

## LIBEL

WILL WORDS NEVER HURT?—*JANKLOW v. NEWSWEEK, INC.*

*Sticks and stones may break my bones,  
But names will never hurt me.  
When I die, then you'll cry  
For the names you called me.\**

## INTRODUCTION

In 1984, William Janklow, Governor and former Attorney General of South Dakota, initiated a libel action against *Newsweek Magazine* ("Newsweek"), *Janklow v. Newsweek, Inc.*<sup>1</sup> The basis for the action was an article published by *Newsweek*. This article described the activities of Indian activist Dennis Banks and Janklow's efforts to prosecute and sentence Banks for his involvement in the 1973 riot at the Custer, South Dakota, courthouse.<sup>2</sup> Janklow charged that the *Newsweek* article defamed him by accusing him of improper motives in prosecuting Banks.<sup>3</sup> The United States District Court for the District of South Dakota agreed that the meaning which could be drawn from the article was susceptible to the defamatory interpretation that Janklow claimed.<sup>4</sup> The district court, however, relying on *Gertz v. Robert Welch, Inc.*,<sup>5</sup> characterized the expression as constitutionally protected opinion and granted summary judgment in favor of *Newsweek*.<sup>6</sup>

The Eighth Circuit Court of Appeals reversed the district court's summary judgment.<sup>7</sup> The Eighth Circuit agreed with the district court that the expression was susceptible to a defamatory meaning but determined that its implication was one of fact rather than opinion.<sup>8</sup> Therefore, the Eighth Circuit found that there was a basis for the libel action.<sup>9</sup>

To determine whether the defamatory assertions in the *News-*

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\* Nineteenth-century poem.

1. 759 F.2d 644, 646 (8th Cir. 1985), *rev'd on rehearing en banc*, No. 84-1452 (8th Cir. Apr. 10, 1986). For a discussion of the court's en banc opinion on rehearing, see note 193 *infra*.

2. *Id.* at 646. See Appendix A (text of article).

3. *Janklow*, 759 F.2d at 646.

4. *Id.*

5. 418 U.S. 323, 339-40 (1974).

6. *Janklow*, 759 F.2d at 646, 649.

7. *Id.* at 654.

8. *Id.* at 652.

9. *Id.*

*week* article were statements of fact or opinion, the Eighth Circuit purported to apply the "totality of the circumstances" test<sup>10</sup> proposed by Judge Bork in his concurring opinion in *Ollman v. Evans*.<sup>11</sup> However, the court actually failed to apply this test. Instead, it utilized the "totality of the circumstances" test drawn from the majority opinion in *Ollman*.<sup>12</sup> The *Ollman* majority opinion test considers four factors: the defamatory statement's common usage or meaning, its verifiability, its context and the broader setting in which the statement appeared.<sup>13</sup> Judge Bork's test adds an additional factor: the extent to which making the statement actionable, given the statement's context, would burden freedom of speech or press.<sup>14</sup> Utilization of Judge Bork's test, thus, de-emphasizes the fact-opinion distinction.<sup>15</sup> In *Janklow*, the Eighth Circuit failed to recognize the difference between the two "totality of the circumstances" tests.

Numerous treatises and law review articles have discussed libel,<sup>16</sup> tracing its development from early common law to its current, constitutional status, which began in 1964 with the decision in *New York Times v. Sullivan*.<sup>17</sup> Rather than repeat this history, this Note maps the decisionmaking process for libel actions in diagram form and focuses on the importance of summary judgment in libel actions.

This Note submits that the Eighth Circuit should have incorporated into its analysis in *Janklow* Judge Bork's balancing test which de-emphasizes the fact-opinion distinction, focusing instead on the defamatory statements' impact on first amendment principles. Had it done so, the Eighth Circuit would *not* have reversed the district court's entry of summary judgment.

## FACTS AND HOLDING

*Dennis Banks's Last Stand* is the title of the *Newsweek* article

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10. *Id.* at 649.

11. 750 F.2d 970, 993 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), *cert. denied*, 105 S. Ct. 2662 (1985).

12. *Compare Janklow*, 759 F.2d at 649 n.7 with *Ollman*, 759 F.2d at 979.

13. *Ollman*, 750 F.2d at 979.

14. *Id.* at 997 (Bork, J., concurring).

15. *Id.* at 1001 n.6.

16. A good background explaining the constitutionalization of the law of defamation is provided by the following commentators: C. MORRIS, MODERN DEFAMATION LAW (1978); W. PROSSER & W. KEETON, THE LAW OF TORTS, §§ 111-16A (5th ed. 1984); R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS (1980); Eaton, *The American Law of Defamation Through Gertz v. Robert Welch and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976). See also note 61 *infra*.

17. 376 U.S. 254 (1964). The *Sullivan* decision set the standard for all libel suits initiated by public officials against the press: a public official must show actual malice with the "convincing clarity which the constitutional standard demands." *Id.* at 285-86.

published in February, 1983, which William Janklow contended defamed him.<sup>18</sup> The article reported the controversy surrounding Indian activist Dennis Banks and described Janklow's adversarial relationship with Banks.<sup>19</sup> The primary basis for the defamation suit was a paragraph in the article concerning a "feud" between Banks and Janklow.<sup>20</sup>

Along the way, Banks made a dangerous enemy—William Janklow. *Their feud started in 1974*, when Banks brought charges against Janklow in a tribal court for assault. A 15-year-old Indian girl who baby-sat for Janklow's children had claimed that he raped her in 1969. Federal officials found insufficient evidence to prosecute, but Banks persuaded the Rosebud Sioux chiefs to reopen the case under tribal law. Janklow, who was running for election as state attorney general at the time, refused to appear for the trial. But the tribal court found "probable cause" to believe the charges and barred Janklow from practicing law on the reservation. *Eight months later Janklow—who had won his election despite the messy publicity—was prosecuting Banks.* And his case—based on the 1973 Custer riot—was successful. Found guilty of riot and assault without intent to kill, Banks jumped bail before sentencing.<sup>21</sup>

Although not mentioned in the article, Janklow's initial contact with Banks was in 1973 when Janklow was appointed by the Attorney General of South Dakota to assist in the prosecution of those Indians involved in the riot at the courthouse in Custer, South Dakota.<sup>22</sup> Banks was one of those charged.<sup>23</sup> In 1975, Banks was found guilty of riot and assault but fled South Dakota before sentencing.<sup>24</sup> In 1980, Janklow was elected governor of South Dakota.<sup>25</sup> As attorney general and later as governor, Janklow attempted to have Banks returned to South Dakota for sentencing.<sup>26</sup> Throughout this period, Janklow had been outspoken and widely quoted regarding his attempts to bring Banks to justice,<sup>27</sup> once stating, "I've always been rankled that [Banks] didn't stick around to take his medicine."<sup>28</sup>

Janklow argued that the article contained specific errors of fact

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18. The full text of the *Newsweek* article is set out in Appendix A.

19. See Appendix A.

20. *Janklow*, 759 F.2d at 646.

21. See Appendix A (emphasis added). See also *Janklow*, 759 F.2d at 646.

22. Brief for Appellant at 2, *Janklow*.

23. *Janklow*, 759 F.2d at 655.

24. *Id.* at 646.

25. Brief for Appellant at 6, *Janklow*.

26. See *Janklow*, 759 F.2d at 646.

27. *Id.* at 655.

28. Supplemental Brief for Appellee at 2, *Janklow*.

which defamed him and that additional facts should have been published, the omission of which also defamed him.<sup>29</sup> The district court, however, found no issue in the article as to any material fact.<sup>30</sup> Instead, it found that, according to the evidence, the basic facts reported by *Newsweek* were not in dispute.<sup>31</sup> The district court also ruled that the omission of facts was not libelous.<sup>32</sup> The Eighth Circuit concurred in both these findings.<sup>33</sup>

Janklow also contended that the article implied that he had begun prosecuting Banks in revenge for the rape charges Banks had brought against him.<sup>34</sup> Because Janklow had begun prosecuting Banks for his part in the 1973 Custer riot *before* Banks had initiated the rape charge, Janklow claimed that the implication was false and defamatory.<sup>35</sup>

Both courts focused on this implication of prosecutorial misconduct. The district court concluded that the implication was an expression of opinion and, therefore, constitutionally protected.<sup>36</sup> The Eighth Circuit, however, held that the meaning that could be drawn from the *Newsweek* article—that Janklow did not commence prosecuting Banks until after Banks had attempted to bring him to justice for the alleged rape of an Indian girl—was factual, and that the factual statement could be construed as defamatory.<sup>37</sup> According to the court, if Janklow had initiated the criminal action against Banks for revenge, that would have been both an abuse of Janklow's power as attorney general and also arguably a cause for his suspension or disbarment by the South Dakota Supreme Court.<sup>38</sup>

Recognizing that the distinguishing of assertions of fact from assertions of opinion is not an easy matter,<sup>39</sup> the Eighth Circuit indicated that it favored Judge Bork's "totality of the circumstances" test formulated in his concurring opinion in *Ollman*.<sup>40</sup> But immediately after quoting Judge Bork, the court referenced by footnote the "totality of the circumstances" test as set out in the *majority* opinion in

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29. *Janklow*, 759 F.2d at 647-48.

30. *Id.* at 647.

31. *Id.*

32. *Id.* at 648.

33. *Id.* at 647-48.

34. *Id.* at 649.

35. *Id.* at 646.

36. *Id.* at 646-47.

37. *Id.* at 649 n.5, 652.

38. *Id.* at 649 n.6. See note 55 and accompanying text *infra*.

39. *Id.* at 649.

40. *Id.* (citing *Ollman*, 750 F.2d at 1001-02) (Bork, J., concurring). In *Ollman*, Judge Bork stated that a court must "turn instead to the totality of the circumstances of the case to determine whether a statement may be actionable." *Ollman*, 750 F.2d at 1001-02 (Bork, J., concurring).

*Ollman* and applied the factors drawn from that test rather than the slightly different test proposed by Judge Bork.<sup>41</sup>

To evaluate the totality of the circumstances in *Janklow*, the Eighth Circuit considered, first, the language used throughout the article<sup>42</sup> and, second, the forum in which the statements were made.<sup>43</sup> Next, the court evaluated whether the statement's meaning was sufficiently precise<sup>44</sup> and, last, whether cautionary language was used.<sup>45</sup> The Eighth Circuit concluded that readers would have assumed that the magazine was reporting facts uncovered during the course of its investigation.<sup>46</sup> Because the article appeared in the national affairs section of *Newsweek*, the court found that the article's meaning was specific and objective.<sup>47</sup> Further, the court found that no cautionary language was present.<sup>48</sup> Based on these findings, the Eighth Circuit reversed the district court's entry of summary judgment and remanded the case.<sup>49</sup>

In his dissent, Judge Arnold argued that the application of the four factors from *Ollman* pointed "decisively in the direction of 'opinion' in this case."<sup>50</sup> He emphasized the importance of the broader social context in the evaluation,<sup>51</sup> stating that his views were closer to Judge Bork's concurrence in *Ollman* than were those presented in the majority opinion.<sup>52</sup>

## BACKGROUND

Generally, libel is a written, defamatory communication which "tends so to harm the reputation of another as to lower him in the estimation of the community."<sup>53</sup> To determine the specific parameters of libel, the federal courts must refer to state law.<sup>54</sup> In South Dakota, libel is defined as "a false and unprivileged publication by

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41. *Janklow*, 759 F.2d at 649 n.7. See notes 13-14 and accompanying text *supra*.

42. *Janklow*, 759 F.2d at 651.

43. *Id.* at 651-52.

44. *Id.* at 652.

45. *Id.*

46. *Id.* at 651.

47. *Id.* at 651-52.

48. *Id.* at 652.

49. *Id.* at 654. The Eighth Circuit's reversal of the district court's entry of summary judgment preempted the issue of malice—a second obstacle for a defamed plaintiff to overcome. However, the Eighth Circuit indicated that some evidence in the record may have shown the existence of actual malice. *Id.* at 653.

50. *Id.* at 657.

51. *Id.*

52. *Id.* at 657 n.2.

53. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

54. *Schuster v. U.S. News & World Report*, 602 F.2d 850, 853 (8th Cir. 1979). See generally *Erie R.R. v. Tompkins*, 304 U.S. 64, 73-80 (1938).

writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."<sup>55</sup>

In permitting defamation actions, courts have long acknowledged that such actions can infringe upon freedom of expression.<sup>56</sup> Beginning in 1964 with *New York Times Co. v. Sullivan*,<sup>57</sup> the Supreme Court began to preempt what previously had been a common law tort.<sup>58</sup> Following *Sullivan*, additional Supreme Court decisions have delineated the constitutional principles governing defamation actions.<sup>59</sup>

The diagram at Appendix B portrays the checks and balances which the courts have woven into the course of a libel action in response to the constitutional dictates. Beginning with the plaintiff's pleadings, the diagram traces the litigation through the various steps which require court resolution of a question of law until either summary judgment or a decision by the trier of fact terminates the action.<sup>60</sup>

#### SUMMARY JUDGMENT

Justice Stevens, in *Bose Corp. v. Consumers Union*,<sup>61</sup> a 1984 libel decision, described the role of judges as "expositors of the Constitution, [who] must independently decide whether the evidence in the

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55. S.D. CODIFIED LAWS ANN. § 20-11-3 (Rev. 1979). According to the Eighth Circuit, an implication of prosecutorial misconduct could be cause for suspension or disbarment and would thus harm Janklow in his occupation. *Janklow*, 759 F.2d at 649 n.6. Consequently such implication, if false, would constitute libel under the South Dakota statute. *Id.*

56. See R. SACK, *supra* note 16, at 153.

57. 376 U.S. 254 (1964). In *Sullivan*, a Montgomery, Alabama, public affairs commissioner claimed that an advertisement printed in the *New York Times* defamed him. *Id.* at 258-59. The advertisement alleged that Montgomery authorities had behaved improperly during local civil rights demonstrations. *Id.* In denying recovery, the Court established the standard for imposing liability which must be met by a public official who brings a libel suit against the press. *Id.* at 278-79. The official must prove that the defamatory statement was made with "actual malice—that is, with knowledge [by the press] that it was false or with reckless disregard of whether it was false or not." *Id.*

58. See *id.* at 265-84.

59. For a discussion of the evolution of the constitutional principles governing defamation actions, see R. SACK, *supra* note 16, at 2-38; Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1221-59 (1976); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 201-12 (1976); Wade, *The Communicative Torts and the First Amendment*, 48 MISS. L. J. 671, 683-706 (1977).

60. The diagram is limited to an action charging a media defendant with defamation.

61. 466 U.S. 485 (1984).

record is sufficient to cross the constitutional threshold."<sup>62</sup> Accordingly, a motion for summary judgment provides the court the opportunity to assess the proof in order to determine whether a genuine issue for trial exists.<sup>63</sup> The Supreme Court has recognized that the cost of defending a protracted libel lawsuit can chill first amendment rights.<sup>64</sup> Additionally, the Eighth Circuit has taken the position that summary judgment procedures are particularly appropriate when first amendment considerations are involved in defamation actions.<sup>65</sup> In *Schuster v. U.S. News & World Report*,<sup>66</sup> the Eighth Circuit observed: "The courts must keep this harmful effect [of the chilling of first amendment rights] in mind and grant summary judgment in favor of libel defendants where, on close analysis, it is appropriate under the Federal Rules of Civil Procedure."<sup>67</sup>

As the diagram at Appendix B illustrates, there are seven junctures in a libel action where the court's ruling on a question of law could result in summary judgment:

- 1) Step I: Is the statement susceptible to a defamatory meaning?
- 2) Step II: Does a privilege exist which shields the defamatory statement?
- 3) Step III: Is the defamatory statement an expression of fact or opinion?
- 4) Step IV: Is the plaintiff a public or a private person?
- 5) Step V-A: Is the evidence of culpability sufficient to raise an issue of fact?
- 6) Step V-B: Does the statement libel plaintiff's official or nonofficial conduct?
- 7) Step VI: Is the evidence of malice sufficient to raise an issue of fact?<sup>68</sup>

The court may enter summary judgment if it determines either that the statement is *not* susceptible to a defamatory meaning, or that, if the statement is susceptible to such a meaning, a privilege exists.<sup>69</sup> Summary judgment is again appropriate if the court concludes that the statement is an expression of opinion.<sup>70</sup> Finally, since *Sullivan*, the court must grant summary judgment if the evidence does not

62. *Id.* at 511.

63. *See Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972).

64. *See Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); *Sullivan*, 376 U.S. at 279.

65. *See Brown v. Herald Co.* 698 F.2d 949, 951 (8th Cir. 1983); *Treutler v. Meredith Corp.*, 455 F.2d 255, 257 n.1 (8th Cir. 1972).

66. 602 F.2d 850 (8th Cir. 1979).

67. *Id.* at 855.

68. *See* Appendix B.

69. *See* Steps I & II and accompanying notes in Appendix B.

70. *See* Step III and accompanying note in Appendix B. Most opinions, but not all, as the diagram indicates, are constitutionally protected. *See id.*

demonstrate proof of actual malice sufficient to create an issue of fact.<sup>71</sup>

Language from a 1974 Supreme Court decision, *Gertz v. Robert Welch, Inc.*,<sup>72</sup> has been cited in numerous libel cases involving media defendants as support for the proposition that expressions of opinion are protected from defamation actions.<sup>73</sup> In *Gertz*, the Court chose not to extend the *Sullivan* requirement of actual malice to defamation actions initiated by private individuals against the press.<sup>74</sup> Instead, the Court allowed the states to define statutorily the appropriate culpability that a private plaintiff would be required to prove.<sup>75</sup> In addition to its holding regarding private plaintiffs, the Court stated: "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."<sup>76</sup>

This statement by Justice Powell in *Gertz*, which the *Ollman* court stated is clearly dicta,<sup>77</sup> has created a legal presumption that most expressions of opinion, even if defamatory, are protected.<sup>78</sup> Thus, the courts, relying on *Gertz*, have begun to extend constitutional protection to defamatory expressions of opinion which heretofore were protected only by the limited common law defense of fair comment.<sup>79</sup> In fact, section 566 of the *Restatement (Second) Of Torts* changed the *Restatement of Torts* treatment of this issue so as to conform to Justice Powell's statement in *Gertz*.<sup>80</sup>

Section 566 of the *Restatement (Second) Of Torts* determines

71. See Step VI and accompanying note in Appendix B.

72. 418 U.S. 323, 339-40 (1974).

73. See, e.g., *Janklow*, 759 F.2d at 649 (citing *Gertz*, 418 U.S. at 339-40); *Ollman*, 750 F.2d at 974 (citing *Gertz*, 418 U.S. at 339-40); *Church of Scientology v. Cazares*, 638 F.2d 1272, 1286 (5th Cir. 1981) (citing *Gertz*, 418 U.S. at 339-40); *Cianci v. New Times Publishing*, 639 F.2d 54, 61 (2d Cir. 1980) (citing *Gertz*, 418 U.S. at 339-40); *Bucher v. Roberts*, 198 Colo. 1, —, 595 P. 2d 239, 240-41 (1979) (en banc) (citing *Gertz*, 418 U.S. at 339-40).

74. See *Gertz*, 418 U.S. at 343-50. The question whether a plaintiff in a libel action is a public or private person is for the court. See Appendix B.

75. *Gertz*, 418 U.S. at 347-48.

76. *Id.* at 339-40.

77. *Ollman*, 750 F.2d at 974 n.6.

78. See *id.* See also *Janklow*, 759 F.2d at 649; *Lauderback v. American Broadcasting Cos.*, 741 F.2d 193, 195 (8th Cir. 1984).

79. See R. SACK, *supra* note 16, at 164-76 (discussing the fair comment defense).

80. Compare RESTATEMENT (SECOND) OF TORTS § 566 (1977) (stating that a defamatory statement that is opinion is not actionable) with RESTATEMENT OF TORTS § 566 (1938) (stating that an actionable defamatory statement can consist of a statement of opinion). The Supreme Court referenced favorably the language from *Gertz* in the libel action of *Bose Corp. v. Consumers Union*, 104 S. Ct. 1949, 1961 (1984) (citing *Gertz*, 418 U.S. at 339-40).

whether expressions of opinions are actionable based upon four fact patterns:

1. opinions based on stated true facts;<sup>81</sup>
2. opinions based on unstated facts which are assumed true by both the defendant and the hearer;<sup>82</sup>
3. opinions based on stated, false facts;<sup>83</sup>
4. opinions based on unstated, false facts.<sup>84</sup>

Many courts have utilized section 566 to assist in determining whether a defamatory opinion is actionable.<sup>85</sup> The Eighth Circuit has prefaced the word "opinion" with a qualifier, the adjective "pure."<sup>86</sup>

In *Lauderback v. American Broadcasting Cos.*,<sup>87</sup> the Eighth Circuit stated: "[T]he publication of truthful, non-private facts and of pure opinion is protected by the First Amendment."<sup>88</sup> The court cited *Gertz*,<sup>89</sup> but it observed that statements clothed as opinion, and which imply that they are based on undisclosed, defamatory facts, are not protected.<sup>90</sup> This approach is in accord with section 566.<sup>91</sup>

In comparison, the *Ollman* Court limited the use of section 566 to "statements . . . laden with factual content."<sup>92</sup> According to the court, the application of the totality of the circumstances test sufficed to determine whether a statement implied the existence of undis-

81. See RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977). The opinion is not actionable. *Id.*

82. See *id.* There is no liability unless the communication suggests other defamatory facts. *Id.*

83. See *id.* In this fact pattern, the libel action would be based on the false facts, not the opinion. *Id.*

84. See *id.* The defendant may be subject to liability. *Id.*

85. See, e.g., *Davis v. Ross*, 754 F.2d 80, 85 (2d Cir. 1985) (holding that a letter written by an employer regarding an employee's job performance contained a personal, defamatory opinion which was based on false facts unknown to the reader, and, therefore, was actionable); *Cibenko v. Worth Publishers, Inc.*, 510 F. Supp. 761, 762 (D.N.J. 1981) (dismissing a defamation action against the publisher of a sociology textbook because the defamatory innuendo that plaintiff was racially prejudiced was the author's commentary on undisputed, correct facts contained within the text); *Beckman v. Dunn*, 276 Pa. Super. 527, —, 419 A.2d 583, 587 (1980) (holding unactionable defamatory statements in a letter written by a professor concerning the reasons for the termination of a former student from participation in the doctoral program and finding that, because the facts in the letter were accurate, the defamatory opinion based on these facts was protected).

86. See notes 87-88 and accompanying text *infra*. Pure opinion has been defined as opinion which is based on disclosed or assumed nondefamatory facts; pure opinion is not based on undisclosed, false facts. *Fleming v. Benzaquin*, 390 Mass. 175, —, 454 N.E.2d 95, 103 (1983).

87. 741 F.2d 193 (8th Cir. 1984).

88. *Id.* at 195 (emphasis added).

89. *Id.* (citing *Gertz*, 418 U.S. at 339-40).

90. *Id.*

91. See RESTATEMENT (SECOND) OF TORTS § 566 comments b, c (1977).

92. *Ollman*, 750 F.2d at 984-85.

closed facts.<sup>93</sup>

#### DISTINGUISHING EXPRESSIONS OF FACT FROM OPINION

Even though courts agree that most opinions are constitutionally protected from defamation actions,<sup>94</sup> courts are divided in their methods of distinguishing expressions of fact from expressions of opinion. Some courts have held that defamatory statements which cannot be interpreted literally are statements of opinion. In *Greenbelt Cooperative Publishing Association v. Bresler*,<sup>95</sup> a newspaper story characterized as "blackmail" the plaintiff's refusal to sell a certain parcel of property to the city unless the city rezoned another parcel.<sup>96</sup> Finding that the statement was not libelous, the Supreme Court stated, "[E]ven the most careless reader must have perceived that the word [blackmail] was no more than rhetorical hyperbole."<sup>97</sup>

In *Old Dominion Branch No. 496 v. Austin*,<sup>98</sup> a union newspaper defined "scabs" (persons who had not joined the union) as traitors to God and country.<sup>99</sup> The Court concluded that it was "impossible to believe that any reader . . . would have understood the newsletter to be charging the appellees with committing the criminal offense of treason."<sup>100</sup>

An extreme example of statements that could not be interpreted literally occurred in *Pring v. Penthouse International, Ltd.*<sup>101</sup> In *Pring*, the Tenth Circuit ruled that a magazine article—which portrayed the plaintiff in a beauty pageant before a national television audience performing oral sex on her coach, causing the coach to levitate—described physically impossible events in an impossible setting.<sup>102</sup> The court stated that no one could possibly interpret the article as factual; the descriptions were "pure fantasy and nothing else."<sup>103</sup>

Other courts have held that defamatory statements which are imprecise in meaning are statements of opinion. For example, in

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93. *Id.* at 985.

94. See notes 73, 78 and accompanying text *supra*. This Note's scope is limited to media defendants. Whether a nonmedia defendant's expression of opinion of and concerning a private party is constitutionally protected has not been specifically addressed. See *Henry v. Halliburton*, 690 S.W.2d 775, 782 (Mo. 1985) (en banc).

95. 398 U.S. 6 (1970).

96. *Id.* at 7.

97. *Id.* at 14.

98. 418 U.S. 264 (1974).

99. *Id.* at 268.

100. *Id.* at 285.

101. 695 F.2d 438 (10th Cir. 1982).

102. *Id.* at 440-41, 443.

103. *Id.*

*Hotchner v. Castillo-Puche*,<sup>104</sup> the alleged libel consisted of a remark about A. E. Hotchner, attributed to Ernest Hemingway, and printed in a book written by Castillo-Puche: "I [Hemingway] don't really trust him, though."<sup>105</sup> The Second Circuit stated that an assertion that cannot be proved false cannot be held libelous.<sup>106</sup>

In *Bucher v. Roberts*,<sup>107</sup> an employee of a department store charged his supervisor with defamation.<sup>108</sup> The supervisor's alleged defamatory statements to the clothing buyer were: "You did not need two fucking gabardine resources. You are presently jacking yourself off with Metro slacks, and another fucking resource, Buccaneer slacks, called today."<sup>109</sup> The Colorado Supreme Court stated that once it must speculate on the meaning conveyed by a statement, the statement enters the area of opinion.<sup>110</sup>

The methodology utilized by the Second Circuit in *Cianci v. New Times Publishing*,<sup>111</sup> required an analysis of the context in which the defamatory statement was made.<sup>112</sup> The mayor of Providence, Rhode Island, claimed that an article defamed him.<sup>113</sup> The article stated that the mayor once had been accused of rape, that the charge had been dropped, and that the mayor had made a payment to the accuser.<sup>114</sup> In finding the article to be actionable, the court stated that the allegedly defamatory passages could be considered only in the context of the entire article and that the words should be interpreted as commonly understood.<sup>115</sup>

The Fifth Circuit used the *Cianci* methodology in its decision in *Church of Scientology v. Cazares*.<sup>116</sup> The mayor of Clearwater, Florida, was charged with defamation by the Church for his use of the phrase "helter skelter" in describing the Church's activities.<sup>117</sup> The mayor testified that his statement had been a joke and that he had not meant to connect the Church to Charles Manson and Manson's philosophy of mass murder.<sup>118</sup> The court reasoned: "Reading the statement in context there is no indication that the Mayor was accus-

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104. 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977).

105. *Id.* at 912.

106. *Id.* at 913.

107. 198 Colo. 1, 595 P.2d 239 (1979) (en banc).

108. *Id.* at —, 595 P.2d at 240.

109. *Id.* at —, 595 P.2d at 240.

110. *Id.* at —, 595 P.2d at 241.

111. 639 F.2d 54 (2d Cir. 1980).

112. *Id.* at 60.

113. *Id.* at 55.

114. *Id.* at 60.

115. *Id.*

116. 638 F.2d 1272, 1286-89 (5th Cir. 1981).

117. *Id.* at 1287.

118. *Id.* at 1288.

ing the Church of advocating mass murder."<sup>119</sup>

The California Supreme Court extended the technique of context analysis to include an examination of the totality of the context in which the defamatory statement was published. In *Gregory v. McDonnell Douglas Corp.*,<sup>120</sup> the court sustained a demurrer to a complaint that alleged a libelous statement issued by McDonnell Douglas during a labor dispute.<sup>121</sup> The court held:

[W]hat constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. [W]here potentially defamatory statements are published in . . . a heated labor dispute . . . language which generally might be considered as statements of fact may well assume the character of statements of opinion.<sup>122</sup>

The methodology utilized in *Gregory* was refined by the Ninth Circuit in *Information Control Corp. v. Genesis One Computer Corp.*<sup>123</sup> The court set out three factors to assist in the totality of the context analysis:

The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.<sup>124</sup>

The court applied these factors to a defamatory press release issued by Genesis which stated that Information Control Corporation was bringing a breach of contract action against Genesis as a "device" to avoid payment of commissions that were due to Genesis.<sup>125</sup> In finding the release to consist of nonactionable statements of opinion, the court quoted *Gregory*:

In this setting, "the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, [and thus] language which generally might be considered as statements of fact may well

119. *Id.* See also *Pritsker v. Brudnoy*, 389 Mass. 776, —, 452 N.E.2d 227, 229 (1983). The *Pritsker* court held that a radio talk show host's statements calling the owners of a restaurant "unconscionably rude and vulgar people" was not actionable. *Id.* at —, 454 N.E.2d at 229. The *Pritsker* court stated, "In making this determination we look to the entire context of the communication." *Id.* at —, 454 N.E.2d at 229.

120. 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976).

121. *Id.* at 598, 552 P.2d at 426, 131 Cal. Rptr. at 642.

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

123. 611 F.2d 781 (9th Cir. 1980).

124. *Id.* at 784.

125. *Id.* at 783.

assume the character of statements of opinion."<sup>126</sup>

The Ninth Circuit emphasized: "The court must consider all the words used, not merely a particular phrase or sentence [and] all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published."<sup>127</sup>

A composite of the various tests used to distinguish fact from opinion emerged from the majority opinion in the District of Columbia Circuit's 1984 decision in *Ollman v. Evans*.<sup>128</sup> The court's analysis was based upon the "totality of the circumstances."<sup>129</sup> Bertell Ollman, a professor of political science at New York University, brought a defamation action against two newspaper columnists, claiming that they had defamed him in an editorial page article, which resulted in his being denied the appointment as chairman of the Department of Government and Politics at the University of Maryland.<sup>130</sup> In deciding whether the statements in the newspaper column qualified for the first amendment protection afforded opinions, the court stated: "[C]ourts should analyze the totality of the circumstances in which the statements are made. . . . [W]e will consider four factors in assessing whether the average reader would view the statement as fact or, conversely, opinion."<sup>131</sup> The factors were an examination of the statement's common usage or meaning, its verifiability, its "full context," and the statement's "broader context or setting."<sup>132</sup> After applying these factors to the facts in *Ollman*, the court held that the challenged statements were constitutionally protected expressions of opinion, stating:

[W]e [must] not engage . . . in a Talmudic parsing of a single sentence or two, as if we were occupied with a philosophical enterprise or linguistic analysis. . . . [W]e are reminded by *Gertz* itself of our duty "to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise."<sup>133</sup>

In his concurring opinion, Judge Bork advocated a somewhat dif-

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126. *Id.* at 784 (quoting *Gregory*, 17 Cal. 3d at 601, 552 P.2d at 428, 131 Cal. Rptr. at 644).

127. *Id.* See also *Fleming*, 390 Mass. at —, 454 N.E.2d at 101 (relying on the Ninth Circuit's test in *Information Control Corp.* in determining that the radio talk show host's statement, "if [Fleming] has children of his own, I'm sorry for them already," could reasonably be understood as an expression of opinion based on the defendant's description of events and, therefore, was not actionable).

128. 750 F.2d 970, 979 (D.C. Cir. 1984).

129. *Id.*

130. *Id.* at 971-72.

131. *Id.* at 979.

132. *Id.*

133. *Id.* at 991 (quoting *Gertz*, 418 U.S. at 342).

ferent totality of the circumstances test.<sup>134</sup> He proposed adding a first amendment balancing test to the factors utilized by the majority because "[a]ny such rigid doctrinal framework is inadequate to resolve the sometimes contradictory claims of the libel laws and the freedom of the press."<sup>135</sup> Judge Bork emphasized the need for "close judicial scrutiny to ensure that cases about types of speech and writing essential to a vigorous first amendment do not reach the jury."<sup>136</sup> He continued:

This requires a consideration of the totality of the circumstances that provide the context in which the statement occurs and which determine both its meaning and the extent to which making it actionable would burden freedom of speech or press. That, it must be confessed, is a balancing test and risks admitting into the law an element of judicial subjectivity.<sup>137</sup>

Judge Bork also criticized the utility of the fact-opinion distinction and maintained that fact and opinion are difficult to separate in any rational, consistent manner.<sup>138</sup> Additionally, Judge Bork believed that persons in the political limelight must expect and accept more disparagement than private individuals.<sup>139</sup>

In summary, Judge Bork maintained that language which arguably could be either fact or opinion should be elevated with deference to first amendment principles.<sup>140</sup> Because the real purpose of any fact-opinion analysis is the protection of first amendment principles, whether the statement is fact or opinion is less important than whether allowing the statement to be actionable infringes upon protections guaranteed by the first amendment.<sup>141</sup>

134. *Id.* at 997.

135. *Id.* at 993.

136. *Id.* at 997.

137. *Id.*

138. *Id.* at 1001. Judge Bork stated: "[T]here is no mechanistic rule that requires us to employ hard categories of 'opinion' and 'fact'—defined by the semantic nature of the individual assertion—in deciding a libel case that touches upon first amendment values." *Id.* In a footnote, Judge Bork added:

It should be noted that a number of scholars have sharply criticized the utility of the opinion-fact dichotomy both at common law and in various lower court opinions applying *Gertz*. . . . [T]he opinion-fact "distinction, without more, primarily furnishes vague familiar terms into which one can pour whatever meaning is desired."

*Id.* at 1001 n.6 (quoting R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 155 (1980)).

139. *Id.* at 1002.

140. *Id.* at 994.

141. *See id.* at 1020-28. *See also* Henry v. Halliburton, 690 S.W.2d 775, 788-89 (Mo. 1985) (en banc) (applying Judge Bork's test to a libel action and holding that the language that plaintiff "acted with greed to fleece a consumer" was a permissible expression of opinion).

## OVERVIEW

As federal and state courts apply *Gertz* in extending constitutional protection to defamatory opinions, a recurring decisional model emerges. First, the court establishes that the alleged defamatory statement meets the applicable state definition of libel<sup>142</sup> and then refers to *Gertz*:

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.<sup>143</sup>

Next, the court typically reviews the various fact-opinion tests and resulting decisions of other courts.<sup>144</sup> Finally, the court chooses the fact-opinion test it deems most persuasive and applies that test to the particular facts before the court.<sup>145</sup> Because the fact-opinion distinction is a question of law, if the court determines that the defamatory expression is an opinion, the court will grant summary judgment in favor of the defendant.<sup>146</sup> The majority of defamation decisions have employed this model.<sup>147</sup>

The decisional model resulting from the *Gertz* directive has generated four additional developments. First, the decisions indicate that courts believe that the role of the court in defamation actions is particularly important.<sup>148</sup> The courts do not hesitate to grant summary judgment on the fact-opinion determination, as well as on other questions of law which arise during the action.<sup>149</sup> In *Ollman*, the court stated: "[T]he predictability of decisions, which is of crucial importance in an area of law touching upon First Amendment values, is enhanced when the determination is made according to announced legal standards. . . ."<sup>150</sup> Second, the single-factor tests for distinguishing fact from opinion<sup>151</sup> have evolved into multi-factor analyses,<sup>152</sup>

142. See, e.g., *Davis*, 754 F.2d at 82; *Church of Scientology*, 638 F.2d at 1286; *Cianci*, 639 F.2d at 60; *Cibenko*, 510 F. Supp. at 764.

143. *Gertz*, 418 U.S. at 339-40. See, e.g., *Ollman*, 750 F.2d at 974 (quoting *Gertz* 418 U.S. at 339-40); *Church of Scientology*, 638 F.2d at 1286 (quoting *Gertz*, 418 U.S. at 339-40); *Cianci*, 639 F.2d at 61 (quoting *Gertz*, 418 U.S. at 339-40); *Bucher*, 198 Colo. at —, 595 P.2d at 240 (quoting *Gertz*, 418 U.S. at 339-40).

144. See, e.g., *Ollman*, 750 F.2d at 977-79; *Cianci*, 639 F.2d at 62-65; *Bucher*, 198 Colo. at —, 595 P.2d at 241; *Halliburton*, 690 S.W.2d at 787-89; *Anton v. St. Louis Suburban Newspapers*, 598 S.W.2d 493, 496-98 (Mo. App. 1980).

145. See, e.g., *Ollman*, 750 F.2d at 986-92; *Cianci*, 639 F.2d at 65-71; *Bucher*, 198 Colo. at —, 595 P.2d at 241; *Halliburton*, 690 S.W.2d at 789-90; *Anton*, 598 S.W.2d at 499.

146. See note 94 and accompanying text *supra*. See also Step III and accompanying note in Appendix B.

147. See cases cited notes 142-45 *supra*.

148. See notes 64-71 and accompanying text *supra*.

149. See notes 64-71 and accompanying text *supra*.

150. *Ollman*, 750 F.2d at 978.

151. See, e.g., *Old Dominion Branch*, 418 U.S. at 285 (holding that statements that

culminating in Judge Bork's "totality of the circumstances" test.<sup>153</sup>

Third, courts are increasingly aware that the circumstances, context, or readers' understanding of the statement can transform a factual statement into opinion.<sup>154</sup> The existence of a controversy to which the alleged libelous statement refers appears to be a common denominator in the cases.<sup>155</sup>

Finally, the courts' recognition of the effect of the context or circumstances on the fact-opinion determination has generated a growing dissatisfaction with a strict fact-opinion dichotomy.<sup>156</sup> This fourth development is well stated in *Pearson v. Fairbanks Publishing*:<sup>157</sup>

The distinction between a fact statement and an opinion or comment is so tenuous in most instances, that any attempt to distinguish between the two will lead to needless confusion. The basis for the privilege is that it is in the public interest that there be reasonable freedom of debate and discussion on public issues. One should not be deterred from speaking out through the fear that what he gives as his opinion will be construed by a court as inferring, if not actually amounting to, a misstatement of fact.<sup>158</sup>

These developments in libel law since *Gertz* support the need for a consistent approach among the courts to the fact-opinion dilemma. Judge Bork's "totality of the circumstances" test furnishes the best solution.<sup>159</sup> Admittedly it is a balancing test between the individual's right to protect his reputation and society's interest in free expres-

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cannot be taken literally are statements of opinion); *Greenbelt Coop. Publishing Ass'n*, 398 U.S. at 14 (holding that statements that cannot be taken literally are statements of opinion); *Hotchner*, 551 F.2d at 913 (holding that statements which lack precision of meaning or usage are statements of opinion). See also notes 95-100 and accompanying text *supra*.

152. See, e.g., *Ollman*, 750 F.2d at 979 (setting forth four factors utilized in evaluating the totality of the circumstances of the case and context); *Information Control Corp.*, 611 F.2d at 784 (requiring an examination in the totality of the context in which the defamatory statement is published). See also notes 111-33 and accompanying text *supra*.

153. *Ollman*, 750 F.2d at 993 (Bork, J., concurring). See also notes 134-41 and accompanying text *supra*.

154. See, e.g., *Old Dominion Branch*, 418 U.S. at 285 (a heated labor dispute); *Greenbelt Coop. Publishing Ass'n*, 398 U.S. at 7 (a city council public hearing); *Ollman*, 750 F.2d at 1004 (Bork, J., concurring) (the appointment of an individual as head of a university department); *Information Control Corp.*, 611 F.2d at 783 (a contested contract action). See also notes 95-139 and accompanying text *supra*.

155. See cases cited note 154 *supra*.

156. See *Ollman*, 750 F.2d at 1001 n.6 (Bork, J., concurring). See also note 138 and accompanying text *supra*.

157. 413 P.2d 711 (Alaska 1966).

158. *Id.* at 714.

159. See *Ollman*, 750 F.2d at 997 (Bork, J., concurring).

sion, and, as all balancing tests do, it involves judicial subjectivity.<sup>160</sup> But as Judge Bork stated: "[T]here is no satisfactory alternative. . . . Given the appellate process, moreover, the subjective judgment of no single judge will be controlling."<sup>161</sup>

## ANALYSIS

The *Janklow* decision reflects the decisional model developed by the courts as a result of *Gertz*.<sup>162</sup> First, the Eighth Circuit determined that the alleged defamatory statement met South Dakota's statutory definition of libel.<sup>163</sup> If Janklow's prosecution of Banks had been for revenge, Janklow could have been subject to disbarment or suspension.<sup>164</sup> Conversely, if the allegation were false, he could have been unfairly subjected to such discipline and the obvious harm resulting therefrom.<sup>165</sup>

Next, the Eighth Circuit cited *Gertz*<sup>166</sup> and then reviewed other decisions addressing the fact-opinion distinction.<sup>167</sup> After recognizing that distinguishing fact from opinion is not an easy matter, the Eighth Circuit evidenced its approval of Judge Bork's totality of the circumstances test.<sup>168</sup> But immediately after quoting Judge Bork,<sup>169</sup> the court referenced the *majority* opinion in *Ollman*:

The importance of the totality of the circumstances test is that it looks to all relevant circumstances to determine whether a given statement is actionable. Thus, a comment about official misconduct made in a coffee shop would almost inevitably be opinion, while "[t]he identical quotation in a newspaper article purporting to publish facts . . . would, of course, be quite another matter."<sup>170</sup>

The Eighth Circuit then applied to the facts of *Janklow* the four factors set out in the *Ollman* majority opinion.<sup>171</sup> The court did not discuss further Judge Bork's balancing test. More importantly, it did

160. *See id.* (Bork, J., concurring).

161. *Id.* (Bork, J., concurring).

162. *See* notes 142-47 and accompanying text *supra*.

163. *Janklow*, 759 F.2d at 649 n.6.

164. *Id.*

165. *Id.*

166. *Id.* at 649 (citing *Gertz*, 418 U.S. at 339-40).

167. *Id.* at 650-51 (discussing *Old Dominion*; *Greenbelt*; *Cianci*; and *Buckley v. Littell*, 531 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977)).

168. *Id.* at 649.

169. *Id.* The court quoted the following statement of Judge Bork: "[A] court [must] turn instead to the totality of the circumstances of the case to determine whether a statement may be actionable." *Id.* (quoting *Ollman*, 750 F.2d at 1001-02 (Bork, J., concurring)).

170. *Id.* at 649 n.7 (quoting *Ollman*, 750 F.2d at 990).

171. *Id.* at 651-52.

not exhibit an awareness of any distinction between Judge Bork's totality of the circumstances test and that of the *Ollman* majority.<sup>172</sup>

Regarding the first development of the decisional model,<sup>173</sup> the Eighth Circuit found summary judgment to be inappropriate. The court reasoned that the meaning which could be drawn from the *Newsweek* article was factual<sup>174</sup> and, thus, reversed the district court's entry of summary judgment.<sup>175</sup> However, the Eighth Circuit's utilization of a totality of the circumstances test reflects the court's approval of a multi-factor test to address the fact-opinion distinction, which is in accordance with the second development.<sup>176</sup>

The third development arising from the decisional model is missing from the *Janklow* opinion.<sup>177</sup> In *Janklow*, the court should have considered whether the national prominence of and public interest in South Dakota's prosecution of Dennis Banks affected the fact-opinion distinction. The riot at the Custer courthouse and the ensuing legal consequences involving Banks qualify as a newsworthy, controversial affair which should have been included in the totality of the circumstances test. These broader circumstances transformed fact into opinion.

In addition, other courts' growing dissatisfaction with a strict fact-opinion dichotomy, the fourth development,<sup>178</sup> was not acknowledged by the Eighth Circuit in *Janklow*. In determining that the *Newsweek* statements were actionable, the Eighth Circuit's decision reflects the court's unqualified reliance on the fact-opinion dichotomy. Once the court classified the defamatory statement as factual, it became actionable.<sup>179</sup>

Utilizing the totality of the circumstances test derived from the majority opinion in *Ollman*, the Eighth Circuit performed a painstaking analysis of whether the implication drawn from the *Newsweek* article was fact or opinion. The court found that the article in its

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172. The *Ollman* decision is a lengthy and complex one, containing approximately 70 pages with a majority opinion, two concurring opinions, three dissents, and one concurring-in-part and dissenting-in-part opinion.

173. See notes 148-50 and accompanying text *supra*.

174. See note 36 and accompanying text *supra*.

175. *Janklow*, 759 F.2d at 652.

176. See notes 151-53 and accompanying text *supra*.

177. See notes 154-55 and accompanying text *supra*.

178. See notes 156-58 and accompanying text *supra*.

179. See *Janklow*, 759 F.2d at 652. The court did not address, however, whether any type of opinion could be actionable. In *Lauderback*, the Eighth Circuit's decision reflected section 566 of the *Restatement (Second) of Torts* position that a defamatory opinion based on undisclosed, material, false facts is not constitutionally protected. See notes 81-90 and accompanying text *supra*. Since the court found no undisclosed, material, false facts in *Janklow*, the court had no need to reaffirm or question *Lauderback*. See *Janklow*, 759 F.2d at 652.

entirely intimated that it was intended to be factual in nature for the following reasons:<sup>180</sup> the article appeared in the national affairs section of *Newsweek*, a forum where the reader would expect factual information; the meaning of the accusation to which the article was susceptible was plain; and no cautionary language was evident.<sup>181</sup> The court concluded that the article would be considered factual by the ordinary reader, and it would imply that Janklow prosecuted Banks to get revenge for Banks' initiation of the tribal court proceedings.<sup>182</sup> According to the court, the implication of prosecutorial misconduct, when viewed as a factual charge, was sufficient for Janklow to bring a defamation action.<sup>183</sup>

However, the Eighth Circuit's analysis did not include the balancing test proposed by Judge Bork in *Ollman*. This omission by the court was crucial. If Judge Bork's test had been applied before determining that the article was actionable, the court would have included an evaluation of the *Newsweek* article in terms of its impact on first amendment principles. Janklow's right to protect his reputation should have been balanced against society's right to free expression. Whether the statements were fact or opinion would have been secondary to the outcome of this balancing test. Factual statements may be, in Judge Bork's words, "wholly unsuitable for trial."<sup>184</sup>

Judge Bork stated that "in order to protect a vigorous marketplace in political ideas . . . those who place themselves in a political arena must accept a degree of derogation that others need not."<sup>185</sup> Thus, before determining whether the *Newsweek* statements were actionable, the Eighth Circuit should have addressed the question of how much criticism elected officials should be required to tolerate as inherent in their public offices and the political environment. The Banks prosecution was an affair where heated discourse and accusations could be expected. In this context of a controversial political issue, factual assertions often become "rough and personal."<sup>186</sup> Protecting free speech in this setting is necessary in order to keep political discourse free and vigorous.

Janklow continued to take a prominent role in Banks' prosecution after his election as attorney general and later as governor of South Dakota. Janklow's status as an elected state official allowed him access to the media to articulate his position on the Banks' pros-

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180. *Janklow*, 759 F.2d at 652.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Ollman*, 750 F.2d at 1002 (Bork, J., concurring).

185. *Id.* (Bork, J., concurring).

186. *Id.* (Bork, J., concurring).

ecution and sentencing,<sup>187</sup> a forum less available to Banks. Moreover, Janklow's state of mind during that period would be difficult to ascertain. According to Judge Bork, to permit trial of such facts would "imperil free discussion."<sup>188</sup> None of these issues were mentioned by the Eighth Circuit in *Janklow*.

The Eighth Circuit should have considered—given the political arena and public controversy—whether allowing Janklow's claim to go to a jury would have, in the totality of the circumstances, endangered first amendment freedoms. If the court had done so, it would have affirmed the summary judgment entered by the district court. Judge Arnold, reflecting concern toward the preservation of first amendment freedoms, stated in his dissent:

It is vital to our form of government that press and citizens alike be free to discuss and, if they think fit, impugn the motives of public officials. . . . I am not blind to the fact that this kind of public discussion has its costs. . . . But the only restraint that should be imposed on this sort of discussion is self-restraint, either of the individual citizen or of the press itself. The Framers of our Constitution long ago struck the balance in favor of speech, and judges ought not to re-weigh it, however much we might desire to elevate the level of public discourse.<sup>189</sup>

As Judge Bork stated: "It is appropriate for judges . . . to take cases from juries when they are convinced that a statement ought to be protected because, among other reasons, the issue it presents is inherently unsusceptible to accurate resolution by a jury."<sup>190</sup>

## CONCLUSION

Which methodology the Eighth Circuit, en banc, will apply in *Janklow* to distinguish fact from opinion, and the weight the court will place on that distinction should more clearly delineate the Eighth Circuit's approach to the *Gertz* directive. The court should incorporate Judge Bork's approach of balancing first amendment principles into its totality of the circumstances test. Courts need the flexibility, and society the protection, that this test provides when

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187. See notes 26-27 and accompanying text *supra*. See also Brief for Appellee at 2, *Janklow*.

188. *Ollman*, 750 F.2d at 1002 (Bork, J., concurring).

189. *Janklow*, 759 F.2d at 657 (Arnold, J., concurring in part and dissenting in part).

190. *Ollman*, 750 F.2d at 1006 (Bork, J., concurring).

dealing with the complexities and sensitivities of first amendment issues.<sup>191</sup>

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191. On rehearing en banc, the Eighth Circuit reversed its earlier opinion and affirmed the district court's summary judgment. *Janklow v. Newsweek, Inc.*, No. 84-1452, slip op. at 12 (8th Cir. Apr. 10, 1986) (en banc). In a 6-3 decision, the court found the *Newsweek* article "to be opinion, absolutely protected by the First Amendment." *Id.* at 3. Judge Arnold, writing for the court, applied the *Ollman* majority's "totality of the circumstances" test in light of Judge Bork's consideration, namely "the public or political arena in which the statement is made and whether the statement implicates the values of the First Amendment." *Id.* at 5 (citing *Ollman*, 750 F.2d at 1002-05 (Bork, J., concurring)). Finding that "[f]ew other discussions of public concern could make a greater claim for First Amendment protection," the court affirmed the district court's summary judgment in favor of *Newsweek*. *Id.* at 11-12.

## APPENDIX A

*Dennis Banks's Last Stand*

[Caption Under Picture: "Banks in North Dakota (1974): Still battling a man he calls 'Custer reborn' "]

Just hours after conservative Republican George Deukmejian was sworn in as California's new governor on Jan. 3, police Sgt. Roy Ennis appeared at the front door of a house in Dixon, Calif., with a South Dakota fugitive warrant for the arrest of Dennis Banks. He was too late. Banks, the 52-year-old leader of the American Indian Movement (AIM), had fled to an Onondaga Indian reservation in upstate New York. Once again, he had escaped the clutches of his nemesis, South Dakota Gov. William Janklow, who has pursued him implacably for nearly nine years. Seated on a narrow bed in an Onondaga family's home, where he has taken refuge, Banks recently vowed that he would never surrender to Janklow. "He's anti-Indian—Custer reborn," Banks told *Newsweek* national correspondent Martin Kasindorf.

Banks's escape was the latest chapter in a bizarre test of wills and wiles that began in the early 1970s. At that time, AIM was escalating its efforts to improve the lot of native Americans. In 1972 Banks confronted Julie Nixon Eisenhower at the Republican convention in Miami with a list of demands for Indian housing and education. A few months later, he was on hand when a band of Indians occupied the Bureau of Indian Affairs (BIA) in Washington. In 1973 he was involved in a riot at the Custer, S.D., courthouse during which several policemen were injured. And he helped lead the 71-day takeover of Wounded Knee, S.D.

Along the way, Banks made a dangerous enemy—William Janklow. Their feud started in 1974, when Banks brought charges against Janklow in a tribal court for assault. A 15-year-old Indian girl who baby-sat for Janklow's children had claimed that he raped her in 1969. Federal officials found insufficient evidence to prosecute, but Banks persuaded the Rosebud Sioux Chiefs to reopen the case under tribal law. Janklow, who was running for election as state attorney general at the time refused to appear for the trial. But the tribal court found "probable cause" to believe the charges and barred Janklow from practicing law on the reservation. Eight months later Janklow—who had won his election despite the messy publicity—was prosecuting Banks. And his case—based on the 1973 Custer riot—was successful. Found guilty of riot and assault without intent to kill, Banks jumped bail before sentencing.

The FBI traced Banks to San Francisco in 1976, and Janklow swore out a state fugitive warrant. But Jane Fonda, Marlon Brando and a host of other liberals led a campaign to save him. Kunstler, collected 1.4 million signatures in a worldwide petition drive to persuade former Gov. Jerry Brown not to comply with the extradition request.

As a compromise, Brown's legal-affairs director offered to jail the fugitive in California for up to 15 years. Banks quickly agreed, but it was not enough for Janklow. "All the little people who followed Dennis Banks that day in Custer faced justice," Janklow says. "One of the key things people like Dennis Banks complain about is the dual standards of justice in this country—and if we allow him to go free because he has friends like Jerry Brown and Marlon Brando, we would be playing right into the accusations of duality." Determined that Banks face justice too, he took his case to the California Supreme Court, which ruled that the matter was entirely Brown's decision. Brown in turn refused extradition after his legal staff warned that Banks's life might be in danger if he returned to South Dakota.

A New Life: Safe at last, Banks began a new life as a lawabiding citizen. He taught courses at Stanford, became chancellor of tiny Deganawidah-Quetzalcoatl University in Davis and he became a favorite on the establishment lecture circuit. Janklow, meanwhile, was elected governor of South Dakota in 1978—and picked a public battle with Governor Brown over extradition. At one point, he spread a story that he had offered "prison or California" to 93 convicted felons in his state. "We kind of feel there's a beacon in California," Janklow said. "Give us your felons, your pickpockets, your crooked masses yearning to be free."

The beacon dimmed for Banks last November. Throughout the California gubernatorial race, Deukmejian vowed that if elected he would not continue to shelter Banks. When Deukmejian pulled off an upset victory, Banks's supporters were desperate but still hopeful. They appealed to his Armenian ancestry, hoping to arouse sympathy for oppressed minorities. Their answer came with Sergeant Ennis's warrant.

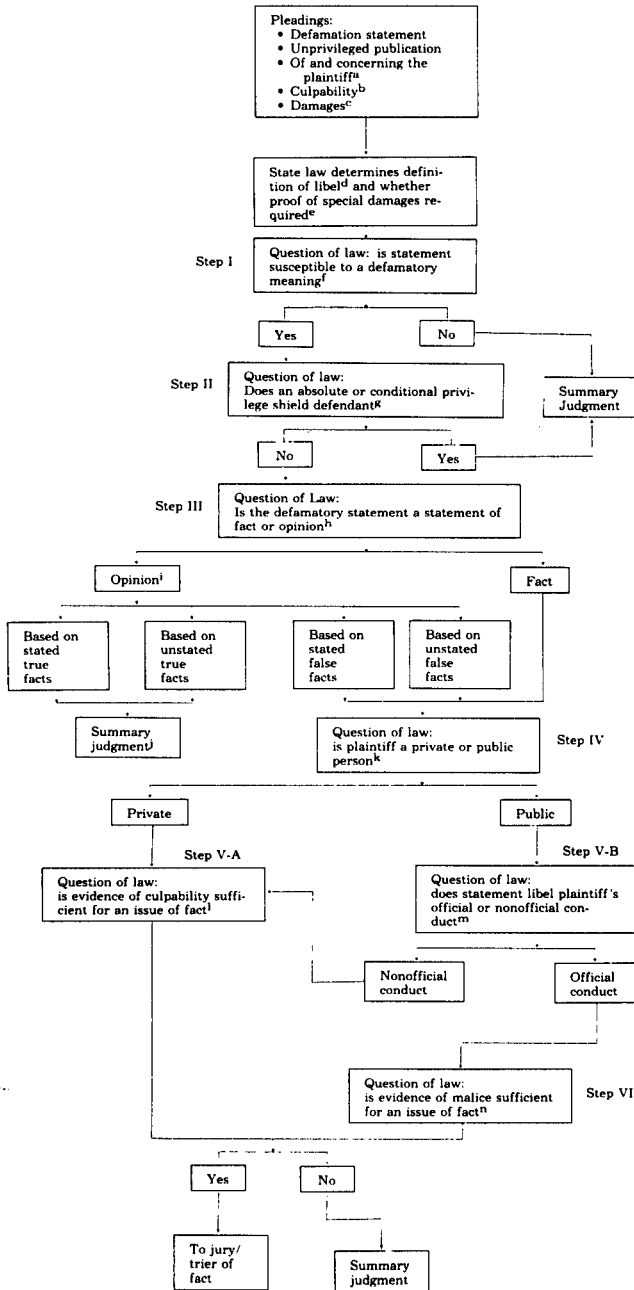
So far, New York Gov. Mario Cuomo has said nothing. But as soon as Janklow presents Cuomo with an extradition request, Kunstler hopes to work out a deal, either for asylum in New York or a quick return to South Dakota for sentencing and then back to New York to serve a short term. The Onondagas have told Banks that they will try to protect him, but "rather than risk [their] blood," he says, "I would leave." For where? One option is Central America.

Another might be to accept Brando's offer of sanctuary on his secluded private island near Tahiti. But Banks has turned that down. "Even though I'm hounded from one end of this country to the other," he says, "I will never abandon it completely."

Leslie & Kasindorf, *Dennis Bank's Last Stand*, NEWSWEEK, Feb. 21, 1983, at —.

APPENDIX B

LIBEL ACTION: MEDIA DEFENDANT



- a. RESTATEMENT (SECOND) OF TORTS § 558 (1977).
- b. See notes 1, n and steps V-A, VI *infra*.
- c. States can base damage awards on elements other than injury to reputation, such as personal humiliation and mental anguish and suffering. *Gertz*, 418 U.S. at 350; *accord* *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976).
- d. See note 54 and accompanying text *supra*.
- e. Some states distinguish between libel *per quod* and libel *per se*. R. SACK, *supra* note 17, at 94-95. If the statement requires the proof of extrinsic facts to be libelous, it is termed libel *per quod*. *Id.* Libel, the defamatory meaning of which is apparent on the face of the statement, is libel *per se*. *Id.* In most jurisdictions making the distinction, libel *per quod* is not actionable unless special damages are proved by the plaintiff. See RESTATEMENT (SECOND) OF TORTS 86-89 (Tent. Draft No. 11, 1965) (containing a survey of the various states' positions).
- Under South Dakota law an action for libel cannot be maintained in the absence of statements which are libelous *per se* without particular allegations of special damages caused by the statements. *Glover v. National Broadcasting Co.*, 594 F.2d 715, 717 (8th Cir. 1979).
- f. See *Davis v. Ross*, 754 F.2d 80, 82 (2d Cir. 1985); *Church of Scientology v. Cazares*, 638 F.2d 1272, 1286 (5th Cir. 1981); *Glover*, 594 F.2d at 717; *Cibenko v. Worth Publishers*, 510 F. Supp. 761, 76 (D.N.J. 1981); *Beckman v. Dunn*, 276 Pa. Super. 527, \_\_\_, 419 A.2d 583, 586 (1980). See also RESTATEMENT (SECOND) OF TORTS § 614 comment b (1977).
- g. See RESTATEMENT (SECOND) OF TORTS §§ 583-612 (1977). Courts must refer to both common law and state statutes to ascertain if a privilege shields the defendant. See generally R. SACK, *supra* note 17, at 267-339.
- h. See *Ross*, 754 F.2d at 85; *Ollman*, 750 F.2d at 978; *Lauderback*, 741 F.2d at 195; *Information Control Corp.*, 611 F.2d at 783; RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977). See generally R. SACK, *supra* note 17, at 153-854.
- i. See notes 81-91 and accompanying text *supra*.
- j. See notes 81-91 and accompanying text *supra*.
- k. See R. SACK, *supra* note 17, at 11-38; RESTATEMENT (SECOND) OF TORTS §§ 580A, 580B (1977).
- l. *Gertz*, 418 U.S. at 347; see RESTATEMENT (SECOND) OF TORTS § 580B (1977).
- m. See RESTATEMENT (SECOND) OF TORTS § 580B (1977). See generally Fenner & Foley, *Media Libel: Federal and Nebraska Law*, 12 CREIGHTON L. REV. 149 (1978).
- n. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964); *Brown v. Herald Co.*, 698 F.2d 949, 951 (8th Cir. 1983); *Walker v. Pulitzer Publishing*, 394 F.2d 800, 806 (8th Cir. 1968). See also *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499-502 (1984) (standard of review).