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The Fact-Opinion Dilemma in First Amendment Defamation Law

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NOTE

THE FACT-OPINION DILEMMA IN FIRST AMENDMENT DEFAMATION LAW

A great deal of confusion has been generated by courts attempting to distinguish fact from opinion in recent defamation cases. Lacking any clear guidance from the Supreme Court on this matter, courts have desperately sought ways to tell the difference between actionable statements of fact and nonactionable expressions of opinion. This Note examines the various approaches that have developed to accomplish this task. The general conclusion reached is that no approach is foolproof and that the problem is best resolved by concentrating on the constitutional principles and interests at stake.

INTRODUCTION

Under current defamation law, defamatory expressions of opinion are generally considered nonactionable.[1] Defamatory statements of false fact, however, receive no such deference.[2] This disparity of treatment is not based necessarily on the premise that all opinion is innocuous or impotent. Although much opinion is relatively harmless, the incredible power and influence of the modern media is capable of elevating even a simple expression of opinion into a statement quite capable of devastating a reputation. Rather, the protection given to expression of opinion is based more on principles of

1. A defamatory communication is "one which tends to hold the plaintiff up to contempt or ridicule, or to cause him to be shunned or avoided." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 739 (4th ed. 1971). Under the *Restatement*, a defamatory statement in the form of an opinion "is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." RESTATEMENT (SECOND) OF TORTS § 566 (1977). *See infra* notes 142-75 and accompanying text.

2. *See infra* note 10 and accompanying text.

free speech and press governed by the first amendment.[3]

Freedom to express opinions, particularly on matters of public interest,[4] is encouraged as a matter of public policy.[5] It is felt that, on balance, the social gain inherent in the free interchange of opinion far exceeds the injury to reputation that such comment might cause, particularly to those persons in the public eye.[6] Although such freedom inevitably produces erroneous, as well as praiseworthy opinion, it is felt that, in a free society, erroneous opinion is "corrected" by "the competition of other ideas."[7] To allow the propriety of an

3. *See* U.S. CONST. amend. I. The first amendment provides: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (emphasis added).

4. The Supreme Court has recently noted that it is speech on matters of public, rather than private, concern that is the focus of first amendment protection. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 755-63 (1985). As stated by Justice Powell in *Greenmoss:* "We have long recognized that not all speech is of equal importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.' " *Id.* at 758-59 (footnote omitted) (quoting First Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).

5. *See generally* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 156 (1980).

6. *Id.*; *see also* Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942); Pearson v. Fairbanks Publishing Co., 413 P.2d 711, 713 (Alaska 1966); Fisher v. Washington Post Co., 212 A.2d 335, 337 (D.C. 1965).

7. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1964). The premise that in a free society erroneous opinion is "corrected" by "the competition of other ideas" provides the foundation for our system of free speech and press. It is felt that such freedom of expression is a necessary condition to our society's quest for truth. As the Supreme Court has recently stated: "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503-04, *reh'g denied*, 467 U.S. 1267 (1984).

This theory, characterized as the "marketplace of ideas" theory of free speech, has emerged in the opinions of some of our most revered jurists. The concurring opinion of Justice Brandeis in Whitney v. California, 274 U.S. 357 (1927), is a classical exposition of this theory in the first amendment context:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be subtle; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear or punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repres-

opinion to be subject to correction in a court of law would, therefore, greatly compromise our system of free speech and press. To be certain, not all erroneous opinion is "corrected" by "the competition of other ideas." However, when the alternative is judicial intervention and corresponding self-censorship, it is clear that some erroneous statements must be tolerated.[8] As Judge Learned Hand once said, the first amendment "[p]resupposes that the right conclusions are more likely to be reached out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[9]

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sion breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law - the argument in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Id. at 375-76 (footnote omitted); *see also* Dennis v. United States, 341 U.S. 494, 546-53 (1951) (Frankfurter, J., concurring); Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, C.J., dissenting).

The "marketplace of ideas" theory of free speech apparently has its roots in free-market economic theory. Professor Schauer details this analogy:

Under this theory, . . . truth will most likely surface when all opinions may freely be expressed, when there is an open and unregulated market for the trade in ideas. By relying on the operation of the market to evaluate any opinion, we subject opinions to a test more reliable than the appraisal of any one individual or government . . . . The theory can be said to rest in part on the value of an adversary process as a means of discovering truth. The Anglo-American legal system uses the adversary system to determine the facts in a court of law. So also, according to the argument from truth, should society enshrine the adversary system as the method of determining truth in any field of enquiry. Freedom of speech can be likened to the process of cross-examination. As we use cross examination to test the truth of direct evidence in a court of law, so should we allow (and encourage) freedom to criticize in order to test and evaluate accepted facts and receive opinion. Undergirding the analogy to cross-examination is an additional analogy to economic theory. Just as Adam Smith's "invisible hand" will ensure that the best products emerge from free competition, so too will an invisible hand ensure that the best ideas emerge when all opinions are permitted freely to compete.

F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY16 (1982); *see also* J. MILTON, AEROPAGITICA - A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING (1644); J. S. MILL, ON LIBERY, ch. II (1859).

8. As put by Judge Jasen of the New York Court of Appeals: "Erroneous opinions are inevitably put forward in free debate but even the erroneous opinion must be protected so that debate on public issues may remain robust and unfettered and concerned individuals may have the necessary freedom to speak their conscience." Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 380, 366 N.E.2d 1299, 1306, 397 N.Y.S.2d 943, 950, *cert. denied*, 434 U.S. 969 (1977); *cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 270-81 (under certain circumstances, false statements of fact are protected to ensure vigorous public discussion as well).

9. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). Professor Schauer explains this point as follows:

Although the public may not be the body to identify most effectively sound

Erroneous statements of fact, on the other hand, stand on less sturdy constitutional ground.[10] There is no social value in the interchange of false statements of fact.[11] Furthermore, since a statement of fact can only be evaluated in terms of truth or falsity, there is no infringement on freedom of expression by permitting a judge or jury to determine the veracity of such statements.

These differences justify the favorable treatment of expressions of opinion in defamation law. They also require some meaningful way to determine which types of statements should be privileged and which should not. Unfortunately, the fact-opinion distinction does not lend itself to easy resolution. The endeavor of distinguishing expressions of opinion from statements of fact has been criticised by both legal scholars[12] and courts.[13] One well-respected commentator

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policies and true statements, its size and diversity make it the ideal body to *offer* the multitude of ideas that are the fuel of the engine for advancing knowledge. By allowing the freest expression of opinion, we increase the number of alternatives and the number of challenges to received opinion. If some proportion of currently rejected ideas are correct, then increasing the pool of ideas will in all probability increase the total number of correct ideas in circulation, and available to those who can identify them as correct.

F. SCHAUER, *supra* note 7, at 27-28.

10. As Justice Powell stated in *Gertz*:

> [T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

418 U.S. at 340 (citations omitted).

11. *Id.*

12. The defects inherent in the fact-opinion distinction have probably been stated best by Professor Wigmore in his treatise on evidence:

> [I]t is obvious (leaving out the history and considering only the principle) that there is no virtue in any test based on the mere verbal or logical distinction between "opinion" and "fact" . . . . In the first place no such distinction is scientifically possible . . . . [A]s soon as we come to analyze and define these terms for the purpose of accuracy which is necessary in legal rulings, we find that the distinction . . . between "opinion" and "fact" is that the one is certain and sure, the other not, surely a just view of their psychological relation serves to demonstrate that in strict truth nothing is certain. Or we prefer the suggestion of G.C. Lewis that the test is whether "doubt can reasonably exist," then certainly it must be perceived that the multiple doubts which ought to exist would exclude vast masses of indubitably admissible testimony. Or if we prefer the idea that "opinion is inference and fact is "original perception," then it must be understood that no such distinction can scientifically be made, since the processes of knowledge and the sources of illusion are the same for both.

J. WIGMORE, EVIDENCE § 1919 (1978); *see also* W. PROSSER, *supra* note 1, at 820 (the fact-opinion distinction "has proved to be a most unsatisfactory and unreliable one, difficult to draw in practice").

13. *See* Ollman v. Evans, 750 F.2d 970, 1001-02 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985); *see also Pearson*, 413 P.2d at 714 ("[t]he

has stated: "No task undertaken under the law of defamation is any more elusive than distinguishing between the two."[14] The difficulty stems from the fact that there is no readily discernable boundary between fact and opinion.[15] Rather, most statements are said to lie somewhere on a continuum between pure opinion and pure fact.[16] Unfortunately, courts have had an exceedingly difficult time determining where and how to mark the boundaries on this continuum in defamation suits.

Various courts[17] and commentators[18] have devised different ways to make this elusive distinction between fact and opinion, or avoid it altogether.[19] Seldom, however, are the analytical underpinnings of the opinion privilege ever explored or articulated. Instead, courts "enunciate such things as four-factor frameworks, three-pronged tests, and two-tiered analyses"[20] to deal with this problem. Needless to say, confusion and unpredictability abound in this area of the law.

This Note will attempt to explain some of the various approaches that have developed to deal with statements in the form of opinions in defamation law. The Note will first review some of the common law foundations of this area of the law, principally the qualified privilege of fair comment.[21] Supreme Court adjudication affecting this area of the law will then be examined.[22] The Note will then discuss some of the current approaches to the opinion problem in defamation law, namely the "totality of circumstances" approach,[23] and Section 566 of the *Restatement (Second) of Torts*.[24] The general conclusion reached by this Note is that, in most cases, it is futile to attempt to draw any bright line between fact and opinion and that the problem

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distinction between a fact statement and an opinion . . . is so tenuous in most instances, that any attempt to distinguish between the two will lead to needless confusion").

14. R. SACK, *supra* note 5, at 155.

15. *See Ollman*, 750 F.2d at 1021-23 (S. Robinson, C.J., dissenting in part).

16. *Id.* at 1021.

17. *See infra* notes 76-103 and accompanying text.

18. *See, e.g.*, Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-line Rule*, 72 GEO. L.J. 1817, 1851-53 (1984) (requiring publishers to label their commentaries as "opinion" by placing them strictly on the editorial page would greatly facilitate the distinction).

19. *See, e.g.*, Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 869-85 (1984) (same); Comment, *Structuring Defamation Law to Eliminate the Fact Opinion Determination: A Critique of* Ollman v. Evans, 71 IOWA L. REV. 913 (1986) (since opinions cannot be false, requiring plaintiff to prove falsity will eliminate the need for the court to make the fact-opinion distinction).

20. *Ollman*, 750 F.2d at 994 (Bork, J., concurring).

21. *See infra* notes 31-58 and accompanying text.

22. *See infra* notes 59-74 and accompanying text.

23. *See infra* notes 76-137 and accompanying text.

24. *See infra* notes 138-211 and accompanying text.

is best resolved by concentrating on the principles and interests at stake.

I. BACKGROUND

Before the United States Supreme Court began applying constitutional principles to defamation law,[25] common-law principles generally controlled. Early defamation law was essentially a law of strict liability; the plaintiff bore no burden of proving fault on the part of the defendant.[26] The plaintiff had only to offer the alleged defamatory statement into evidence. The court then determined whether the statement was capable of bearing a defamatory meaning.[27] If the statement was found not to be defamatory, judgment was entered for the defendant. If, however, the statement was determined to have a defamatory meaning, it was then for a jury to decide whether, in fact, the statement had been interpreted in its defamatory sense.[28]

Initially, truth was the only available defense.[29] Defendants had a particularly difficult time of pleading and proving truth, however, because once the plaintiffs had established the defamatory content of the publication, a presumption of falsity attached.[30] Therefore, statements incapable of being proven true or false, namely opinions, necessarily led to verdicts in favor of plaintiffs.[31]

This early defamation scheme eventually proved to be unsatisfactory. A certain tension inevitably developed between the defend-

25. Supreme Court adjudication in defamation law has dealt mainly with the standard of fault applicable in defamation suits. *See infra* notes 237-49 and accompanying text.

26. According to the *Restatement*, a defamation plaintiff had the burden of proving:

(a) the defamatory character of the communication;
(b) its publication by the defendant;
(c) its application to the plaintiff;
(d) the recipient's understanding of its defamatory meaning;
(e) the recipient's understanding of it as intended to be applied to the plaintiff;
(f) special harm resulting to the plaintiff from its publication; and
(g) abuse of a conditionally privileged occasion.

RESTATEMENT OF TORTS § 613 (1938). The plaintiff bore no burden of proving fault on the part of the defendant. Furthermore, the defendant's intent, even if wholly innocent, was considered irrelevant. Liability arose if there had been an "unprivileged publication of false and defamatory matter." *Id.* § 558. It made no difference whether the defendant did not intend the matter to be defamatory or to harm the plaintiff's reputation. *See id.* § 580.

27. *See id.* § 614 (1).

28. *Id.* § 614(2).

29. The truth of a defamatory statement of fact operated as a complete defense to an action for defamation. *See id.* § 582.

30. *See* RESTATEMENT (SECOND) OF TORTS § 581A comments a and b (1977); *see also* W. PROSSER, *supra* note 1, at 804; R. SACK, *supra* note 5, at 134.

31. *See* Note, *Fair Comment*, 62 HARV. L. REV. 1207, 1212-13 (1949).

ant's freedom of expression and the plaintiff's interest in protecting his reputation.[32] It was recognized that certain types of statements, incapable of being proven true or false in any objective sense of those terms, should be entitled to a limited form of immunity.[33] This led to the establishment of the qualified privilege of fair comment.[34]

In most cases where the defendant could not prove the truth of his defamatory statement, the privilege of fair comment became his only hope. This privilege, however, was of limited availability. In order to qualify as fair comment, the criticism had to meet at least three requirements: (1) it had to relate to a matter of "public concern,"[35] (2) it had to be based on facts truly stated[36] or "otherwise known or available,"[37] and (3) it could not be made maliciously, i.e., it had to represent the critic's actual opinion,[38] and it could not be made for the sole purpose of causing harm to another.[39]

Fair comment permitted a publisher to critize only so much of another's activities that were of a public concern.[40] The defendant was required to satisfy the court that the subject matter of his comment was of such interest to the public that he should be free to make it despite the injury to the plaintiff's reputation.[41] Typically, those who were subject to fair comment included:

> persons, institutions or groups who voluntarily injected themselves into the public scene or affected the community's welfare, such as public officials, political candidates, community leaders from the private sector or private enterprises which affected public welfare, persons taking a public position on a matter of public concern, and those who offered their creations for public approval such as artists, performers and athletes.[42]

To qualify as fair comment, the criticism also had to represent the actual opinion of the publisher and could not be made solely for the

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32. *See id.*; *see also* A. MIEKLEJOHN, POLITICAL FREEDOM, ch. 1 (1960).
33. *See* Note, *supra* note 31, at 1207-09.
34. *See* RESTATEMENT OF TORTS § 606 (1938).
35. *See id.* § 606.
36. *See id.* § 606(1)(a)(i).
37. *See id.* § 606(1)(a)(ii).
38. *See id.* § 606(1)(b).
39. *See id.* § 606(1)(c).
40. *See id.* comment a. Comment on the private lives of public figures or officials was permitted only to the extent that their private conduct affected their public character. *Id.* comment e. For such comment to be privileged, it additionally could "not be so fantastic that a man of reasonable judgment and intelligence could not entertain it." *Id.* comment f. In effect, comment on a public official's or public figure's private life had to be reasonable.
41. *See id.* § 613 (2)(c); Note, *supra* note 31, at 1207.
42. Mashburn v. Collin, 355 So. 2d 879, 882 (La. 1977) (citation omitted); *see also* RESTATEMENT OF TORTS § 606 comment a (1938); R. SACK, *supra* note 5, at 169-72.

purpose of causing harm to the plaintiff.[43] As one commentator has put it: "Implicit in the term 'fair comment' is the requirement that opinions be 'fair.' "[44] Accordingly, the *Restatement*, in addition to requiring that the criticism be the critic's actual opinion, required "that it be published in part at least for the purpose of giving to the public the benefit of the opinion which they are entitled to know."[45] If the criticism was published "solely from spite or ill will and for the purpose of causing harm to the person criticised," it was not privileged.[46]

Finally, to qualify as fair comment, the facts supporting the criticism had to be disclosed or otherwise known to the recipient.[47] Moreover, the facts upon which the criticism was based had to be true, or if they were not true, the critic must have been privileged to state them.[48] Disclosure was required so that the recipient of the communication could judge for himself the propriety of the author's deductions from the facts.[49] It was felt that "[a]n unsound comment on disclosed facts should reflect more on the person making it than the person about whom the comment is made."[50] If the supporting facts were not disclosed, however, the comment carried with it the implication of supporting facts and was thus "more than the mere

43. *See* RESTATEMENT OF TORTS § 606 and comment d (1938); *see also* Post Publishing Co. v. Hallam, 59 F. 530, 539 (6th Cir. 1893); Cherry v. Des Moines Leader, 114 Iowa 298, 303-04, 86 N.W. 323, 323 (1901); Coleman v. MacLennan, 78 Kan. 711, 739-42, 98 P. 281, 281-82 (1908); Eikhoff v. Gilbert, 124 Mich. 353, 359, 83 N.W. 110, 112 (1900).

44. R. SACK, *supra* note 5, at 174 (citations ommitted).

45. RESTATEMENT OF TORTS § 606 comment d (1938).

46. *Id.*

47. *Id.* § 606 (1)(a)(ii). As put by the drafters of Section 606:

> Comment or criticism is an expression of the opinion of the commmentator or critic upon the facts commented upon or criticised. If the facts are not known, a statement, though in form the expression of an opinion, carries with it the implication of facts to support it and is thus more than the mere expression of an opinion. To be privileged comment under the rule stated in this Section, therefore, the facts upon which the opinion is based must be stated or they must be known or readily available to the persons to whom the comment or criticism is addressed, as in the case of a newspaper criticism of a play or a review of a book.

Id. comment b (citation omitted).

48. *Id.* § 606(1)(a)(i); *see also id.* comment b.

49. *See* R. SACK, *supra* note 5, at 165-66; *see also* Parsons v. Age-Herald Publishing Co., 181 Ala. 439, 450, 61 So. 345, 350 (1913); Edmonds v. Delta Democrat Publishing Co., 230 Miss. 583, 591, 93 So. 2d 171, 173 (1957); Coleman v. Newark Morning Ledger Co., 29 N.J. 357, 381-82, 149 A.2d 193, 206 (1959); Leers v. Green, 24 N.J. 239, 250-53, 131 A.2d 781, 787-88 (1957).

50. R. SACK, *supra* note 5, at 166; *see also* Kapiloff v. Dunn, 27 Md. App. 514, 544 n.33, 343 A.2d 251, 270 n.33 (1975) ("[i]f an individual publishes an unreasonable opinion based on vague and invalid standards he libels himself and not the object of his opinion."), *cert. denied*, 426 U.S. 907 (1976).

expression of an opinion."[51] One well-respected commentator explained the rationale behind the disclosure requirement as follows:

> The distinction is fundamental, then, between comment upon given facts and the direct assertion of facts . . . . If the facts are stated separately, and the comment appears as an inference drawn from those facts, any injustice that the imputation might occasion is practically negatived by reason of the fact that the reader has before him the grounds upon which the unfavorable inference is based. When the facts are truthfully stated, comment thereon, if unjust, will fall harmless, for the former furnish a ready antidote for the latter. The reader is then in a position to judge whether the critic has not by his unfairness or prejudice libelled himself rather than the object of his animadversion. But if a bare statement is made in terms of a fact, or if facts and comment are so intermingled that it is not clear what purports to be inference and what is claimed to be fact, the reader will naturally assume that the injurious statements are based upon adequate grounds known to the writer.[52]

Illustrative of the disclosure requirement under fair comment is *Eikhoff v. Gilbert*.[53] In *Eikhoff*, a circular addressed to voters, requesting them to vote against the incumbent political candidate "because in the last legislature he championed measures opposed to the moral interests of the community,"[54] was not entitled to protection under fair comment.[55] Since the factual basis for this assertion had not been made specific, "it afforded no one an opportunity to judge whether the statement was a proper deduction from the facts upon which it was based or not."[56] If, however, the underlying facts had been disclosed, the statement would clearly have been privileged. This would be true even though the comment was unreasonable or highly vituperative. As stated by the drafters of Section 606: "If the public is to be aided in forming its judgment upon matters of public interest by a free interchange of opinion, it is essential that honest criticism and comment no matter how foolish or prejudiced, be privileged."[57] Accordingly, as long as the comment bore some relation-

51. RESTATEMENT OF TORTS § 606 comment b.

52. Veeder, *Freedom of Public Discussion*, 23 Harv. L. Rev. 411, 419-20 (1910).

53. 124 Mich. 353, 83 N.W. 110 (1900).

54. *Id.* at 354, 83 N.W. at 111.

55. *Id.* at 357, 83 N.W. at 114.

56. *Id.* at 356, 83 N.W. at 113.

57. RESTATEMENT OF TORTS § 606 comment c (1938). This principle apparently derives its origin from the "marketplace of ideas" theory of free speech expounded by John Stuart Mill and John Milton. *See supra* note 7. Mill's argument has been paraphrased as follows:

> Only by allowing expression of the opinion we think false do we allow for the possiblity that that opinion may be true. Allowing contrary opinions to be expressed is the only way to give ourselves the opportunity to reject the received opinion when the received opinion is false. A policy of suppressing

ship to the facts upon which it was based, it made no difference how erroneous it appeared to be.[58]

In summary, the privilege of fair comment permitted publishers to criticize only so much of a person's activities that were of a public concern. To qualify as fair comment, the criticism also had to represent the actual opinion of the publisher and could not be made solely for the purpose of causing harm to the plaintiff. The most important requirement under fair comment, however, involved the disclosure of supporting facts. The drafters of the *Restatement* recognized the intimate relationship between the disclosure requirement and the constitutional principles underlying the opinion privilege. Criticism under the first amendment is privileged because it has the capacity to be "corrected" by the "competition of other ideas." However, in order for the "competition of other ideas" to be an effective correction device, opinion must indeed have the capacity to be corrected. As the drafters of the *Restatement* realized, this generally requires that the critic disclose the basis of his opinion, i.e., the underlying facts.

II. Supreme Court Adjudication Affecting the Fair Comment Privilege

Prior to 1974, the Supreme Court did not decide any cases having a direct bearing on the privilege of fair comment. Rarely was the privilege even addressed.[59] The only case in which the Court gave fair comment serious consideration was *New York Times Co. v. Sullivan*.[60] In *Sullivan*, the defendant newspaper company printed a political advertisement which included several false statements of fact concerning repressive police action against civil rights demonstrators in Montgomery, Alabama.[61] The plaintiff, Sullivan, Commissioner of Public Affairs, brought suit alleging that since the conduct of Montgomery police was his responsibility, the advertisement of police misconduct was, in effect, an advertisement of his own mis-

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false beliefs will in fact suppress some true ones, and therefore a policy of suppression impedes the search for truth.

F. Schauer, *supra* note 7, at 22.

58. *See* Restatement of Torts § 606 comment c. If the comment bears no rational relationship to the facts upon which it is made, "it may well be taken to imply the existence of other undisclosed defamatory facts." *Id.* (citation omitted).

59. In several cases, although it did not have the opportunity to apply it, the Court did recognize the continuing role of the fair comment privilege. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 152 n.18 (1967); Time, Inc. v. Hill, 385 U.S. 374, 409 n.6 (1967) (Harlan, J., concurring in part and dissenting in part); Rosenblatt v. Bauer, 383 U.S. 75, 84 (1966); Garrison v. Louisiana, 379 U.S. 64, 76-77 n.10 (1964); Farmers Educ. & Cooperative Union of Am. v. WDAY, Inc., 360 U.S. 525, 530 (1959).

60. 376 U.S. 254 (1964).

61. *See id.* at 256-64.

conduct.[62] Due to the factual nature of the statements at issue, the fair comment defense was not raised at trial;[63] however, the Supreme Court, in a footnote, raised the fair comment issue:

> Insofar as the proposition means only that the statements about police conduct libeled respondent by implicitly criticizing his ability to run the Police Department, recovery is also precluded in this case by the doctrine of fair comment. Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expressions of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defensible if the public official proves actual malice, as was not done here.[64]

Ten years later, a profound change in the law of fair comment was initiated as a result of dicta found in the Court's opinion in *Gertz v. Robert Welch, Inc.*[65] Justice Powell, writing for the Court, penned what has become the cornerstone of the *absolute* privilege for opinion:

> We begin with the common ground. 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 the competition of other ideas. But there is no constitutional value in false statements of fact.[66]

This reiteration of the classical "marketplace of ideas" theory of free speech[67] has been interpreted as transforming the common law *qualified* privilege of fair comment into the *absolute* constitutional privilege of opinion. The Court's assertion that, as a matter of constitutional law, there can be "no such thing as a false idea," together with the implication that only a falsehood is actionable in a defamation suit, has lead to a rather unfortunate syllogism: "A defamation is actionable only if it is false; opinions cannot be false; therefore opinions can *never* be actionable even if defamatory."[68]

When the *Gertz* dicta is interpreted as granting absolute protection to all opinion, it becomes irrelevant whether the defendant's criticism is of a "public concern,"[69] or whether the criticism is made solely for the purpose of causing harm to the plaintiff,[70] or most im-

62. *Id.* at 258-60.

63. The trial judge ruled that the statements in the advertisement were libelous per se. *See id.* at 262-64.

64. *Id.* at 292 n.30 (citations omitted); *see also infra* notes 242-44 and accompanying text (discussing the *New York Times* "actual malice" standard).

65. 418 U.S. 323 (1974).

66. *Id.* at 339-40 (footnote omitted).

67. *See supra* note 7 and accompanying text.

68. R. SACK, *supra* note 5, at 154 (emphasis added).

69. *See supra* notes 40-42 and accompanying text.

70. *See supra* notes 43-46 and accompanying text.

portantly, whether there has been a proper disclosure of supporting facts.[71] In effect, when the *Gertz* dicta is interpreted in this manner, the traditional requirements under the privilege of fair comment no longer apply. Whether this result was intended or not,[72] the American Law Institute,[73] as well as the majority of lower courts,[74] have accepted the dicta as controlling law.

III. THE *GERTZ* AFTERMATH

The demise of the qualified privilege of fair comment has, unfortunately, given new life to the struggle to distinguish fact from opinion. Interpreting *Gertz* as granting absolute protection for opinion, courts have desperately sought ways to distinguish nonactionable expressions of opinion from actionable statements of fact.[75] Basically, two

71. *See supra* notes 47-58 and accompanying text.

72. *See infra* notes 252-55 and accompanying text.

73. *See* RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977). The American Law Institute, however, has not *completely* accepted the absolute protection for opinion suggested by *Gertz*. According to the *Restatement*, the *Gertz* dictum only applies to "pure" opinions. *See id.* comment b. A "pure" opinion "occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications, or character." *Id.* In effect, although giving recognition to the *Gertz* dicta, the *Restatement* has retained the disclosure requirement found under the privilege of fair comment. *See infra* notes 138-47 and accompanying text.

74. Although the "public concern" and "absence of malice" requirements are no longer applicable to statements in the form of opinion, at least in the same way they applied under fair comment, *see infra* notes 237-51 and accompanying text, most courts have interpreted *Gertz* in the same manner as the *Restatement*, holding that it applies only to expressions of "pure" opinion. *See, e.g.*, Keller v. Miami Herald Publishing Co., 778 F.2d 711, 718 (11th Cir. 1985); Lauderback v. American Broadcasting Co., 741 F.2d 193, 195-98 (8th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); Hammerhead Enter., Inc. v. Brezenoff, 707 F.2d 33, 40 (2d Cir.), *cert. denied*, 464 U.S. 892 (1983); Lewis v. Time, Inc., 710 F.2d 549, 552-56 (9th Cir. 1983); Church of Scientology v. Cazares, 638 F.2d 1272, 1286 (5th Cir. 1981); Avins v. White, 627 F.2d 637, 642 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980); Orr v. Argus-Press Co., 586 F.2d 1108, 1114-15 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979); Buckley v. Littell, 539 F.2d 882, 896 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *see also* MacConnell v. Mitten, 131 Ariz. 22, 25, 638 P.2d 689, 692 (1981); Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 117-18, 448 A.2d 1317, 1324 (1982); Hearst Corp. v. Hughes, 297 Md. 112, 131, 466 A.2d 486, 495-96 (1983); Pritsker v. Brudnoy, 389 Mass. 776, 778, 452 N.E.2d 227, 228-31 (1983); Henry v. Halliburton, 690 S.W.2d 775, 782 (Mo. 1985) (en banc); Nevada Indep. Broadcasting Corp. v. Allen, 99 Nev. 404, 410, 664 P.2d 337, 342-43 (1983); Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 135, 516 A.2d 220, 231 (1986); Steinhilber v. Alphonse, 68 N.Y.2d 283, 289-90, 501 N.E.2d 550, 552-53, 508 N.Y.S.2d 901, 903-04 (1986); Havalunch, Inc. v. Mozza, 294 S.E.2d 70, 75 (W. Va. 1981).

75. For a good discussion of the various approaches courts have devised to distinguish expressions of opinion from statements of fact, see Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege*, 34 RUTGERS L. REV. 80, 104-14 (1981). *See also* Note, *supra* note 18, at 1830-45.

approaches have emerged to deal with this problem: the "totality of circumstances" approach and the approach suggested in Section 566 of the *Restatement (Second) of Torts*.

A. The "Totality of Circumstances" Approach

Several courts have adopted what is known as the "totality of circumstances" approach to distinguishing statements of fact from expressions of opinion.[76] Under the "totality of circumstances" approach, a court is required to "analyze the totality of circumstances in which the statements are made to decide . . . whether the average reader would view the statement[s] as fact or, conversely, opinion."[77] Essentially, the "totality of circumstances approach" is a

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76. *See, e.g., Janklow*, 788 F.2d at 1302; *Ollman*, 750 F.2d at 979; Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980); Brown & Williamson Tobacco Corp. v. Jacobson, 644 F. Supp. 1240, 1255-57 (N.D. Ill. 1986); Liberty Lobby, Inc. v. Dow Jones & Co., Inc., 638 F. Supp. 1149, 1154 (D.D.C. 1986); Karp v. Hill and Knowlton, Inc., 631 F. Supp. 360, 364-65 (S.D.N.Y. 1986); Price v. Viking Press, Inc., 625 F. Supp. 641, 646-48 (D.Minn. 1985).

77. *Ollman*, 750 F.2d at 979. In *Ollman*, plaintiff Bertoll Ollman sued syndicated columnists Rowland Evans and Robert Novak for libel. In March 1978, Ollman, a political science professor at New York University, was nominated by a departmental search committee to head the Department of Government and politics at the University of Maryland. *Id.* at 972. This nomination, however, proved to be quite controversial due to Ollman's avowed Marxist political beliefs. *Id.*

In the heat of this controversy, Evans and Novak wrote a column entitled "The Marxist Professor's Intentions." *See* Evans and Novak, *The Marxist Professor's Intentions*, Wash. Post, May 4, 1978, at A27, col. 4. The article appeared in *The Washington Post* and other major newspapers across the country. The article generally characterized Ollman as nothing more than a "political activist" with designs of using his classroom as an instrument "to convert students to socialism." *Id.* It is not surprising that Ollman never received the appointment.

In analyzing *Ollman*, three statements made by Evans and Novak are of particular concern. Ollman claimed the following comments were defamatory statements of fact:

(1) *His candid writings avow his desire to use the classroom as an instrument for preparing what he calls "the revolution."* Ollman, 750 F.2d at 972 (emphasis in original).

(2) *While Ollman is described in new accounts as a "respected Marxist scholar," he is widely viewed in his profession as a political activist. Id.* (emphasis in original).

(3) Referring to Ollman's principal scholarly work: *Such pampleteering is hooted at by one political scientist in a major eastern university, whose scholarship and reputation as a liberal are well known. "Ollman has no status within the profession, but is a pure and simple activist," he said. Id.* at 973. (Emphasis in original).

After examining the above statements, the United States District Court for the District of Columbia entered summary judgment in favor of Evans and Novak. *See* Ollman v. Evans, 479 F. Supp. 292 (D.D.C. 1979), *aff'd*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 105 S. Ct. 2662 (1985). The court characterized the statement as constitutionally protected opinion. 479 F. Supp. at 294. Ollman appealed. The United States Court of Appeals for the District of Columbia Circuit

conglomeration of various other approaches developed by courts attempting to distinguish between fact and opinion.[78] The approach consists of the following four factors: (1) the precision of the language used;[79] (2) the verifiability of the statements made;[80] (3) the literary context in which the statements were made;[81] and (4) the broader social context in which the statements were made.[82]

In considering the precision of the language used by a defendant, a court is required to determine whether the allegedly defamatory statement has a precise meaning and, thus, is likely to give rise to "clear factual implications."[83] Whether a particular statement is capable of creating "clear factual implications" depends on "social normative systems."[84] The example frequently given is the accusation of criminal conduct. Most accusations of criminal conduct are understood by the average person as implying extremely damaging facts.[85]

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reversed and remanded the case for further proceedings. *See Ollman*, 713 F.2d 838, 839 (D.C. Cir. 1983) (per curiam), *vacated*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 105 S. Ct. 2662 (1985). Two months later, the entire court of appeals voted to vacate the earlier opinion and rehear the case en banc. *Ollman*, 713 F.2d 838 (D.C. Cir. 1983).

Applying the "totality of circumstances" test to the statements found in *Ollman*, Judge Starr concluded that all three assertions were protected opinion. *Ollman*, 750 F.2d 989-90. Starr began his analysis by examining the literary and broader social context in which the statements were made. After noting that Evans' and Novak's column was conspicuously placed on the "Op-Ed" page and that the article generally concerned a debated public issue, Starr concluded that their statements were "[p]lainly part and parcel of [the] tradition of social and political criticism. *Id.* at 986 (footnote omitted).

After reviewing the context, Starr turned to the indiviual statements. Referring to the statement characterizing Ollman as a "political activist," Starr noted that such a phrase "is hopelessly imprecise and indefinite." *Id.* at 987. Turning to Evans' and Novak's assertions regarding Ollman's objectives as an instructor, Starr noted that "this statement does not have a well-defined meaning or admit of a method of proof as disproof," *id.* at 989, and that it was clearly just their interpretation of Ollman's writings. *Id.* Finally, with respect to the anonymous professor's claim that "Ollman has no status within the profession," Starr found a "confluence of factors," suggesting the statement to be opinion. *Id.* at 989-90. After noting that the article was found on the "Op-Ed page," that the person making the comment preferred to remain anonymous, and that the article included several facts which negated this claim, Starr concluded that "the charge of 'no status' in this context would plainly appear to the average reader to be 'rhetorical hyperbole' . . . which in turn would lead the reader to treat the statement as one of opinion." *Id.* at 990.

78. *See id.* at 979-84.
79. *See id.* at 979-81.
80. *See id.* at 981-82.
81. *See id.* at 982-83.
82. *See id.* at 983-84.
83. *Id.* at 980.
84. *Id.*
85. *See* Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980). In

Some statements, however, are said to be so "loosely definable" or "variously interpretable"[86] that they are generally incapable of giving rise to clear factual implications.[87] Typical examples of such statements are derogatory epithets such as "bastard," "scoundrel," "bum," "jerk," and other remarks regularly tossed about in heated argument. This is not to say that such statements cannot be damaging. The point is that these types of remarks are usually so devoid of factual content that, in reality, they are little more than general expressions of dislike.

The extent to which a statement is capable of being verified is another factor considered under the "totality of circumstances" approach.[88] This factor appears to be based largely on the dictum in *Gertz* stating that "there is no such thing as a false idea."[89] Accordingly, if a statement is incapable of being verified in terms of truth or falsity, it is likely to be deemed an opinion.[90]

Cianci, a mayor who was seeking reelection sued a magazine publisher for printing an article stating that the mayor had once been accused of rape and had all charges dropped after he made a $3000 "payoff." *Id.* at 56. The court held that the article was much more than mere opinion:

> The charges of rape and obstruction of justice were not employed in a "loose, figurative sense" or as "rhetorical hyperbole." A jury could find that the effect of the article was not simply to convey the idea that Cianci was a bad man unworthy of the confidence of the voters of Providence but rather to produce a specific image of depraved conduct—committing rape with the aid of trickery, drugs and threats of death or serious injury, and the scuttling of a well-founded criminal charge by buying off the victim . . . . To call such charges merely an expression of "opinion" would be to indulge in Humpty-Dumpty's use of language.

Id. at 64; *see also Rinaldi*, 42 N.Y.2d at 381-82, 366 N.E.2d at 1307, 397 N.Y.S.2d at 951 (discussing allegation of "corruption").

86. *Ollman*, 750 F.2d at 980.

87. Particularly illustrative of this point is Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). In *Buckley*, an author's political essay accused columnist and author William F. Buckley, Jr. of being a "fellow traveler" of "fascists." *Id.* at 885 n.1. Noting the wide disparity of meaning attached to the term "facism," and that it was not clear from the context in which that term was used which meaning was being asserted, the court declined to develop its own definition for the term. The court concluded that such remarks "cannot be regarded as having been proved to be statements of fact, among other reasons, because of the tremendous imprecision of the meaning and usage of these terms in the realm of political debate . . . ." *Id.* at 893.

88. *See Janklow*, 788 F.2d at 1302; *Ollman*, 750 F.2d at 981-82.

89. *Gertz*, 418 U.S. at 339. Harper and James explain this principle as follows:

> A statement of fact is one capable of the quality of truth or falsity. A statement of opinion does not have this quality. Shortly speaking, therefore, an opinion is never "true" or "false" in the same sense as a statement of fact. An opinion is a comment on or interpretation of fact. It is always related to the facts it purports to interpret. Depending on its conformity with sound critical standards, the opinion may be "sound" or "unsound," "good" or "bad," "reasonable" or "unreasonable," but never "true" or "false."

1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.8 (1956).

90. *See* Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), *cert. denied sub*

The third factor employed under the "totality of circumstances" approach involves the literary context in which the assertion is made.[91] This factor requires a court to review the entire article in which the allegedly factual statement is found to place it into context.[92] The use of any "cautionary language"[93] such as "in my opinion" must also be considered.[94]

When placed in the context of the article in which they appear, many seemingly factual statements are readily disarmed. In *Myers v. Boston Magazine Co.*,[95] the Massachussetts Supreme Judicial Court held the defendant-publisher's statement that a local sportscaster was "the only newscaster in town who is enrolled in a course for remedial speaking"[96] to be protected opinion. The statement appeared in an article lampooning local sports celebrities in a series of one-liners. After placing the statement in context, the court concluded that the average reader would not take the statement literally.[97]

The last factor a court is required to consider under the "totality of circumstances" approach is the broader social context in which the statement is made.[98] "Some types of writing or speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact."[99] For example, seemingly factual remarks flung about in public debate will often be understood to be nothing more than "rhetorical hyperbole"[100] due to the nature of the forum in which they are made. Particularly illustrative of this point is *Gregory v. McDonnell Douglas Corporation.*[101] In

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nom. Hotchner v. Doubleday & Co., 434 U.S. 834 (1977). A related issue is whether the "falsity" question is one for the jury. Judge Starr, writing for the court in *Ollman*, concedes that the resolution of verifiability "will often be difficult to assay." *Ollman*, 750 F.2d at 982. Nevertheless, he feels that "[t]rial judges have rich experience in the ways and means of proof and so will be particularly well situated to determine what can be proven." *Id.* Accordingly, Starr feels the issue should be removed from the province of the jury. *Id.* at 981. Several commentators, however, have disagreed with Starr. *See, e.g.*, Franklin & Brussel, *supra* note 19, at 865-66; Comment, *supra* note 19, at 932-33.

91. *See Janklow*, 788 F.2d at 1302-03, *Ollman*, 750 F.2d at 982-83; *see also Gregory*, 17 Cal. 3d at 601, 552 P.2d at 428, 131 Cal. Rptr. at 644.

92. *Ollman*, 750 F.2d at 982; Mashburn v. Collin, 355 So. 2d 879, 885 (La. 1977) (restaurant review).

93. *Ollman*, 750 F.2d at 982-83.

94. *See Information Control Corp.*, 611 F.2d at 784 (noting that the allegedly libelous statement was preceded by the phrase "in the Opinion of Genesis' management").

95. 380 Mass. 336, 403 N.E.2d 376 (1980).

96. *Id.* at 338, 403 N.E.2d at 377.

97. *See id.* at 342-43, 403 N.E.2d at 379.

98. *See Janklow*, 788 F.2d at 1303; *Ollman*, 750 F.2d at 983.

99. *Ollman*, 750 F.2d at 983.

100. Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970).

101. 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976).

Gregory, a disagreement arose between the defendant employer and its employees over the implementation of guidelines established to govern a retroactive cost of living pay increase. Before an agreement had been reached, the employees' union distributed various memoranda opposing the employer's position. The employer responded by issuing statements in a bulletin suggesting that any delay in reaching an agreement was due to certain union officials who were using their political power to "seek personal gain and political prestige rather than to serve the best interests of the members they were supposed to represent."[102] The named union officials brought an action for defamation claiming the statements to be factual. The court characterized the assertions as opinion stating:

> [W]here potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.[103]

The "totality of circumstances" approach can be divided into two basic parts or tests. Factors one, three, and four (the precision of the language used, literary context, and social context) require a court to analyze the varying levels of context in which the statement was made. Factor two (the veracity of the statement) requires a court to determine whether the statement can be proved true or false. These tests have been the subject of considerable criticism.[104]

Proponents of the falsity approach take the position that requiring the defamation plaintiff to prove the falsity of the defendant's assertions would result in the avoidance of the fact-opinion distinction altogether.[105] The argument is that since opinions cannot be false, a plaintiff's case based on expressions of opinion will never make it past the pleading stage because plaintiff will be unable to prove falsity.[106] Therefore, proponents argue, the court will avoid having to determine whether a statement is fact or opinion.[107] The burden of proving the statement is factual falls on the plaintiff by having to prove falsity. The additional requirement, that plaintiff must prove falsity with "convincing clarity,"[108] further ensures that statements

102. *Id.* at 599, 552 P.2d at 427, 131 Cal. Rptr. at 643.

103. *Id.* at 601, 552 P.2d at 428, 131 Cal. Rptr. at 644.

104. *See* Note, *supra* note 18, at 1833-39; Note, *supra* note 75, at 105-14.

105. *See, e.g.*, Comment, *supra* note 19, at 931-34; Franklin and Bussel, *supra* note 19, at 865-88.

106. *See* Franklin & Bussel, *supra* note 19, at 865-66.

107. *Id.* at 869.

108. *Id.* at 864. Franklin and Bussel argue:

> Unless the courts require clear and convincing proof on the issue of the statement's falsity, a public plaintiff would be able to prevail in the case sim-

which "do not clearly lend themselves to being proved false"[109] never make it to the jury.

The conceded difficulty with this approach is that "[s]tatements fall along a continuum of greater or lesser susceptibility to disproof, and the line between judicially disprovable and nondisprovable statements is not self-defining."[110] It is claimed, however, that placing the emphasis on disprovability "at least focuses the courts' judgment on the correct issue in the same way that the catchall, undefined word, 'opinion' obscures the issue."[111]

This approach appears to have recently been given some support by the United States Supreme Court in *Philadelphia Newspapers, Inc. v. Hepps*.[112] In *Hepps*, the appellant published a series of articles in its Philadelphia newspaper suggesting that the appellee, a principal shareholder in a franchising corporation, had ties to organized crime and used those ties to influence government officials.[113] The Pennsylvania Supreme Court held that the burden of proving the truth of the assertion rested on the publisher.[114] The Supreme Court reversed, holding that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of a public concern."[115] In such cases, plaintiff must prove falsity.

The effect of *Hepps* on the fact-opinion distinction, however, remains uncertain. The Court did not address the issue of defamatory opinion and it is not clear whether the decision was intended to have any effect on this area of law. It is unlikely, however, that *Hepps* was intended to have the effect desired by some commentators.

The American Law Institute has consistently maintained the position that statements in the form of opinion do not have to be false to be actionable.[116] The reason for this position is that applying the

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ply by creating sufficient doubt in the jurors' minds as to the truth of the statement and then by persuading those jurors to disbelieve the defendant's protestations about honest belief or lack of recklessness. In other words, courts should refrain from offering official determinations of what is true and what is false in all but the clearest cases because an error in the court's judgment in favor of the plaintiff would produce a much greater cost in terms of the imposition of "official truth" and self-censorship than would a similar error in favor of the defendant.

Id. at 864-85 (footnote omitted).

109. *Id.* at 864.

110. *Id.* at 879.

111. *Id.*

112. 106 S. Ct. 1558 (1986).

113. *Id.* at 1560.

114. *Id.* at 1561.

115. *Id.* at 1564.

116. *See* RESTATEMENT (SECOND) OF TORTS § 566 comment a (1977). Under the first *Restatement*, "[t]he expression of opinion was also actionable in a suit for defamation despite the normal requirement that the communication be false as well as de-

falsity requirement to statements in the form of opinion would permit publishers to defame by implication. While it is true that opinions can never be "true" or "false" in any objective sense of those terms, it does not follow that they cannot *imply* the existence of false statements of fact as their basis.[117] This idea is best illustrated by example. Assume A writes B a letter stating that he thinks C is "utterly devoid of moral principles."[118] Assuming A can be taken literally, most people reading such a statement would believe that A must have a pretty good reason for making it. In other words, they would infer the existence of defamatory facts to support A's assertion. If C is actually a scrupulously moral person, he would be defamed by B's inference of false defamatory facts tending to support A's assertion.[119] Nevertheless, under the falsity approach, C would be unable to recover since he could not prove the falsity of A's statement.[120] Under the *Restatement*, however, such statements are generally actionable since they imply the existence of undisclosed defamatory facts as their basis.[121]

The falsity approach suffers not only from under-inclusiveness, but over-inclusiveness as well. A literal application of the test can lead to some statements being characterized as factual that would have been privileged opinion under fair comment. Consider, for example, the following passage in a letter by A to C: "I believe all red-haired, green-eyed people are alcoholics. B has red hair and green eyes. B must be an alcoholic." A's assertion "B must be an alcoholic" is clearly susceptible to being categorized as true or false.[122] However, since the passage indicates the facts upon which A's deduction is based, it would not be actionable under the *Restatement*.[123] Proponents of the falsity approach concede its difficulty with respect to these types of statements:

> On the continuum between the disprovable and the nondisprov-

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famatory. This position was maintained even though the truth or falsity of an opinion— as distinguished from a statement of fact— is not a matter that can be objectively determined and truth is a complete defense to a suit for defamation." RESTATEMENT (SECOND) OF TORTS § 566 comment a (1977) (citation omitted). The falsity requirement is similarly inapplicable to statements in the form of opinions under the second *Restatement*. *See id.* § 566; *see also* Christie, *Defamatory Opinions and the Restatement (Second) of Torts*, 75 MICH. L. REV. 1621, 1625-32 (1977).

117. *See infra* notes 139-48 and accompanying text.

118. RESTATEMENT (SECOND) OF TORTS § 566 comment b (1977).

119. *See id.*

120. *See* Franklin & Bussel, *supra* note 19, at 882 (discussing this particular hypothetical).

121. *See* RESTATEMENT (SECOND) OF TORTS § 566 comment b (1977).

122. Franklin and Bussel would impose liability in a similar hypothetical since the charge of alcoholism is "sufficiently well defined to be disproved." Franklin & Bussel, *supra* note 19, at 883.

123. *See* RESTATEMENT (SECOND) OF TORTS § 566 comment c, illustration 4 (1977).

> able, there is a category of statements for which the determination is difficult. If this is what the *Restatement* means by mixed opinion, we view these statements as the hard cases, the resolution of which depends upon the sound judgment of courts. Some statements will be held to be actionable and some will not. A court that cannot decide whether a statement is disprovable should err on the side of nonactionability.[124]

For a test whose primary virtues are claimed to be "simplicity"[125] and predictability, the falsity approach seems to miss its mark with respect to these types of opinions.

In light of the infirmities of the falsity approach, it is unlikely that the Court intended *Hepps* to apply to statements in the form of opinion. In reconciling the falsity requirement with statements in the form of opinion, the *Restatement*,[126] as well as courts which have considered this issue,[127] state that it is the falsity of the facts supporting the assertion claimed to be an opinion, not the assertion itself to which the requirement applies. "The *New York Times* test of truth and falsity cannot apply to the actual opinion itself but must look to the facts which form the basis for the opinion."[128] "When they are true, and when they are stated, the First Amendment shields from liability an opinion which arises from them."[129]

With respect to the contextual part of the "totality of circumstances" approach, it is felt that the three-part test is so vague that, in most cases, it is incapable of yielding predictable results.[130] This

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124. Franklin & Bussel, *supra* note 19, at 880 n.222.

125. *See* Note, *supra* note 75, at 105.

126. *See* RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977). The *Restatement* gives the following outline of potential liability concerning the facts supporting an opinion:

> (2) If the defendant bases his expression of a derogatory opinion of the plaintiff on his own statement of facts that are not defamatory, he is not subject to liability for the factual statement - nor for the expression of opinion, so long as it does not indicate an assertion of the existence of other, defamatory, facts that would justify the forming of the opinion. The same result is reached if the statement of facts is defamatory but true, *or if the defendant is not shown to be guilty of the requisite fault regarding the truth or the defamatory character of the statement of facts* (*see* §§ 580A and 580B) . . . .

Id., illustration 5 (emphasis added and citation omitted).

Sections 580A and 580B, to which comment c refers, outline the standards of fault applicable in defamation cases under *New York Times Co.* and *Gertz*. *See infra* notes 245-51 and accompanying text.

127. *See, e.g.*, Lewis v. Time, Inc., 710 F.2d 549, 556 (9th Cir. 1983); *Hotchner*, 551 F.2d at 913; McManus v. Doubleday & Co., Inc., 513 F. Supp. 1383, 1385 (S.D.N.Y. 1981); *see also Kapiloff*, 27 Md. App. at 514 n.23, 343 A.2d at 263 n.23; Renwick v. News and Observer Publishing Co., 63 N.C. App. 200, 231-38, 304 S.E.2d 593, 613-16 (1983), *rev'd on other grounds*, 310 N.C. 312, 312 S.E.2d 405, *cert. denied*, 469 U.S. 858 (1984); RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977).

128. *Kapiloff*, 27 Md. App. at 514 n.23, 343 A.2d at 263 n.23.

129. *Lewis*, 710 F.2d at 556.

130. *See* Note, *supra* note 18, at 1846-48 (discussing the problem of "vagueness");

three-part approach can be reduced to a single inquiry: would a reasonable person consider the statements at issue to be fact or, conversely, opinion? What constitutes opinion under this approach is nothing more than what a reasonable person thinks opinion is. Such guidelines tend to produce inconsistency in the law and provide insufficient direction for journalists attempting to tailor their writing to avoid defamation liability.[131]

This is not to say that a basically broad contextual approach is not useful in deciding some cases. In many cases, the social context in which the statements were made has been determinative. This is particularly true with respect to those cases involving satire, like *Myers*, or abusive language tossed about in public debate, like *Gregory*. These, however, are the easy cases—cases in which the only real aproach being applied is common sense. In other cases, context is far from determinative. This is particularly true with respect to cases where the author has not engaged in outright name calling, but has, instead, stated a proposition and supported it with varying degrees of fact, i.e., a "deductive-type" opinion.[132]

Traditionally, the actionability of deductive-type opinions did not depend so much upon the social context in which the statement was made or whether it could be proven false, but upon the disclosure of supporting facts.[133] Reconsider the illustration given earlier concerning A's assertion that "B must be an alcoholic." This assertion, standing alone, is clearly defamatory and would probably be treated as a statement of fact in a libel action.[134] However, A's disclosure of the facts upon which he bases his conclusion, i.e., that he believes all red-haired, green-eyed persons are alcoholics, transforms this otherwise actionable statement of fact into a mere expression of opinion.[135] A well-drafted and carefully supported deductive-type opinion, however, is not likely to be as easily recongized by the average reader or listener as mere interpretation or opinion. Courts that have attempted to apply this approach confirm this difficulty.[136]

In summary, both the broad contextual approach and the falsity approach are difficult, if not impossible, to apply to deductive-type

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see also Janklow, 788 F.2d at 1307 (Bowman, J., dissenting) ("Clearly [the *Ollman* factors] do not yield predictability, unless the prediction is that their application almost always will result in keeping defamation actions brought by public officials and public figures from reaching a jury").

131. *See* Note, *supra* note 18, at 1846-48.

132. *See* Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1249-50 (1976) (discussing "deductive opinions").

133. *See supra* notes 47-58 and accompanying text (discussing the disclosure requirement under the privilege of fair comment).

134. *See* RESTATEMENT (SECOND) OF TORTS § 566 comment c, illustration 3 (1977).

135. *See id.*, illustration 4.

136. *See Janklow*, 788 F.2d at 1303-05; *Ollman*, 750 F.2d at 986-89.

opinions. This difficulty stems from the fact that deductive-type statements are not capable of being definitively labelled as either fact or opinion. In light of this problem, and in light of the rationale behind the opinion privilege, the drafters of the *Restatement (Second) of Torts* appear to have been reluctant to fully embrace the absolute protection for opinion suggested by *Gertz* and have, instead, retained some of the common law vestiges of fair comment to deal with these statements.[137]

B. The Restatement (Second) of Torts, Section 566

The *Restatement* recognizes two types of opinions: those which are supported by truly stated facts, and those which are not.[138] The *Restatement* labels opinions supported by truly stated facts as "pure" opinions.[139] According to the *Restatement*, it is only the "pure" type of opinion to which the absolute immunity suggested by *Gertz* applies.[140] Other types of opinions are referred to as "mixed" opinions.[141] A mixed opinion, under the *Restatement*, "is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."[142] Therefore, as long as the basis for an opinion is disclosed, it cannot generally be actionable under the *Restatement*.[143]

If Section 566 sounds similar to the disclosure requirement under fair comment, couched in different language, that is because it basically is. Although the drafters of the *Restatement* deleted all prior sections on fair comment in response to *Gertz*,[144] they apparently could not part with the disclosure requirement. The reason is clear: the opinion privilege makes no sense without it. Only when the reader knows the basis for the author's opinions is he able to judge for him-

137. *See infra* notes 144-47 and accompanying text.

138. *See* RESTATEMENT (SECOND) OF TORTS § 566 comment b (1977).

139. *Id.*

140. *See id.* comment c.

141. *Id.* comment b.

142. *Id.* § 566.

143. *See, e.g., Lauderback*, 741 F.2d at 195-98; *Lewis*, 710 F.2d at 553; Rinsley v. Brandt, 700 F.2d 1304, 1309-10 (10th Cir. 1983) (false light privacy action); *Orr*, 586 F.2d at 1114-15; National Rifle Ass'n v. Dayton Newspapers, Inc., 555 F. Supp. 1299, 1305-12 (S.D. Ohio 1983); *see also* Underwood v. CBS, Inc., 150 Cal. App 3d 460, 198 Cal. Rptr. 48, 52-53 (1984); Burns v. Denver Post, Inc., 43 Colo. App. 325, 326-27, 606 P.2d 1310, 1311 (1979); Iverson v. Crow, 639 S.W.2d 118, 119 (Mo. Ct. App. 1982); Katlikoff v. The Community News, 89 N.J. 62, 72-73, 444 A.2d 1086, 1089-91 (1982); Pease v. Telegraph Publishing Co., 121 N.H. 62, 66, 426 A.2d 463, 465 (1981); Holy Spirit Ass'n., Etc. v. Sequoia Elsevier, 75 A.D.2d 523, 523-24, 426 N.Y.S.2d 759, 760 (1980).

144. *Compare* RESTATEMENT OF TORTS §§ 606-10 (1938) *with* RESTATEMENT (SECOND) OF TORTS §§ 606-10 (1977).

self the propriety of the author's deductions.[145] Only under such circumstances will "the competition of other ideas" prevail as a correction device over a court of law. If supporting facts are not disclosed or otherwise known by the readers, they will generally be unable to judge the propriety of the author's deductions and will naturally infer the existence of undisclosed defamatory facts supporting the author's derogatory conclusions.[146] As stated in the comment to Section 566:

> A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability.[147]

Under the *Restatement*, the emphasis is placed on the purpose and policies underlying the opinion privilege rather than on definitively labelling the statement as either fact or opinion. In this way, the slippery determination as to whether a particular statement is one of fact or opinion is largely avoided. Statements will generally be protected *as opinion* if enough supporting facts are disclosed to the reader so that he will recognize the statement as a comment on those facts and will not infer the existence of undisclosed defamatory facts. The critical issue under the *Restatement*, therefore, is whether the propriety of the statement is, in fact, capable of being scrutinized by readers or listeners. This usually depends on the degree of disclosure of supporting facts.[148]

The standard articulated by the *Restatement* — whether the state-

145. *See supra* notes 47-58 and accompanying text; *see also* F. HARPER & F. JAMES, *supra* note 89, at 370; Keeton, *supra* note 132, at 1250-51.

146. *See* RESTATEMENT (SECOND) OF TORTS § 566 comment b (1977); *see also* F. HARPER & F. JAMES, *supra* note 89, at § 5.8; R. SACK, *supra* note 5, at 158-59.

147. RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977).

148. In some cases, however, the disclosure requirement is not really necessary. This is particularly true in cases involving ridicule or verbal abuse which are usually understood to be mere opinion and nothing more. *See* RESTATEMENT (SECOND) OF TORTS § 566 comments d and e. However, this is not to say that all such statements are incapable of implying undisclosed facts. "The circumstances under which verbal abuse is uttered affect the determination of how it is reasonably to be understood." *Id.*, comment e. If the circumstances indicate that the publisher intended his remarks to be taken literally, he may be subject to defamation liability. *See id.*

ment "implies the allegation of undisclosed defamatory facts as the basis for the opinion"[149] —is a utopian one. When enough facts are disclosed so that reasonable readers will not infer the existence of undisclosed facts, readers are given just the right amount of facts to judge the propriety of the conclusions being made. Under such circumstances, any erroneous conclusions reached by the author are most likely to be "corrected" by the "competition of other ideas." Similarly, this standard tends to minimize judicial interference with editorial discretion. Authors are not required to supply every fact pertinent to the subject of their comments. They need only supply enough facts so that reasonable readers will not infer the existence of undisclosed defamatory facts.

Unfortunately, this standard is not as utopian in practice. Just what degree of disclosure is required to ensure that readers will not infer the existence of undisclosed defamatory facts is unclear.[150] Chief Judge Robinson of the United States Court of Appeals for the District of Columbia Circuit has taken the position that an assertion should be "absolutely privileged as opinion when it is accompanied by a *reasonably* full and accurate narration of the facts pertinent to the author's conclusion."[151] What constitutes a "reasonable" amount of pertinent supporting facts, according to Robinson, is "enough to enable the audience to fairly judge the conclusion stated."[152]

While it is tempting, in the interest of maximizing the "correction" of erroneous opinion, to agree with Chief Judge Robinson's requirement of "reasonably full and accurate" disclosure, such a requirement "sounds too much like an exercise of editorial judgment."[153]

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149. *Id.* § 566.

150. *See* Note, *supra* note 18, at 1825-30.

151. *Ollman*, 750 F.2d at 1024 (Robinson, C.J., dissenting in part) (emphasis in original).

152. *Id.*

153. Ollman v. Evans, 713 F.2d 838, 855 (D.C. Cir. 1983) (Wald, J., concurring), *vacated*, 750 F.2d 970 (1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

The Supreme Court has similarly indicated a distaste of judicial interference with editorial judgment. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974). In *Tornillo*, the Court stated:

> The choice of material to go into a newspaper, and the decisions made as to the limitation on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id.

It is not surprising that Robinsin's "full and accurate disclosure" requirement has spurred considerable criticism from journalists and legal commentators. One writer has labelled Robinson's requirement as "the most blatant assault against the First Amendment in recent memory," a rule "that might well make every commenta-

Under such a standard, separating the reasonableness of the disclosure from the reasonableness of the deduction being made would be impossible. In other words, courts would necessarily be called upon to judge the propriety of authors' deductions. Such a prospect stands in stark contradiction to the Supreme Court's pronouncement in *Gertz* that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[154]

In practice, courts have required far less than "reasonably full and accurate" dislosure. It would appear that the requirement that an author must disclose enough supporting facts so that a reader will not infer the existence of undisclosed defamatory facts merely requires that the author dislose *some* facts tending to support the comment being made.[155] As long as the comment bears some relation to the facts presented it appears that it will be privileged opinion under the *Restatement*.

For instance, in *Lewis v. Time, Inc.*,[156] an attorney brought a defamation action against a magazine publisher for an article entitled "Those # * & !!! Lawyers." The article stated, in pertinent part:

If the legal profession has been reluctant to discipline its shadier

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tor in the republic the timid prey of ambulance chasers." Tyrrell, *Free the Commentators*, Wash. Post, Aug. 15, 1983, at A15, cols. 2 and 3. Another writer claimed that Robinson's rule was a "recipe for journalistic vapidity." Yoder, *Protecting the Lazy Reader*, Wash. Post, Dec. 1, 1983, at A23, col. 4. Two legal commentators found it "difficult to reconcile such a requirement with the First Amendment philosophy of robust and unfettered debate." Shestack & Solano, *Ollman Signals the Demise of the Opinion Defense*, Legal Times, Dec. 19, 1983, at 29. Their concern stemmed primarily from the procedural problems that Robinson's approach would be likely to create:

> Under the Robinson rule, most statements of opinion that are alleged to be defamatory will require a full-blown trial to determine what facts should have been disclosed in connection with them. So long as the plaintiff can posit some factual detail that might be material to the conclusion expressed by the declarant, and that might somehow lead the reader to reach a conclusion different from that of the declarant, the opinion privilege becomes unavailable and factual hearing must be held. The salutory effect of the opinion privilege in allowing early termination of burdensome litigation by motions to dismiss or for summary judgment will be ended.
>
> Moreover, at the factual hearing itself, the burden of sustaining opinion protection will be extremely difficult. Opinions are not asserted as in a Securities and Exchange Commission prospectus containing the declarant's underlying data. Proof of materiality and similar issues will be burdensome for both the courts and litigants. The result, as perceptively implied by Wald, may well be the demise of the opinion privilege itself and a narrowing of First Amendment protection.

Id.

154. *Gertz*, 418 U.S. at 339-40.

155. Very few cases have been found where liability has been imposed on an author despite the fact that he made *some* disclosure of facts tending to support his conclusions. *See infra* notes 188-210 and accompanying text.

156. 710 F.2d 549 (9th Cir. 1983).

> practitioners, it has been swift to crack down on anyone threatening to cut fees or reduce business.
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> Thanks to painfully slow bar discipline, a northern California lawyer named Jerome Lewis is still practicing law despite a $100,000 malpractice judgment against him in 1970 and a $60,000 judgment including punitive damages in 1974 for defrauding clients of money . . . .[157]

Lewis argued that the article was actionable since it characterized him as dishonest and suggested that he should be disbarred.[158] The Court of Appeals for the Ninth Circuit held that the inference that the plaintiff was a "shady practitioner" was protected because the article set forth facts tending to support that conclusion, i.e., state court judgments against him for fraud and malpractice.[159]

Similarly, in *Underwood v. CBS, Inc.*,[160] a newspaper editor brought an action for defamation against CBS in connection with a biography of reputed mafia figure Jimmy Fratianno. The portion of the biography objected to by the plaintiff involved an alleged scam by reputed ganster Mickey Cohen. In the 1940's, Cohen was apparently involved in a fund-raising benefit to buy arms for Israel.[161] After Cohen had collected almost $1 million, Fratianno claims that Cohen showed him an article in *The Los Angeles Herald* reporting the sinking of a ship loaded with arms.[162] Fratianno then related Cohen's reputation for money-making schemes, his friendship with the plantiff, and that the plaintiff had printed stories for Cohen before.[163] Fratianno concluded that there never were any arms purchased, there was no ship, and that the plaintiff helped Cohen defraud donators by printing the story.[164] The plaintiff argued that the article inferred the fact that she was an accomplice to a crime.[165] The California Court of Appeals, however, found Fratianno's conclusions to be protected opinion since the underlying facts upon which the conclusion was based were stated, i.e., Cohen's reputation for fraudulent money-making schemes, his involvement in the fund-raising activity for Israel, his friendship with the plaintiff, and the appearance of the article in *The Los Angeles Herald*.[166]

The opinion privilege under Section 566 will not even be lost

157. *Id.* at 550-51.
158. *See id.* at 552.
159. *See id.* at 555.
160. 150 Cal. App. 3d 460, 198 Cal. Rptr. 48 (1984).
161. *Id.* at 463, 198 Cal. Rptr. at 50.
162. *Id.*
163. *Id.*
164. *Id.* at 463, n.2, 198 Cal. Rptr. at 50, n.2
165. *See id.* at 463, 198 Cal. Rptr. at 50.
166. *See id.* at 468, 198 Cal. Rptr. at 53. The court concluded that "the average reader would recognize that in the process of telling Cohen's story secondhand, Fra-

when the conclusion reached by the author is not justified by the facts stated or is an extremely harsh judgment on those facts.[167] In *Orr v. Argus-Press Co.*,[168] a local developer planned to build a shopping center. To raise money, the plaintiff prepared and distributed a prospectus to local investors describing the project.[169] The plaintiff was only able to raise a small percentage of the capital he needed and decided to return the money he had collected.[170] The plaintiff was later indicted on charges of failing to comply with state security laws concerning the venture. After the indictment, the defendant published an article containing all the relevant facts, but characterized the shopping mall proposal using terms such as "fraud," "phony," and "swindle," suggesting that the plaintiff had attempted to defraud local investors.[171] The plaintiff brought an action for defamation. The Sixth Circuit Court of Appeals held that, since the publisher accurately reported the underlying facts, the statement was privileged regardless of the fact that the venture was characterized in "strong terms."[172]

Where an author has failed to disclose at least some facts tending to support his defamatory conclusions, however, courts have imposed liability under Section 566.[173] In *Adler v. American Standard Corporation*,[174] plaintiff, Gerald Adler, was hired by the defendant to conduct a comprehensive evaluation of the management and operations of the defendant's commercial printing division. During the course of his investigation, Adler discovered numerous inadequacies including several improper and possibly illegal practices.[175] On several occasions, Adler reported these findings to his immediate super-

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tianno was overlaying the alleged facts with his personal opinion of Underwood's part in the hoax." *Id.*

167. "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, *no matter how unjustified and unreasonable the opinion may be or how derogatory it is*." RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977) (emphasis added).

168. 586 F.2d 1108 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979).

169. *Orr*, 586 F.2d at 1110.

170. *Id.*

171. *Id.* at 1110-11.

172. *Id.* at 1115.

173. *See, e.g.*, Adler v. American Standard Corp., 538 F. Supp. 572, 576 (D. Md. 1982); *see also* Eastern Air Lines, Inc. v. Gellert, 438 So. 2d 923, 926-28 (Fla. Ct. App. 1983); *Nevada Ind. Broadcasting Corp*, 99 Nev. at 410-12, 664 P.2d at 341-43; Kutz v. Independent Publishing Co., 97 N.M. 243, 244-46, 638 P.2d 1088, 1090-91, *appeal after remand*, 101 N.M. 587, 686 P.2d 277 (1984); Bock v. Zittenfield, 66 Or. Ct. App. 97, 101-02, 672 P.2d 1237, 1239-40, *pet. denied*, 677 P.2d 702 (1984); Braig v. Field Communications, 310 Pa. Super. 569, 581-82, 456 A.2d 1366, 1372-73, *cert. denied*, 104 S. Ct. 2341 (1984).

174. 538 F. Supp. 572 (D. Md. 1982).

175. *See* Adler v. American Standard Corp., 291 Md. 31, 33, 432 A.2d 464, 466 (1981).

iors, James Kinealy and James Sinclair, but received little consideration from them.[176] During his last confrontation with Kinealy and Sinclair, Adler announced his intention to disclose his findings to headquarters personnel at the next group meeting.[177] Kinealy and Sinclair insisted on Adler's resignation, and when he refused, they fired him.[178] Kinealy and Sinclair then published statements on behalf of the defendant stating that Adler was terminated "for unsatisfactory performance."[179] The communication failed to disclose any facts supporting its conclusion. The defendant claimed that the communication was privileged opinion. The court disagreed.[180] After discussing Section 566, the court concluded that "the reasonable implication from the allegedly defamatory statements is that plaintiff was guilty of some misconduct, negligence or incompetence in the performance of his duties."[181]

The defendant in *Braig v. Field Communications*[182] similarly failed to disclose the basis of his defamatory conclusions concerning the plaintiff. In *Braig*, a judge brought a defamation action against an assistant district attorney and a television station. The assistant district attorney appeared on a weekly minority-affairs news program to discuss certain incidents where police were alleged to have used excessive force against blacks.[183] Another participant in the program was highly critical of the decision of the district attorney's office to use a certain attorney in a sensitive police brutality case since that attorney had been thrown out of the plaintiff's court for prosecutorial misconduct in an earlier police brutality case.[184] The assistant district attorney responded to this critcism by stating that, "Judge Braig is no friend of the police brutality unit. I don't care who we sent in to try that case, in my opinion, that case was going to get blown out."[185] The court disagreed with the defendant's claim that the assistant district attorney's remarks were privileged opinion.[186] The court held that the remarks were made on the basis of undisclosed defamatory facts and were thus actionable under Section 566.[187]

Several courts have imposed liability under Section 566 despite

176. *Id.* at 33-34, 432 A.2d at 466.
177. *Id.*
178. *Id.*
179. *Id.*
180. *See Adler*, 538 F. Supp. at 576.
181. *Id.*
182. 310 Pa. Super. 569, 456 A.2d 1366, *cert. denied*, 104 S. Ct. 2341 (1984).
183. *Id.* at 572, 456 A.2d at 1368.
184. *Id.* at 573, 456 A.2d at 1368-69.
185. *Id.* at 573, 456 A.2d at 1369.
186. *Id.* at 577, 456 A.2d at 1372.
187. *Id.* at 578, 456 A.2d at 1373.

the fact that the defendants disclosed the facts upon which they based their defamatory conclusions.[188] In *Cianci v. New Times Publishing Co.*,[189] the defendant published an article suggesting that Mayor Vincent Cianci, Jr. raped a woman in 1966 and then, for $3,000, "managed to buy his way out of a possible felony [rape] charge."[190] The article exhaustively set forth the facts upon which the defendant's conclusion was based, including numerous statements from the victim, reports from the State Crime Laboratory, and statements from the polygraph expert who had performed polygraph examinations on both Cianci and the victim.[191] The article then explained that the reason the victim's civil suit was dropped was because her attorney felt that she would be unable to endure a full-blown trial.[192] The article quoted the victim as stating that she had received a settlement of $3,000.[193] Faced with the inadmissibility of the results of the lie detector tests and the unavailability of the victim as a witness, the article stated that the prosecuting attorney similarly decided to drop the case.[194] The article concluded by stating that "[f]or the nominal sum of $3,000, Cianci had managed to buy his way out of a possible felony charge."[195]

The defendant argued that this statement was privileged opinion since his article set forth the facts upon which it was based.[196] The Second Circuit Court of Appeals disagreed stating that "opinions may support a defamation action when they convey false representations of defamatory fact, even though there is no implication that the writer is relying on facts not disclosed. . . ."[197]

Rinaldi v. Holt, Rinehart & Winston, Inc.[198] involves a similar set of facts. In *Rinaldi*, the defendant published a book by well-known investigative jounalist Jack Newfield criticizing the criminal justice system in New York.[199] Part of Newfield's book consisted of reprinted articles which were highly critical of the plaintiff's performance as a judge.[200] Newfield stated that he had spent weeks going over Rinaldi's dispositions. The book discussed several of Rinaldi's disposi-

188. *See, e.g., Cianci*, 639 F.2d at 64-65; *Rinaldi*, 42 N.Y.2d at 381-82, 366 N.E.2d at 1307, 397 N.Y.S.2d at 951.
189. 639 F.2d 54 (2d Cir. 1980).
190. *Id.* at 58.
191. *See id.* at 56-58.
192. *Id.* at 57.
193. *Id.*
194. *Id.*
195. *Id.* at 58.
196. *Id.* at 64.
197. *Id.* at 65.
198. 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977).
199. *Id.* at 374, 366 N.E.2d at 1302, 397 N.Y.S.2d at 946.
200. *See id.* at 375-76, 366 N.E.2d at 1303, 397 N.Y.S.2d at 947.

tions in recent cases. Based on these dispositions, Newfield concluded that the Rinaldi was "incompetent and probably corrupt."[201] The court agreed with the defendant's argument that the allegation of "incompetence" was privileged opinion,[202] but disagreed with respect to the allegation of "corruption."[203] The court concluded that "[a]ccusations of criminal activity, even in the form of opinion, are not constitutionally protected."[204] However, since Rinaldi was unable to prove the requisite degree of fault, the court reversed and granted Newfield's motion for summary judgment.[205]

The courts' analysis in *Cianci* and *Rinaldi* is difficult to square with Section 566. In both cases, the defendants set forth some facts tending to support their defamatory conclusions. Neither case suggests that any further undisclosed defamatory facts were implied. The findings in these cases can, therefore, only be analyzed as consistent with Section 566 if the supporting facts were false or otherwise defective in some manner.

It would appear that, in both cases, there were serious doubts as to the veracity of the underlying facts. In *Cianci*, the court specifically noted the plaintiff's allegation that the article was "replete with misstatements of fact,"[206] and stated that "[i]n such a case it is meaningless to say that the opinion is protected, when the facts are not."[207] The court in *Rinaldi*, similarly noted the inaccuracies present in the defendant's article.[208] If these cases are asserting that when a defendant's opinions are based upon false statements of fact and plaintiff can prove the requisite degree of fault, the defendant's opinion is not privileged, they are in accord with Section 566.[209] If, however, they are asserting that allegations of specific misconduct based on disclosed facts, regardless of the truth or falsity of those facts, are not privileged under Section 566, they are mistaken.[210]

In summary, the drafters of the *Restatement* have rejected the absolute protection for opinion suggested by *Gertz*. Although, in response to *Gertz*, all sections dealing with fair comment have been

201. *Id.* at 376, 366 N.E.2d at 1303, 397 N.Y.S.2d at 947.
202. *Id.* at 381, 366 N.E.2d at 1306, 397 N.Y.S.2d at 947.
203. *Id.* at 381-82, 366 N.E.2d at 1307, 397 N.Y.S.2d at 951.
204. *Id.*
205. *See id.* at 382-86, 366 N.E.2d at 1307-09, 397 N.Y.S.2d at 951-53.
206. *Cianci*, 639 F.2d at 66.
207. *Id.* at 67.
208. *See Rinaldi*, 42 N.Y.2d at 366-67, 366 N.E.2d at 1303-04, 397 N.Y.S.2d at 948.
209. *See supra* notes 126-29 and accompanying text (discussing the falsity requirement with respect to statements in the form of opinion).
210. If the author has disclosed enough true facts supporting his allegation of specific misconduct so that readers will not infer the existence of undisclosed defamatory facts supporting that allegation, the allegation is protected opinion under Section 566. *See* RESTATEMENT (SECOND) OF TORTS § 566 comments b and c (1977).

deleted,[211] the disclosure requirement has been retained. Under Section 566, a statement in the form of an opinion is actionable only if it implies the existence of undisclosed defamatory facts as its basis. In practice, a statement will generally be privileged as opinion under the *Restatement* as long as the author discloses *some* facts tending to support his conclusion.

IV. SYNTHESIS

As things currently stand, in dealing with a statement in the form of an opinion in a defamation action, some courts apply the "totality of circumstance" approach,[212] some the *Restatement* approach,[213] and others both.[214] Even those courts which most adamantly support the "totality of circumstances" approach, however, recognize the importance of the disclosure requirement and tend to factor it into their analyses.[215] Indeed, it would appear that the third factor under the "totality of circumstances" approach (the literary context in which the statement is made) implicitly incorporates the disclosure requirement. Unfortunately, this has not cured the infirmities of the "totality of circumstances" approach.

The problem with the "totality of circumstances" approach is that the other three factors are essentially dead weight which tend to make its application more confusing and its outcome less predictable.[216] Only two inquiries need be made when dealing with a statement alleged to be an opinion. The first inquiry is whether the assertion is capable of being taken literally by reasonable persons. If the assertion is such that it would not be taken literally by reasonable

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211. *Cf.* RESTATEMENT OF TORTS §§ 606-610 (1938).

212. *See supra* notes 77-104 and accompanying text.

213. *See supra* notes 157-88.

214. *See, e.g., Janklow*, 788 F.2d at 1302-06; *Keller*, 778 F.2d at 717-18; *Lewis*, 710 F.2d at 553-57; *Rinsley*, 700 F.2d at 1309; Froess v. Bulman, 610 F. Supp. 332, 339-40 (D.R.I. 1984); *see also Burns*, 43 Colo. App. at 327, 606 P.2d at 1317; Meyers v. Plan Takoma, Inc., 472 A.2d 44, 47-48 (D.C. Ct. App. 1983).

215. *See, e.g., Ollman*, 750 F.2d at 987-89. In analyzing Evans' and Novak's assertions stating that Professor Ollman was "widely viewed in his profession as a political activist," *see supra* note 77 and accompanying text, the *Ollman* court stated:

> Evans and Novak set out facts which signalled the reader that this statement represents a characterization arising from the columnists' view of the facts. In the paragraph immediately following this statement, the column indicated that Mr. Ollman on no less than two occasions finished dead last among all candidates for election to the governing Council of the American Political Science Association . . . . A reasonable reader would conclude that the authors' judgment that Mr. Ollman was "widely viewed as a political activist" was a characterization based upon the latter's unsuccesful electoral endeavors within his profession.

Ollman, 750 F.2d at 987-88.

216. *See supra* notes 130-31 and accompanying text (discussing the problem of vagueness and unpredictability created by the "totality of circumstances" approach).

persons, the statement is clearly mere opinion.[217] Two Supreme Court decisions are particularly illustrative of this point.

In *Greenbelt Cooperative Publishing Association v. Bresler*,[218] plaintiff, a real estate developer and state legislator, brought suit against the defendant newspaper for publishing two articles concerning his involvement in several city counsel meetings. Prior to these meetings, plaintiff was engaged in negotiations with the city to secure certain zoning variances that would permit him to build high-density housing on land which he owned.[219] At the same time, the city sought to purchase other land owned by the plaintiff for the construction of a new high school.[220] The defendant published two articles stating that, at the meetings, some observers characterized the plaintiff's negotiating position as "blackmail."[221] Noting that the defendant published "accurate and full"[222] reports, the court concluded:

> It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more that rhetorical hyperbole . . . .[223]

In *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*,[224] the Court was presented with a similar set of facts. In *Letter Carriers*, names of several nonunion employees of the local post office were included on a list circulated by union employees.[225] Attached to the list was a famous piece of trade literature defining the nature of a "scab."[226] The piece of literature concluded with a statement claiming that "a SCAB is a traitor to his god, his country, his family, and his class."[227] The plaintiffs claimed that this passage could be read to charge them as being "traitors."[228] The Court disagreed. After quoting the *Gertz* dicta,[229] the Court found that it would be "impossible to believe that any reader . . . would have un-

217. *See* RESTATEMENT (SECOND) OF TORTS § 566 comments d and e (1977).
218. 398 U.S. 6 (1970).
219. *Id.* at 7.
220. *Id.*
221. *Id.*
222. *Id.* at 13.
223. *Id.* at 14 (footnote omitted).
224. 418 U.S. 264 (1974) (decided on the same day as *Gertz*).
225. *Id.* at 267.
226. *Id.* at 268.
227. *Id.*
228. *Id.* at 283.
229. *Id.* at 284.

derstood the newsletter to be charging the appellees with committing the criminal offense of treason."[230]

Greenbelt and *Letter Carriers* show that if the assertion at issue is such that it would not be taken literally by reasonable persons, a court need not go any further. In such cases, the statement is clearly opinion. If, on the other hand, the statement is such that it could be taken literally, further inquiry is required.

The second inquiry is whether recipients of the communication have the ability to assess the propriety of the assertions being made. This generally requires that they know the factual basis for the author's conclusions. If the author does not provide any of the facts upon which he bases his conclusions, unless those facts are generally known, two undesirable events are likely to occur. First, the recipients will naturally infer the existence of undisclosed facts tending to support the author's conclusions.[231] And, if those inferences are defamatory, the target of the conclusion will have been defamed by implication.[232] Second, if the conclusion is erroneous, it will have a lesser chance of being "corrected" by the "competition of other ideas."[233]

This two-step approach is essentially the approach suggested by Section 566. It is submitted that this approach is superior for several reasons. First, it is much more simple, and easier to apply than its four-factored counterpart. Under the *Restatement*, the slippery task of labelling a particular statement as either fact or opinion is largely avoided. Under the *Restatement*, it is only necessary to determine whether there has been proper disclosure of supporting facts. The emphasis is not so much on labelling a particular statement as fact or opinion as it is on determining whether a statement is worthy of protection. A statement is worthy of protection when the author has disclosed enough facts to enable the reader to judge the propriety of the expression without inferring the existence of further undisclosed defamatory factual support.

Second, the approach suggested by Section 566 is much more predictable and consistent than the "totality of circumstances" approach. The plight of the journalist under the "totality of circumstances" approach has been described by one commentator as follows:

> The reader-oriented approach places the journalist in the precarious position of guessing how a contention will be regarded by the public. The truth or falsity test forces the journalist to predict how an allegation will be construed by a court. The textual approach

230. *Id.* at 285 (footnote omitted).
231. *See supra* notes 146-47 and accompanying text.
232. *See supra* note 147 and accompanying text.
233. *Gertz*, 418 U.S. at 339-40; *see also supra* notes 1-9 and accompanying text.

> and the broader contextual analysis also place the journalist in the difficult position of speculating as to where and when his or her works will be published, and further require the journalist to guess which of the surrounding circumstances might be deemed relevant.[234]

Under the *Restatement* approach, on the other hand, the journalist is given a greater degree of control over his fate. To avoid defamation liability, he needs only to supply some factual support to his conclusions.[235]

Third, the emphasis under the *Restatement* is on the underlying purpose and policies behind the opinion privilege, rather than on the mechanics of distinguishing fact from opinion. Opinions, as recognized by the Court in *Gertz*, are privileged under defamation law because they have the capacity to be "corrected" by the "competition of other ideas."[236] To allow opinion to be subject to correction in a court of law would be to greatly compromise our system of free speech and press. However, in order for the marketplace of ideas to be an effective correction device for erroneous opinion, the opinion must have the capacity to be corrected. That is, recipients at least need to know the facts upon which the author has based his opinion. When such facts are not stated or otherwise known, the marketplace of ideas becomes an ineffective correction device and a court of law becomes the appropriate forum. By placing the emphasis on these simple principles, the confusion that has been created in this area of the law disappears, journalists are given clear standards to work with, and the multitude of defamation suits is hopefully reduced.

V. "FAULT" AND THE OPINION PRIVILEGE

The focus of this Note thus far has been on the disclosure requirement originally found under the privilege of fair comment. But what has happened to the other elements of fair comment, i.e., the "public concern"[237] requirement and the absence of malice requirement?[238] The answer is that both continue, for the most part, to be very much a part of modern defamation law, but in a different way than they were applied under fair comment.

In general, the extent to which a statement involves a public official[239] or public figure,[240] now defines the degree of "malice" which a plaintiff must prove in a defamation action. The term "malice,"

234. Note, *supra* note 18, at 1846.
235. *See supra* notes 157-73 and accompanying text.
236. *Gertz*, 418 U.S. at 339; *see also supra* notes 1-9 and accompanying text.
237. *See supra* notes 40-42 and accompanying text.
238. *See supra* notes 43-46 and accompanying text.
239. *See New York Times*, 376 U.S. at 254.
240. *See Curtis Publishing Co.*, 388 U.S. at 130.

however, has taken on a few new dimensions. Under fair comment, "malice" existed when the defendant published defamatory matter "solely for the purpose of causing harm to the plaintiff."[241] Under modern defamation law, "malice" has basically taken two forms.

When the topic of the defamation concerns a public official or public figure, the first form of "malice" will generally apply. This form of malice is extremely difficult to prove. "[T]he principle that debate on public issues should be uninhibited, robust and wide-open,"[242] requires a plaintiff to make a higher showing of culpability than when the speech is of a purely private concern. In such cases, the plaintiff must prove that the defendant's assertion was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[243] The plaintiff is further required to prove this standard with "convincing clarity."[244]

A less stringent standard is applied in cases where the plaintiff is neither a public official nor a public figure.[245] The rationale for distinguishing between "public" plaintiffs and "private" plaintiffs has been stated as follows:

> The first remedy of any victim of defamation is self-help — using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officals and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private in-

241. *See* RESTATEMENT OF TORTS § 566 (1)(c)(1938); *see also Cherry*, 114 Iowa at 298, 86 N.W. at 323.

242. *New York Times*, 376 U.S. at 270.

243. *Id.* at 279-80. In *New York Times*, the defendant publisher printed a political advertisement which included several false statements of fact concerning repressive police action against demonstrators in Montgomery, Alabama. The plaintiff Sullivan, Commissioner of Public Affairs, brought suit alleging that since the conduct of Montgomery police was his responsibility, the advertised averments of police misconduct were, in effect, averments of his own misconduct. *Id.* at 258-59.

The trial court instructed the jury that the statements in the advertisement were libelous per se. *Id.* at 262. The jury awarded $500,000, which was upheld by the Supreme Court of Alabama. *Id.* at 261-64.

The United States Supreme Court reversed holding that the rule applied by the lower courts was "constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct." *Id.* at 264 (footnote omitted). In such cases, the Court stated that:

> The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering 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.

Id. at 279-80.

244. *Id.* at 285-86.

245. *See Gertz*, 418 U.S. at 339-52.

> dividuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.[246]

In light of this policy, the "private" plaintiff is faced with a much less demanding standard of "malice" to prove. Generally, such plaintiffs need only show that the defendant was negligent with respect to the truth of the material published.[247]

It should be noted that this has been a most cursory explanation of the fault requirement under modern defamation law. This topic has many nuances and complexities that are far beyond the scope of this Note.[248] The fault requirement, however, is rarely discussed in conjunction with the opinion privilege, and a brief explanation is appropriate.

The difficulty of the malice requirement with respect to opinions is that both standards are articulated in terms of the falsity of the assertion being made. Since opinions can be neither true nor false, the standard is seemingly inapplicable. However, with respect to falsity, the malice standards do not apply to the opinion itself, but to the

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246. *Id.* at 344 (footnote omitted).

247. *See id.* at 347. In *Gertz*, plaintiff Gertz, a prominent Chicago attorney, had represented the family of a youth shot and killed by a Chicago policeman. Robert Welch, Inc., a right-wing political group associated with the John Birch Society, characterized Gertz' involvement as part of a nationwide conspiracy to discredit local law enforcement agencies with the goal of establishing a national police force to support a communist dictatorship. *Id.* The respondent's article contained several inaccuracies such as stating that Gertz has been a former official of the "Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society . . . ." *Id.* at 326. Respondent's magazine portrayed Gertz as an architect of a "frame-up." *Id.* The article also labelled Gertz as a "Leninist" and "Communist-fronter." *Id.*

Gertz brought a diversity action for libel in Federal District Court in Illinois. *See Gertz*, 306 F. Supp. 310. Following a jury verdict in favor of Gertz, the trial court entered judgment for Robert Welch, Inc. notwithstanding the jury's verdict, holding that the *New York Times* standard governed the case despite the fact that Gertz was neither a public official nor a public figure. *See Gertz*, 322 F. Supp. 997 (N.D. Ill. 1970). The Seventh Circuit Court of Appeals affirmed. *See Gertz*, 471 F.2d at 806.

The Supreme Court reversed. "The *New York Times* standard defines," said Justice Powell, "the level of constitutional protection appropriate to the context of defamation of a public person." *Gertz*, 418 U.S. at 342. With respect to plaintiffs who are not public persons (public figures or public officials), Justice Powell stated:

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.

Id. at 347-48 (footnote omitted).

248. For a comprehensive discussion of the fault requirement under modern defamation law see R. SACK, *supra* note 5, at 187-265.

facts supporting the opinion.[249] Applying these standards, "malice" with respect to falsity, will exist in either of two cases:

(1) where the plaintiff is either a public official, or a public figure, and the defendant published the opinion with knowledge that the facts supporting it were false or careless whether they were true or not; or

(2) where the plaintiff is neither a public official nor a public figure, and the defendant published negligently as to the truth of the facts supporting the opinion.[250]

While it is clear that the fault standards apply to an author's culpability involving the falsity of the background facts, it is less clear whether they are also applicable to an author's culpability in failing to properly disclose those facts. According to Chief Judge Robinson, "[t]he considerations underlying the standards of care developed in *New York Times* and its progeny for measuring liability for defamatory falsehood apply equally to situations wherein an author states the background facts incompletely or incorrectly."[251] Robinson summarizes this approach as follows:

> [w]hen the plaintiff claiming defamation is a public figure or public official, the pertinent inquiry should be whether the author's failure to provide . . . background data is traceable to actual malice or recklessness. When the plaintiff is a private figure, the critical question should be whether the author was negligent, or violated a higher local-law standard of conduct applicable, in setting out the factual basis for the hybrid statement. If the error or omission in the recital of predicate data is found nonculpable under the relevant standard, the hybrid statement . . . should . . . be absolutely privileged as opinion even though it may mislead the reader and damage the victim's reputation. [252]

In light of its reluctance to apply any form of strict liability in defamation actions, it is likely that the Supreme Court would favor Robinson's approach. As the Court has recently stated:

> [Some] sort of inaccuracy . . . is commonplace in the forum of robust debate to which the *New York Times* rule applies. . . . "Realistically, . . . some error is inevitable; and the difficulties of separating fact from fiction convinced the Court in *New York Times*, *Butts*, *Gertz*, and similar cases to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material. . . ." "[E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.' "[253]

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249. *See supra* notes 126-29 and accompanying text.

250. Need this footnote to balance with 250 in text.

251. *Ollman*, 750 F.2d at 1025 (Robinson, C.J., dissenting in part).

252. *Id.* n.83.

253. Bose Corp. v. Consumers Credit Union, 466 U.S. 485, 513 (1984) (citations

In summary, it would appear that there are two *types* of standards of fault applicable to opinions: one relating to the veracity of the underlying facts and the other relating to the quantum of underlying facts. Consequently, even if there has been an adequate disclosure of supporting facts, if those facts are false and the plaintiff can prove malice, the opinion is actionable. Similarly, even if the supporting facts are completely true as stated, if the author has failed to supply the requisite degree of factual support, and the plaintiff can prove malice, the opinion is actionable.

CONCLUSION

Under the common law qualified privilege of fair comment, criticism or comment was privileged in defamation law as long as it involved a matter of public concern, the basis of the opinion was disclosed by the publisher or otherwise known by the reader, and the criticism was not made for the sole purpose of causing harm to another. In 1974, the Supreme Court in *Gertz v. Robert Welch*, in dicta, used language which has been interpreted as granting absolute protection to all opinion. This interpretation has necessarily led to a multitude of vague and problematic approaches to distinguish fact from opinion, resulting in inconsistency and unpredictability in this area of the law.

It is undesirable to grant absolute protection to all opinion and it is unlikely that the Supreme Court intended to do so. Professor Hill has observed that "[t]he problem of defamatory opinion was not remotely in issue in *Gertz*, and there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem."[254] Several members of the Court have conceded Hill's proposition. Dissents from denials of certiorari reveal that at least two justices feel that the *Gertz* dictum has been misinterpreted. On one occasion, Justice (now Chief Justice) Rehnquist, joined by Justice White, referred to Professor Hill's article and stated that he was "confident [that] this Court did not intend to wipe out this 'rich and complex history' with the two sentences of dicta in *Gertz* . . . ."[255] Even more recently, Rehnquist has stated:

> At the time I joined the opinion in *Gertz*, . . . I regarded. . . [the *Gertz* dicta] as an exposition of the classical views of Thomas Jefferson and Oliver Wendell Holmes that there was no such thing as a false

omitted) (quoting Herbert v. Lando, 441 U.S. 153, 171-72 (1979) and *New York Times*, 376 U.S. at 271-72, quoting in turn NAACP v. Buttons, 371 U.S. 415, 433 (1963)).

254. Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1239 (1976).

255. Miskovsky v. Oklahoma Publishing Co., 459 U.S. 923, 925 (1982) (Rehnquist, J., dissenting).

> "idea" in the political sense, and that the test of truth for political ideas is indeed the market place and not the courtroom. I continue to believe that is the correct meaning of the . . . passage. But it is apparent . . . that lower courts have seized upon the word "opinion" in the second sentence to solve with a meat axe a very subtle and difficult question, totally oblivious "of the rich and complex history of the struggle of the common law to deal with this problem."[256]

It would, therefore, appear most indefinite as to whether the qualified privilege of fair comment has been permanently escalated into the absolute privilege of opinion via the *Gertz* dicta. As one well-respected commentator has observed: "It would be dangerous to assert conclusively that all opinion is *ipso facto* protected by the First Amendment until the Supreme Court has had an opportunity to rule on the validity of the syllogism which it suggested in *Gertz*."[257]

Statements alleged to be opinion should be priviliged only when the recipient of the communication has the ability to judge the propriety of the deductions being made for himself. This generally requires that an author disclose the facts upon which he bases his opinion, and that those facts be true. This Note generally supports the requirement under the *Restatement (Second) of Torts* Section 566 that an author should disclose enough supporting facts so that a reader will not infer the existence of undisclosed defamatory facts as the basis for the opinion.

Under this approach, the slippery issue as to whether a particular statement is one of fact or opinion is largely avoided. There is no need for a court to engage in "four-factor frameworks, three-pronged tests, [or]. . . two-tiered analyses."[258] Instead, it is only necessary to determine whether there has been an appropriate disclosure of true supporting facts. This approach is more receptive to constitutional principals of free speech and press and will eliminate much of the uncertainty and confusion in this area of the law created by courts attempting to make the illusory distinction between fact and opinion.

J. Miesen

256. Ollman v. Evans, 471 U.S. 1127, 1129 (1985) (quoting Hill, *supra* note 254, at 1239).

257. R. SACK, *supra* note 5, at 182 (emphasis in original).

258. *Ollman*, 750 F.2d at 994 (Bork, J., concurring).