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OPINION AND LIBEL

by Mark Sableman

Fact and opinion seem to be two mutually exclusive categories. Accusations of fact, which are verifiable in their truth or falsity, can be actionable as defamation. Expressions of opinion, inherently unverifiable as true or false, are protected speech. It is that simple. Or is it?

For decades, defamation law (the law of libel and slander, though I will sometimes use “libel” as shorthand) has struggled with the distinction between fact and opinion. It has never been as simple as it would seem at first blush, though the simple fact-opinion distinction has many adherents and refuses to die, even, it seems, when the Supreme Court decrees that it must.

This article will examine the fact-opinion distinction in libel law over the years, and most especially since the Supreme Court’s dictum in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that “there is no such thing as a false idea” seemed to provide an Olympian endorsement of everyone’s gut feeling that there really is a simple, black-and-white, fact-and-opinion distinction.

Fair Comment and Criticism at Common Law

English common law distinguished between fact and opinion in libel law, and recognized an opinion defense under the name “fair comment and criticism.” The defense was designed to shield mere statements of good-faith belief and opinion from libel liability. The defense is explained as follows in Peter Carter-Ruck’s treatise *On Libel and Slander*:

Comment is statement of opinion: it is the inference which the writer or speaker draws from facts. Assertions of facts are not protected by this defence. Comment must appear as comment; it must not be so mixed up with statements of fact that the reader or listener is unable to distinguish between report of facts and comment. “Any matter, therefore, which does not indicate with reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment.” The reason is apparent: to state accurately and clearly what a man has done and then to express an opinion is comment which cannot do any harm or work injustice.

The reader is then put in a position to judge for himself whether the opinion expressed is well-founded or not. If there is any doubt whether the words are statements of fact or comment the question is one to be decided by the jury subject to the judge ruling that the words are reasonably capable of being comment.

For the defence of fair comment to succeed it must be proved that the subject matter of the comment is a matter of legitimate public interest; that the facts upon which the comment is based are true; and that the comment is fair in the sense that it is relevant to the facts and in the sense that it is the expression of the honest opinion of the writer or speaker.

This passage is revealing, for while it suggests a broad defense for “comment,” it also shows that English law imposed a number of qualifications and hurdles for the comment defense to be met. Initially, under the English test, the subject of the comment must have been a matter of “legitimate public interest,” which typically meant matters of government and public administration, and criticism in the fields of art, literature, and entertainment. But the issue of the “legitimacy” of any comment injected an unwelcome subjectivity into the defense. When is an aspect of the private life of someone, even one involved in government, a “legitimate” subject of commentary? Such matters were left to the jury, which was free to conclude that, for example, a speaker went too far when he not only criticized another’s actions but also expressed a good-faith skepticism of that person’s motives. See *Campbell v. Spottiswoode*, 3 B &

S 769, 122 E.R. 288 (1863; opinion of Crompton, J.): “It is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits and impute base and sordid motives which are not warranted by the facts, and I cannot for a moment think that, because he has a bona fide belief that he is publishing what is true, that is any answer to an action for libel.” This notion that an opinion can and should be expressed without attacking one’s opponent’s motives, of course, must seem quaint and foreign to many modern Americans.

Next, fair comment in English law required the defendant to prove that his comment was based upon true facts or privileged reports. Finally, it required the defendant to prove, in Carter-Ruck’s words, “that the comment in question is in the first place comment which an honest minded man could make upon the facts, and secondly that the comment is the defendant’s honest opinion.” The “first place” test, a purportedly objective measure of the protectability of the opinion, created a huge amount of uncertainty for any speaker. It meant, essentially, that a jury would second-guess whether the speaker’s opinion is allowable. A leading judicial test, though meant to be permissive of many opinions, illustrates that ultimately the jury was allowed to rule based on its after-the-fact determination of fairness: “The question which the jury must consider is this: would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said” (*Broadway Approvals Limited v. Oldhams Press Limited*, 2 All E.R. 904 [1964; emphasis added]).

The Fair Comment and Criticism Defense in America

The states of the United States inherited the British fair comment and criticism defense, and made it a mainstay of their laws of libel and slander for many years. In the late nineteenth and early twentieth centuries it was one of the privileges most often raised in defense of libel claims, and indeed it was described in one memorable case as the “brightest jewel in the crown of the law” for its role in protecting freedom of discussion.

The Missouri case of *Diener v. Star-Chronicle Publishing Co.*, 230 Mo. 613, 132 S.W. 1143 (1910; *Diener I*), which applied and explained fair comment, illustrates its importance in American libel law at a time before the First Amendment was found to affect that body of law. In *Diener I*, the plaintiff, a chauffeur for the city health commissioner, had sued a newspaper over an editorial that implicitly criticized him and his boss for an incident in which the plaintiff (while driving his boss) negligently killed a small child. The editorial suggested that the chauffeur’s boss was responsible for having “run down and killed a small child in the street,” and that the coroner who exculpated the health commissioner had acquiesced in “the mangling of ... little tots.”

Automobiles were new at the time, and the ordinary reader of the day, who certainly understood the dangerousness of autos and how easily they could go out of control, would not have understood the phrase “killed a small child,” or even the harsher “mangling of little tots,” to refer to the crime of murder. Rather,

when a car runs someone down, “it is by means of a collision, through negligence, or accident,” as the court noted. So the court held that the newspaper’s editorial did not impute commission of a crime to Diener, and was not libelous per se. But the court went on to address the fair comment privilege, as well. It summarized the defense as follows:

So long as a publication is not directed to a public officer by charging corruption or other criminal malfeasance or non-feasance, so long as it is not directed to the defamation of a individual in his private character or business, but is directed to a matter of live public concern and is for an honest and not a defamatory purpose, it is qualifiedly privileged.

Within those lines, the court stated, everyone is entitled to “comment fairly, freely, with vigor and severity.” After reviewing the policy behind the fair comment privilege, applauding it as “the brightest jewel in the crown of the law,” the court explained the reasons why the privilege applied in this case. First, the office of coroner and its business—particularly its inquiry into the death of a child—were matters of public interest and concern. Second, the editorial was fair and had an honest purpose and was “in no wise earmarked with abuse and vituperative indications of malice.” Hence, the editorial was privileged as a matter of law under the fair comment doctrine.

If the secondary holding status of fair comment in *Diener I* left any doubt as to the importance of the doctrine, that doubt was resolved by a

related case a few months later. At issue in *Diener v. Star-Chronicle Publishing Co.*, 232 Mo. 416, 135 S.W. 6 (1911; *Diener II*), was a second, somewhat-embellished petition filed by the plaintiff after his original petition had been dismissed by the trial court. Among other things, the *Diener II* petition pled that the editorial had effectively branded Diener a “killer.” The court held that even the harshest invective would be protected if the fair comment doctrine otherwise fit:

Libel cannot hang on so slender a thread as a mere matter of taste in the penman’s selection of one word instead of another one, interchangeable as a synonym, or (by condensation) in using laconically one word instead of expanding and diluting his idea into a phrase, thereby toning and softening it down. The use of a given word often makes the stroke that of a feather. The use of another may make the stroke that of a hammer. When the purpose is honest, as gathered from the whole publication, when the discussion is on a matter of live and present public concern (as here) and there are no earmarks of malice through invective, vituperation, or calumny, and where the publication does not pertain to the private business and the private character of an individual, or charge corruption or other misdemeanor to one clothed with authority, in a defamatory way, we say, when such condition of things appears, then a writer may use a hammer, instead of a feather, in fulminating argumentatively.

No wonder the court in *Diener I* had identified fair comment as “the brightest jewel in the

crown of the law” as it sought to “seek and maintain the golden mean between defamation on the one hand, and a healthy and robust right of free public discussion, on the other.” Before *New York Times v. Sullivan*, the fair comment defense was the crucial doctrine that permitted writers to “use a hammer, instead of a feather, in fulminating argumentatively.”

In the area of literary and artistic criticism, American courts generally readily accepted the right of writers to criticize authors and artists who offer their works to the public. The Iowa Supreme Court’s ruling in *Cherry v. Des Moines Leader*, 114 Iowa 298, 86 N.W. 323 (1901), is a landmark decision protecting criticism. The *Leader’s* critic could hardly have been more harsh in his review of the Cherry Sisters, a vaudeville singing and dancing team. The review included this classic passage:

Effie is an old jade of fifty summers, Jessie a frisky filly of forty, and Addie, the flower of the family, a capering monstrosity of thirty-five. Their long, skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom. They pranced around the stage with a motion that suggested a cross between the danse du ventre and fox trot—strange creatures with painted faces and hideous mien. Effie is spavined, Addie is stringhalt, and Jessie, the only one who showed her stockings, has legs with calves as classic in their outlines as the curves of a broomhandle.

Yet the court, basing its opinion both on the entertainer's solicitation of the public and the "manifest distinction between matters of fact and comment on or criticism of undisputed facts or conduct," held the review fully protected as fair comment:

One who goes upon the stage to exhibit himself to the public, or who gives any kind of a performance to which the public is invited, may be freely criticised. He may be held up to ridicule, and entire freedom of expression is guaranteed dramatic critics, provided they are not actuated by malice or evil purpose in what they write. Fitting strictures, sarcasm, or ridicule, even may be used, if based on facts, without liability, in the absence of malice or wicked purpose.

The court ruled within the strictures of the fair comment defense, but, like the court in *Diener I* and *II*, interpreted that defense as supportive of free expression. A dramatic critic, it wrote, "should be allowed considerable license" in a situation like this, because of the value of informing the public of the character of the entertainment.

The fair comment and criticism defense was a mainstay of libel law throughout the nineteenth century and most of the twentieth century. It was the means by which statements of opinion, particularly in literary and artistic reviews, and in political discourse, were protected.

Legal reformers, at times, attempted to broaden the fair comment defense. Thomas Cooley, one of the nineteenth century's most widely read and cited legal commentators, and a member

of the Michigan Supreme Court for twenty-one years, urged a broad view of fair comment in which criticism of public officials would be limited only "by good faith and just intention." In a prescient passage in his 1868 treatise, he argued, for example, against the English law limitation of the fair comment privilege to comments about the *public* acts of officials and candidates. This rule, he noted, assumes "that the private character of a public officer is something aside from, and not entering into or influencing, his public conduct, and that a thoroughly dishonest man may be a just minister, and that a judge who is corrupt and debauched in private life may be pure and upright in his judgments; in other words, that an evil tree is as likely as any other to bring forth good fruits." That assumption, he asserted, "is false to human nature," and thus Cooley concluded that the English fair comment doctrine, which limited criticism about private matters, was not sufficiently comprehensive.

Despite the efforts of Cooley and others, however, most American courts accepted all the limitations on the fair comment defense found in English law, and those limitations at times prevented the defense from applying to political and other commentary that today most Americans would view as well within the realm of free speech. Professor George Chase of Columbia Law School, for example, in reviewing one fair comment decision, pooh-poohed the assertion that the fair comment defense established "a full and free right of criticism." Professor Chase called the Maryland Supreme Court's decision in *Nagley v. Farrow*, upholding a judgment against a newspaper for criticizing a public official, "a mockery."

Rhetorical Hyperbole

What would eventually become one of the most important aspects of the opinion defense in American libel law entered Supreme Court jurisprudence through a back door in 1970. In the years following the constitutionalization of libel law brought about by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court took a number of libel cases to clarify, apply, and, in some cases, expand the *Sullivan* rule. *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), was one such case. In that public official libel case, the trial court had instructed the jury that it could find *Sullivan* “actual malice” simply by examining the alleged defamatory language coupled with evidence of the defendant’s hostility to the plaintiff.

The Supreme Court found the trial court’s instruction to be “error of constitutional magnitude” because of its misinterpretation of the *Sullivan* “actual malice” standard. In so doing, the Court addressed the plaintiff’s contention that because the newspaper repeatedly used the word *blackmail*, and it was obvious that the plaintiff had committed no such crime, an inference of knowledge of falsehood was permissible. The Court noted that in the circumstances at issue, the word *blackmail* could not reasonably be interpreted as referring to the crime of blackmail. Bresler, the plaintiff, was a real estate developer who was negotiating with the Greenbelt City Council to obtain zoning variances. During certain city council and community meetings, various persons characterized Bresler’s negotiating position as *blackmail*, and the newspaper reported those accusations. The

Supreme Court readily concluded that the word *blackmail* in the context of the news reports of the real estate negotiations and its public debate carried a quite different meaning than the accusation of the crime of blackmail:

It is simply impossible to believe that a reader who reached the word “blackmail” in either article would not have understood exactly what was meant: It was Bresler’s public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler’s negotiating position extremely unreasonable.

Thus the Court interpreted the use of the word *blackmail* in the context of the newspaper’s reports of the public debate as “rhetorical hyperbole,” in contradistinction to an accusation of the crime of blackmail. This passage would become one of the crucial precedents of the libel opinion doctrine as it developed.

The Gertz Dicta

The law of comment and opinion took a dramatic turn in 1974 when the Supreme Court issued its decision in *Gertz v. Robert Welch, Inc.* The issue there was the application and extent of the constitutional protection first recognized

in *New York Times Co. v. Sullivan*—specifically, did it cover statements made about persons who were neither public officials nor public figures, and, if so, what fault standard applied? It was not a case about a statement of opinion; the core alleged libelous statements, accusing Elmer Gertz, an esteemed civil rights attorney, of various misdeeds and unsavory associations, were clearly factual assertions that Gertz had proven at trial to be false.

Nonetheless, in the course of the Court’s decision, perhaps hoping to better frame the constitutional status of false factual assertions, Justice Lewis Powell waxed eloquent about the opposite of factual statements—namely, statements of opinion. He began Section III of the *Gertz* decision with this paean to the place of opinion in discourse, and the sharp distinction between protected opinion and actionable fact:

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in “uninhibited, robust, and wide-open” debate on public issues (*New York Times Co. v. Sullivan*, 376 U.S., at 270). They belong to that category of utterances which “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed

by the social interest in order and morality” (*Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 [1942]).

These statements about “no such thing as a false idea” and about opinions depending “on the competition of other ideas,” not “the conscience of judges and juries,” were all dicta—observations not essential to the case at hand, and hence not binding on other courts. But they came from the Supreme Court. They seemed to express legal truisms. They confirmed what many judges, attorneys, and ordinary Americans believe: that the First Amendment gives free reign to expressions of opinion. And, most appealingly, they offered an easy out for courts in deciding many of the borderline libel and slander cases that came before them.

Letter Carriers: More Rhetorical Hyperbole

On the same day that *Gertz* was decided, the Supreme Court also decided a labor dispute case involving alleged libelous statements made during the course of a union organizing campaign, *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264 (1974). Replacement workers sued a union for publishing a “List of Scabs” in its newsletter. Right above the list, the newsletter, among other things, published a lengthy, highly disparaging essay, attributed to Jack London, describing a scab as a rattlesnake, toad, and traitor. Plaintiffs, pointing to that essay, asserted that identifying them as “scabs” was tantamount to accusing them of being traitors.

The union initially sought a ruling that federal labor law preempted state libel law in cases arising from labor disputes, but the court found that this dispute was not preempted. The Supreme Court, however, went on to apply the *Sullivan/Gertz* “actual malice” standard to non-preempted labor libel cases. The Court also went on, much as it did in *Greenbelt*, to determine that the language in question was rhetoric and comment, not factual assertion. The Court found that the mere use of the word *scab*, even together with the Jack London definition, “cannot be construed as representations of fact.” Citing an earlier labor case, *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966), the Court held that in the course of union picketing, use of “loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies” is allowable. Citing *Greenbelt* as well, the Court held that the word *scab* was obviously used “in a loose figurative sense to demonstrate the union’s strong disagreement with the views of those workers who opposed unionization.” Expressions of such opinions “even in those pejorative terms” are protected. The Court even cited its own “no such thing as a false idea” dictum the same day in *Gertz*. *Letter Carriers* thus lined up with *Greenbelt*, and *Linn*, in immunizing “exaggerated rhetoric” from libel law.

The Post-Gertz Definitional Opinion Defense

Soon after the *Gertz* ruling, lower courts began citing Justice Powell’s “no such thing as a false idea” dictum as if it had laid down or discovered a new libel defense or a new First Amendment

doctrine. Two months later, a district court in *Holodnak v. Avco Corp., Avco-Lycoming Division, Stratford, Connecticut*, 381 F.Supp. 191 (D. Conn. 1974), resolved a labor dispute by finding an employee’s expression of opinion protected, relying in large part on the *Gertz* dictum. Within a few years, the dictum was becoming more frequently cited, often as key authority, in libel cases. See, for example, *Pierce v. Capital Cities Communications, Inc.*, 427 F.Supp. 180 (E.D. Pa. 1977), in which a statement the plaintiff described as “immoral” was held to be constitutionally protected opinion; *Steaks Unlimited, Inc. v. Deaner*, 468 F.Supp. 779 (W.D. Pa. 1979), which suggested that if the statements at issue in the case had been ones of opinion, they then could not have been defamatory; *Church of Scientology of California v. Siegelman*, 475 F.Supp. 950 (S.D.N.Y. 1979), which dismissed libel claims based on various statements as non-actionable opinion, or as “a mix of opinion and unflattering, but nondefamatory, factual statements.”

Ollman v. Evans, 479 F.Supp. 292 (D.D.C. 1979), was a key step in the development of a new opinion defense based on the *Gertz* dictum. It involved a professor of political science, as plaintiff, who sued the well-known newspaper columnists Rowland Evans and Robert Novak. Evans and Novak wrote a scathing column about the plaintiff, an admitted Marxist, who had been nominated to serve as chairman of the Department of Government and Economics of the University of Maryland. After their column appeared, the plaintiff was denied the nomination. He claimed that the column damaged his reputation as a scholar. In particular, the plaintiff claimed the article was defamatory

because it portrayed him as a political activist rather than a scholar, and because it contended that he desired to use the classroom as a tool for preparing for “the revolution.”

The district court began its analysis of the defendant’s motion for summary judgment with a flat-out statement that “the First Amendment precludes liability based on the utterance of defamatory opinions.” It cited the famous *Gertz* dictum for that proposition. It then noted, however, that common law drew a distinction between pure opinion and an opinion that includes an implied statement of facts. For this the court relied on Section 566 of the *Restatement (Second) of Torts*, which noted that an opinion can be actionable “only if it implies the allegation of undisclosed defamatory facts as a basis of the opinion.” Accordingly, the court held that if an author bases his opinion on disclosed facts, the opinion itself does not give rise to a cause of action. But if the author supplies no such facts, but utters a defamatory opinion, a claim arises, not because of the opinion but because of the libelous underlying facts that are implied. The court found this distinction between pure opinion, and opinions implying defamatory facts, to strike an appropriate balance “between competing legitimate needs.” Specifically, “it encourages unfettered inquiry, contemplation, and communication, yet does not preclude redress to individuals for damage to their reputation.” The court went on to distinguish between statements of opinion and assertions of fact, admitting that the difference “may be hazy at times” but concluding that at least in the case of loosely defined or variously interpretable statements that are made in the

context of social, political, or philosophical debate, those statements are opinion. By contrast, “statements imputing objective reality, uncolored by possible interpretation or bias, are statements of fact.”

Applying that analysis, the court concluded that the newspaper column in question, while based on a selective reporting of the plaintiff’s positions, reported merely the defendant’s opinions. Accordingly, the court found that under “*Gertz* and its progeny,” the opinions of the defendants were fully constitutionally protected unless they implied defamatory facts. Finding no such implied defamation facts, and finding that the defendants sufficiently disclosed the basis for their opinions, the court granted the summary judgment.

Ollman v. Evans was not the only libel case in which the *Gertz* opinion defense was being asserted or used as a basis for decision. By the early 1980s, the *Gertz* dictum was being asserted in scores of cases across the country, and was generally received approvingly by courts, many of which were eager to dismiss borderline libel claims rather than permit them to move ahead through extensive pretrial proceedings, including intrusive discovery. Nonetheless, *Ollman*, which occurred and was decided in the nation’s capital, a news center, became the focus of much of the attention concerning the opinion defense. The long and rocky course of the case on appeal, and the differing opinions reached by many distinguished appellate judges, only added to the case’s interest and focus.

The District of Columbia Circuit first ruled on

the case in 1983 with a *per curiam* judgment of reversal and three separate opinions (*Ollman v. Evans*, 713 F.2d 838 [D.C. Cir. 1983]). Judge Spottswood W. Robinson III, who wrote the longest separate opinion, began with recognition of the “special solicitude for unfettered expression of opinion” that he understood *Gertz* compelled. But while he accepted the *Gertz* dictum as a binding pronouncement of a new absolute opinion defense, he noted that neither *Gertz* nor any other Supreme Court decision “has provided much guidance for recognizing statements that are ‘opinion’ for First Amendment purposes.” He acknowledged that both *Greenbelt and Letter Carriers* suggested that rhetorical hyperbole qualified as opinion.

Judge Robinson concluded that statements of opinion could not be neatly divided from statements of fact: “Fact is the germ of opinion, and the transition from assertion of fact to expression of opinion is progression on a continuum.” Nonetheless, he attempted to classify statements of opinion and fact in a range, including (1) pure opinion, relating to matters of “personal taste, aesthetics, literary criticism, religious beliefs, moral convictions, political views, and social theories,” (2) loosely definable various interpretable remarks that are often “flung about in colloquial argument and debate,” (3) metaphorical language that clearly could not be proven true or false, and (4) “hybrid opinions” — statements that are neither pure fact nor pure opinion but often evaluations and conclusions “laden with factual contents.” He viewed the statements at issue in *Ollman* as hybrid facts and thus analyzed each of the assertions to determine whether the background facts were fully and

accurately set forth. With respect to one of the statements, “that Ollman lacks a reputation in his field as a scholar,” he concluded that the statement had factual elements and that its ultimate analysis depended upon the background facts and whether they were true or not. The two other judges on the panel took different approaches, but agreed to send the case back for more analysis.

Eventually the D.C. Circuit *en banc* ruled on *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984). The majority decision was written by Judge Kenneth Starr (who later became well-known as the special prosecutor whose report led to the Clinton impeachment). At the outset, Judge Starr noted that the court faced the “delicate and sensitive task” of reconciling First Amendment rights with the plaintiff’s interest in his reputation. He noted the common law fair comment defense, but viewed the *Gertz* dicta (which he acknowledged as such) as “fundamentally” changing the law — “elevating” the fact-opinion distinction to constitutional dimension. Like Judge Robinson, he identified the problem as distinguishing between fact and opinion. In this regard, he first found guidance from *Greenbelt and Letter Carriers*: they squarely put rhetorical hyperbole in the opinion camp. And he looked to how other lower courts had navigated the “largely uncharted seas” left by *Gertz*. Some treated the fact-opinion distinction as a judgment call; some focused almost exclusively on the verifiability of the assertions; others applied multi-factor analyses.

Creating any test for distinguishing fact from opinion was difficult, Judge Starr noted,

In formulating a test to distinguish between fact and opinion, courts are admittedly faced with a dilemma. Because of the richness and diversity of language, as evidenced by the capacity of the same words to convey different meanings in different contexts, it is quite impossible to lay down a bright-line or mechanical distinction. Judicial decisions, however, that represent mere *ad hoc* judgments or which, in contrast, lay down rules of excessive complexity may deter publication of the very opinions which the *Gertz*-mandated distinction is designed to protect, inasmuch as potential speakers or writers would, under such regimes, be at a loss to predict what courts will ultimately deem to be opinion. While this dilemma admits of no easy resolution, we think it obliges us to state plainly the factors that guide us in distinguishing fact from opinion and to demonstrate how these factors lead to a proper accommodation between the competing interests in free expression of opinion and in an individual's reputation.

Ultimately, Judge Starr concluded that a "totality of the circumstances" approach was best, considering (1) the common usage or meaning of the language of the challenged statement, (2) the statement's verifiability, (3) the full context of the statement, and (4) the broader context or setting in which the statement appears. He rejected applying the analysis of Section 566 of the *Restatement (Second) of Torts* (the search for implied factual assertions within a statement in the form of an opinion) on top of the multifactor test, on the grounds that the multi-factor analysis sufficiently tests whether the statement implies

the existence of undisclosed facts. In the *Ollman* case, for example, he concluded that even if all underlying facts had not been disclosed, readers would understand the Evans and Novak column, an opinion column appearing on the opinion page, to be offering only opinions, and not making implied assertions of fact.

Applying the totality of the circumstances approach, Judge Starr found the Evans and Novak column to be one of opinion and not fact, and hence totally nonactionable as libel. Even with respect to the most troublesome statement, the suggestion that Ollman did not have a reputation in his field as a scholar, Judge Starr concluded that the opinion-column context signaled to the reader that this assertion was meant as opinion, not fact. Judge Robert Bork concurred in the result (in partnership with, among others, Judge Ruth Bader Ginsburg), with a somewhat different analysis, relying on both contextual and intuitive signals and policy principles (including deference to free speech when language falls in a gray area, particularly in the public arena). Three dissents were filed, including one by Judge Antonin Scalia, which sharply criticized Judge Bork's policy-informed approach.

Despite the many differing approaches displayed in the *Ollman en banc* opinions, Judge Starr's "totality of the circumstances" approach, with its four clear factors to be analyzed, was subsequently adopted or applied by many other courts. But even as *Ollman* went on to become a leading precedent for the post-*Gertz* opinion defense, a disquieting concern about it lingered, because of an unusual written opinion

by Justice William Rehnquist in 1985 when the Supreme Court denied certiorari (*Ollman v. Evans*, 471 U.S. 1127 [1985; Rehnquist, J., dissenting from denial of certiorari]). The *Ollman* case was untested under *New York Times Co. v. Sullivan*, Justice Rehnquist noted, suggesting that First Amendment protection depended solely upon the *Sullivan* doctrine. He characterized the appeals court's ruling based on the opinion defense as "nothing less than extraordinary." As law students are taught, dissents are worth reading. At times, the dissenter's views can become the majority rule.

***Hustler v. Falwell*: The Missing Opinion Defense**

In 1988, the Supreme Court issued a landmark ruling with respect to expressions of opinion, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). It is an odd-fitting, almost inexplicable decision, however.

Hustler v. Falwell came to the U.S. Supreme Court with its libel claims already resolved. A jury verdict rejected libel claims of the Reverend Jerry Falwell, because the parody ad that he complained of, published by *Hustler* magazine, clearly did not make any factual assertion about Falwell. It was a mean, nasty publication (it portrayed Falwell boasting of having raped his mother in an outhouse) that no one could reasonably interpret as an assertion of fact. But the jury did enter a judgment on Falwell's intentional infliction of emotional distress claim, based on the outrageous nature of the publication and the evidence that *Hustler's* publisher, Larry Flynt, intended to hurt Falwell and

damage his reputation and feelings. The question presented to the Supreme Court, thus, was whether this intentional infliction of emotional distress tort could be applied to publication that was clearly meant to express a political opinion, albeit a mean and hurtful one.

Before the U.S. Supreme Court, a group of editorial cartoonists and political parodists, in an amicus brief, strongly asserted that the tort of intentional infliction of emotional distress should not be allowed to chill and punish many legitimate political commentaries. They gave as illustrations many important historical political cartoons and other political commentaries, which often employed ridicule, caricature, and other techniques similar to those used by *Hustler* magazine. They requested, essentially, recognition of constitutional immunity for political opinion.

The Supreme Court could have found a First Amendment exemption from tort liability when the liability is deposited on such statements of opinion expressed in artistic and other forms. In *Falwell*, rather, the Court, in a unanimous decision written by Chief Justice William Rehnquist, held that expressive content must be judged by the standard of *New York Times v. Sullivan*. Thus, the *Hustler* parody ad in issue was evaluated by the Court under the *Sullivan* standard: had it been published with knowledge of falsity or reckless disregard of truth or falsity? The Court concluded there was no such knowledge of falsity or reckless disregard of truth, and hence the plaintiff could not succeed. It was a victory for opinion and the right to express political commentary, but an odd one analytically. The

Sullivan standard, meant solely to be applied where the truth or falsity of a statement was at issue, was applied to an admittedly nonfactual commentary that clearly could not be judged true or false.

The problems with this analysis may arise from Chief Justice Rehnquist's First Amendment position. Whereas *Sullivan's* author, Justice William J. Brennan Jr., worked hard to expand *Sullivan's* reach in various ways, Rehnquist regularly resisted any such extensions of the *Sullivan* rule. Some lower courts took the constitutional deference to free expression articulated by *Sullivan* as a reason to narrowly construe foreign jurisdiction over publishers and broadcasters. Rehnquist, by contrast, opposed any special deference on summary judgment or *de novo* appellate review in libel cases, or any special jurisdictional rules protecting speakers from libel lawsuits in foreign states. See *Lawrence v. Bauer Pub. & Printing Ltd.*, 459 U.S. 999 (1982; Rehnquist, J., dissenting from denial of certiorari); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.12 (1984); *Calder v. Jones*, 465 U.S. 783 (1984). Logically and analytically, one could easily make a case for the policy behind *Sullivan* requiring new limits on libel claims based on opinion, or tort claims based on expression. Rehnquist responded, however, that the "actual malice" defense of *Sullivan* was sufficient protection for the press, and all activities of the media should be subject to laws of general application. (This position also seemed to explain his dissent from the denial of certiorari in *Ollman*.) This feeling that *Sullivan* sufficiently protects the media, and that common law should otherwise apply, may underlie his reluctance in *Milkovich*

to recognize any new constitutional protection for opinion, and his use of the *Sullivan* standard as the sole protection of free speech.

The ultimate ruling in *Falwell* affirmed the right to critically comment through artistic and other means, and upheld that right not only against libel claims, but also against tort claims, in this case intentional infliction of emotional distress. Though odd in its analysis and particular holding, the *Falwell* decision nonetheless stands as another affirmation of the constitutional right to express opinions.

***Milkovich* and Its Foundations**

For more than a decade after *Gertz*, most federal and state courts treated the *Gertz* dicta, as *Ollman v. Evans* did, as a clear doctrine of constitutional law—namely, a definitive direction that opinion was automatically exempt from libel law. The only question—the one that bedeviled the many judges of *Ollman v. Evans*—was how to distinguish protected opinion from unprotected fact. The comfortable certainty of the absolute opinion defense came to an end, however, when the U.S. Supreme Court ruled directly on opinion as a defense in libel law, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

The plaintiff, Michael Milkovich, had been a high school wrestling coach whose team had been declared ineligible for a state tournament because of a fight at a wrestling match. A sports columnist, Theodore Diadiun, covered the hearing at which Milkovich and his school superintendent testified. The writer did not believe the two officials' testimony and said so, writing in

his column that anyone who attended the meet at which the fight occurred “knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.” Scott (the school superintendent) and Milkovich, the wrestling coach, sued for libel. The Ohio Supreme Court, applying what it understood as *Gertz* absolute protection for opinion and assessing the column under a totality of the circumstances approach, concluded the statements in issue were assertions of opinion, not fact, and not actionable.

When the case reached the U.S. Supreme Court, the Court (again in a decision by Chief Justice Rehnquist) examined the *Gertz* dicta, and labeled it as just that—statements not binding on itself or other courts. The Court rejected a pure textual analysis of whether a statement appeared to be opinion or fact, noting that such a simplistic distinction could lead to abuses. If someone labels a statement as one opinion but it nonetheless asserts facts or implies defamatory facts, it should not be protected as opinion. Essentially, the Supreme Court returned to the distinction made by the *Restatement (Second) of Torts* that one must look at not only the statement itself but also whether it implies or could be seen to imply defamatory facts:

If a speaker says, “In my opinion John Jones is a liar,” he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the 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. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, “In my opinion Jones is a liar,” can cause as much damage to a reputation as the statement, “Jones is a liar.” ... It is worthy of note that, at common law, even the privilege of fair comment did not extend to “a false statement of fact, whether it was expressly stated or implied from an expression of opinion” *Restatement (Second) of Torts*, supra § 566 comment a (1977).

Thus, there being no automatic exemption for opinion, the dispositive question in the *Milkovich* case became whether or not a reasonable fact finder could conclude that the statements in the newspaper column “imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding.” The Court determined that a reasonable fact finder could so conclude. Indeed, the Court distinguished the columnist’s statement from the kind of language used in *Greenbelt*: “This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that the petitioner committed the crime of perjury.”

In his dissent in *Milkovich*, Justice William J. Brennan Jr. described the Court’s theoretical analysis as “almost entirely correct.” He acknowledged the appropriateness of an analysis looking to whether implied factual assertions are made within the scope of a reported opinion. He parted company with the majority, however, as to the application of that rule. In the context of the *Milkovich* newspaper column, Justice Brennan stated, “no reasonable reader could understand

Diadiun to be impliedly asserting—as fact—that Milkovich had perjured himself.”

Stressing that contextual analysis used in *Greenbelt*, *Letter Carriers*, and *Falwell*, Justice Brennan stated that the context of the newspaper sports column in issue, and the columnist’s own language of surmise, sufficiently conveyed to readers that the columnist was asserting only opinions and not facts. Such a complete contextual analysis was essential, Justice Brennan emphasized: “Distinguishing which statements do imply an assertion of a false and defamatory fact requires the same solicitous and thorough evaluation that this Court has engaged in when determining whether particular exaggerated or satirical statements could reasonably be understood to have asserted such facts.” He quoted as well Justice Oliver Wendell Holmes’s famous statement in *Towne v. Eisner*, 245 U.S. 418, 425 (1918), about the importance of context in language interpretation: “A word is not a crystal, transparent and unchanged, it is a skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.”

The end result of *Milkovich* was an odd one. *Milkovich* had directly referred to the *Greenbelt* “rhetorical hyperbole” doctrine, thus formally placing *Greenbelt*’s conclusion that “rhetorical hyperbole” was not actionable within the clarified opinion defense. Yet *Milkovich* had held that a newspaper columnist’s admittedly opinion-based column about public officials was not protected by the opinion defense. It thus left the opinion defense in a somewhat-counterintuitive position: the more outrageous your opinions, in

style and content, the more likely they are to be protected. After *Milkovich*, commentary that uses concrete words and facts and understated expression—the kind that really makes you think—could for the most part subject the speaker to full libel liability. But overstated and grossly exaggerated rhetoric—even when it used highly charged words like *blackmail* and *treason*—would be fully protected.

One can question the advisability of this distinction as a matter of policy. Participants in today’s information-based society need the ability to communicate freely and effectively to influence a resolution of important issues, and decision makers need low-key, thoughtful, and fact-based opinions and analyses to rely upon. Commentators in the media need to be able to express opinions in such understated language in order to give readers what Walter Lippmann described as “a picture of reality on which men can act.” On the other side, we hardly need to encourage sensationalized, hyped, and exaggerated commentary. Such commentary is commonplace and the source of major criticisms of “the media” today, and the extreme political division that it supports is viewed as one of the biggest problems in the political arena. Yet *Milkovich* immunizes rhetorical hyperbole, while leaving less extreme statements of opinion to potential trials.

The Opinion Defense after *Milkovich*

The opinion defense did not die after *Milkovich*, which, technically analyzed, merely tweaked it by requiring careful analysis of whether any purported opinion implied defamatory facts.

But if the Supreme Court in *Milkovich* also sought to slow down, or discourage, recognition of an opinion defense, it has failed in that respect. The response from most courts after *Milkovich* has not been a retreat from recognition of the opinion defense, but rather an intellectual effort to keep that defense alive.

After *Milkovich*, several state courts explicitly recognized state constitutional privileges for opinion. For example, the Oklahoma Supreme Court recognized in *Magnusson v. New York Times Co.*, 98 P.3d 1070 (Ok. 2004), that the common law fair comment privilege, and the pre-*Milkovich* cases on opinion, together afford “individuals the opportunity for honest expressions of opinion on matters of legitimate public interest based on true or privileged statements of facts, to defend against a defamation cause filed by a private person.” Other states that have adopted opinion privileges as a matter of state constitutional law include New York, Ohio, and Utah. See *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270 (1991); *Vail v. The Plain Dealer Publishing Co.*, 649 N.E.2d 182 (Ohio 1995); *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994). See also *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 612 N.E.2d 1158 (1993), which suggested state constitutional privilege would be recognized in appropriate cases.

A number of federal courts, though bound by *Milkovich*, have continued to apply *Ollman*-like totality-of-the-circumstances approaches in analyzing whether the statements in issue express opinions or facts. This was, of course, the means by which Justice Brennan in his *Milkovich* dissent reached the conclusion that

the sports column there did not really imply any defamatory facts.

Yet another possible approach for those who seek a broader opinion privilege would be to encourage courts to recraft the fair comment and privilege defense for modern times. Only a few tweaks to that privilege could adapt it into a broader opinion privilege. Its “matter of public interest” element, for example, could be adapted to the twenty-first century with the recognition that today’s public sphere is occupied not only by government officials and politicians but also by businesses, nonprofit and nongovernmental entities, and even entertainment and sports celebrities. The limitation of the privilege to comment can be addressed through the popular totality of the circumstances test. And the concern with the speaker’s motive embodied in the third element of the common law doctrine could be handled through application of the *Milkovich* “implied facts” analysis, which prevents a speaker from using a comment as a disguise for a malicious attack. Such updates to the fair comment common law defense could revive that defense and make it more meaningful today.

The Progress of the Opinion Defense

Beyond the analytical ups and downs charted above, one can detect significant progress in judicial treatment of opinion. The fair comment defense in English and early American law was limited—to matters of legitimate public interest (whatever that was), and to some kind of subjective good-faith fairness in the origin of the

opinion. Perhaps in an era when written and memorable expressions were largely the products of elites who played by the same rules and had relatively equal access to the judicial system, these rules worked. But in modern times, as speech was democratized and extended to all areas of life, as we came to recognize the value of robust debate on all issues, and as broader recognition of First Amendment rights spawned a social ethos of free expression, those common law limitations became too restrictive. Reformers like Thomas Cooley fought for broader rules of the right to express comment, and landmarks like *Diener* and the *Cherry Sisters* case recognized broad rights of commentary, even within the general outlines of the fair comment defense.

By the post-*Sullivan* era, the time was ripe for shedding the fair comment limitations. If indeed public debate was designed to be “uninhibited, robust, and wide-open,” as *Sullivan* held, and if even factual misstatements and some harm to reputation were inevitable and acceptable consequences of the right of free expression, then some broader protection for comment and opinion seemed appropriate. When the Supreme Court gave an opening in *Gertz*, lower courts readily overlooked its status as dicta and applied it as if it were the most carefully thought-out rendition of new law. The opinion defense, unburdened by the limitations of the common law fair comment doctrine, offered a wonderful new technique for sending disputes out of the courtroom and back into the arena of public debate.

Considering this enthusiasm (and perhaps over-enthusiasm) for a new absolute defense,

perhaps Chief Justice Rehnquist and the *Milkovich* Court were correct to remind lower courts that absolute doctrines often lead courts astray, and that well-established cautions about defamatory factual assertions hidden in the form of opinion must not be forgotten. *Milkovich* was not a reversal of the recognition of opinion, but a caution and a reminder that in law, simplistic litmus tests often lead us astray. Even as states like New York constitutionalize an opinion protection, and even as other states rediscover fair comment and reapply that doctrine to modern circumstances, the *Milkovich* reminder that opinions cannot be used to hide assertions of defamatory facts is a necessary element of opinion law.

Fact and opinion are indeed mutually exclusive, as libel law, in its choppy course, has recognized. But the law has also recognized that separating out facts from opinion cannot be done simplistically, and requires at times a complex analysis, including a gimlet eye for factual assertions hidden or implicit in statements framed as opinions. Statements of opinion are now more protected in American law than they ever have been before. There is indeed no such thing as a false idea. But there also is not—and never was—any such thing as a simple, magical divide between assertions of opinion and of fact.

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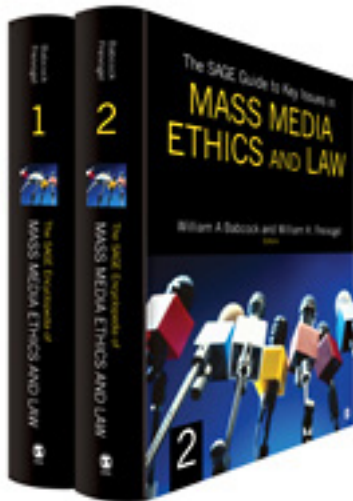
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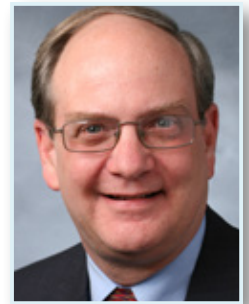
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