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Defamation, Free Speech, and Democratic Governance

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DEFAMATION, FREE SPEECH, AND DEMOCRATIC GOVERNANCE

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I. INTRODUCTION

The common law of defamation defined the balance between free speech and reputation decisively in favor of reputation.[1] It did so lest "good men fall prey to foul rumor."[2] In *New York Times Co. v. Sullivan,*[3] decided during the ferment of the 1960s civil rights movement in the South, the U.S. Supreme Court shifted radically the common law of defamation, fashioning a rule that prevented public officials from recovering for defamation unless they could show that the defendant had acted with "actual malice."[4] In one stroke, reputation was subjugated to free speech, the province of state common law was subjected to federal constitutional law oversight, and the jury function was usurped by judges.[5]

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1. *See* NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 17 (1986).

2. *Id.* at 251. Norman L. Rosenberg traces the colonial roots of this notion. *See generally id.* He notes that President Richard Nixon in 1974 was concerned that libel laws following *Sullivan* would discourage "good people" from running for "public office." *Id.* at 251.

3. 376 U.S. 264, 283 (1964). *See* IAN LOVELAND, POLITICAL LIBELS: A COMPARATIVE STUDY 65-83 (2002) (describing the case in comparative context).

4. The actual malice standard required public officials and later public figures to show that those who defamed them knew that what they published was untrue, or that the defamer acted with reckless disregard for the truth. *See* Curtis Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker, 389 U.S. 997 (1967).

5. *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986). *See generally* Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 603-05, 613-14 (1983); Arthur L. Berney, *Libel and the First Amendment – A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965). For a critical appraisal, see Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986).

Although some commentators questioned whether the Court needed to upset the fine balance of interests within the common law and eliminate the common law of defamation that throughout its development had always closely hewed to the social norms of the society regulated,[6] *Sullivan* continues to be a cornerstone of a strong constitutional interpretation of civil rights.[7] Its eloquent rhetoric continues to center free speech at the apex of democratic government.

Other liberal democracies have more recently begun to abandon the common law of defamation in favor of a more liberal approach to free speech. Rather than trying to protect persons against "foul rumour," the balance has shifted in favor of an approach that perceives the press as an institution capable of fighting governmental over-reaching and corruption. In searching for models by which the press could more adequately perform its public function, other countries began to closely examine the *Sullivan* doctrine as a way to avoid the chilling effect of defamation rules.[8] England, Australia, Canada, and New Zealand embraced the goal of greater protection for free speech. In each of these countries, *Sullivan* was seen as a harbinger, but was also criticized as suffering from flaws that make it incompatible to transplant directly.[9]

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6. *See* SELDEN SOCIETY, SELECT CASES ON DEFAMATION TO 1600 (R.H. Helmholz ed., 1985); David A. Anderson, *Is Libel Law Worth Reforming?* 140 U. PA. L. REV. 487 (1991). Scholarly analysis of the balance ranges beyond American commentary. *See* Denis W. Boivin, *Accommodating Freedom of Expression and Reputation in the Common Law of Defamation*, 22 QUEEN'S L.J. 229 (1997); Charles Tingley, *Reputation, Freedom of Expression and the Tort of Defamation in the United States and Canada: A Deceptive Polarity*, 37 ALTA. L. REV. 620 (1999).

7. *See* New York Times Co. v. United States, 403 U.S. 713, 720 (1971) (Douglas, J., concurring); RANDALL P. BEZANSON, HOW FREE CAN THE PRESS BE? 7-57 (Robert W. McChesney & John C. Nerone eds., 2003) (providing a rich description of *New York Times v. United States* and its standing in press freedom); Russell L. Weaver & Geoffrey Bennett, *Is The* New York Times *"Actual Malice" Standard Really Necessary? A Comparative Examination*, 53 LA. L. REV. 1153 (1993) [hereinafter "Weaver & Bennett"].

8. LOVELAND, *supra* note 3, at 87-114, 133-50. Criticism of the actual malice standard was extensive, even on its home turf, especially in the late 1980s. *See* Weaver & Bennett, *supra* note 7, at 1154. Comparative defamation law is likely to burgeon. For one attempt to measure the comparative law rules with an economic measure, see Charles J. Hartmann & Stephen M. Renas, *Anglo American Defamation Law: A Comparative Economic Analysis*, 5 J. MEDIA L. & PRAC. 3 (1984). **R**

9. *See* Weaver & Bennett, *supra* note 7. This is not to say that innovative rules that uncover truth would not be desirable. It is not to say, either, that the Commonwealth Courts, with their ability to craft and adapt the common law may, over time,

In three Commonwealth countries, the courts have tried to accomplish the objective of protecting political speech through an extension of the common law of qualified privilege.[10] In *Reynolds v. Times Newspapers*, the English House of Lords extended qualified privilege to protect reporting on matters of public concern.[11] In *Lange v. Australian Broadcasting Corp.*, the Australian High Court found that as long as the publisher acts reasonably, a qualified privilege protects the publication of material pertaining to governmental and political matters affecting Australia's representational government structure.[12] Finally, in *Lange v. Atkinson*, the New Zealand Court of Appeal articulated a common law privilege designed to protect "generally-published statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to be members, so far as

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fashion more efficacious defamation rules. *See id. See also* Michael Chesterman, *The Money or the Truth: Defamation Reform in Australia and the USA*, 18 U.N.S.W.L.J. 300 (1995) (arguing that the *Sullivan* decision is ineffectual and perverse); Nadine Strossen, *A Defence of the Aspirations — But Not the Achievements — of the U.S. Rules Limiting Defamation Actions by Public Officials or Public Figures,* 15 MELB. U. L. REV. 419 (1986) (contending that *Sullivan* often has been unfairly attacked and that within the limits of a federal constitutional law system and feckless legislatives unwilling to carry out fundamental reforms, the actual malice rule has been successful in providing a greater freedom to the press to publish political commentary). Likewise, the Canadian courts have recognized the value of the end to be achieved. *See* RAYMOND E. BROWN, 4 THE LAW OF DEFAMATION IN CANADA 1096 (2d ed. 1999). But they have not adopted *Sullivan* as the route. The Canadian Supreme Court in *Hill v. Church of Scientology* [1995] 2 S.C.R. 1130, found that the common law satisfactorily balanced the interest consistent with freedom of speech under the Canadian Charter of Rights and Freedoms.

10. *See* 50 AM. JUR. 2D *Libel and Slander* § 276, stating that:

> The qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest. The essential elements are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty. The transmitter must have an interest or duty in the subject matter, and the addressee must have a corresponding interest or duty, but such duty may be moral or social, rather than a legal one.

See also Knudsen v. Kansas Gas and Electric Co., 807 P.2d 71 (1991).

11. [2001] 2 A.C. 127, 204 (appeal taken from H.L.) (U.K.).

12. (1997) 189 C.L.R. 520, 521 (Austl.).

those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities."[13]

This article examines the *Sullivan* decision and the recent extensions of qualified privilege. We conclude that the balance between free speech and reputation in liberal democracies has shifted strongly in favor of free speech; however, the precise balance that each liberal democracy develops will differ according to constitutional, historical, and social settings. We should be slow to celebrate *Sullivan* as a distillation of wisdom. In an interconnected world, tolerance will have to be shown to differing balances of free speech and reputation.

II. The Common Law Tradition

Attempts to limit public speech are part of a broad theme in English history and, by definition, the United States and Australia. Prior to the invention of the printing press, communication was limited to oral and handwritten methods that were slow, inaccurate, and confined. The development of the printing press had a dramatic effect by making it possible to mass-produce writings, including criticisms of the government. Because of the potential for widespread distribution of potentially seditious writings, the English Crown came to view this invention as dangerous and threatening. As a result, the Crown sought to restrict the public's use of the printing press.[14] Through the late seventeenth century, the Crown imposed licensing schemes that required publishers to obtain official approval before publishing.[15]

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13. [1997] 2 N.Z.L.R. 22 (H.C.).

14. *See* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91, 97-98 (1984); Rosenberg, *supra* note 1; Lindsay M. Kaplan, The Culture of Slander in Early Modern England (1997); Russell L. Weaver & Arthur D. Hellman, The First Amendment: Cases, Materials and Problems 279 (2002).

15. *See* Mayton, *supra* note 14, at 104 n.75. *See also* Talley v. California, 362 U.S. 60, 65 (1960) (describing the fact that John Lilburne was "whipped, pilloried and fined" in England for refusing to answer questions regarding the distribution of books, and the fact that Puritan ministers were sentenced to death for writing, printing and publishing books).

Beginning in 1606 with the decision in *de Libellis Famosis,*[16] the Star Chamber created the crime of seditious libel[17] in part to replace the crime of constructive treason.[18] Seditious libel made it a crime to criticize the government or governmental officials (and, at one point, the clergy as well).[19] The crime was justified by the notion that criticism of the government "inculcated a disrespect for public authority."[20] "Since maintaining a proper regard for government was the goal of this new offense, it followed that truth was just as reprehensible as falsehood" and therefore was not a defense.[21] Indeed, truthful criticisms were punished more severely because it was assumed that true criticisms could be more damaging to the government.[22]

Although the crime of seditious libel began to wane in England in the late eighteenth century,[23] it had already been imposed in the American colonies. The most famous incident involved the 1735 prosecution of John Peter Zenger,[24] a printer, who was prosecuted for printing "many things derogatory of the dignity of his

16. 77 Eng. Rep. 250 (Star Chamber 1606).

17. For a thorough discussion of the history of seditious libel, see LAW COMMISSION, WORKING PAPER NO. 72, CODIFICATION OF THE CRIMINAL LAW: TREASON, SEDITION AND ALLIED OFFENCES, London (1977); Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816 (1984); Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661 (1985). *See also* Jeffrey K. Walker, *A Poisen in Ye Commonwealth: Seditious Libel in Hanoverian London*, 25 ANGLO-AM. L. REV. 341, 366 (1996).

18. *See* Mayton, *supra* note 14, at 98, 100-01 (defining constructive treason as the "generic name" of the offenses that were prosecuted for speech "hostile to the government").

19. *See* Mayton, *supra* note 14, at 91. Indeed, in *de Libellis Famosis*, the defendants had ridiculed high clergy. *See* Mayton, *supra* note 14, at 103.

20. Mayton, *supra* note 14. *See also* Matt J. O'Laughlin, *Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11*, 70 UMKC L. REV. 707, 720-21 (2002) (discussing the seditious libel prosecution of John Wilkes during the reign of George III); LOUIS KRONENBERGER, THE EXTRAORDINARY MR. WILKES: HIS LIFE AND TIMES (1974).

21. De Libellis Famosis, 77 Eng. Rep. 250 (Star Chamber 1686). *See also* William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. ST. B.J. 48, 49 (1996).

22. Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 184 n.290 (1998). *See also* Glendon, *supra* note 21, at 48.

23. Koffler & Gershman, *supra* note 17, at 822. S*ee* LAW COMMISSION, WORKING PAPER NO. 72, CODIFICATION OF THE CRIMINAL LAW: TREASON, SEDITION AND ALLIED OFFENCES, London (1977); R. v. Bow Street Magistrates Court Ex. p. Choudury [1991] 1 Q.B. 429.

24. *See* Glendon, *supra* note 21.

majesty's government, reflecting upon the legislature, upon the most considerable persons in the most distinguished stations in the province, and tending to raise seditions and tumults among the people thereof."[25] In what is widely regarded as the first American case of jury nullification, the jury refused to convict Zenger even though he had effectively admitted all of the elements of the crime.[26]

The crime remained in effect even after the Constitution was adopted. In 1798, when the country was on the verge of war with France, the U.S. Congress adopted the Alien and Sedition Acts.[27] The Acts were widely viewed as an effort by the Federalists to suppress Jeffersonian Republicans.[28] The Acts had two parts. The "first part . . . proscribed organized opposition to public measures. The second made it illegal to criticize government, provided the criticism was malicious, untrue, alienated the people's affections from their government, or brought the government into the contempt of the people."[29] In the States as well, there were prosecu-

25. Cohen v. Hurley, 366 U.S. 117, 140 n.18 (1961) (Black, J., dissenting). In particular, Zenger referred to the Royal Governor of New York (William Cosby) as "a large spaniel, of about 5 feet 5 inches high . . . lately strayed from his kennel with his mouth full of fulsome panegyricks" and as a "monkey . . . lately broke free from his chain and run into the country." Elizabeth I. Haynes, United States v. Thomas: *Pulling the Jury Apart*, 30 CONN. L. REV. 731 (1998). Zenger also described the Governor as a tyrant. *See* Glendon, *supra* note 21, at 50.

26. Glendon, *supra* note 21, at 52. The *Zenger* case was not the only seditious libel prosecution in the American colonies. Another prosecution arose out of former Governor Josias Fendall's 1681 "rebellion." Fendall was prosecuted for "false scandalous mutinous and seditious' speech (i.e., that the Proprietor was a traitor who had formed a Catholic-Indian conspiracy to ruin the colony's Protestants, that anyone who paid the Proprietor's taxes was a fool, and that Fendall would protect the people against Lord Baltimore), attempted rebellion, and attempting to seize Lord Baltimore and several members of the Council." *See* Krauss, *supra* note 22, at 151.

27. John Harrison, *The Constitution in Congress: The Federalist Period, 1789-1801, By David P. Currie*, 15 CONST. COMMENT. 383, 392-93 (1998) (book review) ("The government was on the verge of war with France and faced, many of its leaders believed, a disloyal opposition that was in the French pocket. That is the kind of situation that brings out the worst in rulers, but the worst it brought out of Congress was still arguably within the Constitution.").

28. *See* Thomas Kane, *Malice, Lies, and Videotape: Revisiting* New York Times v. Sullivan *in the Modern Age of Political Campaigns*, 30 RUTGERS L.J. 755, 766 (1999).

29. James P. Martin, *When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117, 122-23 (1999) (noting that the significance of the first part "has been virtually ignored by commentators").

tions for seditious libel or their equivalents (i.e., contempt of court for free expression).[30] During the Civil War, seditious libel prosecutions were routine,[31] and there were a variety of prosecutions in the twentieth century, all designed to suppress dissent against government policies.[32]

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30. *See* Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. PA. J. CONST. L. 12, 16-17 (2002). In the 1788 case *Republica v. Oswald*, Eleazer Oswald, a newspaper man, was subjected to civil arrest and a libel suit by one of his political opponents (Andrew Browne who was described as the "master of a female academy in the city of Philadelphia"). *Id.* at 16. When Oswald published an editorial attacking all parties to the libel action, claiming that they were motivated by political concerns, he was charged with contempt of court. *Id.* at 17. Justice McKean, another of Oswald's political opponents, wrote an opinion in which he asserted that "libeling is a great crime, whatever sentiments may be entertained by those who live by it" and that "the heart of the libeler . . . is more dark and base than that of the assassin." *Id.* Although Justice McKean recognized the importance of free expression (which he viewed as giving "every citizen a right of investigating the conduct of those who are intrusted [sic] with the public business"), he nonetheless found that Oswald's attack was unprotected: the "object and tendency" was to "raise a prejudice against his antagonist, in the minds of those that must ultimately determine the dispute between them" and to "dishonor the administration of justice." As a result, Oswald was subject to punishment for contempt of court. *Id.*

31. *See* Koffler & Gershman, *supra* note 17, at 829-30, explaining:

> After the expiration of the Sedition Act of 1798, seditious libel did not emerge again until the time of the Civil War, when it surfaced not in the lineaments of legislation but under the heavy hand of the commander in chief, President Lincoln. . . . Thousands of suspected or known dissenters and suspected 'dangerous' men were thrown into military prisons without charges and without trial. Thus, although seditious libel was missing from the statute books, it animated an executive dragnet that resulted in the arrest of thousands of men. Lincoln's executive fiat was more despotic and crushing than the statutory form of seditious libel; its broad sweep rendered virtually insignificant in comparison the estimated twenty-five arrests under the Sedition Act of 1798. Furthermore, Lincoln's actions forged a precedent for the resuscitation of seditious libel whenever the executive feels it necessary to protect the national security, thereby retaining, at least in periods of felt crisis, the myth that only an irrefragable authority can save the people.

32. During and immediately after World War I, there were a number of prosecutions under the inaptly named Espionage Act. *See* Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919); Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917). For later similar decisions, see Scales v. United States, 367 U.S. 203 (1961); Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961); Braden v. United States, 365 U.S. 431 (1961); Hannah v. Larche, 363 U.S. 420 (1960); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951); Whitney v.

Government, in a broader sense, was no friend of free speech.[33] While the history of seditious libel provides a window to government regulation, another revealing perspective is provided by the use of the government's taxing power of the press and therefore of knowledge. As Professor Bezanson says, the "values of access to public audiences and freedom from government control over dissemination of information and opinion to the body politic emerged early from the struggle against the stamp."[34] To tax the dissemination of knowledge was to control effectively its flow.[35]

III. THE *SULLIVAN* DECISION

Prior to the landmark case of *Sullivan*, the common law world was remarkably uniform in balancing free speech, reputation, and the public interest in the way just described. *Sullivan* was to sound the death knell for the crime of seditious libel in the United States. In *Sullivan*, the Court concluded in dicta that the Sedition Act was inconsistent with the "central meaning of the First Amendment."[36] *Sullivan*'s dicta was confirmed in *Garrison v. Louisiana*.[37] In *Sullivan*, Justice Black went on to argue that the Sedition Act "by common consent has generally been treated as having been a wholly unjustifiable and much to be regretted violation of the First Amendment."[38] As Professor Harry Kalven in his influential article on the meaning of *Sullivan* stated, "[t]he concept of seditious libel

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California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925). *See also* Koffler & Gershman, *supra* note 17, at 841-42.

33. Some have argued that the government can be a friend of speech. *See, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH 83 (1996) (forcefully arguing that the Government may be a friend of speech).

34. RANDALL P. BEZANSON, TAXES ON KNOWLEDGE IN AMERICA: EXACTIONS ON THE PRESS FROM COLONIAL TIMES TO THE PRESENT 45 (1994).

35. A.C. PIGOU, THE ECONOMICS OF WELFARE (4th ed. 1932). No abstruse lessons in law and economics are necessary to recognize the simple truth of Pigou's theories of incentives on voluntary activities created by tax levies. *See* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (relying on social cost theory but pointing to limits of Pigou's theory).

36. *Sullivan*, 376 U.S. at 273.

37. Garrison v. Louisiana, 379 U.S. 64 (1964).

38. *Sullivan*, 376 U.S. at 296 (Black, J., concurring).

strikes at the very heart of democracy . . . [D]efamation of the government is an impossible notion for a democracy."[39]

The other trammel on free speech, the government's power of taxation, was addressed outside of *Sullivan* in a series of Supreme Court decisions finding that government could not discriminate against the press by its expression or administration of the taxation power.[40] The burdens on speech were particularly suspect because government was acting, as it did in the Star Chamber, to regulate speech directly. *Sullivan*, however, was concerned with analyzing not governmental speech regulation, but its more indirect regulation through affording recovery to individuals whose reputations are besmirched by defamatory imputations. Defamatory speech had not traditionally been at the core of First Amendment concerns. The crucible of the civil rights movement illuminated the costs of the common law of defamation and the past constitutional deference to it.

Sullivan struck a mortal blow against the restraints imposed by civil defamation rules. Since most political speech of substance takes place in the media, and the pre-*Sullivan* law of libel applied a strict form of liability that made words tending to defame another actionable upon publication, "a defendant incurs liability even though he reasonably believes in the truth of the statement."[41] Traduced politicians, like any citizen, could establish a case by simply showing that defamatory words about them were published.[42] The defendant publisher could then assert a defense by establishing the truth of the defamatory implication, proving that it was published in a privileged context, or showing it was a fair comment on a mat-

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39. Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 205. *See also* Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263, 272 (1986). As noted by the *Sullivan* Court, "the attack upon [the Sedition Act's] validity has carried the day in the court of history." 376 U.S. at 276.

40. *See* Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Leathers v. Medlock, 499 U.S. 439 (1991); BEZANSON, *supra* note 34, at 252-83.

41. GATLEY ON LIBEL AND SLANDER ¶ 1.16 (Patrick Milmo & W.V.H. Rogers eds., 10th ed. 2004).

42. Technically, the words must identify the plaintiff, i.e., be "of and concerning" the plaintiff. *Sullivan*, 376 U.S. at 277.

ter of public interest. The burden of proof was on the publisher to establish these defenses.

Sullivan changed common law doctrine and practice in the United States. In terms of doctrine, a matter of private law was brought under the ambit of First Amendment constitutional jurisprudence. This ensured both that greater prominence would be given to the value of free speech and that state law would be unable to resist the onward march of the U.S. Supreme Court's precedent. By turning the issue into one of constitutional law, the role of the jury was diminished, signaling that the jury was no longer to be entirely trusted to balance public and private rights.[43]

Under the common law, governmental officials had ample scope to suppress or punish their critics. The cases from various common law countries such as England, Australia, and the United States follow common fact patterns. In *Sullivan*, a governmental official (a county commissioner) brought a libel action against civil rights activists who were deemed to have criticized his performance in office.[44] Likewise, in two of the prominent Australian decisions, *Theophanous v. Herald & Weekly Times Ltd.*[45] and *Lange v. Australian Broadcasting Corp.*[46] governmental officials (in the latter case, a New Zealand official) brought suit against the Australian media. Finally, in *Reynolds v. Times Newspapers Ltd.*, an English decision, the action

43. *Sullivan*, 376 U.S. at 278-79. *See* Newton v. Nat'l Broad. Co., Inc., 930 F.2d 662 at 666 (9th Cir. 1990) (giving the media assurance under *Sullivan* of "the ability to write and publish freely without risking vindictive reprisals from local juries"). This was ironic given the jury's foundational role in the scheme of freedoms protected by the Constitution. The jury's centrality was articulated most eloquently by Justice White in *Duncan v. Louisiana*, 391 U.S. 145, 149-50 (1968). For a discussion of the role of the jury in the republican scheme of the U.S. Constitution, see David F. Partlett, *The Republican Model and Punitive Damages*, 41 San Diego L. Rev. 1409, 1420-24 (2004). Concerns about governing the jury arise in recent Supreme Court jurisprudence on Punitive Damages. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003) (striking the due process limits of the imposition of punitive damages); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42-43 (1991) (O'Conner, J. dissenting) (explicitly expressing concern). At the same time, the constitutional role of the jury, after a period of decline, has been reasserted in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and most recently in *United States v. Booker*, 125 S. Ct. 738 (2005).

44. *Sullivan*, 376 U.S. 254.

45. Theophanous v. Herald & Weekly Times Ltd., (1994) 182 C.L.R. 104 (Austl.).

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

arose when a newspaper allegedly defamed Ireland's then recently resigned Tiaoseach (Prime Minister).[47]

In terms of changes in practice, the *Sullivan* decision effectively ended civil defamation suits by public officials in the United States. For the U.S. Supreme Court, the jury's proclivities were too dangerous; the First Amendment could not be subject to a populist examiner. Herbert Wechsler, attorney for the New York Times, effectively argued before the Court that historic overreaching signaled present dangers.[48] In the process, however, defamation law in the United States became highly constitutionalized and was stripped of the common law superstructure that had developed over hundreds of years. For example, the burden of proving truth and actual malice shifted to the plaintiff, in contrast to the common law where a defendant needed to assert such facts as a defense.

Revolutions in the law, like all revolutions, lead to uncertainty. The changes in libel law are no exception, and the rebuilding of the law through constitutional analysis has been a stumbling process. The law relating to comment is an example of the Supreme Court finding the wicket rather sticky when it enters common law analysis. Not unremarkably, where law is built quickly, dicta is relied upon as doctrinal cement. In *Gertz v. Robert Welch, Inc.*,[49] Justice Powell suggested that opinion, as distinct from fact, could never be defamatory.[50] There then ensued a body of law built upon

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47. Reynolds v. Times Newspapers Ltd., [2001] 2 A.C. 127, 134, 3 W.L.R. 1010, 1014 (H.L.).

48. *See* Kane, *supra* note 28, at 767, *citing* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 6 (1991) (comparing civil cause of action for libel to Sedition Act).

49. 418 U.S. 323, 339-40 (1974).

50. *See id.* Much weight was subsequently put on Justice Powell's words. Investigations of the Powell Archives at Washington & Lee University School of Law show that Justice Powell completed his opinion after eight drafts. The relevant portion of the opinion remained unchanged from the first draft to the final slip opinion. Most of the attention was devoted to the definition of public figure. John Wade, Dean at Vanderbilt University School of Law and reporter to the ALI put weight on Justice Powell's words in crafting the Defamation portion of the Restatement (Second) of Torts. RESTATEMENT (SECOND) OF TORTS § 580A (1977). The file in the Archives contains a letter dated July 12, 1974, from Laurence H. Eldredge, Hastings College of Law, strongly suggested that Justice Powell's introduction to part III in *Gertz* was dicta and did not dictate a change in the revision. Letter from Laurence H. Eldredge, Hastings College of Law, to Dean Wade, July 12, 1974 (on file with the Powell Archives at Washington & Lee Univ. Sch. of Law). In a later letter, Eldredge further chastises Wade's interpreta-

the premise of a constitutional protection for commentary. Commentary, at least on matters of public concern, was therefore not actionable.[51] This represented a distinct departure from the common law where expressions of opinion are accorded a limited protection under the fair comment defense.[52] In *Milkovich v. Lorain Journal Co.*,[53] the Supreme Court declared that it had not intended to create a constitutional protection for opinion or comment. False opinions, the Court stated, could be actionable provided that the claimant could establish requisite fault, malice or negligence, by the publisher.[54] A recognition of the common law's protection of comment or opinion would have mitigated some of these transaction costs by allowing a smoother integration of constitutional dictates and common law.

Yet, defamation's sometimes arcane doctrine and its indirect means of balancing free speech with reputation was too timorous in an era of civil rights resolve. Thus, *Sullivan* was conceived in high rhetoric for the very reason of bringing the law out of the shadow of the Star Chamber. Under the requirements of the First Amendment, where a newspaper publishes speech of public concern, both public officials and public figures had the burden of showing that the statement was untrue and of meeting the actual malice standard.[55]

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tion of Powell's *Gertz*, part III as "a fantastic construction of Powell's opinion. . . . I respectfully suggest that it carry a: 'Special Note: This is a Wade Restatement rule which has never been considered by the American Law Institute.'" Letter from Laurence H. Eldredge, Hastings College of Law, to Dean Wade, July 16, 1974 (on file with the Powell Archives at Washington & Lee Univ. Sch. of Law) (I thank Powell Archivist, John Jacob for his aid.). It follows, if Eldredge's admonition had been accepted, that Justice Powell's words should have been treated as mere *obiter dicta* and should never have formed a platform for the law of comment/opinion jurisprudence that the federal courts evolved.

51. *See*, *e.g.*, Sisemore v. U.S. News & World Report, Inc., 662 F. Supp. 1529 (D. Alaska 1987).

52. *See* Kotlikoff v. Cmty. News, 444 A.2d 1086 (N.J. 1982) (finding the fair comment defense no longer relevant).

53. 497 U.S. 1 (1990).

54. *See id.*

55. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 773 (1986).

IV. Recent Australian and English Decisions

In marked contrast with the U.S. Supreme Court, the final appeals courts in Australia and England, as courts of general appeal, have nurtured and developed common law doctrine, including defamation. Although England and Australia are democracies, and share a recognition of the value of free speech, they have adopted different approaches to the clash of free speech and defamation as reflected in the recent extensions of common law qualified privilege. The Australian High Court was able to strike this balance by using a jurisdiction unavailable to the U.S. Supreme Court. In Australia, the High Court may declare the common law for Australia.

Australia's extension of qualified privilege followed a number of important and quite remarkable constitutional decisions.[56] In the 1990s, the Australian High Court recognized constitutional implications for the protection of speech. Although Australia's constitution does not explicitly protect speech, it has been interpreted to contain implied protections for political communication pertaining to government or political matters.[57] In *Theophanous*, Australia's High Court used these implied protections to create two new defenses: a constitutional defense for the discussion of political and government matters and an expanded form of common law qualified privilege.[58] The constitutional defense applied as long as defendants could show that they were unaware that the publications

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56. *See generally* Symposium, *Constitutional Rights for Australia?*, 16 Sydney L. Rev. 141 (1994). *See also* Nationwide News Pty. Ltd. v. Wills (1992) 177 C.L.R 1; Australian Capital Television Pty. Ltd. v. Commonwealth (1992) 177 C.L.R 106; *Theophanous*, (1994) 182 C.L.R 104; *Lange*, (1997) 189 C.L.R 520; Levy v. State of Victoria (1997) 189 C.L.R 579; Coleman v. Power (2004) 209 A.L.R 182. *See generally* H.P. Lee, *The Implied Freedom of Political Communication*, *in* Australian Constitutional Landmarks ch. 16 (H.P. Lee & George Winterton eds., 2003).

57. Australian Capital Television Pty. Ltd., (1992) 177 C.L.R 106; Nationwide News Pty. Ltd., (1992) 177 C.L.R 1. This implication has been controversial. *See, e.g.*, George Williams, *Implications from Representative Government*, *in* Human Rights under the Australian Constitution 155-97 (1999); Adrienne Stone, *The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication*, 23 Melb. U. L. Rev. 668 (1999) (raising the problems of constitutional interpretation posed by the High Court's decisions); *see also* Russell L. Weaver & Kathe Boehringer, *Implied Rights and the Australian Constitution: A Modified New York Times, Inc. v. Sullivan Goes Down Under*, 8 Seton Hall Const. L.J. 101 (1998).

58. (1994) 182 C.L.R. 104 (Austl.). *See* Stephens v. Western Australian Newspapers, (1994) 182 C.L.R. 211. For a concise examination of the *Theophanous* defense and subsequent developments, see also Sally Walker, Media Law: Commentary and Mater-

were false; that they had not published recklessly, without caring about truth or falsity; and that the act of publication was reasonable under the circumstances. The common law qualified privilege applied to publications about political or government matters. Expanded qualified privilege was only defeated by malice — that is, an improper purpose in publishing the material.[59] The majority judgments in *Theophanous* also suggested that political communication was a broad concept. It extended to all participants in political discussion, and included discussion of the "conduct, policies or fitness for office" of governments, political and public bodies, public officers, and people seeking public office.[60] It also included "discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate" such as trade union leaders and political commentators.[61]

Since the High Court was deeply divided in *Theophanous*, the Court was better able to revisit the matter in *Lange*.[62] The U.S. Supreme Court in *Sullivan* used the tool of constitutional law to invalidate the Alabama libel law. Thus began an exquisite dance of state common law and federal constitutional law interpretation. In contrast to the United States' method, the Australian High Court, in *Lange*, took the route of shaping the common law of defamation in light of constitutional demands.[63] The *Lange* judgment combined elements of *Theophanous*'s constitutional defense and its expanded common law qualified privilege defense into a new form of privilege by articulating a list of matters that should be weighed.

Lange's qualified privilege defense applies to widespread publications about political and government matters.[64] In general, *Lange*'s qualified privilege requires defendants to establish that they had reasonable grounds to believe the publication was true, did not

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IALS 207-08 (LBC 2000); MICHAEL GILLOOLY, THE LAW OF DEFAMATION IN AUSTRALIA AND NEW ZEALAND 188-96 (Federal Press 1998).

59. Roberts v. Bass, (2002) 212 C.L.R. 1 (Austl.).

60. *Theophanous*, (1994) 182 C.L.R. 104, 124 (Austl.).

61. *Id.*

62. (1997) 189 C.L.R. 520, 521 (Austl.). *See* Adrienne Stone, Lange, Levy, *and the Direction of the Freedom of Political Communication Under the Australian Constitution*, 21 U.N.S.W.L.J. 117, 119-20 (1998).

63. *See* (1997) 189 C.R.L. 520, 556, 563 (contrasting the Court's power to declare the common law with the position in the United States).

64. *See* (1997) 189 C.L.R. 520, 574 (Austl.).

believe it was false, and had made proper inquiries to verify the publication.[65] In addition, defendants must have sought and published a response from the potential plaintiff, except where that was not practical or necessary.[66] *Lange*'s qualified privilege can be defeated by malice. The factors listed by the High Court in *Lange* are likely to be important factors in most cases, but they are merely indicative of when the key requirement of reasonableness has been met.

Reynolds, a decision of the English House of Lords, is comparable, but also quite different.[67] Prior to *Reynolds*, Parliament had already altered the common law in important respects.[68] It continued this trend in *Reynolds* where the House of Lords made a dramatic shift in holding that common law qualified privilege could apply to media publications. The decision extended the traditional duty and interest requirements for qualified privilege to media publications on the basis of the public's right to know, and held that qualified privilege should focus on matters in the public interest. As the judgment of Lord Nicholls stated:

> Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.[69]

The judgment went on to articulate ten factors that should be considered in determining whether a particular publication is entitled to qualified privilege.

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65. *Id.*

66. *Id.*

67. [2001] 2 AC 127 (H.L.). GATLEY ON LIBEL AND SLANDER ch. 14 (Patrick Milmo & W.V.H. Rogers eds. 10th ed. 2004).

68. *See* Defamation Act, 1952, 15 & 16 Geo., 6 & 1 Eliz. 2, ch. 13 (Eng.); Defamation Act, 1996, ch.13 (Eng.). *See also* European Convention on Human Rights and Fundamental Freedoms, Defamation Act, 1952 (adopted into British law by the Human Rights Act 1998 ch. 42 (Eng.)).

69. *Reynolds*, [2001] 2 A.C. 127, 205 (H.L.).

> (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed. . . . (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid. . . . (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. . . . An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. . . . (10) The circumstances of the publication, including the timing.[70]

While *Reynolds* has captured much attention because of its bold expansion of the defense of qualified privilege, an early decision of the House of Lords was a strong harbinger and demonstrates an enthusiastic embrace of free speech. In *Derbyshire County Council v. Times Newspapers Ltd.*, the House of Lords found that a public authority — the Derbyshire Council — could not mount a defamation action for criticism of its official actions.[71] The court cited the need to hold government accountable as the reason for the ban. It is notable that even if the publication were motivated by malice, the local authority would nevertheless have no cause of action in defamation.[72]

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70. *Id.*

71. [1993] A.C. 534. *See also* RUSSELL L. WEAVER, ANDREW KENYON, DAVID PARTLETT & CLIVE WALKER, THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH (2006).

72. As in *Sullivan*, the government's action is often reified in the action of a public official. Thus the U.S. Supreme Court's inclusion of public officials follows. The criticism of a public body may however sometimes traduce individuals in their personal capacity. Here a good cause of action, despite *Sullivan*, ought to subsist. *See* David A. Elder, *Small Town Police Forces, Other Governmental Entities and the Misapplication of the First Amendment to the Small Group Defamation Theory — A Plea for Fundamental Fairness for May-*

V. ASSESSING *SULLIVAN, LANGE* AND *REYNOLDS*

Is one of the three standards (*Sullivan, Lange* or *Reynolds)* preferable to the others? It is difficult to do justice to that question in a short article, and we will elaborate further in a forthcoming book.[73] Nevertheless, certain observations and conclusions are in order.

A. The Common Law

In societies that have attached free speech to democratic values, the common law became inconsistent with the nurturing of democracy in complex industrial/information societies. The balance between reputation and free speech cut too decisively in favor of reputation. Prior to the recent extensions of common law qualified privilege in *Reynold*s and *Lange*, the English and Australian media were fairly cautious and risk adverse compared to the U.S. media.[74] This cautiousness was revealed by the extensive participation of lawyers in the publishing process, as well as by the standards that the English media used in deciding whether to publish.[75] Rarely would the English media publish without "legally admissible evidence" to support its conclusions.[76] Combined with the willingness of some public figures and officials to aggressively assert their rights through litigation, editors were unlikely to publish sensitive information in the public interest without assurances that it could be legally defended.[77]

B. Sullivan's *Impact*

Post-*Sullivan* interviews, conducted by the authors, reveal a U.S. media that functions much differently than either the Australian or English media (either pre- or post-*Lange* and *Reynolds*). The interviews reveal a U.S. media that, while not oblivious to the possi-

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berry, 6 U. PA. J. CONST. L. 881 (2004) (criticizing *Dean v. Dearing*, 561 S.E.2d 686 (Va. 2002)).

73. *See* WEAVER ET AL., *supra* note 71.

74. *See* WEAVER ET AL., *supra* note 71.

75. Weaver & Bennett, *supra* note 7, at 1171-72.

76. Weaver & Bennett, *supra* note 7, at 1173-74.

77. Weaver & Bennett, *supra* note 7, at 1174. Usual assumptions of risk averseness would predict even more docility, considering that corporations owning the press are in highly competitive markets. The mitigating force is the professional norms of the journalists. Owners as utility maximizers must deal with the independent tendencies of journalists, and this may result in publication in some instances despite legal hazards.

bility of defamation suits or the possibility of adverse judgments, is far less concerned about this possibility than their English counterparts. For example, an NPR presenter flatly stated that defamation laws had no impact on his coverage of issues.[78] An Executive Producer of CBS's 60 Minutes made similar statements,[79] as did an executive producer at NBC Nightly News,[80] a Vice President for News Practices at CBS,[81] a local investigative reporter,[82] and a local news anchor.[83] In fact, only one interviewee, a lawyer for a major network, expressed any serious concerns about the impact of United States defamation laws.[84] In other words, *Sullivan* cut the balance between reputation and free speech decisively in favor of free speech.

C. Lange's *Impact*

Unlike *Sullivan*, which appears to have had a major impact on the U.S. media, Australia's *Lange* decision does not appear to have had so dramatic of an impact. The Australian interviews, conducted by the authors, began in 1994, slightly before the *Theophanous* decision and three years before the *Lange* decision, and some of the same individuals were interviewed over time. As a result, the interviews offer considerable insight into the media's pre-*Theopha-*

78. Interview with Anonymous NPR Presenter, National Public Radio, in Wash., D.C. (July 23, 1992) [hereinafter Anonymous NPR Interview] (describing defamation law as having "zip" impact on his coverage).

79. Telephone Interview with Anonymous Executive Producer, 60 Minutes, CBS in Louisville, Ky. (Oct. 13, 1992) (at the time, the Executive Producer could not remember ever killing a story for fear of defamation liability (although 60 Minutes did kill a story later)).

80. Telephone interview with Anonymous Producer, NBC Nightly News with Tom Brokaw, NBC in Louisville, Ky. (Sept. 22, 1992).

81. Telephone interview with Anonymous Vice President for News Practices, CBS in Louisville, Ky. (Sept. 22, 1992) (stating that CBS gets sued "sometimes. Mostly, they get angry letters or calls.").

82. Interview with Anonymous Investigative Reporter, WAVE 3 News, in Louisville, Ky. (Nov. 25, 1997).

83. Telephone Interview with Anonymous News Anchor, WDRB Television, in Louisville, Ky. (July 8, 1992) ("WDRB television may receive two letters from lawyers a year regarding its coverage, and is hardly ever sued. For local news programs, most of what they report on raises little or no defamation problems. Problems arise most frequently with regard to investigative stories.").

84. Telephone Interview with Anonymous Staff Counsel, CBS in Louisville, Ky. (Oct. 12, 1992).

nous and *Lange* conduct and attitudes.[85] Subsequent interviews were conducted in late 1996 and early 1997 (the year in which *Lange* was decided, and three years after *Theophanous* was decided) and final interviews were conducted in 2003 (six years after *Lange* was decided). Since most of the interviewees remained in their same positions throughout the interview period, it was possible to gauge their attitudes over time and draw better conclusions about how *Theophanous* and *Lange* affected their publication decisions.

While *Theophanous* and *Lange* have had some impact on reporting in Australia, most reporters, editors, producers, and defamation lawyers agree that the decision has not "come up to expectations." Part of the problem lies with the focus on "reasonableness." In making decisions about what to publish or withhold from publication, few are confident that judges or juries will find that the media acted reasonably (if, in fact, the media got it wrong). Defamation law in the state of New South Wales had included a broader defense of qualified privilege giving the press protection for "reasonable" publication, but the provision had been ineffective in promoting freer political speech. In addition, the media fears how the courts will apply the "conduct of government" test. It remains unclear how far beyond the electoral sphere the protection will run.[86] As a result, although the Australian media is slightly more "bullish" about what it publishes following *Lange*, that decision has not produced a major change in media psychology. By and large, the media is still focused on making sure that it has "legally admissible evidence" to support allegations, and on proving the truth of what it publishes. The media is sometimes reluctant to publish allegations that it believes to be true, but for which it lacks legally admissible evidence (either because it is unable to obtain that evidence or because its only sources have chosen to remain anonymous).

Particularly revealing is the caution of publishers of biographies on Australian public figures. A biography of Kerry Packer, an Australian press baron and wealthy businessman, was subjected to a complete review by a London barrister prior to its publication. This comported with usual practice. Even where investigative journalism

85. *See* WEAVER ET AL., *supra* note 71, at ch. 5.

86. *See* Lange v. Atkinson, [1997] 2 N.L.L.R. 22 (H.C.) (facing the same issue in the test as proposed by the New Zealand Court of Appeal).

has rooted out crime and corruption, the Australian press post-*Lange* continues to be reluctant to publish the names of protagonists.

Of course, Australia's defamation rules do not function in isolation. It is important to note that much of the impact that the defamation rules have on media conduct is caused not so much by the law itself as by Australia's rule on court costs. The fact that the losing party in a defamation action is required to pay the opposing party's costs, which includes legal fees, has a major impact on the media. In deciding what to publish, as well as in deciding what not to publish, the media is well aware of the costs rule, and in many cases that rule can have a deterrent effect on the media.

D. Reynolds'*s Impact*

Although the *Reynolds* decision has not produced the high level of protection that resulted from the U.S. Supreme Court's decision in *Sullivan*, it does seem to have influenced English defamation law. Prior to *Reynolds*, English law tracked the common law and was protective of reputation.[87] In order to publish, the media needed to be able to prove the truth of the matter asserted or to bring the article within the scope of a recognized privilege. As we have established in our investigations, the media often opted not to publish for fear of liability. After *Reynolds*, some media organizations are able, and are willing, to publish articles that would have previously been banished from the page. So, in this respect, *Reynolds* represents a more successful extension of qualified privilege than the Australian decision in *Lange*.

Despite its positive effect, the English media has concerns regarding the *Reynolds* version of qualified privilege. The media, in particular, remains uncertain about how *Reynolds* multi-factor analysis will be applied. Because there are so many factors, and because there have been so few judicial decisions interpreting and applying *Reynolds*, the media has only feint signals on how to weigh and evaluate the factors. Must the media always seek a response from the subject of an article? If not, when is it permissible not to seek a

87. *Cf.* Derbyshire County Council v. Times Newspapers Ltd., [1993] A.C. 534 (H.L.) (appeal taken from Court of Appeals) (demonstrating an earlier commitment to freedom of political speech).

reply? If the media satisfies some of the *Reynolds* factors, but not others, will it nevertheless pass muster? These concerns may be resolved over time as the courts render additional decisions, but such testing will require a willingness on the part of the press to push limits. Owners of the press will be obliged to bear a cost that may not reap rewards in the market.

Other concerns pose real issues. For example, the media is concerned that *Reynolds* instills as a factor the tone of the publication. Even when the English media views a particular situation as outrageous, and believes that the public interest requires it to declare the outrageousness, few English media outlets would be prepared to do so for fear that they will lose their *Reynolds* defense. For the same reason, the media must also be very careful about the content and size of their headlines. Nevertheless, after *Reynolds*, some English media find that it is possible to make allegations even if they need to be put in a restrained tone.[88] The English media is also concerned about the costs of complying with *Reynolds*. Although the English media spent significantly more on lawyers than the United States media prior to *Reynolds* (e.g., using night lawyers and barristers to go through newspapers looking for potentially defamatory material), the costs have significantly increased in the post-*Reynolds* era. Not only did all newspapers retain the night lawyers and barristers, they also use lawyers to "*Reynoldize*" pieces.[89]

In the final analysis, *Reynolds* is a major development in English defamation law that with the influence of free speech directives emanating from developing Human Rights norms under the European Convention, will entrench the force of free speech. While *Reynolds* may not have found the best balance between speech and reputation (assuming that such a "best" balance exists), it is a rich decision that joins *Sullivan* in providing protection to free speech in modern democracies.

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88. *See, e.g.*, Andrew T. Kenyon, Lange *and* Reynolds *Qualified Privilege: Australian and English Defamation Law and Practice*, 28 MELB. U. L. REV. 406 (2004).

89. It should be noted that *Sullivan* and its progeny have led to a similar tendency of "judicializing" journalistic practice under the "actual malice" test. For trenchant discussion, see Brian C. Murchison et al., Sullivan*'s Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7 (1994). The dynamic between editors, proprietors, and journalists is yet to be explored in a systematic way. For the role of journalists' standards, see Lynn Wickham Hartman, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637 (1987).

CONCLUSION

Over the last four decades, the common law of defamation has steadily given way in favor of free speech. The protection of reputation, the touchstone of defamation liability for centuries, has slowly but surely eroded as societies grant greater protection to free speech principles. While *Sullivan* was decided first, and undoubtedly influenced decisions in other countries, most Commonwealth members have crafted rules to comport with their legal traditions and coordinate with differing social norms. In *Lange* and *Reynolds*, respectively, Australia and England opted to extend common law qualified privilege rather than to adopt *Sullivan's* "actual malice" standard.

The question often asked is whether one standard is preferable to the other, and cuts a better balance between reputation and free speech. No single metric is available by which that question can be answered. The health of a democracy depends upon free and robust speech. Legal dictates in the law relating to defamation, privacy, contempt, and press regulation play a critical role. Beyond substantive law, our political and social institutions are fundamental. For example, a Parliament or Congress that encourages real debate about social issues is a pillar upon which democracy rests.

While differences are obvious, two factors make the comparison useful and compelling for free speech analysis. The first is the common law tradition of those jurisdictions that are the subject of this short analysis. The second is the palpable shift in the last three decades to viewing the reality of freedom in terms of legal rights. *Sullivan* was a product of the civil rights movement where the minority was empowered through judicially interpreted constitutional rights. The most notable example of this empowerment was *Brown v. Board of Education*, recently celebrating its 50th anniversary.[90] The legal tradition in England and Australia also eschewed the creation of new legal rights through codification of human rights. However, in England and Australia the rhetorical force of fundamental freedoms, as enunciated in legal rights, was to win the day. Our analysis shows that the grand rhetoric of the First Amendment

90. *See* 347 U.S. 483 (1954).

is not necessary for a legal shift to take place emphasizing the place of free speech.

A bill of rights that gives courts the ability to declare rights is so powerful that American commentators often fail to appreciate the more subtle protections under the common law and of political institutions. The gravitational pull of the U.S. legal institutions, and the need to harness the expressive power of the law, in reaction to the assaults on freedom before and during the Second World War that codified rights enforceable through the courts,[91] led to an acceptance beyond the United States of the desirability of legally enforceable rights.[92]

As our analysis demonstrates, the road to promoting free speech and reputation varies.[93] If anything our argument ought to be an antidote to those who view the balance reached under *Sullivan* as the distillation of all wisdom. It is surprising for non-Americans to witness the United States press's reaction to the Australian High Court decision in *Dow Jones & Co. v. Gutnick*.[94] In an inter-

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91. The Universal Declaration of Human Rights resulted from the atrocities of the Second World War. (G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948)). This was followed by the International Covenant on Civil and Political Rights (Dec. 16, 1966, 999 U.N.T.S. 171). Canada has enacted the Charter of Rights and Freedoms (Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.)), the New Zealand Bill of Rights Act 1990, No. 109, and the U.K. Human Rights Act, 1998, c. 42, embodying the European Convention for the Protection of Human Rights and Fundamental Freedoms, (Nov. 4, 1950, 213 U.N.T.S. 221).

92. For more on recognition of privacy as an enforceable right in tort law, see Basil Markensinis, Colm O'Cinneide, Jorg Fedtke & Myriam Hunter-Henin, *Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might be of Help)*, 52 AM. J. COMP. L. 133 (2004); Andrew Geddis, Hosking v. Runting: *A Privacy Tort for New Zealand*, 13 TORT L. REV. 5 (2005).

93. *Cf.* Partlett, *The Racial Discrimination Act 1975 and the Anti-Discrimination Act 1977: Aspects and Proposals for Change,* 2 U.N.S.W.L.J. 152 (1977). Witness the different schemes for the protection of racial, ethnic and other minorities from discrimination. In the United States, the constitution has played the dominant role. In the remainder of the common law world various legislatures came to a negotiation of the desirability of protecting minorities from discrimination.

94. (2002) 210 C.L.R. 575. For press commentary, see Editorial, *A Blow to Online Freedom*, N.Y. TIMES, Dec. 11, 2002, at 34; Editorial, *Down (Under) With the Internet*, WALL ST. J., Dec. 11, 2002, at 18; Brian Fitzgerald, Dow Jones & Co. v. Gutnick: *Negotiating "American Legal Hegemony" in the Transnational World of Cyberspace*, 27 MELB. U. L. REV. 590, 593 (2003); Richard Garnett, Dow Jones and Co. Inc. v. Gutnick — *An Adequate Reponse to Transnational Internet Defamation?*, 4 MELB. J. INT'L. L. 196, 207 (2003); Shawn A. Bone, Note, *Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defa-*

connected world the versions of the balance of free speech, reputation, and privacy will be much debated. The technology that gives the comparative law salience will itself lead to a new vision of free speech as a democratic principle.[95] It is on this changing canvas that the courts of liberal democracies will continue to paint free speech as universal, critical, and monolithic.

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mation Posed by Gutnick v. Dow Jones & Co., 62 WASH. & LEE L. REV. 279 (2005) (describing the case in context of U.S. and Australian precedents, its policy implications and suggestions for reform to adequately protect free speech). Berezovsky v. Michaels, [2000] 1 W.L.R. 1004 (The English House of Lords accepting that English courts had jurisdiction and applying *English law* for a *Barron's* article on the Russian politician and businessman Boris Berezovsky). *See also Law Commission on Defamation and the Internet: A Preliminary Investigation*, at 39 (2002), http://news.baou.com/documents/pdf/defamation2.pdf (noting the issues and suggesting that a solution would require "a greater harmonization of the substantive law of defamation").

The latest salvo in the Internet defamation war was fired by the English Court of Appeal in *Lewis v. King* [2004] EWCA (Civ) 1329. The court had before it an Internet defamation dispute regarding several postings made to boxing websites concerning the actions of Don King. In particular, one posting accused Mr. King of anti-Semitic comments, which Mr. King claimed defamed his reputation among the Jewish community in England. The alleged defamatory statements central to the English case came (1) from a piece written in the United States by the New York attorney representing the defendants and posted on the Internet, and (2) 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. The Court of Appeal ruled that Don King could sue in England for his harm suffered there. 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 case 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. 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. *Id.* at ¶ 31.

95. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) (pointing out both the potentialities and obstacles for democratic culture in the digital age).