The Illusion of the Fact-Opinion Distinction in Defamation Law

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THE ILLUSION OF THE FACT-OPINION DISTINCTION IN DEFAMATION LAW*

"Loyalty to petrified opinion never yet broke a chain or freed a human soul."

—Mark Twain

JOHN LOCKE STATED in An Essay Concerning Human Understanding that “[w]e should have a great many fewer disputes in the world if words were taken for what they are, the signs of our ideas only, and not for things themselves.” Yet, words do cause disputes, and they often injure people. Because of this potential for harm, states have attempted to protect their citizens through the law of defamation. At the same time, the Constitution guarantees that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” Thus, there is a conflict between an individual’s right to have his reputation protected and the right to freedom of speech and freedom of the press.

One dispute arising out of this conflict results from the belief that newspapers are privileged to print opinions but may be sued for printing false statements of fact. This belief stems from dicta

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2. See Rosenblatt v. Baer, 383 U.S. 75 (1966)(Stewart, J., concurring). “The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments” of the United States Constitution. Id. at 92. The ninth amendment to the United States Constitution provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.


4. Although many of the arguments used in this Note apply to various forms of speech and written information, the focus of this Note is on information conveyed by the media. However, it is plausible that there should be no difference between the treatment of the media and other forms of speech. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), five of the Justices maintained that there should be no such difference.

For our purposes, this Note assumes there is a difference, whether it is significant or not, and focuses on the media aspect. One possible difference is the belief that people are more likely to believe information they receive through the media rather than what the man on the street says. Furthermore, this Note largely focuses on libel, as opposed to slander, because most of the cases discussed involve the written word. The analysis, however, could apply to all types of defamation.
in the 1974 Supreme Court case *Gertz v. Robert Welch, Inc.*:

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. Neither the intentional lie nor the careless error materially advances society’s interest in “uninhibited, robust, and wide-open” debate on public issues.\(^5\)

A number of states and federal courts have interpreted *Gertz* as creating a privilege for opinions.\(^6\)

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6. McCabe v. Rattiner, 814 F.2d 839, 841 (1st Cir. 1987)(holding that a reporter's article, implicitly concluding that an encounter with condominium salespeople was a scam, was a constitutionally protected opinion); Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir.)(reh’g en banc)(the former State Attorney General claimed that a magazine article implied he was prosecuting a party for revenge, and the court held that the statement was constitutionally protected opinion), *cert. denied*, 107 S. Ct. 272 (1986); Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 223 (2d Cir. 1985)(statements published in a restaurant guide were constitutionally protected statements of opinion); Redco Corp. v. CBS, 758 F.2d 970, 972 (3d Cir. 1983)(in suit by manufacturer of tire rims over news show segment about the safety of the rims, the court denied recovery by finding that the facts disclosed were true and the program adequately disclosed the basis for the opinions expressed); Ollman v. Evans, 750 F.2d 970, 974-75 (D.C. Cir. 1984)(en banc)(statements in newspaper column about political science professor held to be constitutionally protected expressions of opinion), *cert. denied*, 471 U.S. 1127 (1985); Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 259-60, 721 P.2d 87, 90, 228 Cal. Rptr. 206, 209 (1986)(statements in television program review held to be statements of opinion), *cert. denied*, 107 S. Ct. 890, *reh’g denied*, 107 S. Ct. 1360 (1987); Burns v. McGraw-Hill Broadcasting, 659 P.2d 1351, 1358 (Colo. 1983)(statements in news broadcast that a wife “deserted” her disabled husband could be seen as false statements of defamatory fact, and even if seen as opinion, the language implied underlying defamatory facts); Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 116-18, 448 A.2d 1317, 1323-24 (1982)(newspaper articles’ comments held to be constitutionally protected “pure” opinion); Riley v. Moyed, 529 A.2d 248, 251 (Del. 1987)(newspaper article stating that a county council member and other politicians spent more time listening to developers than to other constituents was a constitutionally protected expression of pure opinion); Myers v. Plan Takoma, Inc., 472 A.2d 44, 47 (D.C. Ct. App. 1983)(the court held that the phrase “a shady group of bar owners” in a leaflet, distributed by a neighborhood association in an effort to block the issuance of a liquor license to the plaintiff, was a constitutionally protected opinion); Mashburn v. Collin, 355 So. 2d 879, 883-85 (La. 1977)(a newspaper's restaurant review privileged as opinion when not made with knowing or reckless falsity); Caron v. Bangor Publishing, 470 A.2d 782, 784 (Me.) (editorial which claimed that police officers should be in good physical shape but plaintiff policeman was overweight was a statement of opinion because the article made clear the basis for the opinion), *cert. denied*, 467 U.S. 1241 (1984); Henry v. Halliburton, 690 S.W.2d 775, 781-83 (Mo. 1985) (en banc)(language that insurance agents “acted with greed” to fleece consumers were permissible expressions of opinion); Nevada Independent Broadcasting Corp. v. Allen, 99 Nev. 404, 410, 664 P.2d 337, 341-42 (1983)(statement that one of a gubernatorial candidate's checks for political advertising would not clear and a remark that implied that the candidate did not pay his
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Even if one accepts the fact that there is a privilege for opinions, another problem arises in distinguishing fact from opinion. Courts have created a number of tests for determining the difference between fact and opinion. Recently, the Ohio Supreme Court selected a "totality of circumstances" test, but the decision was far from unanimous. Other jurisdictions have also had difficulty

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political bills were actionable statements of fact); Kotlikoff v. The Community News, 89 N.J. 62, 65, 444 A.2d 1086, 1089 (1982)(statements published in a newspaper as part of a letter to the editor claiming that the plaintiff-mayor might be taking part in a "huge coverup" were protected expressions of opinion); Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 288, 648 P.2d 321, 330 (Ct. App. 1981)(political ad which stated that the gubernatorial candidate would be the kind of governor who would put his "cronies" in state government was a constitutionally protected opinion), cert. quashed, 98 N.M. 336, 648 P.2d 794 (1982); Steinhilber v. Alphonse, 68 N.Y.2d 283, 289, 501 N.E.2d 550, 552, 508 N.Y.S.2d 901, 903 (Ct. App. 1986)(statements in banner and telephone messages allegedly referring to former union member as "scab" and lacking in talent were nonactionable expressions of pure opinion); Scott v. News-Herald, 25 Ohio St. 3d 243, 245, 496 N.E.2d 699, 701 (1986)(statements in a sportswriter's article alleging that plaintiff committed perjury held to be nonactionable opinion); Healy v. New England Newspapers, Inc., 520 A.2d 147, 150 (R.I. 1987)(in newspaper articles reporting opinions about a plaintiff physician's failure to aid collapsed individual, court held that the opinions could reasonably be understood to imply assertion of undisclosed, but false and defamatory, facts justifying the opinions); Dunlap v. Wayne, 105 Wash. 2d 529, 537, 716 P.2d 842, 847 (1986)(holding that a letter from a real estate partner's attorney to a savings and loan branch manager's attorney, which suggested that the manager's actions amounted to solicitation of a kickback and which the partner gave to the savings and loan officials, was a nonactionable expression of opinion).

7. This Note will not focus on whether the Supreme Court actually meant to create a privilege for opinion. There is an argument that the Gertz dicta has been expanded to encompass far more than the Court intended. In dissenting from the denial of certiorari in Ollman v. Evans, Justice Rehnquist, joined by Chief Justice Burger, referred to the Gertz dicta by stating "it is apparent . . . that lower courts have seized upon the word 'opinion' [in Gertz] to solve with a meat axe a very subtle and difficult question." 471 U.S. 1127, 1129 (1985). But cf. Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988), reversing, 797 F.2d 1270 (4th Cir. 1986). In Falwell, an invasion of privacy case, Chief Justice Rehnquist writing for the majority stated, "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." 108 S. Ct. at 879. While the Supreme Court's intent remains open here, this Note will focus on what the Supreme Court and the lower courts should do.

Although in Falwell the Court appears to embrace some sort of opinion privilege, many questions remain. Indeed, on its facts, Falwell may not go much beyond Greenbelt Cooperative Publishing v. Bresler, 398 U.S. 6, 14 (1970)(an obvious use of "rhetorical hyperbole" does not subject a newspaper to liability for defamation). If opinions are privileged, the Falwell Court fails to give a test for determining when a statement is an "opinion." Also, the Court did not state whether Hustler Magazine would have been liable for its advertisement parody of Jerry Falwell if the minister had been a private person. Although most lower courts do not examine the status of the plaintiff in applying the opinion privilege, the Falwell Court did emphasize that Falwell was a public figure.


9. The court voted 4-3 in regards to selecting the totality of circumstances test. Id.
selecting a test.\textsuperscript{10}

This Note will examine the problems arising from the belief that there is a distinction between fact and opinion. The first part of the Note will present an overview of the current status of libel law and the protections provided for the media by the United States Supreme Court. These cases are important in order to obtain an understanding of the reasoning behind current media protections. Part I will conclude with a summary of the primary concerns of those protections.

The second part of this Note discusses a number of lower court cases which have addressed the fact-opinion distinction, beginning with an important decision from the D.C. Circuit Court of Appeals, \textit{Olman v. Evans}.\textsuperscript{11} Next, this Note will examine a recent Ohio Supreme Court case that followed \textit{Olman} in adopting the totality of circumstances test for distinguishing fact from opinion, \textit{Scott v. News-Herald}.\textsuperscript{12} Also, this Note will examine tests used in other jurisdictions, including the Restatement test\textsuperscript{13} and variations on the \textit{Olman} totality of circumstances test.\textsuperscript{14} Part III of this Note addresses the fact-opinion distinction in light of the constitutional concerns of freedom of the press and the need to protect wronged individuals.

Part IV of this Note presents a solution to the problems created by the illusion that facts and opinions are distinguishable. The solution presented is not a fact-opinion test, but a realignment of current protections for the media. This Note will explain where the realignments should be made and proposes that the fact-opinion tests should be abolished, either by the United States Supreme Court or by the state courts reassessing the intent and meaning of the \textit{Gertz} dicta. Further, this Note will address arguments against such a solution. In Part V, a summary of the proposed structure will be presented. An analysis of the manner in which the new structure will work will be offered, pointing out the solution's similarity to common law protections for the media.


\textsuperscript{11} \textit{Id}.

\textsuperscript{12} 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

\textsuperscript{13} \textit{Restatement (Second) of Torts} § 566 (1977).

\textsuperscript{14} \textit{Information Control Corp. v. Genesis One Computer Corp.}, 611 F.2d 781 (9th Cir. 1980); \textit{Dunlap v. Wayne}, 105 Wash. 2d 529, 716 P.2d 842 (1986).
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I. SUPREME COURT DECISIONS

A. The Cases

Until the Supreme Court decided *New York Times Co. v. Sullivan* in 1964, libel was assumed to be beyond the scope of first amendment protection. The common law, however, recognized in defamation actions a qualified privilege of "fair comment" upon the qualifications and conduct of public officers and public employees. This privilege encompassed the publication of matters of general public concern. State courts did not agree on whether the privilege of public discussion was limited to opinion and comment or whether it extended to any false assertion of fact.

In *New York Times*, the United States Supreme Court defined a constitutional privilege that allowed open criticism of public officials free from the restraints imposed by the common law of defamation. The Court, in an opinion by Justice Brennan, held that the first and fourteenth amendments prevent "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." In *New York Times*, the United States Supreme Court defined a constitutional privilege that allowed open criticism of public officials free from the restraints imposed by the common law of defamation. The Court, in an opinion by Justice Brennan, held that the first and fourteenth amendments prevent "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

Justice Brennan "consider[ed] this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and some-

17. Titus, Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment, 15 Vand. L. Rev. 1203, 1204 (1962). This article is a pre-Gertz discussion of the problems of distinguishing fact from opinion for the fair comment privilege. "The meanings of the two words ['fact' and 'opinion'] are so vague that the distinction can be used and is used to justify any conclusion which might be reached." *Id.* at 1215.
19. *Id.* at 279-80. The phrase "actual malice" can be confusing in this area of the law because the words do not mean the same as in their everyday usage. In the interest of clarity, the term "actual malice," which implies bad faith, should not be used to mean "knowledge or reckless disregard." *Black's Law Dictionary* best illustrates the confusion. "In libel and slander, as to privileged communications, 'malice' involves an evil intent or motive arising from spite or ill will. . . . In the context of a libel suit brought by a public figure, it consists in publishing the false defamation knowing it to be false or with a reckless disregard of whether it is true of false." *Black's Law Dictionary* 492 (6th ed. 1983).
times unpleasantly sharp attacks on government and public officials. Thus, one of the main themes of the *New York Times* opinion is "the importance under the First Amendment of public criticism of governmental action." Another important theme is that "a qualified constitutional privilege for the citizen-critic of government is perceived as a necessary corollary to the privilege protecting public officials [for statements made] in the performance of their official duties."

The Court's opinion stated that a rule which forced a critic of official conduct to guarantee the truth of his factual assertions would lead to "self-censorship." Such a rule "thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." The constitutional protection of freedom of expression "was fashioned to assure un fettered interchange of ideas for the bringing about of political and social changes desired by the people."

The Court quoted Judge Learned Hand as stating that the first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

In supporting the importance of open debate, Justice Brennan cited *Barr v. Matteo,* which held "the utterance of a federal official to be absolutely privileged if made 'within the outer perimeter' of his duties." His opinion also pointed out that all state courts "hold that all officials are protected unless actual malice can be proved." In a society which holds the people to be the sovereigns, it is as much the people's "duty to criticize as it is the official's duty to administer." "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity

22. *Id.*
24. *Id.*
25. *Id.* at 269 (quoting *Roth v. United States,* 354 U.S. 476, 484 (1957)).
29. *Id.*
30. *Id.*
granted to the officials themselves." Thus, with the public official privilege and the necessity of open debate in mind, the Court limited the states' ability to impose liability for defamation.

In 1966, the Court extended the actual malice standard to criticism of an unelected, albeit municipally employed, ski area supervisor. Curtis Publishing Co. v. Butts, however, went further. In that case, a majority of the Justices agreed that the protection created in New York Times applies to cases involving public figures as well as public officials.

Four years after Curtis Publishing, the Court went beyond its previous approach of looking only at the status of the plaintiff and began looking at the issue involved in the challenged statement. In Rosenbloom v. Metromedia, Inc., a plurality opinion written by Justice Brennan and joined by Chief Justice Burger and Justice Blackmun, sought to "honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general

31. Id. at 282-83.
32. In their concurring opinion in New York Times, Justices Black and Douglas argued that, rather than merely limit it, the Court should deny altogether the states' power to assess damages against critics of public officials. They claimed that "at the very least [the first amendment] leaves the people and the press free to criticize officials and discuss public affairs with impunity." 376 U.S. at 296. They reasoned that to penalize the right to discuss public affairs through libel judgments would "abridge or shut off discussion of the very kind most needed." Id. at 297. These themes recur in later opinions by Justices Black and Douglas. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 355-60 (1974)(Douglas, J., dissenting); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 57 (1971)(Black, J., concurring); Curtis Publishing Co. v. Butts, 388 U.S. 130, 170-72 (1967)(Black, J., dissenting).

This solution certainly carries the advantage of simplicity. A majority of the Court believes, however, that even public officials are sometimes deserving of judicial redress for criticism leveled against them. Such an approach necessitates line-drawing.

One should note that while the majority's limited privilege applies only when the plaintiff is a public official, Justice Black would apply an absolute privilege to cases involving either a public official or an issue of public concern. For a discussion of this issue, see infra notes 168-91 and accompanying text.

34. 388 U.S. 130 (1967).
35. Justice Harlan's plurality opinion concluded that the New York Times rule should not be applied to public figures. Chief Justice Warren, however, concurring in the result reached by the plurality, agreed with the four dissenting Justices on the issue of the appropriate standard. The Chief Justice stated that the New York Times standard should apply to public figures, because the difference between public figures and public officials has "no basis in law, logic, or First Amendment policy." Curtis Publishing, 388 U.S. at 163. Warren also stressed that public opinion may be the only way for society to influence its public figures, since public figures are not elected. Id. at 164.
concern, without regard to whether the persons involved are fa-
mous or anonymous.\textsuperscript{37} The plurality extended actual malice pro-
tection to all communication involving public issues.\textsuperscript{38} Justice
Brennan explained, "[i]f a matter is a subject of public or general
interest, it cannot suddenly become less so merely because a pri-
ivate individual is involved, or because in some sense the individual
did not 'voluntarily' choose to become involved."\textsuperscript{39}

The \textit{Rosenbloom} approach, however, was short lived. In
1974, three years after \textit{Rosenbloom}, the Supreme Court returned
to a status-oriented approach in \textit{Gertz v. Robert Welch, Inc.}\textsuperscript{40}
\textit{Gertz} involved a libel suit by an attorney against the publisher of
\textit{American Opinion}, a monthly magazine published by the John
Birch Society.

After recapping the \textit{Rosenbloom} decision, the \textit{Gertz} majority
declared a distinction, for constitutional purposes, between ideas
and facts.\textsuperscript{41} It was this dicta that the lower courts have interpreted
as creating an opinion privilege.\textsuperscript{42} The \textit{Gertz} opinion, authored by
Justice Powell, revived the idea that private individuals deserve a
higher level of protection from libel than public figures.\textsuperscript{43}

\textit{Gertz} left some control to the states, holding that they may
define any standard of liability, except strict liability, for "defam-
atory falsehood injurious to a private individual."\textsuperscript{44} The Court,
however, also prohibited the states from allowing recovery of pre-
sumed or punitive damages, even by private individuals, when the
defendant did not act with actual malice.\textsuperscript{45}

In a sharp dissent, Justice Brennan clung to the \textit{Rosenbloom}
rule. His dissent claimed that the court's retreat from \textit{Ros-
enbloom} denied the media the extra breathing space necessary to
maintain freedom of the press.\textsuperscript{46} In another dissent, Justice White

\begin{itemize}
\item \textsuperscript{37} \textit{Id.} at 43-44.
\item \textsuperscript{38} \textit{See id.} at 52.
\item \textsuperscript{39} \textit{Id.} at 43.
\item \textsuperscript{40} 418 U.S. 323 (1974).
\item \textsuperscript{41} \textit{See supra} note 5 and accompanying text.
\item \textsuperscript{42} \textit{See cases cited supra} note 6.
\item \textsuperscript{43} \textit{Gertz}, 418 U.S. at 344-46.
\item \textsuperscript{44} \textit{Id.} at 347.
\item \textsuperscript{45} \textit{Id.} at 349.
\item \textsuperscript{46} \textit{Id.} at 361. In this dissent, Justice Brennan left open the possibility of one way in
which defamed individuals might at least partially regain their reputation without over-
coming the difficulty of establishing actual malice. He suggested that a legislature could
enact a statute to allow suits for retraction or for publication of a court's determination of
falsity, in which a plaintiff would have to prove falsity but not fault. \textit{Id.} at 368 n.3.

This suggestion makes sense. The concerns of libel law focus on the problems that: (1)
criticized the Court for giving the media too much protection.47

The issue-oriented approach, however, was reintroduced into this area of the law in Dun & Bradstreet, Inc. v. Greenmoss Builders Inc.48 In that case, five Justices held that the first amendment does not require a showing of actual malice in order to award presumed or punitive damages when the defamatory statements involve matters of private concern.49

In Greenmoss, a construction company sued a credit-reporting agency for circulating a false report which stated that the contractor had filed for bankruptcy. The Court found for the plaintiff and held that because the report was a matter of private concern it deserved no special protection.60 Justice Powell began his analysis for the plurality by stating, "we must employ the approach approved in Gertz and balance the State's interest in compensating private individuals for injury to their reputation against the first amendment interest in protecting this type of expression."51 The Court then concluded that there was a strong state interest similar to the one in Gertz, but that the first amendment interest involved was less than the one in Gertz. The Court based the latter conclusion on the belief that “[i]t is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection.’”52

When a statement involves only matters of private libel suits cost media defendants money and can result in self-censorship because of that cost, and (2) libel plaintiffs want their reputation vindicated. Perhaps the most just solution should concentrate on retractions and corrections. A correction does not cost the media a great deal of money and it can at least limit the damage to a plaintiff’s reputation.

Such a statute as Justice Brennan suggests might raise questions of constitutionality, however. See id.; see also Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)(Court decided on the same day as Gertz that a Florida statute requiring a newspaper to allow an attacked candidate to have free space in the paper is unconstitutional). Yet, as Brennan suggests, a legislature can pass a law limiting damages where a defendant has made a good faith effort to correct a defamatory error.

47. Gertz, 418 U.S. at 370. Justice White also criticized the Court for requiring a plaintiff in a defamation action to prove actual damages and for limiting punitive damages to cases in which the defendant had published a knowing falsehood or acted with reckless disregard of the truth. Id. at 392-98. Justice White argued that defamatory falsehoods about private individuals serve no purpose in aiding the quality or quantity of public debate. Id. at 399-400. Further, it is possible “that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems. This would turn the First Amendment on its head.” Id. at 400.

49. Id. at 763.
50. Id. at 761-62.
51. Id. at 757.

concern, there "‘is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government.'" 53 Such speech is not totally unprotected, but since there is a lower constitutional value for speech that is not of public concern, the Court held "that the state interest adequately supports awards of presumed and punitive damages — even absent a showing of ‘actual malice.'" 54 Justice White, in a concurring opinion, criticized *New York Times* and *Gertz.* 55

In addition to the state of mind of the defendant, which is the focus of the actual malice standard, the veracity of the alleged libelous statement is also an issue in a libel case. After *New York Times,* the Court concluded that "a public figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation." 56 In *Philadelphia Newspapers v. Hepps,* 57 the Court, in an opinion by Justice O'Connor, extended this burden to some private-figure plaintiffs by holding that "at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false." 58 The Court reasoned that the burden of proof would be important in cases where the fact-finding process would be unable to resolve whether the speech was true or false. Since either the plaintiff or defendant must lose in such a case and since the Constitution favors free speech, the Court placed the burden on the plaintiff when the speech is of

53. *Id.* at 760 (quoting Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 366, 568 P.2d 1359, 1363 (1977)).
54. *Id.* at 761.
55. *Id.* at 767. Justice White, in supporting the importance of the state interest, claimed that the *New York Times* rule creates "two evils":

[F]irst, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. *Id.* at 769.

Finally, Justice White stated that because discovery was likely to be very expensive in a case governed by the *New York Times* test, the press might not be worse off financially if common law rules were applied along with a cap on damages. *Id.* at 774. Furthermore, a damage limit would not be unfair to libel plaintiffs, who are "very likely more interested in clearing their names than in damages." *Id.*
57. *Id.*
58. *Id.* at 768-69.
In addition to the previous cases which form the current structure of libel law, two other Supreme Court cases, *Greenbelt Cooperative Public Association, Inc. v. Bresler* and *Hustler Magazine v. Falwell,* are important because they arguably support the belief that *Gertz* creates a privilege for opinions. In *Greenbelt,* the Court held that an obvious use of "rhetorical hyperbole" would not subject a newspaper to liability for defamation. Claiming that "even the most careless reader must have perceived that the [use of the word 'blackmail' in the newspaper article] was no more than rhetorical hyperbole," the Court stated that to permit liability in such a case "would subvert the most fundamental meaning of a free press." More recently, the Court in *Falwell* held that the publisher of a magazine was not liable for invasion of privacy for publishing an advertisement parody about a public figure. The Court stated that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."
B. Concerns in the Area of Libel Law

Throughout the Supreme Court cases dealing with libel, there have been a number of concerns articulated by various Justices. On one side, there is the state interest in protecting the right of the individual not to be injured by libel. This interest is fairly straightforward, and the objectives are clear. Those who have been defamed want an opportunity to obtain damages and clear their names. However, the constitutional rights of freedom of speech and freedom of the press conflict with the state interest. In order to balance the interest of a free press with the state interest, the rationale behind freedom of speech and freedom of the press must be understood.

The forefathers of the United States had a unique faith in the people. This faith led them to provide that the voice of the people would not be silenced by fear of the government or anyone else. As Thomas Jefferson stated: "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." Our forefathers believed that a free society thrives on ideas.

As Justice Oliver Wendell Holmes stated in a dissenting opinion many years before New York Times:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

A free press allows the people to speak out. The threat of

67. See supra notes 20-26 and accompanying text.
68. See supra notes 20-26 and accompanying text. For an interesting discussion of the twentieth-century understanding of first amendment values, see Blasi, The Checking Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 521, 544-67 (1977). Professor Blasi discusses the first amendment's role in "individual autonomy," "diversity," and "self-government." Id.
defamation lawsuits, however, acts as a deterrent to a free press. Although not a governmental deterrent, this economic deterrent can prevent or hinder the free exchange of ideas.

The cases discussed thus far indicate that there are a number of concerns involved in balancing freedom of the press with the state interest of protecting individuals from defamation: (1) The press must be given sufficient "breathing space" so they will not resort to self-censorship to prevent lawsuits (self-censorship concern);70 (2) discussion of issues and persons of public concern is more important than discussion of private issues and persons (public/private concern);71 and (3) when the freedom of the press is not being infringed upon, individuals have a right to remedies for their injuries due to defamation (remedial concern).72

II. THE FACT-OPINION DISTINCTION: THE TESTS

A. Introduction

After having examined the Supreme Court cases that form the foundation for the conflict between libel law and freedom of the press, one can approach the issues presented by the opinion privilege. First, this Note will discuss the tests which are used by the lower courts to distinguish fact from opinion. Second, the underlying assumptions of the Gertz dicta will be questioned. Third, the opinion privilege and fact-opinion tests will be examined in light of the concerns expressed in the Supreme Court cases previously discussed. Finally, this Note will propose a way to eliminate the fact/opinion problem by returning to a Rosenbloom-type approach.

70. See supra notes 23-46 and accompanying text.


If . . . as our argument has tried to show, the principal of the freedom of speech is derived . . . from the necessities of self-government by universal suffrage . . . . The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest.

72. See supra note 2 and accompanying text.
B. The Scott/Ollman Test: Totality of the Circumstances

**Ollman v. Evans** was a libel suit brought by Professor Bertell Ollman against Rowland Evans and Robert Novak. It involved a column written by Evans and Novak which was published in *The Washington Post* and other newspapers around the country. The controversial article, entitled "The Marxist Professor's Intentions," appeared when Ollman, a professor of political science at New York University, was relocating to head the Department of Government and Politics at the University of Maryland. Pointing out Ollman's Marxist philosophy, the article stated that Ollman's "'candid writings avow his desire to use the classroom as an instrument for preparing what he calls "the revolution."'" The article went on to state:

"He is widely viewed in his profession as a political activist . . . he is an outspoken proponent of 'political Marxism.' . . . Such pamphleteering is hooted at by one political scientist in a major eastern university, whose scholarship and reputation as a liberal are well known. 'Ollman has no status within the profession, but is a pure and simple activist,' he said."

After the district court granted Evans' and Novak's motion for summary judgment, holding that the statements were protected opinion, Ollman appealed.

Judge Starr, writing the opinion for the D.C. Court of Appeals, cited the *Gertz* dicta that "[u]nder the First Amendment there is no such thing as a false idea" and concluded that opinions are privileged. He then looked to the Supreme Court cases *Old Dominion* and *Greenbelt* for guidance in distinguishing fact from opinion. After noting the difficulty in distinguishing between fact and opinion, Judge Starr settled on the totality of circumstances test:

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73. One must be careful in using the phrase "totality of circumstances test" in this area of the law. Courts use this phrase when discussing a number of factors, but the actual factors used can vary. This Note will, for the most part, use the case name(s) identified with the different variations when comparing the tests, in order to limit the confusion.

75. *Id.* at 971-72.
76. *Id.* at 972 (emphasis omitted).
77. *Id.* at 972-73 (emphasis omitted).
78. *Id.* at 973-74.
79. *Id.* at 974.
80. *Id.* at 976-77.
First, we will analyze the common usage or meaning of the specific language of the challenged statement itself, . . . determining whether the statement has a precise core of meaning . . . or . . . 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 . . . we will consider the full context of the statement . . . 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.  

These guidelines have been followed in a number of libel cases.  

Judge Starr supported the first prong of his test — ambiguity — by citing cases which held vague statements unactionable. He supported the second prong — verifiability — by arguing that "a reader cannot rationally view an unverifiable statement as conveying actual facts." He further argued that "[l]acking a clear method of verification with which to evaluate a statement . . . the trier of fact may improperly tend to render a decision based upon approval or disapproval of the contents of the statement, its author, or its subject." Judge Starr supported the third prong — the immediate context of the statement — by claiming that readers will be influenced by the statement's context. Finally, he supported the fourth prong — the broader social context — by claiming that "[s]ome types of writing or speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact."  

81. Id. at 979 (citations omitted).  
83. Ollman, 750 F.2d at 979-81.  
84. Id. at 981.  
85. Id. (citations omitted).  
86. Id. at 982.  
87. Id. at 983. Judge Starr then considered a second level of analysis that some courts have used after determining whether a statement was an opinion or a fact. Relying upon section 566 of the Restatement (Second) of Torts, some courts "consider whether the opinion implies the existence of undisclosed facts as the basis for the opinion. If the opinion implied factual assertions, courts have held that it should not receive the benefit of First Amendment protection as opinion." Id. at 984 (footnote omitted). Judge Starr, however, stated that his four-prong test was "a sufficient aid in determining whether a statement implies the existence of undisclosed facts." Id. at 985.
Judge Starr applied the totality of circumstances test to various portions of the article and concluded that the article was privileged opinion. He focused on the fact that the article was "by well-known, nationally syndicated columnists on the Op-Ed page of a newspaper, the well-recognized home of opinion and comment." Furthermore, Judge Starr noted that the columnists expressly stated that Ollman was a professor at a respected university, thus giving the reader objective evidence of Ollman's standing. Also, the column stated that "Ollman's imminent ascension to the departmental chairmanship at Maryland was troubling only to a clear minority of academics. Thus, the charge of 'no status' in this context would plainly appear to the average reader to be 'rhetorical hyperbole' within the meaning of Greenbelt, which would lead the reader to treat the statement as one of opinion." In a concurring opinion joined by Judges Wilkey, Ginsburg, and MacKinnon, Judge Bork stated that Judge Starr's test was inadequate to immunize the statements at issue as expressions of opinion. Judge Bork contended that the court should have examined the following, additional factors:

Ollman, by his own actions, entered a political arena in which heated discourse was to be expected and must be protected; the "fact" proposed to be tried is in truth wholly unsuitable for trial, which further imperils free discussion; the statement is not of the kind that would usually be accepted as one of hard fact and appeared in a context that further indicated it was rhetorical hyperbole.

Judge Bork argued that "in order to protect a vigorous marketplace in political ideas and contentions, we ought to accept the proposition that those who place themselves in a political arena must accept a degree of degradation that others need not." While admitting that his public arena context is similar to the public figure protection of New York Times, Judge Bork stated that Supreme Court cases giving a privilege to rhetorical hyperbole recognized that New York Times protection is not always

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88. Id. at 990.
89. Id. (footnote omitted).
90. Id. at 993.
91. Id. at 1002.
92. Id.
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adequate.93

Chief Judge Robinson, joined by Judge Wright, dissented in part. Chief Judge Robinson viewed the problem as a continuum with "pure" opinion at one end and representations of fact at the other. He defined "hybrid statements" as statements that most people would regard as possibly true or false, depending on the "background" facts.94 Robinson held "that a hybrid statement is absolutely privileged as opinion when it is accompanied by a reasonably full and accurate narration of the facts pertinent to the author's conclusion."95 He further held that "hybrid statements not so accompanied are not entitled to that degree of protection unless those facts are already known to the author's listeners or readers."96 This approach is similar to the Restatement rule.97 In applying his test to the case, Chief Judge Robinson concluded that some of the passages may not have been supported by an adequate amount of background material, therefore they created a genuine issue to be decided by a jury.98

The dissent by Judge Wald was joined by Judges Edwards and Scalia. Judge Wald adopted Judge Starr's test, but claimed that "the columnists' statement that 'Ollman has no status within the profession, but is a pure and simple activist' is an assertion of fact for which its authors can be made to answer."99 Judge Wald concluded that the statement had a stable core of meaning and that the statement was verifiable.100

Scott v. The News Herald,101 an Ohio Supreme Court decision, followed the reasoning of Ollman. Scott centered on the events surrounding a wrestling match between two high schools. Following a controversial call against the home team, a "fracas" ensued which involved the crowd and the teams. Later, a hearing was held by the Ohio High School Athletic Association (OH-SAA). H. Don Scott, who had attended the match as the Superintendent of the Maple Heights School System, and Michael Milkovich, Sr., the Maple Heights High School head coach, Sr.,

93. Id. at 1005.
94. Id. at 1022.
95. Id. at 1024.
96. Id. (footnote omitted).
97. Id. at 1027.
98. Id. at 1031-32.
99. Id. at 1032.
100. Id. at 1033.
testified at the hearing. After the hearing, OHSAA placed the Maple Heights team on probation and censured Milkovich for his actions during the match.  

After the court of common pleas reversed OHSAA's decision, The News-Herald published a column by J. Theodore Diadiun on the sports page, entitled "Maple beat the law with the 'big lie.'" The words "TD Says" appeared in large print under the title. Diadiun stated in the article that "'[a]nyone who attended the meet . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.'" Scott sued.

Justice Locher, writing for the Ohio Supreme Court, affirmed the decision in favor of The News-Herald. The majority opinion began by citing the Gertz dicta which created the opinion privilege. After stating that a fact-opinion determination is a matter of law, Justice Locher adopted the totality of circumstances test, noting that "'[t]his test, however, can only be used as a compass to show general direction and not a map to set rigid boundaries.'" Citing Ollman v. Evans, Justice Locher stated that the totality of circumstances test "involves at least four factors. First is the specific language used, second is whether the statement is verifiable, third is the general context of the statement and fourth is the broader context in which the statement appeared." Justice Locher then applied the test to the case at hand.

First, Locher examined the specific language of Diadiun's article and concluded that the article clearly stated that Scott had lied under oath. If the analysis ended after this initial examination then Scott would have had a valid cause of action. Locher stated, however, that this was only the beginning of the inquiry. Second, Locher concluded that the statements in the article were objectively verifiable through a perjury action. Therefore, the first two factors in the totality of circumstances test weighed in Scott's favor.

The final two factors, however, led the court to hold that the

102. Id. at 243, 496 N.E.2d at 700.
103. Id. at 244, 496 N.E.2d at 701-02.
104. Id. at 244, 496 N.E.2d at 702.
105. Id. at 244-45, 496 N.E.2d at 701.
106. Id. at 250, 496 N.E.2d at 706.
108. Scott, 25 Ohio St. 3d at 250, 496 N.E.2d at 706.
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statements in the article were protected opinion. In considering the third factor, the general context of the statements, Justice Locher gave weight to the fact that the article began with "TD Says," although he stated that labeling an article "opinion" should not "be a dispositive method of avoiding judicial scrutiny." Locher also found that the context of the statements at issue revealed to the reader that Diadiun was biased. The Ohio court went on to state that the subjectivity of the article was indicated by the phrase: "Anyone who attended the meet . . . knows in his heart that Milkovich and Scott lied . . . ." Finally, Justice Locher examined the fourth element — the broader context of the remarks. He stated that it was significant that the article appeared on the sports page, "a traditional haven for cajoling, invective, and hyperbole." In concluding that "legal conclusions" in this context probably would be viewed as the writer's opinion, the court held that the article was protected opinion under both the "federal and Ohio Constitutions." Three justices filed concurring opinions in Scott, agreeing that the totality of circumstances test should be applied. Three other justices dissented in regard to the test. In one of these dissenting opinions, Chief Justice Celebrezze criticized the totality of circumstances test "which is used to complete the Jekyll and Hyde transformation of this newspaper article from fact to opinion. This test is not only unworkable, it is applied by the majority in self-contradictory fashion to reach an untenable result."

Justice Sweeney claimed that "the majority's new 'test' is in reality no test at all, because its components can be juxtaposed to forge any interpretation that the user of the 'test' desires." Justice Clifford Brown chided the totality of circumstances test as "so malleable and spongy as to permit any interpretation anyone wishes." Further, Justice Brown stated that:

The standardless four-factor test for distinguishing fact from opinion, as applied here in Scott, makes every statement of fact

109. Id. at 252, 496 N.E.2d at 707.
110. Id. at 253, 496 N.E.2d at 708.
111. Id.
112. Id. at 254, 496 N.E.2d at 709.
113. Id. at 263, 496 N.E.2d at 716. Further, Chief Justice Celebrezze claimed that "[s]uch criminal accusations [perjury], even if expressed as opinion, are not entitled to absolute constitutional protection." Id. at 265, 496 N.E.2d at 717.
114. Id. at 267, 496 N.E.2d at 719.
115. Id. at 273, 496 N.E.2d at 723.
a statement of opinion in every case and therefore not actionable. This is a deprivation of every libeled plaintiff's rights under both the Ohio Constitution and the United States Constitution . . . .

C. The Restatement Test

The Restatement test for libel is as follows: “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.” This test is similar to the one applied by Chief Judge Robinson in his partial dissent in Ollman. It draws distinctions between pure opinion and mixed opinion, defining the latter as “one which, while an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication.” A number of courts have used the Restatement test in a variety of ways, often in conjunction with one of the totality of circumstances tests.

D. Other Totality of Circumstances Tests

In Information Control v. Genesis One Computer, the United States Court of Appeals for the Ninth Circuit used a totality of the circumstances test similar to the one used in Ollman and Scott, but omitted the verifiability factor. In order to determine whether a statement was fact or opinion, the court considered three factors:

[T]he test to be applied . . . 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

116. Id. at 276, 496 N.E.2d at 725 (footnote omitted).
118. See supra notes 94-98 and accompanying text.
121. Information Control v. Genesis One Computer, 611 F.2d 781 (9th Cir. 1980).
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.\textsuperscript{122}

Other courts have also used this test.\textsuperscript{123}

The dispute in \textit{Information Control} arose after the following comment by counsel for Genesis was published in an industry journal and later issued by Genesis in a press release: "'In the opinion of Genesis' management, the action by ICC is intended as a device by ICC to avoid payment of its obligations to Genesis . . . .'"\textsuperscript{124} The court of appeals held that the statement was a privileged opinion, focusing on the words "'[i]n the opinion of Genesis' management,'"\textsuperscript{128} as well as the fact that such "fiery rhetoric or hyperbole" should be expected in an article in a trade publication dealing with a lawsuit between business litigants.\textsuperscript{126}

In \textit{Dunlap v. Wayne},\textsuperscript{127} the Supreme Court of Washington considered a different set of factors in applying the totality of circumstances test: "(1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts."\textsuperscript{128} Based on these factors, the court held that a letter from a real estate partner's attorney to a savings and loan branch manager's attorney was a nonactionable expression of opinion.\textsuperscript{129}

\textbf{III. ANALYZING THE FACT-OPINION TESTS}

In evaluating the fact-opinion tests, one must first examine the \textit{Gertz} dicta to identify the foundations for the opinion privilege, then analyze how well the tests meet the goals of the opinion privilege. The dicta provides three bases for such a privilege: (1) "[u]nder the First Amendment, there is no such thing as a false
idea," 130 (2) "there is no constitutional value in false statements of fact," 131 and (3) "[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." 132

The first basis, the belief that an idea cannot be false, is consistent with the verifiability prong of the Ollman/Scott test, which holds that a statement that is verifiable is more likely to be a "fact." 133 If this Gertz assumption is correct, the Ollman verifiability prong is useful in determining whether a statement is an opinion.

Some illustrations, however, will show that this foundation for the opinion privilege is based upon a weak assumption. Suppose A is talking on a telephone and he tells C, "I believe B is not here." Is that statement verifiable? One can argue that it is an opinion because one cannot verify what A "believes." Yet, suppose D was present with A and B when A answered the phone, and A made the statement while looking at B. Would that create a situation where the statement is verifiable by D — that A cannot believe B is not present? Would the statement be a verifiable false opinion?

Still, one could say A's statement is not verifiable because we cannot know what A "believes," even knowing what A sees. But this reasoning leads back to the question: What is "verifiable"? John Brown reads that there is no life on the moon. Is that verifiable to him? Or to ask a more general question, is verifiability relative? Mr. Brown, a judge, cannot verify the statement by going to the moon, but someone else can (and has if one believes Neil Armstrong's historic step). What of the statement, "there is other life in the universe?" One cannot verify this statement today, but maybe in the future it will be verified. One can see the problems with assuming that opinions cannot be false. What is verifiable? "Pilate saith unto him, What is truth?" 134

The second basis for the opinion privilege, that false statements of fact have no value, also provides a weak foundation for an opinion privilege. False statements of fact can be valuable. "The sun travels around the earth," while obviously a false state-

131. Id. at 340.
132. Id. at 339-40 (footnote omitted).
133. See supra notes 81-116 and accompanying text.
134. St. John 18:38 (King James).
ment of fact, was probably a commonplace statement two thousand years ago. Moreover, beliefs based on this false statement of fact enabled our ancestors to predict when the sun would rise and when the seasons would change. Surely, there was some value in that statement. At the very least, it was more valuable than saying that Scott lied, especially if Scott did tell the truth and nevertheless was damaged by the statement. Of course, one could argue that the sun statement is an opinion, or at least was at the time before it was proven wrong. But then, the verifiability problem is faced again, and one can argue that nothing is verifiable.

One could argue that while the sun statement has value, it does not have “constitutional value.” Yet, it seems unreasonable not to protect a useful statement just because it is called a “fact” when the line between “fact” and “opinion” is far from bright. Even the New York Times Court noted that “a false statement may be deemed to make a valuable contribution to public debate.” The basis for protecting opinions is that they are valuable to society. Facts, whether true or false, that are valuable to society should also be protected.

At best, the foundation provided by Gertz’s first two bases is weak. The statements “there is no such thing as a false idea” and “there is no constitutional value in false statements of fact” are not absolute truths.

The third basis for the opinion privilege, a faith in the competition of ideas, is consistent with the self-censorship concern of libel law. Although it is arguable whether opinions really are more valuable than facts, the strongest rationale for the opinion privilege is based on a fear that libel suits will be used to punish ideas. Our society has accepted the fact that ideas have an important role in society, and therefore deserve protection from libel suits. The self-censorship concern was summed up by the New York Times Court, which pointed out that the founders of our country:

“[K]new that order cannot be secured merely through fear of

135. Hanson, Constellations and Conjectures 20 (1973). Further, “most reasonable men at the time of Homer—and the Old Testament—would not have entertained any explanation of the first fact of the heavens which made the earth other than immovable. Why should they? They were prudent and wise then to treat their data thus. Their sun and stars, then, simply moved in perfect circles over our immobile earth.” Id. at 20-21.


137. See supra notes 66-70 and accompanying text.

punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed s ilence coerced by law — the argument of force in its worst form.”

The opinion privilege serves this goal in theory, conferring upon ideas an immunity from libel suits. Yet, the issue here is whether the fact-opinion tests prevent self-censorship and aid in the free flow of ideas in practice. The tests need to be examined to determine what the courts are actually protecting. If the tests do not result in preventing self-censorship, they do not serve Gertz's only legitimate justification for the opinion privilege.

In the attempt to determine when a statement is an “opinion,” the totality of circumstances tests are helpful in that they acknowledge that words can have different meanings in different contexts. The sentence “Reds kill Yankees” has entirely different meanings depending on whether it appears in a sports article or in a headline about homicidal communists. Acknowledging that words can be ambiguous is the first step in analyzing the tests. The second and more difficult step is the attempt to actually determine their meanings, and ultimately, whether the words are meant to be an opinion.

The basic totality test presented in Information Control v. Genesis One Computer considers three factors: (1) the words in the statement, (2) the surrounding words, and (3) the surrounding circumstances. These factors are helpful in determining meaning, but how conclusive are they? How much weight should be given to various words? How much weight should be given to different circumstances?

The Olman case adds the verifiability prong to the basic totality of circumstances test. As previously discussed, the assumption that opinions cannot be verified is weak. Yet, this prong of the test may have a functional use, since a reader ought to give


140. Information Control v. Genesis One Computer, 611 F.2d 781, 784 (9th Cir. 1980).
less weight to something appearing to be unverifiable and therefore should view the statement as an opinion.

Some courts have supplemented the totality test with the Restatement test, making an opinion actionable only if it implies the allegation of undisclosed defamatory facts. Ollman criticized the Restatement test because "factors besides the disclosure of facts are relevant in determining whether a statement implies factual allegations to the reasonable reader."\(^{141}\) The court in Ollman argued that because an article was on the Op-Ed page, among other factors, it would not matter if other undisclosed facts were implied.\(^{142}\)

In reality, the Restatement test is not a test for distinguishing fact from opinion. This test only applies to statements already determined to be opinions. The Restatement test limits the opinion privilege. If a statement is a "fact," it may be actionable.\(^{143}\) If it is an "opinion," it can only be actionable "if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."\(^{144}\)

In addition to the limits placed on the privilege by the Restatement test, some courts hold that specific accusations of criminal conduct expressed in the form of an opinion are not protected.\(^{145}\) When applying the Restatement test, these courts look at the facts implied by such an opinion.\(^{146}\) But if Gertz really meant that opinions are privileged, all opinions should be privileged, not just some opinions. The Restatement test, in reality, makes implied facts as well as express facts actionable. This contention is consistent with one of the Restatement comments, which states that both direct and indirect statements of fact may be actionable.\(^{147}\) Therefore, it seems that if one considered the sur-

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142. Id.
144. Id.
145. Cianci v. New Times Publishing, 639 F.2d 54 (2d Cir. 1980)(statement in magazine article claiming that the plaintiff-mayor had once been accused of rape and paid off the accuser was not protected as a statement of opinion); see also Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983)(published claim that wife "deserted" husband when she actually had filed for and secured a divorce held actionable).
147. RESTATEMENT (SECOND) OF TORTS § 565, comment b (1977). Comment b states that:
rounding context of a statement and what it implied when applying one of the totality tests, these implied facts would already have been considered. Furthermore, liability could be found without using a fact-opinion test at all. Therefore, the second step of applying the Restatement test becomes unnecessary.

Indeed, the court in *Ollman* agreed that the same result is achieved with or without the Restatement test as a second step. In a footnote, the *Ollman* plurality referred to an example from the comment to the Restatement: “A writes to B about his neighbor C: ‘I think he must be an alcoholic.’” Judge Starr pointed out that the Restatement “indicates that this remark should be submitted to the jury as a statement that may imply that ‘A knew undisclosed facts that would justify his opinion.’” Judge Starr reached the same conclusion applying the *Ollman* totality test. He reasoned that the social context indicates that the statement is probably fact “because a neighbor would generally be thought likely to be in a position to report facts, namely . . . [because] he has been in a position to make first-hand observations.” Furthermore, “the statement . . . is so well defined and verifiable that the language ['I think'] . . . would be given relatively little weight.”

One may argue that a court leaning towards free expression might use the *Ollman* test to reach a different result in the comment’s hypothetical case, either by giving more weight to the words “I think” or by claiming that gossipy neighbors are as unreliable as the sportswriters referred to in *Scott*. Yet, Judge Starr shows that the argument can be made that the results via the *Ollman* test or via the Restatement test can be the same. Furthermore, much depends on how the *Ollman* test is applied. If looking

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To be defamatory under the rule stated in this Section, it is not necessary that the accusation or other statement be by words. It is enough that the communication is reasonably capable of being understood as charging something defamatory. Thus another may be defamed by a statement that he associates with persons of notoriously disreputable character or by attributing to him the characteristics of literary or historical figures of ill repute.


149. *Id.*

150. *Id.*

151. *Id.*

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at the total context means also looking at implied facts, then the Restatement test is incorporated in the totality of circumstances tests. Therefore, the results often depend upon how the courts apply the tests.

These fact-opinion tests provide a means for offering constitutional protection to statements held to be opinions. Yet, the tests themselves are hazy and offer little guidance. One federal court, while not rejecting such tests, stated that "[t]he determination of whether a statement is one of opinion or fact . . . is difficult to make and perhaps unreliable as a basis for decision." Another court, dealing with the fact-opinion distinction, stated that "[t]he infinite variety of meanings conveyed by words — depending on the words themselves and their purpose, the circumstances surrounding their use, and the manner, tone and style with which they are used — rules out, in our view, a formulistic approach."

The fact-opinion distinction does appear to serve the self-censorship concern by providing the press with more breathing room. Anything a court labels an "opinion" is immune from a defamation suit, thereby seeming to encourage open debate on any issue. However, this reasoning may not stand up. Granting extra protection to opinions may not serve the intended goal of discouraging self-censorship. The only protection that substantially discourages self-censorship is a predictable protection. If a newspaper reporter is not sure whether an article makes him liable for defamation, the opinion privilege may not be enough to encourage him to print it. The tests used by courts to determine whether a statement is an opinion are merely "compasses," not "maps," adding little predictability to the privilege. Few people in the media would be able to predict that it is permissible to say "[e]veryone knows in his heart that Scott lied" in a sports editorial but not "I think X is an alcoholic."

While it is true that the test allows an unsure jour-

154. Steinhilber v. Alphonse, 68 N.Y.2d 283, 291, 501 N.E.2d 550, 554, 508 N.Y.S.2d 901, 905 (Ct. App. 1986); see also McCabe v. Rattiner, 814 F.2d 839, 841 (1st Cir. 1987). "However, courts that have tried 'to apply the fact/opinion distinction have discovered that speech does not always break down into such clear categories." Id.
155. Scott, 25 Ohio St. 3d at 250, 496 N.E.2d at 706.
156. Under Scott, a newspaper may print the phrase, "[a]nyone who attended the meet . . . knows in his heart that Milkovich and Scott lied" and be immune from liability. Scott, 25 Ohio St. 3d at 244, 496 N.E.2d at 701. Under Olman, a newspaper is immune from liability when it quotes the statement, "Ollman has no status within the profession." Olman v. Evans, 750 F.2d 970, 973 (D.C. Cir. 1984)(en banc), cert. denied, 471 U.S.
alist to use a little more cautionary language to help protect himself from liability, the totality of circumstances test does not offer much predictability when considering the potential liability of the media. Even if a fact-opinion test requires a court to consider all relevant factors, it may not provide much comfort to a journalist who cannot be sure that he is weighing all the factors in deciding not to censor himself. The fact-opinion tests are insufficient guidelines. "Compasses" allow judges too much discretion and add little, if any, predictability to the protection. The appearance that the fact-opinion tests serve the Self-Censorship Concern is merely an illusion. Protection at the whim of the judges is no protection at all.

The Ollman and Scott cases illustrate potential problems of broad judicial discretion in this area. Some commentators suggest juries in libel cases may really be trying the popularity of the statement at issue. However, similar problems can arise with judges. Ollman was a unique case, pitting a liberal plaintiff against the liberal belief in freedom of the press, resulting in a strange alignment of the judges. Conservative Judges MacKinnon and Bork aligned with liberal Judge Ginsburg in protecting freedom of the press, while liberal Judges Wald and Edwards joined with conservative Judge Scalia in finding a cause of action against the newspaper. One can only speculate what role, if any, the politics of the plaintiff and the judges will play in future cases. Further, one justice in Scott noted the possible influence of an upcoming election on how his colleagues voted. If judges and juries are influenced by improper factors, at least juries are constrained by the stricter guidelines of actual malice and falsity, while the judges may rely only on the nebulous fact-opinion tests to guide them.

Yet, one can argue that the fact-opinion distinction does provide some degree of protection for the press. The fact-opinion distinction is a question of law and therefore a vehicle for the press to obtain a summary judgment, avoid the cost of litigation, and

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1127 (1985). Yet, Judge Starr claims that the statement "I think B is an alcoholic" is not privileged, and the poor neighbor has to pay a libel judgment while the News-Herald and Evans go free. Id. at 986 n.31.


158. Ollman, 750 F.2d at 970.

159. Scott, 25 Ohio St. 3d at 275, 496 N.E.2d at 725 (Brown, J., concurring in part and dissenting in part).
avoid a possibly prejudiced jury. High litigation costs even deter a winning media defendant from speaking out on controversial issues.

The opinion privilege, however, is not the best way to protect the press. The summary judgment stage may be the ideal time to protect the press, but not with an unpredictable test. Even one supporter of the opinion privilege has admitted that “[i]n order for the opinion privilege to serve to invigorate the press, . . . the privilege itself must be doctrinally clear and predictable. An unclear or hazy test . . . adds to the doctrinal confusion, which in turn heightens a publisher’s perception of the risk of liability.”

An opinion privilege is a press protection, but it is an unpredictable and marginal protection. Also, a media defendant can secure a summary judgment on other grounds, such as if the plaintiff fails to present clear and convincing evidence that could support a reasonable jury finding of actual malice. Therefore, a better solution is to discourage plaintiffs from suing by increasing their burdens of proof or giving a blanket privilege to both “facts” and “opinions.”

Furthermore, the fact-opinion distinction may actually increase litigation costs. In addition to litigating malice and falsity issues, a newspaper may have to litigate the fact-opinion issue. Without a clear-cut fact-opinion rule, the additional litigation could be costly.

Having concluded that the first two Gertz propositions do not support an opinion privilege and that in practice the fact-opinion tests only marginally serve the self-censorship concern, the other libel law concerns not mentioned in the Gertz dicta, the public/private concern and the remedial concern, must be considered. A brief examination of these libel law concerns will reveal that they also are not served in practice or in theory.

The public/private concern is not served at all by the fact-opinion distinction. Except for Judge Bork’s formulation of the opinion privilege in Ollman, courts generally do not consider

160. See Note, supra note 157, at 1028; see also SMOLLA, supra note 138, at 247-49.
161. Note, supra note 157, at 1028.
162. Id. at 1028.
163. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986)(holding that a trial court may grant summary judgment to a defendant in a libel case if a public figure plaintiff does not present enough evidence for a reasonable jury to find that actual malice has been shown with convincing clarity).
164. See supra notes 90-93 and accompanying text.
whether the person libeled is a public or private figure in determining whether something is a fact or an opinion.\textsuperscript{166} This concern is dealt with at another stage of the procedure when the court determines the level of a defendant's culpability that a plaintiff must prove. The goal of distinguishing private from public discussion is actually inhibited by the opinion privilege, since discussion about private matters and people is elevated to a constitutionally privileged level when it is labeled an "opinion," despite the Supreme Court's explicit intention that these plaintiffs should have a lower burden of proof than public plaintiffs. The Supreme Court has expressed concern over a private individual's right to obtain a remedy in this area, even going so far as to allow states to impose strict liability on the media where a defamation concerns a private person and a private issue.\textsuperscript{166} The opinion privilege, however, allows absolute immunity in the same situation if a court determines that a statement is an "opinion."

Some courts, however, have been more willing to protect a statement as an opinion where the statement deals with a matter of public concern.\textsuperscript{167} This willingness indicates a weakness in the opinion tests. Whether a statement is an "opinion" has little to do with whether the statement is of public concern. Perhaps these courts are acknowledging the weaknesses in the rationale for a blanket opinion privilege by looking beyond semantics and looking at the value of a statement in determining whether it deserves constitutional protection.

The remedial concern also is not served by the fact-opinion tests. The privilege completely bars an injured party from a rem-
ed. The plaintiff in *Scott* could have proven that the sportswriter knew that Scott told the truth and only wrote that Scott lied because he disliked Scott; but Scott would have had no chance of obtaining a remedy because the sportswriter wrote an "opinion." Similarly, if the sportswriter disliked his neighbor, Fred (a private individual), he could have written, "everyone knows that Fred is a liar," and Fred could have done nothing because a court would say it was an "opinion." Giving the media immunity to ridicule anyone they desire as long as they do so in the form of an opinion does not serve the remedial concern.

Of the three concerns of libel law, only the self-censorship concern is served in theory by the opinion privilege. This concern is perhaps the most important concern in this area, as it has a constitutional basis. Yet, in practice, not even this concern is served very well. The following alternative to the opinion privilege would better serve the self-censorship concern, while also serving the public/private concern and the remedial concern.

IV. THE SOLUTION

A. The Framework

States are free to impose greater barriers to an individual's right to sue a newspaper, radio station, or television station for defamation. Yet, lower courts have grasped at an inefficient press protection, while damaging the rights of the individuals they are supposed to protect. There is no justice in prohibiting an individual from seeking a remedy in exchange for a questionable press protection.

The solution is to raise the protection of the press in certain key areas instead of a blanket opinion privilege. This Note proposes that courts should return to a *Rosenbloom*-type standard, giving *New York Times* protection to all statements that deal with public issues and holding the media to a reasonable care standard for private issues. This structure serves the three concerns: (1) preventing self-censorship, (2) allowing the individual a just remedy, and (3) distinguishing public from private debate.168

A return to a *Rosenbloom*-type standard serves the self-censorship concern because the media primarily deals with public issues and the media's level of protection would be raised in the

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168. *See supra* notes 70-72 and accompanying text.
area where plaintiffs are private individuals involved in public issues. Consequently, a newspaper could print most of its articles without fear of liability for defamation, as long as it is not reckless.

The remedial concern is served because in no instance is an individual barred from a remedy. Certainly, it will often be difficult for a plaintiff to prove his case, but that is the price society pays for a free press. Under the Rosenbloom approach, at least, a plaintiff has a remedy. A plaintiff should prefer a small chance over no chance at all. Leaving this slim chance of liability open also prevents a medium from abusing the privilege, which is a possibility when it is immune from liability for "opinions."

The public/private concern is satisfied because this solution realizes that public debate has a greater value than private debate. There is no constitutional basis for giving the media free rein in discussing "opinions" about private individuals in areas of private concern. Those plaintiffs must be given a chance in the courts, while maintaining a solid protection for the media against other plaintiffs. The next issue is whether this solution which moves the line from public/private figure to public/private debate is correct from a practical perspective.

B. In Defense of Rosenbloom

In Gertz, Justice Powell gave four reasons for returning to a status-oriented approach and rejecting the Rosenbloom approach. First, he claimed that private individuals are more vulnerable to defamation than public individuals because they do not have access to channels of communication to rebut the defamatory statements. Second, he claimed that society has a greater interest in how public officials operate. Third, he argued that public officials have voluntarily stepped into the public eye, and therefore deserve less protection. Finally, he stated that it is difficult to distinguish a public issue from a private one.169 Another concern is that private individuals will be afraid to speak out on public issues if they know that they may then be more easily defamed. Therefore, public debate may be discouraged.170

Justice Powell's first argument for rejecting the Rosenbloom approach was that private individuals are more vulnerable than

170. Id. at 400 (White, J., dissenting).
public individuals. As Justice Brennan stated in his dissenting opinion in *Gertz*, this statement is not always true.\(^{171}\) A person’s ability to respond rarely depends on his status as much as it depends on the public interest in a story. If the interest is present, a "private" individual will have the same chance to respond as would a public official. If nobody cares about the denials, few will listen, regardless of whether the person is a public or a private individual. In *Rosenbloom*, Justice Brennan suggested that if the private individual’s inability to respond is a problem, the solution should be in “ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.”\(^{172}\)

Justice Powell also stated that society has a great interest in how a public official operates. This statement is true;\(^{173}\) however, it is also true that society has an interest in public issues being debated openly and freely. Is a community’s interest in the possibility of having a nuclear plant located nearby less deserving of open discussion than of how a minor public official did a minor task? One would think not.

Justice Powell also claimed that public officials are voluntarily in the public eye, and therefore are less deserving of defamation protection than private individuals. Yet, perhaps by speaking out on public issues one also voluntarily enters the public eye. Even if this argument is not accepted, one still must realize that all citizens are "public" persons to some degree.\(^{174}\) In *Gertz*, Justice Brennan pointed out a possible paradox of the *Gertz* rule in that it encourages discussion of a public person’s private life, while it discourages discussion of public issues where private individuals are involved.\(^{176}\)

Justice Powell further supported his status-oriented approach by indicating that it is difficult to distinguish a public issue from a private one. The Supreme Court, however, no longer can use this excuse for refusing to draw the line in an issue-oriented way. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court held that a state can impose strict liability on a medium where the statements involve private people and matters not of public con-

\(^{171}\) *Id.* at 363-64 (Brennan, J., dissenting).


\(^{174}\) *Rosenbloom*, 403 U.S. at 48.

\(^{175}\) *Gertz*, 418 U.S. at 364 (Brennan, J., dissenting).
cern, thereby requiring courts to distinguish public issues from private ones. Although the "public concern" test of Greenmoss has been defined more narrowly than the "public interest" approach of Rosenbloom, the point here is that a workable issue-oriented test is possible. Also, the Supreme Court adopted an issue approach instead of a status approach in allocating the burden of proving falsity in Philadelphia Newspapers, Inc. v. Hepps. If the distinction can be drawn in Greenmoss and Philadelphia Newspapers, it can be drawn in other cases as well. Those two cases indicate that the Court has retreated from its Gertz status-only approach, and may be willing to acknowledge that Gertz is wrong, shifting the focus of press protection to the public issue distinction.

Further, in another area of the law, the Court draws a line between matters of public interest and matters of private interest. There are three types of invasion of privacy torts that require such a distinction: (1) "publicity that unreasonably places the other in a false light before the public," (2) "unreasonable publicity given to the other's private life," and (3) "unreasonable intrusion upon the seclusion of another."

The "intrusion upon seclusion" tort consists of an intentional interference with one's seclusion, either to his person or to his private affairs, that would be highly offensive to a reasonable person. The "false light" tort results when one is placed before the public in a false light that would be highly offensive to a reasonable person by a defendant who acted with actual malice in regard to the falsity of the representation. The "publicity given to private life" tort occurs when one gives publicity to a matter concerning the private life of another, if the matter is not of legitimate concern to the public and the publicity would be highly

180. Id. § 652A(2)(c).
181. Id. § 652A(2)(a).
182. Id. § 652B.
183. Id. § 652E.
offensive to a reasonable person.\textsuperscript{184}

The Restatement (Second) of Torts provides some guidance for distinguishing private from public issues:

Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man’s life in his home, and some of his past history that he would rather forget.\textsuperscript{185}

The Supreme Court has indicated that “events of legitimate concern to the public” cannot be the basis of an action for invasion of privacy.\textsuperscript{186} Because of its treatment of privacy cases, the Supreme Court cannot reasonably argue that it is too difficult to distinguish a public issue from a private one, or that everything must be a public issue once it is published in a newspaper. In practice, in the invasion of privacy and defamation cases of Greenmoss and Philadelphia Newspapers, the Supreme Court illustrates a belief that the distinction can be made.

The distinction between a public concern and a private concern will only become clearer as more cases create precedent. “Public concern” does not have to mean “newsworthy.” One Supreme Court case defines it as “relating to any matter of political, social or other concern to the community.”\textsuperscript{187} This definition, along with precedent established in various privacy cases, the fair comment cases, Greenmoss, and Philadelphia Newspapers, creates a foundation that makes an issue-oriented approach workable.

Also, the line between public and private figures is not much clearer than the line between public and private issues.

[In Gertz,] a well known lawyer who had been active for years in civic affairs and who had written several books and articles was held not to be a public figure. In Firestone, the subject of a

\textsuperscript{184} Id. § 652D.

\textsuperscript{185} Id. § 652D, comment b.

\textsuperscript{186} Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975)(state may not impose sanctions on the accurate publication of a rape victim’s name obtained from public records); see also Prosser, Privacy, 48 CAL. L. REV. 383, 394-96, 410-15 (1960).

\textsuperscript{187} Connick v. Myers, 461 U.S. 138, 146 (1983)(discharge of Assistant District Attorney for distributing questionnaire did not offend first amendment).
cause celebre divorce suit was likewise placed outside the category. Yet earlier, in Curtis Publishing Co. v. Butts, a football coach was held to be a public figure, and in neither Gertz nor Firestone did the Court explain the difference.²⁸⁸

If a court can distinguish private figures from public figures, it can distinguish private issues from public issues.

Another argument against an issue-oriented approach is that the heightened press protection for public issues provided by a Rosenbloom approach will discourage private individuals from engaging in public debate.²⁸⁹ Yet, when most people speak out on a public issue, their main concern is usually not the level of proof in a defamation action. Even if it was a concern to them, having to prove actual malice would be much more appealing to the speaker than having no cause of action because a judge labeled a statement "opinion."

Furthermore, if the logic of this argument was extended, it would require that there should not be a distinction between public figures/officials and private figures. The burdens placed on public officials in libel suits could discourage people from becoming involved in the government for fear of having to prove actual malice to maintain a libel suit. Also, people may be afraid to speak out because it would eventually make them public figures. Whether or not providing protection for the discussion of public issues will discourage debate, that protection's discouraging effect is probably not much different from the discouraging effect of protecting the discussion of public figures.

Having discussed the weaknesses in the arguments against an issue-oriented approach, arguments for such an approach must be discussed. An argument in favor of an issue-oriented approach arises from the fact that public officials have absolute immunity for statements they make in regard to their office.²⁹⁰ This protection results in an immunity for statements made on public issues. It would be ironic if an official could say anything about a public issue, while a newspaper or a citizen could be liable for defamation for negligently making the same statement.

Furthermore, the purpose behind freedom of the press is to encourage debate on public issues.²⁹¹ A government deals with

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²⁸⁸. Blasi, supra note 173, at 581 (citations omitted).
²⁹¹. See supra notes 20-59 and accompanying text.
both public issues and public officials. The Supreme Court must have thought that actual malice protection was adequate to prevent self-censorship, because that was the protection given to public official and public figure discussion. By not providing actual malice protection for public issues, self-censorship on public issues will result. To discourage discussion of public issues would be a grave injustice.

V. APPLYING *Rosenbloom* TO ELIMINATE THE FACT-OPTION TESTS

As the law currently stands, a libel plaintiff must always prove that the statement is defamatory so "as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." This burden is on the plaintiff, regardless of the subject matter or the status of the plaintiff. Also, where the subject matter is of public concern or the plaintiff is a public official/figure, the plaintiff must prove the falsity of the statement.

If the plaintiff is a public official/figure and the statement is of public concern, then the plaintiff must prove that the defendant acted with actual malice. If the plaintiff is a public official/figure and the statement is of private concern, proving a lower level of fault may be adequate, but the Court has not yet dealt with such a situation.

Currently, if the plaintiff is a private figure and the statement is of public concern, then the state may allow the plaintiff to obtain an award of actual damages upon a showing that the defendant was negligent. This aspect of libel law is the only difference between the current structure and the proposed structure. The proposed issue-oriented approach would require actual malice to be shown for a private figure to win a libel suit on a statement of public concern. The current structure does require such a plaintiff to prove actual malice to be awarded punitive damages. The proposed structure, however, would make it more difficult for such a plaintiff to obtain actual damages and deter the plaintiff from bringing suit, thereby protecting the media from litigation costs.

The Supreme Court's retreat from an issue-oriented approach

194. *See supra* notes 40-54 and accompanying text.
was short-lived. The Court has basically returned to *Rosenbloom*, with two exceptions. First, the Court has fashioned a narrower and more workable view of what constitutes a public issue. This fine tuning is something that could have been done without overruling *Rosenbloom*. The second exception is that a statement of public concern is given less constitutional protection when dealing with a private figure rather than a public official/figure. The Court is wrong in not protecting such statements. The protection of these statements is what the proposed solution attempts to do.

An example will illustrate the value of such statements. Mr. Bailey, a newspaper reporter in a small town, negligently reports a story about an epidemic in the town. Mr. Bailey reports that the epidemic was caused by Mr. Potter on Liberty Street, who does not mow his lawn, creating a breeding ground for insects that carry the disease. In reality, the culprit is Mr. Potts, who lives one block from Mr. Potter.

Mr. Potter, who has lost business as a result of the article, sues Mr. Bailey for libel. Mr. Bailey's article stated, "Mr. Potter is a warped, frustrated old man who has caused a number of deaths in our town through his laziness." The epidemic is undoubtedly of public concern. Mr. Potter is a private citizen. Should the Constitution protect such speech? Put another way, do we want to encourage newspapers to print stories on matters of public concern such as that occurring in this situation?

The current structure of constitutional protection would make Mr. Bailey potentially liable for his negligence. The suggested solution would give the reporter actual malice protection. Under the current structure, "freedom of the press" gives Mr. Bailey little protection, encouraging self-censorship on an important issue. In fact, an article about a dog catcher taking an extra five minutes at lunch would have more constitutional protection than this article about a deadly epidemic in the town.

Statements of public concern contribute to our society. One commentator has noted the increase in the amount of public services performed by public contractors. This increase is another reason for an issue-oriented approach — the need to discuss such contractors who probably would not be held to be public figures,

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195. *See supra* note 177 and accompanying text.
196. *See supra* notes 40-59 and accompanying text.
but whose work is of public concern.

As for privileges, the only difference between the current structure and the proposed solution is that currently there is a privilege for opinions. The proposed solution does not do away with the opinion privilege, but protects the opinions through other press protections without incorporating an unworkable test for determining the meaning of words.

This restructuring of the New York Times protection as a solution to the fact-opinion problem is very similar to the structure of the common law privilege of fair comment. "The common law privilege of 'fair comment' . . . permitted statements of opinion about matters of general public interest to be freely made, provided they were both 'reasonable' and based upon facts fairly stated or known to the recipients of the communications."198

The proposed solution is structured around matters of public interest, as is the fair comment privilege. Like the fair comment privilege, the proposed solution does not protect a statement of private interest about a private individual. Once it is established that the statements are of public interest, the proposed solution requires that a plaintiff prove "actual malice." This requirement is similar to the fair comment requirement that the statement be "reasonable" and based upon facts fairly stated or known to the recipients of the communications.

The proposed solution is broader than the fair comment privilege in that it does not require the statement to be an "opinion" to receive actual malice protection. However, there were a minority of jurisdictions that did apply the fair comment privilege to statements of fact.199

The proposed solution's actual malice protection practically creates an absolute privilege for opinions of public interest. In order to show actual malice, a plaintiff must show that the defendant acted recklessly with regard to the truth or acted with knowledge of the statement's falsity. This burden has been acknowledged by the Supreme Court as forcing the plaintiff to prove that the statement is false.200 If one believes the statement

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199. See supra note 17 and accompanying text.
200. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986). The Court also extended that burden by holding that "at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false." Id. at 768-69.
in *Gertz* that "there is no such thing as a false idea," then a plaintiff can never prove an opinion is false, and therefore a plaintiff cannot win a defamation suit where an "opinion" is in controversy. One commentator, prior to *Philadelphia Newspapers*, recommended eliminating the fact-opinion distinction and placing the burden of proving falsity on the plaintiff. Since *Philadelphia Newspapers* has placed that burden on the plaintiff where the speech is of public concern, that commentator would argue that the fact-opinion distinction can now be eliminated without any alterations to the current legal landscape. Such a solution, however, rests too much upon the assumption that an opinion cannot be false. This Note proposes that the plaintiff’s burden of proving falsity is not enough protection for “opinions” of public concern, and that actual malice protection for such statements ensures that even “false opinions” about matters of public concern are protected as long as the speaker was not reckless in making such statements.

Furthermore, Robert Sack, a legal scholar in this area, has stated that after *New York Times*, “cases involving opinion about public officials can usually be dealt with under both the common law and Constitution without making fine distinctions between the two.” Considering the opinion privilege in light of *Rosenbloom*, Sack stated that “[s]ince fact and opinion would both have been covered [under *Rosenbloom*], distinctions between fact and opinion would have become less important.” Such claims indicate that a public issue approach can replace the unworkable fact-opinion tests.

Most of the statements protected by the opinion tests can be protected without resorting to such tests. The Restatement test, for the most part, protects statements which are already protected. If a defendant states all of the nondefamatory true “facts” an “opinion” is based upon, it would be rare that a court would find the defendant negligent, and even rarer that the defendant would be found to have acted with actual malice. If the defendant’s “facts” do not support his “opinion,” the statement probably

204. R. SACK, supra note 198, at 177.
205. Id. at 177-78. Sack also wrote that “[i]n short, there is no sound, dependable, logical device for distinguishing statements of fact from statements of opinion.” Id. at 156.
is not defamatory because the audience would not believe the defamatory "opinion." If defamatory facts are implied, a cause of action will exist, with or without the Restatement test. Also, the verifiability test is unnecessary for determining "opinions" because if opinions cannot be verified, a plaintiff will never be able to prove that an opinion is false and a defendant may obtain a summary judgment.

Further evidence demonstrating that the opinion privilege's protection is illusory is that a number of courts have discovered that statements protected as "opinions" can be protected in other ways. In Ferguson v. Watkins, the Mississippi Supreme Court, after holding that a statement was a privileged opinion, went further in protecting the statement on another ground. The court's method was similar to the solution proposed by this Note. The court, basing its holding on Gertz, created the status of a "vortex public figure," defined as one who "becomes thrust into the vortex of a matter of legitimate public interest" and who "must prove actual malice when he brings a defamation action arising out of the matter of legitimate public interest." The vortex public figure approach shifts the focus from the plaintiff to the issue as does the proposed solution. In Ferguson, the court found the "opinions" to be protected because the subject matter was of legitimate public interest and the plaintiffs failed to prove actual malice.

In Flotech, Inc. v. E.I. Du Pont de Nemours & Co., the First Circuit Court of Appeals found the fact-opinion distinction inconclusive as to whether a statement was an opinion, but found the statement privileged on other grounds. In Marchiondo v.

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206. 448 So. 2d 271 (Miss. 1984)(newspaper article concerning the arrangement physicians had with county for services in the county hospital emergency room constituted caustic commentary but was not libelous).

207. Id. at 277-78. Gertz defined one way a person may become a public figure as when "an individual . . . is drawn into a particular public controversy . . . ." Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). The focus in these situations is on the issue more than the status of the plaintiff. While Gertz claimed to be abandoning an issue-oriented approach, the Court could not abandon the belief that "freedom of speech" is really designed to protect statements about issues of public concern, not just statements about people of public concern. Id. at 344-46.

208. See Note, supra note 197, at 637.

209. Ferguson, 448 So. 2d at 279.

210. 814 F.2d 775 (1st Cir. 1987).

211. Id. at 777. The court affirmed summary judgment for a supplier of motor oil that denounced an oil additive used by the plaintiff in a press release. The statement, while inconclusive as to whether or not it was an opinion, was privileged as a statement made in
the court held a statement to be privileged opinion, but noted that the trial court found the statement to be protected under the common law defense of fair comment. Further, in holding a restaurant review to be a protected opinion, the court in *Mr. Chow of New York v. Ste. Jour Azur S.A.* noted that such reviews have been held not to be libelous for various reasons.

As an example of how statements can be protected without invoking opinion tests, consider an illustration from the Restatement (Second) of Torts: "A says to B about C, a city official: 'He and his wife took a trip on city business a month ago and he added her expenses in as a part of his own.' B responds: 'If he did that he is really a thief.'" The Restatement explains that B's expression is an opinion that does not imply any defamatory facts, and B is therefore not liable to C. The same result, however, can be reached without invoking a fact-opinion test. The statement may be seen as rhetorical hyperbole, which is not actionable. Further, B is probably not even negligent in making such a statement and therefore he would not be liable to C since actual malice would be required in such a situation. Often, the existing structure of defamation law will protect the same statements that the fact-opinion tests protect. Also, if the "publicness" of a statement is determined in light of the audience at which it is directed, then actual malice protection will often be given to such statements.

The lower courts discuss the valuable contributions of opinions to open debate. Yet, without the fact-opinion tests, most "opinions" would still be protected. This Note discussed the idea that false statements of fact can contribute to society as well as false "opinions." If the Court is really concerned about the value of the statements, it would increase the protection for statements of public concern as suggested in this Note. Statements of public concern, facts or opinions, are what contribute to society; such

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213. *Id.* at 294-95, 648 P.2d at 333.
215. *Id.* at 228.
217. Indeed, two of the five illustrations in this Restatement section are based on Supreme Court cases that found no liability without the use of the fact-opinion tests: Greenbelt Cooperative Publishing v. Bresler, 398 U.S. 6 (1970) and Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974).
FACT-OPINION DISTINCTION IN LIBEL LAW

statements need and deserve constitutional protection.\textsuperscript{219} Opinions that do not imply defamatory facts will not make a speaker liable, whether or not an opinion test is used. The opinion tests waste time and resources by shifting the focus away from the real issue of a defamation action. This waste is a great evil in the area of first amendment protection.

CONCLUSION

The proper balance between the concerns of freedom of the press and the rights of individuals is difficult to maintain. Perhaps the changing times give us a reason to take a closer look at the role of the courts in this area. In the early days of journalism, newspapers were not considered as reliable as they are today. When a newspaper is seen as dispensing Truth, the goal of dissemination of a broad range of information is no longer served. Allowing a Charles Foster Kane to publish a libelous statement may aid the free flow of ideas, because readers take it with a grain of salt and balance it with other "ideas." But when \textit{The New York Times} or Dan Rather makes a defamatory statement it is often seen as gospel, and usually the victim's only possible defense to the statement is achieved through the courts.\textsuperscript{220}

The concerns of the individual in our society should not be discarded easily. We have accepted that freedom of speech is often more important than individual justice, because it benefits the individuals more in the long run. The protections offered by the first amendment are of great value. Perhaps it is true "that to the public good [p]rivate respects must yield."\textsuperscript{221} One should remember that James Madison said, "[s]ome degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press."\textsuperscript{222} Yet, some degree of abuse is separable, and it should be separated, especially where it will also result in a more proper protection of the freedom of the press. The value of speech to society results from its focus on public issues, not whether it can be called an "opinion." A concrete

\textsuperscript{219} See supra notes 18-72 and accompanying text. See generally A. Meiklejohn, supra note 71.

\textsuperscript{220} See R. Smolla, supra note 138, at 11-13.


press protection should replace the illusory protection of the fact-opinion distinction, which in reality only hinders the goals of justice.

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