Saturday Review
January 21, 1967

The Kennedy-Manchester Book Controversy

William Manchester's account of the Kennedy assassination, *The Death of a President*, has become the center of the greatest literary controversy of the century. Much of the discussion to date has been directed to news aspects of the case and speculation about the book's contents, as well as the conditions to which the Kennedy family have or have not agreed in connection with its release. But there are deeper implications. In the accompanying section they are explored by five distinguished spokesmen.

John Kenneth Galbraith, whose article introduces the section, is Paul M. Warburg professor of economics at Harvard University, former U.S. Ambassador to India, and author of *The Affluent Society*, *The Liberal Hour*, and other books. Arnold Gingrich is publisher of *Esquire* magazine. J. H. Plumb, who writes the *SR* column PERSPECTIVE, is a Fellow of Christ's College, Cambridge, England, author of numerous historical works, including *Sir Robert Walpole*, *The First Four Georges*, and *England in the Eighteenth Century*, and general editor of the History of Human Society series. Arnold L. Fein is judge in the Civil Court of the City of New York and former special counsel to the Kefauver Crime Committee. Irwin Karp, who is with the law firm Hays, St. John, Abramson & Heilbron, is legal representative for the Authors' League of America.

1. WAS MRS. KENNEDY JUSTIFIED IN BRINGING SUIT?

By JOHN KENNETH GALBRAITH

MACAULAY once observed that few things were more depressing than the British people in one of their periodic outbursts of morality. A prominent possibility is American journalism in pursuit of a principle with which to justify a compelling story. The recent explosion over the Manchester book is an excellent example. To warrant the attention which it attracted—an attention sufficiently explained by the prominence of the principals and the event recalled—it has been held to involve a deep conflict between the right of the public to historical knowledge and that of Mrs. Kennedy, her family, and less plausibly also her brothers-in-law, to privacy. *Newsweek*, frequently a sensible journal, had Jacqueline Kennedy on the cover of its issue of December 26 under the caption "Privacy vs. History." Inside, it first reflected rather irrelevantly on her tendency to have friends and to appear in public. Then, with a solemnity that might have seemed a trifle morbid to *Time* or Richard Nixon, it unleashed the question of principle: "And, most fundamentally, the whole affair raised the most profound questions about the public's right to know and the individual's right to privacy." This is nonsense. I was early taught never to use such crutches as "fundamentally" and "profound," let alone "most fundamentally" or "most profound," to bolster an absent case. They give the show away.

A reasonably detached examination of the circumstances will suggest, I think, that the decisions taken on this matter by Mrs. Kennedy and Robert Kennedy were those that best served the purposes of history. And much of their trouble grew out of precisely this effort. No alternative courses of action, consistent with the standards of decorum and good taste with which Mrs. Kennedy, by no accident, is identified, would have served as well. It will be asked whether, as one associated with the Administration of the late President, I am the right person to display the requisite detachment. I venture that the case, once stated, stands firmly on its own merits. I might add that I have never discussed William Manchester's book with Mrs. Kennedy or either of the Senators Kennedy. Nor have I read it. Nor, recalling that terrible weekend and the horrible disorientation to which one was subject, do I look forward quite as avidly to reading it as *Look*, Harper & Row, and sundry overseas entrepreneurs are estimating that all solvent persons are waiting to do. But let me get back to the issue.

There is no need, I believe, to dwell on the agreement that was made between Mr. Manchester and Robert Kennedy. It was clearly designed to accord members of the Kennedy family, or those they might designate, the right to review the manuscript, together with the companion right to make amendments or deletions without which a right of review is meaningless. Had the conflict come to the courts, there would have been much bickering over the wording of the agreement and whether it had been abrogated by subsequent letters and telegrams from Robert Kennedy. Involved in the latter is the exceedingly difficult matter of delegating the right of such review, a matter with which I have had some experience and to which I will return.

One obvious point seems, nonetheless, worthy of emphasis. Mr. Manchester

entered voluntarily into the agreement. And, although there has been some high-minded opinion to the contrary, it was an arrangement which most journalists and most historians would have welcomed. To write about the events at Dallas without the help of those intimately involved would be to add very little to what is known. To write with this help meant not only a wide audience but a secure position as a major historical source. If the agreement involved an unfair exploitation of a scholar, it must be said that hundreds and even thousands would have been available for the sacrifice.

But the deeper point remains. Is such an agreement proper and did it serve the purposes of history? The answer must be considered in light of the alternatives. The three questions are:

1) Was it wise to have an authorized history of the events leading up to, and following, the bitter tragedy in Dallas of November 22, 1963?
2) Was it proper for those authorizing the history to ask for the right of review together with that of deletion and amendment?
3) Were the changes that were requested reasonable and consistent with historical purpose?

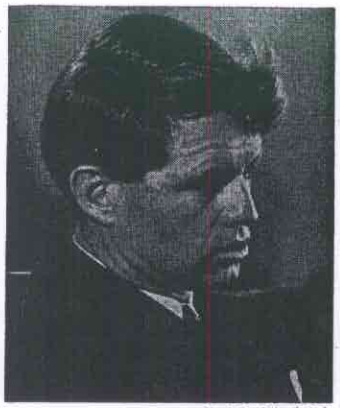
The answer to the first two questions is strongly affirmative. No evidence is available to the outsider on the last point but there is considerable indication that it was exercised with restraint. Let us examine the three decisions in turn.

The words "authorized history" and "authorized biography" have a dubious sound. They suggest self-serving, and also rather tedious books. One senses that they are something to be avoided. But what were the alternatives to selecting a serious and responsible journalist or historian and granting him access to the private papers and memories of the events of November 22 and before and after? There were three possibilities and all were inferior or out of the question. The first was for one of the principals to prepare the definitive account. Since she was the one present, this would have had to be Mrs. Kennedy. To suggest it is

Were the changes that were requested reasonable and consistent with historical purpose?

Jacqueline Kennedy

Author William Manchester



—*Paul Conklin (Pix).*

Senator Robert F. Kennedy

Kennedy lawyer Simon H. Rifkind

Harper's spokesman Cass Canfield

***Look*'s editor-in-chief William Attwood**

—*All photos except that of Robert F. Kennedy from Wide World.*

to eliminate this possibility. And had it been possible, there would have been suspicion that the writer was exploiting a great national tragedy for personal publicity or private gain. This would have been said vehemently when the serialization was arranged and the prices came into public discussion. And it should also be kept in mind that any such first-person account would have been the most severely censored of documents. It is assumed that most authors will delete what they find too awkward or painful.

THE second possibility would have been to open the private recollections and papers of those involved to all comers—and these, considering the commercial possibilities indicated by the interest in the Manchester volume, would have been numerous. How painful this procedure would have been to those involved is patent. Worse would have been the risks of distortion and competitive sensationalism. All who sought to accommodate in candor all who wished to write about the President's death would soon have been advised, and rightly, to stop talking.

The remaining course would have been to maintain a total reticence on the events—to help no one and talk with no one. This would have been a safe and in many ways a sensible decision. It is the one which President Johnson appears to have made. I imagine the Kennedys may now think well of its possibilities. But it is the course that would have made the least conceivable contribution to history.

". . . the decisions taken on this matter by Mrs. Kennedy and Robert Kennedy were those that best served the purposes of history."

—John Kenneth Galbraith.

Thus the decision for an authorized history. Given it, what of the right to review and amendment?

A few weeks ago, while giving some lectures in London, I was invited by Anthony Lewis to participate in a long and detailed interview for use in *The New York Times Magazine*. We talked all one Saturday afternoon in the presence of a tape recorder; the arrangement, which scarcely involved prior discussion, was that I would speak with the utmost informality, candor, and unconcern for syntax and then revise my remarks, as I wished, for publication. I made ample use of this opportunity and also for second thoughts. I greatly amended a comparison between President Kennedy and President Johnson. History (if I can so characterize this microscopic contribution) was obviously denied my original thought.

But in the absence of an opportunity for revision, the original comment would never have been uttered. For then I would have been more cautious in my response: even a college professor must give thought to safeguarding confidences, avoiding damage to the feelings of meritorious people or one's friends, side-stepping libel, saying what he really means to say, and, let it be conceded, exercising a modicum of political tact.

Having undertaken to speak with full candor to Mr. Manchester, it was as appropriate as in my case with the *Times* that Mrs. Kennedy (and others) should be permitted to review and amend their remarks. So, far from denying anything to the historian, this is what makes possible the earlier frankness. Since it can be assumed that Mrs. Kennedy is rather less experienced than a former ambassador in the art of self-censorship, the alternative might well have been to keep all her thoughts and recollections to herself. Again, this would have served the ends of history far less well though it would have been less criticized.

Additionally, Mrs. Kennedy's interview with Mr. Manchester was, as I understand it, a part of the larger oral history of the Kennedy Administration. All participants in this mammoth enterprise were asked to talk freely about any and all matters including, inevitably, some that involved classified information. In return, they were assured that they would be fully protected against any unauthorized use, at least in their lifetimes.* It seems impossible to argue that Mrs. Kennedy should be denied the same protection.

I DO not know what changes and deletions Jacqueline and Robert Kennedy sought. According to the newspapers, they consisted mostly of material from Mrs. Kennedy's interview and, possibly, some items that reflected adversely on President Johnson. The first is readily justified within the framework of my arrangement with the *Times* and that of

*I did not participate because, during my years with the Kennedy Administration, I kept a meticulous diary. Obviously I exercise full rights of review and deletion over what is published from this. And I have so far published none of it—a massive act of censorship for which I have not been criticized at all.

All Summer: A Fairy Tale

By Edwin Honig

WHY does the Princess stand looking away toward the brook?
The Prince needs her. "I am your fate," says a voice in the air.
The flowers he tended for her all nod with their flametips.
Neither dares move. "Come closer—" Neither has spoken.
If she spoke, "I cannot believe you would want me—" that's
where her voice would falter, not with compassion or loneliness
but with revulsion; so not to be misunderstood,
she'd have to swallow her feelings and quickly continue,
"—you'd want me to look at you, crippled and putrid, again."

She says nothing to him still gazing toward her and pleading,
pleading. When will her great green eyes accept him and when
will her tissue-blue silks move near him, her hand ever touch him?
Though neither has moved and nothing is said between them,
the air trembles—is it her loathing or his desire?
Flowers bend—is it in pity for him, their gardener,
or in shame for her silently scorning him? Soon they will wilt.

Soon they will die and soon there will be no garden.
The Prince will turn into a statue imploring the air
with hands cut off at the wrists, neither bone nor marble.
Birds will roost on his huge curly head and wide shoulders.
Having scampered away, the Princess will be somewhere else
combing her thick raven hair, the Prince long forgotten . . . .

Or will she remain to turn into (perhaps is already
becoming—and is this why the Prince importunes her?)
that dry, almost leafless old crone of a tree by the brookside,
standing apart in the garden, infested with larvae
swinging great nets of gossamer hair in the breeze,
the breeze that will shortly become a strong wind, a wind
that will topple the Princess, turn all of her up by the roots
that soon as they crumble, the brook carries off to the sea?

the oral history. Considering the disruption of the time, one could imagine that history might be served by a second and more considered view of President Johnson's decisions. Surely he was right, for example, to insist on being sworn in as soon as possible after President Kennedy's murder, however pushing that might have seemed in the emotional atmosphere of the moment. But there are two earlier experiences which cast light on the tendencies of Mrs. Kennedy and Robert Kennedy in these matters, as well as on the depth of our national commitment to historical truth.

Arthur Schlesinger's *A Thousand Days: John F. Kennedy in the White House* was also an authorized history. It too drew on tape-recorded interviews with Mrs. Kennedy and, indeed, Schlesinger gave over this part of the oral history project to Manchester when the latter's interest became relevant. Schlesinger included in the first draft of his book some vivid descriptions of the President's private reactions to events, among them his grief in the aftermath of the Bay of Pigs. Initially, neither Mrs. Kennedy nor Robert Kennedy suggested deletion of this material; it came into question only after it appeared in *Life* and was attacked by the press and public as an undue invasion of privacy. There was even greater criticism of the author (and indirectly of the Kennedys) for saying that JFK intended to replace Dean Rusk at the end of his first term. So only a year ago the historian and the Kennedys were insufficiently concerned about privacy and insufficiently disposed to protect the position of Mr. Rusk against the claims of history. A great many people expressed themselves rather feelingly on the unwisdom and injustice of what was called, with no slight derogation, *instant* history. One is tempted to conclude that, in this debate over privacy versus history, the only thing that is agreed is that whatever is done is wrong.

MY second bit of evidence is more personal. Last winter and spring, at the request of Mrs. Kennedy and Robert Kennedy, I looked at two books which made use—I am not clear how much—of privileged or personal materials. One of these was Pierre Salinger's *With Kennedy*; the other was a very light-hearted memoir by former Under Secretary of the Navy Paul B. Fay, Jr., *The Pleasure of His Company*. In neither were there any deletions that could conceivably have been considered of historical consequence. Most involved the elimination of language or anecdotes which, out of context, cast reflection on the dignity of the office of President or which might, without purpose, have injured the feelings of personal friends of President Kennedy. These alterations throw some light on one of the problems that arose in connection with the Manchester book—that of delegating responsibility for change.

The Fay volume, as I have observed, is an amiable but slight memoir. There were, however, a number of personal references, drawing on conversations with the President or members of the family, that could inflict minor hurt. I took the position that such negligible wounds heal within twenty-four hours; it being a slight book, one should not worry about what it said. Mrs. Kennedy was a good deal more considerate. Slight materials, she held, should not be so used as to cause pain. The author greatly preferred my interpretation. However, and quite properly, it was Mrs. Kennedy's view, not mine, that was controlling. In the Manchester book, I would gather, representatives of Mrs. Kennedy took a rather more relaxed view of what might be published from her tape recording than did she. It was understandable in this case also—and Mr. Manchester insisted on the point in his letter of December 27 to the *Times*—that the author should prefer the easier view. I would also think, without knowing all of the details, that he might have been entitled to an earlier reading by Mrs. Kennedy of the disputed passages. Merit in these matters is never unilateral. But, given the circumstances of the whole arrangement, it seems to me impossible that she should have been denied the final word.

THERE is a larger problem here. To have custody of the history of anything at once so painful and compelling as the events of the weekend of November 22, 1963, is no light responsibility. And custody lies, inevitably, with those who were there and those who were involved, and it lies in the deepest recesses of memory and feeling. Like all great responsibilities, it causes problems for those who carry it. Neither Mrs. Kennedy nor Robert Kennedy has escaped these problems, which have been formidable and acute. But they have been so because the Kennedys have sought to solve them in a manner consistent with the claims of history. Everything would have been simplified by a policy of silence. The papers and memories could have been locked away—as usually they have been. No access and no help to Theodore Sorensen for *Kennedy*. None to Schlesinger. None to Manchester. But would we now be as informed on these years? Would later scholars have as much to go on? Would the claims of history have been as well served? Surely not.

"Now that we've learned to talk, how's business?"

2. THE TRUTH ? AS PERSONAL PROPERTY

By ARNOLD GINGRICH

MAGAZINE men who would sleep well have unlisted telephone numbers. Because I haven't, I get phone calls from distant time zones, well after midnight, like this one from Texas during the holidays:

"Sir, this is one of your readers. As a matter of fact, I'm speaking for rather a large group, and we've just been going through the Dubious Achievement Awards in *Esquire*'s January issue. We understand all of them, except this one—this 'Loudmouth of the Year.' Now just who is this A. E. Hotchner? Is that a name you made up?"

"No, he's the author of a book called *Papa Hemingway*, which Mrs. Hemingway went to court to try to prevent being published—"

"But how could he be the Loudmouth of the Year, when none of us ever heard of him?"

"Well, I'm not sure that he hasn't lost the title in the last round, so to speak. There's a similar case right now, the Manchester book—"

"Oh, we all know all about that—*he's* going to make a million dollars—and we all know about Hemingway. It's just that none of us ever heard of this A. E. Hotchner."

"But I have answered your question, haven't I?"

"Oh yes, sir, and thank you." He didn't add "just the same" though his tone clearly implied it. I felt that he still "hadn't ever heard of this Hotchner," although from the way he reacted to my mention of the Manchester book it was at once apparent that he, and everybody in what sounded like a large and crowded noisy room, really did "know all about" it.

Yet the two cases are clearly comparable, differing chiefly in the degree to which they were played up as news, because in both instances, if for varying reasons, the plaintiff was trying to exercise property rights over the truth. Both books were to be serialized, when the actions were brought for an injunction against them, and thus twice in one year there was raised for magazine people that bogeyman, of which they have all lived so long in mortal fear.

Around a New York magazine the first shop rule that the rawest recruit learns is "Never let anybody see anything touchy in any issue more than three days before publication, because if you do you have two strikes on you—one for libel and the other for invasion of privacy." Behind this rule has been the hitherto remote but ever-dread contingency that an injunction in restraint of publication could be sought by the affected party.

It has always been assumed that judges would be loath to grant such injunctions, in view of the historic Anglo-Saxon hatred of any form of "prior restraint" of the printed word, as opposed to the universal approval of the principle of full responsibility for it after its appearance in print. But the consequences of being wrong in this assumption are so dire that caution is the operative part of valor in most magazine publication practice. In the mass-circulation category the cost of an issue's loss has been pretty accurately estimated at between three and five million dollars—the range reflecting allowance for seasonal variations in size. Thus few magazines could suffer the suppression of an entire issue without, at least temporarily, having to go into some form of hock. *Look* could.

Though magazine people are as pious and as pompous as anybody else in invoking, before the fact, such high-sounding phrases as "freedom of speech" and "the public's right to know," they are apt to treat people gingerly who are both likely and able to be litigious, the only consistent exceptions being "public figures," particularly those holding elective office. Here the assumption is that such persons will follow their own first shop-rule, best expressed in ward-heeler language as "never sue for libel; the blankety-blanks might prove it on you."

". . . what occurred was an accident, in the classic sense; an incident that nobody wanted to happen and everybody involved sincerely deplored."

—Arnold Gingrich.

Professing bravery and practicing cowardice, which are the pure and the applied religions, respectively, of virtually all magazines of general content and comment, is not as debilitating to their editorial vitality as it may sound. It actually strengthens, rather than weakens, many a magazine piece on which the editors have had to require numerous changes before publication. When their twin radar beams signal danger in either the direction of libel or invasion of privacy, editors are often put to it perforce to demand of authors better documentation of statements, and a more solid foundation in fact, than they might otherwise have allowed to slip by. Serving to sharpen the writing and deepen the insight, the imposed necessity for legal proof—for demonstrable truth, if you like—is as valuable a discipline for magazine writers as the exigencies of the sonnet form, for instance, are for writers of verse.

AS for the famous "right to know," which magazine men tend to invoke in abstract and theoretical discussions, here too, if they are honest with themselves, they realize that there must be something of a double standard concerning what can be stated explicitly in the pages of magazines and those of books. For magazines do lie around where they invite casual browsing to a degree that books never do. Furthermore, almost all magazines tend, through display quotations and subheads and intriguing captions under illustrative and graphic elements, to highlight the more sensational passages of their textual content to a degree that even he who runs can't help but read them. So when delicate considerations arise editors are inclined to "temper the wind to the shorn lamb," even well this side of the limitations in the area of the invasion of privacy imposed by New York law. Women and children, generally, get fairly gentle treatment even without somebody begging for it on their behalf.

One of the several ironies of the Kennedy-Manchester-*Look*-Harper & Row controversy is that in their past relations with, attitude toward, and treatment of the Kennedys these defendants have verged on the idolatrous. Harper & Row has been the publishing house of what Gore Vidal calls our one Holy Family; *Look*, the least abrasive of the big magazines, has always gone far out of even its generally genial way to be especially adoring of all Kennedys, and Manchester's previous printed approach to the Kennedy mystique was tantamount to that of an acolyte. Obviously, what occurred was an accident, in the classic sense; an incident that nobody wanted to happen and everybody involved sincerely deplored.

Another irony is that the behavior

of the three parties summoned to show cause why they should not be summarily silenced was admirable, in contrast to that of those who promptly told the public all they knew about the disputed passages, thus giving them a world-wide airing they would not have received if these sections of the manuscript had been allowed to appear in context, in both magazine and book form, without a news event to focus attention upon them. Never, in any case, were supposedly secret contents of anything kept less secret. While *Look's* and Harper's lawyers were behind closed doors defending their clients' rights to call a spade a spade, the newspapers and newsmagazines, to an orotund obbligato of "the right to know," were gleefully proclaiming it a bloody shovel. This rendered the subject of contention more than moot.

IF it was not evident before, it must be now that some brake is needed on this much-abused "right to know," comparable to the one long ago put on that other shibboleth "free speech" by Justice Oliver Wendell Holmes, who pointed out that it should not be extended to the right to yell "Fire!" in a crowded theater. Two of the most reputable newspapers, *The New York Times* and *The Wall Street Journal*, outdid the tabloids in exposing details of the passages under dispute, in conjunction with many other disclosures, for the least of which in England they would have been in instant contempt of court. On the basis of immediate past performance, at least, it appears evident that if anybody is to be trusted to put on the brakes, by voluntary policing of their product in this respect, it is more likely to be magazines than newspapers.

But the richer irony of the affair was in the Janus-like casting of Mrs. Kennedy's lawyer, who, fresh from defending one book's right to live, against the displeasure with its disclosures evinced by a rich and willful woman, was called upon to attack another on what must have seemed uncomfortably similar grounds. Additional irony was afforded in Arthur Schlesinger's recent defense of his right to tattle on Dean Rusk by arguing the historian's privileged use of the truth, only to be followed by his assailing this privilege on Mrs. Kennedy's behalf when Mr. Manchester sought to invoke it.

The supreme irony, the cream of the tragic jest, was beyond a doubt supplied by the plaintiff herself. Not in the piquant circumstance that in her own former role as inquiring reporter-photographer for a Washington paper she had to run constant professional risks with other people's privacy—far more often than poor Mr. Manchester ever dreamed of in his relatively cloistered career until now. That's too easy, too pat. Infinitely greater is the irony of her having, from the most understandable of motives, brought about the very vulgarization of the grim story's intimate details that she went to such pains to prevent. For what horrified her as undue exposure of too personal revelation in the book's proposed serialization received global dissemination as a result of her action.

Mrs. Kennedy's privacy has been illusory, at least since 1960, and especially since 1963. She is not only a public figure; she is *the* public figure of this country today. That she is also a political figure is certainly not of her choosing, and hasn't been since the days of the 1960 campaign. But that she is, or ever will be again, a private figure is something that Mrs. Kennedy is far too intelligent to try either to believe or to contend. So she chose not to maintain that her privacy had been invaded, perhaps because she realized that in this instance its only real invader had been herself with a tape recorder. Instead she decided, as a means to protect her privacy, to invoke her property rights in the subject matter at issue.

THIS is exactly what Mary Hemingway did. However, in contrast to Jacqueline Kennedy, Mrs. Hemingway could have made a pretty good case for herself on invasion-of-privacy grounds, because she could well have maintained that although her late husband was a public figure, she herself isn't. She chose not to, and sought, rather, that equivalent of book-burning, an injunction against the publication of the Hotchner work. In both cases the contention was that the writing in question constituted a violation not of privacy rights but of property rights—in Mrs. Hemingway's view by unauthorized appropriation of material she considered hers as part of her husband's legacy; in Mrs. Kennedy's view by the failure to abide by the terms of contract. But the heart of the matter is that each made an attempt to control the truth by regarding it as private property. Perhaps it would be fairer to say that Mrs. Kennedy's attempt was not to control the truth so much as to arrange it, for a statement she issued during the case implied that the people have a right to know some of what she had told the tape recorder, but not all.

The saddest aspect of the whole affair is that everything she had hoped to have told only the way she wanted it, artistically arranged to avoid any semblance of sensationalism, was ripped out of its graciously compassionate and almost worshipfully understanding context—and broadcast in stark and ghoulish skeletal form, undergoing that worst of fates, to be summarized in newspaperese.

"How many times do I have to ask you not to phone me at work?

3. THE PRIVATE GRIEF OF PUBLIC FIGURES

By J. H. PLUMB

HOW MUCH privacy have great men ever enjoyed? How far has it been possible to separate their public and private lives? Throughout recorded history and discernibly beyond there have been persons and families of distinction who have been known by name and fame and special status to all members of their communities. High priests, kings, Caesars, popes, emperors —all have belonged to the world in a very special sense. The kings of France dressed and undressed in public, were ceremonially fed before their court; they had an audience for their wedding night, and their wives labored in rooms crowded with nobility. Although it is true that the royal bed was railed off, the rest of the chamber would be thronged with courtiers, listening to the queen's groans, peering and peeping, joking and talking bawdily.

For royalty death was no easier than birth. The courtiers of Carlos II of Spain stood about as the doctors tried the warm entrails of a pigeon on his belly. His priests, putting more faith in San Isidro, brought his mummified remains to the bedside. Their prayers and the hushed gossip of the grandees were drowned by the chants of rival priests, who carried round the room the corpse of San Diego of Alcalá, sitting in its urn. It was not much better for Queen Caroline of England rolling in agony in her own putrefaction, whilst her husband, distracted with grief, upbraided her for looking like a dying cow. The grossly fat prime minister knelt by her side and could not get up. The Archbishop of Canterbury mumbled his prayers. The queen, still in possession of her wits, sent for the lord chancellor to make absolutely certain that Frederick, Prince of Wales, would not inherit one iota of her possessions. As she said on this deathbed, she wished him in the bottommost pit of hell. And there in the corner was little Lord Hervey, rouged, powdered, flamboyantly epicene, taking it all down and doubtless inventing what he could not quite hear. He knew he was present at a moment of history, that posterity would be wide-eyed and open-mouthed for every gory detail of the queen's death. To be royal was to live even the most intimate moments of one's life before the hostile, loving, or indifferent eyes of one's court.

And yet there was, in a sense, privacy. The court was an enclosed, narrow world. For the nation as a whole, the queen died, the prince was born; not for them the detail, the sniggering, the gossip. Lord Hervey naturally did not dare to publish his memoirs. They stayed secret generation after generation, and when at last they were sent to Windsor—to Windsor, mark you, and not to the publisher—a prudent descendant tore out and destroyed a large section which dealt probably with the sexual antics of the Prince of Wales. And until very recently always there have been circles of privacy, zones of silence, that protected the famous and the great. Even as late as 1936, England's millions lived in ignorance of Edward VIII's relationship with Mrs. Simpson, and the abdication crisis came like a thunderbolt from the blue.

Of course, privacy for princes became more difficult as mass means of communication developed. Although the Roman nobility and the cardinals might gossip about Pope Alexander VI, hinting at strange orgies and darker dabblings in incestuous sin, thousands of peasants, completely oblivious, thronged to kiss his foot in the Holy Year. A few decades later the gulf between private life and public fame was more difficult to bridge, for the printing press and the vitriolic pen of Piero Aretino had popularized the lampoon. The private lives of the great were really threatened.

The absolutist kings of Europe, of course, kept a firm hand on the press and clapped courtiers too impudent with their verses into jail or exiled them to their provincial estates. But England had a free press and the second half of the eighteenth century witnessed a remarkable and ribald outburst of satirical verse and colored cartoons that left no aspect of royal life alone. George III's madness was a matter for newspaper gossip, so were his domestic habits; and his sons' riotous sexual lives were pilloried in the press. Moreover, when George IV attempted to divorce his wife, intimate details which would now be considered, in England at least, unfit for publication, were boldly printed.

". . . public families are more than private families. They become, whether they wish it or not, a part of history."

—J. H. Plumb.

Privacy for the royal family and many public figures, oddly enough, became better protected in the late nineteenth century. To some extent this also holds for the twentieth century. No British politician has been ruined as Parnell was, although English politicians have been no less adulterous than their Victorian counterparts. And the same is true of American Presidents. It is doubtful if Woodrow Wilson's physical incapacities and utter dependence on his wife could have been so well concealed in the early nineteenth century. One odd aspect of the growth of illustrated newspapers was to check curiosity. Seeing someone almost every week opening bazaars, signing documents, greeting potentates may satiate rather than quicken curiosity. And possibly a royal image was created that no one wished to see sullied. More important, perhaps, was the sharp realization by the British monarchy that those who lived by the press could be ruined by it. They knew its dangers. Certainly, in spite of a mass press and ubiquitous photographs, the British Royal Family have been extraordinarily skillful in concealing anything they wished to if not from all, at least from millions of their people. And the

ROME.

THE MILAN-PUBLISHED magazine *Epoca*, which holds Italian rights for William Manchester's book on the Kennedy assassination, intends to respect in every way its contract with the American publishers and will make the deletions agreed upon with Mrs. Jacqueline Kennedy, an editorial spokesman says.

"Provision for making deletions is contained in our contract, and our policy is always to stick to the letter of contracts," the spokesman says. "We know that *Die Stern* in Germany has said it intends to publish the original manuscript as it stands, but this has no effect upon us.

"Likewise, had the injunction for which Mrs. Kennedy had planned to ask the American courts gone through, we would have withheld publication."

—ALAN MCELWAIN.

physical state of Churchill after his first stroke in Washington during World War II was carefully hidden from many of his colleagues, let alone the public.

There are strong arguments for maintaining a degree of privacy no matter how public a person may be. An open debate on Churchill's health could have done no good, only harm. His fitness for the conduct of affairs had to be judged by his doctors and colleagues—a desperately difficult decision, as Lord Moran has shown. And again it is reasonable that, within limits, the sexual predilections of men of power should be surrounded by zones of silence. Lloyd George was a warmly lecherous man, with the keen eye, quick response, and tactical skill of a master politician. But his escapades with housemaids were irrelevant to his position and quality as a statesman. On the other hand, they could have developed situations in which this aspect of Lloyd George's character could have been a matter for public concern and one in which exposure was essential. He lived on thin ice, trusted his friends, exploited his wife, and got away with it. Neither he nor the public was harmed.

The privacy of public persons must always be a hazardous frontier. Curiosity is not enough. We all feel it. We are all delighted to get "in" stories and repeat them with glee. And, of course, every eminent person must expect to live with public curiosity as in a constant guerrilla war: kings and princes and their families did in the past; Presidents and their wives must expect it in the present. Death, however, makes a vast difference.

ONCE dead, a public man must become public property, to be assessed by biographers and historians. A great deal of indignation greeted Lord Moran's revelations of Churchill's physical condition. Could he not have waited? Could he not have spared Churchill's family the pain? This seems to me absurd. Sir Winston's health was an important factor in the history of the decade after the war. And for such a family to be betrayed by oversensitivity reflects a failure to realize that public families are more than private families. They become, whether they wish it or not, a part of history. Of course, there might have been situations in Churchill's life that were best kept secret until his immediate family were dead—situations, say, of no relevance to his public role, but of interest in a purely biographical sense. Nevertheless, the decision to maintain silence must always be difficult, for curiosity about those rare creatures dwelling on the Himalayas of power can only be regarded as legitimate. And probably a catch-as-catch-can attitude is the one that ought to prevail.

"Some of us are getting mighty sick of these masterful dissents of yours, Bodgsly!"

Thus when Jacqueline Kennedy asked William Manchester to write *The Death of a President*, the risk was hers—in choice of author, in the exactitude and stringency of conditions; indeed, in what she told the author. Are there, however, stronger arguments for the invasion of private grief than the mere curiosity of the public, or failure of those in the public eye to protect themselves? One that I have heard put forward is that the Kennedys exploited the press to achieve their eminence; hence they can scarcely complain if they become the used instead of the user. Not very convincing.

A better argument is that President Kennedy was a figure of history; therefore every fact about him is worthy of record. In a sense this is true, but its application is fraught with danger, for facts too can lie, and even history can mislead unless it is very carefully and sensitively handled. How his children, for example, reacted to his death is utterly irrelevant to any historical question that is ever likely to be asked. Childish utterances could be true, yet in the hands of an accomplished writer be easily made to mislead. Actions or words, the result of sudden intolerable grief, torn out of context, might also be valid, but, high pointed by dexterous use of literary techniques, carry far more meaning than they should and so lead to a distortion of history rather than to its illumination. About anything so dramatically tragic as the assassination of the President there is always the danger that the concept that every fact about him belongs to history may be used to cloak sensationalism for its own sake. Historians certainly do not require minor incidents at the airfield to demonstrate the arrogance and insensitivity of LBJ or the combative spirit of some of the Kennedys. Of course, one would like to have such incidents recorded, to be able to use them sooner or later to decorate a paragraph or point a sentence, but if their revelation is going to cause pain and bitterness, or add to a sorrow that has been deep enough for anyone to bear, then to wait ten, twenty, thirty years would be a matter of indifference for any historian. And the demands of history cannot be used as an excuse for such exposure. For journalists, of course, it is another matter—their trade is all-in wrestling.

Seen in perspective, the privacy of public figures is still greater than one might expect even if, at times, it is less than they might desire. It has always been a battle from the days when kings, visiting their mistresses, put on disguise to elude their courtiers, and it always will be. But let us have no hypocrisy about it. More often than not such battles have had nothing whatsoever to do with the needs of history.

4. THE LEGAL RIGHT TO PRIVACY

By ARNOLD L. FEIN

IN 1883, Samuel D. Warren, a Boston blue-blood and the law partner of Louis D. Brandeis, married a lady of similar background. They entertained extensively in their exclusive Back Bay home. A local newspaper began to report their social events in sensational detail, much to Warren's annoyance. His discussions with Brandeis resulted in their article "The Right of Privacy" in the *Harvard Law Review* of December 15, 1890. The two great lawyers wrote in professional style for professionals in the law, teachers, students, scholars, practitioners, and legislators. They are said to have added a chapter to the law. Without doubt they provided and furnished the arsenal for the battles to protect the fortress of privacy.

They posed the issue in a portion of the article, phrased as though written for our day:

> The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by invasion upon the domestic circle.

Again, as though writing in 1966, they suggested the need for solitude and privacy in the face of the increasing intensity and complexity of life and the intrusions of modern enterprise and invention. It is not without irony to note that they wrote in the comparatively early days of the camera and before the advent of radio, the movies, television, wire-tapping, and the like. They concluded, after an analysis of the precedents, that the law recognized a right of privacy, the protection of one's private feelings, the right to be let alone—and they sought to define its limits.

The Kennedy-Manchester controversy indicates some of the dimensions of the problem. However, the legal propriety of Manchester's book is at this writing before the courts and is accordingly not an appropriate subject for discussion. Moreover, the issue appears to be in large part dependent on the meaning of the agreements and the communications between the parties.

That the law now recognizes and protects the right of privacy is beyond doubt. Recognition has come by statute in some states and by judicial decision in others. In New York, with which this article is mainly concerned, the basis is New York Civil Rights Law Sections 50 and 51 making it a misdemeanor to use for advertising or trade purposes the name, portrait, or picture of any living person without written consent, and authorizing the issuance of an injunction to restrain such use and the recovery of damages for injuries sustained by reason of such use.

The statute was adopted because of press and public outcry over a 1902 decision of the New York Court of Appeals that there was no right of privacy in New York which would prohibit a flour-milling company from using in its advertising without her consent the picture of a young lady, surrounded by the words "Flour of the Family" and the name of the product and its produce. Claiming she had been humiliated and become ill because of the display of 25,000 such pictures in stores, warehouses, saloons, and elsewhere, she sued for damages and an injunction, both of which were denied.

Strangely enough, *The New York Times* led the editorial onslaught which resulted in adoption of the statute designed to overcome the result of the decision, although shortly before the decision the opposition of the press had defeated a bill that would have accomplished the purpose of the legislation subsequently adopted.

A year or two later, again in New York, a young lady whose picture was taken for her private use found it being displayed for advertising purposes. She was permitted to recover damages against the company so using the picture, the Court of Appeals holding that the statute enacted was not unconstitutional.

Thus far we have dealt only with private persons. What of public officials, politicians, lawyers, writers, actors, singers, prominent business or professional men and women, well-known philanthropists, and others whose activity, calling, or mode of life makes them public figures? And what is meant by trade or advertising?

The Supreme Court of the United States has recently held that a public official may not recover damages in a libel action against a newspaper critical in its columns of his official conduct. The democratic system, with freedom of speech and press, is premised upon a profound commitment to uninhibited, robust, caustic, and wide-open debate. Although this was a libel case, the principle would be equally applicable in a right-of-privacy case. The politician, the candidate, the public official all put their lives upon the line. Such a man's right of privacy is probably limited to those matters that have no conceivable legitimate connection with his public role, office, or candidacy. The conflict is obviously between the public's right to know via freedom of press and speech, and the individual's right of privacy.

"In the public interest, the factual reporting of newsworthy persons and events overrides the right of privacy, statutory or otherwise. The fictional does not." ***—Arnold L. Fein.***

The same principle applies, although perhaps to a lesser degree, to other public figures, whether they be such by choice or involuntarily. The legitimate public interest outbalances the right of privacy. Thus the orchestral conductor Serge Koussevitzky, who was working on his autobiography, could not prevent a prominent music critic from writing an unauthorized biography about him, even though it was alleged to contain some misstatements. Nor could Koussevitzky prevent the use of photographs of himself in the book and its advertisements. Said the court, the great public character

of his own volition dedicates to the public the right of any fair portrayal of himself.

But the portrayal must not be essentially fictional. In the public interest, the factual reporting of newsworthy persons and events overrides the right of privacy, statutory or otherwise. The fictional does not.

THERE was the older case of *Binns vs. The Vitagraph Co.* Binns was a telegraph operator on the steamship *Republic,* which came into collision with another steamship at sea. His use of the wireless to bring aid to his ship resulted in the saving of hundreds of lives, the first such use of wireless telegraphy. Vitagraph prepared a scenario, built around news reports in the daily press. It prepared stage sets representing the captain's cabin, the wireless room, etc., and assigned various actors to the parts, including the role of Binns. A large number of motion picture films were made on this basis, entitled *John R. Binns the Wireless Operator, Jack Binns and His Good American Smile,* etc. Actual pictures of Binns were utilized at a few places in the series and in the advertising, together with his name. Binns was held entitled to an injunction and damages. Although based on fact, the pictures were essentially fiction purporting to be fact. Binns's name and picture were being used without permission for purposes of trade, violating the statute. This was not the permissible simple and direct news reporting in which Binns was an incidental or even the main character.

Use of one's name or photograph in connection with an article of current news or immediate public interest is not inhibited, unless there is only a tenuous connection and no legitimate relationship to the news item, educational article, or immediate public interest. Publication is also permissible, without consent or even over objection, where there is a genuine public interest involving historic or well-known personages, items of past news, surveys of social conditions, or a man's life.

William James Sidis was a child prodigy of eleven in 1910. His name and achievements were widely publicized in the press. For the next five years he lectured to distinguished mathematicians and others. He was graduated from Harvard College at sixteen, amid considerable public attention. He then dropped from sight, having chosen a career as an insignificant clerk and deliberately sought the obscurity and seclusion of a private citizen. Under the title "Where Are They Now?" and the subtitle "April Fool," Sidis having been born on April 1, *The New Yorker* published an article in 1937 that detailed Sidis's life, character, and habits and concluded with an interview at his current lodgings, "a hall bedroom of Boston's shabby South End." Sidis sued in the federal court, invoking the law of several states in which the magazine was circulated that recognized the right of privacy. The court held he had no remedy, either under the New York statute or the case law of the other states. Although neither a politician, statesman, nor current public figure, he had once been a public figure, a person concerning whom there was legitimate public interest of an intellectual nature. It was a matter of proper public concern, the court held, as to whether this earlier public figure had fulfilled his youthful promise. The article was factual. Sidis was no longer a "voluntary" public figure, but he had earlier been one. This the court found was enough. His desire for obscurity was no bar.

The author of a letter and his legal representatives after his death have the sole right to permit or withhold its publication, except that it may be used by the addressee when required or justified to establish his rights in a lawsuit or to protect himself against aspersions or misrepresentations by the writer. There is a "common-law copyright"—the right of an author or proprietor of an unpublished literary work to first publication or to withhold publication. Does that right protect tape recordings and conversations with others from publication in whole or in part by the other party? The issue is not free from doubt. Nor is the picture clear with respect to private tape recordings of telephone conversations, frequently made without knowledge or consent of the speaker on the other end.

THE right of privacy continues to be delineated. No precise lines can be drawn. The continuing development of easy and swift means of communication changes the nature of the problem almost daily. The conflict between the right of privacy and the right to know is obvious. The resolution of any particular cases of the conflict provides a point of departure for the next. There are no final answers nor can there be. The need to protect both rights is manifest. Marking out the shadowy borderline is one of the prices of a free society.

"When S. Hurok stages a happening, then I'll go see a happening!"

5. THE AUTHOR'S RIGHT TO WRITE

By IRWIN KARP

THE KENNEDY-MANCHESTER dispute raises a fundamental question that should concern authors, publishers, and the public: does the Constitution prohibit the courts from enforcing a right-of-approval contract when author and publisher move to issue the book without obtaining the required consent?

The question does not assume that William Manchester breached his agreement. But if the Constitution bars suits to enforce such a contract, a court would never decide whether a breach had occurred. It would have to dismiss the suit at the outset, breach or no breach. And if the Constitution bars this type of litigation everyone would be better off. Authors and publishers could not be compelled to suppress portions of their work. The "subjects" of future books, forewarned of the consequences, would not give authors intimate details they did not wish exposed to public view, thus effectively protecting their right of privacy. The press would be relieved of its present, painful duty of disclosing the very material a plaintiff sues to keep from being published. And the public's right to have freedom of speech and press kept untrammeled would be preserved.

It is likely that the Supreme Court, following a twenty-year-old precedent, would rule that the First and Fourteenth Amendments bar courts from restraining publication of a book which has not obtained the approval required by a contract and also bar them from awarding damages for violation of the right of approval.

The Court may not deal with the issue for years. But the possibility that the right of free speech may take precedence over private contract rights should be aired before the next suit; in fact, before the next contract is signed. Considering it prospectively, rather than during an emotional litigation, might dissipate the notion that there is something unfair about preserving freedom of speech and press. Some of the "let's have no First Amendment nonsense" editorials reflected that attitude: Mrs. Kennedy would not have disclosed the material she objected to had her legal advisor foreseen that the Constitution might nullify her right of approval; therefore, the First Amendment should not prevent her from enforcing that right.

DESPITE Mr. Manchester's harrowing experience, other authors will sign right-of-approval contracts; and there will be more suits. Mrs. Kennedy's success in compelling *Look* to make deletions will itself induce subjects or sources of future biographies or authorized histories to demand rights of approval. Further stimulus may come from comments by New York's Appellate Division in the suit brought by Warren Spahn, under the state's right of privacy law, against the author and publisher of an unauthorized biography. Affirming an injunction against the book, and an award of damages to Mr. Spahn, the court said: "If the publication . . . by intention, purport or format is neither factual nor historical, the [right of privacy] statute applies and if the subject is a living person his written consent must be obtained." It also said that "the consent . . . can be avoided by writing *strictly factual* biographies."

An unauthorized biography may not be "strictly factual." It may contain honest errors of fact, and there is no rule for determining how many are allowed before it ceases being "strictly factual." The court's comments may impel cautious publishers to seek consents for potentially controversial biographies. Obviously, the subject will demand the right of approval before giving his consent. (Equally obvious: if he doesn't like what he reads, he will sue to enforce that right.) Actually, the *Spahn* case involved considerably more than factual errors or distortions; the court found that the biography was larded with "dramatization, imagined dialogue, manipulated chronologies, and fictionalization of events." But until subsequent opinions make it clear that fictionalization (and not factual inaccuracy) is really what the court held to violate the privacy statute, a nervous publisher may take the court's *dicta* at face value and seek consent for any book that may not be "strictly factual."

Obviously, while it costs nothing to preach that an author should never grant the right of approval, it may be more difficult to follow this advice. Writing is a precarious profession. It is not easy for an author to turn down a book that may have the potential of financial success. The temptation will be harder to resist when it is suggested that the pitfalls of the Kennedy-Manchester memorandum could be avoided by more careful drafting. The memorandum leaves room for improvement, and more protection could be provided for an author.

BUT once an author signs such a contract, no matter how well drawn, he hands the other party a weapon that can be used to suppress his book. It makes no difference that he may have complied, or thought he had complied, with the agreement. If the subject wants material deleted he can commence a suit. Often this will be enough to compel the requested changes. Litigation may threaten costly delays in publication, entail heavy expenses for defense and (unless the First Amendment bars it) create some risk of an injunction or a judgment for damages. Any of these factors may bring sufficient pressure on the author to capitulate, even though he might ultimately win on the merits. As the Supreme Court emphasized in *New York Times Co. vs. Sullivan*, the fear of damage awards in private suits and the costs of defending against them "may be markedly more inhibiting" on free speech than the fear of prosecution under a criminal statute.

It may be asked, why should the First Amendment protect an author or publisher who voluntarily signs a contract giving others the right to determine whether the book should be published? If they choose to surrender their freedom to publish, why should the courts

". . . the possibility that the right of free speech may take precedence over private contract rights should be aired before the next suit; in fact, before the next contract is signed."

—Irwin Karp.

Although Irwin Karp is legal representative for the Authors' League of America, this article expresses only his personal opinion.

restore that freedom to them? The answer is that the First Amendment guaranties of free speech and free press are not personal privileges granted to an author or publisher for his private benefit. The First Amendment secures freedom of speech and press for the benefit of the community at large, to ensure that unfettered discussion of issues which is the fundamental condition of a democratic society. It is not in the public interest that authors and publishers be permitted to abdicate those freedoms by private contract.

A right-of-approval contract can be used as a potent instrument for private censorship. It can force deletion of historical or political opinions that are offensive or inconvenient to the subject. It can suppress material the author obtained from other sources, or his own opinions. And it can be used to suppress material that would not violate the subject's rights under state privacy statutes. As the New York Court of Appeals emphasized in the Spahn case, "in balance with the legitimate public interest, the law affords [a public person's] privacy little protection." Moreover, a contract-given right of approval is not necessary to enforce one's right under the privacy laws.

IT seems clear that the public's interest in preserving freedom of speech and press, for its benefit, is inconsistent with the enforcement of a contract in which author and publisher surrender that right and submit themselves to private censorship. Refusal by the courts to enforce such contracts is the only effective way to prevent them. And such refusal is by no means unusual; courts frequently decline to enforce private and voluntary contracts if they run contrary to some aspect of public policy.

Moreover, once the dispute reaches a court and it is asked to issue an order enjoining publication of the book, a new problem is presented. The question now is whether the state, acting through the court, may suppress publication of the book. This is the nub of the Constitutional issue under the First and Fourteenth Amendments.

In 1947 the Supreme Court set aside injunctions issued to prevent the breach of voluntary and lawful private agreements. The case was *Shelley vs. Kraemer*. The agreements were restrictive covenants prohibiting the sale of property to Negroes, agreements which were then lawful. The court said that "the restrictive covenants standing alone cannot be regarded as violative of any rights guarantied to the petitioners by the Fourteenth Amendment. So long as the purposes of these agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the state and the provisions of the Amendment have not been violated."

But, said the court, the Fourteenth Amendment prohibits the state from imposing such restrictions on the ownership of property. It ruled that an order of the court enforcing the agreements and enjoining their violation was an act of the state, prohibited by the Fourteenth Amendment. It said that such a court order, in a private suit, was as much forbidden by the Constitution as would be an act of the legislature barring the sale of property to Negroes. In 1952 the Supreme Court went one step further and held (in *Barrows vs. Jackson*) that state courts were also barred by the Fourteenth Amendment from granting damages for the breach of such agreements.

THE right to own property free from discriminatory restrictions is but one of the rights protected by the Fourteenth Amendment. It also prohibits the states from restricting the rights of free speech and press, guaranteed by the First Amendment. Applying the 1947 opinion, a court order enjoining publication of a book to prevent breach of a contractual right of approval (or granting damages for the breach) would constitute a state restraint on freedom of publication—a restraint the state, and its courts, are prohibited from imposing by the First and Fourteenth Amendments.

Furthermore, the court cited as precedent for the decision prior opinions in which it reversed orders that enforced "common-law policy of the state" because they restricted the Constitutional "guaranties of freedom of discussion."

In addition to the Supreme Court's opinion in *Shelley vs. Kraemer*, there is the traditional refusal of courts to enjoin the publication of allegedly libelous works. For example, in a 1946 libel suit against *PM*, the New York Supreme Court said: "The exercise of equitable jurisdiction to enjoin the publication of a libel is repugnant to the democratic tradition. The judicial restraint of the written or spoken word implies the concept of censorship, unprecedented in our jurisprudence. The Constitutional guaranty of a free speech and a free press may not be thus circumscribed." If courts will not enjoin publication to protect the right not to be libeled, will they do so to protect rights under a contract?

The ultimate paradox is that litigation can destroy the very protection a right-of-approval contract is supposed to provide. A Constitutional barrier to these agreements would not only safeguard freedom of discussion; it would also lead the subjects of future biographies and authorized histories to use more effective means of preserving the privacy of material too intimate to be published now. The First Amendment does not compel anyone to disclose information to an author; it does not prevent anyone from making his own record of intimate information for future historians, without using authors as intermediaries.