CHAPTER 8

FREE EXPRESSION AND ITS LIMITS

One of the unique hallmarks of US society is the right to freedom of expression, enshrined in the First Amendment to the Constitution: "Congress shall make no law . . . abridging the freedom of speech, or the press . . ." Our courts have determined that the word "speech" includes both spoken and written expression, and "the press" includes not just newspapers, but books, magazines, broadcast media, the Internet, and motion pictures—virtually any means of conveying information. The right belongs not just to the speaker, but also to the audience. The theory on which freedom of expression rests was famously explained by Supreme Court Justice Oliver Wendell Holmes, Jr.: "The ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ." Thus, the marketplace of ideas is a social good to be encouraged and the appropriate response to offensive or untrue speech is not punishment or restraint by the state, it is more speech. The prohibition against government restricting its citizens' speech extends to the fifty states by virtue of the Fourteenth Amendment.

But this freedom is far from absolute. First, only the government (including the courts) is prohibited from abridging free expression; private enterprises may restrict or punish speech by employees and other parties.

Copyright, trademark, and unfair competition laws may penalize expressive activity that infringes the rights of others. Some kinds of speech can harm individuals, and all states offer remedies against the publishers of defamation and for invasion of privacy. Laws criminalizing obscenity exist in all fifty states, and schools and libraries routinely censor literature, usually within their legal rights to do so.

A full treatment of any one of these topics and the many hundreds of judicial interpretations of the related laws would fill volumes; an in-depth study is not possible here. But this chapter will attempt to explain the definitions and parameters of defamation, invasion of privacy, newsgathering risks, obscenity laws, and censorship in schools and libraries. It will also examine the legal risks of defamation and privacy violations that professional writers must navigate, whether or not they are members of the press, and offer practical advice for self-protection.

State and federal courts have interpreted laws governing defamation and privacy over many decades, and the legal definitions and standards vary, sometimes considerably, from state to state. In fact, it is not always clear which state's laws apply to a work distributed nationwide, and this uncertainty can work against a writer's freedom of expression if a potential plaintiff lives in a state with particularly unfavorable laws. But one set of standards applies to all works published in the United States, and those are the parameters outlined by the Supreme Court interpreting the First Amendment. For that reason, this chapter focuses on the limits the Supreme Court has drawn around every state's defamation and privacy laws. If your work meets constitutional standards, it should be safe from liability in any state.

DEFAMATION AND "FALSE LIGHT" INVASION OF PRIVACY

Common law or legislation in every state has long recognized that damage to a person's reputation deserves redress, and every state provides a civil remedy to a defamed person.[50] In most states, defamation is defined as the publication of a false statement of fact about a person or entity that is derogatory and tends to injure the subject's reputation, and which was published with some degree of fault. "False light" is a variety of invasion

[50] There is no federal cause of action for defamation. Only states, through legislation and judicially crafted standards, provide a remedy for defamation.

of privacy akin to defamation; it is defined as the widespread publication of facts that show the subject in a misleading light in a way that would be highly offensive to a reasonable person.

Reporting about public officials, public figures, and matters of public concern is highly valued in the United States, and plaintiffs in such cases must meet higher standards of proof and show more fault by the publisher of a false statement. As well, the press enjoys certain privileges that exempt it from liability for merely repeating defamatory statements made in public proceedings, such as indictments, legislative hearings, and lawsuits.

Every one of the elements of defamation, examined below, must be proven to give rise to liability.

PUBLICATION

"Publication" means that the offending statement was uttered to and reached at least one person other than the subject of the statement. The size of the audience does not matter, and if a statement appears in a published book, blog post, or article, "publication" is assumed. The statement may be spoken (slander), or expressed through fixed or written words or images, including motion pictures (libel). In many states, injury to reputation is easier for a plaintiff to prove when the claim is for libel rather than slander.

Under the "republication rule," every party who participates in publishing or who republishes another's defamatory statement can also be liable for defamation. This means that both the publisher of a writer's defamatory statement and the writer are individually responsible for their own publications of the statement. A writer who simply quotes another person's defamatory statement can be liable herself for a new instance of defamation, even if she names the original source, or indicates doubt that the statement is true, or uses the customary phrase "it is alleged," or discloses that the story is based on rumors. By contrast, a mere distributor of a defamatory statement, such as a bookseller or newsstand, is not liable unless it receives notice of the defamation and continues to distribute the publication.

The press enjoys certain exceptions to the republication rule, such as the "fair report privilege," which exempts it from liability for repeating defamatory statements made in judicial and other public proceedings. Section 230 of the federal Communications Decency Act gives Internet service providers and website operators that publish user-generated content

immunity from liability for defamatory statements that users make through their services. (This immunity does not, however, extend to online publications' own published statements.)

STATEMENT OF FACT

Whether a statement is "factual" depends on whether it can be objectively verified. Courts have found humor, ridicule, sarcasm, questions, alterations of quotes, and insinuations to be potentially defamatory statements of fact. By contrast, a genuine statement of opinion cannot be verified as true or false, so it cannot be defamatory. This distinction does not, however, give writers carte blanche to make or imply a defamatory statement in the guise of an opinion. The Supreme Court has held that "expressions of opinion may often imply an assertion of objective fact," which, if false and defamatory, can lead to liability. If a writer asserts facts on which she bases an opinion, the opinion might be defamatory if the facts are incorrect or incomplete.

In examining a statement's meaning, a court must interpret the words as they were "reasonably understood in view of all the circumstances," including the context in which they were published. If the contested statement is "reasonably susceptible of a defamatory connotation," a claim is likely to survive a motion to dismiss the case. To make this determination, the court must give the disputed language a fair reading in the context of the publication as a whole. For example, in 1994, a writer named Dan Moldea sued the *New York Times* over a negative review of his book. Among other things, the review said his book contained "too much sloppy journalism." Moldea claimed that this statement injured his reputation as an investigative reporter. After first ruling that Moldea had stated a valid claim, a federal appellate court took the unusual step of reversing itself and dismissed the case. It ruled that a book review is "a genre in which readers expect to find spirited critiques of literary works that they understand to be the review's description and assessment of texts that are capable of a number of possible rational interpretations," and that the "sloppy journalism" statement was the reviewer's "supportable interpretation of" the book. Only if no reasonable person could conclude that a statement in a review is a "supportable interpretation" of the reviewed work could it be deemed a false factual assertion.

Some states recognize defamation by implication, similar to "false light" invasion of privacy, where the claim is premised not on false assertions but

on false impressions and implications arising from otherwise truthful statements. For example, a news account was found to have implicitly defamed a woman when it reported that a wife had shot her "upon finding her husband" at the victim's home, because it failed to explain that the assault happened during a social gathering that included both parties' husbands. The concern that substantially truthful speech must be protected has led courts to embrace high standards through which to find defamation by implication. For example, one court has held that a defamatory implication must arise from a material omission of information. Federal courts have ruled the defamatory implication must have been a "reasonable interpretation" and the author must have intended to convey the implication. Other courts have rejected the concept of libel by implication altogether, as contrary to free speech values.

"OF AND CONCERNING" THE INJURED PARTY

The offending statement must actually be understood to be about an identifiable person. Accusing all members of a particular ethnic group of being criminals, though offensive, is not "of and concerning" any single member of that group so as to give that person a claim for defamation. Although a person need not be identified by name, the statement and the context must reveal enough identifying information about a subject that those who know her would recognize the statement as being about her. A statement about an unnamed member of a group might be deemed "of and concerning" a particular person if the group is small enough, or if other information describing her is given that leads to the reasonable inference that she is the subject.

A legal entity, including a corporation, can be the subject of a defamatory statement and has the same rights to relief as an individual.

FALSITY

Defamation liability requires that the statement be false. The truth or substantial truth of the statement is considered an absolute defense. "Substantial truth" means that immaterial details are wrong but the offending statement is accurate in substance. Unauthorized biographies and unflattering portraits are legally acceptable if they do not include false and defamatory statements about their subjects. Where the statement made concerns a public official or a public figure or relates to a matter of public concern, the

plaintiff bears the burden of proving the statement false. Where the statement involves a private matter and nonpublic figures, some states require the defendant to prove the statement was true or substantially true, but only if the plaintiff has proven all other elements of the claim.

DAMAGE TO REPUTATION

The published statement at issue must in fact harm the plaintiff's reputation. Merely being offensive or insulting does not suffice. The kinds of statements that can injure a person's reputation vary as much as people do. Any assertion can injure a person's reputation if it exposes her to hatred, ridicule, or contempt, or reduces esteem or respect for her among her peers, causes her to be shunned, or injures her professionally. For the most part, the plaintiff must prove that a published statement actually injured her reputation in specific ways. Some kinds of statements, however, are considered so universally injurious that they are considered defamatory *per se* and do not require that the plaintiff prove actual damage to her reputation.[51] *Per se* defamation includes statements that impugn a person's honesty, ethics, or mental health, or that claim the subject has a dreaded disease, is an alcoholic or drug abuser, is sexually promiscuous or impotent, or is a criminal.

Only living people may sue for defamation because the dead cannot suffer personally from injury to their reputations. Some states make defamation of the dead a crime, but they do not give surviving relatives a right to sue for civil damages.

FAULT: ACTUAL MALICE, GROSS IRRESPONSIBILITY OR NEGLIGENCE

Under the First Amendment, liability for publishing an injurious falsehood requires some degree of fault by the defendant. If writers and publishers faced liability to every person about whom they published an incorrect statement, they would necessarily self-censor their reporting and writing to unacceptable levels of timidity. This tendency to self-censor is known as the "chilling effect" on speech, and it is quite relevant in First Amendment jurisprudence. The Supreme Court has recognized the important role of the media: "acting as the 'eyes and ears' of the public, [the press] can be a

[51] One possible exception: a person with a notoriously bad reputation is less likely to prove reputational injury even when a falsehood published about her is *per se* defamatory.

powerful and constructive force, contributing to remedial action in the conduct of public business." Given the need for the "marketplace of ideas" and the watchdog role of the press in a free society, in 1964, the Supreme Court held that the First Amendment requires significant levels of fault by the speaker, depending on the newsworthiness of the story.

In the 1964 landmark case of *New York Times v. Sullivan*, the Court held that under the First Amendment, the press may make inaccurate statements based on honest error without liability. *Sullivan* provided that public officials may not claim defamation for false statements relating to their official conduct unless they can show the defendant published the statement with "actual malice," i.e., knowledge of falsity or reckless disregard of the truth. The aggrieved public official must prove actual malice "with convincing clarity," a higher level of proof than for most civil lawsuits. Subsequent cases have fleshed out the definition of actual malice. The Court has ruled that even deliberately altering a plaintiff's quoted words does not amount to knowledge of falsity unless the changes result "in a material change in the statement's meaning." "Reckless disregard" for a statement's truth means something worse than just failing to fact-check a news story. Instead, there "must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." This standard obviously does not excuse a publisher from skipping the fact-checking process. To a jury, it might be a short step from that omission to "entertaining serious doubt about the truth."

Since *Sullivan*, the Court has extended the "actual malice" standard of fault to apply to "public figures" as well. Public figures include individuals who, by their accomplishments or positions in life, have given the public a legitimate interest in their affairs. They can include politicians, sports figures, media personalities, and other celebrities, but not necessarily their family members. Private individuals can become "limited purpose public figures," and therefore must meet the actual malice standard, when they actively, voluntarily, or willfully seek the public eye or inject themselves into a matter of public concern. For example, when Richard Jewell, the heroic security guard who granted interviews following the bombing at the 2000 Olympic Games, was later wrongly reported to be a suspect, he was found to have placed himself into the center of a public debate about park safety and thus considered a limited purpose public figure. In contrast, if a person has no public role in society and did not voluntarily join in a

public debate intending to influence its outcome, she is much less likely to be deemed a "public figure" for defamation purposes.

In defamation claims brought by private figures, Supreme Court precedent still requires fault, but allows states to impose a lower standard, such as negligence, which is defined as falling below the standard of care that a reasonable person would employ in a similar situation. Where a public official or public figure is defamed as to private aspects of her life, she is treated as a private person. But if a statement made about a private party is in the context of reporting a matter of public concern, the publisher must have acted in at least a "grossly irresponsible" matter to be liable, and no *per se* or punitive damages are allowed unless the defendant acted with actual malice. Celebrity gossip writers should take care: celebrity breakups have been held to be private matters, even in media-friendly New York.

FALSE LIGHT

False light is a variety of invasion of privacy that some, but not all, states recognize (California does; New York does not). In substance, false light overlaps with the definition of defamation and the same constitutional limitations, described above, apply. The states that recognize the claim define it in different ways, but in general it means the wide dissemination of a statement that identifies the plaintiff and presents her to the public in a misleading way that would be "highly offensive to a reasonable person." The statements made do not have to be false, but they do have to create untrue implications. Unlike defamation, the publication must reach a large number of people, and the implication made must reach a high level of offensiveness on an objective basis. Some states require plaintiffs in false light claims to show a higher level of fault by the defendant than for defamation.

One example of false light is the use of an identifiable person's photo to illustrate a story about nefarious activity. Other cases have involved fictionalized accounts of events of public interest. If substantially true, the account is protected under the First Amendment. If false, the Supreme Court has held that the publisher must have acted with knowledge of its falsity or reckless disregard of the truth to be held liable.

DEFAMATION IN FICTION

While most defamation lawsuits against writers involve nonfiction, defamation can occur in a work of fiction, even if it does not refer to a real

person by name. Court rulings in the 1970s and 1980s have suggested an alarmingly easy test for proving that the depiction of a fictional character constituted a defamatory statement of fact about a real person. Two federal courts allowed the question of whether "the libel [in fiction] designates the plaintiff in such a way as to let those who knew him understand he was the person meant" to be decided by a jury. The Illinois Supreme Court has held that defamation is possible if it is reasonable for objective readers of a work who know both the author and the subject of the statement to have discerned the reference to the plaintiff. New York courts have articulated a stricter test, acknowledging that writers, of necessity, base fictional characters on their own experiences, and that identification alone is not sufficient to overcome a presumption that a character in a work of fiction is imaginary. Rather, the reader must be "totally convinced that the book in all its aspects as far as the plaintiff is concerned is not fiction at all." Another New York court has held that "the description of the fictional character must be so closely akin to the real person . . . that a reader of the book, knowing the real person, would have no difficulty linking the two."

If you are using some traits of people you know in your fictional characters, you can protect yourself by changing identifiable features—their names, physical traits, familial situations, professions, locations—as much as you can. The more unflattering your character, the more distinct you should make him or her from any person you know.

Novels and motion pictures often include disclaimers, such as, "This is a work of fiction. The people, events, and circumstances depicted in this novel are fictitious and the product of the author's imagination, and any resemblance of any character to any actual person, whether living or dead, is purely coincidental." Although a disclaimer might not protect your work if the depiction of a character defames a real person, it can decrease your risk or the potential amount of money damages.

OTHER LIMITS TO LIABILITY: PRIOR RESTRAINTS

In 1971, the Supreme Court refused to issue a prepublication injunction against the publication of the Pentagon Papers, a classified report on US policy in Vietnam that had been leaked to the press. After the *New York Times* and the *Washington Post* jointly began publishing parts of the report, the Nixon Administration sued to enjoin continued publication. In a watershed victory for freedom of the press, the Supreme Court ruled

against the government. It held that any prior restraint on publication is heavily presumed to be unconstitutional, and that the government must prove that a prior restraint is justified. In the *Pentagon Papers* case, the government failed to prove its claim of harm to national security.

A court-ordered restraint on the publication of a work—whether it is deemed defamatory, infringing, or invasive of a person's privacy—is presumptively unconstitutional. The Supreme Court has held that, illegal or not, virtually no work of authorship should be judicially silenced before it is published. Although a work might cause damage to others and liability to its author, the courts generally may not prohibit it from being published and read. Only exceptional circumstances justify a prior restraint on expression. For example, in wartime, publication of the number, location, or sailing dates of troops might be legitimately prohibited.

OTHER LIMITS TO LIABILITY: RETRACTIONS

In many states, damages for defamation against the media will be limited if the publisher retracts the defamatory statement or if the plaintiff fails to demand a retraction before suing. The relevant state laws generally hold that the retraction must be a complete and unequivocal attempt to repair the injury caused to a reputation. The retraction must receive the same prominence and publicity as the defamation and appear as soon after the defamation as possible. Even where the state of jurisdiction does not have a retraction statute, a retraction can help show that the plaintiff suffered less damage and that there was an absence of the malice necessary for liability (for public figures) or punitive damages.

INVASION OF PRIVACY

The doctrine of invasion of privacy gives people the right to redress for the publication of certain true statements and the use of certain intrusive news-gathering methods. The right to privacy is defined as the right to be free from unwanted and unnecessary publicity or interference that could injure one's personal feelings or present a person in a false light. Recognized in varying forms in almost every state, invasion of privacy claims generally protect against four distinct types of injury:

The appropriation of a person's name or likeness for advertising or commercial uses; or

The disclosure to the public of embarrassing private facts; or

The placing of a person in a false light before the public (as described above); or

Intrusion into a person's seclusion or private life.

In every privacy suit, the plaintiff must demonstrate that she had a reasonable expectation of privacy. Therefore, a person's statements made and actions taken in public may be recorded and published without violating her privacy rights.

RIGHT OF PUBLICITY

New York recognizes only the first of the privacy categories, also called invasion of the right of publicity. New York's statute is a good example of this right as it is recognized by most other states. It provides:

> Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without . . . consent . . . may . . . sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful . . . the jury, in its discretion, may award [punitive] damages.

Most other states recognize the right of publicity either by statute or in common law. This right is limited to the commercial exploitation of a person's name or likeness, that is, in connection with advertising or marketing products or services. Therefore, the use in a work of fiction of the name and physical traits of a real person does not infringe her right of publicity (though it could be defamation, as described above). The press may freely use the names and likenesses of people, famous or not, for newsworthy purposes and even for advertising the newsworthy qualities of the publication.

DISCLOSURE OF PRIVATE FACTS

The public disclosure of embarrassing private facts could constitute an invasion of privacy if the disclosure would be highly offensive to a reasonable person and is not of legitimate concern to the public. Courts use a liberal definition of newsworthiness or legitimate public interest. For example, they have ruled that a statement that a person committed a crime is newsworthy, even if the statement is later shown to be false and defamatory. Where the disclosure is about a public figure, it is less likely to

be deemed an invasion of privacy; this allows unauthorized biographers of famous subjects some breathing room to disclose private facts they discover about public figures.

INTRUSION

The final category of invasion of privacy involves intrusion into another's seclusion or private life, where the claimant had a reasonable expectation that the activities or information obtained would be private. "The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." *Dietemann v. Time Inc.* (NY, 1971). The intrusion could be physical, such as trespass into someone's home, but it often relates to unauthorized electronic access or surveillance, such as a wiretap, snooping through windows, and overzealous shadowing, whether or not accompanied by trespass to property. Intrusion and defamation are separate claims. Publication of the information obtained is not required to make a case for intrusion, and the fact that information was obtained through intrusion is irrelevant to whether publishing it is wrongful. "[W]here the claim is that private information concerning the plaintiff has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained." *Pearson v. Dodd,* 1969. However, the money damages awarded for intrusion might be larger if the information obtained was subsequently published.

Given the complexity of the doctrines relating to invasion of privacy, you should seek legal advice if you anticipate difficulties.

AVOIDING DEFAMATION AND INVASION OF PRIVACY CLAIMS

Virtually all book publishers, and a fair number of periodical publishers, require their writers to indemnify them for all costs associated with defending defamation and privacy claims (and obscenity claims, for that matter) based on the authors' work. If an aggrieved party sues your publisher, even if the claim is not valid, you could be held financially responsible for all your publisher's costs, including its attorneys' fees. Most publishers have media liability insurance that covers their costs and liability, but these policies typically have very large deductibles. If you have not been diligent

enough, your publisher might require you to cover its out-of-pocket costs if it is sued, or it might charge its costs against your work's earnings.

To protect yourself against libel claims, you should document your fact-finding thoroughly and methodically to show you have not negligently made a false statement about anyone. Be careful throughout the process—while researching, writing, working through the editing process, fact-checking, even approving jacket copy. You should be able to cite the specific source of the statements of fact in your manuscript. Keep copies of all documents you use, including printouts of online material, and make sure they clearly show their sources and identity. If a source has provided a confidential document, clearly indicate the conditions for its publication, if any, on all copies. Mark your notes and tapes to indicate the identity of their sources or interview subjects and the date, time, and place of the interview or research. When taking notes, identify the words that are direct quotes. Tape recordings or even handwritten contemporaneous notes of interviews carry more weight than word-processed versions.

When conducting an interview, consider tape-recording it (the subject's permission is usually advisable).[52] Always begin each segment of a taped interview with a statement identifying the date, time, and subject. Within your time limits, you should always make the best possible effort to confirm sensitive statements. Consider the reliability of your sources, and try to evaluate whether your subject constitutes a public figure or the matter is newsworthy. Keep in mind that many libel claims come from figures who are minor players in a story and are often not public figures. In *Kirsch's Handbook of Publishing Law*, attorney Jonathan Kirsch advises that while preparing your manuscript you should cross-reference the manuscript to the source materials as much as possible. As you write, create two versions of your work—one with and one without footnotes giving the source for each statement and quote. The version with footnotes will be much easier to fact-check and legally review.

Most publishers have attorneys on staff who will review manuscripts that contain risky content. If the publisher does not supply a legal vetting, and your work contains statements that could be considered defamatory, consider con-

[52] Many states require all parties to a conversation to consent to its recording; some require only one party to consent. Unless you have a very good reason and clearance from a lawyer to record an interview without the subject's consent, it is best to get permission.

sulting your own publishing lawyer. Defamation and privacy law, like all laws, are subject to change without warning, and only an attorney who knows the current law can vet a manuscript effectively. The self-help steps described here will make the vetting lawyer's job easier and faster, and therefore less expensive.

PROTECTING CONFIDENTIAL SOURCES

Journalists need sources to reveal information, often confidentially, in order to investigate the behavior of public officials and of the government. In the era of civil unrest during the Vietnam War, prosecutors commonly sought to subpoena journalists' notes and files, and government agents made unannounced newsroom searches. These circumstances would understandably deter sources from revealing confidential information to the media. After Vietnam, the government reformed many of its own abusive practices. For example, the Privacy Protection Act of 1980 required law enforcement agents seeking information about crime from the media to give reporters advance notice and an opportunity to contest a subpoena in court.

If journalists can routinely be compelled to reveal their sources, people will be less likely to talk to them.[53] Occasionally, courts have ordered journalists to disclose the sources of relevant information, but virtually every reporter would willingly serve jail time for contempt of such court orders, rather than reveal the identity of a source who was promised confidentiality. Courts and legislatures recognize the larger importance to the public of allowing a reporter to keep sources confidential. The majority of states have so-called "reporter's privilege" or "press shield" laws that give journalists the right to refuse to disclose identities of confidential sources, although there is no federal counterpart. Under both the First Amendment and state press shield laws, reporters may have grounds to resist demands by the government that they reveal their sources and notes.

The reporter's privilege, like most others, is not absolute. Under most states' laws and judicial interpretations of the First Amendment, journalists

[53] Beyond the intangible harm to a journalist's ability to investigate, other harms can arise from revealing the identity of a confidential source. In 1991, the Supreme Court upheld a breach of contract claim against reporters who voluntarily revealed a confidential source's identity. The Court observed that the law of contracts applies as much to confidentiality agreements with news sources as to other contracts, largely because imposing contract damages on the reporters does not interfere with the newsgathering process.

can be ordered in some circumstances to disclose their sources. Some interests, in particular a criminal defendant's right to a fair trial, are considered more important than the reporter's privilege. Thus, courts will usually order disclosure if it is shown that the reporter likely has information relevant to the commission of an unlawful act, the prosecution or defense has tried and failed to get the information elsewhere, and the prosecution or defense requires the information to prepare its case.

NEWSGATHERING CLAIMS

Disgruntled subjects of media scrutiny sometimes rely on what media lawyers call "trash torts," such as trespass claims, to circumvent First Amendment accommodations for the press. Trespass is defined as intruding on private property after being told to leave or advised not to enter. Courts generally do not give journalists special treatment under trespass laws. In one New York case, a reporter went onto a person's property with law enforcement investigators who had a search warrant. The plaintiff objected to the reporter coming onto the property, and a court upheld his subsequent trespass suit against the reporter. Some courts award the plaintiff damages flowing from both the trespass itself and the resulting publication, even if not defamatory. Other courts, including those in New York, allow damages only for the trespass itself.

Wiretapping and recording interviews without the subject's permission are risky endeavors. Some states do not require that all parties to a conversation consent to being recorded, but a number of them do; it can be a crime to record a person without their consent in a "two party consent" state. If you are recording an interview or conversation, it is the better course to get all parties' consent, unless you have a good reason not to do so and you know it is legal to do so in the state(s) in which the recording is done.

CENSORSHIP

Under the First Amendment, the only types of expression that may be censored absolutely are obscenity and speech that creates "a clear and present danger that it will bring about the substantive evils that Congress [or the state] has a right to prevent." Even if objectionable material does not fall into either category it may, however, lawfully be kept from minors.

OBSCENITY

Material containing sexual content has existed for millennia, and has been prosecuted since at least Victorian times. Prior to 1973, the test for banning erotic expression, as developed in Britain and substantially followed in the United States, was whether the material "tended . . . to deprave and corrupt those whose minds are open to such immoral influences." In the United States, this led to bans on such works as Giovanni Boccaccio's *Decameron,* John Cleland's *Fanny Hill,* Gustave Flaubert's *November,* Henry Miller's *Tropic of Cancer,* James Joyce's *Ulysses,* D. H. Lawrence's *Lady Chatterley's Lover,* Eugene O'Neill's *Strange Interlude,* and Edmund Wilson's *Memoirs of Hecate County.* The law applied equally to works of obvious literary merit and to hard-core pornography. Obscenity prosecutions became a common way for government officials and private citizens to prevent the public from having access to sexually explicit and violent works. Until the mid-twentieth century, prosecutors commonly went after authors, publishers, and distributors, and the post office, customs, and police routinely seized books and other materials. In 1957, the Supreme Court ruled that obscenity does not warrant the protection of the First Amendment and that obscenity prohibitions and censorship are constitutional. The Court reasoned that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without social importance."

Although this ruling remains the law, the tide in favor of free expression began to turn decades earlier, in 1934, when the Second Circuit Court of Appeals held that Joyce's *Ulysses* was not obscene and could freely pass through US customs. The court ruled that the use of "dirty words" in "a sincere and honest book" did not make the book as a whole "dirty." This distinction made in the case called *United States v. One Book Entitled "Ulysses"* became the precursor to the most crucial part of the current legal definition of obscenity.

In 1973, the Supreme Court formulated the test that remains the law for assessing whether a particular work is obscene. In *Miller v. California*, the Court allowed states and local governments to exercise autonomous, but limited, authority to restrict obscenity in their communities. In assessing whether material is obscene, a jury must determine:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient

> interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

If the answer to all three questions is affirmative, then the work is obscene, and local authorities may remove it from circulation and prosecute the author, publisher, and even the distributor.

To what extent does this definition endanger sexually oriented works that might be valued by only a minority of readers or viewers? Henry Miller eloquently illustrated the importance of the "merit" requirement in his essay "Defense of the Freedom to Read," which he wrote in response to Sweden's attempt to suppress his book *Sexus*: "But it is not something evil, not something poisonous, which this book offers. . . . It is a dose of life which I administered to myself first, and which I not only survived but thrived on. Certainly I would not recommend it to infants, but then neither would I offer a child a bottle of *aqua vitae*. I can only say one thing for it unblushingly—compared to the atom bomb, it is full of life-giving qualities."

The Court subsequently clarified that in fact, "contemporary community standards" may not be applied to assess a work's literary, artistic, political or scientific merit. The "merit" prong of the definition must be determined by a national "reasonable person" standard. Thus, if a work is intended to convey "serious literary, artistic, political or scientific value" to any material degree, it cannot be deemed obscene. Under this standard, most pornography is considered to convey some value, so it is not legally obscene.

Under the First Amendment, procedural safeguards must be given to a writer and publisher whose work is challenged as obscene. Law enforcement officials may not seize the work simply because they think it is obscene. They must file for and serve notice of a judicial hearing to make the determination so that the court rules based on all relevant evidence.

SCHOOL AND LIBRARY CENSORSHIP

Most states give school boards the authority to dictate curricula, course books, and library holdings free from outside interference. Although the discretion of school boards is somewhat limited under the First Amendment, book censorship in schools is rampant. Works by such writers

as Alice Walker, Toni Morrison, J. D. Salinger, James Baldwin, Mark Twain, Kurt Vonnegut, Joseph Heller and many others are routinely banned from class curricula and school libraries. Censorship campaigns led by parents, advocacy groups, school boards, or community leaders demand that schools refuse to purchase certain books, remove books from libraries, place them in restricted or infrequently used areas, or remove them from a class curriculum. Most often, these campaigns target the placement of books in public school libraries.

In 1982, the Supreme Court analyzed the constitutionality of book removal from school libraries and curricula in a case involving a school district's board of education removal of nine books from school library shelves, including Kurt Vonnegut's *Slaughterhouse-Five* and Richard Wright's *Black Boy.* A parents' advocacy group had pushed to have its list of "questionable" books banned; they characterized the books as "anti-American, anti-Christian, anti-Semitic and just plain filthy." The Court sought to balance the First Amendment right of students to read freely and the right of public school authorities to exercise discretion over student access to materials. It recognized that both groups have constitutional rights, but they are not absolute. Although it did not hold the board of education's actions unconstitutional, the Court set a standard for subsequent book removal cases. A school board may maintain wide authority concerning removal of books, but it may not institute such actions because the works contain "partisan or political views [the board does] not share." It acknowledged a student's right to access information when engaged in "voluntary inquiry" and the library's role as a place of inquiry essential to the student's understanding and maturation. Thus, the Court distinguished an educator's selection of books for the curriculum from the banning of books in the library system. School boards have greater discretion to select and reject books for the curriculum, so long as they do not ban works based on partisan or political views, than in choosing library books.

Although the Court did not provide guidelines for how school authorities may choose books for libraries, it acknowledged that they may remove books if they are deemed vulgar or of questionable "educational suitability." In cases following this decision, lower courts have given greater protection to students' rights. A 1989 California appellate court found library book removal to be an invalid use of a school board's authority because

"[if] school boards are granted such authority, every library book bears the imprimatur of the present board."

Other courts have ruled that the removal of library books curtails freedom of speech and thought, particularly where the school board does so because they find the books personally distasteful. Although neither a state nor the board is constitutionally required to provide a library or to choose any particular books, once they create such a privilege for the benefit of its students, a court is loath to allow the authorities to condition the use of the library based solely on the social or political tastes of school board members.

School systems maintain formal procedures for the approval of books for libraries and curricula. Those who want to censor books in schools have learned these procedures and use them to their advantage. Opponents of censorship can obtain copies of this information through "Government in the Sunshine" and Freedom of Information Act requests to learn the administrators' policies and to determine whether they are following proper procedures in censorship cases. The active participation of writers and anticensorship groups in school administrative proceedings has helped to defeat many attempts to censor unreasonably what students may read.