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HUTCHINSON V. PROXMIRE AND THE NEGLECTED FAIR COMMENT DEFENSE: AN ALTERNATIVE TO “ACTUAL MALICE”

Charles H. Carman*

Recent Supreme Court decisions have both limited the category of public figures and eviscerated the public interest concept thereby restricting the defenses available to defamation defendants. Mr. Carman suggests that the defense of fair comment, neglected since the Supreme Court fashioned an actual malice standard, can provide defamation defendants with a shield at least as effective as the public figure doctrine and also afford comments on topics of public interest adequate insulation from speech-chilling defamation liability. He supports this thesis by analyzing a series of defamation cases decided under the public figure standard but suitable for fair comment analysis.

In any revolution, the intensity of the struggle in some prominent arenas causes neglect of other potentially significant matters. So it is with the ongoing revolution in the law of defamation. The radical developments in American libel law since 1964, when the Supreme Court first applied its “actual malice” standard in New York Times Co. v. Sullivan, have directed inquiry toward the plaintiff’s public or private status and toward the defendant’s belief in the truth or falsity of the publication. With the attention of lawyers and scholars focused on the defendant’s state of mind and the plaintiff’s public exposure, a threshold question has not been asked: Is the alleged defamation a statement of fact at all? If not, if instead the statement

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1. Throughout this Article, two terms are used: “malice” and “actual malice.” Malice is the common law concept of spite, hostility or ill will, reflected in the defendant’s attitude toward the plaintiff. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 115 (4th ed. 1971) [hereinafter cited as PROSSER]. “Actual malice,” used with quotation marks throughout this Article, refers to the defendant’s knowledge of the truth or falsity of his allegedly defamatory statement. The two must not be confused. See Henry v. Collins, 380 U.S. 356, 357 (1965).

2. 376 U.S. 254 (1964). The Court ruled that the first amendment prohibits recovery of damages by a public official for a defamatory falsehood relating to his official conduct unless the official proves that the statement was made with “knowledge that it was false or with reckless disregard of whether it was false or not.” Id. at 279-80. The Court termed this mental state “actual malice.” Id.


4. The decision in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), “made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant.” Herbert v. Lando, 441 U.S. 153, 160 (1979). So important is the defendant’s mental state that, in Lando, the Supreme Court allowed discovery proceedings to invade the usually sacrosanct domain of editorial decisions when necessary for a public figure to establish “actual malice.” Id. at 170-75.
reflects an opinion, then courts need not consider whether the public figure doctrine triggers the plaintiff's burden to prove "actual malice." The appropriate defense for opinions and criticism is fair comment. Use of the "actual malice" standard—knowledge of a statement's falsity or reckless disregard of its truth or falsity—only makes sense when applied to an issue of truth. When the alleged defamation states an opinion, legal doctrine and common sense agree that it should not be actionable.

Nevertheless, American courts have sometimes applied an "actual malice" analysis to statements of opinion. Although these courts have usually reached the same defendant-oriented results as they would have under a more suitable fair comment approach, beginning with Gertz v. Robert Welch, Inc., the Supreme Court has repeatedly circumscribed the realm of public figures that will engage the plaintiff's burden of showing "actual malice." As defamation defendants slowly lose the protection of the "actual malice" burden imposed on public figure plaintiffs, the courts may become receptive to attempts to revive the common law doctrine of fair comment, so that a constricted category of public figures will not chill the

5. The doctrine of fair comment protects the defamation defendant from liability when the alleged defamatory statement is an opinion, is based on truly stated facts, is not an overly personal attack, is related to a matter of public interest, and is not made with malice. See F. HARPER & F. JAMES, THE LAW OF TORTS § 5.28 (1956) [hereinafter cited as HARPER & JAMES]; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 110 (3d ed. 1964) [hereinafter cited as PROSSER (3d ed.)]; Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 VA. L. REV. 1349, 1362-64 (1975) [hereinafter cited as Eaton]. Commentators and courts have differed on whether the fair comment doctrine is properly denominated a privilege or a defense. See HARPER & JAMES, supra, § 5.28, at 457; Eaton, supra, at 1363. This Article refers to fair comment variously as a doctrine, a privilege and a defense, and does not involve itself in this argument.


7. See discussion of malice at notes 193-213 and accompanying text infra.

8. The better reasoned cases have recognized the need for free-wheeling acceptance of opinions. "If an individual publishes an unreasonable opinion based on vague and invalid standards he libels himself and not the object of his opinion." Kapiloff v. Dunn, 27 Md. App. 514, 544 n.33, 343 A.2d 251, 270 n.33 (1975) (fair comment defense asserted), cert. denied, 426 U.S. 907 (1976). That opinions are less persuasive than statements of fact is an axiom crucial to an understanding of the role of fair comment. A reader or listener who understands that a statement is opinion is left free to make up his or her own mind on the subject. Thus, when a defendant attacked the plaintiff's study of the psychological effects of radio, the court observed that the defendant's opinion "will undoubtedly reinforce the minds of those who disagree with the plaintiff, and probably will have no effect upon those who think as [the plaintiff] has written." Berg v. Printers' Ink Pub. Co., 54 F. Supp. 795, 804 (S.D.N.Y. 1943) (fair comment defense asserted). Accord, Hall v. Binghamton Press Co., 263 A.D. 403, 412, 33 N.Y.S.2d 840, 849 (1942).


freedom to speak. This chill can be felt in the aftermath of the recent Supreme Court decision in *Hutchinson v. Proxmire*.

After discussing the changes in state defamation law produced by the Supreme Court's post-*New York Times* decisions, this Article evaluates the Court's *Hutchinson v. Proxmire* decision which reveals the need for judicial analysis that extends beyond public figure issues. A framework for such analysis is provided by fair comment, the next topic examined. Special consideration is afforded the components of this common law defense, the impact of Supreme Court defamation decisions on the defense's elements, and how the defense could have changed the outcome in *Hutchinson v. Proxmire*. Finally, this Article illustrates the potential of fair comment by applying the defense to a range of cases that were decided under an "actual malice" approach.

**Contemporary Libel Law: The “Actual Malice” Backdrop and *Hutchinson v. Proxmire***

Liability for a defamatory statement normally requires the presence of four elements: (1) a false and defamatory statement concerning another; (2) publication of that statement; (3) negligence in the publication; and (4) damage to the plaintiff. See *Hatch v. Morning News Co.* (Missouri 1921); *Browning v. v. Des Moines Register & Tribune)* (Iowa 1919). The first and second elements are usually not at issue in libel cases, and the third is often regarded as a matter of proof rather than a matter of essential liability. *Gertz v. Robert Welch*, Inc., 418 U.S. 323, 347-48 (1974).

In addition, the defamatory statement must be false. "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." *Restatement (Second) of Torts* § 581A (1977). The statement need not, however, be literally true in every detail. See, e.g., *Smith v. Byrd*, 255 Miss. 331, 83 So. 2d 172 (1955) (statement that sheriff shot a man was justified by proof that the sheriff was acting in concert with the deputy who shot him). See *Prosser, supra* note 1, § 116.

At common law, the defendant had the burden of pleading and proving a statement's truth. See *Atwater v. Morning News Co.*, 67 Conn. 504, 34 A. 865 (1896); *Bingham v. Gaynor*, 203 N.Y. 27, 96 N.E. 84 (1911). The introduction of constitutional restrictions on state defamation law has, however, required the plaintiff to prove at least negligence in the publication of the defamation. *Gertz v. Robert Welch*, Inc., 418 U.S. 323, 347-48 (1974). That limitation was introduced without a corresponding delineation of how the burden of proof changed, causing the American Law Institute to express "no opinion on the extent to which the common law rule . . . has been changed." *Restatement (Second) of Torts* § 613, caveat (1977). See *Eldredge, supra*, § 63; *Eaton, supra* note 5, at 1426-31.
(2) an unprivileged publication of that statement to at least one third party;¹⁶ (3) some minimum level of fault on the part of the defendant;¹⁷ and

¹⁵. Privileges are normally categorized as absolute or qualified. Absolute privileges provide immunity for otherwise actionable conduct "because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." PROSSER, supra note 1, § 114. See also Harper, Privileged Defamation, 22 Va. L. Rev. 643 (1936); Veedere, Absolute Immunity in Defamation, 9 Colum. L. Rev. 463 (1909). Absolute privilege has been held to encompass: (1) judicial proceedings; (2) legislative proceedings; (3) executive communications; (4) communications between husband and wife; and (5) expressions having the defendant's consent. See Restatement (Second) of Torts §§ 583-592A (1977); Eldredge, supra note 14, §§ 72-76; Prosser, supra note 1, § 114; Handler & Klein, The Defense of Privilege in Defamation Suits Against Government Executive Officials, 74 Harv. L. Rev. 44 (1960); Note, Gravel and Legislative Immunity, 73 Colum. L. Rev. 125 (1973).

Qualified privileges arise when the defendant's statement is regarded as having a lesser, or intermediate, social importance, so that the privilege "is conditioned upon publication in a reasonable manner and for a proper purpose." PROSSER, supra note 1, § 115, at 786. At common law, the interests protected by qualified privilege included: (1) publication of matters necessary for the protection or advancement of the publisher's own legitimate interests; (2) statements necessary for the protection of third-party interests; (3) statements reasonably calculated to protect or further a common interest of the publisher and recipient; (4) communications made to those who may be expected to take official action for the protection of a public interest; (5) publications fitting within the doctrine of fair comment; and (6) reports of public proceedings. Id. Abuse of a qualified privilege results in forfeiture of the defendant's immunity. See Restatement (Second) of Torts § 599 (1977); Hallen, Excessive Publication in Defamation, 16 Minn. L. Rev. 160 (1932). Abuse may take the form of express malice, Kruse v. Rabe, 80 N.J. 378, 79 A. 316 (1911) (advice by an attorney to his client about the integrity of the client's business associate is slanderous and without need of publication or loud utterance if made in public place and addressed to the business associate and not the client), the publication of defamatory matter to an audience whose attention is not necessary or useful in furthering the interest giving rise to the privilege, Sias v. General Motors Corp., 372 Mich. 542, 127 N.W.2d 357 (1964) (accusation of theft in the presence of third party), or the publication of irrelevant defamatory matter, Hines v. Shumaker, 97 Miss. 669, 52 S.W. 705 (1910) (letter sent by superintendent of agents of insurance company to agents referring to representative of another company as dishonest, lacking in brains, undiplomatic and pessimistic, is libelous per se and exceeds any privilege). Note that the dimensions of the qualified privilege have been modified by the Supreme Court's imposition of first amendment concerns on state defamation law. See notes 21-34 and accompanying text infra.

¹⁶. "Publication of defamatory matter is its communication intentionally or by negligent act to one other than the person defamed." Restatement (Second) of Torts § 577(1) (1977). Further, "it is enough that it is communicated to a single individual other than the one defamed." Id. § 577, Comment b. Thus, without communication of the defamatory material to a third party an action for defamation cannot be maintained. Busby v. First Christian Church, 153 La. 377, 95 So. 869 (1923); Fry v. McCord Bros., 95 Tenn. 678, 33 S.W. 568 (1898); Almy v. Kramme, 63 Wash. 2d 326, 387 P.2d 372 (1963). The publication need not be oral or written. It may be made by means of a picture, Louka v. Park Entertainments Inc., 294 Mass. 268, 1 N.E.2d 41 (1936), a statue, Monson v. Tussauds, Ltd., [1894] 1 Q.B. 671, or by gesture, Hird v. Wood, [1894] 38 Sol. J. 234 (pointing at a sign).

¹⁷. Defendants are not liable for defamation of public officials unless the statement was "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).
(4) the presence of special harm caused by the publisher, or the existence of circumstances giving rise to an action irrespective of the presence or absence of special harm. Contemporary libel law represents extensive modifications of common law defamation by Supreme Court decisions spanning the past seventeen years. Before the Supreme Court’s intervention, the common law of defamation, as expressed by the original Restatement of Torts, provided for liability upon a showing of "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." The Supreme Court began to refashion libel law by interposing first amendment concerns in the 1964 landmark, New York Times Co. v. Sullivan. There, the Court required public officials suing for defamation to prove that the alleged defamatory falsehoods were stated with "actual malice"—that is, with knowledge that the statements were false or with reckless disregard of whether they were false or not. The "actual malice" standard significantly changed the minimum standard of fault by eliminating all strict liability for defamatory statements made about public officials.


18. "Special harm ... is the loss of something having economic or pecuniary value. Restatement (Second) of Torts § 575, Comment b (1977). The Restatement uses the term "harm" rather than damages, preferring to reserve the term "damages" for the plaintiff’s final compensation. See Eldredge, supra note 14, § 30.

19. A slander is actionable irrespective of the presence of special harm if it imputes to the plaintiff a criminal offense, a loathsome disease, serious sexual misconduct, or conduct adversely affecting his or her fitness for the proper conduct of his or her lawful business, trade or profession. Restatement (Second) of Torts §§ 570-574 (1977). All libel is actionable without proof of special harm when the publication is defamatory on its face. Most courts, however, hold that if extrinsic facts must be used to demonstrate the libel, the libel is not actionable without proof of special harm unless it falls within one of the four slander categories above. See Prosser, supra note 1, § 112; Murnaghan, From Figment to Fiction to Philosophy—The Requirements of Proof of Damages in Libel, 22 Cath. U.L. Rev. 1 (1972).


22. 376 U.S. at 279-80.

23. Strict liability for defamatory statements was first imposed in Jones v. Hulton & Co., [1908] 2 K.B. 444, aff'd, [1910] A.C. 20. The defendants published what they believed to be a fictitious story about one Artemus Jones, whom they intended and believed to be fictitious, who had been seen with a woman other than his wife. An attorney named Artemus Jones then sued claiming that his neighbors understood the story as referring to him. The House of Lords affirmed a decision favorable to him, holding that the defendant's innocence was no protection...
The actual malice standard was extended in 1967 to a case in which plaintiff was a public figure, and in 1971 to a case with a private plaintiff in which the allegedly libelous matter was published about an issue of general or public concern.

This trend toward broader applications of the "actual malice" standard was reversed in 1974 by Gertz v. Robert Welch, Inc. In Gertz, the Supreme Court rejected application of "actual malice" to matters of general or public concern, and limited the concept of a "public figure" by excluding a prominent Chicago attorney, writer, and lecturer from that category. In 1976, the

against liability. Other instances where the defendant has been held liable without regard to fault include, for example: cases where the defendant did not intend to make the statement, Upton v. Times-Democrat Pub. Co., 104 La. 141, 28 So. 970 (1900) (typographical error changed "cultured gentlemen" to "colored gentleman"); where the statement was true of one of two persons having the same name but not the other, Washington Post Co. v. Kennedy, 3 F.2d 207 (D.C. Cir. 1925) (newspaper item reporting arrest of "Harry Kennedy, an attorney, 40 years old" held libelous as to Harry F. Kennedy, the only attorney by that name in the District and about 37 years old, when the person arrested was from Detroit and was Harry P.L. Kennedy); or where the defamatory meaning was attached by extrinsic facts of which the defendant was unaware, Morrison v. Ritchie & Co., [1904] Sess. Cas. 645 (Scottish case in which plaintiff who had been married only one month was announced to have given birth to twins). See generally Prosser, supra note 1, § 113, at 772-74.

24. Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967). The reach of the designation "public official" has been only partially defined. Although the New York Times Court declined "to determine how far down into the lower ranks of government employees the 'public official' designation would extend," 376 U.S. at 283, two years later the Court offered some guidance. In Rosenblatt v. Baer, 383 U.S. 75, 85 (1966), the Court stated: "[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Id. Officials found by the Court to be public officials include an elected city commissioner, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), criminal court judges, Garrison v. Louisiana, 379 U.S. 64 (1964), a chief of police, Henry v. Collins, 380 U.S. 356 (1965), an elected court clerk, Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967), and a deputy sheriff, St. Amant v. Thompson, 390 U.S. 727 (1968). Accord, Gilligan v. King, 48 Misc. 212, 264 N.Y.S.2d 309 (Sup. Ct. 1965) (occupants of even minor governmental positions are public officials). The Court has continued to refrain from setting precise limits, emphasizing instead the principle that debate on public issues "should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. at 270. Thus, the public official definition apparently turns on the significance of the issues involving the defamed individual.

25. Public figures have been defined as those who "have assumed roles of special prominence in the affairs of society," Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974), or those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Id. Accord, Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976).


28. Id. at 352. That individuals may be public figures for limited purposes has been explicitly recognized by the Supreme Court: "Some [persons] occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Id. at 345.
brethren retreated further, holding in *Time, Inc. v. Firestone*\(^9\) that the wife of an industrial family scion was not a public figure regarding her divorce\(^10\) even though she held press conferences during her divorce proceedings. Most recently, *Hutchinson v. Proxmire*\(^3\) removed a research scientist who had obtained nearly a half million dollars of public money for his research from the sphere of public figures for purposes of discussing his work.

Loath to apply “actual malice” in a variety of situations, the Supreme Court has caused uncertainty and contradictory application of that concept by lower courts. The essence of libel actions therefore is being lost in the nuances of “actual malice,” the status of individual plaintiffs, and cavalier judicial attitudes toward the public interest.\(^3\) The time is overripe for defense attorneys in libel actions to first determine the nature of the alleged defamation, because if found to be opinions, such actions can be defended without entering the public figure-“actual malice” thicket.\(^2\)

The most recent example of trigger-happy public figure analysis is *Hutchinson v. Proxmire*.\(^3\) There, Senator William Proxmire bestowed his monthly Golden Fleece Award—for the organization or person who has

\(^{29}\) 424 U.S. 448 (1976).

\(^{30}\) The Court held that Mary Alice Firestone, wife of the head of the wealthy industrial family of the same surname, was not a public figure for the purpose of determining the constitutional protection afforded to a report of her divorce. *Id.* at 455. The Court held that Ms. Firestone did not “choose to publicize issues as to the propriety of her married life,” *id.* at 454, but was “compelled to go to Court.” *Id.* Her attempts to satisfy inquiring reporters through press conferences did not convert her into a public figure because the interviews should not have affected the outcome of the trial and were not intended to do so. *Id.* at 454 n.3.


\(^{32}\) See discussion of fair comment cases in text accompanying notes 219-270 infra. Part of the uncertainty has resulted from the Supreme Court’s choice of the term “actual malice” to describe the defendant’s state of mind when knowingly or recklessly making a false statement of fact. In libel actions at common law, “malice” referred to the defendant’s spite or ill will, not knowledge of the truth of his or her statements. Lower courts have therefore continually confused these two terms. See Greenbelt Pub. Ass’n v. Bresler, 398 U.S. 6, 10 (1970) (trial court’s instructions to jury that a public figure could recover in libel suit if defendant’s publication had been made with malice, defined as including spite, hostility, or deliberate intention to harm, found to be constitutionally insufficient; decision in favor of plaintiff reversed and remanded); Beckley Newspapers v. Hanks, 389 U.S. 81, 82 (1967) (jury instructions that liability follows from personal spite, ill will, a desire to injure plaintiff, or a bad or corrupt motive held impermissible and decision awarding an elected official damages reversed and remanded); Henry v. Collins, 380 U.S. 356, 357 (1965) (judgments awarding damages to public figures reversed because jury might have understood instructions to permit recovery on showing of intent to inflict harm, rather than on showing of intent to inflict harm through falsehood); Evand v. Lawson, 351 F. Supp. 279, 286 (W.D. Va. 1972) (liability ruled contingent upon proof of actual malice, or utter disregard for the truth or falsity of the statement or knowledge of the statement’s falsity).

\(^{33}\) See notes 170-192 and accompanying text infra.

\(^{34}\) See discussion of hidden fair comment cases in text accompanying notes 219-270 infra.

most utterly wasted your tax dollars”—to three federal agencies that granted about $500,000 over seven years to Dr. Ronald Hutchinson, a research behavioral scientist. According to Proxmire, Hutchinson’s work determined “under what conditions rats, monkeys and humans bite and clench their jaws.” Labeling Hutchinson’s work for the different agencies as “extremely similar and perhaps duplicative,” Proxmire claimed that “the good doctor has made a fortune from his monkeys and in the process made a monkey out of the taxpayer.” Proxmire trumpeted the “transparent worthlessness” of the research in a press release, a newsletter to his constituents, a television appearance, and a speech on the Senate floor.

Dr. Hutchinson clenched his jaw and sued Proxmire for libel. The federal district court for the Western District of Wisconsin granted summary judgment for Proxmire, finding Hutchinson to be both a public figure and a public official for purposes of the suit, so that Hutchinson’s failure to prove “actual malice” on Senator Proxmire’s part in making the statements was fatal. The district court relied in the alternative upon state defamation law. Without ruling which state’s law controlled, the court held that fair comment was either a complete defense or a qualified privilege.

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36. 579 F.2d at 1036. The press release and newsletter provide a lively account of Dr. Hutchinson’s work, in addition to containing some of Senator Proxmire’s allegedly defamatory statements. The release and newsletter are appended to the appellate court’s opinion, id. at 1036-38 app. A & B. The press release is reprinted in full in an Appendix to this Article. 37. Id. at 1037 app. A. 38. Id. 39. Id. at 1030. 40. Hutchinson v. Proxmire, 431 F. Supp. 1311, 1333 (W.D. Wis. 1977). The court also held that the speech or debate clause protected Proxmire’s Senate speech. Id. at 1325. The speech or debate clause provides that “Senators and Representatives... for any speech or debate in either House... shall not be questioned in any other place.” U.S. Const. art. I, § 6. On appeal, the Supreme Court limited protection to Proxmire’s speech in the Senate because only that statement was “essential to the deliberations of the Senate.” 443 U.S. at 130 (citing Gravel v. United States, 408 U.S. 606, 622-26 (1972)). 41. Public officials and public figures are discussed in notes 24 & 25 and accompanying text infra. 42. 431 F. Supp. at 1327-28. 43. Applying the rule of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), the district court attempted to follow the choice of law principles of Wisconsin, the state in which it was sitting. 431 F. Supp. at 1330. Although the court stated that it was “not certain what law Wisconsin would apply in this case,” it concluded that the choice was logically limited to either the law of Michigan or the District of Columbia. Id. 44. 431 F. Supp. at 1331-32. The court found the qualified privilege in Timmis v. Bennett, 352 Mich. 355, 89 N.W.2d 748 (1958). The privilege covered “statements made in good faith by a citizen... having or claiming to have special knowledge... bearing on [a] matter of public concern and communicated to others concerned or interested.” Id. at 369, 89 N.W.2d at 755. The Hutchinson v. Proxmire court did not address whether the fair comment defense exists in Michigan and applies to the case, even though strong Michigan authority for a fair comment was present in Eikhoff v. Gilbert, 124 Mich. 353, 359, 83 N.W. 110, 112 (1900).
Agreeing that Hutchinson was a public figure, the United States Court of Appeals for the Seventh Circuit affirmed without reaching the issue of fair comment. On appeal, the Supreme Court also ignored the fair comment issue, but reversed the appellate court’s decision that Hutchinson was a public figure. The Court reasoned that public interest in Hutchinson’s work was limited to a few professionals in his field, and that mere receipt of public money is insufficient by itself to transform a person into a public figure. The Court noted that Hutchinson’s only access to the press was to respond to the Golden Fleece Award, and held that a defendant could not create a public figure simply by leveling defamatory charges. Having demolished the bulwarks of Proxmire’s defense, the Court remanded the case to the district court for a new trial.

Unfortunately, neither the appellate court nor the Supreme Court concentrated on fair comment, although the subject was briefly raised in the trial court. Yet, Senator Proxmire’s jibes about Dr. Hutchinson’s “personal fortune” and his “perhaps duplicative” work were the only statements that could arguably be considered defamatory falsehoods. Every other statement was Proxmire’s opinion. Had any of the courts carefully evaluated the applicability of fair comment to the case, they would have discovered it to be

45. 579 F.2d at 1035. The court did not address the district court’s holding that Hutchinson was a public official.

46. The Court did not consider the fair comment issue because it found an indication in Hutchinson v. Proxmire, 579 F.2d 1027, 1035 n.15 (7th Cir. 1979), that the Seventh Circuit would not affirm a finding of fair comment. The Supreme Court concluded that if the case were remanded to the trial court for a decision on the state law-fair comment issue, the Seventh Circuit, on appeal, would reject the state law defense. The Supreme Court therefore held that justification existed for an immediate decision on the constitutional issues presented, 443 U.S. at 123, notwithstanding its usual practice of avoiding constitutional issues whenever a dispositive nonconstitutional ground is available. Id. at 122. See Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193 (1909).

47. 443 U.S. at 136. The Court based its decision on an independent examination of the record, following the view of New York Times that “considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for [the plaintiff].” 376 U.S. at 284-85.

48. 443 U.S. at 136.

49. Id. Hutchinson “did not have regular and continuing access to the media that is one of the accouterments of having become a public figure.” Id. His access was limited to responding to Proxmire’s award, and as such arose after the alleged libel.

50. Despite Hutchinson’s acceptance of public money for his studies, the Court held that he was not a public figure before the alleged libel. His writings reached only a small group of professionals interested in his research in human behavior. The subject of his studies and published works became a controversial matter as a consequence of the Golden Fleece Award and “those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.” Id. (citing Wolston v. Reader’s Digest Ass’n, Inc., 443 U.S. 157, 167-68 (1979)).

51. See note 40 supra.

52. 443 U.S. at 136.

53. 431 F. Supp. at 1331.
completely dispositive, as shown below.\textsuperscript{54} But the post-\textit{New York Times} preoccupation with public officials and public figures obscured the threshold fair comment issue.

One can only guess how much public debate has been stifled by general inattentiveness to fair comment and by the Supreme Court's public figure pirouetting. Because confusion in libel law had already caused \textit{Hutchinson v. Proxmire} to languish in court for five years without final decision, Senator Proxmire was forced to abandon his defense and settle with Dr. Hutchinson.\textsuperscript{55} The monetary cost to taxpayers was high and the essential issue of the case remains undecided.

Many libel plaintiffs, including Dr. Hutchinson, should not have a valid cause of action. Regardless of its scientific merit,\textsuperscript{56} Hutchinson's project was prima facie silly. Senator Proxmire tried to hold accountable the scientist and the public agencies that funded him. An understanding of why Dr. Hutchinson and others should have no remedy requires an examination of the fair comment defense. It will become clear through the following discussion of fair comment that this defense not only may augment the protection given speech about subjects of public interest, but also can offer an effective alternative to public figure analysis.

\textbf{THE OUTLINES OF THE FAIR COMMENT DEFENSE}

Fair comment has been a recognized defense to libel actions in Anglo-American jurisprudence at least since the early nineteenth century.\textsuperscript{57} In its

\textsuperscript{54} The fair comment defense is applied to \textit{Hutchinson v. Proxmire} in notes 214-217 and accompanying text infra.

\textsuperscript{55} A Proxmire spokesman, before the settlement, told this writer that the Senator was confident of prevailing in the remand of \textit{Hutchinson v. Proxmire} by using the fair comment defense. That spokesman also bemoaned the cost of the litigation and the time spent, which he felt could have been better expended on other business. Telephone interview of Mr. Howard Shuman, Assistant to Senator William Proxmire, by Charles H. Carman. On Monday, March 24, 1980, as part of the settlement, Proxmire apologized to Hutchinson on the Senate floor. 126 CONG. REC. S2831-32 (1980). Howard Shuman that day announced that, in addition to the apology, Proxmire would pay Hutchinson $10,000 plus court costs of $5132. The original suit had sought $8,000,000. Reason exists, however, to doubt the sincerity of Proxmire's apology; it was clearly far cheaper to settle than to litigate further. Proxmire attorneys, paid from government funds, had already spent $124,351 defending the suit, and at least that amount, and another five years, could have been reasonably expected before the litigation came to rest.

\textsuperscript{56} The National Academy of Sciences, National Aeronautics and Space Administration, and the Navy were interested in the potential of this research for resolving problems associated with confining humans in close quarters for extended periods of time in space and undersea exploration. 443 U.S. at 117. Since the Golden Fleece Award was given to agencies funding plaintiff's research, Dr. Hutchinson has received further federal grants. 431 F. Supp. at 1317.

\textsuperscript{57} Tabart v. Tipper, 170 Eng. Rep. 981 (1808). Lord Ellenborough articulated the justification for fair comment as follows:

\textit{Liberty of criticism must be allowed or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history, and the advancement of science. That publication, therefore I shall never consider as a}
simplest formulation, the modern fair comment defense requires the presence of five elements: (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. Although fair comment appears on first impression to have only a narrow application, the defense has a longer reach than it has been afforded. The following sections of this Article discuss in some detail the elements of the fair comment doctrine, indicating the breadth of interpretation that the doctrine has been given as well as the future possible uses of the fair comment defense.

The Protected Statement Must Be Opinion, Not Fact

That pure expressions of opinion are not actionable was recognized by
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earlier fair comment cases and was reiterated by the Supreme Court in New York Times and Gertz v. Robert Welch, Inc. The Gertz Court saw a crucial difference in judicial treatment of facts and opinions: “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.” If there is any doubt that the Court meant “idea” as a synonym for opinion, its next statement was: “But there is no constitutional value in false statements of fact.” Because the success of a fair comment defense depends upon distinguishing fact from opinion, making this distinction is the first step for the defamation defendant.

Distinguishing fact from opinion is sometimes harder than it might seem. One court suggested that the difference between fact and opinion can usually be determined as a practical matter. That court would ask a simple question: “Would an ordinary person, reading the matter complained of, be likely to understand it as an expression of the writer’s opinion or as a declaration of an existing fact?” Some commentators assert that facts are statements capable of proof as true or false and that statements not capable of such proof are opinions. Courts following this approach have, however,

(brief comment must be afforded for an honest expression of opinion based upon privileged as well as true statements of fact); Golden N. Airways v. Tanana Pub. Co., 218 F.2d 612, 627 (9th Cir. 1959) (if the statement is the honest expression of the writer’s real opinion on the facts which appear in the publication then the fair comment privilege applies); Howard v. Southern Cal. Associated Newspapers, 95 Cal. App. 2d 580, 584-85, 213 P.2d 399, 403 (1950) (expressions of opinions are not actionable if they appear as opinions). See also RESTATEMENT (SECOND) OF TORTS § 566 (1977).


61. 376 U.S. 254 (1964). The Alabama Supreme Court held in New York Times that because criticism of police conduct was criticism of respondent personally and in his capacity as commissioner of public affairs, it was actionable. New York Times Co. v. Sullivan, 273 Ala. 656, 674-75, 144 So. 2d 25, 49 (1962). This was unacceptable to the United States Supreme Court because “the proposition ... strikes at the very center of the constitutionally protected area of free expression.” 376 U.S. at 292. In a footnote the Court continued:

Insofar as the proposition means only that the statements about the police conduct libeled respondent by implicitly criticizing his ability to run the Police Department, recovery is also precluded in this case by the doctrine of fair comment. . . . Since the Fourteenth Amendment required recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here.

Id. at 292 n.30.


63. Id. at 339-40.

64. Id.


66. A commonly invoked distinction between statements of fact and opinion is as follows:

A statement of fact is one capable of the quality of truth or falsity. A statement of opinion does not have this quality. Shortly speaking, therefore, an opinion is never true or false in the same sense as a statement of fact. An opinion is a comment on
been criticized for lack of direct analysis and for circularity of definition. Yet, guidance is required to distinguish facts from opinions, and no court or commentator has suggested a better formula than asking whether the statement is capable of proof of truth or falsity. Often, courts have not considered the distinction, and have instead mistakenly evaluated the truth or falsity of opinions. Such improper analysis has unnecessarily created spurious public official or public figure issues and caused neglect of the fair comment defense.

The uncertainty surrounding the fact-opinion distinction has left an uncomfortable legacy of judicial confusion, which has included imprecise jury instructions. The difficulty of distinguishing facts from opinions has even led some courts to abandon the distinction and extend fair comment protection to criticism based on false "facts" as long as the statements were made in good faith and the other elements of fair comment have been established. The murkiness of the fact-opinion distinction was the explicit reason for adoption of the minority rule in the turn of the century Kansas case that

or an interpretation of fact. It is always related to the facts it purports to interpret. Depending on its conformity with sound critical standards, the opinion may be sound or unsound, good or bad, reasonable or unreasonable, but never true or false.

Harper & James, supra note 5, § 5.8, at 370.


68. See discussion of hidden fair comment cases in text accompanying notes 218-270 infra.

69. An English judge instructed the jury regarding this element of the defense of fair comment as follows:

So the first question in relation to this defense is: Were these words comment, "into which he put all the dirt he knew"? Well, now, members of the jury, you may think that this is not comment, it is simply an allegation of fact. Of course, it is sometimes difficult to distinguish between a statement of fact which is simply a statement of fact and one which can also be reasonably regarded as comment, and that is a question for you in this case, which it is. Again, you may think the question is so difficult that you cannot say, without some doubt lurking in your mind, whether it is in fact comment or whether it is an allegation of fact. Grech v. Odhams Press Ltd., [1958] 2 All E.R. 462, 467-68. (C.A.). The appellate court upheld the jury instructions. Id.

70. Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). Although the court's discussion is fairly abstract, it contains a realistic appraisal of the practical effects of allegedly defamatory statements:

The distinction between comment and statements of fact cannot always be clear to the mind. Expression of opinion and judgment have all the force of statements of fact and pass by insensible gradations into declarations of fact. . . . What is a charge of intoxication—an inference from conduct and appearances and therefore fair comment or the statement of a fact? What is the difference between a charge of intoxication and the following: "Having appearances which were certainly consistent with
was the model for the Supreme Court's "actual malice" standard, adopted in *New York Times*. Similarly, the Alaska Supreme Court, fearing a possible chill of open public debate if an opinion was labeled a fact, rejected the distinction and adopted a rule protecting non-malicious yet false statements of fact when the discussion involved a matter of public interest and concern.

The fact-opinion dichotomy has created uncertainty, and the cases reveal that the analysis must go beyond the allegedly defamatory words that alone may be inadequate to draw the distinction. The textual context is sometimes relevant. For example, even a description of the plaintiff's conduct as constituting a criminal act might not be regarded as a statement of fact. In 1970, the Supreme Court held that a charge of "blackmail" was, *in context*, a criticism and not an actionable statement of fact. Conversely, the lack of a context in the publication may lead to the conclusion that the statement is fact and not opinion. Nevertheless, even when enough facts are provided,
writers must remember that the opinion of another person is a fact, and that erroneous reporting of another's opinion cannot be cloaked in the writer's own fair comment privilege.\textsuperscript{75}

In addition to textual context, the circumstances surrounding the statement can be important. Charges that a person was a "scab" and was "a traitor to his God, his country, his family, and his class" have been held non-defamatory by the Supreme Court because they were made during a labor dispute.\textsuperscript{76} Surrounding circumstances have also protected a statement that otherwise would have accused plaintiff of mental illness.\textsuperscript{77} A similar reasoning has been applied to protect editorial cartoons, including one showing the plaintiff-county assessor picking a taxpayer's pocket\textsuperscript{78} and an illustration of a hotel with its outside walls propped up by crude braces.\textsuperscript{79}

Although the difficulty of drawing the fact-opinion distinction persists, a slowly growing liberality and tolerance for others' expressions may render activities, this statement was a charge of violation of a state anti-kickback law. \textit{Id.} at 730. The rarity of this type of case indicates that courts have generally found it easy to distinguish fact from opinion even when there is a lack of context in the publication; the fair comment defense can still be valid in this situation.\textsuperscript{75} See, e.g., \textit{Cepeda v. Cowles Magazines & Broadcasting, Inc.}, 328 F.2d 869 (9th Cir. 1964). Fair comment will not allow a defendant to escape liability for defamation by showing that he was merely reporting defamatory language used by another person. \textit{Id.} at 871. In \textit{Cepeda}, a sportswriter was held liable even though he was only passing on to his readers what he purportedly learned from other persons.\textsuperscript{76}

Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974). The Court stated that "[s]uch words were obviously used here in a loose figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization." \textit{Id.} at 284.\textsuperscript{77}

\textit{Fram v. Yellow Cab Co.}, 380 F. Supp. 1314 (W.D. Pa. 1974). The court stated: "Statements must be viewed in the context in which they are uttered. . . . [T]he nature of the audience hearing the remarks is a key factor in determining whether they are capable of a defamatory meaning." \textit{Id.} at 1329. The court concluded that viewers would not understand the words "paranoid" and "schizophrenic," the allegedly defamatory words in \textit{Fram}, to refer to an actual physiological or mental affliction of the plaintiff; rather, "the average viewer . . . would understand them to be what they actually were—a rebuttal and criticism of [plaintiff's] accusations." \textit{Id.} at 1330.\textsuperscript{78}

\textit{Thompson v. Newspaper Printing Corp.}, 325 P.2d 945 (Okla. 1958).\textsuperscript{79} Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 866-67 (5th Cir. 1970). The court stated, however, that a doctored photograph which purported to be a true picture would present a statement of fact for which the fair comment defense would be unavailable. \textit{Id.} at 867 n.18.

Other statements which have been held to be opinions by the courts include: "Toady, hypocrite, exploiter," as applied to a writer and lecturer, Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir. 1977); "fascist," as applied to a journalist, Buckley v. Littel, 539 F.2d 882 (2d Cir. 1976); quotation marks around the word "expert," as applied to a professional art authenticator, Porcella v. Time, Inc., 300 F.2d 162 (7th Cir. 1962); "Nazi Trojan Horse," as applied to a magazine, Potts v. Dies, 132 F.2d 734 (D.C. Cir. 1942); "pornography," as applied to a novel, Buckley v. Vidal, 327 F. Supp. 1051 (S.D.N.Y. 1971); "badly hung" and "commercial" in quality, as applied to paintings in an art gallery, Fisher v. Washington Post Co., 212 A.2d 335 (D.C. Ct. App. 1965); and "unsuited," as applied to a high school principal, Kapiloff v. Dunn, 27 Md. App. 514, 343 A.2d 251 (1975), \textit{cert. denied}, 426 U.S. 907 (1976).
more judgments for defendants likely in fair comment cases. Courts are now less willing to unequivocally label statements as "facts." In contrast to modern decisions, an early 1800's jury found judgment for a plaintiff called by the defendant a publisher of "immoral and foolish books," and an early twentieth century plaintiff insisted an article stating he "ignored" his public water bill was actionable. In 1904, even a lampoon of a well-known college English professor, facetiously stating that he was the man to re-write Shakespeare, was considered actionable and libelous per se. That such quibbling disputes will no longer take center stage in the development of libel law is devoutly to be wished. Thus, the remainder of this section will focus on the presumably more important disputes arising in the contemporary political arena.

*Phoenix Newspapers, Inc. v. Church* is a recent politically oriented case illustrating the continuing imprecision of the fact-opinion distinction. Plaintiff Wade Church, then Attorney General of Arizona, proposed the formation of "people's councils" to be composed of all citizens not represented by the special interest lobbyists then influencing the Arizona legislature. The defendant newspapers, commenting on the fact that the plaintiff was six months late in paying its public water bills, stated that the plaintiff had "ignored" a bill. The plaintiff contended that "ignored" was libelous because it meant something more than "failed to pay;" rather, the hotel contended that it connoted a refusal to pay or neglect. The court refused, however, to hold that the word "ignored" was libelous as a matter of law.

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82. Briarcliff Lodge Hotel v. Citizen-Sentinel Pubs., 260 N.Y. 106, 183 N.E. 193 (1932). The defendant newspapers, commenting on the fact that the plaintiff was six months late in paying its public water bills, stated that the plaintiff had "ignored" a bill. Id. at 144, 183 N.E. at 196. The plaintiff contended that "ignored" was libelous because it meant something more than "failed to pay;" rather, the hotel contended that it connoted a refusal to pay or neglect. Id. at 116, 183 N.E. at 197. The court refused, however, to hold that the word "ignored" was libelous as a matter of law. Id.

83. Triggs v. Sun Printing & Pub. Ass'n, 179 N.Y. 144, 71 N.E. 739 (1904). The case is amusing reading, but almost certainly no longer good authority. Professor Triggs sought publicity and for purposes of this litigation would probably be considered a public figure today. Even under the more conservative fair comment law of 1904, the decision seems wrong because there appears to have been no false assertion of fact. See notes 116-156 and accompanying text infra.

84. 103 Ariz. 582, 447 P.2d 840 (1968).

85. Id. at 584, 447 P.2d at 871. Mr. Church told an AFL-CIO convention of the influence upon the legislature of special interest groups, representing the mining, power, construction, finance, and cattle industries, and, citing his own experience, explained how these groups had joined together to limit the money available for the public schools. Id. at 583-84, 447 P.2d at 841-42. Mr. Church proposed:

Now, the working people and the people's groups are going to have to do the same thing. We are going to have to build a council. We are going to have to have full-time representatives up there at that legislature. We are going to have to watch it carefully. The P.T.A. ought to have them. The Council of Churches ought to have them, the labor groups ought to have two or three and those teachers, they are the ones that got a lot of brains, doggone them, they should be out there, too. . . .

Id. at 584, 447 P.2d at 842 (emphasis in original).
Church's proposal—and saw communism. The evidence at trial established that Church was neither a communist nor a communist sympathizer. The majority, however, held that the Republic's innuendoes and "questions" might be opinion, and ordered a re-trial with a fair comment instruction.

Although the majority ordered a re-trial, the five-man court produced four opinions. Justice Struckmeyer suggested that the statements sued upon were statements of fact, not opinion. Justice Udall thought the editorial was

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86. Id. at 585-86, 447 P.2d at 843-44. The article stated in pertinent parts:

_NOTHING ILLUSTRATES_ better the dangerous left-wing ideas of Attorney General Wade Church than his proposals for the setting up of a "people's council" in Arizona.

According to Church our legislature is "dominated" by special interest groups operating from the Adams Hotel in Phoenix. To "correct" this situation Mr. Church proposes the selection of a "people's council" which presumably, should tell the legislature what to do and how to do it.

MR. CHURCH'S "people's council" idea comes straight from the writings of Karl Marx, the god of "scientific socialism" and the prophet of the International Communist movement. The same idea was the cornerstone of the philosophy of Lenin, the founder of the Soviet state. The same idea is the political basis of all Communist regimes all over the world. The story of Communism in power is essentially a story of the "people's council" idea of government put into practice.

The "people's council" idea is only another name for the Communist technique of the seizure of power and for the Communist way of enabling a small minority to control and eventually to rule the huge majority.

"THE PEOPLE'S COUNCIL" idea of Attorney General Church is therefore nothing but a disguised Marxist idea of minority rule over the majority.

We are certain that most Arizonans will resolutely reject Mr. Church's alarming conceptions of government.

We also sincerely hope that the Arizona labor movement—at whose annual convention last week Mr. Church first voiced his "people's council" proposals—will have the good sense to disassociate itself completely from such dangerous ideology, which can only do harm to the rank and file working man.

BUT MR. CHURCH, himself, owes an urgent explanation to the public. He has to state, publicly and clearly, whether or not his "people's council" proposals are part and parcel of a general Marxist philosophy of government and of life.

Does Mr. Church advocate socialism for Arizona?

Does he advocate communism?

Does he want "people's councils" to take over our state government in the way they have taken over the governments of all the unhappy lands behind the Communist Iron Curtain?

Id. (emphasis in original).

87. Id. at 592, 447 P.2d at 850.

88. See note 86 supra.

89. Id. at 598, 447 P.2d at 856. Upon retrial, the jury awarded plaintiff $250,000 actual damages and $235,000 punitive damages against each of three defendants. The decision was upheld on appeal against two of the three defendants, including Phoenix Newspapers. Phoenix Newspapers, Inc. v. Church, 24 Ariz. App. 287, 537 P.2d 1345 (1975).

90. 103 Ariz. at 598, 447 P.2d at 856 (Struckmeyer, J., concurring). Justice Struckmeyer stated: "It can only be understood to mean that Church was advocating the seizure of power..."
clearly opinion because "a reader is put on notice in the very beginning that . . . the People's Council . . . is to be operated by an Arizona labor union." The editorial's constant use of the word "communism," he contended, could not be reasonably interpreted as a factual statement that the council was to be operated by Communists. Justice Bernstein argued that the editorial technically had only demanded that Attorney General Church clarify his position on communism. Because Justice Bernstein felt that charges of communism against public figures were "common place," he advocated application of the fair comment defense and consequently the complaint's dismissal.

The lesson of Phoenix Newspapers is that possibly libelous statements should not become too specific. The crux of the case seems to be that the defendant was found to have alleged advocacy by the plaintiff of a specific device—the people's council—for a specific, treasonable end—the overthrow of Arizona's democratic government. Because it is so difficult to imagine that many readers believed Church was calling for communism in Arizona, the result seems wrong; but the case illustrates that the specificity of a possibly libelous charge will have a bearing on whether the finder of fact calls the statement "fact" or "opinion."

Two cases involving pop conservative William F. Buckley, Jr. also demonstrate that specific allegedly libelous words are likely to be labeled as fact, and that more general words are more likely to be called opinion. The first of the cases, Buckley v. Littell, arose when Dr. Franklin H. Littell's book, Wild Tongues, was found by the district court to have libeled Buckley in three ways:

[F]irst, by labeling Buckley as a "fellow traveler" of "fascism" . . . [s]econd, by saying that he acts as a "deceiver" and uses his journalistic position to spread materials from "openly fascist journals" under the guise of responsible conservatism . . . [t]hird, by accusing Buckley of engaging in the same kind of libelous journalism as Westbrook Pegler practiced against Quentin Reynolds.

Regarding the charge that Buckley was "a fellow traveler" of "fascism," the trial court heard extensive testimony about the imprecision of the word through unlawful acts in the same manner as did the Communists, thereby destroying the democratic government of Arizona." Id.

91. Id. at 601, 477 P.2d at 860 (Udall, Jr., concurring and dissenting). Justice Udall concurred in the decision, but dissented from the majority's ruling that the editorial was libelous per se.
92. Id. at 601, 447 P.2d at 859.
93. Id.
94. Id. at 605, 447 P.2d at 863 (Bernstein, J., dissenting).
95. Id.
96. 539 F.2d 882 (2d Cir. 1976). This case makes interesting reading because the parties are personally antagonistic, hostile, and downright feuding.
97. Id. at 887.
"fascist." The court found the charge non-actionable, being so vague as to be "insusceptible to proof of truth or falsity." The nebulous nature of labels also compelled the circuit court to reverse the trial court on the second count; calling Buckley a "deceiver" who spread material from "openly fascist journals" was again held to be insufficiently precise to constitute libel.

The basis for the third segment of Buckley's suit was Littell's statement that "[l]ike Westbrook Pegler, who lied day after day in his column about Quentin Reynolds and goaded him into a lawsuit, Buckley could be taken to court by any one of several people who had enough money to hire competent legal counsel and nothing else to do." The court held that statement to be an assertion of fact, and ruled that it could not be redeemed simply because it was made in the context of a philosophical or political debate. The

98. "Fascism" was found to be a term with as many shades of meaning as the number of people who use it. Buckley himself, in attempting to define "fascist," made an extended statement which involved a circle where the most extreme right and extreme left met, and which contained at some point every possible shade of left and right. Id. at 893. The court's opinion is informative on the fact-opinion distinction and the practical problems this distinction presents in litigation:

Appellee himself was acutely aware of the element of opinion involved in such loose terminology. The following exchange occurred in cross-examination of him relative to his having called Littell an "abusive rhetorician," after he testified that he did so because "[t]o say . . . that [Edgar] Bundy [of the Church League of America] is part of the fascist underworld is simply abusive":

Q. But that's just your opinion, correct?
A. [Buckley] What do you mean my opinion?
Q. That he was abusive, that Dr. Littell's letter is abusive.
A. Is there an opposite to an opinion in something like this? In my opinion as distinguished from my what?
Q. That's just your opinion. You can answer yes or no.
A. No, I can't. You are playing rhetorical games with me and I choose not to submit. Do you mean is there a Bureau of Labor of Standards or FDA on the basis of which one can measure what is abusive?

Id. at 893 n.9.

99. Id. at 894. The court added:

The use of "fascist," "fellow traveler," and "radical right" as political labels in Wild Tongues cannot be regarded as having been proved to be statements of fact, among other reasons, because of the tremendous imprecision of the meaning and usage of these terms in the realm of political debate, an imprecision which is simply echoed in the book.

Id. at 893. The court also distinguished between being labeled a communist and being accused of being a member of the Communist Party. Id. at 894. This is another illustration of general charges ("communist") being regarded as opinion while specific charges ("party member") are regarded as fact. Although such a distinction is supportable because of the need to draw a line somewhere between actionable assertions of fact and non-actionable statements of opinion, it seems reasonable to believe that the actual harm to plaintiff would be about the same, regardless of the niceties of expression.

100. Id. at 895. Calling a journalist a "deceiver" may be a fact statement, and a serious charge against a journalist. The court determined it was opinion, however, and proceeded to the third charge.

101. Id.
court assigned particular weight to the comparison to Pegler and stated that
this was plainly a factual accusation that Buckley engaged in libelous journalism.\textsuperscript{106}

By using different language, Littell probably could have avoided liability
and leveled a similar and equally powerful charge. Because the comparison
to a notorious and proven libeler such as Pegler was so important to the
court, deletion of the offending analogy probably would have protected Lit-
tell. Evidence of Buckley columns that had been proved libelous (there was
\textit{no} such evidence) would have probably saved Littell from judgment. Alternatively, if Littell had said "should be taken to court" instead of "could be
taken to court," the slight change might have influenced the court to find
that statement to be an opinion. In terms of avoiding libel, Dr. Littell was
less than artful in his harangue; he should have taken lessons from Mr.
Buckley.

\textit{Buckley v. Vidal}\textsuperscript{103} also illustrates the importance of avoiding specificity.
After Buckley sued writer Gore Vidal,\textsuperscript{104} Vidal counterclaimed because Buck-
ley had called Vidal's book, \textit{Myra Breckinridge}, pornography.\textsuperscript{105} Buckley
also said that Vidal was not a real political commentator,\textsuperscript{106} at a time when
Vidal was so employed. Although the court did not explicitly analyze the
fact-opinion distinction relative to Buckley's charge of "pornography," the
court did assume that the case was proper for fair comment\textsuperscript{107} because Buck-
ley's charge of "pornography" was an opinion.\textsuperscript{108} Despite Buckley's state-
ment about Vidal's credentials as a political commentator, the court also held
those comments to be opinion and therefore protected under the law of fair
comment.\textsuperscript{109} Vidal's claims against Buckley's general charges thus could not

\textsuperscript{102. Id. Proving that the charge of libelous journalism was false was essential to Buckley's
case. The court held that "[g]iven the proof of falsity which was presented was not successfully
rebutted, it is constitutionally as well as tortiously defamatory." \textit{Id.} at 896.


104. Buckley sued Vidal following remarks made by Vidal on network television. \textit{Id.} at 1052.

105. \textit{Id.} Mr. Buckley had made two identical statements, once on television and once in a
magazine article: "Let Myra Breckinridge go back to his pornography." \textit{Id.} Buckley was clearly
referring to Vidal by the name "Myra Breckinridge." The court said that because the "novel
\ldots deals quite graphically and at some considerable length with a wide range of sexual in-
terests, acts and perversions, not the least of which include transvestitism, bestiality and mutila-
tion \ldots no jury could reasonably find that Buckley's comments about the book were unfair." \textit{Id.}
at 1054.

106. \textit{Id.} at 1052. In an August 1968 television broadcast, Buckley stated: "I do not think it is
right to present Mr. Gore Vidal as a political commentator of any consequence since he is
nothing more than a literary producer of perverted Hollywood-minded prose." \textit{Id.}

107. The court discussed the elements of fair comment, saying that a "critic enjoys a privi-
lege to make such critical comments as long as the comment does not go beyond the published
work itself to attack the author personally, \ldots the facts are truly stated, \ldots the comment is
fair, \ldots and the comment is an honest expression of the writer's real opinion." \textit{Id.} at 1052-53
(citations omitted).

108. \textit{Id.} at 1053.

withstand a motion for summary judgment. The recurring lesson for would-be knife-twisters who would use the shield of fair comment is that general charges are safer than specific charges. A phrase like "producer of perverted Hollywood-minded prose" is so general that it must be opinion, because it is incapable of being proved true or false.

Similar reasoning can be applied to Hutchinson v. Proxmire. Although the point was not decided, both the court of appeals and the Supreme Court intimated that Proxmire’s only actionable statements were that Hutchinson made a fortune from his monkeys and that his research was "perhaps duplicative." Neither phrase, ambiguous and qualified as they are, is capable of being proved true or false. Because the case has been settled out of court, there will, of course, be no definitive ruling on the point. Nevertheless, for these words to be actionable they probably would have to be loaded with more baggage than they could carry. To say that examinations of "crayfish, wasps, boa constrictors, turtles, alligators, oppossums, foxes, pigeons, monkeys and humans" to discover when they appear angry is "perhaps duplicative" seems to be a reasonable and restrained opinion. The first element of fair comment therefore applies to Hutchinson v. Proxmire.

Some defense attorneys may approach fair comment tentatively because of the lack of certainty regarding the line between fact and opinion. One can, however, be fairly comfortable using the formula that a statement of opinion is one that cannot be proved true or false. When opinion statements are treated as fact statements, erroneous analysis can lead to undesirable results. In a libel action involving an opinion, use of defenses other than fair comment—such as the truth defense, the various privileges, and public figure or official—makes no sense.

The Opinion Must Be Based upon Truly Stated Facts

To successfully assert the defense of fair comment, it is not enough that the statement be an opinion. In addition, the opinion must be based upon

110. Id.

111. Id. at 1052. One can assume that if Buckley had claimed that Vidal's work "turned my ten year old neighbor into a homosexual," or made any other similar statement of fact, then Buckley would have had to prove the truth of the statement. "Producer of perverted Hollywood-minded prose," however, purple and petulant as it is, still is so vague that it cannot reasonably be proven true or false.

112. 579 F.2d at 1035 n.15.

113. 443 U.S. at 115.

114. The phrase "perhaps duplicative" is not the same as "duplicative." "Perhaps" is used when one wants to leave room for doubt. Webster's Third New International Dictionary of the English Language 1679 (1976). Given the facts of the case, however, even an unqualified statement that the research was duplicative might not have been actionable.

As to Dr. Hutchinson's "fortune," Proxmire's apology in the Senate shows that Hutchinson wanted to establish at trial that Proxmire's statement contained an innuendo of "personal fortune." 126 Cong. Rec. S2831 (daily ed. March 24, 1980). Fortune however, does not mean just personal fortune, and Hutchinson's grants and personal income might easily seem a fortune to an average middle-income juror.

115. 579 F.2d at 1038.
truly stated facts. This requirement allows readers or listeners to separate fact from opinion, know the basis for the opinion given, and conclude for themselves whether it is defamatory. For example, a statement that a man is "a disgrace to human nature" is probably a defamatory allegation. If, however, a speaker states, "He murdered his father, and therefore is a disgrace to human nature," the opinion is now derived from stated facts which, if true, will satisfy this second requirement of the fair comment doctrine. Thus, when the underlying facts are set forth in a story itself, the writer's conclusion is clearly opinion and the basis for that opinion is so evident that even words like "blackmail" and "traitor" are not actionable. Indeed, in Gandia v. Pettingill, where the facts were set forth and the plaintiff's conduct was subsequently described as "a monstrous immorality, a scandal, etc., etc.," the Supreme Court found no liability for defamation. Striking to the heart of the case, Justice Holmes wrote that "what really hurt the plaintiff was not the comment but the fact."

Few recent cases address the requirement that the facts be stated, probably because the courts implicitly endorse the notion that it is enough if facts are readily available to anyone who would inquire further. Yet, vestiges of a less liberal interpretation persisted as recently as 1961. In that case,

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116. See note 58 supra.
118. The statement, of course, need not be oral. The mode of statement's communication is not important. See note 16 supra.
119. See notes 73 & 76 and accompanying text supra.
120. 222 U.S. 452 (1911).
121. Id. at 457.
122. Id. at 458.
123. A turn of the century case decided by the Michigan Supreme Court illustrates the less liberal interpretation of the truly stated facts rule. In Eikhoff v. Gilbert, 124 Mich. 353, 83 N.W. 110 (1900), fair comment was held inapplicable to defendants who claimed that the plaintiff, a state legislator, had "championed measures opposed to the moral interests of the community." Id. at 354, 83 N.W. at 111. Neither was fair comment available when vituperation was heaped upon one of the plaintiff's ticket-mates and the defendant exhorted his readers to vote against the plaintiff "for reasons we consider equally as good." Id. at 357, 83 N.W. at 112. The court believed that the first statement was not protected by fair comment because it "afforded no one an opportunity to judge whether the statement was a proper deduction from the facts upon which it was based or not." Id. at 360, 83 N.W. at 113. The second statement was not protected because, according to the court, the plaintiff "was represented to be a man of bad morals, and unworthy of support for that reason." Id. at 362, 83 N.W. at 114. Sounder legal reasoning appeared in the dissent, which pointed out that the plaintiff's voting history was a matter of public record available to any interested person, and that there was no direct comparison to plaintiff's "bad" ticket-mate. Id. at 368, 83 N.W. at 116 (Grant, J., dissenting). To the dissenters, the availability of the voting record was sufficient factual basis for the first statement. Id. Regarding the second statement, the dissent noted that "the plain inference is that the reasons are not the same but, in the opinion of the writers, 'equally as good.' The language speaks for itself." Id. at 368, 83 N.W. at 116.
NEGLECTED FAIR COMMENT DEFENSE

a man was labeled "infamous" in a newspaper editorial that stated none of the underlying facts. The dissent would have accepted a fair comment defense because of the plaintiff's well-known "illegal, disgraceful, and reprehensible course of conduct," but the majority rejected the defense, pointing to the absence of underlying facts in the story itself. Because the trial court did not allow facts in the public record into evidence or allow testimony as to those facts, one commentator has suggested that judicial notice of the plaintiffs' notoriety should be taken.

The more liberal majority rule is, however, that underlying facts in a fair comment case need not be specifically set forth but need only be available; the reasonableness of this rule becomes clear in cases dealing with criticism of artistic or creative works because the works themselves comprise the underlying facts. For example, fair comment has been held applicable when an art gallery was criticized for the quality of its paintings and the way the paintings were hung. The modern rule sweeps broader than artistic works so that in a libel suit based on an editorial critical of a judge, the court held that a mere reference in the editorial to the source of the underlying facts was sufficient.

under provisions of the Maryland state constitution that empowered the Governor to remove civil officers for incompetence and misconduct. Id. at 270, 176 A.2d at 341. After the Governor exonerated the commissioner, the Baltimore Sun newspaper ran an editorial headlined "Not Proved" and containing the statement: "Every important witness against the Police Commissioner, moreover, was a man with a motive. We name especially the infamous Kirby." Id. at 271, 176 A.2d at 342.

Judge Prescott further stated:

Most, if not all, of this was aired in the public press and was readily accessible to the public at large. The record discloses that Kirby's name appeared no less than 183 times in 65 newspaper articles offered in evidence; 23 times his name was in headlines, and three times his photograph accompanied the articles.

To me, the above clearly establishes the fact that Kirby was "infamous" and "a man with a motive."

Judge Prescott concluded that, if anything, this evidence not only established a factual basis for an opinion, but proved the opinion's truth. Id. at 291, 176 A.2d at 352.

On this point, the court concluded: "There is nothing in the editorial to lead the reader to reasons why the writer thought Kirby was infamous or a man with a motive, or why the reader should." Id.

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If the underlying facts are set forth, writers and publishers will be fairly safe in making powerful statements without risking liability for libel. In Porcella v. Time, Inc.,131 Life magazine reported on shady art authenticators, relating various purported “discoveries” of “lost” paintings and concentrating on the “finds” of one Amadore Porcella. Using only skillful ordering of the facts and quotation marks around some key words,132 the story established Porcella as a charlatan. Despite the damage to Porcella, the court found the “description of the entire setting in which he was active” to be an ample basis for the defendant’s opinions, which were therefore protected by fair comment.133 Similarly, a high school principal who was rated “unsuited” for his position was held unable to recover because the defendants had set forth the criteria for their rating and a reader could decide for himself whether the opinion was “valid.”134

Even when the facts underlying an opinion are set forth or readily available, excessive vituperation apparently can overwhelm the facts and cancel their value in establishing the truly stated facts element. The problem arises but is not directly answered in Phoenix Newspapers, Inc. v. Church.135 Earlier articles in the newspaper had reported the plaintiff-attorney general’s proposals for counterbalancing the influence of existing state lobbies. A later editorial referred to Attorney General Church’s advocacy of “people’s councils”136 and stated that “Mr. Church thinks that this ‘people’s council’ should be organized and run by Arizona’s labor unions.”137 Because these fact statements were followed by hundreds of words comparing Church’s idea with communism, the majority felt that the reference to the labor unions did not prevent the balance of the editorial from being a statement of fact that charged Church with advocacy of communist ideas and methods.138 Intensity and length of the opinion therefore transformed it, in the court’s opinion, into a statement of fact.

temperament and . . . [had] exhibited marked signs of prejudice against a litigant appearing before him” was not required to be within the four corners of the allegedly libelous editorial. “It is sufficient that the facts upon which the comment or criticism is based are referred to in the editorial, book review, or article.” Id. at 21, 22, 15 N.Y.S.2d at 61.

131. 300 F.2d 162 (7th Cir. 1962).
132. Id. at 163-65. Normally mundane words such as “remarkable talent,” “masterpieces,” and “expert” attained critical meaning through their emphasis in context. Id.
133. Id. at 166. The court also found the article non-libelous on the basis of the Illinois innocent construction rule. Id. at 167. That rule holds that “if language is capable of innocent construction it should be read and declared non-libelous.” Crosby v. Time, Inc., 254 F.2d 927, 929-30 (7th Cir. 1958).
135. 103 Ariz. 582, 447 P.2d 840 (1968).
136. Id. at 585, 447 P.2d at 843-44.
137. Id.
138. See note 86 supra.
When the underlying facts are found to be untrue, the fair comment defense will be dismissed, as it was in *Goldwater v. Ginzburg*. In *Ginzburg*, the court rejected fair comment without deciding whether the conclusions of the defendant’s magazine articles were fact or opinion, because those conclusions were based upon untrue statements of facts. A defendant who erroneously but in good faith believes that his statement of underlying facts is true at one time had no defense. In 1889, a theater critic who implied incorrect facts into a play was held accountable; the play had not contained the adultery the critic thought he saw. Most modern applica-

139. 261 F. Supp. 784 (S.D.N.Y. 1966), aff’d, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970). Defendant Ginzburg, editor and publisher of *Fact* magazine, turned his October 1, 1964 issue into “A Special Issue on the Mind of Barry Goldwater.” Id. at 785. Ginzburg sent 12,356 questionnaires to psychiatrists. The survey asked the psychiatrists to check “yes” or “no” as to whether they thought Goldwater was mentally fit to serve as President, and solicited other comments the respondents might have. Of a mere 2417 replies, 571 psychiatrists stated they could draw no conclusion about Goldwater’s fitness and only 668 of all responses were signed. 414 F.2d at 334. A cover letter to the questionnaire falsely stated that Goldwater had suffered two mental breakdowns. *Id.* at 330. There was much other evidence at the trial that pointed to a rather obvious conclusion: *Fact* intended to prove, by whatever means, that Goldwater suffered from a mental illness rendering him unfit to be President.

140. 261 F. Supp. at 784. The court recognized the fact-opinion question was difficult, and stated that “even if all the statements were opinions only, proof of actual malice would take away from defendants the privilege conferred by the *Sullivan* principle.” *Id.* at 787. The case is a rare example of a public official plaintiff proving “actual malice.” The district court, using the *New York Times v. Sullivan* framework, may not have been precise in its analysis, although its result was correct. The court was probably right that the fair comment defense was defeasible on a finding of “actual malice,” but the cart was in front of the horse because the truth of the underlying facts had not been established and it is highly doubtful that they could have been. In short, nothing had been established to “defease.” The “actual malice” spoken of by the district court, however, did concern the issue of truth or falsity. Therefore, it is evident that *New York Times* and its progeny have had some impact on the application of the truth and malice requirements of fair comment. The law is yet unsettled; the implications are discussed in the text accompanying notes 193-213 infra.

141. Today, a defense is available even for false statements of fact. When the plaintiff is a public official or public figure, false statements of fact are constitutionally privileged if not made with “actual malice,” which has been defined as follows:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth or falsity of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. [This test] permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity.

*St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Even when the plaintiff is a private person, he or she must show at least negligence, or else the false statement of fact will be protected. See notes 193-213 and accompanying text infra. In some states, “actual malice” is required even when the plaintiff is a private person. See, e.g., *AAFCO Heating & Air Conditioning Co. v. Northwest Pub. Co.*, 162 Ind. App. 671, 321 N.E.2d 580 (1975).

142. *Merivale v. Carson*, 20 Q.B.D. 271 (1887). The defendant-reviewer of plaintiff-author’s play disliked a character and referred to her as “the naughty wife and her double existence.” *Id.* at 276. A jury concluded that this innuendo meant that the character was adulterous, that the
tions of this principle are more favorable to defendants, but, while normally protected, even a slip in the facts can be damaging to a defendant. In Westropp v. E.W. Scripps Co., a newspaper editorial harshly attacked several judges who, by granting a series of continuances requested by the defense, freed a criminal defendant who subsequently ran amuck. The plaintiff in the case was a judge who had granted one continuance, but had granted it at the prosecution’s request. Even though the same newspaper correctly reported on the same page that the plaintiff had not given any continuance to the defendant, the court was stern: “No untruth can be the basis of fair criticism.”

Where the words or works of another are paraphrased, edited, summarized, or changed, fair comment is still a feasible defense as long as the original meaning remains. While actions brought solely upon a misreported interview are rare, suits have been brought alleging a misquote where tangible evidence of plaintiff’s original words or work was available. In one case, although there was no question that a book reviewer had altered an author’s spoken words, fair comment was nevertheless held applicable. “That the ‘quotes’ are not word-for-word—indeed, they are modified on occasion—nor always complete, does not make them facts not ‘truly stated.’” As long as the quoted subject’s meaning is substantially stated,

author failed to express any opinion as to the wife’s morality, and that the failure to condemn an adulterous character reflected poorly upon the writer’s own character.

144. Id. at 366-67, 74 N.E.2d at 342. While awaiting trial, the defendant exchanged gunfire with a policeman, resulting in the death of both. The defendant was carrying a large sum of money; the car he was driving contained a body in the trunk; and defendant possessed stolen goods. Id. at 367-68, 74 N.E.2d at 342-43. The editorial highlighted the defendant’s notoriety and long criminal record and intimated that the continuance was the result of political string-pulling or expert manipulation by the defendant’s attorney. Id. at 367, 74 N.E.2d at 342.
145. Id. at 377, 74 N.E.2d at 346. The plaintiff was one of several judges who had granted continuance in the case; the other judges had granted continuances on defense motions, but Westropp had granted only one, and that was for the prosecutors.
147. As a general rule, a person is subject to liability for repetition of a libel or slander originally published by another. Prosser, supra note 1, § 116. An important exception to this rule is provided by the common law privilege of fair report. This privilege protects one who in good faith and without malice publishes a fair and accurate report of a slander made in the course of an official public proceeding. See Kirby v. Pittsburgh Courier Pub. Co., 150 F.2d 480 (2d Cir. 1945); Cressen v. Louisville Courier-Journal, 299 F. 487 (6th Cir. 1924); Lulay v. Peoria Journal Star, Inc., 34 Ill. 2d 112, 214 N.E.2d 746 (1966); Shriver v. Valdosta Press, 82 Ga. App. 406, 61 S.E.2d 221 (1950). See also Restatement (Second) of Torts § 611 (1977); Prosser, supra note 1, § 118, at 830-31; Sowles, Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report, 54 N.Y.U. L. Rev. 469 (1979).
149. Id. at 1050. There was no doubt that the reviewer had modified the plaintiff’s words, but the court held that fair comment applied. The court stated: “[T]he ‘quotes’ come substantially from the book, from statements made by plaintiff in public meetings, and from a magazine article referring to plaintiff’s writings. Thus, the requirement that the facts be ‘truly stated’ is met.” Id.
the "facts truly stated" requirement is met.\textsuperscript{150} Similarly, the district court in \textit{Hutchinson v. Proxmire} held that "selective reporting will not support a finding of reckless disregard for the truth. Summarizing plaintiff's research ... will not rise to the level of falsification."\textsuperscript{151}

Opinions that need to be protected by fair comment cannot safely be based on other opinions, as Walter O'Malley discovered when he called a doctor's operation on the Brooklyn Dodger catcher, Roy Camenell, "unnecessary" and further asserted that the surgeon thought he was "operating on Roy's bankroll."\textsuperscript{152} O'Malley had based his statements on the medical opinions of other doctors, but the court in \textit{Shenkman v. O'Malley}\textsuperscript{153} held that "fair comment ... has never been applied to an opinion expressed and based upon the opinions of others."\textsuperscript{154} \textit{O'Malley} is a warning against blind adherence to the fair comment defense formula.\textsuperscript{155}

Still, some opinions are more safely reported than others. Legal decisions are called "opinions," yet are more or less authoritative depending on the court rendering them. Sometimes the best knowledge on a subject is an informed opinion; this is true of many medical matters. Although the reported cases do not suggest a pressing need for another rule, creation of a rule that protects opinions based upon the "best available information" or upon true facts appears more in line with the main purpose of the fair comment defense, promoting discussion of matters of public interest. This rule would avoid one result in \textit{O'Malley}: on remand, the jury must decide whether, \textit{in its opinion}, the operation on Camenell was necessary.\textsuperscript{156}

\textit{Opinions Protected by Fair Comment Cannot Contain Overly Personal Attacks}

A general rule of fair comment is that published matter may relate to a person's public acts or works but may not follow him into his private life by attacking his personality or motives.\textsuperscript{157} That general rule is subject to two

\textsuperscript{150}. \textit{Id.} (quoting Briarcliff Lodge Hotel v. Citizen-Sentinel Publs., 260 N.Y. 106, 118-19, 183 N.E. 193, 197 (1932)) ("a fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated").

\textsuperscript{151}. 431 F. Supp. at 1329. This finding was not addressed by either the court of appeals or the Supreme Court.


\textsuperscript{153}. \textit{Id.}

\textsuperscript{154}. \textit{Id.} at 572, 157 N.Y.S.2d at 295.


\textsuperscript{156}. \textit{See} Titus, \textit{supra} note 67, at 1234-35.

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major qualifications. First, criticism of personality or motive may be protected by fair comment if such criticism can be reasonably inferred from truly stated facts. Second, an attack on a public work that necessarily raises defamatory inferences about personality or motive will be protected. As long as the critic is primarily referring to the creative work, the work's creator cannot complain about whatever shortcomings may "rub off" on him or her.

Although the general rule against overly personal attacks is flexible enough to fit a variety of circumstances, courts vary in their willingness or ability to separate personal attacks from criticism of creative work. When Gore Vidal complained that William F. Buckley, Jr. had not very indirectly labeled him a pornographer by calling his book, Myra Breckinridge, "pornography," the court upheld Buckley's claim of fair comment. Likewise, when a defendant-book reviewer said that he was most bothered by the "seeming hypocrisy" of plaintiff's book, the court was unmoved by the necessary implication that the author was being called a hypocrite. The court held that the phrase "seeming hypocrisy" was a comment on the book's contents and was not aimed at the plaintiff personally. One state court, however, refused to hold that a defendant's labeling of plaintiff's painting as "obscene" did not reflect on the plaintiff-painter, and consequently rejected the asserted fair comment defense.

Although some uncertainty exists concerning the extent to which an attack can criticize a person's private affairs and not be held libelous, the problem is more theoretical than real. The forbidden "personal" boundary is drawn

160. See, e.g., Berg v. Printers' Ink Pub. Co., 54 F. Supp. 795 (S.D.N.Y. 1943). In Berg, the court stated that "[p]ractically every word of the [criticism] is aimed at the writings; and while the criticism may indirectly strike the plaintiff, it does so only because the plaintiff was the author of the works criticized." Id. at 804.
161. Buckley v. Vidal, 327 F. Supp. 1051 (S.D.N.Y. 1971). The court recognized that an allegation that a book is pornography suggests that the author is a pornographer. Id. at 1053. The court took a practical approach, however, stating: "[S]uch necessary implications of comments directed at the work itself are not sufficient to turn otherwise protected criticism into unprotected criticism. If the rule were otherwise, the privilege of fair comment would cease to exist." Id. (emphasis added).
163. Walker v. D'Alesandro, 212 Md. 163, 180, 129 A.2d 148, 157 (1957). Mayor D'Alesandro of Baltimore had ordered plaintiff's painting removed from a public exhibit, calling it obscene. A motion to dismiss by the defendant-mayor alleging plaintiff's failure to state a cause of action was denied. The court stated: "Though we think the question a close one, we cannot say as a matter of law that it does not constitute a reflection on the character of an artist, and not merely on his work, to say that he has painted an obscene picture." Id.
by the nature of the story being reported, and reporters and commentators are usually aware of their privilege’s limits.\textsuperscript{164} If the matter commented upon is found to be of public interest, many personal criticisms will still fall within the ambit of opinion protected by fair comment.\textsuperscript{165} Further, one who speaks or performs in public must face the consequent criticism. In this respect, the fair comment rule against personal attacks is analogous to the “actual malice” standard as that standard is applied to criticism of public figures.\textsuperscript{166} In both situations, the plaintiff, by availing himself of a public forum, has invited criticism of his or her actions.\textsuperscript{167} Thus, courts rarely hold criticism to be overly personal.

In light of these principles, Senator Proxmire’s statements were not overly personal attacks on Dr. Hutchinson. Proxmire’s newsletters and press releases stating that Hutchinson’s research was “perhaps duplicative” and that Hutchinson had “made a fortune” from his monkeys related to Hutchinson’s federally funded research.\textsuperscript{168} The argument that these criticisms go beyond Hutchinson’s public actions and into his personal life is not supported by the

\textsuperscript{164} But see McKee v. Robert, 197 A.D. 842, 189 N.Y.S. 502 (1921) (defendant who circulated pamphlet criticizing plaintiff newspaper editor in response to an article criticizing defendant consulted attorney before going ahead with publication, but was nevertheless held liable).

\textsuperscript{165} See, e.g., Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). In commenting on the common sense of the public in interpreting criticism of public persons, the court observed that “the people have good authority for believing that grapes do not grow on thorns, nor figs on thistles.” \textit{Id.} at 739, 98 P. at 291. See also Howard v. Southern Cal. Associated Newspapers, 95 Cal. App. 2d 580, 213 P.2d 399 (1950) (plaintiff and his mayoral recall movement characterized as “mala fide,” “sinister,” a “disgrace to Glendale,” and a “dangerous and unjust element”—not too personal); Foley v. Press Pub. Co., 226 A.D. 535, 538, 235 N.Y.S. 340, 345-46 (1929) (a charge that a technical aide to the Secretary of Navy had conspired “to rig testimony,” “do a little fixing,” and “whitewash” a Navy investigation held not too personal); Hall v. Binghamton Press Co., 263 A.D. 403, 33 N.Y.S.2d 840 (1942) (description of plaintiff-Congressman as “hardly dry behind the ears” and part of a younger generation whose softening was not “necessarily in the muscles”—not too personal), aff’d, 296 N.Y. 714, 70 N.E.2d 537 (1946).

\textsuperscript{166} See discussion of the public interest component of fair comment in text accompanying notes 170-192 infra. See also discussion of public figures in text accompanying notes 23-31 supra.

\textsuperscript{167} See, e.g., Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901). The \textit{Des Moines Leader} reviewed the Cherry sisters’ stage show as follows:

\textit{Effie} is an old jade of 50 summers, \textit{Jessie} a frisky filly of 40, and \textit{Addie}, the flower of the family, a capering monstrosity of 35. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waived frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom.

\textit{Id.} at 299, 86 N.W. at 323. The cruel reviewer wrote more in the same vein, but the court was not dainty either:

One who goes upon the stage to exhibit himself to the public, or who gives any kind of a performance to which the public is invited, may be freely criticised. He may be held up to ridicule, and entire freedom of expression is guarantied dramatic critics. . . . If there ever was a case justifying ridicule and sarcasm—aye, even gross exaggeration—it is the one now before us.

\textit{Id.} at 304-05, 86 N.W. at 325.

\textsuperscript{168} 431 F. Supp. at 1331.
facts. Even if Proxmire's charges could fairly be said to have raised defamatory inferences about Hutchinson's misapplication of the funds, that would not undercut Proxmire's fair comment defense. Because Proxmire attacked only Hutchinson's research, the charges were not personal attacks. Hutchinson should go remediless for those inferences that "rubbed off" on him from Proxmire's true statements.

**Statements Protected by Fair Comment Must Relate to a Matter of Public Interest**

The fourth requirement of the fair comment defense is that the opinion must be on a subject of public interest or concern. Both official acts and personal characteristics of public officials, as well as creative works presented to the public, are unquestionably of public interest. Public official cases, however, have not been decided under fair comment since the Supreme Court applied the "actual malice" standard to discussions of public officials in *New York Times*.

Yet, the Supreme Court's interventions into libel law over the past two decades raise a question and a possible problem regarding comments on matters of public interest. In 1971, the Court held in *Rosenbloom v. Metromedia, Inc.* that a subject of public interest would trigger the plaintiff's burden of proving "actual malice." Three years later that burden was nullified in *Gertz v. Robert Welch, Inc.*, primarily on the rationale that judges should not decide what subjects are of public interest. The serious question raised by this reversal is whether critics and commentators can seek any protection from liability for statements about a subject matter of public interest when the plaintiff is a private individual. The potential problem absent such protection is the possibility that fundamental first amendment rights will be eroded despite "our profound national commitment to the

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169. 579 F.2d at 1037 app. A.
172. See Buckley v. Vidal, 327 F. Supp. 1051 (S.D.N.Y. 1971). The court stated: "When an author submits his work to the public he must, of necessity, expect criticism of that work. He is said, in fact, to invite criticism, and no matter how hostile such criticism may be, the critic enjoys a privilege to make such critical comments." *Id.* at 1052. See also Fisher v. Washington Post Co., 212 F.2d 335 (D.C. Cir. 1965); Potts v. Dies, 132 F.2d 734 (D.C. Cir. 1942); Guitar v. Westinghouse Elec. Corp., 396 F. Supp. 1042 (S.D.N.Y. 1975).
174. See notes 21-24 and accompanying text supra.
175. 403 U.S. 29, 43-44 (1971).
principle that debate on public issues should be uninhibited, robust, and wide-open." 177

In addition, the Court's reversal denies history. If courts cannot determine what subjects are of public interest, then fair comment (not to mention other legal doctrines) would lack a legal and rational basis. Traditionally, however, courts have had little difficulty determining matters of public interest. Further, the legal community has not fallen into step with the Supreme Court's Gertz reversal; scholars 178 and lower courts 179 have conclusively demonstrated that the Supreme Court's "actual malice" decisions are grounded in the concept of public interest, the Court's protests notwithstanding. 180

So strong has been the opposition to the Court's elimination of public interest subjects from the orbit of privileged statements, that some state courts have nevertheless imposed an "actual malice" burden in such cases. For instance, Indiana adopted the Rosenbloom rule even though it recognized that the Supreme Court had rejected it, extending the "actual malice" burden to all discussion of public interest even though the plaintiff is a private person. 181 Some courts, it thus seems, are still able and will-

178. Commentators have argued that public interest is at the heart of the Supreme Court's reasoning, even in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and Time, Inc. v. Firestone, 428 U.S. 448 (1976), where the Court ostensibly repudiated the rule that the existence of public interest invokes the "actual malice" burden. See generally Eaton, supra note 5. Eaton argued that whether Elmer Gertz was to be "classified as a public figure for a limited issue" must begin with a determination of whether the controversy in which the plaintiff participated was a public issue. Id. at 1424. Eaton noted that making this determination is precisely the mischief for which the Gertz Court criticized Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). Id. at 1424. According to Gertz, such mischief arises from "forcing federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not—to determine . . . 'what information is relevant to self-government.' We doubt the wisdom of committing this task to the conscience of judges." 418 U.S. at 346 (1974). Eaton concluded that "while 'public controversy' may be a significant step removed from 'matter of public interest,' the task of determining which publications address public issues and which do not has nevertheless been recommitted to the conscience of judges." Eaton, supra note 5, at 1424. See also Bamberger, Public Figures and the Law of Libel: A Concept in Search of a Definition, 33 Bus. Law. 109 (1978); Prager, Public Figures, Private Figures and Public Interest, 30 Stan. L. Rev. 157 (1977); Wheeler, Media Liability for Libel of Newsworthy Persons Before and After Time, Inc. v. Firestone, 5 Fla. St. L. Rev. 446 (1977).
180. For example, in a recent defamation case, Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1980), the Supreme Court ignored the public interest rationale, basing its decision that the "actual malice" standard did not apply on its finding that the plaintiff was not a public figure. The Court specifically stated that a "libel defendant must show more than mere newsworthiness to justify application of the demanding burden of New York Times." Id. at 168-69.

The key analytic determinant in the application of constitutional protections for speech and press in libel actions by "private" individuals must be whether the
ing to decide whether an issue is a matter of public interest and concern.\textsuperscript{182}

Some uncertainty, however, remains in divining how these courts decide whether a matter is of public interest. The method used bears striking similarity to the test for "limited purpose" public figures.\textsuperscript{183} Traditionally, plaintiffs against whom fair comment is asserted can be said to have invited criticism of their public works and acts\textsuperscript{184} in the same way that limited purpose public figures have opened themselves to certain false statements of fact related to the events or issues that caused them to be deemed public figures.\textsuperscript{185} In short, both groups "assume the risk"\textsuperscript{186} of a sharper than normal challenge, a challenge consisting of a vituperative opinion in fair comment cases or a false statement of fact made without "actual malice" in limited purpose public figure cases.\textsuperscript{187}

\begin{itemize}
  \item Communication involved concerns an issue of general or public interest without regard to whether the individual is famous or anonymous.
  \item Every citizen, as a necessary part of living in society, must assume the risk of media comment when he becomes involved, whether voluntarily or involuntarily, in a matter of general or public interest.
  \item The contention that the judiciary will prove [itself] inadequate [to determine what subjects are of public interest] would be more persuasive were it not for the sizable body of federal and state cases that have employed the concept of a matter of general or public interest to reach decisions in libel cases involving private citizens.
\end{itemize}

\textit{Id.} at 680-86, 321 N.E.2d at 587-90.


\textsuperscript{183} See note 28 supra.

\textsuperscript{184} See Porcella v. Time, Inc., 300 F.2d 162 (7th Cir. 1962) (art authentication); Potts v. Dies, 132 F.2d 734 (D.C. Cir. 1942) (published work is of public interest); Guitar v. Westinghouse Elec. Corp., 396 F. Supp. 1042 (S.D.N.Y. 1975) (artistic works); Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901) (public interest and attendant assumption of risk found in plaintiff's "artistic" works); Shenkman v. O'Malley, 2 A.D.2d 567, 157 N.Y.S.2d 290 (1956) (professional athlete's injury); Cohalan v. New York Tribune, Inc., 172 Misc. 20, 15 N.Y.S.2d 58 (Sup. Ct. 1939) (public officials were said to have assumed the risk of adverse comment).

\textsuperscript{185} See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The Court stated: "More commonly, those classified as public figures have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." \textit{Id.} at 345.

\textsuperscript{186} See \textit{RESTATEMENT OF TORTS} § 610(3), Comments e & f (1938).

\textsuperscript{187} The similarity gains further importance because the public interest aspect of fair comment will become more significant as the Supreme Court continues to constrict the public figure category. Fair comment may invoke its own "actual malice" standard even where "actual malice" is no longer available on a public figure or public interest basis.
The fair comment defense may prove to be more expansive than the public figure—"actual malice" protection, especially considering that the realm of public figures is being whittled away by the Supreme Court. Commentators and courts generally recognize that encouraging discussion of matters of public interest is the rationale for free speech protections. In fact, the state court rendering the decision that provided the model for the \textit{New York Times} "actual malice" standard saw the need to protect free speech, broadly applying that standard to all allegedly defamatory statements about subjects of public interest.

Logic therefore demands that the Supreme Court reconsider its post-\textit{New York Times} decisions and apply the "actual malice" standard to all defamation actions concerning matters of public interest. To do so would breathe new life into the common law fair comment doctrine. A reversal of all recent defamation decisions would not be necessary for the renewed effectiveness of fair comment; the Supreme Court need only affirm the undeniably preponderant view of the lower courts and the legal profession that discussion of matters of public interest should not be stifled.

\textit{Hutchinson v. Proxmire} provides an example of how fair comment could be applied more expansively than the public figure standard. The Supreme Court held that the mere receipt of public funding did not transform Dr. Hutchinson into a public figure; yet, the disbursement of public funds is certainly a matter of widespread public interest. By receiving public funding, Hutchinson "assumed the risk" that those with an interest in the use of the funds would issue vituperative opinions regarding the manner in which the funds were spent. The Restatement of Torts supported this conclusion by stating that fair comment makes criticism of independent contractors working for the government privileged. \textit{Hutchinson v. Proxmire}, therefore, illustrates that speech left unprotected because the plaintiff is not a public figure may nevertheless be protected under fair comment when the subject matter is of public interest.

188. See notes 27-31 and accompanying text supra.
189. See notes 178 & 179 and accompanying text supra.
190. Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). The court stated:

\begin{quote}
[T]he correct rule, whatever it is, must govern in cases other than those involving candidates for office. It must apply to all officers and agents of government—municipal, state and national; to the management of all public institutions—educational, charitable and penal; to the conduct of all corporate enterprises affected with a public interest—transportation, banking, insurance, and to innumerable other subjects involving the public welfare.
\end{quote}

\textit{Id.} at 734-35, 98 P. 289 (emphasis added).

191. 443 U.S. at 133-36.
192. \textit{Restatement of Torts} § 607(2), Comment g (1938). The Comment states: "The fact that the institution is maintained by public funds . . . is sufficient to bring it within the privilege." \textit{Id.}
Opinion Must Be Expressed Without Malice

All authorities agree that the defense of fair comment is defeasible upon a finding of malice. The meaning of the word "malice" has, however, changed dramatically. The development of a constitutional "actual malice" standard, the most important recent change in American libel law, has affected fair comment as well. The Supreme Court decisions rendering false statements of fact non-actionable unless those statements are published with knowledge of their falsity or reckless disregard of their truth or falsity mean that certain privileged, false statements of fact may now be the basis for opinions protected by fair comment.

The pre-New York Times fair comment cases were divided on what type of malice standard should be applied. The majority view focused on the attitude of the defendant toward the plaintiff and commonly defined malice as "personal spite or ill will." The focus in the minority of fair comment jurisdictions was on the defendant's thoughts about the factual statements published. The minority made false statements of fact about public affairs privileged when those statements were made in good faith and with the belief that the statements were true; this view was the model for the United States Supreme Court when it first adopted the "actual malice" standard in New York Times.

At present, the "actual malice" standard applies to the facts underlying the opinion, at least when the plaintiff is a public official or a public figure. The same standard was at one time prescribed for all discussions

194. See notes 21-34 and accompanying text supra.
197. See, e.g., Cherry v. Des Moines Leader, 114 Iowa 298, 300, 86 N.W. 323, 323 (1901).
198. See, e.g., Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908).
199. See id. The Coleman court, in adopting the minority rule, succinctly stated the difference between the minority and majority rules:

According to ] the greater number of [jurisdictions], the occasion giving rise to conditional [fair comment] privilege does not justify statements which are untrue in fact, although made in good faith, without malice and under the honest belief that they are true. A minority allows the privilege under such circumstances.

Id. at 726, 98 P. at 286.
of matters of public interest, but that privilege was withdrawn in *Gertz*.\(^{203}\) State and lower federal courts have, however, extended the "actual malice" standard or its equivalent to false statements of fact about private people involved in matters of public interest, both before "actual malice" was a factor in the Supreme Court's view of public interest cases\(^{204}\) and after "actual malice" was eliminated from the court's consideration of public interest matters.\(^{205}\) The current federal position is that the "actual malice" standard is required to privilege false statements of fact about a public official or public figure, but not when plaintiff is a private person, even if the matter is one of public interest.\(^{206}\)

The current position of the federal courts provides the minimum level of constitutional protection, although *Gertz* left the states free to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to the private individual."\(^{207}\) Extensive authority in state and federal systems indicates that the "actual malice" standard should apply to discussions of matters of public interest,\(^{208}\) and the Supreme Court has ruled out the traditional "spite," or "ill will" form of malice in fair comment cases involving public figure\(^{209}\) and public official plaintiffs.\(^{210}\) Toward that end, jury instructions couching malice in terms of "spite, hostility or deliberate intention to harm" or stating that malice could be inferred from the published words alone, have been rejected by the Court as "constitutionally insufficient where discussion of public affairs is concerned."\(^{211}\) Even before the out-of-court settlement of *Hutchinson v. Proxmire*, extension of "actual malice" protection by the state courts\(^{212}\) to the factual statements in fair comment situations seemed likely, when those statements involved matters of public interest.

As an independent element of fair comment, malice has received little attention in the cases, probably because of its slippery and subjective nature. When a court can decide whether an underlying fact is true, whether the subject is of public interest, or whether an opinion has a basis in truly


\(^{207}\) Id. at 347.

\(^{208}\) See notes 204 & 205 supra.


\(^{211}\) Id. (citing Rosenblatt v. Baer, 383 U.S. 75, 84 (1966)).

\(^{212}\) See, e.g., Phoenix Newspapers, Inc. v. Church, 103 Ariz. 582, 597, 447 P.2d 840, 855 (1968).
stated facts—decisions easier than divining the defendant’s state of mind—judicial minds will continue to focus on these more tangible issues. Whatever importance is assigned to malice, an impressive case can be made from Supreme Court decisions that “actual malice” must be applied in all cases involving discussions of public interest, including fair comment cases.²¹³

**Hutchinson v. Proxmire as a Fair Comment Case**

Fair comment thus protects statements of opinion based upon truly stated facts. Fair comment-protected opinions must involve matters of public interest or concern and must not be overly personal attacks on the plaintiff. The defense can, however, be liberally applied, and wide latitude can be used in several areas, including determination of what constitutes the factual basis of the opinion, whether the subject is of public interest, and whether the defendant’s attack on the plaintiff was too personal. Although common law malice will probably no longer defeat the defense, “actual malice” will. The defense of fair comment has therefore changed since *New York Times*, but has been broadened to the extent that “actual malice” replaces its common law variety. The re-popularization of the fair comment defense will be aided if the concept of “opinion” is expanded by the judiciary, and a corresponding contraction occurs in the concept of “facts.”

If fair comment had been properly considered in *Hutchinson v. Proxmire*, Dr. Hutchinson’s complaint would have been dismissed. The only statements made by Senator Proxmire about Dr. Hutchinson that might have been false were that his research was “perhaps duplicative” and that Hutchinson “made a fortune” from his government funding. Fair comment would have been an effective defense in the case because most courts would agree that Dr. Hutchinson’s funding was of public interest, that he was not personally attacked, that the characterization of his work was not so misleading as to be false, and that there was no showing of “actual malice.” The phrase “made a fortune” probably cannot be shown to be true or false because everyone’s idea of a fortune is different.²¹⁴ Unless that phrase can be said to clearly imply a misappropriation of funds, the statement is protected opinion. Regarding the charge that Hutchinson’s research was “perhaps duplica-

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²¹³ Although recent cases are contradictory in some aspects of the issue, the better view supports application of “actual malice.” Influenced by federal labor law, the Supreme Court applied “actual malice” to a case involving no public officials or public figures. Old Dominion v. Austin, 418 U.S. 264 (1974). In Time, Inc. v. Hill, 385 U.S. 374 (1967), the Court applied the “actual malice” standard to a private false light libel plaintiff involved in a matter of public interest. *Id. But see Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (decided on the same day as *Old Dominion* and apparently rejecting application of “actual malice” to matters of public interest).

²¹⁴ After the out of court settlement, Proxmire stated he wished to “clarify” some of his statements on the research. Although the amount of federal expenditure was large, he said that Dr. Hutchinson did not make a personal fortune. 126 *Cong. Rec.* S2831 (1980).
tive,” the doctor’s similar experiments on a variety of animals show that Proxmire’s statement is common sense to the average citizen even if it seems gross and unfair to research scientists.215 Proxmire’s statements mocked and ridiculed Dr. Hutchinson’s research, not the man or his motives.

The right to criticize expenditures of public money should belong to every citizen, particularly to an elected representative who states a presumably good faith criticism. Fair comment should also protect statements like Proxmire’s no matter who made them because the defense is available without regard to the status of the defendant or plaintiff.216

Hutchinson v. Proxmire helps illuminate the reason for fair comment’s neglect. Protecting remarks like Proxmire’s with fair comment may seem circuitous but only because of the perceptions created in the minds of lawyers and judges by New York Times Co. v. Sullivan and its progeny.217 When “actual malice” was used effectively by defendants against public figures or in matters of public interest, the more difficult fair comment defense naturally took a back seat. After the decisions in Gertz, Firestone and Hutchinson v. Proxmire, it is hoped that fair comment will attain renewed vigor.

**OTHER HIDDEN FAIR COMMENT CASES**

Not only in Hutchinson v. Proxmire, but in a wide range of other fact situations, fair comment could have been employed but was not. The remainder of this Article focuses on ten cases tried under a New York Times—“truth or falsity” framework but better suited for fair comment—“opinion” treatment. Special emphasis is placed upon public interest and public figure cases because all of the former and some of the latter have been undercut by recent Supreme Court decisions.218 The following evaluation reveals that mistaken analysis has usually arisen when the courts failed to evaluate the nature of the allegedly defamatory statement. Courts have too eagerly invoked the public figure or official doctrines because those concepts neatly dispose of disputes. Judicial analysis should not, however, hinge on expe-

215. Since this case arose, the Fund to Protect Scholars from Defamation has been formed and is making a national appeal for funds to help pay legal costs of Hutchinson’s Supreme Court battle. This fund was established following recognition by other research scientists that such suits substantially curtail the awarding of research grants for further studies. SCIENCE, July 13, 1979, at 170-71.


217. See notes 21-34 and accompanying text supra.

diency; rather, the actual meaning of the allegedly defamatory words must be evaluated.\footnote{See Bamberger, \textit{Public Figures and the Law of Libel: A Concept in Search of a Definition}, 33 Bus. Law. 709, 717 (1978).}

All principal cases discussed below arose after 1967 when the Supreme Court first applied "actual malice" to public figures in \textit{Curtis Publishing Co. v. Butts}.\footnote{388 U.S. 130 (1967).} In each, the courts applied "actual malice" with its truth-or-falsity analysis, usually because the plaintiff was held to be a public figure. Yet, fair comment could have formed the primary rationale for deciding each case. No reasons appear for the failure to consider fair comment other than a preoccupation with \textit{New York Times} and its progeny and a misplaced concern for expediency.

\textit{Tait v. King Broadcasting Co.}\footnote{1 Wash. App. 250, 460 P.2d 307 (1969).} illustrates an approach typically taken by post-\textit{New York Times} courts. The defendant was the host of a radio talk show. When asked one night whether the plaintiff had ever been a guest on the show, the defendant answered, "Yes, . . . Our leading American local fascist and Jew-baiter—I've had him on."\footnote{\textit{Id.} at 251, 460 P.2d at 309.} The plaintiff was active in right-wing causes, and the trial brought out the defendant's knowledge of plaintiff's political activities.\footnote{\textit{Id.} at 253, 460 P.2d at 310.} The Washington Court of Appeals reasoned that "[t]he first inquiry for the court is whether Tait [the plaintiff] may properly be classed as a 'public figure,' "\footnote{\textit{Id.} at 253, 460 P.2d at 310.} and swiftly found that plaintiff was a public figure. The remainder of the decision was devoted to the issue of whether defendant had any knowledge of the falsity of his statement, or any reckless disregard about the truth, that is, whether the defendant acted with "actual malice."

Like many courts since \textit{New York Times}, the \textit{Tait} court never asked the proper threshold question: Was the alleged defamation a statement of fact or opinion? Following the rule discussed earlier,\footnote{See notes 66-68 and accompanying text \textit{supra}.} the statement should have been characterized as an opinion, because the meaning of the word "fascist" is debatable and incapable of proof of truth or falsity. "Jew-baiter" is a statement of opinion under the same reasoning.\footnote{The phrase "Jew-baiter," however, could be found to be a statement of fact in light of a cartoon in plaintiff's newspaper showing "a superior court judge of Jewish faith [which] carried a derisive caption . . . reflecting on his religious background as well as his performance as superior court judge." 1 Wash. App. at 253, 460 P.2d at 310.} The defendant's opinions should have been defended as opinion; discussing this kind of political labeling in terms of truth and falsity is absurd. The problem was not that the wrong result was reached. In this and most cases, the result would have been the same under public figure or fair comment analysis, with the defendant's getting the lion's share of verdicts. The case illustrates the utility of
NEGLECTED FAIR COMMENT DEFENSE

fair comment to protect open debate as the Supreme Court continues to savage the public figure doctrine.

Sports has proved to be a subject fertile with litigation that ignores fair comment. In Grayson v. Curtis Publishing Co., the plaintiff was a college basketball coach. An allegedly libelous article appeared in the Saturday Evening Post, under the by-line of a college basketball referee who had quit that position because of crowd violence. The referee had charged the plaintiff with poor sportsmanship, incendiary behavior at basketball games, and inciting violence by disputing the referee’s decisions. According to the referee: “Grayson [the plaintiff] leaped up, kicked some towels and yelled, If that isn’t the worst--call I ever saw in my life!’ . . . Grayson raved and complained to the crowd. It was like ordering a tree and a rope.”

The trial court’s verdict for the plaintiff was reversed and the case was remanded for a new trial after the Washington Supreme Court found a disputed question of fact to be decided by the jury. That decision was unfortunate because whether the coach’s actions contributed to the violent atmosphere cannot be absolutely proved true or false. The parties did not dispute that the referee had been physically attacked by “fans” at the game in question. Although parts of his charges could not be proved with absolute certainty, surely the referee should be free to criticize those who appeared to set the stage for the assault. The elements of a fair comment defense were all present in this case: college sports, the subject of the magazine article, is certainly of public interest and only the public actions of the coach were criticized, so that no personal attack could be found. Fair comment should have been applied as long as the coach in fact “raved and complained to the crowd,” because the cause-and-effect relationship of the coach’s complaints to the assault is a matter of opinion that cannot be proved true or false.

The court, however, remanded the case, so as to find those ephemeral “facts.” Fifty rioting fans were available as witnesses; perhaps the court intended that the one who threw the bottle which split the referee’s scalp should have been asked if he threw it because of the coach’s antics. Applica-

227. 72 Wash. 2d 999, 436 P.2d 756 (1967).
228. This article appeared in the January 5-12, 1963 edition of the Saturday Evening Post and reported a referee’s description and criticism of “Basketball’s Bullies, reckless coaches, rowdy players and riotous fans [who] disgrace our colleges. . . .” Grayson, the head basketball coach at the University of Washington at the time of the publication, was prominently named in the article as an example of “explosive bench behavior”—a coach’s reaction to adverse decisions by a referee—which contributes to a countrywide “scandal” of “rabble-rousing” and violence.
229. The referee, Al Lightner, related his story to Al Stump, a free lance writer, concerning Grayson’s inappropriate and incendiary behavior at a University of Washington v. U.C.L.A. basketball game. The results of Grayson’s behavior according to Lightner were student riots and personal injury to Lightner causing him to refuse to officiate any further games involving Grayson or his team. 72 Wash. 2d at 1000, 1002, 436 P.2d at 757, 759.
230. Id. at 1005, 436 P.2d at 761.
231. Id. at 1008, 436 P.2d at 762.
tion of fair comment at the outset could have eliminated such a hopeless inquiry.

Another ridiculous sports lawsuit, *Time, Inc. v. Johnston*, 232 might have been avoided or simplified if the fair comment defense was understood by courts and pleaded. Eventually judgment was rendered for the defendant, but not until the case reached the Court of Appeals for the Fourth Circuit. *Sports Illustrated*, in an article naming professional basketball player Bill Russell as its "Sportsman of the Year," quoted a former coach of Russell who said that Russell’s defensive work in one game had “destroyed” and “psychologically destroyed” the plaintiff, an opposing player. 233 The court correctly noted that this meant “merely that Russell had completely outplayed and overshadowed the plaintiff, not that Russell had literally ‘destroyed’ him.” 234 Even though all of the fair comment elements were present, 235 the court cited no fair comment cases and reached its decision for the defendant because the plaintiff was a public figure who had failed to prove “actual malice.” 236 The case again emphasizes the preoccupation of attorneys and judges with the *New York Times* Sirens, while ignoring the more appropriate analytical framework of fair comment.

Fair comment was also overlooked at trial and on appeal in *Bon Air Hotel, Inc. v. Time, Inc.* 237 For years, the plaintiff-hotel had served the crowds in Augusta, Georgia at the Masters’ Golf Tournament. *Sports Illustrated* carried a story which, in the district court’s words, described the hotel’s “alleged decline from the status of *grande dame* into the station of a dowdy, decrepit and disheveled old woman.” 238 The basis for the appellate court’s decision was the “actual malice” rule, raised because the Masters’ Tournament was of public interest. 239 The court found that none of the allegedly libelous statements were published with knowledge of falsity or reckless disregard of the truth, and rendered summary judgment for defendants. 240

232. 448 F.2d 378 (4th Cir. 1971).
233. Id. at 379.
234. Id. at 385.
235. It is clear that four of the elements of the fair comment defense were fulfilled in this case. Certainly, the statement of *Sports Illustrated*, quoting the coach, that the plaintiff was “psychologically destroyed” was an opinion—it could not be proved true or false. The statement, just as clearly, was not made maliciously, nor was it overly personal, relating, as it did, to the plaintiff’s play in a basketball game. The statement related to a matter of public interest—a professional basketball game. Arguably, the truly stated facts requirement was also met—what happened in that basketball game was, no doubt, reported in the newspapers. That the underlying facts be available is sufficient, according to the better reasoned cases, to satisfy the truly stated facts element. See notes 128-130 and accompanying text supra.
236. 448 F.2d at 383-84.
237. 426 F.2d 858 (5th Cir. 1970).
238. Id. at 860 (quoting Bon Air Hotel, Inc. v. Time, Inc., 295 F. Supp. 704, 707 (S.D. Ga. 1969)).
239. Id. at 862.
240. Id. at 863-67.
The story, however, only contained statements written with a story teller’s “piquant pen;” statements not containing false allegations, but dripping with protected “exaggeration, slight irony or wit.” Such statements as the hotel has a “whitewashed face,” is staffed with ancient waiters in white coats who “tumble drowsily through the dining room,” or that the hotel management’s attitude toward its guests is that of “stay-at-your-own-risk” cannot reasonably be interpreted as other than opinion. But the court spoke of facts, not opinions, and stated that “Bon Air presented no evidence that Time or Jenkins [the writer] published the statements with knowledge of their falsity or with ‘serious doubts as to the truth of [the] publication.’”

If wasted time and expense were confined to the essentially frivolous amphitheatres of sports, concern with improperly tried cases would not be so serious. More vital discussion is unfortunately also affected, as in Cera v. Mulligan. In that case, plaintiffs were chiropractors who appeared on a local television show to rebut an earlier televised criticism of chiropractic. Defendant Mulligan was chairman of the community relations committee of New York’s Monroe County Medical Society. After the appearance of the plaintiff chiropractors, he wrote a letter to a newspaper that mentioned various studies that were highly critical of chiropractic. The essence of the claimed libel was the defendant’s calling chiropractic a “dangerous cult,” and his statement that the television program that presented the chiropractors’ rebuttal, was a “promotion of quackery.” The court decided that the plaintiffs had made themselves public figures for the limited purpose of criticism of chiropractic. The court gave judgment for defendants because

242. Id. at 118, 183 N.E. at 198.
243. Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 866 (5th Cir. 1970). The complaint alleged that the article as a whole was defamatory and that ten specific statements in the article were false and libeled Bon Air: (1) the hotel had a “whitewashed face”; (2) the hotel is staffed with ancient waiters in white coats who “tumble drowsily through the dining room”; (3) the hotel management’s attitude toward its guests is that of “stay-at-your-own-risk”; (4) the hotel is gradually being converted into a “residence for the elderly”; (5) halls “sloped awkwardly” towards the rooms; (6) rooms are “wide enough so that by turning sideways a guest can walk between the bed and dresser”; (7) “Windows are of two types. If upon entry, a window is up it is not likely ever to come down, especially if the evening is brisk. On the other hand, if the window is down it will never go up”; (8) tubs and basins were never “worth much”; (9) sleeping accommodations are described: “Sleeping at the Bon Air has long been difficult for reasons other than the heat or the cold or the hardness of the beds. It is noisy. Not the least amount of noise sometimes is caused by the clacking of highheeled shoes going down the fire escape outside a guest’s window at 4 AM”; and (10) the hotel has a “sell out crowd” for the week of April 6 through April 12, 1964.” Id.
244. Id. A cartoon of the hotel was also the subject of an “actual malice” discussion by the court. Id. at 866-67.
245. 79 Misc. 2d 400, 358 N.Y.S.2d 642 (Sup. Ct. 1974).
246. See note 28 supra.
247. 79 Misc. 2d at 406, 358 N.Y.S.2d at 648.
"there was no 'actual malice' demonstrated." In the very next sentence, however, the court demonstrated the applicability of fair comment to the case: "The letter did no more than espouse the opinion that chiropractors are a 'dangerous cult.'" In Sellers v. Time, on the other hand, fair comment was mentioned, but decision did not rest on that ground. The case began with a freak golf accident in which the plaintiff partially blinded his golfing partner. The injured golfer sued Sellers and Time magazine reported that action. Subsequently, the plaintiff sued Time for libel. According to the court, the substance of any libel occurred when Time called the plaintiff a "duffer" and reported that when Sellers swung his club, he had "his mind on a potential deal." Although the facts of the case and some of the court's analysis fit fair comment, the court did not clearly state what defense it relied on when it granted the defendant's motion for summary judgment. The court spoke of fair reports of judicial proceedings and of a public interest bringing the case within the "actual malice" rule. The court concluded that the term "duffer" was "a fair comment" and stated that Time's ignorance of what was on Seller's mind when he swung the club did not make the article defamatory: "Such a statement is merely an expression of the opinion of him who makes it. Its truth or falsity is probably not even susceptible of proof." This is plainly fair comment talk. The court might thus have dispensed with "actual malice" and fair reports of judicial proceedings because the article contained no false statements, and all the other fair comment criteria were satisfied. Sellers therefore appears to be a fair comment case, but the dispository grounds remain uncertain.

Use of fair comment would have resulted in judgment for the defendants in Sellers and in Cera just as did the confused reasoning in the former and the public figure finding in the latter, so one cannot flatly conclude that these cases were wrongly decided or defended. But with the Supreme Court's recent vacillation on the scope of the public figure category, fair comment rests on firmer ground. Fair comment could have been raised successfully as an alternative defense. No matter how many defenses are

248. Id. at 405, 358 N.Y.S.2d at 649.
249. Id.
251. Id. at 584.
252. Id. at 586.
253. Id.
254. Fair comment was used successfully as an alternative defense in Exner v. American Medical Ass'n, 12 Wash. App. 215, 529 P.2d 863 (1974). In Exner, the defendant's medical journal ran a pro-fluoridation article about opponents of fluoridation, stating that these opponents "range from the sincere to the charlatan, from the confused to the quack," and called the plaintiff "perhaps the most frequently quoted 'professional' opponent." Id. at 217, 529 P.2d at 866. The article was not defamatory and the court recognized a fair comment defense as dispository because the article "commented fairly on the plaintiff's position on fluoridation and [did not attack] his personal character or medical competence." Id. at 220, 529 P.2d at 867. So powerful
chosen, the one designed to protect opinions should be used both by the litigants and by the court when the allegedly defamatory statement is an opinion.

Strong opinion was again treated as fact in *Edwards v. Audubon Society, Inc.*,\(^{255}\) where the court styled its decision in public figure-"actual malice" terms. In *Edwards*, the Society published the book, *American Birds*, which contained a foreword about the relationship between birds, pesticides, and bird watchers. Scientists and other observers had disputed the effects of the pesticide DDT on American bird populations. The foreword to *American Birds* stated that although the number of birds spotted had increased, this increase was not evidence of a healthy bird population unaffected by insecticide, but only evidence of more and better bird watchers.\(^{256}\) Some observers had interpreted the increased bird counts as a healthy sign,\(^{257}\) but the book claimed that was not true: "Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."\(^{258}\) John Devlin, a nature reporter for the *New York Times*, read the foreword to *American Birds*, did some investigating, and wrote a story with the headline, "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count." The article quoted the foreword and the charges of "lying" in the context of the disputed statistical interpretations. The article essentially reported the charge that pesticide company spokesmen who disagreed with the Audubon Society interpretations were "paid to lie."\(^{259}\) The court of appeals accepted the district court's finding that the plaintiffs were public figures for purposes of the DDT controversy and the case was decided on that ground.\(^{260}\)

Once again, a case contained an unrecognized fair comment situation; the court itself analyzed the so-called libel as an opinion, the basis for which was set forth. In the court's words, "[t]he epithet 'liar' in this context, standing by itself, merely expressed the opinion that anyone who persisted in misusing Audubon statistics after being forewarned could not be intellectually honest. Since the basis for this opinion was fully set forth, the communication . . . cannot be libelous, however mistaken [it] might be."\(^{261}\) Even

\(^{255}\) 556 F.2d 113 (2d Cir. 1977).
\(^{256}\) Id. at 116.
\(^{257}\) Id.
\(^{258}\) Id. at 117.
\(^{259}\) Id. The defendant's charge was in the alternative, inferring that the "scientists" may not have been paid to lie, but may instead have only been woefully ill-informed.
\(^{260}\) Id. at 120-22.
\(^{261}\) Id. at 121 (emphasis in original).
though the court felt that a "paid liar" was worse than one who performed gratis, it nevertheless reversed for the defendants.

Although the court concluded differently, it seems the word "paid" adds little to the word "liar" in the context of this dispute. The defendant's statement was just a harder-hitting version of: "Plaintiffs are paid by chemical companies; their interpretations of statistics do not account for certain crucial elements; we disagree with their interpretations, which are probably intentionally misleading." Although the defendants prevailed upon appeal, the time may come when plaintiffs like these will not be deemed public figures, "actual malice" will not be applied, and plaintiffs will recover. Because the basis for the accusation "paid to lie" was clearly set forth, fair comment should have been applied to the case.

Other hidden fair comment cases illustrate further advantages of the fair comment defense. The Supreme Court's comments on the "voluntariness" aspect of public figures could cause the law of defamation to become mired in a swamp of the Court's own making. One reason Mary Alice Firestone was not a public figure in *Time, Inc. v. Firestone* was that, regardless of the fact that she held press conferences, her divorce action was "no more voluntary in a realistic sense than that of the defendant called upon to defend his interest in court." The Court's logic suggests potentially unwieldy circumstances in other defamation cases because the dividing line between voluntary and involuntary actions remains indistinct. Following the Court's logic, several circumstances pose difficulties: Does a professional athlete "voluntarily" submit himself to scrutiny so as to become a public figure? Probably not: the rewards of professional athletics so outweigh any other work that the athlete seems to have little choice. Similarly, a basketball coach can never work in private. And in *Fram v. Yellow Cab Co.* a man trying to run a taxi company in the face of stiff competition and heavy regulation probably faced no real choice other than to speak publicly to protect his business interests.

In *Fram*, the plaintiff operated a taxicab company in Pittsburgh. After he appeared on a television news program, a spokesman for competing cab companies appeared the next night on the same program, and described Fram's earlier remarks as "a little bit like the sort of paranoid thinking that you get from a schizophrenic." The federal district court recognized that, in context, these words were merely hyperbole, but the court did not say that the words were opinion. Instead, Fram was found to be a public figure because he had "thrust himself into the 'vortex' of a public controversy."

262. *Id.* at 122.
263. *Id.* at 123.
264. See notes 24-33 and accompanying text supra.
267. *Id.* at 1329.
268. *Id.* at 1334.
The reasoning in *Firestone* could lead a court to conclude that *Fram* was overruled because Fram was forced to speak in public to defend his business interests just as Mary Alice Firestone was forced to go to court to get a divorce. If the public figure category is undermined by "voluntariness" issues and uncertainty, fair comment will be available to defendants because of its public interest component.

The public figure defense may also be limited when a once-prominent person fades into obscurity. The Supreme Court has not determined when such a person stops being a public figure, but the issue did arise in the 1974 Seventh Circuit case, *Perry v. Columbia Broadcasting Systems, Inc.* Actor Lincoln Theodore Perry, popularly known as Stepin Fetchit, ended his movie career in 1938. He was still active in show business in 1968, however, when a television program on black history showed clips of his old movies and stated that Perry popularized the "tradition of the lazy, stupid, crapshooting, chicken-stealing idiot." After Perry sued CBS, the court held him to be a public figure, and affirmed the lower court's judgment for the defendant. If Perry had not continued his theatrical work, the thirty-year lapse between his last movie and the alleged defamation might have returned him to private figure status. If so, fair comment might have been the only defense available because the private status will not raise the "actual malice" rule. No fact-opinion problem could have arisen because the statements claimed to be defamatory were merely opinions about Perry's role in movie history.

In one case, the fair comment doctrine actually surfaced. *Hotchner v. Castillo-Puche* appears to acknowledge the vitality of fair comment. Jose Luis Castillo-Puche, a Spanish writer, made statements about A. E. Hotchner, a well-known American writer and authority on and acquaintance of Ernest Hemingway. The jury found six passages in Castillo-Puche's book to

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269. See, e.g., *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979). In *Wolston*, the Court declined to decide the issue when 16 years had elapsed between the defamation and the plaintiff's notoriety. The reader may decide whether this was truly not a consideration in the Court's holding that the plaintiff was not a public figure. Justices Blackmun and Marshall, however, would have held that the plaintiff was not a public figure because of the lapse of time and accordingly would not have decided whether the plaintiff had been a public figure at an earlier time. *Id.* at 169-72 (Blackmun & Marshall, JJ., concurring).

270. 499 F.2d 797 (7th Cir. 1974).

271. *Id.* at 799.

273. Id. at 801. With reference to the limited public figure concept, the court held:

[It] is not necessary in this appeal to deal with the question whether a lapse of time will restore a public figure to the status of a private citizen. Perry continued to be a public figure at the time of the broadcast. He may not have had the breadth of national fame with which he was earlier associated, but he was still active in show business and was being considered for the star role in a television series as well as for the subject of a movie about his life.

*Id.*

libel Hotchner, including: a description of Hotchner as a manipulator, a “toady,” a hypocrite who exhibited “two-faced behavior” toward Hemingway’s true friends, and an “exploiter of [Hemingway’s] reputation” who was “never open and above-board.” The final libel was a quote from Hemingway, who allegedly said, “I don’t really trust him,” referring to Hotchner. At trial, the defendant moved for summary judgment on the grounds that plaintiff Hotchner was a public figure, and that the defendant had no knowledge of the statement’s falsity and did not publish with reckless disregard of the truth. The court denied the motion, ruling that there was an issue of fact on the “actual malice” question. The jury awarded the plaintiff $125,000 damages, and the Second Circuit reversed, holding that the first five statements were opinion, could not be proved true or false, and that “an assertion that cannot be proved false cannot be held libellous.” The appellate court therefore made a cursory fair comment analysis of the first five libels, and interspersed that analysis with a public figure-“actual malice” evaluation. Turning to the sixth libel, the circuit court found the quotation from Hemingway to have been published without “actual malice.” Nevertheless, the court said that the passage could not be independent verified, and where there are no convincing indicia of unreliability, publication of the passage cannot constitute reckless disregard for truth.” The judiciary had finally arrived at the appropriate fair comment conclusion after at least two years of litigation. Use of fair comment in the first instance would likely have resulted in judgment for the defendant on a motion for summary judgment. Not only is the fair comment analysis of the above-discussed cases more intellectually satisfying, but practically, the disposition of cases can be simpler and more certain.

Conclusion

The Supreme Court’s libel decisions of the past six years are disturbing to one who thinks that discussions of matters of public interest such as communist plots, highly public divorce actions, and public expenditures should be protected by a strong rule. Rosenbloom v. Metromedia, Inc., promised to “honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public interest or general concern, without regard to whether the persons involved are famous or anonymous.” Gertz, Firestone, and Hutchinson v. Proxmire have reneged

275. 551 F.2d at 912.
276. Id.
278. 551 F.2d at 914.
279. Id. at 913.
280. Id. at 914.
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on that promise, have eliminated a previous constitutionally mandated "actual malice" standard in cases involving "mere" public interest, and have substantially constricted the public figure category.

The values of free speech and press on the one hand struggle against a desire to protect the reputations of defamed plaintiffs. The relative importance of these competing values can be argued until eternity, and probably will be, but in *Hutchinson v. Proxmire* Dr. Hutchinson should have had no valid action against Senator Proxmire. If a person's publicly funded work cannot be criticized by one who is elected to criticize when he feels it is appropriate, then our representatives' and our own speech is jeopardized. If Hutchinson's research could not stand on its own merits against some well-chosen words, then perhaps Proxmire was right and the research did lack value. By applying the doctrine of fair comment, the courts could help ensure that elected officials play their proper role without hindrance.

The fair comment doctrine should not be confined to publicly funded work that is criticized by a United States Senator, but must apply to all discussions of matters of public interest, regardless of the plaintiff's status.282 Barring unexpected developments, there will be no uniformity in libel law for decades into the future because courts on all levels are still reconciling the common law of libel with *New York Times* and its aftermath. Two things are fairly certain: statements formerly safeguarded by an "actual malice" burden because they related to issues of public interest will continue to be unprotected on the basis of their subject matter; and the public figure category, which likewise raises the plaintiff's burden to show "actual malice," will continue to shrink. Much of the resulting void can be filled by fair comment.

Fair comment has been ignored since *New York Times* focused attention on truth or falsity. During the halcyon days of "actual malice," the nonconsideration of fair comment did no harm because even with the attention of the bar fixed upon truth issues, speech about public issues received adequate protection as defamation defendants won the majority of verdicts. Now, however, the pendulum is moving to allow more plaintiffs room to maneuver and recover. As fair comment now exists, it can cover many cases formerly decided on public interest or public figure bases. In an age of relativity, more statements will probably be recognized as opinions incapable of proof as true or false. All of the fair comment elements are elastic, and if those elements are expanded, fair comment could become the dominant defamation defense. Because of the shifting views of libel in the Supreme Court, opinions may begin to be called opinions, and defended, as they should be, by fair comment.

282. The idea is not new. See Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908).
April 18, 1975 Press Release Office of SENATOR WILLIAM PROXMIRE
Wisconsin
FOR RELEASE AFTER 6:30 A.M. Friday, April 18, 1975

Senator William Proxmire (D.-Wis) announced on Friday, "My choice for the Golden Fleece Award for the biggest waste of taxpayers' money for the month of April goes jointly to the National Science Foundation, National Aeronautics and Space Administration and the Office of Naval Research for spending almost $500,000 in the last seven years to determine under what conditions rats, monkeys and humans bite and clench their jaws. From the findings of these studies it is clear that the Government paid a half million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching in people."

The Wisconsin Senator said, "This is the second in a series of 'fleece of the month' awards which will climax in a Biggest Waste of the Year Award."

"All this money was given to Dr. Roland [sic] R. Hutchinson of Kalamazoo State Hospital in Michigan. Last year alone the good doctor spent over $200,000 of which more than $100,000 were federal funds. And what are some of the other results reached by these research projects in the last seven years?

"Dr. Hutchinson told NASA that people get angry when they feel cheated and tend to clench their jaws or even scream and kick. NSF learned that Dr. Hutchinson's monkeys became angry when they were shocked and would try to get away from the shock. In addition, NSF was informed that drunk monkeys do not usually react as quickly or as often as sober monkeys and that hungry monkeys get angry more quickly than well-fed monkeys.

"The Office of Naval Research appears to have gotten the same type of so-called research as did the NSF and NASA.

"It is very interesting to trace the history of these extremely similar and perhaps duplicative projects. In 1967, NSF gave Dr. Hutchinson $44,700 to study 'Environmental and Physiological Causes of Aggression.' For two years, Dr. Hutchinson studied the biting reactions of monkeys when they received electric shocks. He also compared their reaction while being given a number of different drugs as alcohol and caffeine. In 1969, the NSF gave Dr. Hutchinson another $26,000 to continue these experiments. He received another grant, this one for $51,200 in 1970 from the NSF.

"By this time Dr. Hutchinson was ready to extend his work to human biting and jaw clenching. In 1970, Dr. Hutchinson received a grant which ran for five years from the ONR to continue 'research on sub-human primates to determine the environmental, physiological and biochemical factors responsible for the maintenance of aggressive behavior and systematic replication of results observed in primates extended to human subjects.' Total funding from the Navy ran to $207,000.

"During this period, Dr. Hutchinson applied for and received a $50,000 grant from NASA to develop measurements of latent anger or aggression in humans by means of jaw-clenching. In addition, Dr. Hutchinson received his fourth NSF grant in 1972 for $51,800 in order to continue his experiments on monkeys and extend the work to human jaw-clenching.

"Dr. Hutchinson, who in addition to being Research Director of Kalamazoo State Hospital, is also an Adjunct Professor at Western Michigan University and President of his own non-profit Foundation for Behavior Research, has proposals presently pending before the NSF, the National Institute of Drug Abuse, and the National Institute of Mental Health to continue research on monkeys' drinking, drug and jaw clenching habits. If Dr. Hutchinson is successful in this new grantsmanship attempt, he would receive an additional $150,000 of taxpayers' money.

"The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaw.

"Dr. Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer.
"It's time for the federal government to get out of this 'monkey business.' In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it's time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking out of the taxpayer."

Proxmire said that the public is urged to write him in Washington with suggestions for the "Golden Fleece of the Month" for May.