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Milkovich v. Lorain Journal Co.: The Balance Tips

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CASE COMMENTS

MILKOVICH V LORAIN JOURNAL CO.: THE BALANCE TIPS

IS A NEWSPAPER exempt from liability for defamation if it publishes statements of “opinion” as opposed to “fact?” The Supreme Court considered this question in *Milkovich v Lorain Journal Co.*¹ and answered it in the negative. A 7-2 majority of the Court, in an opinion by Chief Justice Rehnquist, held that no “constitutional privilege for ‘opinion’ is required to ensure the freedom of expression guaranteed by the First Amendment.”² After refusing to exempt the newspaper from liability for defamation based on the statements at issue and finding that the statements do “imply an assertion that Milkovich perjured himself in a judicial proceeding,”³ the case was remanded for further consideration.⁴

Even the Supreme Court described the *Milkovich* case as an “odyssey of litigation.”⁵ The case had its origin in February 1974, when the Mentor, Ohio, High School wrestling team visited Maple Heights, Ohio, for a match with the Maple Heights High School wrestling team. During the match, an altercation took place following a referee’s controversial call. A number of specta-

1. 110 S. Ct. 2695 (1990).

2. *Id.* at 2707.

3. *Id.*

4. *Milkovich* and the newspaper have settled the case for an undisclosed amount “of more than \$100,000.” Mahoney, *News-Herald, Coach Settle 16-year-old Libel Suit*, Plain Dealer (Cleveland), March 30, 1991, § 2 (Metro), at 2, col. 1.

5. *Id.* at 2698.

tors and wrestlers were involved in the altercation and several people were injured. The Ohio High School Athletic Association ("OHSAA") held a series of hearings to investigate the event and issued "sanctions against the Maple Heights team, including a disqualification from the state tournament, a one-year probationary status, and a censuring of" Michael Milkovich, the Maple Heights High School varsity wrestling coach.⁶

A group consisting of Maple Heights wrestling team members and their parents challenged the suspension in the Franklin County, Ohio, Court of Common Pleas.⁷ They alleged that the OHSAA hearings failed to provide adequate procedural safeguards before depriving team members of their property right to compete in state competition. The court ruled for the wrestlers and parents and reinstated the Maple Heights team in the state competition.⁸

The day following the court ruling, the *News-Herald*⁹ sports section published a column, written by J. Theodore Diadiun, entitled "Maple beat the law with the 'big lie.'"¹⁰ Diadiun's column included a number of passages which formed the basis for the action by Milkovich. In sum, Milkovich claimed that in these passages Diadiun accused him of committing perjury at the OHSAA hearing.

Milkovich initiated a defamation action against the Lorain Journal Company and Diadiun in the Lake County, Ohio, Court of Common Pleas. The court granted the defendants' motion for a directed verdict at the close of Milkovich's case, finding that Milkovich had failed to show by clear and convincing evidence that the defendants had published the column with "knowledge of its falsity or with reckless disregard as to its truth."¹¹ The Court of Appeals reversed, finding that "any news article that is published knowing that it conflicts with a judicial determination

6. *Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 292, 473 N.E.2d 1191, 1192 (1984).

7. *Id.* (citing *Barrett v. Ohio High School Athletic Ass'n*, No. 74 Civ. 09-3390 (Jan. 7, 1975)).

8. *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143, 145, 416 N.E.2d 662, 664 (1979).

9. The *News-Herald* is a daily newspaper owned by the Lorain Journal Company. It circulates in Lake County, Ohio, the home of Mentor High School. *Milkovich*, 110 S. Ct. at 2698.

10. *Id.*

11. *Milkovich*, 65 Ohio App. 2d at 144, 416 N.E.2d at 664. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (establishing actual malice standard).

of the truth, may be regarded as a reckless disregard of the truth so as to constitute 'actual malice,'¹² and remanded the case for a factual determination of the 'actual malice' question. The appeal by the defendants to the Ohio Supreme Court was dismissed for failing to present a "substantial constitutional question."¹³ The Supreme Court of the United States denied certiorari.¹⁴

On remand, the trial court granted summary judgment in favor of the defendants, this time on the grounds that Diadiun's statements were opinions, and therefore were constitutionally protected, and alternately that Milkovich, as a public figure, had failed to meet the "actual malice" test required for recovery.¹⁵ This time, the Court of Appeals affirmed both grounds for the decision.¹⁶ The Ohio Supreme Court reversed, however, finding that the statements in question were "factual assertions,"¹⁷ not constitutionally protected opinions, and that Milkovich was neither a public official nor a public figure for the purpose of First Amendment analysis.¹⁸ The Supreme Court of the United States again denied certiorari.¹⁹

The Lake County Court of Common Pleas delayed its consideration of the case while *Scott v News-Herald*,²⁰ a libel action growing out of the same Diadiun article, was argued before the Ohio Supreme Court. When that court reversed itself, now finding the Diadiun article to consist of statements of opinion and not of fact,²¹ the trial court granted summary judgment for the defendants in the *Milkovich* case on the same grounds.²² The Court of Appeals affirmed the decision of the trial court,²³ and the Supreme Court of Ohio dismissed Milkovich's ensuing appeal.²⁴ The plaintiff's petition for certiorari to Supreme Court of the United

12. *Milkovich*, 65 Ohio App. 2d at 148, 416 N.E.2d at 666.

13. *Milkovich*, 110 S. Ct at 2700.

14. *Lorain Journal Co. v. Milkovich*, 449 U.S. 966 (1980). Justice Brennan wrote a lengthy dissent.

15. *Milkovich*, 110 S. Ct. at 2700.

16. *Id.*

17. *Milkovich*, 15 Ohio St. 3d at 298, 473 N.E.2d at 1196-97.

18. *Id.* at 297, 473 N.E.2d at 1196.

19. *Milkovich*, 474 U.S. 953 (1985).

20. 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

21. *Id.* at 249-54, 496 N.E.2d at 705-09.

22. *Milkovich*, 110 S. Ct. at 2701.

23. *Milkovich v. News-Herald*, 46 Ohio App. 3d 20, 545 N.E.2d 1320 (1989).

24. *Milkovich*, 110 S. Ct. at 2701.

States, raising the question "how should defamatory statements be analyzed to determine whether they are assertions of fact or expressions of opinion,"²⁵ was granted.²⁶

The Supreme Court held for Milkovich, but it did so on a more sweeping basis than he had proposed. The Court held that statements of opinion receive no special exemption from liability for defamation. This comment will examine the reasoning that led the Court to this conclusion, concluding that the Court's reasoning is inadequate and that the holding represents a narrowing of the first amendment guarantee of freedom of expression.

I. BACKGROUND

At common law, an action for defamation protected a person's interest in reputation. Such an action had two aspects: protection of the pecuniary, property-like interest in the value of one's reputation to further one's business and employment and protection of one's intangible interest "involving personality and human dignity"²⁷ An action for defamation would allege that either or both of those interests had been injured by the publication of false statements that were "sufficiently derogatory as to cause harm to [one's] reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."²⁸ A defamatory statement of opinion was actionable at common law²⁹

In *New York Times Co. v. Sullivan*,³⁰ the Supreme Court found that the Constitution limits the reach of defamation law. The Court held that a public official may not recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."³¹ Any lower standard, according to the Court, would jeopardize the "profound national commitment to the principle that debate on public issues should be unin-

25. Petition for Writ of Certiorari at 21, *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990) (No. 89-645).

26. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 863 (1990).

27. L. ELDRIDGE, *THE LAW OF DEFAMATION* 2 (1978).

28. *RESTATEMENT (SECOND) OF TORTS* § 566 comment a (1977).

29. *Id.*

30. 376 U.S. 254 (1964).

31. *Id.* at 279-80.

hibited, robust, and wide-open.”³²

The *New York Times* standard was subsequently applied to “public figures” as well as “public officials” in *Curtis Publishing Co. v. Butts*.³³ Chief Justice Warren and those joining his concurrence³⁴ found that two social changes since the 1930s and World War II justified this extension: the growth of large concentrations of nongovernment power in industry and the “ready access [public figures, like public officials, have to] mass media of communication, both to influence policy and to counter criticism of their views and activities.”³⁵

The Supreme Court continued its consideration of types of defamation plaintiffs, moving from the public official and public figure to the private individual in *Gertz v. Robert Welch, Inc.*³⁶ *Gertz* provided some constitutional protection for defendants in defamation suits brought by private individuals but did not require the *New York Times* level of protection. Instead, the Court left the determination of the appropriate standard of liability to the states, “so long as they do not impose liability without fault.”³⁷ The Court reasoned that private individuals do not have the same ease of access to the mass media through which they might rebut defamatory remarks as do public officials and public figures. Moreover, private individuals have not “thrust themselves to the forefront of particular public controversies”³⁸ as have public officials and public figures, who, therefore, volunteer for media scrutiny. The Court concluded that the requirement of fault adequately balances the interest in a bold press and the interest in redressing reputational injury.

The Supreme Court has also held that the Constitution “requir[es] that the plaintiff bear the burden of showing falsity, as

32. *Id.* at 270.

33. 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

34. The Court’s decision in *Butts* was written by Justice Harlan but joined by only three other justices. Chief Justice Warren wrote a concurring opinion joined by four other justices in extending the *New York Times* standard to “public figures.” *Id.* (Warren, C.J., concurring).

35. *Id.* at 163-64 (Warren, C.J., concurring).

36. 418 U.S. 323 (1974). The Supreme Court had considered private individual defamation plaintiffs previously but failed to announce an opinion that a majority of justices were willing to sign. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), *overruled in Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *see also Gertz*, 418 U.S. at 333 (reviewing the several *Rosenbloom* opinions and their antecedents).

37. *Gertz*, 418 U.S. at 347.

38. *Id.* at 345.

well as fault, before recovering damages" for defamation from a media defendant.³⁹ The Court recognized that placing such a burden on the plaintiff, rather than requiring the defendant to show truth as at common law,⁴⁰ would protect some speech which is false. This result was necessary, however, in order to encourage robust public debate.

In another line of cases, the Court has found "constitutional limits on the *type* of speech which may be the subject of state defamation actions."⁴¹ The Court has protected the use of "rhetorical hyperbole,"⁴² "loose, figurative" language,⁴³ and sarcasm.⁴⁴ These types of speech share an intent to communicate a meaning other than the literal denotation of the terms used. Whether it is the word choice itself, the surrounding context, or the inherent outrageousness of the words used, the reader is on notice to look beyond the immediate denotation of the words to reach the author's intended meaning. The Constitution requires that a publisher of such passages not be held liable for an unintended message.

Finally, the Supreme Court has recognized additional constitutional protection of a procedural nature for those defending defamation actions. An appellate court must make an independent review of the entire record when the plaintiff is a public official or public figure. This is to assure that the factual finding of "actual malice" is justified.⁴⁵

39. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

40. See F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 5.20, at 169 (2d ed. 1986) (truth was an affirmative defense at common law).

41. *Milkovich*, 110 S. Ct. at 2704. (emphasis in original).

42. See *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970). In *Greenbelt*, the Supreme Court held that the use of the word "blackmail" would be understood by "even the most careless reader" to refer to acts other than those literally denoted by the term. *Id.* at 14.

43. See *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974). In *Letter Carriers*, the Court found the use of the term "traitor," when describing a person in the context of a union labor dispute, not to be defamatory. *Id.* at 284. In that context, the term was merely "an expression of contempt." *Id.* at 286.

44. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). The Court found an "outrageous" parody was not defamatory because it "was not reasonably believable." *Id.* at 57 (quoting *Falwell v. Flynt*, 797 F.2d 1270, 1278 (4th Cir. 1986)).

45. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 514 (1984) (holding that the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure is not the standard of review in cases governed by *New York Times*).

II. *Milkovich v Lorain Journal Co.*

A. The Majority Opinion

The majority opinion begins with a brief sketch of the history of the case and a complete reprint of the *Diadium* column, the source of the allegedly defamatory statements.⁴⁶ The majority opinion proceeds to give an overview of the history of the common law of defamation,⁴⁷ followed by a sketch of the significant cases establishing the constitutional limitations on state defamation laws.⁴⁸

Chief Justice Rehnquist then begins his analysis by framing the issue as whether the Court will add a "protection for defamatory statements which are categorized as 'opinion' as opposed to 'fact'" to the constitutional protections already extended to defendants in defamation suits.⁴⁹ The newspaper argued that the Court should recognize such a protection and supported this proposition with a well-known passage from *Gertz*:

"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

46. The majority also quoted nine passages cited by Milkovich as accusing him of the crime of perjury and "damag[ing him] directly in his life-time occupation of coach and teacher, and constitut[ing] libel per se." *Milkovich*, 110 S. Ct. at 2699-700.

[A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out.

"If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

"The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott.

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not."

Id. at 2698.

47. See *supra* text accompanying notes 27-29.

48. See *supra* text accompanying notes 30-45.

49. *Milkovich*, 110 S. Ct. at 2705.

the competition of other ideas. But there is no constitutional value in false statements of fact."⁵⁰

Surprisingly, the Court held that this passage did not create a wholesale exemption for statements of opinion, instead viewing it as merely a restatement of the familiar "'marketplace of ideas' concept."⁵¹ The majority cites with approval the reasoning from a Second Circuit opinion which argues that only false statements which can be corrected by entering the "marketplace" are worthy of constitutional protection from defamation laws.⁵²

The Court then examines the statement, "'In my opinion John Jones is a liar.'"⁵³ Such a statement of opinion implies the existence of underlying facts which justify the opinion. If these underlying facts were explicitly stated, and were incorrect or incomplete, they could cause damage to Jones's reputation. If they did so, they would certainly be actionable under state defamation law. If the Court were to recognize an exemption for statements of opinion, a writer could escape liability for defamation by explicitly labeling a statement one of opinion as opposed to one of fact. The Court is simply unwilling to recognize such a broad exemption, especially since so many constitutional protections for potentially defamatory statements have already been recognized.⁵⁴ The majority opinion goes on to emphasize this point by referring once again to the line of cases described above.⁵⁵

After denying the statements written by Diadiun an exemption from liability as "opinions," the majority then examined the statements to determine if they "imply an assertion that Milkovich perjured himself in a judicial proceeding,"⁵⁶ as this became the dispositive question in the action. The Court held that a

50. *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)). While this language was only dicta in the *Gertz* case, a number of federal courts had relied on it to exempt statements of opinion from liability for defamation. *See, e.g.*, *Mr. Chow v. Ste. Jour Azur S.A.*, 759 F.2d 219, 223 (2d Cir. 1985); *Ollman v. Evans*, 750 F.2d 970, 974 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

51. *Milkovich*, 110 S. Ct. at 2705 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

52. *Id.* at 2705 (citing *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 62 n.10 (2d Cir. 1980)). The *Cianci* court quotes the *Gertz* example of an idea which can never be proven false — Thomas Jefferson's argument from his Inaugural Address for "freedom for those 'who would wish to dissolve this Union or change its republican form.'" *Cianci*, 639 F.2d at 62 (quoting *Gertz*, 418 U.S. at 340 n.8).

53. *Milkovich*, 110 S. Ct. at 2705.

54. *Id.* at 2706.

55. *See Id.* at 2706-07. *See generally supra* text accompanying notes 30-45.

56. *Milkovich*, 110 S. Ct. at 2707.

fact-finder might find that Diadium implied this assertion and so remanded the case to the Ohio courts for further consideration on this matter.⁵⁷

B. The Dissenting Opinion

Justice Brennan's dissent, joined by Justice Marshall, begins by agreeing with the majority's statement of legal principles. The dissent joins the majority in finding no "opinion privilege *wholly in addition* to the protections" already enumerated by the Court.⁵⁸ However, Justice Brennan makes explicit what had only been implied in the majority opinion: a statement of "pure opinion," that is, one which does not explicitly state or imply assertions of fact, cannot be proven false.⁵⁹ Therefore, under the *Hepps* standard,⁶⁰ a plaintiff would necessarily fail to carry the burden of demonstrating falsity. Media defendants, at least, cannot be held liable for statements of "pure" opinion.⁶¹

The dissent then considers how implications of fact can be distilled from statements of opinion. Justice Brennan distinguishes statements of opinion which might reasonably be found to imply defamatory assertions of fact from those that do not. As an example of those that might imply defamatory assertions, he cites the majority's statement, "In my opinion John Jones is a liar' — standing alone."⁶² A reasonable reader could justifiably infer that the speaker must have some basis in fact for such an assertion. But a statement of opinion which is explicitly conjectural and sets out the totality of facts on which it is based, none of which is false or defamatory in itself, cannot be defamatory so long as the speaker sincerely holds the belief published.⁶³

57. *Id.*

58. *Id.* at 2708 (Brennan, J., dissenting).

59. *Id.* (Brennan, J., dissenting).

60. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (plaintiff must prove falsity); *supra* text accompanying notes 39-40.

61. Justice Brennan refers to the Court's refusal, in *Hepps*, to decide whether the rule of that case would apply to a nonmedia defendant. *Milkovich*, 110 S. Ct. at 2708 n.2 (Brennan, J., dissenting).

62. *Id.* at 2709-10 (Brennan, J., dissenting).

63. The example from the *Restatement (Second) of Torts* is most clear:

"A writes to B about his neighbor C: 'He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.'"

Milkovich, 110 S. Ct. at 2710 n.3 (Brennan, J., dissenting) (quoting RESTATEMENT (SEC-

Justice Brennan then moves to an analysis of Diadiun's statements about Milkovich under these principles and concludes that "[n]o reasonable reader could understand Diadiun to be impliedly asserting — as fact — that Milkovich had perjured himself."⁶⁴ Diadiun used qualifiers such as "seemed," "probably," and "apparently" to alert the reader to the conjectural nature of his statements. Justice Brennan also points to the tone of the article as a whole — clearly that of a partisan — and its format as a signed editorial to further signal the reader that its statements are not factual assertions but conjecture. Justice Brennan concludes that "[r]eaders of Diadiun's column are signaled repeatedly that the author does not actually know what Milkovich said at the court hearing and that the author is surmising, from factual premises made explicit in the column, that Milkovich must have lied in court."⁶⁵

Finally, the dissent refers to the policy justifications for permitting such conjecture to escape liability for defamation. The quality of public discourse and the effectiveness of the democratic process are furthered by such conjecture.⁶⁶

III. ANALYSIS

The majority opinion in *Milkovich v Lorain Journal Co.*, stripped of its summaries of facts, history, and doctrine, contains a mere four paragraphs of analysis.⁶⁷ Here, the *Gertz* dicta regarding the opinion exemption is quoted, criticized, and rejected. These paragraphs are the heart of the majority opinion, but they are disingenuous, simplistic, and represent a major setback for first amendment freedom of expression.

The majority states the rule that there is no constitutionally compelled exemption from liability for defamation for statements of opinion.⁶⁸ But the Court fails to account for its own role in creating and perpetuating the widespread understanding that such an exemption exists.

OND) OF TORTS § 566 comment c (1977)).

64. *Milkovich*, 110 S. Ct. at 2711 (Brennan, J., dissenting).

65. *Id.* at 2713 (Brennan, J., dissenting).

66. *Id.* at 2714. (Brennan, J., dissenting).

67. These are the four paragraphs beginning with the sentence: "Respondents would have us recognize, in addition to the established safeguards discussed above, still another First Amendment-based protection for defamatory statements which are categorized as 'opinion' as opposed to 'fact.'" *Milkovich*, 110 S. Ct. at 2705-06.

68. *Id.* at 2705.

The majority finds that the *Gertz* dicta⁶⁹ “was [not] intended to create a wholesale defamation exemption for anything that might be labeled an ‘opinion.’”⁷⁰ On its face, however, the *Gertz* language seems clear. Opinions, even those that cause great injury, do not provide grounds for legal redress through defamation actions. Those who are defamed by expressions of opinion must repair their reputations and seek relief through the public exchange of competing opinions.

The clear language of *Gertz* itself is not the only reason to believe the Court intended to create an opinion exemption. The Court’s first amendment jurisprudence, beginning with *New York Times Co. v. Sullivan*⁷¹ in 1964, had expanded the protection given to defamation defendants.⁷² In the *New York Times-Butts-Gertz* line of cases, protection was given to defendants whose statements were, or might have been, both false and defamatory. In the *Greenbelt-Hustler Magazine-Letter Carriers* line, the context of statements was taken into account to provide reason to deny those statements their false and defamatory superficial meaning. The *Gertz* “opinion exemption” fits comfortably into either line. On the one hand, it might have been read as a further protection for media defendants. On the other hand, it might have been viewed as another protection based on the reasonable reader’s understanding of the author’s non-defamatory message. The *Gertz* dicta, therefore, is entirely consistent with the general trend of expanding the protection afforded defendants in defamation actions. The “opinion exemption” stated there may very well have been intended to mean exactly what it says.

Furthermore, the Supreme Court itself has made reference to the *Gertz* dicta without suggesting that it meant anything less than it appears to mean. On the same day *Gertz* was handed down, the Court quoted its language in the *Letter Carriers* case, disposing of a defamation claim that the epithet “scab,” in the context of a union dispute, could be understood to imply that its subject had “rotten principles.”⁷³ The Court found that the word was “used in a loose, figurative sense. Expression of

69. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); see also *supra* text accompanying note 51 (quoting *Gertz*).

70. *Milkovich*, 110 S. Ct. at 2705.

71. 376 U.S. 254 (1964).

72. See *supra* notes 30-45 and accompanying text.

73. *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974).

such an opinion, even in the most pejorative terms, is protected under federal labor law,"⁷⁴ and then cited the *Gertz* dicta.⁷⁵ More recently, in *Hustler Magazine v Falwell*, another opinion written by Chief Justice Rehnquist, the Court commented that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions. The First Amendment recognizes no such thing as a 'false' idea."⁷⁶

After holding that the *Gertz* language was not meant to, and did not, create an "opinion exemption," the Court went on to offer two justifications for not creating the exemption at this time. The first is that only some, but not all, opinions would be welcome in "the marketplace of ideas." According to the Court, "the marketplace provides a place only for 'the sort of thing that could be corrected by discussion.'"⁷⁷ The Court, unfortunately, does not explicate the basis for its theory of correction by the marketplace. The Court may be suggesting that opinions, as statements of value or personal belief, are neither true nor false. Since a statement of opinion makes no claim that it is true for all, "the test of truth" provided by the market is superfluous; opinions are not susceptible of correction. Having explained that the *Gertz* dicta merely restates Holmes's classic marketplace metaphor, the Court leaves questions regarding the relative place of fact and opinion in the market unanswered.

The majority's analysis of the marketplace then continues on to a discussion of opinions that "impl[y] a knowledge of facts."⁷⁸ The majority implicitly suggests that opinions that do not imply the knowledge of any facts may be exempt from defamation liability since they cannot be proven false.⁷⁹ The objectionable feature of those unprotected statements of opinion is, simply, that an opinion may imply a defamatory and false assertion of fact. "Simply couching such statements in terms of opinion does not dispel these implications. 'In my opinion Jones is a liar,' can cause as

74. *Id.* at 284.

75. *Id.*

76. *Hustler Magazine v. Falwell*, 485 U.S. 46, 50-51 (1988) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)).

77. *Milkovich*, 110 S. Ct. at 2705 (quoting *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 62 n.10 (2d Cir. 1980)).

78. *Id.* at 2705-06.

79. Justice Brennan makes this implication explicit when he states that the Court "determines [today] that a protection for statements of pure opinion is dictated by existing First Amendment doctrine." *Id.* at 2708 (Brennan, J., dissenting).

much damage to reputation as the statement, 'Jones is a liar.'"⁸⁰

This is a questionable proposition, particularly as the basis for denying constitutional protection to such a common and valuable form of speech as "opinion." The reasonable reader will treat statements of opinion more critically than statements of fact, having been alerted to their personal or value basis. In addition to examining with a skeptical eye the leap from fact to judgment, such a reader will wonder if the opinion's publisher has seen the "facts" through a lens distorted by the opinion. The Court has already held that publishers are to be granted the freedom to express their metaphoric, sarcastic, and hyperbolic opinions, so long as the reasonable reader would conclude that the author did not intend to be taken literally. Having already granted the reader the ability to glean the author's intent in other rhetorical settings, the Court should have considered doing so in the setting of "opinions."⁸¹

Justice Brennan's dissent is only a partial solution to the opinion problem. He succeeds in rescuing the "pure" opinion from liability on the basis of established first amendment doctrine. But his dissent inadvertently demonstrates the need for an opinion exemption even while he agrees with the majority opinion in rejecting it. He carefully analyzes the statements alleged to be defamatory and finds that Diadiun's use of qualifying language and the context of the article as a whole signal the reasonable reader that no facts are asserted, only conjecture.⁸² The seven member majority arrives quickly at the opposite conclusion.⁸³ Justice Brennan's approach, less obviously but just as surely as the majority's, will permit the lower courts to seek out the facts, whether explicit, implied, or connoted, of an opinion. The specter of liability arises when any of these facts prove false and defamatory. Without the protection of a wholesale exemption for opinions, only foolhardy editorialists will give full vent to their ideas. The result can only be a less robust public debate.

The impact of *Milkovich* is already being felt. For example,

80. *Id.* at 2706.

81. It is ironic that the reader is considered able to distinguish metaphor and hyperbole from assertions of fact and to understand their "truthfulness" but is not granted the same abilities when confronted by an opinion explicitly labeled as such. Parodists are protected by the *Hustler Magazine* decision, but editorialists who carefully describe the basis for their opinions, such as Diadiun, are denied that protection by *Milkovich*.

82. *Milkovich*, 110 S. Ct. at 2710-13 (Brennan, J., dissenting).

83. *Id.* at 2707

the New York Times is currently being sued by Dan Moldea, the author of *Interference: How Organized Crime Influences Professional Football*. Moldea alleges that the Times libelled him in "falsely portray[ing] him as a sloppy and incompetent journalist"⁸⁴ in its review of his book. Taken as a whole, the review is clearly opinion. But *Milkovich* has encouraged Moldea to go forward in his suit in the hope of finding false and defamatory facts explicitly or impliedly included in the review. The Moldea action is only one of "a spate of state and federal lawsuits [which] have cropped up to take advantage of [the *Milkovich* decision.]"⁸⁵

The *Milkovich* Court faced a delicate question, one involving the competing and worthy claims of protection of reputation and protection of speech. The Court chose to provide protection to reputation at the expense of opinions which imply false defamatory facts. Its basis for doing so is not clear from the opinion itself. The varying interpretations of fact and opinion which will emerge in the lower courts as a reaction to *Milkovich* make this an unsettling time for those who publish opinion, and for those who read it as well.

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84. Streitfeld, *Author Sues Over Negative Review; Criticism Was Libelous*, D.C. *Writer Charges*, Wash. Post, August 24, 1990, § C (Style), at 1, col. 1.

85. Resnick, *Florida Case Tests Libel Ruling*, Nat'l L.J., September 24, 1990, at 27, col. 1.