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Introduction

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INTRODUCTION

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More than four decades have elapsed since the U.S. Supreme Court's landmark decision in *New York Times Co. v. Sullivan*[1] and time has given way to deeper reflection. *Sullivan* was initially met with high praise. Alexander Meiklejohn claimed that the decision was "an occasion for dancing in the streets"[2] and columnist Anthony Lewis characterized *Sullivan* as a "thrilling" decision.[3] At the time, these reactions were altogether to be expected. *Sullivan* involved the free speech rights of activists in the civil rights movement and the Alabama defamation law challenged in *Sullivan* had little salience in the vortex of that struggle.[4] In addition, the idea of robust free speech as exercised in New England town meetings had strong democratic appeal to Americans. All of these forces, however, were fiercely domestic, so it is little surprise that as the same issues arose in other nations they were addressed in different ways. While *Sullivan* has helped nudge British Commonwealth countries to reassess their approaches to free speech and defamation, most Commonwealth countries have rejected the *Sullivan* doctrine and fashioned their own approaches to speech and defamation. Nevertheless, as free speech entered the human rights canon throughout the Western World, *Sullivan* — a decision of the most powerful court in the most powerful nation committed to the rule of law — remains a reference point.

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1. 376 U.S. 254 (1964).

2. Harry J. Kalvern Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (quoting Alexander Meiklejohn).

3. Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 625 (1983).

4. *See* 376 U.S. 254 (1964).

This symposium issue of the *New York Law School Law Review* brings together a small group of prominent defamation law practitioners and scholars from three continents — Europe, Australia, and the United States — to explore developments in defamation, free speech, and privacy law both inside and outside of the United States.[5] Forty years ago, the communications revolution manifested itself in national media reporting; today, the velocity of information, the breakdown in international borders, and the revolutionary potential of the Internet add new dimensions to old problems. A number of articles focus on post-*Sullivan* developments in other countries. Others point out that changes in technology have further complicated this area of the law. All reveal how freedom of speech in each society is rooted in history and subject to evolving legal and social norms.

Two papers examine Canadian defamation law developments. Professor Adrienne Stone in *Defamation of Public Figures: North American Contrasts* reviews Canada's approach to free expression with particular emphasis on *Hill v. Church of Scientology*.[6] She notes that *Hill* rejected the *Sullivan* decision in its entirety, emphasizing the individual interest in reputation and the importance of truthfulness in public discourse.[7] After analyzing how Canada balances free speech and reputation issues — with greater protection for reputation and lesser protection for speech — she concludes with a challenge to Canadian free speech proponents to "consider more closely, and to justify, the attitude to state power revealed in its case law."[8] Professor Eugénie Brouillet in *Free Speech, Reputation, and the Canadian Balance* also focuses on the Canadian approach to reputation and speech and agrees that Canada has struck a different balance than the United States.[9] However, although she notes that

5. This issue grew out of a Defamation Discussion Forum that was co-sponsored by New York Law School, Washington & Lee University School of Law, and the University of Louisville's Louis D. Brandeis School of Law and held at New York Law School in New York City on December 3-4, 2004. The articles published here were presented at that event.

6. Adrienne Stone, *Defamation of Public Figures: North American Contrasts*, 50 N.Y.L. SCH. L. REV. 9 (2005-2006) (discussing *Hill,* [1995] 2 S.C.R. 1130).

7. *Id.* at 16-17, 19.

8. *Id.* at 32.

9. Eugénie Brouillet, *Free Speech, Reputation, and the Canadian Balance*, 50 N.Y.L. SCH. L. REV. 33 (2005-2006).

"[o]ne cannot say that there is only one right balance that must be reached in matters of defamation," she concludes that "[b]ecause of the fundamental importance of free speech and free press in democratic societies . . . free speech must be favored at least when political speech is at stake."[10]

In our article *Defamation, Free Speech, and Democratic Governance*, we discuss how Australia and England rejected *Sullivan* in favor of a speech-enhancing doctrine based on extensions of common law qualified privilege.[11] Australia chose to protect material pertaining to governmental and political matters affecting the representational governmental structure of Australia, provided that the publisher acted reasonably,[12] and England, having precluded governmental bodies from proceeding in defamation claims, chose to protect reporting on "matters of public concern."[13] The article examines how the Australian and English extensions of common law qualified privilege affect media reporting and contrasts their impact with that of the *Sullivan* decision.[14] The article includes extensive empirical evidence involving interviews with reporters, producers, editors, and defamation lawyers, and concludes that these three standards have very different effects on the media, but that the differences are rooted in cultural and legal differences.[15]

In *Origins of the Public Figure Doctrine in First Amendment Defamation Law*, Professor Catherine Hancock focuses on a different aspect of the *Sullivan* precedent: its extension to public figures.[16] She focuses on the Court's development of the so-called "public figure doctrine" and analyzes the implications of that development for the Court's creation of First Amendment doctrine.[17] She concludes with the observation that "[g]iven the richness and elusiveness of the public figure concept, it seems destined to vacillate in its meaning, as a permanent moving target, as long as it retains the role of

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10. *Id.* at 55.

11. Russell L. Weaver & David F. Partlett, *Defamation, Free Speech, and Democratic Governance*, 50 N.Y.L. SCH. L. REV. 57, 69 (2005-2006).

12. Lange v. Australian Broad. Corp. (1997) 189 C.L.R. 520, 521.

13. Reynolds v. Times Newspapers Ltd., [2001] 2 A.C. 127, 204 (H.L.).

14. *Id.*

15. *Id.*

16. Catherine Hancock, *Origins of the Public Figure Doctrine in First Amendment Defamation Law*, 50 N.Y.L. SCH. L. REV. 81 (2005-2006).

17. *Id.*

expressing hotly contested compromises over the clash of free speech interests and the ancient interest in reputation protected by libel law."[18]

Professor David Goldberg argues for a more international approach to the problem of defamation. In his article, *Transnational Communication and Defamatory Speech: A Case for Establishing Norms for the Twenty-First Century*, he analyzes the International Convention Concerning the Use of Broadcasting in the Cause of Peace as applied to defamatory speech.[19] He notes that Resolution 26 of the 1948 Conference on Freedom of Information called for the "appointment of a committee of jurists to study the laws of libel, and to formulate a body of fundamental rules and principles on this subject, so closely connected with certain types of international propaganda, but in the opinion of delegates, not ready for consideration without further research."[20] Professor Goldberg suggests that such a study "remains unfinished business for the international legal community."[21]

Professor Clive Walker in *Reforming the Crime of Libel* focuses on criminal libel rather than civil libel.[22] Professor Walker notes that criminal libel has a "long and troubled history" as an "instrument of state repression."[23] His paper traces that history and discusses efforts at criminal libel reform in England and Wales.[24] He concludes by observing that in our modern society "there is no convincing rationale" for criminal libel and advocates for its abandonment, arguing that its use "involves a most serious threat to rights to free expression" and that "there are adequate, albeit imperfect, alternative legal actions which provide redress for attacks on personal reputation."[25]

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18. *Id.* at 143.

19. David Goldberg, *Transnational Communication and Defamatory Speech: A Case for Establishing Norms for the Twenty-First Century*, 50 N.Y.L. SCH. L. REV. 145 (2005-2006).

20. *Id.* at 166-67.

21. *Id.* at 167.

22. Clive Walker, *Reforming the Crime of Libel*, 50 N.Y.L. SCH. L. REV. 169 (2005-2006).

23. *Id.*

24. *Id.* at 176-84.

25. *Id.* at 201, 203.

In *Privacy, Princesses, and Paparazzi*, Professor Barbara McDonald shifts the focus of the symposium from defamation to privacy.[26] She analyzes two important European privacy cases — the European Court of Human Rights decision in the Princess Caroline case,[27] and the British House of Lords decision in the Naomi Campbell case[28] — and discusses their implications for privacy law. Professor McDonald suggests areas of convergence between the two decisions and ultimately speculates on their long-term impact on British and European law.[29] She expresses doubt that damage awards will have much impact on media conduct, especially given the "relatively modest remedy awarded" in the *Campbell* case, but suggests that the willingness of courts to grant injunctive relief may have much greater impact.[30] By contrast, the *Van Hannover* case involving Princess Caroline, she argues, should force national courts in Europe to determine whether their laws are consistent with the European balance between the protection of privacy and the freedom of the press.[31]

Jonathan Donnellan and Justin Peacock in *Truth and Consequences: First Amendment Protection for Accurate Reporting on Government Investigations* look closely at the republication doctrine and argue that existing protections for the news media fail to adequately protect reporting on government misconduct when those reports are republications of accusations made by government officials.[32] They propose "[a] recognition of a First Amendment-based limit on the republication doctrine when the press is providing accurate reports on government accusations and investigations."[33]

Forty years ago, the papers collected here would have been of some comparative interest. Today, however, they are of greater importance as we see that ideas about reputation, privacy, and free

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26. Barbara McDonald, *Privacy, Princesses, and Paparazzi*, 50 N.Y.L. SCH. L. REV. 205 (2005-2006).

27. Van Hannover v. Germany [2004] 2 All ER 995.

28. Campbell v. MGN Ltd., Judgment 24 June 2004, in application 59320/00

29. McDonald, *supra* note 26, at 234-36.

30. *Id.* at 235.

31. *Id.* at 235-36.

32. Jonathan Donnellan & Justin Peacock, *Truth and Consequences: First Amendment Protection for Accurate Reporting on Government Investigations*, 50 N.Y.L. SCH. L. REV. 237 (2005-2006).

33. *Id.* at 268.

speech are fluid and subject to much practical contention. Mobility of information, the globalization of commerce, and the access to the information marketplace stemming from the Internet make pertinent these ideas. For example, several years ago, the Australian High Court in *Dow Jones & Co. v. Gutnick*, was faced with a claim made by an Australian resident, Gutnick, against Dow Jones, about defamation stemming from a small number of downloads of an electronic story that had been made in the State of Victoria.[34] Dow Jones defended, arguing that *Sullivan* should apply since the story about Gutnick was placed on its computers in New Jersey.[35] The Australian Court applied the prevailing rule that each download in Victoria constituted publication and concluded that Australian law was applicable.[36] In another example, the English House of Lords in *Berezovsky v. Michaels* accepted that English courts had jurisdiction and applied English law for a *Barron*'s article on the Russian politician and businessman Boris Berezovsky.[37] In 2002, the English Law Commission in *Defamation and the Internet: A Preliminary Investigation* noted these issues and saw that a solution would require a "greater harmonisation of the substantive law of defamation."[38]

The most recent salvo in the Internet defamation war was fired by the English Court of Court of Appeal in *Lewis v. King*.[39] The court had before it an Internet defamation dispute regarding several postings made to boxing websites concerning the actions of Don King, a promoter who has managed many boxing champions.[40] In particular, one posting accused King of anti-Semitic comments, which King claimed defamed his reputation among the Jewish community in England.[41] The alleged defamatory statements central to the case came from a piece written in the United

34. Dow Jones & Co. v. Gutnick (2002) 210 C.L.R. 575.

35. *Id.*

36. *Id.*

37. [2000] 1 W.L.R. 1004 (H.L.).

38. LAW COMMISSION, DEFAMATION AND THE INTERNET: A PRELIMINARY INVESTIGATION at 39 (2002), *available at* http://www.lawcom.gov.uk/docs/defamation2.pdf. *See also* Shawn A. Bone, *Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by* Gutnick v. Dow Jones & Co., 62 WASH. & LEE L. REV. 279 (2005).

39. [2004] EWCA (Civ.) 1329.

40. *Id.*

41. *Id.*

States by the New York attorney representing the defendants and posted on the Internet, and also from an interview given by that same attorney to a website based in California where the attorney had posted the complaint in the dispute days before.[42] The Court of Appeal ruled that King could sue in England for his harm suffered there.[43] Even though all of the factual events leading up to the English action occurred in the United States, and even though the applicable United States law would likely have doomed a cause of action under the public figure doctrine in *Sullivan*, the English Court of Appeal was untroubled by the lower court's refusal to dismiss King's case.[44] The English Court, refusing to accept the "single publication rule," found that the case could proceed on the basis of King's reputational harm in England.[45]

The American press is disgruntled with these decisions, identifying what they see as a crimping of free speech for publishers who reach beyond the United States. This attitude is on display in litigation brought in England by Saudi businessman sheik Khalid Salim a bin Mahfouz who had brought an action against Rachel Ehrenfeld, the author of *Funding Evil: How Terrorism is Financed — and How to Stop It*.[46] bin Mahfouz and his sons received significant damages for the defamatory statements about bin Mahfouz's terrorist connections.[47] Instead of awaiting an enforcement of the judgment, Ehrenfeld has brought suit in federal court asserting that the suit and its enforcement violates her First Amendment rights.[48]

As organizers of the Defamation Discussion Forum, we hope that the battle of words about various versions of free speech can be transcended by a sober discussion of the nature of free speech and

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42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Mahfouz v. Ehrenfeld, [2005] EWHC 1156.

47. *Id.*

48. Ehrenfeld v. Mahfouz, 2005 WL 696769 (S.D.N.Y. Mar. 23, 2005) (granting a motion to effect service of process). *See also* Sara Ivry, *Seeking U.S. Turf for a Free-Speech Flight*, N.Y. TIMES, Apr. 4, 2005, at C8; Dominic Kennedy, *Libel and Money — Why British Courts are Choice of the World*, TIMES (UK), May 19, 2005, at 6; Dominic Kennedy, *Judge Attacks Author Over Libel Tourism Allegation*, TIMES (UK), June 16, 2005, at 24; Alyssa A. Lappen, *Libel Wars*, FRONTPAGE MAG., July 18, 2005; Jeffrey Toobin, *Let's Go: Libel*, THE NEW YORKER, Aug. 8, 2005, at 36.

defamation and privacy litigation.[49] *Sullivan* is not holy script distilling all wisdom from the past and into the future. We expect that the values at play will evolve and that international scholars should create a venue for dialogue to mediate the discussion in a time of the expansion of global information.

49. This is a purpose of our forthcoming book. *See* RUSSELL L. WEAVER, ANDREW KENYON, DAVID PARTLETT & CLIVE WALKER, THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH (2006).