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CONNECTICUT YANKEE SPEECH IN EUROPE’S COURT: AN ALTERNATIVE VISION OF CONSTITUTIONAL DEFAMATION LAW TO NEW YORK TIMES CO. V. SULLIVAN?

Allen Edward Shoenberger*

I. INTRODUCTION

Americans can justly feel proud of their historic role in identifying and promoting human rights, Guantanamo notwithstanding. The United States Bill of Rights is one of the oldest effective legal protections of human rights ever devised. Moreover, Americans have been instrumental in carrying such rights to the rest of the world. In the eighteenth century, Thomas Paine took American conceptions of rights to France,¹ and in the twentieth century, Eleanor Roosevelt helped spread those same rights on the world stage by assisting the United Nations General Assembly in drafting the International Bill of Human Rights.² That instrument was almost immediately followed by protection of similar rights in the European Convention on Human Rights.³ That convention currently protects the rights of over 800 million persons in Europe, covering forty-seven countries including Russia.⁴ Its provisions are administered through the European Court of

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1. Steven C. Perkins, Guide to Researching International Human Rights Law, 24 CASE W. RES. J. INT’L L. 379, 380 (1992) ("In Europe, the concepts of the American Revolution spread to France with Thomas Paine’s writings: Common Sense and The Rights of Man. The result in France was the Declaration of the Rights and Duties of the Citizen which was the statement of the desires of the people in the French Revolution.").


4. Clara A. Dietel, Note, “Not Our Problem”: Russia’s Resistance to Joining the
Free speech, such as that exemplified by the speeches and pamphlets of the revolutionary firebrand Thomas Paine, has been at the center of American civil rights. Paine’s speech jeopardized his neck, both to the wrath of King George as well as the French mob. Thomas Burke thought Paine’s pamphlet, the Rights of Man, so incendiary it should expose Paine to the criminal justice laws of England. The enactment of the Sedition Act early in our constitutional history posed a serious challenge in the form of criminal liability for speech. With the expiration of the Sedition Act in 1801, the issue of criminal liability for speech remained dormant for many years at the U.S. Supreme Court level until criminal prosecutions during the First World War.

The law of civil defamation remained a matter shaped by state court decisions until the groundbreaking 1964 decision of New York Times Co. v. Sullivan. That decision constitutionalized large aspects of civil defamation law. Sullivan held that public officials could neither be sued nor sue for defamation except in the rarest of situations. Such broad

8. THOMAS PAINE, Rights of Man, in RIGHTS OF MAN, COMMON SENSE AND OTHER POLITICAL WRITINGS, supra note 7, at 83.
9. “If governments, as Mr. Burke asserts, are not founded on the Rights of Man, and are founded on any rights at all, they consequently must be founded on the right of something that is not man. What then is that something?” Id. at 248.
12. See Stewart Jay, The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century, 34 WM. MITCHELL L. REV. 773, 803 (2008) (noting that “[f]or most of the twentieth century . . . the Supreme Court . . . largely ignored the period from the Sedition Act until World War I”). As an article by David Pritchard reveals, criminal libel prosecutions are not as rare as had been assumed in the United States. David Pritchard, Rethinking Criminal Libel: An Empirical Study, 14 COMM. L. & POL’Y 303 (2009). For example, an empirical study in Wisconsin discovered sixty-one such prosecutions over the period from 1991 to 2007. Id. at 305.
14. Id. at 279-80 (noting that “a public official [is prohibited] from recovering damages
immunity to speech removed not only the opportunity for redress in the form of civil damages,\textsuperscript{15} it also removed the opportunity to have judicial and/or jury determinations to "clear the name" of a politician.

In recent times, the results of such broad immunity are varied. It encouraged \textit{inter alia}: the "Swiftboating" of a war hero, John Kerry, by allegations of military incompetency;\textsuperscript{16} multiple allegations of improprieties by Governor Sarah Palin, a vice presidential candidate, costing her more than a half million dollars in legal fees, and possibly contributing to Ms. Palin's resignation;\textsuperscript{17} the publication of a book, \textit{Lies and the Lying Liars Who Tell Them: A Fair and Balanced Look at the Right}, by a subsequent successful candidate for the United States Senate;\textsuperscript{18} and persistent attacks on the legitimacy of President Obama's Hawaiian birth certificate.\textsuperscript{19} More generally, Obama has been attacked for:

\begin{quote}
[P]lotting to set up "death panels," government tribunals authorized to euthanize the old and sick. Obama was born in Kenya and therefore his very Presidency is unconstitutional. Obama will cut Medicare benefits to provide coverage to illegal aliens. Obama seeks to indoctrinate children in Marxist ideology and put teenagers in "reeducations camps." Obama is a Communist. Obama is a Fascist.\textsuperscript{20}
\end{quote}

The thesis of this article is that the rules of \textit{Sullivan} should be reexamined in light of the current framework of flaming political debate on both old and new media. While speech itself may sometimes be a corrective for untrue speech, defamation lawsuits also have an appropriate role, as they have for more than 160 years under the U.S. Constitution.

\begin{footnotes}
\item[15] \textit{Id.} at 277.
\end{footnotes}
In particular, the European Court of Human Rights (ECHR), the constitutional court for Europe, has developed a wealth of jurisprudence relating to the constitutionalization of defamation law, and found it unnecessary to resort to the blanket immunity carved out in *Sullivan*. Yet the ECHR has drawn lines that offer adequate, appropriate protections for political speech, protections that balance the rights of the public to hear with the rights of a politician to seek redress for flagrant, defamatory falsehoods.

Moreover, reconsideration of defamation law is particularly timely today, for defamation has reemerged on the international stage. Defamation law assumed enhanced importance when, on March 26, 2009, a coalition of Muslim countries secured the adoption of a resolution combating “defamation of religions.”21 What speech deserves protection and what speech appropriately should be the basis for either civil or criminal sanctions are today very important questions. As Thomas Paine wrote:

The circumstances of the world are continually changing, and the opinions of men change also; and as government is for the living, and not for the dead, it is the living only that has any right in it. That which may be thought right and found convenient in one age, may be thought wrong and found inconvenient in another. In such cases, Who is to decide, the living, or the dead?22

It is also important, however, to consider the potential ranges of sanctions that may be imposed for speech. Civil damages, criminal jail sentences, and injunctions preventing the publication of books or giving of speeches are all possible sanctions. Jail sentences, as will be seen


The U.N. Human Rights Council adopted the non-binding text, proposed by Pakistan on behalf of Islamic states, with a vote of 23 states in favor and 11 against, with 13 abstentions. Western governments and a broad alliance of activist groups have voiced dismay about the religious defamation text, which adds to recent efforts to broaden the concept of human rights to protect communities of believers rather than individuals.

*Id.*


22. PAINE, *supra* note 8, at 95.
below, are frequently meted out in Europe. Large damage awards are possible both in Europe and in the United States. Injunctive relief has been ordered in many European cases, but rare in the United States. This Article will address the different remedial modalities herein.

Moreover, this Article will discuss the different approach adopted by the ECHR towards civil servants as distinct from elected politicians. This approach may facilitate greater opportunities for "mere" civil servants to protect their reputation through civil damage recovery in contrast to far more limited recovery prospects for politicians who arguably have opened themselves up to more robust criticism.

In addition, the article will review the ECHR jurisprudence that allows more latitude for recovery for statements of opinion, at least in situations in which the opinion has no firm grounding in facts, and suggests that American courts might similarly permit scrutiny and remedies for "unsupported opinion."

Lastly, this Article considers the danger of concepts such as "defamation" of religion.

II. ERECTION OF THE CONSTITUTIONAL WALL AGAINST DEFAMATION SUITS BY PUBLIC OFFICIALS: AN INTRODUCTORY COMPARISON WITH ECHR JURISPRUDENCE

In New York Times Co. v. Sullivan, the United States Supreme Court, for the first time, constitutionalized defamation law for public officials or public figures. The Sullivan decision required proof of "actual malice" before allowing a public official to recover damages for a defamatory falsehood relating to his official conduct. The Court

23. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In the 19th century, the Court, in one of the few defamation cases it heard that century, considered the common law of defamation. White v. Nicholls, 44 U.S. 266 (1845). The allegedly defamatory publications: [D]enounced General Harrison as "the nominee of the bank whig federalist, abolitionist and anti-masons," "an abolitionist of fraud and concealment," as being guilty of pursuing a course "grossly insulting to common sense, honesty, and decency, by shrouding himself in darkness," "of courting dangerous fanatics, and countenancing them (abolitionists) in their mad warfare upon our peace, our property, and our lives."

24. Sullivan, 376 U.S. at 279-80. The particulars of the case involve the removal from office of Robert White, the collector of customs for the port of the District of Columbia. See id. at 266. The nineteenth century was obviously familiar with stinging political invective, as the White case illustrates. The decision of the Supreme Court, however, discussed no constitutional issue, but solely sounded in the common law of defamation. See id. at 284-92.
defined actual malice as knowledge that the publication was false or published with reckless disregard for whether it was false or not.\textsuperscript{25} Subsequent decisions extended the holding of \textit{Sullivan} to apply to "public figures."\textsuperscript{26} The practical impact of \textit{Sullivan} is that it is virtually impossible for a public official to bring a successful defamation action, regardless of the outrageous nature of whatever has been said. In recent years, the U.S. Supreme Court has heard few defamation cases.\textsuperscript{27}

By contrast, defamation cases routinely reach the ECHR, the highest volume human rights court in the world.\textsuperscript{28} That court's active defamation jurisprudence is the ultimate arbiter of the limits of free speech for the 800 million persons who live within the forty-seven member countries of the Council of Europe.\textsuperscript{29} The decisions of that court have also "constitutionalized" large parts of defamation law throughout most of the continent of Europe. The ECHR applies the European Convention on Human Rights to the various defamation laws of the member states of the Council of Europe.\textsuperscript{30} That jurisprudence, however, has adopted no doctrine similar to the "actual malice" standard of \textit{Sullivan}, yet, as will be seen by the cases considered below, the court adequately protects the interests of both the public and public officials.

It is worth comparing ECHR defamation jurisprudence with that of

\begin{itemize}
  \item \textsuperscript{25} \textit{Id.}
  \item \textsuperscript{26} Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43 (1974). Gertz was an attorney representing the family of a victim of a police shooting retained to bring a civil action against the police officer. \textit{Id.} at 323.
  \item \textsuperscript{27} The last defamation-related decision by the Supreme Court was the brief decision of \textit{Troy} v. \textit{Cochran}, 544 U.S. 734 (2005). In \textit{Troy}, however, the Court considered it inappropriate for it to explore petitioners' basic claims about the issuance of a permanent injunction in a defamation case or the lack of appropriate tailoring for the relief because of the death of the petitioner Johnnie Cochran. \textit{Id.} at 737-38. The next previous case implicating a defamation action was \textit{Clinton} v. \textit{Jones}, 520 U.S. 681 (1997), where the Court allowed a civil action to go forward against President Clinton. The most recent cases of substance regarding defamation date from the early 1990s. \textit{See} Masson v. New Yorker Magazine, Inc. 501 U.S. 496 (1991); Siegert v. Gilley, 500 U.S. 226 (1991); Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).
  \item \textsuperscript{28} Allen E. Shoenberger, Messages from Strasbourg: Lessons for American Courts from the Highest Volume Human Rights Court in the World—The European Court of Human Rights, 27 WHITTIER L. REV. 357, 358 (2005).
  \item \textsuperscript{29} Tomuschat, \textit{supra} note 5, at 1 (noting that "the jurisdiction of the European Court of Human Rights . . . extends to 47 states with more than 800 million inhabitants"). The member countries of the European Union are all included, but additional member countries include both Turkey and Russia. Dietel, \textit{supra} note 4, at 171 n.56.
\end{itemize}
the U.S. Supreme Court because democracy is an explicit condition for countries seeking membership in the Council of Europe. Thus, one might expect that a European "take" on defamation laws might better inform U.S. citizens, lawyers, and courts as to the nature of appropriate defamation law in democracies.

There are both similarities and differences that emerge from such comparisons, including, in particular, the ECHR: 1) permits statements of opinion without adequate factual basis to be actionable as not inconsistent with free speech; 2) draws distinctions between elected and nonelected public officials; 3) routinely deals with criminal defamation laws, laws which are assumed to be completely unconstitutional in the United States; and 4) itself determines the facts of a free speech case, instead of deferring to lower court fact-finding.


The New York Times published "a full-page [editorial] advertisement," entitled "Heed Their Rising Voices" on March 29, 1960. The text described "wave[s] of terror" faced by "Southern Negro students . . . engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." The advertisement "concluded with an appeal for funds for three purposes: support of the student movement, 'the struggle for the right-to-vote,' and the legal defense of Dr. Martin Luther King Jr., leader of the movement, against a perjury indictment then pending in Montgomery [Alabama]." The advertisement's text, along with a line reading "We in the south who are

31. See COUNCIL OF EUROPE, CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 2 (2003) (stating that members of the Council of Europe must "[r]eaffirm[ ] their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained . . . by an effective political democracy"). One might admit that the democratic elements within the various nation states of the Council of Europe may not always be as fully developed, as one would wish, particularly when one considers that Russia is now a member.

32. See infra Part III.B.

33. See infra Part IV.F.

34. See infra Part III.D.

35. In a way analogous to the rarely applicable "Constitutional Fact Doctrine" as articulated by the United States Supreme Court. See infra note 52 and accompanying text.


37. Id.

38. Id. at 257.
struggling daily for dignity and freedom warmly endorse this appeal,” appeared over the names of twenty individuals. 39

One of the elected commissioners of the City of Montgomery brought a libel suit against the New York Times alleging that there were various inaccuracies in the advertisement and that he had been injured, even though he was not named in the advertisement. 40 A jury awarded him the full amount claimed, $500,000. 41 Although it was uncontested that the advertisement contained some inaccuracies (for example, the students had sung the National Anthem not My Country Tis of Thee, and Dr. King had not been arrested seven times, but only four times), the commissioner made no effort at trial to prove any “actual pecuniary loss as a result of the alleged libel.” 42 Neither the New York Times nor additional signatories to the advertisement made any effort to confirm the accuracy of the advertisement by either checking with recent published Times articles or other means. 43

The trial judge instructed the jury that “the statements in the advertisement were ‘libelous per se’ and were not privileged, so that [defendants] might be held liable if . . . the statements were made ‘of and concerning’ [the plaintiff].” 44 Furthermore, the trial judge instructed “that, because the statements were libelous per se, ‘the law . . . implies legal injury from the bare fact of publication itself’” and general damages are presumed and need not be proved. 45 In addition, the jury was instructed that it could award punitive damages, which “requires proof of actual malice under Alabama law,” but that a showing of “mere negligence or carelessness is not evidence of actual malice.” 46 The judge refused to charge that actual intent to harm or gross negligence and recklessness must be demonstrated, and declined to require the jury to distinguish between compensatory damages and punitive damages. 47

39. Id.
40. Sullivan, 376 U.S. at 256-58.
41. Id. at 256.
42. Id. at 257-60. “Approximately 394 copies of the edition of the [New York] Times containing the advertisement were distributed in Alabama. Of these, about 35 copies were distributed in Montgomery County.” Id. at 260 n.3.
43. Sullivan, 376 U.S. at 260-61.
44. Id. at 262.
45. Id. (omission in original).
46. Id.
47. Sullivan, 376 U.S. at 261. The Court noted: Alabama law denies a public official recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to
The Supreme Court determined that Alabama law was "constitutionally deficient for failure to provide the [adequate] safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendment in a libel action brought by a public official against critics of his official conduct."48 The Court went on to "hold that under the proper safeguards the evidence... in this case [was] constitutionally insufficient to support the judgment for respondent."49

The Court announced:

[A] federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

This rule is probably the most remembered component of the Sullivan decision, for it is indeed the core of the opinion.

The Court went on, however, to make two other significant determinations. First, the court held that a presumption of general damages was "inconsistent with the federal rule."51 Second, the court reviewed the evidence itself, an unusual exercise for an American appellate court,52 and determined that the proof presented lacked the convincing clarity that the constitution demands for a finding of actual malice.53 The Article will refer to this holding as the Constitutional Fact

comply... Respondent [the commissioner] served such a demand upon each of the petitioners... The Times did not publish a retraction... but wrote respondent a letter stating, among other things, that "we... are somewhat puzzled as to how you think the statements in any way reflect on you."

Id. (fourth omission in original). The commissioner filed suit days later without responding to the Time's inquiry. Id. Time published a retraction of the advertisement on the demand of the Governor of Alabama "who asserted that the publication charged him with 'grave misconduct and... improper actions and omissions as Governor.'" ld. (omission in original).

49. Id. at 264-65.
50. Id. at 279-80.
51. Id. at 283-84. The failure to require the jury to separate the award between general damages and punitive damages (for punitive damages Alabama law required proof of actual malice), meant that it was impossible to know whether the award was wholly an award of one or the other. Sullivan, 376 U.S. at 284. Because of this uncertainty, the Court reversed and remanded the case. Id.
52. Such an exercise by the Supreme Court has been described as the Constitutional Fact Doctrine. See PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW, 973-78 (10th ed. 2003).
53. Sullivan, 376 U.S. at 285-86.
determination. 54

In rejecting the possibility of a finding of actual malice, the court made two independent points. First, nowhere in the evidence was the good faith of the New York Times impeached. 55 The Times' Secretary had testified that "apart from the padlocking allegation . . . the advertisement was 'substantially correct.'"56 At most, the court determined that there was "negligence in failing to discover the misstatements, and this [was] constitutionally insufficient to show the recklessness that is required for a finding of actual malice." 57 Second, the court determined that, at most, the advertisement was a libel on the government, not a personal criticism of the commissioner (who was never named in the advertisement). 58

The second holding of Sullivan has not attracted much attention over the intervening years, which is not surprising, considering the radical change wrought by the decision to American libel law by the requirement of narrowly defined "actual malice." Nor did the two separate opinions joined by three Justices attract much attention—although both opinions took the position that no defamation actions should be constitutionally permitted when official conduct of public officials is criticized. 59

Other issues raised, but not decided in Sullivan, also deserve some attention. For example, the court explicitly refused to decide "how far down into the lower ranks of government employees the 'public official’ designation would extend.” 60 Sullivan dealt with an elected city commissioner, clearly a public official. 61 The Court also declined to

54. The Supreme Court has stated:

[In cases raising First Amendment issues . . . an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. . . . The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.


55. Sullivan, 376 U.S. at 286.
56. Id.
57. Id. at 287-88.
58. Id. at 288-92.
59. Justice Black (with Justice Douglas) wrote one opinion, and Justice Goldberg (with Justice Douglas) authored the other opinion concurring with the result. Sullivan, 376 U.S at 293-305.
60. Id. at 284 n.23.
61. Id. at 256.
explore the boundaries of "official conduct." 62

B. The European Court of Human Rights

The ECHR consists of judges from each of the forty-seven member states of the Council of Europe (virtually every European country is a member, including in particular Turkey and Russia). 63 The judges are appointed to serve in their individual capacities, and not as representatives of the nation states. 64 The court ordinarily sits in one of five different chambers consisting of seven judges. 65 In more important cases, or in certain cases involving an appeal from an ordinary chamber, the court sits in a Grand Chamber of seventeen judges. 66 A Committee of Ministers of the Council of Europe administers the court's decisions. 67 Awards of money damages and costs are routinely complied with in a timely fashion. 68 Decisions that require significant changes to the law of one of the contracting states often take longer, sometimes years to accomplish. 69 In recent years, the chambers of the court have decided more than a thousand cases per year, more than ten

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62. Id. at 284 n.23.
64. EUROPEAN COURT OF HUMAN RIGHTS, supra note 63, at 14.
65. Id. at 14-15.
66. Id. at 15.
67. Id. at 16.
68. Thirty-six percent of monetary damage awards were paid within the deadlines expiring in 2008 and another five-percent were paid after the deadline. COUNCIL OF EUROPE COMMITTEE OF MINISTERS, SUPERVISION OF THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS: ANNUAL REPORT 57 (2008), available at http://www.coe.int/t/dghl/monitoring/execution/default_en.asp (follow “Annual Report 2008” hyperlink) [hereinafter ANNUAL REPORT]. Seven of the forty-seven member countries had more than fifty outstanding cases accounting for seventy-six percent of the unpaid judgments. Id. Turkey, Romania, Ukraine, and Italy had the largest number of outstanding unpaid cases. Id.
69. For a general discussion of the execution of the court's judgments, see Council of Europe, Frequently Asked Questions, http://www.coe.int/t/dghl/monitoring/execution/Presentation/FAQ_en.asp (last visited Feb. 27, 2010). For a general discussion of the execution of judgments, including just satisfaction and other individual measures such as measures to prevent the reoccurrence of similar violations of the convention and possible sanctions for non-compliance, see CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 437-54 (3d ed. 2002). For an incredibly detailed report of the status of judgments, see ANNUAL REPORT, supra note 68.
times the number of cases the United States Supreme Court decides on the merits each year.  


III. DEFAMATION IN THE EUROPEAN COURT OF HUMAN RIGHTS  

A. The ECHR Applies a Defamation Shield to Cases Brought by Private Corporations: Reports of Rumor Protected  

In a rather mundane political graft case, a case in which various public officials (mostly communists) were assigned personal luxury cars, paid for, indeed, over-paid for, by public money, the ECHR held that defamation actions against the investigative reporter and newspaper were improper. Moreover, the ECHR applied free speech protections in an action brought by a private corporation against a newspaper and a reporter. Neither the government nor any governmental official brought the defamation action. (It is particularly interesting to consider that in the United States such a defamation action would not necessarily be covered by the Sullivan rule.) The case, however, well illustrates the typical mode of analysis utilized by the ECHR.  

In Timpul Info-Magazin v. Moldova, a newspaper and a journalist (Ms. Alina Anghel) lodged an application against the Moldovan Government related to a defamation action brought by two private...
corporations in which the Moldovan court ordered the assets of the newspaper frozen.\textsuperscript{77} The newspaper published an article titled “Luxury in the Land of Poverty,” examining the relationship between State authorities and a private investment fund and its management company.\textsuperscript{78} The focus was on the purchase of luxury cars without making details public.\textsuperscript{79} Only after the publication did the government acknowledge that the deal had taken place.\textsuperscript{80} Of the forty-two cars purchased, thirty-two were distributed to the governors of regions of Moldova, thirty-one of whom were communists.\textsuperscript{81} The article questioned whether the purchases were a means for increasing the ability to spread communist propaganda for forthcoming elections and illustrative of corruption at the highest state levels.\textsuperscript{82}

On the date a defamation action was brought against a newspaper and a journalist by the two private corporations (including a request for an injunction) the court ordered that the newspaper’s assets were to be frozen.\textsuperscript{83} The newspaper’s equipment was sequestered and bank accounts actually frozen within two weeks.\textsuperscript{84} The journalist received threatening phone calls.\textsuperscript{85} She was later attacked outside of her house by unidentified persons and suffered a blow to her head and arm with a metal bar.\textsuperscript{86} Both the shuttered newspaper and other media linked the attack to the article at dispute as well as the journalist’s investigation of a luxury car offered as a gift by the President of one of the corporations to the Minister of Internal Affairs.\textsuperscript{87}

The trial court rejected a defense that the article dealt with a matter of important public interest: public money had been utilized, but not through the public agency for making such purchases, nor was the expenditure planned for in the state budget for 2003.\textsuperscript{88} The court also rejected the argument that the statements were value judgments not susceptible of proof or opinions about a well-known politician and

\textsuperscript{77} Id. ¶ 1, 9.
\textsuperscript{78} Id. ¶ 7.
\textsuperscript{79} Id.
\textsuperscript{80} \textit{Timpul Info-Magazin}, App. No. 42864/05, ¶ 7.
\textsuperscript{81} Id. ¶ 8.
\textsuperscript{82} Id.
\textsuperscript{83} Id. ¶ 9.
\textsuperscript{84} \textit{Timpul Info-Magazin}, App. No. 42864/05 ¶ 10.
\textsuperscript{85} Id. ¶ 11.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} \textit{Timpul Info-Magazin}, App. No. 42864/05 ¶¶ 12, 14.
simply reported clearly identified rumors. The court also rejected an argument that the private corporations had become "public persons" by entering into the transactions with the government.

The court cited one fragment of a paragraph from the article as a factual representation that did not correspond to reality:

[W]hen the communists came to power, Vladimir Voronin wanted to cut the Gordian knot of the investment fund [one of the plaintiff corporations]... founded on the basis of investment bonds, that is he was picking at it. They say that, in order for this not to happen, someone paid someone else 500,000 dollars.

It is clear that the Moldovan court interpreted this statement as an allegation that a bribe had been paid. The court then awarded the plaintiffs 95,725 Euro, a judgment that was upheld in the Chisinau Court of Appeal, but reduced in amount by the Supreme Court of Justice to 8430 Euro. The Supreme Court found the article alleged a bribe had been paid, and thus a criminal offense had been committed. It also determined, however, that "a restriction on freedom of expression should not be of such a degree as to put in jeopardy the economic survival of the person sanctioned." Each appellate court rejected the newspaper's defense that the article had been based upon rumors, which the paper had called ill-informed, and had explicitly stated the newspaper did not know whether the rumors were true.

The European Court of Human Rights considered the *Timpul Info-Magazin* case in the light of Article 10 of the European Convention on Human Rights which provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas

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89. Id. ¶ 12.
90. Id.
91. Id. ¶ 13 (internal quotations omitted).
92. *Timpul Info-Magazin*, App. No. 42864/05 ¶ 14. The trial court also ordered that an apology be published by the newspaper. *Id.* It is unclear when the newspaper's equipment was released from sequestration.
93. *Id.* ¶ 17. The Court of Appeals refused to lift the restriction on the newspaper's property since that request had been rejected and no appeal had been taken. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* ¶ 16.
without interference by public authority and regardless of frontiers. This
article shall not prevent States from requiring the licensing of broadcasting,
television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and
responsible, may be subject to such formalities, conditions, restrictions or
penalties as are prescribed by law and are necessary in a democratic society, in
ных interests of national security, territorial integrity or public safety, for the
prevention of disorder or crime, for the protection of health or morals, for the
prevention of the reputation or rights of others, for preventing the disclosure of
information received in confidence, or for maintaining the authority and
impartiality of the judiciary.99

The court noted that it was conceded that the award of damages
constituted an “interference by [a] public authority with the applicant
newspaper’s right to freedom of expression under the first paragraph of
Article 10,” and that such interference constituted a “violation of Article
10 unless it is prescribed by law, has an aim or aims that are legitimate
under paragraph 2 of the Article [10] and is necessary in a democratic
society to achieve such aim or aims.”100 The court determined that the
interference was prescribed by law and served a legitimate aim of
protecting the corporation’s reputation.101

The court then considered whether the action was “necessary in a
democratic society” and held it was not.102 First, the court reiterated its
position that “a possible failure of a public figure to observe laws and
regulations aimed at protecting serious public interests, even in the
private sphere, may . . . constitute a matter of legitimate public
interest.”103 The court stated that particularly strong justifications were
required for any measure affecting the press and limiting the right to
information that the public has a right to obtain when political matters or

99. COUNCIL OF EUROPE, supra, note 31, at 7; see also Timpul Info-Magazin, App. No.
42864/05, ¶ 21.
100. Timpul Info-Magazin, App. No. 42864/05, ¶ 26 (alteration in original) (internal
quotations omitted).
101. Id. ¶¶ 27-28.
102. Id. ¶¶ 29-40.
103. Id. ¶ 30 (internal quotations omitted). The court cited two earlier decisions (Fressoz
42864/05 ¶ 30. In both cases, criminal cases had been brought against publishers of articles
about private persons: in the latter case the chairman of an automobile company undergoing
labor unrest, in the former case an executive vice-president of one of the country’s largest
industrial companies and a famous singer. Fressoz, 1999-I Eur. Ct. H.R. at 22, ¶ 50; Haukom,
other matters of public interest are involved.\textsuperscript{104}

The court itself considered the article's substance and rejected the allegation by the Government that the article intended to attack the corporation's reputation and affect fair competition rules.\textsuperscript{105} Instead, the ECHR construed the article as criticizing the government for a non-transparent, wasteful manner of spending public money, a matter of general public concern, rather than disparaging the company.\textsuperscript{106} The corporation had not charged that any other contents in the article had been untrue, and, in particular, did not claim there had been competitive bidding or deny that the cars were overpriced.\textsuperscript{107}

The ECHR determined that "the Government [had] relied on a part of a sentence [in the article] taken out of context in order to show that the interference with the applicant newspaper's rights had been necessary."\textsuperscript{108} When considered in context, however, the article warned the reader about the unreliable character of the rumor on which it was reporting.\textsuperscript{109} In its role as a public watchdog, media reports on stories or rumors are "to be protected where they are not completely without foundation."\textsuperscript{110} The newspaper had attempted to get information about the transaction from both the Government and the private company but had been unable to do so.\textsuperscript{111} The ECHR opined that other uncontested facts "could reasonably have prompted the journalist to report on anything that was available, including unconfirmed rumours."\textsuperscript{112} Moreover, it noted that "the article was written in the context of a forthcoming election and that [the article] both discussed the possible political reason for the purchase of the cars and expressly urged the voters to punish, during the election, those in power responsible for State-level corruption."\textsuperscript{113} The ECHR determined that the article was political speech critical of the government, expression of which implicates wider permissible criticism limits.\textsuperscript{114} Considering the seriousness of the fine, the newspaper's good faith reporting of an issue

\textsuperscript{104} \textit{Timpul Info-Magazin}, App. No. 42864/05, ¶ 31.
\textsuperscript{105} \textit{Id.} ¶ 32.
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Timpul Info-Magazin}, App. No. 42864/05, ¶ 35.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.} ¶ 36.
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Timpul Info-Magazin}, App. No. 42864/05, ¶ 36.
\textsuperscript{113} \textit{Id.} ¶ 38.
\textsuperscript{114} \textit{Id.} (citing Castells v. Spain, 236 Eur. Ct. H.R. (ser. A) (1992)).
of genuine public interest, the factual background and lack of details about the transaction between the private corporation and the government, and the failure of the domestic courts to consider any of these elements in their opinions, the ECHR determined that the interference was not necessary in a democratic society and thus a violation of Article 10.115

The court then awarded the newspaper damages of 12,000 Euro, and costs and expenses of 1800 Euro.116 This was sufficient to remove the sting of the fine but rather modest, considering the seizure of the newspaper’s equipment.

Jurisprudence of the ECHR thus establishes that defamation actions by private entities implicate free speech concerns, at least if matters involving the government are implicated. In that context, the court announced its willingness to tolerate reports based on rumor, at least after attempts to elicit factual responses had been frustrated. What is also interesting is that the ECHR itself evaluated, in fair detail, the alleged defamatory statement, its context, and, after that evaluation, found the speech protected. In making that determination, while the court did mention that the State’s courts had not referenced certain matters in their opinions, the fact that the ECHR exercised its own independent judgment is obvious.

While the court did find good faith on behalf of the newspaper, the court did not apply any test that smacked of the actual malice test of Sullivan.117 Instead, the court exemplified the second holding of Sullivan, the application of a “constitutional fact” test. The ECHR, just as the U.S. Supreme Court in Sullivan, itself examined the underlying facts of the publication, and turned its decision upon the basis of its own appreciation of those facts. There is little, if any, sense of deference to the decisions of the nation state’s courts.118 Even disavowal of the truth of a statement does not exculpate a republisher.119 Also worth noting is

115. Id. ¶¶ 40-41.
116. Timpul Info-Magazin, App. No. 42864/05, ¶¶ 46, 52. The Supreme Court of Justice had reduced the original award to 8430 Euro. Id. ¶19.
117. Knowledge that a statement was untrue or reckless disregard of whether it was true or not. See New York Times, Co. v. Sullivan, 376 U.S. 254 (1964).
118. Implicit in that consideration is rejection of the American rule that a republication of a defamatory statement makes the republisher just as culpable as the originator of the statement. See E. GABRIEL PERLE ET AL., PERLE & WILLIAMS ON PUBLISHING LAW § 5.10 n.201 (3d ed. Supp. 2002) (citing Cepeda v. Cowles Magazines & Broad., Inc., 328 F.2d 869, 871 (9th Cir. 1964); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976)).
119. Id. “However, because of the decisions in New York Times and Gertz, which require fault as a prerequisite for liability, the mere fact that one has republished a defamation
the recognition by the ECHR that the article in question implicated political speech, speech related to an election and the criticism of government. Such speech is considered at the core of First Amendment protection. It was the nature of the speech, rather than the nature of the parties, that drove the ECHR’s consideration.

Such factual analysis of defamation cases by the ECHR is typical, not atypical, of its approach. On occasion, to be sure, references occur to a “margin of appreciation”—code words for a degree of deference to the laws and courts of the nation states—but such references occur relatively infrequently. There was such a reference in Timpul Info-Magazin: “[t]he State therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation.”120 Such deference did not stop the court from evaluating the facts of the case itself, nor did the court distinctly apply the concept of margin of appreciation to the judicial determinations of the Timpul Info-Magazin courts.

Since defamation cases ordinarily involve a published or broadcasted message, a reviewing court is in a unique position to evaluate the facts of such cases. Only rarely is credibility of a live witness very significant in defamation cases121—the typical question is whether the complained of publication is defamatory in its content.122

cannot be the only consideration. The re-publisher’s degree of fault must also be examined.” Id. § 5.10; see Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (“However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.”) (footnote omitted); RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977). Under the common law, an expression of opinion that was sufficiently derogatory was actionable. Id. at § 501 cmt. c. This common law rule appears to have been abrogated as unconstitutional. See id. Only if the expression of opinion implies the existence of undisclosed facts, which are themselves defamatory, would the opinion statement be actionable. See id.

120. Timpul Info-Magazin, App. No. 42864/05, ¶ 33.

121. On occasion additional evidence is necessary to demonstrate that a statement is defamatory. In cases in which a statement is not defamatory on its face, but takes on defamatory meaning because of extrinsic facts, the plaintiff is required to plead extrinsic facts, which are known as “inducement.” Conroy v. Kilzer, 789 F. Supp. 1457, 1461 n.2 (D. Minn. 1992).

122. But see Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 519 (1984) (Rehnquist, J., dissenting) (“[I]t seems to me that [an actual malice determination] just as often . . . is made . . . on the basis of an evaluation of the credibility of the testimony of the author of the defamatory statement.”).
B. Unsupported Opinions May be Actionable in Defamation

The ECHR has distinguished between statements of fact and value judgments, recognizing that the truth of value judgments is not susceptible of proof, but it did not stop there.\(^{123}\) The ECHR has stated “[t]he requirement to prove the truth of a value judgment is impossible to fulfill and infringes freedom of opinion itself,” but it went on to state, “[h]owever, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive.”\(^{124}\)

The ECHR asserts:

In exercising its supervisory jurisdiction, the Court must “look at the interference [by the government] in the light of the case as a whole, including the content of the remarks held against the applicant and the context . . . . In particular, it must determine whether the interference in issue was “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient.”\(^{125}\)

In doing so, the ECHR must “satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in [Article] 10 and . . . that they based themselves on an acceptable assessment of the relevant facts.”\(^{126}\) In asserting its duty to explore the facts of the case as assessed by the national authorities, the ECHR represents that it will routinely apply its own constitutional fact analysis in cases dealing with speech and press issues.\(^{127}\)

In Busuioc v. Moldova,\(^{128}\) the ECHR considered, on a statement-by-statement basis, whether expressions of opinion were each adequately justified by the journalist who had been found responsible for civil defamation\(^{129}\) and ordered to pay modest damages of 224 Euro.\(^{130}\) For example, in two instances, a reference to a “shady deal”\(^{131}\) was found

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124. Id.
125. Id. ¶ 62.
126. Id.
129. Id. at 259-62, ¶¶ 14-28, 36.
130. Id. at 273, ¶ 100.
131. Id. at 260-61, ¶ 25.
adequately justified by the fact that the transaction referenced was suspected of being illegal, and a Parliamentary Commission made a report to the same effect.\textsuperscript{132} In another instance, the court determined that “expressions such as ‘colourful figure,’ ‘the head of the Airport’s Staff Unit would puzzle even an employee of the staff unit of any penitentiary’ and ‘adventures of this unrestrained civil servant’” which had been held defamatory by the national court, were opinion or value judgments with adequate factual bases for the opinions expressed.\textsuperscript{133} Since each of these expressions were employed in regard to a debate on an issue of public interest, including allegations that a Head of Staff had engaged in sexual harassment, drunkenness, and abuse of an official car (of which the court did not make any assessment),\textsuperscript{134} these expressions were also protected.\textsuperscript{135}

Despite finding that certain of the statements alleged were factually incorrect, and thus properly the subject of an action in defamation, the ECHR awarded the journalist 4000 Euro in non-pecuniary damages for the stress and frustration as a result of the breach of the applicant’s right to freedom of expression.\textsuperscript{136}

Had the U.S. Supreme Court in \textit{Sullivan} found that the minor inaccuracies of the original New York Times advertisement were employed in regard to a debate on an issue of public interest, (segregation in the South) the expression itself might have been similarly ruled protected and the “actual malice rule” consequently unnecessary. One might wonder whether an even more explicit factual evaluation of the original advertisement might not have led the Supreme Court to have determined that it was insufficiently defamatory to have been actionable in the first place!

\textbf{C. Requirement of Free Legal Assistance for Defamation Defendants to Ensure Free Speech Rights of Anti-McDonald’s Food Activists: Longest Trial in British History}\textit{ }

While Americans are familiar with court-provided legal assistance for indigent criminal defendants in the criminal context, courts have

\textsuperscript{132} Busuioc, 42 Eur. H.R. Rep. at 270-71, ¶ 84.
\textsuperscript{133} \textit{Id.} at 269, ¶¶ 73-74.
\textsuperscript{134} \textit{Id.} at 259, ¶ 17.
\textsuperscript{135} \textit{Id.} at 269, ¶ 75.
\textsuperscript{136} Busuioc, 42 Eur. H.R. Rep. at 273, ¶104. The court also awarded costs and expenses of 1500 Euro. \textit{Id.} at 274, ¶ 108.
seldom expanded the constitutional mandate of free legal assistance to civil law actions.\textsuperscript{137}

In marked contrast, the ECHR read the protection of Article 10 to include a requirement that the United Kingdom (U.K.) government provide legal assistance for two defamation defendants, a part-time bar worker and an unwaged single parent, in \textit{Steel v. United Kingdom.}\textsuperscript{138} The case involved a Greenpeace campaign against McDonald’s in the mid-1980s.\textsuperscript{139} The campaign employed a six-page leaflet entitled “What’s wrong with McDonald’s?”\textsuperscript{140} The ECHR described the leaflet as follows:

The first page of the leaflet showed a grotesque cartoon image of a man, wearing a Stetson and with dollar signs in his eyes, hiding behind a “Ronald McDonald” clown mask. Running along the top of pages 2 to 5 was a header comprised of the McDonald’s “golden arches” symbol, with the words “McDollars, McGreedy, McCancer, McMurder, McDisease…” and so forth superimposed on it.\textsuperscript{141}

The text drew connections between McDonald’s, starvation in the “Third World,” and the destruction of rain forests to produce pet food.\textsuperscript{142} Appellations such as “Murdering A Big Mac” and “What’s Your Poison” were accompanied by paragraphs describing the slaughtering of fully conscious animals, and the poisoning of people with chicken and minced meat contaminated with gut contents, feces, and urine, leading to bacterial infections responsible for seventy percent of all food-poisoning incidents.\textsuperscript{143} McDonald’s was accused of being anti-union, and sweating and exploiting its cheap labor.\textsuperscript{144}

In 1990, McDonald’s brought a libel suit against the two applicants

\begin{footnotesize}
\begin{enumerate}
\item[138.] 2005-II Eur. Ct. H.R. 1. Both defendants were, at least some of the time, unwaged or unemployed, and dependent on government income support. \textit{Id.} at 8, ¶ 9.
\item[139.] \textit{Id.} at 8, ¶ 10.
\item[140.] \textit{Id.}
\item[142.] \textit{Id.} at 9, ¶ 12.
\item[143.] \textit{Id.} at 12, ¶ 12.
\item[144.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
and three other persons. The ensuing litigation entailed 313 court
days and “was the longest trial (either civil or criminal) in English legal
history.” At the end of the trial, the trial judge “deliberated for six
months before delivering his substantive 762-page judgment on June 19,
1997.”

The court made findings, including:

[I]t was and is untrue to say that either Plaintiff has been to blame for
starvation in the Third World. It was and is untrue to say that they have
bought vast tracts of land or any farming land in the Third World, or that they
have caused the eviction of small farmers or anyone else from their land.

It was and is untrue to say that either Plaintiff has been guilty of destruction
of rainforest thereby causing wanton damage to the environment.

It was and is untrue to say that either of the Plaintiffs have used lethal
poisons to destroy vast areas or any areas of Central American rainforest . . .

It was and is untrue to say that either Plaintiff has lied when it has claimed
to have used recycled paper.

The charge that McDonald’s food is very unhealthy because it is high in
fat, sugar, animal products and salt . . . is untrue.

. . .

It was and is untrue that Plaintiffs sell meat products which, as they must
know, expose their customers to a serious risk of food poisoning.

. . .

It was and is untrue that the Plaintiffs have a policy of preventing
unionisation [sic] by getting rid of pro-union workers.

The court also found:

[V]arious of the . . . Plaintiffs’ advertisements, promotions and booklets
have pretended to a positive nutritional benefit which McDonald’s food, high
in fat and saturated fat and animal products and sodium, and at one time low in
fibre [sic], did not match.

It was true to say that the Plaintiffs exploit children by using them as more
susceptible subjects of advertising, to pressurise [sic] their parents into going
into McDonalds.

Although some of the particular allegations made about the rearing and
slaughter of animals are not true, it was true to say, overall, that the Plaintiffs
are culpably responsible for cruel practices in the rearing and slaughter of
some of the animals which are used to produce their food.

. . .

. . . It was true to say that the . . . [U.K. McDonald’s] pays its workers low

146. Id. at 14-15, ¶ 19.
147. Id. at 16, ¶ 26.
148. Id. at 17-18 ¶ 27 (internal quotations omitted).
wages and thereby helps to depress wages for workers in the catering trade in Britain, but it has not been proved that . . . [U.S. McDonald’s] pays its workers low wages. 149

The court awarded U.S. McDonalds 30,000 British pounds and U.K. McDonalds a further 30,000 pounds. 150 The award was later reduced to a total of 36,000 pounds for one of the defendants and 40,000 pounds for another. 151

The Court of Appeals rejected the defendant’s various contentions in its 301-page judgment delivered on March 31, 1999. 152 In particular, the court found that commercial corporations, even strong corporations, have a clear right to sue for defamation. 153 Just as with an individual plaintiff, a corporation need not make a showing “that it had suffered actual damage, since damage to a trading reputation might be as difficult to prove as damage to the reputation of an individual . . . .” 154 The court also reaffirmed the English rule that a publication shown to be defamatory was presumed to be false until proven otherwise and it was the defendants’ burden to prove the truth of statements presented as assertions of fact. 155 The court determined that it was not “an abuse of process in itself for plaintiffs with great resources to bring a complicated case against unrepresented defendants of slender means. Large corporations are entitled to bring court proceedings to assert or defend their legal rights just as individuals have the right to bring actions and defend them.” 156

The Court of Appeals refused a leave to appeal to the House of Lords 157 and an application was filed before the ECHR on September

149. Steel, 2005-II Eur. Ct. H.R. at 17-18, ¶ 27 (fourth and fifth alteration in original) (internal quotations omitted).
150. Id. at 18, ¶ 29. No costs were requested by McDonald’s. Id.
151. Id. at 22, ¶ 35.
153. Id. at 19, ¶ 32. There are certain exceptions to this rule in English law: local authorities, government-owned corporations, and political parties cannot sue in defamation because of the public policy that such entities should be open to uninhibited public criticism. Id. at 22, ¶ 40.
154. Id. at 19, ¶ 32.
156. Id. at 21, ¶ 33 (internal quotations omitted). The Court of Appeals did find that the allegation “that, if one eats enough McDonald’s food, one’s diet may well become high in fat etc., with the very real risk of heart disease, was justified.” Id. at 22, ¶ 34 (internal quotations omitted).
157. Id. at 22, ¶ 35.
The applicants raised several arguments before the ECHR, in particular: the failure to provide legal aid to the defendants impeded their ability to defend themselves and the imposition of the burden of proof upon the defendants was allegedly contrary to Article 10 and its mandate that a democracy benefits from free and open discussion of matters of public interest.

The applicants pointed out that the adversarial system of justice in the United Kingdom was based upon the idea that each side could "adduce their evidence and test their opponent's evidence in circumstances of reasonable equality." According to the applicants, various conditions worked to undermine this idea in their case. For example, they noted that McDonald's, in its position of economic power, outstripped many small countries, whereas the applicants were a part-time bar worker earning sixty-five pounds per week and an unwaged single parent. In addition, Queen's Counsel, junior Counsel, and a team of solicitors and administrative staff from one of the largest firms in England represented McDonald's, while pro bono lawyers represented the applicants on eight days during the twenty-eight days of pre-trial hearings and the thirty-seven court days of appeals. During the main trial, "submissions were made by lawyers on their behalf on only three occasions." Furthermore, "offers of help usually came from inexperienced, junior solicitors and barristers, without the time and resources to be effective." They pointed out several particular instances in which their own failures, such as securing, preparing, and paying the expenses of witnesses, prevented them from proving the truth of various charges found to be unjustified.

The ECHR considered the submission on the necessity of legal assistance in the context of an earlier holding "that the English law of defamation and rules of civil procedure applicable in that case were not sufficiently complex to necessitate the grant of legal aid." As the
court pointed out, that case required only that the applicant prove the truth of a single, principal allegation, and cross examine plaintiff's witnesses in the course of a trial that lasted slightly over two weeks.\textsuperscript{169} The instant case was far more complex, both factually and legally.\textsuperscript{170} For example, it involved 130 oral witnesses, including a number of expert witnesses dealing with scientific questions, including issues that the English court held were too complicated for a jury to properly understand.\textsuperscript{171} In addition, over 40,000 pages of documentary evidence were involved.\textsuperscript{172}

The court weighed the "sporadic help" accorded the applicants by volunteer lawyers and the extensive judicial assistance, but concluded that neither "was any substitute for competent and sustained representation by an experienced lawyer familiar with the law of libel."\textsuperscript{173} "[T]he disparity between the respective levels of legal assistance enjoyed by the applicants and McDonald's... was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness..."\textsuperscript{174} Hence, there was a failure to provide a right to a fair trial as provided for in Article 6 of the European Convention on Human Rights.\textsuperscript{175}

\textit{Sullivan} and its progeny have never considered the necessity, vel non, of free legal assistance in a defamation case.\textsuperscript{176} Therefore, the ECHR’s decision in \textit{Steel} certainly merits attention, particularly in situations in which a defamation lawsuit is employed to harass public-

\begin{thebibliography}{99}
\bibitem{footnote}{Steel, 2005-II Eur. Ct. H.R. at 29-30, ¶ 64.}
\bibitem{footnote}{Id. at 30, ¶¶ 65-66.}
\bibitem{footnote}{Id. at 65, ¶ 65.}
\bibitem{footnote}{Id. at 30, ¶ 65.}
\bibitem{footnote}{Steel, 2005-II Eur. Ct. H.R. at 31, ¶ 69. The court also pointed out that "[t]he very length of the proceedings [was]... a testament to the applicants' lack of skill and experience." Id.}
\bibitem{footnote}{Id.}
\bibitem{footnote}{Id. at 32, ¶ 72. Article 6 provides in part: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by and independent and impartial tribunal established by law.
\begin{itemize}
  \item Everyone charged with a criminal offence has the following minimum rights:
  \begin{itemize}
    \item (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
  \end{itemize}
\end{itemize}
COUNCIL OF EUROPE, supra note 31, at 5-6.}
\end{thebibliography}

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spirited defendants.

The ECHR then turned to the Article 10 issues. It asserted that "[f]reedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment [sic]." With respect to value judgments, the court balanced a number of factors to determine whether the governmental interference with speech was proportional. "'Political expression,' including expression on matters of public interest and concern, requires a high level of protection under [Article] 10." While the government correctly "pointed out that the applicants were not journalists, and [thus] should not . . . attract the high level of protection afforded to the press," in a democratic society, the ECHR considers that "even small and informal campaign groups . . . must be able to carry on their activities effectively." Thus, there is a "strong public interest in enabling such . . . individuals . . . to contribute to the public debate . . . on matters of general public interest such as health and the environment."

The court went on to state that there are limits to this right, even for the press, in particular with respect to the reputation and rights of others. The court "consider[ed] that in a campaigning leaflet a certain degree of hyperbole and exaggeration is to be tolerated . . . . In the present case, however, the allegations were of a very serious nature and were presented as statements of fact rather than value judgments."

The ECHR then considered and rejected argument that it was unfair to place the burden of proving truth of defamatory statements upon the speaker or publisher. Nor did the ECHR consider it proper to deprive a large, multinational corporation of the right to defend itself against defamatory allegations.

Despite these findings, the ECHR held that the U.K. breached Article 6(1) because it failed to strike "the correct balance . . . between the need to protect the applicants' rights to freedom of expression and the need to protect McDonald's rights and reputation." The court

178. Id. at 36, ¶ 88.
179. Id.
180. Id. at 36, ¶ 89.
182. Id. at 38, ¶ 90.
183. Id. at 37, ¶ 93.
184. Id. at 87, ¶ 94.
considered the "chilling effect" on others as an important factor in this context, "bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion." The ECHR went on to consider the size of the award against the two applicants, and stated that while serious allegations had been made, under English law, McDonald's had not been required to, and did not, establish that it had in fact suffered any financial loss. While McDonald's had made no attempt to collect the judgment, the ECHR considered the award of damages disproportionate and thus a violation of Article 10.

It is worth noting that in Sullivan, the court did comment that the "judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act." Would it be worth adopting a proportionality test for damages when no actual harm has been demonstrated? In Sullivan, not only had the police commissioner recorded a $500,000 judgment in another suit, a litigant had also recovered $500,000 for the same advertisement, and suits were pending seeking $2,000,000 in additional awards. Enormous verdicts themselves, and even the threat of enormous verdicts, can operate as serious chills to free expression.

The ECHR rejected any award of pecuniary damages, but did award non-pecuniary damages of 20,000 Euros to one applicant and 15,000 Euros to the other.

D. Criminal Defamation Law: A Dangerous Political Weapon Remains Alive in Europe

With the assistance of the Supreme Court's decision in Ashton v. Kentucky, issued only two years after Sullivan, the criminal version of...
libel law has largely passed into desuetude in the United States. In 
Ashton, the Supreme Court held that Kentucky's common law criminal 
libel law was so indefinite and so uncertain that it could not be enforced 
as a penal offense consistently with the First Amendment of the U.S. 
Constitution.\footnote{Id. at 198.}

Since there is currently a movement to criminalize online 
defamation in the United States,\footnote{Id. at 197.} it is worthwhile to review the 
jurisprudence of the ECHR regarding criminal defamation cases---cases 
still permitted in various European jurisdictions.\footnote{Id. at72, ¶20.}

\subsection*{1. Private Criminal Defamation Actions}

In Cumpana v. Romania,\footnote{Id. at 73, ¶23.} a newspaper article alleged that city 
authorities entered into an illegal contract with a private corporation 
relating to the impounding of illegally parked vehicles.\footnote{Id.} The article 
claimed that city council had previously authorized the city to enter a 
contract with another contractor.\footnote{Id. at 63.} The article stated the former deputy 
mayor "received backhanders from the partner company and bribed his 
subordinates . . . or forced them to break the law."\footnote{Id. (internal quotations omitted).} The article further 
alleged that "large numbers of privately owned vehicles ha[d] been 
damaged and . . . thousands of complaints ha[d] been made . . . ."\footnote{Id. at72, ¶20.}
Later that year, the Financial Control Department of the County Audit 
Court determined that the award of the contract "had not been justified 
by any bid submitted" and that no income had been lost for the city 
council, and urged compliance with the law regarding the obligations 
under the contract.\footnote{Id. at73, ¶23.}

Shortly after the newspaper published the article, a woman, who
previously served as the city council’s legal expert and had since become a judge, filed criminal charges against the journalists for insult and defamation. In particular, she complained of her depiction in a cartoon as a “woman in a miniskirt, on the arm of a man with a bag full of money, and with certain intimate parts of her body emphasized as a sign of derision.” After the applicants failed to appear for a hearing, the court adjudged them guilty of insult and defamation, and sentenced them to ten months imprisonment—three months for insult and seven months for defamation—with seven months of immediate imprisonment. The court also prohibited them from working as journalists for one year after serving their prison terms and ordered them to pay non-pecuniary damages of 2033 Euros. In its justification of the decision,

The court note[d] that the injured party is a public figure and that, following the publication . . . , her superiors and the authority above them asked her to explain herself regarding the trial, particularly in view of the fact that she was due to take the professional examination to obtain permanent [judicial] status.

On appeal, the decision was affirmed. However, “the procurator général applied to the Supreme Court of Justice to have the judgments . . . quashed,” asserting that the cartoon only highlighted allegations of corruption and “did not constitute the actus reus of insult as defined in” the criminal code. Additionally, the procurator général argued that the amount of the fine was “extremely high and had not been objectively justified.” Lastly, it was asserted that the requirements for prohibiting a person “who had committed unlawful acts from practicing a particular profession on account of their incompetence, lack of training or any other ground making them unfit to practise [sic] the profession, were not satisfied” in the instant case for lack of unequivocal proof of incompetence.

202. Id. at 71, ¶ 19.
203. Id. at 74, ¶ 25.
205. Id. at 75-76, ¶ 37.
206. Id. at 76, ¶ 37.
207. Id. at 78, ¶ 40 (internal quotations omitted).
209. Id. at 78, ¶ 44.
210. Id.
211. Id. at 79, ¶ 44.
The Supreme Judicial Court rejected these submissions, finding that the cartoon “was likely to have an adverse effect on the injured party’s honour, dignity and public image,” that it “disparage[d] her honour and reputation, [so as to] constitute[] the offense of insult,” and that the fine was justified because the “mass-circulation newspaper . . . seriously offended the dignity and honour of the injured party.”

The applicants failed in their submissions to the ECHR, which found by a vote of five to two that there had been no violation of Article 10. The applicants then appealed to a Grand Chamber, which accepted the request for a hearing. The Grand Chamber focused its opinion on the matter of whether the actions of the national courts were necessary in a democratic society.

In this context, the court considered the vital role of the press as “public watchdog” in a democratic society and, in particular, that the article in question mainly concerned the administration of public funds by certain local representatives. The matter was indisputably one of “general interest to the community which the applicants were entitled to bring to the public’s attention.”

The article, however, conveyed the message that the original plaintiff had been involved in fraudulent dealings and was couched in virulent terms such as “scam,” “series of offenses,” “intentional breach” of the law, and “bribes.” The court reiterated it position that “[t]he existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof.” However, “even a value judgment can be excessive if it has no factual basis to support it.” Therefore, even though the applicants’ statements about the plaintiff “were mainly worded in the form of an alternative,” they could be

212. *Cumpana*, 2004-XI Eur. Ct. H.R. at 79, ¶¶ 45-46 (internal quotations omitted). The applicants never served any of the prison time because the procurator-général executed a series of suspensions and then they received a Presidential pardon dispensing the prison sentence. *Id.* at 80, ¶¶ 48-50. The Presidential pardon also waived the secondary penalty that disqualified them from exercising their civil rights. *Id.* at 80, ¶ 50. The two applicants continued for a time in their journalist positions, one was impacted by staff cutbacks for a time, and the second eventually was elected mayor of Constanta. *Id.* at 80-81, ¶¶ 51-54.


214. *Id.* at 70, ¶¶ 9-10.

215. *Id.* at 89, ¶ 88.

216. *Id.* at 90, ¶¶ 93-94.


218. *Id.* at 91, ¶ 97.

219. *Id.* at 91, ¶ 98.

220. *Id.* at 91, ¶ 99.
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construed as containing allegations of specific conduct (i.e., that she had accepted bribes, and behaved in a dishonest and self-interested manner), or in a way that might lead one to believe that the “fraud” she was accused of was “established and uncontroversial facts.” The Grand Chamber was convinced that the national courts had actively sought to establish the “judicial truth,” but the applicants’ clear lack of interest in the judicial proceedings, by not attending at either the first instance court or the County Court, and failure to adduce evidence at any stage of the proceedings to substantiate their allegations, counted against them. In particular, they failed to submit to the national courts “a copy of the Audit Court report . . . or even indicate during the criminal proceedings . . . that their assertions had been based on such an official report.” In the end, the Grand Chamber also determined that the national court determinations of violations met a “pressing social need.”

This still left the issue of whether the penalties were proportionate to the interference with free expression. The court found the penalties of seven months imprisonment, prohibition “from exercising certain civil rights and from working as journalist for one year” very severe. According to the court, while Contracting States may impose penalties, they “must not do so in a manner that unduly deters the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power.” The chilling effect of criminal penalties upon journalistic freedom of expression is evident. A prison sentence for a press offense would be compatible with freedom of expression only in exceptional circumstances, notably when hate speech or incitement to violence is involved. The case at bar presented “no justification whatsoever for the imposition of a prison sentence.” It does not matter that a presidential pardon meant that the applicants did not serve any prison time; such a pardon does not expunge their conviction. Moreover, the imposition of an order disqualifying the applicants from exercising all civil rights, again waived because of the presidential

222. Id. at 92-93, ¶¶ 103-104.
223. Id. at 93, ¶ 105.
224. Id. at 94, ¶ 110.
226. Id. at 94-95, ¶ 113.
227. Id. at 95, ¶ 114.
228. Id. at 95, ¶ 115.
230. Id.
pardon, was particularly inappropriate in the instant case.\textsuperscript{231} Additionally, the ban from working as journalists for one year was not remitted, and even though it appears to have had no significant practical consequences in the present case, was particularly severe and could not have been justified by the mere risk of the applicants' re-offending.\textsuperscript{232} The prohibition of working as a preventive measure "contravened the principle that the press must be able to perform the role of a public watchdog in a democratic society."\textsuperscript{233} Thus there had been a violation of Article 10 of the Convention.\textsuperscript{234} The ECHR then went on to hold that "the finding of a violation of Article 10 . . . [was] sufficient just satisfaction for any non-pecuniary damage sustained by the applicants."\textsuperscript{235}

The \textit{Cumpana} case represents one of many criminal libel cases from an eastern European country.\textsuperscript{236} It is not unique in a number of instances.\textsuperscript{237}

\begin{enumerate}[231.]
\item \textit{Id.} at 95-96, ¶ 117.
\item \textit{Id.} at 96, ¶ 118.
\item \textit{Id.} at 96, ¶ 122. The vote was sixteen to one, with one judge dissenting because of the court's refusal to afford the applicants any just satisfaction. \textit{Id.} at 102-03 (Costa, J., dissenting).
\item \textit{Id.} at 98, ¶ 130 (majority opinion). The court rejected a request for costs and expenses since the applicants had neither quantified them nor submitted any supporting documents. \textit{Cumpana}, 2004-XI Eur. Ct. H.R. at 98, ¶ 134.
\item Not all such cases stem from Eastern Europe. A major counterexample is \textit{Colombani v. France}, 2002-V Eur. Ct. H.R. 25. That case dealt with two \textit{Le Monde} articles based on a confidential report commissioned by the European Commission naming Morocco as the world's leading exporter and the main supplier of cannabis to Europe. \textit{Id.} at 32-33, ¶ 10-13. The King of Morocco was greatly angered, and upon his complaint, the Paris public prosecutor's office filed criminal charges for "insulting a foreign head of State." \textit{Id.} at 33, ¶ 14-15. The first instance court acquitted the defendants on the grounds that the articles had "merely quoted extracts from what was indisputably a reliable report." \textit{Id.} at 33, ¶ 16. At the King's urging, however, the government appealed and the Paris Court of Appeals found the article "desire[d] to draw the public's attention to the involvement of the royal entourage" and was thus "tainted with a malicious intent," and contained "accusations of duplicity, artifice and hypocrisy that were insulting to a foreign head of State." \textit{Colombani}, 2002-V Eur. Ct. H.R. at 33-34, ¶¶ 17-18 (internal quotations omitted). A fine was assessed, including a direct payment of 10,000 francs to the King of Morocco. \textit{Id.} at 34, ¶ 19. The newspaper, \textit{Le Monde}, was also ordered to publish a report of the details of the convictions. \textit{Id.}
\item Under French law, the defense of justification, which is normally available to a charge of criminal defamation, is not available to a charge of insulting a foreign head of state. \textit{Id.} at 35, ¶ 26. The ECHR found that the French public had a legitimate interest in being informed about the European Commissions' views on the problem of drug production and trafficking in Morocco, a state with which France enjoys close relations. \textit{Colombani}, 2002-V Eur. Ct. H.R. at 43, ¶ 64. The information in the Commission's report was undisputed, and information that the press should be able to rely upon without itself engaging in independent research. \textit{Id.} at 43-44, ¶ 65. According to the ECHR, the elimination of a justification
\end{enumerate}
ways: 1) it concerned a relatively petty local dispute about political corruption; 2) the case was not brought by a public prosecutor, but by an individual; 3) prison time was ordered by the domestic courts along with a financial penalty; 4) the individual bringing the criminal complaint was closely connected with the local political elite; and 5) the ECHR found that the penalty violated Article 10’s protection of the freedom of expression.

The threat of criminal prosecution for speech is quite serious, but Cumpana is far from alone in illustrating that a private person may bring such actions. Some, but not all, of such private criminal prosecutions for defamation are brought by persons who might be described as “politically connected.” For example, Minelli v. Switzerland involved a criminal defamation complaint by a company director against a journalist, which was converted into a private prosecution. In Minelli, the Canton of Zurich Assize Court ordered the defendant to pay two thirds of the court costs with additional compensation based on its determination that, if the case had gone to trial, the defendant would have been found guilty. In Helmers v. Sweden, a university lecturer who had not been appointed to an academic post brought a private prosecution for libel. Kobenter v. Austria and Standard Verlagsgesellschaft mbH v. Austria, however, involved private prosecutions by government officials, with the former being brought by a judge whose judgment in a case involving homosexuals had been criticized, and the latter by an official whose exercise of voting rights on behalf of a political region had been the subject of criticism.

defense, even in the case of a head of State, was beyond what was required to preserve a person’s reputation. Id. at 44, ¶ 66.


238. Id. at 7-8, ¶¶ 10-11. The case was eventually dismissed on procedural grounds. Id. at 8, ¶ 12.

239. Id. at 8-9, ¶¶ 12-13. The ECHR found that the requirements of a fair trial had been violated. Minelli, 62 Eur. Ct. H.R. (ser. A) at 19, ¶ 41.


241. Id. at 8-9, ¶¶ 11, 14. The ECHR decided the case not on the basis of Article 10, but on the basis that the requirements of a fair hearing under Article 6(1) had not been complied with because the Court of Appeals denied a request for an oral public hearing. Id. at 17, ¶¶ 38-39.


244. Kobenter, App. No. 60899/00, ¶ 12. The attacked judgment had been entered in a private defamation prosecution against several defendants, one of which the judge convicted of insult, and the other the judge acquitted. Id. ¶ 11.

Similarly, Kuśmierek v. Poland\(^2\) involved an improperly delayed private prosecution for libel brought by a Deputy Mayor.\(^2\) Likewise, in Dlugolecki v. Poland,\(^2\) a former mayor and candidate for municipal council brought a private bill of indictment against a journalist.\(^2\) Finally, in Karhuvaara v. Finland\(^2\) a Member of Parliament instituted proceedings about newspaper coverage of her husband’s assault upon a police officer and received special protection because she was a Member of Parliament.\(^2\)

The ECHR reached the substance of the Article 10 claims in only a few of these private actions, with Cumpana being the most extensive opinion. In none of the decisions, however, did the ECHR find imprisonment a proper penalty. In most, it found the actions inappropriate. Although, in one case, Standard Verlagsgesellschaft mbH, by a narrow margin, four votes to three, the ECHR found no violation of Article 10.\(^2\) In that case, the limited nature of the judicial interference, forfeiture of the offending article, publication of the judgment, and an order to revoke certain statements, were quite significant to the ECHR majority.\(^2\) For example, in Kobenter, the ECHR found that the criticism of the judge was a matter of public interest.\(^2\) Indeed, the particular passages in the judge’s opinion that were the target of criticism were taken out of the final opinion by the judge himself, and had resulted in an official warning to the judge in subsequent disciplinary proceedings.\(^2\) The Austrian courts failed to justify the criminal conviction for defamation or the imposition of a fine, and the ECHR awarded the full amount of pecuniary damages claimed as well as 5000 Euro for non-pecuniary damage for the journalist.\(^2\)

In Dlugolecki, the defendant, convicted of criminal insult, was ... fulfilled the elements of the offence of defamation ... under Article 111 of the Criminal Code.” Id. ¶ 19.

247. Id. ¶¶ 6-7.
249. Id. ¶¶ 7-8.
251. Id. at 264, ¶¶ 8, 10. Defamation charges were rejected by the trial court, but fines were assessed for invasion of privacy. Id. at 265, ¶ 12.
253. Id. ¶ 43.
255. Id.
256. Id. ¶¶ 33, 37-38.
required to pay a small fine, make a charitable contribution, and publish an apology, which resulted in a conditional discontinuance of the proceedings for a probationary period of one year. The ECHR determined that the publication during an election implicated the crucial importance of free political debate and that the impugned statement was a value judgment, which cannot be said to have been devoid of any factual basis, and thus violated Article 10. The ECHR awarded non-pecuniary damages of 3000 Euro for distress and frustration resulting from the litigation and conviction. Most significantly, the ECHR also stated:

[T]he criminal proceedings in the present case had their origin in a bill of indictment lodged by the politician himself and not by a public prosecutor . . . Nevertheless . . . when a statement . . . is made in the context of a public debate, the bringing of criminal proceedings against the maker of the statement entails the risk that a prison sentence might be imposed.

The court went on to restate, as it had in Cumpana, that “a prison sentence for a press offence will be compatible with the journalists’ freedom of expression . . . only in exceptional circumstances . . . as for example, in the case of hate speech or incitement to violence.”

2. Public Criminal Defamation Actions

Unlike individual criminal prosecutions, defamation prosecutions by public prosecutors offer the potential screening of such actions by an impartial, objective public prosecutor. On the other hand, such public prosecutions may also admit political pressure to protect favorite politicians or public figures, or even to simply protect the government in power from political dissidents.

For example, the Government of France intervened quite directly to assure a criminal defamation prosecution to assuage the feathers of the King of Morocco. In a case from Spain, criminal proceedings were

258. Id. ¶¶ 43-44, 48.
259. Id. ¶ 52. The fine, costs, and required contribution to a charity were quite small: the fine, 50 Polish zlotyz (PLN) (approximately 13 Euros) to the charity; PLN 300 for the costs of the proceedings; and PLN 118 to the State Treasury. Id. ¶ 12.
260. Dlugolecki, App. No. 23806/03, ¶ 47.
261. Id.
In a case from Poland, the Deputy Speaker of the Senate and a Regional Prosecutor were targets of articles by a candidate for Parliament. The Deputy Speaker charged that candidate with criminal libel. In Russia, upon the request of a regional governor criticized in a regional paper, a criminal prosecution was brought against the editor-in-chief.

In the most serious of these cases, a senator in the Spanish Parliament published a magazine article entitled “Insultante Impunidad” (“Outrageous Impunity”) lamenting the number of murders in Basque Country and the Government’s failure to prosecute any perpetrator or to enlist the public’s help, such as through the media. The ECHR held that Article 10 was violated by the denial of any ability to establish the facts underlying the article. The Spanish courts had held that defenses

263. Castells v. Spain, 236 Eur. Ct. H.R. (ser. A) at 11, ¶ 8 (1992). The initial sentence was for a term of imprisonment of one year and a day. Id. at 13, ¶ 13. As an accessory penalty, the applicant “was also disqualified for the same period from holding any public office and exercising a profession and [he was] ordered to pay costs.” Id. The Spanish Supreme Court stayed enforcement of the prison sentence for two years but left intact the accessory penalty, which the Constitutional Court later stayed. Id. at 14, ¶ 14. The Constitutional Court later dismissed the appeal. Castells, 236 Eur. Ct. H.R. (ser. A) at 15, ¶ 17. Later “the Supreme Court ruled that the term of imprisonment had been definitively served.” Id. at 16, ¶ 18. The applicant was apparently out on bail but complained that “he had to appear 52 times before the court of his place of residence . . . and three times before the Supreme Court of Madrid.” Id. at 25, ¶ 55. The ECHR noted that, since he frequently attended the courts in question as a lawyer, this constraint could hardly have caused him any loss. Id.


265. Id. at 569, ¶ 28. The case was actually brought as a private indictment by the Deputy Speaker of the Sejm, who had previously made a formal notification of an offense by the defendant to Regional Prosecutor. Id. at 566, ¶ 8. The prosecutor had earlier signed a warrant authorizing the search of the defendant’s flat, signed an order allowing the tapping of her telephone, and had subsequently been present with the Deputy Speaker when the defendant’s husband was arrested in connection with search of a cottage. Id. at 566, ¶¶ 9-10. After conviction, the defendant was sentenced to an eighteen month term of imprisonment, suspended for five years, ordered to publish an apology, and ordered to reimburse the costs of the proceeding. Malisiewicz-Gasior, 45 Eur. H.R. Rep. at 571, ¶ 33. Although she did not publish an apology, the suspended sentence was not enforced against the defendant. Id. at 573, ¶¶ 42-43.

266. Krasulya v. Russia, App. No. 12365/03, 45 Eur. H.R. Rep. 910, 915, ¶ 10 (2007). A suspended sentence of one year’s imprisonment was given, conditional on six months’ probation. Id. at 918, ¶ 21.

267. Castells v. Spain, 236 Eur. Ct. H.R. (ser. A) at 24, ¶ 48 (1992). “[A]t the common law, truth or good motives was no defense [to a criminal libel action].” Beauharnais v. Illinois, 343 U.S. 250, 254 (1952). Therefore, the English law was not all that dissimilar to that of Spain.

of "truth and good faith" were unavailable in respect to insults directed at the institutions of the nation.\textsuperscript{269} The ECHR stated it "attach[ed] decisive importance to the fact that [the Spanish Supreme Court] declared such evidence inadmissible" even though it "is impossible to state what the outcome . . . would have been" had such evidence been admitted.\textsuperscript{270}

In \textit{Malisiewicz-Gasior v. Poland},\textsuperscript{271} the ECHR found that statements made by the defendant during a political campaign were part of a political debate, and the fact that she was running for office did not mean, as the domestic courts had held, that she "had been trying to achieve her private objective," but she was rather engaged in activity "inherent in the concept of truly democratic regime."\textsuperscript{272} Moreover, the fact that the target of the attacks was a politician should have been taken into account by the domestic courts demonstrating a greater degree of tolerance.\textsuperscript{273} Finally, the court noted that the chilling effect of the "severity of the penalty imposed" must be taken into consideration when assessing the proportionality of the interference by the state with freedom of expression.\textsuperscript{274}

In analyzing criminal libel cases, the ECHR has stated that it will take into account: "the position of the applicant, the position of the person against whom the criticism was directed, the subject matter of the publication, characterization of the contested statement by the domestic courts, the wording used by the applicant, and the penalty imposed on him."\textsuperscript{275} In that connection, whether a value judgment or a factual statement is at issue is a central concern of the ECHR, even though a value judgment must also have adequate support to constitute a fair comment.\textsuperscript{276} Strong wording may be permissible if "it did not resort to offensive or intemperate language and did not go beyond the generally accepted degree of exaggeration or provocation . . . covered by journalistic freedom."\textsuperscript{277} A journalist's role implicated "imparting

\begin{enumerate}
\item \textsuperscript{269} \textit{Id.} at 24, ¶47.
\item \textsuperscript{270} \textit{Id.} at 24, ¶48.
\item \textsuperscript{272} \textit{Id.} at 578-79, ¶¶65-67.
\item \textsuperscript{273} \textit{Id.} at 579, ¶67.
\item \textsuperscript{274} \textit{Id.} at 579, ¶68.
\item \textsuperscript{276} \textit{Id.} at 921-22, ¶¶39, 41; see \textit{Schwabe v. Austria}, 242-B Eur. Ct. H.R. (ser. A) 23 (1992) (finding that a conviction violated Article 10 when impugned statement about alcohol consumption was judged a value-judgment, for which no proof of truth is possible).
\item \textsuperscript{277} \textit{Krasulya}, 45 Eur. H.R. Rep. at 922, ¶43.
\end{enumerate}
information and ideas on matters of public concern, even those that may offend, shock or disturb.”

Even a suspended sentence conditioned upon the commission of no further offenses implicated a condition which, itself, was incompatible with Article 10 as “disproportionate to the aim pursued and not ‘necessary in a democratic society.’”

On the other hand, in Barfod v. Denmark, a journalist was convicted and fined for publishing an article that allegedly defamed two lay judges who were also government employees. The journalist had stated that the two judges “did their duty” finding in favor of the government, their employer. The ECHR determined that there had been a personal attack on the two lay judges and that the criminal conviction did not limit the right to criticize the composition of the High Court in the tax case. Few Americans would have found anything defamatory in the full context of the article, which primarily raised conflict-of-interest problems.

Similarly, almost a decade later in Perna v. Italy, a Grand Chamber of the ECHR sustained a fine, damage award, and costs award against a journalist and the manager of an Italian daily newspaper for defaming a prosecutor. The trial court imposed fines of 1,000,000 Lire and 1,500,000 Lire, as well as the payment of damages and costs, totaling 60,000,000 Lire, and required publication of the judgment in the newspaper. The offending article complained that a prosecutor was biased towards the Italian Communist Party, (the PCI, later the PDS—the Democratic Party of the Left) and that he had participated in an attempt by the PCI to gain control of public prosecutor’s offices and to destroy

278. Id. at 922, ¶ 45.
279. Id. at 922, ¶¶ 44-45. The ECHR awarded 4000 Euros in non-pecuniary damages. Id. at 924, ¶ 57.
281. Id. at 8, ¶ 10. A fine of 2000 Danish Crowns was assessed. Id. at 495, ¶ 11.
282. Id. at 294, ¶ 9.
285. See id.
286. Id. at 344, ¶ 16. These amounts, in dollars, were roughly $650, $970, and $39,000 (at 1,550 lire/dollar). In 1996 (the year these amounts were assessed) the lire’s value in dollars ranged between 1,584 lire to a dollar and 1,513 lire to a dollar. Federal Reserve Bank of St. Louis, Italy/U.S. Foreign Exchange Rate (DISCONTINUED SERIES) (Mar. 3, 2006), http://research.stlouisfed.org/fred2/data/EXITUS.txt. The Chamber opinion mentioned that the newspaper paid all of these monetary amounts, so the journalist paid nothing personally. Perna v. Italy (Perna I), App. No. 48898/99, ¶ 50 (Eur. Ct. H.R. July 25, 2001), http://www.echr.coe.int.
people’s reputation by the opening of a judicial investigation. An ordinary seven-judge chamber of the ECHR ruled that the first allegation, exemplified by an assertion that the prosecutor had taken an “oath of obedience,” had a symbolic meaning and could not be considered an excessively critical comment, and sanctioning such statements violated Article 10. In addition, the Chamber determined that the allegation of an alleged strategy (attributed to the PCI in the article) of gaining control of the public prosecutors’ offices in a number of cities, was unsupported by an adequate factual basis, and thus permissibly sanctioned.

The Grand Chamber of seventeen judges, however, found no violation of Article 10 (with a single dissent). Nor did it bifurcate the allegedly defamatory statements into two categories, as the previous reviewing courts had seemed to do. Instead, it aggregated the allegations’ of a lack of objectivity and lack of independence into the accusation of “carrying out his profession improperly and acting illegally, particularly in connection with the prosecution of Mr. Andreotti.” Moreover, it noted several aggravating circumstances: 1)
“the fact of having imputed to the injured party [the complaining prosecutor] the acts mentioned (and even criminal acts as regards the informer...)) and 2) the fact of committing the defamation “to the detriment of a civil servant in the performance of his official duties.”

The latter aggravating circumstance, ironically, would be mitigating under American jurisprudence. The opaque meaning of the first aggravating circumstance may be clarified by the Grand Chamber’s rejection of the idea that taking the “oath of obedience” was symbolic, as the regular Chamber found, but rather, in the whole context an implication, that the prosecutor was furthering the overall strategy of the PCI through the prosecution of Mr. Andreotti. It is likely in the United States that an allegation that the Justice Department was seeking to implement the priorities of a president and his party through criminal prosecution would be considered anything but opinion and/or not defamatory in the first instance. Indeed, the issue of bias in the prosecution and judiciary is a major issue in the political debate of Italy.

In a dissenting opinion, Judge Conforti decries the overall approach of the Grand Chamber and Chamber opinions in separating procedural issues from issues of substance for Article 10 purposes. The Court’s refusal to accept any evidence was extremely serious, particularly with respect to evidence from the complaining prosecutor. He notes that the “Italian courts acted very speedily in determining the charges against the applicant in less than four years at three levels of jurisdiction,” this

In the Grand Chamber presentation, the attorney for the complaining prosecutor denied that the domestic courts had recognized the political militancy to which the regular chamber had referred in its judgment. Id. ¶ 38.

Andreotti, by the way, was not destroyed by the investigation. He continued as a life senator and became a candidate for the presidency of the Senate at age 87, but was narrowly defeated. John Hooper, Prodi Stands Down After Surprise Defeat in Senate over US Alliance, GUARDIAN (London), Feb. 22, 2007, at 16. His critical abstention vote on January 21, 2007, however, caused the government of Prime Minister Romano Prodi to lose the vote and Prodi to resign. Id.


Id. at 358, ¶ 47.

See Richard Owen, Silvio Berlusconi Blasts ‘Cancerous Growth’ of Italian Judiciary, TIMES (London), June 26, 2008, http://www.timesonline.co.uk/tol/news/world/europe/article4215061.ece. “Mr. Berlusconi called the Italian judiciary a ‘cancerous growth,’ claiming biased prosecutors had pursued him since he entered politics 14 years ago. Crossing his wrists as if in handcuffs, Mr. Berlusconi said: ‘Many prosecutors would like to see me like this.’” Id.


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“in a country condemned many times for the length of its proceedings.”298 Most importantly, Judge Conforti notes that “it is striking how many actions are brought by judicial officers against journalists in Italy and how large are the sums awarded by the Italian courts in damages.”299

3. Conclusion on the European Law of Criminal Defamation

While the ECHR has not rejected criminal defamation prosecutions out of hand, in practice, it has done so except for cases in which damages alone are awarded. In most such cases, either prosecutors or the judiciary were the targets of the defamatory or insulting statements. None of the recently considered cases involve the actual serving of prison time, yet when prison time is ordered, the ECHR, time and time again, has found that the conviction itself, and/or conditions on remission of the prison sentence, were both incompatible with Article 10 and insufficiently protective of press and speech interests. The ECHR repeatedly references the chilling of speech in such cases.

It is reasonable to assert that the United States is more protective of speech in such actions, particularly actions in which prosecutors or judges are complaining parties. Such greater protection of speech better fosters open debate about the functioning of the justice system in democratic systems. European law has heard Thomas Paine’s message in this particular compartment of European law.

On the other hand, while criminal actions to protect judges against critical speech are virtually non-existent in the United States, sanctions such as fines and disciplinary actions against attorneys are not. For example, a Florida court fined a lawyer for describing a judge as an “evil, unfair witch” with an “ugly, condescending attitude” on a courthouse blog.300 In another case, a court imposed sanctions against an attorney who called state appeals judges “jackasses” in a radio show and compared them to Nazis for overturning a $15 million verdict he had won.301

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298. Id.
299. Id. Judge Conforti closes his opinion lamenting that he had to express his opinion in a case involving a prosecutor “risking his life in the fight against the Mafia.” Perna II, 2003-V Eur. Ct. H.R. at 361 (Conforti, J., dissenting).
301. Id. The attorney had represented Dr. Jack Kevorkian, a Doctor who assisted in suicides. Id. The attorney is now contesting the Michigan Rule of Professional Conduct
E. Injunctive Relief for Defamation in the ECHR

In American law, the presumptive unconstitutionality of any prior restraint upon publication means injunctive relief is rarely available.\textsuperscript{302} That is not the case in Europe despite the ECHR. For example, in \textit{Wabl v. Austria},\textsuperscript{303} a protestor described a newspaper article as "Nazi journalism."\textsuperscript{304} The newspaper secured an injunction from the Supreme Court to prevent repetition of the allegation after two lower courts had rejected the request.\textsuperscript{305} The ECHR considered the remark "particularly offensive," and held that the injunction was "necessary in a democratic society" for the protection of the reputation and rights of others.\textsuperscript{306}

In \textit{Plon v. France},\textsuperscript{307} the widow and children of President Mitterrand requested an injunction to prevent the continued distribution of a book, \textit{Le Grand Secret}, which allegedly invaded President Mitterrand’s privacy and injured his relatives’ feelings by disclosure of confidential medical information.\textsuperscript{308} The book discussed the relations between Dr. Gubler and President Mitterrand after the President had been diagnosed with cancer in 1981 (a matter that was treated, at the time, as a State secret).\textsuperscript{309} The requested interim injunction was issued by a lower court and upheld by the Paris Court of Appeal.\textsuperscript{310} That issuance occurred twenty-four hours after the book was published, by which time 40,000 copies had been sold, and ten days after President Mitterrand had died.\textsuperscript{311} By the time the judgment on the case-in-chief was issued by the \textit{tribunal de grande instance}, Mitterrand had been dead requiring treatment of judges with “courtesy and respect” and barring “discourteous or undignified conduct.” \textit{Id.}


\textsuperscript{303} \textsl{Id.} at 1138, \textsection 14.

\textsuperscript{304} \textsl{Id.} at 1139, \textsection 18-20.

\textsuperscript{305} \textsl{Id.} at 1142-44, \textsection 41, 61.


\textsuperscript{307} \textsl{Id.} at 708-09, \textsection 9.

\textsuperscript{308} \textsl{Id.} at 708-09, \textsection 6, 8.

\textsuperscript{309} \textsl{Id.} at 710-12, \textsection 9-10. Appeals to the Court of Cassation were dismissed. \textit{Plon}, 42 Eur. H.R. Rep. at 712, \textsection 11. Criminal proceedings against Dr. Gubler, a journalist who assisted him, and the managing director of the publisher resulted in a four-month prison sentence for Dr. Gubler and fines for the Plon officers. \textit{Id.} at 712, \textsection 12. The civil proceedings not only produced an injunction, but also a damage award for the widow and children. \textit{Id.} at 712-13, \textsection 14.

\textsuperscript{310} \textsl{Id.} at 732, \textsection 53.
for nine and a half months.\textsuperscript{312}

While the ECHR applied a balancing test to determine that the interim injunction was proportionate and justified by the context of grief for the widow and children\textsuperscript{313} by the time of the final trial determination, nine and a half months later, continuation of the injunction was disproportionate to the interests sought to be protected and thus no longer justified.\textsuperscript{314} By that time, not only had the book sold 40,000 copies, "but it had also been disseminated on the internet and . . . been the subject of considerable media comment."\textsuperscript{315} In this determination, the ECHR considered the book's depiction of the President as having consciously lied to the French people about the existence and duration of his illness in the context of "a wide-ranging debate in France on a matter of public interest, in particular the public's right to be informed about any serious illnesses suffered by the Head of State, and the question whether a person who knew that he was seriously ill was fit to hold the highest national office."\textsuperscript{316}

Governments in Europe do seek to enjoin the publication of material considered inappropriate by the government. For example, in \textit{Sunday Times v. United Kingdom},\textsuperscript{317} (hereinafter \textit{Sunday Times I}) the British government sought, and was granted, an injunction to prevent the publication of an article on the background of the introduction of the drug thalidomide to the British market.\textsuperscript{318} Similarly, in \textit{Sunday Times v. United Kingdom (No. 2)},\textsuperscript{319} (hereinafter \textit{Sunday Times II}) the British government was granted an injunction to prevent the publication of a book called "Spycatcher" and any related material about the British Secret Service (MI5).\textsuperscript{320} In both cases the Grand Chambers of the

\textsuperscript{313} \textit{Id.} at 730-31, ¶ 47.
\textsuperscript{314} \textit{Id.} at 732-33, ¶¶ 51, 53-54.
\textsuperscript{315} \textit{Id.} at 733, ¶53.
\textsuperscript{316} \textit{Plon}, 42 Eur. H.R. Rep. at 729, ¶ 44.
\textsuperscript{317} \textit{(Sunday Times I)}, 30 Eur. Ct. H.R. (ser. A) (1978). In a second decision the ECHR awarded costs for the ECHR litigation in the amount of 22,626.78 Pounds (by a vote of 13-3).
\textsuperscript{319} \textit{See Sunday Times I}, 30 Eur. Ct. H.R. (ser. A). Thalidomide was prescribed for a time as a sedative for expectant mothers. \textit{Id.} at 8, ¶ 8. In the U.K. in 1961, a number of these women gave birth to children with severe deformities; in the end, some 450 such births occurred. \textit{Id}
\textsuperscript{320} \textit{Id.} at 10, ¶ 9. The first actions seeking to enjoin publication of \textit{Spycatcher} began in September, 1985 with respect to publication in Australia. \textit{Id.} at 11, ¶ 13. Eventually, the book was published in the United States on July 14, 1987, and many copies were brought back into the U.K. by travelers or were obtained through mail delivery from American bookshops
ECH\(\text{R}\) found violations of Article 10; in *Sunday Times I*, by an eleven-vote to nine-vote margin,\(^{321}\) and in *Sunday Times II* unanimously.\(^{322}\)

In *Sunday Times I*, the Government sought the injunction to delay publication of a particular article because of its fear that the article prejudged the issue of negligence related to ongoing civil actions against a drug manufacturing company defendant, Distillers Company (Biochemicals) Limited ("Distillers"),\(^{323}\) and to avoid the risk of "trial by newspaper."\(^{324}\) The opinion for the ECHR, however, agreed with the applicants that the case had "been in a ‘legal cocoon’ for several years, and that it was . . . far from certain that the parents’ actions would have come on for trial."\(^{325}\) The ECHR further found that it was difficult to divide the wider issues (which the Government did not seek to preclude from press discussion) from the negligence issue; for the question of where responsibility lies for the tragic situation was a matter of public concern.\(^{326}\) The ECHR recognized that "courts cannot operate in a vacuum."\(^{327}\) While courts are a “forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised [sic] journals, in the general press or amongst the public at large."\(^{328}\)

In *Sunday Times II*, the injunctions obtained by the Government related to articles about a book, *Spycatcher*, written by Mr. Peter Wright, a former senior member of MI5.\(^{329}\) The legal action was based upon an argument that Mr. Wright breached his duty of confidentiality under his employment contract.\(^{330}\) The book asserted that “MI5 conducted unlawful activities calculated to undermine the 1974-1979 Labour Government, burgled and ‘bugged’ the embassies of allied and hostile countries and planned and participated in other unlawful and covert activities at home and abroad,” and that a person who headed MI5 for a time when Wright was employed there was a Soviet agent.\(^{331}\) The first


\(^{324}\) *Id.* at 18, ¶ 25.

\(^{325}\) *Id.* at 41, ¶ 66.

\(^{326}\) *Id.* at 41-42, ¶ 66.


\(^{328}\) *Id.*


\(^{330}\) *Id.* at 12, ¶ 13.

\(^{331}\) *Id.* at 11, ¶ 11.
action was commenced in Australia to enjoin publication. After related articles were published in the United Kingdom by the Observer and Guardian newspapers, the U.K. Government brought suit in the Chancery Division of the High Court of Justice of England and Wales against both newspapers, their editors, and their journalists. In these actions, the Government sought permanent injunctions on the theory that the information in Spycatcher was confidential, that it had come into the newspapers’ hands through a breach of confidence, and that knowing reception of such material meant that the same duty of confidentiality applied to the newspapers and their employees as owed by Mr. Wright. Ex parte interim injunctions were granted on June 27, 1986, and continued in effect by an inter partes hearing on July 11, 1986. On appeal in the British court system, both the Court of Appeal and the Appellate Committee of the House of Lords considered the grant of the interim injunctions justified. Although the trial court had ordered the injunctions discharged in view of the publication in the United States, the Appellate Committee of the House of the Lords continued the injunctions on July 30, 1987. Spycatcher had been published in the United States on July 14, 1987.

The Sunday Times then brought the Appellate Committee’s decision before the ECHR. The ECHR found that, by the date of the decision, the argument originally made regarding the necessity of keeping information secret had morphed into an argument that the major purpose of the injunctions was to promote the efficiency and reputation of the Security Service. According to the court, this would be accomplished by preserving third party confidence in the Service, “making clear that unauthorised [sic] publication of memoirs . . . would

332. Id. at 11-12, ¶13.
334. Id. at 13, ¶ 15.
335. Id. at 13, ¶ 17.
336. Id. at 14, ¶ 18.
338. Id. at 20, ¶ 35.
339. Id. at 17, ¶ 28. Around 715,000 copies were printed in the United States, and most sold by October 1987. Id. at 23, ¶ 38. Similarly, the book was printed in Canada (100,000 copies), in Australia (145,000 copies, half sold within a month) and Ireland (30,000 copies).
340. Id. at 8, ¶ 1. The ECHR’s opinion refers to the Times Newspapers Ltd, publisher of the Sunday Times, and its editor, Mr. Andrew Neil. Id.
341. Id. at 31, ¶ 55.
not be countenanced,” and deterring others from similar actions.\textsuperscript{342} The court doubted that actions against the Sunday Times would have achieved these objectives any further than had already been achieved by actions against Mr. Wright himself.\textsuperscript{343} Actions for profits existed against Mr. Wright.\textsuperscript{344} “[C]ontinuation of the restrictions [on publication] after July 1987 prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern.”\textsuperscript{345} The ECHR concluded that the interference was unnecessary in a democratic society and violated Article 10.\textsuperscript{346} The ECHR went on to award costs in the amount of 100,000 pounds.\textsuperscript{347}

The \textit{Sunday Times II} case has an American counterpart in the actions by the United States Government against Victor Marchetti and John D. Marks to prevent publication of a book, \textit{The CIA and the Cult of Intelligence}.\textsuperscript{348} Unlike the action in \textit{Sunday Times II}, however, the action was commenced by the government, not against newspapers, but against a former employee of the CIA to obtain an injunction based upon a secrecy agreement executed by the employee.\textsuperscript{349} The theory adopted by the Fourth Circuit was that, by executing the secrecy agreement, the employee waived his First Amendment rights.\textsuperscript{350}

Another line of cases in American jurisprudence deal with a similar prior restraint, albeit prior restraint imposed by Congress, not by the judiciary. These cases deal with the constitutionality of prior restraints related to an administrative subpoena known as a National Security Letter (NSL) to electronic communication service providers.\textsuperscript{351} The

\begin{itemize}
\item \textsuperscript{342} \textit{Sunday Times II}, 217 Eur. Ct. H.R. (ser A.) at 31, ¶ 55.
\item \textsuperscript{343} \textit{Id.}
\item \textsuperscript{344} \textit{Id.}
\item \textsuperscript{345} \textit{Id.}
\item \textsuperscript{346} \textit{Sunday Times II}, 217 Eur. Ct. H.R. (ser. A) at 31, ¶ 56.
\item \textsuperscript{347} \textit{Id.} at 34, ¶ 70.
\item \textsuperscript{348} VICTOR MARCHETTI \& JOHN D. MARKS, THE CIA AND THE CULT OF INTELLIGENCE (1974). The flyleaf to the book begins: “This book, the first in American history to be subjected to prior government censorship . . . .” It was published with blank spaces indicating the exact location and length of 168 deletions that the district court upheld, and bold type indicating 140 sections that the government first sought to prevent publication of, but which the district court permitted to be published. See Publisher’s Note, \textit{id.} at ix.
\item \textsuperscript{349} \textit{See United States v. Marchetti}, 466 F.2d 1309, 1311 (4th Cir. 1972). After the Government censored the draft book, a subsequent action, filed by the publisher and authors, ultimately upheld the injunctive bar to publishing the 168 deletions. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975).
\item \textsuperscript{350} \textit{Colby}, 509 F.2d at 1370.
\item \textsuperscript{351} \textit{Doe v. Gonzales}, 500 F. Supp. 2d 379 (S.D.N.Y. 2007), rev’d, Doe v. Mukasey, 549
\end{itemize}
statute prohibited the recipient of an NSL from disclosing the fact that an
NSL had been received, and structured judicial review of the non-
disclosure requirement.352

The Federal Bureau of Investigation issued an NSL to John Doe,
Inc., an internet service provider.353 The Court found:

The letter directed John Doe, Inc. “to provide the [FBI] the names, addresses,
lengths of service and electronic communication transactional records, to
include [other information] (not to include message content and/or subject
fields) for [a specific] email address.” The letter certified that the information
sought was relevant to an investigation against international terrorism or
clandestine intelligence activities and advised John Doe, Inc., that the law
“prohibit[ed] any officer, employee or agent” of the company from “disclosing
to any person that the FBI has sought or obtained access to information or
records” pursuant to the NSL provisions.354

After two different district courts held parts of the NSL statute
unconstitutional,355 Congress amended the NSL statutes in two respects:
first, nondisclosure was changed to require certification by senior FBI
officials that “otherwise there may result a danger to the national
security of the United States, interference with a criminal,
counterterrorism, or counterintelligence investigation, interference with
diplomatic relations, or danger to the life or physical safety of any
person”; and second, provisions for judicial review were added
permitting a recipient of an NSL letter to petition a U.S. district court for
an order modifying or setting aside the NSL.356

F.3d 861 (2d Cir. 2008); Doe v. Gonzales, 386 F. Supp. 2d 66 (D. Conn. 2005); Doe v.
Cir. 2006); see also 18 U.S.C. §§ 2709, 3511 (2006); Mukasey, 549 F.3d at 864, n.1 (listing
authority to issue NSLs in other contexts).
352. 18 U.S.C. §§ 2709(c), 3511(b) (2006). Section 2709 had been originally enacted in
1986 as part of the Electronic Communication Privacy Act of 1986, but was amended several
times, including in 2001, by the USA Patriot Act. Mukasey, 549 F.3d at 865.
353. Mukasey, 549 F.3d, at 865.
354. Id. (alterations in original).
355. See Gonzales, 386 F. Supp. 2d 66 (declaring statute’s gag order provision
unconstitutional as applied to ISP); Ashcroft, 334 F. Supp. 2d 471 (declaring the statute
unconstitutional as applied to ISP and statute’s gag order provision unconstitutional on its
face).
356. USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177,
§§ 115, 116(a), 120 Stat. 192, 214 (2006), amended by, USA Patriot Act Additional
(2006); see also Mukasey, 549 F.3d at 866-67.
1. Statutory Reworking

In Doe v. Mukasey,357 the Government urged the United States Court of Appeals for the Second Circuit to interpret each of the standards for issuing NSL letters to require certification by senior FBI officials that disclosure may result in an enumerated harm that is relevant to “an authorized investigation to protect against international terrorism or clandestine intelligence activities.”358 Such a narrow construction avoids part of the troublesome reach of the statutory language, which could authorize NSL letters for ordinary tortious conduct based on the risk of “danger to the life or physical safety of any person.”359 Such a narrowing construction action is beyond the scope of any ECHR jurisprudence, indeed, beyond the jurisprudence of most European courts, particularly in civil law jurisdictions, for European courts seldom engage in substantial revisions of statutory language through judicial reworking of the text.360

The second issue in Mukasey concerned the scope of judicial review. The court required that good reason exist for the NSL issuance, as the Government argued before the court.361 Good reason means more than not frivolous, but rather some reasonable likelihood of an enumerated harm.362 Further, the Government took the position that the burden was on it to demonstrate that such good reason exists, an issue on which the statute itself was silent.363

357. 549 F.3d 861 (2d Cir. 2008).
358. Id. at 875 (internal quotations omitted).
359. Id. at 874-75. The court stated, “[a] secrecy requirement of such broad scope would present highly problematic First Amendment issues.” Id.
360. A counter-example may be that courts in the United Kingdom are instructed, by the Human Rights Act of 1998, the statute incorporating the European Convention on Human Rights into domestic United Kingdom law, that, if possible, a court is to construe a U.K. statute to be consistent with the Convention. Human Rights Act, 1998, c. 42, § 3 (U.K.), available at http://www.opsi.gov.uk/ACTS/acts1998/ukpga_19980042_en_1. When determining a question which has arisen in connection with a Convention right, the court is directed to take into account judgments such as those of the ECHR so far as possible to do so for both primary legislation and subordinate legislation. Id. at § 2(1). If, however, the U.K. court determines that a U.K. statute is incompatible with Convention obligations, the court must declare that incompatibility, but must not permit that determination to affect the validity of the provision about which it is given and that declaration is not binding on the parties to the proceedings. Id. at § 4(2-6). In other words, the U.K. statutory provisions must still be given full effect by the U.K. court, but Parliament is put on notice that a problem exists.
361. Mukasey, 549 F.3d at 875.
362. Id.
363. Id. The court stated that it accepted the Government’s position on all three matters of statutory construction and in doing so did not “trench[] on Congress’s prerogative to
2. Constitutional Analysis

The Second Circuit in *Mukasey* applied the test established in *Freedman v. Maryland*, a motion picture licensing case, which held, *inter alia*, that the government bore the burden of initiating judicial review. In *Mukasey*, the Court determined that the government has several options to avoid the *Freedman* burden. For instance, the Government could notify each NSL recipient that the recipient has a short time, such as ten days, to give the Government notice that the recipient wishes to contest the nondisclosure requirement. If the Government receives such a notice, the Government could be given a reasonable period in which to begin judicial proceedings, perhaps thirty days, and the judicial proceedings would have to be concluded within a prescribed time, perhaps sixty days.

The court went on to determine that the degree of discretion accorded to the Government on judicial review by the statutory language was inconsistent with the First Amendment. To accept conclusory affirmations by the Government would "'cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct.'" Instead, the Government must provide the court with an indication of the apprehended harm and provide a basis on which the court (perhaps based on *in camera* inspections) can determine that the link between disclosure and the risk of harm is substantial. The *Sullivan* balancing analysis of the potential harm against the particular First Amendment interest raised by a particular challenge was central to both the District Court's and the Second Circuit's consideration of the case.

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365. *Id.* at 59 (finding that the censor must, "within a specified brief period of time, either issue the license or go to court to restrain showing the film").
367. *Id.*
368. *Id.*
369. *Id.* at 881.
371. *Id.*
372. *See id.* at 882. The German Constitutional Court went a step beyond that taken by the Second Circuit. In connection with a secret surveillance program dating back to WWII, the court held that after surveillance has ended, the government must notify the target of the surveillance. Klass v. Germany, 28 Eur. Ct. H.R. (ser. A) (1977); Allen Shoenberger, *Privacy*
F. Should There be Different Standards for Defamation Cases Involving Civil Servants?

The ECHR has applied a different standard when reviewing defamation cases involving civil servants acting in their official capacity from the standard it applies for politicians. For example, while the ECHR subjects politicians to wider limits of acceptable criticism than private individuals,373 "it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent politicians do."374 Thus, while civil servants are subjected to wider limits than private citizens,375 they should not be treated on an equal footing with politicians when it comes to criticism.376 "[C]ivil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty."377

In drawing this distinction, the ECHR appears to have considered it significant that abusive language directed at law-enforcement officials occurred in a public place in front of bystanders.378 In Janowski v. Poland,379 a journalist observed police ordering street vendors to leave a municipal square and intervened by informing the guards they had no authority to act.380 During the altercation, he described the guards as "ignorant," "dumb," and "oafs."381 For the verbal insult, the journalist was criminally convicted of hooliganism and sentenced to imprisonment...

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375. Id.


378. Id. at 201, ¶ 34.


380. Id. at 193, ¶ 8.

381. Id. at 194-95, ¶¶ 11, 14.
for eight months, suspended for two years, and fined. On appeal, although the imprisonment sentence was quashed and the fine was reduced, the criminal conviction was upheld. The ECHR found no violation of Article 10 by a vote of twelve to five.

Dissenting judges collectively issued four separate dissenting opinions, with the core of two opinions being that the police officers had been engaged in actions that constituted abuses of their authority. Judge Wildhaber in a single paragraph dissent states: "[T]he applicant used only two moderately insulting words... to defend a position which was legally correct..." The final dissenter, Judge Casadevall, objected in particular to the government's position that "it is irrelevant... whether a civil servant was substantively right or wrong in undertaking a specific action within his official duties." He further stated, "[a]rbitrary conduct cannot be protected," and concluded that, "in spite of the fact that a few of the remarks he made were unfortunately chosen—he was right about the substantive legal point at issue."

Similarly, in Pedersen v. Denmark, the criminal defamation convictions of two television journalists—with orders to pay twenty-day fines of DKK 400 (or twenty days imprisonment in default) and compensation of DKK 100,000 to the estate of the deceased Chief Superintendent—were sustained and found not to violate Article 10. After detailed examination of the evidence, the ECHR determined that there was inadequate evidence to base a broadcasted allegation that the Chief Superintendent "deliberately suppressed a vital piece of evidence in the murder case." Following the airing of the television stories, the person originally convicted of murder was subsequently retried and

382. Id. at 194, ¶ 10.
384. Id. at 201-02, ¶ 35.
385. "The applicant was... amply justified in exercising his freedom of expression in remonstrating with the municipal guards." Id. at 205 (Bratza, J. and Rozakis, J., dissenting). "I harbour... scruples in endorsing the protection of public officers in the course of an abuse of power." Id. at 207 (Bonello, J., dissenting).
387. Id. at 209 (Casadevall, J., dissenting) (omission in original) (internal quotations omitted).
388. Id. at 210.
390. Id. at 143-44, ¶¶ 93, 95. The day fines were approximately 1078 Euros, and the compensation to the estate approximately 13,469 Euros. Id. at 143-44, ¶ 93. "The court does not find these penalties excessive in the circumstances or to be of such a kind as to have a 'chilling effect' on the exercise of media freedom." Id. at 144, ¶ 93.
acquitted by a jury.

As Janowski and Pedersen demonstrate, the ECHR generally applies a "middle level standard of scrutiny" to permit the application of penalties for modest insults or defamatory statements regarding civil servants. The ECHR does not, however, sustain penalties in all such cases, especially when the case involves insulting or defamatory statements about lower level government officials. For example, in Thoma v. Luxembourg the ECHR found it inappropriate under Article 10 to sanction a journalist for an article that quoted another person stating that "I know of only one person who is incorruptible," referencing Forestry Commission employees. Similarly, in Savitchi v. Moldova, the ECHR held that a journalist, found responsible for defamation of police officers in their treatment of an automobile driver involved in an accident, had her Article 10 right violated. The ECHR, in particular, distinguished the case from Janowski stating that the language used "cannot be characterized as 'offensive and abusive.'"

Similarly, in Nikula v. Finland, the ECHR found that a court-appointed defense attorney, convicted on a private prosecution for criminal defamation of a prosecuting attorney, had been deprived of her rights under Article 10. Indeed, the court effectively turned the Janowski principle on its head, for the applicant had argued that she, as defense counsel, should be afforded far-reaching freedom of expression. Although the ECHR purported to consider the application of Janowski, it in fact stated that "only in exceptional cases... [would] restriction—even by way of a lenient criminal penalty—of defence [sic] counsel's freedom of expression... be accepted as necessary in a democratic society."

392. Id. at 118-19, ¶ 24-26. The defendant had already been released on probation from the original conviction. Id. at 113, ¶ 10.
394. Id. at 88, ¶ 64-66.
395. Id. at 75, ¶ 11. Subsequently, fifty-four forest wardens and nine forestry engineers brought civil suits against the journalist. Id. at 76, ¶ 17. The ECHR awarded pecuniary damage of LUF 741,440, and costs of LUF 600,000. Thoma, 2001-III Eur. Ct. H.R. 67, 89-90, ¶¶ 72, 77.
397. Id. ¶¶ 15, 59-60.
398. Id. ¶ 52.
400. Id. at 312-13, ¶¶ 55-56.
401. Id. at 300, ¶ 15.
402. Id. at 310-11, ¶ 48.
To be sure, the principle announced in the Janowski judgment is one that the ECHR has declined to extend too far beyond law-enforcement officers or prosecutors. "[T]his would go too far to extend the Janowski principle to all persons who are employed by the states or by state-owned companies . . . ."\footnote{Busuioc v. Moldova, App. No. 61513/00, 42 Eur. H.R. Rep. 252, 268, ¶ 64 (2006).} The court did not elaborate further on why it thought it improper to extend Janowski.

It is worth speculating what other civil servants might become subject to the Janowski approach in the ECHR. One factor that might be considered relevant is that lower level civil servants seldom have the practical access to the media that politicians and high-level civil servants normally enjoy. Thus, a defamation action may be the only effective method of responding to a character attack.

While no special standard of review ostensibly applies to middle level civil servants under the jurisprudence of the United States Supreme Court, one might reconsider a number of Supreme Court cases in the light of the ECHR treatment. For example, the original "fighting words" case involved a Jehovah's Witness calling a city marshal a "damned Fascist" and "God damned racketeer."\footnote{Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942).} While the conviction, sustained for addressing "offensive, derisive or annoying word to any other person [in public],"\footnote{Id. at 569 (internal quotations omitted).} did not amount to prosecution for criminal libel, the fact is that the statements might very well be prosecuted in Europe today as criminal libel. Such language, given its intemperance, might very well support a valid conviction in the face of Article 10 and ECHR jurisprudence. The fact that the speaker addressed the language to a city marshal would figure prominently in any analysis.

Similarly, in Colten v. Kentucky,\footnote{407 U.S. 104 (1972).} the Supreme Court sustained a criminal conviction for disobeying police orders to move on, when the accused wished to observe the police giving a traffic ticket to a friend.\footnote{Id. at 109.} The criminal statute at issue did not address criminal libel, but rather made action disorderly conduct "if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof [a person] . . . [c]ongregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse."\footnote{Id. at 108 (internal quotations omitted).} The defendant testified that he wanted to make a transportation arrangement

\footnote{405. Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942).}
\footnote{406. Id. at 569 (internal quotations omitted).}
\footnote{407. 407 U.S. 104 (1972).}
\footnote{408. Id. at 109.}
\footnote{409. Id. at 108 (internal quotations omitted).}
for his friend because he understood that the friend’s car was about to be towed away. The Supreme Court opined that fairness was satisfied by the order to disperse, so as to account for vagueness or over breadth problems. While the arrest was not for speech, it was for assembly (another First Amendment interest), with the intent of engaging in a discussion. The resulting decision is consistent with ECHR jurisprudence granting a degree of deference to street-level police officials.

By contrast, the Supreme Court, in *Gooding v. Wilson*, agreed with the overturning of a conviction for speech found offensive by a police officer during a picketing protest against the war in Vietnam. While the underlying statute criminalized the use of “opprobrious words and abusive language,” the state courts had not limited the construction of the statute to apply only to fighting words for which *Chaplinsky* permitted conviction. There are limits in U.S. jurisprudence to deference to street-level, police determinations.

In short, Supreme Court jurisprudence may reflect results that are somewhat more protective of street-level police officers against speech directed against them, but such protection has its limits, for the Court values the First Amendment. Whether the Court should address the issue of a different standard of review for speech in such contacts with authorities has not been specifically addressed. A different standard makes some sense; specifically, a standard more protective of individuals who have not opened themselves up to the level of public invective that elected officials contemplate, and individuals who, as well, lack the practical ability to respond through media or otherwise to criticism and/or invective.

G. Should Defamation of a Religion Be Recognized?

The Human Rights Council of the United Nations recently adopted a resolution expressing deep concern with the negative stereotyping and

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410. *Id.* at 107.
413. *Id.* at 520 n.1, 528.
414. *Id.* at 518.
415. See *id.* at 524.
416. See *City of Houston v. Hill*, 482 U.S. 451 (1987) (finding a municipal ordinance, which made it unlawful to interrupt police officers in the performance of their duties, an unconstitutionally overbroad infringement on First Amendment rights).
Defamation of religions is a strange concept to American ears. Defamation normally implicates defamation of a particular person or small group of persons. Group defamation cases are seldom brought, although they do exist. At the United States Supreme Court level, the last such case in which “group defamation” was sustained, was the “group libel” decision of Beauharnais v. Illinois decided in 1952.

The Beauharnais decision sustained the application of a statute criminalizing the exhibition of any lithograph, which portrayed lack of virtue of a class of citizens. The Illinois statute at issue criminalized publications which, “portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.”

The Illinois Supreme Court described the statute as a form of criminal libel law. The Illinois Supreme Court characterized the words prohibited by the statute as those “liable to cause violence and disorder.” The lithograph at issue was published by the White Circle League, a group of white citizens opposed to the white race becoming “mongrelized by the negro.” Among other contents, the “negro” was accused of “aggressions . . . rapes, robberies, knives, guns and marijuana” and the “further encroachment, harassment and invasion of white people, their property, neighborhoods and persons” was condemned. The Supreme Court pointed out that at the time of the

417. UNITED NATIONS HUMAN RIGHTS COUNCIL COMBATING DEFAMATION OF RELIGIONS (2009), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/Unedited_versionL.11Revise d.doc. Voting against the resolution were Canada, Chile, France, Germany, Italy, Netherlands, Slovakia, Slovenia, Switzerland, Ukraine, and the United Kingdom. Id. Not one European country voted for the resolution. Id.

418. 343 U.S. 250 (1952). Subsequent decisions by the Supreme Court have been read by various United States Courts of Appeals as substantially undercutting the Beauharnais decision. See Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1200 (9th Cir. 1989) (citing Seventh Circuit decisions); American Booksellers Ass’n., Inc. v. Hudnut, 771 F.2d 323, 332 n.3 (7th Cir. 1985); Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir. 1978).

419. Beauharnais, 343 U.S. at 251, 253.
420. Id. at 251.
421. People v. Beauharnais, 97 N.E.2d 343, 346 (Ill. 1951). The penalty was a $200 fine. Id. at 345.
422. Beauharnais, 343 U.S. at 254.
423. Id. at 252.
424. Id. (omission in original).
The Beauharnais decision each of the forty-eight states, the District of Columbia, Alaska, Hawaii, and Puerto Rico punished libels directed at individuals. The issue of whether libel of a group was permissible was the central issue for the Supreme Court. The court permitted such criminal statutes unless it was able to find the statute a "willful and purposeless restriction unrelated to the peace and well-being of the State." In that context, the Supreme Court referenced the tragic experience in Illinois of race riots over three decades, including the Cicero riots of 1951. In each of these cases, the Court observed that utterances of the nature at issue in the Beauharnais case played a significant part—in one case stimulating riots so violent and bloody in East St. Louis just before enactment of the Illinois statute that a Congressional investigation resulted.

While various Courts of Appeals in the United States have indicated they doubt the current validity of the Beauharnais decision, particularly considering Sullivan, the Supreme Court has never overruled Beauharnais.

The ECHR has not squarely dealt with a "defamation of religion" case, but its decision regarding a "blasphemy" statute in Wingrove v. United Kingdom is worth examining. Wingrove dealt with the refusal of a "classification certificate" to permit sales of a video, Visions of Ecstasy, an eighteen-minute film depicting St. Teresa of Avila, a sixteenth century Carmelite nun and founder of many convents. The British Board of Film Classification rejected a request for a classification certificate, citing in its rejection the criminal law of blasphemy. The British blasphemy statute defined blasphemy as:

"[A]ny contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible . . . . It is not blasphemous to speak or publish opinions hostile to the Christian religion" if the publication is "decent and temperate." The question is . . . one of the . . . "manner [of expression], i.e.

425. Id. at 255.
426. Beauharnais, 343 U.S. at 258.
427. Id.
428. Id. at 259.
429. Id. at 259-260.
431. Id. at 1942-43, ¶ 8-9, 13.
432. Id. at 1943, ¶ 12-13. The denial prevented marketing the video in the U.K. Id. at 1944, ¶ 13.
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"the tone, style and spirit," in which [the material] is presented.

The video at issue presents a figure of St Teresa, a saint who experienced powerful ecstatic visions, "writhing in exquisite erotic sensation" and eventually sitting astride the prone body of Christ, "seemingly naked under her habit," and writhing "in a motion reflecting intense erotic arousal." At one point, the video depicts an apparent lesbian relationship in a graphic manner.

The ECHR found that “the law of blasphemy only protects the Christian religion,” and does not extend to other religions. The British government had considered amending the law of blasphemy to take books such as the Satanic Verses outside the boundary of what is legally acceptable, but declined to do so for a variety of reasons, including consideration of whether it was not preferable to repeal the law. The law was repealed, but only in 2008.

The applicant in the ECHR challenged the denial of a classification certificate on the ground that it violated the freedom of expression protected by Article 10 of the European Convention on Human Rights. The ECHR indicated that it viewed the video itself and was "satisfied that the applicant could reasonably have foreseen with appropriate legal advice that the film . . . could fall within the category of the offence of blasphemy." The ECHR thus found that the law adequately prescribed the interference with freedom of expression. The ECHR then found that the blasphemy statute, which aimed at preventing justified indignation among believing Christians pursued a legitimate aim in protecting the “right of citizens not to be insulted in their religious feelings.”

The ECHR then found the restriction “necessary in a democratic

434. Id. at 1942, ¶ 9.
435. Id.
436. Id. at 1951, ¶ 28.
437. Wingrove, 1996-V Eur. Ct. H.R. at 1951, ¶ 29 (alternation in original). This consideration took place during 1989 and culminated with a letter from the Minister of State at the Home Department to a number of influential British Muslims on July 4, 1989. Id.
438. Criminal Justice and Immigration Act, 2008, c. 4, § 79 (Eng.). On May 8 2008, the Criminal Justice and Immigration Act abolished the common law offenses of blasphemy and blasphemous libel in England and Wales, with effect from July 8, 2008. Id.
440. Id. at 1944, ¶ 43. Interesting that both ECHR and the United States Supreme Court on occasion themselves view “raw” films as a judicial function.
441. Id. at 1955, ¶ 44.
442. Id. at 1955, ¶ 47.
society."\textsuperscript{443} In that context, it noted that "blasphemy legislation [was] still in force in various European countries," although the application of such laws was increasingly rare.\textsuperscript{444} In the United Kingdom only two prosecutions had been brought in the last seventy years.\textsuperscript{445} Moreover, it considered the ECHR concept of a margin of appreciation, (another description for degree of deference) and concluded that a wider margin was appropriate when relating "to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion."\textsuperscript{446} The ECHR then considered that it was the manner of the speech that the law sought to control, not the expression of views contrary to the Christian religion, and considering the manner of the video in question,\textsuperscript{447} which the court reiterated it had viewed,\textsuperscript{448} the court concluded the authorities had not overstepped their margin of appreciation.\textsuperscript{449}

What then, can one conclude about the law of defamation of religion in the United States and Europe? The crystal ball is certainly occluded. Neither the ECHR nor the United States Supreme Court has squarely condemned the concept. When public safety and order are at issue, whether public order is threatened by race riots or religious riots, one might anticipate that either or both courts might well reach a similar result, despite the fact that eight member countries of the Council of Europe voted against the Human Rights Council resolution condemning religious defamation.\textsuperscript{450}

IV. CONCLUSION

One may approach the defamation related jurisprudence of the ECHR with the oft quoted words of Patrick Henry, "Give me liberty or

\begin{footnotes}
\item[444] Id. at 1957, ¶ 57.
\item[445] Id.
\item[446] Id. at 1958, ¶ 58. The ECHR noted that there is "little scope" for a margin of appreciation for restrictions on political speech or on questions of public interest. Wingrove, 1996-V Eur. Ct. H.R. at 1957, ¶ 58.
\item[447] Id. at 1958, ¶ 60.
\item[448] Id. at 1959, ¶ 60.
\item[449] Id. at 1060, ¶ 64.
\item[450] UNITED NATIONS HUMAN RIGHTS COUNCIL, supra note 417. France, Germany, Italy, Netherlands, Slovakia, Slovenia, Switzerland, Ukraine, and the U.K. Id. In addition, Canada and Chile voted against the resolution. Id. Countries abstaining include: Argentina, Brazil, Bosnia and Herzegovina, Burkina Faso, Ghana, India, Japan, Madagascar, Mauritius, Mexico, Republic of Korea, Uruguay, and Zambia. Id.
\end{footnotes}
Give me death,” in mind.\textsuperscript{451} The ECHR values speech in many ways and in similar manners to the way in which the United States Supreme Court exemplifies American values of free speech. There are, however, differences.

The ECHR routinely, itself, weighs and evaluates the facts of the alleged defamatory statement. The U.S. Supreme Court did so in \textit{New York Times Co. v. Sullivan}, but such evaluation by the U.S. Supreme Court is infrequent, and usually not as intense a review as ordinarily exercised by the ECHR. Since appellate courts are ordinarily in as good a position as the trial court to evaluate the “facts” of defamation, perhaps such judicial valuation should be more frequent, if not routine.

Not only does it matter to the ECHR what job level a public official holds in valuing speech, it matters whether the speech is opinion, unbacked by adequate justification. Would it not be a good idea to require even opinion to have factual backing? Such a requirement might curtail some of the most outrageous of the talk radio diatribes against public officials, and perhaps improve the level of public debate, ultimately encouraging more members of the public to seek elective or appointive office.

Criminal defamation has not been completely rejected by the ECHR, but it is certainly circumscribed, particularly with respect to the nature and level of permissible penalties that may be assessed.

The idea that court-appointed counsel for indigent defamation defendants may be necessary to adequately protect First Amendment interests implicated by public interest groups such as Greenpeace, Save the Whales, or Mothers Against Drunk Driving, deserves serious consideration. Many of the issues raised in the Greenpeace pamphlet regarding McDonald’s are serious issues indeed. If large, deep-pocketed entities are able to silence potential critics of their conduct by the threat or actuality of defamation suits, that raises very serious First Amendment concerns.

In all of this, it is submitted, the jurisprudence of the ECHR is worthy of serious consideration.

\textsuperscript{451} Patrick Henry, Speech Before the Virginia Convention of Delegates (Mar. 23, 1775), \textit{in} \textsc{The World's Greatest Speeches} 232 (Copeland, et al., eds. 1999).