Sacred Heart University

Sacred Heart University Review

Volume 10 | Issue 1 Article 2

5-15-2012

Freedom of Expression and the First Amendment

Lois G. Forer

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*Freedom of Expression and the First Amendment**

I am delighted to have the privilege of being with you at the inauguration of the Freedom Institute. It is, I believe, fitting and proper for a University to devote attention and resources to the preservation of freedom and to make the students aware of the significance of our liberties and the necessity to preserve them. No right is more important to the maintenance of a free and democratic society than the right of free expression guaranteed by the First Amendment. As we all know, Thomas Jefferson declared, "Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate to prefer the latter."

Tonight I shall not congratulate us Americans on our great constitutional liberties but rather like some modern day Cassandra warn that we are in danger of losing the right of free expression, not so much from government repression, although that is a significant peril, as from economic pressures unleashed by recent developments in the law of libel.

The Western world was shocked by Ayatollah Khomenei's call for the assassination of an author, Salman Rushdie, whose novel, *Satanic Verses*, allegedly slandered the prophet Mohammed. The book was not published or distributed in any Islamic countries. A high British official has called Rushdie's book blasphemous and suggested that the moribund statute penalizing blasphemy be amended to include remarks offensive to any religion.

The Thatcher government of Britain prosecuted — some say persecuted — Peter Wright, a former British secret service agent who wrote a book, *Spycatcher*, critical of the government. Publication was banned in England.

Writers and politicians in Europe and the United States have tergiversated in responding to these assaults on freedom of expression. Civil libertarians in Britain suggest that what that nation needs is the equivalent of our First Amendment.

**This paper was delivered at the formal opening of the Freedom Institute at Sacred Heart University on April 24, 1989.*

Certainly a provision in the basic charter of government protecting freedom of expression is highly desirable but it is not an impregnable shield against omnipresent attempts to muzzle, punish, or obtain money from those who express views that others find inimical. Lest you be lulled into believing that the First Amendment provides a guaranty of freedom of speech and of the press, let me call your attention to a few of the many successful attacks on the First Amendment that have been upheld by the United States Supreme Court in recent years. Former CIA agent Snepp who wrote a book about his experiences in the agency had his royalties confiscated.[1] Britain at least allowed Wright to keep the earnings on his book from sales in other countries. Philip Agee, another former CIA agent had his passport lifted for making critical remarks about government policy.[2] Samuel Loring Morrison was convicted under the espionage act for mailing photos of a Soviet aircraft carrier taken from *Jane's Defense Weekly*, a highly respected British publication.[3] Ralph Ginzberg was convicted and imprisoned for publishing journals that were admittedly not obscene. However, the Supreme Court inferred a salacious intent from the fact these journals were mailed from post offices in towns named "Blue Ball" and "Intercourse."[4] The U.S. government sought to enjoin the *Progessive*, a Wisconsin magazine, from printing material taken from the public library.[5] It cost the *Progressive* a third of its income to fight this suit which was ultimately dropped.

After the Supreme Court lifted the injunction against publication of the Pentagon Papers,[6] most Americans thought that freedom of expression and the First Amendment had been secured. I suggest that this assurance is unfounded.

By misreading legal history and indulging in wishful thinking, most Americans continue to believe that they are protected when expressing their opinions. All too often they find that they are defendants in costly libel suits. One of the most shocking is the case of *McDonald v. Smith*.[7] Smith wrote to President Reagan regarding the pending appointment of McDonald to the sensitive position of U.S. Attorney. The letters were very derogatory. McDonald did not get the appointment and sued for libel. The Supreme Court upheld a substantial verdict against Smith who thought he was exercising two important rights: to express his opinion on a matter of public interest and to petition the government. Neither argument prevailed.

From time to time we take heart from a favorable decision and assume that the danger is over. But as John Philpot Curran declared in 1790, "The condition upon which God hath given liberty to man is eternal vigilance."

In 1735, as every schoolchild knows, John Peter Zenger was prosecuted for libel for publishing an article critical of the British colonial governor of New York. Thanks to the skill of the great Philadelphia lawyer, Andrew Hamilton, the jury failed to convict Zenger who was ultimately released from prison. This crime was known as seditious libel. Under the law as it was then, truth was no defense to libel. Although this case has stood for freedom of the press in America, in fact, it had no real effect on the law. For the next two centuries, the crime of seditious libel flourished in the colonies and under the Constitution. As recently as the early part of this century, in *Patterson v. Colorado*,[8] the U.S. Supreme Court upheld a conviction for contempt against an editor who criticized the Colorado Supreme Court. Justice Holmes, writing for the court grafted onto the First Amendment a severe limitation. He held that this guaranty of freedom of expression applied only to prior restraint of publication. After an article was published the author and publisher could be punished for contempt, as in this case, or be held responsible for libel.

A decade later in the famous, or infamous, Schenck case,[9] the Supreme Court upheld the conviction of the secretary of the Socialist Party, a legal entity, for printing and mailing pamphlets opposing the first World War. In that decision, again written by Justice Holmes, another exception was carved out of the First Amendment, the clear and present danger test. With a facile but irrelevant aphorism Holmes declared that "No one has a right to shout fire in a crowded theater." But Schenck was not in a theater, crowded or empty. He did not shout fire. He printed a little pamphlet expressing his opinion of the war. Without a scintilla of evidence that anyone had read the pamphlet or been influenced by it, Holmes held that its publication made recruitment for the armed forces more difficult. Even if such had been proved, it requires a suspension of logic to find that such a publication constituted a clear and present danger to the United States.

During the McCarthy era in another astonishing opinion in *Dennis v. United States*,[10] the Supreme Court flatly declared that

"freedom of speech is not absolute."

In 1964, the Supreme Court decided *New York Times v Sullivan*.[11] This decision was also hailed as an extraordinary advance in the protection of First Amendment rights. A look at that decision and its progeny would indicate to most persons who value that constitutional provision that the joy was premature and unfounded.

It is worth a few moments to look at the Sullivan case and see what the Court really decided. This was a libel action brought by the sheriff of Montgomery County Alabama against the *New York Times*. An Alabama jury awarded Sullivan $500,000. The verdict was upheld by the Alabama Supreme Court. The United States Supreme Court reversed. As in most libel cases, the allegedly defamatory statement in the Sullivan case was not in dispute. On March 29, 1960, the *New York Times* published an advertisement by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. The ad listed the names of the officers of the committee and its address, and asked for financial contribution. L. B. Sullivan the plaintiff, was a commissioner of the City of Montgomery, Alabama, whose duties included supervision of the police department. He was not mentioned by name in the advertisement, but he claimed that mention of the police referred to him. Moreover, of the two paragraphs in the advertisement, only the third and a part of the sixth paragraphs were the basis of Sullivan's claim of libel. The *Times* appealed the verdict of the Alabama Court.

Although some of the statements contained in the two paragraphs were not accurate descriptions of events that occurred in Montgomery, these inaccuracies did not substantially alter the facts or change the gravamen of the complaint. If the ad had correctly reported that Dr. King had been arrested four times instead of seven, as the ad stated, Sullivan would still have had the same legal claims. The Court also pointed out that the committee paid $1,800 for the ad and that approximately 394 copies of the edition of the *Times* containing the advertisement were circulated in Alabama. Of these, about 34 copies were distributed in Montgomery County. The total circulation of the *Times* for that day was approximately 650,000 copies.

Sullivan did not claim that he had suffered any pecuniary damage. Under the common law, that was not necessary. There were many legal grounds on which the verdict could have been reversed

without raising the constitutional issue of First Amendment rights. The court might have held that the press is not responsible for the content of a paid advertisement that is not scandalous or libelous on its face. The printing of an advertisement or the reporting of a statement by another as a news item, even though libelous, could have been held to be privileged. The contrary view would require the press to censor ads and refrain from reporting newsworthy comments. The tortured identification of Sullivan with the actions of the police was unnecessary. The court could have held that the ad was not "of and concerning" him. Under such a reading Sullivan would have had no standing to complain. The court might also have held that, given the temper of the times in Montgomery, Alabama, the statement did not hold Sullivan up to contumely and ridicule in his community, the test of defamation. He might also have been held to be libel-proof with respect to this statement.

Two other well-established principles of general law also militated against the verdict. The award was clearly excessive and could have been reduced to nominal damages. The court might well have held that because of the minute fraction of a percent of paper distributed in Montgomery that the *Times* was not doing business in Alabama and, therefore, could not be sued in that state. The action should have been brought in New York.

The court, however, chose this occasion to enunciate new law. For more than a century, the Supreme Court had repeatedly declared that libel was not protected by the First Amendment. The court did not forthrightly declare that all libel was protected. Instead it created two new exceptions to the law of defamation: first, the law as applied to public officials — later expanded to include public figures — is different from the law applicable to all others; and second, with respect to public figures the plaintiff must prove that a defamatory statement, even if untrue, was made with "actual malice." Thus the old law of defamation, as rewritten by the United States Supreme Court in *New York Times v. Sullivan*, was as follows:

> The constitutional guarantees require, we think, 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.

Three of the more liberal Justices, Black, Douglas and Goldberg dissented, expressing the view that the *Times* had an absolute unconditional right to publish the ad.

One of the unintended consequences of this decision was to fuel the impetus to sue for libel. For almost two centuries civil libel had been an anachronism, but a relatively harmless one because very few persons did bring libel actions. Those who did had reason to regret it. For example, Alger Hiss. Had he not sued Whittaker Chambers for libel, against the advice of his lawyer friends, he would never have been convicted of perjury.

Now actions for libel are being brought against cartoonists, restaurant critics, credit companies, consumer reports, biographers, novelists, professors who deny their colleagues tenure, letter writers, speakers at public meetings, and, of course, the press and electronic media. Following the Sullivan case, up to 1986 the United States Supreme Court has rewritten the law of libel in some 70 decisions. When one considers that the high court decides at most 160 cases with opinion each year, this seems to be an inordinate amount of effort devoted to one small area of the law, despite its importance. Defamation suits along with bankruptcy and mergers have been a growth industry for the legal profession.

It is not only the number of libel suits, which is enormous, but the cost of defense that has a chilling effect on every one. These lawsuits have been a disaster for both plaintiffs and defendants, a waste of time for the courts, and have sharply curtailed access of the public to information and opinion that all of us as citizens of a democracy should have. Members of the media admit that lawyers are now in the editorial rooms not only of radio and TV stations and newspapers but also book and magazine publishers. Phil Donohue asks "Is the press becoming wimpy?" When the average cost of the defense of a libel suit is more than $200,000 even the wealthiest media giants have to think carefully before airing or publishing stories. The bottom line cannot be ignored. For many small newspapers and journals one lawsuit can mean the difference between bankruptcy and viability. In the libel action brought by Gen. William Westmoreland against CBS and *60 Minutes*, after 18 weeks of trial and the

expenditures by both sides of an estimated $6 to $10 million, the action was withdrawn. The suit by Tavolouareas against Mobil Oil which resulted in a verdict of $2 million is not yet over. The case of *Herbert v. Lando*[12] has been in litigation more than 15 years.

Dickens would have a field day with libel law, except that in these notorious multi-million dollar cases the parties are not the poor and downtrodden but the rich and powerful. Poor people who have been libeled and whose privacy has been brutally invaded cannot afford to sue. And defendants who have no insurance and are of moderate means must buy off the plaintiffs at exorbitant amounts.

Libel has always been an action for the rich and important. Has anyone ever heard of a poor welfare mother suing for libel because she was accused of bearing children in order to increase her allotment? Indeed, under English law, stating that a person was poor was deemed to be libelous *per se*. A husband had an action for libel if his wife was accused of being unchaste because he was the possessor of damaged goods. Most libel plaintiffs today are well-to-do and well-known persons in their communities. Many libel defendants are enormously wealthy. In fact, they are often sued because they have deep pockets. However, less affluent defendants suffer considerably.

Since my book, *A Chilling Effect,* was published a year and a half ago, I have received letters from many libel plaintiffs and defendants who complain bitterly about the law. Many defendants are ordinary citizens who wrote a letter to the local paper or to a journal or spoke at a public meeting and as a result have been sued for libel. These people have lost their life's savings, their homes, and their jobs in the attempt to defend these actions. Some, in despair, have paid huge sums to settle the lawsuits even though their statements were expressions of opinion or were true statements of fact, neither of which is libelous. In one case, after the defendant had paid the plaintiff $100,000 to withdraw the suit, the appellate court entered a decision finding that the statement was true and not libelous. Such a moral victory is cold comfort to the impoverished defendant.

Even though 80% to 90% of verdicts in favor of libel plaintiffs are reversed on appeal, this affords little protection to hapless defendants who have expended hundreds of thousands of dollars in defense costs. Certainly, from the viewpoint of the public this is a waste of valuable court time. From the viewpoint of the trial judge—

not an important consideration, I admit — it is an exercise in futility. No other field of the law has such a high rate of reversal. I suggest that all these ills arise not because of the avarice of the litigants and lawyers, although that factor cannot be discounted, but because of the unsettled state of the law and its counter-intuitive doctrines.

Let us look at several United States Supreme Court decisions that reveal the manifest unfairness of the law. The mayor of Ocala, Florida who was running for re-election was falsely and negligently accused of having a criminal record. Just before the election the local paper published an article stating that the mayor had a criminal record. The mayor lost the election and sued the paper for libel. At trial the defendant admitted that the statement was false. It was the mayor's brother who had a criminal record. Five minutes of investigation would have revealed the truth. But the Supreme Court reversed a verdict in favor of the unfortunate mayor because the publisher acted without "actual malice."[13]

On the other hand, Mary Alice Firestone, the ex-wife of the heir to the Firestone millions recovered $100,000 in a libel action against *Time* for a brief item reporting her divorce. This verdict was upheld by the Supreme Court.[14] *Time* had reported correctly the fact of the divorce, but stated that it was on the grounds of adultery. The decision of the court was unclear. She had been sued for adultery and the local papers had carried lurid accounts of the evidence. However, by examining the law of Florida, the court concluded that the divorce could not have been granted on that ground. Since she was a purely private figure, *Time* could not claim the protection of the "actual malice" rule. The test of a public figure is one who thrusts him or herself into the public eye. By her own flagrant actions this plaintiff had thrust herself into public notice. Nonetheless, the court held that she was not a public figure. Therefore, she could recover in libel even though the reporter was probably not negligent.

But compare the case of the Hill family. They were the victims of a brutal crime that was so disrupting to their lives that they moved to another community to avoid being reminded of their ordeal. The crime was widely reported at the time. Of course, it was news. The incident was also the basis of a fictionalized play, *The Desperate Hours*. The Hills did not sue the dramatist. But when *Time* ran a story stating that the play was a factual reenactment of the crime involving the Hills, they did sue. The article was admittedly false. The

play was not factual; it was fictional. The article was not defamatory. However, the reopening of this painful incident to the public certainly invaded their privacy. The trial court found for the Hills. The Supreme Court reversed holding that they were public figures.[15] While they may have been public figures at the time of the crime and shortly thereafter, they had not been public figures before and certainly not after the lapse of several years. An interesting sidelight of this case is that the Hill family was represented by Richard Nixon in his only appearance before the U.S. Supreme Court. Although knowledgeable attorneys say his argument was brilliant, some lawyers believe that the court was hostile to Nixon. Regardless of such speculation, I submit that people should have a right to privacy.

Countless rape victims find themselves not only victims of criminals but also victims of the legal system. Long after the crime has been reported and the offender tried, the victim has to relive the ordeal when some reporter or producer of a docudrama decides to resurrect the incident.

While much of the publicity with respect to libel and privacy suits has been focused on the reporting of news, the Sullivan decision has affected fiction, biography, humor, and commercial speech. All have been subjected to the doctrines spawned by *Sullivan* with little analysis of the different interests affected and imperilled. These decisions have had the much deplored chilling effect on freedom of expression which, the Supreme Court declared it wanted to prevent.

Many of these decisions appear to lay persons and a number of lawyers to be bizarre. For example, the author of a novel describing nude psychotherapy found herself sued by a nude psychotherapist. The doctor who claimed to be affronted by the novel did not prove that he suffered any damage. It was admitted that the book was a novel which, by definition, is a work of imagination not factual reporting. The therapist in the novel bore not the slightest physical resemblance to the plaintiff and had a different name. Believe it or not there are very many nude therapists and this modality of treatment is not copyrightable or other wise exclusively his property or unique to him. Nonetheless, the Supreme Court refused to review a substantial verdict in his favor.[16]

Those who admittedly write about real people are in great jeopardy. Take Joe McGinnis, who wrote *Fatal Vision*, a best selling biography of Captain Jeffrey MacDonald, who was convicted of

murdering his pregnant wife and two children. The book was made into a popular TV show. MacDonald had entered into a contract with McGinnis under which in return for 40% of the royalties MacDonald would cooperate with the author who retained control of the manuscript. When the author reached the conclusion that MacDonald was guilty, MacDonald sued. The fact that by contract as well as common law and the First Amendment, an author has a right to express his opinion, the case was not dismissed. McGinnis had to sue his publisher's insurance carrier to compel the carrier to defend the law suit. McGinnis won that round but lost a subsequent suit to recoup from the carrier his legal expenses in successfully compelling the carrier to provide his defense. Despite the popularity of the book, legal costs have probably exceeded McGinnis' substantial earnings. Janet Malcolm, in the *New Yorker*, accused McGinnis of shabby journalism by winning the confidence of Captain MacDonald. He cooperated in order to get 40% of the royalties. Malcolm, in my view, is the shabby journalist who picks over other people's books and makes wild accusations to get big fees from the *New Yorker*. But I would defend her right to be sleazy. The Constitution does not protect only the virtuous.

Biographers have fared even worse. Antoni Gronowicz wrote a biography of Pope John Paul that had a fulsome introduction by Cardinal Krol of Pennsylvania. Gronowicz was criminally prosecuted by the federal government for mail fraud on the theory that some of the statements in the book, particularly his claim as to the numbers of times he had interviewed the Pope, were false. The Third Circuit upheld the government's right to prosecute and ruled that the First Amendment did not protect the hapless author.[17] As a trial judge I wondered how the defendant would subpoena the Pope and whether the court would compel the Pope to submit to interrogatories and depositions. The trial of this case would have presented more difficulties than the prosecution of Col. North. Fortunately for the government, the author died before trial was scheduled.

Movie star Elizabeth Taylor sued to prevent production of a docudrama about her life claiming a right of publicity and that she was a private figure. If anyone in recent years has thrust herself into the public eye, it is certainly Elizabeth Taylor. Her multiple marriages, her illnesses, and her dieting have been widely reported. But the court gave preference to the commercial claims of Taylor

over the constitutional rights of the author. At the opposite end of the spectrum is J.D. Salinger, the obsessively reclusive author of *Catcher in the Rye*. Certainly the author of a modern classic that has been required reading in many high schools and colleges for more than a generation should be unable to claim that he is a purely private figure. Salinger objected to quotations from his letters that the biographer had found in a library. Publication of the book was enjoined. This ruling reversed decades of law which held that prior restraint of publication in the absence of a clear and present danger is unconstitutional. What danger could Salinger be exposed to except unfavorable publicity? Or invasion of privacy? The remedy for such harms, if provable, is an action for civil damages. Salinger quickly copyrighted his letters after the biography was written but before the Court decided the case. Again the court gave protection to financial interest over First Amendment rights.[18] Salinger's possible property, interest in the belatedly copyrighted material was held to override the freedom of the press.

Is there a way out of this morass? I believe there is a comparatively simple and direct solution — a federal statute governing the law of libel and privacy. It has taken the Supreme Court more than a quarter of a century to confuse the law of libel and privacy. It will take at least that long to undo the harm that has been done. No court can write a blueprint for an entire body of law; that is a task for the legislature.

A statute is a democratic remedy. It represents the consensus of the legislature. As we all know, lawmakers are responsive to the will of the people, which is as it should be. That great political commentator, Peter Finley Dunne's Mr. Dooley declared, "The Supreme Court follows the election returns." That may or may not be true. But legislation provides a direct and prompt response to public dissatisfaction.

I propose that Congress enact a law governing libel and privacy actions. Almost all books and periodicals are published on a national basis. Even regional and local papers are frequently sold across state boundaries. The entire electronic communications industry is engaged in interstate commerce and subject to federal regulation. It is, therefore, appropriate that libel should be governed by federal law, not the different laws of fifty states as it is at present. A statute should abolish both presumed and punitive damages. An injured libel

plaintiff should recover actual losses that are proved by clear and convincing evidence. Neutral reportage, that is accurately reporting what someone else says, should be privileged. The press would not be subject to suit for letters to the editors, ads, and so forth. If such a law had been in effect, Sullivan's suit against the *New York Times* would have been dismissed.

More than two centuries ago, the great English jurist Lord Mansfield wrote, "Whenever a man publishes, he publishes at his peril." That chilling statement has never been more true than today. In our dangerous world where all of us face the perils of nuclear annihilation, destruction of the ozone layer, and all the complex problems of the global village, the public needs more information and more robust and uninhibited discussion. We also need the intellectual stimulation of arts and literature that are not censored either by government or by the omnipresent fear of a crippling libel suit. It is time for the Congress to act and for concerned citizens to make their views on this subject heard.

Notes

[1]Snepp v. U.S., 444 US 507 (1980).
[2]Haig v. Agee, 453 US 280 (1981).
[3]*New York Times*, Feb. 8, 1985, p. 4E.
[4]U.S. v. Ginzberg, 383 US 463 (1961) rehearing den. 384 US 934 (1966).
[5]U.S. v. The Progressive, Inc., 486 F Supp 5 (W D Wisc. 1979)
[6]New York Times v. U.S., 403 US 713 (1971).
[7]472 US 479 (1985).
[8]205 US 454 (1907).
[9]Schenck v. U.S., 249 US 47 (1919).
[10]384 US 853 (1966).
[11]376 US 254 (1964).
[12]441 US 153 (1979).
[13]Ocala Star — Barmer Co. v. Damron, 401 US 295 (1971).
[14]Time, Inc. v. Firestone, 424 US 448 (1976).
[15]Time, Inc. v. Hill, 385 US 374 (1967).
[16]Bindrim v. Mitchell, 155 cal 29 (1979) cert. den., 444 US 984 (1979).
[17]*Philadelphia Inquirer*, Dec. 2, 1984, p. 1B.
[18]Salinger v. Hamilton & Random House.