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ABSTRACT

Since the 1974 Supreme Court dicta in "Gertz v. Robert Welch, Inc.," many courts have held that statement of opinion is constitutionally protected. However, statements that appear to be opinion based on undisclosed facts or knowledge not generally known to the public can be an exception. For instance, courts have protected specific unfavorable restaurant and book reviews, but refused to protect as opinion a statement by the owner of a baseball team, reported in a newspaper, that the club's former general manager was a "despicable human being." This presents a problem for the media, which may be impeded in debating issues of public concern for fear that the opinions they publish, which had formerly been protected under fair comment, may not be qualified for legal protection. The Restatement of Torts in 1977 attempted to distinguish between "pure" and "mixed" opinions, and a later torts hornbook posited "deductive," "evaluative," and "informational" opinions. Courts have also taken the possibility of intended malice and "rhetorical hyperbole" into account. To protect the right to debate issues of public concern, courts should consider merging the ideas of Judge Robinson's dissent in "Ollman v. Evans" and the Supreme Court's opinion in "Philadelphia Newspapers v. Hepps," and protect any comments, without consideration of whether they are fact or opinion, that cannot be proven false. (Four pages of footnotes are included.) (JC)

THE DANGEROUS EXCEPTION TO PROTECTION FOR OPINION

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THE DANGEROUS EXCEPTION TO PROTECTION FOR OPINION

The press long has used its public platform to express opinions about matters as diverse as politics, restaurants and literature. For more than 125 years, it relied on the common law[1] fair comment privilege to avoid liability for defamation when publishing stories stating that the mayor's proposed budget would mean bankruptcy for the city, the new restaurant's food was inedible or the best selling novel was trash. However, the common law privilege was not absolute, and could be lost if the defendant failed to prove, for example, that the statement of opinion was made honestly and without malice. The privilege also was lost if the statement was not supported by stated or known facts. In 1974 the Supreme Court's dicta in Gertz v. Robert Welch, Inc.,[2] laid the groundwork for finding statements of opinion to be nonactionable. The Court said that "[u]nder the First Amendment there is no such thing as a false idea."[3] Since Gertz, many courts have held that opinion is constitutionally protected.

However, there is an important exception to both the constitutional and common law shields from liability for opinion. A statement which appears to be opinion is not protected if it implies that it is based on facts not stated and not generally known by the public. For example, a court protected a newspaper's restaurant review that said the food "t'aint Cajun, t'aint French, t'aint Country American, t'aint good."[4] Another court protected a book's statement that a judge was "incompetent" and should be removed from office.[5] However, a court refused to protect a letter to the editor that said a clinical psychologist advocated techniques that were "used in brainwashing prisoners of war."[6] Another court would not protect as opinion a statement by the owner of a baseball team, reported in a newspaper, that the club's former general manager was a "despicable human being."[7]

The critical distinction beween these cases is that the protected statements were accompanied by pertinent background facts supporting the opinions, while the

unprotected statements failed to supply such information. According to the courts, the actionable statements implied that the opinions were based on undisclosed defamatory facts. That courts continue to base decisions on the requirements of the traditional common law fair comment defense often has been overlooked by the media in the euphoria of increased protection after Gertz.[8]

The media's lack of absolute protection for opinion presents serious problems for at least four reasons. First, unwary journalists may become careless when using opinion because they believe statements of opinion are constitutionally protected and have not been made aware of the exception to that rule. This danger arises particularly when reporters repeat others' opinions in news stories, or newspapers or magazines print letters to the editor. Second, protection against a defamation action may hinge precariously on the unclear definition of opinion. Third, if the constitutional shield is lost and reliance is on a common law defense, the case likely will be put in the hands of a jury rather than a judge.[9] Juries are notoriously harsher on the media in defamation cases than are judges and appellate courts.[10] Fourth, not only will the defendant lose the fair comment privilege and the constitutional protection by not including facts supporting the opinion, but the truth defense also likely will be lost for the same reason.

Fair comment long had been the only shield for journalists who expressed their opinions or reported others' opinions. At common law, actions for defamation developed to protect individuals against harm to their reputations. However, to prevent self-censorship based on fear of being sued for libel or slander, the courts granted certain protections. Among these was a qualified immunity from defamation actions to allow the expression of opinions regarding subjects of public interest. Recognized at least since the early 19th century,[11] the privilege was intended to protect only opinions based on true, underlying facts. In 1938, the first Restatement of Torts,[12] reflecting the then-current status of the law, reported that fair comment was protected from a defamation action if the opinion was (1) about a matter of public interest, (2) based upon stated "true

or privileged statement[s] of fact, or upon facts otherwise known or available" to the public, (3) the critic's actual opinion and (4) made without intending to cause harm.[13] Courts have been divided over whether the comment also must be reasonable in order to be protected.[14] Further, courts have held that if the plaintiff is a public official or public figure, the fair comment defense is applicable even if the statement's underlying facts are false, so long as actual malice is not proved.[15] For private plaintiffs, states can choose to require the underlying facts to be true or permit them to be false, so long as liability is not imposed in the absence of fault.[16]

In the early 1970s, the Supreme Court suggested that the fair comment defense may not be sufficiently protective under some circumstances. In Greenbelt Cooperative Publishing Association v. Bresler,[17] a real estate developer tried to obtain zoning variances for high density housing in Greenbelt, Maryland, and the city concurrently was attempting to purchase land from the developer for a school site. An audience member at a public meeting held to discuss these negotiations referred to the developer's tactics as "blackmail," a remark reported by the local newspaper. The developer sued the newspaper for defamation and was successful at trial, but the Supreme Court concluded that the word "blackmail" was not libelous. Rather, readers would understand the term as an opinion-laden criticism of the developer. The Court held the remark was protected "rhetorical hyperbole," since, in the context of the remark, readers would not assume the charge implied underlying criminal activity.[18]

The Court relied on Greenbelt Publishing in deciding Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin,[19] handed down in the same term as Gertz. In that case, the Letter Carriers union circulated a list of names which included three non-union postal employees. Attached to the list was author Jack London's definition of a "scab." In part, London said, "Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class."[20] The Court found this statement to be

absolutely protected in the context of a labor dispute. The language, it said, was used in a "loose, figurative sense," which could not be construed as asserting that the employee had committed "the criminal act of treason."[21]

The Supreme Court "seemed to provide absolute immunity from defamation actions for all opinions and to discern the basis for this immunity in the First Amendment"[22] when it stated in the landmark libel case of Gertz that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact . . . ."[23] This seemingly gave statements of opinion, whether or not defamatory, constitutional protection.

Taken together, Greenbelt, Letter Carriers and Gertz offer First Amendment protection to statements of opinion. The first requirement, however, is for a court to determine if the challenged statement should be categorized as opinion or if it instead is an assertion of stated or implied fact. The Supreme Court has offered little guidance in applying this differentiation. The Gertz decision, for example, contained no discussion of the distinction.

Instead, two leading analytical approaches developed after Gertz to define protected opinion. Each approach seemingly discarded the common law fair comment defense in favor of constitutional protection, but actually retained an important element of the common law doctrine. That is, under either test, protection for opinion is lost if supporting facts are not stated or generally known.

Some courts adopted the new scheme put forth in 1977 by the second Restatement of Torts.[24] The Restatement dropped any mention of fair comment. Instead it recognized the Supreme Court dicta that statements of opinion are constitutionally protected.[25] However, the Restatement carved an exception. While the Court did not explicitly exempt from protection those opinions suggesting unstated allegations, the Restatement distinguished between "pure" opinions, based on stated or generally known

facts and thus protected under Gertz, and "mixed" opinions. The Restatement provided that 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."[26] If the statement is one of opinion rather than fact — a difficult question in itself for the courts to answer — it is eligible for constitutional protection that prevents a successful defamation action. However, if it appears to be an opinion, but is found to be based on undisclosed, untrue defamatory allegations, it will not qualify for protection under either the common law or the Constitution.[27]

For example, in a case noted earlier, a letter to the editor said, among other statements, that a psychologist used methods that were "destructive of the human spirit."[28] Under the Restatement's analysis, this would be a constitutionally protected statement of opinion — except that it implies that the author knew undisclosed defamatory facts justifying the statement. If those facts generally were known or were contained in the letter, neither true in above case, the writer would retain the First Amendment protection given to opinion. Otherwise, a libel action could be sustained and even the truth defense would be difficult to interpose in the absence of stated or known supporting facts.

The authors of a well-known torts hornbook have taken an approach to the fact-opinion distinction similar to the Restatement's. Prosser and Keeton posit a three-part categorization: opinions can be "deductive," "evaluative" or "informational."[29] Deductive opinions imply misconduct or disparaging facts based on true information stated with the opinion or already known by the public. For example, "Since A had access to the company's books, and since he was deep in debt, I believe he embezzled the money." Prosser and Keeton and the Restatement would protect such opinions. Evaluative opinions involve a value judgment, again based on stated or known facts. For example, "He couldn't hit the right note. He was the worst singer I've ever heard." Such

opinions are protected unless dishonestly held.[30] Informational opinions are similar to the Restatement's "mixed" opinions in that they use the opinion form to convey defamatory allegations and are not protected. "That judge is corrupt" may be an unprotected statement. Also, according to Prosser and Keeton, if the allegations "do not justify the conclusion drawn, the statement made is to be regarded as a misstatement of the undisclosed facts."[31]

Some courts did not adopt the Restatement approach, but instead searched for other tests to differentiate between fact and opinion. A few noted the difficulty of the task and simply held that the difference between fact and opinion was a matter of the court's judgment.[32] Some courts focused on a single factor, such as whether the allegedly libelous statement could be verified.[33] However, a consensus seems to have developed that all the circumstances surrounding the allegedly defamatory statement must be examined, and that various factors can be used in the evaluation process.[34] For example, in Information Control Corp. v. Genesis One Computer Corp., the Court looked at (1) the facts surrounding the publication, (2) the context in which the words were uttered, such as in a public debate or a labor dispute, and (3) the language itself.[35]

Ollman v. Evans,[36] a leading opinion case, went a step further than Information Control and utilized a four-factor test. Columnists Rowland Evans and Robert Novak wrote that Bertell Ollman, a New York University professor who was nominated to head the University of Maryland Political Science Department was "widely viewed in his profession as a political activist" and that "he is an outspoken proponent of 'political Marxism.' "[37] They also quoted an unnamed "political scientist in a major eastern university" as stating that " 'Ollman has no status within the profession, but is a pure and simple activist.' "[38]

The Court of Appeals for the District of Columbia Circuit, in an en banc decision, found the column to be protected opinion. First, the Court looked at the precision and specificity of the statements.[39] Vague or imprecise statements are difficult to

categorize as "fact." For example, a court found that calling someone a "fascist" was sufficiently indefinite to be an opinion, but that calling someone a libeller was specific and therefore fact.[40]

Second, the Ollman court examined the degree to which the statement was verifiable.[41] A statement which cannot be proven, said the court, cannot be construed as conveying facts. For example, an allegation of a criminal activity is laden with factual content. Courts, even after Gertz, generally have found such accusations to be based on factual implications and therefore able to support a defamation action.[42]

Third, the statement must be evaluated in the linguistic context in which it was made.[43] A newspaper column may be so clearly the writer's opinion that any statement in the column must be seen as opinion and not factual. A magazine's statement that a television sports reporter was "the only newscaster in town who is enrolled in a course for remedial speaking" was found to be opinion as part of a series of one-liners in an article on the city's "best" and "worst."[44] Cautionary language in the text, such as stating that the material is the writer's opinion, also may prevent statements from being found to be factual, although this is not definitive.[45] Similarly, a column being placed on a newspaper's editorial page is a factor in determining that the column is opinion.[46]

Finally, the broader social context in which the statement was made is important, according to the Ollman court.[47] In Letter Carriers, for example, a harsh accusation of being a traitor made in the heat of a labor dispute was opinion, not a factual statement.[48] There also is a long history of protection for sharp and biting discourse in political debates.[49]

While Ollman's four-factors do not specifically exclude from protection opinions implying unstated defamatory allegations, the court said that the Restatement approach is subsumed in the court's test. Unsupported statements fail the first two prongs, "definiteness" and "verifiability," and therefore are not protected.

Unsupported opinions also fail the test posited by Judge Robinson in his Ollman dissent. He proposed a continuum from "pure" to "hybrid" opinions.[50] The most protected statements, according to Robinson, would be "pure" opinions, i.e., statements incapable of verification, such as personal taste, literary criticism and political views. Near this same protected end of Robinson's continuum would be innocuous epithets, such as "fascist" or "radical right," and metaphorical language.

Hybrid opinions are those implying factual content, such as "Jones is incompetent to handle that job."[51] If "accompanied by a reasonably full and accurate account of the material background facts," Robinson would protect such opinions.[52] But "when a hybrid statement appears without any recitation of the underlying facts, or when those facts are stated incompletely or erroneously," and with reckless disregard of the truth, the protection is lost.[53] Robinson notes that his approach is similar to the Restatement's "pure" and "mixed" opinion, the latter losing protection if implying unstated defamatory allegations.

Under the Restatement test or the Ollman analytical scheme, statements cast in the form of opinions are in danger of losing their protection if supporting facts are not supplied concurrently or publicly known. Courts' analyses of this exception to the opinion protection, however, tend to be perfunctory. Despite the importance of the exception, and its potentially decisive effect on a defendant's case, courts rarely discuss the issue thoroughly or analyze it effectively. Frequently, a citation to the Restatement or an earlier case noting the exception suffices.

However, even without a detailed rationale, and whether using the Restatement or the multi-factor test, courts will not allow the rubric of "opinion" to shield implied, but unstated, defamations. As one court said:

> This stricture on publication of opinion rests on the assumption that, given all the facts of a situation, the public can independently evaluate the merits of even the most outrageous opinion and discredit those that are unfounded. On the other hand, when an opinion held out for belief is stated so that the average

> listener would infer that the speaker had an undisclosed factual basis for holding the opinion, the listener does not have the tools necessary to independently evaluate the opinion and may rely on unfounded opinion that defames an individual.[54]

For example, in a case noted above, a federal court acknowledged that Gertz protected opinion, but the court held that language reported in the Houston Chronicle referring to the plaintiff as a "despicable human being" fell within the Restatement's exception as "reflect[ing] the author's deductions or evaluations, but at the same time [being] . . . laden with factual content."[55] The court said that "hybrid," or "mixed" in the Restatement's terminology, statements are "generally entitled to an absolute privilege as opinion only when . . . accompanied by a full and accurate narration of the material background facts."[56] Here, the "defendant failed to set forth any facts in support of his assertion . . .," allowing a cause of action to be continued against the individual defendant.[57] The newspaper was not a party to the suit.

Implied defamatory allegations also allowed a defamation action to be sustained against a city clerk whose remarks about city aldermen were reported in the Chicago Daily News and the Chicago Sun-Times.[58] The court found that the clerk implied "that he was privy to facts" about the plaintiff aldermen "and their actions" when he stated that "240 pieces of silver changed hands — 30 for each alderman."[59] The court found that, in the context of the city's award of a garbage collection contract, the city clerk's comparison of the aldermen's actions "to Judas' betrayal of Christ" raised the implication of bribery. Since the clerk implied he knew supportive defamatory information that was not revealed in his statement, the court rejected the defense of opinion.

While a court dismissed a libel action against Wometco West Michigan TV because a public figure plaintiff could not show actual malice, the court rejected the defendant's assertion of the opinion defense.[60] The court found that the statement implied defamatory facts. A television station owned by the defendant broadcast a remark that the plaintiff " 'went down and started Channel 41 in Battle Creek, and then he didn't make

it happen down there, I guess, whatever happened, and then he went away for a while.'"[61] The court followed the Restatement's approach. It held that the words "I guess, whatever happened" gave the statement the character of an opinion, but that the statement did not include "the underlying facts upon which [the] . . . opinion was based."[62] This allowed viewers to conclude that the "comment was based on undisclosed defamatory facts, i.e., that plaintiff was inept or incompetent as an owner-manager of a television station."[63] The court thus concluded that "present constitutional law does not bar plaintiff from maintaining a defamation action against defendant for [the] . . . alleged opinion statement."[64]

Citing the Restatement rule, a New Mexico appellate court held that a material issue existed whether remarks published by one weekly newspaper about a second weekly paper were protected opinion.[65] One paragraph in the allegedly defamatory article stated, "The News actually printed a piece by rabid environmentalist Jack Kutz, who used to send us letters so violent we turned them over to the police."[66] The court found that readers could construe "rabid environmentalist" as opinion.[67] However, the words "letters so violent [that] we turned them over to the police" implied that the writer possessed undisclosed facts suggesting that Kutz "intended or threatened to injure, harm, destroy, or damage . . . someone or something . . . ."[68] The court held that statements of opinion lose their constitutional protection when they imply underlying knowledge substantiating the comments. If such information existed, it had to appear in the article or generally be known if the statement was to be protected as opinion.

Davis v. Ross[69] also illustrates that courts will not protect statements couched as opinions which imply the existence of unstated and unknown defamatory facts. One year after plaintiff Gail Davis voluntarily resigned as singer Diana Ross' "executive assistant," Ross wrote and disseminated a letter which listed the names of seven people, including Davis, and stated, "If I let an employee go, it's because either their work or their personal habits are not acceptable to me. I do not recommend these people. In fact, if you hear

from these people, and they use my name as a reference, I wish to be contacted."[70] The letter did not contain details of Ross' dissatisfaction with Davis' employment. The Court held that "Ross' letter, read in its entirety, seems to imply that she had knowledge of facts supporting her claim of Davis' unacceptable work and personal habits."[71] Since such facts were not set forth nor generally known, the defamatory statements were not protected opinion.

Courts have made it clear that statements can be protected as opinion even if the underlying facts are not stated, so long as they generally are known among the recipients of the statements at issue. For instance, the Wilmington (Del.) News Journal successfully defended a libel suit based on the newspaper's assertion in an editorial that Melvin Slawik, a former county official, had "abused his office."[72] The editorial, which was focused on Wendell Howell, another former public official, did not explain its statement. However, the court upheld the trial court's decision that it was "well-known" that Slawik was removed from office by the state governor for conviction of perjury, a conviction later overturned, and that he pled guilty to a charge of obstruction of justice. Because support for the newspaper's statement was known by readers, although not explicitly stated, the defense of opinion was available.

Statements of opinion also are protected if "there is no reasonable inference to be drawn of undisclosed defamatory facts."[73] An article published in the Ithaca (N.H.) Times and the Portsmouth (N.H.) Magazine during the 1984 presidential primary described Walter Mondale's visit to the home of attorney Alfred Catalfo, Jr. and his family. The article stated that " 'Mondale had his arm around the sleazy little Catalfos . . . .' "[74] The court found the statement to be protected opinion "given the context of the entire article, with its . . . indication that the author knew nothing of the Catalfos other than what he saw and described of that evening . . . ."[75] On that basis, there was no implication that the article implied unstated defamatory facts leading to a conclusion that the Catalfos were "sleazy." Rather, the word was used only as one without "a precise meaning."[76]

Finally, under either the Restatement or the multi-factor test, courts grant protection to statements of opinion supported by stated facts. For example, in Rinaldi v. Holt, Rinehart & Winston, Inc.,[77] a judge sued the publishers of a book which stated that he was more lenient with heroin dealers and organized crime figures than with Black and Puerto Rican defendants. The author described the judge's release without bail of a narcotics distributor with 12 prior arrests, and his assessment of $250 fines for misdemeanor convictions of organized crime figures charged with bribery and conspiracy. The author called the judge "incompetent" and called for his removal from office. The New York Court of Appeals found that the term "incompetent" and the author's advocating the judge's removal were protected opinions because they were supported by stated facts. According to the court, "Based upon the facts stated and public debate provoked by the statements, each reader may draw his own conclusions as to whether [the author's] views should be supported or challenged."[78]

Similarly, the Chicago Tribune published a critique by Paul Gapp, its architectural critic, of a 150-story skyscraper Donald Trump proposed to build in Manhattan.[79] Gapp described the artist's illustration of what would have been the world's tallest building as showing "one of the silliest things anyone could inflict on New York."[80] But Gapp also described the basis for his opinion, saying, for example, that the building would offer "condos, office space and a kitchy shopping atrium of blinding flamboyance."[81] Further, Gapp stated, " 'Yet, while this sort of speculation is amusing, it is necessary to add a few hard facts.' "[82] The court, after summarizing the information Gapp included in the critique, concluded that "the article set out in full the facts on which the opinions expressed were predicated,"[83] and held that the article was protected opinion.

CONCLUSION

Clearly, constitutional protection for opinion is more complicated than the dicta in Gertz v. Robert Welch, Inc., may have suggested. When the Supreme Court declared that

there is no such thing as a false idea, it did not explain how ideas are to be distinguished from facts. Nor did the Court say that published ideas must be supported by stated or widely known fac ·.

Lower courts have struggled for more than a decade for a way to decide how to distinguish opinion from fact. However, they have consistently held that once expression was determined to be opinion, it must be supported by stated or generally known fact to be protected.

The result is that although the declaration by many courts that opinion is constitutionally protected sounds reassuring, it also can be misleading. Editors still cannot be certain when a court will decide that an editorial or letter to the editor is protected opinion or implies a defamatory assertion of fact. Before editors can rely on the constitutional protection for opinion, they must be sure that any comments are supported by accurate statements of fact or facts generally known by the public.

To be sure, the Supreme Court in Greenbelt and Letter Carriers protected extreme statements of opinion, often called "rhetorical hyperbole," without requiring supporting facts. However, in both cases the Court believed the context of the statements made it clear that assertions of "blackmail" and "traitor" were not based on undisclosed defamatory facts. Courts have said that epithets, insults, hyperbole and name calling do not have ordinary meanings that can rest on factual support.

Unfortunately, even the Court's protection for rhetorical hyperbole leaves editors in a quandry. They cannot be certain when use of a word such as "liar" will be declared protected as rhetorical hyperbole or be found to be an unprotected statement because of the lack of a factual basis.

In other words, protection for opinion since Gertz has improved only incrementally. The constitutional protection for opinion does not appear to require that a defendant prove lack of malice, a requirement under the common law defense of fair comment. Unlike the common law defense, the constitutional protection does not depend upon proof that an

opinion was fair or not extreme. Unlike the common law defense, the constitutional protection seems to apply to any published opinion rather than only those representing the news of a media owner or employee. However, the constitutional protection has not yet resolved the problem of distinguishing fact from opinion, as discussed above. The constitutional protection still ordinarily requires a basis of fact and, so far, protection under the Constitution and in the common law has been granted only when comment was about matters of public interest.

Better protection for opinion, protection that would improve the predictability of court rulings without significantly increasing the vulnerability of individual reputation, is offered by merging the ideas of Judge Robinson's dissent in Ollman and the Supreme Court's opinion in Philadelphia Newspapers v. Hepps.[84] As suggested by Franklin and Bussel,[85] courts should protect any comments, without consideration of whether they are fact or opinion, that cannot be proven false. However, any statement would be actionable if the plaintiff could establish clearly and convincingly that it is based on disclosed, implied or undisclosed defamatory statements of fact. Such an approach would protect any opinions incapable of being proved true or false without the dilemma of deciding whether or not the comment meets the judicial criteria for "opinion." Such an approach would protect the statements that both fair comment and the constitutional protection for opinion were intended to -- comments about matters of public interest that do not lend themselves to litmus tests of truth or falsity. Both professional communicators and private citizens need to be able to debate freely issues of public concern without first checking with a lawyer to determine whether their comments satisfy criteria that qualify them for legal protection.

FOOTNOTES

1 The "common law" is a term used to refer to court decisions not based on legislative enactments, but on society's custom and usage, and on prior cases relying on those standards.

2 418 U.S. 323 (1974).

3 Id. at 339. Since an opinion cannot be proved false, the Court reasoned, it cannot be found to be a false statement of fact, which is a prerequisite for holding a statement to be defamatory. See Philadelphia Newspapers v. Hepps, 106 S. Ct. 1558 (1986).

4 Mashburn v. Collin, 355 So. 2d 879, 880 (La. 1977).

5 Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299, 1303, cert. denied, 434 U.S. 969 (1977).

6 Madsen v. Buie, 454 So. 2d 727, 728 (Fla. App. 1984).

7 Smith v. McMullen, 589 F. Supp. 642, 643 (S.D. Tex. 1984).

8 As First Amendment expert Floyd Abrams said, "We may not know what opinion is, but whatever it is, it is absolutely protected." Abrams, The Burger Court and the First Amendment: Part 2 - An Analysis, in B. Chamberlin & C. Brown, The First Amendment Revisited: New Perspectives on the Meaning of Speech and Press 143 (1982).

9 See, e.g., Grass v. News Group Publications, Inc., 570 F. Supp. 178, 188 (S.D. N.Y. 1983).

10 See, e.g., Pring v. Penthouse, Inc., 695 F.2d 438 (10th Cir. 1982), cert. denied, 462 U.S. 1132 (1983).

11 See Carman, Hutchinson v. Proxmire and the Neglected Fair Comment Defense: An Alternative to "Actual Malice," 30 DePaul L. Rev. 1, 10 (1980).

12 The series of Restatements is a distillation of the law published by the American Law Institute, a private organization. While unofficial, the Restatements are highly respected and often cited and quoted by the courts.

13 Restatement of Torts § 606(1) (1938); see, e.g., Brewer v. Hearst Publishing Co., 185 F.2d 846, 850 (7th Cir. 1950).

14 See B. Sanford, Libel and Privacy 110 and n.13 (1986).

15 See New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Associated Press v. Walker, 388 U.S. 130 (1967).

16 See Gertz v. Robert Welch, Inc., 418 U.S. 323.

17 398 U.S. 6 (1970).

18 Id. at 14.

19 418 U.S. 264 (1974).

20 Id. at 268.

21 Id. at 284-85.

22 Ollman v. Evans, 750 F.2d 970, 974 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985).

23 418 U.S. at 339-40.

24 Restatement (Second) of Torts § 566 (1977).

25 There is not a consensus that Gertz eliminated the fair comment defense by giving constitutional protection to opinions. Justices Rehnquist and White have expressed doubts about the sweep of the Gertz dicta. Miskovsky v. Oklahoma Publishing Co., 459 U.S. 923, 924 (1982) (denial of certiorari) (Rehnquist and White, JJ., dissenting); see also Ollman v. Evans, 471 U.S. 1127 (1985) (denial of certiorari) (Rehnquist, J., and Burger, C.J., dissenting). Some courts suggest that Gertz extended protection only to those opinions on matters of public concern that would have been privileged under fair comment. See, e.g., Kotlikoff v. The Community News, 89 N.J. 62, 444 A.2d 1086, 1089-90 (1982); Goodrich v. Waterbury Republican-American, 188 Conn. 107, 448 A.2d 1317, 1324 (1982).

26 Restatement (Second) of Torts § 566 (emphasis added).

27 Opinions, false or not, defamatory or not, sincerely held or not, are constitutionally protected, provided the facts supporting the opinion are set forth. See, e.g., Rinaldi v. Holt, Rinehart & Winston, 366 N.E.2d at 1306-07. However, if the stated facts are themselves false and defamatory, they may be the subject of a defamation action.

28 Madsen v. Buie, 454 So. 2d at 728.

29 W. Prosser, W. Keeton, P. Dobbs, R. Keeton & D. Owen, The Law of Torts § 113A (5th ed. 1984).

30 See R. Smolla, Law of Defamation § 6.05(3)(a).

31 W. Prosser, supra note 29, at § 113A.

32 See, e.g., Shiver v. Apalachee Publishing Co., 425 So. 2d 1173 (Fla. Dist. Ct. App. 1983).

33 See, e.g., Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), cert. denied, 434 U.S. 834 (1977).

34 See Catalfo v. Jensen, 657 F. Supp. 463, 467 (D.N.H. 1987); R. Smolla, Law of Defamation § 6.03(5) (1986).

35 611 F.2d 781, 783-84 (9th Cir. 1980).

36 750 F.2d 970.

37 Id. at 972.

38 Id. at 973.

39 Id. at 979-81.

40 Buckley v. Littell, 539 F.2d 882, 893-94, 895-96 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977).

41 611 F.2d at 981-82.

42 See, e.g., Rinaldi v. Holt, Rinehart & Winston, Inc., 366 N.E. 2d at 1307 (book stated judge was "probably corrupt").

43 611 F.2d at 982-83.

44 Myers v. Boston Magazine Co., Inc., 380 Mass. 336, 403 N.E.2d 376, 377 (1980).

45 Compare Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1360 (Colo. 1983), with Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980).

46 See Loeb v. Globe Newspaper Co., 489 F. Supp. 481 (D. Mass. 1980).

47 611 F.2d at 983-84.

48 418 U.S. 264.

49 See Buckley v. Littel, 539 F.2d at 889.

50 750 F.2d at 1021-22.

51 Id. at 1022.

52 Id. at 1024 (emphasis in original).

53 Id. at 1023, 1025.

54 Lauderback v. American Broadcasting Cos., Inc., 741 F.2d 193, 195-196 (8th Cir. 1984), cert. denied, 469 U.S. 1190 (1985).

55 Smith v. McMullen, 589 F.2d at 645.

56 Id.

57 Id.

58 Catalano v. Pechous, 69 Ill. App. 3d 797, 387 N.E.2d 714, 25 Ill. Dec. 838 (1978), aff'd, 83 Ill. 2d 146, 419 N.E.2d 350, 50 Ill. Dec. 242, cert. denied, 451 U.S. 911 (1981).

59 387 N.E. 2d at 723.

60 Searer v. Wometco West Michigan TV, Inc., 7 Med. L. Rptr. (BNA) 1639 (Mich. Cir. Ct. 1981).

61 Id. at 1639.

62 Id. at 1641.

63 Id.

64 Id.

65 Kutz v. Independant Publishing Co., Inc., 97 N.M. 243, 638 P.2d 1088 (1981), app. after remand, 101 N.M. 587, 686 P.2d 277 (1984).

66 Id. at 1088.

67 Id. at 1091.

68 Id.

69 754 F.2d 80 (2d Cir.), on remand, 107 F.R.D. 326 (S.D.N.Y. 1985).

70 Id. at 81-82.

71 Id. at 86.

72 Slawick v. News-Journal, 428 A.2d 15 (Del. 1981).

73 Catalfo v. Jensen, 657 F. Supp. at 468.

74 Id. at 465.

75 Id. at 468.

76 Id.

77 366 N.E.2d 1299.

78 Id. at 1306.

79 Trump v. Chicago Tribune, 616 F. Supp. 1434 (S.D.N.Y. 1985).

80 Id. at 1435.

81 Id.

82 Id. at 1437.

83 Id.

84 106 S. Ct. 1558.

85 Franklin & Bussel, The Plaintiff's Burden in Defamation: Awareness and Falsity, 25 Wm. & Mary L. Rev. 825 (1984).