

No. 19-1545

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

BRIAN McCAFFERTY and MELISSA McCAFFERTY,
individually and on behalf of their minor child C.M.,
Appellants,
v.
NEWSWEEK MEDIA GROUP, LTD.,
Appellee.

On Appeal from the U.S. District Court
for the Eastern District of Pennsylvania
No. 2:18-cv-1276-JS
Hon. Juan R. Sánchez, District Judge

**Brief *Amici Curiae* of the Reporters Committee for Freedom of
the Press and the Pennsylvania Center for the First Amendment
in Support of Appellee**

Eugene Volokh*
UCLA First Amendment Clinic
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu
Counsel for Amici Curiae

* Counsel would like to thank Brenna Scully, a UCLA School of Law student who worked on the brief.

Corporate Disclosure Statement

The Reporters Committee for Freedom of the Press is a nonprofit organization; it has no parent corporation and no publicly held corporation that owns 10% or more of its stock.

The Pennsylvania Center for the First Amendment is a project that is part of the Pennsylvania State University, a governmental entity.

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Interest of *Amici Curiae*¹

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee has a strong interest in ensuring that libel law is properly constrained in order to prevent it from unduly deterring free expression.

The Pennsylvania Center for the First Amendment is an educational, advocacy, and research organization dedicated to advancing the freedoms of speech and the press in the United States. For over fifteen years, the Center has continuously provided educational programs, sponsored

¹ No party or party's counsel has wholly or partly authored or funded this brief. No person has contributed money intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

speakers, published books and articles in the popular and academic press, and served as a media resource on a wide array of First Amendment topics.

Summary of Argument

Opinion journalism often reflects inferences that characterize people and events based on accurately reported facts. Even objective news accounts often quote sources who draw such inferences.

A man who spoke out in favor of cattle farming may be described by one writer as supporting animal genocide; another writer might describe the same man as supporting American family businesses, traditions, and nutrition. In both instances, a reasonable reader would understand that the author's characterization is expressing an opinion about the moral and practical significance of the man's speech. Both statements would be protected opinion.

To be sure, characterizations may be actionable if a reasonable person would understand them to be provably false, factual accusations of specific acts of misconduct. But merely reporting, accurately, what someone

said in an interview, and then quoting someone else pejoratively characterizing those statements, is not actionable.

Here, Newsweek accurately described what plaintiff C.M. had said, and then quoted commentator Todd Gitlin's disapproval of that statement. Newsweek said C.M. and another Trump supporter were members of a "weird little army," A002, an obvious expression of opinion. (What is "weird" is opinion, and "army" is being used figuratively.) It quoted Gitlin as saying that the Trump supporters were "defending raw racism and sexual abuse," *id.*, but that in context simply referred to Gitlin's view that President Trump is guilty of racism and sexual abuse, and that Trump's supporters are morally complicit in that because of their support.

Gitlin's saying that the Trump supporters were "reveling in the chance to show off," A003, was plainly conjecture about their motivation. And his saying that the supporters were "reading chapter and verse a text written by somebody else," *id.*, was likewise plainly conjecture—or, even if it could be read as a factual assertion, not one that was defamatory (because there is no norm requiring political advocates to state only their

own original ideas). The District Court was therefore correct in concluding that the Newsweek article was, as a matter of law, not defamatory.

Argument

I. Characterizing someone based on disclosed facts is not actionable defamation

To characterize, either accurately or inaccurately, another’s “political, economic or sociological philosophies does not give rise to an action for libel,” *Balletta v. Spadoni*, 47 A.3d 183, 199 (Pa. Commw. Ct. 2012), when the speaker “discloses the factual basis for the idea [and] the disclosed facts are true,” *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 972 (3d Cir. 1985); *see also Baker v. Lafayette Coll.*, 516 Pa. 291, 298-99, 532 A.2d 399, 403 (1987). The characterization is not actionable because “a listener may choose to accept or reject it on the basis of an independent evaluation of the facts.” *Redco*, 758 F.2d at 972; *see also Hill v. Cosby*, 665 F. App’x 169, 175 (3d Cir. 2016); *Raible v. Newsweek Inc.*, 341 F. Supp. 804, 807-09 (W.D. Pa. 1972).

For example, in *Balletta*, the court held that labeling the plaintiffs as “anarchists,” “paper terrorists,” and “fellow travelers of anti-government

groups” was not actionable defamation. 47 A.3d at 199. The defendants had said those things about plaintiffs in talking to a newspaper reporter; the newspaper quoted or paraphrased the defendants, *id.* at 189, and also described what plaintiffs had in fact been doing—attempting to buy properties at foreclosure sales using gold and silver, *id.* at 188, which the plaintiffs said was “the only valid money,” *id.* at 198, and claiming that other buyers were paying with “illegitimate paper money,” *id.* at 189. The defendants’ labeling of the plaintiffs, the court concluded, constituted “non-actionable statements of opinion,” *id.* at 199; the article “fully disclose[d] the facts upon which [the defendant] based his opinions,” *id.*, and defendants’ statements were thus “merely expressions of opinion based on disclosed facts,” *id.* at 200.

As in *Balletta*, the Newsweek article simply described and characterized the plaintiff’s actions. Newsweek accurately explained what C.M. said on the Alex Jones show and C.M.’s defense of President Trump and his positions. The article then quoted Gitlin characterizing Trump and

the “hard right,” A002, as standing for “raw racism and sexual abuse,” *id.*—an opinion.

The article (including the Gitlin quote) does not state that C.M. is himself a racist or sex abuser. Nor does it state that C.M. made other specific statements defending raw racism and sexual abuse; at most, it is a pejorative characterization of C.M.’s endorsement of the President and his policies, or (perhaps) of C.M.’s implicit endorsement of Jones’ hostility to what Jones calls “globalis[m],” *id.*

A reasonable reader in this case, like the reasonable reader in *Balletta*, would understand the article as quoting Gitlin’s negative opinion of Trump and of Trump’s supporters (including C.M.). Gitlin’s criticism of the “[C.M.] interview[],” *id.*—that it espouses a defense of the “hard right,” *id.*, and President Trump—does not make any provably false accusation against C.M. of any specific factual misconduct: It merely provides an evaluation, however negative, of the accurately reported facts about what C.M. said. And to the extent the article suggests that C.M., alongside M.M., allowed himself to be “deployed,” *id.*, by the “alt-right,”

id., that too is an opinion based on C.M.’s appearing on the Alex Jones show.

Likewise, Gitlin’s guess as to C.M.’s attitude (that he is “reveling in the chance to show off,” A003) and as to how much C.M. has borrowed another’s ideas (that he is “reading chapter and verse a text written by someone else,” *id.*) are presented as Gitlin’s speculations, and would likewise be understood as opinion. “[A]nyone is entitled to speculate on a person’s motives from the known facts of his behavior.” *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993); *see also Scholz v. Delp*, 473 Mass. 242, 251, 41 N.E.3d 38, 46 (2015) (endorsing this principle); *Gacek v. Owens & Minor Distribution, Inc.*, 666 F.3d 1142, 1147-48 (8th Cir. 2012) (noting state court’s endorsement of this principle). Finally, a reasonable reader would understand that whether something is “weird,” A002, whether the size of a group is “little,” *id.*, and whether a group of people with shared political goals is properly labeled an “army,” *id.*, are merely the author’s opinion.

For the same reasons, the article, when read in context, cannot give rise to liability under a “false light” theory. “[T]he defense available in a defamation action that the allegedly defamatory statements are opinions, not assertions of fact, is also available in a false light privacy action.” *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983). Both “alleged defamation and false light claims” must be “based on assertions of fact rather than non-actionable opinions or name-calling.” *Knight v. Climbing Magazine*, 615 F. App’x 409, 410 (9th Cir. 2015). “[I]f [an] article expresses opinion, then [plaintiff’s] claims for libel . . . and false light invasion of privacy must fail.” *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 893 (9th Cir. 1988).

II. Characterizing an interview with someone as “defending racism and sexual abuse” is not actionable defamation absent an additional charge of specific wrongdoing

Even if the Gitlin “defending racism and sexual abuse” quote, A002, could be reasonably understood as making a factual claim about C.M.’s beliefs, it would still not be actionable. An allegation of mere adherence to certain ideologies is not defamatory. Thus, for instance, in *Sweeney v.*

Phila. Rec. Co., this Court held that an article whose “gist . . . was that the basis of the [plaintiff’s] opposition to the proposed judicial appointee was that he was a foreign-born Jew” was not defamatory. 126 F.2d 53, 54 (3d Cir. 1942). “At the most [the plaintiff] is charged with being a bigoted person who [was] actuated by a prejudice of an unpleasant and undesirable kind,” which is not actionable. *Id.* at 55; *see also Smith v. Sch. Dist. of Phila.*, 112 F. Supp. 2d 417, 429 (E.D. Pa. 2000) (calling someone a racist and an anti-Semite was “merely non-fact based rhetoric” and did “not rise to the level of defamation as a matter of law”); *O’Donnell v. Phila. Rec.*, 56 Pa. D.&C. 328, 330-31 (Ct. C.P. 1946) (characterizing the plaintiff as a “Naziphile” was not actionable defamation), *aff’d*, 356 Pa. 307, 51 A.2d 775 (1947).

Of course, accusing someone of specific misconduct, such as criminal behavior, abuse of power in office, or violation of professional norms, can be defamatory. Thus, for instance, in *MacElree v. Phila. Newspapers, Inc.*, the court held that characterizing the plaintiff as having acted improperly by “abusing his power as the district attorney, an elected office,

to further racism and his own political aspirations” could be actionable. 544 Pa. 117, 125, 674 A.2d 1050, 1054 (1996). But the court specifically stressed that the statement did more than “merely label[the plaintiff] a racist”—the statement was actionable because it focused on what the plaintiff supposedly did rather than just on what he believed, and thus “amount[ed] to a charge of misconduct in office.” *Id.* Here, the Newsweek article includes a quotation that, at most, “merely label[s]” C.M. based on his supposed views; it does not “charge” any “misconduct in office” or in a profession.

One case cited by appellants, *Jungclaus v. Waverly Heights, Ltd.*, pushes the boundaries of what might be considered actionable. There, the district court suggested that accusing someone of publishing a “racist” Tweet might be actionable. No. CV 17-4462, 2018 WL 1705961, at *5, 2018 U.S. Dist. LEXIS 59635, at *13 (E.D. Pa. 2018). But even the *Jungclaus* court stressed that “[t]ypically disparaging someone’s character would not be considered defamation *per se*, unless that trait is ‘peculiarly valuable in [that] business or profession.’” *Id.* at *4, 2018 U.S. Dist.

LEXIS 59635, at *12 (citation omitted). The court viewed the accusation as potentially actionable only because “Ms. Jungclaus is [allegedly] still pursuing a career in human resources,” and the accusation may “adversely affect her ability to do business in human resources.” *Id.* at *5, 2018 U.S. Dist. LEXIS 59635, at *13.

Gitlin’s statements about C.M. have nothing to do with any business or professional role—they are at worst generally “disparaging [his] character,” *id.* (though, as Part I argues, they are likely not even that). And *Jungclaus* is in any event an unpublished district court opinion, and its discussion of accusations of racism appears to be dictum: The court ultimately concluded that the defendant had not actually accused the plaintiff of being racist. *Id.*

This distinction between accusations of bad beliefs and accusations of specific criminal or professional misconduct is also visible in Pennsylvania cases dealing with allegations of Communism. And that was so even in the 1950s and 1960s, when such accusations were highly incendiary.

Those cases make clear that it is not actionable to accuse another of expressing sympathy for Communism, defending Communism, or even being Communist in his ideology. “Nor was the statement attributed to [plaintiff] to the effect that ‘we all have to have a little communism today’ libelous. . . . To say a man is a communist or a socialist is not to defame him.” *McAndrew v. Scranton Republican Pub. Co.*, 364 Pa. 504, 514-15, 72 A.2d 780, 784 (1950); *see also Lawrence v. Walker*, 9 Pa. D.&C. 5th 225, 231-32 (Ct. C.P. 2009) (*quoting McAndrew*, 364 Pa. at 514, 72 A.2d at 784).

Likewise, characterizing the plaintiff as having a voting record with Communist tendencies is not actionable. *Clark v. Allen*, 415 Pa. 484, 496, 204 A.2d 42, 48 (1964). Indeed, the Pennsylvania Supreme Court in *Clark* stressed that debate about such claims of alignment with Communism was “absolutely essential for the existence and preservation of our Country” because “[w]ithout such discussion, charges, countercharges and debate, not only our future welfare but, we repeat, our very existence as a free nation may be jeopardized or destroyed.” *Id.* at 495, 204 A.2d at 47.

It is a matter of widespread common knowledge that countless patriotic Americans sincerely and sharply disagree as to what actions and/or words and/or policies aid the Communist cause, or what show Communist tendencies, or what amounts to an “appeasement” of Communism, or what is a “pro-Communist,” or exactly what is meant by the term “soft on Communism.”

While these words and expressions have a different meaning or meanings for very many Americans and often are undoubtedly intended to be derogatory, they are not libelous. In no other way can the menace and dangers of Communism be as clearly and succinctly brought home to the American people.

To hold these words or any of said expressions libelous would realistically and practically put an effective stop to searching and illuminating discussion and debate with likely dire results.

Id. (paragraph breaks added). The same is equally true today about allegations of sympathy for “raw racism and sexual abuse,” A002, (or of being “deployed . . . by the alt-right,” A092, ECF No. 31 (alteration in original), though in any event the Newsweek article said that only about M.M., not C.M. And this logic applies fully to the false light tort, with its requirement that the alleged false light be “highly offensive” to a reasonable person, A090, A098, A099, ECF No. 31, as much as to defamation.

In this case, as in *Clark*, allegations of specific criminal behavior or misconduct in government office or in a profession—as opposed to allegations of mere beliefs, sympathies, or tendencies that one has expressed—

may be actionable. For example, alleging that the plaintiff's "communistic activities and her membership in a communist organization . . . rendered her unfit to hold her position as Assistant District Attorney" could be libelous. *Matson v. Margiotti*, 371 Pa. 188, 193, 88 A.2d 892, 895 (1952), *overruled on other grounds*, *Commonwealth v. Schab*, 477 Pa. 55, 383 A.2d 819 (1978). Likewise, when Pennsylvania law criminalized membership in the Communist Party from 1951 to 1972, allegations that "connote[someone] is a member of the Communist Party" could be actionable allegations of crime. *Solosko v. Paxton*, 4 Pa. D.&C. 2d 240, 245 (Ct. C.P. 1954), *aff'd*, 383 Pa. 419, 119 A.2d 230 (1956).

But here there were no such statements. The Newsweek article does not claim that C.M. committed sexual abuse, and it is not a crime to defend someone who has been accused of sexual abuse. Nor does it claim that C.M. has engaged in any criminal conduct. Absent an accusation that C.M. himself acted improperly, the statements cannot be the basis for a libel or false light invasion of privacy suit.

Conclusion

Newsweek published accurate descriptions of C.M.'s statements in the Alex Jones interview, coupled with opinion about how those statements should be characterized. The article did not accuse C.M. of being a sex abuser, of engaging in racist conduct, or even of himself personally holding racist or pro-sex-abuse beliefs. Because a reasonable reader would understand the descriptions and characterizations to be Gitlin's and the author's opinions of C.M.'s actions, Newsweek cannot be held liable for defamation or false light invasion of privacy.

Respectfully submitted,

s/ *Eugene Volokh*
UCLA First Amendment Clinic
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu
California State Bar #194464
Counsel for Amici Curiae

Certificate of Compliance

This brief contains 2,691 words, excluding the parts exempted by Fed. R. App. P. 32(f); this complies the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

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Counsel for *amici* is a member of the bar of this Court.

Dated: August 26, 2019

s/ Eugene Volokh

Certificate of Service

I electronically filed the foregoing amicus brief with the Clerk of this Court using the appellate CM/ECF system on August 26, 2019.

All participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: August 26, 2019

s/ Eugene Volokh