The Fact/Opinion Distinction: An Analysis of the Subjectivity of Language and Law

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"There's glory for you!" [Humpty Dumpty exclaimed.]
"I don't know what you mean by 'glory,'" Alice said.
Humpty Dumpty smiled contemptuously. "Of course you
don't - till I tell you. I meant, there's a nice knock-down
argument for you!"
"But 'glory' doesn't mean, a nice knock-down argument," Alice objected.
"When I use a word," Humpty Dumpty said, in rather a
scornful tone, "it means just what I chose it to mean -
neither more nor less."
"The question is," said Alice, "whether you can make words
mean so many different things."
"The question is," said Humpty Dumpty, "which is to be
master - that's all."

In *Gertz v. Robert Welch, Inc.*, the Supreme Court stated
that the first amendment required a distinction between state-
ments of fact and statements of opinion. Whether a state-
ment is fact or opinion turns upon the use of language.
The inherent indeterminacy of words and the subjectivity of inter-
pretation makes the fact/opinion distinction difficult. This
Comment will address the impracticability of separating fact
from opinion. Part I will set forth the development of the
fact/opinion distinction. Part II will examine the continuum
between fact and opinion. Part III will analyze the use of
words in defining fact and opinion. Finally, Part IV will look
at how the law, that is the separation of fact and opinion, is
subject to various interpretative approaches.

3. U.S. Const. amend. I provides: "Congress shall make no law respecting an
establishment of religion, or prohibiting the free exercise thereof; or abridging the free-
dom of speech, or of the press; or the right of the people peaceably to assemble, and to
petition the Government for a redress of grievances."
5. See infra notes 72-88 and accompanying text.
6. See infra notes 72-131 and accompanying text.
I. THE DEVELOPMENT OF THE FACT/OPIINION DISTINCTION

A. Theory

1. The Marketplace

Underlying the theory that "there is no such thing as a false idea" is the purpose of free speech- the search for truth. There are three premises upon which this principle is based.

The first, commonly associated with John Stuart Mill, is that one receives a clearer perception of truth if it is the result of a "collision with error." One can never be sure that an opinion which we seek to suppress is false. To assume otherwise is to assume infallibility. Hence, an individual who seeks truth must consider opposing opinions to sift the true from the false. The collision of adverse opinions is necessary in the search for truth.

Second, even assuming absolute truth can be found, the political state may not be the appropriate body to make such a determination. In a democracy, popular views may be deemed true without appropriate reflection and analysis. Furthermore, there is nothing to suggest that decisions by the political state "are always or even generally correct."

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8. John Stuart Mill was a 19th century English philosopher and political economist. His book, On Liberty, converted the idea of liberty into a philosophically respectable doctrine, and put it in its most comprehensive, extensive, and systematic form, the form in which it is generally known and accepted today. On Liberty is recommended reading for many university students of political science.
10. Id., See also Emerson, supra note 7.
11. J. Mill, supra note 9. See also Emerson, supra note 7.
13. Id. Toward the possibility of supressing truth, Mill felt no one is justified in controlling the expression of opinion. "If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind." Id. at 76.
15. Schauer, supra note 7, at 270.
Third, determinations of truth and belief belong to the individual.\textsuperscript{17} The political state does not have any authority to determine the truth or falsity of a belief: "[A]ll evidence bearing on such determinations must be available to the individual without any intervening 'preselection' by the state on the basis of truth or falsity."\textsuperscript{18}

These are the premises of the marketplace theory, in which the "consuming public in the marketplace of ideas,"\textsuperscript{19} ultimately determines which beliefs are true.\textsuperscript{20} Under this theory, "false ideas need not be suppressed, for the operation of the market ultimately will reject ideas that are in fact false."\textsuperscript{21}

2. Meiklejohn

The marketplace theory views the search for truth as the underlying rationale for the freedom of speech.\textsuperscript{22} Of equal importance is "unrestricted public discussion as a corollary to democratic theory . . . ."\textsuperscript{23} Intelligent and well-informed decision-making by the public is essential to self-government.\textsuperscript{24} This is the Meiklejohn theory of the first amendment.\textsuperscript{25}

\begin{itemize}
\item[17.] Schauer, \textit{supra} note 7, at 270.

"The government has no authority to render religious associations either legitimate or illegitimate any more than it has this authority in regard to art and science. These matters are simply not within its competence as defined by a just constitution. Rather, given the principles of justice, the state must be understood as the association consisting of equal citizens. It does not concern itself with philosophical and religious doctrine but regulates individuals' pursuit of their moral and spiritual interests in accordance with principles to which they themselves would agree in an initial situation of equality."

\textit{Id.} (quoting J. \textsc{Rawls}, \textit{A Theory of Justice} 212 (1971)).

\item[19.] Schauer, \textit{supra} note 7, at 271.
\item[20.] \textit{Id.}

\item[21.] \textit{Id.} at 271-72. The marketplace theory is not without criticism. The marketplace theory may not be particularly accurate given the structure of the market for the competition of ideas. It assumes a perfectly competitive market. This assumption is seriously questionable in light of the monopoly power which the media utilizes to selectively disseminate news to the public.

\item[22.] \textit{See supra} note 7 and accompanying text.


\item[24.] A. \textsc{Meiklejohn}, \textit{Political Freedom} 27 (1960).

\item[25.] \textit{Id.} at 24; Meiklejohn, \textit{The First Amendment is an Absolute}, 1961 \textit{Sup. Ct. Rev.} 245; Schauer, \textit{supra} note 7, at 272. For elaboration, discussion, and criticism of the
Meiklejohn's theory functions on both a political and personal level. Politically, free speech is necessary in a democratic form of government. The people govern. The freedom to form and communicate one's own opinion is a must in the forming of individual and common judgments for the good of all. Personally, freedom of expression in the areas of human interest, that is, art, philosophy, science, etc., is necessary to make knowledgeable decisions regarding public interests. Under Meiklejohn's theory, the value of the first amendment is the communication of ideas as it is under marketplace theory.

B. History

The distinction between fact and opinion was first made under the common law privilege of fair comment. The privilege of fair comment shielded an individual from liability if the alleged defamatory statements were pure expressions of opinion on matters of public interest. Courts, however, were unable to agree on how the distinction between fact and opin-

Meiklejohn theory, see Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 HARV. L. REV. 1 (1965); Emerson, supra note 7, at 882-84.

26. A. MEIKLEJOHN, supra note 24; Schauer, supra note 7, at 272-73.

27. The premise is that a democratic society is one in which "the people hold the ruling power either directly or through elected representatives; ruled by the ruled." WEBSTER'S NEW WORLD DICTIONARY 375 (2d. ed. 1976).

28. Emerson, supra note 7, at 883. "[T]he right of all members of society to form their own beliefs and communicate them freely to others must be regarded as an essential principle of a democratically-organized society." Id. See also A. MEIKLEJOHN, supra note 24.

29. Emerson, supra note 7, at 879-81; Schauer, supra note 7, at 273.

30. Schauer, supra note 7, at 273. Freedom to express opinion and belief allow an individual to make intelligent and knowledgeable decisions regarding his society and state. The value of speech is in the information communicated. Id.


32. Carman, supra note 31, at 11; Note, supra note 31, at 1819. There are five elements to the privilege of fair comment: "(1) the allegedly defamatory statement must be opinion, not fact; (2) that opinion must be based on truly stated facts; (3) the opinion cannot be an overly personal attack against the plaintiff; (4) the protected opinion must relate to a matter of public interest; and (5) the opinion must not be stated with malice." Carman, supra note 31, at 11. See RESTATEMENT (SECOND) OF TORTS § 566 comment b (1977); RESTATEMENT OF TORTS §§ 606-610 (1938).
ion should be made. Some courts simply refused to make the distinction. Although the fact/opinion distinction remained the province of the fair comment privilege for most of American history. It was not until 1964, in the landmark case of New York Times v. Sullivan, that first amendment protection was extended to the area of defamation law. New York Times protected criticisms of public officials acting in their official capacity. The Court held that a public official could not recover damages for defamatory falsehoods concerning official conduct unless the


34. In Pearson v. Fairbanks Publishing Co., 413 P.2d 711 (Ala. 1966), the Alaska Supreme Court rejected the fact-opinion distinction. In Pearson, the Fairbanks Daily News-Miner published an editorial attacking syndicated columnist Drew Pearson. The day before, the News-Miner had published an article Pearson had written about Alaska's statehood effort. Id. at 712. The editorial stated that one of Pearson's colleagues had described him as the "Garbage Man of the Fourth Estate," and a subsequent editorial stated that the News-Miner was discontinuing Pearson's column because the newspaper "did not wish to distribute garbage." Id. The Alaska Supreme Court held that the challenged statements in the editorials were false statements of fact, but concluded that they should be protected. Id. at 713. The court rejected the majority rule due to the tenuousness of the fact-opinion distinction and extended the fair comment privilege to non-malicious misstatements of fact. Id. at 713-14.

35. It was not until the first part of the 20th century that the first amendment guarantee of free speech was held applicable to the states through the due process clause of the fourteenth amendment. Schneider v. State, 308 U.S. 147, 160 (1939); Gitlow v. New York, 268 U.S. 652, 666 (1925).

Then in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), the Court found libelous statements to be outside the protection afforded by the first amendment. The Court stated:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the libelous. Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72. See also Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (libelous utterances not within the area of constitutionally protected speech).

37. Id. at 282-83.
38. Id. In New York Times v. Sullivan, a Commissioner of the City of Montgomery, Alabama, alleged that he had been libeled by a newspaper advertisement, which included statements, some of which were false, about police action allegedly directed against participants in a civil rights demonstration and a leader of the civil rights movement. He claimed the statements referred to him because his duties as commissioner included supervising the police department. Id. at 256-58.
falsehoods were uttered with "actual malice," - knowledge or reckless disregard of falsity.\(^{39}\)

Ten years later in \textit{Gertz v. Robert Welch, Inc.},\(^{40}\) the Supreme Court raised the fact/opinion distinction to a constitutional level.\(^{41}\) 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. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited robust, and wide-open" debate on public issues.\(^{42}\)

The Court, drawing a distinction between fact and opinion, did not apply the distinction, but rather decided the case on other grounds.\(^{43}\) Gertz claimed he had been libeled by a publication which labeled him a "Leninist" and a "Communist-fronter."\(^{44}\) The Court, noting their defamatory nature, did not address whether the statements were fact or opinion.\(^{45}\) Instead, the Court found Gertz to be a private figure, held the \textit{New York Times} standard inapplicable, and remanded the case for a new trial.\(^{46}\)

The first case in which the United States Supreme Court expressly addressed the fact/opinion distinction was \textit{Greenbelt Cooperative Publishing Assoc. v. Bresler}.\(^{47}\) Bresler was a real estate developer who sought to obtain zoning variances from the Greenbelt City Council.\(^{48}\) The city council was in the process of attempting to acquire land, owned by Bresler, to build

\begin{itemize}
\item \(^{39}\) \textit{Id.} at 279-80.
\item \(^{40}\) 418 U.S. 323 (1974).
\item \(^{41}\) In \textit{New York Times}, the Supreme Court hinted that there might be a constitutional distinction between statements of fact and statements of opinion. \textit{New York Times}, 376 U.S. at 292 n.30.
\item \(^{43}\) Rather than pursuing the fact opinion distinction, the Court examined the extent of a publisher's constitutional privilege against liability for the defamation of a private figure. \textit{Gertz}, 418 U.S. at 325.
\item \(^{44}\) \textit{Id.} at 326.
\item \(^{45}\) \textit{Id.} at 331 n.4.
\item \(^{46}\) \textit{Id.} at 352.
\item \(^{47}\) 398 U.S. 6 (1970).
\item \(^{48}\) \textit{Id.} at 7.
\end{itemize}
a new school. Negotiations between the two parties became heated and the term "blackmail" was used to characterize Bresler's bargaining tactics. Bresler sued for libel after the Greenbelt News Review printed these remarks. The Court, while noting the word could be read as charging the crime of blackmail, stated that this was not a reasonable reading of the context of the article. The Court held that the use of the word "blackmail" was "no more than rhetorical hyperbole" and not actionable.

In National Assoc. of Letter Carriers v. Austin, (Old Dominion) decided the same day as Gertz, the Court followed Greenbelt in finding that the word "scab" and its definition were used in a "loose, figurative sense," and were statements of opinion not of fact. In Old Dominion, a union newsletter had been distributed which described individuals who refused to join the union as "scabs." A "scab" was defined as "a traitor to his God, his country, his family and his class." A defamation action was brought against the union. Although the case was decided upon the basis of federal labor law, the Court termed the definition of scab as "merely rhetorical hyperbole" and thus protected.

49. Id.
50. Id.
51. Id. at 8.
52. Id. at 7-8.
53. Id. at 14 (footnote omitted). The Court stated:

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

Id.
54. Id.
56. Id. at 284.
57. Id. at 267.
58. Id. at 268.
59. Id.
60. Id. at 285-86. The Court stated:

It is similarly impossible to believe that any reader . . . would have understood the newsletter to be charging the appellees with committing the criminal offense
The Supreme Court has raised the fact/opinion distinction to a constitutional level but has failed to define fact or opinion. Assuming that the completion of such a task is possible, it is not likely. The Supreme Court recently refused to examine the issue. Lower courts are left to formulate their own theories of fact and opinion.

II. The Fact/Opinion Continuum

Statements cannot be divided into rigid categories of fact and opinion. Rather a continuum exists: "Quite often, the factual word used to describe a factual object or occurrence will result in a statement containing some belief or opinion." A "fact" in its most basic form refers to a tangible object. The words may be compared to the object to determine the relation between the two. The statement that a person is holding a pen in hand may be deemed a fact because one can presumably observe whether in fact a pen is in that person's hand.

At the other end of the spectrum is opinion. Opinion cannot be compared to a physical object or to accepted criteria in order to determine truth or falsity. Such statements may concern the existence of God or the nature of knowledge.

Between the two extremes of fact and opinion is an area where fact and opinion are inseparably meshed - an area where statements involve varying degrees of inference and

of treason . . . [The] "definition of a scab" is merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refused to join.

Id. (footnote omitted).

61. See Ollman v. Evans, 750 F.2d 970, 975 (D.C. Cir. 1984) (noting that Gertz provided little guidance as to how to distinguish between fact and opinion).
63. See generally Note, supra note 31 for a discussion of how courts have dealt with the fact/opinion distinction.
64. Schauer, supra note 7, at 276-81.
65. Id. at 279 n.64.
66. Id. at 277.
68. Schauer, supra note 7, at 278.
value judgment. Indeed, "[m]ost speech will contain some elements of fact, some of inference, some of emotion, and some of value judgment." For example, assume a person observes a fellow classmate reading late on a Friday evening. The person then makes the statement, "John Doe is a diligent student." This statement is neither purely fact nor purely opinion. The fact that the student was reading late on a Friday evening may be verified. However, the person has inferred from the fact of reading that the student was studying. The statement now includes some degree of opinion or belief. The student, in fact, could have been reading the latest science fiction best seller merely for pleasure. The statement may also reflect the person's emotions toward, and judgments of, that student. Rather than characterizing the student as diligent, the observer could have described the student as "an egghead." Both statements would have originated from the same verifiable fact of reading, however, both are inseparable from the observer's opinion of that student.

III. THE USE OF WORDS

A. The Inherent Indeterminacy of Words

The inherent indeterminacy of words makes any distinction between fact and opinion a subjective determination. If I refer to someone as an alcoholic, I should be referring to a relatively identifiable illness, although there is some amount of inference in diagnosing the illness from the directly observable symptoms. But if instead I use the word "drunk," I may have the same object in mind, as well as the same inferences, but I have added a degree of negative personal judgment. It becomes more of a mixed statement of fact and belief. If I refer to someone as a "theoretical academician," I am probably being complimentary, but if I call that same person an "egghead" the meaning changes substantially. So it also is with a great deal of speech that cannot be easily pigeonholed as fact or opinion. Id. See also Hallen, supra note 31, at 53 (question of what should be called fact and opinion is difficult).
1. Words Are Artificial Creations

Words are artificial creations designed to facilitate communication. Communication would be impossible if we each spoke a separate language. As a result words are given normative meanings. A commonly accepted meaning of a word allows the speaker and listener to picture the same image. Thus the word C-A-T causes the speaker and the listener to envision a four-legged, furry animal of the feline species.

Words, however, may be subject to various and changing meanings. For example, consider the word “bastard.” Literally the word bastard means a child born out of wedlock. Colloquially it may mean an individual who is regarded with contempt or hatred. When used literally, the term suggests a fact. When used colloquially, the term becomes opinion - a value judgment. As a result, when an individual is referred to as a “bastard” it may be interpreted as fact or as opinion.

2. The Ambiguity of Words

The meanings attributed to words are the result of a dynamic interpretive process between text and reader or speaker and listener. In every conversation, ambiguous words are engaged by the speaker. Although people attempt to use words intelligibly, the words used are redefined by the variety of contexts in which they are used and by the variety of experiences people attempt to communicate. The possibilities of

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73. Schauer, supra note 7, at 282.
74. Id.
75. Id.
76. Id.
77. Williams, supra note 72, at 180.
78. WEBSTER'S NEW WORLD DICTIONARY 118 (2d ed. 1976).
79. Id.
80. A fact is the “state of things as they are; reality; actuality; truth.” Id. at 501.
81. An opinion is a “belief not based on absolute certainty or positive knowledge but on what seems true, valid, or probable to one's own mind; judgment.” Id. at 997.
82. Note, supra note 31, at 1825. See generally WAISMAN, supra note 67 (the way we see a fact - i.e., what we emphasize and what we disregard - is our work).
83. See supra notes 77-82 and accompanying text.
84. White, Law as Language: Reading Law and Reading Literature, 60 TEX. L. REV. 415, 426 (1982).
85. Id. at 426.
human experiences, and thus the possible meanings of a word, are unlimited.\footnote{Id. at 420.}

The words “fact” and “opinion” are also ambiguous.\footnote{WAisman, supra note 67, at 59.} In theory, it is easy to label a statement as either fact or opinion. However, when one focuses upon “what is fact” or “what is opinion,” the meaning tends to fade away.\footnote{Id. at 420.} A statement is either a fact or opinion depending upon how we interpret the words, not because of any set definition.

\section*{B. The First Amendment Protects Use of Words}

The first amendment precludes the government, including the courts, from restricting expression “because of its message, its ideas, its subject matter or its content.”\footnote{New York Times v. Sullivan, 376 U.S. 254, 270 (1964).} Words are the vital medium through which we express ourselves. The fact/opinion distinction inevitably restricts an individual’s use of words and thus his freedom of expression.\footnote{For example, in Cohen v. California, 403 U.S. 15 (1971), the Supreme Court recognized the existence of opinion, emotion, and judgment within the words of protest “Fuck the Draft.” These words on Cohen’s jacket clearly were not intended or taken in their most literal sense. The choice between “Fuck the Draft” and “I disagree with the policies of the Selective Service System” is a choice that conveyed part of Cohen’s meaning and constituted expression within the protections of the first amendment. Cohen is relevant here because it recognizes that the choice of words itself may be part of the message.}

Any distinction between fact and opinion must inevitably be based upon someone’s perception of what is fact and what is opinion.\footnote{The terms fact or opinion do not have any one objective meaning. Rather the meaning given to the terms fact and opinion is the result of how the individual defining the terms perceives them. Dworkin, Law as Interpretation, 60 Tex. L. Rev. 527, 533-34 (1982).} To prevent arbitrary distinctions by judges and juries, most courts have imposed a common usage or meaning standard.\footnote{See, e.g., Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984).} The common usage or meaning of a word “is a consensus, a linguistic majority rule.”\footnote{Schauer, supra note 7, at 282.} Most words have central “core” meanings along with a variety of “fringe” meanings which may or may not have been accepted by the
Subjecting the use of words to the majority's consensus of what is the common use or meaning of a word violates the tradition of the first amendment. The first amendment protects expression, and thus, the use of words, from majority control.

Subjecting the use of words to majority control would inhibit political argument, central to first amendment protection, and the communication of novel ideas and concepts. Often, in order to make a strong political statement, words which elicit negative emotions may be used. This may involve the distortion of the common use or meaning of a word. For instance, the words "fascist" and "Nazi" may be used to denounce conservative philosophies. Likewise, the words "socialist" or "communist" may be used to denounce philosophies to the left of one's own philosophy. Indeed, individuals often tend to use the words "socialist" or "communist" to refer to any disapproved change.

The communication of a new or unconventional idea may also distort the common use or meaning of a word. Language describes "existing objects, ideas, feelings, and concepts." Words are often used in a non-traditional sense to express that which is new or unconventional. Literature often uses personification, simile, and metaphor to "break through the boundaries of ordinary language."

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94. Id. See generally Williams, supra note 72 for a discussion of central and fringe meanings of words.

95. The first amendment may be interpreted as protecting the use of language from majority control. See Kalven, "Uninhibited, Robust, and Wide-Open" - A Note on Free Speech and the Warren Court, 67 Mich. L. Rev. 289, 294 (1968).

96. Schauer, supra note 7, at 284. "Restricting the use of language may not only constrain the speaker's choice of language; it also may prevent him from effectively communicating original ideas and arguments." Id.

97. Id. at 284-85.

98. Id.

99. Schauer, supra note 7, at 284.

100. Id.

101. Id.


103. Schauer, supra note 7, at 285.

104. Id. at 283.

105. Id.

106. Id. at 284 n.81.
IV. LAW AS LITERATURE

Even if the amorphous quality of a word is considered in drawing a distinction between fact and opinion, the necessary interpretation of the "law" will result in a subjective view of what constitutes fact and opinion. Law is like literature; it must be interpreted. The interpretation of law reflects the individual judge's philosophies.

A. Literature

The interpretation of literature seeks to explicate the meaning of a text. A text may be subject to more than one interpretation - more than one meaning. No one interpretation may be deemed "correct," however, the interpretation one deems the "best" will depend upon individual beliefs as to what is good in literature. For example, an archetypist will view a piece of literature "better" because of the universal human reactions it elicits. Whereas a formalist will view a piece of literature "better" because of the form in the literary work, that is, its shape and effect.

107. See infra notes 114-31 and accompanying text.
108. See Dworkin, supra note 91, at 545.
110. Id.
111. Dworkin, supra note 91.

[It is with the relationship of literary art to "some very deep chord" in human nature that mythological criticism deals. The myth critic is concerned to seek out those mysterious elements that inform certain literary marks, and that elicit, with almost uncanny force, dramatic and universal human reactions. He wishes to discover how it is that certain works of literature, usually those that have become, or promise to become, "classics," image a kind of reality to which readers give perennial response - while other works, seemingly as well constructed, and even some forms of reality, leave us cold. Speaking figuratively, the myth critic studies in depth the "wooden hawks" of great literature: the so-called archetypes or archetypal patterns that the writer has drawn forward along the tensed structural wires of his masterpiece and that vibrate in such a way that a sympathetic resonance is started deep within the reader.]

Id. at 116.
113. Id. at 45.

As its name suggests, "formalistic" criticism has for its sole object the discovery and explanation of form in the literary work. This approach assumes the autonomy of the work itself and thus the relative unimportance of extraliterary considerations - the author's life; his times; sociological, political, economic, or psychological implications . . . . The heart of the matter for the formalist critic is
B. Law

Law, like literature, is subject to various interpretative approaches. Unlike literature, however, interpretations of the law must carry authority. Legal disputes must be resolved on one side or another "even when there may be no good reason to prefer one interpretation over conflicting ones." The conflicting approaches to the interpretation of law have been the subject of ongoing debate among legal scholars.

The central issue of the debate is whether texts can have any determinable and objective meaning. "The law," it is said, "must be understood to have objective meaning, because objectivity is the only pretense that judges can offer in support of their claim to resolve conflicts on a basis other than their own will or the will of the politically powerful."

The debate is divided by those who believe legal interpretation is or should be constrained by what is "in the text," that is, the positivists, and those who believe legal interpretations are rationalizations of the judge's political and personal

quite simply: What is the literary work, what are its shape and effect, and how are these achieved? All relevant answers to these questions ought to come from the text itself.

Id. (emphasis in original).

114. Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739 (1982). "Adjudication is interpretation: Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text." Id.


There are . . . special problems attending the interpretation of legal texts, or the interpretation of texts from a legal point of view. Interpretations of statutes and legal documents have to carry authority in a way that a literary critics' interpretation of a poem or a bystander's interpretation of a remark in the street do not. Judges have to resolve ambiguities in statutes on one side or another . . . .

Id.

116. Id.

117. See generally Dworkin, supra note 91; Fish, Working on the Chain Gang: Interpretation in Law and Literature, 60 TEX. L. REV. 551 (1982); Fiss, supra note 114; Graff, supra note 115; Levison, Law as Literature, 60 TEX. L. REV. 373 (1982); Nelson, Standards of Criticism, 60 TEX. L. REV. 447 (1982); White, The Text, Interpretation and Critical Standards, 60 TEX. L. REV. 569 (1982); White, supra note 84 (can texts have any determinable and objective meaning).

118. White, supra note 84, at 416.

beliefs, that is, the realists. It is a division of the purely objective and the purely subjective.

Legal positivists believe that the law is wholly descriptive—that legal propositions are in fact "pieces of history." Objective, in their view, is obtained through the constraining nature of the text. Judge interpretations are limited by the text. Their interpretations are only reflections of what the law is and not what they think it should be.

Realists, on the other hand, make no attempt to achieve objectivity. Realists accept the subjective nature of the law. Judges are free to interpret the law according to their judicial philosophies.

Other legal scholars propose that the interpretative process is transformed from a subjective to an objective process through constraints. Some scholars believe that judicial interpretation is constrained by precedent; others feel judicial interpretation is constrained by morality; still others argue community acceptance acts as an interpretive constraint.

120. Fish, supra note 117, at 551.
121. Id. at 551-52.
123. Id.
124. Fish, supra note 117, at 551.
125. Id.
126. See infra notes 127-29 and accompanying text.
127. See Dworkin, supra note 91. Dworkin draws an analogy between precedent and the imagined literary example of a novel written not by a single author but by a group of co-authors, each of whom is responsible for a separate chapter. The members of the group draw lots. The lowest number writes the opening chapter of a novel, which he or she then sends to the next number who adds a chapter, with the understanding that he is adding a chapter to that novel rather than beginning a new one. Then he sends the two chapters to the next number, and so on. Now every novelist but the first has the dual responsibilities of interpreting and creating, because each must read all that has gone before in order to establish, in the interpretivist sense, what the novel so far created is. He or she must decide what the characters are "really" like; what motives in fact guide them; what the point or theme of the developing novel is; how far some literary device or figure, consciously or unconsciously used, contributes to these, and whether it should be extended or refined or trimmed or dropped in order to send the novel further in one direction rather than another. Id. at 541-42.
128. Fiss, supra note 114, at 751. "Interpretation does not require agreement or consensus, nor does the objective character of legal interpretation arise from agreement. What is being embodied in that text, not what individual people believe to be the good or right." Id.
129. Fiss, supra note 114.
Undermining all views of legal interpretations is the view “that for any text there are any number of possible meanings and the interpreter creates a meaning by choosing one.” This “nihilism” is also present in literary criticism and is referred to as “deconstructionism.”

Which philosophy of legal interpretation is “best?” The answer to this question will depend upon each individual’s own judicial philosophies.

C. Ollman v. Evans

The fact/opinion distinction is subject to a variety of interpretations. Each determination will reflect the individual’s view of what is fact and what is opinion.

Consider the lesson of Ollman v. Evans. Bertell Ollman, an avowed Marxist, was a professor of political science at New York University. In March 1978, he was nominated by a departmental search committee to head the Department of Government and Politics at the University of Maryland. The committee’s recommendation was approved by the provost of the University and the chancellor of the College Park campus, but was eventually overruled by the University’s president.

The nomination proved to be highly controversial. In the midst of this controversy Rowland Evans and Robert Novak, nationally syndicated columnists, published a column titled “The Marxist Professor’s Intentions.” The column asserted that Ollman’s “candid writings” revealed a desire to “use the

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130. Id. at 762.
132. 750 F.2d 970 (D.C. Cir. 1984).
133. Id. at 971-72.
134. Id. at 971.
classroom as an instrument for preparing what [Ollman] calls the 'revolution.'” The column went on to add that a political scientist in a major eastern university, whose scholarship and reputation as a liberal were well known, had stated that "Ollman [had] no status within the profession, but [was] a pure and simple activist.”

Ollman brought a defamation action against Evans and Novak. The complaint alleged that several of the statements in the column were false and defamatory and had resulted in Ollman being denied the chairmanship. The district court granted Evans’ and Novak’s motion for summary judgment, concluding that the column simply reflected the columnists’ opinions and interpretations of Ollman’s writings.

In a plurality opinion, the court of appeals held the statements to be constitutionally protected expressions of opinion. The decision, however, produced three differing approaches to the fact/opinion distinction and resulted in disagreement as to whether the statements regarding Ollman’s alleged desire to use the classroom in preparation of revolution, and lack of status within his profession, were fact or opinion.

Judge Starr, in the opinion for the court, set forth a four-factor test to separate fact from opinion and held the statements to be opinion. Judge Bork, concurring, felt that rigid categories of fact and opinion were inadequate and that the totality of the circumstances should be considered to determine whether the statements in question deserved first amend-

135. Id. at 972.
136. Id. at 989.
137. Id. at 973 n.1.
138. Id. at 973. The district court expressly held that the expressions of opinion implied no “underlying false or defamatory statements of fact.” Ollman v. Evans, 479 F. Supp. 292, 294 (D.D.C. 1979).
139. Ollman, 750 F.2d at 987, 989-90. The court analyzed three challenged statements: the statement that “Ollman is an outspoken proponent of political Marxism;” the statements from and about his writings; and the statement that “Ollman has no status within the profession but is a pure and simple activist.” Id. at 987-89.
140. See infra notes 141-49 and accompanying text.
141. 750 F.2d at 979. The first step in the test involves an analysis of the common usage or meaning of the specified language of the challenged statement itself. Second, the court considers the statement’s verifiability. Third, moving from the challenged language itself, the court considers the full context of the statement. Finally, the court analyzes the broader context or setting in which the statement appears. Id.
ment protection.\footnote{Id. at 997.} He found the statements in *Olman* to be opinion.\footnote{Id. at 1010.} Judge Robinson recognized a continuum between fact and opinion.\footnote{Id. at 1021. He states that "[f]act is the germ of opinion, and the transition from assertion of fact to expression of opinion is a progression along a continuum." Id. at 1022-24.} Hybrid statements reflected deductions or evaluations based upon fact. If the facts supporting the evaluation were reasonably full and accurate, the statement deserved first amendment protection.\footnote{Id. at 1029.} If facts were omitted or were in error one had to consider whether culpability was great enough to incur liability under relevant state defamation law. If not, the statement was entitled to first amendment protection.\footnote{Id. at 1032-39.} Robinson felt the statements in question were hybrids.\footnote{Id. at 1033.}

Judges Wald, Edwards, and Scalia also filed separate opinions.\footnote{Id. at 1033.} Each felt that the statement disparaging Ollman's professional reputation was actionable libel and not protected opinion.\footnote{418 U.S. 323 (1974).}

The court in *Olman* attempted to draw a distinction between fact and opinion. The differing approaches to the distinction and the disagreement as to how the statements in question should be characterized demonstrates the practical difficulty in distinguishing fact from opinion.

V. CONCLUSION

The current state of the law involving the first amendment fact/opinion distinction is contradictory and muddled. While the Supreme Court's dicta in *Gertz v. Robert Welch, Inc.*\footnote{418 U.S. 323 (1974).} is commonly accepted as establishing absolute first amendment protection for opinion, there is no single accepted method by which the distinction can be made between statements of fact and statements of opinion.

This article is as much an exercise in jurisprudential thought as in traditional doctrinal analysis. Its purpose is to
suggest how difficult it is to provide an analytically sound test for the distinction of fact and opinion. It has attempted to expose the problems created by language’s inherent subjectivity. The assumption that one can draw a bright line rule between fact and opinion is troublesome. The concepts of fact and opinion are subject to rigid categorization in only the most extreme situations. Most statements are an inseparable mixture of fact and opinion.

Furthermore, the assumption that words such as “fact” and “opinion” have concrete meanings is functionally inadequate. The fear is that the erroneous determination of “opinion” as “fact” can result in denial of the first amendment right of freedom of expression.

As a natural progression from the discussion of the inherent subjectivity of language, this article examined the scholarly debate concerning the interpretation of law. Our understanding of law can be improved by comparing legal interpretation with the interpretation of literature. The debate is divided, in short, between those scholars who believe that interpretation is grounded in objectivity and those who believe that interpretation is free from constraint.

The difficulty of characterizing fact and opinion is representative of the difficulties faced in the interpretation of law. The conceptual difficulty in determining what a word “means” parallels the difficulty in determining the meaning of a text. The indeterminacy of language is eloquently stated by Justice Holmes: “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and times in which it is used.”

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