How Iago Infiltrated the American Courts

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse steals trash;
'Tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.

Othello, III. 3. 155-161.

I hate this speech.

I'm a First Amendment lawyer. My clients are unions and anti-corporate groups like Greenpeace. We are under continual siege from corporations who bring million-dollar lawsuits for "defamation" anytime we say something that hurts their public relations.

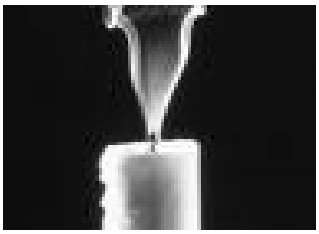
Corporate defamation plaintiffs always trot out Iago's speech in their briefs and jury arguments. It is the perfect counter to our free speech defense. It is erudite and poetic, more elegant than any of our fancy-pants First Amendment arguments. Judges and juries are so taken with it that they are happy to smother us. Iago's speech has so much hypnotic power that it works its way into appeals court decisions, without the judges having the slightest idea who is speaking it or what harm he is causing.

This is almost a sci-fi story: an evil fictional character incarnates himself in the minds of judges, and proceeds to take over the Law. A search of the Westlaw database turns up sixty-three published court opinions since 1900 that quote this speech. Most of them are defamation cases. In most of them the court is approving a punitive lawsuit, overruling the defendant's free-speech defense. In over half these opinions, the court does not even name the character who speaks it.

Instead, they fawn over "the immortal words of the Bard of Avon" or "the sage observation of our greatest playwright." Even when the Court identifies Iago as the speaker, *it does not acknowledge who Iago is or what he is doing to Othello* with this speech.

A classic example is *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990). *Milkovich* is probably the most damaging anti-free-speech decision in fifty years. Chief Justice Rehnquist wrote the decision, with only Brennan and Marshall dissenting. The decision obliterates the "opinion" defense in defamation cases. After *Milkovich*, if you say "I think Sarah Palin is a crook and a bully," and Palin sues you for defamation, you can no longer claim that you were just expressing your opinion. Palin is allowed to sue you, says Rehnquist, because your negative statement implies bad facts about her. This erodes her public image, which is *property* that she is entitled to control against the hostile World. So by expressing an unflattering thought about Palin, you are robbing her as surely as if you burglarized her house. The linchpin of Rehnquist's decision is Iago's speech, which he quotes without irony or context. Rehnquist implies that because this idea comes from Shakespeare, it must be a hallowed part of our culture.

With Shakespeare fans like Rehnquist, who needs villains? Courts have bought Iago's advice just as Othello did, and with the same consequences. If thoughts are left free and uncontrolled, those thoughts will tear the State apart. Integrity depends on thought control. Freedom is Slavery. This leads the law to smother the very thing it claims to love—freedom of thought, freedom of speech. So Iago wins after all.



[11]Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements. See L. Eldredge, Law of Defamation 5 (1978).

[12]In Shakespeare's Othello, Iago says to Othello:

> "Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash;
> 'Tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed." Act III, scene 3.

Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements. Eldredge, *supra*, at 5. As the common law developed in this country, apart from the issue of damages, one usually needed only allege an unprivileged publication of false and defamatory matter to state a cause of action for defamation. See, *e.g.*, Restatement of Torts § 558 (1938); *Gertz*[13] *v. Robert Welch, Inc.*, 418 U.S., at 370, 94 S.Ct., at 3022 (WHITE, J., dissenting) ("Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule"). The common law generally did not place any additional restrictions on the type of statement that could be actionable. Indeed, defamatory communications were deemed actionable regardless of whether they were deemed to be statements of fact or opinion. See, *e.g.*, Restatement of Torts, *supra*, §§ 565–567. As noted in the 1977 Restatement (Second) of Torts § 566, Comment *a:*

> "Under the law of defamation, an expression of opinion could be defamatory if the

decided there was no negligence in this case even if petitioner were regarded as a private figure, and thus the action is precluded by our decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Although the appellate court noted that "the instant cause does not present any material issue of fact as to negligence or 'actual malice,' " *Milkovich v. News–Herald*, 46 Ohio App.3d 20, 24, 545 N.E.2d 1320, 1325 (1989), this statement was immediately explained by the court's following statement that the *Scott* ruling on the opinion issue had accorded respondents absolute immunity from liability. See 46 Ohio App.3d, at 24, 545 N.E.2d, at 1325. The court never made an evidentiary determination on the issue of respondents' negligence.

Next, respondents concede that the *Scott* court relied on the United States Constitution as well as the Ohio Constitution in its recognition of an opinion privilege, Brief for Respondents 18, but argue that certain statements made by the court evidenced an intent to independently rest the decision on state-law grounds, see 25 Ohio St.3d, at 244, 496 N.E.2d, at 701 ("We find the article to be an opinion, protected by Section 11, Article I of the Ohio Constitution ..."); *id.*, at 245, 496 N.E.2d, at 702 ("These ideals are not only an integral part of First Amendment freedoms under the federal Constitution but are independently reinforced in Section 11, Article I of the Ohio Constitution ..."), thereby precluding federal review under *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). We similarly reject this contention. In the *Milkovich* proceedings below, the Court of Appeals relied completely on *Scott* in concluding that Diadiun's article was privileged opinion. See 46 Ohio App. 3d, at 23–25, 545 N.E.2d, at 1324–1325. *Scott* relied heavily on federal decisions interpreting the scope of First Amendment protection accorded defamation defendants, see, *e.g.*, 25 Ohio St. 3d, at 244, 496 N.E.2d, at 701 ("The federal Constitution has been construed to protect published opinions ever since the United States Supreme Court's opinion in *Gertz v. Robert Welch, Inc.* ..."), and concluded that "[b]ased upon the totality of circumstances it is our view that Diadiun's article was constitutionally protected opinion both with respect to the federal Constitution and under our state Constitution." *Id.*, at 254, 496 N.E.2d, at 709. Thus, the *Scott* decision was at least "interwoven with the federal law," and was not clear on its face as to the court's intent to rely on independent state grounds, yet failed to make a "plain statement ... that the federal cases ... [did] not themselves compel the result that the court ... reached." *Long, supra*, 463 U.S., at 1040–1041, 103 S.Ct., at 3476. Under *Long*, then, federal review is not barred in this case. We note that the Ohio Supreme Court remains free, of course, to address all of the foregoing issues on remand.