

10-1962

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Recommended Citation

Herbert W. Titus, Statement of Fact Versus Statement of Opinion – A Spurious Dispute in Fair Comment, 15 *Vanderbilt Law Review* 1203 (1962)

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Statement of Fact Versus Statement of Opinion— A Spurious Dispute in Fair Comment

Herbert W. Titus*

In this article the author sets forth the rationale behind the defense of fair comment and proposes new standards and methods of analysis as a solution to the problems raised by this defense. Mr. Titus rejects the present use by the courts of the fact-opinion distinction in fair comment cases, relying heavily on the fact situations and holdings in actual litigation to elucidate and substantiate his criticism.

I. INTRODUCTION

In attempting to solve problems in a variety of areas lawyers continuously make use of a distinction between statements of "fact" on the one hand and those of "opinion" on the other.¹ So versatile is this distinction that it has been used to solve problems raised in such diverse areas of the law as evidence and defamation. However, since the turn of the century the fact-opinion dichotomy has been severely criticized as a means of deciding what kinds of testimony should be allowed in a legal trial.² Yet in the law of defamation, where this distinction has been extensively applied in the analysis of problems raised by the defense of fair comment, almost no one has questioned its usefulness.

The overwhelming majority of courts require the defendant who raises the defense of fair comment in a libel or slander case to prove that the statements he made were "honest expressions of *opinion* on matters of legitimate public interest where based upon a *true* or privileged statement of *fact*."³

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1. See, e.g., PROSSER, TORTS § 90 (2d ed. 1955) (law of misrepresentation); Magaw, *Representations in the Law of Life Insurance*, 12 TEMP. L.Q. 55 (1937).

2. 7 WIGMORE, EVIDENCE 10, 13-16 (3d ed. 1940); Ladd, *Expert and Other Opinion Testimony*, 40 MINN. L. REV. 437-40 (1956); McCormick, *Some Observations Upon the Opinion Rule and Expert Testimony*, 23 TEXAS L. REV. 109, 111 (1945); Slovenko, *The Opinion Rule and Wittgenstein's Tractatus*, 14 U. MIAMI L. REV. 1 (1959).

3. 1 HARPER & JAMES, TORTS 456 (1956) (Emphasis added.); accord, ODGERS, LIBEL AND SLANDER 166 (6th ed. 1929); PROSSER, *op. cit. supra* note 1, at 621; 3 RESTATEMENT, TORTS § 606 (1) (1938); Thayer, *Fair Comment as a Defense*, 1950 WIS. L. REV. 288, 298; Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413 (1910); *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 927 (1956); Note, 37 GEO. L.J. 404, 405 (1949); Note, 62 HARV. L. REV. 1207, 1211 (1949); Comment, 16 TEXAS L. REV. 87 (1938); Comment, 12 U. MIAMI L. REV. 89 (1957); see, e.g., *Post Publishing Co. v. Hallam*, 59 Fed. 530 (6th Cir. 1893); *Miller v. Capital City Press*, 142 So. 2d 462 (La. 1962); *Hubbard v. Allyn*, 200 Mass. 166, 86 N.E. 356 (1908).

Only a handful of courts extend the defense of fair comment to all of the statements made by the defendant regarding the public activities of the plaintiff.⁴ In those courts the defendant need only prove that he honestly believed what he said was true, that he was not actuated by malice, and that he met certain standards of fairness. Only a few of these cases and authorities require in addition that the defendant's honest belief be supported by reasonable grounds.⁵

Regardless of the view adopted, statements which enjoy the protection of the defense of fair comment are privileged even though they are defamatory.⁶ However, there is a minority of American courts which maintain that "fair comment" is not defamatory at all.⁷ Throughout this paper I will adopt the view that such statements are privileged for two reasons: (1) It is not part of the plaintiff's case to show that the defendant's statements are not "fair comment" in order to prove them libelous; and (2) It is difficult to understand why a statement is no longer a disparagement of a person's reputation just because that person's activities have become matters of public concern.

The primary difference then between the majority and the minority views is that the latter does not make any distinction between statements on the basis of "fact" and "opinion." A quick survey of cases which adhere to the majority position illustrates the recurring phenomenon that the availability of the defense of fair comment oftentimes turns upon whether or not a particular statement will be placed into one cubbyhole called "fact" or in another called "opinion."⁸ As to those statements which are

Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (1947); *Marr v. Putnam*, 196 Ore. 1, 246 P.2d 509 (1952).

4. *Salinger v. Cowles*, 195 Iowa 873, 191 N.W. 167 (1922); *Coleman v. McLennan*, 78 Kan. 711, 98 Pac. 281 (1908); *Clancy v. Daily News Corp.*, 202 Minn. 1, 277 N.W. 264 (1938); *Lafferty v. Houlihan*, 81 N.H. 67, 121 Atl. 92 (1923); PROSSER, *op. cit. supra* note 1, at 621.

Some writers who support this view are: Boyer, *Fair Comment*, 15 OHIO ST. L.J. 280 (1954); Hallen, *Fair Comment*, 8 TEXAS L. REV. 41 (1930); Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875 (1949).

5. *E.g.*, *Clancy v. Daily News Corp.*, *supra* note 4; *Lafferty v. Houlihan*, *supra* note 4; Noel, *supra* note 4, at 894-95.

6. 3 RESTATEMENT, TORTS § 606 (1) (1938).

7. *Bearce v. Bass*, 88 Me. 521, 34 Atl. 411 (1896); *Hoan v. Journal Co.*, 238 Wis. 311, 298 N.W. 228 (1941).

The English courts, however, have carried on a hot dispute over whether or not "fair comment" is defamatory. Compare *Henwood v. Harrison*, L.R. 7 C.P. 606 (1872) and *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K.B. 627, with *Campbell v. Spottiswoode*, 3 B. & S. 769, 122 Eng. Rep. 288 (1863) and *Merivale v. Carson*, [1887] 20 Q.B. 275. This dispute seems to have been resolved in favor of the American *Restatement* view by *Grech v. Odhams Press, Ltd.*, [1958] 2 All E.R. 462, 469-70 (see note 66 *infra*).

8. *E.g.*, *Porcella v. Time, Inc.*, 300 F.2d 162 (7th Cir. 1962); *Westropp v. E. W. Scripps Co.*, 148 Ohio St. 365, 74 N.E.2d 340 (1947); *Marr v. Putnam*, *supra* note 3; *Bell Publishing Co. v. Garrett Eng'r Co.*, 141 Tex. 51, 170 S.W.2d 197 (1943); *Grech v. Odhams Press, Ltd.*, *supra* note 7; See PROSSER, *op. cit. supra* note 1, at 621; Veeder,

classified as "fact" the defendant must rely upon the defense of truth.⁹

Yet the court decisions in this area make no attempt to lay down the standards by which one can decide whether a particular statement is one of "fact" or one of "opinion."¹⁰ Only a cursory glance at the authorities yields the startling realization that the "distinction is more often stated than defined,"¹¹ and if and when it is defined, that it is often stated in a manner as if the words were self-explanatory.¹²

Harper and James, in their fine treatise on the law of torts, present a typical explanation of what is meant by this distinction:

The distinction between "facts" and "opinions" here . . . is somewhat nebulous, as a matter of pure logic. As a practical matter, however, it is susceptible of reasonable analysis. The important point is whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact. . . . If the actual facts are accurately stated, an opinion based thereon will be understood as such and taken for what it is worth. . . . But if the facts are misstated, the subject of his remarks is at the writer's mercy, and a defamatory opinion, unless properly labeled, may have the effect of a statement of fact.¹³

The immediate objection I have here is that the authors have told us nothing of what they mean by "fact" and "opinion." The words are treated as if they possessed some "magic quality" of self-elucidation. The distinction, without more, primarily furnishes vague familiar terms into

supra note 3, at 419 ("The distinction is fundamental, then, between comment upon given facts and the direct assertions of fact."); Note, 62 HARV. L. REV., *supra* note 3, at 1212.

9. *Mencher v. Chesley*, *supra* note 3; *Marr v. Putnam*, *supra* note 3; *A. H. Belo & Co. v. Looney*, 112 Tex. 160, 246 S.W. 777 (1922); Note, 62 HARV. L. REV., *supra* note 3, at 1211-13.

As for statements which are otherwise privileged, such as reports of certain legislative or judicial proceedings (See PROSSER, *op. cit. supra* note 1, at 623-25), I do not intend to deal with these. Obviously statements which a court classifies as ones of "fact," must be unprivileged on any grounds before the distinction makes any difference to the defendant. It is only then that he has to prove the statement to be true.

10. See, *e.g.*, the cases discussed in the text at pp. 1215-22 *infra*.

11. Note, 62 HARV. L. REV., *supra* note 3, at 1212 (citing Ducasse, *Propositions, Opinions, Sentences, and Facts*, 37 J. PHILOSOPHY 701 (1940)); see, *e.g.*, *Hubbard v. Allyn*, *supra* note 3; *Mencher v. Chesley*, *supra* note 3; *Westropp v. E. W. Scripps Co.*, *supra* note 8; *Marr v. Putnam*, *supra* note 3; *Hallen*, *supra* note 4, at 99; Note, 37 GEO. L.J. 404, 417 (1949).

A most curious elucidation of this distinction was made by Mr. Justice Holmes in *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 243, 28 N.E. 1, 4 (1891): "In the former (the area of public affairs) what is privileged, if that is the proper term, is criticism, not statement . . . [W]hat the interest of private citizens in public matters requires is freedom of discussion rather than of statement."

12. 1 HARPER & JAMES, *op. cit. supra* note 3, at 458-59; 3 RESTATEMENT, TORTS § 606 (1), comment *b* (1938); *Veeder*, *supra* note 3, at 415, 419-20; Comment, 16 TEXAS L. REV. 87, 91 (1938).

13. 1 HARPER & JAMES, *op. cit. supra* note 3, at 458.

which one can pour whatever meaning is desired in order to reach a particular conclusion. The authors perhaps have forgotten that the two words are merely handy abbreviations for what they are being used to describe or clarify. Unfortunately, the handiness of the distinction has become more important in deciding whether or not to use it than its accuracy.¹⁴

A much more crucial objection must be made to the analysis set forth in the above quoted passage. The authors make no attempt to justify the fact-opinion dichotomy on the grounds that it is a useful tool for carrying out the purposes for which the defense of fair comment has been devised. Apparently the distinction has become "an aim in itself and a self-justifying dogma."¹⁵

In this article I hope to extricate the defense of fair comment from this distinction. First, I will attempt to elucidate more clearly the rationale upon which the defense of fair comment is based. Second, accepting that a workable distinction between "fact" and "opinion" statements can be made, I will argue that, nevertheless, the distinction is based upon an assumption which is much too narrow for the purposes of determining liability for defamatory statements made about "public people." I will then try to show that the distinction merely states a conclusion based upon factors which may or may not be articulated. Finally, I propose to set up some standards and tools of analysis as an alternative solution to the problems raised by this defense.

II. RATIONALE OF FAIR COMMENT

Most writers justify the defense of fair comment on the grounds that it is necessary to protect the defendant's right of freedom of speech and the public's right to find out what is going on in matters of "legitimate public interest."¹⁶ The conflicting lines of authority merely differ in the solution offered as a means of reconciling the conflict of interests among a particular plaintiff, a particular defendant, and the public.¹⁷

The ultimate success or failure, then, of the distinction made by the majority view between statements of "fact" and those of "opinion" should turn upon its usefulness in reconciling this conflict of interests. I think, therefore, that a more extensive exploration into the nature of this conflict is desirable in order to determine whether or not the fact-opinion dichotomy

14. See FRANK, *LAW AND THE MODERN MIND* 84 (1936); OGDEN & RICHARDS, *MEANING OF MEANING* 24-47 (4th ed. 1936).

15. 7 WIGMORE, *op. cit. supra* note 2, at 14.

16. Hallen, *supra* note 4, at 55-61; Noel, *supra* note 4, at 877; Note, 37 *Geo. L.J.* 404, 407-12 (1949).

17. Compare *Post Publishing Co. v. Hallam*, *supra* note 3, at 540-41 (stating the majority view), with *Coleman v. McLennan*, *supra* note 4, at 717, 724-26, 739, 98 *Pac.* at 283, 286-90, 291 (stating the minority view).

adequately focuses upon the relevant factors involved.

The formation of an enlightened "public opinion"¹⁸ has long been considered fundamental to the concept of a democratic society.¹⁹ Initially, the existence of such public opinion was "taken for granted," probably for the following two reasons.

First, democratic theorists were wont to assume that the primary motivating factor in all men was the instinct of self-government, and that it was that instinct which helped make a democratic society function.²⁰ No matter what any particular person's experiences were, his opinions on public affairs, because of the common instinct of self-government, would be very similar to those of his fellows, who might have had entirely different sensory experiences.

Complete harmony among these opinions was both the desirable and the probable result because each man had the fundamental right of free speech. This concept of freedom of speech was grounded in a faith that the *truth* will ultimately prevail if absolute unlimited discussion will be allowed within the democratic community.²¹ Hence through the free exchange of ideas any disparity arising among the people's "self-centered" opinions would work itself into harmony because of the natural tendency for "truth" to reign supreme.²²

Therefore these theorists minimized the problems raised in the formation of "public opinion" and concentrated on whether or not the "common will" was being expressed by the government.²³

Yet as the democratic society has become more complex the problem of an enlightened public opinion has been thrust into a new light. Foremost it has led to the realization that man is motivated by several factors which work in addition to or against his desire to govern himself.²⁴

In addition came the realization that the individual must rely upon others to supply him with information about his environment. No single individual has sufficient opportunity to make direct contact with all of the matters which affect his life.

18. An extensive discussion of the meaning of this term is beyond the scope of this paper. For those who are curious to know what I do mean, I will borrow the following from Walter Lippmann's book, *Public Opinion*: "Those features of the world outside which have to do with the behavior of other human beings, in so far as that behavior crosses ours is dependent upon us, or is interesting to us, we call roughly public affairs. The pictures inside the heads of these human beings, the pictures of themselves, of others, of their needs, purposes, and relationship, are their public opinions." LIPPMANN, *PUBLIC OPINION* 29 (MacMillan paper ed. 1960) [hereinafter cited as LIPPMANN].

19. LIPPMANN 253; cf. CHAFEE, *FREEDOM OF SPEECH* 34 (1920).

20. LIPPMANN 310-12.

21. MILL, *ON LIBERTY* 15-54 (App. Cent. Crofts paper ed. 1947); MILTON, *AREOPAGITICA* 59 (Bk. League of America ed. 1929); see LIPPMANN 318.

22. CHAFEE, *op. cit. supra* note 19, at 34, 38.

23. LIPPMANN 311.

24. LIPPMANN 310-12.

For the real environment is altogether too big, too complex, and too fleeting for direct acquaintance. We are not equipped to deal with so much subtlety, so much variety, so many permutations and combinations.²⁵

The individual's "self-centered" opinions can no longer serve as an adequate foundation upon which he can make reasoned judgments about public affairs.

The interest of a democratic public then could be described as the right to have a reasonable opportunity to form enlightened opinions about those people whose activities affect their collective lives. It would be unreasonable to assume "that the whole invisible environment will be so clear to all men that they will spontaneously arrive at sound public opinions" on all of the matters affecting them. Even if this were a plausible assumption, nevertheless, most people would find it too bothersome to think about *all* the forms of social action which affect them. The formulation of an enlightened public opinion, then, depends upon the existence of a group of people whose job it is to communicate what is going on and what is being thought about those "public" matters with which the mass of society has no direct contact.²⁶

The interest of the person who is writing or speaking likewise can no longer be adequately identified by the traditional notions of free speech.

But in spite of its [free speech's] fundamental importance, civil liberty in this sense does not guarantee public opinion in the modern world. For it always assumes, either that truth is spontaneous, or that the means of securing truth exist when there is no external interference. But when you are dealing with an invisible environment, this assumption is false. The truth about distant and complex matters is not self-evident, and the machinery for assembling information is technical and expensive.²⁷

Freedom of speech does not take into consideration the fundamental problem confronting the "communicator." Because of the immense diversity and complexity of the subject matter about which he usually talks or writes, the "communicator" must formulate some rules and techniques for presenting the great mass of sensory data, it being both impossible and undesirable to present such data in an unadulterated form.²⁸ Freedom of speech fails to differentiate between the relative difficulties of writing an article or giving a speech on the stock market, where the "ticker tape" provides a systematic record of raw data, and those involved in making statements about a person's character or beliefs, where no such systematic recordation exists (even if one assumes that such a system is possible).²⁹

25. LIPPMANN 16.

26. LIPPMANN 314.

27. LIPPMANN 319.

28. LIPPMANN 338-57, 362.

29. LIPPMANN 341-42.

Finally, the interest of the potential plaintiff must be reckoned with. Generally, the law of defamation protects a person from statements which disparage his reputation unless those statements can be proved true by the defendant. Merely because a person's activities have become matters of "public" concern should not mean that he has abandoned completely his interest to be free from such libelous or slanderous communications. Otherwise, persons who are qualified and competent would shy away from the undertaking of tasks which are vital to the proper functioning of a democratic society.

The obvious conflict among these interests, then, has given rise to the defense of fair comment. If that defense "did not exist, then when defamatory statements were made that could neither be proved true or false . . . nor be proved correct or incorrect . . . the conflict of interests would always be resolved in the plaintiff's favor, since the burden of justification is on the defendant."³⁰

So if truth were the only defense here, then a jury (or a judge as the case might be) would be given the advantage of hindsight and of unlimited access to the information possessed by the defamed person as to his own activities. This in turn would lead to a reluctance on the part of the "communicator" to make statements which he is not sure would survive the court test of "truth" even when he had reasonable grounds to believe them to be accurate.³¹ Therefore, the foundation upon which a potential reader or hearer formulated his opinions on matters of public interest would correspondingly be narrowed.

In order to encourage the writer's or the speaker's activity the burden of proving the truth of defamatory statements must be alleviated. Information about and evaluation of the reputation of a person, whose activities vitally affect the lives of a great number of people, are important to enable those people to understand what the effect of his activities on them is going to be. If a person offers himself as a political candidate or as a writer or otherwise, he represents that he has the necessary qualities to perform such tasks. In order to protect those persons who will be affected by the aspirations of such people, the potential plaintiff's interest not to be defamed except by true statements should not be maintained.

In addition, many such potential plaintiffs occupy positions which would enable them to wage a defense, independent from an action for libel or slander, to an attack upon their reputation, because they may have access to effective means of publication, as well as to extensive sources of information, one or both of which may not be available to the "communicator"

30. Note, 62 HARV. L. REV., *supra* note 3, at 1212-13.

31. Boyer, *supra* note 4, at 289-90, 301; Noel, *supra* note 4, at 892; Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1290-92 & n.35 (1942).

or to the public.³² For example, the publisher of a newspaper has readily accessible the means to counteract effectively defamatory statements; or the chairman of a government agency has *unlimited* access to information upon which his agency acts.

Furthermore, many persons involved in public affairs use a personal "press agent" for the very purpose of sifting information and thereby controlling what is said about them in the first place. Since the sources of information about a particular person's activities may be largely within his initial control, an effective press agent can minimize the probabilities of mistaken defamatory statements about that person.³³

Moreover, the defense of truth assumes that the standards of truth and falsity, or correctness and incorrectness, are proper terms to be applied to all kinds of defamatory statements. However, certain kinds of statements, such as a value judgment that "X acted immorally," simply are not the kinds of statements which a defendant *can prove true*.³⁴ The standards for making such judgments differ significantly among different people. A jury randomly picked would merely substitute its values as the standard of truth. As to these kinds of statements other standards, which would lead to more principled decisions, should be required of the "communicator" in order to avoid his misleading the reader or the hearer who depends upon him for his information.³⁵

The goal to be striven for, then, by those who attempt to convey their findings and thoughts about "public persons" to others is to present to their readers or their hearers a reasonable opportunity to discuss intelligently the subject matter upon which they are writing or speaking.³⁶ Because man is limited by his very nature in his ability to communicate and to understand the complex environment in which he lives, he nevertheless must act and does act upon what he thinks that environment really is. If the disparity between his idea of his environment and his actual environment is too great, then he will either be deceived or become skeptical, depending upon whether or not he discovers a "noticeable break in the texture of the world" as he pictures it in his mind.³⁷

Neither of these alternatives is a desirable one. Yet, neither is inevitable if the "communicator's" presentation indicates the degree of fidelity to which he may reasonably lay claim as to what actually happened.³⁸ Through such

32. Green, *Relational Interests*, 30 ILL. L. REV. 314, 350-51 (1935); Noel, *supra* note 4, at 894.

33. Cf. LIPPMANN 44-45.

34. Riesman, *supra* note 31, at 1290-92; *accord*, Boyer, *supra* note 4, at 289-90, 301.

35. Two authorities recommend that the defendant's liability be determined by the traditional tort notion of negligence. *Gearhart v. WSAZ, Inc.*, 150 F. Supp. 98, 108 (E.D. Ky. 1957); Noel, *supra* note 4, at 890, 895.

36. See Green, *supra* note 32, at 350.

37. LIPPMANN 12-16; Cf. Riesman, *supra* note 31, at 1283.

38. LIPPMANN 16.

a disclosure the probabilities of misleading the "public" will be reduced. Hence the accuracy with which a statement is made, the availability of opportunities to the reader or the hearer either to verify or disprove the statements or to approve or disapprove of them, and the probability that the reader or the hearer will take advantage of those opportunities become crucial factors to be taken into account if an enlightened public opinion is to be forthcoming.

III. INADEQUACY OF THE FACT-OPINION DISTINCTION

In order to justify its use, the distinction between "fact" and "opinion" statements must qualify as an appropriate tool for balancing the conflict of interests here. Only one piece of legal writing has attempted to analyze what is meant by the distinction between these two kinds of statements. A student note in 62 *Harvard Law Review* suggests the following test:

[T]he statement in question should be regarded as one of fact if a substantial number of readers would understand it as intended to convey ideas the asserted validity of which is independent of the belief of the person making the statement. If a substantial number of readers would understand the statement to rest solely on the opinions of the person making the statement, the statement should be regarded as comment. . . .³⁹

Accepting for the moment that this is an adequate explanation of the distinction I want first to explore why it is that "fact" statements should be singled out as those which in any event must be proved true.

A. THE DISTINCTION'S USE IS BASED UPON A FAULTY PREMISE

The note argues that in all cases where the defense of fair comment is raised, statements of "fact" more effectively influence the mind of the reader or the hearer, and hence "enhance the damage done to the reputation of the defamed," than do statements of opinion.⁴⁰ The validity of the fact-opinion dichotomy as a tool of analysis must depend upon the validity of this premise. I think the premise is erroneous.

In the first place this assumption pays no attention to who is making the statement. It may be that a substantial number of people will accept a statement as valid precisely because a particular writer or speaker believes it. In a famous series of articles on the law of defamation David Riesman recommended that a systematic analysis, which was directed towards finding out what social groups have power over public opinion, should be made in formulating standards to be applied in the area of fair comment. He maintains that such a search would demonstrate that *any* statements

39. Note, 62 HARV. L. REV. 1207, 1213 (1949).

40. *Ibid.*

made by the socially weak groups are ineffective while statements by powerful groups are effective.

What this means is that words are not fungible goods. The identical words, in the mouths of different persons, can carry a radically different weight. Yet the courts, viewing the words coldly on paper, out of their social context, tend to apply a system of precedents which is based on comparing identical or similar words, rather than identical situations.⁴¹

As a corollary matter it should be pointed out that the strength or weakness of any particular group member's statements depends on whether his audience is favorably or unfavorably disposed to his point of view. For example, a communication by the President of the American Medical Association will be more effective if made to members of the Daughters of the American Revolution than if made to an Americans for Democratic Action group. In most cases, however, a particular communication will not be confined to persons of a homogenous disposition. Since it will usually be made to so many persons in different stations of life, generalizations of what groups are strong and what ones are weak should suffice for the purposes of deciding the ordinary libel or slander case.

The failure to focus upon the person making the statement, then, ignores the difference between the effect of statements made by way of a newspaper editorial or television broadcast (or by other means of mass communication) and those made by a person unconnected with them. It may be that the hearer or the reader more readily accepts the statements made by persons connected with mass communication facilities on the assumption that they have better systems of gathering information.

The distinction also overlooks the atmosphere in which a particular statement is made. A passionate campaign speech will very likely have a more profound effect upon the hearer than a sober account of the speech made later in a newspaper will have upon the reader.⁴² The person who hears a speech on radio or television cannot re-examine the entire text of the speaker's statement, whereas the reader of a particular article can make such an examination. The difference in the medium of communication then will determine somewhat the probable effect on the defamed person's reputation.

Third, the test makes no reference to the person about whom the statement is made. As a practical matter the ability of persons to counteract

41. Riesman, *supra* note 31, at 1306-07.

42. Gearhart v. WSAZ, Inc., *supra* note 35, at 108: "I believe it is proper to point out a distinction in this case between a broadcast or telecast read from a manuscript and libelous matter printed in a newspaper or publication. A written statement in its full context with proper punctuation may appear to the public in one light. The same matter read in a telecast by a trained individual, whose profession requires him to make the news interesting, by emphasis and accent may leave an entirely different impression."

the effect of such statements varies significantly. Those who have money and/or who are identified with "socially acceptable groups" will less likely be harmed than those who do not have money and/or who are members of a minority group.

Perhaps the social identification card of the person talked about is a crucial factor in any reasoned estimation of the probable effect that a defamatory statement will have upon his reputation. A man like Jimmy Hoffa may have plenty of money and considerable influence within the Teamsters organization itself, but his identification with the Teamsters does little to help him counteract a particular statement's effect among the great number of American people, who have been geared to eye the Teamsters Union with great suspicion.

The premise also ignores the different degrees to which any particular statement affects a person's reputation. A statement accusing a person of corrupt and dishonest motives⁴³ tends to lower a person's reputation more than a statement making a charge of incompetence.

Moreover a particular statement which would qualify as one of "fact" may not be defamatory at all when it is isolated from its context. It may only offer support to an alleged defamatory remark, which may, itself, qualify only as a statement of "opinion." The premise behind this test does not take into account whether the "fact" statement provides the crucial factor upon which the validity of the defamatory statement depends or whether it adds little, if anything, to the validity of that statement. In either case the statement must be proved true.⁴⁴

Nor does the distinction concern itself with the kinds of words used by the writer or the speaker to express his ideas. Words with emotive or pejorative connotations are treated on a par with words which are more neutral.⁴⁵ The only attention paid to these qualities occurs when the court examines whether or not the words are defamatory at all, *e.g.*, in accepting proof of innuendo. But once it is decided that the words are capable of a defamatory meaning, then the differences in the words'

43. Many courts simply classify statements which impute bad motives as statements of "fact." This is discussed in particular at pp. 1219-20 *infra*.

44. *Kemsley v. Foot*, [1952] A.C. 345, 357 (dictum); see 3 RESTATEMENT, TORTS § 606 (1)(a)(i), comment *b* (1938).

An English committee on the law of defamation proposed to eliminate this problem by adopting the following rule: the defendant need only prove as true so many of the statements of "fact" contained in the libel in order to justify the court in concluding that any remaining statement, which has not been proved true, does not add materially to the injury of the plaintiff. REPORT OF THE COMMITTEE ON THE LAW OF DEFAMATION, CMD No. 7536, at 23 (1948).

The American courts have attempted to alleviate the defendant's burden here by adopting a "relaxed" standard of truth. Note, 62 HARV. L. REV., *supra* note 39, at 1212. *E.g.*, *Verne v. Time, Inc.*, 25 N.Y.S.2d 185 (Sup. Ct. 1940).

45. *Riesman*, *supra* note 31, at 1283, 1308.

emotive qualities are ignored in the attempt to classify the statement as "fact" or "opinion."

Finally, the distinction between "fact" and "opinion" cannot offer a satisfactory explanation why some "opinion" statements, *e.g.*, "X acted immorally," become "fact" statements when those statements are made with little, if any, indication of the grounds upon which they are based.⁴⁶ Most advocates of the usefulness of this distinction maintain that such a statement is one of "fact" because it implies the existence of "facts" withheld from the reader or the hearer, but relied upon by the writer or the speaker.⁴⁷ This explanation serves solely to accommodate the test.⁴⁸

A closer look reveals that such "bare opinions" will very likely mislead the reader or the hearer in that he does not know (or cannot find out) what the writer's or the speaker's reasons are for making the statement. Hence he will more likely conclude that the writer or the speaker refers to what he, the reader or the hearer, would have referred to had he made the statement.⁴⁹ What will be thought about the person talked about, then, will vary so significantly with the readers' or the hearers' ideas of the meaning of such statements that those statements could not imply the existence of any particular "corroborative facts," but a whole gamut of such "facts." Therefore the danger of such statements does not arise solely from any particular implication but from the number of possible inferences which are likely to be made by the readers or the hearers.

In the light of these considerations the premise upon which the use of the distinction between "fact" and "opinion" statements is based fails to take into account several factors which probably affect the mind of the reader or the hearer as much as, if not more than, those statements which this test singles out as "fact" statements.

It could be argued that the requirement that a statement be "fair" adequately takes these factors into account.⁵⁰ But a survey of the cases

46. *E.g.*, *Eikhoff v. Gilbert*, 124 Mich. 353, 83 N.W. 110 (1900) (this case is discussed at pp. 1215-16 *infra*).

47. 1 HARPER & JAMES, *op. cit. supra* note 3, at 460; PROSSER, *op. cit. supra* note 1, at 622; 3 RESTATEMENT, TORTS § 606 (1) comment *c* (1938); Veeder, *supra* note 3, at 420, 423-24; Note, 62 HARV. L. REV., *supra* note 39, at 1213.

48. Another effort to explain why these statements, which look like "ordinary opinion statements," are nevertheless "fact" statements is that the "opinion" is not stated as such, but is stated as a "fact." *Eikhoff v. Gilbert*, *supra* note 46, at 359, 83 N.W. at 113; *Hunt v. Star Newspaper Co.*, [1908] 2 K.B. 309, 320 (concurring opinion); 1 HARPER & JAMES, *op. cit. supra* note 3, at 450; Veeder, *supra* note 3, at 420, 422.

The difficulty that I have with this explanation is that it furnishes no criteria by which one is to decide when to transform any particular "opinion" statement into a "fact" statement. It is no more than "a convenient way of describing a result." Keeton, *Fraud: Misrepresentation of Opinion*, 21 MINN. L. REV. 643, 652 (1937).

49. OGDEN & RICHARDS, *op. cit. supra* note 14, at 15.

50. However, Harper and James argue that the concept of "fairness" only goes to the question of whether or not the statements constitute "opinion" rather than "fact."

illustrates that the courts do not address themselves to these factors by way of that concept either. A typical example of what is meant by the term "fair" is found in the case of *Briarcliff Lodge Hotel v. Citizen-Sentinel Publishers*:⁵¹

Mere exaggeration, slight irony, or wit, or all those delightful touches of style which go to make an article readable, do not push beyond the limitations of fair comment. Facts do not cease to be facts because they are mixed with the fair and expectant comment of the story teller, who adds to the recital a little touch of his piquant pen.⁵²

B. THE DISTINCTION ITSELF IS A SPURIOUS ONE

Not only does the distinction fail to consider the multifarious factors which determine the probable effect of a particular statement upon the reader's or the hearer's mind, but a test based upon the fact-opinion dichotomy merely states a conclusion which in turn does not provide any useful tools for deciding whether a statement fits into one category or the other. The courts assume that the two kinds of statements are readily distinguishable⁵³ and hence apply it with relish in that it presents an easy solution to some very difficult problems.⁵⁴

A short survey of cases will illustrate that the dispute over "fact" and "opinion" is largely a spurious one. The distinction tends to obscure the issues rather than to illuminate them. Moreover, this survey will show that the meanings of the two words are so vague that the distinction can be used and is used to justify any conclusion which might be reached.

In *Eikhoff v. Gilbert*,⁵⁵ one of the leading cases in this area, Gilbert and others published a circular urging voters not to vote for Eikhoff "because in the last legislature he (Eikhoff) championed measures opposed to the moral interests of the community." The circular did not contain any further information as to the contents of these measures. At the trial defendants offered in evidence that plaintiff supported "pro-saloon" bills in the last legislature. This evidence was not disputed. Defendants then argued that this was the basis for the statement made in the circular and that therefore they were entitled to the defense of fair comment. The trial

1 HARPER & JAMES, *op. cit. supra* note 3, at 460. Another noted authority concludes that "fairness" means nothing more than the absence of "malice." Veeder, *supra* note 3, at 427.

51. 260 N.Y. 106, 183 N.E. 193 (1932).

52. 260 N.Y. at 118, 183 N.E. at 198. *Accord*, *Hartmann v. Boston Herald-Traveler Corp.*, 323 Mass. 56, 61, 80 N.E.2d 16, 19 (1948); *Merivale v. Carson*, *supra* note 7, at 280-81.

53. Noel, *supra* note 4, at 894-95. *Contra*, *Bailey v. Charlestown Mail Ass'n*, 126 W. Va. 292, 300, 27 S.E.2d 837, 841 (1943) (This court adopted the minority view).

54. Green, *supra* note 32, at 344; see generally FRANK, *op. cit. supra* note 14, at 22-31.

55. 124 Mich. 353, 83 N.W. 110 (1900).

judge granted defendants' motions for a directed verdict. On appeal the Michigan Supreme Court reversed and remanded the case for a new trial. It ruled that defendants could not rely on the defense of fair comment because the above statement was one of fact.

Yet in *Pott v. Dies*,⁵⁶ defendant published an article which quoted another article, the latter of which praised Hitler as a "Prince of Peace." After identifying plaintiff as the publisher of the quoted article, defendant branded plaintiff as "The Nazi Trojan Horse in America." Plaintiff at the trial admitted that defendant quoted him correctly and that plaintiff had printed the article. The court ruled here that the "Nazi Trojan Horse" statement constituted mere opinion and upheld a dismissal by the trial court on the grounds that the statement was protected by the defense of fair comment.

In neither case did the plaintiffs dispute the truth of the grounds upon which the defendants drew their respective value judgments. The crucial distinguishing factor seems to be that in the latter case the defendant stated more precisely the grounds upon which his accusation was based and therefore had given his reader an opportunity to judge for himself the validity of his claim; whereas, in the former case the defendant's statement was so general that it allowed the reader to speculate at will what the defendant was complaining about.

The important consideration, then, is not whether the particular statement fits into one category or another, but whether the particular article provided sufficient information upon which the reader could make an independent judgment for himself. The *Eikhoff* case, itself, offers reasoning which illustrates that its findings, *i.e.*, that the statement was one of "fact" was merely a conclusion arrived at after a consideration of other factors.

It [defendant's statement] appealed alike to all classes,—those who should look upon the legislation proven as not opposed to the moral interests of the community as well as those holding contrary views; and 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.⁵⁷

The danger here, however, is that the conclusion stated has now become the rationale of particular cases. This may not lead to incorrect results in cases where the defendant makes no attempt at all to set forth specifically the basis upon which a particular statement is made,⁵⁸ but most cases lie somewhere in between the *Eikhoff* and *Pott* cases.

56. 132 F.2d 734 (D.C. Cir. 1942).

57. *Eikhoff v. Gilbert*, *supra* note 55, at 360, 83 N.W. at 113; *accord*, *A. S. Abell Co. v. Kirby*, 227 Md. 267, 176 A.2d 340 (1961); *Christie v. Robinson*, 10 N.S.W. St. 157, 161 (1889).

58. See, *e.g.*, *Larrick v. Gilloon*, 176 Cal. App. 2d 408, 1 Cal. Rptr. 360 (Dist. Ct.

*Hotz v. Alton Telegraph Printing Co.*⁵⁹ presents one of these cases. Here defendant printed an article stating that plaintiff, as a member of a vote canvassing board, had helped to deprive a local political aspirant, one S. Vaughan, of his rightful office. It accused the board of going behind the vote returns to distribute votes not originally reported by the election officers. In support of its charges defendant set forth the following grounds: (1) that this was the third successive time that the board had declared Vaughan's opponent, S. O'Neill, elected in as many very close races; and (2) that the board had given to O'Neill a far greater increase in votes than it had given to another candidate, one L. Harris, who had been elected by a good margin.

Defendant raised the defense of fair comment. The court on appeal ruled that all of the statements were ones of "fact" and that therefore the defense of fair comment was not available. No analysis was made of any particular statement nor was one distinguished from another.

Yet in the case of *Lukaszewicz v. Dziadulewicz*,⁶⁰ defendant published an article urging people not to vote for plaintiff for alderman. The pertinent parts of the article were as follows:

[W]here was Mr. Lukaszewicz at the time Alderman Janicki lay wounded on the battlefields of France? . . . At that time Mr. Lukaszewicz grew fat selling bakery at war-time prices. Mr. Lukaszewicz purports to be a patriot, yet he tries . . . to deprive an able, conscientious ex-soldier, and one who is physically disabled, of his bread and butter. . . . Today, he would deprive a world [war] veteran of his last crumb of bread. We ask, in the face of all this, how can Mr. Lukaszewicz, owning a wholesale and retail bakery, and abounding in wealth, and who on a previous occasion had proven himself unfit as an alderman, expect the support of the 14th ward voters.⁶¹

App. 1959), in which defendant stated that he had evidence, which if placed before a grand jury would bring about the indictment of plaintiffs and their ultimate removal from office. He also stated that plaintiffs had defrauded the county of tax revenue through various rackets. Defendant, however, did not state more specifically the grounds upon which he based these charges. Defendant was held liable. In *A. S. Abell Co. v. Kirby*, *supra* note 57, at 342, defendant, *Baltimore Morning Sun*, published an editorial concerning an abortive attempt by the "Baltimore City Delegation in the State Legislature" to remove the Baltimore Police Commissioner. In this editorial the paper condemned the removal proceedings particularly because "every important witness against the Police Commissioner, moreover, was a man with a motive. We name especially the infamous Kirby . . ." Although the *Sun* based its defamatory accusations upon Kirby's involvement in rackets and prostitution as a cop and, more recently, upon his removal from the police force for insubordination, it made no effort to communicate this to its readers. Plaintiff recovered. In *Lindsey v. Evening Journal Ass'n*, 10 N.J. Misc. 1275, 163 Atl. 245 (Sup. Ct. 1932), defendant accused plaintiff of being a "Seglie heuchman, who was caught in the act of disenfranchising Union City voters simply because they did not bow the knee to Paul Seglie." Defendant offered nothing further in support of these charges. Defendant was held liable.

59. 324 Ill. App. 1, 57 N.E.2d 137 (1944).

60. 198 Wis. 605, 225 N.W. 172 (1929).

61. 198 Wis. at 607, 225 N.W. at 173.

It was admitted at the trial that Mr. Janicki was a veteran who had been wounded in World War I. Also it was agreed that plaintiff had run a bakery during the war.

The trial court overruled defendant's demurrer to plaintiff's complaint that the article was libelous. On appeal by defendant the court held that the demurrer was good. It reasoned that since the "facts" were not disputed then the article was protected under the defense of fair comment.

Both of these cases avoid the difficult problems raised concerning the opportunity each article gave the reader to judge for himself the validity of the writers' defamatory statements. I think it very doubtful that the article in the latter case provided a sufficient opportunity. No specific occasion was cited in support of the statement that plaintiff was unfit to be an alderman. Nor was there any indication why defendant charged that plaintiff would deprive a veteran of his last "crumb of bread." Nevertheless defendant's demurrer was sustained.

However, in the *Hotz* case defendant surely presented a less impassioned picture of plaintiff's activities. Yet he did not even get to a jury on the issue of fair comment. In both cases surely the problem is whether or not the articles were written in such a manner as not to mislead in an unjustifiable way their respective readers in the formation of their judgments about the different plaintiffs. This distinction between statements of "fact" and those of "opinion" however does not address itself to this problem.⁶²

It could be argued that the mistake in the above cases is that the court failed to instruct the jury on the issue of whether or not some of the statements were ones of "fact" or ones of "opinion." The case of *Grech v. Odham's Press, Ltd.*,⁶³ graphically illustrates the futility of such an instruction.

In this case plaintiff, Grech, had been arrested one day by Robertson, a member of the metropolitan police, for an alleged theft of some money from the flat of J. Morrison. Robertson claimed that he found a key in Grech's flat which fitted the lock of Morrison's flat. At Grech's trial, however, Robertson testified that Grech's lock and Morrison's lock were identical. Nevertheless Grech was convicted of this theft.

After Grech had been sent to prison he sent a petition to the Home Secretary alleging in part that Robertson and others had made an agreement with him to change the lock on his door to match the one on Morrison's door for the purpose of achieving an acquittal of this theft for Grech. This petition became the foundation of a trial and a conviction of Robertson and others for a conspiracy to defeat the ends of justice.

In its newspaper defendant reported the proceedings of the latter trial as follows:

62. See, e.g., *Schwarz Bros. Co. v. Evening News Publishing Co.*, 84 N.J.L. 486, 87 Atl. 148 (Sup. Ct. 1913); *Hoan v. Journal Co.*, 238 Wis. 311, 298 N.W. 228 (1941).

63. [1958] 2 All E.R. 462 (C.A.).

At his trial Grech said the key was for his flat. And on the order of the court, Robertson was sent to try it. He reported that it fitted a lock there, but the jury convicted Grech. . . . There [in jail] he [Grech] brooded over his belief that he had first been framed, then induced to pay out money for the "Fiddle" and yet jailed. . . . Grech drew up a petition to the Home Secretary. Into it he put all the dirt he knew. . . .⁶⁴

Plaintiff brought an action for libel based upon the last sentence of the above quoted statement. Defendant contended that he was protected by the defense of fair comment. On this issue the court instructed the jury that defendant must first show that the above defamatory statement was not a statement of fact:

Were these words comment, "into which he put all the dirt he knew"? Well, now, members of the jury, you may think that that is not comment 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 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.⁶⁵

The judge then concluded that if the jury could not decide whether it was fact or comment, it must decide against defendant because he had the burden of proof to show that his statement was comment. Whether or not the jury addressed itself to the question of whether the reader was given a sufficient opportunity to weigh the validity of defendant's defamatory statement becomes a matter of pure speculation.⁶⁶

In other cases the dispute does not seem to be over the adequacy with which the defendant has disclosed the basis upon which he made his defamatory statement. These cases arise most often when the defendant makes a statement which imputes bad motives to the plaintiff. The courts find themselves at loggerheads when they attempt to classify these kinds of statements under the rubric of "fact" or of "opinion."⁶⁷ Again the distinction merely serves to obscure the problems raised by this defense.

64. *Id.* at 464.

65. *Id.* at 467-68.

66. In this case the trial judge had also instructed the jury to answer the question whether or not defendant's article was a fair and accurate report of the criminal trial. The jury answered this question in the negative. *Id.* at 464. Yet the jury found the statement to be protected by the defense of fair comment. The court on appeal did not question the consistency of these two answers. *Id.* at 468. On the contrary it treated the two questions as separate and distinct ones. *Id.* at 467.

Also the jury made the specific finding that the charge made by the defendant was an untrue defamatory statement. The court ruled that this finding was not inconsistent with the jury verdict that the plaintiff was protected by the defense of fair comment. *Id.* at 469-70. This ruling necessarily overrules the English cases which have stated that "fair comment" is not defamatory at all. See note 7 *supra*.

67. PROSSER, TORTS § 95, at 622 & cases cited nn.91 & 92 (2d ed. 1955).

In *Streeter v. Emmons County Farmers' Press*,⁶⁸ plaintiff had a contract with the state of North Dakota to publish election ballots. A state law required that each candidate must be given an equal number of places at the top of all of the ballots and that the ballots must then be distributed equally throughout the precincts so that each candidate appeared on the ballots in the top position an equal number of times in each precinct. Plaintiff printed the ballots so that each candidate was given an equal number of number one places, but he distributed the ballots in such a manner that one candidate appeared in the same position on each ballot in each precinct. After setting forth this information defendant charged that plaintiff had made a deliberate attempt to violate the state law and thereby to defeat the fair expression of the opinion of the electorate.

At the trial defendant admitted that plaintiff had merely been mistaken as to what the law required in the distribution of the ballots throughout the different precincts. The trial court, however, refused to instruct the jury on the defense of fair comment. The court on appeal from this ruling by defendant affirmed the trial court. It reasoned that the charge of dishonesty was a statement of "fact" and therefore must be proved true.⁶⁹

However in *Hunt v. Star Newspaper Co.*,⁷⁰ defendant printed an article which stated that plaintiff, a public official, had excluded members of the opposite party from watching the polls at election time. It charged that plaintiff was actuated by personal prejudice against that party and that such action was improper. The trial court instructed the jury that defendant enjoyed the protection of the defense of fair comment only if he had not imputed improper motives to plaintiff. The court on appeal held that this instruction was erroneous. The issue should have been whether or not this imputation was fair as based upon the "facts" stated, if those facts were true.⁷¹

In both of these cases the plaintiffs contended that they were not acting with improper motives. In neither case did the plaintiffs dispute the grounds upon which the defendants relied as the foundations for their charges of improper conduct. Yet the *Emmons* case rules that an imputation of bad motives is a statement of "fact," while the *Hunt* case rules that it is not. The different results can be explained only by going behind the protective veil of "fact" and "opinion" to the underlying attitude of the courts towards these kinds of statements.⁷² The reasons for ruling one way or the other remain unarticulated.

68. 57 N.D. 438, 222 N.W. 455 (1928).

69. *Contra*, *Porcella v. Time, Inc.*, 300 F.2d 162 (7th Cir. 1962).

70. [1908] 2 K.B. 309 (C.A.).

71. The judge in the dissenting opinion reasoned that imputations of improper motives were allegations of fact. *Id.* at 320.

72. See, e.g., *Preveden v. Croatia Fraternal Union of America*, 98 F. Supp. 784

The discussion of these cases indicates that the fact-opinion distinction has indeed acquired a rather chameleon quality. The courts use it primarily to furnish familiar terms into which the courts pour whatever statement they desire according to the conclusion which they want to reach.

Perhaps the only mistake made here is that the courts have failed to articulate adequately the difference between the two categories of statements. If the courts adopted the test offered by the student note in 62 *Harvard Law Review* as quoted above, then the objections that I have pointed out might be effectively countered.

However I contend that the suggested test found in the Note says no more than "fact statements are not opinion statements." One need only substitute the word "opinion" for the word "belief" in order to arrive at this conclusion. I think such a substitution is a permissible one in that "belief" usually expresses the kind of attitude that a person has towards a particular proposition. Whereas "opinion" perhaps is only a broader term which includes not only the attitude of the writer or the speaker, but the proposition embraced by it.⁷³

A less picayune objection may also be made to this suggested test. What factors are to be used to decide whether a substantial number of readers would understand a statement to be valid notwithstanding the writer's belief or whether they would understand it to be valid only because of his belief? This test gives none.

Moreover I fail to understand what is to be done with a statement which would be understood to be valid partly because the writer believed it and partly because other people believed it. I suppose such a statement would

(W.D. Pa. 1951); *Foley v. Press Publishing Co.*, 226 App. Div. 535, 235 N.Y. Supp. 340 (1929); *A. H. Belo & Co. v. Looney*, 112 Tex. 160, 246 S.W. 777 (1922); Note, 62 *HARV. L. REV.*, *supra* note 39, at 1209-10. The student author seems to recognize that it is futile to justify protection or non-protection of "motive statements" by means of the "fact-opinion" diagnosis. He examines the problem in light of the conflicting interests of the defamer, the defamed, and the public. Then, surprisingly enough, the note proceeds to justify the fact-opinion distinction as a useful tool of analysis.

It is also interesting to note that the court in *Campbell v. Spottiswoode*, 3 B. & S. 769, 122 Eng. Rep. 288 (Q.B. 1863) did not utilize the distinction between "fact" and "opinion" statements at all. Yet this case has been cited again and again as one of the leading cases which states the majority view. A closer look reveals that the court merely distinguished "motive statements" from other kinds of statements. *Id.* at 776-77, 122 Eng. Rep. at 290-91.

Other cases appear to have excepted particular kinds of statements from the protection of the defense of fair comment regardless of the circumstances in which they were published. *Utah State Farm Bureau Fed'n v. National Farmers Union Serv. Corp.*, 198 F.2d 20 (10th Cir. 1952) (statement that plaintiff group was "communist dominated"); *Foltz v. News Syndicate*, 114 F. Supp. 599 (S.D.N.Y. 1953) (statement that plaintiff was suspected of "Red activities"); *Fitzjarrald v. Panhandle Publishing Co.*, 149 Tex. 87, 228 S.W.2d 499 (1950) (statement which sets forth grounds sufficient to remove the plaintiff from office).

73. Ducasse, *Propositions, Opinions, Sentences, and Facts*, 37 *J. PHILOSOPHY* 701, 702-03 (1940); cf. McCormick, *Some Observations Upon the Opinion Rule and Expert Testimony*, 23 *TEXAS L. REV.* 109 (1945).

be considered to be one of "fact" in that its validity does not rest "solely" upon the belief of the person making it. If this is correct, then the suggested test leads to the absurd result that the most cogent, well-documented, and well-reasoned argument would be considered to be composed wholly of statements of "fact." In those arguments the writer or the speaker attempts to validate his conclusions upon reasons other than that he, and he alone, believes them. Yet those kinds of statements will less likely mislead the hearer or the reader and will less likely lead to untrue statements about the plaintiff.⁷⁴

Even beyond these objections there remains a fundamental flaw in the adoption of a distinction between "fact" and "opinion" statements. This position assumes that statements of "fact" and those of "opinion" are opposites and are therefore readily distinguishable. At the "fact" end of the spectrum are included those things of which one is certain and sure, *e.g.*, one's direct sensory perceptions, and at the other end are included those ideas which are not, *e.g.*, "X is immoral." The problem remains, however, to classify the statements which lie between these two poles. As can be seen in the above survey of cases, not one statement could be considered an attempt to convey an unadulterated report of one's original perceptions, if indeed that was either possible or desirable.⁷⁵ All of the above statements are products somewhat of inference, memory, and reflection. If this is correct, then the distinction between "fact" and "opinion" statements represents only a difference of degree of specificity. The assumption that they can be readily categorized, then, is illusory.⁷⁶

Because of the above objections, I propose that the distinction made by those supporting the majority view between statements of "fact" and statements of "opinion" should be abandoned. This proposal does not require the adoption of the minority view as has been assumed by some writers. I do not think that view offers a satisfactory solution to the problems raised by this defense either. Therefore, as I attempt to set forth a proposed analysis of the problems raised by this defense, I will indicate my disagreement with the minority position as well as with the majority.

IV. PROPOSED ANALYSIS

For the purposes of this analysis I think it is desirable to separate the defendant's activities into two parts. First, I plan to focus upon what the defendant did in order to get information about the plaintiff's activities,

74. Perhaps the most apt criticism of this test is found in *Coleman v. MacLennan*, 78 Kan. 711, 738, 98 Pac. 281, 291 (1908): "You have full liberty of free discussion, provided, however, you say nothing that counts."

75. LIPPMANN 338-57.

76. 7 WIGMORE, EVIDENCE § 1919 (3d ed. 1940); McCormick, *supra* note 73, at 111; Slovenko, *The Opinion Rule and Wittgenstein's Tractatus*, 14 U. MIAMI L. REV. 1, 18-21 (1959).

i.e., what the plaintiff did or said. Second, I will deal with the problems raised by the defendant's communication of his findings, and his conclusions thereon, to his prospective readers or hearers.

A. DEFENDANT'S INFORMATION GATHERING ACTIVITIES

Neither the majority nor the minority view pays serious attention to what the defendant did or could have done in the *acquisition* of the information which in part led to his statements about the plaintiff.⁷⁷ A few courts representing both views merely state that the defendant's statements must be supported by reasonable grounds.⁷⁸ None of these courts, however, attempt to set down what factors should be considered in deciding whether or not an inquiry was "reasonable."⁷⁹ Nor does any court treat this aspect of the defendant's activities as an inquiry separate and distinct from the one whether or not the defendant had succeeded in making a fair and accurate *communication* of his findings and thoughts to his reader or his hearer.⁸⁰

All of the cases focus exclusively upon the ultimate *effect* that the defendant's words had upon the reader's or the hearer's thoughts about the plaintiff. Proponents in both the majority and the minority camps in all probability would argue that an independent inquiry directed towards the defendant's information gathering activities would not be a fruitful one because it would not focus upon the ultimate issue in a libel or a slander case, *i.e.*, the harm to the plaintiff's reputation.

But this contention ignores several factors which are fundamental to the formation of an enlightened "public opinion" and hence to the defense of fair comment. As discussed above the mass of a democratic society must rely upon a small number of people for their information about and evaluation of the activities of "public persons." Yet under the traditional analyses the chain newspaper with its great wealth of manpower and information gathering facilities is treated on a par with a small newspaper or an individual person.⁸¹ A person who has had direct contact with or who has participated in the plaintiff's activities is not differentiated from a person who has not.

77. Authorities cited note 3 *supra* (majority view); authorities cited note 4 *supra* (minority view).

78. *E.g.*, *Preveden v. Croatia Fraternal Union of America*, 98 F. Supp. 784 (W.D. Pa. 1951) (majority view); *Lafferty v. Houlihan*, 81 N.H. 67, 121 Atl. 92 (1923) (minority view).

79. *E.g.*, *Clancy v. Daily News Corp.*, 202 Minn. 1, 277 N.W. 264 (1938).

80. *Compare* *Clancy v. Daily News Corp.*, 202 Minn. 1, 277 N.W. (1938), *with* *Gearhart v. WSAZ, Inc.*, 150 F. Supp. 98, 108 (E.D. Ky. 1957) *and* *Noel, Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 889, 895 (1949).

81. *Riesman, supra* note 31, at 1314. *Compare* *Pulvermann v. A. S. Abell Co.*, 131 F. Supp. 617 (D. Md. 1955) (*Baltimore Sun*), *with* *Derounian v. Stokes*, 168 F.2d 305 (10th Cir. 1948) (*dictum*) (individual journalist).

Nor do the courts discuss the relative difficulties of gathering information about the more complex activities as contrasted with the rather simple factual situations.⁸² In addition they do not inquire into the extent of the availability of sources of information about the plaintiff's conduct.⁸³ Yet, as was pointed out previously, these factors must be considered in order to make a reasoned reconciliation of the conflict of interests which arises in "fair comment" cases.

As would be expected, these factors differ significantly from case to case. But no matter what the circumstances may be in any particular case, what the "communicator" actually says is determined to a great extent by his belief as to what the particular plaintiff did or said. The more diligent his inquiry into these matters the less likely he will err in his conclusions about them. Therefore, he will less likely make any defamatory statement at all if he discovers an error unless, of course, he does not care whether or not he makes a correct statement.

Perhaps this proposition can best be illustrated by a simple example. Suppose I were to say that "X is a drunkard." Before I make such a statement I must have at least some evidence that on such and such a day X was drinking alcoholic beverages no matter what my standards may be for determining drunkenness. The more extensive my inquiry into X's exact drinking habits on that particular day (and other days) the less likely I will err in my belief of what actually happened. If I were to find out that X did not drink alcohol that day, but only ginger ale, then I will not make the defamatory accusation at all unless I find other evidence (assuming that I do care about the accuracy of my statements).

Such an inquiry, then, does ultimately focus upon the plaintiff's interest to be free from unjustifiable disparagements of his reputation where a defamatory statement is based upon erroneous grounds. The defendant's ideas of what the plaintiff did or said are a fundamental determinate of the probability that the defamatory statements will be made in the first place. Hence the more accurate the defendant's findings here, the less likely he will make these kinds of mistaken defamatory statements.

The majority requirement that the defendant must show the "truth" of statements of "fact" may seem at first glance to place a high premium on accuracy in the "information gathering stages" and thus to protect the plaintiff from these kinds of mistakes which lead to defamatory statements. A closer scrutiny reveals this contention to be an illusory one. The requirement of truth applies only to the statements *made*, and not to the statements that the defendant could have made (or would have refrained from making) had he conducted a more extensive inquiry. This focus

82. Compare *Emde v. San Joaquin County Cent. Labor Council*, 23 Cal. 2d 146, 143 P.2d 20 (1943), with *Cooksey v. McGuire*, 146 S.W.2d 480 (Tex. Civ. App. 1940).

83. *Ibid.*

gives more favorable treatment to the defendant who limits his inquiry (for one reason or another) or who does not convey his entire findings than to the defendant who attempts to do a thorough job with the best available tools.

Perhaps this disparity can best be illustrated by a comparison of two cases. In *Cooksey v. McGuire*⁸⁴ defendant found a check signed by plaintiff to the order of defendant's father, now deceased. The check was not marked paid. In a political campaign plaintiff was running for sheriff. Defendant published the "unpaid check" with a statement that anyone who refused to pay an honest debt rendered himself unfit for the job of sheriff. In his libel complaint plaintiff alleged that defendant's father, who had once worked for him, had owed him money; that the father had agreed to tear up the check in consideration of plaintiff's cancellation of the debt; and that the father had merely failed to tear up the check. Defendant demurred to this complaint alleging that all of the "facts" stated by him were true and that the statement about plaintiff's dishonesty was merely comment which referred to those "facts."

The trial court granted defendant's demurrer. The appellate court affirmed. It reasoned that defendant had set forth accurately plaintiff's conduct and that the conclusion of dishonesty was merely a statement referring to that conduct and was fair.⁸⁵ The court made no inquiry into what defendant did to gather his information. In fact had defendant made further inquiry into the matter, and had he found reasonable grounds to believe what plaintiff was now alleging was not true and stated those grounds, then under the traditional analysis he would have had to prove the truth of that matter as well because such statements would probably be considered ones of "fact."

If, therefore, the defendant discloses only those "facts" which he is reasonably assured he can prove true, then he need only show that what he said was "fair" and perhaps that he was not actuated by malice, if the plaintiff attempts to prove that he was.⁸⁶ And, as it has already been shown, neither the concept of "fairness" nor the fact-opinion distinction offers a satisfactory solution to this particular problem.⁸⁷

The more diligent inquirer finds himself in a rather disadvantageous position. In *Hubbard v. Allyn*⁸⁸ plaintiff, a baker, sued defendant, a chemist and a member of the local board of health, for libel. Defendant

84. 146 S.W.2d 480 (Tex. Civ. App. 1940).

85. Writers for the majority view might argue that this case was wrongly decided in that the statement that the plaintiff was "dishonest" is one of "fact" and therefore that the plaintiff erred in not contesting the case upon this ground. I have already shown the fallaciousness of this kind of argument in section III.

86. The argument that "malice" effectively copes with this problem is dealt with at p. 1227 *infra*.

87. See pp. 1211-15 *supra*.

88. 200 Mass. 166, 86 N.E. 356 (1908).

had taken samples of vanilla flavoring which plaintiff was using in his bakery. His analysis of the vanilla revealed that it contained an amount of wood alcohol dangerous to human health. As a result of this investigation defendant published an article in which he reprimanded plaintiff for his (plaintiff's) use of inferior merchandise without any regard to its effects upon the health of his customers. He stated in part:

Pure vanilla wholesales at about \$12 per gallon. What can one expect for \$2.75? He who buys at this price is either criminally stupid or deliberately dishonest. . . .⁸⁹

At the trial plaintiff's evidence that he in fact paid four dollars per gallon was not directly disputed. Defendant argued that the two dollar and seventy-five cent figure represented what most vanilla of this quality sold for. The jury found for plaintiff. On appeal defendant urged that he should have been granted a directed verdict on the grounds that his statements were within the protection of fair comment.

The court rejected this argument saying that the jury would have been justified in finding against defendant if it had found that in fact plaintiff had paid four dollars for the vanilla. In part the court reasoned:

The right of the defendant was not to make false statements of fact because the subject matter was of public interest, but only to criticize, discuss and comment upon the real acts of the plaintiff and the consequences likely to follow from them. . . . This may be done with severity. Ridicule, sarcasm and invective may be employed. But the basis must be a fact, and not a falsehood.⁹⁰

Although the court correctly rejected defendant's motion for a directed verdict, no credit was given to defendant for a rather diligent attempt to get at the "facts." In this case a rather high premium is placed on "truth" even though had the correct price been stated, defendant's accusation may nevertheless have been a perfectly justifiable one.⁹¹

Furthermore, the majority view ignores the defendant's information gathering activities in those cases where it is found that the "facts [are] otherwise known or available to the recipient as a member of the public. . . ."⁹² This standard is usually applied to those statements made by a defendant about the works of authors, newspapermen, entertainers, painters, and the like.⁹³ These are the kinds of cases where the courts often con-

89. *Id.* at 169, 86 N.E. at 358.

90. *Id.* at 170, 86 N.E. at 358.

91. The Massachusetts court, however, considered that the correct price was a pivotal fact. *Ibid.*

92. 3 RESTATEMENT, TORTS § 606 (1)(a)(ii) (1938).

93. *E.g.*, *Cherry v. Des Moines Leader*, 114 Iowa 298, 86 N.W. 323 (1901); *McQuire v. Western Morning News Co.*, [1903] 2 K.B. 100 (C.A.). The case of *A. S. Abell Co. v. Kirby*, 227 Md. 267, 176 A.2d 340, 346-48 (1961) specifically limits this aspect of the fair comment defense to these kinds of cases.

clude that there is sufficient information available to the members of the public regardless of the kind of communication made by the defendant.⁹⁴ Nevertheless, it is conceivable that in some cases the defendant critic will have had access to more information than people who are not critics and that had he made an effort to get that information then he would not have made the defamatory statements that he did.

Although the "common knowledge" standard has limited application, nevertheless, it allows the defendant considerable flexibility in what he can say about the plaintiff's activities. If the defendant would be required initially to show that he met certain minimum standards in gathering his information, this would provide more protection to the plaintiff from mistaken defamatory statements than would the rather vague notions of "common knowledge."

The minority position offers an even more unsatisfactory solution to the problem of information gathering. All the defendant need show is that he honestly believed what he wrote or said.⁹⁵ The plaintiff's difficulties in proving dishonesty more often than not are insurmountable. Only when the defendant has discovered something which makes the falsity of what he thought more probable than not, but has nevertheless published those thoughts anyway, can the plaintiff prove him dishonest. The defendant who simply fails to explore further does not have the necessary information to be dishonest.

Both the minority and the majority proponents could argue that the shortcomings which I have pointed out are effectively countered by the opportunity for the plaintiff to show malice. As a tool of analysis this term leaves much to be desired. First, it likewise does not focus upon the ability of the defendant to gather information, or upon the complexity of the subject matter, or upon the availability of sources of information. If anything, it merely refers to some idea that the defendant thinks badly of the plaintiff for the wrong reasons⁹⁶ or that he thinks recklessly,⁹⁷ and as a result tells bad things about the plaintiff. Secondly, the term, malice, is susceptible to so many interpretations⁹⁸ that if use of the word can be avoided, I think it wise to do so.

94. See, e.g., *Kemsley v. Foot*, [1952] A.C. 345, 355-56.

95. "True, neither DePaola nor the defendant company investigated the truth or falsity of the statements made concerning the plaintiff. That attests rather to want of care or to thoughtlessness than to bad motives or dishonesty." *Charles Parker Co. v. Silver City Crystal Co.*, 142 Conn. 605, 618, 116 A.2d 440, 446 (1955). *Contra*, *Bailey v. Charleston Mail Ass'n*, 126 W. Va. 292, 306, 27 S.E.2d 837, 844 (1943).

96. "The word [malice] implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations." *Swearingen v. Parkersburg Sentinel Co.*, 125 W. Va. 731, 746, 26 S.E.2d 209, 216 (1943) (quoting *Philadelphia, W. & B. R.R. v. Quigley*, 62 U.S. (21 How.) 202 (1858)).

97. *Aetna Life Ins. Co. v. Mutual Benefit Acc. Ass'n*, 82 F.2d 115, 120 (8th Cir. 1936).

98. See Comment, 12 U. MIAMI L. REV. 89, 98-99 (1957).

I think the problems here can best be dealt with by the utilization of traditional tort notions of fault. In order for the defendant to invoke the defense of fair comment he should be required in the first instance to show that he exercised reasonable care in his search for information about a particular plaintiff's activities. The formulation of a standard of care here would be based upon the facilities and know-how of a particular defendant to gather information about what a particular plaintiff said or did, the opportunities that are available to the defendant to gather such information, and the relative complexity of the matter about which the defendant is talking.

An analysis based upon these factors will provide a flexibility which seems to be desirable in the reconciliation of the conflict of interests among the defendant, the plaintiff, and the public. It will enable the court to distinguish between the chain newspaper and the small critical journal or between the activities of a particular plaintiff that are so complex that an accurate picture is almost impossible to achieve and the simple activities as illustrated by the *Cooksey* case discussed above.

The analysis here might also take into account the relative degrees of influence that different kinds of defendants have upon their readers or their hearers. A defendant television company which has a virtual monopoly in a particular area might be required to conduct a more diligent inquiry than one which has competition.⁹⁹ A higher standard of care in the former case seems desirable also for the reason that the plaintiff will probably not have effective means at his disposal to counteract the effect of the defendant's communication, whereas in the latter he might.

More fundamentally, however, this standard of care should be gauged to protect the plaintiff's primary interest, to be free from defamatory statements which are unjustifiable because they are based upon unreasonably erroneous grounds. Because this is the ultimate focus of this inquiry, the defendant should be required to establish that he exercised such care in the formulation of his beliefs about what the plaintiff did or said that he was justified in making the defamatory statements in the first place.

This standard would require in effect that the defendant show at least that he was justified, in light of the investigation which he actually made, to have concluded that more probable than not, the plaintiff did or said a particular thing. Even if he could establish this he would also have to prove that his actual inquiry satisfied the appropriate standard of care.

In the alternative the defendant could show that even if he had made the more extensive investigation required by the applicable standard, or even if he was not justified in his beliefs based upon his actual investigation, still it is more probable than not that he would have made the defamatory statements anyway. Perhaps the thrust of this two-pronged

99. See *Gearhart v. WSAZ, Inc.*, 150 F. Supp. 98, 108 (E.D. Ky. 1957).

attack can best be explained by a re-examination of the *Cooksey* and *Hubbard* cases discussed above.

In the *Cooksey* case no doubt the defendant could establish that he was justified by his actual investigation in concluding it to be more probable than not that the plaintiff had signed a check payable to the defendant's father's order, that that transaction had been bona fide, and that the check was not marked paid. No evidence was offered to rebut these facts. Since dishonesty is at least a permissible inference at this point, the defendant would have been justified in making the defamatory accusation.

However, the defendant, under the proposed analysis, would have to prove his inquiry to be a reasonable one as well. If the investigation required by the applicable standard of care would have revealed no more than what the defendant actually discovered, then this would indicate that there was no causal connection between the unreasonableness of his inquiry and the communication of the statement. It may be that the defendant's actual investigation was a reasonable one anyway. In either event the defendant would satisfy the requirement laid down by this test.

However, if the reasonable investigation would have led the defendant to have discovered some or all of the plaintiff's version of what happened, then he would have to show that he discovered some evidence which caused him to reason that more probable than not the plaintiff's story was not true. Only then would he be justified in deciding that the plaintiff was dishonest. For if the plaintiff's story is a verifiable one, then the defendant's accusation of dishonesty is no longer a permissible conclusion. More probable than not the defendant would not have made the defamatory statement at all had he known of the plaintiff's allegations and had he not discovered any reason to doubt their authenticity. (And as noted above, the defense of truth, which is required of the defendant under the current majority view, would not protect the plaintiff from statements which would not have been made had there been a more extensive investigation because that defense pays no attention to the reasonableness of the defendant's inquiry.)

The proposed analysis offers a more realistic approach to the *Hubbard* case as well. In that case there is no doubt that the defendant had reasonable grounds to believe that the plaintiff paid only two dollars and seventy-five cents for each gallon of vanilla. Moreover, it is quite probable that the defendant's search was a reasonable one. But even if the defendant should have discovered that the plaintiff had paid four dollars per gallon for vanilla, more probable than not he would have made the same defamatory accusations anyway. The one dollar and a quarter difference between the two figures would probably have affected very little the formation of the defendant's opinions about the plaintiff. Whether or not his accusation unjustifiably defamed the plaintiff depends upon

whether or not the communication of the lower price instead of the higher one would have unjustifiably misled the reader in his formulation of his opinions about the plaintiff. This problem does not arise now when the defendant is forming his own beliefs about the plaintiff, but arises later when the defendant makes his communication of those beliefs. (This problem is a significantly different one and is discussed at length below.)

As can be seen from this examination, the proposed analysis would require a reasonable belief in any particular statement, which is not itself defamatory, only if there is a causal connection between that statement and the defamatory statement itself. This makes more sense than does the current majority view which requires all statements of "fact" to be proved true regardless of their significance to the validity of the defamatory statements themselves.

In cases where the defendant attempts to show that there was no causal connection between his failure to conduct a reasonable investigation or to draw reasonable conclusions about what the plaintiff did or said in light of his actual investigation and the resulting communication of his defamatory statement, one particular problem deserves special attention. This problem can perhaps best be explored by way of a hypothetical case.

Suppose that Mrs. Y, the president of the Woman's Christian Temperance Union, stated that X was a drunkard solely because Mrs. Z told her that she (Mrs. Z) saw X take several drinks of alcohol at a party and "stagger all over the place." Now further suppose that in fact X had taken only one drink of alcohol at this party and that he never took more than one drink a week.

Assuming that Mrs. Y was negligent either in believing Mrs. Z or in not making a further inquiry of others who were at the party, nevertheless Mrs. Y would be expected to argue that even if she had known the true circumstances she would have made the defamatory statement anyway. Because what she means by a "drunkard" may include any person who takes even one drink of alcohol, it is more probable than not Mrs. Y would have felt justified in concluding that X was a drunkard, regardless of her misconception of X's drinking habits.

It was her peculiar standard for drunkenness, then, that led to the defamatory statements and not her failure to draw reasonable conclusions about what X did or said. Again whether or not her statement of drunkenness was unjustifiably defamatory would depend upon the effect of the communication of those erroneous grounds to the reader.

To determine the existence or non-existence of a causal relation between the negligence of the "communicator" and the resulting defamatory statement, one should take into account the "communicator's" actual standards for making particular value judgments. But once those standards are ascertained, then the "communicator" would not be allowed to make un-

reasonable probability judgments in his application of those standards. For instance, it would ill behoove Mrs. Y to argue that she was justified in calling X a drunkard when, had she exercised reasonable care, she would have discovered that X was in fact a drinker of "white grape juice" and a veritable teetotaler.

An analysis, then, based upon some notion of fault would remedy some of the main defects in the traditional analyses of the problems raised by the defense of fair comment. Also, this proposed analysis offers a more intellectually satisfying rationale for decisions in particular cases than does the application of the distinction between "fact" and "opinion" statements. A comparison of the following two cases illustrates this proposition.

In *Westropp v. E. W. Scripps Co.*¹⁰⁰ plaintiff, a judge, sued defendant, a newspaper, for a libelous statement which appeared in an editorial complaining of plaintiff's lenient treatment of a local criminal. The complaint was based upon the following grounds: N. Spruiel, a local "hood," had appeared before plaintiff on a criminal charge. Plaintiff granted a continuance of the trial. Fourteen days later Spruiel, who was out on bail, killed a woman. The editorial then charged that had Spruiel not been granted the continuance, which was given because of the influence of the local "mob," then the killing would not have taken place.

At the trial plaintiff showed that in fact the continuance had been granted upon a motion by the prosecution because of the lack of material witnesses, and not at the request of the killer. The higher court, reversing the trial court which had directed a verdict for the defendant, held that the defense of fair comment was not available because the editorial was based on untrue "facts."

However the judge in *Gearhart v. WSAZ, Inc.*¹⁰¹ did not discuss the question of whether or not defendant's statements were ones of "fact" or ones of "opinion." Here plaintiff was a county attorney who had been elected to that office on a reform platform. In attempting to clean up his county he hired three well-known underworld characters to gather evidence to be used to convict the local gangsters. These "stool pigeons" were paid by him from funds which had been raised by a local reform group. Plaintiff was able to procure several convictions with their help.

But in several instances grand jury indictments had failed because the "stoolies" had presented "trumped-up" fact situations. At one of these hearings one of the "stoolies" testified under a name which plaintiff knew to be fictitious. Eventually all of plaintiff's "stool pigeons" were accused of different crimes and were jailed. At this time some female friends of

100. 148 Ohio St. 365, 74 N.E.2d 340 (1947).

101. 150 F. Supp. 98 (E.D. Ky. 1957). Although the defendant raised the defense of fair comment, the court did not discuss the fact-opinion distinction. It did not, however, explain why that defense was not available. It simply assumed that the defendant must show the truth of his statements. *Id.* at 111.

the now jailed "stoolies" filed charges with the Kentucky Bar Association seeking appropriate disciplinary action for the alleged misconduct of Gearhart. The Bar Association refused to give any information as to the nature of these charges.

Defendant on five different occasions made a television broadcast charging that plaintiff was attempting to make his county "dry" in order to force those people who ran bootlegging, gambling, and other illicit activities to pay plaintiff a certain amount of their profits or to go out of business. Defendant's charges were based upon the following grounds: (1) Plaintiff knew that one of his "stool pigeons" had testified before a grand jury under a phony name, (2) personal checks signed by Gearhart had been written to the order of known underworld characters, and (3) the jailed "stoolies" had signed affidavits which made substantially the same charges of corruption.

The judge submitted the case to the jury on two issues: (a) whether or not defendant exercised reasonable care in making its investigation and its broadcasts of the results, and (b) whether or not the statements made were true. The jury found for plaintiff; defendant moved for a judgment notwithstanding the verdict. The judge denied this motion emphasizing that there was sufficient evidence to support a jury finding that defendant did not exercise reasonable care in investigating or in broadcasting the statements.

The reasoning in the latter case makes much more sense to me than that found in the former. Both cases deal with charges of corruption in public office. In both cases the defendants disclosed the basis for their respective charges. Had the defendant in either case made a more intensive search, it would have discovered evidence sufficient to discount the validity of its charge and hence would probably not have made the defamatory statement at all. Especially in the *Westropp* case the defendant need only have examined the court records (which were presumably available) in order to have discovered that its accusation was baseless. To reason that the defendant must rely only upon the defense of truth because he made a misstatement of "fact" misses the crucial factor which led to the mistaken defamatory statement.¹⁰²

102. Other cases in which there was no foundation for the defendant's statement are abundant. *E.g.*, *Hartzog v. United Press Ass'ns*, 202 F.2d 81 (4th Cir. 1953). In this case defendant printed an article stating that plaintiff had been forcibly ejected from a political party executive committee meeting by the police at the request of the committee chairman. Defendant offered no evidence as to the foundation upon which he made the statement. He admitted at the trial that his report was incorrect. Plaintiff's appeal from a directed verdict in favor of defendant won a reversal in the court of appeals on the ground that the statements were ones of fact and not opinion. In *Murphy v. Farmer's Educ. & Co-op. Union of America*, 72 N.W.2d 636 (N.D. 1955) the court found that defendant had no foundation to state (1) that plaintiff, the state dairy commissioner, received travel money from the American Dairy Association, and (2) that plaintiff did not spend enough time

B. DEFENDANT'S COMMUNICATION

Having suggested a means of analyzing the defendant's information gathering activities, I turn now to the problems raised by what the defendant wrote or said about those activities. I will treat this aspect of the defendant's conduct in two parts. First, I want to re-examine the reasons given by the supporters of the majority view for requiring the defendant to prove the truth of statements of "fact" in all cases. Second, I will attempt to elucidate factors which should be considered in deciding whether or not the defendant must prove the truth of any or all of his statements.

The ardent fear which has given rise to the majority view that "fact" statements must be proved true arose from those cases where a person constructs a fictitious story, which is not in itself defamatory, and then that person makes defamatory statements about the person involved which, if there were no requirement to prove the truth of that story, would enjoy the protection of the privilege of fair comment.¹⁰³ But if the defendant must show that he exercised such care in gathering information about the plaintiff's activities, at least to justify a belief that it was more probable than not the plaintiff did or said a particular thing (when that belief makes some contribution to the validity of the defamatory statement), then this fear is allayed.

Nevertheless, the majority proponents would probably not be satisfied in their quest for accuracy. Such a showing required of the defendant would not guarantee that what the defendant reasonably thought had happened "really" did happen. This desire to force the defendant to justify his defamatory statements only if he can prove their basis to be some "objective reality" can best be examined by an analysis of the following case.

In *Shenkman v. O'Malley*¹⁰⁴ plaintiff, a doctor, performed an operation upon the hand of Roy Campanella (hereinafter referred to as Campy),

on his state job because he was always collecting American Dairy Association dues from North Dakota farmers. Both of these statements were crucial factors upon which defendant based a charge against plaintiff of misfeasance in office. In *Marr v. Putnam*, 196 Ore. 1, 246 P.2d 509 (1952), defendant wrote an article which complained of a "radio racket" in the city of Salem, Oregon. The writer reported that established dealers and repair plants were becoming alarmed because of this racket which was being carried on by people who were not operating out of established shops. Plaintiffs, local college students, were operating a free pick-up and delivery radio repair service. At the trial it was not disputed that plaintiffs were running a legitimate enterprise. Also it was established that no "rackets" complaints had been received in the entire city of Salem. The court held that the defense of fair comment did not apply because defendant's statements were ones of "fact." Another such case is *Bell Publishing Co. v. Garrett Eng'r Co.*, 141 Tex. 51, 170 S.W.2d 197 (Tex. Comm'n App. 1943).

103. 1 HARPER & JAMES, TORTS § 5.28 (1956); Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 424 & cases cited n.2 (1910).

104. 2 App. Div. 2d 567, 157 N.Y.S.2d 290 (1956).

then the star catcher on the Brooklyn Dodgers baseball team. Sometime previous to this operation another doctor had performed a similar operation on the same hand.

Plaintiff sent a bill to Campy for the sum of \$9,400. Campy in turn informed him that the Dodgers would pay the bill. Upon receipt of plaintiff's bill Walter O'Malley, then the president of the club, informed plaintiff to forget it. Plaintiff thereafter made several statements in public that he was responsible for repairing Campy's hand so that Campy could again play baseball, and further that he was being "robbed" by the Dodgers because they refused to pay him. Defendant then released a statement to the press to the effect that plaintiff's claim was exorbitant mainly because he had been informed by some doctors that the first operation had been completely successful and that the operation which had been performed by plaintiff had been unnecessary. He therefore accused plaintiff of operating on Campy's "bankroll" not on his hand.

Plaintiff brought an action for libel. O'Malley alleged in his answer to this complaint that the statements made were fair comment because they were based upon the opinions of reputable physicians. Plaintiff demurred to this answer. The appellate court said that the defense of fair comment was not available unless and until O'Malley alleged in his answer that the first operation was completely successful as a matter of fact. The court reasoned as follows:

[D]efendant O'Malley does not allege that his comment was based upon facts truly stated. On the contrary, the so-called "facts" upon which he relies are the opinions of physicians that the first hand-operation was "successful" and the opinion of the medical profession that such operation was successfully performed by a recognized specialist. . . . [T]hese "facts" are not asserted as objectively true, but simply as the opinion of experts. This falls short of the basis for fair comment. [Citation omitted.]

It is true, that upon a trial, the nature and the successfulness of the first operation would be proven, undoubtedly, by opinion testimony, namely, through the lips and the opinions of experts. Nevertheless, it would be incumbent upon the jury . . . to find the objective facts as distinguished from the opinions of the experts.¹⁰⁵

The basic difficulty that I have with this position is the contention that the jury finds some "objective reality," which is called "truth," when it chooses between conflicting testimony as to whether or not the first operation was successful. The jury merely examines the evidence produced by both parties and then decides that more probable than not one thing or the other happened. Where the probabilities are in balance, then the jury must decide against the defendant who has the burden of proof.

If this analysis is correct, then the guarantee sought by the majority

105. *Id.* at 572-73, 157 N.Y.S.2d at 295-96.

position is an illusory one. The difference between the requirement that the defendant prove what he thought happened was true and that he prove what he thought happened was supported by reasonable grounds is not so great. The latter requirement demands that the jury assess the probabilities of what happened based upon what the defendant knew and what he should have known at the time he formulated his beliefs. Whereas in the former, the jury assesses the probabilities in light of evidence produced not only by the defendant, but by the plaintiff. This evidence may or may not have been available to the defendant at the time he formulated his beliefs. Here, though, the jury is given both the advantage of hindsight and the advantage of unlimited access to what the plaintiff knew about his own activities.

To require the defendant to prove the truth of any particular statement in any particular case, then, ignores the facilities the defendant had available to investigate the plaintiff's activities, the opportunities he had to find out about them, and the complexity of those activities. Whether or not these factors should be ignored with regard to any particular statement should depend upon a full consideration of the many factors which determine the probable effect that any particular defamatory statement will have upon those persons who read or hear the defendant's entire communication. For it is at the point when the defendant actually communicates the defamatory statement that the harm to the reputation of the person talked about will occur. It is necessary, then, to attempt to ascertain more precisely the harm from which we are trying to protect the plaintiff in cases where the defense of fair comment applies.

The aim of the law of defamation cannot simply be to protect the plaintiff from being thought worse of. Even in the ordinary libel or slander case where truth is almost always a complete defense the plaintiff's interest to be free from reputation-disparaging remarks cannot be defined so broadly. He is protected from defamatory statements which cannot be proved. Nevertheless, a person will be thought worse of as much, if not more, when the statement is true as when it is not. The reason for protection from untrue defamatory statements must be that fewer people will, without justification, think worse of the person talked about where the defamatory statement is true than where it is not.

But the defense of fair comment has been promulgated for the very purpose of alleviating the burden of the defense of truth and of providing the defendant with an alternative standard by which he might justify his statements about "public persons." Since the basic purpose of the defense of fair comment is to provide a means by which the reader or the hearer can make enlightened appraisals of the activities of "public persons," the probability that the reader or the hearer will be misled in the formation of what he thinks of the person talked about should provide the scale by

which the defendant's defamatory statement will be measured in order to determine whether or not any particular statement was justified. Where that probability is high, a greater number of people will think worse of the plaintiff for reasons other than those which the defendant has relied upon than if that probability is low.

Take, for example, the case of *Eikhoff v. Gilbert* discussed above.¹⁰⁶ The defamatory statement that the plaintiff opposed the moral interests of the community provided no information which would be useful to the reader for the purpose of discovering what the defendant's standards of morality were. Because people's ideas of what is and what is not opposed to the moral interests of a community differ significantly, the probability that any person who reads such a statement will be misled in what he thinks about the plaintiff will be very high. Whereas, had the defendant indicated that the particular measures complained of were "pro-saloon" bills, then the reader could have readily ascertained the defendant's standards of morality. Therefore the reader would have an opportunity to agree or disagree with the defendant's defamatory proposition. Consequently, fewer people will, without justification, think worse of the person talked about where the statement provides a sufficient opportunity for the reader or the hearer to arrive at a conclusion different from the writer's or the speaker's than where it does not.

The focus of this inquiry then must be to formulate some standards to be used in deciding whether or not the opportunity to agree or disagree was sufficient. As a preliminary matter, however, I want to dispose of two problems: (1) Whether or not this opportunity should be appraised in light of the defendant's reasonable belief at the time he made the alleged defamatory statement, and (2) whether or not this opportunity should be appraised only by an examination of the defendant's entire communication.

Since the defendant has initial control over what he says and to whom he will say it, the interest of the plaintiff should be given paramount consideration. The defendant's reasonable belief in the sufficiency of this opportunity has no effect upon whether or not fewer people will be misled in the formation of their opinions about the plaintiff. Hence, the sufficiency of the reader's or the hearer's opportunity to agree or disagree should not be determined in light of the defendant's reasonable belief concerning that opportunity.

This opportunity should be appraised only by an examination of the defendant's entire communication. It would not make much sense to include in this inquiry those persons who read or heard only a part of the defendant's communication because the defendant has no control over the peculiar reading or listening habits of his audience. However, it may be

106. See pp. 1215-16 *supra*.

that the defendant set forth his statement in such a manner that most of his prospective readers or hearers would not come into contact with his complete statement. In those cases the entire communication should include only those parts which the substantial number of probable readers or hearers would have read or heard.

For example, the formulation of what is an entire communication would not take into account those television viewers who tuned in at the middle of an alleged defamatory speech about the plaintiff. But it would consider the probable number of television viewers who would miss part of a series of such speeches, all of which concerned the activities of the plaintiff. The defendant has little or no control over the former occurrence, but he could have minimized his risk in the latter situation by making a single broadcast.

More precisely, the focus of this inquiry is to determine whether or not a substantial number of readers or hearers had a sufficient opportunity to agree or disagree with the writer or the speaker after an examination of the entire communication. Because of the great diversity of factors which combine to create the effect that any particular defamatory statement will have upon the mind of a reader or a hearer, I find it difficult to lay down a general rule to cover all kinds of statements in all cases.

A particular court however may rule that particular kinds of statements, such as "X is a Communist" or "X is guilty of embezzlement," are so damaging to the plaintiff's reputation that the defendant must prove the truth of such statements (or at least the grounds upon which those statements are made) no matter what kind of communication was made by the defendant. But the reason for such a choice should not be that such statements are "bald and unambiguous fact" statements.¹⁰⁷ On the contrary, a court should realize that it is choosing to protect the plaintiff notwithstanding the defendant's exercise of reasonable care in gathering information which led him to make the defamatory statement or the reader's or hearer's opportunity to agree or disagree with the writer's or the speaker's defamatory accusation. In making such a choice a court should not be allowed to hide behind the protective veil of the "fact-opinion" diagnosis when in fact it is making a qualitative leap to protect the plaintiff because of the reputation damaging quality of the defamatory statement.

I would not attempt a list of what particular statements are to be singled out for special treatment. To resolve the conflict of interests here in such a manner depends upon what particular judges think about the defamatory nature of particular statements. But the defamatory quality of a particular statement will vary significantly according to the time and the place of the

107. *Utah State Farm Bureau Fed'n v. National Farmers Union Serv. Corp.*, 198 F.2d 20, 23 (10th Cir. 1952).

communication, the persons involved, and the manner of the communication. Therefore, this approach fails to provide a workable basis for a principled decisional process in these kinds of cases. Perhaps the reputation damaging quality of an isolated statement could be considered as one factor which affects the standard of care set up to grade the defendant's information gathering activities or which affects the determination of the sufficiency of the opportunity of the reader or the hearer to agree or disagree with the defendant. For example, suppose I call X a Communist. Such an accusation today no doubt would damage X's reputation significantly unless I was known to virtually all my audience as a "crackpot." Since this kind of accusation very likely will damage X's reputation more than if I were to call X a Jew or a Negro, I might be required to exercise greater care in arriving at my beliefs in what X said or did, or I might be required to set forth more precisely why I think that X is a Communist than I would in making another accusation.

In any event statements imputing bad motives should not be singled out for special treatment as so often has been the case.¹⁰⁸ The probable effect of such statements on any particular plaintiff's reputation not only depends on the variants cited above, but also upon the kind of imputation made. An accusation that X was motivated to appoint Y as city police commissioner solely because Y is X's brother will less likely disparage X's reputation as much as a statement that X was motivated to appoint Y solely because Y promised to pay X a certain sum of money. A rule that would single out "bad motive" statements, then, simply fails to offer a flexibility which is desirable if this varying factor is to be taken into account.¹⁰⁹

I think that the most principled decisional process in these cases will be achieved only by a formulation of the relevant factors to be considered in the balancing of the interests involved and by an assessment of the comparative probative weights to be given to these factors. In this manner I hope to set up some standards by which one can measure whether or not the opportunity of the reader or the hearer to agree or disagree with the communicator was a sufficient one.

Here I think it is useful to make a rough distinction in all cases between those statements made by the defendant which are alleged to be defamatory and those statements, if any, which provide the foundation for the defendant's defamatory statements. This should be a relatively easy task because the plaintiff's complaint already will have singled out that part of the defendant's statement which he considers defamatory. Moreover, if the defendant must initially satisfy a minimum standard of care in formulating his beliefs of what the plaintiff did or said, then those

108. See cases and authorities cited note 72 *supra*.

109. Boyer, *Fair Comment*, 15 OHIO ST. L.J. 280, 290-92 (1954).

findings may be used to extract the grounds upon which the defendant based his defamatory conclusions from the defendant's entire communication.

To a certain extent this separation of the defamatory from the non-defamatory is already attempted by a court when it segregates particular statements as either "fact" or "opinion."¹¹⁰ But the distinction that I suggest would provide better tools for dissecting the defendant's statement.

For example, in the case of *Mencher v. Chesley*¹¹¹ defendant stated that plaintiff was a former employee of the *Daily Worker* and a past campaign manager for one I. N., a Communist Party candidate for Bronx Borough President in New York City. Defendant accused plaintiff, who was then in charge of the Information Division of the Regional Office of Price Administration, of using that government agency to promote selfish political aims of left-wing groups. Plaintiff's complaint that defendant's statement was libelous was based primarily on defendant's attempt to link plaintiff with the communists. The statements about plaintiff's former employment with the *Daily Worker* and about his service as a campaign manager for a Communist Party candidate contained sufficient implications to be treated as defamatory. Under my proposed analysis the grounds upon which these statements were made will be readily ascertained because the defendant must initially establish that he exercised reasonable care in gathering information about the plaintiff's activities.¹¹² Under the "fact-opinion" diagnosis such a discovery would be left to chance.

As a preliminary matter, then, the defendant's entire communication should be roughly separated into that part which is alleged to be defamatory and that part which provides the grounds upon which the defamatory remark is based.

The reader or the hearer gets his first opportunity to agree or disagree with the defendant's defamatory statement from an examination of the complete statement itself. Since other means of testing the validity of the defamatory statement differ significantly from case to case and since those means are very likely to arise only after the defendant's statement has made its initial impact, then I think the most probative of the factors to be weighed in resolving this question is the adequacy of such an opportunity within the statement itself. This will necessarily depend upon several factors.

Foremost in this analysis I think the statement must inform its reader

110. *E.g.*, *Cooper v. Lawson*, 8 Ad. & E. 746, 749, 112 Eng. Rep. 1020, 1022 (K.B. 1838).

111. 297 N.Y. 94, 75 N.E.2d 257 (1947).

112. For this reason this task would be a relatively easy one in such cases as *Pott v. Dies*, 137 F.2d 734 (D.C. Cir. 1942), *Hotz v. Alton Tel. Printing Co.*, 324 Ill. App. 1, 57 N.E.2d 137 (1944), *Streeter v. Emmons County Farmers' Press*, 57 N.D. 438, 222 N.W. 455 (1928), and *Cooksey v. McGuire*, 146 S.W.2d 480 (Tex. Civ. App. 1940).

or its hearer why the writer or the speaker thinks the way he does about the person talked about. This can best be treated in two parts: (1) Did the defendant make a sufficient disclosure of his grounds so that one could find out what standards the defendant used to arrive at the conclusions which the plaintiff considers defamatory? (2) Did the defendant make a sufficient disclosure of the specific acts and/or words of the plaintiff so that one could weigh the validity of the defendant's grounds for the defamatory statement? In both inquiries the more specific presentation of the grounds upon which the defendant based a particular defamatory statement would be preferred to a more general presentation of those grounds.¹¹³

In order to find out the defendant's standards for making a particular defamatory statement, there must be some attempt to specify the grounds upon which that statement depends.¹¹⁴ Here the question should be whether or not the defendant's entire communication provides the reader or the hearer with something useful for the purpose of deciding what the defendant means by his defamatory statement, *e.g.*, that a particular person is "dishonest" or "immoral." I do not see any value in an attempt to lay down general rules as to the desired specificity. The degree of specificity must necessarily depend upon the kind of defamatory statement. People's standards for drunkenness or dishonesty differ less significantly than do their standards for morality. Hence, in order for a statement of "grounds" to be useful in the latter case it would have to be more detailed than in the former.

Not only will a more specific statement of the grounds for a defamatory statement be useful, but it may be that the person making the statement will be readily identified with a group which has peculiar standards for certain kinds of value judgments.¹¹⁵ Hence, if a member of the Woman's Christian Temperance Union, were to call X a drunkard, it is more likely that fewer people will think worse of X if that affiliation were disclosed to the reader or the hearer, even if there was no attempt to specify further why the speaker or the writer thought that he was a drunkard.

Likewise, if the communicator attempts to disclose his sources of information, the reader or the hearer will be given a better opportunity to know what the writer or the speaker means by his defamatory statement. For example, if I say that X is a drunkard and that therefore he is unfit to run for public office, I have not given my listener any opportunity to

113. Cf. McCormick, *supra* note 73, at 113-15.

114. Compare Pott v. Dies, 137 F.2d 734 (D.C. Cir. 1942), with Eikhoff v. Gilbert, 124 Mich. 353, 83 N.W. 110 (1900) and A. S. Abell Co. v. Kirby, 227 Md. 287, 176 A.2d 340 (1961).

115. See Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1311 (1942) which notes that Jehovah's Witnesses, for example, should be singled out as one of these groups.

know what I mean by "drunkard" (except of course the reputation that I might have for my ability to tell a "drunk" guy from a "sober" one and that I might have for telling the truth). However if I were to disclose that Mrs. Y, the President of the Woman's Christian Temperance Union, told me that X was a drunkard, then X's reputation will less likely be unjustifiably injured because the reader or the hearer will less likely be misled as to my standards for drunkenness.

The initial standard that the defendant must meet, then, is that a substantial number of readers or hearers would be provided with a disclosure which would be useful in finding out what the defendant meant by his defamatory statement.

Not only should the defendant provide a minimum number of tools for the above inquiry, but he should also be required to make some effort to provide sufficient information which the reader or the hearer might use to weigh the validity of the defendant's belief in the grounds upon which he has based his defamatory statement. The defendant may satisfy minimum standards of care in gathering information and in formulating his beliefs about what the plaintiff did or said; but nevertheless, he may convey such information in a manner which would not indicate the validity which should be given to those information sources.

If the defendant at least attempts to disclose his information sources, the reader or the hearer will be given a better opportunity to weigh the validity of that person's grounds than if there had been no disclosure. Suppose that I set forth fully what I mean by a drunkard and then aver that X is a drunkard. At this point, even though I have given my reader or my hearer sufficient opportunity to find out my standards for drunkenness, nevertheless I have failed to give him any opportunity to test the validity of my belief that X is a drunkard (except again, of course, the reputation that I might have for telling the truth). But if I were to disclose that Y, X's opponent in an election campaign, told me that X was a drunkard and that was the sole ground for my belief, then X will less likely be unjustifiably injured because the substantial number of my readers or hearers will less likely be misled by my statement.

However, such a specific disclosure will very often not be the case. In *Thompson v. Newspaper Printing Corp.*¹¹⁶ defendant printed a cartoon which pictured plaintiff picking the pocket of a "Tulsa Taxpayer." Along with this cartoon defendant exhibited a schedule which showed the increase in taxes over the past five years in the city of Tulsa. Defendant further stated that "some appraisers say" that plaintiff's home was assessed at one-fifth its value, and not one-third as is supposed to be the case with every home in Tulsa.

Defendant demurred to plaintiff's complaint that the cartoon and the

116. 325 P.2d 945 (Okla. 1958).

article were libelous on the ground that he was protected by the defense of fair comment. The trial court granted defendant's demurrer and plaintiff appealed. The court on appeal upheld the trial court because the entire publication constituted "criticism" and hence was privileged.

Although I think the court erred in deciding this case on a demurrer, nevertheless, I do agree with the court's emphasis on the defendant's disclosure of his source of information concerning the appraised value of the plaintiff's house. The court reasoned that the defendant's article gave the reader an opportunity to conclude that some other appraiser might arrive at a different valuation.

Likewise in *Fitzjarrald v. Panhandle Publishing Co.*¹¹⁷ defendant published a statement that eight Negroes told some newsmen that the Hall County Attorney, plaintiff, "once fired several shots close to the feet of a negro just to scare him." There was no evidence whether or not plaintiff shot, but not to scare, or even shot at all. Nevertheless, the court held in this case that defendant was not protected by the defense of fair comment. The majority opinion reasoned that the defense was unavailable because defendant's defamatory statement set forth grounds which, if true, were sufficient to cause plaintiff's removal from office. A concurring opinion reasoned that defendant's defamatory statement was one of "fact" and therefore the defense was not available.

Neither of these opinions gave the defendant credit for disclosing his source of information for the defamatory remark. Yet in the South, if this paper were circulated primarily among white people, it is very likely that the plaintiff would have been worse off had the defendant stated that he had gathered his information from a "reliable source" or had he failed to mention his source of information at all. Most white people might readily have concluded that Negroes simply do not like law enforcers or that Negroes are simply not trustworthy people.

Hence, if the defendant makes a disclosure of his information sources, which would be useful to the reader or the hearer to determine the validity of the defendant's belief in the grounds for his defamatory statement, then the probable misleading effect of such a statement will be reduced.

Under traditional analyses, however, the defendant would be given no benefit for making a useful disclosure of his sources of information. He would have to prove the truth of such a statement under one or both of the following rules: (1) The usual rule that every repetition of a libel or slander makes the publisher liable even if he identifies his source or states specifically that it is rumor or otherwise indicates its fidelity to the truth;¹¹⁸ (2) the majority rule that a statement, the validity of which depends upon the authority of a person other than the writer, is a "fact" statement

117. 149 Tex. 87, 228 S.W.2d 499 (1950).

118. 1 HARPER & JAMES, TORTS 402-03 (1956).

and not an "opinion" one.¹¹⁹ Hence, if the statement is a defamatory one, as in the *Fitzjarrald* case, rule number one (if not rule number two) would require the defendant to prove the truth of that statement. But if the statement is a non-defamatory one which only lends support to the validity of the defamatory statement, as in the *Thompson* case, then rule number two would require the defendant to prove the truth of that statement. Yet it does not make much sense to apply either one of these rules in cases where the defense of fair comment applies.

The "fact-opinion" distinction, which I have already criticized at length, fares no better when it is applied to a statement which discloses the "communicator's" source of information. The requirement that all "fact" statements are to be proved true stemmed from an assumption that all such statements more profoundly affect the plaintiff's reputation than do statements of "opinion." And only those statements, which depended solely upon the belief of the person making them, can qualify as "opinion" statements.¹²⁰ Any statement which is stated as made upon the authority of a person other than the writer or the speaker would probably convey the impression that its validity depended primarily upon the reliability of its source. It is difficult for me to understand why in every case a statement made upon a fully disclosed source, other than the "communicator," would have any more effect upon the reader or the hearer than where the statement depends "solely" upon the belief of the maker of the statement. This would depend upon who the source is, who the writer or the speaker might be, and the weight given to the particular source by the speaker or the writer.

Moreover if the source of the defendant's information is predominantly the plaintiff himself, such a test indiscriminately applied would lead to a rather absurd result. For example, in the case of *Thomas v. Bradbury, Agnew & Co.*¹²¹ plaintiff wrote a biography of his former boss. In the preface to his book plaintiff remarked that one of the reasons for his writing the book was that his now deceased boss had left "abundant personal materials" for just such a purpose.

Defendant published a scathing review of this book. He accused plaintiff of bad writing and of making statements of his own and then attributing them to his boss. Defendant lamented the fact that since there were sufficient materials for a good biography that one had not been written.

In an action for libel plaintiff won a jury verdict. Defendant appealed. The court on appeal affirmed this verdict. Although it found that the verdict was supported by evidence sufficient to establish that defendant

119. *Shenkman v. O'Malley*, 2 App. Div. 2d 567, 157 N.Y.S.2d 290 (1956); *Bell Publishing Co. v. Garrett Eng'r Co.*, 141 Tex. 51, 170 S.W.2d 197 (Tex. Comm'n App. 1943).

120. Note, 62 HARV. L. REV. 1207, 1213 (1949).

121. [1906] 2 K.B. 627 (C.A.).

was actuated by malice, nevertheless it also emphasized that the verdict was supported by evidence sufficient to conclude that in fact there were not "abundant" materials for a biography!

As for the ordinary rule that a person is liable for repeating a defamatory statement regardless of his disclosure of its source or its reliability, such a rule simply ignores the problems confronting those people who attempt to report what is going on in public affairs. The "communicator" does not control the contents of a public person's activities nor does he have the facilities to record and transmit the complex sensory data which go to making up those activities. Instead he must rely upon others to perform these initial services. What is both possible and desirable, though, is for the "communicator" to attempt to convey to his reader or his hearer the reliability of his source of information.¹²² A specific disclosure of that source could be step number one toward such a conveyance.

A minority of courts have abandoned this old rule in cases where a newspaper or a radio reports a story which originated from a *responsible* news agency, e.g., the Associated Press, so long as the newspaper or radio had no reason to suspect the truth or accuracy of the particular reports.¹²³ The wealth of authority, however, favors retention of the general rule.¹²⁴ Both because of the difficulties that arise in checking stories of distant happenings and because news of public importance demands prompt dissemination, the minority approach makes much more sense than the majority.¹²⁵ Furthermore, I see no good reason why the old rule should not be abandoned in every "fair comment" case regardless of whether or not the information source is a "responsible" one. The requirement that the defendant exercise reasonable care in gathering information would provide the plaintiff with enough protection from statements emanating from "irresponsible" sources.

On the other hand, adequate disclosure of the defendant's sources of information should not be considered sufficient to establish that the defendant need not prove the truth of the statement made. The defendant may disclose such sources and yet may act in such a manner as to eliminate the effectiveness of such a disclosure. For example, WSAZ in *Gearhart v. WSAZ, Inc.*¹²⁶ broadcast in a prominent manner the alleged libelous statement a total of five times, even though its information had come from rather dubious sources. Although a specific disclosure of these sources was made in each broadcast, the repetition by the television

122. LIPPMANN 359, 361.

123. 1 HARPER & JAMES, *op. cit. supra* note 118, at 404.

124. E.g., *Wood v. Constitution Publishing Co.*, 57 Ga. App. 123, 194 S.E. 760 (1937); *A. H. Belo & Co. v. Smith*, 40 S.W. 856 (Civ. App.), *aff'd*, 91 Tex. 221, 42 S.W. 850 (1897); 1 HARPER & JAMES, *op. cit. supra* note 118, at 404.

125. 1 HARPER & JAMES, *op. cit. supra* note 118, at 404, 408.

126. 150 F. Supp. 98 (E.D. Ky. 1957); see generally LIPPMANN 358-65.

station more likely indicated that the station itself was convinced of the validity of the charges made by the jailed "stool pigeons."

Nor should non-disclosure of the defendant's sources of information be established as a blanket rule forcing the defendant to prove the truth of the grounds stated. The court in *Grech v. Odhams Press, Ltd.*,¹²⁷ addressed itself to this problem. In addition to the facts set forth previously herein,¹²⁸ defendant stated categorically that one J. Addis, an ex-solicitor, had assisted Grech in drawing up his document. Defendant made no attempt to indicate the source of his information as to Addis's assistance.

At the trial it was shown that the defendant had acquired such information from a jailer who had told the defendant that Grech told him that "some guy" by the name of Addis had helped him draw up the document. The court ruled that the defendant could not invoke the defense of fair comment as against the complainant Addis, because a fair and accurate report requires identification of the source of the reporter's information.¹²⁹

The court appears to rule here that the defendant must indicate in all cases the source of information as to the grounds upon which he based his defamatory statement. This presents a possible solution to the problem. But I think a preferred analysis would result in an inquiry as to whether or not the defendant's statement of his belief would reasonably indicate the validity of his sources of information. Here the words which the defendant uses might be a crucial factor to be considered. A bold statement that Addis helped draw up Grech's document would very likely mislead the reader in that the basis for making that statement is rather meagre. Perhaps the use of words such as "it is a fact that," "in my opinion," or "I believe" may help to determine whether or not the reader or the hearer would have a sufficient idea of the weight to be given to the defendant's information sources. These questions will very likely be close ones. Nevertheless, I think it a useful inquiry to be made in resolving the probable misleading effect that any particular defamatory statement will have. It should be emphasized here, however, that if the defendant does not make a useful disclosure of his sources of information, then the most desired opportunity for the reader or the hearer to formulate an independent judgment as to the sufficiency of the writer's or the speaker's grounds has been lost.

In addition to the above factors some weight should be given to the relative clarity with which the defendant sets forth his defamatory statement and his grounds therefor. Furthermore, some consideration should be given to the kind of language used. The more sober account of a person's

127. [1958] 3 Weekly L.R. 16 (C.A.).

128. See pp. 1218-19 *supra*.

129. *Grech v. Odhams Press, Ltd.*, *supra* note 127, at 21-23.

activities outlined with care and differentiated from the defamatory inferences of the writer or the speaker would be preferred to the emotion-packed statement.

A further investigation should be made as to the opportunities for the reader or the hearer to agree or disagree with the writer or the hearer outside of the contents of the defendant's communication. Here the ability of the plaintiff to counteract the impact made by the defendant's statement becomes a paramount consideration. This depends not only upon the access that the plaintiff may have to effective means of communicating his "story" to those who are likely to come into contact with the defamatory statement, but upon the probability that such a counter-attack would have some effect upon the formation of the reader's or the hearer's thoughts.

Among the factors to be considered here then are whether or not the plaintiff is identified as a member of a minority group which has little power over the formation of public opinion and on the other hand whether or not the defendant is identified with a group which has a great deal of influence. Moreover, the defendant's statement might have been made so close to the day of an election, in which the plaintiff is a candidate, that the plaintiff would be unable to wage an effective counteraction before that crucial time.

The medium of communication, which was utilized by the defendant to make his statement, may also affect the opportunity which the reader or the hearer has to find out the defendant's foundation for his defamatory statement. A radio or television broadcast does not set forth these grounds in such a manner that a hearer can re-examine them, whereas a newspaper article gives its reader such an opportunity.

Utilizing these factors in the manner indicated above, I propose that the defendant must establish that more probable than not a substantial number of readers or hearers had a sufficient opportunity first, to discover what the defendant meant by his defamatory statement, and second, to weigh the validity of the defendant's grounds for making a particular defamatory statement about a particular plaintiff. If the first standard is not met then the defendant must prove the truth of all of his statements. But if the defendant meets that standard and yet he falls below the second one, then he need prove only the truth of the grounds upon which he made his defamatory statement. It may be that the defendant can satisfy this test only as to part of his grounds for his defamatory conclusion. If so, then the court could single out those statements as to which he has not done so and could require that he prove them to be true. But if the defendant meets both standards in every respect, then he will be relieved of the burden of proving the truth of any of his statements. In order for him to escape from liability completely he then need only prove that his statement was a "fair" one and that he was not actuated by malice, if the plaintiff raises that issue.