Fair Comment, the "Brightest Jewel in the Crown of the Law," as Protection For Free Speech and Against Abusive SLAPP Suits

The privilege of fair comment and criticism was once a mainstay of Missouri defamation law. The time is now ripe to revive that neglected defense, and use it as a springboard for a state constitutional privilege for statements of opinion and expanded protection against abusive SLAPP suits.

Free discussion is the foundation on which free government itself is builded. That lost, all is lost; the two exist or perish together. ... It is the brightest jewel in the crown of the jewel of the law to seek and maintain the golden mean between defamation on the one hand, and a healthy and robust right of free public discussion, on the other.

– Diener v. Star-Chronicle Pub. Co.[1]

When today's computers, e-mail, facsimile and other high-tech systems fail, it's nice to be able to switch back to older technologies like handwriting, typewriters and messengers. We may even discover aspects of the old ways that are desirable in their own right. In the same way, when a new development cripples some much-relied-on modern legal rule, old legal doctrines may need to be revived or reexamined. So it is with the "fair comment" doctrine of libel law. By reviving this almost-forgotten doctrine, and applying it to today's public debate arena, Missouri can effectively protect its citizens' right to comment on public issues, and prevent abusive use of SLAPP suits designed to stifle public criticism and comments.

"Fair comment and criticism" was a fixture of the common law of defamation, including Missouri libel and slander law, for many years. In the late nineteenth and early twentieth centuries it was one of the privileges most often raised in defense of libel claims. (Privileges are defenses to defamation claims, which are recognized because of policy determinations that certain kinds of assertions are socially valuable.) In the 1970s and 1980s, it was eclipsed by a simpler and more absolute defense often applied to statements of opinion. But after

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that defense in turn was limited by the U.S. Supreme Court in 1990, lawyers and courts somewhat surprisingly did not turn back to the common law "fair comment" doctrine. That doctrine, however, particularly if properly reinterpreted and applied to contemporary law, can act as a valuable screening mechanism against the abusive legal actions known as SLAPP ("Strategic Lawsuits Against Public Participation") suits.

I. THE FAIR COMMENT PRIVILEGE IN MISSOURI

The rule protecting fair comment and criticism originated in English common law and has long been a fixture in Missouri libel law. The seminal Missouri case of *Diener v. Star-Chronicle Publishing Co.* (*Diener I*),[2] applied and explained fair comment. In *Diener I* the plaintiff, a chauffeur for a city health commissioner, brought a libel suit, complaining of a newspaper editorial. The editorial had criticized the coroner for exculpating the health commissioner, the plaintiff's boss, in connection with an incident in which the plaintiff (while driving the health commissioner) negligently killed a small child. The editorial suggested that the coroner went easy on the health commissioner, who, it charged, was responsible for having "run down and killed a small child in the street." The editorial encouraged voters who objected to "the mangling of...little tots" to vote against the coroner.

Automobiles were new at the time, as was apparent from the Supreme Court's definition: a "heavy self-propelled vehicle plying on the public streets and capable of great speed – a vehicle propelled by internal combustion engines, steam engines, or electric motors, one well calculated to give joy and comfort to its occupants but abounding in danger and terror to pedestrians."[3] The editorial did not suggest that Diener or the health commissioner *meant* to kill the child, and indeed, the ordinary reader of the time, who certainly understood the dangerousness of autos and how easily they could go out of control, would not understand the phrase "killed a small child," or even the harsher "mangling of little tots" to refer to the crime of murder. Rather, when a car runs someone down, "it is by means of a collision, through negligence, or accident."[4] The Supreme Court held that because the editorial, construed according to its ordinary understanding at the time, did not impute a crime to Diener, it was not libelous *per se*. Hence, it affirmed the trial court's dismissal of the libel petition on a demurrer.

But the Supreme Court in *Diener* went on to address another defense, the fair comment privilege, as well. On this ground, too, the Court found the editorial nonactionable. The court first noted the grounding of the fair comment doctrine in "the constitution" (apparently referring to the Missouri constitution), and then summarized the rule as follows:

> So long as a publication is not directed to a public officer by charging corruption or other criminal malfeasance or non-feasance, so long as it is not directed to the defamation of a individual in his private character or business, but is directed to a matter of live public concern and is for an honest and not a defamatory purpose, it is qualifiedly privileged.[5]

Within those lines, the Court stated, everyone is entitled to "comment fairly, freely, with vigor and severity." After reviewing the policy behind the fair comment privilege, applauding it as "the brightest jewel in the crown of the law," the court explained the reasons why the privilege applied in this case. First, the office of coroner and its business – particularly its inquiry into the death of a child – were matters of public interest and concern. Second, the editorial was fair and had an honest purpose and was "in no wise earmarked with abuse and vituperative indications of malice." Hence, the editorial was privileged as a matter of law under the fair comment privilege.

If the secondary holding status of fair comment in the *Diener I* left any doubt as to the importance of the doctrine, that doubt was resolved by a related case a few months later. At issue in *Diener v. Star-Chronicle Publishing Co.* (*Diener II*)[6] was a second somewhat embellished petition filed by the plaintiff after his original Petition had been dismissed by the trial court. Among other thing, the *Diener II* petition pled that the editorial had effectively branded Diener a "killer." The court held that even the harshest invective would be protected if the fair comment doctrine otherwise fit:

> Libel cannot hang on so slender a thread as a mere matter of taste in the penman's selection of one word instead of another one, interchangeable as a synonym, or (by condensation) in using laconically one word instead of expanding and diluting his idea into a phrase, thereby toning and softening it down. The use of a given word often makes the stroke that of a feather. The use of another may make the stroke that of a hammer. When the purpose is honest, as gathered from the whole publication, when the discussion is on a matter of live and present public concern (as here) and there are no earmarks of malice through invective, vituperation, or calumny, and where the publication does not pertain to the private business and the private character of an individual, or charge corruption or other misdemeanor to one clothed with authority, in a defamatory way, we say, when such condition of things appears, then a writer may use a hammer, instead of a feather, in fulminating argumentatively.[7]

Later, the Supreme Court applied the fair comment privilege to classic political criticism in *Cook v. Pulitzer Publishing Co.*[8] The plaintiff, a former Missouri Secretary of State, sued the owner of the *St. Louis Post-Dispatch* over an editorial that criticized the plaintiff for failing to close a bank that later became insolvent. The editorial suggested that the plaintiff had gone easy on the bank's principals because of their Democratic Party connections. Plaintiff won a $50,000 libel judgment and the newspaper appealed, invoking its right to criticize public officials.

The Supreme Court reversed the judgment, holding that the fair comment privilege protected the editorial. The Court invoked the right of the press and public to comment on matters of public interest, and noted that that right extended not only to tempered and truthful comments but also harsh and even mistaken ones:

> It will not do to say that the right of comment would permit the defendant to suggest the first and most favorable explanation, but deny to it the right, in good faith, to suggest the second, which was fully warranted on the conceded facts. The right to comment on matters of public interest means the right to express opinions as to the acts of a public officer and to draw inferences as to his motives, whether such opinions or inferences are right or wrong, reasonable or unreasonable, provided they are made in good faith and based upon the truth. *** [9]

Even if critical editorials will cause officials' acts to be "misconstrued" and "wrong motives . . . imputed even when they are entirely free from blame," the court said, such criticisms must be allowed. [10]

Other Missouri cases have applied or considered the fair comment privilege in connection with comment upon a politician's fitness for office,[11] newspaper criticism of a state officer,[12] and criticism of public figures who were not governmental officials or candidates.[13] The privilege has been applied in other states to protect opinions in the context of reviews, political and social commentaries, editorials, artistic works, and criticism of non-governmental public figures and prominent institutions. In the area of literary and artistic criticism, for example, the fair comment privilege recognized that authors and artists invite criticism by creating and offering their works to the public. The Iowa Supreme Court's decision in *Cherry v. Des Moines Leader*,[14] is a landmark decision protecting criticism. The *Leader*'s critic could hardly have been more harsh in his review of the Cherry Sisters, a vaudeville singing and dancing team.[15] Yet the court, basing its opinion both on the entertainer's solicitation of the public and the "manifest distinction between matters of fact and comment on or criticism of undisputed facts or conduct," held the review fully protected as fair comment:

> One who goes upon the stage to exhibit himself to the public, or who gives any kind of a performance to which the public is invited, may be freely criticised. He may be held up to ridicule, and entire freedom of expression is guaranteed dramatic critics, provided they are not actuated by malice or evil purpose in what they write. Fitting strictures, sarcasm, or ridicule, even may be used, if based on facts, without liability, in the absence of malice or wicked purpose.[16]

Many other fair comment decisions reflect similar sensitivity to the need for critics to be able to offer even harsh opinions.[17] Limits were imposed on critical reviews, however, most notably the rule developed from one of the numerous libel cases brought by novelist James Fennimore Cooper that a review may not be used to disguise an out-and-out personal attack on an author.[18]

The fair comment privilege has also recognized that editorials must be judged differently from news columns, and that editorial writers must be given freedom to criticize. In *Cleveland Leader Printing Co. v. Nethersole*,[19] for example, the Ohio Supreme Court protected as fair comment an editorial that characterized certain theatrical productions as "brazen, fleshy plays" and criticized them for the "evil" of "the subtle undermining of the character which follow

upon laughing attacks made upon domestic life." The court characterized the editorial as a protected comment upon a matter of public interest and quoted one of the nation's earliest and most frequently cited fair comment cases for the proposition that such criticism is not only the right but perhaps also the duty of newspapers:

> The editor of a newspaper has the right, if not the duty, of publishing for the information of the public, fair and reasonable comments however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice.[20]

When applied to criticism of public officials and other public figures, the common law fair comment privilege arguably afforded critics better protection than the constitutional privilege of *New York Times v. Sullivan*,[21] because, unlike that privilege, it required no inquiry into the defendant's subjective state of mind. Rather, as with an analysis of the defamatory or non-defamatory nature of language, it looked primarily to the face of the statements at issue. In connection with criticism of public officials, the fair comment privilege extended even to criticism of lowly university employees,[22] prison wardens,[23] and police detectives,[24] and school coaches.[25]

II. THE RISE AND FALL OF THE "OPINION" PRIVILEGE

From 1974, when the U.S. Supreme Court in dictum in *Gertz v. Robert Welch Inc.*[26] stated that "there is no such thing as a false idea," until 1990, when the Court in *Milkovich v. Lorain Journal Co.*[27] "clarified" that statement, courts throughout the Nation turned away from use of the "fair comment" privilege, and embraced instead a broad absolute privilege in libel and slander law for statements of "opinion." Hundreds of cases cited the *Gertz* dictum as support for their dismissal of defamation claims based on words of opinion. Libel cases based on critical reviews were dismissed. Plaintiffs who charged defamation based on hyperbolic accusations made in the course of heated arguments lost their cases. Charges and countercharges about matters that couldn't be strictly proven true or false were held nonactionable. Editorials, commentaries and news analysis pieces, even ones making strongly worded charges of misconduct, were held protected. Courts in Missouri and the Eighth Circuit embraced the new "opinion" doctrine.[28] In particular, the Missouri Supreme Court's decision in *Henry v. Halliburton*[29] strongly supported and applied the opinion doctrine.

In determining whether a statement is one of fact (and hence actionable) or opinion (and hence protected under the opinion doctrine), courts developed various tests. In Missouri and the Eighth Circuit, courts typically applied one or both of two key tests. First, a *factual implication analysis* was often conducted to determine if the allegedly defamatory language, although couched as an opinion, actually "implie[d] the allegation of undisclosed defamatory facts as the basis for the opinion."[30] If so, the implied factual assertion may be actionable.[31] If the opinion implied defamatory facts, those implications could form the basis of a libel suit, and would not be protected. Second, an *ordinary understanding* analysis was used to determine if the statement was fact or opinion, based upon the factors like the verifiability of the assertion in issue (whether it can be proven false); its context; its common usage or meaning; and the broader context in which the statement appears. Missouri followed the "totality of the circumstances" approach in which *all* those factors were considered, and the *context* of the statement in particular was given weight.[32]

In practice, both the factual implication analysis *and* the ordinary understanding analysis were often used in the pre-*Milkovich* era, and Missouri's "totality of the circumstances" approach embraced both. The Missouri Supreme Court stressed that courts were not bound to any rigid factors, but rather should examine "all relevant circumstances" to determine if an assertion is fact or opinion. This "totality" approach was necessary, the Supreme Court noted, because the same words may suggest criminal conduct in certain contexts, and in other contexts "may only suggest to the ordinary reader that the defendant disagrees with the plaintiff's conduct and used pejorative statements or vituperative language to indicate his or her disapproval."[33] Thus, courts must examine context, tone and circumstances, even more that the actual words used, since this is determines whether words are used as factual assertions or just as opinions of disapproval.[34] In application, the *Henry* "totality" approach permitted courts to find even harsh and accusatory words such as "fraud" "blackmail," "crook" and "liar" to be protected and nonactionable, if in context they were offered as the speaker's opinions rather than as assertions of undeniable fact.[35] This was consistent with results recorded by courts in other jurisdictions.[36]

The totality approach of *Henry* made sense legally and semantically. It rejected rigid methods of analysis, and recognized the truism that in interpreting a message (and its nature, as fact or opinion) one must examine the full verbal and social context.[37] Moreover, the "totality" approach recognized that the fact-opinion distinction is not a mere linguistic distinction but is based on policy grounds – specifically, the policy that in a free society governed by the First Amendment, the defamation tort ought not to cover statements of opinion, comment and criticism. The partly subjective nature of the "totality" approach allowed courts to consider, in addition to the purely linguistic analysis, a policy-based analysis of whether a particular statement should be considered actionable fact or protected opinion.[38]

The Supreme Court's 1990 decision in *Milkovich*, however, appeared to sound the death knell for a broad absolute privilege for opinion as a matter of federal constitutional law. The Court sharply narrowed the opinion defense; it held that the constitutional defense applied solely to cases of "rhetorical hyperbole" – statements so extreme and overstated that no reader or listener could seriously consider them to imply factual charges. All other statements of opinion, including those found in editorial columns, critical reviews and statements that can't be proven true or false, were to be considered potentially actionable, at least under federal constitutional law. In both its holding and its tone, *Milkovich* battered the opinion privilege.[39]

III. PROSPECTS FOR THE FAIR COMMENT PRIVILEGE TODAY

Though neglected, the fair comment privilege is still available today. Those who, after *Milkovich*, still believe it is important to protect speech in the nature of opinions and commentary, should reexamine this privilege, from several perspectives.

Initially, how can and should this privilege function in our times? Next, can we, and should we, go farther than merely reviving the common law fair comment privilege? More specifically, should Missouri recognize

a state privilege for statements of opinion broader than the *Milkovich* doctrine – that is, embracing the broad pre-*Milkovich* opinion doctrine of *Henry v. Halliburton* and many other state and federal courts? And should the fair comment principle lead courts to fashion a special procedure for early screening of abusive suits that target protected comment and criticism – that is, a procedure for applying the fair comment privilege at an early stage, so that it affords defendants not just the phyrric victory of an ultimate vindication after years of speech-chilling and costly litigation, but rather effective protection against the chilling effect inherent in SLAPP suits?

These questions relating to the direction of the law must be considered against the background of contemporary practices, current issues relating to debate and discussion in the public sphere, and state policy.[40]

A. COMMENT AND CRITICISM IN THE PUBLIC ARENA TODAY

Debate and discussion in the public arena today is, to use Justice Brennen's memorable phrase, "uninhibited, robust and wide-open" often involving "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[41] In some ways, the public debate today more closely resembles the boisterous advocacy of colonial and early republican days than the more constrained climate of the mid-twentieth century, when the fair comment privilege fell into disuse. Not unlike assertive colonial pamphleteers, today's Internet bloggers, self-publishers, and callers and guests on video and television shows vigorously thrust their ideas and comments into the broad public debate. The subjects of our public concerns, moreover, have multiplied – they embrace not only government actions, but the affairs and actions of businesses, non-governmental organizations, and, increasingly, those powerful and prominent personal institutions known as celebrities.

The change in public focus over the years is dramatically illustrated by a series of surveys of school children about the persons they most admired.[42] In 1898, George Washington and Abraham Lincoln led the list, which included hardly any entertainment or sports personalities. In 1948, Franklin D. Roosevelt and Clara Barton topped the list, which this time included entertainers like Gene Autrey and Betty Grable and sports figures like Ted Williams and Babe Ruth. By 1986, a leading list of persons most admired by teenagers was filled almost entirely by entertainment celebrities, from Bill Cosby to Arnold Schwarzenegger, with Ronald Reagan, an actor turned politician, as the only political entry. Our cultural focus today is unquestionably far broader than in the past. Public concern today clearly extends beyond governmental affairs. The U.S. Supreme Court recently noted in *City of San Diego v. Roe*,[43] that "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication," favorably citing *Cox Broadcasting Corp.* v. *Cohn*,[44] and *Time, Inc.* v. *Hill*,[45] both of which involved news reports about private persons.

In short, public discussion today takes place in a big tent, one that embraces concerns not only about government but also about business, the non-profit sector, and individuals of renown. And the vigorous debate within that big tent more resembles the cacophony of the commodities pit than the stilted formality of an Oxford Union exchange.

B. MISSOURI'S ANTI-SLAPP ACT

In the 1990s, as a result of growing concerns about abusive suits that were primarily designed to muzzle and intimidate, states began enacting legislation to prevent or minimize the harm from such suits. The abusive suits were given a name – SLAPP, meaning Strategic Lawsuits Against Public Policy – and the corrective acts became known as anti-SLAPP acts. California's trendsetting act, enacted in 1993, provided for an early cutoff of lawsuits directed against those who spoke out "in furtherance of [his or her] right of petition or free speech … in connection with a public issue."[46] The act has been enormously successful in screening out abusive suits, and preventing them from having a substantial chilling effect, because of its early-resolution procedural remedy and the court's ability to award attorneys' fees in favor of a successful movant.

Missouri has not been free of SLAPP suits. In the late 1980s, two private citizens wrote letters to local newspapers, criticizing the operation of a waste incinerator in their area. The incinerator operator responded by suing the citizens for libel, and conducting their own counter public relations campaign against them. The citizens successfully defended the suits brought against them, and then countersued based on the company's abusive actions. They won an $86 million judgment in 1991.[47]

A decade later, the SLAPP focus in Missouri shifted to disputes between politicians, as a political dispute between political factions in the City of Creve Coeur led to several suits by the mayor against political opponents.[48] Though these suits were unsuccessful, they and other suits and threats between politicians led to lobbying for a Missouri anti-SLAPP act. The General Assembly responded in its 2004 session by passing S.B. 807, Missouri's first anti-SLAPP legislation. Governor Holden signed the bill and it became effective on August 28, 2004.

The Missouri act applies in the case of any lawsuit seeking damages "against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting, in a quasi-judicial proceeding before a tribunal of decision-making body of the state or any political division of the state."[49] This language appears broad enough to cover news reporting and citizen commentary made "in connection with" such proceedings. In the case of lawsuits based on such speech, the act provides that dispositive motions must be heard "on an expedited basis to ensure the early consideration of the issues raised… and to prevent the unnecessary expense of litigation."[50] The act also provides for suspension of discovery pending the court's decision on such motions, and during the pendency of the special appeal that the statue makes available from orders on such motions.[51] Additionally, successful defendants are automatically entitled to an award of their attorneys fees and costs in defending the action, so long as they file their dispositive motion within certain time limits.[52] Plaintiffs can get an attorneys fee award only upon a showing that the defendant's motion was "frivolous or solely intended to cause unnecessary delay."[53] Most SLAPP suits are brought on a libel theory, but the Missouri act explicitly applies to "all causes of action," thus preventing end-runs around the anti-SLAPP provisions by plaintiffs using different legal theories.[54]

Interestingly, the Missouri anti-SLAPP act is silent as to the substantive basis for the early dispositive motions that it foresees and encourages. However, since the General Assembly clearly meant for SLAPP defendants to have an effective early remedy, it must have assumed that existing defenses – such as the fair comment privilege – would

provide adequate substantive basis for the motions and for court orders putting a prompt end to SLAPP suits.

C. APPLYING FAIR COMMENT AND CRITICISM TODAY

Since the big and noisy tent of today's public sphere differs so much from the world of a hundred years ago, how can we successfully import that era's fair comment privilege into our modern cases? And how can we ensure the adequate *substantive* protection for speech on matters of public concern that is needed for use with the new Missouri anti-SLAPP *procedural* protection? As it turns out, only a few tweaks to the old fair comment privilege are needed to successfully adapt it to today's circumstances. The Missouri fair comment privilege historically required proof of three elements: (1) a subject matter of public interest, (2) a statement of opinion ("comment"), and (3) the speaker's proper purposes and motives.[55]

Subject Matter of Public Interest. The fair comment privilege, developed and applied in the United States in the pre-television times of the nineteenth and early twentieth centuries, applied to statements made about issues of public interest and concern, not matters of a purely private nature. It applied in those times to situations involving political, governmental and legal matters; appeals for public patronage; literary and artistic publications; public entertainment; and matters relating to religious groups – probably all of major areas that were then in the public eye.

The old cases presumed there to be some line between public and private matters. But the line was unclear. Witness, for example, the statement contained *Smith v. Burrus*: "Within the bounds of legitimate discussion all that is necessary to say and proper to say respecting the actions of candidates or public officers may legitimately be said."[56] One could hardly write more circular and less useful guidance. Also often engrafted onto the "public concern" element of the privilege was the requirement that the comment pertain "not to an individual but to his acts." This meant that the comment must consist of a legitimate contribution to the public debate, not *ad hominem* attacks on individuals.

The fair comment privilege can be adapted for the twenty-first century by retaining the "public interest" limitation, but recognizing that today's public sphere is occupied not only by government and politicians but also by businesses, non-profit and non-governmental entities, figures in the sports and entertainment world, and other prominent public persons. Just as religious institutions, vaudeville acts and book authors were considered proper subjects of fair comment in the past, the prominent institutions and people of today must also be subject to commentary. As stated in dictum in *Diener I*, "Every one of the public is entitled to pass an opinion *on everything which in any way invites public attention.*"[57] Courts may also consider the evolving boundary between the "public" and "private" spheres; many facts about public officials and prominent celebrities which would previously have been considered private are now generally considered matter of public interest.

Nature of Statements as Opinion. The fair comment privilege protects *comment* – that is, opinion. Commentary, unlike factual assertions, does not defame. In the words of an early American commentator, "criticism is no libel":

> As for example: Condemnation of the foreign policy of the government, however sweeping, is no libel. Animadversions, however severe, on the use made by the vestry of the money of the rate-payers is not libelous, unless corruption or embezzlement be imputed to individual vestrymen. Criticism, however trenchant, on any new poem or novel, or on any picture exhibited in a public gallery, is no libel.[58]

Naturally, the fair comment privilege protects only the opinion stated, not any statement of facts on which it is based.[59]

The common law grappled with ways to distinguish fact and comment. Some cases looked at the truthfulness of the stated facts; others analyzed the "fairness" of the commentary.[60] Such difficult and tortured means of distinguishing fact from opinion are now unnecessary. The "totality" approach of *Henry v. Halliburton* and the implied defamatory facts concern of *Milkovich*, and the insights of other modern decisions more than adequately cover these concerns. They ensure that commentary is not used improperly to disguise defamatory factual claims. They recognize that a commentary can be fair so long as the reader can see how the commentator reached his or her conclusion, even if the commentator relied on untrue facts or illogical inferences.[61]

Thus, the opinion screening analysis of *Henry* and *Milkovich* directly and adequately serves the purpose of this prong of the fair comment doctrine.

Speaker's Purpose and Motives. Several old Missouri cases hold that the plaintiff can overcome the fair comment privilege only if the statements of fact supporting the comment were false, or where plaintiff proves express malice.[62] By "express malice," these cases apparently mean an improper motive.[63] Other formulations of the fair comment privilege often state that the privilege protects only statements made "in good faith and with fair motives" – a different verbal formulation also focusing on motive.

The first ground for defeasance of the privilege – that the statements upon which the comment were based were false – seems unnecessary in light of today's more sophisticated understanding of what constitutes statements of fact and opinion. If false facts are set forth, those statements of fact may be the basis for a defamation suit, and will not be protected by any fair comment privilege.[64]

The second ground for defeasance – express malice – is rarely used today."[65] It seems, moreover, out of place and ill-suited to a doctrine that seeks to protect comment within a tradition of wide-open debate, since almost any highly charged statement can be alleged to be mean spirited and made in bad faith. But highly charged rhetoric is common today, and, in the context of today's standards, is not seen as antithetical to protected expression. Even Chief Justice Rehnquist in *Milkovich* exempted what he called "rhetorical hyperbole" from potential liability, and even praised the value of such discourse.[66] Inflated language today does not evidence malice or improper conduct; it is, for good or ill, a common means of expression in our uninhibited public sphere. Indeed, even the fair comment cases of a century ago recognize that bold language is permissible. The old cases allowed commentary with "vigor and severity"[67] and "use [of] a hammer, instead of a feather, in fulminating argumentatively.[68]

The express malice test may have been imposed in order to prevent a speaker from using a comment as a disguise for a malicious attack. But if a speaker attempts in such an attack to imply defamatory facts, given the *Henry/Milkovich* understanding of implied factual assertions, the speaker will not get away with anything; he will still be liable for any implied defamatory factual assertions. And if the statements are truly opinion, even if meant as an attack, they will

not harm anyone and can be probably assessed by the public, which understands opinions for what they are.

In short, since the purposes for the express malice test are met by excluding implied factual assertions from the protection of the privilege, a motive-based defeasance test is no longer necessary. As with other absolute privileges, like the fair report privilege,[69] which serve important public policy ends by ensuring that the debate on public issues is full and vibrant, the sole legal test for fair comment should be whether the occasion and expression qualify for the privilege.[70]

D. A MODERN "OPINION AND FAIR COMMENT" PRIVILEGE

Considering that Missouri courts, like most courts nationwide, approved of and readily followed the broad pre-*Milkovich* opinion doctrine when it reigned, they may fulfill the policy and purposes of that privilege not only by reviving the fair comment privilege, but also by adopting the *Henry v. Halliburton* opinion doctrine as a matter of state constitutional law. This is a path already followed by several states,[71] and it would permit Missouri to build on, rather than retreat from, both the policies of the old fair comment privilege and the lessons of the pre-*Milkovich* precedents. The Oklahoma Supreme Court recently joined this group, recognizing in *Magnusson v. New York Times Co.*,[72] that the common law fair comment privilege, and the pre-*Milkovich* cases on opinion, together "afford[] individuals the opportunity for honest expressions of opinion on matters of legitimate public interest based on true or privilege statements of facts, to defend against a defamation cause filed by a private person." Our Supreme Court in *Diener I* already alluded to a state constitutional basis for the fair comment privilege.[73] The language of Missouri's free speech guarantee can readily support a constitution opinion privilege.[74] And ample other grounds for recognizing such a privilege exist in the principles of the fair comment privilege, and the practical and modern understanding of semantics that underlies *Henry v. Halliburton* and other Missouri precedents.

Essentially, the Missouri Supreme Court in *Henry* based the special protection for opinion on the distinctiveness of statements of comment – *i.e.*, the fact that readers and listeners understand opinions differently than factual assertions. Under a state constitutional privilege for opinion, courts would follow the *Henry* model, give life to all citizens for the right of speaking out expressed in both the Missouri Constitution's Bill of Rights and the anti SLAPP act, and avoid the uncertainties inherent in *Milkovich's* narrow view of protection for opinion that does not fit into the narrow "rhetorical hyperbole" category.

E. FAIR COMMENT AS AN ANTI-SLAPP TOOL

The fair comment privilege can also be adapted for today by reading it in tandem with the policy of Missouri's anti SLAPP Act. The policy of the anti SLAPP Act is to encourage public debate, although the act itself goes only part way to effectuating that purpose. It most directly protects politicians and those participating in governmental matters, because its streamlined resolution procedure is mandated only in certain qualifying cases – those involving public meetings or proceedings.

The core policy of the fair comment privilege is protection for the privilege of speaking out on matters of public concern – a right that all citizens possess. Politicians have no free speech rights superior to ordinary citizens. The "brightest jewel in the crown of the law," the fair comment privilege, was not designed to be worn only by elected officials. If the privilege of engaging in the public conversation is to be fully respected, the full procedural protections attendant to such expression should be afforded to all speakers, regardless of their social, economic, or official status. In the same way, speech relating to government affairs is not the only kind of speech deserving of this crown-jewel protection. We must protect speech about businesses, non-profit entities, and other prominent entities and persons, too. A citizen of Creve Coeur needs the right to speak out not only on municipal politics issues, but also about Microsoft Corporation's software, the services of his non-profit health maintenance organization, and the activities of the real estate developer whose bulldozer is headed into his neighborhood. Properly interpreted and applied today, the fair comment privilege can protect those important speech rights across the broad spectrum of today's big tent of public debate and discussion.

To give full life to the fair comment privilege, moreover, judges can look to the policy of the anti-SLAPP act – encouraging prompt disposition of cases where the very pendency of the case threatens the exercise of First Amendment freedoms – in all fair comment situations. Although the attorneys fee and expedited appeal provisions of the Act obviously do not apply beyond the statute's express scope, its early-disposition policy can and should guide courts in all fair comment cases. All libel suits and other actions based against expression present a serious threat of a chilling effect, detrimental not only to the speaker, but also to society. Judges who employ expeditious anti SLAPP-like procedures in free speech cases, even ones that do not technically fit within the anti-SLAPP statute, will minimize that chilling effect and promote justice by reestablishing "the golden mean between defamation on the one hand, and a healthy and robust right of free public discussion on the other."

Conclusion

The landmark *Diener* decision, now almost a century old but still the single best source of insight into Missouri defamation law, identified fair comment as a means for achieving the "golden mean" of a balance between defamation and free speech. Fair comment achieved this end by screening out defamation claims based on matters of opinion and comment. Privileges like fair comment play a key role in our society, because freedom to comment is an essential part of American discourse, and "whatever is added to the field of libel is taken from the field of free debate."[75]

It is time to dust off the brightest jewel in the crown of the law. Missouri should make fair comment – interpreted and applied consistent with modern understanding – a bedazzling centerpiece for its state constitutional protection for free expression. And our state courts should also ensure, through anti-SLAPP-like procedures in all situations involving speech on matters of public concern, that this bright jewel outshines abusive lawsuits and prevents them from stifling valuable critical expression and comment.

[1] 230 Mo. 473, 132 S.W. 1143, 1149 (1910).
[2] 230 Mo. 613, 132 S.W. 1143 (1910).
[3] *Id.* at 626, 132 S.W. at 1147.
[4] *Id.*
[5] *Diener I*, at 629, 132 S.W. at 1148-49.
[6] 232 Mo. 416, 135 S.W. 6 (1911).
[7] *Diener II,* 135 S.W. at 9.
[8] 145 S.W. 480 (Mo. 1912).
[9] *Cook*, at 488, 489.
[10] *Id.*
[11] *Epps v. Dukett*, 284 Mo. 132, 142 (1920) (personal character and official fitness of applicant for appointment to public office were legitimate subjects of comment within the confines of the truth); *Walsh v. Pulitzer Publishing Co.,* 157 S.W. 326 (Mo. 1913)(upholding dismissal as fair comment statement that plaintiff's candidacy "should fill the city with alarm" when statement was also made that plaintiff had no qualifications for office, because statements did not reflect upon plaintiff personally but on his fitness for office).
[12] *McClung v. Star-Chronicle Pub. Co.* [hereafter, *McClung I*], 274 Mo. 194, 202 S.W. 571 (1918)(applying fair comment privilege to protect articles critical of prison warden); *McClung v. Pulitzer Pub. Co.* [hereafter, *McClung II*], 279 Mo. 370, 214 S.W. 193 (1919)(applying fair comment privilege to protect editorials critical of prison warden's conduct); *Merriam v. Star-Chronicle Pub. Co.*, 29 S.W.2d 201 (St.L. Ct. App. 1930)(noting that privilege would apply to newspaper articles critical of jail conditions and responsible official; coverage of privilege depends on whether facts set forth in articles were true).
[13] *Warren v. Pulitzer Pub. Co.,* 78 S.W.2d 404 (Mo. 1934)(noting, in case involving prominent minister and church tribunal proceeding, that fair comment privilege covers "discussion of the qualifications, character and abilities of public men").
[14] 114 Iowa 298, 86 N.W. 323 (1901).
[15] The review included this classic passage:
Effie is an old jade of fifty summers, Jessie a frisky filly of forty, and Addie, the flower of the family, a capering monstrosity of thirty-five. Their long, skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom. They pranced around the stage with a motion that suggested a cross between the danse du ventre and fox trot—strange creatures with painted faces and hideous mien. Effie is spavined, Addie is string-halt, and Jessie, the only one who showed her stockings, has legs with calves as classic in their outlines as the curves of a broomhandle.
86 N.W. at 325.
[16] *Id.*
[17] *Dowling v. Livingstone*, 108 Mich. 321, 66 N.W. 225 (1896)(book review held to be fair comment; review blasted book "utterly lacking scientific value," "hopelessly lost," "as full of contradictions and absurdities as a schoolboy of tricks" and a "quack remedy"; court held, "The critic was at liberty to attack or denounce [the propositions in the book] with sarcasm and ridicule").
[18] *See generally,* Norman L. Rosenberg, *Protecting the Best Men: An Interpretative History of the Law of Libel* 137-139 (1986) (describing Cooper's wave of suits).
[19] 84 Ohio St. 118, 95 N.E. 735 (1911).
[20] *Gott v. Pulsifer,* 122 Mass. 235 (1877).
[21] 376 U.S. 254 (1964).
[22] *Epps v. Dunkett*, 284 Mo. 132 (1920).
[23] *McClung v. Star-Chronicle Pub. Co.*, 274 Mo. 194, 202 S.W. 571 (1918) and 297 Mo. 370, 214 S.W. 193 (1919).
[24] *Addington v. Times Publishing Co.*, 139 La. 731, 70 So. 784 (1916)(protecting as fair comment an article criticizing a police detective for "another bonehead stunt," and a "bum steer"; newspaper was permitted to use pointed language and figures of speech).
[25] *Hoeppner v. Dunkirk Printing Co.*, 254 N.Y. 95, 172 N.E. 139 (1930)(coach subject to fair comment doctrine because "His work and the play of his team were matters of keen public interest.").
[26] 418 U.S. 323 (1974).
[27] 497 U.S. 1 (1990).
[28] *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986) (en banc);
Lauderback v. American Broadcasting Cos., 741 F.2d 193 (8th Cir. 1984).
[29] 690 S.W.2d 775 (Mo. banc 1985).
[30] Restatement (Second) of Torts § 566.
[31] *Lauderback v. American Broadcasting Cos.*, 741 F.2d at 198-99; *Iverson v. Crow*, 639 S.W.2d 118, 119 (Mo.App. 1982) ("where the facts underlying the opinion are set forth in the article, the opinion is afforded privilege because each reader may draw his own conclusion to support or challenge the opinion").
[32] *Henry v. Halliburton*, 690 S.W.2d 775, 788 (Mo. banc 1985).
[33] *Id.* at 788-89.
[34] As part of the "totality" approach, the Court in *Henry* directed trial judges to examine the precision or imprecision of language employed, because imprecise statements usually are indicative of opinions rather than facts. *Id.* at 789. Other factors to be considered include whether facts are disclosed in support of the opinion, whether the assertion can be proven false, how the words are commonly used, and the broader context in which the statement appears. *Id.* at 787-88.
[35] *E.g., Henry v. Halliburton*, 690 S.W.2d 775, 789-90 (Mo.banc 1985) (statements that insurance agent was a "fraud" and a "twister" held to be opinion; *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493 (Mo.App. 1980) ("sleazy dealings", "sleazy sleight-of-hand" by attorney); *Iverson v. Crow*, 639 S.W.2d 118 (Mo.App. 1982) ("half-truths, innuendo, distortion and misrepresentation").
[36] *Edwards v. National Audubon Society, Inc.*, 556 113, 121 (2d Cir. 1977) (word "liar" merely expressed opinion and hence was nonactionable); *Lewis v. Time, Inc.*, 710 F.2d 549,556 (9th Cir. 1983) (cited with approval in *Henry v. Halliburton*) (statement that lawyer was "shady practitioner" held to constitute opinion); *Lauderback v. American Broadcasting Cos.*, 741 F.2d 193, 196-97 (8th Cir. 1984) (statements that insurance agent was "unethical," "crook," and "con man" who person engaged in "insurance fraud" held to constitute opinion); *Henderson v. Times Mirror Co.,* 669 F. Supp. 356 (D. Colo. 1987) (sports agent called "sleaze bag" who "kind of slimmed up from the bayou"); *Parkes v. Steinbrenner*, 518 N.Y. S.2d 1 (App. Div. 1987) (umpire who was called "not capable" and said to "misjudge plays"); *Hammond v. Donrey Inc.*, 14 Media L. Rptr. 1350 (W.D. Ky. 1987) ("immoral" and "wicked"); *Miller v. News Syndicate Co.*, 445 F. 2d 356 (2d Cir. 1971) ("masqueraded as legitimate businessman"); *Spelson v. CBS, Inc.*, 581 F. Supp. 1195 (N.D. Ill 1984) *aff'd Mem.* 757 F.2d 1291 (7th Cir. 1985) ("con-artists" and part of an "international network of medical quackery").
[37] *See* Sableman, "The Court's Role in Interpreting Language in Libel and Slander Cases." 45 J.Mo.Bar 399 (1989).
[38] *Id.*
[39] In actual application, *Milkovich* may not have affected the law as drastically as the Supreme Court expected. Since *Milkovich* recognizes that statements not reasonably understood as factual accusations are nonactionable, some courts applying the decision have protected more than just "rhetorical hyperbole," on the ground that the language in issue, in context, could not be reasonably understood as factual accusations.

[40] Libel issues must always be assessed against "the temper of the times [and] the current of contemporary public opinion," *Mencher v. Chesley*, 297 N.Y. 94, 75 N.E.2d 257, 259 (1947), because the nature and traditions of public discussion and public understandings of words may change significantly over time.

[41] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[42] *See* Tyler Cowen, *What Price Fame?* 47-48 (2000) (describing surveys).

[43] 125 S.Ct. 521, 525-26 (2004).

[44] 420 U. S. 469 (1975).

[45] 385 U. S. 374, 387–388 (1967).

[46] Cal. Code Civ. Pro. §425.16.

[47] Judith Vande Water, "Award Tops $86 Million in Lawsuit," *St. Louis Post-Dispatch*, May 14, 1991.

[48] *See Mandel v. O'Connor*, 99 S.W.3d 33 (Mo. App. E.D. 2003) (affirming summary judgment in libel suit brought by mayor against city residents).

[49] Mo.Rev.Stat. § 537.800.1.

[50] *Id.*

[51] *Id.* (stay of discovery); § 537.800.3 (right to expedited appeal).

[52] § 537.800.2.

[53] *Id.*

[54] § 537.800.7.

[55] *McClung* II, 214 S.W. at 200-01; *Warren v. Pulitzer Pub. Co.*, 78 S.W.2d 404, 413 (Mo. 1934). It has always been the court's role to determine if the privilege applies to a particular situation. *McClung II* at 201.

[56] 106 Mo. 94 (1891).

[57] *Diener I*, 132 S.W. at 1149 (emphasis added).

[58] Martin L. Newell, THE LAW OF DEFAMATION, LIBEL AND SLANDER (1890) 567.

[59] *Merriman v. Star-Chronicle Pub. Co.*, 29 S.W.2d 201, 203 (Mo.App. 1930).

[60] Some old cases required that the comment be fair "in the sense that the reader can see a factual basis for comment and draw his own conclusions." The requirement of facts being truly stated does not prohibit speakers from basing their conclusions on *interpretations* of facts; there is some room for interpretation by the newspaper. *McClung II* at 201 (permissible for newspaper to infer motive for why warden treated a prisoner harshly; "The defendant paper had the privilege of attributing that motive to the plaintiff.") The privilege under this analysis would be lost only if the commentary was based on a "substantial misstatement of fact" – and in effect, in cases of this nature, the factual inaccuracy, not the comment based upon it, is likely to be considered the defamatory statement. *McClung II* at 201.

[61] *Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994)(book review held to constitute protected opinion because writer's inferences and reasoning were apparent and disclosed).

[62] *Cook*; *McClung II*.

[63] *McClung II* at 202, quoting an English case that says it is an "indirect and wrong motive."

[64] Indeed, even if no false statements are directly set forth, but are clearly *implied*, the implied false factual assertions can be the basis for a suit and the comment privilege will not protect them.

[65] *Burger v. McGilley Memorial Chapels, Inc.*, 856 F.2d 1046, 1049 (8th Cir. 1988)("The Missouri standard for actual malice is based on the *New York Times* test. *McDowell*, 747 S.W.2d 632.").

[66] *Milkovich*, 497 U.S. 1, 20 (1990) ("the *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual. *Falwell*, 485 U.S., at 50, 108 S.Ct., at 879. This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation.").

[67] *Diener I*, 132 S.W. at 1148-49.

[68] *Diener II*, 135 S.W. at 9.

[69] RESTATEMENT (SECOND) OF TORTS § 611.

[70] This breakdown of the elements of the fair comment privilege as applied to modern situations, as described in this Section C, is similar to the Oklahoma Supreme Court's recent revival of that state's fair comment privilege, characterizing its elements as (1) speech dealing with a matter of public concern, (2) based on true or privileged facts, and (3) representing the actual opinion of the speaker, not made for the sole purpose of causing harm. *Magnusson v. New York Times Co.*, 98 P.3d 1070, ___ (Ok. 2004). The only difference is that Oklahoma chose to retain a limited intent test, focused solely on whether the speaker intended to cause harm. Such an intent element, however, carries the potential for frustrating the purpose of the privilege, since many statements of opinion may be alleged to have been made for the purpose of causing harm.

[71] Other states that have adopted opinion privileges as a matter of state constitutional law include New York, *Immuno, AG v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270 (1991), Ohio, *Vail v. The Plain Dealer Pub. Co.*, 649 N.E.2d 182 (Ohio 1995), and Utah, *West v. Thompson Newspapers*, 872 P.2d 999 (Utah 1994). *See also*, *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 612 N.E.2d 1158 (1993) (suggesting state constitutional privilege would be recognized in appropriate case).

[72] 98 P.3d 1070 (Ok. 2004).

[73] In *Diener I*, 132 S.W. at 1148, the court stated in beginning its fair comment analysis: "freedom of speech is guaranteed to the individual and newspaper by the Constitution." This was years before the U.S. Supreme Court held that the First Amendment of the United States Constitution was incorporated by the Fourteenth Amendment and thus applied to the states (*see Gitlow v. New York,* 268 U.S. 652, 666 (1925)), so the reference must be to the Missouri Constitution.

[74] Article 1, section 8 of the Missouri Constitution provides: "That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty; and that in all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and in suits and prosecutions for libel the jury, under the direction of the court, shall determine the law and the facts." This provision is essentially identical to the state constitutional provisions in New York, Ohio and Utah that were held to support a state constitutional privilege for opinion. *See* N.Y. CONST. Art. I § 8; OHIO CONST. § 1.11; UTAH CONST. Art. 1, § 15.

[75] *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C.Cir. 1942).

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