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DEFAMATORY OPINIONS AND THE *RESTATEMENT (Second) OF TORTS*

George C. Christie*

I. INTRODUCTION

After years of effort that included presentations at the annual meetings of the American Law Institute in 1965, 1966, 1974, and 1975, the Institute has finally published the portions of the *Restatement (Second) of Torts* that deal with defamation. The process was difficult and at times controversial. When the first two volumes of the *Restatement (Second)* were published in 1964, few people imagined that volume III, which includes the *Restatement's* treatment of defamation, would not appear until 1977.

In the early stages there was a major controversy over whether a plaintiff, in an action for libel that did not involve one of the four categories that are grouped together under the rubric "slander per se," had to plead and prove special damages, as is required in all cases of slander not constituting slander per se. The original *Restatement* adopted the position of English law and imposed no such requirements upon the plaintiff.¹ The then-reporter of the *Restatement (Second)*, the late Dean Prosser, argued that the majority of the states did not accept this position.² Dean Prosser's interpretation of the cases was challenged by Lawrence H. Eldredge, who in 1966 was still active at the Philadelphia bar.³ At its 1965 and 1966 annual meetings the Institute was unable to resolve these conflicting views, and the protagonists of each position continued the debate in the law reviews.⁴ The controversy was resolved only after the New York Court of Appeals, in *Hinsdale v. Orange County Pub-*

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1. RESTATEMENT OF TORTS § 569 (1938).

2. RESTATEMENT (SECOND) OF TORTS § 569, Note to Institute at 86-89 (Tent. Draft No. 11, 1965).

3. See Mr. Eldredge's comments in 42 ALI PROCEEDINGS 411-16 (1965), 43 ALI PROCEEDINGS 434-39, 444-45 (1966).

4. See Eldredge, *Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966); Eldredge, *Variation on Libel Per Quod*, 25 VAND. L. REV. 79 (1972); Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966).

lications, Inc.,⁵ came down firmly in favor of the position adopted in the original *Restatement* and espoused by Mr. Eldredge. Most other state courts in which the issue was litigated adopted the New York view,⁶ and that ended the matter.

While this debate was raging, the Institute and its reporter were forced to deal with the revolutionary developments in the law of defamation that were introduced by the Supreme Court, a process that began in March 1964 with the landmark decision in *New York Times Co. v. Sullivan*.⁷ Although the subject of defamation was not brought to the floor of the Institute until May 1965, much of the work on the defamation provisions of the then-proposed *Restatement (Second)*—which, except for the controversy over the need to plead and prove special damages in actions for libel, closely paralleled the original *Restatement*—had begun before 1964. The subsequent drafts and redrafts of these provisions represented an attempt by the Institute to accommodate the *Restatement (Second)* to the actions of the Supreme Court. Throughout that process the Institute reacted passively to the Court's decisions. It rarely attempted to anticipate what the Court might do⁸ and was never cited by the Court as an authority on how the law in the area should develop.⁹ The Institute's role in the whole process was, at best, reportorial. Seldom constructive in its approach, the Institute appeared at times to be conducting a rearguard action against the Court.

This Article will focus on one important aspect of the Institute's work: the question of whether opinion, including ridicule, can be an independent basis of an action for defamation. Before undertaking

5. 17 N.Y.2d 284, 217 N.E.2d 650, 270 N.Y.S.2d 592 (1966). As a consequence of the *Hinsdale* decision, Dean Prosser abandoned the struggle to change *Restatement* § 569. Except for minor wording changes, that provision in the *Restatement (Second)* is identical to the original version.

6. These state cases are listed in RESTATEMENT (SECOND) OF TORTS § 569, Reporter's Note at 59 (Tent. Draft No. 20, 1974).

7. 376 U.S. 254 (1964). In *Sullivan* the Court held that, at least with respect to the nonprivate aspects of his life, a public official could not successfully bring a defamation action unless he could show deliberate falsehood or reckless disregard of the truth on the part of the commentator.

8. Not surprisingly, the Institute's own evaluation of its approach is more favorable. See III RESTATEMENT (SECOND) OF TORTS, Special Note at 151-52 (1977).

9. In his dissent in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 374-76 (1974), Justice White suggested that the majority's concerns about the first amendment could be accommodated by adopting the libel per se/libel per quod distinction, the position the *Restatement (Second)* had already abandoned by the time Justice White embraced it. Compare RESTATEMENT (SECOND) OF TORTS § 569, at 29 (Tent. Draft No. 12 1966), which was cited by Justice White, with RESTATEMENT (SECOND) OF TORTS § 569, at 55 (Tent. Draft No. 20, 1974).

that inquiry, however, some basic concepts regarding defamatory opinions must be understood. First, a statement of opinion can, of course, often be reasonably construed to imply the existence of facts that would justify the opinion. If a direct statement of those facts would be defamatory, then the statement of an opinion that implies the existence of those false facts would be defamatory and capable of supporting an action for defamation. An opinion is said to be an "independent" basis for an action for defamation only in a situation where either the facts are all known or no one would seriously consider the opinion in question as implying any particular factual allegations. Much ridicule is of this latter nature, as is, of course, much simple vituperation. Finally, a declaration need not be prefaced with the words "in my opinion" in order to be classified as a statement of opinion. Evaluative statements like "he is a fool, . . . a son of a bitch . . . a traitor to his class" are all statements of opinion. Some of these remarks may imply that the speaker is aware of specific facts that justify his choice of words, but others have only a vague connection with any particular factual context, and, as is the case with the most vituperative of these remarks, some have no such connection at all.

The *Restatement (Second) of Torts*, as first proposed, strengthened the original provisions on defamatory opinion by expressly providing, in a new section, that ridicule could also be the basis of an action for defamation quite apart from any factual connotations of the challenged statements.¹⁰ Over the years the Institute steadfastly resisted attempts to retreat from this position. Indeed, it reaffirmed that viewpoint as late as May 1974, when it overwhelmingly rejected a motion to delete the provisions on defamation by opinion and ridicule.¹¹ Then, on June 25, 1974, the Court handed down its decision in *Gertz v. Robert Welch, Inc.*,¹² in which, speaking through Justice Powell, it declared that "[u]nder 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."¹³ In a companion case decided the same day, *Old Dominion Branch*

10. See, e.g., RESTATEMENT (SECOND) OF TORTS § 567A, at 46 (Tent. Draft No. 20, 1974). The provision also appeared in RESTATEMENT (SECOND) OF TORTS § 567A, at 79 (Tent. Draft No. 11, 1965).

11. 51 ALI PROCEEDINGS 339 (1974).

12. 418 U.S. 323 (1974).

13. 418 U.S. at 339-40.

No. 496, *National Association of Letter Carriers v. Austin*,¹⁴ the Court cited the *Gertz* declaration in denying relief to the plaintiffs by alternatively holding that most of the allegedly libelous statements in *Old Dominion* were mere epithets that could not support an action for defamation.¹⁵

Many people would have thought that *Gertz* would end the matter. Surprisingly, however, the draftsmen of the *Restatement (Second)* showed themselves unable to bury the question completely, and, despite the language of *Gertz*, it was proposed at the 1975 annual meeting that the Institute handle the entire subject of defamatory opinions by adopting the following revision of section 566:

Expression of Opinion.

A defamatory communication may consist of a statement in the form of an opinion. A statement of this nature, *at least if it is on a matter of public concern*, is actionable, however, only if it also expresses, or implies the assertion of, a false and defamatory fact which is not known or assumed by both parties to the communication.¹⁶

On its face this provision left open the possibility that opinion *qua* opinion could be actionable in certain circumstances. As will be discussed in some detail later in this Article,¹⁷ the "loophole" suggested by the italicized language was narrowed considerably by the comments accompanying proposed section 566 and, later in the process of securing the approval of the Institute, closed entirely by the deletion of the italicized words from the provision.¹⁸ This was not the only accommodation that the Institute was forced to make, for, at

14. 418 U.S. 264 (1974).

15. In a recent article, Professor Alfred Hill, after characterizing the *Gertz* declaration as "dictum" on a problem "not remotely in issue in *Gertz*," states: "Yet it is apparently solely in consequence of the *Gertz* dictum that the *Restatement (Second)* now provides that an action can never lie for an opinion *qua* opinion." Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1239-40 (1976). In an accompanying footnote, *id.* at 1239 n.156, Professor Hill treats the *Old Dominion* case as a federal labor law case. Leaving aside the question whether or not *Old Dominion* was or was not in the minds of the *Restatement's* draftsmen, whether *Old Dominion* can be dismissed as a federal labor case is a point on which conflicting views may be expressed. See, e.g., Christie, *Injuries to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43, 51-52 (1976). See *id.* for a brief review of the Supreme Court's efforts in the field of defamation since the decision of *Sullivan* in 1964.

16. RESTATEMENT (SECOND) OF TORTS § 566, at 6 (Tent. Draft No. 21, 1975). The material in italics was inserted by the Council of the Institute. See note 37 *infra*.

17. See text at note 38 *infra*.

18. See text at note 39 *infra*.

the same time that the wording of section 566 was finally being brought in line with the *Gertz* declaration, the Institute also eliminated proposed sections 606-610, which dealt with fair comment.¹⁹ The need for doing so was inescapable. If only false statements of fact could be actionable, it was irrelevant whether the comment was fair or not. Comment *qua* comment could never be actionable.²⁰

Certainly many people would find the *Restatement's* final maneuvering an odd and somewhat grudging accommodation to *Gertz* and its companion case, *Old Dominion*. More fascinating, however, is the validity of, first, the theory behind the *Restatement's* approach over the past forty years to the questions of defamation and of defamatory opinions and, second, the methodology employed in the production of the *Restatement (Second)*. These matters will be the primary focus of this Article.

II. THE "LOGIC" UNDERLYING THE *Restatement's* APPROACH TO DEFAMATION

A. *The Original Restatement*

Volume III of the *Restatement*, which contains the provisions on defamation, was published in 1938. As already indicated, it took the position that the expression of an opinion on the basis of known facts could be the subject of an action for defamation.²¹ The difficulty, however, was that the *Restatement* had already committed itself to a basic view of the nature of defamation that made it logically impossible for it to adopt this position even if the support for this approach in the cases was completely overwhelming, which it certainly was not.²² This internal inconsistency has plagued the *Restatement* ever since and was even exacerbated in the early drafts

19. RESTATEMENT (SECOND) OF TORTS § 566, Note to Institute at 13 (Tent. Draft No. 21, 1975).

20. Professor Hill decries the *Restatement's* deletion of the "fair comment" provisions. Hill, *supra* note 15, at 1239-45. In an argument that I find hard to follow or to accept, he speculates, as I understand him, that in striving to give some redress for the expression of scurrilous opinion, the Court is likely to hold that the opinion really amounts to a false assertion of fact, a finding from which liability will automatically follow. If the problem were approached under the common law privilege or concept of fair comment, which has underlying it an elaborate case law on what constitutes an abuse of the privilege, liability is less likely to result. He thus feels that deleting any mention of the fair comment defense might reduce a speaker's first amendment protections.

21. RESTATEMENT OF TORTS § 566 (1938).

22. For a discussion of the paucity of authority cited for this position by the draftsmen of the *Restatement (Second)*, see text at note 74 *infra*.

of the *Restatement (Second)*. The nature of the logical problems is readily evident on the face of the *Restatement*. In section 558, its first provision on the subject, the *Restatement* set forth the underlying nature of liability for defamation:

§ 558. *Elements Stated.*

To create liability for defamation there must be an unprivileged publication of false and defamatory matter of another which

- (a) is actionable irrespective of special harm, or
- (b) if not so actionable, is the legal cause of special harm to the other.²³

Succeeding sections of the *Restatement* elaborated upon these general principles. Section 565, for example, contained the unexceptionable statement that "a defamatory communication may consist of a statement of fact," and section 567 likewise provided that "a defamatory communication may consist of a statement of opinion upon undisclosed facts." In the intervening section 566, however, the *Restatement* fell into the error from which, for a long time, it was not able fully to extricate itself. That provision and its accompanying comment and illustration are, accordingly, best set out in toto:

§566. *Expressions of Opinion Upon Known or Assumed Facts.*

A defamatory communication may consist of a statement of opinion based upon facts known or assumed by both parties to the communication.

Comment:

a. Under the rule stated in this Section, the defamation may consist of a comment upon some act or omission of another which is accurately stated by the person making the comment or which, because of its notoriety or otherwise, is known to the recipient. If such comment expresses a sufficiently derogatory opinion as to the conduct in question, it is defamatory and, unless it is privileged as fair comment (see § 606), is actionable. On the other hand, the comment may be upon conduct which is stated by the person making the comment and which is otherwise unknown to its recipient. If the other's conduct is inaccurately or falsely described, the statement thereof is defamatory under the rule stated in § 565. The alleged conduct on which the comment is based may, however, be itself not so reprehensible as to make its imputation defamatory under § 565, but nonethe-

23. RESTATEMENT OF TORTS § 558 (1938).

less the comment thereon may be so derogatory as to make it defamatory under the rule stated in this Section.

The truth or falsity of an accusation of reprehensible conduct is a matter of fact, provable as such. The propriety of the opinion, as fair comment thereon, is a matter of judgment. Nevertheless, a defamatory communication may be made by derogatory adjectives or epithets as well as by statements of fact. Thus, it is defamatory to add to an accurate statement of another's innocent conduct, an adjective or epithet which characterizes it as reprehensible.

Illustration:

I. A, while making a political speech, accurately relates certain specific conduct of his opponent in blocking reform measures advocated by A. In the course of his argument, A declares that any person who would so conduct himself is no better than a murderer. A has defamed his opponent under the rule stated in this Section. Whether the defamation is privileged as fair comment is determined by the rule stated in § 606.²⁴

Leaving aside the constitutional questions that would now be presented, it is clear that this provision is flatly inconsistent with section 558, which categorically states that "to create liability for defamation" there must be publication of matter which is "*false* and defamatory." By no stretch of the imagination can section 566, particularly as fleshed out by the comments and the illustration, be said to apply to things capable of being labeled false. Indeed, the illustration is precisely a case where the statement in question is not logically capable of being true or false, and hence, under section 558, it is not within the range of speech to which the concept of defamation is applicable. Insofar as it allowed for the possibility of liability merely for the expression of an opinion, section 606 of the *Restatement*, which dealt with what is customarily called the defense or privilege of "fair comment," was also subject to the same logical criticism.²⁵

It is interesting to note that Professor Arthur Goodhart, in a 1941 article comparing American law (as evidenced in volume III of the *Restatement of Torts*) to English law, made this comment about section 566:

24. *Id.* § 566.

25. In the illustration to *Restatement* § 566 set out in the text at note 24 *supra*, § 606 on fair comment (or "privileged criticism") was envisaged as a defense available, in some situations, to one who would otherwise be subject to liability under § 566 for publishing a defamatory opinion. But, even in situations in which it was available, the privilege could be defeated, *inter alia*, if malice were shown or, in some circumstances, if the comment were unfair.

Illustration (1) to Section 566 is rather a strange one. It holds that to state of a political opponent who has blocked reform measures that he "is no better than a murderer" is defamatory. It is probable that the English courts would hold that this was merely a form of abuse, and therefore not actionable. American political controversies must be conducted on a very high level if such a remark is held to fall within the law of defamation.²⁶

The extent to which statements not capable of being either true or false have been held to be actionable is a question addressed in section III of this Article, where the methodology employed in the preparation of the *Restatement (Second)*'s treatment of defamatory opinions will be examined. For the moment it is necessary to turn to the *Restatement (Second)* in order to continue our exploration of the *Restatement*'s internal inconsistencies.

B. *The Restatement (Second)*

Instead of eliminating the inconsistencies present in the original *Restatement*, the *Restatement (Second)*, as first drafted, exacerbated them. *Restatement* sections 558, 565, and 567 were retained substantially verbatim,²⁷ as was section 566, which thus continued to be the odd man out. The only alterations in these provisions worth mention were some additions to the comments and some changes in the illustrations to reflect the fact that in 1964, with its decision in *New York Times Co. v. Sullivan*,²⁸ the Court had begun to impose constitutional limitations upon the law of defamation. The alterations in the comment to section 566, which did not appear until the 1974 draft, were as follows:

Even though an expression of a derogatory opinion is defamatory, the Constitution may restrict the maintaining of an action for defamation if it deals with a matter of public or general interest. (See § 581, Comment *i*). It may also be privileged as fair comment. (See § 606).

. . . .

Illustration:

1. A, while discussing his next-door neighbor with a friend, ac-

26. Goodhart, *Restatement of the Law of Torts, Volume III: A Comparison Between American and English Law*, 89 U. PA. L. REV. 265, 283-84 (1941).

27. See RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 11, 1965); RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 12, 1966) (no mention of a section in the tentative draft means the original *Restatement* section was to be retained). See also the comment by Mr. Lawrence Eldredge in 51 ALI PROCEEDINGS 333-34 (1974).

28. 376 U.S. 254 (1964), discussed in note 7 *supra*.

curately relates certain specific conduct of his neighbor in abusing his wife. In the course of his discussion, A declares that any person who would so conduct himself is no better than a murderer. A has defamed his [neighbor] under the rule stated in this Section.²⁹

But at the same time the Institute in the *Restatement (Second)* was acknowledging the constitutional boundaries of liability for defamation, it continued to propose that a new section, 567A, be adopted, the practical effect of which was to broaden the range of such liability. Section 567A and its accompanying comment provided as follows:

§ 567A. *Ridicule.*

A defamatory communication may consist of words or other matter which ridicule another.

Comment:

a. *Ridicule.* One common form of defamation is ridicule, which in effect is the expression of an opinion that the plaintiff is ridiculous, and so exposes him to contempt or derision, or other derogatory feelings. Humorous writings, verses, cartoons or caricatures which carry a sting and cause adverse rather than sympathetic or neutral merriment, may be defamatory. It is of course possible that any humorous publication may reasonably be understood only as good-natured fun, not to be taken seriously, and in no way intended to reflect upon the individual. Thus a narration by a toastmaster at a banquet of some entirely fictitious and utterly ridiculous incident involving the speaker whom he is introducing is not reasonably to be understood as defamation, but only as a jest. But if the same narrative is reported in a newspaper, where it is read by those who were not present and did not understand the situation, it may become defamatory.

NOTE: This section has been added to the first Restatement.³⁰

Of the portions of the *Restatement (Second)* now under discussion, only the newly proposed section 567A on ridicule was brought before the Institute in 1965, the year in which the Institute first addressed itself to the subject of defamation, and, at that time, it received very little attention. All of these provisions were presented to the Institute in 1974,³¹ in conjunction with a review of the

29. RESTATEMENT (SECOND) OF TORTS § 566, Comment *a* & Illustration 1 (Tent. Draft No. 20, 1974).

30. *Id.* § 567A.

31. At the 1974 meeting of the ALI, the reporter asserted that § 567A had been approved by the Institute "in the 1960's." 51 ALI PROCEEDINGS 307 (1974). This does not appear to be the case, as that provision was not put to a vote, and Dean Prosser indicated he might remove the section. 42 ALI PROCEEDINGS 404-05 (1965).

Restatement (Second)'s treatment of the entire subject of defamation in the light of developments in the Supreme Court.³² As already noted, an attempt was then made to strike sections 566 and 567A on both logical and constitutional grounds.³³ The attempt was decisively defeated.³⁴

Within five weeks, however, the Court handed down *Gertz v. Robert Welch, Inc.*³⁵ and *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*.³⁶ The Institute, unprepared as it was to recognize the demands of pure logic, could no longer shut its eyes to the direction in which the Court was moving. One might have hoped that the Institute would have abandoned all attempts to deal with defamatory opinions and been content with section 558's declaration that an action for defamation required publication of matter that was false as well as defamatory. That expressions of opinion, insofar as they implied the existence of defamatory facts, could lead to liability for defamation could then have been covered in the comments. Instead, the Council of the Institute proposed a revised *Restatement* section 566, which, as we have seen, provided:

§ 566. *Expression of Opinion.*

A defamatory communication may consist of a statement in the form of an opinion. A statement of this nature, at least if it is on a matter of public concern, is actionable, however, only if it also expresses, or implies the assertion of, a false and defamatory fact which is not known or assumed by both parties to the communication.³⁷

On its face this section—which covered the matters originally included in section 566 and the now-deleted sections 567 and 567A of the proposed *Restatement (Second)*—left open the possibility that mere expressions of opinion on matters *not* of “public concern” could be actionable even if they did not express or imply the assertion of “a false and defamatory fact which is not known or assumed by both parties to the communication.” The accompanying com-

32. RESTATEMENT (SECOND) OF TORTS, Special Note at 2 (Tent. Draft No. 20, 1974).

33. 51 ALI PROCEEDINGS 306-08, 332-37 (1974).

34. *Id.* at 339.

35. 418 U.S. 323 (1974), discussed in text at notes 12-13 *supra*.

36. 418 U.S. 264 (1974), discussed in text at notes 14-15 *supra*.

37. RESTATEMENT (SECOND) OF TORTS § 566, at 6 (Tent. Draft No. 21, 1975). At the 1975 meeting of the American Law Institute, the reporter stated that he drafted the provision without the words “at least if it is on a matter of public concern,” which were later inserted at the direction of the Council. 52 ALI PROCEEDINGS 152 (1975).

ment, however, made it clear that even the Institute recognized that the possibility of such liability ran squarely against the logic of *Gertz*:

Comment:

. . . .

c. *Effect of the Constitution.* The common law rule that an expression of opinion of the first, or pure, type may be the basis of an action for defamation now appears to have been rendered unconstitutional by U.S. Supreme Court decisions. As the Court says in *Gertz v. Robert Welch, Inc.*, (1974) 418 U.S. 323, 339: "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." This categorical statement was not necessary to the decision in the case in which it is found, and the Supreme Court indications that an expression of opinion cannot be the basis of a defamation action have involved public communications on matters of public concern. While it is thus possible that private communications on private matters will be treated differently, the logic of the constitutional principle would appear to apply to all expressions of opinion of the first, or pure, type.

The distinction between the two types of expression of opinion, as explained in Comment *b*, therefore becomes constitutionally significant. The requirement that a plaintiff prove that the defendant published a defamatory statement of fact about him which was false (See § 558) can be complied with by proving the publication of an expression of opinion of the mixed type, if the comment reasonably implies the assertion of the existence of undisclosed facts about the plaintiff which must be defamatory in character in order to justify the opinion. A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.³⁸

This interplay between section and comment was unquestionably a curious way to attempt to handle the matter. At its meeting in May 1975, the Institute voted to strike the language "at least if it [the opinion] is on a matter of public concern," and the conformance to the *Gertz* declaration was finally made complete.³⁹ The provision was subsequently reworded by the reporter and, as it has now been published in the *Restatement (Second)*, reads:

§ 566. *Expressions of Opinion.*

A defamatory communication may consist of a statement in the

38. RESTATEMENT (SECOND) OF TORTS § 566, at 8 (Tent. Draft No. 21, 1975).

39. 52 ALI PROCEEDINGS 155 (1975).

form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.⁴⁰

In the redrafted comment to this section the Institute also belatedly recognized that, in originally allowing for defamation by opinion without reference to any false implication of facts, it had departed from the logic underlying the *Restatement's* treatment of defamation. It explained away this contradiction in a section of the comment introduced by the heading "*Opinion as defamatory at common law.*" After stating that "[u]nder the law of defamation, an expression of opinion could be defamatory if the expression was sufficiently derogatory of another as to cause harm to his reputation," it obliquely recognized the internal contradiction of its earlier position by declaring that "[t]he expression of opinion was also actionable in a suit for defamation, despite the *normal* requirement that the communication be false as well as defamatory. (See § 558)."⁴¹ I leave to the reader whether the categorical statement of section 558, which in both the *Restatement* and the *Restatement (Second)* unequivocally declares that "[t]o create liability for defamation there must be . . . [a] false and defamatory statement concerning another," can fairly be described as merely stating the "normal" rule.

III. THE METHODOLOGY OF THE *Restatement (Second)*

It is submitted that the Institute's treatment of the subject of defamatory opinions, which has produced a satisfactory solution to the problem only after a great deal of time and effort, is in large part the product of the methodology that the Institute applied to its tasks. In particular, the Institute's approach to the cases concerned with defamation left much to be desired. Nowhere is this better illustrated than in the development of the proposed section 567A dealing with ridicule. The *Restatement (Second)*, it will be recalled, proposed a separate section specifically stating that "a defamatory communication may consist of words or other matter which ridicule another."⁴² Of the ten cases cited in support of this proposi-

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

41. *Id.*, Comment *a* at 171 (emphasis added). This statement first appeared in Tentative Draft No. 21 (1975). It was undoubtedly added to meet some of the objections raised during the unsuccessful efforts to delete § 567A and § 566, as they were then drafted, at the Institute's 1974 annual meeting. See text at note 33 *supra*.

42. RESTATEMENT (SECOND) OF TORTS § 567A, at 79 (Tent. Draft No. 11, 1965); RESTATEMENT (SECOND) OF TORTS § 567A, at 46 (Tent. Draft No. 20, 1974).

tion, five were decided before 1915 and only two after 1936.⁴³ Four of these cases were from New York, with the most recent an appellate division decision in 1930.⁴⁴ Regrettably, all four New York cases concerned the preliminary question of whether the plaintiff had sufficiently pleaded a cause of action; in none of them, therefore, did the court consider and weigh the possible defenses to such actions.

The key New York decision was *Triggs v. Sun Printing and Publishing Association*,⁴⁵ decided by the court of appeals in 1904. On the basis of *Triggs*, a New York lower court held libelous an apparently true newspaper article about a woman upon whom process was served in a bathtub by a man who slipped past the "Irish" maid by telling her "I'm sure she's very anxious to see me";⁴⁶ another New York lower court found libelous an article that reported that a Spanish nobleman was "in revolt against work" and had quit a job as a "carpet layer" in his father-in-law's hotel business.⁴⁷ In both cases the courts held the items were not "news" stories. In the third and most recent post-*Triggs* case in New York, *Zbyszko v. New York American, Inc.*,⁴⁸ the appellate division held libelous a picture of a professional wrestler printed next to that of a gorilla used to illustrate an article about similarities between man and the gorilla and to support the contention that both have evolved from a common source. This article was unlike the other two since the use of Zbyszko's name and picture was not part of the reporting of an allegedly newsworthy event, although the other two cases could likewise be considered as invasions of privacy, given the relative obscurity of the plaintiffs. Nevertheless, except possibly for *Zbyszko*, it is hard to imagine that a modern court would have allowed recovery in any of these cases.

43. See RESTATEMENT (SECOND) OF TORTS § 567A, at 46 (Tent. Draft No. 20, 1974).

44. The New York cases cited are *Triggs v. Sun Printing & Publishing Assn.*, 179 N.Y. 144, 71 N.E. 739 (1904); *Zbyszko v. New York American, Inc.*, 228 App. Div. 277, 239 N.Y.S. 411 (1930); *Snyder v. New York Press Co.*, 137 App. Div. 291, 121 N.Y.S. 944 (1910); *Pignatelli v. New York Tribune, Inc.*, 117 Misc. 466, 192 N.Y.S. 605 (Sup. Ct. 1921).

45. 179 N.Y. 144, 71 N.E. 739 (1904). In *Triggs*, the court held that the plaintiff, a University of Chicago professor of English, had a cause of action for libel against a newspaper that had printed three articles that allegedly portrayed him as a "presumptuous literary freak." 179 N.Y. at 155, 71 N.E. at 742.

46. *Snyder v. New York Press Co.*, 137 App. Div. 291, 293, 121 N.Y.S. 944, 945 (1910).

47. *Pignatelli v. New York Tribune, Inc.*, 117 Misc. 466, 467, 192 N.Y.S. 605, 606 (Sup. Ct. 1921).

48. 228 App. Div. 277, 239 N.Y.S. 411 (1930).

Two of the non-New York cases cited by the proposed *Restatement (Second)* in support of its provision on ridicule involved serious factual charges: in one case, suggestions of marital infidelity;⁴⁹ in the other, intentionally serving unwholesome food to the city's poor in order to save money.⁵⁰ One supposes the cases were cited under the ridicule section because of the manner in which the charges were made. In the case involving the alleged marital impropriety, the article was couched in a humorous and titillating style,⁵¹ and in the other case the medium was a cartoon containing items captioned as "rancid butter" and "poor food."⁵²

Of the other non-New York cases cited to support the contention that ridicule may be defamatory independently of the factual implications it contains, two are comparatively recent, though both are relatively obscure. One was an Oregon case decided in 1973.⁵³ In that case a book mentioned the plaintiff by name and described him as "close to being the laziest man in the world." As an illustration, the book stated that much of the plaintiff's house was built by his wife and that the plaintiff "was always falling asleep on the mower and would end up drowsing with his team standing quietly idle somewhere off in the jackpines, where the mower had finally run into a tree too big to cut."⁵⁴ The Oregon court acknowledged that it had previously held that it was not defamatory to say falsely that a husband and wife were separated and getting a divorce.⁵⁵ How could it then hold that it was defamatory to call a person lazy? The court found its solution in a distinction between the mere statement of a charge and the statement of a charge with such embellishments and illustrations as would subject the person to ridicule.⁵⁶ Principal reliance for the holding was placed on the treatment of ridicule in Dean Prosser's hornbook, which reflected the position he had taken in the drafting of the proposed *Restatement* 567A.⁵⁷ Even though the decision seemed to permit liability to rest upon the apparently true

49. *Colbert v. Journal Publishing Co.*, 19 N.M. 156, 142 P. 146 (1914).

50. *Brown v. Harrington*, 208 Mass. 600, 95 N.E. 655 (1911).

51. 19 N.M. at 164-65, 142 P. at 148-49.

52. 208 Mass. at 601, 95 N.E. at 655.

53. *Farnsworth v. Hyde*, 266 Ore. 236, 512 P.2d 1003 (1973).

54. 266 Ore. at 237-38, 512 P.2d at 1004 (quoting defendant's book).

55. 266 Ore. at 239, 512 P.2d at 1004 (citing *Andreason v. Guard Publishing Co.*, 260 Ore. 308, 311, 489 P.2d 944, 945 (1971)).

56. 266 Ore. at 239 n.2, 512 P.2d at 1004 n.2.

57. See 266 Ore. at 239-40, 512 P.2d at 1004-05 (citing W. PROSSER, *THE LAW OF TORTS* 742-43 (4th ed. 1971)).

statements that plaintiff's wife built their house and that the plaintiff fell asleep on his mower, there was no discussion of whether this conclusion could stand in the light of *Time, Inc. v. Hill*.⁵⁸ The second of this pair of cases was decided in 1958 and involved a newspaper article about a thirty-five-year-old man who was building his own coffin to save money.⁵⁹ In upholding liability, the Maine court held that this article about a "classic example of Yankee thrift"⁶⁰ made the plaintiff seem "odd."⁶¹

The remaining two non-New York cases are somewhat more famous. In *Buckstaff v. Viall*,⁶² decided in 1893, the Wisconsin Supreme Court held that a satirical "prayer to Bucksniiff" that urged him to stop blocking approval by the state legislature of an amendment to the charter of the city of Oshkosh defamed the plaintiff, a state senator to whom the prayer was obviously addressed. Even if the newspaper were wrong in supposing that Buckstaff was the cause of the legislative inaction, in light of *New York Times Co. v. Sullivan* and its aftermath⁶³ it really is inconceivable how lawyers in the United States, let alone those preparing material for the American Law Institute, could in 1974 have considered the *Buckstaff* case to be good law.

The last non-New York state court case, *Burton v. Crowell Publishing Co.*,⁶⁴ is also of little precedential value, being almost sui generis. The case, familiar to many law students, was decided by the Second Circuit in the pre-*Erie* days, and involved an endorsement for Camel cigarettes given by a famous gentleman jockey. In one part of the advertisement there was the caption, "Get a lift with a Camel."⁶⁵ The plaintiff was also quoted as being "restored" after a "crowded business day."⁶⁶ The crucial part of the advertisement was a photograph of the plaintiff dressed as a jockey and holding a saddle, with the white girth thrown over it, about twelve inches below his waist. The picture, for some odd reason, made it look

58. 385 U.S. 374 (1967). Surely the Oregon court was not suggesting that it is easier to bring an action for the publication of true statements than it is for the publication of false statements. See also *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975).

59. *Powers v. Durgin-Snow Publishing Co.*, 154 Me. 108, 144 A.2d 294 (1958).

60. 154 Me. at 109, 144 A.2d at 295.

61. 154 Me. at 111, 144 A.2d at 296.

62. 84 Wis. 129, 54 N.W. 111 (1893).

63. See note 7 *supra*; Christie, note 15 *supra*, at 46-47.

64. 82 F.2d 154 (2d Cir. 1936).

65. 82 F.2d at 154.

66. 82 F.2d at 154.

very much as if the plaintiff were exposing himself in a bizarre and grotesque manner. The trial judge was not sympathetic, finding that no right-minded person would hold the plaintiff up to ridicule, hatred or contempt because of the photograph and that, in any event, the plaintiff had consented to its use. On appeal, the plaintiff's attorneys argued that grotesque phalli had been used on the stage in ancient Greece and that, given the suggestiveness of the photograph, people might be prepared to think that the plaintiff was engaging in similar conduct.⁶⁷ The court, through Judge Learned Hand, refused all suggestions that "the advertisement might be read to say that the plaintiff was deformed, or . . . had indecently exposed himself, or was making obscene jokes."⁶⁸ Judge Hand ruled, however, that the advertisement was libelous, even though under his interpretation it was not capable of being true or false, because the advertisement held the plaintiff up to "ridicule" and "contempt."⁶⁹ The case seems so unusual and, if the court were not so prudish, so capable of being fitted into the traditional true/false category, that it has little precedential value. Indeed, with the *Buckstaff* result now a constitutional impossibility, *Triggs* remains the only really major support for proposed section 567A of the *Restatement*. It is therefore important to analyze the *Triggs* case carefully and to compare it with modern practice—after all, it was cited as good law as recently as 1974.

*Triggs v. Sun Printing and Publishing Association*⁷⁰ involved a series of sarcastic articles about Professor Oscar L. Triggs, a well-known professor of English at The University of Chicago who, among other things, favored a simpler style of English than was currently fashionable. Triggs had turned down a substantial offer to give public lectures to the audiences who went to view the plays of a touring Shakespearean company. As part of its sarcastic series of articles about the professor, the newspaper described how it imagined he would rewrite Shakespeare. In bringing the action, Triggs' counsel argued that the article implied that Triggs was an illiterate buffoon who was not professionally qualified to fill his high academic post and that such false factual implications made the articles libelous. The New York Court of Appeals, however, while holding that Triggs had stated a good cause of action for libel, focused only

67. Recollection of Parker Bailey, Esq., a friend of the author and one of plaintiff's counsel in the case. In addition, see Appellant's Brief at 11-12.

68. 82 F.2d at 155.

69. 82 F.2d at 155-56.

70. 179 N.Y. 144, 71 N.E. 739 (1904).

on the ridicule and seemingly held that it alone made out the libel in the circumstances of the case before it. In judging the merits of that holding, it might be instructive to set out the heart of the ridicule in *Triggs*⁷¹ and to contrast it with a *New York Times* article by Russell Baker that appeared on January 10, 1965.

One of the articles involved in *Triggs* stated:

"As yet, Prof. Triggs is but in the bud He . . . came near blossoming the other day, and the English drama would have blossomed with him. A firm which is to produce 'Romeo and Juliet' offered him \$700 a week to be the 'advance agent' of the show and to 'work up enthusiasm by lecturing.' Prof. Triggs . . . was compelled to decline the offer, but the terms of his refusal show that it is not absolute, and that 'some day' as the melodramas cry, he will illuminate Shakespeare, dramatic literature and the public mind: 'I regret my inability, at this time, to take advantage of this opportunity, for the plan proposed seems to me to be an excellent one. I would regard it, from my point of view, as an educational opportunity. It would gratify me to be able to present my views on drama, on Shakespeare and on this particular play to audiences that would gather together from a serious interest in the drama itself. This would be a form of 'university extension' not hitherto tried, and which should be attended with good educational results—such as I would desire and such also as I assume you would desire.' The nap is worn off the phrase 'university extension.' What Prof. Triggs . . . proposes and the country hungers for is Triggs . . . 'extension.' He must not give up to Chicago what was meant for mankind. His views on any subject are impressive, but on Shakespeare they would be as authoritative and final as it is his genius to be. As we have watched him . . . swatting Whittier and Longfellow, we have felt like yelling: 'What are thou drawn among these heartless hinds?' . . . The pro-

71. The major thrust of the ridicule of Professor Triggs concerned the matters to be set out shortly in the text. Triggs was also ridiculed, however, for, *inter alia*, not being able to decide on a name for his child until the child was one year old. The story was apparently true. The New York Court of Appeals declared that the area of privileged criticism "does not follow a public man into his private life [or allow the critic to] pry into his domestic concerns." 179 N.Y. at 156, 71 N.E. at 743. Recognizing that this doctrine may not have been properly applied in *Triggs*, Professor Hill believes the *Restatement (Second)*'s original position to have been sound. See Hill, *supra* note 15, at 1236. I am skeptical of the validity of this doctrine insofar as it permits punishing a speaker for speaking the truth on matters about which he has learned without physically intruding into the plaintiff's home, office, or other area of privacy, and without violating any confidential relationship. A possible exception is where the matter concerns some particularly intimate detail, such as the plaintiff's sex life. On the peripheral private matters involved in *Triggs*, *Restatement* § 606 on "privileged criticism" (or fair comment) permitted criticism of the private conduct or character of a public person, if the matter in issue affected "his public conduct." The supposedly private matter in *Triggs* arguably met this criterion. Moreover, even if the statement were false, which it apparently was not, is it defamatory to state falsely that a person took a year agonizing over a name for his child?

fessor . . . should take a man more nearly of his size. The Shakespeare legend should be allowed to delude no more. Prof. Triggs . . . can be depended upon to reduce this man Shakespeare to his natural proportions, club the sawdust out of that wax figger of literature and preach to eager multitudes the superiority of the modern playwrights, with all the modern improvements The so-called poetry and imagination visible in this Stratford Charlatan's plays must be torn out, deracinated, the fellow . . . would call it, in his fustian style If these plays are to be put upon the stage, they must be rewritten; and Prof. Triggs . . . is the destined rewriter, amender and reviser. The sapless, old-fashioned rhetoric must be cut down. The fresh and natural contemporary tongue, pure Triggsian, must be substituted. For example, who can read with patience these tinsel lines? 'Madam, an hour before the worshipped sun peered forth the golden window of the east, a troubled mind drave me to walk abroad.' This must be translated into Triggsian . . . somewhat like this: 'Say, lady, an hour before sun-up I was feeling wormy and took a walk around the block' Here is more Shakespearian rubbish:

'O, she doth teach the torches to burn bright!
Her beauty hangs upon the cheek of night,
As a rich jewel in an Ethiop's ear.'

How much more forcible in clear, concise Triggsian: 'Say, she's a peach! A bird!' . . . Hear 'Pop' Capulet drivel: 'Go to, go to, You are a saucy boy!' In the Oscar . . . dialect, this is this: 'Come off, kid. You're too fresh.' . . . Compare the dropsical hifalutin:

'Night's candles are burnt out, and jocund day
Stands tiptoe on the misty mountain's tops,'

with the time-saving Triggsian version: 'I hear the milkman.' . . . The downfall of Shakespeare is only a matter of time and Triggs.

. . . "72

Contrast the following excerpt from Russell Baker's comparatively recent article in the *New York Times*:

Mortimer Adler, the Great Books man, confesses in *Playboy*, that some of the classics bore even him. If Dr. Adler can't stand Cicero, it seems reasonable to assume that we *Playboy* oriented masses find the going just as tough with the lighter authors, such as Thomas Aquinas and Immanuel Kant.

The problem, for a nation self-consciously aware that it is supposed to be undergoing a cultural explosion, is how to keep the classics alive. The solution would seem to lie in bringing them up to date, possibly by commissioning the foremost writers of the day to rework them in terms that are meaningful to culturally exploding moderns.

To illustrate what can be done, here is a hypothetical publisher's

72. 179 N.Y. at 148-50, 71 N.E. at 740-41 (quoting the allegedly libelous article).

list of a book house that might be called Modernized Library:

Anna Karenina by Henry Miller. In his revivification of Tolstoy's lugubrious Tsarist soap opera, Miller, writing in the first person through Vronsky's eyes, shifts the scene from Russia to Paris of the 1930's to illuminate the mystical hedonism of a profligate young Count fleeing American materialism. In his liaison with Anna, the half-wit wife of a French telegraph deliveryman, Vronsky perceives that the essential evil of woman is her destructive hatred of man's polygamous nature. With characteristic exhaustiveness, Miller finally answers all questions about the physical relationship between Anna and Vronsky in some of the most explicit prose ever published by Modernized Library.

Heidi by Terry Southern and Mason Hoffenberg. A scathingly existentialist satire on the morality of Swiss peasantry living at the foot of Europe's most fashionable ski runs. Nothing like it since Vladimir Nabokov's "Little Women." Banned in Paris.

Huckleberry Finn by James Baldwin. This long awaited indictment of the white liberal is at once a tender and infuriated cry from the heart. Jim, its protagonist, is ostensibly aided by the typical well-meaning but shallow white liberal, Huck, in his flight from the sinister Miss Watson. As the two drift down the Mississippi, the pent-up hatred on their raft gradually builds up to the breaking point, a moment of fury in which Jim makes Huck understand that he is bigoted because he, like Miss Watson, is incapable of love. In despair, Jim leaps up to his death from the raft. Huck sails on to what will clearly be the sterile lifetime of a hack writer sending small sums anonymously to Jim's sister as conscience balm.

The Adventures of Sherlock Holmes by William S. Burroughs. Holmes, a cocaine addict, is seen on the opening page snatching a bowler in the Charing Cross underground station to get pawnshop money for his pusher. We then follow him, more or less, on a bizarre romp through London, always one step ahead of Scotland Yard. Holmes's cocaine hallucinations—of everything from murderous hounds to nude hanging scenes involving his junkie pal, Dr. Watson—constitute the most pungent statement ever composed against law enforcement.

• • • •

Wuthering Heights by Tennessee Williams. Heathcliff, a brooding delicate lad who has been psychically mutilated by his domineering mother, is marked for marriage by the lusty, possessive Cathy, and the stage is set for tragedy. Williams provides it when Heathcliff falls into a pen of half-starved hogs. The critics will argue for years whether Heathcliff's fall was an act of will.

Modernized Library would probably put an end to advertisements like the one that appeared recently in a local paper. "World's Greatest Books!" it said. "Money-back guarantee."⁷³

73. Baker, *Observer: Adapting Literature for the Culture Hungry*, N.Y. Times, Jan. 10, 1965, § 4, at 12, col. 4.

One very much doubts that the lawyers for the *Times*, if in fact they were even consulted, experienced much difficulty in approving Mr. Baker's article for publication. Yet, if *Triggs* and the New York lower court cases following *Triggs* were good law, these lawyers certainly should have been concerned about the article. What is amazing is that in 1974 the American Law Institute approved changes in the *Restatement of Torts*, the effect of which would have been to broaden the scope of an action for defamation on the basis of cases that no serious observer could possibly think accurately reflected the current law.

Nor was it only with respect to ridicule that the Institute adopted the attitude that a case that had not been expressly overruled was good law and therefore to be included in the game of counting noses. In Tentative Draft No. 20, dated April 25, 1974, the Institute cited only four cases in support of retaining the provision in section 566 of the original *Restatement* that a "defamatory communication may consist of a statement of opinion based upon facts known or assumed by both parties to the communication."⁷⁴ Of the four, one was an English case concerned with whether proof of actual malice toward the author of a book being reviewed in *Punch* could defeat the defense of fair comment.⁷⁵ The case also included some proof of a misstatement of facts.⁷⁶ The only relevance of the case to the point for which it was cited in Tentative Draft No. 20 was that the defendant had apparently pleaded both truth and fair comment in defense to an action for defamation. Presumably, if actual malice could defeat the defense of fair comment, the draftsmen may have reasoned that actual malice could also make an unfavorable expression of opinion on known facts defamatory. The tentative draft does not discuss this aspect of the case, however, and also fails to discuss the position espoused in section 566 that such opinions could be actionable regardless of the existence of actual malice.

74. RESTATEMENT (SECOND) OF TORTS § 566, at 42 (Tent. Draft No. 20, 1974). One reason for the paucity of authority is undoubtedly that, where an attempt has been made to hold a person liable for the mere expression of an opinion without regard to whether there was some false implication of facts, the cases were usually litigated under the claim that they were abuses of the common law privilege of fair comment. See, e.g., *Beauharnais v. Pittsburgh Courier Publishing Co.*, 243 F.2d 705 (7th Cir. 1957); *Catalfo v. Shenton*, 102 N.H. 47, 149 A.2d 871 (1959); *Hoepfner v. Dunkirk Printing Co.*, 254 N.Y. 95, 172 N.E. 139 (1930). Fair comment at common law was supposedly limited to subjects of "public interest," but the scope of what was considered "public interest" was broad and flexible. See Boyer, *Fair Comment*, 15 OHIO ST. L.J. 280, 283-85 (1954).

75. *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K.B. 627 (C.A.).

76. See 2 K.B. at 643.

The three American cases cited to support section 566 give scarcely this much support for the proposition that an opinion based upon fully disclosed facts that does not imply the existence of other undisclosed facts can be defamatory.⁷⁷ None of them required a ruling on that precise question, and the most that can be culled from the dicta is that *Restatement* section 566 was cited in one of the cases in support of the proposition that “to assert a suspicion, belief, or opinion is as effectively a libel as though the charge were positively made.”⁷⁸ Yet it was on the basis of this relatively scant, largely unhelpful, and, in the case of the proposed section 567A on ridicule, wholly obsolete authority that the Institute attempted to hold and even push back the line in the post-*New York Times Co. v. Sullivan* world.

Though *Gertz*⁷⁹ ultimately put an end to the matter, even after that decision the Institute appeared to feel itself constrained by its

77. *Smith v. Levitt*, 227 F.2d 855 (9th Cir. 1955); *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F. Supp. 274 (D. Mont. 1958); *Woolston v. Montana Free Press*, 90 Mont. 299, 2 P.2d 1020 (1931). In the *Smith* case, Levitt, the plaintiff, had asserted in a telegram that he had in his possession what he believed to be irrefutable evidence that Senator Joseph McCarthy was a member of a subversive organization. The defendants in their newspaper asserted that Levitt's statement was “a lie” and that it was “a ruthless dagger dripping ‘the blood’ of character assassination.” 227 F.2d at 857. The court held that Levitt's statement was open to reprisal and that Smith's rejoinder was privileged fair comment. It further held that, since Smith called Levitt a liar, it was open to Smith to challenge the bona fides of Levitt's asserted belief about McCarthy. Again, this was not a case holding that mere opinion could be libelous. The court concluded that, “[i]f the attack be not malicious, the truth of the publication need not be established in order to make good the defense of conditional privilege. Whether the law of California or the common law be applied, the rulings [below in favor of Levitt] require reversal.” 227 F.2d at 858. A number of *Restatement* provisions, including § 566, were cited in support of the last statement. In the *Woolston* case, in holding the alleged libel not to be libelous per se, the court said “to assert a suspicion, belief, or opinion is as effectively a libel as though the charge were positively made.” 90 Mont. at 310, 2 P.2d at 1022. It is rather clear that the court was concerned with statements of fact that a publisher had attempted to disguise as mere statements of opinion.

78. *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F. Supp. 274, 287 (D. Mont. 1958) (quoting *Woolston*, 90 Mont. at 310, 2 P.2d at 1022, discussed in note 77 *supra*). In its original form in *Woolston*, the statement undoubtedly referred to a situation where a libelous imputation of fact was made in the guise of an opinion. This also seems to be the context in which these words were used in *Bankers Life*, which involved several counts of libel appended to an antitrust claim. The plaintiff corporation asserted that the defendant corporation was trying to drive it out of business. The only cause of action for libel not dismissed by the court was based on a newspaper advertisement that advised persons to report to the state insurance commissioner the receipt of certain representations from insurance agents. The advertisement was held to be libelous per se because it was tantamount to saying “call a cop” if a certain businessman attempts to do business with you, which allegedly harmed the plaintiff in its occupation or business. 163 F. Supp. at 286-89.

79. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), discussed in text at notes 12-13 *supra*.

past efforts. Rather than immediately abandoning the original *Restatement's* insistence that defamation could arise from an opinion based on known facts—a position that even if constitutionally possible in 1938 was logically inconsistent with the *Restatement's* own approach to defamation—it first proposed a solution that seemingly preserved a portion of its original stance. The initially proposed black letter law retained the possibility that an opinion *qua* opinion could support an action for defamation, even as the commentary written by the reporter acknowledged that this position disregarded the logic of *Gertz*.⁸⁰ Fortunately, common sense ultimately prevailed, and the final version of section 566 conforms both with *Gertz* and with the internal logic of the *Restatement*.⁸¹

IV. CONCLUSION

The purpose of this Article has been to explain this curious solution to the problem of whether opinions can be defamatory, to show the internal inconsistencies in the Institute's approach to the matter from the very beginning of its efforts on the *Restatement of Torts* in the 1930s, and to point out the Institute's often wooden and pedantic approach to the case law. For the future this last item is the most important. There is a beauty in the case law, but to use cases properly one must, as Llewellyn pointed out, try to find their "situation-sense."⁸² Without such guidance the cases can become a quagmire in which lawyers struggle like beginning law students. Under these conditions the cases become meaningless or even harmful, since their presence can lead one to abandon common sense.

As obvious as this last point may be, it needs to be stressed, for the inflexible approach taken by the Institute to the problem of defamatory opinion is not an isolated example. Another instance of rigidity in the *Restatement (Second)*'s treatment of defamation arose in connection with section 591, which deals with the privilege of executive or administrative officers to publish defamatory matter. The black letter law asserts that "any executive or administrative officer of the United States [or] governor or other superior executive officer of a state" has an absolute privilege if the publication is made in the performance of his official duties.⁸³ The comments to this

80. See text at notes 37-38 *supra*. For a discussion of the Council's involvement in the issue, see note 37 *supra*.

81. See text at notes 39-40 *supra*.

82. K. LLEWELLYN, *THE COMMON LAW TRADITION* 121-57 (1960).

83. *RESTATEMENT (SECOND) OF TORTS* § 591, at 181 (Tent. Draft No. 20, 1974).

section assert that several states have followed federal law and extended the absolute privilege to all employees however minor but that "the greater number of state courts have refused to make this extension."⁸⁴ However, all but two of the cases cited in the reporter's notes⁸⁵ as support for this statement in the comments ante-dated *Barr v. Matteo*,⁸⁶ which the *Restatement (Second)* itself recognizes as having extended the absolute privilege to lower federal officials. In fact, most of the cases cited in support of the statement in question were decided before 1920.⁸⁷ On the other hand, the five cases cited in which state courts extended the absolute privilege to lower level employees were all decided after 1950.⁸⁸ On the basis of this evidence, how the *Restatement (Second)* can assert "the greater number of state courts have refused to make this extension"—i.e., presumably, of the privilege extended in 1959 to all federal officials by *Barr*—is rather puzzling, particularly when this same comment confidently asserts that this leaves the inferior state officers in these states with only a conditional privilege.⁸⁹ I do not claim to know what the relevant law is in these states, but I would suggest that it would be unwise for a practicing lawyer to accept unhesitatingly the *Restatement (Second)*'s assertion, particularly if the relevant cases in his jurisdiction were decided before 1920.⁹⁰

84. *Id.* § 591, Comment c at 182.

85. *Id.* § 591, at 184-85. The two post-*Barr* cases that support the *Restatement* are *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962), and *Ranous v. Hughes*, 30 Wis. 2d 452, 141 N.W.2d 251 (1966). *Mayo v. Sample*, 18 Iowa 306 (1865), was incorrectly cited by the *Restatement* as being decided in 1965.

86. 360 U.S. 564 (1959).

87. *Barry v. McCollom*, 81 Conn. 293, 70 A. 1035 (1908); *Pearce v. Brower*, 72 Ga. 243 (1884); *Mayo v. Sample*, 18 Iowa 306 (1865); *Tanner v. Stevenson*, 138 Ky. 578, 128 S.W. 878 (1910); *Weber v. Lane*, 99 Mo. App. 69, 71 S.W. 1099 (1903); *Collins v. Oklahoma State Hosp.*, 76 Okla. 229, 184 P. 946 (1916); *In re Investigating Commn.*, 16 R.I. 751, 11 A. 429 (1887).

88. *Long v. Mertz*, 2 Ariz. App. 215, 407 P.2d 404 (1965); *McNay v. Kelly*, 184 So. 2d 428 (Fla. 1966); *Schlinkat v. Henderson*, 331 Mich. 284, 49 N.W.2d 180 (1951); *Sheridan v. Grisona*, 14 N.Y.2d 108, 198 N.E.2d 359, 249 N.Y.S.2d 161 (1964); *Montgomery v. City of Philadelphia*, 392 Pa. 178, 140 A.2d 100 (1958).

89. RESTATEMENT (SECOND) OF TORTS § 591, Comment c at 182 (Tent. Draft No. 20, 1974).

90. See *Evans, New Freedom of Speech in Politics*, 10 N.Y.L.F. 333 (1964), an instance of a practicing lawyer's early awareness of the problem noted in the text.