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Newspaper Immunity in Reporting Judicial Proceedings

*James W. Adams**

ORDINARILY, there is a legally enforceable right to recover damages for libelous statements. On the other hand, newspapers enjoy a constitutionally guaranteed right of free press. Free press however is not synonymous with a license to libel[1] and newspapers normally stand in no better position than any other member of the community in defense of libel suits.[2]

The law does recognize in varying degrees, depending on the jurisdiction involved, the existence of a privilege which affords newspapers immunity in libel suits under certain conditions when they report judicial proceedings. This permitted the writers of the *Restatement of the Law of Torts*[3] to conclude that a defamatory newspaper report of a judicial proceeding is privileged provided the report is a fair and accurate account of the proceeding and is not made solely for the purpose of causing harm to the defamed person.[4] The privilege applies only where the proceeding reported is a judicial one, that is, one involving some official action.[5] Reports of both ex parte and inter partes proceedings are included in the privilege.[6] Moreover, the privilege is distinguishable from other qualified privileges in that it is not lost even if the newspaper knows that the defamatory statement is false.[7]

The standard of fairness and accuracy necessary to preserve the privilege is satisfied if the report conveys to the reader a substantially correct account of the proceeding.[8] If the report eliminates part of the proceeding, misplaces the order of the proceeding, or is otherwise edited so that an erroneous impression is conveyed to the reader, the report may be accurate, but it is not fair. The relative completeness of the coverage afforded each side in the controversy can be a factor in determining fairness.[9] Examples of unfair reporting suggested in the *Restatement* include the report of defamatory testimony by a witness and subsequent failure

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1 Near v. Minnesota, 283 U.S. 697, 708 (1931); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

2 53 C.J.S., Libel and Slander § 121 (1948).

3 Restatement of Torts, § 611 (1st ed. 1938).

4 *Ibid.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

to report the presentation of evidence tending to discredit this testimony, a defamatory headline which is qualified only in the text of the report, and otherwise reporting the portions of the proceeding which contain defamatory matter and failing to report later proceedings which vindicate the person defamed.[10]

If the reporter chooses to make additions and comments to the report, to impute corrupt motives, or to question the veracity of the parties to the proceeding, he removes the report from the scope of the privilege associated with reporting judicial proceedings[11] although the report may be protected under the immunity afforded privileged criticism.[12] To be privileged, the criticism must concern those activities of another which are matters of legitimate public concern.[13] Even if the criticism is defamatory, it is privileged provided that it is based upon a true statement of facts or facts otherwise known or available to the public; that it is the actual opinion of the critic; and that it is not made solely to harm the person defamed.[14] Otherwise defamatory criticism of judges, prosecutors, litigants, witnesses, jurors, magistrates, and others who participate in the administration of justice is privileged if the criticism meets these requirements.[15]

The *Restatement* recognizes two principal sources of immunity afforded newspapers in reporting judicial proceedings: (1) the qualified privilege to publish fair and accurate reports of judicial proceedings, and (2) the qualified privilege to criticise the activities of those involved in the proceeding. This general state of the law exists because courts or legislatures have preferred to safeguard and extend free press rather than to protect an individual from defamation. The term "extend" is appropriate since the privilege has not existed always.

An inherent characteristic of our law is that, in creating or recognizing a legally enforceable right, the right created or recognized inevitably comes into conflict with another legally enforceable right usually necessitating a judicial or legislative preference of one at the expense of the other to resolve the conflict. Free press has a penchant for conflicting with other rights. In the problem under consideration, free press conflicts with the right of the individual to recover damages for libelous statements. Similarly, in the reporting of judicial proceedings and matters incident to these proceedings, free press often comes into conflict with the right to a fair trial.[16]

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[10] *Id.* at Comment (d)

[11] *Ibid.*

[12] *Id.* at § 606.

[13] *Ibid.*

[14] *Ibid.*

[15] *Id.* § 607.

[16] Sheppard v. Maxwell, 384 U.S. 333 (1966).

A newspaper report of a trial may libel one or more persons without abrogating the fairness of the trial. Likewise, a newspaper report may jeopardize the right to a fair trial without constituting libel. It would appear that newspaper immunity from libel suits arising out of the reporting of judicial proceedings and the adverse effects of such reporting on fair trials are unrelated problems. To the extent that both problems require evaluation of free press, they are at least related so that useful reference can be made from time to time to the comments regarding free press in the current "free press-fair trial" controversy.

Ohio View in Reporting Judicial Proceedings

By statute, Ohio has explicitly defined its position on the immunity afforded newspapers in reporting judicial proceedings other than trials:

> The publication of a fair and impartial report of the return of any indictment, the arrest of any person accused of crime, or the filing of any affidavit, pleading, or other document in any criminal or civil cause in any court of competent jurisdiction, or of a fair and impartial report of the contents thereof, is privileged, unless it is proved that the same was published maliciously, or that the defendant has refused or neglected to publish in the same manner in which the publication complained of appeared, a reasonable written explanation or contradiction thereof by the plaintiff, or that the publisher has refused, upon request of the plaintiff, to publish the subsequent determination of such suit or action. This section and section 2317.04 of the Revised Code do not authorize the publication of blasphemous or indecent matter.[17]

This statute grants newspapers a qualified privilege to report even the *fringe* areas of judicial proceedings, that is, criminal arrest, the filing of affidavits, pleadings and other documents, as well as the contents of these documents. Ohio courts hold that pleadings, affidavits, testimony, and the like produced in judicial proceedings are absolutely privileged if in any way relevant or material to the issue.[18] Thus, defamatory matter can be incorporated in a pleading which is filed with the appropriate court where the newspapers can then obtain and report it. The one defamed usually has no remedy since the publications involved are privileged.

The Ohio statute requires that the report be "fair and impartial" which seems to be equivalent in purpose to the "fair and accurate" standards set forth by the *Restatement.* However, in Ohio, if a report is made maliciously, the privilege is lost whereas the *Restatement* requires that

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[17] Ohio Rev. Code, Evidence, § 2317.05 (1953).

[18] Lanning v. Christy, 30 Ohio St. 115, 27 Am. R. 431 (1876); Liles v. Gaster, 42 Ohio St. 631 (1885); Rudin v. Fauver, 9 Ohio N.P. (n.s.) 289 (Ct. C.P. Lorain County 1909), aff'd, 83 Ohio St. 468, 94 N.E. 1114 (1910); Erie County Farmers' Ins. Co. v. Crecelius, 122 Ohio St. 210, 171 N.E. 97 (1930); Buehrer v. Provident Mutual Life Ins. Co., 123 Ohio St. 264, 175 N.E. 25 (1931).

the report be published solely to cause harm before the privilege is lost. Presumably then, a report jointly motivated by malice and a legitimate desire to inform the public would not be privileged in Ohio. The term "maliciously" was used in the prior Ohio statute[19] which was substantially identical with the present one. As used in the prior statute, it was held to mean "express malice" and to give rise to a rebuttable presumption of "no malice." [20] The burden of proof then falls on the plaintiff and, at best, it will be difficult to establish express malice as a motivating force behind the publication of the report.

The additional requirements specified by the present statute as prerequisites to immunity seem more meaningful to the one defamed. To qualify, the newspaper cannot neglect or refuse to publish, in the same manner as the defamatory publication, a reasonable written explanation or contradiction by the plaintiff. These provisions do not deter or prevent libel nor do they avoid or compensate the injury to reputation inherent in libel. They do, however, provide a public means by which the one defamed can defend himself and possibly lessen the consequences of the libel.

The present statute does not reflect the earlier opinions of the Ohio courts. The first decision by the Ohio supreme court dealing with the question of newspaper immunity in reporting judicial proceedings falling with the terms of the present statute was handed down in 1860 in *Cincinnati Gazette Co. v. Timberlake*.[21] There the court was confronted with a libel suit in which the newspaper, The Cincinnati Gazette, defended its report of a warrant for Timberlake's arrest and his subsequent arrest as being privileged. On August 8, 1856, the newspaper reported under the heading "Swindling" that Timberlake had been arrested on a charge of petit larceny as a result of an arrest warrant charging that he had bought land warrants for ninety-five dollars but refused to pay more than seventy-five dollars after the warrants were delivered. Timberlake was jailed, but was acquitted the following day in police court. The trial court had advised the jury that the privilege claimed did not extend to preliminary and ex parte proceedings and charged that truth of the publication was the only defense.

The Ohio Supreme Court acknowledged in dictum that there was

> . . . no doubt that a full, fair, and impartial report of a judicial trial, had in open court, where the parties interested have an opportunity of asserting and vindicating their rights, may be published with impunity. Such reports, unaccompanied by malicious and defamatory comments, have always been held privileged.[22]

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[19] Ohio General Code, § 11343-2 (1953).

[20] Heimlich v. Dispatch Printing Co., 18 Ohio N.P. (n.s.) 505 (1915), aff'd, 60 Ohio App. 394 (1916).

[21] 10 Ohio St. 549 (1860).

[22] *Id.* at 552, 78 Am. Dec. at 285.

The court then directed its attention to whether the privilege extended to preliminary proceedings, that is, proceedings prior to trial. Acknowledging that the constitutions of both the United States and Ohio guarantee free press, the court noted that the latter also values reputation.[23] The court contemplating no inconsistency in free press and the protection of reputation, held that no privilege existed for reporting proceedings prior to trial and that the only defense to such reports was truth.

The Maryland Supreme Court was called upon to decide the same issue in 1877 in the case of *McBee v. Fulton.*[24] After reviewing many of the same English and American authorities considered earlier by the Ohio court in *Cincinnati Gazette Co.,* the Maryland court extended a qualified privilege to newspapers in reporting ex parte and preliminary judicial proceedings. The Maryland court was apparently influenced by some English and New York cases not available at the time of the Ohio court's decisions.

In 1900, the Ohio legislature amended the statute dealing with libel so that newspapers were better able to defend themselves against libel suits arising out of reports of judicial proceedings. The revised statute destroyed the presumption of malice ordinarily associated with libelous publications if a retraction was published upon request and if the original publication was made in good faith with reasonable grounds for believing it to be true.[25] If these conditions were met, the statute required proof of special damages or actual malice in order to recover damages in a libel suit.

The Post Publishing Co. asked the Sixth Circuit court to construe the statute so that its ameliorating provisions became effective when a retraction was published regardless of whether the retraction was published at the request of the one defamed. The court stated that this construction of the statute would raise questions of its constitutionality in view of the protection afforded reputation in the Ohio constitution. This construction would permit the newspaper to limit its liability without the consent of the one defamed, because, as the court noted, proof of special damages in libel suits was almost impossible. Therefore, it was held that the one defamed had to request retraction for the retraction to have the consequences stated in the statute. The requested retraction served as a waiver of remedy and was not barred by the Ohio constitution.[26]

The Ohio Supreme Court was not so generous. It held the statute unconstitutional in *Byers v. The Meridian Printing Co.*[27] A Cleveland

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[23] Ohio Const., Art. I, § 16 (1851).

[24] 47 Md. 403, 28 Am. Rep. 465 (1877).

[25] Ohio Rev. St., § 5094 (1900); 94 Ohio L. 295.

[26] Post Publishing Co. v. Butler, 137 F. 723 (6th Cir. 1905).

[27] 84 Ohio St. 408, 95 N.E. 917 (1911).

newspaper reported that an arrest warrant had been sworn against the plaintiff, a local attorney, charging him with perjury. In fact, the justice of the peace had convinced the would-be complainant that he had no cause of action and the oath in support of the warrant was never signed. A retraction of the report was published upon request of the attorney. The newspaper, citing *McBee*, argued that the publication would be privileged in all jurisdictions other than Ohio and that *Cincinnati Gazette Co.*, was decided incorrectly. The Supreme Court was not impressed and swept away these contentions by saying that the reasoning in their decision was sound even if the authorities were questionable. Again the court held that there was no privilege to report preliminary and ex parte judicial proceedings and quoted with approval the reasons given by the Michigan Supreme Court[28] to sustain a similar decision in denying a privilege to report pleadings.

> . . . One of the reasons why parties are privileged from suit for accusations made in their pleadings is that the pleadings are addressed to courts where facts can be fairly tried, and to no other readers. If pleadings and other documents can be published to the world by any one who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news. The public has no right to any information on private suits until they come up for hearing or action in open court; and, when any publication is made involving such matters, they possess no privilege, and the publication must rest on either non-libelous character or truth to defend it.[29]

The Ohio legislature in 1911, the same year that *Byers* was decided, passed additional legislation[30] explicitly extending a qualified privilege to report preliminary judicial proceedings. The 1911 statute was substantially identical with the one currently in force.[31]

One of the first attacks upon the 1911 statute failed.[32] In its decision, the Franklin Common Pleas Court noted both *Cincinnati Gazette Co.* and *Byers, supra,* but found them not controlling because the statute in question was very different from the one found unconstitutional. First, the court decided that the statute had changed the rule of these cases and extended the privilege beyond what judicial precedent had formerly recognized. Further, the court found no constitutional conflict since newspapers were privileged to report only those documents which were filed in courts where they became public property and available to all to examine and discuss. In other words, newspapers were only privileged

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[28] Park v. Free Press Co., 72 Mich. 560, 40 N.W. 731 (1888).

[29] *Id.*, at 586, 40 N.W. at 734, Quoted at 84 Ohio St. at 418; 95 N.E. at 918.

[30] Ohio General Code, § 11343-2; 102 Ohio L. 95 (1911).

[31] *Supra* note 17.

[32] See Heimlich v. Dispatch Printing Co. *supra* note 20.

to report that which was already available. With this understanding of the statute, the court found that a newspaper report of an arrest warrant charging an attorney with perjury was privileged.

This view was upheld on appeal to the Court of Appeals for Franklin County.[33] However, the decision of the appellate court specified that the privilege presumes no comments on the part of the publisher.

The current statute permitted another Ohio appellate court to hold that the Mansfield News-Journal was immune in a libel suit involving the following circumstances.[34] The newspaper reported on November 28, 1953, that the plaintiff had been arrested on a warrant charging him with the rape of a twelve-year old girl. Actually, the victim was twenty-four and the arrest of the plaintiff proved to be a case of mistaken identity. The newspaper reporter "learned" the age of the victim from police personnel in charge of records, not from an inspection of the warrant itself. On November 7, 1953, the newspaper published a full account of the facts, including plaintiff's complete exoneration. Under such circumstances, the report, though erroneous, was privileged.

However, the privilege afforded under the present statute is not absolute. When a newspaper decided to translate language referring to "unnatural" sexual behavior, as used in an answer filed in a divorce case, into "sex perversion," the court found that this act of interpreting the language of the answer removed the report from the privilege.[35] The language "sex perversion" was considered more opprobious than "unnatural" sexual relations and even to impute sodomy, a crime in Ohio. This case illustrates the risks associated with interpreting the language employed in judicial proceedings. It is doubtful that the ordinary reader would find any meaningful difference between "unnatural" sexual behavior and sex perversion (if, in fact, there is any real difference). Thus, it would seem, that the report could easily have been regarded as fair and impartial. Perhaps, the lesson to be learned from this case is that judges may narrowly construe the privilege and any variations in critical wording will offer them the opportunity to find the report not privileged.

The Ohio statutes are silent on the question whether newspapers are privileged to report trials. The Revised Code explicitly extends a privilege to report other judicial proceedings as well as proceedings before state and municipal legislative or executive bodies, boards, and officers. This fact, however, is clearly not indicative of any belief on the part of the legislature that they have withheld the privilege with regard to reporting trials. Rather, it is indicative of the fact that there has never been any real question in Ohio as to the existence of this privilege.

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[33] *Ibid.*

[34] Torski v. Mansfield Journal, 100 Ohio App. 538, 137 N.E. 2d 679, *appeal dismissed,* 165 Ohio St. 245, 135 N.E. 2d 63 (1956).

[35] Williams v. P. W. Publishing Co., 76 Ohio L. Abs. 404, 140 N.E. 2d 809 (Ct. App. Cuyahoga County 1957).

The qualified privilege to publish fair and impartial accounts of trials was recognized in dicta in early decisions by the Ohio Supreme Court; *Cincinnati Gazette Co.*, in 1860; in *Post Publishing Co. v. Maloney*[36] in 1893; and in *Byers, supra,* in 1911. The lower courts in Ohio have recognized and upheld the privilege since before the turn of the century. In 1895, a newspaper report of the testimony of a witness was held privileged, even though the testimony later proved unfounded.[37] In 1896, relying on the dictum in *Post Publishing Co.*, it was found that a newspaper was privileged to report the testimony of a discharged housekeeper, plaintiff in a suit for wages where the plaintiff suggested in her testimony that her employer had tried to abduct her granddaughter, a girl of fourteen.[38]

Recently, it was held that a fair report of the trial conduct of a judge was privileged.[39] Acknowledging that the Revised Code did not specifically provide any privilege to report trials, the court felt that sections 2317.04 and 2317.05 dealing, respectively, with the privilege to report governmental and preliminary judicial proceedings pointed the way and were consistent with prior case law upholding the right to report trials.

Unquestionably, Ohio newspapers enjoy a liberal judicial and legislative attitude that recognizes a qualified privilege to publish fair and impartial accounts of judicial proceeding. As long as the reports are free from comment or interpretation on the part of the publisher, the newspaper will be immune in libel suits resulting from the reports.

Proposed Limitations

Almost invariably, the decisions discussed above sustaining the right to report judicial proceedings advance either, or both, of two basic reasons to support immunity. First, these proceedings are a matter of public record available to the public and a fair and impartial newspaper report merely provides the public with another source of information already available. The second is based on the constitutional guarantee of free press. Keeping the public informed on judicial proceedings is considered more important than protecting the reputation of an individual.

On the surface, it is difficult to quarrel with the basic principles underlying these reasons. Certainly, free press is an essential ingredient in a self-governing society. Indeed, the Supreme Court has characterized a ". . . responsible press as the handmaiden of effective judicial adminis-

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[36] 50 Ohio St. 71, 33 N.E. 921 (1893).

[37] Coleman v. Ohio State Journal, 5 Ohio Dec. 579, 7 Ohio N.P. 564 (Franklin C.P. 1895).

[38] Parks v. Enquirer Co., 4 Ohio Dec. 184, aff'd, 8 Ohio C. Dec. 621, 16 Ohio C.C.R. 409 (Hamilton C.P. 1896).

[39] Driscoll v. Block, 3 Ohio App. 2d 351, 210 N.E. 899 (1965).

tration . . ." [40] But the Supreme Court has also pointed out that free press is not an absolute freedom.[41]

Free press can be regulated.[42] In fact, it is regulated by the very Federal Constitution which protects it.[43] The basic idea underlying free press is to facilitate the dissemination of ideas, facts, criticisms, warnings, advice, dissent, and the like. This hopefully leads to informed discussion and positive action so that society will develop and improve. Presumably, judicial administration also can be improved by this method.

But does piecemeal reporting of a search warrant, an arrest warrant, an arrest, the jury selection, the day-to-day testimony of each witness, the admonitions of the judge, the concluding arguments of counsel, the jury charge, the verdict, and the sentence over a period of days, weeks, or months promote informed discussion? Or does such reporting result in a distorted view of the accused, the judicial process, and those involved in its administration? Are false impressions created by the reporting of unfounded but privileged testimony really corrected in the minds of readers by the reporting of subsequent events? Are newspaper reports responsible? [44] Whether a responsible press is the law's handmaiden is irrelevant if the press is not responsible. Are newspapers primarily consumer businesses out to sell a consumer product? When a business depends on consumer acceptance to sell its product, it is inclined to furnish the consumer with a product tailored to the consumer's opinions. In other words, doesn't it make sense to tell the consumer what he wants to hear—to suggest day after day that the accused did it? [45] It seems that the answer to these and other questions must be de-

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[40] Sheppard v. Maxwell, *supra* note 16.

[41] See, for example, Justice Black's dissent in Beauharnais v. Illinois *supra* note 1. For a more recent statement of his opinion on this subject, see his dissent in Ginzburg v. United States, 383 U.S. 463 (1966).

[42] This is illustrated by the decisions in Beauharnais v. Illinois, *supra* note 1 and Ginzburg v. U.S., *supra* note 41.

[43] The First Amendment of the Constitution merely forbids Congress to pass laws ". . . abridging the freedom of speech, or of the press. . . ." It in no way implies that the Constitution itself cannot define the boundaries of free speech and press. The Constitutional guarantee of ". . . a speedy and public trial, by an impartial jury . . ." is just such a limitation. To the extent that free press interferes with the right to an impartial jury in criminal cases as provided by the Sixth Amendment, it is an unconstitutional exercise of "free" press proscribed by the Constitution.

It would appear that as to the "free press-fair trial" controversy, newspapers and other news media have no constitutional basis from which to challenge any legislation which restricts the reporting of criminal trials or other matters incident thereto which could reasonably be expected to influence jurors or potential jurors so that the jury's impartiality would be destroyed. Such legislation as is necessary to safeguard the guarantees of the Sixth Amendment against infringement by speech and press are clearly within the authority provided Congress under the "necessary and proper" clause.

[44] For a sampling of "responsible" newspaper reporting, see pages 25-47 of the American Bar Association report, *Standards Relating to Fair Trial and Free Press* (tentative draft, 1966) also known as the *Reardon Report.*

[45] Sheppard v. Maxwell, *supra* note 15. See also newspaper reports quoted with decision.

termined and taken into account when considering whether newspapers should be afforded a qualified privilege to report judicial proceedings at the expense of personal reputation.

To imply that a fair and impartial newspaper report of a judicial proceeding does no additional harm to reputation since it publishes only what is already known to the public seems to deny reality. Common sense tells any reasonable person that, were it not for the news media, he would know of few, if any, pending criminal or civil actions. While such information may be available, he has neither the interest nor the time to find it. As it is, the newspapers advise him, along with tens of thousands of others in the community, of each step in many judicial proceedings. In a suitable case, the news media "inform" the entire nation of each step in a judicial proceeding. Instead of a few dozen people or at most a few hundred people knowing of a given judicial proceeding, the whole community is advised of the fact—friends, enemies, relatives, business associates, employees, employers, customers, clients, creditors, neighbors, phone-calling crackpots, everybody. Again common sense requires the conclusion that whatever harm to the reputation is attributable to defamatory matter published or made available through a judicial proceeding is compounded by a newspaper report of the proceeding.

If newspapers were granted a qualified privilege to report judicial proceedings after completion of trial or disposition without trial, there could be no serious complaint that free press was abridged. Newspapers would still be free to report judicial proceedings as they saw fit. They would not be forbidden to report judicial proceedings before the completion of trial or disposition without trial. They simply would not be granted any immunity for reports published prior to this time. The absence of any privilege to report at the earlier stages of judicial proceedings could be conducive to more responsible journalism during this period. At the same time, persons injured by libelous statements contained in reports published without a privilege could recover damages according to the general rules applicable to damages in libel suits.

Upon completion of the trial or disposition of the proceeding without trial, the newspaper would be privileged to publish a fair and impartial account of the proceeding under the general guidelines currently in effect in Ohio. An account of the proceeding at this time should be more informative to the readers as they will have the complete summary of events to evaluate—the "big picture" as opposed to a series of "snapshots" presented over varying periods of time. Having the result of the trial to consider when the other events of the trial are being evaluated is likely to produce less distorted impressions in the minds of the readers concerning the judicial process and the persons involved.

On the other hand, the person allegedly defamed by a fair and impartial report of a proceeding at the completion of the proceeding would

not be in a very good position to complain. If the facts and evidence establish nothing defamatory, then the overall tenor of the report should not be defamatory, or it will not be privileged.

This approach to an accommodation between free press and preventing unnecessary injury to reputation is analogous in many respects to recommendations recently approved by the House of Delegates of the American Bar Association,[46] and contained in the Association's report *Standards Relating to Fair Trial and Free Press.*[47] After finding that present newspaper reporting "may destroy the reputation of one who is innocent and may seriously endanger the right to a fair trial," [48] the report writers recommended that certain matters should not be reported until after trial or disposition without trial.[49] Comment and criticism at this time was believed sufficient to foster the improvement of judicial administration through free press.

Free press would remain unfettered since no restriction whatever is imposed upon newspaper reports of judicial proceedings. The only restrictions resulting from the postponement of immunity would be self-imposed by the newspapers. Self-imposed restrictions are not forbidden by either the federal or state constitutions. In fact, *self-imposed restraint* should be the *watchword* of a *responsible free press.*

At the same time, reputation would be afforded greater protection. Damages could be recovered for libelous statements published before the qualified privilege became effective. Moreover, postponement of the effectiveness of the privilege would diminish the adverse effects which accompany the premature publication, for example, where earlier proceedings contained defamatory matter subsequently proved unfounded.

The proposed limitation on the qualified privilege to report judicial proceedings requires amending section 2317.05 of the code (1) to include reporting of trials and (2) to postpone the operation of the privilege until the end of trial or disposition without trial. Nothing more would be required. The standards to qualify for the privilege as now recognized would remain unchanged otherwise.

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[46] The New York Times, City Edition, Vol. CXVII, No. 40204, reported February 20, 1968, on pages 1 and 35 that the House of Delegates had adopted the recommendations of the *Reardon Report* at their midwinter meeting in Chicago on February 19, 1968.

[47] The Reardon Report, *supra* note 44.

[48] Id. at 16.

[49] *Id.* at 8: recommendation 3.1 provides for the exclusion of the public from all or part of the pre-trial proceedings upon a motion by the defendant and at 12: recommendation 3.5 provides for exclusion of the public from any portion of the trial held in the absence of the jury upon a motion by the defendant. As to 3.5, the Reardon Report specifically notes that Ohio may have trouble with this procedure since an Ohio court has already held that the news media cannot be excluded from trials. E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E. 2d 896, *appeal dismissed,* 164 Ohio St. 261, 130 N.E. 2d 701 (1955).

Conclusion

Modification of the present Ohio law as suggested represents only a minor departure from the existing law. Yet it could facilitate a desirable accommodation between free press and an important individual right—the enjoyment of good reputation.

In addition, the modification could prove to be a worthwhile step in preserving the right to a fair trial. It is likely that the future will see a growing conflict between fair trial and free press with fair trial being the eventual winner. Facing such dim prospects, newspapers may be in a mood to accept self-imposed restrictions with a little inducement. Self-imposed restraint could be reflected in less reporting of preliminary proceedings or more responsible reporting. Either would decrease the likelihood that a newspaper report would adversely affect the right to a fair trial.

Admittedly the benefits ascribed to the modification are conjectural but they are at least possibilities. If any one of them actually could be achieved or facilitated through the modification, then the modification would be worthwhile. The "harm" which would flow from the modification may be a temporary delay in "informing" the public. This "harm" can be offset by the *improved accuracy* and *quality* possible in a report published at the conclusion of the proceeding where the entire record, including the result, is available for evaluation.

In short, the modification seems sound.