Statements of Fact, Statements of Opinion, and the First Amendment

There is an inherent tension between defamation law and the first amendment. To deal with this tension, a variety of privileges have developed to preserve the vitality of public debate by immunizing various kinds of speech from defamation actions.[1] One such privilege protects statements of opinion. At common law, opinions were protected by the privilege of fair comment; today they are constitutionally protected.[2]

Constitutional protection for statements of opinion is based largely on a dictum in Justice Powell's majority opinion in *Gertz v. Robert Welch, Inc.*:[3]

> 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.[4]

This Comment will explore and analyze the development of the opinion privilege, beginning its analysis with the first amendment values that seem to underlie the opinion privilege. It pursues a coherent and workable test for the opinion privilege that is consistent with the first amendment, but does not seek to reevaluate the appropriateness of the privilege itself. It assumes the public's interest in freedom of speech outweighs a plaintiff's reputational interest where statements of opinion are properly defined. Part I of the Comment will give a general description of the opinion privilege and of its development, including a discussion of the Supreme Court's sparse doctrinal guidance. Part II will outline two theories of the first amendment and will discuss the need to develop a test of the opinion privilege that is predictable and useful in summary adjudication. Part III will attempt to judge how the three predominant versions of the opinion privilege conform to these two theories of the first

1. *See* Wade, *The Communicative Torts and the First Amendment*, 48 MISS. L.J. 671, 672-73 (1977) (noting that common law sought to relieve the tension between defamation and free expression by resorting to various privileges such as the privileges accorded to participants in a trial, to legislators, to governmental executive officials, and by the fair comment privilege); *see also, e.g.*, W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 114, at 816-23 (5th ed. 1984) [hereinafter PROSSER & KEETON] (absolute privileges for judicial proceedings, legislative proceedings and executive communications are maintained to favor a policy permitting complete freedom of expression).

2. *See infra* Part I.

3. 418 U.S. 323 (1974).

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

amendment and will then examine each version's predictability and its suitability for summary adjudication. Part IV will compare the three versions of the opinion privilege to the current case law on the privilege.

I
DEVELOPMENT OF THE PRIVILEGE

This Part will briefly trace the development of the opinion privilege from its origin in the common law privilege of fair comment through its constitutional recognition. It will then summarize three predominant methods used by the lower courts to apply the opinion privilege.

A. Fair Comment

Statements of opinion have long been protected at common law by the doctrine of fair comment.[5] The purpose of such protection was to accommodate the defendant's right to comment on public affairs and the public's right to learn about such affairs.[6] These rights reflect the democratic interest in encouraging public debate.[7] The actual dimensions of the fair comment privilege are very confused and complex,[8] but invocation generally requires proof of four factors. A statement is privileged if: 1) it is about a matter of public concern; 2) it is based on true or privileged statements of fact[9] that are either set forth with the disputed statement or are generally known to the public; 3) it represents the actual opinion of the critic; and 4) it is not made solely for the purpose of causing harm to the one criticized.[10] The privilege of fair comment is an affirmative defense; the defendant bears the burden of proving that these criteria have been satisfied.[11] Once he establishes these four factors his statement is protected. Its foolishness or prejudicial impact is irrelevant.[12]

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5. English courts in the early nineteenth century developed the common law fair comment privilege. American courts followed in the late nineteenth and early twentieth centuries. *See* Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule*, 72 GEO. L.J. 1817, 1819 & nn.15-16 (1984) [hereinafter Note, *The Fact-Opinion Distinction*].

6. *See* Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203, 1206 (1962).

7. *See* Note, *Fair Comment*, 62 HARV. L. REV. 1207, 1207 (1949); Note, *Fact and Opinion After* Gertz v. Robert Welch, Inc.: *The Evolution of a Privilege*, 34 RUTGERS L. REV. 81, 85 (1981) [hereinafter *Fact and Opinion*].

8. *See* Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1240 (1976).

9. "[T]he facts upon which the criticism is based must either be true or, if untrue, the critic must be privileged to state them." RESTATEMENT OF TORTS § 606 comment b (1938).

10. *Id.* § 606. For a general discussion of the privilege of fair comment, see 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.8 (1956); Note, *Fair Comment*, *supra* note 7.

11. *Cf.* Note, *Fair Comment*, *supra* note 7, at 1207 (stating that privilege is an affirmative defense and that public interest must be proven by the defendant).

12. *See* RESTATEMENT OF TORTS § 606 comment c (1938). Professor Hill has suggested that in practice statements that courts found unreasonable would lead to liability, even though the fair

The fair comment privilege requires that the facts be set forth or be generally understood, and that the statement be the actual opinion of the critic. Therefore, it recognizes an explicit distinction between statements of fact and statements of opinion. Unfortunately, the courts and commentators analyzing fair comment have generally failed to articulate a test for distinguishing between the two, treating the difference as if it were self-evident.[13] Similarly, the *Restatement*'s commentary on the fair comment privilege merely says a comment "is an expression of . . . opinion" and that such an opinion is privileged if "the facts upon which the opinion is based [are] stated or [are] known or readily available."[14] It defines neither "facts" nor "opinion." As a result, it is very difficult to know when the "facts" have been fully set forth or how to determine whether the "facts" are generally known.[15] One minority view of the fair comment privilege avoids the fact-opinion dichotomy. Like the majority view, it requires that the statement concern a matter of public interest, be honestly believed, and not be motivated by malice. Unlike the majority view, however, the minority view does not require that the statement be based on disclosed or generally understood facts. Thus, it protects both factual and nonfactual statements, even if the statement is false, as long as the statement was "fair." That is, the statement is protected as long as it was honestly believed and not uttered out of malice.[16]

In a series of cases discussed below, the Supreme Court found that the common law privileges, including fair comment, were inadequate to protect freedom of speech. As a result, the Court recognized that some statements were constitutionally privileged. Although none of the cases expressly recognizes a constitutional privilege for opinions, taken together they create a framework of which the opinion privilege is a part.

B. Development of a Constitutional Privilege

The first step toward a constitutional privilege for statements of

comment privilege theoretically provides otherwise. *See* Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1229-30 (1976).

13. *See* Titus, *supra* note 6, at 1205-06. An exception is Note, *Fair Comment*, *supra* note 7, which Titus criticizes. Titus, *supra* note 6, at 1211-22. Titus rejects the fact/opinion distinction and instead proposes that for the privilege to apply the defendant must establish that more probably than not a substantial number of readers or hearers had a sufficient opportunity to do two things: first, to discover what the defendant meant by his defamatory statement, and second, to weigh the validity of the defendant's grounds for making a particular defamatory statement about a particular plaintiff. *Id.* at 1246.

14. RESTATEMENT OF TORTS § 606 comment b (1938).

15. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 118, at 820 (4th ed. 1971) (fact-opinion distinction in fair comment has proved unsatisfactory, unreliable, and difficult to draw in practice).

16. *See Id.*; Titus, *supra* note 6, at 1204.

opinion came in the historic *New York Times v. Sullivan* case.[17] In *New York Times*, the Court held that false statements of fact were constitutionally protected and would not subject the speaker to liability if the statements were made without knowledge of their falsity or reckless disregard for whether they were true or false.[18] The Court obtained the standards for this new constitutional privilege directly from the minority interpretation of the fair comment privilege.[19] Thus, although the decision itself dealt with statements of fact rather than opinion, its elevation of the minority view of the fair comment privilege to constitutional status prepared the way for subsequent doctrinal changes. Under the minority view of the fair comment privilege, statements of both fact and opinion were privileged if the speaker honestly and reasonably believed in their truth. Once the Court adopted this minority view for statements of fact, the Court almost obligated itself to adopt a similar view for statements of opinion. Since the minority view makes no distinction between fact and opinion, it would be somewhat inconsistent to borrow the standards from that view, but then apply them only to statements of fact.

More importantly, *New York Times* also set the stage for the opinion privilege by revolutionizing the treatment of libel law under the first amendment. Traditionally, libel was considered a category of speech completely beyond the protection of the first amendment.[20] As a result, libelous statements were not constitutionally protected, regardless of whether they were expressions of opinion, innocently mistaken statements of fact, or knowingly false statements. However not all defamatory statements were actionable. Some statements were still privileged, but the source of such privilege was the common law, not the constitution.[21]

Instead of following this traditional analysis, Justice Brennan's opinion in *New York Times* focused on the possible first amendment value in protecting some defamatory statements.[22] The Court held that false statements of fact, made without actual malice, should be protected to

17. 376 U.S. 254 (1964).

18. *See id.* at 279-80.

19. *See id.*, *id.* at 280-81 (discussion of similarity to minority view of fair comment); W. PROSSER, *supra* note 15, § 118, at 819-20 (discussing the relationship between minority view of fair comment and *New York Times* rule).

20. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

21. Of course, the desire to protect freedom of speech was the basis for many common-law privileges. *See supra* note 1. But the holding that the *first amendment* required the privilege was indeed revolutionary. Dean Prosser described the *New York Times* decision as a "bombshell" and "unquestionably the greatest victory won by the defendants in the modern history of the law of torts." W. PROSSER, *supra* note 15, § 118, at 819.

22. *New York Times*, 376 U.S. at 269 (libel claim not immune from constitutional limitations of the first amendment).

promote robust public debate.[23] This analysis leads logically to protection for statements of opinion if it can be shown that opinions promote robust public debate.

The Court refined the *New York Times* analysis in *Garrison v. Louisiana*.[24] In *Garrison*, the Court reversed the criminal defamation conviction of a man who said that the behavior of eight Louisiana Criminal District Court judges raised "interesting questions about the racketeer influences on our eight vacation-minded judges."[25] The Court found that the trial court applied the wrong standards for the *New York Times* privilege.[26] Although the decision did not turn on whether the allegedly defamatory statement was fact or opinion, Justice Brennan's language laid the foundation for Justice Powell's statement in *Gertz*.

In reiterating the *New York Times* privilege in *Garrison*, Justice Brennan said that it is only "calculated *falsehoods*" that are completely unprotected under the Constitution.[27] Though Justice Brennan may have believed he was simply restating the holding in *New York Times* (which protected untrue statements when made without knowledge of their falsity or without reckless disregard for their falsity),[28] the language of *Garrison* goes further. The statements expressly protected by *New York Times* are certainly not "calculated falsehoods." But by stating that only "calculated falsehoods" are actionable, the language protected not only "uncalculated" false statements, but also any statements that are not clearly "falsehoods." In other words, statements that are neither true or false would be protected under the language of *Garrison*.

Under this reading of *Garrison*, a statement is protected by the first amendment unless it is both false and published with knowledge or recklessness. Therefore, if Justice Powell's statement in *Gertz* that "there is no such thing as a false idea"[29] is correct, then "ideas" should be protected. Since Justice Powell assumed that ideas are synonymous with opinions,[30] it follows that the language of *Garrison* protects statements of

23. *Id.* at 278-80.

24. 379 U.S. 64 (1964).

25. *Id.* at 66.

26. The trial court used a standard of common law malice—i.e., ill-will, spite, or hostility—to decide whether the *New York Times* privilege applied. The appropriate standard, however, was whether the defendant made the statement with knowledge or reckless disregard for the truth. *Garrison*, 379 U.S. at 78.

27. *Garrison*, 379 U.S. at 75 (emphasis added).

28. Justice Brennan does not attribute the terminology "calculated falsehood" to any particular case, but he uses it as synonymous with the type of statement not protected by *New York Times*. For example, he states that "[c]alculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas.'. . . Hence the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection." *Garrison*, 379 U.S. at 75 (citation omitted).

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

30. *Id.*

opinion.

Justice Brennan's analysis in *Garrison* refined *New York Times* in a second way, by expanding the underlying rationale. As in *New York Times*, Justice Brennan focused on the utility of protecting the statements to promote public debate, but this time he extended the analysis to the operation of democratic government. In so doing, he explained that calculated falsehoods have no part in the exposition of ideas because the "use of the known lie . . . is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."[31] In fact, he explained that calculated falsehoods could subvert orderly democratic change because they could be used to unseat public servants unjustifiably.[32]

The next move toward a constitutional privilege for opinions came in *Greenbelt Cooperative Publishing Association v. Bresler*.[33] In *Greenbelt Cooperative*, the Court held that a newspaper's statement equating a developer's negotiating position in a city development dispute with "blackmail" did not amount to libel as a matter of law.[34] In so holding, however, the Court did not provide one specific rationale, but rested its ruling on a variety of factors. Depending on the emphasis given each of these different factors, *Greenbelt Cooperative* can be read a number of ways. It can be interpreted as protecting the statement involved in the case because it was part of a fair report, or because it was not a calculated falsehood, or because it was not defamatory.

The fair reporting interpretation of *Greenbelt Cooperative* is supported both by the facts of the case and by the language of the Court. The allegedly defamatory statement that the developer "blackmailed" the city was part of a newspaper report of public meetings.[35] The Court characterized the story as an "accurate and truthful" report of what had been said at the meetings.[36] Since the public had a "substantial concern" in the outcome of these meetings, the newspaper was performing its "wholly legitimate function as a community newspaper" when it published the report.[37] Based on this language, one might characterize the holding of *Greenbelt Cooperative* as protecting statements made in a full and accurate report of public meetings that were of substantial public interest.[38]

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31. *Garrison*, 379 U.S. at 75.

32. *Id.*

33. 398 U.S. 6 (1970).

34. *Id.* at 13.

35. *Id.* at 11.

36. *Id.* at 12.

37. *Id.* at 13.

38. The fair reporting privilege, also called the privilege of reporting on public proceedings, was recognized at common law, but it is now subsumed under the Constitution. *See* W. PROSSER,

On the other hand, the language in *Greenbelt Cooperative* also supports the interpretation that the statement that the developer "blackmailed" the city was protected because it was not a calculated falsehood. In addition to its fair reporting rationale, the Court emphasized that the use of the word "blackmail" did not imply that the developer committed the crime of blackmail. The context of the article, the Court found, was such that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet."[39] Since the statement was merely rhetorical hyperbole, and not an actual accusation of criminal conduct, it is possible that the Court considered the statement something other than a "calculated falsehood," the only type of statement actionable under the *New York Times-Garrison* analysis. Though the Court did not expressly endorse this reasoning, it might be the rationale which underlay the Court's emphasis on the fact that the term "blackmail" was rhetorical. Thus, *Greenbelt Cooperative* might stand either for a constitutional privilege for rhetorical excess, or for a broader constitutional privilege for all statements that are not "calculated falsehoods."

A third interpretation of the *Greenbelt Cooperative* holding is not based on constitutional grounds. The Court emphasized that a reader would understand "blackmail" in its rhetorical sense.[40] This intimation by the Court might mean that the statement was not actionable because it was not defamatory. This interpretation turns on state defamation law rather than on an interpretation of the first amendment. It is unsatisfying, however, because the Court never addressed the possibility that the rhetorical use of the term "blackmail" still could be defamatory. Even the rhetorical use of the term "blackmail" might have harmed the developer's reputation because it made him appear manipulative and unscrupulous.

Four years after *Greenbelt Cooperative*, Justice Powell wrote the dictum that became the commonly cited source of the constitutional privilege for statements of opinion. In *Gertz v. Robert Welch, Inc.*,[41] the defendant published an article accusing plaintiff Gertz of having a criminal record, of being a "Leninist" and a "Communist-fronter," and of helping to "frame" a Chicago policeman convicted of murder.[42] The jury awarded $50,000 damages to Gertz, but the trial court granted judgment notwithstanding the verdict on the basis that the plaintiff failed to

supra note 15, § 118, at 830-31. The theory behind the privilege is that any member of the public could attend a public meeting, so the reporter is merely a substitute for the public eye. *Id.* The fair reporting privilege traditionally protected reports about public deliberations of municipal bodies. *Id.*

39. *Greenbelt Cooperative*, 398 U.S. at 14.

40. *Id.*

41. 418 U.S. 323 (1974).

42. *Id.* at 325-26.

prove that the defendant published the statements with actual malice—that is, that the defendant published the statements with knowledge of their falsity or reckless disregard for whether they were true or false.[43] The Court of Appeals for the Seventh Circuit affirmed.[44]

The Supreme Court reversed on the ground that the *New York Times* actual malice standard should not be applied to private individuals.[45] The Court refused to apply the actual malice standard for two primary reasons. First, as a private individual, Gertz had less access to the media to contradict the errors and minimize the impact of the defamatory statement than would a public figure. Therefore, the state interest in protecting the private individual is greater than it is in protecting a public figure.[46] Second, as a private individual Gertz did not thrust himself into the public eye; thus he did not voluntarily assume the risk of close public scrutiny as public figures do.[47] Since Gertz was not a public figure, the actual malice standard was inappropriate. The Supreme Court ruled that the lower court should have applied the less stringent state standard for intent in defamation.[48]

Justice Powell's widely cited statement 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"[49] is mere dictum. Nevertheless, this dictum may be a logical outgrowth of the *New York Times-Garrison* analysis, at least if two important premises are correct. The first premise is that "there is no such thing as a false idea."[50] If that is true, it follows that "ideas" are protected by the first amendment because they cannot fall into the category of actionable statements—calculated falsehoods. The second premise is that opinions are "ideas." Justice Powell treats opinions as ideas when he writes that "[h]owever pernicious an opinion may seem, we depend for its correction . . . on the competition of *other* ideas."[51] If this premise is correct, it follows that opinions are protected because, like ideas, they do not fall into the category of calculated falsehoods.

Regardless of the merits of Justice Powell's dictum and its assumptions, it has been generally accepted as valid constitutional law. Nearly every jurisdiction in the United States cites the *Gertz* dictum as binding

43. *Id.* at 329 & n.2.
44. Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972).
45. *Gertz*, 418 U.S. at 343.
46. *Id.* at 344.
47. *Id.* at 344-45.
48. *Id.* at 345-47.
49. *Id.* at 339-40.
50. *Id.* at 339.
51. *Id.* at 339-40 (emphasis added).

constitutional authority.[52] Although the Supreme Court has not yet directly ruled on the issue, one recent Supreme Court opinion has implicitly accepted the lower courts' recognition of a constitutional privilege for statements of opinion.[53] On the other hand, some members of the Court have questioned the validity of this view.[54] It remains to be determined whether the common-law predecessor of the constitutional privilege for opinions, the fair comment privilege, has become obsolete.[55]

Further insight into the opinion privilege is provided by *Old Dominion Branch No. 496, National Association of Letter Carriers v. Aus-*

52. *See* Ollman v. Evans, 750 F.2d 970, 974 n.6 (D.C. Cir. 1984) (majority of federal circuit courts have recognized constitutional protection for statements of opinion), *cert. denied*, 105 S. Ct. 2662 (1985). For examples of states that have recognized the *Gertz* dicta as establishing a consitutional privilege for statements of opinion, see Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 601, 552 P.2d 425, 427, 131 Cal. Rptr. 641, 643 (1976); Bucher v. Roberts, 198 Colo. 1, 3, 595 P.2d 239, 240-41 (1979) (en banc); Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 117, 448 A.2d 1317, 1324 (1982); Lampkin-Asam v. Miami Daily News, Inc., 408 So. 2d 666, 667 (Fla. Dist. Ct. App. 1981), *review denied*, 417 So. 2d 329 (Fla.), *appeal dismissed, cert. denied*, 459 U.S. 806 (1982); Catalano v. Pechous, 83 Ill. 2d 146, 159, 419 N.E.2d 350, 356-57 (1980), *cert. denied*, 451 U.S. 911 (1981); Mashburn v. Collin, 355 So. 2d 879, 885 (La. 1977); Caron v. Bangor Publishing Co., 470 A.2d 782, 784 (Me.), *cert. denied*, 104 S. Ct. 3512 (1984); 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, 341 (1983); Pease v. Telegraph Publishing Co., 121 N.H. 62, 65, 426 A.2d 463, 465 (1981); Kotlikoff v. Community News, 89 N.J. 62, 65, 444 A.2d 1086, 1089 (1982); Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 291, 648 P.2d 321, 330 (1981); 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); Leader v. WSM, Inc., 10 Media L. Rep. (BNA) 1343, 1343 (Tenn. Cir. Ct. 1984). Other jurisdictions have an opinion privilege, but it is not expressly based on *Gertz*. *See, e.g.*, Myers v. Boston Magazine, 380 Mass. 336, 403 N.E.2d 376 (1980); Miskovsky v. Oklahoma Publishing Co., 654 P.2d 587, 593 (Okla.), *cert. denied*, 459 U.S. 923 (1982).

53. Bose Corp. v. Consumers Union, Inc., 104 S. Ct. 1949, 1961 (1984).

54. Justice Rehnquist, joined by Chief Justice Burger, dissenting in the Court's denial of certiorari in Ollman v. Evans, 105 S. Ct. 2662 (1985), stated that the *Gertz* dictum has been misunderstood by the lower courts. He said:

> At the time I joined the opinion in *Gertz*, I regarded this statement as an exposition of the classical views of Thomas Jefferson and Oliver Wendell Holmes that there was no such thing as a false "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 quoted passage. But it is apparent from the cases cited by petitioner 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."

Id. at 2663-64 (citation omitted); *see also* Miskovsky v. Oklahoma Publishing Co., 459 U.S. 923 (1982) (Rehnquist, J., dissenting) (denial of certiorari inappropriate because *Gertz* dictum not meant to supersede common law privilege of fair comment).

55. There is some authority for the proposition that the constitutional privilege for statements of opinion has superseded the privilege of fair comment. *See* Kotlikoff v. Community News, 89 N.J. 62, 65, 444 A.2d 1086, 1087 (1982) (fair comment no longer relevant in the wake of *Gertz*); RESTATEMENT (SECOND) OF TORTS § 566, Note to Institute at 13 (Tent. Draft No. 21, 1975); Christie, *Defamatory Opinions and the* Restatement (Second) of Torts, 75 MICH. L. REV. 1621, 1625 (1977). *But see* Cianci v. New Times Publishing Co., 639 F.2d 54, 66 (2d Cir. 1980) (fair comment considered alternative privilege to opinion privilege); Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 294, 648 P.2d 321, 333 (1982) (fair comment still a valid defense).

tin,[56] decided the same day as *Gertz*. In that case, a labor union newsletter published the plaintiff's name under the heading, "List of Scabs," on three separate occasions.[57] On one of these occasions the newsletter defined a "scab" as, among other things, an "animal" with "a corkscrew soul, a water brain, a combination backbone of jelly and glue."[58] The newsletter concluded with the following:

> The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.
>
> Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.[59]

Justice Marshall, writing for the majority, noted that Federal labor policy required more protection for a union involved in a labor dispute than state law provides. He reasoned that the rights recognized by Executive Order 11491,[60] like chapter 7 of the National Labor Relations Act,[61] include the right to attempt to persuade others to join them. These rights should not be "stifled" by the threat of liability for defamation unless the plaintiff could meet the actual malice intent standard of *New York Times*.[62]

Before applying the actual malice standard to the facts of the case, however, Justice Marshall cited *Gertz* for the proposition that there must first "be a false statement of fact."[63] The Court held that the expression of even the most pejorative opinions is protected under federal labor law.[64] The Court found that the statements about scabs were used in a loose, figurative sense, as mere rhetorical hyperbole like the terms "unfair" or "fascist."[65] As in *Greenbelt Cooperative*, the Court thought that readers would understand the statement as an expression of the author's contempt, not an accusation that the plaintiff had committed a criminal offense.[66]

Even though *Letter Carriers* is an interpretation of Federal labor

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56. 418 U.S. 264 (1974).

57. *Id.* at 267.

58. *Id.* at 268.

59. *Id.*

60. 3 C.F.R. 254 (1974). This Executive Order governs labor-management relations in the executive branch of the Federal Government. *See also Letter Carriers*, 418 U.S. at 273-74.

61. 29 U.S.C. § 151 (1982).

62. *See Letter Carriers*, 418 U.S. at 277-79 & n.13.

63. *Id.* at 284.

64. *Id.*

65. *Id.*

66. *Id.* at 284-86 & n.16. It is interesting to note that Justice Powell, author of the *Gertz* dictum, disagreed with the majority's conclusion that the statements were mere hyperbole involving no statements of fact. Justice Powell believed the statements were libelous because they implied that the plaintiffs lacked "character" and had "rotten principles." As a result, he would have held the union liable. *Id.* at 296-97.

law, not constitutional law, it refines the *Gertz* dictum in several ways. First, *Letter Carriers* shows that the Supreme Court has explicitly recognized a privilege for statements of opinion in labor disputes regulated under Federal law. Of course, there may be nonconstitution-based policy reasons for giving speakers greater latitude in a heated labor dispute than in other contexts. Nevertheless, the Court recognized the legitimacy of the reasoning of the *Gertz* dictum.

Letter Carriers also used *Greenbelt Cooperative* as an example of, and authority for, the opinion privilege; the Court relied on the earlier case to find that the statements were not actionable because readers understood them in a figurative sense.[67] Thus, this use of *Greenbelt Cooperative* implies support for interpretation of this case as standing for the proposition that pejorative terms used in a loose, figurative, or rhetorical sense are not actionable.

Two basic principles emerge from the Supreme Court cases discussed above.[68] First, expressions of opinion, to the extent they are not calculated falsehoods, are protected by the first amendment. Second, this privilege for statements of opinion extends to cases of "rhetorical hyperbole," where listeners would understand that the words were used in a figurative sense. The development of the opinion privilege in the lower courts is considered in the next Section.

C. *Application of the Privilege by the Lower Courts*

Although the lower courts generally follow the *Gertz* dictum by protecting statements of opinion as constitutionally privileged, they have adopted different methods for implementing the opinion privilege. Three main theories can be found in the case law: the *Restatement* test, the totality of circumstances test, and the verifiability test.[69] Some courts use

67. *Id.* at 284-85.

68. Some might think that Hutchinson v. Proxmire, 443 U.S. 111 (1979), is relevant to this discussion of the opinion privilege. In that case, the Court held that statements made in a press release, newsletter, and television interview by Senator Proxmire which disparaged the plaintiff were not protected by the speech and debate clause of the Constitution. In addition, the Court held that the plaintiff, a scientist receiving government grant money, was not a public figure, so the *New York Times* "actual malice" standard was inappropriate. Even though Proxmire's characterizations of Hutchinson's research as "nonsense" and "transparent worthlessness" might be statements of opinion, the Court did not address an opinion privilege question. *See also* Ollman v. Evans, 750 F.2d 970, 976 n. 11 (D.C. Cir. 1984) (en banc) (noting that nothing in *Hutchinson* suggests that the statements would not have been protected opinion had the Court reached the issue), *cert. denied*, 105 S. Ct. 2662 (1985).

69. A fourth possible theory that will not be considered at length in this Comment is the "perception of the reader" test. This test asks whether the ordinary reader or listener would perceive the statement as one of fact or one of opinion. *See* 1 F. HARPER & F. JAMES, *supra* note 10, at 458; *see also, e.g.*, Mashburn v. Collin, 355 So. 2d 879 (La. 1977) (court finds statement to be protected opinion because, among other things, the readers would perceive it to be opinion). It need not be considered at length because it is a circular test: The test judges a statement perceived as opinion to

one theory, but more often the courts use some combination of two or more theories. The following Section briefly describes the genesis and development of each view and discusses the support that can be found for each view in the Supreme Court's decisions.

1. The Second Restatement's View

The *Second Restatement* view, which is the predominant view in the lower courts,[70] comes from section 566 of the *Restatement (Second) of Torts*. That section provides: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."[71]

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be a statement of opinion without identifying any salient characteristics to distinguish such a statement from a statement of fact. Other commentators have criticized this test. *See* Titus, *supra* note 6, at 1205-06; Note, *Fact and Opinion, supra* note 7, at 105. In addition, it is similar to the *Restatement* test, which will be analyzed below. *See infra* Part III B.

Two other theories have been recently proposed by commentators. One, proposed by Professor Zimmerman, argues that a form of the innocent construction rule should be applied to the opinion privilege. Under this interpretation, a statement is privileged opinion unless it is unreasonable to interpret the statement as not factual. *See* Zimmerman, *Curbing the High Price of Loose Talk*, 18 U.C. DAVIS L. REV. 359, 440 (1985). Since this formulation of the privilege uses the same factors as the current case law, *id.*, it is subject to the same criticisms that apply to the three predominant tests. Most notably, like the reader-perception test considered above, this test fails to articulate any fact-opinion distinction.

Another suggestion for the opinion privilege comes from a student Note, which proposes that a statement is an opinion whenever it is labeled as such. *See* Note, *The Fact-Opinion Distinction, supra* note 5, at 1851. This is very much like the cautionary language of the totality of the circumstances test, which looks to language modifying the disputed statement that might warn the recipients that it is opinion. *See infra* text accompanying notes 86-94. For a criticism of the cautionary language aspect of the totality of the circumstances test, *see infra* text accompanying notes 201-09.

70. Many jurisdictions have used the *Second Restatement* test to decide whether a statement is fact or opinion. *See, e.g.*, Avins v. White, 627 F.2d 637, 642 (3d Cir. 1980); Bucher v. Roberts, 198 Colo. 1,4, 595 P.2d 239, 241 (1979) (en banc); From v. Tallahassee Democrat, Inc., 400 So. 2d 52, 57 (Fla. Dist. Ct. App. 1981); Pritsker v. Brudnoy, 389 Mass. 776, 776, 452 N.E.2d 227, 228 (1983); Searer v. Wometco West Mich. TV, 7 Media L. Rep. (BNA) 1639, 1640 (Mich. Cir. Ct. 1981); Iverson v. Crow, 639 S.W.2d 118, 119 (Mo. Ct. App. 1982); Nevada Indep. Broadcasting Corp. v. Allen, 99 Nev. 404, 411, 664 P.2d 337, 342 (1983); Kotlikoff v. Community News, 89 N.J. 62, 68-69, 444 A.2d 1086, 1089 (1982); Rand v. New York Times Co., 75 A.D.2d 417, 422, 430 N.Y.S.2d 271, 274 (1980); Braig v. Field Communications, 310 Pa. Super. 569, 580-81, 456 A.2d 1366, 1372-73 (1983), *cert. denied*, 466 U.S. 970 (1984); Hawkins v. Oden, 459 A.2d 481, 484 (R.I. 1983).

Other jurisdictions, while not using the *Restatement* test directly, utilize a similar analysis by requiring that the facts upon which the statement is based are fully set forth. *See, e.g.*, Lewis v. Time, Inc., 710 F.2d 549, 555-56 (9th Cir. 1983); Hammerhead Enterprises, Inc. v. Brezenoff, 707 F.2d 33, 40 (2d Cir.), *cert. denied*, 464 U.S. 892 (1983); Rinsley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983); Orr v. Argus-Press Co., 586 F.2d 1108, 1115 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979); Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761, 765 (D.N.J. 1981); Mashburn v. Collin, 355 So. 2d 879, 885 (La. 1977); Caron v. Bangor Publishing Co., 470 A.2d 782, 784-85 (Me.), *cert. denied*, 104 S. Ct. 3512 (1984); Myers v. Boston Magazine, 380 Mass. 336, 341, 403 N.E.2d 376, 378 (1980); Anton v. St. Louis Suburban Newspapers, Inc., 598 S.W.2d 493, 498-99 (Mo. Ct. App. 1980); Plough v. Schneider, 8 Media L. Rep. (BNA) 1620, 1622 (Ohio Ct. App. 1982).

71. RESTATEMENT (SECOND) OF TORTS § 566 (1977).

This passage demonstrates that the American Law Institute ("ALI") reluctantly recognized the constitutional privilege for statements of opinion. The opinion privilege is explicitly recognized only in the commentary to section 566. In comment c, the ALI admits that the common law rule making actionable those expressions of opinion which are not accompanied by a statement of the facts underlying the opinion "now appears to have been rendered unconstitutional by U.S. Supreme Court decisions."[72]

The ALI position, however, retains liability for statements of "mixed" opinion and fact. Mixed opinion is distinguished from pure opinion that is a statement that sets forth the facts on which its conclusions are based or a statement that implicitly refers to facts already known by the speaker[73] and his or her audience.[74] Mixed opinion is a statement that "is apparently based on facts . . . that have not been stated . . . or assumed."[75] Since mixed opinion implies the existence of undisclosed facts which recipients may take to be the basis for the opinion, it is treated as a statement of those facts.[76] Thus, a statement that is mixed opinion may result in liability, while a statement that is pure opinion is privileged.[77] The court is responsibile for deciding whether a statement is "mixed" or "pure" opinion.[78]

The key to whether a statement is mixed or pure opinion is the effect the statement would have on its recipient. In other words, if a recipient of a statement understands that it is a conclusion drawn from a set of generally known facts, or facts fully disclosed by the speaker, then the statement is protected as pure opinion. On the other hand, if the recipient believes that the speaker draws her conclusions from undisclosed facts, such as inside information, then the statement is "mixed" opinion and may result in liability.

This distinction between mixed and pure opinion, based on the assumed effect the statement has on the recipient, comes directly from the first *Restatement*'s formulation of the fair comment privilege. In the commentary to section 606 of the first *Restatement*, which lays out the general principles governing fair comment, the ALI states:

> Comment or criticism is an expression of the opinion of the commentator 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

72. *Id.* comment c at 172.

73. The term "speaker" will be used throughout this Comment in place of all other sources of communication such as writers, publishers, etc.

74. RESTATEMENT (SECOND) OF TORTS § 566 comment b at 171.

75. *Id.* at 172.

76. *Id.* comment c at 173.

77. *Id.*

78. *Id.*

> 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 person to whom the comment or criticism is addressed . . . .[79]

The *Second Restatement*'s opinion privilege is, however, broader than the first *Restatement*'s privilege of fair comment. Under fair comment, a statement must not only be pure opinion, but also must represent the actual opinion of the critic, and must not be made solely to harm the person criticized.[80] Because of the *Gertz* dictum, the *Second Restatement* position was modified so that all statements of "pure" opinion would be protected.[81]

The ALI's recognition of a constitutional privilege for opinion came only after a period of resistance. During the early debates over the treatment of opinions, the ALI defeated a motion to delete the *Second Restatement*'s reference to defamatory opinions based on the notion that *New York Times* and its progeny had settled the question whether opinions could be defamatory. *Gertz* and *Letter Carriers*, however, forced the ALI to concede that at least some statements of opinion were privileged. But even this concession was made reluctantly and was relegated to the commentary accompanying section 566.[82] As a result, the *Restatement* still recognizes the possibility that statements of opinion can be defamatory, which, on its face, seems contrary to the *Gertz* dictum.

Despite the ALI's reluctance and its compromises, it can be argued that the Supreme Court's decisions support the *Restatement* test. In the only two Supreme Court decisions that seem to apply the opinion privilege, *Greenbelt Cooperative* and *Letter Carriers*, the Court's decisions may have turned on the full disclosure of the facts in the articles. For example, in *Greenbelt Cooperative* the Court noted that plaintiff "Bresler's proposal was accurately and fully described in each article, along with the accurate statement that some people at the meetings had referred to the proposal as blackmail, and others had indicated they thought Bresler's position not unreasonable."[83] Similarly, the Court in *Letter Carriers* indicated that the article called the plaintiffs "scabs"

79. RESTATEMENT OF TORTS § 606 comment b at 276-77 (1938); *see also* RESTATEMENT (SECOND) OF TORTS comment b at 172 (1977) ("It was the first, or pure, type of expression of opinion to which the privilege of fair comment was held to apply. . . . For the second, or mixed, type of expression of opinion the privilege of fair comment was held to be inapplicable . . . .").

80. RESTATEMENT OF TORTS § 606 (1938).

81. The ALI notes, however, that it is an open question whether the privilege applies to private statements about nonpublic matters. RESTATEMENT (SECOND) OF TORTS § 566 comment c, at 173 (1977).

82. *See* Christie, *supra* note 55, at 1629-31 (discussing evolution of section 566).

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

because they "had in fact refused to join" the union.[84] As a result of full disclosure, the recipients of these allegedly defamatory statements would have understood that the offending language was figurative and that the defendants had not accused the plaintiffs of criminal activity.[85] Thus, the *Restatement* accords with the facts of those cases decided by the Court. The Court has not yet spoken in the converse situation where the speaker is held liable for a "mixed" opinion because of the failure to disclose fully the underlying facts. Thus, it remains to be seen whether the *Restatement* view is correct, or whether the Supreme Court will extend the opinion privilege to some "mixed" opinions.

2. *Totality of the Circumstances Test*

The California courts have developed a second view of the opinion privilege, the totality of the circumstances test. The Ninth Circuit summarized the California rule as follows:

> [T]he test to be applied in determining whether an allegedly defamatory statement constitutes an actionable statement of fact requires that the court examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.[86]

Under this test the court looks to all relevant factors including: the surrounding words, any cautionary language, and the surrounding circumstances such as the medium used and audience addressed. In a few jurisdictions outside of California, this rule has been adopted specifically or used in part.[87]

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84. *See* Old Dominion Branch No. 496, National Ass'n of Letter Carriers AFL-CIO v. Austin, 418 U.S. 264, 283 (1974).

85. *See id.* at 285; *Greenbelt Coop.*, 398 U.S. at 14.

86. Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980). The court found support for its summary of California law in the California Supreme Court decision Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 601-03, 552 P.2d 425, 428-29, 131 Cal. Rptr. 641, 644-45 (1976).

87. Massachusetts and New Mexico have adopted the totality-of-the-circumstances rule. *See* Cole v. Westinghouse Broadcasting Co., 386 Mass. 303, 309-10, 435 N.E.2d 1021, 1025, *cert. denied*, 459 U.S. 1037 (1982); Marchiondo v. Brown, 98 N.M. 394, 404, 649 P.2d 462, 472 (1982). The Ninth Circuit also continues to use the test. *See* Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983).

Other courts have cited *Information Control Corp.* as part of a conglomeration of various tests used to distinguish fact from opinion. *See, e.g.*, Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1360 (Colo. 1983) (en banc); Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 120-21, 448 A.2d 1317, 1325-26 (1982); From v. Tallahassee Democrat, Inc., 400 So. 2d 52, 57 (Fla. Dist. Ct. App. 1981), *review denied*, 412 So. 2d 465 (Fla. 1982).

Still other courts, while not citing the *Information Control* line of cases, have analyzed the fact/opinion distinction in a way that is similar to the totality-of-the-circumstances test. *See, e.g.*, Rinsley

The totality-of-the-circumstances test comes from a combination of several common law doctrines. The principal case is *Gregory v. McDonnell Douglas Corp.*[88] There, the California Supreme Court held statements made by management in a labor dispute—that the union officials were seeking "personal gain and political prestige rather than to serve the best interests of the members" [89] —were privileged statements of opinion.[90] The Court looked to a combination of authority for its conclusion: *Gertz* and *Letter Carriers*,[91] a California Supreme Court case that granted broad protection for speech uttered in labor disputes,[92] and a series of California appellate cases that looked to audience expectations in deciding whether a statement was an opinion.[93]

The rationale behind this view of the opinion privilege is that, depending on the circumstances, the same statement may be perceived as either fact or opinion. The totality-of-the-circumstances test focuses on the probable expectations of the audience to which the disputed statements are addressed. Thus, statements phrased cautiously, or made in the midst of a public debate, are "opinions" because they are not likely to be perceived as factual.[94]

As with the *Restatement* test, some support for the California test can be found in both *Greenbelt Cooperative* and *Letter Carriers*. The out-

v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983) (court must look at nature and context of the statement as a whole); Anton v. St. Louis Suburban Newspapers, 598 S.W.2d 493, 499 (Mo. Ct. App. 1980) (same); Dupler v. Mansfield Journal Co., 64 Ohio St. 2d 116, 413 N.E.2d 1187 (Ohio Ct. App. 1979) (presence of cautionary language is important); Haas v. Painter, 62 Or. App. 719, 725, 662 P.2d 768, 771 (statement part of an editorial), *review denied*, 295 Or. 297, 668 P.2d 381 (1983).

Perhaps the most notable similar view is that held by Judge Bork of the District of Columbia Circuit. In his concurrence in Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2662 (1985), he rejects any clear fact/opinion dichotomy. Judge Bork believes that, instead of trying to categorize statements as fact or opinion, the judiciary should closely scrutinize statements to protect certain "types" of speech essential to preserving the values protected by the first amendment. This scrutiny "requires a consideration of the totality of the circumstances that provide the context in which the statement occurs and which determine both its meaning and the extent to which making it actionable would burden freedom of speech or press." *Id.* at 997. The "types" of speech that Bork considers deserving of protection are those made as part of a "political" controversy, especially those shown by the context to be recognizable rhetorical hyperbole. *See id.* at 1002-03. One jurisdiction has explicitly adopted Judge Bork's view, and has interpreted "totality of the circumstances," as including the factors outlined in *Information Control Corp.* and in the majority opinion of *Ollman*. Henry v. Halliburton, 690 S.W.2d 775, 781-88 (Mo. 1985) (en banc).

88. 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976).

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

90. *Id.* at 604, 552 P.2d at 430, 131 Cal. Rptr. at 646.

91. *Id.* at 600-01, 552 P.2d at 427-28, 131 Cal. Rptr. at 643-44.

92. *Id.* at 601-02, 552 P.2d at 428, 131 Cal. Rptr. at 644 (citing Emde v. San Joaquin County etc. Council, 23 Cal. 2d 146, 143 P.2d 20 (1943)).

93. *Id.* at 602-03, 552 P.2d at 429, 131 Cal. Rptr. at 645 (citing Scott v. McDonnell Douglas Corp., 37 Cal. App. 3d 277, 112 Cal. Rptr. 609 (1974) and Taylor v. Lewis, 132 Cal App. 381, 22 P.2d 569 (1933)).

94. *Information Control*, 611 F.2d at 783-84; *Gregory*, 17 Cal. 3d at 601-03, 552 P.2d at 428-29, 131 Cal. Rptr. at 644-45.

come in these cases relied to some extent on the audiences' perception of the protected statements. In *Greenbelt Cooperative*, the Court found that "[i]t 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."[95] Also, in *Letter Carriers* the Court found that "[i]t is similarly impossible to believe that any reader of the Carrier's Corner would have understood the newsletter to be charging the appellees with committing the criminal offense of treason."[96] Additionally, both cases involved a public controversy or debate. In *Greenbelt Cooperative*, the statement was made at "public debates at the sessions of the city council."[97] In *Letter Carriers*, the statement was made in the course of a labor dispute where "this particular epithet is common parlance."[98]

Greenbelt Cooperative and *Letter Carriers* did not, however, go so far as to indicate that the audience's perceptions or public debate or controversy are either necessary or sufficient conditions for the invocation of the opinion privilege. Although these conditions are two factors cited by the Court, the cases do not formulate such a test for the opinion privilege. In addition, *Greenbelt Cooperative* and *Letter Carriers* do not support that part of the totality of the circumstances test which directs the court to look for cautionary language. The statements at issue in both cases were made without any cautionary language such as "opinion," "believe", or "probably." Since, as with the *Restatement* test, the Supreme Court decisions neither fully confirm or deny the legitimacy of the totality of the circumstances test, the test needs to be examined in terms of the first amendment principles it is intended to promote. This will be done in Part III.

3. *Verifiability Test*

A third test for distinguishing statements of fact from statements of opinion is the "verifiability" test. This test directs the court to decide first whether the language used is so imprecise or vague that it has no generally accepted core of meaning.[99] If so, the statement is protected.

95. *Greenbelt Coop.*, 398 U.S. at 14.

96. *Letter Carriers*, 418 U.S. at 285.

97. *Greenbelt Coop.*, 398 U.S. at 13.

98. *Letter Carriers*, 418 U.S. at 283.

99. Professor Schauer developed a similar concept in his article, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263 (1978). He argues that words have meaning because the community by consensus understands the word to represent a particular concept. *Id.* at 282. Some meanings have enough of a consensus that they are considered "factual." The clearest example of a fact is a statement about a tangible object. *Id.* at 277. The next step toward opinion is the "particularized belief," which is a statement that can be verified by observations or generally accepted standards. *Id.* at 278. Both particularized beliefs and statements about tangible objects are examples of facts under the verifiability standard.

However, if there is a generally accepted meaning, the court is then to look to the provability of the statement.[100] If it cannot be proven objectively, the statement is protected opinion. Unlike the two tests discussed above, the verifiability test is rarely used alone; courts often examine the verifiability of a statement in conjunction with other factors to ascertain whether a statement should be protected as opinion.[101]

Buckley v. Littell[102] was one of the earliest cases using the verifiability test. In that case the court found that "the use of 'fascist,' 'fellow traveler' and 'radical right' as political labels . . . 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."[103] Because these terms were so imprecise, any attempt to prove them true or false would be arbitrary.[104] The Second Circuit's reasoning was based on its interpretation of *Gertz*. It found that *Gertz* identified a crucial distinction between " 'false statements of fact' which receive no constitutional protection, and 'ideas' and 'opinions' which by definition can never be 'false' so as to constitute false statements which are unprotected when made with actual malice."[105] Drawing on this distinction, the court deduced that the way to determine whether a statement is one of fact or opinion is to see if the language of the statement is about "concepts whose content is so debatable, loose and varying, that they are insusceptible to proof of truth or falsity . . . [and]

100. Protection for allegedly defamatory statements that are not "disprovable" has been favored in an article by Franklin and Bussel. *See* Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 866 (1984).

101. Some courts have found that a statement was factual by using a form of verifiability. They reason that a statement which appears to be an opinion on its face may be so laden with factual content that it is actually factual. *See* Cianci v. New Times Publishing Co., 639 F.2d 54, 63 (2d Cir. 1980); Costello v. Capital Cities Media, Inc., 111 Ill. App. 3d 1009, 1016, 445 N.E.2d 13, 18 (1982). This is the reverse side of verifiability; that is, since the statement is "laden with factual content" it is one that can be verified.

Other courts have used verifiability in conjunction with a *Restatement*-like requirement that the facts upon which the statement is based be fully set forth. *See, e.g.*, Bucher v. Roberts, 198 Colo. 1, 595 P.2d 239 (1979)(en banc); National Ass'n. of Gov't Employees v. Central Broadcasting Corp., 379 Mass. 220, 396 N.E.2d 996 (1979), *cert. denied*, 446 U.S. 935 (1980); DeLuca v. New York News, 109 Misc. 2d 341, 438 N.Y.S.2d 199 (N.Y. Sup. Ct. 1981).

Finally, some courts use a potpourri approach, combining verifiability with a version of the totality of the circumstances test. *See, e.g.*, Rinsley v. Brandt, 700 F.2d 1304 (10th Cir. 1983) (using verifiability, the *Restatement*, and context as a whole); Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983)(en banc)(same); Cole v. Westinghouse Broadcasting Co., 386 Mass. 303, 435 N.E.2d 1021 (verifiability and context as a whole), *cert. denied*, 459 U.S.1037 (1982); Anton v. St. Louis Suburban Newspapers, 598 S.W.2d 492 (Mo. Ct. App. 1980) (verifiability, facts set forth, and communication as a whole); Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982) (verifiability, entire context, and reasonable reader).

102. 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

103. *Id.* at 893.

104. *Id.* at 894.

105. *Id.* at 893.

within the realm of protected opinion and idea under *Gertz*."[106]

Perhaps the most precise statement of the verifiability test is found in *Ollman v. Evans*.[107] In a thorough and scholarly opinion for the D.C. Circuit Court, en banc,[108] Judge Starr formulated the following four-factor test for distinguishing between fact and opinion:

> First, we will analyze the common usage or meaning of the specific language of the challenged statement . . . [to determine] whether the statement has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous. . . . Second, we will consider the statement's verifiability—is the statement capable of being objectively characterized as true or false? . . . Third, moving from the challenged language itself, we will consider the full context of the statement—the entire article or column, for example—inasmuch as other, unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer that a particular statement has factual content. Finally, we will consider the broader context or setting in which the statement appears. Different types of writing have . . . widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion.[109]

The first two parts of this test determine verifiability. Part one is the linguistic side of verifiability. It requires the court to look at the language itself to see if it has a consistent, determinate meaning for a consensus of understanding.[110] Part two is the practical side of verifiability. It focuses on the capability of objectively proving the truth or falsity of the statement.[111] A statement may be incapable of objective proof when it is incapable of evidentiary proof. For example, it is very difficult to prove whether a police officer harassed a suspect because of his social

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106. *Id.* at 894.

107. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2662 (1985).

108. There were six opinions in *Ollman*. Judge Starr filed the court's opinion; Judge Bork filed a concurring opinion, joined by Judges Wilkey, Ginsburg, and MacKinnon; Judge MacKinnon filed his own concurrence; Chief Judge Robinson dissented in part, joined by Judge Wright; Judge Wald dissented in part and was joined by Judges Edwards and Scalia; Judge Edwards filed a statement concurring in part and dissenting in part; Judge Scalia dissented, joined by Judges Wald and Edwards. *Id.* at 971.

109. *Id.* at 979 (citations omitted).

110. The *Ollman* court refers to the absence of a "correct" definition of terms such as "fascist." *Id.* at 980. The absence of a "correct" definition is what this Comment means by no consensus of understanding. In other words, it means that there is no generally accepted definition of what the language used means. A similar concept is developed by Professor Schauer. *See supra* note 99.

111. This part of the *Ollman* test is more fully explained later in the opinion. *See id.* at 981.

It should be noted that "objectively proving the truth" of a statement is not meant to imply that a statement is "true" in any metaphysical sense. Rather, it is more like a legal term-of-art. A statement is "objectively" provable if there are legally acceptable standards against which to measure the alleged conduct or status. A similar concept is developed by Franklin and Bussel. *See* Franklin & Bussel, *supra* note 100.

status.[112] Alternatively, a statement may be incapable of objective proof where the standards of comparison for the statement are ambiguous. For instance, it is hard to prove whether an individual's behavior is "cruel" because there is no well-accepted standard for cruelty—what seems cruel to one might be humanitarian to another.[113] Since these statements cannot be evaluated objectively, any decision about their truthfulness is likely to be speculative, which is an arbitrary basis for liability.[114]

The third and fourth parts of the *Ollman* test are similar to the totality-of-the-circumstances test. Part three examines the language surrounding a disputed statement to determine how it would be understood. This inquiry resembles that element of the totality-of-the-circumstances test that directs the court to look for any cautionary language—"I think," "in my opinion," or "it seems to me." If cautionary language surrounding a statement warns the recipient that the statement is not meant to be taken as factual, then the statement may be treated as opinion.[115]

Part four of the *Ollman* test focuses attention on factors extraneous to the disputed language itself, such as the statement's social context or its setting. It allows consideration of factors such as whether the statement is part of a heated public dispute, part of an editorial, or part of a satire. As with the totality of circumstances test, the presumption is that such circumstances alert recipients that the statements are not intended to be factual.[116]

As with the other two tests, the verifiabiliy test has some foundation in the Supreme Court's decisions. Most notably, as the Second Circuit explained in *Buckley*, the language of *Gertz* is consistent with the verifiability test. It follows from Justice Powell's assumption that "there is no such thing as a false idea," that ideas and opinions are "insusceptible to proof of truth or falsity."[117] This interpretation of *Gertz* accords with language used in *Letter Carriers*. In *Letter Carriers*, the Court said that "loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like "unfair" or "fascist" are statements of opinion."[118] "Loose language" and "unde-

112. See the discussion of such a case *infra*, text accompanying notes 253-55.

113. *See, e.g., infra* notes 250-52.

114. *Ollman*, 750 F.2d at 981.

115. This part of the test is discussed more fully later in the text of the opinion, where the court cites *Information Control Corp.* and discusses the role of cautionary langauge in the opinion privilege. *See id.* at 982-83.

116. *Id.* at 983-84.

117. *See supra* note 106 and accompanying text.

118. *Letter Carriers*, 418 U.S. at 284 (quoting Cafeteria Emp. Local 302 v. Angelos, 320 U.S. 293, 295 (1943)). §

fined slogans" are of indeterminate meaning, and thus may be privileged because they are unverifiable.

Unfortunately, verifiability does little to explain the factors the Court used in *Letter Carriers* and *Greenbelt Cooperative* to justify protecting the disputed statements. As discussed above, the Court in both *Greenbelt Cooperative* and *Letter Carriers* relied to some extent on the full disclosure of the underlying facts and the existence of a heated public controversy in the offending article. Neither of these factors relates to verifiability.

Since all three of the tests lower courts fashioned to distinguish fact from opinion are to some extent both consistent and inconsistent with the Supreme Court's sparse discussions of the fact-opinion issue, precedent alone will not clarify which test is the most appropriate. Therefore, discussion necessarily turns to the values which the first amendment seeks to promote in order to set out a framework for critically analyzing these theories.

II
FIRST AMENDMENT FRAMEWORK

Examination of the opinion privilege from a first amendment perspective requires consideration of both theoretical and practical aspects of the first amendment. The theoretical side of the inquiry examines the abstract relationship between the doctrine and first amendment values. The practical side looks at the way the doctrine will operate in the courts to protect first amendment values.

A. First Amendment Values and Principles

The logical place to start a theoretical first amendment analysis of the opinion privilege is *Gertz*. Justice Powell's crucial statement, once again, was: "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."[119] This statement may be explained by either of two prominent theories of the first amendment—the search-for-truth theory, or the self-government theory.[120] The relationship between the *Gertz* dictum and these two theories will be considered in turn.

The use of notions such as "no such thing as a false idea" and "correction" through "competition" are obvious references to Justice

119. *Gertz*, 418 U.S. at 339-40 (footnote omitted).

120. There are several other theories of the first amendment that this Comment does not consider in analyzing the opinion privilege because they are quite clearly inapplicable.

Holmes's "marketplace of ideas" metaphor.[121] Though Powell does not give any specific citation, this metaphor has a long constitutional tradition and has been used in many different first amendment contexts.[122] The marketplace of ideas is a mechanism to discover truth. Often attributed to John Stuart Mill,[123] this perspective emphasizes that the "truth" of any given statement is always uncertain. Because of this uncertainty, ideas must be allowed to compete with one another so that untruths will eventually be exposed. The test for "truth" is its ability to martial a consensus in the marketplace of ideas. Through continual evaluation and reevaluation of ideas, the marketplace produces increasingly accurate versions of the "truth."[124] This rationale for protecting free speech has been utilized by the Supreme Court in a variety of contexts.[125]

This search-for-truth theory of the first amendment seems to be what Justice Powell had in mind in *Gertz*. The statement that there is "no such thing as a false idea" is consistent with Mill's notion of uncertainty. Since we are never completely sure that an idea is true, we also cannot be sure that an idea is false. Therefore, it would be unwise to restrict any ideas through libel law because they may have at least a kernel of truth. Furthermore, Powell's statement that we do not depend on "the conscience of judges and juries" to correct falsehoods is implicitly justified by reliance on the competitive forces of the intellectual marketplace.[126]

The self-government theory also might explain Justice Powell's statement. This theory focuses on the role that ideas play in political

121. For the original judicial use of the marketplace metaphor, see Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). At least one court has expressly noted that Justice Powell's statement in *Gertz* seems to refer to this metaphor. *See* Cianci v. New Times Publishing Co., 639 F.2d 54, 62 n.10 (2d Cir. 1980).

122. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364, 377-78 (1984) (marketplace of ideas rationale used in declaring a law forbidding editorializing by public broadcasting stations a violation of the first amendment); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537-38 (1980) (marketplace rationale used in restricting regulation of speech by commercial entity); Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969) (marketplace rationale used to justify regulation of broadcasting); NAACP v. Button, 371 U.S. 415, 437 (1963) (marketplace rationale used in restricting application of anti-solicitation statute).

123. *See, e.g.* Schauer, *supra* note 99, at 268-72. John Milton may have developed the search-for-truth rationale for free speech earlier. *See* Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 101 n.100 (1978). Milton's exposition of the theory can be found in J. MILTON, AREOPAGITICA (1644), *reprinted in* MILTON'S AREOPAGITICA 3-32 (M. Mayer ed. 1957).

124. J. S. MILL, ON LIBERTY 19-67 (C. Shields ed. 1956). For a good summary in the form of a syllogism, see *id.* at 64.

125. *See, e.g.*, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 (1980); Wood v. Georgia, 370 U.S. 375, 388 (1962); American Communications Ass'n v. Douds 339 U.S. 382, 396 (1950); Thornhill v. Alabama, 310 U.S. 88, 95-96 (1940).

126. The Supreme Court recognized the parallel between the *Gertz* dicta and the search-for-truth theory of the first amendment in Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503-504, *reh'g denied* 467 U.S. 1267 (1984).

change. Developed most fully in a constitutional context by Alexander Meiklejohn, the theory argues that freedom of speech is essential to effective self-government. To make wise decisions about public policy, the citizen must have access to all relevant information. If the government limits the information available, the citizen may be misinformed and make a decision she would not otherwise make. When the government limits speech by assessing damages for the utterance of certain statements, it usurps the right of the people to choose relevant information for themselves. The issue is not whether an idea is true or false, but who should decide its falsity. This theory differs from the search-for-truth theory in its emphasis on the importance of protecting "political" speech.[127] The self-government theory has been used by the Supreme Court in a variety of circumstances, often in conjunction with the search-for-truth theory, to justify protection of speech.[128]

The self-government theory also is consistent with *Gertz*. Powell indicated that he hesitated to rely on government officials such as judges and juries to decide which opinions should be heard and which censored. Moreover, Powell's citation to a statement by Jefferson can be taken as evidence that Powell meant to protect only "opinions" and "ideas" that were uttered in a political dispute. In footnote 8 he quotes from Jefferson: "If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[129] Since Powell's only example of protected opinion is statements that are about the proper form of government, one could argue that the *Gertz* dictum is restricted to political speech. Thus, *Gertz* may be consistent with the self-government theory of the first amendment because it indicated that the people should decide what is true or false, and because it emphasized political speech.

On the other hand, one might argue *Gertz* is inconsistent with the self-government theory to the extent that its language seems to protect all opinions, whether they concern matters of political interest or merely the reputation of a private individual.[130] The quote from Jefferson could be

127. *See* Stone, *supra* note 123, at 101 n.101 (citing *inter alia* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)).

128. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 145 (1983); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 (1980); Red Lion Broadcasting v. FCC, 395 U.S. 361, 390 (1969); Garrison v. Louisiana. 379 U.S. 64, 74-75 (1964); New York Times v. Sullivan, 376 U.S. 254, 269 (1964); Wood v. Georgia, 370 U.S. 375, 388, 392 (1962); Roth v. United States, 354 U.S. 476, 484 (1957); Stromberg v. California, 283 U.S. 359, 369 (1931).

129. *Gertz*, 418 U.S. at 340 n.8.

130. It is not yet clear whether the opinion privilege extends to statements made about private individuals or is limited to statements about public figures. What scant authority there is supports the conclusion that the privilege applies to all opinions regardless of the identity of the subject. *See* Lewis v. Time, Inc., 710 F.2d 549, 553 (9th Cir. 1983); Henry v. Halliburton, 690 S.W.2d 775, 786-

taken merely as an example of the opinions that should be protected, not a limitation on the type that should be protected.

Under either theory of the first amendment, some statements should probably not receive protection because they serve neither the search for truth nor self-government. This distinction between useful and useless speech has been recognized by the Supreme Court and was first clearly articulated in *Chaplinsky v. New Hampshire*[131]:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances 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.[132]

Certain types of speech are not protected because they arguably are not useful, either as a mechanism for finding truth, or for making political change. At the time of *Chaplinsky*, all libelous speech was unprotected by the first amendment. Under current constitutional law, however, the only type of libelous statement that is clearly unprotected is the "calculated falsehood."[133] A calculated falsehood serves no purpose in the search for truth precisely because it is false;[134] testing its truth in the marketplace is a waste of time. As Justice Powell put it in *Gertz*, "there is no constitutional value in false statements of fact."[135]

A calculated falsehood also may distort the search for truth for the period of time between publication and invalidation of the statement.

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87 (Mo. 1985) (en banc). *But see* From v. Tallahassee Democrat, Inc., 400 So. 2d 52, 58 (Fla. Dist. Ct. App. 1981) (Smith, J., dissenting) (*Gertz* imposes no constitutional restriction on the defamation claim of a *private* figure), *review denied*, 412 So. 2d 465 (Fla. 1982).

131. 315 U.S. 568 (1942).

132. *Id.* at 571-72 (citations omitted).

133. *See supra* text accompanying notes 27-32. The Supreme Court reevaluated the first amendment exclusion for libel law in *New York Times*, 376 U.S. at 269 ("mere label" of a statement as libel by state law does not remove the statement from protection of the first amendment). Since *New York Times* requires a false statement made with knowledge of its falsity or recklessness as to whether it is true or false, the best example of an unprotected libelous statement is the calculated falsehood. *See also* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (criminal libel unprotected only if the statement is a calculated falsehood).

134. Mill might disagree with this notion of "false facts." He would probably say that there is a high degree of uncertainty about the truth or falsity of any statement, regardless of whether it was characterized as one of fact or opinion. For the purposes of this Comment, however, it is sufficient to assume that, from an epistimological standpoint, community norms at least define certain core categories of statements as "fact." For example, the statement that the "sky is blue" is generally understood as a statement of fact. At the core, then, a statement like "the sky is green" is clearly a false statement of fact.

135. *Gertz*, 418 U.S. at 340.

For example, suppose *X* is falsely accused of being a bad credit risk. Before the marketplace can correct the falsehood, *X* may be denied her student loan. As a result of this failure to obtain a loan, *X* may not have the money to attend college. Since *X* is not in college, *Y* may assume, incorrectly, that *X* does not want to attend college or that she does not have adequate academic credentials for admission. The market may ultimately correct this secondary falsehood, but it would be easier to prevent the first statement.

A calculated falsehood also may distort the process of self-government.[136] Suppose that *A*, an incumbent judge, is falsely accused of taking bribes. Before the marketplace can prove that *A* is innocent, *A*'s opponent may win the election even though *A* would be the better judge. Thus, it would be better to prevent publication of calculated falsehoods, rather than relying on the marketplace for correction.

In sum, Justice Powell's statement in *Gertz* is supported by well accepted first amendment jurisprudence and theory. It is consistent with both the search-for-truth and self-government theories of the first amendment, though more clearly with the former because Powell doesn't distinguish between political and nonpolitical speech. Under either theory, an opinion is protected because it may be useful in the search for truth or in the process of self-governance. Statements that are not useful, or that distort the marketplace of ideas, such as calculated falsehoods, should not be protected by the first amendment. These considerations set the framework for the Part III analysis of the different versions of the opinion privilege.

B. First Amendment Administrative Concerns

Besides abstract rights of expression, application of first amendment theories must consider actual effects of speech restrictions. Thus, any version of the opinion privilege that is intended to protect first amendment values and principles must consider the vulnerability of the press when it is forced to defend itself in a court of law. Faced with the expense of defending against libel suits and the possibility of large libel verdicts, many publishers choose to avoid controversial issues even though not all statements about controversial issues are libelous.

This problem of self-censorship motivated the Supreme Court's reassessment of libel law starting with *New York Times Co. v. Sullivan*.[137] In that case, the Court reasoned that:

> [W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in

136. *See* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (calculated falsehoods not protected because they could be used to unseat public servants without just cause).

137. 376 U.S. 254 (1964).

> fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone."[138]

The Court therefore declared that erroneous statements published without actual malice "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive."[139] Even though falsehoods do not help in the search for truth, or in self-government, some such statements must be protected to encourage vigorous and robust debate.

The *New York Times* actual malice rule, which protects false statements about public officials when made without knowledge of their falsity or reckless disregard for their truth, helped invigorate the press.[140] Nevertheless, libel suits are proliferating,[141] intimidating the press into unnecessary and undesirable self-censorship.[142] One judge has concluded that "the area in which legal doctrine is currently least adequate to preserve press freedom is the area of defamation law."[143]

This continuing threat has several causes. First, defending a libel suit is both economically and psychologically expensive. Even where a statement is privileged under *New York Times* or its progeny, it may take hundreds or thousands of hours of discovery to prove that a publisher did not know of the falsity of the statement and was not reckless. In

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138. *Id.* at 279 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

139. *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

140. *See* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 430 (1975).

141. *See* Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 1-4 (1983). Professor Smolla contends that:

> [T]here are four contributing causes to the recent rejuvenation of American libel law . . . . The first factor is a new legal and cultural seriousness about the inner self. Tort law has undergone a relaxation of the rules that formerly prohibited recovery for purely emotional or psychic injury, a doctrinal evolution that parallels the growth in the "me-generation." A second factor is the infiltration into the law of defamation of many of the attitudes that have produced a trend in tort law over the past twenty years favoring compensation and risk-spreading . . . . A third cause of the new era in libel is the increasing difficulty in distinguishing between the informing and entertaining functions of the media. . . . The final factor is doctrinal confusion, caused in large part by a pervasive failure to accommodate constitutional and common law values in a coherent set of standards that is responsive to the realities of modern communications.

Id. at 11.

142. Justice Bork recently wrote:

> *Sullivan*, for reasons that need not detain us here, seems not to have provided in full measure the protection for the marketplace of ideas that it was designed to do. Instead, in the past few years a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment most certainly would not permit.

Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 105 S. Ct. 2662 (1985); *see also* Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 603 (1983) (the press and its lawyers are justifiably concerned about the threat of liability for libel).

143. *Ollman*, 750 F.2d at 995 (Bork, J., concurring).

addition to the costs of legal fees for discovery,[144] editors and writers bear the psychological costs of spending many hours answering probing and personal questions about their mental processes during publication.[145] If a case goes to trial, the legal fees may be hundreds of thousands or even millions of dollars.[146] For example, the recent Westmoreland case, which was not appealed, cost CBS an estimated three to six million dollars.[147] It is hardly surprising that the press avoids publishing statements that might give rise to litigation.[148]

Second, if the defense is unsuccessful, a judgment may be extremely burdensome. In addition to the loss of the public image an adverse judgment represents,[149] juries (which are frequently unsympathetic to the press)[150] often award damages over $100,000. Verdicts increasingly exceed one million dollars.[151] In one recent case on appeal, a jury awarded the plaintiff $47.5 million dollars.[152] Such judgments may threaten the financial viability of the press.[153] Although the jury awards are routinely reduced,[154] the risk that they will be upheld often leads to generous settlements.[155]

Third, these costs are magnified by the uncertainty caused by the current doctrinal confusion in the law of defamation. Since the law is uncertain, more potential plaintiffs perceive a chance of winning a libel judgment and are encouraged to file suit.[156] The doctrinal confusion about such things as the opinion privilege leaves publishers uncertain as

144. In Herbert v. Lando, 441 U.S. 153 (1979), a case that never went to trial, the legal fees were estimated at between three and four million dollars. *See* Lewis, *supra* note 142, at 611-12. Of course, that case is not typical because it was argued in the Supreme Court, but it nevertheless demonstrates that discovery can be expensive.

145. The discovery process in a libel case is explained in detail in Lewis, *supra* note 142, at 609-12.

146. *See* Smolla, *supra* note 141, at 13.

147. *See* Nat'l L.J., Mar. 4, 1985, at 3, col. 1.

148. *See* Lewis, *supra* note 142, at 609, 611 (noting costs of defamation suits cause concern and self-censorship among publishers and reporters); Smolla, *supra* note 141, at 13 (high legal fees alone can chill the press).

149. *See* Anderson, *supra* note 140, at 435.

150. *See* Lewis, *supra* note 142, at 613; Smolla, *supra* note 141, at 21; L.A. Daily J., Aug. 14, 1985, at 4, col. 5 (surveys show that juries in defamation cases sometimes set aside their instructions).

151. Floyd Abrams, a prominent libel attorney, recently reported that more than half of all jury awards in defamation cases are over $100,000, and that between 1980 and 1984 there were 20 jury awards of more than one million dollars. L.A. Daily J., Sept. 30, 1985, at 4, col. 3; *see also* Lewis, *supra* note 142, at 608; Smolla, *supra* note 141, at 6 & n.43 (citing recent data from the Libel Defense Resource Center).

152. *See* Nat'l L.J., May 20, 1985, at 8, col. 1.

153. *See* Smolla, *supra* note 141, at 12-13.

154. Abrams reported that jury awards are often reduced on appeal, and that the largest verdict allowed after an appeal was for $400,000. L.A. Daily J., Sept. 30, 1985, at 4, col. 3.

155. *See* Smolla, *supra* note 141, at 13.

156. *Id.* at 11.

to whether they can defend such claims economically. As a result, the press is more likely to avoid controversial statements in the first place.[157]

Fourth, there is little economic incentive to publish statements that put a publisher at risk of liability. Profit margins are rarely affected by how controversial a statement may be;[158] on the contrary, the economic incentive is to avoid the risk of damages for publishing controversial statements.[159] Of course, journalistic ethics encourage publishers to take some risks, but they may not be sufficient to overcome economic self-interest.[160]

One solution to the threat of self-censorship is to make summary judgment easier. Summary judgment avoids many of the direct costs of litigation. A case that goes to trial costs about four times as much as one decided on summary judgment. By reducing the costs of litigation, summary judgments encourage a more vigorous press.[161] Moreover, summary adjudication avoids the possible prejudices of juries. As a result, summary adjudication also reduces the costs of libel litigation by reducing the number of unfavorable verdicts.[162]

The opinion privilege is very appropriate for summary disposition of libel suits because it is almost universally accepted as a question of law to be decided by the judge.[163] Moreover, depending on the form of the privilege, little effort may be needed to gather the evidence necessary to win summary judgment. Using the opinion privilege would then allow publishers to end litigation relatively quickly and inexpensively.

In order for the opinion privilege to serve to invigorate the press, however, the privilege itself must be doctrinally clear and predictable. An unclear or hazy test for distinguishing facts from opinion adds to the doctrinal confusion, which in turn heightens a publisher's perception of the risk of liability. To ensure publication of controversial statements,

157. *See* Zimmerman, *supra* note 69, at 399; Note, *The Fact-Opinion Distinction*, *supra* note 5, at 1845.

158. *See* Anderson, *supra* note 140, at 433.

159. *Id.* at 434.

160. *See* Legal Times, Oct. 31, 1983, at 36, col. 2.

161. *See* Kotlikoff v. Community News, 89 N.J. 62, 67, 444 A.2d 1086, 1088 (1982); Anderson, *supra* note 140, at 436-37.

162. *See Ollman*, 750 F.2d at 1005-06 (Bork, J., concurring).

163. It is well established that the question of whether a statement is a privileged statement of opinion is one of law for the court to decide. *See, e.g., Ollman*, 750 F.2d at 978 (overwhelming weight of authority); Lewis v. Time, Inc., 710 F.2d 549, 553 (9th Cir. 1983); Rinsley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983); Orr v. Argus-Press Co., 586 F.2d 1108, 1114 (8th Cir.), *cert. denied*, 440 U.S. 960 (1979); Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 601, 552 P.2d 425, 428, 131 Cal. Rptr. 641, 644 (1976); Bucher v. Roberts, 198 Colo. 1, 3, 595 P.2d 239, 241 (1979)(en banc); Myers v. Boston Magazine Co., 380 Mass. 336, 339, 403 N.E.2d 376, 378 (1980); Kotlikoff v. Community News, 89 N.J. 62, 67, 444 A.2d 1086, 1088 (1982); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 381, 366 N.E.2d 1299, 1306, 397 N.Y.S.2d 943, 950 (1977); RESTATEMENT (SECOND) OF TORTS § 566, comment c, at 173 (1977).

the courts must provide the publisher with clear doctrinal assurance that the statement will be privileged. Thus, the goal is to find a form of the opinion privilege that demarcates privileged opinion with a "bright-line." Moreover, this line should err on the side of allowing the speech, so that borderline cases will not be subject to self-censorship.[164]

In evaluating the different versions of the opinion privilege, then, one should look for a version of the privilege that allows for quick summary adjudication with relatively minor legal expense, and that provides a bright-line rule. Consequently, this Comment proceeds to such an analysis of the three versions of the opinion privilege.

III

FIRST AMENDMENT ANALYSIS OF THE OPINION PRIVILEGE

This Part will analyze each of the three versions of the opinion privilege in terms of the search-for-truth and the self-government theories of the first amendment. It will also consider the summary adjudication operation of each version of the privilege and their respective predictability of outcomes. The verifiability test will be examined first, followed by the *Restatement* test and the totality-of-the-circumstances test.

A. Verifiability

The verifiability test, which protects statements that either have no determinate meaning or are incapable of being proven true or false, is consistent with the first amendment search-for-truth theory. Nonverifiable statements are precisely the sort of statements that belong in the marketplace of ideas. Since they are incapable of being proven true or false in a court of law, they should compete with other ideas for acceptance. By competing in the marketplace, these nonverifiable statements encourage debate, which ultimately may lead to the discovery of truth.

Likewise, the verifiability test is consistent with the self-government theory of the first amendment. Since an unverifiable statement is one that cannot be proven true or false definitively, it is more appropriate that citizens, not government, choose whether or not to believe such a statement. To allow the government to choose which nonverifiable statements be treated as true and which as false would increase the amount of control the government has over information in society. With greater control over information, the government would have greater control over what topics were discussed, and what could be said about those

164. The argument is that at the margin some statements that are not opinions would be protected to insure that all statements that are opinions are protected. *Cf.* New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (the law must protect some untrue statements to ensure that true statements are protected).

topics. As a result, the citizens would be in an inferior position for governing themselves.

On the negative side, the verifiability test may protect some statements that harm the reputation of the subject of the communication. For example, a statement that accuses a person of being a "fascist," which is not verifiable, can tarnish that person's reputation. Using a verifiability test, however, will not shield a significantly greater number of defamatory statements than does present case law, as Part *IV* will show. In addition, the impact of a statement that harms another's reputation will probably be diminished by its nonverifiability. If a statement cannot be proved true or false, the recipient seems just as likely to discount the statement as to accept its truth. For example, if *X* accuses *Y* of being "immoral," the recipient of the statement may not think any less of *Y* because the recipient may not know *X*'s standard of morality.[165]

The verifiability test also may be criticized on administrative grounds because it does not provide a bright line test to distinguish fact from opinion.[166] Nevertheless, although there will always be some gray area between verifiability and nonverifiability, there are many statements which clearly fall into one category or the other. For example, the accusation of a crime is clearly verifiable because society has generally accepted standards of meaning and proof. On the other hand, rhetorical or hyperbolic language is clearly nonverifiable. Language is rhetorical and hyperbolic when its context shows that its usage is allegorical rather than ordinary. Since rhetorical language is used in an extraordinary way, it usually has a very personal and individual meaning. Authors generally are very careful about language and have a good understanding of it. As a result, they should be able to choose to use verifiable or unverifiable language in many cases, depending on their need and intent. Admittedly, as cases get closer to the margin they become increasingly difficult. But judges "have rich experience in the ways and means of proof and so will be particularly well situated to determine what [statements] can be proven."[167]

Even if the verifiability test is not completely predictable, it has the advantage of being a quick and easy test for summary adjudication. The judge simply looks to the statement and its context to see if the statement is verifiable. This ease of decision has several advantages. First, if the statement is found to be nonverifiable, the defendant can avoid the costs

165. Persuasiveness itself, however, should not be part of a test of whether or not a statement should be protected speech. The point is simply that vague epithets, unsupported by a factual context, would not significantly harm the subject's reputation. The impropriety of using persuasiveness to decide whether to protect a statement is discussed *infra* text accompanying note 176.

166. *See* Note, *The Fact-Opinion Distinction*, *supra* note 5, at 1834-35.

167. *Ollman*, 750 F.2d at 982.

of trial. Second, it reduces the cost of discovery because there is little extrinsic evidence necessary to prove that a statement is nonverifiable. Third, it avoids some arbitrary jury verdicts by preventing jury deliberations on nonverifiable statements. Such jury deliberation would be dangerous, because if a statement is nonverifiable, then there are no generally accepted standards for the jury to use in evaluating the statement's truth. Any jury determination about the defamatory effects of such a statement is therefore likely to be arbitrary.[168] Avoiding arbitrary results is particularly important in first amendment cases because of the chilling effect they may have on the press. Moreover, a jury that cannot turn to generally accepted standards in its deliberations is likely to decide according to its own approval or disapproval of the statement,[169] contrary to the first amendment principle that ideas should not be restricted because of their content.[170]

B. The Restatement *Test*

The *Restatement* view differs significantly from the verifiability standard. Instead of focusing on the statement itself, the *Restatement* considers its context. The critical inquiry is whether or not the statement "implies the allegation of undisclosed defamatory facts as the basis for the opinion."[171] If so, the statement is treated as a recitation of fact, and may result in liability. If, however, the facts upon which the opinion is based are set forth, or are generally known by the readers, then the statement is protected as opinion.[172]

The *Restatement* has an initial conceptual problem: it fails to define either fact or opinion. Since the test turns on whether the facts upon which the opinion is based are disclosed, it is crucial to know which statements are facts, and which are opinions. If the statement is not an opinion, then inquiry under this standard ends. But if one part of the disputed statement is an opinion, one must then determine whether accompanying statements disclose the factual basis for the opinion, or are merely more opinions. This failure of definition thus begs the question this Comment addresses: How should the courts distinguish between facts and opinion?

This conceptual problem aside, the *Restatement* test should be rejected because it is inconsistent with the search-for-truth and self-government theories of the first amendment in at least three ways. First, it

168. *See id.* at 979; Buckley v. Littell, 539 F.2d 882, 894 (2nd Cir. 1976) (search for precise meaning of ambiguous words leads to arbitrary judgments), *cert. denied*, 429 U.S. 1062 (1977).

169. *See Ollman*, 750 F.2d at 981.

170. *See infra* note 182; *see generally* Stone, *supra* note 123 (discussing content restriction by subject matter).

171. RESTATEMENT (SECOND) OF TORTS § 566 (1977).

172. *See supra* text accompanying notes 70-85.

is based on an unacceptable premise that opinions with disclosed facts should be protected because they are less harmful to the subject's reputation. Second, the *Restatement* is overinclusive, protecting statements that have no constitutional value. Third, it is underinclusive in its failure to protect statements that have constitutional value.

Analysis of the premise that opinions with undisclosed facts are unprotected because they are more harmful than other opinions must begin with the ALI's own commentary. The authors of the *Restatement* explain the difference in treatment this way:

> The difference [between protected and unprotected statements] lies in the effect upon the recipient of the communication. In the first case, [where the facts underlying the opinion are set forth], the communication itself indicates to him that there is no defamatory factual statement. In the second, [where the statement is based on undisclosed facts] 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.[173]

This reasoning focuses on the effect that the statement has on its recipient, and indicates that opinions are protected or unprotected depending on whether the reader believes that they are based on undisclosed defamatory facts.

There are two possible implications of this type of reasoning; both can be illustrated by hypothetical examples. Suppose that a journalist accuses Judge *X* of being corrupt. This statement might be accompanied by a true supporting assertion that the judge took a $25,000 campaign contribution from lawfirm ABC, in which case the statement would be protected under the *Restatement* standard. If, on the other hand, the statement were made without factual support (explicit or understood), it would not be protected. One possible reason for protecting the first statement (the one supported by a factual assertion) and not the second is that the recipient of the first statement is less influenced than the recipient of the second. In other words, since the recipient of the first statement can judge the statement of opinion for herself, based on the facts set forth, the statement has no more persuasive power than the facts which support it.[174] In contrast, the second statement, which is only opinion, may be overly persuasive because the recipient might assume that the author had access to undisclosed facts that support his statement. For example, in the illustration used above the recipient of the statement "Judge *X* is corrupt" might assume that the journalist had undisclosed proof that Judge *X* had taken bribes for judicial decisions. If the reader makes this

173. RESTATEMENT (SECOND) OF TORTS § 566 comment c, at 173 (1977).

174. *See* Lauderback v. American Broadcasting Cos., 741 F.2d 193, 195-96 (8th Cir. 1984) (statements based on disclosed facts are protected because the listener can independently evaluate the statement and can discount outrageous opinions).

assumption, the second statement is probably more influential than the first. Thus, the *Restatement* test may be justified by the presumed persuasiveness of statements that are based on undisclosed facts.

As a factual matter, however, the assumption that unsupported opinions are overly persuasive may be incorrect. Instead of understanding an unsupported opinion as a statement with implied facts, the recipient might simply treat the statement as an unsupported assertion. For example, if someone says that *X* is a bad mayor, or that product *Y* is dangerous, most hearers would be influenced only if the facts which support these assertions were disclosed. Thus, it is just as plausible that recipients will disbelieve unsupported assertions as assume that such statements are supported by undisclosed facts.

Furthermore, if the *Restatement* test really is based on the persuasiveness of an opinion which implies undisclosed facts, it should also take into account other possible factors influencing the persuasiveness of a statement of opinion: for example, audience susceptibility, credibility of the medium of communication, ability of the subject to respond, identity of the speaker, and wording of the statement.[175] In any particular context these factors could be more influential than the disclosure of underlying facts. Failure to account for such factors significantly undermines the justification for using the persuasiveness rationale at all.

These conceptual limitations aside, the persuasiveness rationale distinguishes between privileged and unprivileged opinions in a manner

175. Audience susceptibility is one factor that may affect persuasiveness of various statements. For example, a Neo-Nazi group is more likely to believe that Jews are involved in a conspiracy regardless of how many facts are set forth.

Another persuasiveness factor is the medium of communication. Certain newspapers or programs may have more credibility with readers or hearers than other periodicals or programs. The New York Times is more credible to most readers than is the National Inquirer. Likewise, a viewer is more likely to believe a segment on the CBS Evening News or Sixty Minutes than a segment on Ripley's Believe It or Not.

A third persuasiveness factor is the ability of the subject of the statement to respond to the accusation. Some individuals have the ability to mount a counter-campaign in the media that can reduce the persuasive effect of the accusatory statement. However, some people have little media access. For example, when the New York Times publishes an article about several New York police officers, the officers may have little ability to respond. The reader is more likely to believe the accusations than if the article was about Mayor Koch, who has substantial media resources.

A related persuasiveness factor is the identity and reputation of the subject. Readers and hearers are more likely to believe certain accusations about some people than they are about others. For example, it is more likely that a reader will believe that anti-semitic remarks came from Louis Farrakhan than from Woody Allen.

Additionally, using a certain wording for a statement can make it more persuasive. Certain words carry connotations that make them more reasonable or influential. Further, a writer or speaker can slant a statement of underlying facts so that the opinion seems to be a clear conclusion supported by the facts. Yet the *Restatement* fails to consider this possibility. It simply requires that the facts be set forth, not that they be set forth in a completely neutral manner.

Professor Titus discuses similar considerations with regard to the operation of the fair comment privilege. *See* Titus, *supra* note 6, at 1212-14.

inconsistent with the search-for-truth and self-government theories of the first amendment. In fact, persuasive speech is precisely the sort of speech that deserves first amendment protection.[176] If speech were limited because of its influence, the search for truth would be prejudiced. The search-for-truth theory relies on a statement's persuasiveness to determine which statements are most likely true. Moreover, limiting speech because of its persuasiveness would distort the operation of self-government. People choose to believe the most persuasive ideas. Allowing government to restrict speech simply because it is persuasive is tyrannical; the government might allow only the speech with which it agrees. Since any persuasive opposition could be repressed, government could accomplish its objectives without the informed consent of the citizens.

There is a second possible way to understand the premise behind the *Restatement* test. The ALI simply may not want the opinion rubric to protect defamatory facts, which, if communicated directly, would not be privileged. Such a rationale works from the assumption that all opinions imply the existence of supporting facts; an opinion is simply a different way of making a factual assertion. Under this interpretation, the difference between supported and unsupported opinion is not its persuasiveness, but whether the opinion represents defamatory facts. As an illustration, consider the example given above. In that instance, the author might state that Judge *X* was corrupt without citing any supporting evidence. This statement would be unprotected not because it was more persuasive than if the facts were set forth, but because it has the impact on the recipient as if defamatory facts were stated. The recipient may assume that the journalist has undisclosed facts that the Judge did something like accepting bribes. On the other hand, where the author's statement that Judge *X* is corrupt is accompanied by the supporting statement that Judge *X* accepted a legal $25,000 campaign contribution, the statement would be privileged because it was not defamatory.[177] Thus, the unsupported opinion is not protected if it implies undisclosed defamatory facts because those facts, which may be knowingly false and therefore unprotected by the first amendment, are communicated to the recipient.

The initial problem with this interpretation is that it makes an assumption which, like the assumption of the persuasiveness interpreta-

176. *Cf.* New York Times v. Sullivan, 376 U.S. 254, 273 (1964) ("Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.").

177. There are two other permutations of the fact-opinion relationship under the *Restatement*. First, the opinion may be based on disclosed *defamatory* facts, but in that case the privilege is not important because the facts themselves would be actionable. Second, the opinion might imply the existence of undisclosed nondefamatory facts, but in that case the privilege is unimportant because the opinion would not be defamatory.

tion, may be factually incorrect. As explained above, the recipient of an unsupported opinion may be as likely to believe that there are no facts to support the opinion as to believe that the opinion implies support by undisclosed defamatory facts.

If, in fact, the unsupported opinion communicates the existence of undisclosed defamatory facts to the recipient, then this second interpretation of the premise behind the *Restatement* is consistent with the first amendment. Under this interpretation, the *Restatement* test prevents calculated falsehoods from being protected under the rubric of the opinion privilege. This protection will help in the search for truth and in self-government by preventing the distortions that occur when calculated falsehoods are in the marketplace.[178]

The *Restatement* test is, however, a cumbersome way to protect against calculated falsehoods. It is both over and underinclusive. In other words, it may protect statements that do not deserve protection and fail to protect statements that do. Two illustrations make this point. Suppose that the journalist from the above example accuses Judge *X* of being a rapist. Why should the disclosure of the facts upon which this opinion is based protect this accusation if it is knowingly or recklessly false? Since the *Restatement* only requires that the facts *upon which the opinion is based* be fully disclosed, the journalist is under no legal obligation to disclose those facts which exonerate the judge.[179] As a result, it is possible that a calculated or reckless falsehood, if supported by disclosed and true facts, would be protected by the *Restatement* test. Yet, if the accusation is knowingly or recklessly false, it will distort the marketplace

178. The disutility of calculated falsehoods in the marketplace of ideas is explained *supra*, text accompanying notes 133-36.

179. The *Restatement* itself merely states that an opinion is actionable "if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." RESTATEMENT (SECOND) OF TORTS § 566 (1977). Thus, the opinion defense seems to prevail when there are no undisclosed facts as the basis for the opinion, even though there are undisclosed facts that *refute* the opinion.

This interpretation is supported by two recent Eighth Circuit decisions. In Lauderback v. American Broadcasting Cos., 741 F.2d 193 (8th Cir. 1984), the court held that statements made during a 20/20 broadcast which showed the plaintiff on video tape and then descibed him and other insurance agents as "crooks" and "liars," and their behavior as "rotten," "unethical," "sometimes illegal" were privileged opinions. In reaching this result, the court recognized that opinions which are based on undisclosed defamatory facts are not protected, *id.* at 195, but that not all information favorable to the plaintiff must be disclosed, *id.* at 198.

The court went even further in Janklow v. Newsweek, Inc., 759 F.2d 644 (8th Cir. 1985), *reh'g granted*, May 22, 1985 (en banc). In that ease the court held that the statement that there was a "feud" between Native American rights activist Dennis Banks and Governor Janklow of South Dakota was not a protected statement of opinion. Although the court relied on the totality of the circumstances test, *id.* at 649, it first disposed of the plaintiff's assertion that the article was defamatory beeause it omitted various facts. The court held that making omissions of fact actionable would violate the first amendment because it would be tantamount to compelled publication, which the Supreme Court rejected in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). *Janklow*, 759 F.2d at 648.

of ideas even if it is accompanied by a statement of underlying facts. Judge *X* could lose his next election because of this false accusation, distorting the operation of self-government. Thus, if the accusation is a calculated falsehood, it should be actionable regardless of whether the underlying facts which are the basis for the opinion are disclosed.[180]

Conversely, the *Restatement* does not protect some statements which do have constitutional importance.[181] Suppose that the journalist accuses *X* of being a "bad judge," without setting forth the underlying facts. Under the *Restatement*, such an accusation would be actionable. But it is the sort of statement that should be protected in the marketplace of ideas. It could foster debate about the quality of *X*'s judging, which would then foster better self-governance. Or, the accusation might promote reevaluation of standards for judging, which could help in the search for the true standards for a good judge. Perhaps more importantly, a statement such as "*X* is a bad judge" should be protected in order to avoid censorship of unpopular ideas. If the journalist is taken to court, without a generally accepted standard for assessing the "goodness" of a judge, the jury would probably find for the judge if he was popular. Such an evaluation is almost entirely subjective and would be inimical to the first amendment because it prohibits speech based on its unpopularity.[182]

In addition to the *Restatement* test's problems discussed above, the test also has two administrative limitations. First, it fails to create a predictable, bright-line distinction between fact and opinion.[183] Second, it does not effectively further summary adjudication. Its overall failure to create a bright-line test stems from a series of specific limitations: it does not articulate a test for the initial determination whether a statement is fact or opinion; it does not define what it means to set forth the underlying facts; it does not indicate how many facts must be set forth; and it does not tell the court how to determine if the facts are generally known and assumed.

The initial problem, that the *Restatement* fails to provide any criteria for distinguishing facts from opinion, allows confusion of fact and

180. This analysis of the application of the *Restatement* to the accusation of criminal activity is discussed more fully in Part *IV A, infra*.

181. *See* Zimmerman, *supra* note 69, at 411-13 (arguing that some opinions without disclosed facts should be protected).

182. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364, 383-84 (1984) (unconstitutional to restrict a point of view); Monitor Patriot Co. v. Roy, 401 U.S. 265, 275 (1971) (even loathful opinions protected); NAACP v. Button, 371 U.S. 415, 444-45 (1963) (protection regardless of popularity); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York, 360 U.S. 684, 689 (1959) (unconventional ideas protected); *see generally*, Stone, *supra* note 123 (discussing content-based restrictions).

183. *See* Zimmerman, *supra* note 69, at 420, 445-46 (arguing that the *Restatement* test of the opinion privilege is unpredictable).

opinion. When some facts are set forth, it is unclear whether the subsequent statement is an opinion based on the facts or is an additional fact. For example, in *Ricci v. Venture Magazine, Inc.*[184] the court held that a statement saying the plaintiff's prior criminal case was dismissed after he threatened a witness in the courtroom was an opinion based on facts set forth. The article explained that someone had seen Ricci gesture to the witness in a threatening manner. While the disputed statement may be characterized as an opinion as to why the case was dismissed, it may also be characterized as a statement of fact—that the witness was threatened. The problem, from a first amendment perspective, is that the reporter and editor cannot be sure how such a statement will be characterized by the court. In this case it was considered an opinion, but since the *Restatement* is not an objective test, in the next case presenting similar facts, a statement might be considered a fact.

A related problem is determination of whether facts have been set forth or whether the statement implies undisclosed facts. A disputed statement almost always will be accompanied by other information. The problem for the author is predicting whether the court will find that other information sufficient to constitute disclosure of the underlying facts. Unfortunately, the case law is confused and, as a result, adds little clarity to the *Restatement*'s ambiguous language. In some cases courts have found that there were no undisclosed facts where, in fact, not all facts were disclosed. For example, in *Avins v. White*[185] the court found that an academic report accusing the school of "an academic ennui" and lack of an "intellectual spark" among the faculty was not based on undisclosed fact. Yet the court did not identify the facts in the report upon which the statement was supposedly based. This is understandable since the report admitted that the "deficiency is an intangible one."[186] Since the basis of the statement was admittedly intangible, its factual basis could not have been set forth.[187]

On the other hand, some courts find that there are undisclosed defamatory facts when the facts have actually been fully set forth. In *Nevada Independent Broadcasting Corp. v. Allen*,[188] the court found that the defendant's question "what would a political candidate who didn't

184. 574 F. Supp. 1563 (D. Mass. 1983).

185. 627 F.2d 637 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980).

186. *Id.* at 640.

187. The court's recognition of this problem seems to point to its desire to use something akin to the verifiability test. In its holding, the court emphasized that use of those particular terms makes the statement "subjective." *Id.* at 643. Since the opinion is subjective, a jury evaluation of the statement would be inappropriate because, like an unverifiable statement, it would result in an arbitrary decision which could punish a speaker for stating unpopular opinions.

188. 99 Nev. 404, 664 P.2d 337 (1983).

pay his bills do if allowed to handle state funds?"[189] was a defamatory opinion under the *Restatement* standard. The discussion was obviously about Allen, and several references were made to a bad check which Allen had given the broadcasting corporation. Obviously, the question about mishandling state funds was an opinion based on the disclosed fact that Allen had bounced a check to the station. Nevertheless, the court found that the statement was based on undisclosed defamatory facts.

Authors also have trouble forseeing how many facts the courts will require be disclosed to protect an opinion under the *Restatement*. A good illustration of this problem comes from two reports of the same incident in Colorado. In *Burns v. Denver Post, Inc.*,[190] the Colorado Court of Appeals found that all of the relevant facts were set forth supporting a newspaper article's implication that a policeman's wife had left him because of his injury in a bombing. The article stated that the Burns' had had marital problems before the accident, and reported the details of the accident. Then it quoted the officer's statement that "the thing that tore me up was my wife divorcing me. She just couldn't live with a blind man."[191] The second case, *Burns v. McGraw Hill Broadcasting Co.*,[192] involved a similar report on television. The broadcast included the same basic information, but the wife's action was characterized as "desertion."[193] The Colorado Supreme Court reasoned that the term "deserted" meant that the wife had "abandoned [her husband] without warning, permission or right."[194] The court refused to apply the opinion privilege. Thus, while the broadcast had fully disclosed the underlying facts, the use of the term "deserted" was taken to imply the existence of some inside knowledge. The distinction between these two cases, if there is one, is difficult to find, especially in terms of the *Restatement* test. The same facts were set forth in both reports. The only difference was the way the wife's action was characterized. One might argue that more information should haved been disclosed in the latter case, where her action was called "desertion," but it is unclear what undisclosed information was implied.

A final, related problem arises in cases where the facts are assumed. Under the *Restatement*, a statement may be protected if the facts upon which it is based are generally "assumed"—that is, where the facts that are the basis for the opinion are generally known to the recipients of the communication. Unfortunately, neither the *Restatement* nor the case law give much guidance to authors about what constitutes assumed facts.

189. *Id.* at 408, 664 P.2d at 340.
190. 43 Colo. App. 325, 606 P.2d 1310 (1979).
191. *Id.* at 326, 606 P.2d at 1310.
192. 659 P.2d 1351 (Colo. 1983).
193. *Id.* at 1354 ("his wife and five children have deserted him since the accident").
194. *Id.* at 1362.

As a result, authors cannot predict whether their statements will be treated as implying undisclosed facts or assumed ones—a distinction that can make the difference between liability and privilege.

The case of *From v. Tallahassee Democrat, Inc.*[195] is illustrative. In that case an article stated that From, a local tennis pro, had "an improving player's grand illusions" and that he "did not fully understand his members' needs."[196] The court reasoned that it was well known in the tennis community that From had lost his job at the tennis club. Therefore, the court said the facts underlying the statements were assumed and generally known.[197]

There are several problems with this result. First, the teunis community was not the entire readership of the article, so the fact that From had been fired was not known to all the recipients of the statement. Second, the assumed fact that From was fired does not seem to be a sufficient disclosure of the facts that could be implied by the statement that he failed to meet his members needs. Perhaps the readers inferred that From was arrogant and rude. Or perhaps they took it to mean that he was a bad teacher. Third, From's termination seems an unlikely basis for the statement that From had "an improving player's grand illusions." Instead, that statement seems to imply that From was not a very good tennis *player*, perhaps not good enough to be a pro or to compete in tournaments.

Admittedly, these cases could be examples of misapplication of the *Restatement* test. Nevertheless, they illustrate problems that can arise from the ambiguity of the *Restatement* test itself. The test fails to define several of its crucial elements, and the ambiguity makes the results of the rule unpredictable.[198] As explained above, unpredictability creates uncertainty that encourages self-censorship.

A second administrative flaw of the *Restatement* test is its unsuitability for summary judgment. To show (or disprove) satisfaction of the *Restatement* requirement that the facts be fully set forth or generally assumed, parties must produce evidence about the underlying facts—what facts are generally known to recipients of the statement, and what the statement could be interpreted as implying. Only with this evidence will the court be able to assess adequately whether the recipients have sufficient information to make a judgment for themselves, which is the objective of the factual disclosure. To obtain the necessary evidence, the

195. 400 So. 2d 52 (Fla. Dist. Ct. App. 1981).

196. *Id.* at 53.

197. *Id.* at 57.

198. *Cf.* Titus, *supra* note 6, at 1215-19 (arguing that a fact-opinion distinction in the fair comment privilege based on whether the factual basis for the statement was sufficiently set forth is spurious and speculative).

parties must conduct at least some discovery before the summary judgment motion. This inevitably adds to the cost of defending against a libel suit. Of course, the requirement of evidence does not make the summary judgment motion impossible. Nevertheless, since any factual questions must be undisputed for summary adjudication, the evidentiary requirements under the *Restatement* test make summary adjudication more difficult.

To summarize, the *Restatement* test fails to articulate a standard for distinguishing fact from opinion, and is inconsistent with the search-for-truth and self-goverument theories of the first amendment. Its distinction between privileged and unprivileged opinions, which is based on whether the facts supporting the opinion are set forth or assumed, is both over and underinclusive. In some situations, the *Restatement* test would protect a calculated or reckless falsehood, while in other situations it would fail to protect a statement that is not a calculated or reckless falsehood. Moreover, the *Restatement* has significant administrative limitations. Since it fails to provide a standard for examining the sufficiency of the facts set forth, the test is inconsistently applied for unpredictable results. Additionally, its reliance on the way the recipient understands the statement reduces the usefulness of the test as a mechanism for summary adjudication.

C. *Totality of the Circumstances Test*

The totality of the circumstances test directs the court's attention to the context, cautionary words, and the circumstances when applying the privilege. Some parts of this test are consistent with the search-for-truth and self-government theories of the first amendment and some are not. The first consideration, the context of a statement, is obviously consistent with these theories of the first amendment. Since context gives meaning to a disputed statement, it will affect the way the statement operates in the marketplace of ideas. Both the search-for-truth and the self-government theories rely on individual assessments of the disputed statement. If context affects that assessment, it is relevant in determining whether a statement is one of opinion or of fact.

The most obvious example of an appropriate use of context is in the case of rhetorical hyperbole. If a newspaper reports that a developer "blackmailed" the city council, the statement could be taken to mean either that the developer had committed the crime of extortion, or that the developer was using legal leverage in a way that the author considered immoral.[199] If the statement is an accusation of illegal conduct, it

199. This was the factual situation in Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), discussed *supra* in text accompanying notes 33-39.

may constitute a calculated falsehood that would distort the search-for-truth and self-governing functions of the first amendment.[200] But if the statement is no more than an accusation of immoral but legal conduct, it might help in the search for truth or self-governance by focusing debate on the developer's tactics in obtaining city approval. This, in turn, could prompt citizens to exercise greater control over the city's development policy.

The second part of the totality-of-the-circumstances test, cautionary language, initially seems consistent with the first amendment theories as well.[201] It is, however, overinclusive because it may operate to protect calculated falsehoods. For example, suppose that *A* knowingly and falsely says that *X* is a high school dropout, or suppose that *B* knowingly and falsely accuses Judge *Y* of accepting bribes. Such calculated falsehoods have no worth under the search-for-truth or self-government theories of the first amendment.[202] The addition of cautionary language such as "I think" does not magically make these statements any more valuable. If the statements are worthless in their absolute form, they are still worthless in their cautionary form.[203]

Of course, the cautionary language part of the totality-of-the-circumstances test would not be overinclusive if the statement being qualified was not a calculated falsehood. In the above example, finding the statement privileged would be consistent with the first amendment theories considered here if *B* had said "I think Judge *Y* is a bad judge." *B*'s statement is not a calculated falsehood because there are no standards to evaluate "badness." It therefore serves a legitimate function in public debate; it might advance the search for truth by focusing debate on what makes a judicial decision good or bad, or it might assist the citizens in self-governance by encouraging dissemination of information about judicial decisions. The critical distinction in this second version of the "judge" example is *not* the cautionary language, but the nature of the statement modified by that language.

The consideration of cautionary language under the totality-of-the-circumstances test presumes such language changes the way the recipient understands the statement. It assumes that cautiously phrased state-

200. The distorting effects of calculated falsehoods on the marketplace of ideas are explained *supra* in text accompanying notes 133-36.

201. One commentator has suggested that the opinion privilege should turn on whether or not the author tells the recipients that the statement is an opinion. *See* Note, *The Fact-Opinion Distinction*, *supra* note 5, at 1851. For a further discussion of this proposal, *see supra* note 69.

202. This example is similar to one used to show that calculated falsehoods distort the marketplace of ideas *supra* in text accompanying note 136.

203. Judge Friendly reached a similar conclusion. In Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980), he wrote: "It would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think'." *Id.* at 64. For a more complete discussion of this case, *see infra* text accompanying notes 223-35.

ments deserve more protection because they are less likely to be taken as "factual,"[204] and are, therefore, less persuasive. This implied use of persuasiveness as a factor in the analysis is inappropriate, just as it was with the *Restatement* test.[205] It fails to account for many other factors—such as audience susceptibility, credibility of the medium of communication, ability of the subject to respond, identity of the speaker, and the wording of the statement[206]—that could make a cautiously phrased statement very persuasive. Moreover, it is based on a premise—that persuasiveness of the statement is relevant—which is inconsistent with the search-for-truth and self-government theories of the first amendment.[207]

One might argue that a cautiously phrased statement should be protected as opinion because the author honestly believes the statement to be true.[208] But the *New York Times* actual malice requirement already does that. An author is protected for uttering false facts under *New York Times* unless the statement is knowingly or recklessly false. Furthermore, the author's belief in the statement does not justify protecting the statement under the search-for-truth or self-government theories of the first amendment. If an author wrongly believes that a judge is taking bribes, his accusation will still distort the search for truth or self-governance. Of course, it may be beneficial to protect mistaken false statements to encourage robust debate, but, again, this is precisely what *New York Times* is designed to do.[209]

The third part of the totality-of-the-circumstances test—the circumstances of the communication, including the medium of expression and audience expectations—is also overinclusive. Since this part of the test turns on the statement's impact on the audience, it may protect calculated falsehoods simply because the audience takes the statement with a grain of salt. But, again, calculated falsehoods have no value under the search-for-truth or self-government theories,[210] even if they are discounted by the recipients of the statement because of their expectations or the medium used.[211]

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204. *See, e.g.*, Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980).

205. *See supra* text accompanying notes 173-76.

206. For a more complete discussion of these factors that may influence the recipients of a statement, *see supra* note 175.

207. For the discussion of why persuasiveness is an inadequate basis for distinguishing facts from opinions, see *supra* text accompanying note 176.

208. New York Times Co. v. Sulllivan, 376 U.S. 254, 274-80 (1964).

209. *See id.* at 279-80.

210. The distorting effects of calculated falsehoods on the marketplace of ideas are explained *supra* in text accompanying notes 133-36.

211. Audience expectations must be distinguished from rhetorical hyperbole. If the audience expectation factor is taken to an extreme, the calculated falsehood becomes rhetorical hyperbole. For example, in *Greenbelt Coop.*, the statement that plaintiff "blackmailed" the city was knowingly

An example will illustrate this overinclusiveness. In *Desert Sun v. Superior Court*[212] the court held that a letter to the editor accusing the plaintiff, a political candidate, of contriving political polls, making up committees, and touching up photos, was a protected statement of opinion. The court based its decision on the fact that the letter contained typical political charges in typical political rhetoric.[213] Yet, these statements are the sort that should not be automatically protected. If they are knowingly false and factual, they serve no useful purpose in the search for truth or self-governance. They distort the search for truth by leaving recipients with a false impression that the plaintiff lied during his campaign. Moreover, this false impression of plaintiff's behavior may unfairly affect the outcome in the election, which would distort the operation of self-governance. If, on the other hand, the statements are not knowingly false, protection of the statements as opinions would be unnecessary because they would be protected under *New York Times* as statements made without actual malice.

One might argue that it is appropriate to protect statements made in the circumstances of a public controversy, even if they are calculated falsehoods, to encourage public debate on public issues.[214] But this proposition would go beyond *New York Times* and its progeny, which have limited protection to statements about public figures made without actual malice. Moreover, the expansion of the definition of a "public controversy" under the third part of the totality-of-the-circumstances test might ultimately protect many calculated falsehoods. At first, the circumstances of communication were used to justify protecting statements made during a public labor dispute.[215] Subsequently, that part of the test

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false insofar as the speaker knew that the plaintiff had not committed extortion. But the recipients of the communication, the audience, understood it to be rhetorical.

The difference between rhetoric and a statement that is privileged because of audience expectation is one of degree. Rhetorical hyperbole only occurs when it "is simply impossible to believe that a reader" would not understand the statement as rhetorical. *Greenbelt Coop.*, 398 U.S. at 14; *accord* Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 285 (1974). In contrast, audience expectation becomes relevant any time there are circumstances, such as a public controversy, that alert the recipient to possible exaggeration. Instead of looking at the specific statement, the court looks at the general circumstances surrounding the communication to see if any or all of the statements communicated would be discounted by the recipients. *See* Lewis v. Time, Inc., 710 F.2d 549, 553-54 (9th Cir. 1983); Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980).

212. 97 Cal. App. 3d 49, 158 Cal. Rptr. 519 (1979).

213. *Id.* at 53, 158 Cal. Rptr. at 522.

214. Some have argued for this kind of protection, but not under the opinion rubric. For example, one commentator has suggested that statements made about public officials be protected unconditionally. *See* Lewis, *supra* note 142, at 620-22; *see also* New York Times v. Sullivan, 376 U.S. 254, 295 (1964) (Black, J., concurring) (calling for absolute immunity for criticism of the way public officials do their duty).

215. *See* Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 602-03, 552 P.2d 425, 428-29, 131 Cal. Rptr. 641, 644-45 (1976).

was used to justify public statements made by a party to a lawsuit about his opponent.[216] More recently, consideration of the circumstances of a statement has been used to justify a statement that was merely "an effort to persuade" about an issue of public importance.[217] But this goes too far: many published statements are part of an effort to persuade the audience about an important public issue.

These problems aside, the premise for consideration of audience expectations is questionable. It may very well be incorrect to assume that the circumstances of a public controversy cause the audience to discount the statement. Yet, this part of the test presumes that in certain circumstances, such as public debates, the recipients of an allegedly defamatory statement will discount it because they are expecting fiery rhetoric.[218] It is just as plausible, however, that some recipients of a statement made in a public dispute are predisposed to believe that statement. This predisposition may be due to the recipients' philosophical or political bent, or to their high regard for the speaker. In addition, recipients might believe that the information is coming from an expert, or from a person with special inside information. Furthermore, if one begins to look at factors that affect the way an audience understands a statement, such as the existence of a public debate, there are many other factors that affect audience perceptions (such as those considered above[219]) that should be considered for logical consistency.

Moreover, the assumption that the audience will discount statements in certain circumstances is based on the constitutionally impermissible premise discussed above: that less persuasive statements should be protected as statements of opinion. This is particularly true where a statement is made during a public debate, which is a paradigm of the sort of circumstances courts use to justify the opinion privilege.[220] Thus, a standard that would protect a statement merely because it was made in a public debate creates the risk of undermining the self-governing function of the first amendment.

The totality-of-the-circumstances test has administrative problems as well. It does not provide a bright-line for authors.[221] Since it directs a

216. *See* Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980).

217. *See* Lewis v. Time, Inc., 710 F.2d 549, 553-54 (9th Cir. 1983).

218. *See, e.g., Information Control Corp.*, 611 F.2d at 784; *Gregory v. McDonnell Douglas*, 17 Cal. 3d at 601, 552 P.2d at 428, 131 Cal. Rptr. at 644; Cole v. Westinghouse Broadcasting Co., 386 Mass. 303, 309-11, 435 N.E.2d 1021, 1024-26, *cert. denied* 459 U.S. 1037 (1982).

219. *See supra* note 175.

220. *See* cases discussed *supra* note 218.

221. *Cf.* Zimmerman, *supra* note 69, at 404 (arguing *Information Control* test is unpredictable); Note, *The Fact-Opinion Distinction, supra* note 5, at 1837-39 (arguing that it is hard to guess the circumstances that may be considered relevant to the opinion privilege under a "broad context" test).

court's attention to the *totality* of circumstances, and gives no guidelines for relative importance of various elements, it is impossible for authors to predict with any sort of precision what elements the court will consider, and how much weight will be placed on those elements. As a result, the totality-of-the-circumstances test, while it may help some authors after the fact, does not establish predictable standards which will encourage authors to utter controversial statements.

The test presents fewer problems with the second administrative concern of appropriateness for summary adjudication. The first two parts of the test, context and cautionary language, are easy for the judge to evaluate and require virtually no evidentiary support other than the text of the allegedly defamatory communication. The third consideration, the circumstances of the statement, may be more problematic. Although most of the circumstances surrounding a statement may be uncontroverted, it is possible that a resourceful plaintiff might raise an issue of fact about audience expectations of the communication. Thus, the court may require evidence of how the audience understood the statement.

D. Comparative Evaluation

Having considered how consistent each of the three versions of the opinion privilege is with the search-for-truth and self-government theories of the first amendment and the predictability and amenability to summary adjudication of each version of the privilege, it is useful, at this point, to make some comparative evaluations of these tests.

The verifiability test, on the whole, is the superior test under the criteria used in this Comment. This test is consistent with the search-for-truth and self-government theories of the first amendment. In addition, it provides a generally predictable test to distinguish fact from opinion, and it is a convenient vehicle for quick and relatively inexpensive summary adjudication.

In contrast, the *Restatement* test has serious first amendment problems. Its distinction between privileged and unprivileged statements, based on whether the underlying facts are disclosed, is inconsistent with the search-for-truth and self-government theories. As a result, the *Restatement* protects some statements not worthy of protection and fails to protect others that should be protected. Furthermore, it may be inconsistently applied and it renders unpredictable results. It may also require some evidence to support its application, making summary judgment more difficult.

The totality-of-the-circumstances test, by comparison, is more consistent with the search-for-truth and self-government theories. The first part of the test, which considers the context of a statement, is consistent

with the first amendment theories. By considering the context of the statement, the court can better understand the meaning of the communication. This meaning is relevant to whether a statement is valuable in the search for truth or in self-governance. But parts two and three of the totality-of-the-circumstances test, which consider the cautionary language of a statement, and the setting in which it was communicated, are inconsistent with the first amendment because they are overinclusive. Under some circumstances, these factors may protect calculated falsehoods. Finally, results of applying the totality-of-the-circumstances test are unpredictable.

In sum, an ideal test for the opinion privilege from the first amendment perspectives considered here is one that combines verifiability with an examination of the context of the statement. This combination test directs a court's attention first to the context of a statement to see if the language is rhetorical hyperbole. If it is, then the statement is one of opinion. If not, the court then should look to the statement's verifiability. Verifiability can be established in either of two ways: first, if the statement has a generally accepted core of meaning, and, second, if the statement is capable of objectively being proven true or false. If verifiability is not established under either of these considerations, the statement is a privileged opinion. Otherwise, it is a statement of fact.

IV
APPLICATION OF THE THREE TESTS TO EXISTING CASE LAW

The implicit use of a test that examines a statement's verifiability and its context would explain some of the apparently paradoxical results the courts have reached in applying the opinion privilege. The courts have used different versions of the opinion privilege, as well as various combinations of those versions. It appears, however, that the courts' results can best be explained by the disputed statement's verifiability and its context. This Part of the Comment will analyze the case law by the "type" of statements involved. It will look at four roughly drawn categories of statements: allegations of criminal activity, assaults on personal or professional integrity, statements about a person's motivation, and rhetorical hyperbole.[222] The three tests will be applied to each category of cases to evaluate their support for the results of the case law. In addition, the search-for-truth and self-government theories of the first amendment will be used to assess the appropriateness of the courts' results. Verifiability will best explain the decisions in the first three categories of

222. Evaluative opinions, like book reviews and restaurant reviews, are not considered here because they present few problems. In general, they satisfy all three tests for opinion.

statements, and the context of the disputed statement will explain the results in the last category.

A. Allegations of Criminal Activity

The verifiability test best explains results in the defamation cases where the plaintiff complains he has been falsely accused of criminal activity. In general, the courts have found that accusations of criminal activity are unprotected by the opinion privilege.[223] The facts of *Cianci v. New Times Publishing Co.*[224] are useful for comparison of the three different versions of the opinion privilege. In that case, a magazine article accused an incumbent mayor, seeking reelection, of "buy[ing] his way out of a possible felony [rape] charge."[225] The article exhaustively set forth the underlying facts. It quoted extensively from a statement by the alleged rape victim. She recounted a specific chronology of events leading to Cianci's threat that he would kill her and throw her into a ravine if she did not submit to sexual intercourse with him. The alleged victim notified the police and underwent a thorough examination. She identified Cianci as the rapist. Several lab reports corroborated her story, and she passed a lie detector test. Cianci failed a similar lie detector test on three occasions.[226]

The article then reported that the victim's attorney did not think she was healthy enough to go through with a civil trial, so he counseled her to settle out of court. It quoted her as saying she had received a $3,000 settlement. Subsequently, the district attorney dropped the criminal case because the lie detector evidence was inadmissible, and because he assumed that the victim, the key witness, would not testify due to the settlement.[227] After stating these and other facts, and recounting the obstacles faced in publishing the article, the author concluded that "[f]or the nominal sum of $3,000, Cianci had managed to buy his way out of a possible felony charge."[228]

The district court granted an order dismissing Cianci's libel com-

223. *See, e.g.*, Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976) (defendant claimed plaintiff was guilty of libel), *cert. denied*, 429 U.S. 1062 (1977); McManus v. Doubleday & Co., 513 F. Supp. 1383 (S.D.N.Y. 1981) (defendant accused plaintiff of homicidal tendencies); Catalano v. Pechous, 83 Ill. 2d 146, 419 N.E.2d 350 (1980) (defendant said to have received bribes), *cert. denied*, 451 U.S. 911 (1981); Kutz v. Independent Publishing Co., 97 N.M. 243, 638 P.2d 1088 (1981) (implied threats of violence); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (corruption implying illegality), *cert. denied*, 434 U.S. 969 (1977). *But see* Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978) (allegation of fraud), *cert. denied*, 440 U.S. 960 (1979).

224. 639 F.2d 54 (2d Cir. 1980).

225. *Id.* at 58.

226. *Id.*

227. *Id.* at 55-57.

228. *Id.* at 58.

plaint on the basis that any implications that Cianci was guilty of rape or improper payoffs were constitutionally protected as expressions of opinion.[229] The Second Circuit reversed and remanded. The court held that the implication that Cianci was guilty of rape and obstruction of justice was not absolutely protected, even if read as expressing "opinion," because it implied specific criminal conduct.[230] Furthermore, even if the statement that Cianci had bought his way out of a criminal charge was not factual, it was so "laden with factual content [that] . . . the First Amendment confers no absolute immunity [on it]."[231]

From a first amendment standpoint, this result seems correct. Since there are well defined, commonly understood elements of criminal conduct, it is possible to determine whether a person has committed a crime or not. Thus, the accusation of criminal conduct could be a calculated falsehood. And if it is a calculated falsehood, it should not be protected as opinion because it could seriously distort the political process. People are unlikely to vote for a mayor who they think is a rapist. On the other hand, the accusation may be true. If so, it would be important in the operation of self-governance. Few people would want a rapist for a mayor. Excluding a criminal accusation from the opinion privilege, however, does not automatically make the speaker liable for defamation. As long as the accusation is not knowingly or recklessly false, it is protected under *New York Times*.

The result in *Cianci* is consistent with the verifiability test. Allegations of criminal conduct are verifiable because they carry with them images of specific conduct. For example, when Cianci was accused of being a rapist, the reader undoubtedly understood the statement to mean that Cianci forced someone to have sexual intercourse with him against her will. The accusation, therefore, is a sort of shorthand for more detailed allegations of specific factual conduct; such allegations are capable of being objectively proven true or false. If the alleging statement is false in this objective sense, it has no place in the marketplace of ideas.

Had the *Restatement* test been applied in *Cianci*, the court would have reached a different and improper result. All the facts supporting the statement that Cianci "bought his way out of a felony charge" were set forth. Therefore, the statement would be protected under the *Restatement* as "pure opinion." The trial court, relying on the full disclosure of the underlying facts ruled that the opinion privilege applied.[232] It reasoned that there was enough information set forth for the recipient

229. *Id.* at 59.

230. *Id.* at 64-65.

231. *Id.* at 63.

232. Cianci v. New Times Publishing Co., 486 F. Supp. 368 (S.D.N.Y. 1979), *rev'd*, 639 F.2d 54 (2d Cir. 1980).

to judge for herself whether the disputed statement was opinion. Because the *Restatement* test would protect the statement that Cianci bought his way out of a felony charge, the appellate court in *Cianci* rejected the *Restatement* test as overly protective.[233]

One interpretation of the statement in *Cianci* would make the *Restatement* test reach the right result. Under that interpretation, the concluding statement would be treated as factual like the preceding statements. In other words, the statement that "Cianci bought his way out of a felony charge" might itself be a factual statement rather than an opinion based on the other facts in the article. If this were so, then the *Restatement* opinion privilege would not apply simply because the statement contained no opinions. While this solution "saves" the *Restatement* test, it also highlights one of its primary inadequacies: failure to articulate a fact-opinion distinction.[234] Under the *Restatement* test there is no way to tell if the statement that "Cianci bought his way out of a felony charge" was a statement of fact or opinion.

Application of the totality-of-the-circumstances test, like application of the *Restatement*, probably would have resulted in improper protection of the statement in *Cianci*. Under that test, the statement about Cianci probably was privileged as part of a public debate about Cianci's fitness for public office. Since he was seeking reelection, he voluntarily submitted to continuing public scrutiny. Furthermore, the disputed statement can be argued to be cautiously phrased: instead of accusing Cianci of being a rapist, the article merely stated that he bought his way out of a "possible felony charge." Thus, under these circumstances, the totality-of-the-circumstances test would appear to protect accusations of criminal conduct.[235]

B. Assaults on Personal or Professional Integrity

The verifiability test also would aid in sorting out the confused and inconsistent case law for statements demeaning an individual's personal or professional integrity. The inconsistency of the law is readily apparent from several cases that reach opposite results on similar facts. For instance, the court in *McHale v. Lake Charles American Press* found that the opinion privilege did not protect the statement: "No bond buyer would buy a nickel's worth of securities on McHale's opinion."[236] In

233. 639 F.2d at 65 ("opinions may support a defamation action . . . even though there is no implication that the writer is relying on facts not disclosed").

234. *See supra* text accompanying note 172.

235. For another example of the totality of the circumstances test's protection of criminal allegations, see Desert Sun Publishing Co. v. Superior Court, 97 Cal. App. 3d 49, 158 Cal. Rptr. 519 (1979) (court cites examples in which a party accuses politicians of criminal behavior).

236. McHale v. Lake Charles Am. Press, 390 So. 2d 556 (La. Ct. App. 1980), *cert. denied*, 452 U.S. 941 (1981).

contrast, the court in *Plough v. Schneider* found that the privilege protected the statement "[plaintiff gave] very incompetent legal advice."[237] Similarly, the court in *Lewis v. Time, Inc.* found that the privilege protected the statement "[plaintiff is one of the] shadier [legal] practitioners."[238] Although there are some minor variations in the facts of these cases, they all involved allegations of legal incompetence.

The search-for-truth and self-government theories of the first amendment demonstrate that *McHale* and *Lewis* were properly decided, though for different reasons. Since there are clear, objective standards of competence in legal practice, as evidenced by the tort of malpractice, an assertion that McHale was an incompetent bond attorney could be proven true or false. If it was knowingly or recklessly false, then the statement would serve no purpose in the marketplace of ideas. For similar reasons, *Plough* was wrongly decided. Like the statement in *McHale*, the assertion that Plough gave very incompetent legal advice can be evaluated by objective, commonly understood norms of the legal profession.

Lewis presents a different situation because the statement that plaintiff was a "shadier" practitioner has no objective, commonly understood meaning. Consequently, imposition of liability for that statement would depend on a standardless, arbitrary finding, which is inconsistent with the first amendment. Moreover, such a statement should be protected for its possible utility in the marketplace of ideas. It could motivate recipients to discuss and investigate whether Lewis was incompetent or not. Thus, the statement that Lewis was "shady" could propel discussion toward the truth.

A second set of illustrative cases deal with the personal integrity of various public figures. In *Costello v. Capital Cities Media, Inc.*[239] the court found that the opinion privilege did not protect explicit and repeated assertions that the plaintiff had lied in public office. But in *Desert Sun Publishing Co. v. Superior Court*,[240] the court held that charges that a political candidate had used contrived polls, fictitious committees, and touched up photos were protected.

Under the first amendment theories the decision in *Costello* was proper, but the decision in *Desert Sun* was not. The court could look to objective criteria to ascertain whether the plaintiff in *Costello* was lying, and to determine if the candidate in *Desert Sun* had actually contrived polls or touched up photos. Therefore, to give the defendants' statements blanket protection risks protecting calculated falsehoods. If these statements were false, they could skew the outcome of an election where the

237. Plough v. Schneider, 8 Media L. Rep. 1620 (Ohio Ct. App. 1982).
238. *Lewis v. Time*, 710 F. 2d at 550-51.
239. 111 Ill. App. 3d 1009, 445 N.E.2d 13 (1982).
240. 97 Cal. App. 3d 49, 158 Cal. Rptr. 519 (1979).

voters might otherwise have elected the defamed party. Thus, the statements should only be protected if true, or made without actual malice.

Examination of these cases shows that the verifiability test will help align the case law with the first amendment. A court using the verifiabilty test would have reached the proper result in each of the cases. The first amendment analysis turns on the same issues verifiabilty does: the provability and determinacy of the statement. If a statement cannot be proven or is so indeterminate that there is no generally accepted understanding, then it is protected under the verifiability test. Thus, the verifiabilty test would have protected only the *Lewis* statement, that the plaintiff was a shady practitioner.

These cases also highlight the inadequacy of the other opinion tests. Under the *Restatement* test, *Plough* would be upheld though wrongly decided. The statement that plaintiff gave incompetent legal advice might have been a calculated falsehood, but the *Restatement* test would be satisfied because the facts upon which the statement was based were fully set forth.[241] Likewise, a court applying the totality-of-the-circumstances test would have upheld the wrongly decided case of *Desert Sun*, because it involved statements in a letter to the editor in the midst of a political campaign.[242] In addition, the court using the totality-of-the-circumstances test would have reversed the correct outcome of *McHale*. There the opinion privilege did not protect the statement that no "bond buyer would buy a nickel's worth of securities on McHale's opinion." Because the article was about McHale's appointment to public office, which is a matter of public interest, the totality-of-the-circumstances test probably would require a finding that the statement was privileged.[243]

Admittedly, the verifiabilty test is no panacea. Cases will remain where it is unclear whether a statement is verifiable. For example, in *Ollman v. Evans*[244] the defendants said that Ollman had "no status" among his fellow political scientists. The court held that this statement was protected as opinion because, among other reasons, it could not be verified. The majority reasoned that "status" is too malleable a concept.[245] Three dissenters, however, argued quite persuasively that a survey could be administered to evaluate Ollman's professional standing.[246] But even if such a survey were taken, the respondents to the survey would very likely have markedly different ideas of what constitutes high standing in their community.[247] Thus, the view that "status" is not veri-

241. *See Plough*, 8 Media L. Rep. at 1622.
242. *See Desert Sun*, 97 Cal. App. 3d at 53, 158 Cal. Rptr. at 521-22.
243. *See McHale*, 390 So. 2d at 561.
244. 750 F.2d 970, 973 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2662 (1985).
245. *Id.* at 989-91 & n.42.
246. *Id.* at 1032-34 (Wald, J., dissenting in part) (joined by Edwards, J., and Scalia, J.).
247. *Id.* at 990 n.42.

fiable seems correct, but it is a close call.

C. Motivation

This third category of statements, like the first category, has been treated fairly uniformly by the courts. In general, statements about a person's motivation for a given action are considered statements of opinion.[248] The results in such cases are consistent with the second part of the verifiabilty test, which looks to the provability of the statement. Human motivation is complex and capricious. As a result, it is hard to prove exactly what motivates a person to do something. Although both criminal and civil law examine a defendant's motive or intent, they rarely, if ever, base a finding solely on his state of mind. In general, crimes and torts require that something more be proved. Libel cases involving motivation are therefore distinguishable from crimes and torts examining motivation, because liability for defamation would arise solely from false characterization of a person's state of mind. Thus, the absence of objective evidence for proving a person's motivation justifies finding under the second part of the verifiability test a statement about that motivation privileged.[249]

Finding statements about another's motivation privileged also is often consistent with the first part of the verifiability test: the determinacy of the language used. Many statements about motivation use language without a commonly understood meaning. For example, motivation characterized as "cruel,"[250] "greedy,"[251] or "sadistic"[252] can mean different things to different people. Most jury verdicts would be arbitrary in libel cases where the statement at issue concerns motivation.

248. *See, e.g.*, Cibenko v. Worth Publishers, 510 F. Supp. 761 (D.N.J. 1981) (plaintiff's acts motivated by suspect's social status); Burns v. Denver Post, 43 Colo. App. 325, 606 P.2d 1310 (1979) (plaintiff's acts motivated by ex-husband's handicap); Medeiros v. Northeast Publishing, 8 Media L. Rep. (BNA) 2500 (Mass. Super. Ct. 1982) (plaintiff masochistic and sadistic); Kotlikoff v. Community News, 89 N.J. 62, 444 A.2d 1086 (1982) (plaintiff motivated by self-interest because of involvement in possible conspiracy); Rand v. New York Times Co., 765 A.D.2d 417, 430 N.Y.S.2d 271 (1980) (defendant quoted another who said plaintiff took advantage of her); Note, *Fact and Opinion*, *supra* note 7, at 116-17 & n.206.

249. The inabilty to prove a person's motivation should not be confused with lack of proof for something like criminal conduct which is otherwise provable. The difference is whether the statement is theoretically provable, not whether there is proof in the particular instance. In other words, the fact that a plaintiff's criminal files were destroyed in a fire does not mean that a defendant's statement about the plaintiff's criminal history is "unverifiable." Since it is an allegation of criminal conduct, it is theoretically provable by evidence of criminal conduct.

250. *See* Spiegel v. Newsday, 7 Media L. Rep. 1759 (N.Y. Sup. Ct. 1981) (plaintiff accused of cruelty).

251. *See* Greer v. Columbus Monthly, 4 Ohio App. 3d 235, 448 N.E.2d 157 (1982) (plaintiff accused of trying to "milk you for every penny").

252. *See* Medeiros v. Northeast Publishing, 8 Media L. Rep. 2500 (Mass. Super. Ct. 1982) (plaintiff accused of masochistic and sadistic philosophy).

Therefore, it is perhaps best to apply the opinion privilege to keep such issues from going to the jury.

Protection for statements about motivation is consistent with the first amendment theories. A statement about a person's motivation can stimulate further discussion about his character, or motivation generally, which then leads to discovery of the truth. In addition, discussing of the motivations of public figures enhances citizens' ability to exercise their right to govern themselves. Knowing their statements about a person's motivation are protected, citizens can feel free to evaluate openly the behavior of public officials.

The case of *Cibenko v. Worth Publishers*[253] illustrates these benefits. In that case, a sociology text included a picture of the plaintiff, a caucasian police officer, prodding a black man who appeared to be trying to sleep. The caption stated that social status seemed to be the most significant determinant in arrests and convictions. It then asked "[w]ould the officer do the same if the offender was a well-dressed, white middle-aged person?"[254] The court, holding that the statement was an opinion, dismissed the case.

From a first amendment and verifiability standpoint the decision is correct. It would be virtually impossible to ascertain whether the plaintiff's motivation in prodding the man was related to the offender's social status. Any investigation into the accuracy of the statement would be fruitless. Rather than attempting to investigate the statement judicially, it is more appropriate to let the marketplace of ideas operate. The argument of the caption, that police act on the basis of socio-economic prejudice, is an important public issue. By discussing it, insights into police motivation might be discovered. Or, discussion of the issue might stimulate legal reform. Thus, the caption contained an idea or opinion that should be protected.

Although the court in *Cibenko* considered both the *Restatement* and totality-of-the-circumstances tests,[255] neither of these tests adequately explains the outcome. The *Restatement* view fails because, as a factual matter, it cannot be correct to say the caption does not imply that there are other facts, in addition to the picture, that provide the basis for the implication that the policeman was motivated by the suspect's class. Most readers probably would assume that the author had more than the picture to support the claim that social status is the most important factor motivating police harassment. The statement clearly implied the existence of other defamatory facts, such as a consistent pattern of police

253. 510 F. Supp. 761 (D.N.J. 1981).

254. *Id.* at 764.

255. *Id.* at 764-66.

harrassment of nonwhite persons. Therefore, under the *Restatement* test the court would have found the statement unprivileged.

The totality-of-the-circumstances test also inadequately explains the results in *Cibenko*. Although the totality-of-the-circumstances test could justify the finding of privilege, that result, on these facts, goes too far. In looking at the totality of the circumstances, the court relied on the educational context of the picture and statement to justify protection. Virtually every publication, however, is arguably intended to educate its audience. Therefore, protecting "educational" statements might include many false statements which should not be protected by the first amendment.

D. Rhetorical Hyperbole

Following the lead of the U.S. Supreme Court in *Greenbelt Cooperative*,[256] lower courts generally hold that rhetorical statements are protected statements of opinion.[257] This approach is consistent with the first amendment theories considered here. Such statements are usually designed to provoke debate, which in turn promotes the competition of ideas underlying the search-for-truth and self-government theories. Furthermore, from an administrative view, imposing liability for such rhetorical statements inevitably would be arbitrary since rhetoric or hyperbole mean different things to different people.

It might be argued that rhetorical or hyperbolic language does not deserve protection because the ideas can be expressed in less caustic or offensive language. But this argument iguores the emotive aspect of communication. One aspect of the ideas conveyed by language is the emotion certain words evoke. Such emotive considerations are important in the marketplace of ideas because emotions foster robust debate.[258] Saying an action is "blackmail" evokes a stronger response than labeling the same action "improper."

256. 398 U.S. 6 (1980).

257. *See, e.g.*, Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.) ("hypocrite" and "two-faced"), *cert. denied*, 434 U.S. 834 (1977); Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976) ("fellow-traveler" of fascism); Stuart v. Gambling Times, 534 F. Supp. 170 (D.N.J. 1982) (plaintiff's book a "fraud"); Loeb v. New Times, 497 F. Supp. 85 (S.D.N.Y. 1980) (plaintiff described as "near-Neanderthal"); Pease v. Tel. Publishing Co., 121 N.H. 62, 426 A.2d 463 (1981) (plaintiff described as "scum of the earth"); Ithaca College v. Yale Daily News, 105 Misc. 2d 793, 433 N.Y.S.2d 530 (1980) ("sex, drug and booze are the staples of life" at plaintiff institution), *aff'd on other grounds*, 85 A.D.2d 817, 445 N.Y.S.2d 621 (1981); Ferguson v. Dayton Newspapers, 7 Media L. Rep. (BNA) 1396 (Ohio Comm. Pleas Ct. 1981) (cartoons depicting plaintiff as skunk, witch, rat, etc.).

258. The constitutional status of the emotive content of words has been recognized by the Supreme Court. *See* Cohen v. California, 403 U.S. 15 (1971).

This emotive aspect of language should not be confused with persuasiveness. Caustic or offensive language is protected because it conveys an emotional aspect of the speakers message, not because it is more persuasive than less offensive languagc.

Both the verifiability and the totality-of-the-circumstances tests are consistent with the case law on rhetorical hyperbole, as illustrated by the rather extreme example of hyperbole in *Silberman v. Georges*[259] That case involved a painting entitled "Mugging of the Muse." It depicted two people, wearing masks that resembled the plaintiffs, attempting to assassinate a woman. The court, relying on *Greenbelt Cooperative Publishing v. Bressler*,[260] held that the depiction of the plaintiffs was allegorical and symbolic, and thus was protected opinion.[261]

This result accords with the verifiability and totality-of-the-circumstances tests, but not with the *Restatement* test. Although the resemblance of the masks to the plaintiffs could be verified, the fact that their resemblances had been used in the painting did not have any determinate meaning. It seems clear that the muse represented the arts, and, as a result that the figures pictured were "mugging" the arts. But what was meant by the fact that the figures were wearing masks? And what does it mean to "mug" the arts? The painting, and what it implied about the plaintiffs, had no consistent, determinate meaning. As a result, it was not verifiable. Furthermore, under the totality-of-the-circumstances test, the context and medium of communication—a painting—demonstrated that it was improbable viewers would understand the painting to be conveying a factual assertion. It seems doubtful that observers would take a painting of a "muse" and two murdering figures as a literal depiction of the plaintiffs. Therefore, the painting was a statement of opinion. In contrast, the *Restatement* test, which requires that the underlying facts be disclosed, probably would not protect the painting. Since an allegorical painting with a title does not set forth the underlying facts, and since there was no evidence that the facts were generally understood, the painting would not be protected.

CONCLUSION

This Comment has evaluated the first amendment underpinnings of the opinion privilege that developed from dicta in *Gertz*. That privilege is consistent with two of the most common first amendment theories, the search-for-truth theory and the self-government theory.

In application, the opinion privilege is most consistent with first amendment values when it takes the form of the verifiability test. Both the *Restatement* and the totality-of-the-circumstances tests are inconsistent with first amendment values because they rely on the persuasiveness of the speech in deciding whether or not it should be protected. In addition, they may protect some statements that do not deserve first amend-

259. 91 A.D.2d 520, 456 N.Y.S.2d 395 (1982).
260. 398 U.S. 6 (1970).
261. *Silberman*, 91 A.D.2d at 521, 456 N.Y.S.2d at 397.

ment protection, while failing to protect some statements that should be protected.

The verifiability standard also has the advantage of being the most easily and quickly administered. It provides a relatively predictable test for distinguishing between facts and opinion. The courts can use the test for early summary adjudication with little evidentiary development. These advantages help preserve first amendment values by providing an administrative system that reduces uncertainties and costs in litigating libel claims. In contrast, the *Restatement* and totality-of-the-circumstances tests are unpredictable and can require extensive, costly discovery.

Not only is verifiability superior from a first amendment standpoint, it also best explains the current case law, and reduces the confusion due to the first amendment inadequacies of the other tests. To deal with these inadequacies, the courts have had to distort the other tests. If the courts were to use verifiablity, however, such distortion would become unnecessary.

*Jeffrey E. Thomas**

* B.A. 1983, Loyala-Marymont University; third-year student, Boalt Hall School of Law, University of California, Berkeley.