

# Two Cheers for the First Amendment

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Anthony Lester\*

E.M. Forster gave only two cheers for democracy when he surveyed Europe from 1936.<sup>1</sup> I shall explain why I can give only two cheers for the First Amendment as interpreted by your Supreme Court from 1964 when *New York Times Company v. Sullivan*<sup>2</sup> was decided.

In 1960, when I was a Visiting Fellow at Harvard Law School, I had the privilege of meeting Justice Hugo Black in his chambers. We met soon after he had publicly affirmed his belief that all state libel laws were unconstitutional. He confirmed that opinion, producing his pocket copy of the First Amendment to remind me of its literal command: “Congress shall *make no law . . .* abridging the freedom of speech, or of the press.”

I had the chutzpah to ask Justice Black if he would permit any public interest exceptions to the First Amendment to promote consumer protection or health care, or a level playing field in labor disputes, or to protect against unwarranted media intrusion on private life and personal privacy. He eyed me warily. Raising his powerful voice, he said: “You must be at Harvard Law School, and taught by Paul Freund.” I admitted that to be the case. “I thought so,” he retorted. “Well do you know that Paul Freund omitted to include my dissenting judgment in *Beauharnais v. Illinois*<sup>3</sup> in his constitutional law casebook?”

I firmly denied this, but as I recently discovered, Justice Black was right. Professor Freund’s casebook contained the opinion of the court delivered by Justice Felix Frankfurter and excerpts from dissenting opinions, but, as the casebook’s editors stated, it omitted the separate dissenting opinion by Justices Black and Douglas.<sup>4</sup> I should have known better than to question a Supreme Court Justice.

In *Beauharnais*, the majority of the Court, led by Justice Frankfurter, upheld the constitutionality of a statute under which criminal punishment was inflicted on *Beauharnais* for group libel in causing the distribution of

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\* Lord Lester of Herne Hill QC is a Liberal Democrat peer and practices constitutional and human rights law at Blackstone Chambers, Temple, London EC4Y 9BW. This is a revised version of a lecture given on August 8, 2013, at the Annual Convention of the Association for Education in Journalism and Mass Communication, in Washington, D.C. The lecture was dedicated to the late Judge Louis H. Pollak and Anthony Lewis. See Lord Anthony Lester, *Two Cheers for the First Amendment* (Aug. 8, 2013), in 46 ASS’N FOR EDUC. IN JOURNALISM & MASS COMM. NEWS 1, 7–13 (2013). The author wishes to thank Joanna Dawson, his former parliamentary legal officer, for her assistance in preparing the paper. My thanks also to Zoe McCallum, current Parliamentary Legal Officer.

<sup>1</sup> See generally E.M. Forster, *Two Cheers for Democracy* (1951).

<sup>2</sup> 376 U.S. 254 (1964).

<sup>3</sup> 343 U.S. 250, 267–75 (1952) (Black, J., dissenting).

<sup>4</sup> See PAUL A. FREUND ET AL., *CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS* 1310 (1st ed. 1954). For Justice Black’s views before *Sullivan*, see *Justice Black and the First Amendment “Absolutes”: A Public Interview*, in *ONE MAN’S STAND FOR FREEDOM* 467–83 (Irving Dillard ed., 1st ed. 1963).

pamphlets in Chicago advocating racial segregation in Illinois.<sup>5</sup> Justice Frankfurter treated libelous utterances as being outside the boundaries of the First Amendment. In his dissent, Justice Black described the statute as involving state censorship, and he criticized the majority of the Court for “giving libel a more expansive scope and more respectable status than it was ever accorded even in the Star Chamber.”<sup>6</sup>

My encounter with Justice Black brought home to me the full force of his absolutist interpretation of the First Amendment. His opinion won the argument in *New York Times v. Sullivan* and well beyond.<sup>7</sup> I shall first discuss the *Sullivan* decision and explain why I believe that in its wake, the First Amendment has been interpreted in a way that gives too little protection to the right to a good reputation and to respect for private life, and why the Supreme Court has given too little protection to freedom of speech when national security is invoked. Then I will discuss recent reforms in the law of freedom of expression in the United Kingdom, especially the recently enacted Defamation Act. To conclude, I will compare and contrast American First Amendment jurisprudence with British law of freedom of expression, identifying the lessons that we can learn from one another.

## I. A FLAWED FREEDOM: THE FIRST AMENDMENT AFTER *SULLIVAN*

The Supreme Court’s decision in *Sullivan*<sup>8</sup> marked a turning point for the First Amendment. Since that decision, the Supreme Court has continued to erode a non-governmental actor’s rights to privacy and good reputation. The Supreme Court has also provided too much protection to hate speech and corporate political speech, but has not provided needed protection to individual political speech, especially where national security is involved. In this section, I begin by analyzing *Sullivan* and its progeny to show how the United States has not afforded the proper protection to the rights to privacy and good reputation. I conclude by analyzing other shortcomings of American First Amendment jurisprudence as viewed from the British side of the Atlantic.

### A. *The Sullivan Decision*

Prior to their revolution against British rule, the American colonies had adopted the common law of libel. As Justice White observed in his dissenting opinion in *Gertz v. Robert Welch, Inc.*, “For some 200 years . . . the law of defamation and the right of the ordinary citizen to recover for false publi-

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<sup>5</sup> See *Beauharnais*, 343 U.S. at 266.

<sup>6</sup> *Id.* at 273.

<sup>7</sup> See *Sullivan*, 376 U.S. at 268.

<sup>8</sup> 376 U.S. 254 (1964).

cation injurious to his reputation have been almost exclusively the business of state courts and legislatures.”<sup>9</sup>

*Sullivan* was no ordinary libel case involving a dispute between two private parties. The alleged libel concerned alleged misconduct in his public office by Police Commissioner Sullivan in policing civil rights demonstrations in Alabama.<sup>10</sup> The Supreme Court ruled that the First Amendment, as applied through the Fourteenth Amendment, protected *The New York Times* from being sued in a state court for publishing false defamatory statements in an advertisement about the conduct of a public official, because the statements were not made with knowing or reckless disregard for the truth. In effect, the Supreme Court recognized that the private law tort of defamation in Alabama and every other state had to be viewed through different spectacles in a public law context to give much wider freedom to political speech.

That was the way the rationale of *Sullivan* was interpreted by Justice Harlan in his opinion in *Curtis Publishing Co. v. Butts*,<sup>11</sup> by Justices Marshall and Stewart in their joint dissenting opinion in *Rosenbloom v. Metromedia, Inc.*,<sup>12</sup> and by Justice White in his dissenting opinion in *Gertz*.<sup>13</sup> Each of these dissents required proof of actual malice or reckless disregard of the truth because of the fact that the libel concerned the performance by a public officer of his public functions.

### B. Confusion After Sullivan: Who Is a Public Figure?

The constitutional rationale of *Sullivan* was clear and convincing, but it became blurred and confusing when federal and state courts applied the rule not only to public officials but also to a bewildering variety of so-called “public figures” in the world of entertainment and beyond. This process of expansion began with the Supreme Court decision about Wally Butts, athletic director of the University of Georgia.<sup>14</sup> Under New York state law, the test of those who have taken steps to attract public attention has been extended to: a dolphin trainer;<sup>15</sup> a belly dancer;<sup>16</sup> a woman who billed herself as a “stripper for God;”<sup>17</sup> and a restaurant with a drag queen cabaret where female impersonators are both waiters and performers, and customer participation contributes to the entertainment.<sup>18</sup> It is difficult to understand why the reputations of these non-governmental actors should be virtually unprotected as a matter of First Amendment doctrine simply because they are public entertainers.

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<sup>9</sup> 418 U.S. 323, 369–70 (1974) (White, J., dissenting).

<sup>10</sup> See *Sullivan*, 376 U.S. at 256.

<sup>11</sup> See 388 U.S. 130, 153 (1967).

<sup>12</sup> See 403 U.S. 29, 80 (1971) (Marshall, J., dissenting).

<sup>13</sup> See 418 U.S. at 387 (White, J., dissenting).

<sup>14</sup> See *Butts*, 388 U.S. at 135.

<sup>15</sup> See *Fitzgerald v. Penthouse Int'l Ltd.*, 691 F.2d 666, 670 (4th Cir. 1982).

<sup>16</sup> See *James v. Gannett Co.*, 353 N.E.2d 834, 838 (N.Y. 1976).

<sup>17</sup> See *Evarts v. Downey*, 16 Med. L. Rep. 2449, 2453 (N.Y. Sup. Ct. 1989).

<sup>18</sup> See *Themed Rests., Inc. v. Zagat Survey, LLC*, 781 N.Y.S.2d, 441, 444 (Sup. Ct. 2004).

*Time Inc. v. Hill* demonstrates the deeply troubling lengths to which this trend has gone.<sup>19</sup> In a 5-4 decision, the Supreme Court applied the *Sullivan* rule to conclude that the protection of free speech by the First Amendment completely barred a claim of unwarranted media intrusion into the private lives of ordinary citizens falsely depicted in a *Life* magazine article that irresponsibly violated respect for their private lives and personal privacy.<sup>20</sup>

James Hill, his wife, and their five children were held hostage for nineteen hours by three escaped convicts. The family became swept up in publicity and moved to a new home to escape the limelight. Their ordeal was portrayed in a novel and a play, and *Life* published an article echoing the novel's inaccuracies. *Life* described the play as a re-enactment, and used as illustrations photographs of scenes staged in the former Hill home. Mrs. Hill experienced a mental breakdown after the piece was published. The Hill family sued under a New York statute that provided for liability where published statements placed someone in a "false light."<sup>21</sup>

The New York courts upheld the claim, but the Supreme Court reversed. Justice Brennan gave the opinion of the Court. Applying *Sullivan*, he wrote that the New York privacy statute could not be used to award damages for false reports on matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth. It made no difference to the Supreme Court's majority that the Hill family were private individuals and entirely blameless, and that they did not choose to become involved. Justice Brennan argued for an expansive view of the concept of a public figure that included even those who are simply linked to an incident that interests the public. Four Justices dissented.<sup>22</sup> Justice Harlan's opinion is, in my view, wholly persuasive. He argued for protecting those who came into the public interest through no choice of their own, and who have less recourse to defend themselves against journalistic scrutiny.

It is difficult to see how unwarranted media intrusion into the private lives and homes of ordinary citizens is justified when the only rationale for the story is that it entertains the public. Samuel Warren and Louis Brandeis derived the constitutional right to personal privacy partly from English equitable principles.<sup>23</sup> The *Hill* majority decision is at odds with those principles and with the law of many other common law countries.<sup>24</sup> Likewise, it seems

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<sup>19</sup> 385 U.S. 374 (1967).

<sup>20</sup> *Id.* at 390.

<sup>21</sup> N.Y. Civil Rights Law §§ 50, 51 (McKinney 2013).

<sup>22</sup> Justice Harlan, Justice Fortas, Chief Justice Warren, and Justice Clark. *Hill*, 385 U.S. at 402-20 (Harlan, J., dissenting, and Fortas, J., dissenting).

<sup>23</sup> See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>24</sup> See, e.g., *Von Hannover v. Germany*, 40 Eur. H.R. Rep. 1 (2005); *Campbell v. MGN Ltd.*, [2004] UKHL 22, [2004] 2 A.C. 457; *Murray v. Big Pictures Ltd.*, [2008] EWCA (Civ) 446 (Eng.); *Mosley v. UK*, Eur. Ct. H.R. 774 (2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104712>. See also Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 ("1. Everyone has

unfair in the context of defamation to require the plaintiff in a non-public-figure case of public concern to carry the burden of proving that the publisher was negligent.<sup>25</sup> And it does not enhance legal certainty to have to identify whether the plaintiff is a public figure, a limited-purpose public figure, or a private figure where there is no matter of public concern.

*C. Other First Amendment Expression Protection Problems: Too Much or Not Enough?*

There are other ways in which the Supreme Court's interpretation of the First Amendment allows both too much and too little protection to expression in ways that distort democratic values. For example, the Supreme Court has taken a very permissive approach to racist speech. In *Brandenburg v. Ohio*, a Ku Klux Klan leader denounced blacks and Jews at a rally.<sup>26</sup> He said: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." The Supreme Court reversed his conviction. To pass muster under the First Amendment, a conviction must be for advocacy directed to "incitement to imminent lawless action," and be "likely to incite or produce such action."<sup>27</sup> Anthony Lewis observed that:

In an age when words have inspired acts of mass murder and terrorism, it is not as easy for me as it once was to believe that the only remedy for evil counsels, in Brandeis's phrase, should be good ones. The law of the American Constitution allows suppression only when violence or violation of law are intended by speakers and are likely to take place imminently. . . . I think we should be able to punish speech that urges terrorist violence to an audience some of whose members are ready to act on the urging. That is imminence enough.<sup>28</sup>

This approach would surely strike a better balance than exists under prevailing American constitutional doctrine. It would presumably include not only speech that urges terrorist violence but also speech that urges violence against a racial or religious minority, exemplified by the malevolent antics of Pastor Terry Jones in publicly burning copies of the Qur'an in Florida in the certain knowledge that it would provoke violence across the Muslim

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the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.").

<sup>25</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 376 (1974) (White, J., dissenting).

<sup>26</sup> 395 U.S. 444, 444-47 (1969) (per curiam).

<sup>27</sup> *Id.* at 449, 447.

<sup>28</sup> ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* (2007), 166-67 (citing *Whitney v. California*, 274 U.S. 357, 374-78 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969)).

world.<sup>29</sup> The remedy for the murder and mayhem that ensue in such a case is not provided by the marketplace of free ideas.

The Supreme Court has also been too permissive on the issue of corporate political speech, which holds the potential to twist democratic processes and outcomes. In *Citizens United v. FEC*, a majority of the Supreme Court decided that the First Amendment prohibits the government from restricting independent political expenditures by corporations and trade unions.<sup>30</sup> That decision and its consequences in the 2012 presidential elections strike overseas observers as bizarre and an affront to basic democratic principles.<sup>31</sup> Justice Holmes famously said, echoing John Stuart Mill, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>32</sup> However, that statement assumes that the market has not been distorted by the wealthy.

While permitting verbal attacks on vulnerable groups and unlimited influence of money on political speech, the Supreme Court has negated the very essence of First Amendment protection in the context of national security and terrorism. *Holder v. Humanitarian Law Project*,<sup>33</sup> a recent case dealing with a legal NGO, illustrates this disturbing trend. Humanitarian Law Project is a human rights and peace organization dedicated to using international human rights law and humanitarian law to resolve conflicts peacefully. It sought to teach the Kurdistan Workers’ Party how to file human rights complaints with the United Nations and to conduct peace negotiations with the Turkish government. It also attempted to teach the Liberation Tigers of Tamil Eelam how to present claims to international bodies for tsunami-related relief, to provide legal expertise on peace negotiations with the Sri Lankan government, and to teach general political advocacy skills. In spite of the importance of freedom of expression, the Supreme Court upheld the constitutionality of the relevant provisions of the PATRIOT Act<sup>34</sup> and gave an expansive meaning to the term “material support” for foreign terrorist organizations, depriving partner organizations of access to independent legal advice and expertise.

In the years since *Sullivan*, there have been other flaws in the Supreme Court’s jurisprudence on free speech, including both an incoherent and unsatisfactory approach to protection of personal privacy and an approach to instances of speech in the public square that is at times at odds with demo-

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<sup>29</sup> Kevin Sieff, *Florida Pastor Terry Jones’s Koran Burning Has Far-Reaching Effect*, WASH. POST, (Apr. 2, 2011), [http://articles.washingtonpost.com/2011-04-02/local/35229731\\_1\\_dove-world-outreach-center-florida-pastor-koran](http://articles.washingtonpost.com/2011-04-02/local/35229731_1_dove-world-outreach-center-florida-pastor-koran).

<sup>30</sup> 558 U.S. 310, 362 (2010).

<sup>31</sup> The European Court of Human Rights recently held that a U.K. law prohibiting the broadcasting of political advertising did not violate the right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights. *Animal Defenders Int’l v. U.K.*, Eur. Ct. H.R. 363 (2013), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119244>.

<sup>32</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>33</sup> 130 S. Ct. 2705 (2010).

<sup>34</sup> See 18 U.S.C. § 2339B (2009).

cratic values. Between its permissive First Amendment attitude regarding racism and unlimited money in politics, and its restrictive attitude whenever national security is even tangentially involved, the Supreme Court's free speech jurisprudence has had elements corrosive of democracy as well as privacy. While there cannot be a unitary theory of freedom of expression to answer all free speech questions, many of which are fact-sensitive in situations where context is everything, the way in which the British government and Parliament have sought to reform our civil law of defamation might interest jurists, scholars, and media law reformers in the United States.

## II. CHANGES IN THE ENGLISH LEGAL SYSTEM: STRIKING A BETTER BALANCE BETWEEN FREE EXPRESSION AND OTHER VALUES

Over the course of the last several decades, freedom of expression has gone from merely a vital political value to become a common law constitutional right. I will first discuss the Human Rights Act,<sup>35</sup> which gave formal legal protection in U.K. law to the freedom of expression as defined by the European Convention on Human Rights. I will then turn to the recent passage of the Defamation Act, which rebalances libel law to give stronger protection to freedom of speech and greater access to justice by alleged victims of libels. Finally, I will note difficulties that have arisen in implementing the Defamation Act, and the continuing controversy about press regulation.

### A. *What Led to the Defamation Act*

The United Kingdom does not have the benefits and burdens of a written constitutional code protecting fundamental human rights and freedoms as the supreme law of the United Kingdom. However, the United Kingdom does have the Human Rights Act of 1998, which gives direct legal effect to the fundamental rights protected by the European Convention on Human Rights as interpreted by the supra-national European Court of Human Rights and the British courts.<sup>36</sup>

The European Convention protects the fundamental human rights and freedoms of the 800 million inhabitants of the forty-seven member states of the Council of Europe. The Convention guarantees the rights to free expression, to a good reputation, and to respect for personal privacy.<sup>37</sup> Those rights and freedoms are qualified rather than absolute. Our legal and political sys-

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<sup>35</sup> Human Rights Act, 1998, c. 42 (U.K.).

<sup>36</sup> The Northern Ireland, Scotland, and Government of Wales Acts, enacted in 1998 before the Human Rights Act came into force, require the devolved legislative and executive institutions to act in accordance with the Convention rights. *See* Northern Ireland Act, 1998, c. 47, § 6; Scotland Act, 1998, c. 46, § 29; Government of Wales Act, 1998, c. 38, § 107, *repealed* by Government of Wales Act, 2006, c. 32, § 163.

<sup>37</sup> Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8,10, Nov. 4, 1950, 213 U.N.T.S. 221.

tem has been greatly influenced by the Convention and its jurisprudence in interpreting these rights and freedoms and attempting to strike a fair balance between them. Only half a century ago, free expression was well recognized in the United Kingdom as a vital political value but not as a constitutional legal right. In terms of the law, free expression was what was left after the positive criminal and civil restraints on free expression had been given effect—restraints imposed by the laws regulating defamation, blasphemy, contempt of court, including so-called “scandalizing the judiciary,” national security, confidential information, and respect for personal privacy.

Our system did not give sufficient weight to free expression. But when the Human Rights Act was introduced, instead of welcoming its protection of free speech, sections of the British media lobbied unsuccessfully for complete immunity because they feared that it would result in the legal protection of personal privacy against media intrusion.<sup>38</sup> They have been strongly opposed to the Human Rights Act ever since, especially as our courts have developed a right of personal privacy relying upon the Convention.<sup>39</sup>

I used the Convention and *Sullivan* in the European Court of Human Rights and English courts to develop a positive right to free expression under our common law.<sup>40</sup> Although I had some success, I realized that there were limits to what could be achieved incrementally, case by case. Coherent law reform is better achieved through codification by Parliament rather than haphazardly and piecemeal through individual court cases. And because of the constitutional separation of powers, there are limits to the proper role of judges as lawmakers. When the political branches are unable or unwilling to use their powers,<sup>41</sup> judges are only able to make incremental changes, rather than to effectuate coherent law reform.

### B. *The Passage of the Defamation Act*

The situation cried out for legislation. Despite the progress we had made in the European Court—particularly by relying on *Sullivan*—the com-

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<sup>38</sup> Personal privacy, through breach of confidence actions, has protected against media intrusion in a variety of situations. See *Abernathy v. Hutchinson*, (1824) 47 Eng. Rep. 1313, 1318, 1 H & Tw. 28 at 40–41 (protecting Dr. Abernathy’s hospital lectures); *Prince Albert v. Strange*, (1849) 41 Eng. Rep. 1171 (protecting Prince Albert’s etchings); *Duchess of Argyll v. Duke of Argyll and Others*, [1967] Ch. 302 at 338 (protecting the secrets of Margaret, Duchess of Argyll’s marriage bed); *Attorney-General v. Jonathan Cape Ltd.*, [1976] Q.B. 752 at 772 (protecting Cabinet discussions). But see *Kaye v. Robertson* [1991] F.S.R. 62 at 71 (deciding in Court of Appeal that there was no enforceable civil right to personal privacy in English law, while regretting the failure of the common law and statute to protect the personal privacy, where there had been a gross intrusion by the media on a patient in hospital).

<sup>39</sup> See Thomas de la Mare et al., *Article 8: Right to Respect for Private and Family Life, Home and Correspondence*, in *HUMAN RIGHTS LAW AND PRACTICE* 359, 386–94 (Anthony Lester et al. eds., 3d ed. 2009).

<sup>40</sup> See, e.g., *Derbyshire CC v. Times Newspapers Ltd. & Others*, [1993] A.C. 534; *Lingens v. Austria*, 8 Eur. H.R. Rep. 407 (1986); *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127; *Sunday Times v. United Kingdom* (No. 2), 14 Eur. H.R. Rep. 229 (1992).

<sup>41</sup> See Anthony Lester, *English Judges as Law Makers*, P.L. 269, 281 (1993).



mon law still had a notoriously chilling effect on free expression. Legal protection of reputation was so heavily weighted against free speech in the United Kingdom that foreign claimants with little connection to the United Kingdom decided to travel to Britain to have their claims adjudicated here, rather than in their home countries.

One well-known victim of “libel tourism” was Dr. Rachel Ehrenfeld, the author of *Funding Evil: How Terrorism is Financed—and How to Stop It*.<sup>42</sup> Her book, published in New York, argued that money from drug trafficking and wealthy Arab businessmen was funding terrorism.<sup>43</sup> The book made serious allegations against the Saudi billionaire, Khalid bin Mahfouz, including channeling money to al Qaeda.<sup>44</sup> It was published in hard copy and a chapter was available online at ABCNews.com.<sup>45</sup> Only twenty-three copies were sold in Britain via the Internet,<sup>46</sup> but the ABCNews.com posting meant that it could be downloaded in the United Kingdom.<sup>47</sup> Mahfouz and his two sons sued in London and obtained summary judgment for damages and legal costs totaling £110,000.<sup>48</sup>

The case provoked an understandable outcry in the States. The state of New York passed the Libel Terrorism Protection Act declaring foreign libel judgments unenforceable unless foreign law provided the defendant with the same First Amendment protections as are available in New York.<sup>49</sup> Other states followed suit, and President Obama gave his approval to the so-called “SPEECH Act,” making foreign libel judgments unenforceable in the United States unless they are compatible with the First Amendment.<sup>50</sup>

It was no easy project to legislate on the back of several centuries of case law. Parliament had only made minor changes throughout the last century. Deciding what reforms to push for in Parliament required careful thought about what is best left to the courts and what to the legislature. Helped by the Libel Reform Campaign of free speech NGOs,<sup>51</sup> and by legal experts in this complex area of the law,<sup>52</sup> I introduced a Private Member’s Bill immediately after the Coalition Government was formed.

<sup>42</sup> RACHEL EHRENFELD, *FUNDING EVIL: HOW TERRORISM IS FINANCED—AND HOW TO STOP IT* (2006).

<sup>43</sup> See generally *id.*

<sup>44</sup> Such allegations are found on page xv of the preface of the expanded edition, and also pages 22, 39, and 47.

<sup>45</sup> Matthew Pollack, *Court Refuses to Protect Author From British Libel Verdict*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Dec. 21, 2007), <http://www.rcfp.org/browse-media-law-resources/news/court-refuses-protect-author-british-libel-verdict>.

<sup>46</sup> David Pallister, *US Author Mounts “Libel Tourism” Challenge*, THE GUARDIAN (Nov. 15, 2007), <http://www.theguardian.com/world/2007/nov/15/books.usa>.

<sup>47</sup> Pollack, *supra* note 45.

<sup>48</sup> See Pallister, *supra* note 46.

<sup>49</sup> Libel Terrorism Protection Act, N.Y. C.P.L.R. §§ 302(d), 5304(b) (McKinney 2008).

<sup>50</sup> Securing the Protection of our Enduring and Established Constitutional Heritage Act, 28 U.S.C. §§ 4101–4105 (2010).

<sup>51</sup> See *Who Supports Us?*, THE LIBEL REFORM CAMPAIGN, <http://www.libelreform.org/who-supports-us> (last visited Dec. 23, 2013).

<sup>52</sup> The Rt Hon Sir Brian Neill and Heather Rogers QC.

My Bill was well received,<sup>53</sup> and the Government introduced its own draft Bill, much of which was similar to my Bill.<sup>54</sup> A Joint Committee of both Houses of Parliament scrutinized them.<sup>55</sup> The Government took stock and published the actual Defamation Bill.<sup>56</sup> The Bill was carefully scrutinized in both Houses. It was enacted as the Defamation Act of 2013<sup>57</sup> and came into force in England and Wales on January 1, 2014.<sup>58</sup>

### C. Key Legal Reforms in the Defamation Act

The Defamation Act rebalances the law in favor of freedom of speech. Several key features of the Act highlight this point:

- The Act creates a new “serious harm” test that must be met before defamation proceedings may proceed.<sup>59</sup>
- The Act requires that corporate claimants must show actual or likely serious financial loss.<sup>60</sup>
- The Act also introduces measures to protect foreign defendants from inappropriate actions brought in England or Wales.<sup>61</sup>
- The Act provides several defenses to defamation suits, including:
  - Replacing the common law defenses of justification and fair comment with more clearly defined defenses of truth<sup>62</sup> and honest opinion;<sup>63</sup> and
  - Creating a new public interest defense that reflects the importance of editorial discretion.<sup>64</sup>

<sup>53</sup> The Bill had its Second Reading debate on July 9, 2010. 720 PARL. DEB., H.L. (5th ser.) (2010) 423–71 (U.K.).

<sup>54</sup> MINISTRY OF JUSTICE, DRAFT DEFAMATION BILL: CONSULTATION, 2011, Cm. 8020 (U.K.).

<sup>55</sup> HOUSE OF LORDS AND HOUSE OF COMMONS, JOINT COMMITTEE ON THE DRAFT DEFAMATION BILL REPORT, 2010–12, H.L. 203, H.C. 930-I (U.K.).

<sup>56</sup> See Defamation Bill, 2012–13, H.C. Bill [5], available at [http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0005/cbill\\_2012-20130005\\_en\\_1.htm](http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0005/cbill_2012-20130005_en_1.htm).

<sup>57</sup> It received Royal Assent on April 25, 2013. Defamation Act, 2013, c. 26, available at <http://services.parliament.uk/bills/2012-13/defamation.html>.

<sup>58</sup> Pinsent Masons LLP, *Defamation Law Reform to Take Effect From the Start of 2014*, OUTLAW.COM (Nov. 20, 2013), <http://www.out-law.com/en/articles/2013/november/defamation-law-reforms-to-take-effect-from-the-start-of-2014/>.

<sup>59</sup> See Defamation Act § 1.

<sup>60</sup> See *id.*

<sup>61</sup> See *id.* at § 9.

<sup>62</sup> See *id.* at § 2.

<sup>63</sup> See *id.* at § 3. The new defense of honest opinion accords with the Supreme Court’s statement in *Gertz* that “there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.” 418 U.S. at 339–40.

<sup>64</sup> See Defamation Act § 4. The public interest defense makes it a defense in an action for defamation for the defendant to show that the statement complained of was on a matter of public interest, and that the defendant reasonably believed that it was in the public interest. In determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest, the court is required to make appropriate allowance for editorial judgment. *Id.*

- The Act updates occasions protected by statutory qualified privilege for fair and accurate reporting,<sup>65</sup> removing unnecessary restrictions, as well as providing additional protection for articles in peer-reviewed academic publications so that publishers can impart opinions freely, without fear, for example, of reprisal from drug companies they may view in their professional opinion to be worthy of criticism.<sup>66</sup>
- The Act restricts the use of juries in most cases<sup>67</sup>—a reform that is supported by the media.<sup>68</sup>
- The Act empowers the courts to order a summary of their judgments to be published,<sup>69</sup> and to make orders for the removal of defamatory statements from websites<sup>70</sup>—a reform that is less popular with the media.<sup>71</sup>
- The Act creates a new procedure for the early resolution of key issues, to be introduced along side other procedural measures aimed at capping costs and better case management.<sup>72</sup> These reforms are vital to ensure access to justice and equality of arms between the strong and the weak.

Parliament stopped short of incorporating the so-called *Derbyshire* principle in the Defamation Act. In *Derbyshire*, the Court of Appeal held that a County Council did not have the right at common law to maintain an action for damages for defamation to vindicate its governing reputation.<sup>73</sup> It did so mainly by reference to *Sullivan* and to Article 10 of the European Convention, even though the Convention had not at that stage been given legislative effect in English law. The House of Lords concurred on appeal and held that government bodies cannot now sue for libel to vindicate their governing reputations.<sup>74</sup> Instead, they may only sue for the separate tort of malicious falsehood, which requires a showing of either actual malice or reckless disregard of truth. The Law Lords relied on *Sullivan* to reach this conclusion, and its holding parallels the core rationale of *Sullivan*.<sup>75</sup> How-

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<sup>65</sup> See *id.* at § 7.

<sup>66</sup> See *id.* at § 6.

<sup>67</sup> See *id.* at § 11.

<sup>68</sup> See Lucy Britt, *Changes to the Defamation Act – Increased Protection for the Media?*, THE JUSTICE GAP, <http://thejusticegap.com/2013/10/changes-defamation-act-increased-protection-media/> (last visited Dec. 23, 2013).

<sup>69</sup> Defamation Act § 12.

<sup>70</sup> *Id.* at § 13.

<sup>71</sup> See Britt, *supra* note 68.

<sup>72</sup> Better case management depends on judicial leadership in applying the Act's § 1 requirement of serious harm.

<sup>73</sup> See *Derbyshire CC v. Times Newspapers Ltd. & Others*, [1992] Q.B. 770 at 817, 825–27, 835 (Eng.).

<sup>74</sup> See *Derbyshire CC v. Times Newspapers Ltd. & Others*, [1993] A.C. 534 at 547–51.

<sup>75</sup> Lord Keith of Kinkel referred to Chief Justice Thompson's judgment for the Supreme Court of Illinois in *City of Chicago v. Tribune Co.*, 139 N.E. 86 (1923), endorsed in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964), and said this:

While these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest consid-

ever, unlike *Sullivan*, it applied only to the government body itself, and not to individual public officers suing to vindicate their own public reputations. The Defamation Act does not adopt the rationale of *Sullivan* because it was widely felt that to do so would be unfair to claimants, and it does not codify the *Derbyshire* principle as I had hoped it would, but has left that aspect to be developed by the courts on a case-by-case basis.

For the most part, however, the reforms contained in the Defamation Act went a long way toward enhancing the formal legal protection for freedom of expression while still respecting the privacy of individuals. On the expression side of the ledger, the Act requires plaintiffs to show serious harm and adds several clearly defined defenses for defendants. On the privacy side of the ledger, the Act allows for quick and efficient resolution of those cases that do cause serious harm and do not fit into one of the new defenses.

#### D. *Problems With Implementation of the Defamation Act*

Two difficult problems with implementing the Defamation Act have arisen. First, the United Kingdom's devolved system of government has created the potential for inconsistent and incompatible freedoms of expression in Northern Ireland, Scotland, and England and Wales. Second, in the wake of *The News of the World* scandal, the Cameron Government launched an investigation into the culture and ethics of the press that culminated in the Leveson Report, which now threatens to undermine some of the reforms of the Defamation Act.

The United Kingdom does not have a federal system of government. Under our system of devolved government, the Westminster Parliament may legislate for England and Wales, but not for Scotland and Northern Ireland with respect to certain public powers devolved to the latter's governments and legislatures.<sup>76</sup> Defamation law is a devolved subject.

Scotland's government has adopted some very limited aspects of the legislation,<sup>77</sup> and Northern Ireland's coalition government of opposing par-

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erations which underlaid them are no less valid in this country. What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.

*Derbyshire*, [1993] A.C. at 548.

<sup>76</sup> See generally *Devolution: A Beginner's Guide*, BBC, (Apr. 29, 2010, 6:21 PM), [http://news.bbc.co.uk/2/hi/uk\\_news/politics/election\\_2010/first\\_time\\_voter/8589835.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/election_2010/first_time_voter/8589835.stm) (describing devolution generally, and as applied in Scotland, Wales, and Northern Ireland).

<sup>77</sup> Sections 6 and 7(9) of the Defamation Act, conferring qualified privilege on academic and scientific peer reviewed journals and conferences, have been extended to Scotland. The Legislative Consent Memorandum (Motion S4M-04380) through which these provisions were adopted concluded at provision 27: "In light of the fact that there has been no requirement identified for reform of the law of defamation in Scotland and that the wider body of Scots law on defamation appears robust enough for present purposes, it is not proposed that the Legisla-

ties<sup>78</sup> indicated initially that it had no plans to review the law of defamation.<sup>79</sup> The law of defamation in Northern Ireland has never before been detached from that in England and Wales. It is ironic that the Democratic Unionist Party, committed to keeping Northern Ireland within the United Kingdom, should decide to sever Northern Ireland from England and Wales in this area of law.

This impasse undermines the very essence of the new statutory scheme, fashioned with such care and democratic scrutiny. Unless there is a political solution, it will mean that the media, publishing across the U.K., will have to comply with the antiquated common law and its chilling effects in Northern Ireland, as well as modern statute law in England and Wales. Publishers cannot choose to publish only in England and Wales, and the Northern Ireland judiciary will be faced with intractable problems in reconciling the situation with the right to free speech, protected by the Human Rights Act and the Northern Ireland Act.<sup>80</sup> However, there is vigorous political debate in Northern Ireland about whether to introduce matching legislation, and it remains to be seen whether the problem will be resolved politically.

That is not the only political problem that has arisen. Just when it seemed that the Defamation Bill would become law, it was almost stifled at birth. The Prime Minister, The Rt Hon David Cameron MP, ordered a public inquiry by a Court of Appeal judge, Lord Justice Leveson, into the culture, practice, and ethics of the press in the wake of the *News of the World* phone-hacking scandal.<sup>81</sup>

The Leveson Report was published in November 2012.<sup>82</sup> It suggested several legal rules to ensure that journalists were not abusing the privilege of free expression. Unfortunately, the Leveson inquiry overreached itself and opened the way for intrusive and punitive statutory regulation. It was a clas-

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utive Consent Motion should seek to extend any further changes to Scotland other than the limited scientific and academic related provisions.” SCOTTISH GOV'T, LEGISLATIVE CONSENT MEMORANDUM, DEFAMATION BILL, 2011-12, S4M-0438, at 6 (Scot.).

<sup>78</sup> Democratic Unionist Party and Sinn Féin. See Ian Graham, *Northern Irish Coalition Returned to Power*, REUTERS (May 7, 2011), <http://uk.reuters.com/article/2011/05/07/uk-irish-vote-idUKTRE7455TB20110507>.

<sup>79</sup> Lisa O'Carroll, *Northern Ireland Decides Not to Follow English and Welsh Libel Reforms*, THE GUARDIAN (June 27, 2013), <http://www.theguardian.com/media/2013/jun/27/northern-ireland-libel-law-changes>. The Finance and Personnel Committee of the Northern Ireland Assembly are, however, currently taking evidence on the Defamation Act. See generally COMM. FOR FIN. & PERSONNEL, N. IRELAND ASSEMBLY, DEFAMATION ACT 2013: BRIEFING FROM JOHNSONS SOLICITORS (2013), available at [http://www.niassembly.gov.uk/Documents/Official-Reports/Finance\\_Personnel/2012-2013/130626\\_DefamationAct2013\\_JohnsonsSolicitors.pdf](http://www.niassembly.gov.uk/Documents/Official-Reports/Finance_Personnel/2012-2013/130626_DefamationAct2013_JohnsonsSolicitors.pdf); COMM. FOR FIN. & PERSONNEL, N. IRELAND ASSEMBLY, DEFAMATION ACT 2013: DFP BRIEFING (2013), available at [http://www.niassembly.gov.uk/Documents/Official-Reports/Finance\\_Personnel/2012-2013/130703\\_DefamationAct2013DFPBriefing.pdf](http://www.niassembly.gov.uk/Documents/Official-Reports/Finance_Personnel/2012-2013/130703_DefamationAct2013DFPBriefing.pdf).

<sup>80</sup> See Human Rights Act, 1998, c. 42, § 12 (U.K.); Northern Ireland Act, 1998, c. 47, § 6.

<sup>81</sup> See generally THE RT HON LORD JUSTICE LEVESON, AN INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS: REPORT, 2012-13, H.C. 780-I (U.K.), available at <http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp>.

<sup>82</sup> *Id.*

sic example of overkill—in Justice Frankfurter’s phrase in a free speech case, an example of “burn[ing] the house to roast the pig.”<sup>83</sup>

Specifically, Leveson recommended:

- Financial penalties to be inflicted on publishers, large and small, for failure to join the new system of regulation;<sup>84</sup>
- A narrowing of the exemptions from data protection law for investigative journalism;<sup>85</sup>
- Strong powers of interference by the new regulator, including a power to direct the “nature, extent and placement of apologies,” and to impose financial sanctions of up to one percent of turnover, with a maximum of £1 million on any subscriber found to be responsible for “serious and systemic breaches of the standards code or governance requirements” of the regulator;<sup>86</sup>
- An arbitral process in relation to civil legal claims against subscribers that would be “fair, quick and inexpensive, inquisitorial and free for complainants to use.” The arbitrator would have the power to dispense with hearings;<sup>87</sup> and
- Exemplary damages (renamed punitive damages) to be available against non-members of the scheme, for actions for “breach of privacy, breach of confidence and similar media torts, as well as for libel and slander.”<sup>88</sup>

Long before the report was published, Lord McNally, the Minister in charge of the Defamation Bill in the House of Lords, had made clear his determination that the Bill would not sink under the “tsunami” of Leveson.<sup>89</sup> His hopes were almost dashed when the House of Lords voted for amendments to the Defamation Bill to coerce the government to implement Leveson by statute.<sup>90</sup> The Bill was taken hostage, and there was a real risk that it would be shelved. The Prime Minister, The Rt Hon David Cameron, shared the hostility of the press to any form of statutory regulation.<sup>91</sup>

The three political parties had protracted talks involving the press and the powerful, celebrity-led pro-Leveson lobby group Hacked Off, which re-

<sup>83</sup> *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

<sup>84</sup> See THE RT HON LORD JUSTICE LEVESON, AN INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS: EXECUTIVE SUMMARY AND RECOMMENDATIONS, 2012–13, H.C. 779, at 35–36 (U.K.), available at <http://www.official-documents.gov.uk/document/hc1213/hc07/0779/0779.pdf>.

<sup>85</sup> See *id.* at 39–40.

<sup>86</sup> See *id.* at 34.

<sup>87</sup> See *id.* at 35.

<sup>88</sup> See *id.* at 42.

<sup>89</sup> See Rachel Bartlett, *Lord McNally Says Leveson Inquiry Must Not Delay Libel Reform*, JOURNALISM.CO.UK (Mar. 15, 2012), <http://www.journalism.co.uk/news/lord-mcnally-don-t-want-libel-reform-swept-away-in-leveson-tsunami-/s2/a548364/>.

<sup>90</sup> 743 PARL. DEB., H.L. (5th ser.) (2013) 140–171 (U.K.).

<sup>91</sup> Patrick Wintour & Dan Sabbagh, *Leveson Report: David Cameron Refuses to ‘Cross Rubicon’ and Write Press Law*, THE GUARDIAN (Nov. 29, 2012), <http://www.theguardian.com/media/2012/nov/29/david-cameron-refuses-to-write-press-law>.

sulted in amendments to two other Bills<sup>92</sup> and the creation of a Royal Charter to recognize the regulator. The Royal Charter is supposed to set up a recognition panel to give legal recognition to an independent regulator that fulfills the criteria set out in the Leveson Report.<sup>93</sup> It is a convoluted way of avoiding direct statutory underpinning.

This botched and cumbersome outcome has been condemned across the world,<sup>94</sup> and there is nothing like it in any modern democracy. Many have correctly advised<sup>95</sup> that its punitive sanctions would unlikely pass muster in our courts or the European Court of Human Rights. Other interested parties have made alternative proposals.<sup>96</sup>

The Press Standards Board of Finance published an alternative charter,<sup>97</sup> and leading newspaper publishers also proposed<sup>98</sup> the creation of an Independent Press Standards Organisation (IPSO) to investigate poor journalistic practices, to stand up for those who suffer as a result of those practices, and to enforce large fines when appropriate. On October 8, 2013 the Secretary of State for Culture announced that the subcommittee of the Privy Council had rejected the press's proposal.<sup>99</sup> A final draft royal charter was published three days later and was sealed by the Privy Council on October 30.<sup>100</sup>

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<sup>92</sup> See Enterprise and Regulatory Reform Act, 2013, c.24, § 96 (providing that any future attempt to amend the Royal Charter must have parliamentary approval); Crime and Courts Act, 2013, c.22, §§ 34–42 (providing for a punitive regime of costs and damages for newspapers unwilling to comply with the scheme).

<sup>93</sup> See Laura Smith-Spark, *UK Newspapers Fail to Block Royal Charter on Press Regulation*, CNN WORLD (Oct. 30, 2013), <http://edition.cnn.com/2013/10/30/world/europe/uk-press-regulation/index.html>.

<sup>94</sup> See, e.g., Editorial, *Britain's Press Crackdown*, N.Y. TIMES, Mar. 20, 2013, at A26, available at [http://www.nytimes.com/2013/03/20/opinion/britains-press-crackdown.html?ref=editorials&\\_r=0](http://www.nytimes.com/2013/03/20/opinion/britains-press-crackdown.html?ref=editorials&_r=0); Ben Webster & David Brown, *World Media Condemns Attack on Press Freedom*, THE TIMES, Mar. 22, 2013, at 13.

<sup>95</sup> See Frances Gibb & Ben Webster, *Leveson Plan to Punish Papers That Opt Out 'is Against the Law'*, THE TIMES, Feb. 21, 2013, at 13.

<sup>96</sup> The press have put forward their own Royal Charter for consideration by the Privy Council, the body responsible for overseeing the operation of Royal Charters. This alternative plan has been criticized as being insufficiently independent of the industry in terms of oversight and appointments. The government is currently considering the alternative Charter before deciding how to make progress with its own scheme. See 746 PARL. DEB., H.L. (5th ser.) (2013) 975–78.

<sup>97</sup> See generally Press Standards Bd. of Fin. Ltd., *Draft Royal Charter for the Independent Self-Regulation of the Press*, THE PRIVY COUNCIL (Apr. 30, 2013), <http://privycouncil.independent.gov.uk/wp-content/uploads/2013/05/Press-Standards-Board-of-Finance-Ltd-Petition-and-Draft-Charter.pdf>.

<sup>98</sup> See *Independent Press Standards Organisation*, NS: THE VOICE OF LOCAL MEDIA (July 8, 2013), <http://www.newspapersoc.org.uk/08/jul/13/independent-press-standards-organisation>; Pdraig Reidy, *IPSO Proposal an Opportunity to Break Leveson Deadlock*, INDEX ON CENSORSHIP (July 9, 2013), <http://www.indexoncensorship.org/2013/07/ipsa-proposal-an-opportunity-to-break-leveson-deadlock/>.

<sup>99</sup> See *Politicians 'Reject' Press Plan for Regulation*, BBC NEWS (Oct. 8, 2013), <http://www.bbc.co.uk/news/uk-24439588>.

<sup>100</sup> See Patrick Wintour, *Press Regulation Royal Charter Given Go-Ahead by the Queen*, THE GUARDIAN (Oct. 30, 2013), <http://www.theguardian.com/media/2013/oct/30/press-regulation-royal-charter-approval>.

This latest version has been condemned by many newspaper publishers.<sup>101</sup> It is likely that the industry will boycott the charter by refusing to put forward a regulatory body to be considered for recognition and by pressing on with its own plans for self-regulation. When politicians are determined to treat the press, like the East India Company, as governed by Charter and Act of Parliament, it is important that there is a well-informed debate. In my view, some of the Leveson proposals, now embedded in two statutes, threaten the freedom of expression of the press and the public in breach of Article 10 of the European Convention on Human Rights.

The British press is subject to our plentiful criminal and civil laws. There is no need for further state intervention, as proposed by the Hacked Off celebrity campaigners. We need a system of independent self-regulation that encourages professional standards and provides effective redress, avoiding unnecessary litigation. And in the meantime, we need a little common sense. After all, the British are supposed to be good at that.

### III. LESSONS TO BE LEARNED FROM ONE ANOTHER

As I have suggested, American First Amendment jurisprudence provides too much protection for the freedom of expression vis-à-vis the rights to privacy and good reputation. Recent reforms in Britain may provide guidance on how a proper balance between these two competing values can be reached. However, Britain's problems with implementing the landmark Defamation Act could undermine that delicate balance. The United States, for better or worse, does not have similar problems.

#### A. *First Amendment Jurisprudence Does Not Strike a Fair Balance*

The Supreme Court's First Amendment jurisprudence has lost persuasive influence in Europe because its decisions have afforded too much protection to freedom of expression at the expense of personal privacy. Its judgments have made libel law all but useless to victims of seriously harmful libels and have denied constitutional protection to the victims of gross media intrusion on private lives. It seems unfair in the context of defamation to require the plaintiff in a non-public figure case of public concern to carry the burden of proving that the publisher was negligent.<sup>102</sup> And it does not enhance legal certainty to have to identify whether the plaintiff is a public figure, a limited-purpose public figure, or a private figure where there is no matter of public concern.

The problem of balancing the freedom of expression with other freedoms is not just in the context of libel law. The Supreme Court has also

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<sup>101</sup> See Roy Greenslade, *Newspapers Lament Signing of the Royal Charter on Press Regulation*, THE GUARDIAN (Oct. 31, 2013), <http://www.theguardian.com/media/greenslade/2013/oct/31/national-newspapers-press-regulation>.

<sup>102</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 376 (1974) (White, J., dissenting).



removed restrictions on campaign spending designed to promote a level playing field while permitting sweeping and excessive restrictions on free speech in the context of national security. The result is that corporate political speech drowns out individual political speech. And whenever national security is affected, the security interest trumps freedom of expression.

By contrast, recent reforms in the United Kingdom have gone a long way to striking a fairer balance between expression and privacy. Only decades ago, the freedom of expression was merely a political virtue, but the Human Rights Act and the Defamation Act have formalized and expanded the right to freedom of expression. The Defamation Act in particular instituted many reforms that give greater protection to freedom of expression while not sacrificing individual privacy to the extent that the Supreme Court has.

### *B. Challenges That Could Undermine Recent Reforms*

The potential for inconsistent laws defining the freedom of expression in Northern Ireland and Scotland illustrates why the United Kingdom needs to introduce a federal system in place of our flawed devolution scheme, but that will not happen in a hurry. The United States does not have the problem of incompatible freedom of speech law throughout the many states. The Supreme Court has made it impossible for the states to rebalance their libel laws as the United Kingdom has done, because the constitutional reach of *Sullivan*, *Gertz*, and *Hill* forbids state action that would give greater protection to reputation or personal privacy. Only a future judgment of the Supreme Court could strike a fairer balance. In short, a lack of uniformity in the protections for freedom of expression is an obstacle to effective reform in the United Kingdom; however, the inability of state governments to rebalance the freedoms of expression and privacy is an obstacle to efficient reform in the United States.

In addition, it remains to be seen how the recommendations from the Leveson Report affect the delicate balance of freedom of expression in the United Kingdom. It is unlikely that similar government regulation of the press could ever come to pass in the United States. The Leveson Report illustrates how statutory protections for freedom of expression are more at risk than constitutional protections. When the freedom of expression is not memorialized in a constitution, even where effective reforms have been achieved, those reforms can be amended or even repealed by subsequent laws.

## IV. CONCLUSION

In viewing the Supreme Court's recent First Amendment jurisprudence as I do, I reflect the different values on my side of the Atlantic. We share with the United States a vibrant culture of liberty. But our idea of liberty values not only free speech but also respect for personal privacy and protec-

tion of a good reputation. The writings of Milton, Wilkes, Paine, and Mill are part of our common constitutional heritage, but the United Kingdom is not dogmatic in its commitment to free speech. We recognize that it is not an absolute right but rather a right qualified by the need to respect the rights of others.

That is why I can give only two cheers for the way in which the First Amendment has been interpreted since the Supreme Court ruled in *Sullivan* that Alabama libel law was unconstitutional. My old friend and colleague, Floyd Abrams,<sup>103</sup> would not agree, preferring the near-absolutism of Hugo Black's reading of First Amendment to ours. But I remind myself of Learned Hand's famous speech on the spirit of liberty given in 1944: "the spirit of liberty" he declared, "is the spirit that is not too sure that it is right."<sup>104</sup> Surely that is also the spirit that should inform the way the First Amendment is read and given effect.

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<sup>103</sup> See FLOYD ABRAMS, *FRIEND OF THE COURT: ON THE FRONT LINE WITH THE FIRST AMENDMENT* (2013).

<sup>104</sup> Judge Learned Hand, "The Spirit of Liberty," Speech at the "I Am an American Day" Event in New York City's Central Park (May 21, 1944), available at [http://www.digitalhistory.uh.edu/disp\\_textbook.cfm?smtID=3&psid=1199](http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=1199).