FREEDOM OF SPEECH: IS IT THE PRIMARY RIGHT?

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I. INTRODUCTION

THE title of this article is not intended to disparage the value of freedom of speech in a modern democratic society. The right freely and publicly to criticise the institutions of government, the conduct of public affairs whether by the executive or Parliament, the freedom, indeed, to criticise the performance of the judiciary—that right is one of the glories of the unwritten constitution of this country. Its importance is constantly and forcefully emphasised in our highest courts. In one of the *Spycatcher* cases Lord Bridge of Harwich said that the right to freedom of speech is one of the fundamental freedoms essential to a free society.[1] In the same case Lord Oliver quoted Blackstone's statement that the liberty of the press is essential to the nature of a free State.[2] More recently Lord Goff of Chieveley, observing that he could see no inconsistency between English law and the European Convention on Human Rights in relation to freedom of speech, added: "This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world."[3]

Nor am I myself likely to underrate the value of free speech, having spent the greater part of my professional life under an authoritarian government which, while not suppressing political criticism either on public platforms or in the press, nonetheless passed laws which grossly violated the common law traditions of free speech. Mention of a few cases will suggest the atmosphere of the period. In one of them the editor and the reporter of a leading daily newspaper were convicted of a new criminal offence of negligently publishing incorrect information about conditions in prisons. In another, a law professor had conducted an opinion survey among a number of South African judges and barristers, asking the question whether the race of either the accused or the victim was a factor which influenced verdicts and sentences in criminal cases. He published the results in the *South African Law Journal*, including the fact that a fair

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1. *Attorney-General* v. *Guardian Newspapers Ltd* [1987] 1 W.L.R. 1248, 1286.
2. *Idem*, p.1320.
3. *Attorney-General* v. *Guardian Newspapers Ltd (No.2)* [1990] 1 A.C. 109, 283.

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percentage of both judges and advocates had answered in the affirmative. He was prosecuted for contempt of court and acquitted only on the grounds that he had not the subjective intention to bring the courts into contempt.[4] The same professor (a good lawyer but one not apt to learn from experience) subsequently made a public speech in which he urged judges not to give credence to the evidence of prosecution witnesses if (as was often the case in political trials) they had been brought to court after long detention in police custody. This time he was indeed convicted.[5] It was some time before newspapers were again prepared to investigate conditions in prisons or the racial element in criminal prosecutions. So I am, I think, unlikely to undervalue freedom of speech. It is a right which should never be taken for granted. That is why it was proper to test in the courts of England the validity of the regulation which prohibited the broadcasting not of the opinions or the words but merely of the voices of members of unlawful organisations—although I may be forgiven for regarding this case[6] as being at the luxury end of the human rights spectrum.

II. IS FREEDOM OF SPEECH THE PRIMARY RIGHT?

WHAT is meant by asking whether freedom of speech is the "primary right"? A primary right is here used to mean a right which is not merely described as "fundamental" but which is assumed to take precedence over other rights or interests. Neither in English common law nor in most constitutional bills of rights is there to be found any formal hierarchy of rights, but in certain countries and at certain times some rights seem to be favoured above others. This is nothing new. For Blackstone it was the right of property. "There is nothing", said Blackstone, "which so generally strikes the imagination and engages the affections of mankind, as the right of property."[7] In the United States the Supreme Court has disavowed any hierarchy of constitutional rights, but I believe nonetheless that freedom of speech and of the press is in fact the primary right in this sense. A similar if more limited development is now to be seen in Australia. In the United States the First Amendment to the Constitution provides that "Congress shall make no law abridging the freedom of speech or of the press". The Commonwealth of Australia has a written constitution but it contains no bill of rights—the framers, it is understood, deliberately decided against one. The High Court of Australia has however recently discerned in the Australian Constitution an entrenched freedom of public discussion of political matters.[8] This freedom is implied as being essential to the system

4. *State* v. *Van Niekerk* 1970 (3) S.A. 655 (T).
5. *State* v. *van Niekerk* (2) 1972 (3) S.A. 711 (AD).
6. *R.* v. *Home Secretary, ex p. Brind* [1991] 1 A.C. 696.
7. Blackstone, *Commentaries*, Vol.II, p.2.
8. *Nationwide News Pty Limited* v. *Wills* (1992) 177 C.L.R. 1; *Australian Capital Television Pty Ltd and Others* v. *The Commonwealth of Australia* (1992) 177 C.L.R. 106.

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of representative democracy established by the Constitution. During the past four years a number of statutes and rules of common law in Australia have in fact been held by the High Court to be unconstitutional as being in conflict with this implied term.[9]

There are good historical and political reasons for the American deference to First Amendment rights, beginning with the successful campaign against the Sedition Act of 1798. In any event the choice was one for the American courts to make and it seems to have commanded broad acceptance from both conservative and liberal justices in the United States. As to Australia, an outsider's mild surprise at the laying bare, after 90 years, of an unexpressed fundamental right in the Constitution, cannot temper his admiration for the ingeniously reasoned process of discovery.

In England freedom of speech, important though it is, is not the primary right in the same sense. There are those who think it ought to be.

It should, of course, at once be made clear that notwithstanding the "primacy" of the right of freedom of speech in some countries, in no constitution is the right absolute. Freedom of speech and of the press are always to be balanced against other legitimate interests. In some constitutional instruments the balancing of the right of free speech against other interests is expressly provided for. In the Canadian Charter of Rights, among the fundamental rights is the freedom of speech and of the press. This, however, like other rights is subject to section 1 of the Charter, which permits such reasonable limitations on Charter Rights "as can be demonstrably justified in a free and democratic society". Similarly, the new South African Constitution entrenches as a fundamental right freedom of speech and of the press,[10] but it permits the limitation of fundamental rights provided that such limitation is "justifiable in an open and democratic society based on freedom and equality".[11] Article 5 of the German Basic Law provides that the right of free expression may be limited for the protection of the citizen's right to personal respect. Under Article 10 of the European Convention on Human Rights the right to freedom of expression is subject to such restrictions as are prescribed by law and are necessary in a democratic society in the interest of, among other things, the protection of morals, the protection of the reputations or rights of others, or for maintaining the authority and impartiality of the judiciary.

As already stated, Lord Goff found no difference between the right of freedom of speech in the European Convention and the right under

9. See the cases *ibid* and *Theophanous* v. *Herald and Weekly Times Ltd* (1994) 68 A.J.L.R. 713; *Stephens* v. *West Australian Newspapers Ltd* (1994) 68 A.J.L.R. 765. See also Jones, "Freedom of Political Communication in Australia" (1996) 45 I.C.L.Q. 392.

10. Constitution of the Republic of South Africa Act, No.200 of 1993, s.15.

11. *Idem*, s.33.

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English common law. In all these systems a balancing is called for, or, rather, a weighing; in any particular case, the scales must come down on one side or another.

III. WHERE FREEDOM OF SPEECH CONFLICTS WITH OTHER RIGHTS

IN English courts freedom of speech may have to be weighed against other legally recognised rights such as the right to reputation, the right to a fair trial or the right to confidentiality. I stress a "legally recognised right", for if a litigant seeks to set against freedom of speech some interest not recognised by English law (such as privacy) there is nothing to put into the balance. Thus in 1994 the Court of Appeal refused to prevent a television broadcast of a programme which would have exposed a young child to harmful publicity.[12] Hoffman LJ in an illuminating judgment explained that the desire to avoid intrusive publicity was not an interest to which at present English law gave protection. Outside the category of recognised rights or any new ones enacted by Parliament there was "no question of balancing freedom of speech against other interests. It is a trump card which always wins."[13] (This last statement is sometimes quoted out of its context.) So it is in the context of conflicts between freedom of speech and other rights recognised by law that one should consider whether freedom of speech should always be the trump card.

First, some selective comparisons: in England, in terms of the Public Order Act 1986 it is an offence, among other things, for a person to use threatening, abusive or insulting words or behaviour with intent to stir up racial hatred, or if in the circumstances racial hatred is likely to be stirred up. That restriction on freedom of speech is here seen as justifiable because of the harm done to society by that type of speech. In the United States such a statute could not pass the test of constitutionality. In a well-known case in 1978 a federal court of appeal struck down a local ordinance designed to block a march of American Nazis through a village in which many Jewish survivors of the Holocaust lived. The ordinance was held to be contrary to the First Amendment because it impaired the right of free political expression.[14] In a celebrated judgment in 1919 Mr Justice Oliver Wendell Holmes had said that speech should be punishable only when "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent".[15] This came to be an accepted test, with the result that, however plain the harmful *tendencies* of a speech or writing, they were immune from legislative control unless the

12. *R.* v. *Central Independent Television plc* [1994] Fam. 192.
13. *Idem*, p.203.
14. *Collin* v. *Smith* 578 F.2d 1197 (7th Circuit 1978).
15. *Schenk* v. *United States* 249 U.S. 47, 51–52 (1919).

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danger to society which they posed was "clear and present". Another great American judge, Learned Hand, had suggested an even stricter criterion. Speech, he thought, should not be punishable unless it constituted a direct incitement to violence.[16] In 1969 Judge Learned Hand's test, or something very like it, seems to have been accepted by the Supreme Court, in a case in which a member of the Ku Klux Klan was prosecuted under an Ohio Act which made it an offence to advocate the necessity of terrorism or illegal action. Going beyond the "clear and present danger" test, the Court held that under the First Amendment there was a right to advocate the use of force or other unlawful conduct "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce action".[17] An American writer, one sympathetic to First Amendment rights, has called that case "the greatest protection to what could be called subversive speech that it has ever had in the United States, and almost certainly greater than such speech has in any other country".[18]

The Canadian Supreme Court, by contrast, has given more weight to the harm done by what is colloquially called "hate speech". It has held that a statute making hate speech criminal was demonstrably justified in a free and democratic society because of the harm which could be expected to result from such speech.[19] Under the European Convention, too, laws prohibiting incitement to racial hatred have been held to be justifiable limitations on the right of free expression.[20] The weight put into the scales is different.

In another recent American case an Indianapolis ordinance prohibited pornography, which it defined as the "graphic portrayal of the sexually explicit subordination of women whether in pictures or words". It was aimed at preventing the display of scenes of degradation, torture and sexual exploitation of women. This was held to be an impermissible limitation on freedom of expression.[21] The ordinance was condemned "as a form of thought control" which was bad because it restricted that particular form of speech "no matter how great the artistic, literary or political value of the work as a whole". The court accepted that the portrayals of women which the ordinance sought to prohibit might well lead to actual harm to women. This was not sufficient to justify it.

16. *Masses Publishing Co.* v. *Patten* 244 Fed. 535 (S.D.N.Y. 1917).
17. *Brandenburg* v. *Ohio* 395 U.S. 444 (1969).
18. Anthony Lewis, *Make No Law* (1991), p.236. This is a lucid and compulsively readable account of freedom of speech and of the press in the US, and in particular of the litigation culminating in the Supreme Court decision in *New York Times* v. *Sullivan* 376 U.S. 254 (1964).
19. *R.* v. *Keegstra* (1990) 61 C.C.C. (3rd) 1.
20. *Glimmerveen* v. *The Netherlands* (1979) 4 E.C.H.R. 260.
21. *American Booksellers Association* v. *Hudnut* 771 F.2d 323 (1985).

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This characterisation of the law of the United States is incomplete and somewhat crude. The First Amendment jurisprudence which has flourished since the end of the First World War is complex and sophisticated. It has many nuances. Not all speech is accorded the same value: political speech carries more constitutional weight than commercial speech (that is to say, advertising) or than pornography. There are subtle distinctions drawn in relation to other interests which are to be weighed against freedom of speech. The context of the speech is taken into account. Speech in a military environment is not necessarily as free as it would be in an academic environment. Yet any examination of the recent decisions on the First Amendment plainly shows that it is only the most compelling public interest that may override freedom of speech—and there are very few interests which would be regarded as sufficiently compelling. Although competing public interests are considered, "ordinarily paramount weight would be given to the public interest in freedom of communication". This was the conclusion reached by Mason CJ in a recent Australian case upon an analysis of both American and Australian law.[22]

IV. HAS ENGLAND FALLEN BEHIND?

JUDGED by the measure of the legal protection given to freedom of speech in the United States, England seems to have fallen behind. Although, as Lord Goff said, freedom of speech (as a legal right) has existed in England probably longer than in any other country in the world, we are no longer in the lead. Ought we to be trying to catch up? Many lawyers and many journalists would say so. But before we agree let us ask two preliminary questions. The first is: why do we recognise the value and importance of freedom of speech? That is not a difficult question to answer on the pragmatic level. Three main objectives have been identified both by judges and by writers on jurisprudence. One of them is that freedom of speech encourages the self-fulfilment of individuals in society. The toleration of a range of ideas, no matter that they are unpopular or even hurtful, fosters the personal development both of those who express the ideas and of those who receive them. A second is that truth is likely to emerge from the free expression of conflicting views. This was the outlook of Mr Justice Holmes (following John Stuart Mill), who saw truth emerging in a market place of ideas. In words which still resound after 75 years he said:[23]

> When men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.

22. *Australian Capital Television*, *supra* n.8, at p.143.
23. *Abrams* v. *United States* 250 U.S. 616, 624 (1919).

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The third (and to me most practically important) purpose which freedom of speech is designed to serve is the integrity of democratic government, which requires that opinion and information about those who govern us or who would wish to govern us are available to the electorate. Mason CJ has summed it up by saying that the purpose of protecting the free flow of information, ideas and debate is to equip the electors to make choices, the elected to make decisions and thereby to enhance the efficacy of representative government.[24]

It is surely material then when weighing the right of freedom of speech against other interests to ask which of the purposes described is served by the freedom claimed. Instead of starting with the assumption that the right to freedom of speech is *prima facie* entitled to paramount consideration one may ask, for example, which of the above-mentioned purposes is served by speech which foments racial hatred or which of those purposes is served by pornography depicting the degradation of women. Some would answer that these are not the relevant questions, because any restriction on freedom of speech is the beginning of a slippery slope which must eventually lead to serious erosion of the right. The experience of England does not bear that out. Nor is it in the English legal tradition to decide these questions on the basis of so speculative a generalisation.

Another example: in the United Kingdom there have for many years been statutory limits on the amount of money a parliamentary candidate may spend on his own election. There is a related prohibition of political advertising on radio and television. The object of these laws is to protect the fairness and equality of the political process. The statutes may not entirely achieve these ends but the desirability of such laws seems to be accepted by all political parties. The US Congress in 1971 passed a law which sought to limit to $50,000 the amount which a candidate in a federal election might expend out of his own and his family's monies. It, too, was a measure aimed at preserving the integrity of the political process. The US Supreme Court held, however, that this was an infringement of the First Amendment because it imposed direct restrictions on communication with the electorate and, as the majority put it, restricted the voices of those with money to spend.[25] Marshall J, dissenting,[26] considered that the law was justified to ensure that candidacy did not become the exclusive province of the wealthy, but the majority held this to be an inadequate justification for the interference with the freedom of speech. Similarly, the High Court of Australia has declared invalid an Act of Parliament which prohibited paid advertising on radio or television during an election period on the ground that it infringed the right of communication on matters rel-

24. *Theophanous*, *supra* n.9, at p.717.
25. *Buckley* v. *Valeo* 424 U.S. 1, 17 (1976).
26. *Idem*, p.288. See also *First National Bank, Boston* v. *Bellotti* 435 U.S. 765 (1978).

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evant to political discussion.[27] The majority of the court criticised the law as having the effect of putting opposition parties at a disadvantage, but the basic objection to it was that it restricted free expression of political views by those who might have been able to pay for it. Again, it is useful to ask whether the liberty to spend unrestricted amounts of money on political campaigning and television advertisements assists in the purpose of maintaining effective democratic government.

The second preliminary question one should ask when weighing conflicting interests is whether the interest which comes into conflict with freedom of speech may not itself constitute a fundamental right equally worthy of regard. This question is well illustrated by reference to two branches of the law in which the primacy accorded in the United States to freedom of speech has led to the most radical divergence between that legal system and the English system: contempt of court and defamation.

V. THE LAW OF CONTEMPT OF COURT

THE legal tradition in England has been that the right to a fair trial especially in the criminal courts is as fundamental and important as the right of free speech. The effect of this recognition has been that comment in relation to a pending trial is restricted by the common law in order to avoid prejudice to the parties to litigation and particularly to accused persons. Thus public expressions of opinion on the guilt or innocence of the accused or the publication of facts such as the accused's previous convictions made before or during a trial (or a trial by jury, at least) would be regarded as calculated to prejudice the outcome and to constitute a punishable offence.

A. The Sunday Times *Case*

In *Attorney-General* v. *Times Newspapers*[28] litigation was pending in the English courts in which damages had been claimed by parents of children affected by the drug Thalidomide against the manufacturers of that drug. The case had understandably aroused intense public interest. While negotiations for settlement of the case were in progress, the *Sunday Times* published an article which was found by the House of Lords to have constituted improper pressure on the manufacturers to settle. The case gave the Law Lords the opportunity to deal with the broad issue of pretrial comment and of contempt of court. Lord Simon of Glaisdale in his speech rejected the suggestion that the administration of justice must be paramount in every situation of actual or potential conflict with the right of freedom of discussion:[29]

27. *Australian Capital Television*, *supra* n.8.
28. [1974] A.C. 273.
29. *Idem*, pp.319–320.

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> Each is a genuine interest of society, and neither can be held to be universally paramount over the other; nor is it really difficult, when the rationale of each is borne in mind, to decide which ought to have paramountcy at any particular moment.

This is the English approach to the weighing of conflicting rights.

As it happened the *Sunday Times* took the case to the European Commission of Human Rights, which sent it to the European Court of Human Rights. The question before the European Court was whether under Article 10 of the Convention the ban on publication while the proceedings were pending was "necessary in a democratic society ... for maintaining the authority and impartiality of the judiciary". By the narrow margin of 11 votes to 9 the Court held that the prohibition or punishment of the publication had not been shown to be necessary for that purpose.[30] In consequence of that judgment Parliament amended the law of contempt of court to give somewhat greater scope for discussion of pending cases.[31] The judgment of the European Court of Human Rights did not meet with universal approval. There was one criticism by an authority always weighty but who on this occasion might be called unassailable. That critic of course was Dr Francis Mann, who commented on the similar decision of the European Commission which had preceded that of the Court. No better tribute can be paid to him than to give this reminder of his incomparable style, particularly when roused. He said[32] that the case involved contempt of court in pending proceedings, "one of the most exemplary contributions of English law to civilisation, the maintenance of personal liberty and the improvement of standards of public life". Dr Mann went on:[33]

> Anyone familiar with conditions on the Continent will be conscious of the great evil which trial by newspaper is doing there. It would surely be perplexing if foreign judges who are unaware of the high minded purposes and the lofty rationale of the English rule were to condemn an institution which, however uncertain some of its ramifications may be, is far superior to anything known to their own national legal systems. What matters in the present context is that English courts should appreciate the necessity for adapting their reasoning to the Strasbourg terminology and mentality ... Sometimes it is not so much the result as the grounds provided for it that would make all the difference for the foreign observer who knows little about the virtues of a legal tradition grown over the centuries and whose

30. *Sunday Times* v. *UK* (1979) 2 E.H.R.R. 245.
31. Contempt of Court Act 1981, s.2.
32. "Britain's Bill of Rights" (1978) 94 L.Q.R. 512. This was the text of the 3rd Blackstone Lecture, delivered at the University of Oxford.
33. *Idem*, pp.529–530.

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> instruction in a strange field pre-supposes special sympathy, seeing that he is not always representative of the highest judicial or even legal quality in his own country.

In times when perhaps exaggerated deference is paid to European courts, one misses Francis Mann more than ever. The Strasbourg judgment nonetheless stands, as does the Contempt of Court Act. Neither derogates from the approach to the weighing of rights outlined by Lord Simon in his judgment, a judgment which Dr Mann said "may seem so persuasive as to be almost inevitable".[34] The 1981 Act is certainly no open road to the public prejudging of issues in a pending trial.

In the *Sunday Times* case Lord Reid said that in England there is a strong feeling that trial by newspaper is wrong and should be prevented:[35]

> What I think is regarded as most objectionable is that a newspaper or television programme should seek to persuade the public, by discussing the issues and evidence in a case before the court, whether civil or criminal, that one side is right and the other side wrong. If we were to ask the ordinary man or even a lawyer in his leisure moments why he has that feeling I suspect that the first reply would be—"well, look at what happens in some other countries where that is permitted".

B. The Trial of O. J. Simpson and other US Cases

In recent months we have indeed been looking at what happens in another country, in particular in the State of California. The conduct of the American media in the O. J. Simpson trial and of the lawyers outside court has been astonishing to an English lawyer and disquieting to many American lawyers. Leaving aside the televised proceedings—which raises other issues—the particular element causing disquiet is the unrestrained media comment before and during the trial. Views were canvassed on whether the accused was guilty or not—indeed public opinion polls were taken on the question. During the case the credibility of the witnesses was daily assessed by "experts" and evidence or alleged evidence which was not and probably could not have been admitted in court was referred to and discussed. Counsel both for defence and prosecution gave press and television interviews in which they expressed their own confidence in the innocence or guilt of the accused, as the case may be, conduct for which English counsel would be subject to disciplinary proceedings. We should be wrong, however, if we thought that counsel—and for that matter the media—behaved as they did simply because they are less moral or professional than we are. That such things could take place is due directly to

34. *Idem*, p.530.
35. [1974] A.C. 273, 300.

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the relative weight accorded by the American judicial system to the right of free speech as against the right to a fair trial. The virtually unrestrained freedom of comment on a pending trial can be traced to two decisions of the US Supreme Court given in 1941, both appropriately enough in appeals from California. In one of them two union members had been convicted of violence in the course of a labour dispute which had become a matter of great public interest in California. Before sentence was passed by the judge the *Los Angeles Times* published a strong editorial. It was headed "Probation for Gorillas?" The writer said that the judge would be making a serious mistake if he granted probation to the two union members who had been convicted. What was needed, it said, was "the example of their assignment to the jute mill". The newspaper was fined for contempt of court.

In the second case a judge had given a ruling in a dispute between two trade unions. The leader of the union on the losing side sent a telegram to the US Secretary of Labor criticising the judge's decision as outrageous and threatening that enforcement of his order would lead to a strike. He said that the union did not intend to allow a State court to override the majority vote of the members. This too was adjudged a contempt of court. When the cases[36] came to the Supreme Court Mr Justice Frankfurter, dissenting, found in these articles an improper attempt to overawe the judiciary. In his judgment he freely cited English precedents. But the majority, speaking through Black J, explicitly rejected English practice as a guide. The Court held that the right of free discussion of a matter of general interest overrode any dangers to the judicial process in those two cases. The Court founded its judgment on a broad principle. The First Amendment, it said, required to be given the broadest scope that could be countenanced in an orderly society. Consequently, comment on a pending case should not be punished as contempt unless it raised "a clear and present danger" of producing unfair administration of justice. It thus applied in this field Mr Justice Holmes's test for political speech. This is a much stricter test, needless to say, than that applied in England. In the O. J. Simpson trial it was apparently thought by the judge and the lawyers that any danger to the administration of justice could be averted by sequestering the jury for the duration to keep the media comments from their eyes and ears—with what effects on the jury one can only speculate.

The O. J. Simpson case may have been an aberration. In many places in the United States the media observe voluntary codes of restraint. It is nonetheless legitimate to test the American approach by its application to an extreme case. One may ask what purpose that degree of freedom of

36. *Bridges* v. *California*, *Los Angeles Times* v. *California* 314 U.S. 252 (1941).

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speech serves in the context of pending trials. It hardly helps in the search for truth. What democratic values does it serve and what would be lost by requiring such comments to be reserved until after the case? One may ask why the accused—or for that matter the prosecution—should have to submit to every risk of prejudice short of one which would constitute a clear and present danger to the fairness of the trial. In a 1976 decision the US Supreme Court, through Burger CJ, set aside an order of the Nebraska courts, pending trial of a gruesome murder case, prohibiting the press from reporting a confession made by the defendant to the police, as being an improper prior restraint on speech.[37] Such a restraint, he said, was not justifiable unless alternative measures such as moving the trial to a distant court, or delaying it, were shown to be unavailable or ineffectual. Fully accepting the undesirability of prior restraints on the press we may still wonder that it is the accused who must bear the burden of proving that the alternative measures suggested by the Chief Justice would be ineffectual.

VI. THE LAW OF DEFAMATION

THERE is another branch of the law in which the weight given to the right of freedom of speech has caused the law of the United States (and also of Australia) to diverge radically from that of England, namely the law of defamation. Any law of libel is a restriction on freedom of speech. Although in England truth is a defence to an action for libel, it has rightly been said that freedom of speech is of limited value if it is no more than freedom to publish the truth. Freedom of speech must at least in some measure include the freedom to err. These are truisms for which no authority need be quoted. Yet the English law of defamation, protective as it is of the reputation of the individual, often penalises even honest error.

The law does not by any means ignore the claims of freedom of speech. A statement otherwise libellous is not actionable if it constitutes comment on a matter of public interest made honestly and without misstatement of fact. The law also realises that in some situations it would not serve the public interest that defamatory allegations could be made only on condition that they could be proved to be true. Those situations, which are fairly clearly defined by the common law, give rise to a qualified privilege. In such situations it is enough that the defamatory statements were published in good faith, without malice. Fair and accurate reports of what passes in Parliament and the courts and some other places are also privileged. The categories of qualified privilege, being based on public policy, are not necessarily closed but the English courts do not readily invent new

37. *Nebraska Press Association* v. *Stuart* 427 U.S. 539 (1976). Burger CJ was at pains to point out that no right had priority over any other under the Constitution under all circumstances. He nonetheless asserted that freedom of speech from prior restraint "should have particular force as applied to the reporting of criminal proceedings".

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heads of privilege. This is not, however, a disquisition on the English law of libel. What is important for present purposes is that English law does not recognise any general privilege for the press or for anyone else to defame an individual, even one in a prominent public position, on the grounds that what is said expresses the writer's honest and reasonable belief on a matter which is one of real public interest.[38] This is an undoubted limitation on speech, especially for the press and other media. An editor may have heard a highly discreditable fact about a leading political figure which, if true, the public ought to know. After taking some care to check it he may firmly believe that it is true. If he publishes it and cannot in the event prove its truth he will have to pay damages and costs. As juries in England have taken to the habit of awarding enormous damages for libel and as the Court of Appeal regards its power to interfere with those awards as limited[39] there is peril in attacking the character or conduct of a public man or woman even in good faith. In an appeal to the Privy Council from the West Indies Lord Bridge said that in a free and democratic society it was almost too obvious to need stating that those who hold office in government must always be open to criticism. "Any attempt to stifle or fetter such criticism", he said, "amounts to political censorship of the most insidious and objectionable kind."[40] One has seen examples in England (and more so in some foreign countries) of defamation actions being used for just that purpose.[41] In a recent case of the highest importance to freedom of speech in England, the *Derbyshire County Council* case,[42] the House of Lords has held that a local authority, as an organ of government, could not sue for defamation.[43] In the course of his speech Lord Keith said:[44]

> 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 defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available.

It is therefore not surprising that human rights lawyers as well as journalists in England and other countries have looked wistfully at the

38. *Campbell* v. *Spottiswoode* (1863) 3 B. & S. 769, 777; *Blackshaw* v. *Lord* [1984] Q.B. 1, 26.

39. *Rantzen* v. *Mirror Group Newspapers (1986) Ltd* [1994] Q.B. 670. (But see now *John* v. *MGN Ltd*, (C.A.) *The Times*, 14 Dec. 1995.)

40. *Hector* v. *Attorney-General of Antigua* [1990] 2 A.C. 312, 318.

41. In the Australian High Court Deane J observed that actions for defamation had become a valued source of tax-free profit for holders of public office: *Theophanous*, *supra* n.9, at p.745.

42. *Derbyshire County Council* v. *Times Newspapers Ltd* [1993] A.C. 534.

43. Following the judgment of the South African Appellate Division in which it had been held that the South African Railways (then a department of the government) could not mount an action for defamation: *Die Spoorbond* v. *South African Railways* 1946 A.D. 999.

44. [1993] A.C. 534, 538.

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bold and far-reaching rewriting of the law of defamation by the US Supreme Court some 30 years ago in the great case of *New York Times* v. *Sullivan*.[45]

A. The Sullivan *Case*

The circumstances of this case are well known. Let me nonetheless recapitulate its main features. The action arose from an advertisement placed in the *New York Times*, at the height of the American civil rights struggle, by the Committee to Defend Martin Luther King. The advertisement detailed instances of the ferocious suppression of peaceful protest in various towns in the South, and spoke of "Southern violators of the Constitution". It specifically referred to the action of the police in Montgomery, Alabama. Sullivan was a Montgomery city commissioner who had the particular duty of supervising the police department of that city. He was not mentioned by name or office, but he nevertheless maintained that the advertisement would be read as referring to him. His action for damages for libel came before an Alabama jury, which awarded him $500,000 in damages, a very considerable sum indeed in 1960. The jury's verdict was welcomed in the South as being a due warning to newspapers like the *New York Times*. It was followed by other writs against the *New York Times* and against individual journalists and civil rights campaigners in which huge amounts of damages were claimed. An appeal to the Alabama Supreme Court had been dismissed.

The *New York Times* took its case to the Supreme Court, which reversed the rulings of the Alabama courts in a decision which revolutionised the law of libel as it related to public officials. The main judgment, by Mr Justice Brennan, deserves to be read as law, history and literature. It is a magnificent judgment by one of the great judges of our time. It is impossible to read it without a feeling of excitement. It "strikes the imagination and engages the affections", as the right of property did for Blackstone. In so rich a judgment one can merely outline its result. Founding on the First Amendment it laid down that when allegations which would ordinarily be defamatory were made of a public official in relation to his official conduct an action by him would not succeed unless he proved that the defamatory statement was false and, what is more, proved with "convincing clarity" that it was made by the defendant with knowledge of its falsity or with reckless disregard whether it was false or not. Malice in the sense of motive was irrelevant. There was one further important aspect of the judgment. The Alabama courts had held that the criticism of the Montgomery police could be read as a libel on an individual official. Mr Justice Brennan, on the contrary, said that, it being well recognised that no organ of

45. 376 U.S. 254 (1964).

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government in the United States could sue for libel, impersonal criticism of government at any level could not be converted "by some legal alchemy" into libel of the officials of whom the government is composed.[46]

Human rights lawyers, the press and the broadcasting media look with some longing at this remarkable and resounding vindication of the right of free speech. I hope that I may regard myself as a human rights lawyer and I have had some experience of acting for the press in defamation actions both in England and in South Africa. Yet I do not share that longing to have the rule in *New York Times* v. *Sullivan* as part of English law.

My reservations are in part practical. The concept of a "public official" under the *Sullivan* judgment has been extended to public figures generally. It has been held to cover a popular entertainer accused of contacts with the Mafia,[47] and a manager of a football team accused of rigging matches.[48] At least some of the justices of the Supreme Court have suggested that the rule be extended to private persons whose conduct has become a matter of public interest.[49] Moreover, the *Sullivan* decision has not much affected either the prevalence of defamation actions or the generosity of juries. What it has done is to add to the length and cost of libel actions because the plaintiff must be allowed the explore the editorial processes of the defendant newspaper or broadcaster, if he is to have any chance of proving that the latter knew that what he published was untrue. It had been generally recognised that save in exceptional circumstances the freedom of the press required that an editor should not be obliged to divulge the sources of his information. In the United Kingdom that protection to the press is embodied in the Contempt of Court Act 1981.[50] In the United States that protection cannot stand against the *Sullivan* rule.

There are more basic reasons for reservations. The most fundamental is that it gives wholly insufficient weight to an individual's right of reputation. A person who goes into public life must expect robust and often unfair criticism. That is part of the price of going into public life. But it does not follow that it is necessary to deprive him or her of any right to reputation. There are surely some libels so gross and offensive that they should be publishable only on condition that they are proved to be true. If it is said of a cabinet minister or a judge that he takes bribes, must he grin and bear it because he cannot prove that the falsehood was a knowing falsehood? The High Court of Australia has been conscious of the unfairness of such a rule. It has in part followed the *Sullivan* judgment but with

46. 376 U.S. 254, 292 (1964).
47. *Newton* v. *NBC* 930 F.2d 662 (1990).
48. *Curtis Publishing Co.* v. *Butts* 388 U.S. 130 (1967).
49. *Rosenbloom* v. *Metromedia* 403 U.S. 29 (1971).
50. S.10. See *In re an Inquiry* [1988] A.C. 660.

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the limitation of its scope to persons engaged in politics or government, and with the burden on the defendant of proving that he honestly and reasonably believed in the truth of what he published.[51] This is a fairer rule but in the case of grossly defamatory allegations of fact it may still be thought to give inadequate protection to the reputation of the plaintiff. Suppose that a newspaper editor is told by a usually reliable informant whom he has no reason to distrust that a cabinet minister has given away State secrets to a foreign power. He believes the story and publishes it. It turns out that it is in fact untrue. Does the public interest in freedom of speech require that it is the innocent plaintiff who should suffer rather than the defendant who erred in his editorial judgment? As the late Lord Goodman said: "The principle of publish and be damned is a valiant and sensible one for a newspaper. Publish and let someone else be damned is a discreditable principle for a free press."[52] It was said in the *Sullivan* case that a person in a public position has means at his disposal to answer calumny. Sometimes he has, but often there is no effective answer but legal action. There is a public interest in the good repute of politicians. Are the standards of public life raised by the liberty to savage the reputations of those in public life presently enjoyed by the media in the United States? Well over a hundred years ago Cockburn CJ said:[53]

> It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs should not be conducted by men of honour ... if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation.

We tend to think in terms of an embattled newspaper fighting against the odds to uncover wrongdoing in high places. I knew many editors and journalists in South Africa who ended up not only in the civil courts but in the dock in a criminal court for trying to do just that. But it is not always the case of the courageous editor fighting against the odds. Sometimes it is an embattled plaintiff whom a powerful defendant is trying to discredit and destroy, and whose only redress is an action for defamation. In such a case the *Sullivan* defence does not seem particularly appealing. It is surely not too much to hope that the English law of libel can be reformed without undermining the individual's right to reputation and dignity even if he or she does happen to be in public life. It should not be beyond a court's ability to distinguish in any particular case between hard-hitting political criticism and truly libellous allegations of fact. It is still open to the courts,

51. *Theophanous* and *Stephens*, both *supra* n.9.
52. Quoted in the Faulks Report on the law of defamation (Cmd.5909), 1975.
53. *Campbell* v. *Spottiswoode* (1863) 3 B. & S. 769, 777.

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and if not to the courts to Parliament, to give the presiding judge and the Court of Appeal greater control over awards of damages.[54] The "chill factor" referred to by Lord Keith in the *Derbyshire County Council* case[55] undoubtedly exists. But it is only one factor. The press in England shows little signs of timidity in its criticism of public figures. Nor have I personally come across a case where an editor who has good reason to believe that there is real political villainy afoot simply lets the story lie on the file.

What are the prospects for the adoption of the *Sullivan* principles or their Australian modification in the English courts? In the *Derbyshire County Council* case in the House of Lords Lord Keith referred to the *Sullivan* case and said that the public interest considerations underlying it were no less valid in England than in the United States.[56] He went no further than that. Indeed, unlike Brennan J, he accepted that if a publication attacking the activities of a governmental authority was also a libel on any individual who managed its affairs that individual himself could bring proceedings for defamation.[57] In the Court of Appeal[58] in that case two of the Lord Justices referred to *Sullivan* without endorsing its conclusions. The third Lord Justice said expressly that she would not wish to follow *Sullivan* in its refusal of protection to individual politicians.[59] It may be noted that the Supreme Court of Canada has very recently refused to apply either *Sullivan* or its Australian modification.[60] Nor is it clear how any English court, even the House of Lords, could in the absence of a binding British Bill of Rights rewrite English law so as to accord with *Sullivan*.

If an appropriate case arises, the European Court of Human Rights may no doubt be invited to apply the *Sullivan* principles. That Court has not as yet made any move in that direction. Its decisions in freedom of speech cases such as *Lingens* v. *Austria*[61] do not seem to be inconsistent with English law. Whether that Court would in future be receptive to an argument based on *Sullivan* principles I should not like to predict. When Dr Mann wrote the article earlier referred to there were about 20 judges of that Court. There are now over 30 from very varied legal and political backgrounds.

54. A recent decision of the Court of Appeal points in that direction, departing in that respect from *Rantzen*, *supra* n.39. See *John* v. *MGN Ltd*, *The Times*, 14 Dec. 1995.
55. [1993] A.C. 534, 548.
56. *Ibid.*
57. *Idem*, p.550. In South Africa an article criticising the government for racial bias in the exercise of the prerogative of mercy was held to be capable of giving rise to an action for defamation by the (unnamed) minister chiefly responsible for the exercise of the prerogative: *South African Associated Newspapers* v. *Pelser* 1975 (4) S.A. 797 (AD).
58. [1992] Q.B. 770.
59. Butler-Sloss LJ, *idem*, p.832.
60. *Manning and Church of Scientology of Toronto* v. *Hill* (1995) 126 D.L.R. (4th) 129.
61. (1986) 8 E.H.R.R. 407.

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VII. CONCLUSION

To return to our starting point, at different times different countries have accorded express or implicit primacy to particular rights. Under the German Basic Law, as one might expect given its historical background, the right of individual dignity appears to have pride of place.[62] In the new South African Constitution, for obvious reasons, the right of human dignity is also expressly protected;[63] whether it will turn out to be the primary right in South Africa remains to be seen. A judge who has recently been in the Czech Republic tells me that many lawyers in that country regard the right of property as the primary constitutional right. England has no hierarchy of rights. Under the common law there is no reason to fear that freedom of speech will be overborne in importance by any other recognised right. But to take that right to extremes, to attempt to extend its sway over interests hitherto recognised by the common law and by Parliament as equally worthy of protection, is likely to damage rather than further the purposes for which it exists. It may indeed reduce rather than increase society's commitment to freedom of speech.

One of the famous aphorisms of Mr Justice Holmes was that the most stringent protection of free speech would not protect a man falsely shouting fire in a crowded theatre.[64] An American wit has said that these days many lawyers think they can win their cases simply by shouting freedom of speech in a crowded court. That was his joke but it is a joke with a point. Even the best of ideas can be taken too far. More than 200 years ago Blackstone said of England that it was "a land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the Constitution".[65] It is no longer the only one in the universe, but I hope that the rest of the quotation remains true. What we should not assume is that there is only one path to that end, or that we must follow in the footsteps of others to reach it.

62. Art.1: "The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority."

63. The Republic of South Africa Constitution Act, s.10: "Every person shall have the right to respect for and protection of his or her dignity."

64. In *Schenk* v. *United States*, *supra* n.15.

65. Blackstone, *Commentaries*, Vol.I, p.6.

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