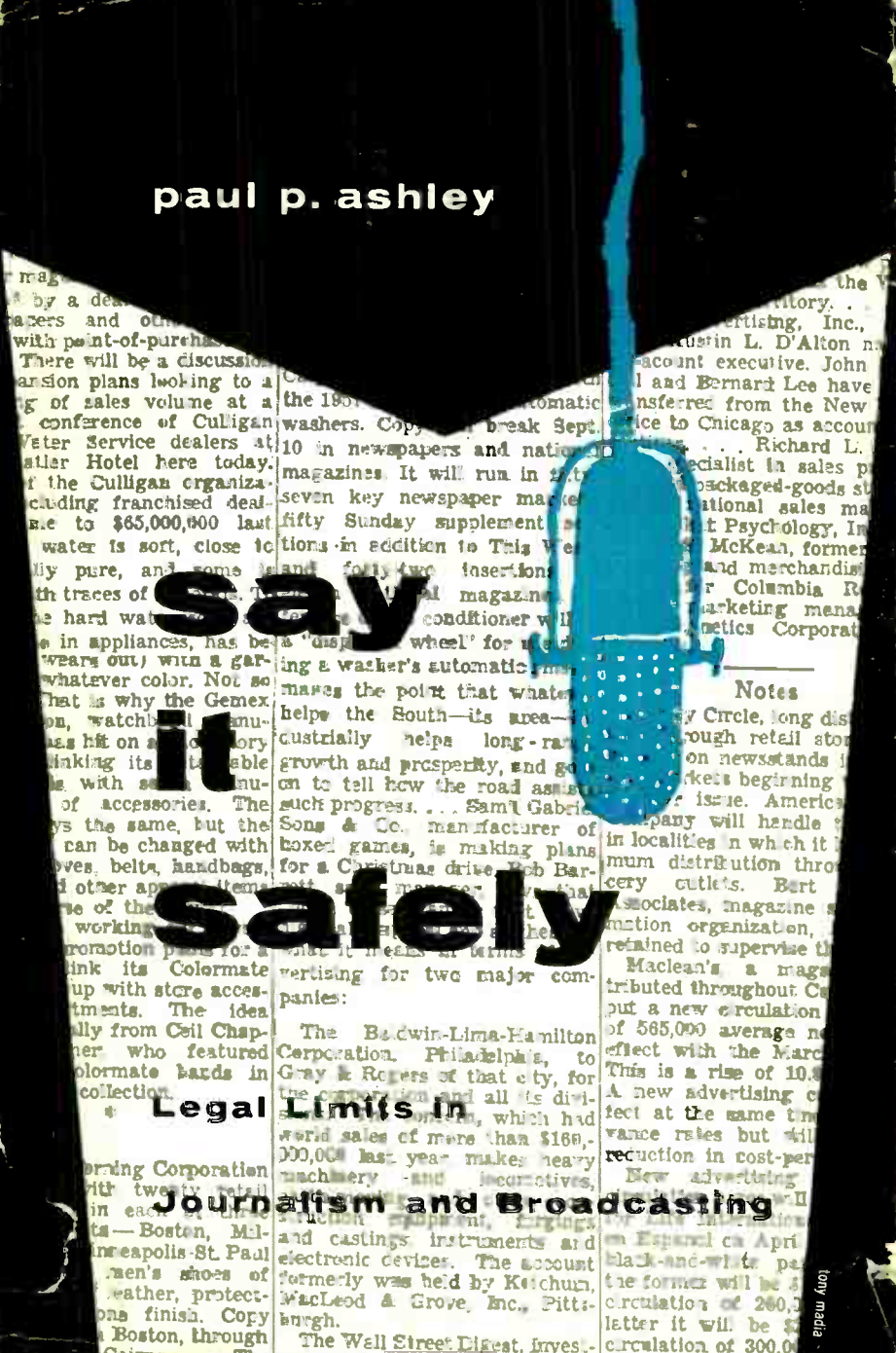
paul p. ashley

say it safely

Legal Limits in Journalism and Broadcasting



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PRESS OPINIONS

"You can scarcely go without this little manual for ready reference . . . it is a terse guide to the legal danger zones that any communicator risks daily."—*Journal of Broadcasting*

"If read and heeded by those for whose use it is written, the result should be a wholesome and greatly needed improvement in the work of news reporters, broadcasters, publicity men, and politicians in and out of office."—*American Bar Association Journal*

"Will a given statement make a writer, broadcaster, or editor liable for damages because of libel or invasion of privacy? Chances are Mr. Ashley's book will lead you to the right answer. It is the simplest, clearest book on the subject for a non-lawyer."—*Author and Journalist*

About the Author

Paul P. Ashley is legal counsel for several newspapers and a broadcasting company, with much practical experience trying libel cases. Author of *Essentials of Libel*, from which this book was adapted, and coauthor of *Cases on Business Law* (Prentice-Hall), he is a former Associate Professor of Business Administration at the University of Washington, and since 1939 Lecturer at the Pacific Coast Banking School.

UNIVERSITY OF WASHINGTON PRESS
Seattle 5

$2.50

SAY IT SAFELY

Legal Limits in Journalism and Broadcasting

By Paul P. Ashley

REVISED EDITION

This manual is designed to help publishers and broadcasters avoid the pitfalls of libel, invasion of privacy, and contempt of court. First expanded and revised in 1956 to include new chapters on Freedom of Speech and Contempt of Court, Photographs, Right of Privacy, and Radio and Television, *Say It Safely* now contains all 1959 rulings on libelous statements and "equal time" in political broadcasts.

Say It Safely is not a reference work destined to repose in the library or morgue, or on the shelf across the room. It is a working tool for day-to-day use by all who write or process copy. It is written, in the words of the author, "in the interest of the citizen's right to know what is going on . . . at a time when the trend is against freedom of expression. The purpose is not to frighten publishers and broadcasters into saying less. It is to help them to be more secure in saying what should be said."

Say It Safely

LEGAL LIMITS IN JOURNALISM AND BROADCASTING

By Paul P. Ashley
OF THE SEATTLE BAR

Revised Edition

SEATTLE · 1959

University of Washington Press

Library of Congress Catalog Card Number: 59-15703
Printed in the United States of America

This book replaces the author's ESSENTIALS OF LIBEL: A HANDBOOK FOR JOURNALISTS, *published in 1948.*

First edition of SAY IT SAFELY: LEGAL LIMITS IN JOURNALISM AND BROADCASTING *published in 1956.*

SAY IT SAFELY: LEGAL LIMITS IN JOURNALISM AND BROADCASTING *is published in cooperation with the Allied Daily Newspapers of Washington and the School of Communications, University of Washington. Author's royalties will go to a scholarship fund for the School of Communications, University of Washington.*

preface

THIS MANUAL is a working tool designed for day-to-day use by all who write or process copy. It is not a reference work destined to repose in the library or morgue, or on the shelf across the room.

Eight years of experience with its forerunner, *Essentials of Libel,* a handbook for journalists, have demonstrated the advantage of placing such a book on each desk, convenient to reach and use. *Say It Safely* includes new material covering radio, television, and photography, with special emphasis on the problems of the political broadcast, column, and on-the-spot radio and television report. In addition to offering a condensed presentation of the law of libel, the manual discusses contempt of court and the developing concept of right of privacy.

Say It Safely is pinpointed for personnel of newspapers, publishers of magazines and books, radio and television broadcasters, the wire services and broadcasting networks, advertising agencies, and students looking toward a career in the field of mass communication. It will also answer practical questions for the public relations counsel of corporations, government, and professional and trade associations.

The dictionary, trade custom, and the courts justify the use of the words "broadcast" and "broadcasters" to include both oral and visual broadcasts, and they are here so used. "Publisher" refers to all who use the printed word or picture; "publication" includes everything circulated on paper.

Unless the context requires otherwise, words such as "copy," "reporter," "writer," "story," and so on apply to both publication and broadcast. For most rules considered herein, it does not matter whether the copy ends up in type or is put on the air.

Elsewhere I made grateful record of help given by friends—Charles Henry of the New York bar, Edward L. Compton of the Los Angeles bar, Garret McEnerney II of the San Francisco bar, Arthur E. Simon and Charles H. Todd of the Seattle bar, and W. W. Witherspoon of the Spokane bar, all able attorneys familiar with this field of the law. Similar acknowledgment was and is made to veteran journalists, a baker's dozen in number, who also read copy and made helpful suggestions.

Now I must add an additional word of thanks to Robert L. Heald of the Washington, D.C., bar and to Otto P. Brandt of Seattle.

But all are exonerated from blame. Responsibility for sins of omission and commission is mine. If *Say It Safely* follows the precedent of its predecessor and proves useful, credit should go to H. P. Everest, vice-president of the University of Washington; Lew Selvidge, executive secretary of the Allied Daily Newspapers of Washington; and M. E. Benson of the University of Washington School of Communications, three hard taskmasters who put me to work again.

P.P.A.

contents

say it safely

LEGAL LIMITS IN JOURNALISM AND BROADCASTING

We should never so entirely avoid danger as to appear irresolute and cowardly. But, at the same time, we should avoid unnecessarily exposing ourselves to danger, than which nothing can be more foolish.
—*Cicero*

1

hazards of libel

LIBEL MAY be defined as any false statement, written or broadcast, which tends to (1) bring any person into public hatred, contempt, or ridicule; (2) cause him to be shunned or avoided; or (3) injure him in his business or occupation.

As to newspapers: Risk of libel cannot wholly be avoided by a newspaper which reports the news and dares to fight for honest government. Deadlines demand fast handling and do not permit an exhaustive and scientific investigation of every fact. Sometimes a paper's duty to its community requires exposure of corruption under actual threat of suit by someone who thinks it will be impossible to prove in open

court the facts which a reporter has unearthed, or even those which have become notorious.

Reports of crimes, trials, politics, public affairs, and many other stories involving defamation must be published. Factual errors creep in. There is a day-to-day hazard from which there is no complete escape by a newspaper worth reading. It is big in terms of dollars.

As to radio and television: The risks of spot news are about the same. Broadcasters face additional hazards inherent in the possibility of departure from script and in Federal Communications Commission regulations pertaining to political broadcasts. These are considered in Chapters 15 and 16.

Though broadcasters do not editorialize and advocate for or against public questions as much as do newspapers, magazines, and books, the rules of fair comment and criticism reviewed in Chapter 9 are already of importance. For instance, some of the patter of a disc jockey can be justified only under the theory of fair comment and criticism. His remarks are not factual; they are but his opinion, and possibly his spontaneous opinion of the moment. When gossiping about private lives, some disc jockeys give the impression of stating supposed facts not meticulously documented as to accuracy. This tendency increases the hazards of their comments.

Regardless of whether the laws of the state permit punitive damages (damages to punish the wrongdoer in addition to compensating the injured), juries do punish by enormous verdicts. Stable, long-established

properties have been crippled as a result of one libelous comment.

Sometimes a jury is prejudiced against the publisher or his policies, or against the broadcaster. Perhaps more frequently, the jury believes that the publisher or broadcaster was wantonly careless, malicious, or so eager for circulation or listeners that he deliberately exploited false rumors of scandal.

So, as to libel, every publisher and broadcaster is engaged in an extra-hazardous occupation.

But, despite the dangers, all the news can be published or broadcast and a strong editorial policy maintained with little risk if the basic legal principles are remembered and observed. Knowing how to recognize and then avoid libelous statements permits publication and broadcast of stories and justifies aggressive editorials which an uninformed person would have to kill because of fear of the unknown. Skilled mountaineers seldom fall; week-enders often do.

This manual is written for all writers, copyreaders, and telegraph, sports, women's, city, and other editors, announcers, commentators, admen, proofreaders, printers, and make-up men who at one stage or another handle the copy which may contain libelous matter. Men processing copy may be as much to blame when a libelous statement slips by unnoticed as is the excited cub reporter who telephones a story to the newsroom, or the advertising salesman who brings in a defamatory political ad.

The purpose here is to state enough by way of rule

or illustration to enable anyone to recognize the risk of libel—*always,* if he gathers the news and writes the story; *usually,* if he sees the copy but does not himself investigate the facts. The policy of all who engage in mass communication is presumed to be:

1. To write or pass copy or ads for publication or broadcast free of hazard.
2. Whenever dangerous copy is observed, to call attention to the risk of libel, violation of the right of privacy, or contempt, as the case may be.

Except for management (top brass, so to speak), the only question is—is this hazardous? If the answer is yes, the doubtful material should be stricken or so earmarked that it cannot escape the attention of those whose responsibility it is to accept or reject the calculated risk of publishing or broadcasting dangerous statements.

The Theme

Because this is a Stop, Look, and Listen handbook, in certain close situations the rules have been strictly construed against publishers and broadcasters. *In court, the interpretation should be more favorable than here indicated.*

But, as already intimated, the basic purpose and theme of this manual is not to deter the publishing and broadcasting of material which should be communicated to the public. It is to state the basic rules of the game in usable, practical form, to the end that

more, not less may be published and put on the air. Nothing is more important to the maintenance of a free society than the preservation and enlargement of the right of the people to know what is going on in public affairs.

Slander is a vice that strikes a double blow, wounding both him that commits, and him against whom it is committed.
—*Saurin*

2

when and why?

WHEN AND WHY, you ask, did this specter called libel arise to haunt us?

Libel is not new in the law. The Papyrus of Hunefer shows the soul of that dignitary, then lately departed, pleading before the sun god, Osiris:

"I have not robbed;
"I have not slandered"

and so on until he had pleaded not guilty to each of the forty-two offenses of which early Egyptian law took cognizance.

Moses commanded: "Neither shalt thou bear false witness against thy neighbor." The Far East punished slander. The Twelve Tables of Rome recognized

defamation. Early Anglo-Saxon and Germanic laws took a serious view of insult by word or gesture. Punishments included excision of the tongue.

In England, a book on libel was written three hundred years ago. Under a French ordinance of the past century the publication of a libel was punished by whipping and, on a second offense, with death.

Lady Montague remarked: "I am charmed with many points of the Turkish law. The proved authors of any notorious falsehood are burned on the forehead with a hot iron." If a South Pacific Islander hurts another person's body or his name, the *nanmarki,* the chief, must decide between them.

For a long time everywhere defamation has been recognized as a crime or as a civil wrong or both. It must be recognized that protection from this tort is one of the most cherished legal rights.

The rise of large newspapers during the nineteenth century brought special legal problems. Their ability to inflict injury is enormous. But the daily deadlines make it difficult to take the precautions available to the publisher of a book or the writer of a speech. The recent development of radio and television poses new problems.

Despite its long history, the law of libel is still in a period of evaluation. It reflects a continuing attempt by society to reach a proper balance between the need of the individual for protection and the necessity for a free dissemination of news and fair comment in respect to public affairs.

Except as granted by statute, no publisher or broadcaster has prerogatives greater than those of the or-

dinary citizen. But even without statutory shield, proper understanding and use of the rules pertaining to qualified privilege and freedom of comment and of criticism afford every publisher and broadcaster ample latitude.

Right of Privacy

Libel is an age-old risk. The year 1890 may be said to mark the birth of its kinsman, right of privacy. As will be shown in Chapter 14, whenever a publisher or broadcaster departs from the dictates of good taste and invades this newly come right of privacy, the right is given a chance to grow, step by step, by adverse court decision. If the trend is permitted to continue, a day may come when right of privacy is deemed a greater hazard than libel.

Fore-warned, fore-armed.

—*Cervantes*

3

what is libel?

THE WORDS "defame" and "defamation" include both libel and slander. If the defamation is by writing, picture (printed or televised), or cartoon, it is a libel. If it is by word of mouth, it is a slander. If by radio, strictly speaking it is a slander. But the law is evolving to treat a false broadcast as a libel. So it should be assumed that when material goes on the air it is subject to the laws of libel, which are much more severe than those relating to slander.

Copy is defamatory if it tends to harm the reputation of any person by (1) exposing him to public aversion, (2) lowering him in the estimation of his fellows, or (3) deterring third persons from dealing with him. A corporation, partnership, club, or other association of individuals may be defamed.

Reputation may be harmed by a story which exposes a person to hatred, contempt, ridicule, or obloquy. Words are libelous if they reflect unfavorably upon personal morality or integrity, or carry imputations which tend to injure financial standing. A story may be defamatory because it injures a person socially, although no reflection is cast upon personal or business character. Even a criminal may be libeled, as by accusing an embezzler of kidnaping. A story reciting drunken driving may be libelous of a driver convicted only of speeding.

Criminal Libel

Defamations tend to disturb the peace. They make men fighting mad. Thus the state, as custodian of the peace, is interested. A libel may be a crime in addition to giving rise to a civil action in favor of the person defamed. Loosely, a criminal libel may be defined as a malicious or wanton publication of defamatory statements or pictures. In contrast to civil libel, truth cannot be relied upon as a defense against an accusation of criminal libel.

Defamation of the dead may be a criminal libel but does not ordinarily give rise to a civil action. No further reference will be made to criminal libel. Nor will seditious libel, which tends toward treason, be touched upon.

Types of Civil Libel

1. A libel may consist of a statement of fact, that is to say, a report of a particular act, omission, or condition.

A story which indicates that by act or omission a person has betrayed a trust, is guilty of dishonesty, fraud, or falsehood, has been cowardly or cruel, has been profane, has been guilty of political corruption, has refused to pay his debts, or has been guilty of a crime, may be libelous. It may be libelous to report a condition of drunkenness, insanity, loathsome disease, or illegitimacy; or to say, for instance, that a person is an infidel or descends from one of the so-called "inferior" races. Words in themselves innocent but which, as used, injure one's business, property, profession, trade, or employment may be actionable.

2. A libel may consist of a statement of opinion based on facts, actual or supposed.

To say that a person is a hypocrite, faker, crook, sneak, criminal, a "Benedict Arnold," or otherwise adversely characterize him may be libelous whether or not the facts on which the remark is based are known to the reader.

The propriety of the opinion, in view of the provable facts, is a matter of judgment. In the heat of a campaign or crusade certain adjectives and epithets may seem proper enough. Later, calmly viewing all of the facts, a judge or jury may hold the words defamatory.

3. An indirect statement or imputation may be libelous if susceptible of a defamatory interpretation.

Words written in jest may be read as libelous. Satire, irony, figure of speech, and innuendo may be defamatory, though not so intended.

Disparagement of Property (Often Called Slander of Title)

A story disparaging another's property (whether land, buildings, chattels, or intangible things, such as a copyright), under such circumstances that it should have been foreseen that a purchaser or lessee of the property might be influenced adversely, may give rise to a cause of action in favor of the owner for the resulting pecuniary loss.

ILLUSTRATIONS

1. Published or broadcast in good faith, a story says that many titles in Grey Acre Subdivision are defective. That is not true. The owner proves that sales were lost. Unless the story is privileged, he is entitled to damages.

2. The women's page or morning broadcast says that a particular method of canning renders food unwholesome. Jones is a canner. His advertising and labels show that he uses that method. His business falls off. The broadcaster or publisher may be forced to prove the truth of his assertion.

Statements of this sort differ from a true libel which reflects on the character of the owner or operator, as when a boarding house is called a brothel.

Meaning of Words

In testing for libel, the meaning of language is not limited to orthodox dictionary definition. It hinges also upon the temper of the times, colloquialisms, connotations, previous and subsequent articles or

broadcasts, and matters of common knowledge in the circulation or listening area.

Meaning reflects the whole picture in relation to day and place of publication or broadcast and probable day and place of trial should a suit be brought. Context enters into meaning.

Therefore it must be remembered that the words used will be read or heard in the framework of the public knowledge.

ILLUSTRATION

> To say that Joe Doakes, the gifted photographer, was having a hilarious time after five highballs would not, under most circumstances, be libelous of Joe. But to say that Joseph H. Doakes was enjoying similar festivities might be a libel *per se* if the reader or listener might reasonably conclude the reference to be to the Reverend Joseph H. Doakes, the eminent pastor of the First Baptist Church.

"I did not mean it that way" may not help. If some readers can naturally and reasonably understand a story to be defamatory, then it may be.

Standing alone, the statement, "Smith got rich fast" would not imply corruption. But the assertion, "Smith got rich fast while he was a tax collector," or the words "got rich fast" used in a context where it is implicit that Smith is or was the tax collector might well be libelous *per se*.

Interpretation is always in relation to time, place, and circumstances. Presently it is libelous *per se* to call a man a communist. But that was not necessarily

so while Russia was our ally. The time may again come when it is not so.

Judges will not strip words to their minimum meaning and ignore unfavorable implications. They will not strain to interpret pictures and cartoons in their mildest and most inoffensive sense in order to hold them not libelous.

A man defames his neighbor at his peril.
—Pollock

4

keep away from libel per se

THE TERM *per se* means "by or in itself." When the defamation is evident from the article itself, it is called a libel *per se.*

A libel *per se* is actionable *per se;* in itself it is a sufficient basis for a cause of action. Plaintiff need not allege or prove that he suffered actual dollar damage. In some states punitive damages (damages to punish defendant) are allowed.

The consequence is that the publisher or broadcaster must prove truth or show privilege or other sufficient defense. The plaintiff is not required to prove the falsity. These are the dangerous libels.

In sharp contrast to libel *per se,* in unusual circumstances, the most innocent-sounding copy may be

defamatory. Suppose a story in print or over the air tells of the fine pitching of Sam Smith at Saturday's sand-lot game. It should have said "Friday." If Sam is a leader in a church which stresses Saturday as a holy day, Sam may be libeled. But this is not a libel *per se*. Sam must demonstrate the defamation and prove that he suffered special harm.

These mild libels are difficult to recognize when editing script and reading copy or proof. They are not often important. Almost always a correction will cure the ill.

Except when management is evaluating risk, it should always be assumed that anything which appears to be libelous may be libelous *per se*. If management believes a story is of public importance, management may decide that though apparently defamatory the statement is not a libel *per se* and may be broadcast or published because (even though libelous) it seems unlikely that the plaintiff could prove he suffered damage.

But for all other purposes *the definitions of defamatory copy and pictures and all of the descriptions of types of civil libel found in Chapter 3 should be used as the measure of libel* per se.

Here classified are a few specific expressions typical of those which should be considered libelous *per se* when referring to:

Affiliations

atheist
communist
fascist

Ku Klux Klan
Nazi
nudist or other queer groups
subversive groups
any organization which, at the moment, is opprobrious

Attorneys

ambulance chaser
betrayed client
hypocrite and altered records
lacks requisite qualifications to practice
pettifogging shyster
tricky and dishonest
unprofessional conduct

Authors and journalists

attacks sanctity of home and desecrates memory of the dead
defender of degenerates for hire
humbug and fraud
plagiarist
rewrote another's work

Business establishments—corporations

ad a fraud
adulteration of products
complicity in swindle
dirty products
driven out competitors and mercilessly robbed the people
false weights used
filthy and unhealthful milk

financially weak
hot, dirty, and poorly ventilated
precarious existence, not able to meet its financial obligations
price wrecker
racketeering methods
refuses to pay debts
swindle
unpaid claims
wares worthless

Businessmen

bankrupt
blackmail
crook
defrauding government
evading payment of a debt
false representations
false weights used
fraud
gouged money
sharp dealing
short in accounts

Candidates, officeholders, politicians

buys votes
campaign of abuse and slander
corruption
deadbeat running for office for money
debauched the electorate with liquor
defaulter and bad moral character
dishonest treasury raid

falsifier of public documents
fawning sycophant
filching money from public
grafter
grossest dereliction of duty, if not crime
groveling office seeker
judge was a peril to children and sympathetic with criminals
partner of notorious criminal
paid dollars for office
perjurer
pockets public funds
received dollars for offices
scoundrel
sells his influence
sold out to the monopoly
solicited slush funds
stuffed the ballot box
swindler
superintendent of an institution permitted vile and immoral conditions

Clergymen

conduct unbecoming a married man and minister
curses, drinks, gambles
disgraceful conduct
intimate with choir leader
trouble with women
unmannerly, discourteous, and ignorant

Crimes

any words imputing a crime
connivance with crime
consort with criminals

Disease

any loathsome disease
any acute mental disorder
venereal diseases

Doctors or dentists

abortionist
advertising specialist
caused death by reckless treatment
charlatan
drug addict
faker
malpractice
neglected patient
quack
unprofessional conduct
used improper instruments

Domestic difficulties

another wife elsewhere
divorce action instituted (i.e., when none had been)
gross misconduct

Drunkenness or liquor

aiding moonshiners
booze-hound
drunkard

kept booze for unlawful purposes
toper

Honesty (see also *Reputation*)

crook
dishonesty
fraud
guilty of falsehood
liar
rogue
unreliable and does not meet his obligations
unworthy of credit

Hotels, apartments, and boarding houses

brothel
disorderly house
gambling house
vice den

Labor and management

company put on unfair list
company violated its union contract
employer falsified facts to workers and the public
racketeers
scab
strikebreaker and foe of labor
union officials corrupt

Morality

adulterer
affinity

bigamist
fornication
illicit relations
infidelity
lovemate
mistress
moral delinquency
moral obliquity
promiscuous lovemaker
seducer
unmarried mother
unchastity
villain

Obituaries (*person not dead*)

death in discreditable circumstances
suicide, or other disgraceful cause

Patriotism

anarchist
flag, called it a dirty rag
red-tinted agitator
secret foreign agent
seditious agitator
spreader of distrust, discontent, and sedition
traitor

Reputation

deadbeat
disreputable
gambler
horse thief

hypocrite
illegitimate
poltroon
rascal
skunk
suicide attempted
venality
vile and slanderous tongue
wastrel

Sanity

fit to be sent to asylum
just a little daft
unsafe to be at large
unsound mind

Teachers

ignoramus
incompetent
intemperate
shameless skulduggery
unfit to be on faculty
unladylike conduct, unfit to teach school

This and that

blasphemy, guilty of
community cannot despise him more
deprived of ordinances of the church
ejected by police (the reference being to a reputable citizen)
informer
infringed a patent
insulted females

juror agreed to determine verdict by lot
juror agreed to determine verdict by game of checkers
jurors did injustice to oaths
libelous journalist
publisher of a libel
suicide, in reference to a living person
uses cloak of religion for unworthy purposes

Recapitulation

Specific false expressions like those just listed (all included in the types of libel described in Chapter 3) may be reclassified into four kinds of libel *per se:*

1. Accusations or imputations of crime.
2. Statements or insinuations of insanity or of loathsome or contagious disease.
3. Assertions of want of capacity to conduct one's business or profession.
4. Any expression which tends to bring public hatred, contempt, or ridicule.

And of course the most innocuous of words, so combined that at the time and place used they mean something libelous *per se,* must be so classified.

Hell is paved with good intentions.
—*Samuel Johnson*

5

intention and mistake

MOST LIBEL actions stem from careless reporting or writing or from careless treatment in the course of editing, printing, or broadcasting—including departures from script. Many a libel comes from what may be termed unimaginative handling of a routine story, i.e., no one noticed that, while superficially innocent of libel, the story was actually libelous *per se*. Attempts to build a story out of little or nothing involve disproportionate risks.

Mistake

The publisher or broadcaster may be liable even though (1) the writer carefully gathered data and believed them true; (2) he did not intend the story to

be read in a defamatory sense; (3) he did not realize that it could be so understood; and (4) no copyreader, continuity editor, proofreader, or anyone else suspected defamation. If the words are susceptible of a defamatory meaning, the copy or script may be defamatory despite the most innocent of motives. If even a minority of readers, listeners, or viewers could reasonably interpret the story as defamatory, the court or jury may so construe it.

Good faith is of course a *defensive* aid. In contrast, if anyone preparing, passing upon, or handling copy has been negligent in failing to observe discernible error, the defendants in the libel case have two strikes against them.

Headlines

Defamatory headlines are not cured by explanations in the story. The courts realize that frequently the headlines alone are read, and that the article itself may be read so hastily that fine distinctions are not grasped by the reader.

> ***CAUTION***
>
> Because of their brevity, headlines may be ambiguous. When the story itself is close to being dangerous, the headlines must be watched with special care.

Misuse of headlines comes most frequently in connection with reports of criminal investigations. "Murderer Apprehended," "Kidnaper Caught," "Sheriff Nabs Thief," and the like may be libelous though

followed (it might be said *because* followed) by a story which is explicit to the effect that the suspect has only been arrested or charged and stoutly maintains his innocence.

One newspaper suffered a large verdict for its headline, "Spy Caught." A competitive paper escaped liability because its headlines said, "Arrested Aboard Ship as Spy."

A headline saying, "Doctor Kills Child" was followed by a story of an auto accident in which the doctor driver was perhaps negligent but certainly not deliberately reckless. The headline misleads. It connotes intent or unprofessional conduct.

A press association is not liable for headlines added by a newspaper.

Identification

There is not sufficient excuse if the writer and all others passing upon copy or script honestly believe the reference is applicable only to a certain person if, in fact, the public may reasonably think the story applies to another person. The test is not whom the story intends to name but who a part of the audience may reasonably think is named—"not who is meant but who is hit," as one court put it.

ILLUSTRATIONS

Acquaintances might be able to identify an unnamed subject from:

1. "Veteran's wife says he beat her and year-old triplets."

2. "Mr. Rothschild, the bank's president, believes that a newly employed watchman is implicated in the robbery."

Recently libelous things were published about the conduct of a corporation. No officer was mentioned. The president sued. He showed that he controlled the corporation. Ergo, the townsfolk understood that he had been charged with the nefarious acts. He was allowed recovery without proof of special damage.

A telecast sponsored by the Better Business Bureau defamed the "Day and Night Television Service." Suit was brought by the two partners although neither had been named and one was a silent partner, not active in the business. The libel of the trade name was held a libel of the two partners, either of whom was entitled to maintain the successful action against the broadcasting company.

When a person is identified by address, vocation, hobby (such as archery), relatives, or other data, the indicia, if in error, may make the story libelous. Suppose a story says that Bill Brown, former football star, was arrested for drunken driving. The name is correct, but the deputy sheriff was in error as to the football. The story libels the football star of that name.

CAUTION

If a coined name is used, make sure it will not fit some living person or that it is obviously a "John Doe" type of name, not applicable to anyone in particular.

But the persons named must be sufficiently identified. Otherwise someone else of that name may be able to state a cause of action. A defamatory statement is made of Richard Roe of Olympia without further identification. Three men of that name live in that city. Two of them might be in a position to state a cause of action for a libel even though the story is true as to the third.

It should not be assumed that similarity in names means identity.

Libel of a Class

An individual may be defamed by words which disparage a small group of which he is a member, as by a statement that "the members of the school board are corrupt." Hence fine discrimination must be exercised when deciding whether a reference to a small body of people (or to an unnamed member or members thereof) identifies particular persons.

The size of the group is a critical, but not necessarily the controlling, factor. Obviously a reference to "a corrupt Congressman" or to "corrupt Congressmen" does not in itself identify anyone in that huge body. But a libelous statement referring to the Congressional delegation from a named state, particularly a small state, might be actionable by some or all of those Congressmen.

ILLUSTRATION

Assume a board of twelve city councilmen and, in the same area, a board of three county com-

missioners. Accusations of graft in city and county government may require different treatment.

Successive Stories

Whenever there is a succession of stories, a person may be libeled by a story in which he is not named and from which, standing alone, he cannot be identified, if he is named or identified in a previous or subsequent story. Hence, all of a series must be read together for the purpose of determining possible libel and identification.

Malice from Carelessness

In the eyes of the jury carelessness merges into recklessness. They both feed a charge of malice. For practical purposes it is not necessary to delve into what constitutes malice—actual and constructive. Legal rules as to whether and when plaintiff must allege and prove malice are bypassed here. Suffice it to say that the jury, if it thinks that the tone of a story or comment or the circumstances of publication or broadcast indicate malice toward the plaintiff, will be slow to believe the defenses and may be lavish in the verdict.

Group Libel

Statutory libel of the group itself is in sharp contrast to libel of an individual by reference to his group. An occasional law prohibits any publication

or broadcast which, for instance, "would expose citizens of any race, creed, or color to contempt, derision, or obloquy." Such restrictions are primarily penal.

Tale-bearers are as bad as the tale-makers.

—*Sheridan*

6

quotations and ads

PUBLISHERS and broadcasters may not repeat false and defamatory matter and escape liability with the plea that they were but quoting a source deemed authentic or passing along current news already published or on the air. They are not saved by naming the author or origin, or even by accompanying the defamation with an expression of disbelief.

Quotations

Except in a very few places, they may be held liable for publication or broadcast of items received through the news services. They may be responsible for what their columnists and commentators say de-

spite disavowal of sponsorship and disagreement with the statements made and views expressed.

Truth, privilege, fair comment, and other defenses are of course available. But in the absence of privilege, the defense of truth requires more than merely proving that the quoted statement was made. The jury must be satisfied that its assertions are true.

ILLUSTRATION

At an important community club meeting an indignant citizen asserted that a certain office-holder "pockets public funds." This was repeated by the press and over the air. Libel suits ensued. A host of witnesses testified that those very words had been used. Such testimony does not prove truth. The occasion being unprivileged, the defendants must convince each jury that plaintiff did pocket public funds.

If the source of the story is such that some privilege may attach, that source must be identified as by name and office. The loose expression "high officials state" is a weak foundation upon which to build a defense of privilege. Reference to a proper specific source shows authenticity and the propriety of relying upon that source.

ILLUSTRATIONS

For cause of death, quote "J. B. Ded, King County Coroner," if possible, rather than someone in another department. If the story has to do with an investigation of graft or faulty construction in the erection of the new city hall, quote the Mayor

or head of the Board of Public Works, not a councilman.

The stock phrases "it is alleged," "it is reported," "police say," and so on are meaningless so far as liability for defamation is concerned unless the story is actually privileged.

It distills almost to this: in the absence of qualified privilege, one who repeats another's defamatory remarks is legally responsible unless he has available defenses which would shield him were he the author.

Advertisements

When passing upon advertising copy and script, apply the general rules pertaining to libel. In addition, the possibility of disparaging (libeling) the property or business of a third party must be kept in mind (see Chapter 3). Unnamed individuals may be identified by reference to their business or trade name. The printed ad which appears upon the screen in a telecast should be scrutinized as well as the script which will reach the audience through the voice of the announcer.

In some states there are statutes imposing artificial, in contrast to common law, restrictions upon advertising. Indeed, legislation of this sort is sometimes found in city ordinances with municipal, but not statewide, effect. Local counsel should be consulted in these matters.

Likewise, advertising must conform to postal regulations—in respect, for instance, to lotteries.

Political Ads

Political ads may be subject to statutory requirements touching identification of sponsors and related matters.

Not infrequently a campaign committee offers a libelous or a borderline ad with the assertion that "this has been approved by our attorney and he says it is safe." If the copy is plainly libelous *per se,* it should not be run or broadcast unless management is on a crusade and knowingly assumes the risk.

If, however, there is some question as to whether it is libelous, and you are dealing with responsible, solvent people, a practical out is to suggest to the committee: "You, of course, have confidence in your attorney. Our attorney is doubtful, but you have a greater factual background and he may be unduly apprehensive. If all members of the committee and their wives will enter into an agreement to indemnify us if any judgment should be entered against us, and to pay all costs of the suit, including our attorney's fees, we will be glad to print or broadcast your ad." Almost always this ends the matter and snuffs out criticism to the effect that the publisher or broadcaster is too timid.

Broadcasts by candidates for political office are discussed in Chapter 16.

> The only security of all is in a free press. . . . No government ought to be without censors: and where the press is free no one ever will.
>
> —*Thomas Jefferson*

7

privilege—who has it?

THE BROAD term "privilege" includes both absolute privilege and qualified privilege. Publishers and broadcasters enjoy no absolute privilege. For them and for all who do not qualify as actors on a stage affording absolute privilege, the word "privilege" must mean a qualified or conditional privilege if the essential legal requirements are met and preserved.

Absolute Privilege

Absolute privilege is strictly limited, both as to the persons whose utterances are protected and the occasions when it may be invoked. It gives freedom to utter any statements however erroneous and however

damaging about any person, with complete immunity from accountability for the libelous utterance. It is a freedom conferred only when the rights of individuals to protection against libel must be subjugated to the common good as, principally, in the course of judicial and legislative proceedings.

A judge or other judicial officer, an attorney participating in a judicial proceeding, parties to litigation, witnesses, and jurors are all absolutely privileged to make false and defamatory statements if they bear some relationship to the matter under consideration. A member of the Congress of the United States or of the legislature of any state or territory is absolutely privileged to say false and defamatory things in the performance of his legislative function. But in a lesser assembly (a town council, for instance) a member may not enjoy an absolute privilege if he is malicious or if his remarks become irrelevant to the public matter then under consideration.

The President of the United States and the governor of any state or territory, the Cabinet officers of the United States, and the corresponding officers of any state or territory are absolutely privileged when making false and defamatory statements if (1) they are made in the course of executive proceedings in which the officer is acting and (2) they have some relation thereto. Lesser executives might not enjoy this absolute immunity. Nor does the absolute privilege extend to statements such as press releases or newspaper interviews, even though made by a higher executive. When statements absolutely privileged

when uttered are repeated by radio and the press, the privilege becomes qualified or conditioned.

Qualified Privilege

Sometimes statements made between two (or among a few) individuals, as between past and prospective employers of an applicant for a job, are qualifiedly privileged. The rules pertaining to these private communications are here bypassed; publishers and broadcasters are primarily interested in reporting proceedings, occasions, and matters affecting the public generally and in relaying spot news to everybody.

A qualified—a conditional—privilege arises when it is more important for the public to be informed about the privileged proceeding or event than it is for an individual to have legal redress. This most frequently occurs in connection with reports of judicial or legislative proceedings and in stories concerning the administration of government.

Anyone reporting these and other privileged occasions to the public enjoys a limited privilege. This privilege of telling about these occasions is said to be qualified or conditional because good faith and absence of malice are elements. If qualified privilege is abused, it is forfeited.

The qualifiedly privileged report need not be a verbatim account, but it must be fair and impartial.

The qualified privilege applies only to that which happened and was said during the privileged occasion. If the story includes additional facts, the broadcaster or publisher must be prepared to prove that the added statements are true.

There is no formula which will automatically determine how much reliance may be placed upon all occasions of qualified privilege. The various typical situations must therefore be described, and a practical evaluation made. This is done in Chapter 8.

Hereafter the lone word "privilege" will be used in lieu of the longer expression "conditional or qualified privilege."

Maxima confusio in libello

The confusion which, in some states, exists in the law of libel has been noted by many writers, both judicial and lay. It is deplored by all. Explorations into the reasons leading to the confusion would end in mere speculation, not worth while here.

Suffice it to say that significant segments of the law of libel are unique—dissimilar from legal rules with which lawyers and judges are most familiar. Libel cases are relatively few in number. Judges are not ordinarily experienced in the practical application of the basic concepts of qualified privilege and fair comment essential to the preservation of freedom of speech and, in turn, of a free society.

And so it is that here and there will be found maverick decisions which distort the law of libel. For instance, though it finally abandoned it, for more than a generation an appellate court repeated the whimsical refrain:

> "Privilege ends where falsity begins."

Yet obviously the very essence of the defense of privilege is protection despite falsity.

Recently, in a 5-to-4 decision, the majority of a nine-judge appellate court twice said (in essence):

> "The defense of qualified privilege does not extend to a publication to the entire public."

If that were the law, legislative and judicial proceedings could not be reported without omitting defamatory remarks, by whomsoever made, except at prohibitive risk. It is apparent that such an error cannot control in a government by and for the people—the "entire public" does have a right to know.

The purpose of these remarks is to remind you that every jurisdiction is subject to idiosyncrasies in the law of libel. The most bothersome manifestations are in the areas of qualified privilege and fair comment. If there are any special hazards in your state, your own attorney will know.

To abuse it is to lose it.

—*Macrae*

8

qualified privilege—practical application

QUALIFIED privilege is frequent, but the *kinds* or *classes* of occasions which give rise to a qualified privilege are not numerous. The quality, the degree, the vigor of the qualified privilege vary with the kind of occasion and the surrounding circumstances.

Roughly arranged in descending order from most vigorous to feeble, the kinds of occasions which give rise to a qualified privilege when what happened at them is reported are these:

1. *Judicial, legislative, and executive proceedings:* Everyone may quote false and defamatory matter made in the course of and as part of judicial or most public legislative or executive proceedings. The ac-

curate and fair reports of these proceedings are protected by a privilege which is qualified only to the extent that protection is lost if the story is published for the purpose of defaming the person named and not for the purpose of informing the public. This privilege differs from a feeble qualified privilege in that there is protection even though it is known that the defamatory statement is false.

This vigorous privilege is applicable to coverage of proceedings in any court, federal, state, or municipal, whether the court is one of general or of special and limited jurisdiction. It applies to stories of other proceedings, judicial in character, although they took place before an administrative, executive, or legislative body, as, for example, an extradition hearing before a state governor or impeachment proceedings before a legislative body.

It protects a story when it tells of the official proceedings of Congress or of any state legislature. It applies also, but not necessarily with full force, to the proceedings of any city or town council, school board, civil service commission, or other official municipal body.

Except in the most flagrant situations, the reporter need not be concerned with whether the court has lawful jurisdiction of a particular proceeding in which it undertakes to act or whether a legislative committee has exceeded its powers.

CAUTION

Statements stricken from the record may not be privileged.

2. *Ex parte hearings:* Sometimes, as on a show cause order, only one party is before the court. The other has not yet had a chance to be heard. This does not destroy privilege if the matter has come officially before the tribunal and action has been taken.

CAUTION

When only one side has been heard, great care should be used lest the story be unfair to the absent party. The privilege must not be abused. If possible, the explanation of the person defamed should be in the first story.

3. *Pleadings before action:* A great judge said that in respect to court proceedings a qualified privilege is granted not to satisfy public curiosity about a neighbor's misfortune but to enable the public to watch the court perform its judicial functions and see that justice is even-handed. Consistent with his theory, in most states the mere filing of a complaint, petition, affidavit, or other document with the clerk of the court does not in itself make the contents privileged.

Hence, unless (as in a few jurisdictions) the laws of the states in which the publication circulates or the broadcast is heard are clear to the effect that merely filing such a document does give rise to a qualified privilege, it should be assumed that there is none.

The privilege to repeat its contents attaches when a document has been called to the attention of the court and the court has acted. Final disposition of the matter by the court is not required. It is enough if some judicial action has been taken so that in the

normal progress of the proceeding a final decision will be rendered.

> Almost always, if a modicum of skill is exercised, a first-class page one story and headline can be run or a news broadcast safely featured when the complaint or other document is first filed, even before any judicial action is taken. The parties may be named, the nature of the action and the relief sought described, and (except in very rare instances) enough of the allegations recited to round out the story. Usually the omission or toning down of specific defamatory allegations will make the publication or broadcast secure.

Consistent with the preceding subsection, it is immaterial whether the proceeding is *ex parte* or contested, with both parties present.

Pleadings in abatement proceedings are subject to the rules just given.

4. *Coroner's jury:* The actual verdict of a coroner's jury is privileged unless it is apparent that the procedure was irregular, that the verdict was not reached in good faith, or that it contains defamatory matter not pertinent to the inquiry. Sometimes the inquiry before a coroner's jury is one-sided with no chance for an accused to be heard. Sometimes the accused is present and is afforded an opportunity to testify and examine witnesses. Accordingly, when an inquest is reported, discrimination must be used.

CAUTION

> If, for instance, a verdict reads, "Death by poisoning," but does not name the person who adminis-

tered the vial, you assume disproportionate risk if you name the suspected person, unless the story gives a fair and impartial account of his testimony.

5. *Grand juries:* The following observations in respect to the handling of grand jury indictments and reports are subject to this caution: Some grand juries have statutory power to investigate public institutions and other public affairs and to make reports concerning them. Other grand juries—including federal—have only the right to indict or ignore; such a jury has no right to make a report of any kind. Its "report" might have no privilege at all.

A grand jury conducts a secret inquisition. There is no *carte blanche* to repeat everything said before or reported by a grand jury, even after its indictment or report has been presented to the court. The indictments, if any, and matters of public concern contained in the report may be told.

The news story may say that the grand jury was critical of, or severely condemned, the subject of its inquiry but should not recite libelous details unless clearly in the public interest or included in an indictment.

CAUTION

Grand jury reports containing libelous imputations upon private citizens or upon public officers not touching their fitness for office or their fidelity to the public service or the propriety of official acts must be handled circumspectly.

6. *Hearings and investigations:* Accounts of executive and legislative investigations have a qualified privilege. The privilege may extend to proceedings, findings, and reports of legislative committees, state or federal agencies, and special bodies appointed under authority of law for public purposes if the matter under consideration actually is of public concern.

Here, as in many situations, the quality of the privilege varies with the circumstances. Privilege in reporting an important public investigation or hearing by the Interstate Commerce Commission, the National Labor Relations Board, or other similar public bodies approaches that described in subsection 1. But in the telling of sleuthing by a committee of a town council or by county commissioners, privilege might be slight or even nil. When the stature and authority of the investigating body are not obvious, any claim of privilege may need to be reinforced by the public importance of the matter under scrutiny.

Libelous statements made at the hearing but not germane to the public question involved should be deemed not privileged.

7. *Indictments, information, warrant for arrest:* There is a privilege when publishing or broadcasting the charge contained in an information, indictment, or warrant for arrest. Here privilege combines with the easily provable truth that the charge was actually filed as long, but only as long, as the story stays by the court record. Often the off-the-record statements of law enforcement officers contain real news. But, as

will be seen, except in rare instances these carry little or no privilege.

CAUTIONS

(a) It should be remembered that a suspect is presumed innocent until proved guilty. It may be proper to say, "Jones was arrested and questioned" but libelous to say, "Burglar is caught" or "Hunted criminal is found." When no indictment, information, or warrant has been issued, the story should usually be limited to a statement such as, "Blank was arrested and is being held" in connection with the case.

(b) Expressions such as "suspect grilled" should not be used until a charge has been filed. The suspect may be exonerated, never charged with crime, and then claim that he was being questioned only as a possible witness.

(c) If it is manifest that the charging officer has gone beyond the customary language of a charge and, for instance, unnecessarily maligned third persons, the material should be handled charily.

Reports of the preliminary proceedings before the magistrate as well as of the trial itself are privileged.

8. *Public officials:* As will be again mentioned in Chapter 9 concerning comment and criticism, a growing number of states recognize a qualified privilege when reporting upon the acts of public officials. The ramifications of government, federal, state, and municipal, are beyond description. Many courts now recognize that it is no longer realistic to assume that even the largest publisher or broadcaster has personnel sufficient to investigate every facet of public af-

fairs and to be able to prove in court that every statement made touching the administration of government is literally true. Hence it is hoped that, in response to the public's need to know what is going on in government, a general rule will evolve to the effect that if the publisher or broadcaster in good faith believes the statement to be true, and has made a fair investigation or has received his news in the belief that a fair investigation has been made, and publishes or broadcasts in good faith, without malice, there is a qualified privilege. As stated by the supreme court of West Virginia:

> ". . . a citizen of a free state having an interest in the conduct of the affairs of his government should not be held to strict accountability for a misstatement of fact, if he has tried to ascertain the truth and, on a reasonable basis, honestly and in good faith believes that the statements made by him are true."

Courts already recognize a privilege in the reporting of the official action (but not the accompanying statements, unless part of a privileged proceeding) of high executive and administrative officials of the state or nation and, to a lesser degree, when reporting the official action of the heads of lesser governments, such as cities, towns, counties, school districts, park, water, and irrigation districts, and other public bodies.

CAUTION

Subject to exceptions which may arise in connection with reporting matters of great public concern,

it is the conservative course to assume that statements by legislators, judges, prosecuting attorneys, and other public officers which are not made openly as a part of and in the course of a privileged public proceeding are no more privileged than are the statements of a private individual.

And, obviously, a public official may be speaking or acting as a private citizen in an affair not connected with his public duties. For example, a prosecuting attorney representing a private client is not a public official in that representation.

Assertions of a recall petition not directed to efficiency or competency in office but to the officeholder's private life or honesty carry no privilege. If the petition asserts dishonesty in the conduct of public office, great care must be used. Unless you are prepared to prove truth, details should not be published. Nor should the story be so written as to convey the impression of guilt.

9. *Replies to attacks:* One who has been attacked by another has the right of self-defense. The role of publishers and broadcasters in such a situation is discussed in Chapter 10. When there is a broadcast by a political candidate, this right is in black and white under FCC regulations, as will be noted in Chapter 16.

10. *Semipublic proceedings:* Unless, because of unusual circumstances, the matter is of paramount public importance, there is no privilege when reporting private gatherings—church, society, lodge, stockholders' meetings, conventions, caucuses, community clubs, and the like. Unless in a particular case the

public interest justifies it, political meetings afford no privilege.

However, there are exceptions. For example, an ecclesiastical trial may be before a tribunal duly constituted by church law. If the proceeding is open to the public and is a matter of public importance, there may be a qualified privilege. But all factors should be weighed.

When the legislature has given a medical or bar association or other semipublic body authority in respect to admission and discipline, its public proceedings may carry a certain privilege.

11. *Police news:* The suspicions and theories, the clues and forecasts, and the reports of law enforcement officers seeking publicity often accompany criminal proceedings. These statements are not privileged. Privilege must be based on one or more of the several occasions already discussed.

CAUTION

The report by an officer that the prisoner has confessed is not privileged. It may be true, but sometimes a prisoner denies that he confessed. You must be prepared to prove that the confession was made. Confessions that implicate others have added hazards.

Sometimes confessions are lost by the police. In dubious cases it is prudent to photograph the confession so that it will be available when needed.

12. *Depositions:* Ordinarily depositions of parties or witnesses are not privileged until read in court.

Beware of depositions released by publicity-conscious lawyers prior to presentation in court.

13. *Innocent third parties:* Depending upon the type of hearing, the privilege to report public proceedings is not an unlimited license to repeat whatever may be said about persons not party to the proceedings, particularly when the remarks are not germane to the matters in issue.

Identify the Privileged Occasion

In Chapter 6 it was mentioned that when a source is quoted it should be identified. Whenever privilege is present, the nature of that privilege should be revealed in the publication or broadcast so that all will know the origin of the assertions.

ILLUSTRATION

Secret Service men were quoted as charging Hughes and wife with making and passing bogus money. When sued, the newspaper attributed the announcement to the Secretary of the Treasury. But the article itself neither mentioned the Secretary of the Treasury nor intimated that it was reporting an official statement by him.

The court held that undisclosed similarity or coincidence between a defendant's libelous statement and a public official's previous announcement is not enough to make the statement a report of the official announcement.

Hence, as a matter of foresight, it should be assumed that a publication or broadcast not purporting

to be a report of an official proceeding cannot claim privilege as a report of that proceeding.

In the illustration just given the court did not decide whether qualified privilege would extend to the report of such an "announcement" by the Secretary of the Treasury. Under the rules summarized in the preceding paragraphs (8. *Public officials* and 11. *Police news*), a safer course would have been to withhold names until a specific charge was of public record.

Abuse of Privilege

As has been seen, as a matter of public policy, anyone is protected when in good faith he gives a fair and accurate report of a privileged occasion even though the report quotes false and defamatory statements. But if this qualified privilege is misused it may be destroyed and lost as a defense.

The fact that the story tells of a privileged occasion is not in itself enough. It must be consistent with the purposes of the qualified privilege. It must be an impartial (historical) account of the privileged event which included the defamation. The story may be lively, even sensational, but it must not distort. It must not be inaccurate, inflammatory, vicious, or malicious when reciting the defamatory statements made in the course of a privileged event.

In respect to accuracy, publishers and broadcasters are not held to the scientific precision demanded in technical or similar reporting. It is enough if the arti-

cle gives a substantially correct account of what happened.

When Privilege Is Weak

When the occasion is not clearly one which affords a qualified privilege which can be relied upon, your position is strengthened by including statements from the person defamed. These should be given a prominence similar to the charges against him. Even the sentence "John Doe could not be reached for comment" helps somewhat. It shows a desire to give an impartial account.

Calculated Risk

Words and circumstances are infinite in number and character. Permissible stories cannot be catalogued. The degree (amount) of protection actually afforded by an occasion of qualified privilege cannot be estimated without knowledge of the facts and circumstances deemed to constitute the occasion of privilege. A sound discretion based upon the law and the facts should be exercised before any questionable story goes to press.

For instance, the cautious course is to assume that the statements of public officers not made as part of an official public proceeding are no more privileged than those of a private individual. A presidential press conference is not an official proceeding. Yet surely any statement on public affairs thus openly made by the President of the United States, as President of the United States, can be safely passed along.

But there would be no privilege in repeating defamatory attacks made by this same man while a candidate for re-election.

Statements by lesser executives, even though made by them as public officials in respect to public affairs, grade down to zero as far as privilege to repeat is concerned. In a matter of great public importance, the statement of the mayor of New York, speaking as mayor and not as a politician, might be repeated with confidence that, as a practical matter, there is a certain protection—a sort of extralegal practical privilege —if true qualified privilege fails. The utterances of a small town mayor or chairman of an irrigation district would have no such sanctity.

Similarly there is, by legal rule, a most vigorous qualified privilege in telling of legislative proceedings. But in practice the courts and juries will not grant the same protection when reporting the antics of a meeting of county commissioners as when reporting the deliberations of the Senate of the United States. As to the former, a court or jury may more quickly find an abuse of privilege, whatever the legal theories may be.

The practical result is that statements made before a city council, for instance, cannot be repeated with the same confidence in a shield of privilege as statements made on the floor of the Congress or a state legislature.

In all doubtful cases editorial and managerial discretion must be used, taking into consideration: (1) the importance to the public of the subject under discussion, (2) the eminence of the public officer or the

nature of the public proceeding, (3) the circumstances of the utterance, (4) the *provable* reputation of the person defamed, (5) whether because of other relevant and provable offenses he is in any position to bring suit against the paper, and (6) all other facts and circumstances.

The expression "other relevant and provable offenses" needs illustration. Here is an actual sequence, typical of a situation when it can be proved that the accused did do something else just as bad which is sufficiently related to the story in question:

A reputable husband was suspected of murdering his second wife. The first stories were written warily. Suddenly the body was found, and he made an easily provable confession. The field became wide open—headlines announced, "Husband Confesses Murder." Then he was suspected of having murdered his first wife. This he hotly denied. His denials mentioned third persons, connecting them with the disappearance of his first wife. As to the husband, the easily provable confession in respect to wife number two made safe the publication or broadcast of the details of the investigation of the death of wife number one. But, concerning the third persons mentioned by Bluebeard, prudence indicated utmost caution.

It is much easier to be critical than to be correct.

—*Disraeli*

9

comment and criticism

THE DEFENSE of qualified privilege applies to defamatory statements of fact. The defense of fair comment (sometimes called privileged criticism) applies to defamatory comments. The one permits factual statements; the other permits expressions of opinion which otherwise would cause actionable damage.

Fact and comment do not dwell in sharply divided compartments. They mingle in the same speech or editorial—frequently in the same paragraph. Not unnaturally, court decisions sometimes treat the two as almost alike. Nevertheless, there are important distinctions between qualified privilege and fair comment. The essence may be stated thus:

A certain false assertion of fact would be an actionable libel were it not for the qualified privilege in saying or repeating this libelous thing.

Fair comment is an opinion fairly stated in relation to the fact. It is no libel.

In short: One is a libel against which there is a defense. The other is not a libel.

The Strict Rule

The traditional rule, once sound but by changed conditions rendered harsh, is that the comment is fair when:

1. *It is based on facts provably true.*
2. It is free of imputations of corrupt or dishonorable motives on the part of the person who is criticized except insofar as such imputations are warranted by the facts.
3. It is an honest expression of opinion—the motive is the public weal, not desire to harm.

This is still the rule in many jurisdictions.

Proving the truth of the facts upon which the comment is based was not too heavy a burden—was not against the public interest—when the rule evolved. When matters of public import were fewer and less complicated—when it was expectable that the facts behind honest criticism would be known in the sense of being provable—there would be little or no suppression of comment by a rule requiring proof of truth.

Now, as suggested when discussing qualified privi-

lege, government has become exceedingly big and exceedingly complex. Unless publishers and broadcasters have some latitude for error when in good faith, without malice, they disseminate news concerning governmental affairs, believing it to be true—and with good grounds for their belief—much important news will be suppressed.

The Liberal Rule

Responsive to these changed conditions, a more liberal rule is supplanting the old. Under this more realistic rule, a misstatement of fact about a public official or candidate, in connection with matters of public concern, is privileged. Hence, there is a defense to the libel action if the statement is made for the benefit of the public, in the absence of malice, and in the honest belief that it is true. As indicated, "honest belief" presupposes care in gathering the news or receipt from a reliable source; a jury might think negligence inconsistent with honest belief.

Under the liberal rule, criticism based on such innocent factual misstatements is fair criticism if it meets the other essentials of fair comment. Likewise, the defense of fair comment will be available to the publisher or broadcaster if the facts upon which the comment is based are already generally known to the public.

Who May Be Criticized

Natural subjects of criticism and adverse comment include candidates for public office; public officials

(judges, legislators, and executives); public institutions; matters of public concern (including the work of independent contractors being paid out of public funds); scientific, artistic, literary, dramatic, and sport productions and exhibitions; and sporting events catering to the public.

Criticism May Be Severe

Whether as to the facts the criticism comes within the harsh rule or the liberal rule, whichever is applicable, the critic may write a philippic. He may condemn in no uncertain terms. He may use satire and proper invective—flanked by a cartoon.

A book, for instance, may be referred to as dull, shallow, and stupid if the reviewer so believes. But the review will not be protected as a fair criticism if the author is accused of plagiarism. That charge must be proved true.

Check List

If there is a negative answer to any one of the following five questions, the proposed criticism should be reviewed again with possible libel especially in mind:

1. Is the subject of public interest or concern?
2. Are the facts upon which the criticism is based provably true or, in the alternative, under the liberal rule?
3. Is there an expression of opinion in contrast to an assertion of fact?
4. Is it a fair comment?

5. Is it in the public interest, free from the taint of malice?

Public policy does not require the protection of a person who, instead of expressing his honest opinion, seizes upon an opportunity to gratify his own malice or to exhibit his skill in vituperative utterance.

Libel based on comment or criticism almost always originates in a situation easily avoidable by use of moderate journalistic skills. There is usually at least a little time for reflection and verification—the deadline is not ten minutes away. The criticism may be couched in safe language, yet be equally effective—perhaps equally pungent.

With care, stringent and caustic comment and criticism may be made almost wholly safe—not safe from many threats of suit by disgruntled politicians and from occasional actual nuisance suits—but safe from verdicts in significant sums.

Loss of Right

The area of comment is fraught with such hazards, yet the importance of free and forceful comment to the preservation of a free society is so great that a rephrasing of certain basic principles already stated seems justified, as a supplement to the check list. Whether the strict rule or the liberal rule is applicable, the essentials of fairness are lacking:

1. If the comment assaults motive, conduct, or character unrelated to the public matters to which the comment really relates.

2. If it criticizes a person's private life in respect to affairs unrelated to the public matter properly under discussion.
3. If it accuses a person of a crime or employs degrading or insulting epithets, except (a) when necessary or proper to show his unfitness for, or unfaithfulness in, public office, or (b) when otherwise clearly appropriate to a legitimate end sought by the comment made in the public interest.
4. If the criticism is malicious—and it must be remembered that a jury may infer malice from conduct.

As a Practical Matter

Because deadlines and broadcast schedules do not control comment as they do spot news, there is more time to be careful. Hence, comment which smacks of libel should be submitted to your attorney before publication or broadcast. He will know whether your state:

1. Adheres to the old harsh rule, or
2. Has adopted the new liberal rule and, if so, to what situations it applies, or
3. Is in a passing phase of uncertainty, and
4. Whether states in which your publication is distributed or your broadcast heard have a stricter rule than that of your own state. If so, the rule of the other state may become important if the person referred to lives or is well known there.

Criticism of the Court

When the comment or story shows mishandling of a judicial proceeding, there are three elements to consider: (1) possible contempt of court; (2) the possibility that excessive zeal on the part of the reporter or other inaccuracy has resulted in an abuse of the qualified privilege and consequent vulnerability to libel actions by counsel, litigants, witnesses, or third parties mentioned in the trial; and (3) possible libel of the judge. Contempts of court are covered in Chapter 12.

Ad-lib Disc Jockeys

The ad-lib radio and television broadcasts (including "personality-type" disc jockeys who intersperse recordings with comments upon the music and perhaps upon the world and life in general) pose peculiar problems. There is little or no opportunity to check such remarks beforehand. Disc jockeys and all other ad-libbers must be schooled to keep their remarks within the rules of fair comment and criticism.

Nothing is so firmly believed as what we least know.

—*Montaigne*

10

truth, consent, and replies

PROOF THAT the defamatory statement is true is a complete defense to a civil action of libel.*

A reporter may "know" many things which he could not possibly prove in court. Hearsay and gossip are not admissible in evidence, even though everybody "knows" the statements to be true. For your purposes, *a defamatory story should be presumed false unless it can be proved true by evidence which is admissible in court* and which will be available for the trial.

* Except in those few states which do not accept truth as a complete defense if the publication was from "malicious motives" or which require that along with truth it must be shown the publication was for "justifiable ends" or related to a "subject of public concern."

ILLUSTRATION

At a political gathering a candidate for public office shouts that his rival obtained his naturalization papers through perjury. The story quotes the speaker accurately and can prove that the statement was made as quoted. To sustain a defense of truth in an action brought by the rival, the publisher or broadcaster must prove the perjury.

A mistaken belief in the truth of the matter published, although honest and reasonable, is not a defense unless the publication was privileged.

Fortunately, it is not necessary to prove that a story is meticulously true. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance. But the decision as to whether the charge was proved substantially true may be delegated to a hostile jury.

Consent

A person who consents to the publication cannot recover. But, as in the case of truth, consent means a consent which can be proved at the trial. The consent must be to the type of publication in question. If Joe College, class of '35, consents to the publication of a caricature and a supposedly humorous but scurrilous story in his fraternity magazine, he has not consented to a reprint in a publication of general circulation.

CAUTION

Sometimes a person defamed in a proposed story readily grants an interview giving his version

of the affair. *This does not in itself constitute a consent to publication of the defamation.* But, if he does not object to publication of the entire account as read to him, the interview is a significant factor when deciding whether as a practical matter the story, including his statements, may be run.

Replies

As between adversaries in the public forum, there is a considerable right of self-defense. When an individual has been attacked by, say, a political opponent, he may wish to reply through the medium which carried the original attack. Hence, even though the reply is defamatory of the original attacker, a broadcaster or publisher may have a qualified privilege in disseminating the reply, if the new defamatory matter is essential to support a contention that the first attack was unjustified.

Because the libelous reply is usually in response to a libelous accusation, the publisher or broadcaster may be in the midst of one libel already uttered and another potential. If he refuses to pass along the reply to the public, the injured party will claim connivance and malice. But if the reply is beyond what is necessary to answer the original attack, the first victim will wail. These are delicate situations. The difficult situation of the broadcaster is considered in Chapter 16.

Confession of our faults is the next thing to innocency.

—*Publilius Syrus*

11

corrections and retractions

THE IMPORTANCE of giving an accused person an opportunity to state his side in a story when it is first published or broadcast is mentioned elsewhere. Such an explanation may keep alive a qualified privilege which otherwise might be lost; it shows a desire to be fair and rebuts malice.

Situations where falsity is claimed or suspected in a story already broadcast or published are somewhat different. Whether a correction or retraction should be made is a neat question of policy, depending upon all the circumstances and upon the law of the state where suit will be brought. About half the states have adopted statutes to the effect that a retraction may be introduced in evidence in mitigation of damages.

Some limit recovery to actual provable damage unless a retraction is demanded and refused.

But, obviously, if the principal justification is truth, a retraction may amount to an admission of falsity in circumstances where, if the admission had not been made, the defendant would have been able to prove substantial truth. When a retraction is demanded, the cue is to consult counsel.

If a correction or retraction is in order, it should not be grudgingly or ambiguously made. It should be full and frank, though it need not be abject. It should be published in as conspicuous a place as the article complained of. If the retraction is over the air, and is incident to a serious libel which has attracted attention, some effort should be made to assure a listening audience greater than that which heard the broadcast. In the customary impartial fashion a check should be made so that there will be proof available that the listening audience was greater.

Refusal to correct or retract a defamatory statement may be used to show malice or a callous disregard for the rights of others. Hence, if truth is not one of the principal defenses, a full and prompt correction or retraction is usually the better policy, although it is recognized that neither will ordinarily create a complete defense.

Sometimes, *by agreement,* an affirmative story which makes no reference to the libel is the best correction. To illustrate: The publication or broadcast defamed Jones by saying he was involved in a fraud. It may be possible to prove the story true; but that is not certain. Jones threatens suit for libel. If he, too, is

not too sure of his case, a pleasant story telling of his fine work in the Elks Lodge or of his daughter's wedding may satisfy him—without putting the publisher or broadcaster in an untenable position.

If all printers were determin'd not to print any thing till they were sure it would offend no body, there would be very little printed.

—*Benjamin Franklin*

12

freedom of speech and contempt of court

THE FIRST amendment to the Constitution of the United States says that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." The fifth amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." Most state constitutions contain similar provisions. Freedom of the press and fair trial are not in themselves the ends. Both are necessary adjuncts to the goal of freedom for the individual. If either should be lost, so would individual freedom.

Yet at times freedom to report court proceedings seems to clash with the judicial concept of a fair trial. The advent of photography, radio, and television ac-

centuates the problem. Many jurists believe that the activities of these new media within the courtroom make a fair trial difficult if not impossible. The presence of reporters is accepted as a matter of course except for a few hearings which, as a matter of public policy, are conducted privately.

There are sharp differences in opinion between broadcasters and publishers on the one hand and judges and lawyers on the other in respect to proper canons of conduct, and there are divergences in viewpoint not so marked within each group.

Contempt of Court

Affirmative aspects of freedom of the press and freedom of speech are reflected in qualified privilege and the right of fair comment and criticism, but every right carries a corollary duty. The constitutional guarantees of free speech and a free press are expressly or implicitly subject to the burden that the speaker is responsible for any abuse of his freedom. One manifestation of that responsibility is found in the law of libel; another in the right of privacy. A third segment is found in the rules pertaining to contempt of court.

Basic Principles

Disregarding the dignity and authority of the court, or any act which tends to impede or frustrate the administration of justice, may be a contempt of court. The power to punish for contempt is inherent in the courts. It is deemed essential to the preservation of an independent judiciary and the protection of litigants.

As indicated in Chapter 9, the courts have no immunity from criticism. Under the rules there reviewed, anyone has wide latitude in honest though severe editorial comment upon the courts. Judicial inefficiency may be exposed, almost as in the case of other public officials.

But a story or photo which tends: (1) to produce an atmosphere of prejudice where a pending case is being or is to be tried; (2) to delay or interfere with the administration of justice; or (3) to cause justice to miscarry, may be held to be in contempt of court.

Typical Contempts

Critical editorial comment ineptly worded in respect to a suit is an obvious path to contempt proceedings. Perhaps the most frequent offense is playing up the opinions of detectives, alienists, and other experts, thus prejudicing a community and prospective jurors in advance of trial. While the case is being tried, publication of supposed facts not admissible in evidence may force the judge to grant a mistrial—here clearly interfering with the administration of justice. This may be so even though the jury is held overnight and theoretically has no access to the newspapers.

Other illustrations of possible contempts include:

1. Grossly careless or overdramatic handling of courtroom news.
2. Caustic cartoons depicting the trial.
3. Photographs taken in court against court rules or orders.

4. Publishing or broadcasting stories about juvenile delinquents when forbidden by law or order or rule of court (see Chapter 17).
5. Stories which interfere with the investigations of a grand jury.
6. A reporter's refusal to reveal confidential sources of information.

Judicial decisions say that "the first requisite of a court of justice is that its machinery be left undisturbed." Hence, anyone who intrudes himself on the due and orderly administration of justice is guilty of contempt of court and subject to punishment.

Assume, for instance, a suit based upon permanent and deforming injuries to a five-year-old girl. The little girl has not been exhibited to the jury; she has not even been taken into the courtroom. A newspaper and newscaster describe her as a "bright and happy little girl" playing in the hall of the courthouse, "not at all depressed by her misfortune." In the courtroom the parents and their attorney are presenting their case under the theory that since the accident the little girl has been depressed and unable to join with her friends gaily in play as she did before the accident. Query: Would the news story constitute a comment on the evidence so as to interfere with the administration of justice?

Most courts hold that comment on concluded cases cannot be punished as contempt—there might be a libel of the judge though no contempt of the tribunal. However, occasional deviations say that a violent statement touching a concluded case may be a con-

tempt. The rationale is that such a statement degrades the court and tends to destroy public confidence and impair the court's efficiency in subsequent litigation. Courts differ as to whether a case already tried and now on appeal, or where the time within which to appeal has not yet run, is still pending or is over so far as contempt of court is concerned.

Truth Not a Defense

The truth of a story is not a defense against a citation for contempt. Perhaps the truth hurts most. Punishment may be by fine or imprisonment, or both.

Possible contempts are not everyday problems, as are incipient libels and violations of the right of privacy. Neither writers nor administrative personnel can be expected to develop an adequate discretion in respect to contempts—not even the courthouse reporter can do this. As an officer of the court, your attorney will sense the situation.

A room hung with pictures is a room hung with thoughts.

—*Sir Joshua Reynolds*

13

photographs

As ALREADY indicated, contempts of court may stem from the taking of pictures. Violations of the right of privacy are more often predicated on the picture than on the story. Hence photographers are invited to consider the preceding and next succeeding chapters as well as this to be their special domain.

Error in identification is probably the most frequent source of libel based on pictures. Usually that is a "someone-blundered" situation. Perhaps years ago the picture was mislabeled in the morgue. Perhaps the writer of captions or cut lines made a mistake—excusable or otherwise. Not all libel based on pictures can be debited against photographers. But much of

it can, and most of that can be traced to careless identification. In contrast to script, which may be false, an accurately identified picture is in itself true.

Typical situations resulting in suits for libel include the following:

1. Picture of two or more persons at the jailhouse, the wrong one being identified as the character being booked.
2. Picture of "men mentioned" in the "blackmail scandal," plaintiff not being singled out as an innocent bystander until near the end of the story.
3. Picture of a movie starlet in a scandal; wrong starlet or scandal.
4. Picture of one or a few out of many persons held by the police for questioning, the picture and captions giving the impression that some of those pictured are suspects, not merely potential witnesses.
5. Picture of the scene of an auto accident involving a crime, such as drunken driving, without making plain who are the accused and who are the injured innocent or mere bystanders.
6. Picture of a solid citizen erroneously identified as doing something amounting to a libel *per se* as described in Chapter 4.

For instance, if a feature story about customs inspectors tells of their uncanny knowledge of hiding places, a picture of identifiable persons passing through a customs inspection may suggest that they are customs suspects.

Among other principal sources of libel from photographs must be listed:

1. Violations of conditions imposed by subject.
2. Retouching a picture to accentuate seminudity, however flattering the result may be.
3. Deleting part of the picture; superimposed or fake pictures; distortions and optical illusions.
4. Any picture accompanying defamatory text or cut lines.

When a picture is taken despite the objections of the subject, or when the photographer has shouldered his way into a private home or other unauthorized spot to take it, the defense of the picture is made doubly difficult.

Cartoons and Sketches

Sketches of current events are subject to the same tests as photographs. Cartoons are usually in the category of comment and criticism. They are subject to the rules of Chapter 9.

Courtroom Photography

Believing that the taking of pictures in court is not fitting and results in improper publicizing of judicial proceedings, many states—by rule of court or otherwise—have mandates to the effect that:

> The taking of photographs in the courtroom, during sessions of the court or recesses between

> sessions, and the broadcasting or televising of court proceedings, are calculated to detract from the essential dignity of the proceedings and distract the witness in giving his testimony.

The precise wordings differ somewhat. Usually the rule does not apply to a ceremonial such as a naturalization proceeding.

The federal rules of criminal procedure state that:

> The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasts . . . from the courtroom shall not be permitted.

This federal prohibition is commonly observed in civil trials. Even in the absence of a written rule, a judge has power to punish as a contempt any photographic expedition into his courtroom. As photographers who have been fined or imprisoned well know, the punishment is imposed by the very judge who believes that the dignity of his forum has been violated.

In practice, judicial and courthouse policy in respect to courtroom photographs and television is peculiarly a local matter.

Studies are now under way looking toward the formulation of rules more favorable to photography, television, and broadcasting than those here summarized. Meanwhile, until these rules are accepted by the court in question (in contrast to merely being approved by interested associations, such as the Na-

tional Press Photographers Association and the American Bar Association), photographers who unduly press for courtroom pictures will set back the evolution and acceptance of more satisfactory rules.

A newspaper should not invade private rights or feeling without sure warrant of public right as distinguished from public curiosity.

—*Canons of Journalism of the American Society of Newspaper Editors*

14

right of privacy

THE RIGHT OF privacy—the right to be let alone—as today enforced in some courts is a relatively new facet of the law. In 1890 Louis D. Brandeis and his law partner wrote an article, "The Right to Privacy." Denouncing the flamboyant journalism of that day, they contended that invasions upon privacy were subjecting individuals "to mental pain and distress, far greater than could be inflicted by mere bodily injury." They asserted that the press was "overstepping in every direction the obvious bounds of propriety and of decency." They discerned a common law right, "forged in the slow fires of the centuries," entitling a person to redress if his privacy was wrongly invaded.

Here and there judges began to follow their reasoning; two or three legislatures took statutory notice of the problem. Though other courts and legislatures refused, today it must be said that a considerable body of law supports the rule embodied in the Restatement of Torts:

> "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others *or his likeness exhibited to the public,* is liable to the other." [Italics added]

Perhaps the trend of the times is indicated by an assertion in the Universal Declaration of Human Rights:

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Here the new right against interference with privacy is named before the ancient right of redress for libel.

However, the situation must not be overstated. Certainly this right of privacy does not prohibit publication and broadcasting of matters of public interest. The news may be made known and newsworthy pictures printed and broadcast even though the subject came unwillingly into the limelight. Following the language of the supreme court of Kentucky:

> There are times when one, whether willingly or not, becomes an actor in an occurrence of public

> or general interest. When this takes place, he emerges from his seclusion. It is not an invasion of his right of privacy to publish his photograph with an account of the occurrence.

And certainly many persons are in themselves newsworthy. When a person becomes a public character, he relinquishes his right of privacy or at least great areas of privacy. The right of privacy does not exist where:

1. The subject has himself published or broadcast the matter or given consent . . . but consent or waiver can be rescinded before the broadcast or publication.
2. The subject is in the news because of his prominence or activities.
3. He is an object of legitimate public interest because of some event. (But some judges are beginning to speak of an area of privacy which may not be invaded with impunity even though related to the newsworthy event; for instance, in the case of a gruesome picture.)
4. Under the law of libel there would be a privileged communication.
5. The subject is a corporation or public institution.

The prohibition is merely against the publicizing of private affairs with which the public has no legitimate concern or the wrongful intrusion (the bad taste, if you please, of an intrusion) into private activities in such a manner as to cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.

Courts have said that the right protects against "the unwarranted appropriation or exploitation of one's personality." The meaning and scope of that vague phrase will be determined only if a considerable number of cases reach courts of final jurisdiction. The theme of this chapter is that, if publishers and broadcasters will exercise a modicum of discretion and use the good taste which, as individuals, they exercise in their own affairs, the now evolving right of privacy will wither. If it is given food on which to grow, this newborn right may become a Frankenstein which may deter either publication or broadcasting of material which should be known to the public.

May a person, once in the news, by lapse of time reacquire a right of privacy as to his past life? A former child prodigy, a failure as an adult, sued the *New Yorker* because of an unvarnished factual account of his life. The court denied recovery; there was a certain continuing public interest in what he turned out to be.

A former convict sued the National Broadcasting Company because it televised a dramatized fictional version of his conviction for murder and later pardon. He was not identified. There was no actionable invasion of privacy. But a former prostitute who had metamorphosed into a respectable matron was successful in a suit against the publishers of the unsavory incidents of her past. The California court found a constitutional right to "pursuing and obtaining safety and happiness."

Courts have given consideration to a theory denominated a "relational right of privacy." This means, for instance, the right of parents to be spared suffering from the publishing or broadcasting of pictures of a son (not himself newsworthy) killed under grotesque or disgraceful circumstances. A story of a deformed, stillborn baby plus a picture taken without the consent of the parents ended in a judgment against the publisher.

A few more instances of violation of the right of privacy will suffice:

1. The picture of a husband and wife in an affectionate position as part of an article on "Love"—held not warranted by public need or the public character of the twain.
2. A photograph of a child as she lay in the street after an auto accident as part of a later safety-first article entitled, "They Asked to Be Killed." Original publication of the picture as news was not a violation.
3. A photograph of a female taxi driver as an illustration in a libelous article directed against taxi drivers in general. Plaintiff was not mentioned by name or otherwise identified.
4. Too vivid cheesecake (photograph or television) in relation to the sensibilities, vocation, and environment of the subject.

A person attending a public event may be televised, or his picture may be taken as part of the audience. Someone who is traveling or elsewhere in public cannot object to being pictured as part of a general scene. For instance, a television camera "pan-

ning" the audience may televise a recognizable individual. But, without his consent (unless he himself is newsworthy), he should not be featured in a close-up shot.

Discussing "the area of privacy which may not be invaded even in this modern era of television," the Court of Appeals of New York said:

> ". . . One traveling upon the public highway may expect to be televised, but only as an incidental part of the general scene. So, one attending a public event such as a professional football game may expect to be televised in the status in which he attends. If a mere spectator, he may be taken as part of the general audience, but may not be picked out of a crowd alone, thrust upon the screen and unduly featured for public view. . . ."

If, however, an individual is a public personage, or an actual participant in the public event, or if some newsworthy incident affecting him is taking place, his picture may be played up to its full news value.

It is hoped that the apogee has been reached when an attorney representing a marine returning from the wars felt justified in bringing suit because a paper published his picture taken at the dock while weeping on his mother's shoulder. The theory was that the picture was an invasion of his privacy and humiliating to a hardy marine.

Advertising

When advertising is involved, the rule is more strict. In some states, there may be a misdemeanor.

A violation may stem from the mere use of a name or picture in advertising without an otherwise objectionable connotation. All of the following were so held:

1. Plaintiff was photographed in a store. Without her consent, her photograph was published to advertise the business.
2. Without her consent, a picture of the plaintiff—doubtless beautiful—was used in a cosmetic advertisement.
3. The army took a picture of an optical expert then in the service and released it for publication. The picture was used by a commercial concern to advertise its wares.

Truth Not a Defense

In sharp contrast to libel, truth is not a defense where right of privacy is concerned. Nor is absence of malice a complete defense. Plaintiff need not prove special damage. Hence, in that respect, a violation of the right of privacy is akin to a libel *per se*. Even punitive damages have been allowed (see Chapter 4).

It would be easy to arrange a neat tabulation purporting to list some states which recognize the right of privacy and some which do not. For others, it is impossible to make a sharp classification. Moreover, even in those states which purport to recognize the rule, the cases are so few that definite and specific guideposts cannot be set up.

In states which now deny the rule, it is equally important to avoid a violation of the right of privacy.

The first publisher or broadcaster who flagrantly violates the rule recognized in other states may bring it into his own state, to the detriment of every publisher and broadcaster.

Zeal is very blind, or badly regulated, when it encroaches upon the rights of others.

—*Quensel*

15

radio and television

THE FUNDAMENTALS of libel and of the right of privacy apply to communication by radio and television. In addition, broadcasters have unique problems. Some are inherent in their method of communication—broadcasts in contrast to the printed page. Others are created by fiat of regulatory bodies. The latter, particularly those resulting from the impact of the Communications Act of 1934 as administered by the Federal Communications Commission in respect to political broadcasts, are reserved to the next chapter.

Though a newspaper's deadline may leave little time for deliberation, the editorial rooms do have an opportunity to read every word and scrutinize

every picture before they go to press. In contrast, a broadcaster can never be completely sure that the script will be followed with fidelity, or that the television actor or speaker, by gesture or grimace, will not convey or emphasize a meaning not apparent in the words alone. Inflection of speech and gesture may carry as much or even more conviction than print or still picture.

In the absence of statutory relief, a station might be held liable for whatever it puts on the air, even though the utterance was a departure from script in defiance of instructions forbidding ad-libbing and in spite of seemingly adequate precautions taken by broadcaster's personnel.

By common law reasoning some courts protected a station not at fault; but others did not. About thirty legislatures have met the problem by enacting laws to the effect that a broadcaster shall not be liable unless it is alleged and proved that he (meaning the station's staff) has failed to exercise due care to prevent the publication or utterance.

Whether the station exercised due care may become a question of fact to be decided by a jury. Failure to observe a libel *per se* in a manuscript submitted by a speaker or in a script prepared by the staff would almost certainly show lack of due care, whether the error stemmed from carelessness or ignorance. A station that permitted a person ignorant of the laws of libel to pass on copy would not be exercising due care. In short, the statutes do not relieve broadcast personnel from requirements of alert-

ness comparable to those for journalists who communicate on paper.

There is not yet a body of case law from which can be gleaned rules clearly delineating due care. A speaker departs from his approved script—how many libelous words may he say before there is a failure in due care if he is not cut off? Or he makes small departures, each almost a libel or violation of privacy but not quite. Then, in one clause, before he can be cut off, he says something clearly actionable. Were small departures harbingers of the actionable statement so that in exercise of due care the station should have substituted a Strauss waltz?

As to writers of radio and television scripts, producers, directors, continuity editors, announcers, and all other station personnel, the proper caution is:

> Statutes ameliorating common law rules will help you only if you have been as careful as you can. The statutes will help defend if and only if due care has been exercised. So, as a practical matter, station personnel should be as informed, alert, and careful in states with protective statutes as in states without them.

Network Programs

Some statutes protect a station broadcasting a network program if it is not the station of origin. How such statutes will be construed in aggravated situations where due care would have prevented the tort is not yet known.

What Law Applies

State boundaries are no barrier to a broadcast. A court may hold that the final act of your broadcast occurred in a receiving set a thousand miles away, rather than in the studio. If you defame or violate the right of privacy of a person resident and known in that distant state, the law of that state may govern in the suit against the station. For this additional reason, therefore, except as to discretionary decisions by management—the calculated risks deliberately assumed—a protective statute should be thought of as a defense, not as justification for laxity.

Controversial Issues

When station time is granted for radio or television broadcasts concerning a controversial subject of public nature—whether political, economic, religious, or on another subject where opinions differ—the people on the other side of the question have a right to be heard. It matters not whether the program is commercial or sustained. Federal Communications Commission policy requires that a balanced presentation be afforded both sides. Whenever possible the station should seek out the other side and offer time. Certainly equivalent time should be made available if requested.

In this respect printed comments and advocacy differ from those put on the air. In their editorials, newspapers, and magazines, and in their books, writers may be partisan. There is no legal obligation to

state both sides of any question. Not so with the broadcaster who chooses to editorialize or permits others to editorialize on a controversial issue. The broadcaster is bound to make a balanced presentation available. But this does not mean that the broadcaster may not protect the station in respect to libels, violations of the right of privacy, and possible contempts of court. Except in the case of certain political broadcasts, which are considered in the next chapter, the broadcaster may do whatever is proper to safeguard the station.

A strong dilemma in a desperate case!
To act with infamy, or quit the place.
—*Swift*

16

political broadcasts

THE MANDATES of the Communications Act as implemented by the Federal Communications Commission are such that a sharp distinction must be drawn between broadcasts by (1) a "legally qualified candidate for any public office" and (2) anyone else. As to the former, the station may face delicate dilemmas in respect to possible libel; it may have to choose the lesser of two evils instead of doing what, in good conscience, seems fair to the candidates and safe for the station.

Broadcasts by Candidates

For operating purposes, a candidate should be deemed to be legally qualified if he appears to be a bona fide candidate for any public office—national, state, county, or municipal—whether he is on the ballot or may be voted for by sticker or by writing in. This is controlled by state and local law; the real test is whether a person may be voted for and nominated or elected. (Not every crack-pot who announces himself as a candidate is actually a candidate prior to the time he is on the ballot.)

The act does not require a radio or television station to permit the use of its facilities by any political candidate. But, if it puts one candidate on the air, an equal opportunity must be afforded to all other legally qualified candidates for the same office.

This is a personal right to candidates only. The statutory requirement of "equal opportunity" does not reach requests for time by political parties, as such, campaign committees, and articulate supporters. Nor does candidate Jones have a legal right to demand an equal opportunity because Smith, not a candidate, has spoken against Jones or in behalf of a rival candidate.

Libel enters the picture because the act also states that the station "shall have no power of censorship over the [candidate's] material." Under FCC edicts, the editing of a candidate's script and the deletion of libel is censorship. (Obscene matter may be deleted.) Several state courts disagree with the FCC rulings; this conflict increases the problem of the station.

As indicated, the act comes into play when the first of any number of legal candidates for the same office (or a legal candidate for nomination to the same office) has the use of broadcast facilities. Such use includes:

1. Discussion of matters not related to his candidacy.
2. A broadcast in some capacity other than as a candidate.
3. An appearance on a variety program, even though only to take a bow.
4. A speech incident to a ceremony or other public service.
5. A debate between. or forum type of program featuring, two candidates, a third being left out.
6. Acceptance speeches by the successful candidate for the nomination.

Any one of these broadcasts gives any opposing candidate the right to demand an "equal opportunity" with no right reserved to the station to refuse to broadcast his defamation.

A recent amendment to the Communications Act relieves the station from the obligation to provide equal opportunity to all candidates where one candidate appears in any bona fide newscast, news interview, news documentary, or in on-the-spot coverage of news events, including political conventions.

Primary and Final Campaigns

Though it is permissible to treat the primary and final election campaigns separately from the standpoint

of equal opportunity, a broadcaster's controversial issue obligations might make it unwise to allow a drastic imbalance to occur. For instance, if during the primary campaign candidate A is permitted to purchase or is given ten hours of time, whereas candidate B requests only two hours, it would be difficult to refuse a timely request by B for more time in the runoff than is requested by A, so that in the aggregate B may have as much time as A.

Protection against Libel

The Supreme Court of the United States has ruled that, when a candidate is utilizing the station's facilities by virtue of his rights under the Communications Act, the station is not liable for defamatory statements made by him. However, at this stage in the evolution of the law, we must assume that this protection does not apply to the *first* candidate, since the station is not bound to afford him an opportunity to broadcast.

About thirty states also give the station a measure of statutory protection in situations where (under federal law and FCC regulations) the station is unable to keep the candidate's defamatory statements off the air. These statutes vary from state to state.

What, as a practical matter, can the station do to protect itself from defamatory statements by the first candidate?

1. In acute situations where serious libel would be a rational prognosis, deny time to all the actual candidates for a particular office. Put the spokes-

men on the air only after review of script and adequate assurance that there will be no departure from it. Candidates for other offices, though on the same ballot, may be granted use of the station's facilities.

2. Require each candidate to submit by specified deadline either a full script or a complete outline of his talk. Remind the candidate and his advertising agency, and, if possible, leading members of his campaign committee, that they also may be held legally responsible for libel, or at least become involved in a suit based on libel or conspiracy, if their candidate defames his adversary.

A great majority of potential libels can be prevented by friendly discussion with the candidates without running afoul of FCC regulations.

Other Campaign Speakers

When the candidate himself is not the speaker, the station may treat the broadcast as it would any other controversial program. Advance script may and should be required. Language which appears to be defamatory or which tends to invade the right of privacy may be stricken. If the integrity or emotional stability of the speaker is doubtful, adequate safeguards that he will stay by his script may be imposed. In short, the station may do what is fair under the circumstances and in the public interest, without needlessly exposing itself.

Utterances by Public Officials

The statutory requirement of "equal opportunity" does not apply to a statement made by an official before becoming a candidate, even though he is potentially one. After he becomes a candidate, the situation is a different one.

Records of Requests

Records of all requests for political broadcast time should be kept as required by FCC regulations. It is prudent to make a tape of all political broadcasts; otherwise the station may be put to the difficult task of proving what was actually said in opposition to the testimony of friends of the man who claims to have been libeled.

If a little knowledge is dangerous, where is the man who has so much as to be out of danger?

—T. H. Huxley

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danger zones

CHECK AND double check. Usually any one of several men could have corrected the error, or at least recognized the possible presence of defamation and referred the copy to someone for verification or scrutiny. When dealing with defamatory matter not clearly privileged or easily proved true, it is prudent: (1) to double check the facts; (2) to do so in such a fashion that every juror will say, "The writer and, in fact, everyone handling the copy did everything they could to be careful"; and (3) when proofreading and processing, to handle like an explosive.

Crimes

Stories concerning crimes are apt to be libelous *per se* of someone, if untrue. As cautioned in Chapter 8, section 7, until a charge is filed circumstances do not ordinarily warrant more than a statement that the police are holding whoever it may be for questioning in connection with the crime of which a story tells.

To say, "Blank was jailed on an open charge" may convey to the public the impression that a charge of some sort has been filed. "Blank was not charged but is being held," or "Blank is held in jail but has not been charged," is more accurate. Statements of this sort are justified because provably true. However, there are times when the nature of the crime or the prominence of those involved requires much bolder treatment. Under those circumstances, the responsibility of the source, the reputation of the accused, and all other factors must be weighed and a sound discretion exercised.

In any such story a denial of guilt should be as conspicuous as the accusation.

Columnists

Statistics are not available, but it is doubtless safe to assert that syndicated columns and columnists are involved in a disproportionate number of libel actions. A mathematician might say that the hazard of libel is in inverse relation to the distance. A column refers to someone resident in, say, Denver. As a prac-

tical matter, the story might be safe enough in any state other than Colorado plus perhaps nearby areas of adjoining states. Before publication or broadcast a column should be read in the light of the local situation. If, as a calculated risk, a possibly libelous statement regarding local people is to be published, they should be given a chance to answer, preferably in the same issue, just as though the story had been written locally.

Crusades

A crusade series is vulnerable because the stories are not founded on spot news brought in through ordinary channels. Crusade stories are unearthed by the reporter—the plaintiff claims maliciously. So crusade material should be viewed critically.

Domestic Discord

Except when referring to persons with a history of domestic infelicity or to members of a set noted for the shifting of spouses, it should be assumed that a false statement of contemplated divorce or other assertion of critical domestic rift may be defamatory. In states where adultery is the only or principal ground for divorce, a false charge that Valerie was divorced by Henry may be libelous *per se*.

Where by statute or rule of court certain proceedings in a domestic relations court are supposed to be private in nature, there are two hazards—(1) want of the privilege which would be incident to the proceeding in open court, and (2) contempt of court.

Financial News and Comment

Libel through disparagement of property is touched upon in Chapter 3. Sometimes financial writers and commentators not only disparage a business—they assert or intimate wrongful, perhaps fraudulent, conduct on the part of the corporate officers. There is no privilege when repeating the accusations and counter-accusations of a proxy fight, unless the latter be under the wing of right to reply (Chapter 10). Cooperatives and charitable corporations, as well as corporations organized for profit, may be libeled. As in the case of columnists and commentators, the hazard of mistaken identity is not trivial.

Juvenile Delinquents

Reports and data concerning juvenile delinquents may not be public records. To protect the child, laws commonly authorize or require private hearings before the juvenile court. At his discretion, the judge may withhold a child's name. In such circumstances publication of a name obtained from juvenile court records or authorities may be wrongful—perhaps a contempt of court. When, however, a juvenile is formally charged in criminal court by indictment or information, there is no such restriction.

Know Your Nuances

Chapter 3 concludes with mention of the meaning of words. If words are used precisely, there will be no opportunity for court or jury to construe you into

saying something you did not intend to say. Is the following libel?

> The candidate for re-election is a shameless extravert. Not only that, he practices nepotism. His only sister was once a thespian in Greenwich Village, New York. He matriculated with co-eds at the university. It is an established fact that before his marriage he habitually practiced celibacy.

The words "guilty" and "fined," for instance, refer to or at least connote a criminal procedure. Never use them when describing a civil action—in a civil action the court or jury finds for or against the defendant, and a judgment is entered.

New Trials, Verdicts Set Aside, and Appeals

A lawsuit is not finally determined until (1) the time for an appeal has run without an appeal or (2) the court of final jurisdiction has spoken its final word. If the paper or newscaster has told of conviction of a crime or a finding of fraud or other obnoxious act in a civil case, a follow-up story should tell when:

1. The verdict is set aside or a new trial granted by the trial court; or
2. The case has been reversed by the appellate court.

Otherwise a defendant (who may also resent the way the story of the trial was handled) may claim the

paper did not publish a fair report of the entire proceedings.

CAUTION

Names of defendants appearing in dismissals of cases on appeal from police, traffic, and justice court convictions on motion of the prosecuting officer—thus vacating the conviction—should be checked to see if a story telling of the conviction was run. If it was, a story of the dismissal should be published. If it was not, the dismissal may be reported or ignored, depending on news value.

No-Name Stories

There are two traps: (1) The person defamed may be identified despite the lack of name; or (2) the no-name story may make difficult the use of the name in subsequent stories.

ILLUSTRATIONS

1. The headline says, "Suspect Grilled." The story says, "A clerk employed five years ago by County Treasurer Jones and dismissed last week by the present Treasurer is being questioned in connection with shortages in the pension fund." The clerk has been identified. If not a suspect but merely a helpful witness, he has been libeled.

2. A story recites "evidence" which, to the reader, convicts an unnamed man of murder. He is arrested and charged. The paper or newscaster reports the arrest by name, carefully refraining from tie-in to the anonymous story. But the suspect can show that some people knew him to be the man referred to in the first story.

The true murderer is found and confesses. The charge against the paper's suspect is dismissed. So is the reporter.

"Not" Words

Like "not," a number of words make mistakes easy. "Not" may be typed or set as "now." Either makes sense when read and so is easily overlooked. "He is now in jail"—or not, which is it? When your story defames, avoid prefixes and words vulnerable to error in transmittal and printing. When you telephone, wire, or even write "not guilty," there is more chance of the paper's printing, or the newscaster's saying, "guilty" than if you say "acquitted" or "innocent."

Promises

There is a constant temptation to place too much reliance on promises that something will happen tomorrow—the report will be filed, the suspect will be named, the officer will be dismissed. These promises are not as good as are the intentions of the men who make them because the situation may change overnight. Do not defame under the assumption that your evidence of truth will be born tomorrow. Never report a defamatory event in the past tense before that event has occurred.

Society

The society editor says such pleasant things that to her libel is almost a stranger—unless society includes a gossip column or commentator. The principal pres-

ent hazard incident to the handling of social events is the expanding right of privacy. Barely over the horizon are incipient right of privacy cases predicated on too much cheesecake in society pictures or too much prying into personal affairs, even though the words used sound friendly. See Chapter 14.

Sports

Sport pages and broadcasts cover more than high school and Ivy League contests. Professional athletes have much at stake financially. It is noticeable that more libel cases than formerly originate in the sports room—insinuations that the goalie threw the game, or that a fighter was cowardly, are typical. Sport libel may be hard to defend; truth may be the only defense. His buddies may back the libeled player, even though before the publication they wished him off the team.

What Law Governs?

The writing is published or the broadcast tower situated in state A. The publication circulates or the broadcast is heard or viewed also in states B, C, D, and E. Jones, a resident of one of the latter states, is defamed. If jurisdiction over the publisher or broadcaster is obtained in the plaintiff's state, its law may apply. Or, because the dissemination of the libel was in the plaintiff's state, its laws may govern even though suit is brought in some other state. If a story goes over the wires it may be published or broadcast in every state.

Wire Stories

A defamatory wire story purporting to be about a local person should not be published or broadcast without being checked locally to make sure as to identity and that the person named was at the place described in the story. Serious libel suits have been based upon wire stories telling of the participation of a local resident in an event occurring in a distant city when, as a matter of fact, the accused was safely at home. One wire story told of the arrest of a young woman in a "love nest" in San Francisco. It was passed along to an eager public in her home town, a thousand miles away, without being checked locally. The local girl could prove that instead of being in the love nest at the time of the arrest she had been attending church services presided over by her father, a bishop.

The great end of life is not knowledge but action.

—*T. H. Huxley*

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thirty

THIS HANDBOOK has but touched the high spots—perhaps not all of them. Nevertheless, study and periodical reading of the rules here given will enable anyone dealing with writing or broadcasting to recognize the presence of danger.

Possible libel having been recognized, a story or broadcast satisfactory to all but the most ardent propagandist can be produced without appreciable risk (or, at least, without undue risk) in almost every situation.

Like a chart, this manual notes the rocks and shallows and shows the aids to navigation. Vast areas of clear sailing are unmentioned. There is plenty of

room to maneuver stories and editorials and publish and broadcast pictures if a wary eye is kept on the markers here listed. As indicated in Chapter 1, because this is a danger signal manual, *in close cases the rule has been stated in stricter terms than the court should enforce.*

If often it is difficult to defend a libel suit, just as often is it difficult for the plaintiff to win—particularly when the plaintiff's past is shady and it is plain that the newspaper or broadcaster was careful and the mistake natural, hence perhaps excusable. Jurymen, too, have erasers on their pencils.

Most rules of law are subject to exceptions. That has to be so because in nearly every field of law possible combinations of circumstances are so varied and numerous that a single rule can seldom encompass all of them. Here the attempt has been to state the basic rules in simple terms and to show how they apply to typical situations.

There has been no attempt to write a legal treatise, suitable for use by lawyers or a judge. Because every month brings fresh decisions from the courts, a book purporting to delve into every detail would be outmoded before it was off the press. But, except when the preceding pages have given you express or implicit warning as to the hazards of local variations, fundamentals are constant—or at least nearly so. These basic principles and concepts are adequate as guideposts.

Often exceptions to and variations of the rules here given will be sufficient legal answer if a publication or broadcast is questioned in court. But to go into

them in this handbook would be a disservice to the men and women for whom it is written.

If, by inviting closer collaboration with your attorney, we have persuaded you to seek advice in advance, we shall have made a very great contribution to your pocketbook as well as to your peace of mind. An attorney is inexpensive when consulted in advance, relatively costly when called in after the event. One of the purposes of this book is to give you a sixth sense as to when you should telephone him in advance. In the long run—if you work closely with him—he will show you how you may safely publish more than you otherwise safely could.

The Right to Know

Because freedom of the press is taken for granted in this country, it is easy to forget that (1) the right is relatively new; (2) in many lands it does not exist; and (3) it is being undermined here.

Freedom of the press and freedom of speech were written into the federal Constitution at a time when there was not such freedom in England. Two decades after the adoption of our Constitution, an English publisher was convicted of crime because he criticized Parliament. An eminent American historian remarked, "We need, from time to time, to take a look at the things that go without saying to see if they are still going."

As was stated in the introduction and as, we hope, is implicit throughout, the purpose of this manual is not to frighten publishers and broadcasters into

saying less. It is to help them be secure in saying what should be said. The trend of the times is against freedom of expression. Many a bureaucrat, in Washington, in state capitals, in the city hall, and in the county courthouse, would prefer that the news touching governmental affairs be limited to mimeographed handouts. The premise of this book is that, except where national security is actually involved, the citizens of this country have a right to know what is going on. Unless they do, the country will not long remain free.

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