Notre Dame Law Review

Volume 30 | Issue 2 Article 4

3-1-1955

# Private Libel or Public Exhortation

Leon R. Yankwich

# PRIVATE LIBEL OR PUBLIC EXHORTATION

## INTRODUCTION

Some of the things we treasure most in our American democratic society contain the seeds of peril. Thomas Jefferson considered the principal evil of popular government "the turbulence to which it is subject."[1] This turbulence is inherent in what he has called "the boisterous sea of liberty."[2]

Recently an editorial writer of a large metropolitan newspaper related this problem to newspapers in this manner: " 'You can't have free speech without some noisy people; you can't have a free press without what many people would consider some reprehensible newspapers.... There is no way to have either without losing freedom itself.' "[3]

Much of the criticism directed at newspapers stems from failure to distinguish the noisy from the quiet ones, the reprehensible from the praiseworthy. In this the pattern is the same which Jefferson considered inherent in our democratic government. Yet he saw less peril in it than in tranquil servitude.[4] And despite the tendency towards maturity and stabilization which a century and a half of national life has produced, the development of modern

---

1 THE WRITINGS OF THOMAS JEFFERSON, Vol. VI, p. 65 (1903), (Letter to James Madison, Jan. 30, 1787).

2 THE WRITINGS OF THOMAS JEFFERSON, Vol. XV, p. 283 (1904), (Letter to Richard Rush, Oct. 20, 1820): "Nor is our side of the water entirely untroubled, the boisterous sea of liberty is never without a wave."

3 Carl R. Kesler as quoted in EDITOR AND PUBLISHER, Vol. 87, No. 28 at p. 12 (July 3, 1954).

4 *Supra* note 1.

newspaper techniques and new media of communication, such as radio and television, have made it possible for the strident voice to overshadow the restrained one, or appear to do so. Nevertheless, a fair appraisal of the situation would indicate that the newspapers of today are, in the main, performing their function in our democratic society in good tradition. It is the object of this study to point to some of the rights of the newspapers and the value to the community of their proper exercise.

## I

## NEWSPAPER RIGHTS AND PRIVILEGES

Jefferson was so convinced of the indispensability of the newspaper to democratic society that he once wrote that if given the choice between a government without a newspaper or newspapers without a government, he would choose the latter.[5] The right to gather and disseminate information and to comment on what goes on about us belongs to the newspaper publisher as an individual and *not* in his capacity as a newspaper man. He exercises a right which belongs to every citizen, be he newspaper publisher or not. Indeed, one of California's court of appeals expressed it in this manner: "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."[6] This principle is not new. It has been expressed in

---

[5] *Op. cit. supra* note 2 Vol. VI at 57-58, (Letter to Edward Carrington, Jan. 16, 1787): "The basis of our governments being the opinion of people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers, and be capable of reading them."

[6] Morcom v. San Francisco Shopping News, 4 Cal. App.2d 284, 287 (1935).

many cases, old and new, in California and elsewhere.[7]

A West Virginia court has stated it in one sentence: "Any person has the same right as a publisher of a newspaper."[8] So when we speak of "the rights and privileges" of newspapers and hear charges of their abuse, we are, in reality, discussing the rights and privileges of all of us and their possible abuse in democratic society. So, we are back to the "turbulence" of which Jefferson spoke.

The problem still is, how should this function be performed? There are those who would, by dilution of our constitutional safeguards, impose censorship in one form or another. Others would, in indirect fashion, regulate the contents of newspapers or limit their method or manner of distribution. Leaving aside any constitutional considerations, I am of the view that the limitations imposed on the newspapers by the law of defamation and the rules evolved by the courts in interpreting statutory definitions of libel are sufficient to insure protection against the abuses of sensational newspapers using reprehensible methods.

It is not my object to discuss in detail the limitations upon the exercise of freedom of expression which the law of defamation, the law of privacy and the law of contempt impose upon newspapers.[9] Rather shall I point to some of these rights and the manner of exercising them which

---

[7] An old California case, Tanner v. Embree, 9 Cal. App. 481, 484 (1908), although expressing some doctrines now repudiated, said correctly in this respect: "In measuring the right to discuss in public print the character and conduct of one who is a public officer, or a candidate for public office, all persons stand upon an equal plane. It matters not that one causing such publication may be in the publishing business as a means of livelihood, or for a less selfish purpose, while another committing the same act may be engaged in some other pursuit. Neither may print or publish any matter which falsely charges such person so in office, or a candidate, with the commission of a crime without incurring a liability for the injury occasioned thereby." This is the view of most American courts. See 53 C.J.S., *Libel and Slander* § 121 (1948).

[8] Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 306, 27 S.E.2d 837, 844 (1943).

combine the utmost freedom in the performance of the newspapers' function with the protection of society's rights.

## II

## PRIVATE LIBEL OR PUBLIC EXHORTATION

The most important safeguard is the determination of the courts to draw a strict line between what is private and what is public. So far as the newspaper is concerned, this expresses itself in several ways. Even in states which, like California, recognize the right of privacy, the right ends when the interest of the public in the dissemination of ideas is involved or a person's actions are of a public character. In the domain of privacy, the publication of what is of no public concern is an invasion of a right, whether it affects the reputation of the individual or not. The invasion of the right of privacy is an injury to a person's feelings by having matters which are solely his private concern exposed to the public. In the law of defamation, the courts have drawn the distinction between private scandal and comments on the actions of public men and matters of public concern and interest. A West Virginia case has expressed the distinction in this manner:

> The distinction between a statement with reference to private gossip and 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

---

[9] YANKWICH, IT'S LIBEL OR CONTEMPT IF YOU PRINT IT (1950) is an elaborate discussion of these limitations. More recent developments have been treated by Yankwich in numerous articles in legal publications. Among them are: *The Right of Privacy*, 27 NOTRE DAME LAW. 499 (1952; *The Protection if Newspaper Comments on Public Men and Public Matters*, 11 LA. L. REV. 327 (1951); *The Law of Defamation and Privacy as a Restraint on Expression and Creation*, THE ARTS, PUBLISHING AND THE LAW, 117 (Conf. Series No. 10, U. of Chi. Law School) (1952); *Certainty in the Law of Defamation*, 1 U.C.L.A. L. REV. 163 (1954); *Recent Developments in the Law of Creation, Expression and Communication of Ideas*, 48 N. W. LAW REV. 453 (1954); *Trends in the Law of Media of Communication*, 15 F.R.D. 291 (1954).

> 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.[10]

In that case, the court held that an article on a member of the state road commission which commented critically on the price at which a bridge had been constructed was within the range of fair comment on the acts of a public official.

Almost identical language has been used in California:

> 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.*[11] (Emphasis added)

The doctrine is not new. For it has been the law of California even before the application of the rule of qualified privilege to the comments on public men and public matters[12] and certainly since then, that criticism of the manner in which one performs a public office is not libelous.[13] Nor is it libelous to charge one with unfitness

---

10 Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 306, 27 S.E.2d 837, 844 (1943).

11 Howard v. Assoc. Newspapers, 95 Cal. App.2d 580, 584 (1950).

12 Snively v. Record Pub. Co., 185 Cal. 565, 198 Pac. 1 (1921).

13 Eva v. Smith, 89 Cal. App. 324 (1928).

for office.[14]

Back of these decisions is the thought constantly followed by many courts in the land: that matters of public concern are the legitimate objects of a citizen's comment. Mr. Justice Oliver Wendell Holmes wrote in an old case:

> For apart from the question whether attributing to the plaintiff conduct that was lawful, as the plaintiff says, could be a libel . . . *he was a public officer in whose course of action connected with his office the citizens of Puerto Rico had a serious interest, and anything bearing on such action was a legitimate subject of statement and comment.*[15] (Emphasis added)

In the case in which this was written, the article referred to the fact that a certain person while United States Attorney, carried on a private law practice and the conduct was characterized as "a monstrous immorality", "a scandal", etc.

While some of the cases are grounded upon the right of fair comment, others are based on the distinction which courts make between words written of a person in his private capacity and those concerning one in his public capacity or activities. Under either criterion, words which if spoken of a man's action in a public capacity would be considered not libelous or fair comment, may be held to be libelous when spoken of a person in his private capacity. Hence the distinction between exhorting the public to action and disseminating private scandal. Denunciation may be resorted to with impunity in the former, but not in the latter.

---

14 Taylor v. Lewis, 132 Cal. App. 381 (1933); Howard v. Assoc. Newspapers, 95 Cal. App.2d 580, 584 (1950).

15 Gandia v. Pettingill, 222 U.S. 452, 457 (1912). See Noel, *Defamation of Public Officers and Candidates,* 49 COL. L. REV. 875 (1949).

16 Aldrich v. Boyle, 328 Mass. 30, 101 N.E.2d 495, 496 (1951).

17 Sullivan v. Meyer, 91 F.2d 301 (D.C. Cir. 1937). See Rutherford v. Dougherty, 91 F.2d 707 (3d Cir. 1937).

18 Sweeney v. Patterson, 128 F.2d 457, 458, 459 (D.C. Cir. 1942).

## III

## DEFAMATION OF PERSONS IN PRIVATE CAPACITY

The contrast between the two approaches may be illustrated by references to other cases. Thus, in Massachusetts, which does not recognize the liberal rule of privilege, a statement that a councilman *had acted in his own interest* was held not to be defamatory. This ruling rests on these significant reasons:

> We do not see how the advertisement, *published as it was in the course of a political campaign could injure the plaintiff's reputation in the community or expose him to hatred, ridicule, and contempt .... We think that the advertisement, read as a whole and reasonably interpreted, would not discredit the plaintiff in the minds of a considerable and respectable class of the community. Rightly understood, it is the customary type of hortatory appeal commonly made to voters at election time.*[16] (Emphasis added)

This ruling accords with others made elsewhere in which a person's attitude towards public questions is made the subject of criticism.[17] The Court of Appeals for the District of Columbia has given expression to the philosophy behind such decisions in language which is worth quoting:

> 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....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.[18]

By contrast, the same court, in dealing with an article concerning a physician who sought appointment to the staff of a sanatorium, which commented on his "suave" manners, and characterized him as one "whose social graces have won him many feminine clients" held that the article reflected upon his integrity saying:

> We think that any average reader would gain the impression from this series of articles that the plaintiff was a fake, in the sense that he promoted himself by political sponsorship and personal charm, rather than by professional ability. The publications, read in the light of the average reader's understanding, undoubtedly were calculated to damage the plaintiff's professional standing.[19]

In contrasting the right not to have one's reputation endangered with the right to inform the public, Judge Bennett Champ Clark wrote:

> The duty to inform the public and the right to make a 'fair comment' ought not be so interpreted as to prejudice the individual's rights to protect himself in the courts when he is attacked. The least that the paper should be called upon to do is come in and defend itself on the merits, when it has published inherently damaging materials. This is no burden on the 'freedom of the press', it simply calls upon the press to exercise some care in discharging its responsibility to the entire public — individuals and mass alike.[20]

Another court of appeals interpreting South Carolina law held that an almost innocuous statement that a person had been forcibly ejected from a party committee meeting presented a question of fact to the jury as to whether injury of reputation would flow from it, saying:

> It was, as a matter of fact, a question within the province of the jury to decide whether the statements in question — to the effect that plaintiff was forcibly ejected (or forcibly kicked out) from the meeting of the Committee by police called by Committeeman Gerald —

19 De Savitsch v. Patterson, 159 F.2d 15 (D.C. Cir. 1946).

20 *Id.* at 17.

were or were not defamatory and actionable as tending to reduce plaintiff's character or reputation, to render him odious, contemptible or ridiculous, or diminish his reputation in his profession. We cannot say, as a matter of law, that the publications in question did not tend to bring about at least one of these effects. It is not necessary that the publication directly charge the commission of a crime or even precisely imply moral obliquity in order to be defamatory and actionable. The test is how the words in the publication may normally be understood by third persons.[21]

## IV

## FAIR COMMENT

In adopting a policy favorable to greater freedom of comment on matters of public interest, the courts do not follow a consistent pattern. Some achieve the result by merely narrowing a statutory definition of libel which they are called upon to interpret. Others resort to the doctrine of fair comment first promulgated in England which protects a fair expression of honest opinion which does not go beyond what the particular facts and circumstances warrant. In order to achieve this result the comment must satisfy these conditions:

(1) It must relate to a matter of public interest.

(2) It must relate not to a person, but to his acts. Hence, it must not contain imputations of corrupt or dishonorable motives on the person whose conduct or work is criticized, save in so far as such imputations are warranted by the facts.

(3) It must be based on facts truly stated.

(4) It must be the honest expression of the writer's real opinion on the facts which appear in the publication.

---

21 Hartzog v. United Press Ass'ns, 202 F.2d 81, 83-84 (4th Cir. 1953).

Fair comment is essentially opinion based on facts. It protects the comments of a writer on plays, works of literature or art, schemes of improvement, governmental measures, and the like.[22]

An old Kansas case has stated the matter, so far as it applies to public performances, in this manner:

> 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 criticized. 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.[23]

The difficulty in the application of the principle, especially when we deal not with performers, actors or the like, but with public men whether they are in or out of office, is to draw a true distinction between fact and comment. A distinguished writer thirty-five years ago adverted to these difficulties:

> The difficulty is that these decisions have generally gone beyond the actual issue, and, often using the term 'criticism' as synonymous with derogatory statements of fact, have expressed the dictum that criticism is privileged, or not actionable, so long as it does not attack the private character of the person criticized, or impute evil motives. In other words, while the actual decision is gen-

---

22 See Yankwich, *The Protection of Newspaper Comments on Public Men and Public Matters*, 11 LA. L. REV. 327, 338-340 (1951); GATLEY ON LIBEL AND SLANDER 335, 369 (4th ed. 1953); RESTATEMENT, TORTS §§ 606-609 (1938); Potts v. Dies, 132 F.2d 734, 735 (D.C. Cir. 1942); Brewer v. Hearst Pub. Co., 185 F.2d 847, 850 (7th Cir. 1950). The reason for fair comment was stated by Scott, L.J. in Lyon v. Daily Telegraph, 1 K.B. 746, 752 (1943) as follows: "The right of fair comment is one of the fundamental rights of free speech and writing which are so dear to the British nation, and it is of vital importance to the rule of law on which we depend for our personal freedom."

> erally unimpeachable, the foundation is delusive, i.e., a distinction between comment and statement of fact. While this doctrine recognizes some latitude in the discussion of matters of public interest, its practical futility is shown by the conflicting and sometimes fanciful ideas of the sort of imputations which are held to fall within it. But this doctrine, so far as it is intelligible, would seem to leave little, if any, more practical freedom in the discussion of the conduct of a private person. It leaves the law very much in the attitude of saying, 'You have *full liberty of discussion, provided, however, you say nothing that counts.*[24] (Emphasis added)

An old Australian case, often cited, seems to express the true basis of differentiation:

> The error which is usually committed by those who bring themselves within the law of libel when com-

---

[23] Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901). The article contained this rather vigorous comment on three vaudevillians known as the Cherry Sisters: "Billy Hamilton, of the Odebolt Chronicle, gives the Cherry Sisters the following graphic write-up on their late appearance in his town: '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 outline as the curves of a broom handle.'" And see, Cleveland Leader Printing Co. v. Nethersole, 84 Ohio 116, 95 N.E. 735 (1911) (comment on acting); Hoeppner v. Dunkirk Printing Co., 254 N.Y. 95, 172 N.E. 139 (1930) (comment on football coach); Cohen v. Cowles Pub. Co., . . . . Wash. . . . ., 273 P.2d 893 (1954) (comment on horse race and conduct of jockey). On the whole subject, see GATLEY ON LIBEL AND SLANDER 362-366 (4th ed. 1953).

[24] Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 412, 432-433 (1910). The writer's comment is aptly illustrated by the following language in the old California case of Tanner v. Embree, 9 Cal. App. 481, 484 (1908), now repudiated: "The law tolerates public criticism of such officer or candidate in so far as his moral delinquencies so made public may affect his official character or fitness to assume the public duties to which he aspires, upon the theory that the general public is entitled to know the truth that they may intelligently exercise the elective franchise, or, in the case of a public officer, be advised of the manner in which those in office are discharging the duties of their trust. But in assuming to discuss in print the private character of such candidate or officer one may not publish any matter false in fact."

> menting on conduct is in thinking that they are commenting when in point of fact they are misdescribing. Real comment is merely the expression of opinion. Misdescription is matter of fact. If the misdescription is such an unfaithful representation of a person's conduct as to induce people to think that he had done something dishonourable, disgraceful, or contemptible, it is clearly libelous. To state accurately what a man has done, and then to say that in your opinion such conduct is dishonourable or disgraceful, is comment which may do no harm, as every one can judge for himself whether the opinion expressed is well-founded or not. Misdescription of conduct, on the other hand, only leads to the one conclusion detrimental to the person whose conduct is misdescribed, and leaves the reader no opportunity for judging for himself the character of the conduct condemned, nothing but a false picture being presented for judgment.[25]

The matter before the court was a card concerning a candidate for public office circulated by another candidate in which it was charged that there had been a "dishonorable use of another's name" by the candidate and that he had admitted that fact. The court held that *this was not fair comment* because the plaintiff's conduct had been misdescribed, using the language quoted, and asserting that *misdescription of what occurred is not fair comment.* When this distinction is observed, the difficulties inherent in conforming to the doctrine are minimized, but they do not

---

[25] Christie v. Robertson, 10 N.S.W. St. R. 157, 161 (1889) per Windeyer, J. This quotation is adopted with approval in De Savitsch v. Patterson, *supra* note 19. The same Judge Windeyer gave a succinct statement of the elements which make up fair comment in Christie v. Robertson, at 161: "The law regards as fair comment or criticism all that a fair-minded man would think it right and just to say either of a literary work or of the action of a person whose conduct is open to criticism. Anything which goes beyond this is libellous. The question, therefore, in every case of comment or criticism is whether the language used exceeds the limits within which anyone meaning to deal fairly with the person criticized would feel bound to confine himself." Misstatement of facts does not destroy "fair comment". PROSSER ON TORTS, § 94, pp. 839-840 (1941); Note, 62 HARV. L. REV. 1207 (1949); Boyer, *Fair Comment,* 15 OHIO ST. L. J. 280-302 (1954). See Golden North Airways, Inc. v. Tanana Pub. Co., 217 F.2d . . . ., (9th Cir. 1954) decided Dec. 10, 1954 and not yet reported in the advance sheets (comment on inadequacy of airplane service in Alaska).

altogether disappear. A more desirable result is reached when we apply to publications relating to public men and public matters the doctrine of qualified privilege as is done in California and in a few other states.[26]

## V

## QUALIFIED PRIVILEGE

The doctrine of qualified privilege applies to a variety of relationships. The California statute which may be used as an illustration, declares qualifiedly privileged publications made upon the following occasions:

(1) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information;

(2) By a fair and true report, without malice, in a public journal, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof, or of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued;

(3) By a fair and true report, without malice, of the proceedings of a public meeting if such meeting was lawfully convened for a lawful purpose and open to the public, or the publication thereof was for the public benefit.[27]

---

[26] Noel, Defamation of Public Officers and Candidates, 49 COL. L. REV. 875, 903 (1949).

[27] CAL. CIV. CODE § 47 (3), (4) and (5) (1949). This is also the rule elsewhere. See 53 C.J.S., *Libel and Slander* §§ 90-97 (1948).

### *A. Public Meetings*

The qualified privilege of communications by and to persons interested and of reports of judicial, legislative and other public official proceedings has existed for a long time, and almost universally in all our commonwealths.

The privileged character of communications addressed by one interested to another who is also interested has been applied to a variety of situations. In the older decisions, the privilege was limited to close members of the family, or members of the same church or lodge, as will appear further on in the discussion. But with the broadening of relationships in a complex society, it became apparent that there might be other relationships which imposed obligations to disclose information under the protection of privilege. So the privilege exists in the case of persons engaged in a labor dispute;[28] persons sponsoring the recall of a public official;[29] the father of children presenting to a local Chamber of Commerce a resolution concerning the conduct of a teacher;[30] statements in a war community concerning a residence which was alleged to have been a disorderly house; [31] a statement by a physician disclosing the report of a laboratory which stated that a person had a venereal disease.[32]

The qualified privilege attaching to reports of public meetings is not so widespread. Such a provision was enacted in England in 1888, as a part of the Law of Libel Amendment Act.[33] The principle embodied therein is in derogation of the Common Law under which privilege at-

---

28 Emde v. Labor Council, 23 Cal.2d 146, 143 P.2d 20 (1943); Freeman v. Mills, 97 Cal. App.2d 161, 166-167, 217 P.2d 687 (1950). See Annotations, *Communication Between Members of Family,* 78 A.L.R. 1182 (1932); *Defamation of One Relative to Another by Person not Related to Either,* 25 A.L.R. 2d 1388 (1952).

29 Gunsul v. Ray, 6 Cal. App.2d 528, 45 P.2d 248 (1935).

30 Heuer v. Kee, 15 Cal. App.2d 649, 171 P.2d 118 (1946).

31 Glenn v. Gibson, 75 Cal. App.2d 649, 171 P.2d 118 (1946).

32 Shoemaker v. Friedberg, 80 Cal. App.2d 911, 183 P.2d 318 (1947).

33 51 & 52 Vict. c. 64 (1888).

tached only to reports of judicial and parliamentary proceedings.[34]

Under this provision, the following conditions must concur before privilege attaches:

(1) There must have been a public meeting, convened for a lawful purpose and open to the public;
(2) The reports must be fair and accurate;
(3) The matter must be of public concern or the publication thereof for the public benefit.

To be fair and accurate the report need not be *verbatim.* A fair summary of the proceedings is sufficient. Slight inaccuracies will not deprive a report of the privilege if it be, as a whole, a substantially fair and correct account of what took place at the meeting.[35]

The negative side of the principle may be stated as follows: In order that an article be considered a fair and true report of a public meeting:

(1) It should not contain any derogatory statements which were not uttered at the meeting;
(2) It should not contain any addition of extrinsic libelous matter which amounts to an accusation or declaration that the charges made at such meeting were true;
(3) Nor should it contain comment which assumes the guilt of the person referred to in the meeting.

Under the English provision, as interpreted by the courts, it is not sufficient that the meeting be for the public benefit, and the proceedings and speeches, on the whole, also for public benefit. It must also be proved that the pub-

---

34 GATLEY ON LIBEL AND SLANDER 326-331 (4th ed. 1953); NEWELL, SLANDER AND LIBEL §§ 468-473 (4th ed. 1924).

35 Gatley, *op. cit. supra* note 34, at 327-328. FRASER ON LIBEL AND SLANDER 140-146 (7th ed. 1936).

lication of the particular matter complained of was for the public benefit.[36]

The California provision is broader and the requirement that the publication of the matter complained of be for the public benefit is an alternative one. The privilege would seem to attach to reports of meetings provided they are public, whether their proceedings or speeches be for the public benefit or not. More, if the publication of the matter be for the public benefit, the privilege would attach even though some of the requirements as to the nature of the public meeting (such as the lawfulness of its purposes) be absent.

### *B. Other Public Proceedings*

The principles by which is determined the fairness of reports of judicial, legislative and other public official proceedings are, generally, the same as those by which are judged the reports of public meetings.

Fairness is absent when the report contains fragmentary, incomplete parts of the proceedings which do not indicate a fair summary of the whole thereof.[37] In this respect, however, the court overlooks unimportant inaccuracy. It does not require perfection of the reporter and will grant him the full benefit of the privilege if his report is substantially accurate.

As said by a California court:

> It is not the mere fact that a difference exists between the published report of what the complaint in the proceeding charged and what was actually alleged in the complaint, but rather is the difference of a substantial character and does it produce a different effect. It seems clear that the published article was a fair and substantial account of the complaint written by a reporter

---

[36] Gatley, *op. cit. supra* note 34, at 329. Kelly v. O'Malley, 6 T.L.R. 248 (1889); Sharman v. Merritt, 32 T.L.R. 360 (1916).

[37] People v. Gordan, 63 Cal. App. 627, 219 Pac. 486 (1923).

> and finally published without any unusual circumstances obtaining.[38]

The addition of facts which did not occur or comments or inferences drawing libelous conclusions from the facts—such as, in the case of the publication of the fact that a person had been arrested and upon what charge, comment implying guilt — destroys the privilege. Any such comment is considered "excessive publication."[39]

## VI

## THE PRIVILEGE OF REPORTS OF JUDICIAL PROCEEDINGS

The question has often arisen whether pleadings or complaints filed in the office of a county clerk or court clerk and which have not yet been read in open court or been the subject of some judicial act — are qualifiedly privileged.

Generally, courts have made a distinction between a complaint and a judicial proceeding.[40] The older cases even went so far as to hold that the qualified privilege of publication applied only to proceedings on the merits (hearings in open court). But this rule has been modified and the privilege now attaches to reports of *ex parte* and preliminary proceedings.

This rule will render privileged a fair report of the

---

38 Kurata v. Los Angeles News Pub. Co., 4 Cal. App.2d 224, 228, 40 P.2d 520 (1935).

39 53 C.J.S., *Libel and Slander* § 97 (1948); Moore v. Dispatch Printing Co., 87 Minn. 450, 92 N.W. 396 (1902); Atlanta News Pub. Co. v. Medlock, 123 Ga. 714, 51 S.E. 756 (1905); Earl v. Times-Mirror Co., 195 Cal. 165, 196 Pac. 57 (1921); Lyon v. Fairweather, 63 Cal. App. 194, 218 Pac. 477 (1923); Norfolk Post Corp. v. Wright, 140 Va. 735, 125 S.E. 656 (1924); Wiley v. Oklahoma Press Pub. Co., 106 Okla. 52, 233 Pac. 224 (1924); Campbell v. New York Eve. Post, 245 N.Y. 320, 157 N.E. 152 (1927); Hubbard v. Assoc. Press, 123 F.2d 864 (4th Cir. 1941); Glenn v. Gibson, 75 Cal. App.2d 649, 661, 171 P.2d 118 (1946); Spanel v. Pegler, 160 F.2d 619, 622 (7th Cir. 1947). Annotation, *Libel by Headline,* 40 A.L.R. 583 (1926). See 53 C.J.S., *Libel and Slander* § 121 (1948) (Newspapers and News).

40 Nixon v. Dispatch Printing Co., 101 Minn. 309, 112 N.W. 358 (1907).

charges made in a bill of equity which has been presented to the court, and upon which the court has acted by making an order that the defendants appear and show cause why an injunction should not be issued against them.[41] So that, taking the court action to which publicity is mostly given — that of divorce — the issuance of an order to show cause *re* alimony makes the publication of the contents of the complaint qualifiedly privileged.

However, I am of the view that in California the privilege of publication attaches the moment the pleading is filed in the office of the clerk. My reasons are these:

The filing of a complaint is a part of a judicial proceeding (the first step therein) [42] or of a "public official proceeding"[43] and the subsequent pleadings are successive steps therein. Under Section 1888 of the California Code of Civil Procedure, pleadings, when filed, become public writings.

By Section 1892 of the California Political Code, "the public records and other matters in the office of any officer, are at all times, during office hours, open to inspection of any citizen of this state." This right may be enforced by a writ of mandate.[44]

The right of a citizen to inspect and take a copy of a public writing — the right, in other words, of familiarizing himself with the contents thereof — implies the right to make the contents known to others. When made public,

---

41 Metcalf v. Times Pub. Co., 20 R.I. 674, 78 Am. St. Rep. 900 (1898); Lundin v. Post Pub. Co., 217 Mass. 213, 104 N.E. 480 (1914); Thompson v. Boston Pub. Co., 285 Mass. 344, 189 N.E. 210 (1934); Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 61 N.E.2d 5 (1945); Annotations, *Privilege of Pleadings*, 52 A.L.R. 1438 (1928); 104 A.L.R. 1124 (1936).

42 CAL. CODE CIV. PROC. § 405 (1953).

43 CAL. CIV. CODE §47 (4) (1949).

44 Coldwell v. Bd. Of Public Works, 187 Cal. 510, 202 Pac. 879 (1921); San Francisco v. Superior Court, 38 Cal.2d 156, 161, 238 P.2d 581 (1951).

45 Campbell v. New York Eve. Post, 245 N.Y. 320, 157 N.E. 153 (1937). Other courts are now taking the same view: Fitch v. Daily News Pub. Co., 116 Neb. 474, 217 N.W. 947 (1928); Lybrand v. The State Co., 179 S.C. 208, 184 S.E. 580 (1936).

they lose their private confidential character. "What one may lawfully speak, he may lawfully write and publish."[45] Both the Appellate Division and the Court of Appeals of New York, under similar statutes, have so held.[46]

A New York woman brought suit against a newspaper for the publication of a news item which referred to the fact that a summons had been served against her and reciting the alleged facts in the case. Before the complaint was filed, the proposed suit was settled out of court. The woman sued for libel, contending that the publication was untrue, that it was false to say that she had been sued when only summoned and that the publication of news concerning the issuance of a summons was not privileged. The court of appeals said that "A lawsuit, from beginning to end, is in the nature of a judicial proceeding."

Because the New York statutes make any paper filed in the County Clerk's office, excepting pleadings in actions for divorce, public property, subject to inspection and examination at all times and because the New York Practice Act defines, in Section 4, an action in almost the identical language of the California Code,[47] the ruling of the two highest courts of New York should be determinative of the question.

An additional reason exists with us in California. In New York, an action is begun by the service of the summons, with or without a complaint. With us, an action is commenced by filing of a complaint, in all cases except in condemnation proceedings.[48]

---

46 Campbell v. New York Eve. Post, 219 App. Div. 169, 218 N.Y. Supp. 446 (1926). See the interesting comment on the New York Court of Appeals decision by Cardozo, the then Chief Judge of that court, in his THE PARADOXES OF LEGAL SCIENCE 23-24 (1928).

47 CAL. CODE CIV. PROC. § 22 (1953).

48 CAL. CODE CIV. PROC. §§ 405 and 1243 (1953). Indicative of a liberal trend is the fact that the report of a grand jury returned without an indictment was held privileged: Irwin v. Murphy, 129 Cal. App. 713, 19 P.2d 292 (1933). As to the privileged character of affidavits see Donnell v. Linforth, 11 Cal. App.2d 25, 52 P.2d 937 (1935).

## VII

## THE QUALIFIED PRIVILEGE OF PUBLICATIONS IN DISCHARGE OF DUTY

The qualified privilege of communications by and to persons interested covers a multitude of relationships. They include, generally, communications between interested parties and parties between whom a confidential relation exists, and communications the object of which is to protect private interests. They also include communications made in discharge of duty. The duty need not be one binding at law. It includes moral and social duties. The cases already discussed indicate the broadening scope in interpreting these duties.

By the ruling of the supreme court in *Snively v. Record Publishing Co.*,[49] the mantle of qualified privilege has been thrown over newspaper comments on the acts and conduct of public officials. Such comments, even though false, even though amounting to a charge of crime or corruption, are privileged if published without express malice (with belief in their truth).

---

[49] Snively v. Record Pub. Co., 185 Cal. 565, 198 Pac. 1 (1921). In addition to California, the rule seems to obtain in Arizona, Iowa, Kansas, Minnesota, Montana, New Hampshire, North Carolina, South Dakota and West Virginia: Connor v. Timothy, 43 Ariz. 517, 33 P.2d 293 (1934); Coleman v. McLennon, 78 Kan. 711, 98 Pac. 281 (1908); Cooper v. Romney, 49 Mont. 119, 141 Pac. 289 (1941); Lewis v. Carr, 178 N.C. 578, 101 S.E. 97 (1919); McLean v. Merriman, 42 S.D. 294, 175 N.W. 878 (1920); Salinger v. Cowles, 195 Iowa 873, 191 N.W. 167, 174 (1922); Lafferty v. Houlihan, 81 N.H. 67, 121 Atl. 92 (1923); Steenson v. Wallace, 144 Kan. 730, 62 P.2d 907 (1936); Clancy v. Daily News Corp., 202 Minn. 1, 277 N.W. 264 (1938); Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 27 S.E.2d 837 (1943). In Connor v. Timothy, *supra*, the court stated, 33 P.2d at 295: "It is urged by defendant that this communication was privileged because it was a statement made in the course of an election. It is true that statements respecting political affairs, public officers, and candidates for office are in a measure privileged, for one who seeks public office waives his right of privacy, so that he cannot object to any proper investigation into the conduct of his private life which will throw light on the question as to whether the public, which bestows upon him the office which he seeks, shall elect him or not, and a charge made in good faith against such candidate which affects his fitness for the office which he seeks is privileged, even though untrue."

The full import of this decision cannot be understood without some comment on the state of the law prior to its rendition. Our courts had repeatedly refused to recognize that a newspaper published (as a citizen) has a qualified privilege to comment on the acts and conduct of public officials. So much so that there had grown up a phrase which was used every time the question of newspaper privilege was brought up, namely, "A lie is never privileged."

While this expression does not actually occur in the cases which the *Snively* case overrules, they contain its equivalent. "One can justify," said the Supreme Court of California, "the publication of a libel against a candidate for office upon privilege, only by proof that the accusation is true."[50]

"One cannot," echoed one of our appellate courts, "escape responsibility for a falsehood under the claim of privilege." [51]

The challenge to this principle was this: A lie is privileged if told on a privileged occasion, without malice. If this were not so, and if truth were the only defense to civil libel, the doctrine of privileged publications might as well be abandoned.

One does not need the protection of privilege to tell the truth. To use a homely illustration: One needs an umbrella when and where it rains. When it is not raining or when one is under shelter one does not need an umbrella. The protection of privilege is needed when the libeler has not truth on his side.

In the *Snively* case, the Supreme Court of California, following the intimation it had given in denying a hearing in *Adams v. Cameron*,[52] repudiated its prior doctrine. This de-

50 Dauphiny v. Buhne, 153 Cal. 757, 96 Pac. 880 (1908); Jarman v. Rea, 137 Cal. 339, 70 Pac. 216 (1902).

51 Adams v. Cameron, 27 Cal. App. 625, 150 Pac. 1005 (1915).

52 *Id.*

cision determines that newspaper comments on the acts and conduct of public officials are qualifiedly privileged and that mere falsity will not destroy the privilege.

The principles so declared flow from the very wording of the California statutory definition of libel. The words "false and unprivileged" are used therein. Now, if mere falsity is enough, why should our code makers have added "unprivileged" conjunctively? Again, if mere falsity destroys the qualified privilege created by subdivision 3 of Section 47 of the Civil Code, why call it "privilege" at all?

Since the promulgation of the doctrine, the courts have given it a latitudinarian interpretation with the result that it has been extended to a large variety of publications which charged the unfitness of candidates for or occupants of public office. Indeed, the courts seem to have gone further and held that such a charge, if it contains no imputation of corruption in office, *is not even libel.*

Illustrative are: The statement that the members of a city council "lacked the conscientious regard for the city's interest which makes the public office a public trust," and urging their recall; [53] a publication impugning the motive of a mayor and attributing his attitude towards a certain ordinance to selfish motives and his aspirations to Congress; [54] a statement impugning the motives of a member of a school board in opposing the establishment of student savings bank; [55] 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;[56] a charge that certain members

---

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

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

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

56 Babcock v. McClatchy Newspapers, 82 Cal. App.2d 528, 186 P.2d 737 (1942).

57 Eva v. Smith, 89 Cal. App. 324, 264 Pac. 803 (1928).

of a city council "have neither the zeal nor the temperament to administer the business of the city";[57] a letter criticizing a group connected with a recall election, calling the recall movement "illegitimate, a sinister movement" referring to the committee as a "disgrace" and as a "dangerous and unjust element."[58]

Notwithstanding this trend, when the courts are dealing with persons in their private capacity, the definition of libel is broadened so as to include almost any charge which reflects on a person's character. This is especially true when the charge is of a character that tends to injure him in his occupation. Thus, an accusation that a person is engaged in espionage as a member of the American Embassy is a libel.[59] So is a charge that a member of a labor organization is a "demagogue" and "would-be dictator."[60] A communication that a jockey was guilty of unethical practices and the type of individual "who might readily have been involved in furnishing batteries to jockeys" is libelous, although privileged when circulated solely among members of an association.[61]

The upshot of the matter is that, despite the liberalization of the rules in California and other states as they affect persons in public life and matters of public interest, the newspaper man must still tread cautiously if he is to exercise competently and with responsibility the right to comment on matters of public concern. After all, the privilege is not absolute but qualified. It can be lost by overpublication or excessive publication and by malice.

## VIII

## PRIVILEGE AND MALICE

Malice in fact (or express malice) destroys qualified privilege of whatever character. In each case (communications by or to interested persons, reports of judicial, legis-

lative or other public proceedings, or reports of public meetings) the privilege is dependent upon the absence of malice

---

[58] Howard v. Assoc. Newspapers, 95 Cal. App.2d 580 (1950). Recent decisions elsewhere in states which do not recognize the liberal rule of privilege are equally generous. Thus, a statement that the brother of a governor was in charge of patronage could not be turned into a charge of soliciting and receiving bribes (Tobin v. Boston Herald-Traveler Corp., 324 Mass. 478, 87 N.E.2d 116 (1949) ); a charge that a councilman had voted for his own personal interest (Aldrich v. Boyle, 328 Mass. 30, 101 N.E.2d 495 (1951) ); that a magistrate running for re-election did not make monthly reports until forced to do so (Piacenti v. Williams Press, 347 Ill. App. 440, 107 N.E.2d 45 (1952) ); attributing financial motive, the desire for two retirement pensions to a candidate for public office (Poland v. Post Pub. Co., 116 N.E.2d 860 (1953) ); attacking limited business experience of candidate for auditor by reflecting on her management of father's estate and stating that it had $50,000 in debts outstanding (Tiernan v. East Shore Newspapers, 1 Ill. App.2d 150, 116 N.E.2d 896, 898-899 (1953) ). The case last cited uses language which, while not adopting the doctrine of qualified privilege, nevertheless goes about as far as any American case on fair comment, including Howard v. Assoc. Newspaper, *supra,* has gone: "Our Supreme Court has determined that when anyone becomes a candidate for public office, which is conferred by the vote of the people, he is considered as putting his character in issue in so far as it may respect his fitness and qualifications for the office, and everyone may freely comment on his conduct and actions. His acts may be canvassed and his conduct boldly censured.

"A number of cases have given considerable attention to criticisms substantially similar in nature and which have been potentially more derogatory in nature, such as statements in a campaign for sheriff to the effect. 'It is no wonder that these crooks are for him and boast that they will run the county for the next four years.' . . . 'It may be conceded that the publications do not charge appellant with the commission of any crime, nor with the expression of principles subversive of government. . . . It is not libelous per se to say that the defendant had done nothing in the enforcement of the law, nor was it libelous per se to charge that thieves, burglars, bank robbers . . . were supporting the candidate for sheriff and boasting that they would run the county for the next four years because. . . . The law will presume that their support was induced wholly by their preference for that candidate, and may refer entirely to politics, and does not tend to show any criminal connection nor impugn his honesty or integrity.' To make such publication libelous per se, the Court indicated, ' "The conduct charged must be of such a nature as to reflect upon the character and integrity of the plaintiff and to subject him to a loss of public confidence and respect; and a writing, although charging wrongful conduct or dereliction of duty, is not libelous per se, within the meaning of the rule, unless it imputes a dishonest or fraudulent motive or interest." ' Testing the present publication by such cases it could not fairly be said that there was any charge of dishonesty in the publication referred to. Certainly it is difficult to sustain any theory upon which the publication could be deemed as libelous per se since nothing specifically is charged in the language contained in the communication which comes within the definition of such libels." But this broad rule will not ordinarily be applied if the charge imputes "malfeasance in office". (Earl v. Winne, 14 N.J. 119, 101 A.2d 535, 538 (1953) ).

in fact.[62] Such malice in fact is not inferred from the communication or publication.[63] Nor is it ever presumed. And by express malice is meant actual malice, the motive of personal spite or ill-will towards the plaintiff, the malice of malevolence in the sense in which that word is used in the well-known phrase from the Litany of the Church of England, "from envy, hatred and malice, and all uncharitableness."

This malice is not to be confounded with malice in law which is merely a "wrongful act, done intentionally, without just cause or excuse."[64]

Ultimately, however, malice, be it malice in law or malice in fact, or, as it is variously called, actual or express malice, has its being in the intentional doing of what is injurious to another — of what the law denounces as a wrong.

Both are deduced from such an act, the one by implication made by law, *i. e.*, by the court; the other by inference made by the jury.[65] In either case, the deduction is made from the doing of an act injurious to another without just cause — an act which is "connected with such circumstances as carry in them 'the plain indications of a heart regardless of social duty, and fatally bent on mischief.' "[66] Inherently there is no difference between the two. The difference lies only in the manner of proof.

There is no malice in law (or implied malice) in the law of civil libel in California. And the California Supreme

---

59 Pridinoff v. Balokovich, 36 Cal.2d 788 (1951).

60 Jeffers v. Screen Extras Guild, 107 Cal. App.2d 253 (1951).

61 Freeman v. Mills, 97 Cal. App.2d 161 (1950).

62 Gosewich v. Doran, 161 Cal. 511, 119 Pac. 656 (1911).

63 CAL. CIV. CODE § 48 (1949).

64 Maynard v. F.F. Ins. Co., 34 Cal. 48 (1867). The trend in the same direction in other states is quite evident. See Annotations, *Doctrine of Privilege as Applicable to Misstatements,* 110 A.L.R. 412 (1937), 150 A.L.R. 358 (1944).

65 Davis v. Hearst, 160 Cal. 143, 116 Pac. 530 (1911).

66 United States v. Cornell, 25 Fed. Cas. No. 14,867 (1819).

Court, while adopting the liberal rule of privilege, has refused to apply to it the rule sanctioned by many courts to qualifiedly privileged publications, that the burden is on the plaintiff to prove actual malice.

On the contrary, its ruling is that privilege being a matter of defense, which, to be available, must be pleaded,[67] the burden is on the defendant who pleads the privilege to show the absence of actual malice.[68]

Many cases hold that express malice must be proved by evidence *dehors* the publication.[69] The California court rules that such malice may be inferred by the jury from the publication and the circumstances connected with it.[70] It may be shown by legitimate inference from other facts and circumstances,[71] and by other publications of the same or of different character.[72] So that, supposing a plea of privilege is made, and evidence of want of malice is offered, it is not difficult for the plaintiff to prove its existence.

---

67 Snively v. Record Pub. Co., 185 Cal. 565, 577, 198 Pac. 1 (1921); Stevens v. Snow, 191 Cal. 58, 214 Pac. 968 (1923); Maher v. Devlin, 203 Cal. 270, 263 Pac. 812 (1928). But see Locke v. Mitchell, 7 Cal.2d 599, 602-603, 61 P.2d 922 (1936). For the view that the burden is on the plaintiff to prove the existence of malice in fact, if the publication is qualifiedly privileged, see Coleman v. McLennan, 78 Kan. 711, 98 Pac. 281 (1908); Sowers v. Wells, 154 Kan. 134, 114 P.2d 828 (1941). Some cases even require proof of falsity. See Cooper v. Romney, 49 Mont. 119, 141 Pac. 289 (1914).

68 Longsworth v. Curson, 56 Cal. App. 489, 206 Pac. 779 (1922). As to proving privilege under a general denial see Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 27 S.E.2d 837 (1943).

69 Hemmens v. Nelson, 138 N.Y. 517, 34 N.E. 342 (1893); Somerville v. Hawkins, 10 C.B. 583, 138 Eng. Rep. 231 (1851).

70 See note 48, *supra*. Siemon v. Finkle, 190 Cal. 611, 213 Pac. 954 (1923). See Hallen, *Excessive Publication in Defamation*, 16 MINN. L. REV. 160-171 (1932).

71 Davis v. Hearst, 160 Cal. 143, 166, 116 Pac. 530 (1911).

72 Scoff v. Times-Mirror Co., 181 Cal. 345, 184 Pac. 672 (1919). As to the respective provinces of court and jury in determining privilege and malice, see Annotation, 26 A.L.R. 830 (1923).

73 See note 2, *supra*. Dauphiny v. Buhne, 153 Cal. 757, 763 (1908).

74 See Tanner v. Embree, 9 Cal. App. 481 (1908) (a constable "winking at prostitution"); Dauphiny v. Buhne, *supra* note 72 (a councilman soliciting trade in his grocery store from a franchise seeker).

## CONCLUSION

Little remains to be said by way of conclusion. It is quite apparent that through the (1) tightening of the definition of libel; (2) the application and extension of the law of fair comment; and (3) the doctrine of qualified privilege applied to comments on public men and public matters, newspapers can still influence public opinion effectively.

Even before the adoption of the liberal rule, courts conceded the right to comment on a public man's "faults and vices so far as they affect his official character."[73] But while giving expression to these generalied principles, in reality, they permitted no defense other than truth to any charge of misconduct in relation to the office.[74] So the supposed right of comment was illusory. At present, in states which, like California, follow the liberal rule,[75] the good faith of the writer, his belief in the truth of his charges, the reliability of his sources of information are shields which protect him in the performance of his public responsibility. This can be done without resorting to slander, which in the words of Pisanio:

> . . . is sharper than the sword, whose tongue
> Outvenoms all worms of Nile, whose breath

---

75 The scope and limitations of the liberal rule of privilege are well stated in two old New Hampshire cases: Palmer v. Concord, 48 N.H. 211, 97 Am. Dec. 605, 611 (1868): "Conductors of the public press have no rights but such as are common to all. . . . But in this country, every citizen has the right to call the attention of his fellow-citizens to the maladministration of public affairs, or the misconduct of public servants, if his real motive in so doing is to bring about a reform of abuses, or to defeat the re-election or reappointment of an incompetent officer." State v. Burnham, 9 N.H. 34, 31 Am. Dec. 217, 220 (1837): "If the end to be attained is justifiable; as, if the object is the removal of an incompetent officer, or to prevent the election of an unsuitable person to office, or, generally, to give useful information to the community, or to those who have a right and ought to know, in order that they may act upon such information, the occasion is lawful, and the party may then justify or excuse the publication.

"Where, however, there is merely color of a lawful occasion, and the party, instead of acting in good faith, assumes to act for some justifiable end merely as a pretense to publish and circulate defamatory matter, or for other unlawful purpose, he is liable in the same manner as if such pretense had not been resorted to."

> Rides on the posting winds and doth belie
> All corners of the world; Kings, queens and states
> Maids, matrons, nay, the secrets of the grave
> This viperous slander enters.[76]

And constitutional protection does not extend to defamatory words or "fighting words." As said by the Supreme Court of the United States in a famous case: "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."[77] So there is no gain in joining the "noisy few." To the contrary, there is always danger that those who would restrict the public's right to know[78] would use the abuses of the irresponsible as an excuse for achieving indirectly what cannot be done directly — control of the press, under which no democratic society can exist.

*Leon R. Yankwich**

---

[76] Shakespeare, Cymbeline, Act III sc. IV, lines 34-40.

[77] Cantwell v. Connecticut, 310 U.S. 296, 309-310 (1940). See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942) and Beauharnais v. Illinois, 343 U.S. 250 (1952).

[78] See CROSS, THE PEOPLE'S RIGHT TO KNOW (1953).

* Chief U.S. District Judge, Southern District of California.