Notre Dame Law Review

Volume 14 | Issue 3 Article 3

3-1-1939

Fair Comment in Literary Criticism

James L. C. Ford

FAIR COMMENT IN LITERARY CRITICISM

Fair comment on literature, drama, and the arts today rests upon a fixed and relatively stable interpretation of the law. In other fields of jurisprudence, new cases constantly bring new precedents, old rulings are changed and revised. But in the field of fair comment on artistic productions, it is possible today to examine the evidence and know the landmarks of this field of law. Economic conditions have been the chief contributing factor in establishing this seemingly firm ground in the shifting quicksand of the legal landscape.

For thirty years, fair comment in literary criticism has been static and unaffected by surrounding change. Its history began in the early 19th century, its history ended — to all intents and purposes — in the first decade of the twentieth. Since that time, there have been few if any cases — search of the American Digest system fails to reveal any listed under fair comment in literary criticism for all the thirty years.

Thus, it has become possible to survey and analyze this legal territory from the vantage ground of the historian, to trace its development and growth, to track down its causes, to estimate its effects. Putting it under the microscope of history, we may discover how it got that way and why. But, first, a word of warning. It is not accurate to minimize or depreciate fair comment in literary criticism as a funereal dead-letter or a legal corpse. Its influence is alive and active every day of the year. It affects every book published in this age of printing press epidemics, casts its shadow over every critic who meets the literary disease with his hypodermic needle of comment. And with radio daily assuming new importance in our national life, radio comment may bring new problems.

Two main reasons have brought about this unusual situation. First, the critics have been able to benefit by resolved doctrine; they know how far they can go and where it is wise to stop. Secondly, and more important from its practical effects, publishers and authors of today have found it more advantageous to play ball with the critics than to antagonize them. Offend the tribunal of literary despots with the power of literary life and death! It is not healthy and it is certainly poor business. For reviewers hold their jobs long and publishers have other books forthcoming in the future while authors flower on every bush.[1]

Whether this is a healthy condition in the literary body is a matter of doubt but that is a literary question; the law has little to do with the sanitary hygiene of *belles lettres.*

Fair comment in literary criticism concerns two vital and fundamental rights — the right of the individual and the right of society. These rights, which so often have clashed in practice and principle, sometimes collide through the catalytic effect of criticism, and then we have a potential case for the judge and jury. For society's good we have accepted the principle of fair comment — not only in the field of literary and other forms of criticism but in the broader territories of the administration of justice and government, the management of public institutions, the conduct of religious bodies and all matters of bona fide public interest. Fair comment is our watchdog of press freedom in action. For the individual's protection, however, we have the laws of libel and slander. When the boundaries of fair comment are transgressed, the libel statutes put a punishing muzzle on the watchdog.[2]

---

1 "Authors and publishers don't sue critics who crack down on them, not because they believe in turning the other cheek, but because they know that their existence depends upon newspaper notice, good or bad, and that a cantankerous author or publisher is apt to be wholly ignored," writes Alexander Lindey, of Greenbaum, Wolff & Ernst, New York, in a letter to the author. Lindey collaborated with Morris Ernst, of the same firm, in writing a popular and entertaining book on libel and slander entitled, HOLD YOUR TONGUE!, Methuen, 1936.

2 "It is to protect this valuable possession — the individual's good name — that the law of libel has been developed even as men have developed laws to pro-

When an author feels that a critic has dealt with him unfairly and harshly, has maliciously or spitefully attacked him and his work, then he can have recourse to the courts for redress. And at various times through the years, various authors have availed themselves of this privilege. Let us examine some of these cases.

Back when the 19th century was cutting its eye-teeth and barely out of swaddling clothes, a certain publisher, Tabart by name, printed and vended books for children. Tipper, in his "Satirist or Monthly Meteor," accused Tabart of publishing immoral and absurd literature, really quite improper. Tabart, injured in reputation and business, brought suit. And the result of the case was that Lord Ellenborough held the defendant, Tipper, under a plea of not guilty, might adduce evidence, to show that the supposed libel was a fair stricture upon the general run of the plaintiff's (Tabart's) publications. *But,* that although it was lawful for an author (Critic Tipper in this case) to animadvert upon the conduct of a bookseller in publishing books of an improper tendency, it was actionable to impute to him falsely the publication of an immoral or absurd literary production. And Tipper admittedly had done just that. The verdict was for plaintiff, with one shilling damages.[3]

The next important case was that of *Carr v. Hood,*[4] also in 1808, and this time the important question of what is comment was passed upon. Sir John Carr was the author of a book titled THE STRANGER IN IRELAND and Hood had printed a parody of his creation. Thereupon Sir John brought suit for libel charging that the parody had been "false, scandalous, malicious, and defamatory" and that a gross caricature of his dignity had been used as a frontispiece. Despite all this, however, our Lord Ellenborough laid down the following *obiter dicta*:

---

tect their personal safety, their money and their property." William R. Arthur and Ralph L. Crosman in THE LAW OF NEWSPAPERS, McGraw-Hill (1928) 2.

3 Tabart v. Tipper, 1 Camp. 350 (1808), English Reports, vol. 170.

4 1 Camp. 354 (1808), English Reports, vol. 170.

"We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous. . . Reflection on personal character is another thing. Show me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule. . . The critic does a great service to the public, who writes down any vapid or useless publication such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury; because it is a loss which the party ought to sustain. It is in short the loss of fame and profits to which he was never entitled. Nothing can be conceived more threatening to the liberty of the press than the species of action before the court. We ought to resist an attempt against free and liberal criticism at the threshold."

The jury found for the defendant.

In this charge to the jury, Lord Ellenborough laid down the firm and lasting foundation for fair comment in literary criticism, a foundation which has endured without alteration and whose broad principles hold as true today as they did a hundred and thirty years ago.

Other cases have emphasized other standards for fair comment in literary criticism but they have never altered the basic criteria here established. Several American trials have been effective in reiterating these criteria. That criticism never attacks the individual but only his work was brought out strongly in *Triggs v. Sun Printing & Publishing Association.*[5] In 1903 the *New York Sun* published three articles ridiculing Professor Oscar Lovell Triggs of the Department of English of the University of Chicago. They referred to Triggs as "the hammer of hymn writers," "the scourge of Whittier and Longfellow," "a brass band and a skyrocket." They said he had spent months of pregnant, "solemn consultation" in naming his baby and called his activities a

[5] 179 N. Y. 144 (1904).

"theatrical advance agent," a "dazzling promotion." Triggs, shamed by such digs, brought suit and Triggs collected, for the court held:

"The articles complained of represent the plaintiff as illiterate, uncultivated, coarse, and vulgar, and his ideas as sensational, absurd, and foolish. . . They also ridicule his private life. . . In short, they affect to represent him as a presumptuous literary freak. These representations concerning his personal characteristics were not within the bounds of fair and honest criticism, and are clearly libelous *per se*. . .

"The single purpose of the rule permitting fair and honest criticism is that it promotes the public good, enables the people to discern right from wrong, encourages merit, and firmly condemns and exposes the charlatan and the cheat, and hence is based upon public polity. The distinction between criticism and defamation is that criticism deals only with such things as invite public attention or call for public comment, and does not follow a man into his private life, or pry into his domestic concerns. It never attacks the individual, but only his works. A true critic never indulges in personalities, but confines himself to the merits of the subject matter, and never takes advantage of the occasion to attain any other object beyond the fair discussion of matters of public interest, and the judicious guidance of the public taste. The articles in question come far short of falling within the line of true criticism, but are clearly defamatory in character, and are libelous *per se*."

James Fenimore Cooper, central figure in many a case arising out of his literary creations, plays the leading role in another American suit which stressed the rule that criticism never imputes dishonorable motives unless justice requires it and then only on the clearest proofs. In *Cooper v. Stone*,[6] he brought suit against the then president of Columbia University, charging that Stone, in a review of Cooper's THE HISTORY OF THE NAVY OF THE UNITED STATES OF AMERICA, had libeled him by imputing to the author "a disregard of justice and propriety as a man," representing him "as infatuated with vanity, mad with passion, and the apologist from force of sympathy of another stigmatized with ingratitude and perfidy," and charging him "with publishing as true, statements and evidence falsified, and encomiums re-

[6] 24 Wend. 434 (1840).

tracted." The court held the review to be libelous in its imputation of dishonorable motives and judgment was found for Cooper on demurrer.

Criticism never gratifies private malice, a point well demonstrated in *Thomas v. Bradbury, Agnew & Co., Ltd., and another,*[7] in which it was shown that a review printed in PUNCH on a volume of memoirs by Frederick Moy Thomas was libelous and that the criticism was actuated by malice, malice which existed before it was even published and again demonstrated in the courtroom by the reviewer. The court found that comment which is thus actuated by malice cannot be deemed fair on the part of the person who makes it and therefore proof of malice may make a criticism that is prima facie fair, outside the limits of fair comment. Thomas was awarded three hundred pounds damages, the defendants appealed, and the appeal was denied.

But if the criticism confines itself to the work in hand, even gross exaggeration and ridicule may be permitted. In *Strauss v. Francis,*[8] where the defendants, publishers of the literary review, the ATHENAEUM, themselves admitted the alleged libel of an "abominable" novel by Strauss, Chief Justice Cockburn held that "it was of vast importance that criticism, so long as it was fair and reasonable and just, should be allowed the utmost latitude, and that the most unsparing censure of works which were fairly subject to it should not be held libelous. . . It was all very well for the plaintiff's counsel to contend that literature should be free and unfettered. Be it so. But, then, if you give, on the one hand, the utmost latitude to literary composition, there ought to be at least the same latitude to literary criticism."

The Athenaeum won.

Thus we have a body of precedent established, precedent which may be summarized in the following four principles:

---

7 2 K. B. 627 (1906).

8 4 F. & F. 1107 (1866), English Reports, vol. 176.

1. Fair comment deals only with such things as invite public attention or public comment.[9]
2. Fair comment never attacks the individual, only his work. But here gross exaggeration or ridicule may be permitted.[10]
3. Fair comment never imputes dishonorable motives unless justice requires it and then only on the clearest proofs.[11]
4. Fair comment never gratifies private malice.[12]

In the trial of libel cases arising out of literary criticism, certain fundamental precedents also have been laid down. These may be epitomized as follows:[13]

1. Where the defendant pleads and proves justification of a libel containing comment or criticism, it is unnecessary for him to raise any other defence. Under ancient British law, the truth of the charges contained in the libel is a complete defence in civil proceedings, for the law "will not permit a man to recover damages for injury to a character which he does not or ought not to possess."[14] This type of defence is known as a plea of justification. In order to succeed in it, the defendant must establish the substantial truth of the whole of the libel. The plea of justification "involves the

---

9 Gott v. Pulsifer, 122 Mass. 235 (1877), 23 Am. Rep. 322; Dibdin v. Swan and Bostock, 1 Esp. 28 (1793); Carr v. Hood, 1 Camp. 355 (1808); Henwood v. Harrison, L. R., 7 C. P. 606 (1872), 41 L. J. C. P. 206, 20 W. R. 1000, 26 L. T. 938; Dowling v. Livingstone, 108 Mich. 321, 66 N. W. 225, 62 Am. St. Rep. 702, 32 L. R. A. 104 (1896).

10 Carr v. Hood, 1 Camp. 355 (1808); Tabart v. Tipper, 1 Camp. 350 (1808); Merivale v. Carson, 20 Q. B. 275 (1887).

11 Cooper v. Stone, 24 Wend. 434 (N. Y. 1840); Campbell v. Spottiswoode, 3 F. & F. 1107 (1863), English Reports, vol. 176.

12 Gott v. Pulsifer, 122 Mass. 235, 23 Am. Rep. 322 (1877); Dowling v. Livingstone, 108 Mich. 321, 66 N. W. 225, 62 Am. St. Rep. 702, 32 L. R. A. 104 (1896).

13 Summary based on principles laid down in THE LAW OF LIBEL AND SLANDER, by W. Valentine Ball and Patrick Browne, Stevens and Sons, 1936; PRINCIPLES OF THE LAW OF LIBEL AND SLANDER, by Wilfred A. Button, Sweet and Maxwell, 1935.

14 Barrow v. Lewellin, Hobart 62 (Star Chamber) (1615); McPherson v. Daniels, 10 B. & C. 263 (1829).

justification of every injurious imputation which a jury may think is to be found in the alleged libel." [15]

If the defendant cannot justify his expression of opinion in this sense, he may be able to fall back upon the defence that they are a fair comment on a matter of public interest, and this plea, if made out, is a complete answer to a libel action. A successful defence of fair comment essentially must demonstrate that the facts upon which the comments complained of are based are truly stated. Therefore the defendant is under obligation at the very beginning of establishing the truth of the facts commented upon and also the fairness of his comments. Much wider obligations are incurred by the defendant pleading justification for he must establish the truth of every injurious imputation which the jury believes to be contained in the matter under dispute while in fair comment, "The allegation of truth is confined to the fact averred, and the averment as to the comments is not that they are true but only that they were made in good faith and that they are fair and do not exceed the proper standard of comment upon such matters." [16]

2. It is for the judge to decide, as a question of law, whether the matter to which the comment relates is one of public interest.[17]

3. Defence of fair comment protects only statements of opinion — it does not extend to defamatory allegations of fact. It is for the jury to say in each case what view they take of the statements. The category to which the several statements belong is a question for the jury, subject to direction from the judge.[18] (A book review containing a charge of plagiarism against the author may be given as an illustration of an allegation of fact introduced into a literary criticism.)[19]

15 Digby v. Financial News, 1 K. B. 502 (1907).
16 Sutherland v. Stopes, A. C. 47 (1925).
17 M'Quire v. Western Morning News, 2 K. B. 100 (1903).
18 Hunt v. Star Newspaper, 2 K. B. 309 (1908).
19 Joynt v. Cycle Trade Publishing Co., 2 K. B. 292 (1904).

4. The document containing the comment may or may not also state the facts on which the comment is based; in either case the defendant must prove the truth of the stated or assumed facts if the plaintiff disputes it. The comment must not misstate facts, because a comment cannot be fair which is built on facts which are not truly stated. Comment, in order to be fair, must be based on facts, and if a defendant cannot show that his comments contain no misstatements of fact, he cannot prove a defence of fair comment.[20] If the defendant makes a misstatement of any of the facts upon which he comments, it at once negatives the possibility of his comment being fair.[21]

5. Comment must be relevant — personal attacks on the author would almost always be irrelevant.[22]

6. Even if the defendant satisfies the above points, the plaintiff will still succeed if he proves by extrinsic evidence that the comment was prompted by malice.[23]

7. It is for the plaintiff to show publication of alleged libelous matter and that this material goes beyond the limits of fair criticism. Once the plaintiff has established the publication by the defendant of defamatory words which are capable of being construed as an unfair comment, the burden of proof shifts to the defendant.[24]

Some confusion arises on occasion as to the distinction between Fair Comment and Qualified Privilege, and Fair Comment and Justification. The following concise statements may serve as a guide.[25]

Contrast with qualified privilege: A privileged occasion is one on which the privileged person is entitled to do some-

20 Hunt v. Star Newspaper, 2 K. B. 309 (1908).

21 Thomas v. Bradbury, Agnew & Co., Ltd., and another, 2 K. B. 627 (1906).

22 Fraser v. Berkeley, 7 C. & P. 621 (1836).

23 Thomas v. Bradbury, Agnew & Co., Ltd., and another, 2 K. B. 627 (1906).

24 M'Quire v. Western Morning News, 2 K. B. 100 (1903).

25 Summarized from PRINCIPLES OF THE LAW OF LIBEL AND SLANDER, by Wilfred A. Button, Sweet and Maxwell, 1935.

thing which no one, who is not within the privilege, is entitled to do on that occasion. A person in such a position may say or write about another things which no other person is entitled to say or write. But in the case of criticism upon a published work every person is entitled to do and is forbidden to do exactly the same things, and therefore the occasion is not privileged.[26]

Contrast with justification: In order to justify a libel the defendant must establish the truth of every injurious imputation which is contained in it but in fair comment, the allegation of truth is confined to the fact averred, and the averment as to the comments is not that they were true but only that they were made in good faith and that they are fair and do not exceed the proper standard of comment upon such matters.[27]

Question of fact and comment: The question of what is fact and what is comment is one for the jury and in order to obtain the advantage of the protection afforded by this defence, the defendant must satisfy them that the statements complained of are comment only and do not amount to statements of fact, to which the only defence will be privilege or justification.[28]

In the United States, all forty-eight of the states have constitutional provisions bearing indirectly upon fair comment either through the approach of libel or freedom of the press.[29]

---

26 Henwood v. Harrison, 7 C. P. 606 (1872); Arnold v. The King Emperor, 30 T. L. R. 462 (1914).

27 Digby v. Financial News, 1 K. B. 502 (1907); Sutherland v. Stopes, A. C. 47 (1925).

28 Hunt v. Star Newspaper, 2 K. B. 309 (1908).

29 According to a survey made by William R. Arthur and Ralph L. Crosman in 1928 and published in their THE LAW OF THE NEWSPAPERS, McGraw-Hill, 1928, and THE RIGHTS AND PRIVILEGES OF THE PRESS, by Frederick Seaton Siebert, D. Appleton-Century, 1934, statutory provisions upon libel (again affecting fair comment) are to be found in all the states with the exception of Arizona. These authors also cite three states — New York, New Mexico, and Texas — as having definite statutes upon their books in regard to fair comment. These statutes are as follows:

A number of questions arise, ethical and moral questions, which have an important philosophical bearing upon the subject.

Is fair comment in the public good?

This question has been answered already, answered many times. It is interesting to note, however, that it was set at rest with complete finality in one of the first cases of fair comment in literary criticism to be tried. Said the learned Lord Ellenborough:

"Liberty of criticism must be allowed or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I should never consider a libel which has for its object not to injure the reputation of any individual, but to correct misrepresentation of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." [30]

The point then arises whether there should be any bounds upon fair comment in literary criticism if admittedly it is for the public good. As this question raises the whole ethical philosophy of public versus private right, an exhaustive examination would be interminable. However, good sense itself dictates the reply that when the individual is grossly harmed through the exercise of comment, ostensibly fair, he should certainly have the right to redeem his tarnished reputation. If the comment is not fair, nobody can gainsay the individual's right of legal redress, and even when it is fair, the individual should be able to demand a test of that fair-

New Mexico: 1727. Criticism and Opinions, Sec. 277.—It is no offense to publish any criticism or examination of any work of literature, science, or art, or any opinion as to the qualifications or merits of the author of such work.

New York: Penal Code, Consolidated Laws, Chap. 41, Sec. 1342.—The publication (of a libel) is excused when it is honestly made, in the belief of its truth and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect of public affairs, or upon a thing which the proprietor thereof offers or explains to the public.

Texas: Art. 1284. Not libelous —

4. To publish any criticism or examination of any work of literature, science or art or any opinion as to the qualifications or merits of the author of such work.

5. To publish true statements of fact as to the qualifications of any person for any occupation, profession, or trade.

30 Tabart v. Tipper, 1 Camp. 350 (1808), English Reports, vol. 170.

ness. Society itself demands a bound upon the extent of comment for its own protection; it has placed such a boundary marker in criminal libel.

Out of the inquiry there comes a subsequent query — should the public, also for its own protection, demand that qualifications and standards be set upon the critic enthroned in his ivory tower for its benefit? And if the reply is "Yes," what shall these standards be?

Morris Ernst has suggested a board of official admirers whose job it shall be to defend and answer the critic who has stung the author.[31] One of the provisos of his scheme is an arbitrary requirement that the answer must be printed in full in equivalent space and position.[32] Apart from the purely practical defect that few if any newspaper or magazine publishers would consent to such a plan, there is the even more serious flaw that the very nature of such a laudatory committee would make its critical estimates valueless — they would always have to be eulogies of the most sickening nature. And how would you set up standards for the critics of the critics?

The answer of common sense again would seem to be that you cannot set a yardstick for knowledge. If the critic is good, if he is fair, he will hold his job. If not, the libel laws and universal laughter will soon make an end of him. And the answer also lies in the hands of the forthright and able author who has enough courage to expose folly and presump-

31 HOLD YOUR TONGUE! by Morris L. Ernst and Alexander Lindey, pp. 133-137.

32 Under Comp. L. § 10506 of Nevada, for example, a similar solution is offered for dealing with such problems. This section compels a newspaper, under penalty of fine and/or imprisonment, to publish a *signed* denial submitted to it concerning any identifiable person who has been the subject of an article in the paper. The section does not require that the article be libelous, although the "lead-line" to it reads "Denial of libelous article must be published." The article may simply have been erroneous. The denial or correction must be printed if submitted within one week of the original publication in the case of a newspaper published daily within Nevada, or within thirty days in the case of other periodicals. The denial or correction must be printed in the next issue after its receipt except in the case of its submission within two days of such issue. It shall be given like position and space. If it takes up more space than the original, the newspaper may charge regular advertising rates for the excess matter.

tion in the critical chair. Authors genuinely interested in their art and its immaculate virginity rather than seductive movie rights can put an end to any critic who produces inept and incompetent merchandise. Through their own writings, published in books, periodicals, and even "letters to the editor," they can pillory the critic who repeatedly exposes his own ignorance and incapacity.

Then, digging into the heart of the matter, if you confine comment to the product and so not allow it to invade the field of private character, is this ethically desirable from the larger viewpoint? In the personal opinion of the writer, the answer has to be "Yes." Should an author whom you know to be a reprobate and a scoundrel, a scoundrel perverted in mind and body, be allowed to publish his ideas and opinions and theories? You may say that if those ideas and opinions and theories as presented in his book are innocuous, there should be no bar. But even then do you not build up an audience for this man in the future which may receive his future books with ready enthusiasm, books which may be as bad as the man himself? Yes, but the answer has to be that the future must take care of itself. When the bad book appears, then is the time to knock its ears down. If even a dog is entitled to his day in court, then you must judge by the product and not by the producer.

From an esthetic standpoint, it undoubtedly raises a problem for the modern expressionist critic who judges the man and his work as one and almost inseparable, finding the man in the work and the work in the man. And, in this connection, who can really divorce the man from his brain-child. But that is a critical problem and our answer now has to be that the critic as every other man has to observe the "Don't" signs of legal liability.

In this ethico-legal tangle is another pitfall — is malice ever justified? And, if so, is it libelous? In practicality, can you separate malice from justifiable comment? If a book

reviewer is given a book to review, a book by a confessed communist, a book advocating free love, the downfall of the American republic and the distribution of all millions including the publisher's, how much of his comment is going to be justifiable and how much malice?

Here, of course, the basic answer is to be found in the law itself.

"In order to justify a libel the defendant must establish the truth of every injurious imputation which is contained in it, but in fair comment, the allegation of truth is confined to the fact averred, and the averment as to the comments is not that they are true but only that they were made in good faith and they are fair and do not exceed the proper standard of comment upon such matters." [33]

These and similar questions which might be raised demonstrate the human fallibility of the law, it is true, but common sense and keen intellectual reasoning — the basis in the last analysis of jurisprudence — show the way to the solution. And a re-examination of the cases cited above and the points of law involved will clearly demonstrate that the bench and bar have set worthy precedents in this field.

Fair comment in literary criticism may be a closed book insofar as active litigation is concerned, but it is closed only because the rulings of the past have established literary and legal rights on a firm foundation of sound and rational equity. Critical liberty is the foundation stone of both democratic government and artistic progress. Without it, the blight of censorship and suppression kills every prospect of advance and every hope of individual freedom and creative development. The individual must be protected, it is true, and the laws of libel protect him, but society itself would suffer and slide back a thousand years if the privilege of fair comment were destroyed.

James L. C. Ford.

Madison, Wisconsin.

33 PRINCIPLES OF THE LAW OF LIBEL AND SLANDER, by Wilfred A. Button, Sweet & Maxwell, 1935.