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Thomas Paine and the Rights of Man in European Jurisprudence: European Caselaw Confronts New York Times v. Sullivan : Different Results, Methods and Considerations: Time to Rethink Sullivan?⁑

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> Toward the end of his life, Paine was a delegate to the revolutionary French National Assembly, charged with drafting a constitution for the new Republic. His stubborn affirmations of human rights -- including opposition to the beheading of King Louis XVI -- enraged the Jacobites, who imprisoned him and came very close to chopping off his head.[1]
>
> Eleanor Roosevelt spread the U.S. Bill of Rights around the world by incorporating large parts of it in the International Bill of Rights while she chaired a United Nations Committee. The European Convention on Human Rights owes much to it U.S. antecedents.
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> "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?"[2]
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> 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?[3]

Few defamation cases ever reach the United States Supreme Court; however, most lawyers if asked about its defamation jurisprudence will likely recall New York Times v. Sullivan.[4] That decision constitutionalized large parts of the law of defamation, at least insofar as public officials or public figures are involved. The New York Times decision required proof of actual malice before a public official may recover damages for

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[1] Thomas Paine is not forgotten! http://www.topix.com/forum/com/aanb/T4KMOE5HJEIL54VV8

[2] Thomas Paine, The Rights of Man, available at http://www.ushistory.org/Paine/rights/index.htm

[3] *Id*.

[4] 376 U.S. 254 (1964).

a defamatory falsehood relating to his official conduct. Actual malice was defined as knowledge that the publication was false or published with reckless disregard for whether it was false or not.[5] Subsequent decisions extended the holding of New York Times v. Sullivan to apply to public figures.[6]

By contrast defamation cases frequently reach the European Court of Human Rights (ECHR), the highest volume human rights court in the world.[7] 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 47 member countries of the Council of Europe.[8] 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[9] to the various defamation laws of the member states of the Council of Europe.

It is worth comparing ECHR defamation jurisprudence with that of the U.S. Supreme Court, for democracy is a requirement of countries who are members of the Council of Europe, and 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.

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[5] 76 U.S. 279-280.

[6] Gertz. v. Robert Welch, Inc. 418 U.S. 323 (1974). Gertz was an attorney representing the family of a victim of a police shooting retained to bring a civil action against the policeman.

[7] Allen 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 Whit. Law Rev. 357 (2005).

[8] The member countries of the European Union are all included, but additional members countries include both Turkey and Russia.

[9] A document that owes its direct intellectual heritage to the United States Constitution's Bill of Rights. See, Shoenberger. Messages from Strasbourg, supra note 4, at 359-60.

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 non elected public officials;
3) routinely deals with criminal defamation laws, laws which are assumed to be completely unconstitutional in the United States.
4) itself determines the facts of a free speech case, instead of deferring to lower court fact-finding.[10]

New York Times v. Sullivan: A short summary:

The New York Times published a full page "editorial advertisement," entitled "Heed their Rising Voices" on March 29, 1960.[11] The text 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.[12] 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 even though he wasn't named in the advertisement, he had been injured.[13] A jury awarded him

[10] in a way analogous to the rarely applicable "Constitutional Fact Doctrine" as articulated by the United States Supreme Court. See infra notes ___ to ____ and accompanying text.

[11] 376 U.S. 256.
[12] *Id.*
[13] *Id.*

the full amount claimed, $500,000.[14] It was uncontested that there were some inaccuracies in the advertisement: 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.[15] No effort was made at trial to prove any actual pecuniary loss as a result of the alleged libel.[16] Neither the New York Times nor additional signatories to the advertisement made any effort to check the accuracy of the advertisement either by checking with recent published Times articles or by other means.[17]

The judge instructed the jury that the statements in the advertisement were libelous per se, not privileged, so that defendants might be held liable if the statements made were "of and concerning the plaintiff, and that because the statements were libelous per se, the law implies legal injury and general damages are presumed and need not be proved.[18] The jury was also instructed that it could award punitive damages, which requires actual malice under Alabama law, but for which mere negligence or carelessness is not evidence of actual malice, but the judge refused to charge that actual intent to harm or gross negligence and recklessness must be demonstrated and also declined to require the jury to distinguish between compensatory damages and punitive damages.[19]

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[14] *Id*.
[15] *Id*. at 258-259.
[16] *Id*. at 260. Approximately 394 copies of the edition of the New York Times containing the advertisement were distributed in Alabama, about 35 copies in Montgomery County.
[17] *Id*. at 261.
[18] *Id*. at 262.
[19] *Id*. at 262. Under Alabama law, punitive damages are denied to a public official unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Respondent served such a demand upon each of the petitioners. The Times responded by a letter stating (among other things) that "we … are sumoewhat puzzled as to how you think the statements in any way reflect on you." Id at 261. Suit was filed days later without any response to the Time's inquiry. A retraction of the advertisement was published on the demand of the Governor of Alabama who asserted the publication

The Supreme Court determined that Alabama law was constitutionally deficient for failure to provide adequate safeguards for freedom of speech and of the press in a libel action brought by a public official against critics of his official conduct.[20] The court went on to hold that under the proper safeguards the evidence in the case was constitutionally insufficient to support the judgment for respondent.[21]

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. "[22] This rule is probably the most remembered component of the NYT v. Sullivan decision, for it is indeed the core of the opinion.

However, the Court went on to make two other significant determinations. First, the court held that a presumption of general damages was inconsistent with the federal rule.[23] Second, the court reviewed the evidence itself, an unusual exercise for an American appellate court,[24] and determined that the proof presented lacks convincing

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charged him with "grave misconduct and … improper actions and omissions as Governor. *Id* at 261.

[20] *Id* at 264.

[21] *Id*. at 264-65.

[22] *Id*. at 279-80.

[23] *Id*. at 283-284. 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. "Because of this uncertainty, the judgment must be reversed and the case remanded." *Id*. at 284.

[24] Such an exercise by the Supreme Court has been described as the Constitutional Fact Doctrine. See, Strauss, Rakoff and Farina, Gellhorn and Byse's Administrative Law, revised 10th edition, 973-978 (2003).

clarity which the constitution demands for a finding of actual malice.[25] This holding will be referred to below as the Constitutional Fact determination in NYT v. Sullivan.[26]

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.[27] The Times' Secretary had testified that except with regards to the padlocking allegation, the advertisement was substantially correct.[28] At most the court determined that negligence in failing to discover misstatements, which is constitutionally insufficient to support a finding of recklessness required for a finding of actual malice.[29] Second, the court determined that at most the advertisement was a libel on the government, not a personal criticism of respondent (who was never named in the advertisement).[30]

The second holding of NYT v. Sullivan has not attracted much attention over the intervening years, 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

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[25] *Id*. at 285-286.
[26] The Supreme Court stated in Milkovich v. Lorain Journal Co., 497 U.S. 1, 17 (1990) ""[I]n 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.'" (citations omitted) 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."
[27] *Id*. at 285-288.
[28] *Id*. at 286.
[29] *Id*. at 288.
[30] *Id* at 291-292.

opinions took the position that no defamation actions should be constitutionally permitted when official conduct of public officials is criticized.[31]

Other issues raised, but not decided in NYT v. Sullivan also deserve some attention. The court explicitly refused to decide how far down the lower ranks of governmental employees the "public official" designation would reach.[32] NYT v. Sullivan dealt with an elected city commissioner, clearly a public official.[33] The court also declined to explore the boundaries of "official conduct."[34]

The European Court of Human Rights

The ECHR consists of judges from each of the 47 member states of the Council of Europe (virtually every European country is a member, including in particular Turkey and Russia). The judges are appointed to serve in their individual capacities, and not as representatives of the nation states. The court ordinarily sits in one of four different chambers consisting of seven judges. 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. Enforcement of its decisions is administered by a Council of Ministers of the Council of Europe. Awards of money damages and costs are routinely complied with in a timely fashion. Decisions that require significant changes to the law of one of the contracting states often take longer, sometimes years to accomplish.[35] In recent years the chambers of the court have decided more than a thousand cases per year, more than

[31] Justice Black (with J. Douglas) wrote one opinion, and Justice Goldberg (with J. Douglas) authored the other opinion concurring with the result. *Id.* at 293-305.
[32] *Id*. at 284 n. 23.
[33] *Id*.
[34] *Id*.
[35] See, http://www.echr.coe.int/echr/,

ten times the number of cases the United States Supreme Court decides on the merits each year.[36]

The ECHR enforces the European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, drafted in Rome in 1950.[37]

Defamation in the European Court of Human Rights

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

In *Timpul Info-Bagazin v. Moldova*[38] 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 Moldavan court ordered the assets of the newspaper frozen.[39] 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.[40] The focus was on the purchase of luxury cars without making details public.[41] Only after the publication did the

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[36] The European Court of Human Rights Annual Report for 2007 reports that it has decided 9,031 cases through 2007, including in the last three years, 1,105 cases in 2005, 1560 in 2006, and 1503 cases in 2007. [36] Annual Report 2007, p. 149, available at http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+Reports/. See, 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 Wittiier L. Rev. 357 (2005).

[37] For the contracting parties (i.e. the 47 nation states of Europe who are now members of the Council of Europe) see, http://www.coe.int/.

[38] [2007] ECHR 42864/05.

[39] *Id*. at ¶¶ 1, 9.

[40] *Id* at ¶ 7.

[41] *Id*.

government acknowledge that the deal had taken place.[42] Of the 42 cars purchased, 32 were distributed to the governors of regions of Moldova, 31 of whom were communists.[43] 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.[44]

On the same date that a defamation action was brought against the newspaper and the journalist by the two private corporations, including a request for an injunction; the newspaper's assets were ordered frozen by the court.[45] The newspaper's equipment was sequestered and bank account frozen within two weeks of the court order.[46] The journalist received threatening phone calls and several months later was attacked outside her house by unidentified persons and suffered a blow to her head and arm with a metal bar. Both the shuttered newspaper and other media linked the attack to the article at dispute as well as of 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.[47]

The trial court rejected a defense that the article dealt with a matter of important public interest: although public money had been utilized but not through the public agency for making such purchases nor planned in the state budge for 2003; the statements were value judgments not susceptible of proof or involved opinions of a well known politician and of clearly identified rumours; and in addition, the plaintiff corporations had

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[42] *Id*.
[43] *Id*. at ¶ 8.
[44] *Id*.
[45] *Id*. at ¶ 9.
[46] *Id. at ¶ 10.*
[47] *Id*. at ¶ 11.

become "public persons" by entering into the transactions with the government.[48] The court cited one fragment of a paragraph from the article as a factual representation that did not correspond to reality:

> "… when the communists came to power, Vladimir Voronin wanted to cut the Gordian know 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 be happen, someone paid someone else 500,000 dollars…."[49]

It is clear that the Moldavan 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 the Supreme Court of Justice reduced the total award to 8,430 euro.[50] The Supreme Court of Justice determined that the article alleged that a bribe had been paid, and thus a criminal offense had been committed.[51] However, it also determined that a restriction of freedom of express should not be of a degree as to put in jeopardy the economic survival of the person sanctioned.[52] Each of the appellate courts rejected the newspaper's arguments that the article had been based upon rumours which it had called ill-informed, and added that it was not known if the rumours were true.[53]

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

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[48] *Id*. at ¶ ¶ 12 13.
[49] *Id*. at ¶ ¶ 13, 14.
[50] *Id*. at ¶ ¶ 17-19. The trial court also ordered that an apolgy be published by the newspaper. ¶ 14. It is unclear when the newspaper's equipment was released from sequestration. 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. ¶ 17.
[51] *Id*. at ¶ 19.
[52] *Id*.
[53] *Id.* at ¶ 16.

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 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 responsibilities may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the 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 protection 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.

The court noted that it was conceded that the award of damages constituted an interference by a public authority with the applicant newspaper's freedom of expression within the meaning of the first paragraph of article 10, and that such interference constituted a violation of article 10 unless it was prescribed by law, had an aim or aims legitimate under paragraph 2 of Article 10, and that it was "necessary in a democratic society" to achieve such aim or aims.[54] The court determined that the interference was prescribed by law and served a legitimate aim of protecting the corporation's reputation.[55]

The court then considered whether the action was "necessary in a democratic society" and concluded it was not.[56] First, the court reiterated its position that the 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

[54] *Id.* at ¶ 26.
[55] *Id.* at ¶¶ 27-28.
[56] *Id.* at ¶¶ 29-41.

public interest.[57] 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 other matters of public interest are involved.

The court itself considered the substance of the article at issue and rejected the allegation by the Government that it intended to attack the corporation's reputation and affect fair competition rules.[58] Instead, the court construed the article as criticizing the government for a non-transparent and wasteful manner of spending public money, a matter of general public concern, rather than disparaging the company. The corporation had not charged that any other contents in the article had been untrue, and in particular did not dispute that there had been no competitive bidding and that the cars were overpriced.[59]

The court determined that the Government had relied upon part of a sentence in the article taken out of context in order to show that the interference with the applicant's rights had been necessary.[60] However, in context, the article warned the reader about the unreliable character of the rumour on which it was reporting.[61] In its role of a public watchdog, media reports on stories or rumours is to be protected where they are not completely without foundation.[62] The newspaper had attempted to get information about

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[57] *Id*. at ¶ 30. The court cited two earlier decisions, Fressoz and Roire v. France [1999] ECHR 29183/95 at para. 50, and Tonsbergs Blad AS and Haukom v. Norway [2007] ECHR 510/04 at para 87. 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 first case an executive vice-president of one of the country's largest industrial companies and a famous singer.
[58] Timpul Info-Magazin v. Moldova, supra note ___, at ¶ 32.
[59] *Id*. at ¶ 32.
[60] *Id*. at ¶ 35.
[61] *Id*.
[62] *Id*. at ¶ 36.

the transaction from either the Government or the private company but had been unable to do so.[63] The court opined that other uncontested facts could reasonably have prompted the journalist to report on anything available, including unconfirmed rumours.[64] Moreover it noted that the article was written in the context of a forthcoming election, and that the article discussed the possible political reason for the puirchase of the cars and expressly urged voters to punish, during the election, those in power responsible for States-level corruption.[65] The court determined that the article was political speech critical of the government, expression of which implicates wider permissible criticism limits.[66] Considering the seriousness of the fine, and taking into account the newspaper's good faith in reporting on an issue of genuine public interest, the factual background and lack of detail 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 court considered that the interference was not necessary in a democratic society and thus a violation of Article 10.[67]

The court then awarded the newspaper damages of 12,000 euro and costs and expenses of 1,800 euro.[68] This was sufficient to remove the sting of the fine, but relatively modest considering the seizure of the newspaper's equipment.

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[63] *Id*.
[64] *Id*.
[65] *Id*. at ¶ 38.
[66] *Id*. The court cited Castells v. Spain [1992] ECHR 11798/85 at para 46.
[67] Timpul Info-Magazin v. Moldova, supra note ___, at ¶¶ 40, 41.
[68] Id. at ¶¶ 46, 52. The Supreme Court of Justice had reduced the original award to 8,430 euro. ¶ 19.

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 rumour, 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 NYT v. Sullivan.[69] Instead, the court exemplified the second holding of NYT v. Sullivan, the application of a "constitutional fact" test. The ECHR, just as the U.S. Supreme Court did in Sullivan, 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 any deference to the decisions of the nation state's courts. 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.[70] Even disavowal of the truth of a statement does not exculpate a republisher.[71] Also worth noting is the recognition by the

[69] Knowledge a statement was untrue, or reckless disregard of whether it was true or not.
[70] See, Perle and Williams on Publishing Law, (2004 Supplement) § 5.10 citing Cepeda v. Cowles Magazines & Broad, Inc. 328 F.2d 869, 871 (9th Cir.), cert denied, 379 U.S. 379 U.S. 844 (1964); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976). Of course
[71] Perle and Williams, supra note ___, § 5.10. "However, under the decisions in New York Times and Gertz, which require fault as a precondition for liability, the mere fact that one has republished a defammation cannot be the only consideration. 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.

Such factual analysis of defamation cases by the ECHR is typical, not atypical of its approach. On occasion there are references 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*: "The 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 harming its reputation."[72] However, such deference did not interfere with the court itself evaluating the facts of the case, nor did the court distinctly apply the concept of margin of appreciation to the judicial determinations of the Moldovan 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 significant in defamation cases[73] – the typical question is whether the complained of publication is defamatory in its content.

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republisher's degree of fault must also be examined. § 5.10. *See*, Gertz. v. Robert Welch, Inc. 418 U.S. 323, 339 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience3 of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.") See, Restatement (Second) of the Law of Torts, § 566, Expressions of Opinion. Under the common law an expression of opinion that was sufficiently derogatory was actionable. This common law rule appears to have been abrogated as unconstitutional. Restatement (Second) Comment c. Only if the expression of opinion implies the existence of undisclosed facts which are themselves defamatory, would the opinion statement be actionable. See, Restatement (Second) comment c.

[72] Timpul, supra note ___ at ¶33.

[73] On occasion additional evidence is necessary to demonstrate that a statement is defamatory. In case in which statement is not defamatory on its face, but takes on

Unsupported Opinions May be Actionable

The ECHR has distinguished between statements of fact and value judgments, recognizing that the truth of value judgments is not susceptible of proof.[74] "The requirement to prove a value judgment is impossible to fulfill and infringes freedom of speech itself," the ECHR has stated, but it went on to state, "However, even where a statement amounts to a value judgment, the proportionality of an interference may depend upon 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."[75]

The ECHR asserts that in exercising its supervisory jurisdiction, the Court must look at the interference [by the government] in the light of the cases 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 aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient.'"[76] In doing so the ECHR must satisfy itself that the national authorities applied standards that were in conformity with the principles of Article 10 and, … that they based themselves on an acceptable assessment of the relevant facts.[77] 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.

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defamatory meaning because of extrinsic facts, plaintiff is required to plead extrinsic facts, known as "inducement." Conroy v. Kilzer, 789 F. Supp. 1457, 1461, n.2 (D. Minn. 1992).

[74] Busuioc v. Moldova [2004] ECHR 61513/00, ¶ 61.

[75] *Id*, citations omitted.

[76] *Id*. at ¶ 62.

[77] *Id*.

In Busuioc v. Moldova[78] the ECHR considered on a statement by statement basis whether expressions of opinion were adequately justified by the journalist who had been found responsible for civil defamation and ordered to pay damages of 224 Euro.[79] For example, in two instances, a reference to a "shady deal" was found adequately justified by the fact that the transaction referenced was suspected of being illegal and a Parliamentary Commission made a report to that effect.[80] In another instance the court determined that expressions such as "colourful figure," "the head of the Ariport'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.[81] 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 (which incidents were not found inaccurate or untrue), these expressions were also protected.[82]

Despite holding that certain of the statements alleged were factually incorrect, and thus properly the subject of an action in defamation, the court awarded 4,000 euro in non-pecuniary damage for the stress and frustration as a result of the breach of the applicant's right to freedom of expression.[83]

Failure of the Government to provide Legal Assistance to Defamation Defendants Violated the Free Speech Rights of Anti-McDonald Food Activists

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[78] Supra note_____.
[79] Id. at ¶¶ 14-28, 36, 100.
[80] Id at ¶¶ 80-85, 92-93.
[81] *Id*. at ¶¶ 73-75.
[82] *Id.* at ¶ 75.
[83] Id at ¶ 104. Costs and expenses of 1,500 euro were also awarded. ¶ 108.

In Steel and another v. United Kingdom[84] the ECHR extended the protection of Article 10 to include a requirement that the U.K. government provide legal assistance for two defamation defendants, a part time bar worker and an unwaged[85] single parent. The case emerged from a Greenpeace campaign against McDonalds in the mid-1980s.[86] The campaign employed a six-page leaflet entitled "What is wrong with McDonalds?"[87] The first page of the leaflet showed a grotesque cartoon image of a man wearing a Stetson with dollar signs in his eyes hiding behind a "Ronald McDonald" clown mask. Running along the top of pages 2-5 were headers with the words McDollars, McGreedy, McCancer, McMurder, and McDisease.[88] The text drew connections between McDonald's and starvation in the "Third World," destruction of rain forests in part to produce pet food.[89] Appellations such as "Economic Imperialism" and "Colonial Invasion" accompanied paragraphs describing "slaughtering animals while still fully conscious," and "poisoning people with chicken and minced meat contaminated with gut contents, faeces and urine, " leading to bacterial infections responsible for 70 percent of all food-poisoning incidents.[90] McDonalds was accused of being anti-union, and sweating and exploiting its cheap labour.[91]

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[84] (2005) 18 BHRC 545, [2005] ECHR 68416/01.
[85] Unemployed and dependent on government income support. *Id*. at ¶ 9.
[86] *Id*. at ¶ 10.
[87] *Id*.
[88] *Id*. at ¶ 11.
[89] *Id*. at ¶ 12.
[90] *Id*.
[91] *Id*.

McDonalds brought suit in 1990 against the two applicants and three other persons for libel.[92] The litigation that ensued entailed 313 court days and was the longest trial, either civil or criminal; in English legal history.[93] At the end of the trial, the trial judge deliberated for six months before delivering his substantive 762-page judgment on June 19, 1997.[94]

The court made findings including:

It was and is untrue to say: that "either Plaintiff has been to blame for starvation in the Third World;" or 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;" or that "either Plaintiff has been guilty of destruction of rainforest; or used lethal poisons to destroy vast areas or any areas of Central American rainforest;" or that either Plaintiff has lied when it has claimed to have used recycled paper;" or that "McDonald's food is very unhealthy because it is high in fat, sugar, animal products and salt;" or that "Plaintiffs exploit children by using them as more susceptible subjects of advertising, to pressurize their parents into going into McDonalds;" or that "Plaintiffs sell meat products which, as they must know, expose their customers to a serious risk of food poisoning;" or that "the Plaintiffs have a policy of preventing unionization by getting rid of pro-union workers."[95]

However, the court did find: "various … 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,

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[92] *Id*. at ¶ 14.
[93] *Id*. at ¶ 19.
[94] *Id*. at ¶ 26.
[95] *Id.* at ¶ 27.

did not match;" and, that while "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;" and it was true that "[McDonalds UK} pas its workers low wages and thereby helps to depress wages for workers in the catering trade in Britain, but it has not been proved that [US McDonalds] pays its workers low wages."[96]

The court awarded US McDonalds 30,000 British pounds and UK McDonalds a further 30,000 pounds.[97] That award was later reduced to a total of 36,000 pounds for one of the defendants and 40,000 pounds for another.[98]

The Court of Appeals rejected various contentions in its 301 page judgment delivered on March 31, 1999.[99] In particular, commercial corporations, even strong corporations, have a clear right to sue for defamation.[100]Just as with an individual plaintiff, no showing that it had suffered actual damage was required, since damage to a trading reputation might be as difficult to prove as damage to the reputation of an individual.[101] The court also reaffirmed the English rule that a publication shown to be defamatory was presumed to be false until proven otherwise; it was the defendants'

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[96] *Id*.
[97] *Id*. at ¶ 29. No costs were requested by McDonalds.
[98] *Id*. at ¶ 35.
[99] *Id*. at ¶ 30.
[100] *Id*. at ¶ 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 ¶ 40.
[101] *Id*.

burden to prove the truth of statements presented as assertions of fact.[102] The court determined that it was not an abuse of process for plaintiffs with great legal resources to bring a complicated case against unrepresented defendants of slender means. [103] "Large corporations are entitled to bring proceedings to assert or defend their legal rights just as individuals have [that same right] …."[104]

Leave to appeal to the House of Lords was refused;[105] an application was filed before the ECHR on September 20, 2000.[106] The applicants raised several points 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.[107]

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.[108] McDonalds, they noted, in its economic power outstripped many small countries, whereas the applicants were a part-time bar-worker earning 65 pounds per week and an unwaged single parent.[109] McDonald's (U.S. and U.K.) were represented by Queen's Counsel and

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[102] *Id*.
[103] *Id*. at ¶ 33.
[104] *Id*. 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." ¶ 34.
[105] *Id*. at ¶¶ 35-36.
[106] *Id*. at ¶ 1.
[107] *Id*. at ¶¶ 52, 78-79.

[108] *Id*. at ¶ 50
[109] *Id.*

junior counsel[110] and a team of solicitors and administrative staff from one of the largest firms in England.[111] On occasion, the applicants were represented by pro-bono lawyers.[112] These pro-bono lawyers represented them on eight days during the 28 days of pre-trial hearings and appeals (37 court days).[113] During the main trial submissions were made on their behalf on only three occasions.[114] Offers of help usually came from inexperienced, junior solicitors and barristers, without the time and resources to be effective.[115] They pointed out several particular instances in which their own failures such as securing, preparing and paying the expenses of witnesses, they would have been able to prove the truth of various charges found to be unjustified.[116]

The ECHR considered the submission on the necessity of legal assistance in the context of an earlier holding by itself 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.[117] However, that case involved the requirement 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.[118] The instant case was far more complex, both factually and legally.[119] It involved 130 oral witnesses, including a number of expert witnesses dealing with scientific questions, including issues which the

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[110] The junior counsel was a specialist in libel law. *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id. at ¶ 52.*
[117] *Id. at ¶ 64* citing McVicar v. UK. (2002) 12 BHRC 567 at ¶ 55.
[118] *Id.* at ¶ 64.
[119] *Id.* at ¶¶ 65, 66.

English court held were too complicated for a jury to properly understand.[120] Over 40,000 pages of documentary evidence were involved.[121]

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."[122] The 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…."[123] 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.[124]

New York Times v. Sullivan and its progeny have never considered the necessity, vel non, of free legal assistance in a defamation case.[125] The ECHR's decision in such a case certainly merits attention.

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[120] *Id*. at ¶ 65.
[121] *Id*.
[122] *Id*. at ¶ 69. The court also pointed out that "the very length of the proceedings, was… a testament to the applicants' lack of skill and experience."
[123] *Id.*
[124] *Id*. at ¶ 72. Article 6 provides in part:

> (1) 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. …
> (2) ….
> (3) Everyone charged with a criminal offence has the following minimum rights;
> (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;

[125] See, : Lyrissa Barnett Lidsky, SILENCING JOHN DOE: DEFAMATION & DISCOURSE IN CYBERSPACE 49 Duke L.J. 855, (2000).

For example, a defamation lawsuit regarding scientific research may be quite expensive:

> While the likelihood of success in a defamation lawsuit based on scientific speech seems remote, the "threat of being put to the defense of a lawsuit ... may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." Any lawsuit that an environmental scientist must defend extracts a heavy toll in time and expenses. In the Immuno AG. case, although the editor of the Journal of Medical Primatology was ultimately vindicated by a unanimous court, the seven-year litigation cost $2 million in legal expenses, including $70,000 the editor had to pay out of his own pocket because his insurance company would not pay for certain necessary depositions. The other defendants in the case, which included the person who wrote the letter to the editor, the New Scientist journal, and New York University, settled rather than endure the time and expense of a trial.[126]

The ECHR then turned to the Article 10 issues. It asserted that Freedom of expression was an essential foundation of a democratic society, one of its basic conditions for its progress, and for each individual's self-fulfilment.[127] With respect to value judgments, the court balances a number of factors to determine whether the governmental interference with speech was proportional.[128] Political expression, including expression on matters of public interest and concern require a high level of protection under article 10.[129] While the government correctly pointed out that the applicants were not journalists, and thus should not be accorded 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.[130] There is a strong public interest in enabling such individuals to contribute

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[126] Robert R. Kuehn, SUPPRESSION OF ENVIRONMENTAL SCIENCE, 30 AM.J.L. & M. 333, 348 (2004) (footnotes omitted).
[127] Steel v. U.K. *supra* note ___ at ¶ 87.
[128] *Id*. at ¶ 88.
[129] *Id.*
[130] *Id*. at ¶ 89.

to the public debate on matters of general public interest such as health and the environment.[131]

However, there are limits, even for the press, in particular with respect to the reputation and rights of others. The court considered that in a campaigning leaflet a certain degree of hyperbole and exaggeration is to be tolerated. In the instant case, however, the allegations were serious in nature and presented as statements of fact rather than value judgments.[132]

The ECHR then considered and rejected arguments that it was unfair to place the burden of proving truth of defamatory statements upon the speaker or publisher, nor did it consider it proper to deprive a large multinational corporation of the right to defend itself against defamatory allegations.[133] However, considering that the lack of legal aid made the defamation proceedings unfair, in breach of Article 6(1) , the court considered that the U.K. failed to strike the correct balance to protect the applicants' right to freedom of expression and the protection of McDonald's rights and reputation.[134] The court 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."[135] 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

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[131] *Id*.
[132] *Id*. at ¶ 90.
[133] *Id*. at ¶¶ 91-94..
[134] *Id*. at ¶ 95.
[135] *Id*. (citations omitted).

suffered any financial loss.[136] While McDonald's had made no attempt to collect the judgment, it remained enforceable yet, and the ECHR considered the award of damages also disproportionate and thus violating Article 10.[137]

It is worth noting that in New York Times v. Sulllivan, the court did comment that the judgment awarded in the case "without 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."[138] 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 recovered $500,000 for the same advertisement and suits were pending seeking $2,000,000 in additional awards.[139] 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.[140]

Criminal Defamation Law: Alive In Europe

The criminal version of libel law has largely passed into desuetude in the United States. That passage was assisted by the Supreme Court's decision in Ashton v.

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[136] *Id*. at ¶ 96.
[137] *Id*. at ¶ ¶ 97-98.
[138] *Supra* note ___ at 376 U.S. 277. The Sedition Act is the Sedition Act of 1798, 1 Stat. 596.
[139] 376 U.S. 278 n. 18.
[140] *Id*. at ¶¶ 106, 109. Costs of 50,000 euros were also awarded. ¶ 112.

Kentucky[141] only two years subsequent to New York Times v. Sullivan. In Ashton the Supreme Court held that Kentucky's common law criminal libel law was so indefinite and uncertain that it could not be enforced as a penal offense consistently with the First Amendment of the U.S. Constitution.[142]

Since there is a movement to criminalize online defamation in the United States,[143] it us worthwhile to review the jurisprudence of the ECHR regarding criminal defamation cases – cases that are still permitted in various European jurisdictions.[144]

1. Private Criminal Defamation Actions

In Cumpana v. Romania[145] a newspaper article alleged that an illegal contract was made between city authorities and a private corporation relating to the impounding of illegally parked vehicles.[146] The city council had earlier authorized a contract be made between the city and another contractor.[147] The article stated the former deputy mayor received "backhanders from the partner company and bribed his subordinates … or

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[141] 384 U.S. 195 (1966). The petitioner had been sentenced to six months in jail and fined $3000 for printing a pamphlet found in violation of Kentucky criminal law.The trial court had charged that criminal libel "is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable." 384 U.S. 197-198.

[142] 384 U.S. 198. "[S]ince no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky."

[143] See, Susan W., Brenner, Should Online Defamation be Criminalized? 76 Miss. L.J. 705 (2007). "This article argues for incorporating a narrowly-focused, precisely-defined defamation offense into our criminal law." 76 Miss. L.J. at 786.

[144] See, Dean Chapman, Suppressing Dissent: The Pivotal Role of the Prosecutor in Criminal Defamation Proceedings in Countries Subject to the European Court of Human Rights, 14 Colum. J. Eur. L. 597 (2008).

[145] [2004] ECHR 33348/96 (Grand Chamber).

[146] *Id*. at ¶ 20.

[147] *Id.*

forced them to break the law."[148] The article alleged that "large numbers of privately owned vehicles have been damaged and … thousands of complaints have been made…"[149] The Financial Control Department of the County Audit Court found later that year that the award of the contract had not been justified by any bid submitted; income had been lost to the city council, and urged compliance with the law as regards the obligations under the contract.[150]

Shortly after the article was published, a woman who had been the council's legal expert and by the then 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 of money, and with certain intimate parts of her body emphasized as a sign of derision."[151] After the applicants failed to appear for a hearing, they were adjudged guilty of insult and defamation and sentenced to imprisonment for three months for insult and seven months for defamation, with the seven months to be immediate imprisonment.[152] They were also prohibited from working as journalists for one year after serving their prison terms and ordered to pay non-pecuniary damage of 2,033 euros.[153] In its justification of the decision the court noted that the injured party is a public figure and that following the publication, "her superiors

[148] *Id.*
[149] *Id.*
[150] *Id*. at ¶ 23.

[151] *Id*. at ¶¶ 18, 20, 25.
[152] *Id*. at ¶ 37.
[153] *Id*.

and the authority above them asked for an explanation of the trial, particularly as she was due to the examination to obtain permanent [judicial] status."[154]

On appeal the decision was affirmed. However, the Procurator-General applied to the Supreme Court of justice to have both 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, and the amount of the fine was extremely high and had not been objectively justified.[155] Lastly, it was asserted that the prohibition of persons from practicing a particular profession on account of their incompetence, lack of training or any other ground making them unfit to practice the profession was not satisfied in the instant case for lack of unequivocal proof of incompetence.[156]

These submissions were rejected however, by the Supreme Judicial Court which found that the cartoon was "likely to have an adverse effect on the injured party's honour, dignity and public image" and 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 person.[157]

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[154] *Id*. at ¶ 40.
[155] *Id*. at ¶ 44.
[156] *Id*.

[157] *Id*. at ¶¶ 45, 46. The applicants never served any of the prison time first as a result of a series of suspensions by the Procurator-General, then they were granted a Presidential pardon dispensing them from the prison sentence; the pardon also waived their secondary penalty of disqualification from exercising civil rights. ¶¶ 48-50. 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. ¶¶ 51-54.

The applicants failed in their submissions to the ECHR which found by a vote of 5 to 2 that there had been no violation of Article 10.[158] However, the case was appealed to a Grand Chamber, which accepted the request for a hearing.[159] The Grand Chamber focused its opinion on the matter of whether the actions of the national courts were necessary in a democratic society.[160]

The court considered in this context the vital role of the press of "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.[161] The matter was indisputably one of general interest to the community which the applicants were entitled to bring to the public's attention.[162]

However, the article conveyed the message that the original plaintiff had been involved in fraudulent dealings and was couched in virulent terms such as "scam" and "series of offenses" and "intentional breach" of the law, and "bribes."[163] The court reiterated it position that the existence of facts can be justified, whereas the truth of value judgments is not susceptible of proof.[164] However, even a value judgment can be excessive if it has no factual basis.[165] While the applicants' statements about the plaintiff were mainly worded in the form of an alternative, they could be construed that they contained allegations of specific conduct, i.e. that she had accepted bribes, and behaved

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[158] *Id*. at ¶ 8.
[159] *Id*. at ¶ 10.
[160] *Id*. at ¶¶ 88-110.
[161] *Id*. at ¶¶ 93, 94.
[162] *Id*. at ¶ 95.

[163] *Id*. at ¶ 97.
[164] *Id*. at ¶ 98.
[165] *Id*. at ¶ 99.

in a dishonest and self-interested manner in a way that might lead one to believe that the "fraud" they were accused of were "established and uncontroversial facts."[166] 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 either at 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.[167] In particular, they failed to submit to the national courts a copy of the Audit Court report or indicate during the court proceedings that their assertions had been based upon such an official report.[168] In the end, the Grand Chamber also determined that the national court determinations of violations met a "pressing social need."[169]

However, that left the issue of whether the penalties were proportionate in connection with the interference with free expression. The court found the penalties, three months and seven months of imprisonment were very severe.[170] Contracting parties may impose penalties, but must not do so in a manner that unduly deters the media from fulfilling their role of alerting the public of apparent or suspected abuse of public power.[171] The chilling effect of criminal penalties upon journalistic freedom of express is evident.[172] 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

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[166] *Id*. at ¶ 100.
[167] *Id*. at ¶¶ 103-104..
[168] *Id*. at ¶ 105.

[169] *Id*. at ¶ 110.

[170] *Id*. at ¶ 112.
[171] *Id*. at ¶ 113.
[172] *Id*. at ¶ 114.

violence is involved.[173] The case at bar presented "no justification whatsoever for the imposition of a prison sentence."[174] 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.[175] Moreover, the imposition of an order disqualifying the applicants from exercising all civil rights, again waived as a result of the presidential pardon, was particularly inappropriate in the instant case.[176] 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' reoffending.[177] This prohibition of working as a preventive measure contravened the principle that the press must function as a public watchdog in a democratic society. Thus there has been a violation of Article 10 of the Convention.[178] The ECHR then went on to find that the finding of a violation of Article 10 was sufficient just satisfaction for any non-pecuniary damage sustained by the applicants.[179]

The Cumpana case is one of many criminal libel cases from an eastern European country.[180] It is not unique in a number of ways: 1) It concerned a relatively petty local

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[173] *Id*. at ¶ 115.
[174] *Id*. at ¶ 116.
[175] *Id*.
[176] *Id*. at ¶ 117.
[177] *Id*. at ¶ 118.

[178] *Id*. at ¶ 122. The vote was 16 to one. One judge dissented because of the refusal of the court to afford the applicants any just satisfaction. See, dissenting opinion of Judge Costa.
[179] *Id*. at ¶ 130. The court rejected a request for costs and expenses since the applicants had neither quantified them nor submitted any supporting documents. ¶ 134.
[180] Not all such cases stem from Eastern Europe. A major counterexample is Colombani et al v. France, [2002] 51279/99. That case dealt with two Le Monde articles based on a

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; 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 Compana is far from alone in illustrating that a private person may bring such actions. Some but not all such private criminal prosecutions for defamation are brought by persons who might be described as "politically connected." For example, Minelli v. Switzerland[181] involved a criminal complaint of defamation by a company director against a journalist which was converted into a private prosecution.[182] In Minelli the Assize Court ordered the

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confidential report commissioned by the European Commission naming Morocco as the world's leading exporter and the main supplier of cannabis to Europe. ¶¶ 11-13. 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. ¶¶14-15 The first instance court acquitted the defendants on grounds that the articles had merely quoted extracts from an indisputably reliable report. ¶ 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." ¶ 18. A fine was assessed, including a direct payment of 10,000 francs to the King of Morocco. ¶ 19. The newspaper, Le Monde, was also ordered to publish a report of the details of the convictions. ¶ 19. 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. ¶ 26. The ECHR found that the French public had a legitimate interest in being informed about the European Commission's view on a problem of drug production and trafficking in Morocco, a state with which France enjoys close relations. ¶ 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. ¶ 65. The elimination of a defense of justification, even in the case of a head of state, was beyond what was required to preserve a person's reputation. ¶ 66.

[181] (1983) 5 EHRR 554, [1983] ECHR 8860/79.

[182] Eventually dismissed on procedural grounds. *Id* at ¶ 12.

defendant to pay two thirds of the court costs with additional compensation on the basis of its determination that if the case had gone to trial, the defendant would have been found guilty.[183] In Helmers v. Sweden[184] a private prosecution for libel was brought by a university lecturer who had not been appointed to an academic post.[185] However, Kobenter and another v. Austria,[186] and Standard Verlagersellschaft mbH v. Austria[187] involved private prosecutions by government officials, with the former being brought by a judge whose judgment in a case involving homosexuals had been criticized,[188] and the latter by an official whose exercise of voting rights on behalf of a political region had been the subject of criticism.[189] Similarly Kusmierek v. Poland[190] involved an improperly delayed private prosecution for libel brought by a Deputy Mayor. Likewise, in Dlugolecki v. Poland[191] a former mayor, candidate for municipal council brought a private bill of indictment against a journalist. Likewise, in Karhuvaara v. Finland[192] a member of Parliament instituted proceedings about newspaper coverage of her husband's

[183] The ECHR found that the requirements of a fair trial had been violated. *Id*. at ¶ 41.
[184] [1991] ECHR 11826/85.
[185] 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 by the denial of a oral public hearing by the Court of Appeals. Id. at ¶¶ 38-39.
[186] [2006] ECHR 60899/00.
[187] [2007] ECHR 37464/02.
[188] Kobenter, supra note ___ at ¶ 12. The attacked judgment was itself entered in a private defamation prosecution against several defendants, one of which the judge convicted of the offense of insult, and the other acquitted. ¶ 11.
[189] Standard Verlagersellschaf mbH, supra note ____ at 19. "[T]he article at issue … fulfilled the elements of the offense of defamation under article 111 of he Criminal Code."
[190] [2004] ECHR 10675/02.
[191] [2009] ECHR 23806/03.
[192] [2004] ECHR 53678/00.

assault upon a police officer and received special protection because she was a member of parliament.[193]

In few of these private actions did the ECHR reach the substance of Article 10. Cumpana v. Romania, discussed above, is 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 Verlagesellshcaft, by a narrow margin, 4 votes to 3, it found no violation of Article 10.[194] 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.[195] For example, in Kobenter, the ECHR found that the criticism of the judge was a matter of public interest; 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 himself in subsequent disciplinary proceedings.[196] The Austrian courts failed to justify the criminal conviction for defamation and the imposition of a fine and awarded the full amount of pecuniary damages claimed as well as 5,000 euro for non-pecuniary damage for the journalist.[197] In Dlugolecki the defendant convicted of criminal insult[198] was required pay a small fine, make a charitable contribution and publish an apology with a conditional discontinuance of the proceedings

[193] Id. at ¶ 13. Defamation charges were rejected by the trial court, but fines were assessed for invasion of privacy. ¶ 12.
[194] Standard Verlagesellschaft, supra note ___ at ¶ 44. Dissenting opinion by Judges Rozakis, Vajic and Spielmann.
[195] *Id*. at 43.
[196] Kobenter, *supra* note ____ at ¶31.
[197] *Id*. at ¶¶ 32-33, 37-38.
[198] *Id*. at 12.

for a probationary period of one year.[199] The ECHR determined that the publication during an election implicated the crucial importance of free political debate in 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.[200] The ECHR awarded non-pecuniary damages of 3,000 euro for distress and frustration resulting from the litigation and conviction.[201] The ECHR also most significantly 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…."[202]

The court went on to restate, as it had in Cumpana that a prison sentence for a press offense will be compatible with the journalists' freedom of expression … only in exceptional circumstances … as for example hate speech or incitement to violence.[203]

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 also may admit of political pressure to protect favorite politicians or public figures or even to simply protect the government in power from political dissidents.

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[199] Dlugolecki, *supra* note ___ at 12.
[200] *Id*. at ¶¶ 43, 44
[201] *Id*. at ¶ 52. The fine, costs and required contribution to a charity were quite small, the fine approximately 13 euros (50 polish zlotys – PLN), PLN 300 for costs and PLN 118 to the charity.
[202] Id. at ¶ 47.
[203] *Id*. at ¶ 47.

For example, the Government of France intervened quite directly to assure a criminal defamation prosecution to assuage the feathers of the King of Morocco.[204] In a case from Spain, criminal proceedings were brought for insulting the Government.[205] In a case from Poland, the deputy speaker of the Senate and a regional prosecutor were targets of articles by a candidate for parliament; that candidate was charged by the deputy speaker with criminal libel.[206] In Russia, upon the request of a regional governor criticized in a regional paper a criminal prosecution was brought against the editor-in-chief.[207]

In the most serious of these cases, a senator in the Spanish Parliament, published a magazine article entitled "Outrageous Impunity" lamenting the number of murders in Basque Country and the Government's failure to prosecute any perpetrator or to enlist the

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[204] Colombani et al v. France, [2002] 51279/99.

[205] Castells v. Spain, 91992) 14 EHRR 443, [1992] ECHR 11798/83. The initial sentence was for a term of imprisonment of one year and a day and as an accessory penalty he was disqualified for the same period from holding any public office and exercising a profession and ordered to pay costs. The Spanish Supreme Court stayed for two years the enforcement of the prison sentence but left intact the accessory penalty, which was itself stayed by the Constitutional Court. ¶¶ 13, 14. The Constitutional Court later dismissed the appeal. Later the Supreme Court ruled that the term of imprisonment had been definitively served. ¶ 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. ¶ 55. The ECHR noted that since he frequently attended the courts in question, this constraint can hardly have caused him any loss. ¶ 55.

[206] Malisiequicz-Gasior v. Poland, [2006] ECHR 43797/98. 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 Prosecutors. The prosecutor had earlier signed a warrant authorizing search of the defendant's flat and signed an order allowing the tapping of her telephone., and subsequently been present with the Deputy Speaker when the defendant's husband was arrested in connection with search of a cottage. ¶¶ 8-10. After conviction the defendant was sentenced to a term of imprisonment of eighteen months suspended for five years and ordered to publish an apology and to reimburse the costs of the proceeding.¶ 33. Although she did not publish an apology, the suspended sentence was not enforced against the defendant. ¶¶ 42-43.

[207] Krasulya v. Russia [2007] ECHR 12365/03 ¶ 10. A suspended sentence of one year's imprisonment was given, conditional on six months' probation. ¶ 21.

public's help, such as through the media.[208] The ECHR held Article 10 violated by the denial of any ability to establish the facts underlying the article.[209] The Spanish courts had held that defenses of "truth and good faith" were unavailable in respect to insults directed at the institutions of the nation.[210] The ECHR stated it "attached decisive importance to the fat that [the Spanish Supreme Court] declared such evidence inadmissible" even though it "is impossible to state what the outcome … would have been."[211]

In Malisieqicz-Gasior v. Poland,[212] 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."[213] Moreover, the target of the attacks was a politician, should have been taken into account by the domestic courts demonstrating a greater degree of tolerance.[214] Finally the court noted 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.[215]

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[208] "Insultante Impunidad" in Spanish. Castells v. Spain, *supra* note ___ at ¶¶ 6-7. At the common law, truth or good motives was not a defense to a criminal libel action. Beauharnais v. Illinois, 343 U.S. 250, 254 (1952), so the English law was not all that dissimilar than that of Spain.
[209] *Id*. at ¶¶ 47-48, 50
[210] *Id*. at ¶ 47.
[211] *Id*. at ¶ 48.
[212] *Supra* note ____.
[213] *Id* at ¶¶ 65-67.
[214] *Id* at ¶ 67.
[215] *Id.*

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 publications, characterization of the contested statement by the domestic courts, the wording used by the applicant, and the penalty imposed on him."[216] In that connection, the issue of whether a value judgment or a factual statement is at issue is a central concern of the ECHR even though value judgments must also have adequate support so as to constitute fair comment.[217] 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."[218] A journalist's role implicated "imparting information and ideas on matters of public concern, even those that may offend, shock or disturb….."[219] 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.[220]

On the other hand in Barford v. Denmark,[221] a journalist was convicted and fined for publishing an article that allegedly defamed two lay judges who were also government employees.[222] The journalist had stated that the two judges "did their duty"

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[216] Krasulya v. Russia, *supra* note ___ at ¶ 35.
[217] *Id* at ¶¶ 39-42. See, Schwabe v. Austria, [1992] ECHR 13704/88 ¶¶ 11, 35 (private prosecution by member of parliament; conviction violated Article 10 when impugned comparison about alcohol consumption was judged a value-judgment, for which no proof of truth is possible).
[218] *Id* at ¶ 43.
[219] *Id*. at ¶ 45.
[220] *Id*. at ¶ 44. The ECHR awarded 4,000 euros in non-pecuniary damage. ¶ 57.
[221] (1991) 13 EHRR 493, [1989] ECHR 11508/85.
[222] *Id*. at ¶¶ 8, 10, 11. A fine of 2000 Danish Crowns was assessed. ¶ 11.

finding in favor of the government, their employer.[223] 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.[224] 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[225]a Grand Chamber of the ECHR sustained a fine, damage and costs award against a journalist and the manager of an Italian daily newspaper, for defaming a prosecutor.[226] 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 the publication of the judgment in the newspaper.[227] The offending article complained that a prosecutor was biased towards the Italian Communist Party (the PCI, later the PDS) and that he had participated in an attempt by the PCI to gain control of public prosecutor's offices and to destroy people's reputation by the opening of a judicial investigation.[228] An ordinary seven judge chamber of the ECHR

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[223] *Id*. at ¶ 9.
[224] Id. at ¶¶ 32-33. Judge Glckl dissented.
[225] [2003] ECHR 48898/99.
[226] Id at ¶¶ 32, 48.
[227] *Id* at ¶ 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 1584 lire to a dollar and 1513 lire to a dollar. 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, [2001] ECHR 48898/99, ¶ 50.
[228] *Id*. at ¶ 7. Investigation of a three-time prime minister of Italy. Guilio Andreotti for alleged mafia connections involving the use of a government paid informer who the prosecutor allegedly met in the United States to offer eleven million Lire a month for continued cooperation, formed part of the article.
Notable quotes attributed to Andreotti include, "Power wears out those who don't have it." In the movie, Godfather III, a fictional politician modeled on Andreotti, before he was killed, had that same phrase whispered into his ear by the killer.

ruled that the first allegation, exemplified by an assertion that the prosecutor had taken an "oath of obedience," had a symbolic meaning could not be considered excessive critical comment and sanctioning such statements violated Article 10. However, 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.[229]

The Grand Chamber of seventeen judges, however, found no violation of Article 10 (with a single dissent).[230] Nor did it bifurcate the allegedly defamatory statements into two categories. Instead, it aggregated the allegation 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.[231] Moreover,

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[229] Perna v. Italy, [2001] ECHR 48898/99, ¶¶ 40-43, 45.
[230] Perna v. Italy [2003] ECHR 48898/99.
[231] Id. at ¶ 40. One could speculate that the appearance as a third-party intervenor, the complaining prosecutor (represented by a lawyer) in the first instance in the Grand Chamber proceedings may have had an impact on the court's treatment of the evidence. Neither the regular chamber nor the grand chamber had any difficulty with the refusal of the trial court to allow the prosecutor to be summoned and submitted to cross examination – in the regular chamber, because he had already denied the allegations (Perna v. Italy, [2001] ECHR 48898/99 at ¶ 29) and in the Grand Chamber because, the journalist had not demonstrated that evidence from the complaining prosecutor would have been helpful in proving some of the prosecutor's alleged conduct (Perna v. Italy [2003] ECHR 48898/99. ¶ 32).
It is odd that the prosecutor should be given the unusual ability to intervene at the Grand Chamber level for the first time when one of the major objections to the procedures below was that that prosecutor was not subjected to cross examination about his conduct. The court never explained, for example, why an answer to questions about the alleged trip of the prosecutor to the United States to offer money to an informant could not have been probative of issues before the court.
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. Perna v. Italy, [2003] ¶ 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

it stated 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.[232] 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 in the whole context an implication that the prosecutor was furthering the overall strategy of the PCI through prosecution of Mr. Andreotti.[233] 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. See, "*Silvio Berlusconi blasts 'cancerous growth' of Italian judiciary*."[234]

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.[235] The courts' refusal to accept any evidence was extremely

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narrowly defeated. However, his critical abstention vote on January 21, 2008 caused the government of Prime Minister Romano Prodi to lose the vote and Prodi to resign.

[232] Perna v. Italy*, supra* note ____, at ¶ 40.

[233] *Id*. at ¶ 47.

[234] June 26, 2008 article. "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.'"
http://www.timesonline.co.uk/tol/news/world/europe/article4215061.ece

[235] Dissenting opinion, second paragraph.

serious, particularly with respect to evidence from the complaining prosecutor.[236] He notes that the Italian courts "acted very speedily in determining the charges against the applicant, taking less than four years at three levels of jurisdiction, ….this in a country condemned many times for the length of its proceedings."[237] 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 as damages.[238]

4) 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 but for cases in which only damages are awarded and in most of those cases either prosecutors or the judiciary were the targets of the defamatory or insulting statements. None of the cases it has recently considered involved the actual serving of prison time, yet when prison time is ordered, the court time and time again had 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 legal position in the United States towards such actions, particularly actions in which prosecutors or judges are complaining parties, is more protective of the speaker. Such greater protection of speech better fosters open

[236] *Id.*
[237] Dissenting opinion, third paragraph.
[238] Dissenting opinion, fifth paragraph. 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.

debate about the functioning of the justice system in democratic systems. Thomas Paine's message has been little heard in this 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. Lawyers have been fined for describing a judge as an "evil unfair witch" with an ugly, condescending attitude" on a courthouse blog;[239] in another case 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 was santioned;[240]

Injunctive Relief for Defamation in the ECHR

In American law the presumptive unconstitutionality of any prior restraint upon publication means that injunctive relief is rarely available. New York Times v. United States (Pentagon Papers Case),[241] Nebraska Press Association v. Stuart (Fair Trial Gag Order Case),[242] Near v. Minnesota (attempt to abate scandalous newspaper as public nuisance).[243]

Not so in Europe. For example, in Wabl v. Austria[244] a protestor described a newspaper article as "Nazi-journalism."[245] The newspaper secured an injunction to

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[239] *Lawyers Critical of judges fight for rights*, The National Law Journal, Feb. 9, 2009, p.4. ($1,200 fine plus reprimand.)
[240] Id. The attorney had represented Dr. Jack Kavorkian, a Doctor who assisted in suicides. The attorney is now contesting the Michigan Rule of Professional Conduct requiring treatement of judges with "courtesy and respect" and barred "discourteous or undignified conduct."
[241] 403 U.S. 713 (1971).
[242] 427 U.S. 539 (1976).
[243] 283 U.S. 697 (1931).
[244] [2000] ECHE 24773/94.
[245] *Id*. at ¶ 14.

prevent repetition of the allegation from the Supreme Court after two lower courts had rejected the request.[246] 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."[247]

The widow and children of President Mitterrand requested an injunction to prevent the continued distribution of a book, Le Grand Secret, that allegedly invaded President Mitterrand's privacy and injured his relatives' feelings by disclosure of confidential medical information. Plon (society) v. France.[248] 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).[249] The requested interim injunction was issued and upheld by the Paris Court of Appeals.[250] That issuance occurred 24 hours after the book was published by which time 40,000 copies had been sold and ten days after President Mitterrand had died.[251] By the time the judgment on the case in chief was issued by the tribunal de grande instance, Mitterrand had been dead for nine and a half months.[252]

The ECHR applied a balancing test and determined that the interim injunction was proportionate and justified by the context of grief for the widow and children, but by the time of the final trial determination, nine and a half months later, continuation of the

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[246] *Id*. at ¶ ¶ 18 - 20.
[247] *Id*. at ¶ 45.
[248] [2004] ECHR 58148/00, ¶ 9.
[249] *Id* at ¶¶ 6,8.
[250] *Id* at ¶¶9-10. Appeals to the Court of Cassation were dismissed. ¶ 11. Criminal proceedings against Dr. Gubler, a journalist who assisted him and the managing director of the publisher resulting in fines. The civil proceedings not only produced an injunction, but also a damage award for the widow and children. ¶¶ 12, 14.
[251] *Id*. at. ¶ 53
[252] *Id.*

injunction was disproportionate to the interests sought to be protected and no longer justified.[253] By that time not only had 40,000 books been sold, but the book had also been disseminated on the internet and was the subject of considerable media comment.[254] In this determination, the ECHR considered the books 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."[255]

Governments in Europe do seek to enjoin the publication of material considered inappropriate by the government. For example, in two cases, Sunday Times v. United Kingdom,[256] (hereinafter Sunday Times I) and Sunday Times v. United Kingdom (no. 2)[257](hereinafter Sunday Times II) the British government sought and was granted injunctions to prevent a publication on the background of the introduction of the drug thalidomide[258] to the British market and a book called "Spycatcher" and any related material about the British Secret Service (MI5).[259] In both cases the Grand Chambers of

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[253] *Id*. at ¶¶ 47-48, 51-55.
[254] *Id*. at ¶53.
[255] *Id.* at ¶¶44, 47.
[256] (1980) 2 EHRR 245, [1979] ECHR 6538/74. (Grand Chamber). In a second decision the ECHR awarded costs for the ECHR litigation in the amount of £22,626.78. (By a vote of 13-3). Sunday Times v. United Kingdom, (1981) 3 EHRR 317, [1980] ECHR 6538/74, ¶ 45.
[257] (1992) 14 EHRR 229, [1991] ECHR 13166/87. (Grand Chamber).
[258] Thalidomide is a drug prescribed for a time as a sedative for expectant mothers. 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. Sunday Times I, *supra* note ___ at ¶ 8.
[259] The first actions seeking to enjoin publication of Spycatcher began in September, 1985 with respect to publication in Australia. Eventually the book was published in the

the ECHR found violations of Article 10; in Sunday Times I by an eleven vote to 9 vote margin, and in Sunday Times II, unanimously.

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 on going civil actions against a drug manufacturing company defendant, Distillers Company (Biochemicals) Limited, (Distillers), and to avoid the risk of "trial by newspaper."[260] However, the opinion for the ECHR 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' action would have come on for trial.[261] The ECHR further found that it was difficult to divide the wider issues (which the Government did not seek to preclude from press discussion on) from the negligence issue; for the question of where responsibility lies for the tragic situation was a matter of public concern.[262] The ECHR recognized that "courts cannot operate in a vacuum."[263] While courts are a forum for settlement of disputes, "this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialized journals, in the general press or amongst the public at large."[264]

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

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United States on July 14, 1987, and many copies were brought back into the U.K. by travelers or obtainable through mail delivery from American bookshops willing to deliver in the United Kingdom. Sunday Times II, *supra* note ____ at ¶¶ 13, 28-29.

[260] Sunday Times I, supra note ___, dissenting opinion of Judges Wiarda, Cremona, Thr Vilhjlmsson, Ryssdal, Ganshof Van Der Meersch, Sir Gerald Fitzmaurice, Bindschedler-Robert, Liesch and Matscher at ¶ 11.

[261] *Id.* at ¶ 66.

[262] *Id*.

[263] *Id* at ¶ 65.

[264] *Id*

MI5.[265] The legal action was based upon an argument that Mr. Wright breached his duty of confidentiality under his employment contract.[266] The book asserted that MI5 conducted unlawful activities calculated to undermine the 1974-1979 Labor 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.[267] The first action was commenced in Australia to enjoin publication.[268] 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 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 covered Mr. Wright.[269] Ex parte interim injunctions were granted on June 27, 1986, and continued in effect by inter pares hearing on July 11, 1986.[270] On appeal in the British court system, both the Court of Appeals and the Appellate Committee of the House of Lords considered the grant of the interim injunctions justified.[271] The injunctions were continued on July 30, 1987 by action of the Appellate Committee of the House of Lords although the trial

[265] Sunday times II, *supra* note ___ at ¶ 11.
[266] *Id* at ¶ 13.
[267] *Id*. at ¶ 11.
[268] *Id*. at ¶ 13.
[269] *Id*. at ¶ 15.
[270] *Id*. at ¶ 17.
[271] *Id*. at ¶ 18.

court had ordered the injunctions discharged in view of the publication of the book in the United States.[272] Spycatcher had been published in the United States on July 14, 1987.[273]

The decision of July 30, 1987 was then brought before the ECHR by the Sunday Times.[274] The ECHR found that by that date the argument originally made regarding the necessity of keeping information secret had metamorphed into an argument that the major purpose of the injunctions was to promote the efficiency and reputation of the Security Service, by preserving confidence in that service by third parties; making clear that unauthorized publication would not be countenanced and deterring others from similar actions.[275] 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.[276] Actions for profits existed against Mr. Wright.[277] Continuation of the restrictions on publication after July 1987 prevented newspapers from exercising their right and duty to purvey information on a matter of legitimate public concern.[278] The ECHR concluded that the interference was unnecessary in a democratic society and violated Article 10.[279] The ECHR went on to award costs in the amount of £100,000.[280]

The Spycatcher case has an American counterpart in the actions by the United States Government against Victor Marchetti and John D. Marks to prevent publication of

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[272] *Id*. at ¶¶ 33, 35.
[273] *Id*. at ¶¶ 28, 52. Around 715,000 copies were printed in the United States, most sold by October 1987. 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). ¶ 38.
[274] Sunday Times in the ECHR's opinion refers to the Times Newspapers Ltd, publisher of the Sunday times, and its editor, Mr. Andrew Neil. *Id*. at ¶ 9.
[275] *Id*. at ¶ 55.
[276] *Id*.
[277] *Id*.
[278] *Id*.
[279] *Id*. at ¶ 56.
[280] *Id*. at ¶ 70.

a book, **The CIA and the Cult of Intelligence**.[281] However, unlike the action in Sunday Times II the action was commenced not by the government against newspapers, but against a former employee of the CIA to obtain an injunction based upon a secrecy agreement executed by the employee.[282] The theory adopted by the Fourth Circuit was that by executing the secrecy agreement, the employee waived his First Amendment rights.[283]

Another case line in American jurisprudence deals with a similar prior restraint, albeit prior restraint imposed by Congress, not by the judiciary.[284] 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 ("ECSPs").[285] The statute prohibited the recipient of an NSL from disclosing the fact that

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[281] Knopf, 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, at p. ix.
[282] United States v. Marchetti, 466 F..2d 1309 (4th Cir. 1972), cert. denied, 93 S.Ct. 553 (1972)(Justices Brennan, Douglas and Stewart dissenting). After the Government censored the draft book, a subsequent action was filed by the publisher and authors which ultimately upheld the injunctive bar to publishing the 168 deletions: Alfred A. Knopf, Inc. v. William Colby as Director of the Central Intelligence of the United States and Henry Kissinger, as Secretary of State of the United States, 509 F.2d 1362 (4th Cir. 1975), cert. denied, 95, S.Ct. 1555, and 95 S.Ct. 1999 (1975).
[283] Knopf v. Colby, supra, 509 F.2d 1370.
[284] Doe v. Ashcroft, 334 F.Supp.2d 471 (S.D.N.Y. 2004), remanded by Doe v. Gonzales, 449 F.3d 415 (2nd Cir. 2006), Doe v. Gonzales, 386 F.Supp.2d 66 (D.Conn. 2005), Doe v. Gonzales, 500 F.Supp. 2d 379 (S.D.N.Y. 2007), affirmed in part, reversed in part and remanded, Doe v. Mukasey, 549 F.3d 861 (2008). See, 18 U.S.C. §§ 2709, 3511, and the list of comparable NSLs in n.1, Doe v. Mukasey at 549 F.3d 864.
[285] Doe v. Mukasey, 549 F.3d 864.

an NSL has been received, and structuring judicial review of the non-disclosure requirement.[286]

An NSL was issued by the Federal Bureau of Investigation to John Doe, Inc, an internet service provider. The letter directed John Doe, Inc. "to provide the [FBI] the names, addresses, lengths of service and electronic communication transactional records [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.[287] After two different district courts held parts of the NSL statute unconstitutional, Congress amended the NSL statutes in two respects: First, nondisclosure required 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.[288]

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[286] 18 U.S.C. §§ 2709(c) and 3511(b). 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., Pub. L. No. 107-56, 115 Stat. 272, 365 (2001). *See*, 549 F.3d 865.

[287] 549 F.3d 865.

[288] USA Patriot Improvement and Reauthorization Act of 2005, §§ 115, 116(a), Pub.L. No. 109-177, 120 Stat. 192, 211-14 (March 9, 2006), amended by USA Patriot Act

Statutory reworking

At oral argument before the United States Court of Appeals for the Second Circuit, the Government urged the court 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 related to "an authorized investigation to protect against international terrorism or clandestine intelligence activities."[289] Such a narrowing construction avoids part of the troublesome reach of the statutory language that could authorize NSL letters for ordinary tortuous conduct based on the risk of "danger to the physical safety of any person."[290]

Such 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.[291]

Additional Reauthorizing Amendments Act of 2006, § 4(b), Pub.L. No. 109-178, 120 Stat. 278, 280 (March 9, 2006).

[289] 549 F.3d 875.

[290] 549 F.3d 874. The court stated, "A secrecy requirement of such broad scope would present highly problematic First Amendment issues." 874-875.

[291] 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 of 1998, 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." (Interpretation of Legislation, § 3 (1)). However, if 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.(Declaration of Incompatibility, § 4(1-6). In other words the U.K. statutory

The second issue concerned the scope of judicial review. The court required that good reason exist for the NSL issuance as the Government argued before the court.[292] Good reason means more than not frivolous, but rather some reasonable likelihood of an enumerated harm.[293] 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.[294]

Constitutional analysis

The Second Circuit applied the test established in Freedman v. Maryland,,[295] a motion picture licensing case, which held, *inter alia*, that the burden of initiating judicial review was placed upon the government.[296] The Court determined that Government was constitutionally required to notify each recipient of an NSL letter that it has a short time, such as ten days, to give the Government notice that wishes to contest the nondisclosure requirement, and that if the government receives such a notice, that the Government must begin judicial proceedings within a specified time, perhaps 30 days, and that the judicial proceedings would have to be concluded within a prescribed time, perhaps 60 days.[297]

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

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provisions must still be given full effect by the U.K. court, but Parliament is put on notice that a problem exists.

[292] 549 F.3d 875.

[293] *Id.*

[294] *Id*. at 875-876. 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 legislate."

[295] 380 U.S. 51 (1965) The censor must within a specified brief period of time either issue the license or go to court to restrain showing the film.

[296] Id. at 380 U.S. 59. The censor must within a specified brief period of time either issue the license or go to court to restrain showing the film.

[297] 549 F.3d. 879.

Amendment.[298] 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."[299] 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.[300] The New York Times v. 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.[301]

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. Politicians are subjected to wider limits on acceptable criticism than private individuals.[302] "However, it cannot be said that civil servants knowingly lay themselves

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[298] 549 F.3d. 881-883.
[299] 549 F.3d. 881.
[300] *Id*.
[301] 549 F.3d. 882. The German Constitutional 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 target of the surveillance must be notified by the government. Judgment of December 15, 1970, discussed in Klass v. Germany, 2 Eur. H.R. Rep, 214 (1980), [1980] ECHR 5029/71. See discussion in Shoenberger, Privacy Wars: EU versus US: Scattered Skirmishes, Storm Clouds Ahead, 17 Indiana Int'l & Comp. L.Rev. 355, 370-375 (2007).
[302] Oberschlick v. Austria, (1998) 25 EHRR 357, [1997] ECHR 20834/92, ¶ 29, Janowski v. Poland, [1999] ECHR 25716/94, ¶ 33, Thoma v. Luxembourg, [201] ECHR 38432/97, ¶ 47.

open to close scrutiny of their every word and deed to the extent politicians do."[303] While such civil servants are subjected to wider limits than private citizens,[304] they should not be treated on an equal footing with politicians when it comes to criticism.[305] "[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."[306] The ECHR appeared to have considered it significant that abusive language directed at law-enforcement officials occurred in a public place in front of bystanders.[307] Apparently a journalist observed police ordering street vendors to leave a municipal square, and intervened informing the guards they had no authority to act, and during the altercation described the guards as "ignorant" "dumb" and "oafs."[308] For the verbal insult, the journalist was criminally convicted of hooliganism and sentenced to imprisonment for eight months, suspended for two years and fined.[309] On appeal, the imprisonment sentence was quashed, but although the fine was reduced the criminal conviction was upheld.[310] The ECHR found no violation of Article 10 by a vote of twelve to five.[311]

Dissenting judges collectively issued four separate dissenting opinions, the cores of two opinions being that the policemen had been engaged in actions that constituted

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[303] Pedersen and another v., Denmark, [2004] ECHR 49017/99, ¶ 80.
[304] *Id*.
[305] Thoma, supra note ___ at ¶47.
[306] Janowski v. Poland, *supra* note ___ at ¶ 33.
[307] *Id*. at ¶ 34.
[308] *Id* at ¶¶ 11, 14.
[309] *Id* at ¶ 10.
[310] *Id*. at ¶ 12-14.
[311] *Id*. at ¶ 35.

abuses of their authority.[312] 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…."[313] The final dissenting 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, "Arbitrary conduct cannot be protected," and concluded that "in spite of the fact that a few of the remarkes he made were unfortunately chosen – he was right about the subtantive legal point at issue…."[314]

Similarly, in *Pedersen v. Denmark*[315] criminal defamation convictions of two television journalists with orders to pay 20-day fines of DKK 400 (or 20 days imprisonment in default) and compensation of DKK 75,000 to the estate of the deceased Chief Superintendent, were sustained as not violating Article 10.[316] 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."[317] The person originally convicted of murder

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[312] *Id*. at dissenting opinions by Sir Nicolas Bratza, joined by Judge Rozakis, ("The applicant was … amply justified in exer4cising his freedom of expression in remonstrating with the municipal guards."; and an opinion by Judge Bonello ("I harbour, … scruples in endorsing the protection of public officers in the course of an abuse of power.")
[313] *Id.*
[314] *Id.*
[315] [2004] ECHR 49017/99. The day fines were approximately € 1,078, and the compensation to the estate approximately € 13,469. ¶ 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." ¶ 93.
[316] Id. at ¶¶ 94-95.
[317] Id. at ¶ 92.

was retried subsequent to the airing of the television stories, and acquitted on the retrial by a jury.[318]

Thus in *Janowski v. Poland and Pedersen v. Denmark in* the ECHR applied its "middle level standard of scrutiny" to permit penalties to stand for modest insults or defamatory statements regarding civil servants. However, such results do not always attend application of this different standard of review for insulting or defamatory statements about lower level government officials. 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].[319] Similarly, in *Savitchi v. Moldova*[320] a journalist found responsible for defamation of police officers in their treatment of a automobile driver involved in an accident, was found to have had her Article 10 right violated.[321] The ECHR in particular, distinguished the case from *Janowski* stating that the language used "cannot be characterized as 'offensive and abusive.'"[322]

Similarly, in *Nikula v. Finland*,[323] a court appointed defense attorney, who had been convicted on a private prosecution for criminal defamation of a prosecuting attorney, had been deprived of her rights under Article 10.[324] Indeed, the court

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[318] Id. at ¶ 26. The defendant had already been released on probation from the original conviction. ¶ 10.
[319] Thoma v. Luxembourg, supra note ___ at ¶¶ 11, 64-66. There were then fiftyfour forest wardens and nine forestry engineers then employed who subsequently brought civil suits against the journalist. ¶ 17. The ECHR awarded pecuniary damage of LUF 741,440, and costs of LUF 600,000. ¶¶ 72, 77.
[320] [2005] ECHR 11039/02.
[321] *Id* at ¶¶ 59-60.
[322] *Id* at ¶ 52.
[323] [2002] ECHR 31611/96.
[324] *Id*. at ¶ 55.

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.[325] Although the ECHR purported to consider the application of Janowski[326] in fact it stated that "only in exceptional cases would restriction – even by way of a lenient criminal sanction - of defense counsel's freedom of expression be accepted as necessary in a democratic society."[327]

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. "[I]t would go too far to extend the *Janowski* principle to all persons who are employed by the states or by State-owned companies."[328] The court did not further elaborate 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 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 that the someone has chosen to launch.

No special standard of review ostensibly applies to middle level civil servants under the jurisprudence of the United States Supreme Court. However, one might reconsider a number of 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

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[325] *Id* at ¶ 15.
[326] *Id* at ¶ 48.
[327] *Id* at ¶ 55.
[328] Busuioc v. Moldava, [2004] ECHR 61513/00, at ¶ 64.

"damned Fascist" and "God damned racketeer."[329] While the conviction the Supreme Court sustained for addressing "offensive, derisive or annoying word to any other person in public"[330] 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 language was addressed to a city marshal would figure prominently in any analysis. Similarly, in *Colten v. Kentucky,*[331] 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. The criminal statute at issue did not address criminal libel, but rather made action "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof … congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse…"[332] The defendant testified he wanted to make a transportation arrangement for his friend for he was aware that the friends car was about to be towed away.[333] The Supreme Court opined that fairness was satisfied by the order to disperse so as to account for vagueness or overbreadth problems.[334] 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

[329] 315 U.S. 568 (1942).
[330] 315 U.S. 569.
[331] 407 U.S. 104 (1972).
[332] 407 U.S. 589.
[333] 407 U.S. 588.
[334] 407 U.S. 589-590.

police officials. By contrast, the Supreme Court in *Gooding v. Wilson*,[335] agreed with the overturning of a conviction for speech found offensive by a police officer during a picketing protest against the war in Vietnam. The underlying statute criminalized the use of "opprobrious words and abusive language"[336] However, the state courts had not limited the construction of the statute to apply only to fighting words for which *Chaplinsky* permitted conviction.[337] There are limits in U.S. jurisprudence to deference to street level police determinations. *Accord*, *City of Houston v. Hill*, [338] (municipal ordinance making it unlawful to interrupt police officers in the performance of their duties unconstitutionally overbroad infringement on First Amendment rights: Defenant shouted at police to divert their attention from friend, "Why don't you pick on somebody your own size.").

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 addressed. One might certainly believe that there is some sense in a different standard, one that is somewhat 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.

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[335] 405 U.S. 518 (1972).
[336] 405 U.S. 518-519.
[337] 405 U.S. 524.
[338] 482 U.S. 451 (1987).

For example, Brian Markovitz, authored an interesting article*, Public School Teachers as Plaintiffs in Defamation Suits: Do they Deserved Actual Malice*?[339] The article begins with discussion of two cases, one in which a teacher who had been defamed, was able to receive judicial redress because the state courts ruled that teachers were not public officials,[340] and another case, with a teacher never able to dispute allegations that he was a child molester in court because the state courts ruled school teachers were public officials.[341] In the second case, the teacher alleged he had been "exposed to wrath, public hatred, contempt, and ridicule and ha[d] [been] deprived of the benefits of public confidence and social interaction" such that he "suffered economic loss, injury to his reputation and emotional distress…."[342] In the first case the teacher's supervisor found that "she ha[d] changed from a 'proud, confident person' to one who avoids crowds, does not mingle with people, 'has like crawled into a little shell, lost faith in almost anything and everything.'"[343] The ECHR approach might allow such teachers to reclaim their dignity: The New York Times actual malice rule does not.[344]

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[339] 88 Geo.L.J. 1953 (2000).
[340] Richmond Newspapers, Inc. v. Lipscomb, 362 S.E.2d 32 (Va. 1987).
[341] Campbell v. Robinson, 955 S.W.2d 609 (Tenn. Ct. App. 1997).
[342] Plaintiff's Complaint at 2-3, Campbell v. Times Printing Co, Circuit Court of Hamilton County, Tenn. (no. 96-CV-0234) (1996).
[343] Richmond Newspapers*, supra* note ___ at 362 S.E.3d 45.
[344] In an unpublished decision, the United States Court of Appeals for the Sixth Circuit, ruled that a post doctoral research assistant is not a public official, although it recognized that Tennessee courts had held a public school teacher, Campbell v. Robinson, and a state highway patrol officer, Roberts v. Dover, 525 F.Supp. 987 (M.D.Tenn. 1981), are public officials. Woodruff v. Ohrman, 29 Fed. Appx 337, 347, 162 Ed. Law Rep. 707 (6th Cir. 2002). In Elstrom v. Independent School District No. 270, 533 N.W.2d 51, 56 (Ct. App. Mnn. 1995) the court recognized that courts had split on the status of public school teachers as public officials or not, however, ruled that in Minnesota teachers are public officials. *Accord*, Paul v. News World Communications, 2003 WL 23899002 (D.C.Super. 2003) n.1 at *3. (which held a highly compensated Chief Information Officer of a public school system was not a private person * 4). Johnson v. Corinthian Television Corp., 583

Conclusion

One may approach the defamation related jurisprudence of the ECHR with the oft quoted words of Patrick Henry, "Give me liberty or Give me death," in mind. The ECHR values speech in many ways in similar manners to the way in which the United States Supreme Court exemplifies American values of free speech. However, there are differences.

The ECHR routinely, itself, weighs and evaluates the facts of the alleged defamatory statement. The U.S. Supreme Court did that in New York Times v. Sullivan, but such evaluation by the U.S. Supreme Court is infrequent. Since that court is ordinarily is as good an opinion as the trial court to evaluate the "facts" of defamation, perhaps such valuation should be more frequent if not routine.

Not only does it matter to the ECHR what the job level a public official holds in valuing speech, it matters whether the speech is opinion, unbacked by justification. Would it not be a good idea to require even opinion to have some backing in factual basis – such a requirement might curtail some of the more outrageous of the talk radio diatribes against public officials, and perhaps improve the level of public debate.

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.

P.2d 1101, 1102 (Ok. 1978) held a grade school wrestling coach a public official. Kahn v. Bower, 22 Cal. App.3d 1599, 1615,284 Cal.Rpr. 244, 254 (Ct. App. Cal. 1991) held a county social worker was a public official required to plead the N.Y.Times actual malice standard in a defamation case. The court stated: "[W]hile every public employee has not assumed the risk of being defamed in every aspect of his or her life, all public employment is a matter of profound, abiding, and legitimate public interest, and everyone entering it invites public attention to the quality and efficiency of his or her work. The very term 'public servant' reflects the concept that the public is … the employer."

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 McDonalds are serious issues indeed. If large deep pocket 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 this context, Justice White's concurring opinion in *Dun & Bradstreet, v. Greenmoss Builder*s[345] is worth considering. He stated:

> In New York Times, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have been scrutinized as Justice Harlan suggested in Rosenbloom…., or perhaps even entirely forbidden. Presumed damages to reputation might have been prohibited, or limited, as in Gertz. Had that course been taken and the common-law standard of liability been retained, the defamed public official, upon proving falsity, could at least have had a judgment to that effect. His reputation would then be vindicated; and to the extent possible, the misinformation circulated would have been countered. He might have also recovered a modest amount, enough perhaps to pay his litigation expenses. At the very least, the public official should not have been required to satisfy the actual malice standard where he sought no damages but only to clear his name. In this way, both First Amendment and reputational interests would have been far better served.[346]

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

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[345] 472 U.S. 747, 765 (1985).
[346] Id. 771. (internal citations omitted).