v. Capital Cities Communications, Inc., 153 Ill. App. 3d 956, appeal docketed, No. 65083 (Ill. Sup. Ct. June 4, 1987), the defense observed:

Only six board members testified that Costello had spoken with them, some referring to the discussions as “casual” and involving no attempts at persuasion . . . . others indicating that the discussion was initiated by them and not Costello . . . . and still others referring to one-time-only discussions where the issue just “came up” . . . . Three board members knew of absolutely no efforts by Costello to persuade Board members to vote against the measure . . . . Costello would have this Court believe . . . . he “did everything he could.” The simple fact is that he did not.


In referring to Jerry Costello, the author of the editorial used the word “lie,” or a variation of it, no less than six times. Id.

The editorial read as follows:

Costello blew his first chance.

Jerry Costello lied to us.

There’s no nicer way to put it; he simply lied.

And, when he lied to us, he lied to you.

He said he was going to be a tough county board chairman, especially when board members wanted to spend taxpayers’ money.

He said he would militantly oppose the implementation of any new tax without first seeking the voters’ approval through a referendum.

He said he would lead the County Board down the proper paths, protecting the rights of the taxpayers.

Well, he lied.

He didn’t do any of those things Monday night, thereby breaking his most sacred campaign promise at his very first meeting.

The County Board had an opportunity to conduct a binding referendum, asking you if you wanted to pay a new sales tax to support the Bi-State bus system. That’s the very thing Costello had pledged he would do. He had promised, in the strongest possible terms, that he would let the voters decide.

But when the time came to make a decision, he was up there sitting on his
Costello then brought a libel action against the author of the editorial and the owner of the newspaper. The circuit court granted the defendants' motion to dismiss. The appellate court reversed, holding the editorial to be libelous per se, and re-gavel.

Some leader!

You couldn't tell him from any other politician in the bunch. He did absolutely nothing to protect your interests.

To say we're disappointed is too mild; we're irate. We supported Costello's election because of what he said to us. We told you what he said and how we thought he was different from the run-of-the-mill, Touchette-dominated Democrats of the past.

Now we wonder if we didn't lie to you.

Maybe Costello isn't different.

Maybe Costello didn't mean any of the things he said.

Maybe his opponent, Republican Larry Reinneck, was right when he said Jerry Costello was nothing more than another patronage-oriented political hack.

How are we supposed to tell otherwise?

Jerry Costello asked for a chance to prove himself and, in his very first meeting, he blew it.

Just think, we've got two more years of the Costello brand of lying leadership.

Doesn't that thrill you? —RICHARD N. HARGRAVES

Id. at 1002, 502 N.E.2d at 730.

23. The owner of the Belleville News-Democrat was Capital Cities Media, Inc., and the author of the editorial is Richard Hargraves, editorial page editor. Costello, 153 Ill. App. 3d at 963, 505 N.E.2d at 705. The defendant corporation changed its name to Capital Cities Communications, Inc., after the first appeal. Id.

24. Costello v. Capital Cities Media, Inc., 111 Ill. App. 3d 1009, 1016, 445 N.E.2d 13, 19 (1982). The appellate court opinion does not indicate the grounds on which the motion to dismiss was based. The issues on appeal, however, were whether the editorial statements were libelous per se, and whether Costello's complaint sufficiently alleged actual malice. Id. at 1011, 1016, 445 N.E.2d at 15, 18.

25. Id. at 1016-17, 445 N.E.2d at 19.

26. Four categories of words are so obviously harmful that proof of special damages is unnecessary under Illinois law. Zeinfeld v. Hayes Freight Lines, Inc., 41 Ill. 2d 345, 348, 243 N.E.2d 217, 220 (1968). The Illinois Supreme Court recently reaffirmed these four classes of libel per se:

1. Those imputing the commission of a criminal offense;
2. Those imputing infection with a communicable disease of any kind which, if true, would tend to exclude one from society;
3. Those imputing [an] inability to perform or want of integrity in the discharge of duties of office or employment.

4. Those prejudicing a particular person in his profession or trade.

Fried v. Jacobson, 99 Ill. 2d 24, 27, 457 N.E.2d 392, 394 (1983). Where the actionable words fit into one of these categories, they are said to be libelous per se. If not, the plaintiff must plead and prove special damages and the action is called libel per quod. See generally POLELL & OTTLEY, supra note 1, at 114-24. The appellate court determined that the editorial was libelous per se because it imputed to Costello "a want of integrity or lack of honesty in performing the duties of his office." Costello, 153 Ill. App. 3d at 967, 505 N.E.2d at 708. In the earlier appeal, the court had distin-
manded the case for trial on the issue of actual malice. After a bench trial on that issue, the circuit court entered a judgment of $1,050,000 for Costello.

On a second appeal, the court considered whether the defendants' editorial statements were constitutionally privileged as expressions of opinion. In affirming the circuit court's judgment on liability, the appellate court held that the innocent construction rule was the correct analytical tool for determining whether the editorial was fact or opinion.

The court began its analysis by acknowledging that under Bose Corp. v. Consumers Union of United States, Inc., it was first required to make an independent review of the evidence to ensure that clear and convincing proof supported the trial court's finding of

The facts of Costello from three Illinois libel cases that were ruled nonactionable despite having been based on statements containing charges of dishonesty or lying: Costello v. Capital Cities Media, Inc., 111 Ill. App. 3d at 1014, 445 N.E.2d at 17. The court held that the statements in those cases were merely criticisms of specific acts of conduct, while the Costello editorial was an "assault on the plaintiff's character in general." Id. (emphasis added).

27. After ruling that Hargraves' editorial statements were libelous per se and that they were not constitutionally protected expressions of opinion just because they appeared on the newspaper's editorial page, the appellate court concluded that the plaintiff had met the minimal pleading requirements for alleging actual malice. Costello, 111 Ill. App. 3d at 1016, 445 N.E.2d at 19. The court, therefore, remanded the case to the trial court to determine whether the plaintiff could prove actual malice by clear and convincing evidence. Id. at 1017, 445 N.E.2d at 19.

28. The court held that under Illinois law, Costello had sufficiently pleaded New York Times actual malice by alleging that the editorial's statements were published with knowledge of their falsity or in reckless disregard of whether they were true or false. See id. at 1016, 445 N.E.2d at 18-19.

29. Costello, 153 Ill. App. 3d at 963, 505 N.E.2d at 705. The trial court awarded the plaintiff $450,000 in compensatory damages and $600,000 in punitive damages. Id. at 973, 505 N.E.2d at 711-12.

30. Id. at 963-67, 505 N.E.2d at 705-08.

31. The court did, however, strike the $600,000 in punitive damages and also reduced the compensatory damage award to $200,000. Id. at 974-76, 505 N.E.2d at 712-13. The court first held that where actual malice is a necessary element to recovery in libel (as it is in an action brought by a public official), an award of punitive damages in addition to substantial compensatory damages is an impermissible double recovery. Id. But see Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1142 (7th Cir. 1987) (punitive damages are available when plaintiff proves actual malice and Costello is only Illinois case holding otherwise). The court also held the original award of $450,000 in compensatory damages to be excessive in light of the fact that Costello had offered no proof of actual damages and was still chairman of the county board, having been reelected in 1982. Costello, 153 Ill. App. 3d at 976, 505 N.E.2d at 713-14. In fact, the News-Democrat even endorsed Costello's reelection. The Belleville News-Democrat, Oct. 28, 1982, § A, at 4, col. 1.

32. Costello, 153 Ill. App. 3d at 966, 505 N.E.2d at 708. Applying this rule to the paper's allegedly defamatory statements, the court held that the evidence the plaintiff introduced at trial was sufficient to support the circuit court's findings that the editorial was libelous per se and that it was published with actual malice. Id. at 967, 505 N.E.2d at 708.

actual malice. Upon making such a review, the court found the evidence sufficient to support conclusions that Costello had not lied and that the defendants either knew the charges were untrue or recklessly disregarded whether they were true or false. The Costello court then considered the defendants' argument that their statements, even if libelous, were expressions of opinion, and therefore protected under the first amendment. The defendants urged the Court to apply the four-part test developed by the Court of Appeals for the District of Columbia Circuit in *Ollman v. Evans*, to determine whether the Costello editorial was protected.

34. *Costello*, 153 Ill. App. 3d at 963-64, 505 N.E.2d at 706 (citing Wanless v. Rothballer, 115 Ill. 2d 158, 503 N.E.2d 516 (1986)). The *Costello* court noted that recklessness turns on the subjective frame of mind of the actor, and exists only where the defendant in fact entertained serious doubts as to the truth of the publication. *Id.* at 963, 505 N.E.2d at 705 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

35. *Id.* at 968, 505 N.E.2d at 709. The court determined that Costello had demonstrated *New York Times* actual malice because "[i]t is evident that plaintiff had not lied to either the defendant or to the public." *Id.* First, the court reasoned that the author made a false statement by charging Costello with "lying" when he said he would militantly oppose new taxes. *Id.* at 969-70, 505 N.E.2d at 709-10. Second, the court found the editorial statement, "He didn't do any of those things [efforts to oppose the measure] Monday night" to be false. *Id.* The court concluded that these statements were made with the necessary actual malice because the defendant knew Costello was vigorously opposed to the creation of a transit district and also knew that Costello's authority as chairman was limited to serving as presiding officer and parliamentarian. *Id.* at 972, 505 N.E.2d at 711. Thus, the defendants' contemporaneous knowledge of the falsity of their statements indicated that they were made with actual malice.

36. *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985). In *Ollman*, a political science professor nominated to head the University of Maryland's Department of Government and Politics brought a defamation action against syndicated columnists Rowland Evans and Robert Novak for statements in a *Washington Post* column on May 4, 1987 that allegedly caused the university to deny Ollman the position. *Id.* at 970-71. Specifically, Evans and Novak said the professor's writings indicated a desire to use the classroom for "preparing [for] what he calls the revolution." *Id.* at 972. Quoting an unnamed political scientist from a major eastern university, the authors wrote: "Ollman has no status within the [political science] profession, but is a pure and simple [political] activist." *Id.* at 973. The *Ollman* court decided that dicta from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), provided expressions of opinion with absolute immunity under the first amendment. *See supra* note 6. Concluding that the dicta "elevated to constitutional principle this distinction between fact and opinion," the *Ollman* court developed a four-factor test in order to ascertain whether a particular statement is one of actionable fact or protected opinion. *Ollman*, 750 F.2d at 975, 979.

The goal of the *Ollman* test is to determine whether the average reader would view the challenged statement as fact or opinion. *Id.* at 979. The four factors are therefore designed to reflect the "totality of circumstances" in which the average reader will receive the words. *Id.* In brief, a court will analyze the precision of the language used, the verifiability of the statement, the literary context, and the social context of the statement. *See infra* notes 38-41 for an explanation of how these factors are applied.

Several jurisdictions have adopted the *Ollman* test. *See Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 107 S. Ct. 272 (1986); *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219 (2d Cir. 1985); *Price v. Viking...
opinion or actionable fact. The factors a court looks at under the Oilman test are: (1) precision of the language; (2) verifiability of the statement; (3) literary context of the statement; and (4) so-


At the time I joined the opinion in Gertz . . . I regarded this statement as an exposition of the classical views of Thomas Jefferson and Oliver Wendell Holmes that there was no such thing as a false "idea" in the political sense, and that the test of truth for political ideas is indeed the marketplace and not the courtroom. I continue to believe that is the correct meaning of the quoted passage. But it is apparent from the cases cited by petitioner that lower courts have seized upon the word "opinion" in the second sentence to solve with a meat axe a very subtle and difficult question, totally oblivious "of the rich and complex history of the struggle of the common law to deal with this problem." Id. at 2263-64 (quoting Hill, Defamation and Privacy Under the First Amendment, 76 COLUM. L. REV. 1205, 1239 (1976)). Rehnquist concluded that in the context of the first amendment and the history of common law libel, the statement "Oilman has no status within the profession" is an actionable statement of fact. Id. at 2264. But see Bose Corp. v. Consumer's Union of United States, Inc., 466 U.S. 465, 504 (1984) (Supreme Court cites Gertz dicta with approval).

37. The defendants argued that the court should use the Oilman test to determine whether each challenged statement is factual or merely the protected expression of an opinion. Costello, 153 Ill. App. 3d at 966, 505 N.E.2d at 708.

38. The question here is whether, in common usage, the allegedly libelous statement has a "precise core of meaning" sufficiently definite to convey facts, or whether it is instead ambiguous. Oilman 750 F.2d at 979.

39. Here the court determines whether the statement is "objectively capable of proof or disproof." See id. at 981. The idea behind this inquiry is that we should not allow the fact-finder to determine the "falsity" of an unverifiable statement. This would invite the trier of fact to improperly reach its decision based on its "approval or disapproval of the [statement's] contents [or] its author." Id. For example, calling someone a "fellow traveler of fascists" is quite impossible to prove both because the statement lacks a precise core of meaning (does "fascist" mean "member of the Nazi Party" or just "political right-winger"?), and because it would be impossible to prove someone was, or was not, a "fellow traveler." See Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1052 (1977).

40. The statement may also appear in a literary setting that would put the average reader on notice that the statements he reads will probably be opinions. For example, in the context of an article lampooning sports personalities by a series of "one-liners," the statement that a certain sportscaster was the only broadcaster in town "enrolled in a course for remedial speaking" was nonactionable opinion. Myers v. Boston Magazine Co., 360 Mass. 336, 403 N.E.2d 376, 377 (1980). The United States Supreme Court has also emphasized the importance of context in determining if a statement is one of actionable fact. See Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) (characterization of land developer's zoning negotiating tactics as "blackmail" held an expression of opinion in the context of detailed article on the developer's proposals).
cial context of the statement.\textsuperscript{41} Although the court acknowledged that the United States Supreme Court had recognized an absolute privilege for the expression of opinions in \textit{Gertz v. Robert Welch, Inc.},\textsuperscript{42} it rejected the four-factor \textit{Ollman} analysis.\textsuperscript{43} The \textit{Costello} court reasoned that the \textit{Ollman} test does not adequately assist a court in determining the sufficiency of the pleadings in a defamation case.\textsuperscript{44} Noting that the \textit{Ollman} test lacks any objective criteria,\textsuperscript{45} the \textit{Costello} court concluded that the innocent construction rule is easier to apply and understand.\textsuperscript{46}

In rejecting the \textit{Ollman} approach, the \textit{Costello} court relied primarily on Illinois Supreme Court precedent.\textsuperscript{47} The court reviewed several recent defamation opinions\textsuperscript{48} and found that although that court has cited to \textit{Ollman},\textsuperscript{49} it has never used \textit{Ollman}'s four factors

\begin{itemize}
\item \textsuperscript{41} The inquiry into the statement's broader social context is based on the notion that different types of speech or writing have "widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion." \textit{Ollman}, 750 F.2d at 979. The importance of a statement's social context was recognized by the United States Supreme Court in Old Dominion Branch No. 946, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974). The Court held that because exaggerated rhetoric was commonplace in the context of a labor dispute, calling an employee who crossed the picket line a "traitor" could not be construed as an imputation of actual criminal conduct. \textit{Id. at} 286.
\item \textsuperscript{42} 418 U.S. 323 (1974). The \textit{Costello} court observed that "[o]pinion is absolutely protected under the First Amendment." \textit{Costello}, 153 Ill. App. 3d at 965, 505 N.E.2d at 706.
\item \textsuperscript{43} \textit{Costello}, 153 Ill. App. 3d at 966, 505 N.E.2d at 708. The court noted that although \textit{Gertz} held that opinion is absolutely protected under the first amendment, "it is difficult to draw a bright line between fact and opinion." \textit{Id. at} 964, 505 N.E.2d 706 (quoting \textit{Janklow v. Newsweek, Inc.}, 788 F.2d 1300, 1302 (8th Cir.), \textit{cert. denied} 107 S. Ct. 272 (1986)). The court also expressed concern that people who cleverly defame could use the privileged expression of opinion rule to avoid liability for their libelous statements:
\begin{quote}
Any defendant in any defamation suit, no matter how shrill, acerbic, profane or accusatorial the utterance may be, can always say, "Why, I was only expressing an opinion, and that's privileged." We do not believe the law of defamation should digress so far, as could happen if the "protected expression of opinion" rule is given full sway. The innocent construction rule does not permit such an extreme digression.
\end{quote}
\item \textsuperscript{44} \textit{Id. at} 964-65, 505 N.E.2d at 706.
\item \textsuperscript{45} \textit{Id. at} 966, 505 N.E.2d at 708.
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} The \textit{Costello} court found that three facts were significant in the supreme court cases: first, the Illinois Supreme Court had never followed the \textit{Ollman} rule; second, the supreme court had criticized the "privileged expression of opinion rule" in \textit{Catalano v. Pechous}, 83 Ill. 2d 146, 419 N.E.2d 350, \textit{cert. denied} 457 U.S. 911 (1980); and third, the Illinois Supreme Court has continued to follow the innocent construction rule in recent years. \textit{Costello}, 153 Ill. App. 3d at 965, 505 N.E.2d at 706-07.
\item \textsuperscript{49} \textit{Owen}, 113 Ill.2d at 280-81, 497 N.E.2d at 1148 (\textit{Ollman} cited for the proposition that the context of the disputed language must be considered in determining
to decide a case. Instead, the appellate court found that the supreme court continues to use the “innocent construction rule” to decide defamation cases. Applying this rule, the Costello court reaffirmed its holding in the first appeal that the editorial constituted an actionable libel. Accordingly, the appellate court affirmed the trial court’s judgment for Costello because the defendants’ libelous statements were unprotected by constitutional privilege and were made with actual malice.

The Costello court’s decision is unsatisfactory for three reasons. First, the court erred in concluding that the Illinois Supreme Court prefers the innocent construction rule to the four-part Olman analysis in determining whether allegedly libelous statements are fact or opinion. Second, the Costello court failed to recognize that the sufficiency of a plaintiff’s prima facie defamation case is an entirely different issue from whether the defendant was constitutionally privileged to say what he did. The court, therefore, inaccurately concluded that finding the editorial libelous per se under the innocent construction rule ended the constitutional inquiry as well. Finally, the Costello court should have applied a principled fact-versus-opinion test to determine whether the editorial statements were constitutionally privileged.

The Illinois Supreme Court has discussed the constitutional privilege for expressions of opinion only three times. In Catalano v. Pechous, the supreme court held that a city clerk’s statement accusing the city’s aldermen of bribery was an actionable assertion of fact and not a constitutionally protected expression of an opinion.

whether the statement is an expression of opinion).

50. Costello, 153 Ill. App. 3d at 965, 505 N.E.2d at 706-07.
52. Costello, 153 Ill. App. 3d at 968, 505 N.E.2d at 709.
53. Id.
54. Id. at 965, 505 N.E.2d at 706-07. See infra notes 56-69 and accompanying text for a discussion of the Illinois Supreme Court’s implicit adoption of the Olman test.
55. See infra notes 73-77 and accompanying text for an explanation of the privileges in tort actions generally, and their procedural effect within the law of defamation.
57. 83 Ill. 2d 146, 419 N.E.2d 350 (1980).
58. Referring to the award of a city garbage contract, the clerk said “240 pieces of silver changed hands, thirty for each alderman.” Id. at 151, 419 N.E.2d at 353.
The Illinois Supreme Court based its decision in Catalano on the fact that both the literary and the social context of a statement will affect a reader's perception. The Catalano court also recognized that certain statements are so imprecise that it is impossible to prove their falsity. Therefore, although the supreme court found the statements in Catalano to be actionable assertions of fact, it analyzed the case with reference to each of the four factors that would ultimately comprise the Ollman test.

In Owen v. Carr, the court used a similar analysis to decide that certain statements were constitutionally protected opinion. In this case, the supreme court cited Ollman directly as support for the proposition that a court must consider allegedly defamatory lan-

59. Id. The supreme court first found the statement to be a defamatory allegation of bribery without a plausible innocent construction. Id. at 157, 419 N.E.2d at 356. The Catalano court also rejected the notion that a charge of a crime must be treated as a nonactionable expression of opinion if it is based only on an inference drawn from the speaker's statement. Id. at 164, 419 N.E.2d at 359. The court decided that Pechous' statement accused the aldermen of a crime and was therefore an assertion of fact "and not the constitutionally protected expression of an opinion." Id.

The Catalano court was therefore not only uncritical of the protected expression of opinion rule, it actually embraced it, adopting this statement of the Second Circuit as part of its analysis: "[A] perjorative statement of opinion concerning a public figure generally is constitutionally protected, quite apart from Sullivan, no matter how vigorously expressed." Id. at 161, 419 N.E.2d at 357 (quoting Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980)).

60. The court cited Old Dominion Branch No. 946, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974), where the United States Supreme Court held that in the social context of a labor dispute, no reader could understand the epithet "scab" to mean one who is a traitor to his country. Catalano, 83 Ill. 2d at 162, 419 N.E.2d at 358. The court also noted that in the literary context of an article about a real estate developer's "negotiations" with the city for a zoning variance, "even the most careless reader would have understood that a reference to the developer's position as "blackmail" was no more than rhetorical hyperbole, and not an accusation of a criminal charge. Id. (citing Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970)). Thus, the Illinois Supreme Court expressly cited the sources and employed the guidelines of two elements of the Ollman test. For an explanation of the Ollman test, see supra notes 38-41.

61. Catalano, 83 Ill. 2d at 162, 419 N.E.2d at 358 (citing Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976)). See supra note 39 for a discussion of Buckley.

62. 113 Ill. 2d 273, 497 N.E.2d 1145 (1986).

63. Owen, 113 Ill. 2d at 280-81, 497 N.E.2d at 1148. In Owen, attorney Carr accused opposing counsel Owen of filing a Judicial Inquiry Board complaint against Carr's client (a circuit court judge), solely for the purpose of intimidating judges in future cases involving Owen's client. Id. at 275, 497 N.E.2d at 1146. After the comments were published in a prominent legal newspaper, Owen brought a defamation action. Id. The Illinois Supreme Court upheld the trial court's dismissal of the case, basing its decision on twin rationales. First, the charge of intended judicial intimidation could reasonably be construed innocently as "an attorney's biased presentation of his client's view of a pending cause of action." Id. at 280-81, 497 N.E.2d at 1148. Second, in the context of a contentious lawsuit, statements about the motivations of an opposing counsel "may reasonably be viewed as an expression of Carr's opinion regarding his client's allegations against Owen." Id.
language in its context to determine whether it is privileged opinion. More importantly, however, the Owen court stated that the United States Supreme Court has recognized a constitutional privilege for expressions of opinion. Instead of criticizing Oilman's four-factor test, the Illinois Supreme Court implicitly recognized it in Catalano and then, in Owen, declared it to be constitutionally grounded. The Costello court's conclusion that the Illinois Supreme Court prefers the innocent construction rule to an Oilman-type analysis is, therefore, inconsistent with the Owen and Catalano decisions.

The Costello court also fundamentally erred when it failed to make an independent examination of whether the editorial was a constitutionally privileged expression of opinion. The Costello court correctly used the innocent construction rule to decide that the editorial was libelous per se. The court, however, erroneously

64. The court's citation of Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974), as well as Oilman, indicates that the context the Owen court was referring to is the statement's "public context," rather than "literary context." Owen, 113 Ill. 2d at 280-81, 497 N.E.2d at 1148.

The Old Dominion Court held that federal labor policy favoring uninhibited, robust and wide-open debate in union disputes prohibited a libel award based on figurative use of words like "traitor." Old Dominion, 418 U.S. at 271. "Expression of such an opinion, even in the most perjorative terms, is protected under federal labor law. Here, too, there is no such thing as a false idea." Id. at 284 (emphasis added). The Court also noted that the National Labor Relations Board had often concluded that epithets like "scab," "unfair," and even "liar," were commonplace in the context of a heated labor dispute and were, therefore, protected even though erroneous and defamatory. Id. at 278. Similarly, in Oilman, the statement's public context (syndicated column on a newspaper's Op-Ed page), was of central importance for the court in finding the statements to be privileged opinion. Oilman, 750 F.2d at 986-87. The court noted that the average reader is predisposed to consider statements on an editorial page as opinion. Id.

65. Owen, 113 Ill. 2d at 280, 497 N.E.2d at 1148.
66. Id. (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)).
67. The Costello court stated that the Illinois Supreme Court had previously expressed disapproval of Oilman's four-factor protected expression of opinion rule. Costello, 153 Ill. App. 3d at 964, 505 N.E.2d at 707. However, a careful analysis of the cited case, Catalano v. Pechous, 83 Ill. 2d 146, 419 N.E.2d 350 (1980), reveals that the supreme court used exactly those factors in reaching its decision. See supra notes 57-61 and accompanying text for a discussion of Catalano.

68. See supra notes 57-61 for a discussion of Catalano.
69. Owen v. Carr, 113 Ill. 2d 273, 280, 497 N.E.2d 1145, 1148 (1986). The Catalano court had discussed the defendant's claim that, under Gertz, an expression of opinion can never be actionable, Catalano, 83 Ill. 2d at 154, 419 N.E.2d at 356-59, but it did not state categorically that opinions were constitutionally privileged.
70. The Costello court, in effect, decided only the question of whether the editorial was libelous, instead of first determining whether the editorial was defamatory, and then examining whether it was nonetheless privileged as opinion: "In our resolution of the issue of whether the . . . editorial was libelous, we have followed the Illinois innocent construction rule rather than the privileged expression of opinion rule." Costello, 153 Ill. App. 3d at 966, 505 N.E.2d at 708. Collapsing the two questions into one test was the court's fundamental misstep.
71. Id. at 966, 505 N.E.2d at 709. The Costello court did not err in concluding that the editorial was incapable of an innocent construction. Since the modification of the rule in Chapski v. Copley Press, 92 Ill. 2d 344, 442 N.E.2d 195 (1982) courts are no longer allowed to strain to find a conceivably innocent construction. Certainly,
determined that this finding foreclosed further inquiry into the separate question of whether the defendants' statements were constitutionally privileged.\footnote{72}

The very nature of a privilege is that it excuses or justifies conduct that would otherwise be actionable.\footnote{73} As a result, the defendant in a libel suit is allowed to escape liability when his conduct promotes a societal interest\footnote{4} that is worthy of protection, "even at the expense of uncompensated injury to the plaintiff's reputation."\footnote{76} Because the court did not realize that the issues of libel per se and constitutional privilege require separate inquiries, it chose one test\footnote{76} to dispose of both questions. The \textit{Costello} court simply did not recognize that a defamatory statement could still be constitutionally privileged as an expression of opinion.\footnote{77}

Finally, the \textit{Costello} court erred when it failed to apply a substantive fact-versus-opinion test to determine whether the editorial statements\footnote{78} were constitutionally privileged. Because \textit{Gertz} created commenting that "[w]e've got two more years of the Costello brand of lying leadership" imputes to Costello a want of integrity in the discharge of his duties of office. Even under the pre-\textit{Chapski} interpretation of the rule, it is difficult to imagine a fanciful construction that would make the statement other than defamatory.

\textit{72.} The \textit{Costello} court did not analyze whether the challenged statements accusing Costello of "lying" were facts or opinions. Instead, the court simply made its own subjective evaluation of the statements, stating, "It is evident that the plaintiff had not lied to either the defendants or the public." \textit{Costello}, 153 Ill. App. 3d at 968, 505 N.E.2d at 709. The \textit{Costello} court concluded that the first amendment does not protect the defendants' statements because "the editorial in question goes well beyond the bounds of protected criticism." \textit{Id.} at 967, 505 N.E.2d at 708. As the dissent points out, however, the majority provides no explanation of how they reached this conclusion. \textit{Id.} at 998, 505 N.E.2d at 727 (Steigmann, J., dissenting).

\textit{73.} \textit{See} \textit{Prosser}, supra note 1, at 98. "Privilege is the modern term applied to those considerations which avoid liability where it might otherwise follow." \textit{Id.}; \textit{see also} \textit{Restatement (Second) of Torts} § 10 (1976).

\textit{74.} \textit{Prosser}, supra note 1, at 776. According to Prosser, the various defamation privileges have been developed by courts to protect the interests of either the defendant, a third party, or the general public. \textit{Id.} The extent of the privilege will vary with the relative importance of the interest to be promoted. Therefore, courts have developed absolute immunity only "where there is an obvious policy in favor of permitting complete freedom of expression, without any inquiry into the defendant's motives." \textit{Id.} at 777. It was the premise of the \textit{Ollman} court, accepted by the Illinois Supreme Court in \textit{Catalano} and \textit{Owen}, that \textit{Gertz} mandated this type of immunity for the expression of opinions. \textit{See} \textit{Gertz} v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). For a review of the various defamation privileges available to defendants, see \textit{Prosser}, supra note 1, at 776-96.

\textit{75.} \textit{Prosser}, supra note 1, at 776.

\textit{76.} \textit{Costello}, 153 Ill. App. 3d at 966, 505 N.E.2d at 708. \textit{See} supra note 70 and accompanying text for an explanation of the court's error in this regard.

\textit{77.} The magnitude of this error in the court's reasoning can be demonstrated by constructing a simple syllogism. The major premise is "[a]ll opinions are privileged." \textit{Gertz}, 376 U.S. at 27. The minor premise is "[s]ome opinions are defamatory" (Costello lied about what he intended to do in office). The irrefutable conclusion, therefore, is "[s]ome defamatory statements are privileged."

\textit{78.} Costello alleged that he was libeled by seven different statements in the editorial. For a list, see Costello v. Capital Cities Media, Inc., 111 Ill. App. 3d 1009,
absolute immunity for expressions of opinion, courts now have the difficult but constitutionally mandated duty to distinguish between fact and opinion. Whether a statement is one of fact or opinion is a question of law. Other jurisdictions have adopted a wide variety of tests to draw the line between statements of actionable fact and those of privileged opinion. Illinois courts, however, have followed either a multi-factor variation of the Oilman test, an analysis from


79. See supra note 8 for the United States Supreme Court’s discussion of opinion and the first amendment in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). See supra notes 56-69 and accompanying text for an argument that the Illinois Supreme Court has recognized an absolute privilege for the expression of opinions and, by implication, a multi-factor Oilman-type test to distinguish facts from opinions.

80. Courts and commentators have uniformly recognized that distinguishing fact from opinion is difficult, if not impossible. The Oilman court recognized that “it is quite impossible to lay down a bright-line or mechanical distinction.” Oilman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985). Professor Prosser has noted that the fact-opinion distinction within the common law qualified privilege of fair comment is a “most unsatisfactory and unreliable one, difficult to draw in practice.” PROSSER, supra note 1, at 820. See also J. WIGMORE, EVIDENCE 14 (J. Chadbourne rev. ed. 1978); Carman, Hutchinson v. Proxmire and the Neglected Fair Comment Defense: An Alternative to “Actual Malice,” 30 DePaul L. Rev. 1, 12-21 (1980); Titus, Statement of Fact v. Statement of Opinion—A Spurious Dispute in Fair Comment, 15 Vand. L. Rev. 1203 (1962).

McCormick has observed that “[t]he difference between so-called fact and opinion is not a difference between opposites or contrasting absolutes, but a mere difference in degree with no recognizable boundary.” C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 22 (1954). Professor Prosser, discussing the fact-versus-opinion distinction in the law of misrepresentation, stated that every opinion is actually a statement of fact—the fact of the speaker’s belief, and his state of mind at the time he asserts the statement. PROSSER, supra note 1, at 721. The dissent in Costello, therefore, aptly noted that facts and opinions lie on a continuum, and although there may be a “grey sea of uncertainty” where the two polar concepts meet, “it is this court’s constitutional duty to chart this sea as best we can to enable us to decide whether, at a given point, our location is fact or opinion.” Costello, 153 Ill. App. 3d at 980, 505 N.E.2d at 716 (Steigmann, J., dissenting).


81. See Owen, 113 Ill. 2d at 280, 497 N.E.2d at 1148 (citing Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983)).

82. See, e.g., RESTATEMENT (SECOND) OF TORTS § 566 (1977) (statements in the form of opinions actionable if they imply the existence of undisclosed facts); Oilman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (precision of language along with statement’s verifiability, literary context, and public context examined for determining whether fact or opinion); Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980) (court looks at facts surrounding the publication, circumstances in which the audience may, or may not, anticipate persuasion by the parties, and the manner in which the language itself is phrased); Meshburn v. Collin, 355 So. 2d 879 (La. 1977) (“average reader’s view” defines whether statement is fact or opinion).

83. See, e.g., Owen, 113 Ill. 2d 273, 497 N.E.2d 1145 (lawyer’s statements critical of his opponent’s motives in filing a judicial complaint held to be opinion in the context of a pending libel suit); Catalano v. Pechous, 83 Ill. 2d 146, 419 N.E.2d 350
the Restatement (Second) of Torts, or simply an ad hoc approach under the innocent construction rule. These approaches, however, are deficient. The Restatement approach is unsatisfactory because it does not provide a comprehensive analysis to distinguish statements of actionable fact from expressions of protected opinion. The innocent construction rule and the test developed under the

(1980) (court considers context and precision of words in determining whether defendant's figurative accusation of bribery was a fact or opinion).


85. In Owen, for example, the court essentially made an intuitive judgment call in finding the challenged statements there to be opinions: "[T]he statements may reasonably be viewed as an expression of Carr's opinion regarding his client's allegations." Owen, 113 Ill. 2d at 290-91, 497 N.E.2d at 1146. The court made only a passing reference to any objective criteria such as the public context in which the statements appeared. See id. For Illinois appellate court decisions using an innocent construction approach to fact versus opinion distinctions, see Colson v. Steig, 86 Ill. App. 3d 993, 408 N.E.2d 431 (1980) (criticism of college professor by department chairman a factual expression not capable of being innocently construed as a belief or an opinion); Galvin v. Gallagher, 81 Ill. App. 3d 927, 401 N.E.2d 1243 (1980) (newspaper story on teen drug problems innocently construed as author's editorial opinions); Byars v. Kolodziej, 48 Ill. App. 3d 1015, 363 N.E.2d 628 (1977) (department head's statements about political science professor's qualification for tenure innocently construed as nondefamatory opinion). 86. Restatement (Second) of Torts § 566 (1977). The American Law Institute interpreted Gertz to hold that pure opinions are now absolutely immune from a libel action. The approach adopted in the Restatement (Second) of Torts, therefore, distinguishes between two types of opinions: those in which the speaker states the facts on which he bases his opinion (pure opinion), and those in which the speaker does not state the factual basis for his opinion (mixed opinion). Only the former would be privileged: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Id.

87. See id. At first view, it seems that the Restatement test makes some opinions actionable. It is, however, perhaps more accurate to say that under the Restatement, "All opinions are protected, but statements of fact are not, even if they are in the form of opinions." The Restatement analysis, therefore, helps a court to detect statements of fact that are disguised in the form of opinion, but does not help it to identify an opinion that is in the form of a statement of fact. It does not help in determining whether a statement in a neutral form is a fact or an opinion, either. However, if the Costello court had adopted even this limited Restatement approach, the editorial statements about Costello would not have been actionable because the factual basis for the conclusory statements labeling Costello a liar is clearly laid out in the editorial itself. See supra note 22 for the text of the editorial.

88. The innocent construction rule demands that words be given their natural and obvious meaning. See supra note 2. This does not, however, provide guidance to courts making fact-versus-opinion distinctions because the root of the problem is ascertaining precisely what an expression's natural and obvious meaning is.

The Costello dissent complained that declaring statements opinions if they can reasonably be interpreted as such, simply begs the question: "How is one to tell whether the statement may reasonably be so read and what standard to apply? The majority decision in this case is an example of the standardless decision-making created by application of the innocent construction rule to a fact-versus-opinion issue."
common law privilege of fair comment\textsuperscript{99} also fail to adequately distinguish fact from opinion. Illinois courts should, therefore, formally adopt the \textit{Olman} test\textsuperscript{90} to determine whether a challenged statement is an assertion of actionable fact or protected opinion. This approach would have a broader application to fact-versus-opinion determinations,\textsuperscript{91} would provide courts with objective guidelines,\textsuperscript{92} and would be consistent with the Illinois Supreme Court’s multi-factor approach in \textit{Catalano}.\textsuperscript{93}

\begin{quote}
\textit{Costello}, 153 Ill. App. 3d at 1000, 505 N.E.2d at 728 (Steigmann, J., dissenting).
\end{quote}

\textsuperscript{89} The \textit{Olman} court criticized Illinois’ innocent construction rule and distinguished the application of that rule’s language from its own four-part test. \textit{Olman}, 750 F.2d at 980 n.18. When a statement is ambiguous under the \textit{Olman} test, the conclusion is that the statement is an opinion, not that the statement has an “innocent meaning.” Id. Scholars do not agree on whether fair comment is a privilege, a right, or a defense. See Carman, supra note 80, at 2 n.5. Professor Prosser, however, lists fair comment as a privilege. \textit{Prosser}, supra note 1, at 819. The fair comment privilege that developed at common law had five elements: (1) the statement must be one of opinion, not fact; (2) the opinion must be based on accurately stated facts; (3) the opinion may not be a purely personal attack; (4) the opinion must relate to a matter of public interest; and (5) the opinion must not be expressed with malice. See \textit{W. Hale, The Law of the Press} 703 (3d ed. 1948).

Because the qualified fair comment privilege was only applicable to opinions, making a distinction between fact and opinion became critically important. One commentator observed that the distinction made under the fair comment test was “nebulous, as a matter of pure logic. . . . The important point [in distinguishing fact from opinion], is whether ordinary persons reading or hearing the matter complained of would be likely to understand it as an expression of opinion.” \textit{F. Harper & F. James, The Law of Torts} 458 (1956). This is not a “test” at all, however, because it merely restates the problem. See Titus, supra note 80, at 1205-06. (1962).

Because the fair comment opinion test was essentially tautological, courts would usually base fact-opinion determinations on their intuitive sense of the distinction, with the “test” used only to justify the conclusion the court wished to reach. See Comment, \textit{Fact-Opinion Distinction}, supra note 80, at 1820. Some jurisdictions, unhappy with the “slippery quality” of this analysis, altogether abandoned the fact-opinion distinction in fair comment. Id. Professor Prosser notes that in about a quarter of the states, the privilege extends to nonmalicious statements of fact. \textit{Prosser}, supra note 1, at 819.

\textsuperscript{90} See supra note 36 for a discussion of \textit{Olman} and its four-factor test for distinguishing fact and opinion.

\textsuperscript{91} \textit{Olman}’s four-factor test, unlike the \textit{Restatement} approach, can be used to determine if any statement is one of actionable fact, not just those statements that are in the form of opinions. See supra notes 86-87 for a discussion of the \textit{Restatement} approach and its limitations.

\textsuperscript{92} The \textit{Costello} majority complained that the \textit{Olman} factors are “lacking in any objective specificity.” \textit{Costello}, 153 Ill. App. 3d at 966, 505 N.E.2d at 708. However, the dissent countered that the majority offered no suggestion as to how it made the determination that the editorial went “well beyond the bounds of protected criticism.” Id. at 998, 505 N.E.2d at 727 (Steigmann, J., dissenting):

[No] there is any guidance [in the majority opinion] for trial courts or other courts of review who might be called on to make similar decisions in the future. Instead this holding represents ad hominem judicial decision-making at its worst. It is nothing more than the civil law application of obscenity law made simple: I may not not know how to define it, but I know it when I see it. Id. at 997-98, 505 N.E.2d at 727.

\textsuperscript{93} See supra notes 57-61 and accompanying text for a discussion of the Illinois Supreme Court’s multi-factor analysis in \textit{Catalano}. 
If the Costello court had applied the Olman test, three factors would have indicated that the challenged editorial statements were opinions and, therefore, nonactionable. First, the editorial's author repeatedly used "liar" in a loose, figurative sense. This made the allegedly libelous statements both imprecise and unverifiable. Second, the statements appeared under the bold-type heading "Opinions" on an editorial page titled "Our Viewpoint." Because readers expect editorial writers to make strong, argumentative statements, this literary context indicates a greater probability that statements found there will be perceived by the audience as expressions of opinion. Third, the public context of the statements involves criticism of a public official's performance in office. Such speech goes to the heart of the first amendment and, therefore, demands protection.

94. The word "lie" can mean several things. It can mean an intentional untruth or simply the unintentional creation of a false and misleading impression. Costello, 153 Ill. App. 3d at 990-91, 505 N.E.2d at 722-23 (Steigmann, J., dissenting). This latter, more figurative sense is used in the editorial's statement: "Now we wonder if we didn't lie to you." See supra note 22 for the full text of the editorial.

95. The term "liar" is imprecise because it has multiple meanings. See supra note 94. It is unverifiable because "determining whether a speaker has lied always involves the use of judgment by the listener." Costello, 153 Ill. App. 3d at 989 (Steigmann, J., dissenting). Whether the editorial's general accusation (that Costello "lied") is true really requires an answer to the question: "Did Costello fail to act in accordance with his promised course of action?" Id. at 990, 505 N.E.2d at 722. Because of the vagueness of the terms "lying" and "liar," the court's task is nearly impossible: "[W]hile courts can adjudicate who said what to whom, they are ill-equipped to adjudicate who may have lied when making statements of future, intended conduct." Id.


97. See Olman, 750 F.2d at 990; Costello, 153 Ill. App. 3d at 991, 505 N.E.2d at 723 (Steigmann, J., dissenting).

98. The notion that such political speech is at the core of first amendment freedom of speech is universally recognized by first amendment scholars. See, e.g., T. Emerson, The System of Freedom of Expression 532-33 (1970) (no dispute that the first amendment is intended to protect all communication dealing with public issues); Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," Sup. Ct. Rev. 191, 193 n.9 (1964) (the framers did not intend to incorporate the English common law of seditious libel, which punished speech or writings critical of government and its officials). See also A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948). In this classic work, Meiklejohn argues that the primary purpose of the first amendment's free speech and press clauses is to guarantee citizens the right to criticize their government and assure a free flow of political information in the republic.

The Supreme Court accepted this "central meaning" of the first amendment in New York Times, when, in dicta, it declared the Sedition Act of 1798 unconstitutional. New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964). The Court determined that silencing political debate is inconsistent with democratic self-government. Id. This is not to say, however, that other speech should not receive first amendment protection: "There is nothing in the language of the first amendment to indicate that it protects only political speech, although to provide such protection was no doubt a strong reason for the amendment's passage." H. Black, A Constitutional Faith 46 (1968) (emphasis added). Indeed, the Court has clearly extended first amendment protection to areas beyond the range of political speech. See, e.g., Thornhill v. Alabama, 310 U.S. 88 (1940) (economic speech in a labor dispute). For an argument that only "explicitly political speech" should receive first amendment protection, see Bork,
in order to serve our profound national commitment to the free debate of public issues.\textsuperscript{99} Because these factors indicate that the challenged editorial statements are opinion rather than fact, the statements should be privileged as a matter of law.

Even if Illinois courts formally adopt the \textit{Ollman} test, the innocent construction rule can continue to play an important role in fact-versus-opinion determinations.\textsuperscript{100} When properly viewed as a rule of construction, innocent construction simply means statements that may reasonably be construed as opinions will be constitutionally privileged.\textsuperscript{101} It would be appropriate, therefore, for courts to continue applying the “innocent construction rule” to the issue of constitutional privilege, but only where it is needed to resolve the reasonably ambiguous results of a substantive fact-versus-opinion test.\textsuperscript{102} In \textit{Costello}, the very fact that the appellate court was divided\textsuperscript{103} indicates that the challenged editorial statements could be

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\textsuperscript{99} \textit{New York Times}, 376 U.S. at 270. “The general proposition that freedom of expression upon public questions is secured by the first amendment has long been settled by our decisions . . . [the debate on public issues] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” \textit{Id}. The \textit{Costello} court stated it was “fully cognizant” of this national commitment and also that “candidates for public office, having thrust themselves to the forefront of particular public controversies . . . have voluntarily exposed themselves to increased risk of defamatory falsehood.” \textit{Costello}, 153 Ill. App. 3d at 967, 505 N.E.2d at 708 (quoting \textit{Gertz v. Robert Welch}, Inc., 418 U.S. 323, 345 (1974)). The court, nonetheless, concluded that because the editorial “goes well beyond the bounds of protected criticism,” the defendants could not claim the first amendment as a defense. \textit{Id}.

\textsuperscript{100} The Supreme Court of Illinois, in \textit{Chapski} v. Copley Press, 92 Ill. 2d 344, 442 N.E.2d 195 (1982), recently reaffirmed the innocent construction rule’s vitality in Illinois law and indicated that the rule is applicable to “opinion” cases. \textit{Id}. at 350, 442 N.E.2d at 199. \textit{Accord Catalano v. Pechous}, 83 Ill. 2d 273, 419 N.E.2d 350 (1980). The court is unlikely to discard the rule in its entirety. Therefore, a “compromise” that allows the innocent construction rule and the \textit{Ollman} test to co-exist would be appropriate. Courts could apply the innocent construction rule only after the \textit{Ollman} test—and only if that test has produced inconclusive results. Such an approach would retain the spirit of the innocent construction rule (statements reasonably capable of a nondefamatory, or privileged, construction shall be so construed), and also provide the first amendment with some much-needed breathing space. In addition, the \textit{Ollman} test would give courts some objective criteria for making their fact-versus-opinion distinctions.

\textsuperscript{101} \textit{See Owen v. Carr}, 113 Ill. 2d 273, 276, 497 N.E.2d 1145, 1148 (1986); \textit{Chapski}, 92 Ill. 2d 344, 350, 442 N.E.2d 195, 199.

\textsuperscript{102} This is basically how the innocent construction rule is used in deciding issues of colloquium and defamatory meaning. \textit{See, e.g.}, \textit{Wexler v. Chicago Tribune Co.}, 69 Ill. App. 3d 610, 387 N.E.2d 892 (1979) (defamatory meaning); \textit{Belmonte v. Rubin}, 68 Ill. App. 3d 700, 386 N.E.2d 404 (1979) (colloquium). The question of whether a statement is a fact or an opinion is, however, a much murkier inquiry. In deciding issues of colloquium or defamatory meaning, the ambiguity that calls for the innocent construction rule can be found on the face of the words. In deciding whether a statement is fact or opinion, however, the distinctions are so nebulous that courts will often need a substantive test just to determine if a real ambiguity is present.

\textsuperscript{103} A three-judge panel decided \textit{Costello} by a 2-1 vote. Justice Jones wrote the
reasonably characterized as expressions of opinion.\textsuperscript{104}

The \textit{Costello} court had an opportunity to clarify a constitutional privilege for expressing opinions that exists independently of any common law defamation doctrine. The Illinois Supreme Court’s decisions in \textit{Catalano} and \textit{Owen} suggested this result. Instead, the \textit{Costello} court made an unnecessary choice between the innocent construction and the privileged opinion rules. It is ironic that the \textit{Costello} court used the innocent construction rule, which has been such a formidable shield for defamation defendants, to undercut an emerging constitutional privilege. A careful analysis would have led the court to conclude that the innocent construction rule does not provide expressions of opinion with the constitutional protection that \textit{Gertz} requires and which the \textit{Ollman} approach would have guaranteed. If other Illinois courts were to follow the \textit{Costello} approach, individuals, as well as the news media, would be subject to libel judgments for merely criticizing public officials. Courts, therefore, should instead apply a principled fact-versus-opinion test, like the \textit{Ollman} analysis, in order to preserve the free flow of political information that is at the heart of our constitutional right of free speech.

\textit{Jerald B. Holisky}

\textsuperscript{104} By accepting the decision in the first appeal, the majority implicitly found the editorial statements to be factual. \textit{Costello v. Capital Cities Media, Inc.}, 111 Ill. App. 3d at 1009, 1016, 445 N.E.2d at 13, 18 (1982). The dissent, on the other hand, concluded that these same statements were expressions of opinion. \textit{Costello}, 153 Ill. App. 3d at 993, 505 N.E.2d at 724 (Steigmann, J., dissenting). Thus, the divided \textit{Costello} court itself demonstrates that the editorial statements might reasonably be construed as either fact or opinion.