

Opinions, Implications, and Confusions

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The law of defamation is haunted by ancient common law principles, such as the distinction between libel *per se* and libel *per quod*, that contribute nothing to our current jurisprudence beyond providing opportunities for misunderstanding and perplexity. Unfortunately, more contemporary doctrines have further complicated the field by sowing fresh confusions. This article explores two such doctrines—the principle that a defamation claim cannot rest upon an opinion and the principle that a defamation claim can rest upon unstated implications—and suggests that there are troublesome contradictions both within them and between them. In short, this article respectfully proposes that these two areas of defamation law are unsettlingly messy if taken separately and, to an even greater extent, if taken together.

Let's start with the first of these principles and its jurisprudential antecedent, *Gertz v. Robert Welch*.¹ In an opinion written by Justice Powell, the Supreme Court famously declared: "We begin with the common ground. Under the First Amendment there is no such thing as a false idea."² No matter how "pernicious an opinion may seem," the Court announced, "we depend for its correction" on "the competition of other ideas."³

When Justice Powell wrote these words, he was right in at least two ways. First, as a summary of First Amendment precedent, this statement was uncontroversial, perhaps even incontrovertible. It self-consciously echoed Justice Holmes's influential declaration about "opinions and exhortations," i.e., "the ultimate good desired is better reached by free trade in ideas . . . The best test of truth is the power of the thought to get itself accepted in the

competition of the market."⁴

Holmes and Powell were on to something about what the First Amendment must mean, or at least what it cannot mean. After all, if the First Amendment leaves room for the state to punish unpopular opinions, it also empowers the state to dictate ideological orthodoxy. And, as Justice Jackson elegantly wrote in *West Virginia State Board of Education v. Barnette*, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."⁵

But there is a second sense in which Powell was right; like Holmes, he was also on to something about the nature of language. There are some kinds of statements (put aside, for the moment, whether we call them ideas or opinions or something else) that do not lend themselves to objective verification. It therefore makes no sense to label them as false and thereby allow them to be punished or restricted. And, because we cannot test them against objective criteria, we do so by allowing them to compete with other positions for popular allegiance. The linguistic point matters immensely because it clarifies the extent of the concern and the depth of the violation: to punish someone for uttering a false idea or opinion is to punish him for doing something he cannot have done.

Every student of media law knows what happened next. In the years that followed *Gertz*, many lower courts interpreted the case as standing for the proposition that the First Amendment precluded defamation actions based upon expressions of opinion.⁶ Over time, a multipart test emerged to assist in distinguishing statements of opinion from statements of fact.⁷ This body of law—supported by legal precedent, language, and logic—did not seem much at risk until the Supreme Court decided *Milkovich v. Lorain Journal*.⁸

In *Milkovich*, the Court held that *Gertz* did not "create a wholesale defamation exemption for anything that might be labeled 'opinion.'" The Court observed that utterances framed as opinions may be functionally equivalent to statements of fact. Because *Milkovich* concerned an accusation that the plaintiff had lied under oath, the Court made its point by using this example: the statement "In my opinion Jones is a liar" can cause "as much damage to reputation" as "Jones is a liar."¹⁰

The Court argued that expressions of opinion receive adequate breathing space through application of its decision in *Philadelphia Newspapers, Inc. v. Hepps*.¹¹ In *Hepps*, the Court held that statements on matters of public concern must be provably false in order to be actionable. The *Milkovich* Court reasoned that "*Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection."¹² The "imaginative expression" and "rhetorical hyperbole" that has "traditionally added much to the discourse of our Nation" will thus be insulated from liability.¹³ This makes much more sense, the Court observed, than reliance upon "an artificial dichotomy between 'opinion' and fact."¹⁴

Milkovich suffers from numerous conceptual infirmities. The Court errs in assessing the functional equivalency of statements of opinion and fact by reference to their capacity to injure reputation. Of course, expressions of opinion can impair and even destroy the popular regard in which someone is held. But in this context that does not matter. Absolutely true statements of fact can destroy reputations, too, but *Hepps* makes clear that they cannot serve as the basis for libel claims.

The Court also takes a curiously pointless detour in observing that merely adding words like "I think" or "in my opinion" to the beginning of an

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utterance does not transform it from a statement of fact to one of opinion. The defendant had not advocated for such a talismanic view of these phrases and the Court acknowledged as much.¹⁵ Nor had the lower courts adopted such a simplistic and formulaic approach. *Milkovich* was certainly correct in suggesting that distinguishing opinions from facts requires a more nuanced analysis than taking phrases like “in my view” at face value; but this simply knocks down a straw man of the Court’s own making.

[S]tatements of fact and opinion clearly differ in meaningful ways.

The Court also goes astray in condemning the “artificial dichotomy between ‘opinion’ and fact.” It may be true that labels by themselves do not determine on which side of the dichotomy any given statement falls. But there is no question that the dichotomy is a real one: statements of opinion and fact clearly differ in meaningful ways. Indeed, the Court’s dismissal of the idea that there is a critical distinction between statements of fact and opinion has some irony to it, because *Milkovich* did not banish this dichotomy; *Milkovich* enshrined it. *Milkovich* neatly divided all language into (1) that which can be proven true or false, and (2) that which cannot and endorsed a principle driven by that division.

In one sense, *Milkovich* and its miscues did no harm to existing First Amendment jurisprudence. Media lawyers simply substituted “rhetorical hyperbole” for “opinion” in their briefs and arguments. Most courts that considered opinion cases after *Milkovich* “reached the result that they likely would have before the Supreme Court decided the case” and even continued to apply the same standard.¹⁶ It could even be argued that *Milkovich* actually expanded First Amendment protections by adopting an analysis that embraced not just opinions, but also “imaginative expression” and other forms of “loose, figurative, or hyperbolic language.”¹⁷

In another sense, though, the binary view reflected in

Milkovich—everything can or cannot be proven true—fails to take into account the complexities of language or of the world as we find it. Consider, for example, the following statement about our beleaguered Jones: “I see Jones every morning. He is drinking out of a bottle in a brown paper bag. His breath smells like alcohol. Based on these facts, I think Jones is an alcoholic.” If Jones sues, acknowledging the truth of the underlying facts but denying that he suffers from alcoholism, how should we think about his claim? Should we assess the utterance by reference to its conclusion, note that alcoholism is a verifiable medical condition and treat this as a statement of fact? Or should we take the utterance as a whole, note that people could differ in their evaluation of the underlying facts (maybe Jones is taking a swig from a bottle of mouthwash) and treat it as something else—as something more subjective and contingent? In such circumstances the orderly division of all things into the two categories envisioned by *Milkovich* seems to break down.

This lapse is particularly significant because, long before *Milkovich* was decided, lower courts had developed a thoughtful and nuanced approach to such statements. The Restatement declared that a privilege arises “when the maker of [a] comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff’s conduct, qualifications or character.”¹⁸ The Restatement goes on to observe that this “opinion *may be ostensibly in the form of a factual statement* if it is clear from the context that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated.”¹⁹ As the Restatement indicates, courts sometimes refer to this protection as the privilege of “fair comment.”²⁰

The logic behind the fair comment privilege seems unassailable. Where the speaker sets forth true facts and offers an interpretation of them, the listener can evaluate the quality of speaker’s thinking and either agree or disagree. This approach poses only negligible risks of unwarranted injury to reputation while allowing abundant opportunities for expression and debate. Numerous cases, both before and after *Milkovich*, therefore embraced the principle,

some claiming for it not just common law but constitutional underpinnings.²¹ And the lower courts have continued to endorse this principle and ground it in the First Amendment, even though it arguably lies outside of the binary approach adopted in *Milkovich*.

One can persuasively contend that *Milkovich* did not discuss the fair comment rationale—and, indeed, should not have done so—because it would have been dictum given the facts of the case. Still, when the Court purports to sweep away and reconstruct an entire doctrine, it seems reasonable to expect a more comprehensive analysis than we would otherwise anticipate. Also, in what is undoubtedly dictum, the Court observed in passing that “[e]ven if a speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.”²²

The Court thus meandered briefly in the direction of the fair comment privilege, and then not only misstated the result that the privilege would yield but fell into just the sort of error that the central holding in *Milkovich* sought to prevent. After all, assessments can be evaluative and highly subjective in nature and not subject to proof of truth or falsity. Indeed, the example of a nonactionable statement offered in *Milkovich*—“In my opinion, Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin”—can fairly be described as two assessments, one of communist doctrine and one of somebody who subscribes to it. Fortunately, this puzzling rumination about assessments has not caused much confusion or consternation in the lower courts, which have, for the most part, appropriately passed over it in silence.

This body of doctrine evolved alongside another that has proved much more troublesome: the doctrine of libel by implication. Courts and commentators have recognized two contexts in which in which a claim based upon this theory might arise.²³ One such circumstance is where the omission of a material fact causes a literally true statement to suggest something false and defamatory. For example, if I tell you that I saw Jones running away from a bank mere seconds after it was robbed, but fail to add that Jones was chasing the culprit, it seems

unfair to allow me to take refuge in the literal truth of my statement. Defamation by omission of material facts does raise serious concerns,²⁴ but, for present purposes, I want to focus on the second and distinguishable context in which courts have held that a libel by implication theory might apply.

Some courts have recognized that such a claim can also arise where the defendant states true facts that give rise to an implication (or, if you prefer, an insinuation or innuendo) that is provably false. If I tell you that I heard noises at the home of my neighbor Jones; that I ran over and knocked; and that, when Jones opened the door, I saw his wife on the floor sobbing and bruised on the face, you might conclude that Jones had perpetrated a terrible act of domestic violence. If it turns out that Jones's wife had in fact tripped over the cat and fallen into the coffee table then my truthful recitation yielded a false implication.

The concerns that attend recognizing a claim under these circumstances are probably obvious. Why should someone be liable for words he did not say? Given the unpredictability of what listeners might infer from true statements, how do speakers decide what they can and cannot safely communicate? If the implication of the true statements is clear, and clearly negative, won't speakers self censor in order to avoid liability? How do we square that result with our belief that the best test of truth is not censorship but scrutiny within the marketplace of ideas and information?

In light of these and related concerns, some courts have declined to recognize a claim for defamation by implication, either entirely or under certain circumstances.²⁵ More commonly, however, courts have addressed these concerns by requiring the plaintiff to prove that the defendant intended to create the implication or somehow endorsed it.²⁶ This intent requirement supposedly provides greater latitude to speech by elevating the plaintiff's burden of proof and by insulating the defendant from liability for implications he or she did not mean to create.

There are, however, at least three significant problems with using an intent requirement to address our worries about this kind of claim. The first problem has to do with the predictive value of the rule. Speakers who feel

hesitant to communicate, even when everything they are saying is true, because they think they may be held liable for whatever they imply will find little reassurance in the notion that they will only be held liable for whatever a jury thinks they intended to imply.

The second problem relates to the procedural implementation of the rule. Legal defenses that turn on intentionality make tough fodder for early motions to dismiss. In many cases, therefore, defendants will have to suffer through the expense and trouble of discovery and summary judgment motions and, perhaps, trial before they have any hope of extricating themselves from a lawsuit based upon something they did not say.

The third and most interesting problem is that the intent requirement reveals a fundamental inconsistency between the doctrine of libel by implication and the fair comment privilege. Returning to an earlier example, let's take the statement "I see Jones every morning. He is drinking out of a bottle in a brown paper bag. His breath smells like alcohol." In its starkest terms, the intent requirement stands for the proposition that Jones can maintain a libel action if he can show that the speaker purposefully meant to convey through these words that Jones is an alcoholic. But, as previously noted, the defendant could avail himself of the fair comment privilege if he spoke up, declared "based on these facts, I think Jones is an alcoholic," and removed all doubts about his intentions. Immunity when you say it; liability when you don't; as Alice cried: "Curiouser and curiouser."

These incongruous results do not just reflect a technical inconsistency between two doctrines. Rather, they flow from two very different views about how human beings process and experience what they read and hear. The fair comment privilege embodies an optimistic view: people are rational; they spot faulty arguments; they know when conclusions do not follow from premises; they challenge unfair accusations. The doctrine of defamation by implication embodies a pessimistic view: people are suckers; they mistake innuendo for evidence; they make snap judgments; they are seduced by insinuation.

The pessimistic view may find support in everyday experience. It does not, however, correspond with our

approach to the law of defamation generally. The law of defamation assumes, for example, that those who read an article in a newspaper do not just look at the headline; they read the entire piece; they take statements in context; they give words their fair and usual meaning. We understand that the law here indulges in a fiction—perhaps even an extravagant one—and it may well be the case that most readers do not do any of these things, let alone all of them. But the alternative is to allow for a form of heckler's veto, where the predispositions and personalities of a less-than-ideal audience determine the rights of the speaker.

This point goes to the very foundations of First Amendment theory. For the marketplace of ideas model, perhaps the single most influential argument for free expression in our constitutional jurisprudence, takes a similarly optimistic approach. It, too, assumes that people think critically about what they read and hear; they know the truth when it comes their way; they choose it over falsehood—and do so regardless of forces like bias and ignorance and self-interest; they persuade others to do likewise. Justice Holmes (surely, no Pollyanna) understood that this is less a reality that we observe than a theory that we embrace; he recognized, indeed, happily conceded, that this is "an experiment, as all life is an experiment."

The experiment can go wrong in different ways. It can go wrong in operation, when participants in the marketplace of ideas do not behave as intelligently, responsibly, or selflessly as we might hope. But it can also go wrong at the design stage if we set the wrong protocols. And I conclude by respectfully suggesting that we have set poor protocols indeed when we assume that language is less complex than it is; when we believe that we can divide all of human expression into two neat categories; when we lose our faith that people will filter what they read and hear through the fine meshes of reason, analysis, skepticism, and debate; and when we abandon the optimism of the First Amendment for the skepticism of the censor.

Endnotes

1. 418 U.S. 323 (1974).
2. *Id.* at 339–40.

3. *Id.* at 341.

4. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For a thoughtful analysis of the marketplace of ideas model, see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15–34 (1982).

5. 319 U.S. 624, 642 (1943).

6. Indeed, this understanding of *Gertz* achieved such prominence and prevalence that it was reflected in the Restatement of Torts. See Restatement (Second) of Torts § 566 cmt. c (1977) (stating that *Gertz* “may have . . . rendered unconstitutional” any claim that seeks to recover for defamation based upon an expression of opinion).

7. The most commonly applied test was that articulated in *Ollman v. Evans*, 750 F.2d 970, 979–84 (D.C. Cir. 1984).

8. 497 U.S. 1 (1990).

9. *Id.* at 18.

10. *Id.* at 19.

11. 475 U.S. 767 (1986).

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

13. *Id.*

14. *Id.* at 19.

15. See *id.*

16. Robert Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill*, 100 COLUMBIA L. REV. 294, 322–323 (2000). Indeed, “[e]ven the *Ollman*-type factors used to identify statements of opinion survived *Milkovich* despite *Milkovich*’s explicit disapproval of them.” *Id.* at 324. See also SACK ON DEFAMATION, LIBEL, SLANDER, AND RELATED PROBLEMS § 4.2.4 (3d ed. 1999) (“[T]he syllogism implied by *Gertz* stands after *Milkovich*: Defamation is actionable only if false; opinions cannot be false; opinions are not actionable”).

17. *Milkovich*, 497 U.S. at 20–21.

18. Restatement (Second) of Torts § 566 cmt. b (1977) (emphasis supplied).

19. *Id.*

20. I will refer to this doctrine as the “fair comment privilege” for purposes of convenience, while acknowledging that different jurisdictions assign somewhat different meanings to the term.

21. See, e.g., *Riley v. Harr*, 292 F.3d 282, 289 (1st Cir. 2002) (“[O]f central importance in this case, even a provably false statement is not actionable if it is plain that the speaker is expressing a subjective view. . . . [W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment”) (internal quotation marks omitted);

Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1440 (9th Cir. 1995) (“Readers were free to form another, perhaps contradictory opinion from the same facts . . . as no doubt they did”); *Moldea v. New York Times Co.*, 15 F.3d 1137, 1144–45 (D.C. Cir. 1994) (“Because the reader understands that such supported opinions represent the writer’s interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation”); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (defendants’ conclusions were not actionable because they disclosed the underlying facts, “did not pretend to have the inside dope,” and drew “a natural though not inevitable inference”); *Phantom Touring, Inc. v. Affiliated Publ’ns*, 953 F.2d 724 (1st Cir. 1992) (defendant’s article was not actionable because it “discussed all the facts underlying his views [and even] gave information from which readers might draw contrary conclusions”); *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1290 (4th Cir. 1987) (“[W]hen properly viewed in context, the statement in question readily appears to be nothing more than the author’s personal inference[. . .] which] the reader is by no means required to share”); *Ollman v. Evans*, 750 F.2d 970, 1022–23 (D.C. Cir. 1984) (Robinson, C.J., dissenting) (“Having supplied an accurate account of [the underlying] facts, the author cannot be said to have misled or deceived the reader about the matter discussed, even if the author’s ultimate conclusion—the hybrid statement—may in some sense be erroneous”); *Balderman v. Am. Broad. Cos.*, 738 N.Y.S.2d 462, 467 (N.Y. App. Div. 2002) (The conclusions in question were “preceded by a recitation of the facts on which those statements were based and thus constitute non-actionable expressions of ‘pure opinion’”); *Hamilton v. Hammons*, 792 So. 2d 956, 961 (Miss. 2001) (“[Defendant’s] statements as to what he believed in response to questions posed by [police] and the reporter . . . were based on objective, verifiable facts and do not rise to the level of an actionable opinion”); *Bruno v. N.Y. News, Inc.*, 456 N.Y.S.2d 837, 840 (N.Y. App. Div. 1982) (“Expressions of opinion are constitutionally privileged when accompanied in the articles by objective facts supporting them”); *Nat’l Ass’n of Gov’t Employees v. Cent. Broad. Corp.*, 396 N.E.2d 996, 1,000 (Mass. 1979) (“[Where an] opinion is recognizable as such because its factual ingredient is known or assumed presents a clear case for First Amendment

protection including freedom from civil liability”); It should be noted that courts generally decline to recognize this privilege when the facts offered in support of the conclusion are false. See, e.g., *Condit v. Dunne*, 317 F. Supp. 2d 344, 363–64 (S.D.N.Y. 2004).

22. *Milkovich*, 497 U.S. at 19 (emphasis supplied).

23. See Thomas B. Kelley & Steven D. Zansberg, *Libel by Implication*, 20(3) COMM. LAW. (2002).

24. See *id.* but cf. C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times v. Sullivan*, 78 IOWA L. REV. 237 (1993) (providing a comprehensive overview of defamation by implication and discussing how courts could apply the principles of *Sullivan* to avoid some of the dangers inherent in the doctrine).

25. See, e.g., *Krems v. Univ. Hosp.*, 762 N.E.2d 1016 (Ohio 1999). In addition, a number of courts have held that public figure plaintiffs cannot bring an action for defamation by implication, at least in cases where the innuendo does not arise from the omission of material facts. See, e.g., *Strada v. Conn. Newspapers, Inc.*, 477 A.2d 1005, 1010 (1984) (holding that “First Amendment considerations dictate that an article concerning a public figure composed of true or substantially true statements is not defamatory regardless of the tone or innuendo evident”); *Schaefer v. Lynch*, 406 So. 2d 185 (La. 1981) (“Where public officers and public affairs are concerned there can be no libel by innuendo”). Other courts have allowed such claims, subject to the plaintiff’s ability to prove by clear and convincing evidence that the defendant created the false implication with actual malice. See, e.g., *Saenz v. Playboy Enter., Inc.*, 841 F.2d 1309, 1314 (7th Cir. 1988).

26. See, e.g., *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092–93 (4th Cir. 1993) (holding that the “language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference”); *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990) (holding that “if the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant intends or endorses the defamatory inference, the communication will be deemed capable of bearing that meaning”); *Leddy v. Naragansett Television, L.P.*, 843 A.2d 481 (R.I. 2004) (citing and following *White*).