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Recent Developments: Illinois v. Perkins: Undercover Agents Need Not Give Miranda Warnings to Incarcerated Suspects before Asking Questions Which May Elicit Incriminating Responses

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opinion, the Court explained, did not exist. *Id.*

The Court explained, however, that the affirmative defense known as "fair comment" was incorporated into common law, applying only to expressions of opinion. This principle, "afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *Id.* at 2703 (quoting 1 F. Harper & F. James, Law of Torts § 5.28 (1956)). The Court found that the purpose of "fair comment" was to balance free and uninhibited discussion of public issues with the need to redress injury to reputation caused by invidious irresponsible speech. *Id.*

To further protect freedom of speech, freedom of the press and uninhibited debate, the Court explained, it began to require public officials to prove defamatory statements were made with 'actual malice.' *Id.* (citing *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964)). The *New York Times* 'actual malice' test was later extended to public figures, defined as those persons "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* (quoting *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967)). The required standard of proof for both public officials and public figures, the Court noted, was clear and convincing evidence. *Id.* at 2703-04 (citing *Gertz,* 418 U.S. at 342).

The distinction between public and private individuals, the Court reasoned, was predicated not only on the fact that public persons voluntarily exposed themselves to the increased risk of defamation, but also had greater opportunity to counteract any false statements through effective communication channels. *Id.* at 2704 (citing *Gertz,* 418 U.S. at 344-45). However, the Court did not extend the 'actual malice' standard to private persons concerning matters of public interest. *Id.* (citing *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971)).

The Court discussed further limitations placed on the damages recoverable in libel actions. First, liability could not be imposed without some showing of fault. *Id.* Second, punitive damages were not recoverable without a showing of 'actual malice.' *Id.* Finally, the Court had held that it could no longer be presumed that defamatory speech was false, as under common law. Moreover, the burden of showing falsity and fault was on the allegedly defamed plaintiff and not on the media defendant who previously was required to prove truth. *Id.* (citing *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 776 (1986)).

The Court then noted its recognition of constitutional limitations on the type of speech which could serve as a basis for a defamation action. *Id.* Constitutionally protected speech, not subject to defamation law included "loose figurative speech," "merely rhetorical hyperbole," as well as, "lusty and imaginative expression of contempt." *Id.* at 2705 (quoting *Letter Carriers v. Austin,* 418 U.S. 264, 284-86 (1974)).

Milkovich, attempted to persuade the Court to recognize an additional protection for statements characterized as opinions as opposed to fact. He relied on dictum from *Gertz* which basically reiterated Justice Holmes' "marketplace of ideas" concept. *Id.* Yet the argument, equating "opinion" with "idea," was rejected by the Court, which stated that the passage relied upon from *Gertz* was not "intended to create a wholesale defamation exception for anything that might be labeled 'opinion.'" *Id.*

The Court noted that expressions of opinion may often imply an assertion of objective facts. *Id.* For example, the statement "[i]n my opinion Jones is a liar," the court believed could cause as much damage to one's reputation as the statement, "Jones is a liar." *Id.* at 2706. "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" *Id.* (quoting *Cianci v. New Times Publishing Co.,* 639 F.2d 54, 64 (2d Cir. 1980)).

The Court stated that public figures and officials must show that defamatory statements were made with knowledge of their falsity or with reckless disregard of the truth. *Id.* at 2707. Alternatively, statements involving private individuals on matters of public concern place the burden on the plaintiff to show that the false connotations were made with some level of fault as required by *Gertz. Id.* Thus, on matters of public concern, statements must be provable as false before liability can be imposed under state defamation laws, at least when they involve a media defendant. *Id.* (citing *Hepps,* 475 U.S. at 772).

Turning to the facts of the instant case, the Court found that the language used in the article about Milkovich was not "loose, figurative or hyperbolic language." *Id.* Additionally, the Court stated that neither the language, nor the general tenor of the article, negated the impression that the author seriously maintained that Milkovich committed the crime of perjury. *Id.*

The Court noted that the truth could be ascertained by comparing, inter alia, Milkovich's testimony at the OHSAA hearing with his subsequent testimony in trial court. Therefore, the connotation that Milkovich committed perjury was an articulation of an objectively verifiable event. *Id.* Consequently, the Court remanded the case for a determination of whether or not the statements were false.

In reaching its conclusion, the Supreme Court managed to intricately balance first amendment values. Namely, it balanced the vital guarantee of freedom of speech as it relates to the press and the uninhibited discussion of public issues against the pervasively strong interest of preventing reputations from being falsely dishonored. Thus, the Court, in a unanimous decision, opted not to provide even more protection to media defendants by failing to recognize an opinion exception to state defamation laws.

— *Kimberly A. Doyle*

Illinois v. Perkins: UNDERCOVER AGENTS NEED NOT GIVE *MIRANDA* WARNINGS TO INCARCERATED SUSPECTS BEFORE ASKING QUESTIONS WHICH MAY ELICIT INCRIMINATING RESPONSES

In *Illinois v. Perkins,* 110 S. Ct. 2394 (1990), the Supreme Court held that the fifth amendment does not require undercover government agents posing as inmates to give *Miranda* warnings to incarcerated suspects before asking questions that may elicit incriminating responses. The Court found that no coercive atmosphere exists when an incarcerated suspect voluntarily makes incriminating statements to an officer he assumes to be a fellow inmate.

In November 1984, Richard Stephenson was murdered in East St. Louis, Illinois. There were no suspects in the homicide until March 1986, when Donald Charlton, an inmate of the Graham Correctional Facility, informed the police that he had pertinent information regarding the crime. A fellow inmate of Charlton's, Lloyd Perkins, had told him the details of a murder he committed in East St. Louis.

Acting on Charlton's detailed account, which the police found to be credible, police traced Perkins to a jail in Montgomery County, Illinois, where he was awaiting trial on an unrelated charge. In order to further investigate Perkins' relation to the murder, police placed undercover agent, John Parisi, and Charlton in a cellblock with Perkins. The two men were instructed to engage Perkins in casual conversation and report any reference made to the Stephenson murder. Parisi and Charlton gained Perkins' confidence by promising a fabricated escape plot. In that murder could have been necessary to effectuate such a plot, Parisi inquired whether Perkins had ever murdered anyone before. Perkins responded by relaying the details of how he murdered Stephenson. At no time was Perkins given *Miranda* warnings, and Perkins was subsequently charged with the Stephenson murder.

At trial, Perkins moved to suppress his statements made to Parisi while in jail. The trial court granted the motion; the State appealed. In affirming, the appellate court held that *Miranda v. Arizona,* 384 U.S. 436 (1966), "prohibits all undercover contacts with incarcerated suspects which are reasonably likely to elicit an incriminating response." *Perkins,* 110 S. Ct. at 2396. The Supreme Court granted certiorari to determine whether *Miranda* warnings must be given under such circumstances, and reversed.

In an opinion delivered by Justice Kennedy, the Supreme Court first cited the fifth amendment privilege against self-incrimination, which prohibits the admission into evidence of statements made during custodial interrogation, absent *Miranda* warnings. Custodial interrogation involves the questioning of a suspect in a coercive, police-dominated atmosphere. *Id.* at 2397. The Court found that the doctrine was intended to safeguard suspects from the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* (quoting *Miranda,* 384 U.S. at 467).

The Court, however, distinguished *Perkins* from the concerns underlying *Miranda.* The problem of compulsion inherent in a police-dominated atmosphere, the Court reasoned, is not present when an incarcerated suspect speaks voluntarily to an undercover agent. "Coercion is determined from the perspective of the suspect." *Id.* (citations omitted). Thus, the coercive atmosphere is absent where a suspect speaks voluntarily to a fellow inmate, unaware that the inmate is a police officer. *Id.*

Moreover, the Court rejected the state court's assumption that whenever a suspect is in technical custody, *Miranda* warnings must precede any conversation with an undercover agent. *Id.* The Court reasoned that a suspect, unaware that he is speaking with an undercover agent, is neither motivated by pressure nor the reaction he expects from his listener. *Id.* at 2398. *Miranda,* the Court stated, was not intended to protect statements motivated entirely by a suspect's desire to impress other inmates. When inmates boast to fellow inmates of their crimes, they do so at their own risk. Only when a suspect is under coercive pressure to do so, must *Miranda* warnings be given. *Id.*

In addressing the ploy used to elicit Perkins' statements, the Court found that "strategic deception" did not rise to the level of coercion and, was therefore not violative of the Self-Incrimination Clause. *Id.* (citations omitted). Relying primarily on *Hoffa v. United States,* 385 U.S. 293 (1966), the Court reiterated its approval of the use of deceptive tactics. *Perkins,* 110 S. Ct. at 2398. In *Hoffa,* incriminating statements made by the petitioner to a police informant who fooled him into believing that he was a colleague, were held admissible, in that they did not result from coercion. The only factual distinction between the cases, the Court noted, was that Perkins was incarcerated, a fact the Court considered irrelevant. *Id.*

In addition, the Court distinguished ated suspect made incriminating statements to an Internal Revenue Service agent absent *Miranda* warnings. *Id.* In *Mathis,* the suspect's statements were found to be inadmissible. However, in *Mathis,* the Court noted, the suspect was fully aware that the agent was a government official and was therefore susceptible to coercive pressure to answer questions. *Perkins,* on the other hand, was unaware of the undercover agent's official status. *Id.*

Finally, the Court rejected the respondent's argument that a bright-line rule for applying *Miranda* was desirable. *Id.* at 2389. The Court reasoned that law enforcement officials would have no problem implementing the holding that undercover agents need not Mirandize incarcerated suspects. *Id.* The holding clearly stated that *Miranda* concerns were not present in such cases, and therefore, *Miranda* warnings were not required under such circumstances.

Finding no *Miranda* concerns implicated when an undercover agent speaks with an incarcerated suspect, the Court held that *Miranda* warnings need not be given. The Court found arguments against the use of such deceptive techniques and in favor of *Miranda* warnings in all custodial situations to be unpersuasive. Thus, the use of undercover agents to elicit incriminating information from suspects was ruled to be a valid law-enforcement technique.

— *Tena Touzos*

Cruzan v. Missouri Department of Health: MISSOURI MAY REQUIRE CLEAR AND CONVINCING EVIDENCE OF A PATIENT'S WISHES TO DISCONTINUE FOOD AND WATER

In *Cruzan v. Missouri Dep't of Health,* 110 S. Ct. 2841 (1990), the Supreme Court held that a state may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person in a persistent vegetative state. Thus, unless the patient expressed his wishes sufficiently to meet this standard before incompetency, he would remain in a vegetative state indefinitely, regardless of the objections and wishes of family members.