Deranged and Defamed: U.S. Courts and Defamation Suits Involving Mental Illness Imputations After the Americans with Disabilities Act

By
Louisa Clark

Senior Honors Thesis
Journalism and Mass Communication
University of North Carolina at Chapel Hill

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Approved:

Victoria Ekstrand
Dr. Victoria Ekstrand, Thesis Advisor

Anne Johnston
Dr. Anne Johnston, Reader

Joseph Cabosky, Reader

Abstract

The purpose of this thesis is to explore and analyze the way U.S. courts have treated defamation claims involving the imputation of mental illness. Specifically, this thesis looks at 11 cases, both state and federal, following the passage of the Americans with Disabilities Act of 1990, in which discrimination based on disability was prohibited.

In eight of the cases analyzed, the alleged defamatory statement was determined to be non-actionable opinion or hyperbole. In two of the cases the statements were found to be defamation *per se* and in one case the statement was determined to not impute mental illness and to be substantially true.

This thesis looks specifically at how each court in the non-actionable opinion or hyperbole cases came to that determination. Both ambiguity and inconsistencies were found among the courts in defining what constitutes an opinion protected by the First Amendment. This thesis also approaches these cases from a Critical Legal Studies perspective and analyzes the specific rhetoric used by the courts when discussing mental illness and its wider implications.

In no case examined does the court argue that imputing mental illness is no longer defamatory, even if the statement in the majority of the cases was ultimately deemed non-actionable. The cases in which the imputation of mental illness constituted defamation *per se* focused on the impact the imputation had or could have had on the plaintiffs' careers or employment. This suggests that a plaintiff is more likely to be successful in a defamation claim involving reputational harm to their abilities as an employee.

A consistent standard for what constitutes non-actionable opinion is needed in order to understand the state of defamation law in relation to the imputation of mental illness. Courts also

need to acknowledge their role in the country's social context and the impact their characterization has.

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Chapter I

Introduction

"The common law of defamation has long been viewed as an intellectual wasteland," Dean Robert C. Post of Yale Law School wrote in 1986.[1] Over 80 years before Post made that statement, United States federal judge Van Vechten Veeder described defamation law saying, "…perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is as a whole, absurd in theory, and very often mischievous in its practical operation."[2] Defamation law attempts to balance the protection of an individual's reputation and another individual's First Amendment rights.[3] A defamatory statement is defined as one that "tends to damage a person's standing in the community through words that attack an individual's character or professional abilities," that can also, "cause people to avoid contact with the person attacked."[4] Defamation can be further classified into spoken defamation, slander, and written defamation, libel.[5] However, whether or not a statement is defamatory varies depending on the "climate of opinion."[6] As the climate of opinion shifts, so does the defamatory nature of some statements or ideas. Veeder also remarked on how defamation law has the ability to reflect society at specific points in history:

> Since the law of defamation professes to protect personal character and public institutions from destructive attacks without sacrificing freedom of thought and the benefit of public discussion, the estimate formed of the relative importance of these objects, and the degree

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[1] Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution,* 7 CALIF. L. REV. 691, (1986).
[2] Van Vechten Veeder, *The History and Theory of the Law of Defamation. I,* 3 COLUM. L. REV. 546 (1903).
[3] Post, *supra* note 1, at 691-692.
[4] KENT R. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATION 96 (9th ed. 2014).
[5] *Id.*
[6] *Developments in the Law Defamation,* 69 HARV. L. REV. 875, 882 (1956).

> of success attained in reconciling them, would be an admirable measure of the culture, liberality, and practical ability of each age.[7]

As a matter of state law, defamatory statements usually fall into one of two categories: defamation per se and defamation per quod. Statements considered defamation per se are blatantly and outright defamatory, whereas statements considered defamation per quod are defamatory by implication or innuendo.[8] "An expression may shift over time from one category to another. Such changes reflect the living and changing nature of discourse and culture, as well as the responsiveness of libel law," Alan Durant wrote.[9]

Most defamatory statements involve "criminal activity, serious moral failing, or incompetence in business or professional life." Although less frequent in libel cases, words that "imply that a person is unpatriotic, mentally incompetent, alcoholic, or infected by loathsome disease,"[10] as well as the imputation of mental derangement, are also considered defamatory.[11]

This thesis focuses on defamation suits in which the words or phrases are associated with the imputation of mental illness. Society as a whole often throws around psychiatric terms without a true understanding of what they mean.[12] Frank Farley, a professor of psychology at Temple University described how this can be problematic saying, "These labels give a false simplicity to human behavior. Something very complex boils down to (a generic, psychiatric label…But human behavior is not well captured by these labels."[13] Emanuel Maidenberg,

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[7] Veeder, *supra* note 2.
[8] MIDDLETON & LEE, *supra* note 4, at 106-107.
[9] ALAN DURANT, MEANING IN THE MEDIA 171 (2010).
[10] MIDDLETON & LEE, *supra* note 4, at 101.
[11] Karen M. Markin, *Still Crazy After All These Years: The Enduring Defamatory Power of Mental Disorder*, 29 LAW & PSYCHOL. REV. 155, 162 (2005).
[12] Meghan Holohan, *'She's OCD!' 'He's Schizo!' How Misused Health Lingo Can Harm,* NBC NEWS, December 29, 2014, http://www.nbcnews.com/storyline/2014-year-in-review/shes-ocd-hes-schizo-how-misused-health-lingo-can-harm-n275381.
[13] *Id.*

clinical professor of psychiatry and director of the cognitive behavioral therapy clinic at Semel Institute for Neuroscience and Human Behavior at the University of California, Los Angeles, put it like this, "When people use (psychiatric labels) in daily language, I think it is intended to deliver some sort of emotional context…It says that there is something wrong with you."[14] By, "re-stigmatizing people through lazy labeling," individuals could be left ashamed to seek help.[15] Laws in the United States further confirm the idea that psychiatric labels signal, "that there is something wrong with you"[16] through the defamatory potential of mental illness imputations. Defamation law recognizes that wrongfully implying an individual suffers from a mental illness can result in injuring their good reputation. This suggests the power courts can have beyond the field of law and, therefore, the relevance of this study.

Court cases involving claims of defamation by imputation of mental disorder date back as far as 1863 and continue to arise today.[17] However, neither the legal or cultural conceptions of mental disorder have remained constant since the 19th century. For example, in 1973, the American Psychiatric Association removed homosexuality from the Diagnostic and Statistical Manual of Mental Disorders (DSM), thus "leading to changes in the broader cultural beliefs about homosexuality."[18] One of the biggest moments in the history of mental health law came with the passage of the Americans with Disabilities Act of 1990, which prohibited discrimination based on disability.[19] The law does this through setting specific standards for things such as employment and public accommodations. For example, an employer cannot discriminate against

[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Markin, *supra* note 11, at 157.
[18] Jack Drescher, *The Removal of Homosexuality from the DSM: Its Impact on Today's Marriage Equality Debate,* 16 JOURNAL OF GAY & LESBIAN MENTAL HEALTH. 124, 124 (2012).
[19] Randy Chapman, *The Americans with Disabilities Act: Civil Rights for Persons with Disabilities,* 19 COLO. LAW. 2233, 2233 (1990).

an applicant simply because of a disability.[20] The ADA states, "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society."[21]

Mental illness is addressed in many aspects of U.S. law. Examples of those areas include: involuntary commitment to a mental health facility, the criminal defense of insanity, fitness to stand trial on criminal charges, guardianship of disabled adults, child custody; anti-discrimination laws, sex offender laws, eligibility for government and private disability benefits, and tort liability.[22] Mark J. Heyrman argues that mental illness is not a status, but rather a condition. This is an important distinction because conditions carry a less permanent connotation than someone's status. The majority of mental illnesses are treatable, and their effects on the individual fluctuate over time and are influenced by whether or not the individual is on any sort of medication or treatment.[23] Heyrman also points out that, legally, individuals with mental illness are able to make decisions about their own lives.[24]

The purpose of this thesis was to investigate the idea put forth by Durant[25] with specific regard to the defamatory nature of mental illness. In this thesis, the terms mental derangement, mental disorder and mental illness will be used interchangeably as well as the terms the Americans with Disabilities Act and the ADA. This thesis examines the way in which United States courts have approached defamation suits in which the statement was related to the imputation of mental disorder following the passage of the Americans with Disabilities Act. The ADA was chosen as a marker because it noted a significant change in the way U.S. law regarded

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[20] Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2008).
[21] *Id.*
[22] Mark J. Heyrman, *Five Things Every Lawyer Should Know About Mental Health Law,* CBA REC. 31, 31 (2004).
[23] *Id.* at 31-32.
[24] *Id.* at 32.
[25] DURANT, *supra* note 9.

disability. This was selected with the idea that attitudes might have changed concerning mental illness in defamation law; similar to the way it did with the label of homosexuality. After looking at courts' treatment of these types of defamation claims, this thesis then explored the specific rhetoric employed by the courts and what that might suggest for the stigma surrounding mental illness, as well as its power to injure an individual's reputation.

Literature Review

The scholarly literature that provides the foundation for this study has been divided into four categories for review. These distinct categories arose from the interdisciplinary nature of this study involving topics in both the legal and health field. The categories are: 1) The Relationship Between Mental Illness and Reputation; 2) Studies on the Stigmatizing Label of Mental Illness; 3) Scholarship Regarding the ADA's Impact on the Field of Mental Illness; and 4) Discontent Surrounding United States Defamation Law.

The Relationship Between Mental Illness and Reputation

The concept of reputation is at the core of defamation law, for it is what the law aims to protect. Robert C. Post determined reputation to be rooted in the social understanding individuals have of one another. However, he points out, almost all social relationships or constructs are made up of such understanding and not all social relationships fall under the protection of defamation law.[26] Post argues that this is extremely telling:

> But by looking carefully at the nature of the "injuries affecting a man's reputation or good name" defamation law is actually designed to redress, one can uncover a more focused image of the exact kinds of social apprehension that defamation law considers "normal," or "desirable," or deserving of the law's protection. In this sense defamation

[26] Post, *supra* note 1, at 692.

> law presupposes an image of how people are tied together, or should be tied together, in a social setting.[27]

Post goes on to identify the three most important concepts of reputation in terms of their influence on defamation law: reputation as property, honor and dignity.[28] The idea of reputation as property is especially relevant. Post equates this to one's "reputation in the marketplace."[29] Ideally, in order to be successful in the "marketplace," an individual must maintain a "good" reputation.[30] One way to measure an individual's reputation in the marketplace is his or her ability to obtain or maintain employment. Janet R. Cummings and her co-authors point out that those with mental illness are more likely to experience unequal employment opportunities and dissimilar employment outcomes than those who do not suffer from a mental illness.[31] Legislation, such as the Americans with Disabilities Act, was designed to reform such disparities.[32] If Post is correct in saying that one key concept in reputation is regarding reputation as property and the ADA's goal is the help eliminate some disparities those with mental illness face in employment, connections could be drawn between the legislation and the defamatory power in the imputation of mental illness. However, it appears no existing scholarship has made any connections between these two subject areas.

Studies on the Stigmatizing Label of Mental Illness

Disparities that those with mental illness face, as mentioned previously, are not limited to the field of employment. These disparities are rooted in the stigma that surrounds the label of

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[27] *Id.* at 692-693.
[28] *Id.* at 693.
[29] *Id.*
[30] *Id.* at 693-697.
[31] Janet R. Cummings, Stephen M. Lucas & Benjamin G. Druss, *Addressing Public Stigma and Disparities Among Persons with Mental Illness: The Role of Federal Policy,* 103 Am. J. Public Health 781, 781 (2013).
[32] Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2008).

mental illness. David Mechanic argues, "Psychiatric conditions, particularly those relating to psychoses and substance abuse, carry a much greater stigma than do physical abilities."[33] The public's response to mental health problems, the health care profession's response to those seeking treatment for mental illness and the creation of public policy are tied to public attitude regarding mental health.[34] For example, studies have found that those with mental illness are more prone to housing and employment discrimination than an individual without a mental disorder.[35] Mental illness is relevant topic in the United States, as shown by its prevalence in the population. According to the National Institute of Mental Health, 18.1 percent of adults in the United States experience mental illness in a given year.[36]

Susan Stefan argues that mental illness and disability stigmas are more complicated by the fact that many mental illnesses and disabilities often do not develop until an individual has already formed a personal identity. It is then extremely challenging for an individual to accept that those around them change their behavior once they become aware of the illness or disability.[37] This change in behavior signifies the way in which the mental illness label has defamatory capabilities. Mental illness can change the way a person is treated and, therefore, has the potential to harm reputation.

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[33] David Mechanic, *Cultural and Organizational Aspects of Application of the Americans with Disabilities Act to Persons with Psychiatric Disabilities,* 76 THE MILBANK QUARTERLY. 5, 6 (1998).
[34] Bernice A. Pescosolido et. al., *"A Disease Like Any Other"? A Decade of Change in Public Reactions to Schizophrenia, Depression, and Alcohol Dependence*, 167 AM J PSYCHIATRY 1321, 1324 (2010).
[35] Angela Parcesepe & Leopoldo Cabassa, *Public Stigma of Mental Illness in the United States: A Systematic Literature Review,* 40 ADMINISTRATION & POLICY IN MENTAL HEALTH SERVICES RESEARCH 384, 384 (2013).
[36] RC Kessler, WT Chiu, O Demler and EE Walters, *Prevalence, severity, and comorbidity of twelve-month DSM-IV disorders in the National Comorbidity Survey Replication (NCS-R).* 62 ARCHIVES OF GENERAL PSYCHIATRY. 617-27 (2005).
[37] Susan Stefan, *"Discredited" and "Discreditable": The Search for Political Identity by People with Psychiatric Diagnoses,* 44 WM. & MARY L. REV. 1341 (2003).

The degree to which that stigma has changed has often been a topic of research. Jo C. Phelan and three other scholars compared the results of two surveys concerning the meaning of mental health administered in 1950 and in 1996. According to findings from the surveys, the public's perception of the mentally ill as violent or frightening increased substantially over the 46-year period; however, this perception is attributed to those who viewed mental illness as equivalent to psychosis. Phelan and her co-authors argue that there has been an increase in the acceptance of some forms of mental illness with the exception of psychosis, which is even more feared than it was 50 years ago.[38] The authors defend their claim of increased acceptance by citing that the use of mental health services has at least doubled from 1950 to 2000.[39]

Their study, however, is limited in that it only measures one element of the stigma surrounding mental illness: perceptions of violence.[40] A 1999 report by the U.S. Surgeon General found similar results. Although the stigmatization of mental health has intensified between 1949 and 1999, understanding has improved.[41] According to the report, the stigma is rooted in fear of violence, despite the findings in the report that likelihood of violence is extremely low. The report attributes the increase in stigmatization to the fact that the average individual is unable to differentiate abnormal behavior from a mental illness diagnosis.[42] Karen M. Markin argues that examining court decisions involving allegations of mental disorders reinforce the Surgeon General's findings that the stigma attached to mental illness has increased in the past forty years.[43] The scholarship regarding the stigmatizing label of mental illness, however, can be seen

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[38] Jo C. Phelan et. al., *Public Conceptions of Mental Illness in 1950 and 1996: What is Mental Illness and Is It to be Feared?,* 41 JOURNAL OF HEALTH AND SOCIAL BEHAVIOR 188, 188 (2000).
[39] *Id.* at 189.
[40] *Id.* at 201.
[41] *Mental Health: A Report of the Surgeon General*, 1, 8 (1999).
[42] *Id.* at 7.
[43] Markin*, supra* note 11, at 155.

as extremely dated. The U.S. Surgeon General has not released a report on mental health since 1999. Perceptions, also, are just one way to examine stigma. How people respond to those with mental illness is also relevant and not addressed in the Surgeon General's report.

Scholarship Regarding the ADA's Impact on the Field of Mental Illness

Scholars write that stigmas are made up of four different social-cognitive processes: cues, stereotypes, prejudice and discrimination.[44] According to Cummings and her co-authors, cues such as psychiatric symptoms, social-skills deficits, physical appearance and labels have the ability to imply mental illness. Stereotypes are widely held beliefs. For the mentally ill, those stereotypes typically include incompetence and violent behavior. Prejudice arises when people believe such stereotypes and then treats people differently (discrimination). Discrimination is "the behavioral manifestation of prejudice."[45]

The ability of legislation to address and alter such stigma is limited. In fact, discrimination is the only aspect of stigma that laws can directly address.[46] However, Cummings and her co-authors point out the impact laws can have on stigma explaining, "…laws hold tremendous symbolic value and the potential to indirectly improve other components of public and self stigma (e.g., stereotypes and prejudice) by affirming that those with mental illness should not face discrimination."[47] The Americans with Disabilities Act was passed in July of 1990 to broaden the legal rights of those with disabilities and to establish specific standards private industry must follow in regard to those with disabilities.[48] Those with psychiatric

[44] Cummings, Lucas & Druss, *supra* note 31.
[45] *Id.* at 782.
[46] *Id.*
[47] *Id.*
[48] Chapman, *supra* note 19.

disabilities are included in this legislation.[49] The key aspect of this legislation was the condition that employers grant "reasonable accommodation" to individuals who qualify as disabled.[50] However, some scholarship suggests that the ADA has had a negative impact on those suffering from mental illness. Cummings and her co-authors argue that although legislation, such as the ADA, has gradually increased legal protection for the mentally ill, these protections do not apply to those suffering from mental illness as a whole because of:

1) Explicit language about inclusion and exclusion criteria in the statute or implementation rules
2) Vague statutory language that yields variation in the interpretation about which groups qualify for protection, and
3) Incentives created by the legislation that affect specific groups differently.[51]

Overall, the scholarship regarding overall impact the ADA has had on those with mental illness as well as the mental health field as a whole is mixed.

Discontent Surrounding United States Defamation Law

M. Linda Dragas addresses the two competing elements that come to a head in defamation law: the concept of freedom of expression and the idea of protecting reputation. Dragas argues that the law has extended beyond what is necessary in order to protect a person's reputation.[52] She contends that media defendants usually have an advantage when it comes to defamation because the idea of the free press overshadows the idea of an individual's right to protect his or her reputation. The dominant concern in a libel suit is not the falsity of the

[49] David Mechanic, *Cultural and Organizational Aspects of Application of the Americans with Disabilities Act to Persons with Psychiatric Disabilities,* 76 THE MILBANK QUARTERLY. 5, 5 (1998).
[50] *Id.*
[51] Cummings, Lucas & Druss, *supra* note 31, at 783.
[52] M. Linda Dragas, *Curing a Bad Reputation: Reforming Defamation Law, 17* U. HAW. L. REV. 113, 115-16 (1995).

defamatory statement, but rather, whether or not the defendant is at fault.[53] Dragas cites the media as the biggest hindrance when discussing defamation law reform. She claims the media have been given such substantial protection legally that they have no desire for the system to change in any way.[54] This piece of literature speaks to the paradox that seems to exist between United States defamation law and the United States' ideal of freedom of expression. It raises the question of how can the law balance the two and how has the law balanced the two specifically in regard to defamation suits involving the imputation of mental illness.

Discontent in defamation law related to homosexuality led some states to make changes. Homosexuality, like mental illness, has a long history of being stigmatized in the United States. Markin draws a connection between the imputation of homosexuality and that of mental illness by showing how, in some courts, allegations of homosexuality have shifted in terms of the allegation's ability to defame. U.S. courts are not all on the same page in regard to the defamatory power of calling a person homosexual.[55] Markin suggests that the imputation of mental illness could result in a similar situation.[56] Matthew D. Bunker, Drew E. Shenkman and Charles D. Tobin examined the way in which courts find defamatory meaning with particular emphasis on the topic of homosexuality. Whether or not a statement is capable of defamatory meaning is ordinarily up to the judge in the first instance. This is determined using both descriptive and normative elements.[57] An article featured in the Harvard Law Review in 2013

[53] *Id.* at 116.
[54] *Id.* at 120.
[55] Markin, *supra* note 11, at 156-158.
[56] *Id.*
[57] Matthew D. Bunker, Drew E. Shenkman & Charles D. Tobin, *Not That There's Anything Wrong With That: Imputations of Homosexuality and the Normative Structure of Defamation Law,* 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 581, 585 (2011).

examined the New York Appellate Court decision in *Yonaty v. Mincolla,*[58] which makes a similar argument.[59] In New York, the judge ultimately must decide how a "substantial and respectable minority" of the community would react to the statement and whether that reaction would be harmful to the plaintiff. It is left up to the knowledge and beliefs of the judge to make a decision regarding what the community would or would not react to.[60] Bunker, Shenkman and Tobin point out that the "normative grounding" of defamation law implies when social norms shift, so would defamatory interpretations.[61] Bunker, Shenkman and Tobin support this claim by describing the way in which racial misidentification was once considered defamatory. It was not until the courts began to recognize that white prejudices only existed in a few portions of society and not the community as a whole that courts rejected the claims.[62]

State law determines the defamatory power of a false imputation of homosexuality. Bunker, Shenkman and Tobin divide the choices into three different categories: courts that regard the statements as defamatory per se (damages are presumed), courts that regard the statements as capable to defame (damages must be proven) and courts that regard such statements as not capable to defame.[63] Bunker, Shenkman and Tobin attribute the latter to contemporary society's increased tolerance of homosexuality [64] and the groundbreaking decision

[58] Yonaty v. Mincolla, 97 A.D.3d 141 (N.Y. App. Div. 2012).
[59] *Tort Law – Defamation – New York appellate division holds that the imputation of homosexuality is no longer defamation per se – Yonaty v. Mincolla,* 945 N.Y.S2d 774 (App. Div. 2012), 126 HARV. L. REV. 852, 857 (2013).
[60] Bunker, Shenkman & Tobin, *supra* note 57, 585-86.
[61] *Id.* at 586.
[62] *Id.* at 586.
[63] *Id.* at 587.
[64] *Id.* at 588.

in the Supreme Court case *Lawrence v. Texas*.[65] In *Lawrence v. Texas*, the United States Supreme Court struck down Texas' statute in which homosexuality was made a criminal act.[66]

The state of New York ruled that the imputation of sexuality is no longer defamation per se in the appellate court case *Yonata v. Mincolla* in 2011.[67] The court argued, "such a rule necessarily equates individuals who are lesbian, gay or bisexual with those who have committed a 'serious crime' – one of the four established per se categories."[68]

Even at first glance parallels can be drawn between the defamatory power of the imputation of homosexuality and that of mental illness. However, there is not academic literature that analyzes the defamatory nature of imputing homosexuality in relation to imputing mental illness. Are there any signs of mental illness' defamation classification changing like it did for homosexuality in New York? This study attempts to address that gap.

Four distinct concepts emerged in the literature in connection to the topic of how United States defamation law has treated the imputation of mental illness following the passage of the ADA. These concepts, although different, are relevant in examining the way in which United States defamation law treats the imputation of mental illness. Each concept also demonstrates holes present in the current scholarship, and therefore, the need for this particular thesis. While research exists regarding the stigma attached to mental illness, there is currently no scholarship that examines the relationship between the stigma and U.S. case law in the period following the Americans with Disabilities Act.

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[65] *Id.* at 596 (citing Lawrence v. Texas, 539 U.S. 558 (2003)).
[66] *Id.* at 589.
[67] *Tort Law – Defamation – New York appellate division holds that the imputation of homosexuality is no longer defamation per se – Yonaty v. Mincolla,* 945 N.Y.S2d 774 (App. Div. 2012), 126 HARV. L. REV. 852, 852 (2013).
[68] *Id.* at 858.

Justification

In today's society individuals are quick to jump to conclusions when it comes to mental illness. People often speak without realizing the implications of what it is that they are saying.[69] This thesis is important because it sheds light on a topic within defamation law that has not been frequently addressed, particularly in the last few years. This thesis is also relevant because it specifically looks at the topic since passage of the Americans with Disabilities Act. It specifically examines defamation claims involving the imputation of mental illness in the post-ADA period.

Research Questions

As previously noted, the purpose of this thesis is to investigate the idea best summarized by Alan Durant, "An [defamatory] expression may shift over time from one category to another. Such changes reflect the living and changing nature of discourse and culture, as well as the responsiveness of libel law,"[70] with specific regard to the defamatory nature of mental illness. To accomplish this objective, this thesis addresses the following research questions:

1) How have United States courts approached defamation suits in which the statement was related to the imputation of mental disorder following the passage of the Americans with Disabilities Act (ADA) in 1990?
2) What does that suggest for future defamation cases involving mental illness?
3) How have courts characterized the rhetoric surrounding the topic of mental disorder in terms of defamation after the ADA?
4) What can be said about the examined cases when approaching them from a Critical Legal Studies perspective?

[69] Holohan, *supra* note 12.
[70] DURANT, *supra* note 9.

Chapter II

Methods

This thesis was designed to examine the way United States defamation law has treated statements imputing mental illness following the Americans with Disabilities Act. This thesis critically evaluated court cases across the United States court system and from eight different states plus the District of Columbia.

The analysis focused on court decisions across the United States in 25 years after the Americans with Disabilities Act of 1990, a federal law prohibiting discrimination based on disability, was passed. The ADA marked a key moment in U.S. history regarding the perception of mental illness from both a legal and cultural perspective. The court decisions were retrieved through WestlawNext and Google Scholar. Eleven cases were analyzed in this thesis. These cases were discovered through WestlawNext's "Key Numbers" system, the database's classification system for U.S. law. The cases were retrieved through WestlawNext category 237 (Libel and Slander), subcategory 6 (Actionable words in general) and within the further subcategory four (Imputation of inebriety or mental derangement). Within that, WestlawNext classified 105 cases (both federal and state jurisdiction). For the purpose of this thesis, any cases that occurred before July 26, 1990 were discarded and the relevant cases were selected for analysis. Each court case was analyzed by looking at the treatment of the particular doctrine, the procedural posture, the facts of the case, the issue as presented by the court (including the court's rhetoric) and the holding.

Finally, this thesis interpreted whether any links can be drawn between the way in which United States defamation law has treated statements imputing mental illness post-ADA and the stigma associated with mental illness. This thesis also differs from most legal studies in that it

examines the cases from a Critical Legal Studies (CLS) perspective. CLS "takes a critical perspective on the formulation and implementation of the various branches of modern law."[71] CLS is based on two main principles: "all law is politics by other means," and the way law is formulated and implemented often "reproduces inequality and injustice, even though it is supposed to redress both."[72] Overall, CLS investigates how law can be made better to serve society.[73]

Availability of Resources

I obtained the information I needed to complete this thesis on campus. Through databases such as WestlawNext and Google Scholar, I accessed case law and secondary sources related to my study.

Chapter Breakdown

The third chapter of this thesis reports the findings in the 11 cases that involved the imputation of mental illness from 1990 to today. The fourth chapter analyzes the specific 11 cases by sorting them into three different groups. It also looks at the rhetoric courts used in regard to mental illness following the ADA, as well as interprets whether any links can be drawn between United States defamation law and the stigma attached to mental illness. The fifth chapter discusses what the findings mean for the topic mental illness and suggested ways the law could be improved.

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[71] Noel Castree, Rob Kitchin & Alisdair Rogers, *Critical Legal Studies* A DICTIONARY OF HUMAN GEOGRAPHY (2013) *available at* http://www.oxfordreference.com.libproxy.lib.unc.edu/view/10.1093/acref/9780199599868.001.0001/acref-9780199599868-e-316.
[72] *Id.*
[73] *Id.*

Chapter III

Findings

The Americans with Disabilities Act of 1990 (ADA) states, "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society."[74] Legally, however, the imputation of mental illness still has the ability to damage an individual's good reputation. Since the passage of the ADA, 11 court cases have emerged involving defamation most related to the imputation of mental illness. The cases come from both federal and state courts and cover eight states plus the District of Columbia. In eight of the cases the court found the alleged defamatory statements non-actionable because they fell under the category of constitutionally protected opinion or hyperbole. In two cases, the court found the statement in question to be defamation *per se*. In the remaining case, the court determined the alleged defamatory statements to be substantially true, and therefore, non-actionable.

Before exploring the 11 cases related to the imputation of mental illness post-ADA, Supreme Court precedent should be reviewed. Two cases in particular are relevant and involved the opinion and hyperbole defense for defamation claims. The case, *Hustler Magazine, Inc. v. Falwell* (1988), involved a parody that was printed in *Hustler* magazine. The publication depicted fundamentalist evangelist Reverend Jerry Falwell, "as a drunk in an incestuous liaison with his mother in an outhouse."[75] Falwell sued *Hustler* to recover damages for invasion of privacy, libel and intentional infliction of emotional distress.[76] A U.S. District Court jury in Virginia found the parody was not libelous because "no reasonable reader would have

[74] Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2008).
[75] Rodney A. Smolla, *Hustler Magazine v. Falwell, in* THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS 132, 132 (Kermit L. Hall ed., 1999).
[76] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 48 (1988).

understood it as a factual assertion that Falwell had engaged in the described activity."[77] Despite this finding, the jury awarded $200,000 in damages due to a count of "intentional infliction of emotional distress," which does not require a statement of false fact.[78] The U.S. Supreme Court, however, overturned the jury's verdict and held that for a public figure or official to recover for intentional infliction of emotional distress based on a publication, a false statement of fact must have been made with actual malice.[79] The court asserted that attacks on public figures "are part of the American tradition of satire and parody, a tradition of speech that would be hamstrung if public figures could sue them anytime the satirist caused distress."[80]

The case, *Milkovich v. Lorain Journal Co.* (1990), "demonstrated the complexity of late twentieth-century defamation law."[81] The case arose from a 1975 incident in which a local sports column implied that a high school wrestling coach had lied during an investigation of a post-match altercation. In response, the coach, Michael Milkovich, sued the columnist and the newspaper for libel. The case went through Ohio's courts for nearly fifteen years until the newspaper was granted a summary judgment by the reasoning that the column was a constitutionally protected opinion. When the case reached the U.S. Supreme Court, the ruling was overturned and sent back for a trial on the merits of the case.

Chief Justice William Rehnquist argued that some courts misinterpreted a previous Supreme Court case, *Gertz v. Welch* (1974),[82] in which the standard of First Amendment

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[77] Smolla, *supra* note 75.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] Norman L. Rosenburg, *Milkovich v. Lorain Journal Co., in* THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS 188, 188(Kermit L. Hall ed., 1999).
[82] *Id.*

protection against defamation brought by private individuals was determined.[83] According to Rehnquist, some courts, like those in Ohio, were interpreting *Gertz v. Welch* to mean that any libelous statement characterized as an "opinion" was granted protection under the First Amendment. Rehnquist contended however, that nowhere in the case was that defense constitutionally justified.[84] Defamatory statements made in columns or articles that have the ability to be verified have the potential basis for a libel suit, including those statements regarding public figures. As Rehnquist put it, *Gertz v. Welch* was not "intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'"[85] In *Milkovich,* the court ultimately identified two types of opinions protected by the First Amendment: those that are not "provable as false"[86] and those that "cannot reasonably be interpreted as stating actual facts."[87]

These cases are relevant in the current inquiry because the first examined cases are the eight in which the court determined the alleged defamatory statements were non-actionable because they fell under the category of constitutionally protected opinion or hyperbole. Those eight are followed by the two cases in which the court found the statements to constitute defamation *per se*. The last case examined is the one in which the court determined the alleged defamatory statements to be substantially true, and therefore, non-actionable.

Non-actionable Opinion or Hyperbole Cases

Pease v. International Union of Operating Engineers Local 150

The first case involving defamation and mental illness imputation post-ADA, in which the court found the statement to be opinion or hyperbole, was *Pease v. International Union of*

[83] Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 (1974).
[84] Rosenburg, *supra* note 81.
[85] Milkovich v. Lorain Journal Co., 467 U.S. 1, 18 (1990).
[86] *Id*. at 20.
[87] *Id.* at 25.

Operating Engineers Local 150 (1991).[88] The case came from the Appellate Court of Illinois. Construction company owner Jack Pease brought false imprisonment, defamation and malicious prosecution actions against members of the International Union of Operating Engineers Local 150, as well as the union itself following a labor dispute. Prior to the lawsuit, Pease and the union, International, engaged in a disagreement regarding Pease's failure to sign a collective bargaining agreement. The defamation portion of Pease's action arose from an interview printed in an Illinois newspaper, in which the president of International, William E. Dugan, was quoted as making the following statements about Pease, "'He lies a lot,' Dugan said of Pease. 'He's dealing with half a deck, did you know that? I think he's crazy.'"[89] A trial court granted a partial summary judgment to Dugan and International based on the defamation in newspaper article. Pease appealed and raised the following issue: "whether the alleged defamatory statements in this case were defamation *per se,* for which actual damages need not be shown."[90] In the appellate court's decision Illinois' four categories of words that constitute libel per se were cited:

> (1) words which impute the commission of a criminal offense;
> (2) words which impute that one has a communicable disease which tends to exclude a person from society;
> (3) words which impute inability to perform or want of integrity in the discharge of duties of office or employment;
> (4) words which prejudice a particular party in his profession or trade.[91]

According to the court, the statement, "He's dealing with half a deck, did you know that? I think he's crazy," fell into the category of "words that are mere name calling or found to be rhetorical hyperbole or employed in a loose, figurative sense."[92] The first portion of Dugan's statement,

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[88] Pease v. International Union of Operating Engineers Local 150, 567 N.E.2d 614, 616 (Ill. App. Ct. 1991).
[89] *Id.*
[90] *Id.* at 617.
[91] Haberstroh v. Crain Publications, Inc., 545 N.E.2d 295, 295 (Ill App. Ct. 1989).
[92] *Pease,* 567 N.E.2d at 619.

however, "He lies a lot," was found by the court to constitute libel *per se* because "it imputes to Pease a want of integrity in the discharge of his business."[93] Pease, therefore, did not have to prove actual damages. The court explained further:

> Dugan's statement was made in the following context. Amy Mack, a reporter for the Northwest Herald, interviewed Dugan. She told Dugan that, in a prior conversation with Pease, Pease had told her that the union was directly responsible for the vandalism at his firm; she asked Dugan for a response to Pease's statement, to which Dugan made the complained-of statement…the defamatory meaning here is evident, and the statement is not reasonably susceptible to an innocent construction.[94]

Polish American Immigration Relief Comm., Inc. v. Relax

Polish American Immigration Relief Comm., Inc. v. Relax (1993) was a case out of the Appellate Division of the Supreme Court of the State of New York.[95] In the case, the Polish American Immigration Relief Committee, Inc. (PAIRC), and its president, Janusz Krzyzanowski, brought a libel action against Michael Kuchejda and Andrew Heyduk. Kuchejda and Heyduk were the publisher and editor of "Relax," a Polish-language magazine. The libel action stemmed from a letter to the editor and interview published in a February 1989 issue of the magazine.[96] A recent Polish Immigrant, Marian Jabloski, wrote the letter to the editor in which he "complains in emotional and hyperbolic terms about his family's treatment, upon and after their arrival in the United States, by PAIRC and another organization, the Polish American Congress."[97] According to the court, only one statement in the letter to the editor was arguably defamatory. Jablonski wrote, "I had not figured that at the PAIRC we would have to deal with thieves who should have

[93] *Id.*
[94] *Id.*
[95] Polish American Immigration Relief Comm., Inc. v. Relax, 189 A.D.2d 370, 370 (NY App. Div. 1993).
[96] *Id.* at 371.
[97] *Id.*

been put to prison long ago."[98] The other alleged defamation came from an interview with Jablonski and his wife, and in individual by the name of Mrs. Banaszewska (none of whom were named as defendants). The interviewees are attributed to saying:

> PAIRC is a madhouse. For instance, they won't pick up people at the airport. Last year there was nobody to meet for families. So the families talked about it on the radio…but [PAIRC's Chicago representative] always comes up with something new.[99]

Other statements from the interview that formed the basis of PAIRC's complaint included:

> As I said, I don't regret having left Poland. There's a lesson for me: forget the PAIRC, forget the Polish American Congress, forget others. Let them do their fund raisers that nobody understands the aim of, let them pretend they are just and democratic, let them have their pictures taken with whomever they choose, let them listen to national anthems. I myself have found a job in my own occupation, and so I now have a chance to move out of here and really start living on my own instead of just treading water. The farther away from false do-gooders, the better.[100]

The letter to the editor and the interview were published without editorial approval. However, Relax editor, Heyduk, prefaced them with a statement that said, "'"[t]he text really speaks for itself, yet if anything remains to be said, it is the institutions referred to that should say it."[101] The defendants' motion for a summary judgment included an affidavit by Kuchejda, Relax's publisher, in which he claimed he proposed to the plaintiff publishing an article with their version of events, but never received a response. Heyduk also claimed that, he too, reached out to PAIRC's Chicago representative for comment or response, but could never reach her.[102]

In the opinion, the court cited a previous New York Court of Appeals case, *600 W. 115th St. St. Corp v. Von Gutfeld* (1992), a defamation case in which the defendant contended the

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[98] *Id.*
[99] *Id.*
[100] *Polish American Immigration Relief Comm.*, 189 A.D.2d at 372.
[101] *Id.*
[102] *Id.*

statement in question was constitutionally protected opinion.[103] According to the court, the pivotal issue in determining what is considered opinion was "whether a reasonable listener could conclude that the defendant is conveying facts."[104] In regard to the statements in "Relax," the court determined that they were "clearly rhetorical hyperbole and vigorous epithet, and thus constitute non-actionable expressions of opinion under Federal or State constitutional standards."[105] According to the court, the fact that the statements were part of a letter to the editor and an interview proved that no reasonable person would interpret the expressions as factual.[106]

Hohlt v. Complete Health Care, Inc.

In the Missouri Court of Appeals case, *Hohlt v. Complete Health Care, Inc.* (1996), Dustin Hohlt filed a libel suit against a health service provider and one of its employees.[107] According to Hohlt, Complete Health Care, Inc.'s employees made "false, defamatory and malicious" statements about him in reports to the Division of Aging of the Missouri Department of Social Services.[108] The statements in question were:

(1) I have also heard Bob & his 21 yr. old daughter state that the daughter is pregnant for the 2nd time c [sic] her brother's child (Dustin)
(2) I have also heard Bob & his son Dustin call Mrs. Rice "Crazy" and "Stupid."
(3) "[T]he aide arrived to find Mrs. R. on the floor she had not been hurt. She told the aide that her grandson locks her in the room and hits her."
(4) "The aide told me that she was afraid of him and Mrs. Rice had told her that they beat her. The aide ask who they are and she said her son and grandson."[109]

According to the court, the first, third and fourth statements were defamatory because they

[103] 600 W. 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 136 (N.Y.S.2d 1992).
[104] *Polish American Immigration Relief Comm.*, 189 A.D.2d at 373.
[105] *Id.* at 374.
[106] *Id.*
[107] Hohlt v. Complete Health Care, Inc., 936 S.W.2d 223, 223 (Mo. Ct. App. 1996).
[108] *Id.* at 224.
[109] *Id.*

alleged that the plaintiff was guilty of crimes (incest and some degree of assault).[110] In regard to the statement that involves imputing mental illness the court determined that it "contains insulting and discourteous language, but was not legally defamatory."[111]

Weyrich v. New Republic, Inc.

Weyrich v. New Republic, Inc. (2001), was a United States Court of Appeals case out of the District of Columbia Circuit. Paul Weyrich filed a defamation, false light invasion of privacy and civil conspiracy to defame suit against *The New Republic* after an article by David Grann was published about him on October 27, 1997.[112] Paul Weyrich was a conservative political activist and commentator. Weyrich asserted that *The New Republic's* article went beyond protected political commentary by saying he had the diagnosable mental condition of paranoia.[113] He also claimed that "in presenting its overall picture of mental instability," the article used inaccurate anecdotes and two defamatory caricatures.[114] Some of the article's statements in question regarding Weyrich were as follows:

> (1) By 1981, while his friends were still basking in their newfound power, Weyrich began to experience sudden bouts of pessimism and paranoia—early symptoms of the nervous breakdown that afflicts conservatives today.
> (2) Since taking power in 1994, conservatives have gorged even by their standards. They have savaged Dole, ravaged Gingrich, plumped up and then devoured Lott. They have shut down the government they spent decades trying to fill. They have, in short, acted as nutty as Weyrich.
> (3) As they had back home in Wisconsin, people in Washington soon crossed to the other side of the street when they saw Weyrich coming. Gingrich, who had anchored two shows, declined to sign another contract. Lott revoked the special Senate parking privileges Weyrich had gotten after a car accident. GOP Senator John McCain of Arizona refused even to talk to him. `We know,' says Senator Orrin Hatch, `who has the psychological problems.'[115]

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[110] *Id.*
[111] *Id.*
[112] Weyrich v. New Republic, Inc., 235 F.3d 617, 620 (D.C. Cir. 2001).
[113] *Id.*
[114] *Id.*
[115] *Id.* at 621-622.

The court determined that the statements in the article were non-actionable saying:

> We reject Weyrich's claim that the article attributes to him a diagnosable mental illness. "Paranoia" is used in the article as a popular, not clinical, term, to embellish the author's view of Weyrich's political zealotry and intemperate nature. The author's musings on these scores are protected political commentary, for, in context, it is clear that his comments are meant only to deride Weyrich's political foibles and, relatedly, to attack what the author sees as the inability of the conservative movement "to accept the compromising nature of power." In short, these comments cannot reasonably be understood as verifiably false, and, therefore potentially actionable, assertions of mental derangement.[116]

Miracle v. New Yorker Magazine

In the United States District Court case, *Miracle v. New Yorker Magazine* (2001), Nancy Miracle brought an action against *The New Yorker* Magazine for defamation.[117] Miracle was born Nancy Maniscalco. She became Nancy Green after marrying, however, changed her last name to Miracle in the early 1990s after a "miraculous" discovery regarding her identity.[118] According to Miracle, she was the daughter of the famous actress, Marilyn Monroe, who left Miracle as a baby in order to pursue an acting career.[119] Miracle's claim to be Monroe's daughter related to the case through an article by David Samuels published in the November 3, 1997 issue of *The New Yorker*. The article, entitled, "Fakes: Who Forged the J.F.K.-Marilyn Monroe Papers?," centered around Lawrence ("Lex") Cusack III. Cusack's father was an attorney who secretly handled "sensitive legal matters" for President John F. Kennedy.[120] Cusack was selling documents found in his father's files that he claimed confirmed an extramarital affair between President Kennedy and Marilyn Monroe. The documents were later found to be forgeries and Cosack was convicted of "mail and wire fraud in connection with the creation and sale of forged

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[116] *Id.* at 620.
[117] Miracle v. New Yorker Magazine, 190 F. Supp. 2d 1192, 1195 (D. Haw. 2001).
[118] *Id.*
[119] *Id.* at 1196.
[120] *Id.*

documents."[121]

According to Samuel's article, Cosack was working as a paralegal at his late father's law firm when Miracle came in asking to see his father. She was taken to Cosack instead where she, according to the article, "laid out a tangled claim to the Monroe estate."[122] After meeting with Miracle, Cosack was curious and began to search through his father's old files. The rest of the article chronicled Cosack's attempt to sell the documents he said verified a Monroe-Kennedy affair.[123] Miracle's defamation complaint identified the following statements from the article as "false and defamatory":

(1) that Miracle was "disheveled" and "in her early forties";
(2) that Miracle "laid out a tangled claim to the Monroe estate";
(3) that Miracle "was nuts";
(4) that Gladys Baker, Monroe's mother, passed away in 1986;
(5) that "[a]nother note was later found suggesting that Nancy Green might be a code name for Marilyn Monroe";
(6) that "[l]ike novelists, forgers inhabit their characters in order to convince. They can't help leaving traces of themselves behind";
(7) that "[t]he forger had to start somewhere…";
(8) that Monroe "blackmailed J.F.K. into created another, similar trust, telling him that if he didn't she would reveal his ties to the Mob"; and
(9) an advertisement at the end of the article for the television program "Washington Week in Review," showing a picture of $100 dollar bills hung on a clothesline to dry, with the slogan underneath reading, "If you launder it, is it still dirty?"[124]

The third statement involves the imputation of mental illness. The court found the statement not actionable because although "nuts" can describe someone's mental state, it is does not in this context. According to the court, the term was meant in the "'popular, not clinical, sense' to emphasize how outlandish Miracle's claim appeared."[125] The court added, "Because the statement relays Lex's subjective evaluation of Miracle and does not assert what the author

[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.* at 1197.
[125] *Id.* at 1200-1201.

believes to be the state of Miracle's mental health, it is not defamatory."[126]

Bowles v. McGivern

In the Iowa Court of Appeals case, *Bowles v. McGivern* (2004), Niky Bowles filed a petition for slander against her Alderman, Robert McGivern.[127] The petition stemmed from an incident in 2000 when Bowles attended a Davenport City Council meeting. Bowles addressed the council prior to a vote on a zoning request. She requested that her alderman, McGivern, not vote. She claimed McGivern was biased toward her and that he had previously called her a "crazy woman."[128] McGivern replied with the statement, "Your Honor, just for clarification, for clarification your Honor, I called her a freaking crazy woman."[129] The slander petition followed. Bowles contended that that in calling her "a freaking crazy woman," McGivern was alleging that she was mentally ill. She cited a letter written by McGivern in November 2001, which stated that he was "truly concerned with [Bowles'] present physical and psychological state."[130] McGivern, however, argued that the phrase constituted non-actionable option and rhetorical hyperbole.

The court cited *Jones v. Palmer Communication, Inc.* in illustrating how they came to their decision:

> "To determine whether a statement constitutes non-actionable opinion or an actionable false statement, we must consider (1) the precision and specificity of the disputed statement; (2) the verifiability of the statement; and (3) the context in which the statement is made."[131]

The court ultimately determined that McGivern's statement constituted non-actionable opinion saying, "While "crazy" can be used as a factual assertion, describing someone who has been

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[126] *Id.* at 1201.
[127] Bowles v. McGivern, 680 N.W.2d 378 (Iowa Ct. App. 2004).
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] Jones v. Palmer Communication, Inc. 440 N.W.2d 884, 891 (Iowa 1989).

diagnosed by a professional with a mental illness, "crazy" is also commonly used to express an opinion that someone is unusual, impractical, erratic or unsound."[132] The court also contended that by using "freaking" as a "euphemistic intensifier," McGivern demonstrated that his comment was not meant as fact. [133]

Doe v. Cahill

Doe v. Cahill (2005), was a case out of the Delaware Supreme Court regarding an internet blog that was key in the area of anonymous internet speech. However, it did involve a defamation claim.[134] On September 18-19, 2004, John Doe (the only John Doe defendant in the case) posted two statements on an Internet website sponsored by the Delaware State News entitled, "Smyrna/Clayton Issues Blog." Doe, under the alias "Proud Citizen," wrote about Smyrna City Councilman Patrick Cahill. The only guidelines written on the blog page were, "[t]his is your hometown forum for opinions about public issues."[135] Doe's first statement on September 18 read as follows:

> If only Councilman Cahill was able to display the same leadership skills, energy and enthusiasm toward the revitalization and growth of the fine town of Smyrna as Mayor Schaeffer has demonstrated! While Mayor Schaeffer has made great strides toward improving the livelihood of Smyrna's citizens, Cahill has devoted all of his energy to being a divisive impediment to any kind of cooperative movement. Anyone who has spent any amount of time with Cahill would be keenly aware of such character flaws, not to mention an obvious mental deterioration. Cahill is a prime example of failed leadership — his eventual ousting is exactly what Smyrna needs in order to move forward and establish a community that is able to thrive on its own economic stability and common pride in its town.

The following day, Doe posted another statement on the blog saying, "Gahill [sic] is as paranoid as everyone in the town thinks he is. The mayor needs support from his citizens and protections

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[132] *Bowles,* 680 N.W.2d at 378.
[133] *Id.*
[134] Doe v. Cahill, 844 A.2d 451, 453 (Del. 2005).
[135] *Id.*

from unfounded attacks…"[136]

In order to bring legal action against Doe, Cahill contacted a third party in order to obtain Doe's IP address. Using a good faith standard to test Cahill's complaint, a Superior Court judge ordered the third party to disclose Doe's identity.[137] On appeal, however, the Supreme Court of Delaware reversed the Superior Court's decision and established a summary judgment standard "to strike the balance between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously."[138] The court found only two statements of Doe's to be potentially defamatory: "Anyone who has spent any amount of time with Cahill would be keenly aware of ... [his] character flaws, not to mention an obvious mental deterioration" and "Gahill [sic] is ... paranoid."[139] However, the court ultimately found Doe's statements on the blog to be incapable of defamatory meaning due to the platform used to make them:

> Given the context, no reasonable person could have interpreted these statements as being anything other than opinion. The guidelines at the top of the blog specifically state that the forum is dedicated to *opinions* about issues in Smyrna. If more evidence of that were needed, another contribution to the blog responded to Doe's second posting as follows: "Proud Citizen, you asked for support, I don't think you are going to get it here. Just by reading both sides, your tone and choice of words is [that of] a type of person that couldn't convince me. You sound like the person with all the anger and hate…"[140]

Feld v. Conway

Feld v. Conway (2014) was a United States District Court case out of Massachusetts that resulted from an allegedly defamatory tweet.[141] Plaintiff Mara Feld had her thoroughbred horse, Munition, shipped to a farm to become a companion horse. The horse ended up, however, being

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[136] *Id.*
[137] *Id.* at 455.
[138] *Id.* at 460.
[139] *Id.* at 466-467.
[140] *Id.* at 467.
[141] Feld v. Conway, 16 F. Supp. 3d 1 (D. Mass. 2014).

sent to an auction in Pennsylvania and then was possibly sent to Canada to be slaughtered. The topic of Feld and Munition became popular on numerous horse web sites with different individuals debating about what happened.[142] One of the individuals who became involved in the online debate was Crystal Conway, who was a "Bloodstock Agent" at a full-service thoroughbred breeding and consulting agency in Kentucky. On December 11, 2010, Conway posted: "Mara Feld aka Gina Holt –you are fucking crazy!"[143] Because Feld worked in the field of academia, her professional career relied on positive endorsements and reviews of her publications. Individuals sought Feld's work by searching her name on the Internet. After publishing her tweet, Conway's post appeared in the search results for Feld. Feld brought an action against Conway on December 10, 2013 alleging defamation of character by libel.[144]

The court cited *Gertz v. Welch* saying, "Under the First Amendment, opinions are constitutionally protected and cannot form the basis of a defamation claim." The court also cited a United States Court of Appeals Case, *Yohe v. Nugent,* saying, "An `expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified or unreasonable the opinion may be or how derogatory it is.'"[145] The court used *Yohe v. Nugent* again to cite how a statement is determined to be opinion, "a court must examine the statement in its totality and in the context in which it was uttered or published. The court must [also] consider all the words used . . . [and] all of the circumstances surrounding the statement."[146] The court determined that when examining Conway's statement in context (a debate surrounding Feld's horse Munition) it cannot be taken literally:

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[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] Yohe v. Nugent, 321 F.3d 35, 41 (1st Cir. 2003).
[146] *Id.*

> The phrase "Mara Feld . . . is fucking crazy," when viewed in that context, cannot reasonably be understood to state actual facts about plaintiff's mental state. It was obviously intended as criticism—that is, as opinion—not as a statement of fact. The complaint therefore cannot base a claim of defamation on that statement.[147]

Defamation *Per Se* Cases

Stratman v. Brent

The first case involving defamation and mental illness imputation, post-ADA, in which the court explicitly found the statement to be defamation *per se*, was *Stratman v. Brent* (1997), a case out of the Appellate Court of Illinois.[148] This slander case came about when City of Aurora police officer Joseph Stratman applied for different jobs with the United States Drug Enforcement Agency (DEA) and the Bureau of Alcohol, Tobacco, and Firearms (BATF).[149] After Stratman applied, the Federal Bureau of Investigation (FBI) and the Department of the Treasury performed a background check on Stratman for the BATF. Both the FBI and the DT interviewed Stratman's superior, Police Chief Robert Brent, concerning his employment with the City of Aurora.[150] In response to this interview, Stratman brought about a slander action against Brent and claimed Brent made the following statements about him to the DT:

(1) That the plaintiff was involved in a fatal shooting on March 20, 1979 and subsequent to that shooting, the plaintiff declined any offers of counseling;
(2) That the plaintiff was given the nickname [`]Code Red[,'] which is the Aurora Police Department unofficial designation for mentally disturbed person;
(3) That the plaintiff became a loner soon after the shooting and that the plaintiff became unpredictable and displayed an increasingly negative attitude, in fact a pervasive negative attitude;
(4) That the plaintiff became incapable of handling stress and that the defendant was relieved when the plaintiff resigned;
(5) That the defendant was keeping a close eye on the plaintiff prior to his resignation and monitoring him with the idea of finding just cause to fire him and was glad to see the plaintiff leave;

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[147] *Feld,* 16 F. Supp. 3d at 6.
[148] *Stratman*, 683 N.E.2d at 958-959.
[149] *Id.*
[150] *Id.*

(6) That the defendant would not rehire the plaintiff and if the plaintiff attempted to return to the Aurora Police Department, the defendant would go to any length to prevent his return and would subject the plaintiff to every psychological screening available;
(7) That the defendant could have [a] department wide mutiny if the plaintiff returned;
(8) The other officers would not work with the plaintiff; [and]
(9) That the defendant would not recommend the plaintiff for employment with the United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms.[151]

Stratman also claimed that Brent made similar statements about him to the FBI.[152] The court found Brent's statements to constitute defamation *per se* saying:

> After considering all of these statements taken together in context, it is clear that, in making the alleged statements, the defendant intended to convey that the plaintiff was, and is currently, unable to perform his duties as a law enforcement officer…Telling such a prospective employer that an applicant is "mentally ill" or "crazy," taken in context with the other alleged statements, constitutes defamation *per se,* incapable of an innocent construction.[153]

In Brent's defense he cited the previously described case, *Pease v. International Union of Operating Engineers, Local 150*,[154] in which the statements in question were deemed non-actionable hyperbole. However, the court argued that case to be irrelevant in regard to Brent because he "intended that the DEA and BATF take his statements as more than mere name calling or hyperbole."[155]

Askew v. Collins

The Supreme Court of Virginia case, *Askew v. Collins* (2012) was a case in which the plaintiff, Brenda Collins, brought about defamation and breach of contract action against defendant, Verbena Askew.[156] Collins used to work for the drug treatment court in the City of Hampton, Virginia, over which Askew presided. In 1999, Collins filed a sexual harassment

[151] *Id.* at 953-954.
[152] *Id.* at 954.
[153] *Id.* at 959.
[154] *Pease,* 567 N.E.2d at 619.
[155] *Id.*
[156] Askew v. Collins, 722 S.E. 2d 249, 250 (Va. 2012).

complaint against Askew and the City of Hampton. In 2001, Askew signed an agreement saying she would not "make any disparaging comments or statements about Collins' conduct or character and to maintain confidentiality."[157] When Askew was being considered for reappointment in 2003, the General Assembly was given access to all the documents relating to Collin's Equal Employment Opportunity Commission complaint. Evidence was presented to the court that several of the documents were released to The Daily Press.[158] On January 8, 2003, Askew made a statement to two Daily Press Reporters saying, "Collins was institutionalized—that's the only way you qualify for family leave."[159] The court found Askew's false statements to be defamation per se citing *Great Coastal Express, Inc. v. Ellington,* "At common law, defamatory words which are actionable per se [include] ... [t]hose which impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment."[160]

Substantially True Case

Shipkovitz v. The Washington Post Co.

The only case involving defamation and mental illness imputation post-ADA, in which the court found the statements to be substantially true and, therefore, non-actionable was *Shipkovitz v. The Washington Post Co.* (2008), The United States District Court case arose from an article printed in the Washington Post regarding Samuel Shipkovitz.[161] Shipkovitz lived in a condominium owned by Stephen Crossan. Crossan permitted Shipkovitz to live there while Crossan was committed to a mental health institution. After Crossan's release from the

[157] *Id.*
[158] *Id.* at 251.
[159] *Id.*
[160] Great Coastal Express, Inc. v. Ellington, 334 S.E.2d 846, 849 (Va. 1985).
[161] Shipkovitz v. The Washington Post Co., 571 F.Supp. 2d 178 (D.D.C. 2008).

institution, he and Shipkovitz lived in the condominium together until October 20, 2005.[162] On October 20, Deputy Fire Marshal Keith Grierson came to the condo with permission to inspect the premises. Grierson determined that Shipkovitz's "massive accumulation of personal property" constituted a fire hazard and deemed the condo uninhabitable.[163] Following the inspection, Shipkovitz reached out to the Washington Post to write an article documenting his legal attempts to challenge the county.[164] On June 18 and July 27, 2006, the Washington Post published articles about Shipkovitz's "accumulation of property, the actions of what is known as the Arlington hoarding task force, and the dismissal of Eastern District of Virginia litigation challenging the task force's actions."[165] Shipkovitz objected to following statements in the articles:

(1) he works sporadically and has had long periods of unemployment;
(2) [h]e admits that his place was a mess;
(3) he slept on top of his stuff on the floor;
(4) there were boxes in the bathtub;
(5) there was rubbish, debris, paper,... [and] bags ...crammed from floor to ceiling;
(6) the kitchen was unusable;
(7) researchers are studying hoarding's "association with mental illness, brain dysfunction, and obsessive-compulsive disorders;
(8) Shipkovitz's ... court filings are typed single-spaced or handwritten on 100 percent recycled paper;
(9) "[e]very count [of plaintiffs Eastern District of Virginia lawsuit] was found to be without merit;
(10) [there was a] massive amount of junk in the condo—... bags, trash....[166]

The Court of Appeals held that the statements made in the newspaper articles were substantially true and, therefore, did not defame Shipkovitz. The court also argued that the statements in the article did not imply that Shipkovitz was mentally ill:

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[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*

> The Washington Post merely stated that "[t]hough researchers have just begun to study [hoarding] and its association with mental illness, brain dysfunction and obsessive-compulsive disorders, they estimate that 1.4 million Americans—and that might be a gross underestimation—cannot stop themselves." This does not imply that plaintiff is mentally ill. Rather, the article suggests that the link between mental illness and hoarding is unclear; in any event, the article makes no connection between plaintiff and mental illness. Such a statement is insufficient to constitute libel.[167]

These cases arise from eight states (Delaware, Hawaii, Illinois, Iowa, Massachusetts, Missouri, New York and Virginia) and the District of Columbia. Because defamation is state law, what qualifies as defamation does often vary from state to state. Some states' defamation definitions and laws particularly distinguish it from others.

In Delaware, a defamatory statement is defined as one that "tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."[168] In Hawaii, "A communication is defamatory when it tends to 'harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating with him.'"[169] In Illinois, statements recognized as defamation *per se* are ones that do any of the following:

> (1) accuses the plaintiff of committing a crime;
> (2) indicates that the plaintiff is infected with a loathsome communicable disease;
> (3) indicates that the plaintiff is unable to perform or lacks integrity in performing his or her employment duties;
> (4) attributes to the plaintiff a lack of ability or otherwise harms the plaintiff in his or her profession; or
> (5) accuses the plaintiff of engaging in adultery or fornication.[170]

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[167] *Id.*
[168] Spence v. Funk, 396 A.2d 967, 969 (Del. 1978), (quoting Prosser *Law of Torts* § 111 at 739 (1971).
[169] Fernandes v. Tenbruggencate, 649 P.2d 1144 (Haw. 1982).
[170] Solaia Tech., LLC v. Speciality Pub'g Co., 852 N.E.2d 825, 839 (Ill. 2006).

In Massachusetts on the other hand, the separate category of defamation *per se* has dissolved to a certain extent. Any libel is considered actionable *per se* under Massachusetts common law.[171] In Missouri, the distinction between defamation *per se* and defamation *per quod* no longer exists.[172] In Virginia, statements recognized as defamation *per se* are ones that do any of the following:

> (1) attributes to the plaintiff the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished;
> (2) indicates that the plaintiff is infected with a contagious disease;
> (3) attributes to the plaintiff unfitness to perform the duties of an office or employment of profit, or lack of integrity in the discharge of the duties of such an office or employment; or
> (4) hurts the plaintiff in his or her profession or trade.[173]

In the District of Columbia, defamation *per se* is any statement, written or printed, that falsely accusing someone of committing a crime.[174]

[171] Sharratt v. Housing Innovations, Inc., 365 Mass. 141 (Mass. 1974).
[172] Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. 1993).
[173] Fleming v. Moore, 221 Va. 884, 889 (Va. 1981).
[174] Raboya v. Shrybman & Associates, 777 F.Supp. 58 (D.D.C. 1991).

Chapter IV

Analysis

Of the 11 post-ADA cases examined above, no court gave any indication that the imputation of mental illness is no longer defamatory or has less defamatory power than at any other point in history. However, the majority of defamation cases involving the imputation of mental illness hinged on a crucial determination: whether or not the statement in question fell under the category of constitutionally protected opinion or hyperbole. This was key in the defamation element of eight of the cases, where all of the alleged defamatory statements were found ultimately to be non-actionable.[175] Of the remaining three cases, only two were determined to be defamation *per se*.[176] In the final examined case, the court denied the statement imputed mental illness and found the statements to be substantially true.[177] These results are not surprising. As Markin noted in her study regarding defamation and the imputation of mental illness, "Such an imputation is most likely to be actionable if it is a medicalized allegation rather than a hyperbolic comment that can be dismissed as opinion."[178] This is also to be expected based on the Supreme Court precedent previously cited.[179] However, based on the opinions, the courts in the group of eight cases took a wide range of approaches in determining and explaining when a statement was protected opinion or hyperbole.

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[175] *Weyrich*, 235 F.3d at 623-624; *Feld*, 16 F. Supp. 3d at 1; *Miracle*, 190 F. Supp. 2d 1200-1201; *Doe*, 844 A.2d at 467; *Pease,* 567 N.E.2d at 618-619; *Bowles,* 680 N.W.2d at 378; *Hohlt,* 936 S.W.2d at 224; *Polish Immigration Relief Comm.,* 189 A.D.2d at 373-374.
[176] *Askew*, 283 Va. 482, 722 S.E. 2d at 251; *Stratman*, 683 N.E.2d at 959.
[177] *Shipkovitz*, 571 F.Supp. 2d at 178.
[178] Markin, *supra* note 11 at 185.
[179] *Hustler*, 485 U.S. at 48; *Milkovich*, 467 U.S. at 20.

In the cases, *Pease v. International Union of Operating Engineers Local 150*[180] and *Hohlt v. Complete Health Care, Inc.*,[181] the courts gave almost no explanation why the alleged defamatory statements that imputed mental illness fell into the category of constitutionally protected opinion or hyperbole.[182] In *Pease*, the defendant referred to the plaintiff saying, "He's dealing with half a deck, did you know that? I think he's crazy."[183] The court addressed the statement in two sentences: "Words that are mere name calling or found to be rhetorical hyperbole or employed only in a loose figurative sense have been deemed non-actionable. Dugan's statements, "He's dealing with half a deck, I think he's crazy," clearly fit into those categories and are not therefore, libelous per se."[184] The court gave no further explanation as to how they came to the determination except for the citing of *Haberstroh v. Crain Publications, Inc.* (1989).[185] *Haberstroh* quoted another case in determining what constitutes a non-actionable opinion;[186] however, the court in *Pease* did not make any specific references to the case.[187]

In *Hohlt,* the court addressed the mental illness imputation statement in a similar fashion. In one of the statements in question, the defendant referred to the plaintiff saying, "I have also heard Bob & his son Dustin call Mrs. Rice 'Crazy' and 'Stupid.'"[188] The court in this case addressed the statement with one sentence, "[The statement] contains insulting and discourteous

[180] *Pease,* 567 N.E.2d 614.
[181] *Hohlt,* 936 S.W.2d 223.
[182] *Pease,* 567 N.E.2d at 618-619; *Hohlt,* 936 S.W.2d at 224.
[183] *Pease,* 567 N.E.2d at 616.
[184] *Id*. at 619, (citing Haberstroh v. Crain Publications, Inc., 545 N.E.2d 267, 273-274 (Ill. App. 1989)).
[185] *Haberstroh*, 545 N.E.2d 267.
[186] *Haberstroh*, 545 N.E.2d 273-274 (quoting Stewart v. Chicago Title Insurance Co., 503 N.E.2d 888, 893-894 (Ill. App. 1987)).
[187] *Pease,* 567 N.E.2d, 614.
[188] *Hohlt,* 936 S.W.2d at 224.

language, but it is not legally defamatory."[189] The court cited another case, *Morton v. Hearst Corp.* (1989), but like in *Pease,* did not make any specific references.[190] *Morton*, unlike *Haberstroh,* did not outline a specific way to determine if a statement constitutes non-actionable opinion or hyperbole. The courts in both *Pease* and *Hohlt* were somewhat ambiguous about how they came to their decisions regarding these particular statements. It is unclear how judges, particularly in cases such as these, come to their decision. Judges may draw on their own knowledge and experiences when assessing whether a statement is or is not defamatory. They do not go beyond their judicial discretion in doing so, but it does pose the question: Do all individuals perceive defamation the same way? It seems extremely unlikely. If judges rely entirely on their personal experiences to determine what is defamatory, inconsistencies will abound.

The courts' approaches in *Weyrich v. New Republic,*[191] *Miracle v. New Yorker Magazine,*[192] *Bowles v. McGivern,*[193] *Doe v. Cahill*[194] and *Feld v. Conway*[195] deviated from *Pease* and *Hohlt*. In these five cases, the courts explicitly defined the manner in which what constitutes a non-actionable opinion is determined.[196] In *Weyrich* the court cited Supreme Court precedent from *Milkovich,* "For a statement to be actionable under the First Amendment, it must at a minimum express or imply verifiably false fact about appellant."[197] The court went on to say that the First Amendment protects "statements that cannot reasonably [be] interpreted as stating

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[189] *Id.* (citing Morton v. Hearst Corp., 779 S.W.2d 268 (Mo. App. 1989)).
[190] *Hohlt,* 936 S.W.2d at 224.
[191] *Weyrich*, 235 F.3d 617.
[192] *Miracle*, 190 F. Supp. 2d 1192.
[193] *Bowles,* 680 N.W.2d 378.
[194] *Doe*, 844 A.2d 451.
[195] *Feld*, 16 F. Supp. 3d 1.
[196] *Weyrich*, 235 F.3d 617; *Feld*, 16 F. Supp. 3d 1; *Miracle*, 190 F. Supp. 2d 1192; *Doe*, 844 A.2d 451; *Bowles,* 680 N.W.2d 378.
[197] *Weyrich*, 235 F.3d at 624 (citing *Milkovich*, 467 U.S. at 19-20).

actual facts about an individual,"[198] and that "the court must consider the statement in context."[199] The court in *Miracle* cited the test Hawaii has adopted for determining whether a statement qualifies as non-actionable opinion or an assertion of objective fact:

> "(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being proved true or false."[200]

The *Bowles* court also specified how the determination is made:

> To determine whether a statement constitutes non-actionable opinion or an actionable false statement, we must consider (1) the precision and specificity of the disputed statement; (2) the verifiability of the statement; and (3) the context in which the statement is made.[201]

The court then addressed each part of the process, piece by piece: precision and specificity, verifiability and context before making their determination.[202] In *Doe,* the court cited the four factors considered in *SPX Corp v. Doe* (2003): "(1) the specific language used; (2) whether the statement is verifiable; (3) the written context of the statement; and (4) the broader social context in which the statement is made."[203] In *Feld*, too, the court gave a definition:

> To determine whether or not a statement is opinion or hyperbole, "a court must examine the statement in its totality and in the context in which it was uttered or published. The court must [also] consider all the words used . . . [and] all of the circumstances surrounding the statement."[204]

These five definitions or tests to determine whether an alleged defamatory statement is

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[198] *Weyrich*, 235 F.3d at 624 (citing *Milkovich*, 467 U.S. at 19-20 (quoting *Hustler*, 485 U.S. at 50)).
[199] *Weyrich*, 235 F.3d at 624 (citing Moldea v. New York Times Co., 22 F.3d 310, 313-315 (D.C. Cir. 1994)).
[200] *Miracle*, 190 F. Supp. 2d at 1199 (citing Gold v. Harrison, 962 P.2d 353, 360 (Hawaii 1998) (quoting Fasi v. Gannett Co., Inc. 930 F.Supp. 1403, 1409 (D.Haw. 1995)).
[201] *Bowles,* 680 N.W.2d 378 (citing Jones v. Palmer Communication, Inc. 440 N.W.2d 884, 891 (Iowa 1989)).
[202] *Bowles,* 680 N.W.2d 378.
[203] *Doe*, 844 A.2d at 466 (quoting SPX Corp. v. Doe, 253 F.Supp.2d 974 (N.D. Ohio 2003)).
[204] *Feld*, 16 F. Supp. 3d 1 (quoting Yohe v. Nugent, 321 F.3d 35, 41 (1st Cir. 2003).

non-actionable opinion show the perplexing nature of the question. Within these five cases alone, there was no consensus on whether an opinion does or does not have the ability to legally constitute defamation. In *Weyrich, Miracle and Doe* the courts admitted that under some circumstances, opinions can be actionable. For example, in *Weyrich,* the court said, "[S]tatements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false."[205] In *Bowles* and *Feld*, on the other hand, the courts did not make such a distinction. The court in *Feld* cited the Supreme Court case, *Gertz v. Welch,*[206] "Under the First Amendment, opinions are constitutionally protected and cannot form the basis of a defamation claim."[207] This is particularly interesting considering that in the Supreme Court case, *Milkovich v. Lorain Journal,*[208] which was prior to *Feld*, the court said they do not believe the opinion from *Gertz* "was intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'"[209]

Although each case applies to different state laws, it is worth noting the way the five definitions or tests do not align. However, this is to be expected considering they are all state law. Four of the definitions or tests required the statement not be verifiable to constitute non-actionable opinion.[210] However, in one definition that was not a specified requirement.[211] All five required context be considered, but whether each refers to the overall social text or the context in

[205] *Weyrich*, 235 F.3d at 624 (quoting *Moldea,* 22 F.3d at 313).
[206] *Gertz,* 4 U.S. 323.
[207] *Feld*, 16 F. Supp. 3d 1 (quoting *Gertz,* 4 U.S. 339-340).
[208] *Milkovich*, 467 U.S. 1.
[209] *Id.* at 18.
[210] *Feld*, 16 F. Supp. 3d 1; *Miracle*, 190 F. Supp. 2d 1192; *Doe*, 844 A.2d 451; *Bowles,* 680 N.W.2d 378.
[211] *Weyrich*, 235 F.3d 617.

which the statement was written or uttered is less clear.[212] Four of the definitions or tests also required that the specific language or words used be examined.[213] However, once again, in one definition that is excluded.[214] In none of these tests or definitions is speaker intent or receiver perception directly addressed although both would offer additional insight into whether a statement is an opinion or hyperbole.

The court in the remaining case in this group didn't focus on one test or definition at all. In the case, *Polish Immigration Relief Comm., Inc. v. Relax* (1993),[215] the court methodologically quoted and addressed previous case law to justify how they arrived at its decision. In *Polish Immigration Relief Comm.,* the court began by addressing *600 W. 115th St. Corp. v. Von Gutfeld* (1992).[216] In interpreting the extent of constitutionally protected speech, the court in *600 W. 115th St.* cited that the essence of the question is, "whether a reasonable listener could conclude that the defendant is conveying facts."[217] From there, the court then referenced *McGill v. Parker* (1992), another case in which the alleged defamatory statements were determined to be non-actionable partly due to context. They were considered part of a discussion surrounding a controversy.[218] Next, the court described *Gross v. New York Times Co.* (1993),[219] a case in which the court made the distinction between two types of opinion:

[A] "pure opinion," a statement of opinion which discloses the facts relied on, or does not

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[212] *Id.*; *Feld*, 16 F. Supp. 3d 1; *Miracle*, 190 F. Supp. 2d 1192; *Doe*, 844 A.2d 451; *Bowles,* 680 N.W.2d 378.
[213] *Feld*, 16 F. Supp. 3d 1; *Miracle*, 190 F. Supp. 2d 1192; *Doe*, 844 A.2d 451; *Bowles,* 680 N.W.2d 378.
[214] *Weyrich*, 235 F.3d 617.
[215] *Polish American Immigration Relief Comm.,* 189 A.D.2d 370.
[216] 600 W. 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130 (N.Y. 1992).
[217] *Polish Immigration Relief Comm.,* 189 A.D.2d at 373 (quoting 600 W. 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 139 (N.Y. 1992)).
[218] *Polish Immigration Relief Comm.,* 189 A.D.2d at 373- 374 (citing and quoting McGill v. Parker, 179 A.D.2d 98 (N.Y.S. 1992).
[219] Gross v. New York Times Co., 623 N.E.2d 146 (N.Y.S. 1993).

> suggest that it is based on undisclosed facts, is protected under the New York State Constitution, whereas statements of "mixed opinion" by a media defendant published with actual malice as to the facts underlying the opinion are actionable."[220]

After addressing each one of these cases specifically, the court made its determination about the issue at hand, "The words at issue here are clearly rhetorical hyperbole and vigorous epithet and thus constitute non-actionable expressions of opinion under Federal or State Constitutional standards." The court didn't give an explicit way they came to the determination, but does give a road map through previous case law.

Although in the majority of the cases examined the alleged defamatory statement was found to be non-actionable, there were two cases in which the courts determined the statements constituted defamation per se. But what is it that differentiates *Stratman v. Brent*[221] and *Askew v. Collins*[222] from the previous eight cases? Both *Stratman* and *Askew* focus on the impact the alleged defamatory statements had on their employment.[223] In *Stratman,* the defendant (plaintiff's supervisor at the time) was speaking as a job reference. The court determined that, "Telling such a prospective employer that an applicant is 'mentally ill' or 'crazy,' taken in context with the other alleged statements, constitutes defamation *per se,* incapable of an innocent construction."[224] The court did not, however, address how mental illness that inhibits job performance. In *Askew,* the court found the defendant's statement, "Collins was institutionalized—that's the only way you qualify for family leave," defamation *per se* as well.[225] The court determined that defendant's statement fell into the category of "[t]hose which impute

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[220] *Polish Immigration Relief Comm.,* 189 A.D.2d at 374 (citing and quoting Gross v. New York Times Co., 623 N.E.2d 146 (N.Y.S. 1993)).
[221] *Askew*, 722 S.E. 2d 249.
[222] *Stratman*, 683 N.E.2d 951.
[223] *Askew*, 722 S.E. 2d at 251; *Stratman*, 683 N.E.2d at 958-959.
[224] *Stratman*, 683 N.E.2d at 959.
[225] *Askew,* 722 S.E. 2d at 251.

to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of such an office or employment."[226] When comparing *Stratman* and *Askew* to the other previous eight cases, it appears that when mental illness is imputed as a critique of an individual's abilities as an employee it is more likely to be considered defamatory. However, *Feld v. Conway* serves as an exception. In *Feld,* the alleged defamatory statement was in the form of a tweet calling the plaintiff "fucking crazy" that appeared when the plaintiff's name was searched on the Internet.[227] In the background portion of the opinion, the court described how the statement impacted the plaintiff's career:

> Feld holds a doctorate in toxicology. Consequently, her professional career is dependent on the public review and endorsement of her publications. Peers, professors, prospective employers, and interested parties find her work by searching the Internet for her name. Conway's tweet can be found by searching for Feld's name with Internet search engines.[228]

The court ultimately found the statement to non-actionable because of the context in which it was made, as part of ongoing online discussion and debate.[229] However, it is also worth noting that the court in *Feld* was also one that implied an opinion could never be actionable.[230]

The final case, *Shipkovitz v. The Washington Post Co.,*[231] was the only one in which the alleged defamatory statement was found non-actionable because the court found it to be substantially true.[232] This was also the only case in which the court explicitly stated that the alleged defamatory statements about the plaintiff did not imply he was mentally ill.[233] After calling the plaintiff a hoarder in an article, The Washington Post went on to suggest that

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[226] *Id.* (quoting Coastal Express, Inc. v. Ellington, 334 S.E.2d 846, 850 (Va. 1985)).
[227] *Feld*, 16 F. Supp. 3d at 1.
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Shipkovitz*, 571 F.Supp. 2d 178.
[232] *Id.* at 178.
[233] *Id.*

researchers were beginning to study the relationship between hoarding and mental illness. The court determined, "the article suggests that the link between mental illness and hoarding is unclear; in any event, the article makes no connection between the plaintiff and mental illness. Such a statement is insufficient to constitute libel."[234] Regardless of whether the statements were found non-actionable, the court in *Shipkovitz,* as well as the courts in the other eight cases, did entertain the defamatory potential of each of the plaintiff's claims.

When analyzing the law from a Critical Legal Studies (CLS) perspective, one approach is to perform "a more careful examination of the adverse rhetorical power of western legal practice."[235] CLS suggests that through rhetoric, courts have the ability to either perpetuate or abandon different social understandings. Thus, the way the courts characterized the imputation of mental illness, could have impacted mental illness' connotation. In three of the studied cases, *Pease, Feld* and *Shipkovitz,* the courts did not characterize mental illness or the words that imputed it.[236]

However, in *Weyrich, Miracle* and *Bowles,* the court made the distinction between popular and clinical terminology.[237] For example, the court characterized the terminology in *Miracle*, "To be sure, 'nuts' is a pejorative term. In certain contexts, it can be a description of the mental state of a person. In the context of the article in question, however, the term is used in its 'popular, not clinical, sense…'"[238] The court in *Bowles* made a similar assessment, "While 'crazy' can be used as a factual assertion, describing someone who has been diagnosed by a

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[234] *Id.*
[235] Victoria Smith Ekstrand et al., *The Intensification of Copyright: Critical Legal Activism in the Age of Digital Copyright,* 53 IDEA 291, 295-296 (discussing background on critical legal studies).
[236] *Shipkovitz*, 571 F.Supp. 2d 178; *Feld*, 16 F. Supp. 3d 1; *Pease,* 567 N.E.2d, 614.
[237] *Weyrich*, 235 F.3d at 620; *Miracle*, 190 F. Supp. 2d 1200-1201; *Doe*, 844 A.2d at 467; *Bowles,* 680 N.W.2d at 378.
[238] *Miracle*, 190 F. Supp. 2d 1200-1201.

professional with a mental illness, 'crazy' is also commonly used to express an opinion that someone is unusual, impractical, erratic or unsound."[239] In addition, the court also makes the clarification, "We note that we are not holding that calling someone 'crazy' could never constitute slander."[240] What terms carried both popular and clinical meanings were left to the court's discretion and, therefore, bred inconsistencies. For example, in *Doe,* the court determined that the term "paranoid" did not assert a deteriorating mental condition because of where it was published. However, the court gave the impression that had it been published elsewhere, that might not have been the case.[241] This differed from the Court's argument in *Weyrich*, "The article's single reference to 'paranoia' is certainly pejorative, but the author deploys it in its popular, not clinical, sense…the definitive, clinical term 'paranoia' has taken on a less-than-definitive popular meaning, as have 'crazy' and 'nutty.'[242] This is particularly interesting considering that *Weyrich* occurred four years prior to *Doe.*[243] Either "paranoia" lost its "less-than-definitive popular meaning"[244] or the courts differed in their interpretations.

The courts in these cases acknowledge that terms such as, "nuts," "crazy" and "paranoid," do have the ability to impute a mental illness. However, the courts also contend that the terms carry another, less damaging, meaning in society. Here, the courts appear to argue that once a term becomes common slang or jargon its true definition or meaning is discarded, and, therefore, its ability to defame changes.[245]

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[239] *Bowles,* 680 N.W.2d at 378.
[240] *Id.* at 378 n.1.
[241] *Doe*, 844 A.2d at 467.
[242] *Weyrich*, 235 F.3d at 624.
[243] *Weyrich*, 235 F.3d 617; *Doe*, 844 A.2d 451.
[244] *Weyrich*, 235 F.3d at 624.
[245] *Weyrich*, 235 F.3d at 620; *Miracle*, 190 F. Supp. 2d at 1200-1201; *Doe*, 844 A.2d at 467; *Bowles,* 680 N.W.2d at 378.

The courts' characterization of mental illness in *Stratman* and *Askew*, as previously mentioned, implied mental illness hinders an individual's ability to hold employment without any explanation.[246] In *Polish Immigration Relief Comm.* and *Hohlt,* mental illness was also characterized somewhat negatively.[247] The court in *Polish Immigration Relief Comm.* denoted the defendant's imputation of mental illness as "vigorous epithet."[248] In *Hohlt*, it was "insulting and discourteous language."[249] Although portraying mental illness in this way is sympathetic to the plaintiff by validating the offense, it also perpetuates the idea that mental illness constitutes an insult and is something to be ashamed of. Courts do not have the ability to alter what society considers defamatory,[250] but they can alter their characterization of defamatory assertions.

[246] *Askew*, 722 S.E. 2d at 251; *Stratman*, 683 N.E.2d at 958-959.
[247] *Polish American Immigration Relief Comm.*, 189 A.D.2d 370; *Hohlt,* 936 S.W.2d 223.
[248] *Polish American Immigration Relief Comm.*, 189 A.D.2d at 374.
[249] *Hohlt,* 936 S.W.2d at 224.
[250] Markin, *supra* note 11, at 184.

Chapter V

Discussion and Conclusions

Before drawing any conclusions, it is important to recall the originally posed research questions: *How have United States courts approached defamation suits in which the statement was related to the imputation of mental disorder following the passage of the Americans with Disabilities Act (ADA) in 1990? What does that suggest for future defamation cases involving mental illness? How have courts characterized the rhetoric surrounding the topic of mental disorder in terms of defamation after the ADA? What can be said about the examined cases when approaching them from the Critical Legal Studies perspective?*

Based on the 11 post-ADA court cases examined in this thesis, defamatory claims involving the imputation of mental illness are most likely going to be found by courts to constitute non-actionable opinion or hyperbole. However, it is worth noting that they still accepted the defamatory potential of such statements and no court made any indication that the imputation of mental illness was no longer defamatory or less defamatory than in previous times.

There are, however, limitations to this study. This study looks only at cases following the Americans with Disabilities Act, which was signed into law on July 26, 1990.[251] It does not examine any cases that occurred prior to that date. It is worth noting that many cases are settled or not appealed and, therefore, are not available for analysis. The 11 cases analyzed are also appeals cases, meaning that there could have been information addressed at the trial court level, such as expert testimony or other evidence, that was not referenced by the appellate court. For future research, I recommend continuing to examine these types of cases to see if any changes begin to surface.

[251] Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2008).

The statements were deemed non-actionable opinion or hyperbole in eight of the 11 cases. This was to be expected based on precedent. However, how each of the courts came to that determination varied. There was no one set standard for determining what qualifies as a non-actionable opinion or hyperbole. Some courts offered no explanation at all, where as others cited specific tests and definitions or extensive amounts of previous case law. This suggests uncertainty and ambiguity for future cases. A few of the cases made a distinction between the popular and clinical meaning of words that impute mental illness. How that distinction was determined, however, is less clear. No court had a precise way of measuring when a term went from being used mainly in the clinical sense, to mainly in the popular sense, making it extremely subjective. It is clear that an explicit federal standard on how to determine what constitutes an opinion protected under the First Amendment would be helpful in both helping plaintiff's understand and making court decisions consistent across the country.

The rhetoric the courts used in these cases also characterized the terminology imputing mental illness. Even in cases where the imputation was found non-actionable the court still admitted the potential harm was an accusation. This can be seen in two ways. First, that the court is using its social capital to acknowledge the validity of the plaintiff's claim. By doing this, the court is sympathetic to the plaintiff and verbally recognizes their position in the matter. On the other hand, it also can be seen as perpetuating the stigma attached to mental illness. In this regard the courts did not appear to do anything to decrease the stigma surrounding mental illness even though they could. If a court finds that a statement imputing mental illness isn't defamatory, the court has the potential to address mental illness from a unique and powerful platform. It is possible for courts to admit the accusation's potential harm, while also pointing out that it is because of the stigma attached to mental illness, not necessarily because of mental illness itself.

From a Critical Legal Studies perspective, it seems that courts could do more to help society move in the direction of acceptance. Based on this study as a whole, the way courts in defamation claims have treated the imputation of mental illness has not changed since the passage of the American with Disabilities Act.

Prior to completing this study I was hoping to find that the defamatory power of mental illness had declined since the passage of the ADA. The stigma attached mental illness and mental health in general, I find to be wrong and often born out of ignorance. However, on a personal level I believed that slowly that stigma was beginning to change. In my experience, mental illness is not spoken about as negatively as it once was. I was curious to see if that change that I feel as an individual was reflected in the courts. If there were no stigma attached to mental illness, imputing it would not be defamatory. With no negative connotation, suggesting that an individual has a mental disorder would not lessen their standing in the community.

In general, I hoped that in the future the imputation of mental illness will not be considered defamatory by law, signaling to me, the removal of the stigma. However, this goal could be potentially problematic. Realistically, a stigma can never be entirely removed. As much as I desire that mental illness not have such a negative reputation in the United States, I am also practical enough to admit that is impossible. With that in mind, how can mental illness imputation be taken completely off the table? It is also worth noting that the term mental illness constitutes a very broad category. For example, the Diagnostic and Statistical Manual of Mental Disorders lists 20 different divisions of mental disorders.[252] This makes it difficult to say there should be one defamation law standard that applies to every mental disorder. After completing

[252] The Diagnostic and Statistical Manual of Mental Disorders (Am. Psychiatric Ass'n 5th ed. 2013).

this study I believe that mental illness imputation should remain legally capable of defamation due to society's misunderstanding of mental illness. However, courts have the ability while deciding these cases to point out society's errors and, therefore, can make a powerful social statement.

Appendix

Analyzed Cases

1) Askew v. Collins, 722 S.E. 2d 249 (Va. 2012).

2) Bowles v. McGivern, 680 N.W.2d 378 (Iowa Ct. App. 2004).

3) Doe v. Cahill, 844 A.2d 451 (Del. 2005).

4) Feld v. Conway, 16 F. Supp. 3d 1 (D. Mass. 2014).

5) Hohlt v. Complete Health Care, Inc., 936 S.W.2d 223 (Mo. Ct. App. 1996).

6) Miracle v. New Yorker Magazine, 190 F. Supp. 2d 1192 (D. Haw. 2001).

7) Pease v. International Union of Operating Engineers Local 150, 567 N.E.2d 614 (Ill. App. Ct. 1991).

8) Polish American Immigration Relief Comm., Inc. v. Relax, 189 A.D.2d 370 (NY App. Div. 1993).

9) Shipkovitz v. The Washington Post Co., 571 F.Supp. 2d 178 (D.D.C. 2008).

10) Stratman v. Brent, 683 N.E.2d 951 (Ill. Ct. App. 1997).

11) Weyrich v. New Republic, Inc., 235 F.3d 617 (D.C. Cir. 2001).

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