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Is it libelous to write that someone has been convicted of a crime, but to fail to mention that the conviction has been reversed? Or to write that someone has been charged, without mentioning the acquittal? The answers, it turns out, are often "yes"; this Article lays out the precedents that so conclude.

INTRODUCTION

Say that I accurately write that you have been convicted of a crime, but I knowingly fail to mention that the conviction has been reversed.[1] To make the matter particularly stark, say the conviction has been reversed on grounds that show you were innocent (rather than just for procedural reasons). Or say that I accurately write that you were charged with a crime, but knowingly fail to mention that you were acquitted.

Is that libelous? This question arose in the course of my writing a separate article in this issue, which deals with whether a *later* reversal triggers an obligation to remove or modify the account of the original conviction.[2] But the question is important even apart from that separate matter, so the editors kindly allowed me to answer it in this separate short Article.

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Disclosure: I filed amicus briefs in two of the cases cited in this Article: *Martin v. Hearst Corp.*, 777 F.3d 546 (2d Cir. 2015), and *Petro-Lubricant Testing Laboratories, Inc. v. Adelman*, 184 A.3d 457 (N.J. 2018).

1 For purposes of this Article, it's enough to assume that I knowingly fail to mention this; but in principle I could be liable if I merely negligently fail to mention it, if you're a private figure and you can show that you have suffered damages as a result of my negligent falsehood.

2 *See* Eugene Volokh, *The Duty Not to Continue Distributing Your Own Libels*, 97 NOTRE DAME L. REV. 315 (2021).

I. LIBEL BY OMISSION

It turns out that the cases dealing with this question overwhelmingly answer it "yes." The law recognizes that even something that is literally true may be so incomplete and therefore misleading in its "gist"—its overall tenor—that it might be actionable libel. "[T]he law of libel has long recognized that omissions alone can render a statement false."[3] "[M]aterial omission of facts that would render the challenged statement(s) non-defamatory" can yield "implied defamation": "a defendant does not avoid liability by simply establishing the truth of the individual statement(s); rather, the defendant must also defend . . . the omission of certain facts."[4]

The classic example of such libel by omission is *Memphis Publishing Co. v. Nichols*, where the *Memphis Press-Scimitar* wrote,

> A 40-year-old woman was held by police in connection with the shooting [of Mrs. Ruth Nichols] with a .22 rifle. Police said a shot was also fired at the suspect's husband.
>
> Officers said the incident took place Thursday night after the suspect arrived at the Nichols home and found her husband there with Mrs. Nichols.[5]

What do you, as a reasonable reader, think happened? Well, here's what really happened, but the story neglected to mention: "The undisputed proof showed that not only were Mrs. Nichols and [the shooter's husband] at the Nichols' home but so, also, were Mr. Nichols and two neighbors, all of whom were sitting in the living room, talking, when [the shooter] arrived."[6]

The article was therefore a half-truth, with "the clear implication . . . that Mrs. Nichols and [the shooter's husband] had an adulterous relationship"[7]—an implication that would have been absent had the omitted details been included. And this made the story potentially actionable as libel. Such libel by omission is a special case of libel by implication or by innuendo.[8]

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3 Morse v. Fusto, 804 F.3d 538, 549 n.8 (2d Cir. 2015).

4 Toney v. WCCO Television, Midwest Cable & Satellite, Inc., 85 F.3d 383, 387 (8th Cir. 1996).

5 569 S.W.2d 412, 414 (Tenn. 1978) (quoting Menno Duerksen, *Woman Hurt by Gunshot*, MEM. PRESS-SCIMITAR, June 5, 1971).

6 *Id.*

7 *Id.* at 419.

8 *See, e.g.*, Strada v. Conn. Newspapers, Inc., 477 A.2d 1005, 1010–12 (Conn. 1984) (describing libel by implication or by innuendo).

II. LIBEL BY OMISSION OF CRITICAL LEGAL CONTEXT

Libel-by-omission claims generally prevail only in cases where the omission is particularly stark and critical to the story. But omitting a reversal when talking about a conviction would generally qualify. "It is a misleading half-truth to say that a person was convicted . . . without including the fact that his conviction was overturned on appeal."[9]

Likewise, liability may thus be imposed when "a defendant widely publicizes that a plaintiff was charged with a criminal offense but knowingly [does] not mention that the charge was found to be baseless."[10] "The failure to report that [plaintiff] was acquitted, leaving the impression that he was guilty of the [charge mentioned in the article is] . . . clearly more damaging to his reputation in the mind of the average reader than the truth would have been," which is enough to make the partial account libelous.[11]

III. NOT A "FULL AND FAIR" REPORT

Another way of reaching the same result is through the "full and fair" element of the fair report privilege. Usually, fair reports about court proceedings and court documents are immune from defamation liability, regardless of whether there may have been some

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9 Wiest v. E-Fense, Inc., 356 F. Supp. 2d 604, 610 (E.D. Va. 2005); *see also, e.g.*, Martin-Trigona v. Kupcinet, No. 87 C 3347, 1988 WL 93945, at *4–5 (N.D. Ill. Sept. 2, 1988); Purcell v. Westinghouse Broad. Co., 191 A.2d 662, 665 (Pa. 1963); LaMon v. Butler, 722 P.2d 1373, 1377 (Wash. Ct. App. 1986), *aff'd on other grounds*, 770 P.2d 1027 (Wash. 1989) (en banc); Karuza v. Chance, No. 34964–3–I, 1996 WL 180267, at *2 (Wash. Ct. App. Apr. 15, 1996) (characterizing *LaMon* as concluding that "[a] true statement can also be defamatory if it has been legally voided"); Martin v. Griffin, No. CV 990586133S, 2000 WL 872464, at *18 (Conn. Super. Ct. June 13, 2000) (suggesting that mentioning a felony coupled with "the omission to mention the reversal of the conviction" could be libelous); *see also* Garcia v. Puccio, No. 108964/02, 2003 WL 25594218, at 10 (N.Y. Sup. Ct. Jan. 6, 2003) (reporting on complaint against plaintiff filed with the school but without mentioning "that the accusation was ultimately found to be baseless and expunged from plaintiff's teaching record" may be libelous under a "defamation by implication" theory, as not being the "substantial truth"); Reilly v. Gillen, 423 A.2d 311, 313–14 (N.J. Super. Ct. App. Div. 1980) (likewise); Entravision Commc'ns Corp. v. Belalcazar, 99 S.W.3d 393, 398 (Tex. App. 2003) (reporting on lawsuit against plaintiff but without mentioning that plaintiff had been dropped from that lawsuit may be libelous); Express Pub. Co. v. Gonzalez, 350 S.W.2d 589, 592 (Tex. Civ. App. 1961) (same). *But see* Hoyt v. Klar, No. 2020-235, 2021 WL 841059, at *2 (Vt. Mar. 5, 2021) (holding that defendant's mentioning plaintiff's criminal charges but "fail[ing] to mention" that they "were later dismissed" didn't constitute false light invasion of privacy, and presumably also didn't constitute defamation).

10 G.D. v. Kenny, 15 A.3d 300, 319 (N.J. 2011).

11 Klentzman v. Brady, 456 S.W.3d 239, 268 (Tex. App. 2014), *aff'd on other grounds*, 515 S.W.3d 878 (Tex. 2017).

false statements within those proceedings or documents. The privilege exists because people need to be free to discuss formal allegations made in official court proceedings being considered by governmental actors.[12]

But the reports have to be "full, fair, and accurate report[s]"[13] and "[a] report may not be 'fair' if it fails to reveal the ultimate outcome of the reported accusation."[14] "[A]ccurately reporting a . . . charge . . . but failing, in the same article, to report the subsequent dismissal of the charge is not covered by the fair-report privilege."[15] "The fair report privilege may not protect a publication that only reprints the allegations but not the favorable verdict."[16]

In a sense, this is a version of the libel by omission theory:

1. Under the libel law republication rule, repeating false and reputation-injuring allegations is generally itself libelous, even if the repetition accurately summarizes the allegations: saying "*A* said that *P* stole money from petty cash" is libelous if *P* didn't steal the money, even if it's accurate that *A* said that *P* stole the money.[17]
2. The fair report privilege is a limit on this republication rule. Saying "the indictment said that *P* stole money from petty cash" or "the civil complaint said that *P* stole money from petty cash" isn't libelous, even if *P* didn't steal the money, so long as the summary of the legal documents is full, fair, and accurate.[18]

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12 *See* Petro-Lubricant Testing Labs., Inc. v. Adelman, 184 A.3d 457, 470–71 (N.J. 2018).

13 *Id.* (quoting Salzano v. N. Jersey Media Grp. Inc., 993 A.2d 778, 791 (2010)); *see also* RESTATEMENT (SECOND) OF TORTS § 611 cmt. f (AM. L. INST. 1977).

14 Fortenbaugh v. N.J. Press, Inc., 722 A.2d 568, 573–74 (N.J. Super. Ct. App. Div. 1999); Mitan v. Osborn, No. 10–3207–CV–S, 2011 WL 4352550, at *7 (W.D. Mo. Sept. 16, 2011) ("[T]he fair report privilege" cannot "be met by pulling statements out of a brief filed in an official proceeding without reporting . . . the ultimate outcome of the proceeding."); Torres v. Playboy Enters., Inc., 7 Media L. Rep. (BL) 1182, 1185 (S.D. Tex. Oct. 22, 1980); *see also* Lee v. TMZ Prods. Inc, 710 F. App'x 551, 558 (3d Cir. 2017) (noting that the fair report privilege applied because "Lee's ultimate exoneration is not determinative. At the time the articles in question were published, the NYAG's allegations against Lee were actively pending"); O'Keefe v. WDC Media, LLC, No. 13–6530, 2015 WL 1472410, at *5 (D.N.J. Mar. 30, 2015) ("Courts . . . have held that reports were not entitled to the protection of the fair-report privilege where the articles in question omitted ultimate exculpatory facts in ways that were misleading."). *But see* Jenzabar, Inc. v. Long Bow Grp., Inc., No. 2007-2075H, 2008 WL 7163549, at 4 n.5 (Mass. Super. Ct. Aug. 5, 2008) (concluding that there's no duty to "publish [a] follow-up" to an initial story when charges are retracted).

15 *Salzano*, 993 A.2d at 793.

16 *Petro-Lubricant Testing Labs.*, 184 A.3d at 472.

17 *See* RESTATEMENT (SECOND) OF TORTS § 578 cmt. b (AM. L. INST. 1977).

18 *See* RESTATEMENT (SECOND) OF TORTS § 611 cmt. f (AM. L. INST. 1977).

3. But saying "the indictment said that *P* stole money from petty cash," but omitting *P*'s acquittal, is no longer a "full and fair" report, precisely because it omits an important fact.

In such a situation, "[t]he falsity . . . lies not in what was said but in what was left unsaid. . . . For example, a person who is arrested erroneously, based on mistaken identity, thereafter should not be subject to media reports citing his arrest while ignoring his subsequent vindication."[19]

IV. NO LIABILITY FOR NOT REPORTING SETTLEMENTS OR EXPUNGEMENTS

To be sure, sometimes omitting the follow-up information doesn't sharply change the gist of the original information: an expungement or settlement, for instance, doesn't demonstrate innocence of the original charge. In that situation, omitting that information isn't libelous. Thus, for instance, it isn't libelous to mention an arrest without mentioning that it was expunged or that charges were dismissed for non-innocence-related reasons.[20]

It similarly isn't libelous to mention that a lawsuit was filed without mentioning that it was settled.[21] "A settlement . . . is different from a favorable verdict. A settlement generally 'reflects ambiguously on the merits of the action' and is not a determination of whether the allegations are true or false."[22]

But mentioning a prosecution yet omitting the acquittal may well be libelous, precisely because it does change the gist of the overall story. Likewise with mentioning a conviction yet omitting the reversal. Reporting on lawsuits and criminal prosecutions is broadly protected against libel liability—but not when the outcome of those proceedings is omitted, and the reader is left hearing only about an indictment or conviction and not the acquittal or reversal.

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19 LaMon v. Butler, 722 P.2d 1373, 1377 (Wash. Ct. App. 1986), *aff'd on other grounds*, 770 P.2d 1027 (Wash. 1989) (en banc).

20 Martin v. Hearst Corp., 777 F.3d 546, 553 (2d Cir. 2015); G.D. v. Kenny, 15 A.3d 300, 314–15 (N.J. 2011); Bahr v. Statesman J. Co., 624 P.2d 664, 666 (Or. Ct. App. 1981). Likewise, in a case where a newspaper article mentioned an alleged police brutality incident, but didn't mention criminal prosecution or acquittal, the court held that the article wasn't "defamatory by the omission of the fact that the officers were later acquitted of criminal charges" because including that information "would not have placed the officers in any better light in the public mind." Casper v. Wash. Post Co., 549 F. Supp. 376, 378 (E.D. Pa. 1982).

21 *Petro-Lubricant Testing Labs.*, 184 A.3d at 472 (quoting McCubbrey v. Veninga, 39 F.3d 1054, 1055 (9th Cir. 1994)).

22 *Id.*