Louisiana Law Review

Volume 11 | Number 3
March 1951

The Protection of Newspaper Comment: On Public Men and Public Matters

Léon R. Yankwich

The Protection of Newspaper Comment On Public Men and Public Matters

*Léon R. Yankwich**

Article 18 of the Belgian Constitution reads:

> "The press is free; censorship shall never be established; no bond or guarantee shall be required on the part of writers, editors or printers. When the author is known and lives in Belgium, the editor, publisher or distributor cannot be proceeded against." [1]

Dicey, the English constitutionalist, commenting, in the early part of the century, on the special immunity which this provision conferred, contrasted it with the absence of such immunity in English law, as involving

> "a recognition of special rights on the part of persons connected with the press which is quite inconsistent with the general theory of English law."

He added:

> "It is hardly an exaggeration to say, from this point of view, that liberty of the press is not recognized in England." [2]

And he referred, not quite approvingly, to the tendency to relieve newspapers of responsibility through such special legislation as the English law that declared fair and true reports of public meetings to be qualifiedly privileged.[3]

---

* LL.B., Willamette University (1909); J.D. (1920), LL.D., Loyola University (1929). Judge, United States District Court, Southern District, California. Author, It's Libel or Contempt If You Print It (1949); The New Federal Rules of Criminal Procedure (1946); The New Federal Rules of Civil Procedure (1938); Marriage and Divorce (1937); The Constitution and the Future (1936); Notes on Common Law Pleading (1930); Essays in the Law of Libel (1929); Handbook of California Pleading and Procedure (1926); various articles in legal periodicals.

1. La Constitution Belge (1931) Art. 18, as quoted in Dicey, The Law of the Constitution, 234-235 (7 ed. 1908): *"Art. 18. La presse est libre; la censure ne pourra jamais être établie: il ne peut être exigé de cautionnement des écrivains, éditeurs ou imprimeurs.*

"Lorsque l'auteur est connu et domicilié en Belgique, l'editeur, l'imprimeur ou le distributeur ne peut être pour-suivi."

2. Dicey, op. cit. supra note 1, at 243.

3. Libel Law Amendment Act, § 4 (1888) (51 & 52 Vict. c. 64).

On the whole, however, the statement just quoted is a clear summary, in one sentence, of the modern law of the press as reflected in English and American law.[4]

Whatever rights the editor or publisher of a newspaper enjoys come to him not by reason of his calling, but as an individual living in a free, democratic community.

While here and there a statute, such as the California retraction statute,[5] may confer a special benefit upon a newspaper, the inclusion of newspapers in the National Labor Relations Act,[6] and the Fair Labor Standards Act,[7] and the refusal of the Supreme Court of the United States to grant them exemption under these laws,[8] and to exclude news-gathering agencies from the provisions of the anti-trust laws,[9] indicate that the attitude which Dicey noted in England, at the beginning of the century, is still dominant with us. The full application of the laws of libel and contempt to newspapers expresses the same approach.

Nevertheless, in the unfoldment of the democratic process, and the increasing appreciation of the importance of public scrutiny of acts of public officials and of matters of public interest, a definite extension of the right to mirror and comment on such acts has taken place.

I

THE ENLARGEMENT OF THE DEFINITION OF LIBEL

The significance of this trend will be more apparent if we advert to the fact that in the law of libel, the tendency is to broaden the definition of libel so as to consider libelous statements which, by older standards, would not have been considered such. Illustrative are the recent cases in which statements accusing a person of professing unpopular political views, such as being a "Fascist" or a "Red," or "Fascist" or "Communistic" sympathizer, have been held to be libelous, even in states like California where communism is still recognized as a lawful political party and where the courts have refused to take judicial notice

4. See, e.g., Cal. Civ. Code (Deering, 1949) § 47(5).
5. Id. at § 48(a), which, at this writing, has been invalidated by the court of appeals, Werner v. Southern California Associated Newspapers, 92 Cal. App. 224 (1949).
6. 49 Stat. 449, 29 U.S.C.A. § 151 et seq. (1935).
7. 52 Stat. 1060, 29 U.S.C.A. § 201 et seq. (1938).
8. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).
9. Associated Press v. United States, 326 U.S. 1 (1945).

of the fact that the Communist Party advocates the forcible overthrow of the government.[10]

Indeed, a great federal court, speaking through one of our outstanding judges, Chief Judge Learned Hand of the Court of Appeals for the Second Circuit, has held that accusing one of being a representative of the Communist Party, *even without attributing to him personally the profession of its doctrine, was libelous under the law of New York.* Referring to what had been called "the right-thinking people's test," Judge Hand wrote:

> "We do not believe, therefore, that we need say whether 'right-thinking' people would harbor similar feelings toward a lawyer, because he had been an agent for the Communist Party, or was a sympathizer with its aims and means. It is enough if there be some, as there certainly are, who would feel so, even though they would be 'wrong-thinking' people if they did."[11]

What the courts are saying is that any epithet which, in the minds of *a definite segment of the people*, might be considered a reflection on the person is a libel. This is quite a departure from the old rule which enjoined us that, in determining whether a publication is libelous, we are to consider only the views of those persons whose attitude commends itself to the approval of the court. The newspaper and legal professions are familiar with the group of cases instituted by Congressman Martin L. Sweeney against many newspapers throughout the United States because they published a Pearson and Allen column which charged him with opposing the appointment of the then United States Attorney for Ohio as a federal district judge, for the sole reason that he was "a Jew and one not born in the United States." It is estimated that the total damages asked was the sum of $7,500,000.00.

The divergent conclusions reached in two of these cases by federal circuit courts which decided them under the laws of different states illustrate the tendency just mentioned and present a striking contrast.

---

10. Washington Times Co. v. Murray, 299 Fed. 903 (D.C. Cir. 1924); Grant v. Reader's Digest Assn., 151 F. 2d 733 (2d Cir. 1945); Wright v. Farm Journal, 158 F. 2d 976 (2d Cir. 1947); Spanel v. Pegler, 160 F. 2d 619 (7th Cir. 1947); Holden v. American News Co., 52 F. Supp. 24 (D.C. Wash. 1943); Communist Party v. Peek, 20 Cal. 2d 536, 127 P. 2d 888 (1942); Gallagher v. Chavalas, 48 Cal. App. 2d 52, 119 P. 2d 408 (1941); Mencher v. Chesley, 297 N.Y. 94, 75 N.W. 2d 257 (1947); Toomey v. Jones, 124 Okla. 167, 254 Pac. 736 (1926).

11. Grant v. Reader's Digest Assn., 151 F. 2d 733, 735 (2d Cir. 1945).

Judge Biggs, of the Court of Appeals for the Third Circuit, could see no libel in the statements:

> "Can it be said that the words printed were such as tended to expose the plaintiff as a private citizen to contempt, ridicule, hatred or degradation of character? . . . We conclude that they are not. At the most, the appellant is charged with being a bigoted person who, actuated by a prejudice of an unpleasant and undesirable kind, opposed a foreign-born Jew for a judicial appointment. Let us assume that it was stated in the alleged libel that the plaintiff opposed the appointment of a candidate simply because he was an Eskimo born above the Arctic Circle. We think that this example makes obvious the absurdity of the plaintiff's position." [12]

But Judge Chase, of the Court of Appeals for the Second Circuit, saw libel in the fact that liberty-loving people in a country dedicated to religious and racial freedom would be shocked by the attitude of a public official who based his opposition to official preferment on the religion or national antecedents of a candidate. He wrote for the court:

> "Those who hate intolerance are prone to regard the person who believes in and practices acts of intolerance with aversion and contempt. And in these times when it is universal knowledge that one foreign dictator gained his power by practices which included large-scale, unreasonable Jewish persecutions which have played an important part in making his name an anathema in many parts of this country the publication of statements such as those alleged may well gain for

12. Sweeney v. Philadelphia Record Co., 126 F. 2d 53, 55 (3rd Cir. 1942). In one of the companion cases instituted in the state courts of Ohio, the court, in holding that the publication *was not libelous*, used this language:

"To oppose a person for political reasons because he is a Methodist, a Baptist, a Catholic, a Jew, or one foreign born, for a particular appointment, does not carry the necessary implication that the person opposing is influenced by his own intolerance, any more so than does opposition to a qualified person because he is of some other political party, or is in the declining years of his life, or favors prohibition, or is of socialistic tendencies, or has had capitalistic connections. . . . Our decision cannot be bottomed upon social implications which might attach to such language, nor to its governmental effect. It is not our province to approve or disapprove such argument, and our holding in this case in no wise indicates that this court approves of opposition to the appointment of a man to public office based on the religious or social heritage of the proposed appointee. We merely hold that to publish of a man that his opposition to a proposed appointee for office is based on religious grounds and the fact that the candidate is of foreign birth, is not libelous as a matter of law—e.g., per se." (Sweeney v. Beacon Journal Publishing Co., 66 Ohio App. 475, 481, 25 N.E. 2d 471, 472 [1941]).

the person falsely accused the scorn and contempt of the right-thinking in appreciable numbers." [13]

Students of the law of libel can hardly agree with this reasoning. Under it, the test of the most prejudiced may be made to govern. And in a conservative religious community or a community in which many disapprove of divorce, a false statement that a person is divorced might become actionable.

Nevertheless, such seems to be the direction which the law of libel is taking at the present time. The object seems to be to broaden the definition of libel so as to make it cover the most generalized and even negative statements of disapproval of conduct or imputations on a person's character.[14]

II

Acts of Public Persons

When the broadening of the field of comment and criticism of public officials and matters of public interest is considered against this rather rigorous background, the strides we have made in that direction will appear in their true significance.

It is not my object to consider here the liberal rule established in California by the now famous *Snively* case,[15] and obtaining in eight other states (Arizona, Iowa, Kansas, New Hampshire, North Carolina, South Dakota and West Virginia), and which makes comments on the acts of public officials and candidates for public office, qualifiedly privileged, even when charging them with crime. The inquiry will be limited to the problem of fair comment.

The right of fair comment stems from the fundamental principle that any matter of public concern is a proper subject of dissemination and comment. In an old Massachusetts case, the principle was stated very succinctly:

"The editor of a newspaper has the right, if not the duty, of publishing—for the information of the public, fair and reasonable comments, however severe in terms, upon any-

13. Sweeney v. Schnectady Union Publishing Co., 122 F. 2d 288, 290 (2d Cir. 1941).

14. This subject is treated fully in my recently published book. See Yankwich, It's Libel or Contempt If You Print It, 1-9, and illustrative cases (Group B, 30-92) (1950).

15. Snively v. Record Publishing Co., 185 Cal. 565, 198 Pac. 1 (1921). See Yankwich, op. cit. supra note 14, at 305-330.

thing which is made by its owner a subject of public exhibition, as upon any other matter of public interest . . . ." [16]

In a more recent case, the Supreme Court of West Virginia

16. Gott v. Pulsifer, 122 Mass. 235, 238 (1877).

Although the older American cases do not draw clearly the distinction between fair comment and qualified privilege, the statement of the principle just quoted has been accepted generally.

A more elaborate statement is found in Cherry v. Des Moines Leader, 114 Iowa 298, 304, 86 N.W. 323, 325 (1901):

"One who goes upon the stage to exhibit himself to the public, or who gives any kind of a performance to which the public is invited, may be freely criticised. He may be held up to ridicule, and entire freedom of expression is guaranteed dramatic critics, provided they are not actuated by malice or evil purpose in what they write. Fitting strictures, sarcasm, or ridicule, even, may be used, if based on facts, without liability, in the absence of malice or wicked purpose. The comments, however, must be based on truth, or on what in good faith and upon probable cause is believed to be true, and the matter must be pertinent to the conduct that is made the subject of criticism. Freedom of discussion is guaranteed by our fundamental law and a long line of judicial decisions. As said in the Gott Case, supra, the editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications, for which no action will lie without proof of actual malice. See, also, Eastwood v. Holmes, 1 Fost. & F. 347. Paris v. Levy, 9 C.B. (N.S.) 342; Donaghue v. Caffey 1885, 53 Conn. 43, 2 Atl. 397; Carr v. Hood, 1 Camp. 355, Note. Surely, if one makes himself ridiculous in his public performances, he may be ridiculed by those whose duty or right it is to inform the public regarding the character of the performance. Cooper v. Stone, 24 Wend. 434. Mere exaggeration, or even gross exaggeration, does not of itself make the comment unfair. It has been held no libel for one newspaper to say of another, 'The most vulgar, ignorant, and scurrilous journal ever published in Great Britain.' Heriot v. Stuart, 1 Esp. 437. A public performance may be discussed with the fullest freedom, and may be subject to hostile animadversions, provided the writer does not do it as a means of promulgating slanderous and malicious accusations. O'Connor v. Sill, 1886, 60 Mich. 175, 27 N.W. 13; Davis v. Duncan, L.R. 9 C.P. 396. Ridicule is often the strongest weapon in the hands of a public writer; and, if it be fairly used, the presumption of malice which would otherwise arise is rebutted, and it becomes necessary to introduce evidence of actual malice, or of some indirect motive or wish to gratify private spite. There is a manifest distinction between matters of fact and comment on or criticism of undisputed facts or conduct. Unless this be true, liberty of speech and of the press guaranteed by the constitution is nothing more than a name."

The article involved was a rather scathing denunciation of the performance of a theatrical team known as the "Cherry Sisters," which the Des Moines Leader had reproduced from another newspaper, and which read:

"Effie is an old jade of 50 summers, Jessie a frisky filly of 40, and Addie, the flower of the family, a capering monstrosity of 35. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waived frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom. They pranced around the stage with a motion that suggested a cross between the danse du ventre and fox trot,—strange creatures with painted faces and hideous mien. Effie is spavined, Addie is stringhalt, and Jessie, the only one who showed her stockings, has legs with calves as classic in their outlines as the curves of a broom handle." (114 Iowa 298, 299, 86 N.W. 323, 325.)

While the court, in its decision, stressed *privilege* dependent upon *absence of malice*, it is to be noted that the court declined (1) to find malice in the

has stated the reasons for the distinction between private libels and publications commenting on matters of public interest in this language:

> "The distinction between a statement with reference to private gossip and a scandal and one concerning an act or conduct of public interest is so palpable as to require no elucidation. Consideration of peace and order between individuals calls for repression and punishment of false and defamatory statements of fact concerning the private person. There are equally cogent reasons for liberality of statement in matters of public concern. 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 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." [17]

Several California cases decided in the last two decades illustrate this distinction and the scope and nature of the protection which courts have thrown around comment on matters of public concern. They are especially important because they establish firmly the principle that a charge of unfitness for office, whether the person be a candidate for office or its occupant, even if couched in extravagant language, is not libel. The following is a summary of the imputations: The statement that the members of a city council "lacked that conscientious regard for the city's interest which makes the public office a public trust," and

---

mere extravagance of the language, and (2) placed the burden of proving it upon the plaintiff, and sustained a directed verdict, in the absence of such proof.

So we have, in this case, an older example of a principle which in more recent years came to be applied with greater clarity and which resulted in the doctrine that fair criticism is not *libel*, which malice cannot turn into actionable libel, a doctrine to be discussed further on in this article. See Albert Woodruff Gray, All's Fair In Criticism, Editor and Publisher, Vol. 83, No. 24, p. 20, June 10, 1950.

17. Bailey v. Charleston Mail Assn., 126 W. Va. 292, 306, 27 S.E. 2d 837, 844 (1943). This case also expresses in very succinct language the thought that the rights which newspapers enjoy belong to any person on the same basis:

"The constitutional provision relative to the freedom of the press confers no special privilege or right upon a publisher of a newspaper in relation to the law of defamation. Any person has the same right as a publisher of a newspaper."

Almost identical language is found in Morcom v. San Francisco Shopping News, 4 Cal. App. 2d 284, 287, 40 P. 2d 940, 941 (1935): "The law recognizes no special privilege in a newspaper. The privilege of a newspaper is in nowise different from that of any citizen of the community." This is the view held by all American courts. See 53 C.J.S., Libel and Slander, § 1212.

urging their recall;[18] a publication questioning the motive of a mayor and attributing his attitude toward a certain ordinance to selfish motives and his aspirations to Congress;[19] a statement impugning the motives of a member of the school board in opposing the establishment of student savings banks;[20] a questioning of the sources of the wealth which had been accumulated in public office while working on a small salary without making any intimation that it was acquired illegally;[21] a charge that certain members of a city council "have neither the zeal nor the temperament to administer the business of the city." [22]

18. Taylor v. Lewis, 132 Cal. App. 381, 22 P. 2d 569 (1933).

19. Morcom v. San Francisco Shopping News, 4 Cal. App. 2d 284, 40 P. 2d 940 (1935).

20. Harris v. Curtis Publishing Co., 49 Cal. App. 2d 340, 121 P. 2d 761 (1942).

21. Babcock v. McClatchy Newspapers, 82 Cal. App. 2d 528, 186 P. 2d 737 (1947).

22. Eva v. Smith, 89 Cal. App. 324, 265 Pac. 803 (1928).

A recent California case, Howard v. Southern California Associated Newspapers, 95 Cal. App. 2d 580, 213 P. 2d 399 (1950), illustrates the trend to give the broadest scope to the right of comment. A recall election was pending in Glendale, California, for the removal of some city officials. The plaintiff, Austin F. Howard, was chairman of the committee sponsoring the recall. Donald E. Close, the minor son of W. E. Close, published in the Glendale News-Press, a letter attacking the recall movement and Howard. The letter contained the following language:

"In the light of what has already been said in opposition to the recall and what I have added above, it cannot be denied that the recall movement is entirely illegitimate, a mala fide attempt to discredit noble and honorable officials who have served our city long and well. This sinister movement must not be permitted to continue to malign the democratic foundations of our city government. Mr. Howard and his entire recall committee have proved themselves a disgrace to Glendale, and it should be the desire of every citizen to destroy this dangerous and unjust element by casting his vote against the recall."

Howard sued the Closes, father and son, and the newspaper. Sustaining the trial court which ruled that the article was not libelous, the court reaffirmed the distinction between attacks on individuals in their private capacity and attacks on public men or persons engaged in public controversies, saying:

"Publications by which it is sought to convey pertinent information to the public in matters of public interest are permitted wide latitude. In controversies of a political nature, in particular, the circumstances often relieve statements, which might otherwise be actionable, of possible defamatory imputations. Mere expressions of opinion or severe criticism are not libelous if they clearly go only to the merits or demerits of a condition, cause or controversy which is under public scrutiny, even though they may adversely reflect upon the public activities or fitness for office of individuals who are intimately connected with the principal object of the attack. . . .

"These familiar rules have direct application to elections for the recall of public officials. (See Maher v. Devlin, 203 Cal. 270 [263 P. 812], recall of mayor and city council; Taylor v. Lewis, supra, recall of city councilman.)

"The statements of the portion of the article protested by plaintiff were prefaced by a reference to the parking meter issue and to the asserted fact that the sponsors of the recall had made no specific charges or accusations against the officials. It was asserted that no 'pointed' charges of misconduct had been made against the councilmen, no proof offered to connect them with the 'deplorable' conditions which plaintiff claimed to exist, and that plaintiff

These cases range over a period of more than twenty years. Nevertheless, the reasoning behind them was best stated in the oldest of them, which also gives the limitations:

> "The conduct of public officers being open to public criticism, it is for the interest of society that their acts may be freely published with fitting comment or strictures. . . . The right of criticism rests upon public policy and those who seek office should not be supersensitive or too thin-skinned concerning criticism of their qualifications. (Newell on Libel and Slander, 4th ed., p. 536) In commenting upon a published article of the character here involved the supreme court of Nebraska used the following apt language: 'It relates to the fitness of those who adhere to the ruling clique and their conduct in office. It imputes no crime to them. It employs no degrading or insulting epithets toward them, but in extravagant language denounces them as derelict in the duties of their office, unfit, unfaithful, etc. This we understand a political stump orator may do, and outside of ethics there is no rule against using the pulpit for a like purpose. It would be absurd to hold as libelous to say of a candidate for public office that he was utterly unworthy of public confidence. To maintain that proposition, all political arguments are advanced against a candidate. They are sometimes rambling but the law does not undertake to punish the man who sums them up in a single sentence.' (Arnold v. Ingram, 151 Wis.

---

had conceded as much. The concluding paragraph, which assumed the truth of the preceding statements, appears to be only an expression of the opinions and views of the author respecting the merits of the recall movement. It was devoid of statements of fact. It denounced the recall movement, calling it 'illegitimate,' 'a mala fide attempt' to discredit the officials, a 'sinister movement,' and it referred to the recall committee as a 'disgrace to Glendale,' and as a 'dangerous and unjust element' that must be destroyed by defeating the recall. Considered with the preface, as the author said it should be, the final paragraph merely enlarged upon the idea that no sufficient cause was being advanced for the recall of the councilmen. The justness and good faith of the recall were questioned without any words casting doubt upon the character of the members of the recall committee or the integrity of their actions apart from their active support of the recall.

"In the words of the court in Taylor v. Lewis, 132 Cal. App. 381, 386 (22 P. 2d 569, 572), the article . . . 'does not charge anything that would follow appellant into his private life and stamp him as dishonest or bring upon him in the capacity of a private citizen the contempt of his fellows,' etc. This, we take to be a proper test on a charge of libel of words spoken or written concerning those who are participating on one side or the other of a political issue." (Howard v. Southern Cal. Associated Newspapers, 95 C.A. 2d 580, at 584-585.)

It is sufficiently clear that, despite some very strong language which could readily have been interpreted as stating *facts* rather than *comment*, the Court recognized the right to comment in its widest scope.

438, Ann. Cas. 1914C, 976, 138 N.W. 111). . . . In thus permitting criticism the law gives a wide liberty, there being an honest regard for the truth. Within this limit public journals, speakers, and private individuals may express opinions and indulge in criticism upon the character or habits—or mental or moral qualifications of official candidates. (1 Cooley on Torts, p. 443)." [23]

Recently the Louisiana legislature attempted to use Article 3, Section 11, of the Louisiana Constitution to curb the freedom of a New Orleans newspaper to comment on matters of public concern.

The Constitution of Louisiana, Article III, Section 11, reads:

"Either House, during the session, may punish by imprisonment any person not a member who shall have been guilty of disrespect, or disorderly or contemptuous behavior, but such punishment shall not exceed 10 days for each offense."

The general impression among students has been that the aim of the section is to give to the legislature the power to punish those who are guilty of direct contempt towards the legislature. It was never thought that this gave to the legislature the power to punish as contempt newspaper criticism of its conduct. How-

23. Eva v. Smith, 89 Cal. App. 324, 329, 265 Pac. 803 (1928). And see A.L.I., Restatement of Torts, §§ 606-610 (1938); Connor v. Timothy, 43 Ariz. 517, 33 P. 2d 293 (1934); Steenson v. Wallace, 144 Kan. 730, 62 P. 2d 907 (1936). One of the broadest statements of this principle is contained in the opinion of Mr. Justice Edgerton of the United States Court of Appeals for the District of Columbia in another one of the *Sweeney* cases, Sweeney v. Patterson, 128 F. 2d 457, 458 (D.C. Cir. 1942):

"The cases are in conflict, but in our view it is not actionable to publish erroneous and injurious statements of fact and injurious comment or opinion regarding the political conduct and views of public officials, so long as no charge of crime, corruption, gross immorality or gross incompetence is made and no special damage results. Such a publication is not 'libelous per se.' . . . . Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. Since Congress governs the country, all inhabitants, and not merely the constituents of particular members, are vitally concerned in the political conduct and views of every member of Congress. Everyone, including appellees and their readers, has an interest to defend, and anyone may find means of defending it. The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. Information and discussion will be discouraged, and the public interest in public knowledge of important facts will be poorly defended, if error subjects its author to a libel suit without even a showing of economic loss. Whatever is added to the field of libel is taken from the field of free debate."

ever, the State Senate of Louisiana cited David Stern, III, Publisher, and Clayton Fritchey, Editor, of the New Orleans Item for writing an editorial saying the legislature acted as "trained seals" and "lackeys of Governor Earl K. Long." [24]

While the threat of imprisonment was not carried out and the senate contented itself with rebuking the editor and publisher, the action of the Louisiana senate, even if conceivably within the wording of the Louisiana Constitution, goes counter to the trend here discussed and could not be supported under the recent norms introduced by the Supreme Court of the United States into constructive contempt and followed throughout the country.[25]

III

Matters of Public Concern

The right of fair comment extends to whatever one exhibits for public approval. A brief statement of the principle is contained in a case in which rather harsh criticism of a then famous actress, Olga Nethersole, was declared to be within the scope of the privilege. The article under consideration, in addition to criticizing the type of plays in which the actress was appearing, stated that one of the plays had been "hissed" in London and that the actress "had hysterics." A jury verdict in her favor was set aside by the higher court upon the ground that the article did not exceed the limits of fair comment:

> "When one offers a production or performance for public exhibition, he submits it to fair and reasonable criticism, and, unless the writer passes beyond the limits of such criticism, his language cannot be held to be libelous. Whether or not the falsity of such a statement tends to prove express malice need not be considered here, for, even though the statement as to the hissing of 'The Labyrinth' in London be untrue, it cannot be considered as evidence of express malice in respect to criticism which is otherwise fair and reasonable. The plays all treat of illicit relations between the sexes. They all present situations which suggest the yielding to animal passions. The

24. New Orleans Item, June 5, 1950.

25. Bridges v. California, 314 U.S. 252 (1941); Times v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331, 348 (1946); Craig v. Harney, 331 U.S. 367 (1947); Baltimore Radio Show, Inc. v. State, 67 A. 2d 497 (C.C. Md. 1949), certiorari denied by the Supreme Court of the United States on January 9, 1950. See Terminiello v. Chicago, 337 U.S. 1 (1949). And see Yankwich, op. cit. supra note 14, at 477-486, 509-528.

life which they represent is not according to the universally accepted standards of morality and decency of conduct. It may be that intelligent and right-minded persons may take different views as to the tendency of such plays, and as to the policy of presenting them. Some may say that the picture of the consequence of an evil life will deter people from entering upon such a life. Others may say that such a representation gives knowledge of evil and suggests thoughts which tend to wrongdoing. Still others may say if a play represents any phase of life it should be judged wholly as a work of art. There may be honest and fair criticism from either standpoint. The true test is whether the description of the plays is fairly given, and whether the opinions expressed are such as may be reasonably entertained and expressed by an honest person. Judged by this test, there can be no doubt that the criticism complained of is fair and reasonable, and the case is not one where different minds may properly arrive at different conclusions in respect to its fairness and reasonableness." [26]

Without going into further detail, it may be stated generally that the right of fair comment protects comments on governmental affairs, on the conduct and administration of educational, charitable, religious and public institutions and organizations and of their officers and employees, on the administration of justice, on public spectacles, plays, books, pictures, and, generally, on matters in which the public has a substantial interest. It embraces, in addition to persons actually in public life, and candidates and applicants for public preferment or office, the conduct of persons who, by their positions, and their appeals for approval—be they actors, public men, public contractors, ministers, educators, players in various sports—have become a matter of concern and interest to the public.

IV

WHEN IS COMMENT FAIR?

At times, writers and writers of opinions, including some which we have discussed here, use "qualified privilege" and "fair comment" interchangeably. However, they are not the same. In qualified privilege, the publication would be considered libelous

26. Cleveland Leader Printing Co. v. Nethersole, 84 Ohio St. 118, 137, 95 N.E. 735, 740 (1911). And see, A.L.I., Restatement of Torts, § 609 (1938).

but for the existence of the privileged occasion. Or the publication is, *in fact*, libelous, but because it is uttered under circumstances which render it privileged, it is not actionable unless published with actual malice. A privileged publication is, therefore, defamatory, but the privileged occasion immunizes it against action.

In order that comment be fair, (1) it must be based on facts truly stated, or, differently expressed, it must not misstate facts—for a comment cannot be fair when based upon facts not stated truly. (2) It must not contain imputations of corrupt or dishonorable motives to the person whose conduct or work is criticized, except insofar as such imputations are warranted by the facts. (3) It must be the honest expression of the writer's real opinion.

Fair comment is essentially opinion based on facts.

In formulating these rules, courts have also stated the negative side of the problem. The elements of fairness are absent (1) if the publication contains attacks on the motives and character of the person, unrelated to the matters as to which the comment or criticism relates, (2) if it discusses his private life as to matters not connected with the work which is the subject of criticism, and (3) if it accused him of crime or employs degrading or insulting epithets, other than those necessary to characterize his unfitness for, or unfaithfulness in, office.

The line between the permissible and the forbidden is difficult to trace at times. And the courts, themselves, are not always consistently successful in drawing it true. For, while, for instance, in discussing a book, play or a public performance, the private life of the author or performer may be entirely foreign to the subject of the discussion, in commenting on the fitness of a man for public office, be he an aspirant or occupant, his private life and morals may have a very direct bearing upon his availability for office. His observance of the higher decencies in his behavior and relations with individuals, in his family or business life, his observance of the accepted norms of fair, decent and honest conduct in private affairs may furnish a telling clue to his character. For it is axiomatic that one who does not have a proper regard for moral standards and those decorous rules of conduct which, by common agreement, should obtain in one's personal relations with one's fellowmen, is not likely to conform to those higher standards of probity required of one in public office. A personal

attack may, therefore, be an integral and essential part of fair comment and receive legal sanction as such. The courts do but lay down general rules, which are merely guideposts. And whether a particular criticism exceeds the bounds of fairness is, ultimately, determined by a consideration of each particular situation, taking into account the exigencies of the situation and all the circumstances surrounding the act which is the subject of the comment or criticism and making all converge around the fundamental test of all protected criticism, *that it be fair.* And fairness in this, as in other instances of which it is an element, is not an abstract but a concrete concept. Its existence or non-existence depends upon time, place, circumstances, and, chiefly, upon what, according to those high standards of right conduct which our way of life recognizes, and which the courts apply, should obtain in a particular instance.

V

THE WIDENING HORIZON OF CRITICISM

It is quite obvious that the horizon has widened and that the realm of public criticism has been extended (1) by making privileged comments on public men, whether they occupy public office or are aspirants for it, or have acquired a public character through their activities and (2) by protecting certain types of discussions as fair comment.[27] To these should be added (3) the denial to

27. Indicative of the liberal attitude is a decision of the Court of Appeals for the Seventh Circuit, based on the law of Illinois, holding that an accusation of "unfairness to labor" against a national concern does not exceed the limitations of fair comment (Montgomery Ward & Co. v. McGraw-Hill Pub. Co., 146 F. 2d 171, 176 (7th Cir. 1944). The article charged the officials of the company with refusal to recognize the union, to bargain with them, or to make any concessions, that they had given the "brush-off" to representatives of the United States Conciliation Services and—as to one of them, a Catholic clergyman with the rank of Monsignor—that they had given him the "run-around." The court ruled that, on the whole, the article was no more than an accusation of unfairness to labor. In this way they could see no libel.

"If it were libelous simply to say of another that he is unfair to labor, every picketer who carries a banner with such a legend would be guilty of libel. To say that one is unfair to labor is not a statement of a fact, but of an opinion. Likewise to say of one: you are reactionary, you are undemocratic, you are a nationalist, you are an isolationist, you are a New Dealer, you are a Union Leaguer, you are opposed to labor, you are a coddler of labor, is similarly to express an opinion. Calling one unfair to labor is no different. All of these expressions spring from controversies on questions of public interest."

A like liberal attitude is indicated in a recent decision of the Supreme Judicial Court of Massachusetts (Tobin v. Boston Herald Traveler Corp., 324 Mass. 478, 487, 87 N.E. 2d 116, 120 [1949]). The defendant on March 28, 1945, had published in the Boston Herald the following article: "'Clear It With Jimmy' Or Else—If you don't 'clear it with Jimmy' your chances of getting

public men of the right of privacy.[28] This was promulgated in California on November 18, 1949, in a case in which the court recognized that when one becomes a public character, he relinquishes the right of privacy, so as to permit exploitation of his life without any limitation as to time. The litigation turned around a statement by Groucho Marx, the well-known comedian, broadcast over the network of the American Broadcasting Company on a program known as "You Bet Your Life":

> "I once managed a prize fighter, Canvas-back Cohen. I brought him out here. He got knocked out and I made him walk back to Cleveland." [29]

Cohen, who had entered the prize ring as a professional boxer in 1933, and continued his ring career—a losing one—until 1939, when he abandoned it, sued. The court held that the suit could not be maintained because, as a professional boxer, he had waived the right of privacy, which lapse of time did not reinstate. The court said:

> "A person who, by his accomplishments, fame, or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes

---

anything out of this administration in the line of patronage are not good. Jimmy is Gov. Tobin's younger brother and according to all available reports, he rules the patronage with an iron hand and if you weren't right in the election, your chances of getting a job can be discounted."

The plaintiff, James G. Tobin, brother of the then Governor of Massachusetts, Maurice J. Tobin, identified by the pleadings as the "Jimmy" referred to in the article, brought action alleging that the article charged that he "was soliciting and receiving bribes . . . and . . . had committed serious wrongs involving moral turpitude."

The trial court overruled the newspaper's demurrer to the complaint. The higher court reversed upon the ground that the article was not defamatory, and ordered the demurrer sustained, and judgment for the newspaper entered as to the count of the complaint which set forth the publication, saying: "The gist of the publication is that Governor Tobin was distributing patronage on the basis of party affiliation or, at least, that such affiliation was one of the factors to be considered, and that he had delegated to his brother, the plaintiff, the matter of determining whether applicants for patronage had the necessary qualifications in this regard. The statement in the publication that the plaintiff 'rules the patronage with an iron hand' added little or nothing when read in the light of the words following it, namely, 'and if you weren't right in the election, your chances of getting a job can be discounted.' That means no more than that the plaintiff was rigidly enforcing the party affiliation requirement, alleged to be essential to the obtaining of patronage. It does not impute wrongdoing or reprehensible conduct to the plaintiff. The expression 'Clear it with Jimmy' used in the publication has no invidious connotation. In its context it meant only that patronage must 'clear' through the plaintiff."

28. Yankwich, op. cit. supra note 14, at 274-285.

29. Cohen v. Marx, 97 Cal. App. 2d 704, 705, 211 P. 2d 320, 321 (1949).

> a part of his right of privacy. . . . Applying the foregoing rule to the facts in the present case, it is evident that when plaintiff sought publicity and the adulation of the public, he relinquished his right to privacy on matters pertaining to his professional activity, and he could not at his will and whim withdraw himself like a snail into his shell and hold others liable for commenting upon the acts which had taken place when he had voluntarily exposed himself to the public eye. As to such acts he had waived his right of privacy and he could not at some subsequent period rescind his waiver." [30]

Other courts have applied this principle with the utmost liberality. A feature story in 1937, in The New Yorker, about one who had been considered "a boy wonder" in 1910,[31] and a contemporaneous comment on the life of a person who was a defendant in a nationally discussed sedition trial,[32] were both placed outside the protection of the right of privacy. In the last case, the court summed up the principle in this sentence:

> "The right of privacy does not include protection from publication of matter of legitimate public or general interest."

And this for the reason that

> "one who becomes an actor in an occurrence of public or general interest must pay the price of publicity through news reports concerning his private life, unless those reports are defamatory." [33]

So, despite the tightening of the law of libel against the purveyor of news in other respects, there has been a noted extension of the realm of criticism and comment on public men and public matters. This is a healthful sign, especially because there are strident voices in our midst who would stifle, in true totalitarian manner, all public criticism. While their avowed aim may appear praiseworthy and be couched in very high-minded language, the ultimate aim is to encompass all of what the Duke of Marlborough referred to, in bitterness, as "the villainous way of printing." Others imbued by the desire to help public free discussion in our democratic society, would abolish the distinction between conditionally privileged publications and fair comment.

---

30. Cohen v. Marx, 94 Cal. App. 2d 704, 705, 211 P. 2d 321, 322.
31. Sidis v. F-R Publishing Corp., 113 F. 2d 806 (2d Cir. 1940).
32. Elmhurst v. Pearson, 153 F. 2d 467 (App. D.C. 1946).
33. Id. at 468.

A recent writer on the subject has stated:

> "The most needed development . . . is wider acceptance of the rule that there is a conditional privilege to make misstatements of fact. Most of the uncertainty of the law arises from the difficulty of disentangling comment, statements of motives, and statements of fact; this uncertainty would be avoided if all comments and statements about political officers and candidates were conditionally privileged. Such a rule would provide needed encouragement to those who wish to speak out honestly and with due care in the public interest, and the conditional character of the privilege would guarantee adequate protection to officers and candidates." [34]

The adoption of such rule might be of benefit in states which, although recognizing the right of fair comment, do not recognize the liberal rule of privilege which obtains in California and eight other states in relation to men in, and candidates for, public office. However, in the states where both are present, the abolition of the distinction would not result in any great practical advantage. And, even in other states, such reform might not be desirable.

As already noted, the chief distinction between the two is that, in qualified privilege, the article would be libelous but for the privilege, while fair comment is no libel.

In final analysis, however, both a privileged publication and a publication which is claimed to be fair comment may have its character destroyed by excess—in the one case by malice in fact, in the other, by extravagant personal attacks not warranted by facts. In the case of qualified privilege, a mere allegation, in a complaint, of actual malice is enough to force a trial. In the case of fair comment, the question whether the personal attack is warranted by the facts stated is one of law to be determined by the court. In most instances, such a determination would terminate the lawsuit. And the cases mentioned at the beginning of this discussion indicate that this is what actually occurred.[35] Only if the facts on which the comment is based did not appear in the publication and if the court ruled that the inference is not one which should, under the circumstances, be made, would there be a question of fact left for a jury.[36] And the instances in which

34. Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875, 903 (1949).

35. See cases cited in notes 18-23, supra.

36. Yankwich, op. cit. supra note 14, at 319-322, 372-374.

A very recent Illinois case (Dilling v. Illinois Publishing & Printing Co.,

this would happen are likely to be less frequent under the present state of the law.

VI

CONCLUSION

The two plagues which scourge the life of newspaper editor and publisher—libel and contempt—are a challenge not only to his ingenuity, but also to his sense of responsibility, without which he cannot perform his true function in a free democratic

---

91 N.E. 2d 635, 637 [Ill. 1950]), decided on March 8, 1950, contains a very apt illustration of the application of this principle.

The Chicago Herald-American had published a dispatch from San Jose, California, stating that the California Legion had adopted a resolution which charged that "Communists and Fascists continue to threaten our cherished ideals of Americanism."

The dispatch stated that, among the persons named in the resolution "as fostering subversive activities," was Elizabeth Dilling. She sued for libel. The trial court sustained a motion to dismiss the complaint. On appeal, the appellate court of Illinois sustained the ruling.

While adhering to the recently declared principle that the characterization of a person as a Communist or as an un-American disciple of Fascism is libelous per se, the court ruled that the article did not amount to a charge of either, saying: "Nowhere in the article complained of is there a statement that plaintiff is a Communist or a Fascist or that she is an adherent of Communism or Fascism. All the article says about the plaintiff is that she is named in the resolution as one who is fostering subversive activities. In our opinion the language used does not charge plaintiff with the crimes of treason or sedition, nor can the language of the published article be construed as charging plaintiff with any crime." (91 N.E. 2d 635, 637.)

More significant to the problem we are discussing is the fact that the court finding on the face of the complaint and in the publication that Elizabeth Dilling had been engaged in advocating publicly as a lecturer and authoress certain doctrines, the publication of the dispatch and the dispatch itself were no more than fair comment on her activities. The court said:

"In her complaint plaintiff alleges that she 'is a patriotic author and a lecturer on behalf of Christianity and Americanism.'

" 'One who by his activities and by written or spoken language attempts to influence public opinion in any way is subject to the free and honest criticism of his efforts by members of the public. Thus, lobbyists and other persons attempting to influence prospective legislation, propagandists seeking public support for their causes, and various persons who participate in civic and state activities, not as office holders or candidates therefor, but merely as private citizens, are subject to the free expression of the opinion of those commentators who honestly but disparagingly pass judgment upon their activities.' A.L.I., Restatement of Law—Torts, vol. 3, sec. 610, p. 292.

"According to the allegations of her complaint, plaintiff sought public support and patronage, thus inviting public criticism. The fact that defendants were reporting and commenting on a matter of public interest appears from the complaint. Hence, defendants' right of fair comment in a matter of public interest was properly presented for determination by their motion to dismiss, and it was unnecessary to plead this right as an affirmative defense. Manifestly the executive committee of the California American Legion does not share plaintiff's views on Americanism. In our view this expression of difference of opinion as reported in the article here complained of is not actionable per se." (91 N.E. 2d 635, 637.)

society. The Hutchins Commission on Freedom of the Press gave expression to this thought when it wrote:

> "Freedom of the press for the coming period can only continue as an accountable freedom. Its moral right will be conditioned on its acceptance of this accountability. Its legal right will stand unaltered as its moral duty is performed." [37]

To obtain the optimum of the wider scope of coverage and criticism of public men and matters, which the courts now concede to the newspaper editor and writer, two cardinal rules should be observed:

(1) Comment should be limited to what is essential to the special situation. The unworthiness of a person may be shown even though condemnation and exposure be confined to the characteristics which disqualify in the particular respect. Indeed, such approach may be the more effective. And it is impossible to stay in the realm of legitimate privilege or criticism if the writer seeks to make a specific incident the occasion for giving vent to unbounden wrath, righteous or other, or for dealing with all the venal sins or peccadillos, of which the subject under attack may, at one time or another, have been guilty, and which have no true relation to the unfitness which it sought to expose.[38]

---

37. Report of the Commission on Freedom of the Press, A Free and Responsible Press, 19 (1947) (Chairman, Robert M. Hutchins).

38. It is, often, very difficult to draw the exact boundaries of privileged comment. Some of the older writers have sought to do it by postulating that publications relating to "political views or arguments on questions of public interest" shall not "attack the character of a person." (Newell, Slander and Libel, 57, § 18 [4 ed. 1924]). But comment may, of necessity, be of such nature as to call for invasion of the domain of private conduct. The Restatement of Torts, while not approving the liberal rule, gives the following as the rule of law obtaining at present:

"The privilege stated in this Section applies not only to discussion of the public acts of officers and candidates, but no [sic] criticism of the private conduct and the motives which affect their public acts.

"The fact that a person holds public office or is an employee of the public does not throw his entire private life or character open to criticism. However, his private conduct may be of public importance if it is such as to indicate characteristics incompatible with the proper discharge of his public duties. To this extent the private life of the public official may be subject to criticism. Thus, the fact that a man has in his private affairs shown himself to be dishonest in his custody of other people's money is highly important in determining his fitness for an office in which he has or will have the custody of public funds. So, too, a public officer's personal character as indicated by his private acts may be of importance in determining his fitness for an office since the fact that he acted for an improper purpose on one occasion may properly be regarded as indicating that similar motives may influence his official conduct. However, the privilege to criticise the private conduct or character of a public official differs in one important particular from the privilege to criticise the quality of his public acts. In the latter case it is necessary to show only that the criticism expressed the actual opinion of the

(2) Facts should be made to speak, and non-essential comments should be avoided—especially those fulminating epithets so beloved of columnists and headline writers, which courts seize upon so eagerly in order to pin "libel" on what might, otherwise, have been protected comment.

In brief, editors and writers must be careful how they fling about what Ambrose Bierce called "the splintering lightning and the sturdy thunders of admonition." [39]

Self-interest and a salutary sense of social responsibility and accountability command such conduct.

---

critic. In the former, it is necessary to show not only this but also that the opinion expressed by the criticism is one that is reasonably warranted by the facts, that is, that it is one with which a man of reasonable intelligence and judgment might agree." (A.L.I., Restatement of Torts, § 607.)

This is but an application of the principle that fair comment *may* include a personal attack. See IV, supra; Yankwich, op. cit. supra note 14, at 317-322, 371-375.

39. Bierce, The Devil's Dictionary, "Editor," in the Collected Writings of Ambrose Bierce, 228 (Fadiman ed. 1946).