

## CHAPTER EIGHT: UNITARY AND DUAL COURTS SYSTEMS AND THE ROLE OF CONSTITUTIONAL VALUES IN PRIVATE LITIGATION

### KEY CONCEPTS FOR THE CHAPTER

- CONSTITUTIONAL VALUES PLAY A ROLE IN PRIVATE AS WELL AS PUBLIC LITIGATION, BUT THE DOCTRINES DIFFER IN SIGNIFICANT DEGREE BECAUSE OF THE ORGANIZATION OF EACH COUNTRY'S JUDICIARY:
  - THE U.S. SUPREME COURT CAN ONLY DETERMINE FEDERAL CONSTITUTIONAL AND STATUTORY ISSUES, WHILE THE SUPREME COURT OF CANADA AND THE HIGH COURT OF AUSTRALIA ARE GENERAL COURTS OF APPEAL COMPETENT TO HEAR APPEALS FROM LOWER COURTS
  - MOST COMMON LAW SUITS IN THE UNITED STATES ARE FILED IN STATE COURTS OF GENERAL JURISDICTION, IN MANY CASES BEFORE ELECTED JUDGES; COMMON LAW SUITS IN CANADA MUST BE FILED IN COURTS OF GENERAL JURISDICTION BEFORE FEDERALLY-APPOINTED JUDGES WITH LIFE TENURE; WHILE AUSTRALIAN STATE COURTS ARE OF GENERAL JURISDICTIONS, THEIR JUDGMENTS CAN BE APPEALED TO THE HIGH COURT

## I. Organization of the Judiciary

One of the significant structural differences in the administration of law in the United States and Canada concerns the organization of the judiciary. As with other matters, the formal differences can't be fully appreciated without understanding the informal customary practices as well.

### A. United States

The American system features a dual judicial structure. Each state has its own judicial system, usually including inferior courts of limited jurisdiction, superior courts of general jurisdiction, an intermediate appellate court in all but the smallest states, and a supreme court of the state. The powers and authority of state courts are entirely governed by state law, except for the provision in the U.S. Constitution that "the Judges in every State shall be bound" by the Constitution, Laws, and Treaties of the United States, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. State courts handle most litigation in the United States. Litigation over tort, property, or contract law issues, and most criminal prosecutions, occur in state courts. Recall that, under the Tenth Amendment, states enjoy plenary power to enact laws on any subject, except the few specifically denied to them by Art. I, §10, and (more significantly today) areas of law where Congress, as part of its authority to regulate interstate commerce, regulate bankruptcy,

control immigration, etc. has pre-empted state law.

The federal courts of the United States are all formally courts of limited jurisdiction. The federal structure includes district courts, circuit courts of appeal (the country is divided geographically into 12 circuits), and the U.S. Supreme Court. In addition, Congress has created several courts with special jurisdiction (*e.g.*, trial courts for tax and government claims and an appellate court for tax, government contracts, and patent cases, and a nationwide system of bankruptcy judges). Article III of the U.S. Constitution expressly limits the “judicial power of the United States” to “Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,” to admiralty and maritime cases, and to other special cases based on the identity of the parties. The latter category includes, most notably, litigation where the United States is a party and cases between citizens of different states (this is called “diversity” jurisdiction).

Because Article III’s jurisdictional limitation applies to the U.S. Supreme Court, that court’s authority to review decisions by state courts is limited to questions of federal law. In addition, under the doctrine established in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), even when federal courts are hearing cases of state law pursuant to their diversity jurisdiction, the federal judge is to follow the state court’s interpretation of state law issues. As applied, issues arising under the common law, and non-federal modifications of the common law by statute, are determined by each state. It might be fair to say that there is no “common” law of the United States, but rather 51 common laws.

## B. Canada

Canada has a more unitary judicial structure. At confederation, each of the uniting provinces had its own system of courts modeled on the English judiciary. This included inferior courts of limited geographic or subject matter jurisdiction, a superior court of general jurisdiction, a provincial court of appeal, and final appeal to the Privy Council in London. The *British North America Act* expressly continued these courts, and assigned the matter of the “administration of justice” to each province under s. 92(14). This power enables the provinces to vest their courts with jurisdiction over all cases, which includes litigation over the Constitution, federal law, provincial law, or common law. Of particular comparative significance, s. 101 of the *BNA Act* authorized Parliament to create a Supreme Court of Canada to serve as a “general court of appeal for Canada.” Thus, all judgments of the provincial courts of appeal are subject to further appeal to the Supreme Court of Canada.<sup>+</sup>

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<sup>+</sup> Many Americans are amazed to learn that panels of the Supreme Court of Canada routinely review judgments from the Quebec Court of Appeals on ordinary questions of civil law. Here, like other matters discussed below in text, formality must be combined with custom to understand what is really going on. These cases are generally assigned to panels of five of the nine justices, which will include all three justices that the *Supreme Court Act* requires be appointed from the Quebec bar. The two non-Quebec justices by custom vote to join the result reached by the majority of the Quebecois justices.

Canada does have a federal court structure as well. Section 101 of the *BNA Act* authorized Parliament to create a Supreme Court but “any additional courts for the better administration of the laws not only of Canada.” Parliament has created a Federal Court (consisting of a trial and appellate division) to cover a host of specific matters that are the subject of federal statutes, including tax and government claims, intellectual property, admiralty, citizenship, federal agency administrative review, and certain interprovincial commercial claims and claims regarding certain kinds of commercial paper (per s. 91(18)).

### C. Australia

Australia has both a unified judicial system, with a single common law, and a federal judicial system. State courts are jurisdictionally separate from each other, but are linked at the apex of the system by the High Court which has (discretionary) jurisdiction to hear appeals from State Supreme Courts in all classes of matter, civil and criminal. The High Court also exercises jurisdiction over constitutional questions, applications for writs against an Officer of the Commonwealth, and appeals from other federal courts. There are three other (lower) federal Courts (State Courts are also “vested” with federal jurisdiction):

The Federal Court of Australia (established in 1976) has jurisdiction in matters invested by Commonwealth (federal) legislation, including bankruptcy, corporations, patents, industrial relations, taxation and trade practices laws. It is also able to hear applications for writs of mandamus, prohibition and injunction against an Officer of the Commonwealth. It hears appeals from a single Judge of the Federal Court, and in some limited cases from State Supreme Courts, concerning matters coming under its statutory jurisdiction.

The Family Court of Australia (established 1975) is a court of specialist jurisdiction, exercising both original and appellate jurisdiction with respect to marriage, divorce, and the custody of children. Its power to hear cases concerning the custody of ex-nuptial children has been conferred upon it under Commonwealth law, by a “referral” of state power to the Commonwealth, under s. 51 (xxxvii) of the Constitution.

The Federal Magistrates Court (established in 2000) shares jurisdiction with the Federal Court and the Family Court, and hears similar, but less complex, disputes.

The states typically have three levels of Court: Magistrates Courts, which deal with summary offences and some small civil actions; intermediate Courts (known variously as “District” or “County Courts”) which conduct most criminal trials and civil litigation up to a certain money limit; and Supreme Courts, which exercise both original and appellate jurisdiction, dealing with the most serious criminal and civil cases, and hearing appeals from lower state Courts. As noted, the Supreme Courts are also vested with federal jurisdiction, and can act as federal courts when federal matters arise. Some states also have specialist courts - for example the Land and Environment Court of NSW.

Common law actions for tortious wrongs on the part of a federal (Commonwealth) Officer(s)

would be brought in State Courts (vested with federal with federal jurisdiction). Federal Court jurisdiction in tort law only arises where this is conferred under a Commonwealth statute.

The High Court rarely (if ever, these days) exercises original jurisdiction in civil law matters. Section 75 (iv) of the Constitution confers original jurisdiction on it over matters between (among others) “residents of different States” (“resident” is confined to natural, not corporate persons). This form of “diversity jurisdiction” has little application, however, and the High Court will discourage actions by, among other things, exercising its power, under the *Judiciary Act* 1903, to “remit” any matter coming under its original jurisdiction to a lower Court, to avoid hearing trivial matters.

#### D. Who appoints the judges

An understanding of the differences in judicial structure must include an appreciation of the formal and informal practices concerning the appointment of judges. In the United States, federal judges enjoy life tenure after being appointed by the President and confirmed by the Senate. The appointment process is highly political. Increasingly, nominees are appointed and sometimes rejected because of their judicial philosophy. In addition, the President relies heavily on the recommendation of Senators from his party when appointing judges in their states. At the circuit court level, there is a customary allocation of seats to the various states that comprise the circuit (and occasionally a customary allocation within a state’s geographic regions). Regional balance has not played a significant role in appointments to the U.S. Supreme Court in recent years.<sup>++</sup> The composition of the state judiciary varies widely, but many judges are elected for a term of years, many running with party labels.

In Canada, all but inferior court judges are appointed by the Governor General. They serve until mandatory retirement at age 75. In reality, this means that they are appointed by the Prime Minister in consultation with the Minister of Justice. By law, three of the nine Supreme Court justices must be from Quebec; by custom, three of the others are allocated to Ontario, and one each to British Columbia, the Maritime provinces (New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland), and the Prairie (Manitoba, Saskatchewan, and Alberta). Within the latter category, a weaker custom rotates the seat among the provinces. The Minister of Justice extensively consults with the bar. Although partisanship and politics are not insignificant, there are many occasions where a nominee comes from a different party than the government. (The only real political barrier -- which is significant -- seems to be the inability to obtain an appointment if one is a Quebec separatist.)

Inferior judges are appointed by each province’s Lieutenant Governor (*i.e.*, by the

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<sup>++</sup> Significant attention was paid to President Reagan’s nomination of the first woman justice, Sandra Day O’Connor. Very little attention was paid to the fact that this would give the small state of Arizona two of the nine justices.

provincial cabinet). Provincial custom varies widely -- some require an application and review process where the Attorney General is limited to selecting among a small list of nominees approved by a bar committee, while others feature widespread use of the provincial judiciary for political patronage.

Given their broad power to administer the judiciary, provinces could easily evade the constitutional requirement that judges be federally-appointed by expanding the jurisdiction of provincial courts. The Supreme Court has held, however, that any court that exercises jurisdiction over the sort of cases that have traditionally been exercised by the federally-appointed superior court judges must conform to the federal appointment requirements. For example, in *Re B.C. Family Relations Act*, [1982] 1 S.C.R. 62, the Court upheld the assignment of guardianship and custody issues to the provincial court, but rejected provisions also conferring provincial court jurisdiction over occupancy and access to the family residence, which was “more conformable to that exercised and exercisable by a s. 96 court.”

In Australia, all Federal (including High Court) judges are appointed by the “Governor-General in Council” (s 72 of the Constitution) - meaning, appointment on the advice of the executive government. The Constitution mandates a minimum of three Justices on the High Court. Since 1913, there have been seven; currently, four men (including the Chief Justice) and three women sit on the Court.

State Court judges are, similarly, appointed by the state Governor, on the advice of the state government.

## II. The Concept of State Action

The topic of this Chapter is litigation where a private party seeks to invoke the Constitution either to state a claim or provide a defense in litigation with another party. The question is whether the courts should subject private acts to constitutional restrictions. See Nowak & Rotunda §12.1. As we will see, the Supreme Court of Canada finds no “state action” sufficient to directly invoke the Charter, while on similar facts the U.S. Supreme Court finds state action to exist, and it appears that the High Court of Australia has shifted toward their Canadian sisters. However, the basic principles are the same. The Charter applies only to the legislatures and government of Canada and the provinces (s.32). The original U.S. Constitution only applied to the federal government, and the 14th Amendment’s key protection against deprivations of due process or equal protection are textually limited to deprivations by the states. The High Court of Australia has extended the implied right of political communication to all levels of governments (albeit without making this explicit), while other individual rights or freedoms guaranteed in the Australian Constitution - with the exception of s 117 (prohibiting out-of-state residency discrimination) and s 92 (guaranteeing “absolutely free... intercourse”, or freedom of movement, among the states) - are expressly confined to the federal government. Thus, each country requires an element of “state action” before courts will recognize constitutional rights.

**SHELLEY v. KRAEMER****SUPREME COURT OF THE UNITED STATES  
334 U.S. 1; 68 S. Ct. 836; 92 L. Ed.1161 (1948)**

[Before Vinson, C.J., and Black, Douglas, Frankfurter, Murphy, and Burton, JJ.]

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

[The opinion is for two cases consolidated for judgment. The first comes to the Court on certiorari to the Supreme Court of Missouri. In 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, restricting the use and occupancy of the properties to exclude persons "not of the Caucasian race." Shelley, an African American, received a warranty deed to a parcel subject to the restriction. Kraemer and others brought suit in Missouri state court to restrain Shelley from taking possession for the property, divesting Shelley's title, and revesting it in the immediate grantor or another party. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained. The Supreme Court of Missouri sitting en banc reversed and directed the trial court to grant the relief for which respondents had prayed. That court rejected the trial judge's conclusion about the intent of the parties. The court noted that covenants "restricting property from being transferred to or occupied by negroes have been consistently upheld by the courts of this state as one which the parties have the right to make and which is not contrary to public policy." *Kraemer v. Shelley*, 198 S. W. 2d 679, 682 (1946).

The second of the cases under consideration came from the Supreme Court of Michigan. The circumstances presented do not differ materially from the Missouri case. The Michigan Court distinguished *In re Wren*, [1945] O.R. 778 (Ont.H.C.), which held, *inter alia*, that a covenant not to sell land to "Jews or persons of objectionable nationality" was too indefinite to be enforceable.<sup>+</sup> Although many states outside the south did not have miscegenation laws, the court wrote that no one "could contend either that persons of the Mongoloid or Negroid races are embraced within the term 'Caucasian,' or that this term does not specifically exclude all other races." *Sipes v. McGhee*, 25 N. W. 2d 638, 642 (1947). The Michigan court then considered the claim that the restriction was enforceable as contravening public policy. The court took note of state statutes prohibiting racial discrimination in public schools and public accommodations, mental institutions, and life insurance sales. The court also noted that contract restrictions are valuable property rights that cannot be taken without compensation, and cited state precedents that recognized rules of property "ought not to be overturned without the very best of reasons." *Ibid.* at 643. Thus, the court re-affirmed prior precedents that racially restrictive covenants were not contrary to public policy. *Parmalee v. Morris*, 188 N.W. 330 (1922). The court

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<sup>+</sup> Ed. note: This case is discussed below.

declined the invitation to reconsider that precedent in light of international declarations of human rights. "So far as the instant case is concerned, these pronouncements are merely indicative or a desirable social trend and an objective devoutly to be desired by all well-thinking peoples. These arguments are predicated upon a plea for justice rather than the application of the settled principles of established law."]

**[As discussed in the Introductory Notes, these holdings about the enforceability of covenants under the common law in light of public policy were not subject to appeal to the U.S. Supreme Court. That court's jurisdiction was limited to issues arising under federal law. Absent statutory authority, the only federal question was a constitutional one.]**

Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment. Specifically, petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

#### I.

Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider.

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It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, § 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration,<sup>8</sup> provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

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It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the

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<sup>8</sup>In *Oyama v. California*, 332 U.S. 633, 640 (1948) the section of the Civil Rights Act herein considered is described as the federal statute, "enacted before the Fourteenth Amendment but vindicated by it." The Civil Rights Act of 1866 was reenacted in § 18 of the Act of May 31, 1870, subsequent to the adoption of the Fourteenth Amendment. 16 Stat. 144.

private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of *Buchanan v. Warley*, [245 U.S. 60 (1917)] a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. During the course of the opinion in that case, this Court stated: "The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color."

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But the present cases, unlike those just discussed, do not involve action by state legislatures or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters.

## II.

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in *Virginia v. Rives*, 100 U.S. 313, 318 (1880), this Court stated: "It is doubtless true that a State may act through different agencies, -- either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another." In *Ex parte Virginia*, 100 U.S. 339, 347 (1880), the Court observed: "A State acts by its

legislative, its executive, or its judicial authorities. It can act in no other way." In the *Civil Rights Cases*, 109 U.S. 3, 11, 17 (1883), this Court pointed out that the Amendment makes void "State action of every kind" which is inconsistent with the guaranties therein contained, and extends to manifestations of "State authority in the shape of laws, customs, or judicial or executive proceedings." Language to like effect is employed no less than eighteen times during the course of that opinion.

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The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, *supra*. Cf. *Pennoyer v. Neff*, 95 U.S. 714 (1878).

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But the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.<sup>19</sup> Thus, in *American Federation of Labor v. Swing*, 312 U.S. 321 (1941), enforcement by state courts of the common-law policy of the State, which resulted in the restraining of peaceful picketing, was held to be state action of the sort prohibited by the Amendment's guaranties of freedom of discussion. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion. In *Bridges v. California*, 314 U.S. 252 (1941), enforcement of the state's common-law rule relating to contempts by publication was held to be state action inconsistent with the prohibitions of the Fourteenth Amendment. And *cf. Chicago, Burlington and Quincy R. Co. v. Chicago*, 166 U.S. 226 (1897).

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

### III.

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We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in

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<sup>19</sup> In applying the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), it is clear that the common-law rules enunciated by state courts in judicial opinions are to be regarded as a part of the law of the State.

question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

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Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

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The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

For the reasons stated, the judgment of the Supreme Court of Missouri and the judgment of the Supreme Court of Michigan must be reversed.



As we will see in the next case, the Supreme Court of Canada reached the opposite result concerning the applicability of the Charter to judicial enforcement of common law remedies. Some additional background is required to understand the case. The defendant union was engaged in "secondary picketing." This term means that the union pickets were not targeting their own employer -- Purolator Courier -- but a sub-contractor from Purolator. Secondary

picketing is a desirable strategy when the simple refusal to work does not confer sufficient bargaining leverage on the union, which is particularly true when the employer can outsource work to other firms and their employees to carry on despite the strike. At common law, secondary picketing was held to be an unreasonable restraint of trade and a concerted effort to unjustifiably encourage the plaintiff's workers to break their own employment contracts with Dolphin Delivery in order to get Dolphin to put economic pressure on Purolator to settle with the union. Secondary picketing also violates the *B.C. Labour Code*, as well as the U.S. National Labor Relations Act. There are, however, no provisions of the (federal) *Canada Labour Code* concerning secondary picketing.

The B.C. Labour Code's provisions apply to most secondary picketing in British Columbia, because the *British North America Act* generally assigns labor relations to provincial regulation. (In contrast, Congress has exercised its authority under the Commerce Clause to create a federal scheme of labor law administered by the National Labor Relations Board.) However, there is an exception for national industries such as telecommunications and transportation. These industries are governed by a federal labor relations regime.

Under modern labour statutes, including U.S. and B.C. laws, the common law has been superseded by rulings by a specialized agency. However, the federal labour law in Canada applicable to the transportation industry did not supplement the common law. Hence, this case is one of the few labour issues to arise under the common law.

**RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 580, V.  
DOLPHIN DELIVERY LTD.**

**SUPREME COURT OF CANADA  
[1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174**

The judgment of Dickson C.J. and Estey, McIntyre, Chouinard and Le Dain JJ. was delivered by

MCINTYRE J.--This appeal raises the question of whether secondary picketing by members of a trade union in a labour dispute is a protected activity under s. 2(b) of the Canadian Charter of Rights and Freedoms and, accordingly, not the proper subject of an injunction to restrain it. In reaching the answer, consideration must be given to the application of the Charter to the common law and as well to its application in private litigation.

The respondent, Dolphin Delivery Ltd. ("Dolphin"), is a company engaged in the courier business in Vancouver and the surrounding area. Its employees are represented by a trade union, not the appellant. A collective agreement is in effect between Dolphin and the union representing its employees, which provides in clause 8: "it shall not be a violation of this agreement or cause for discipline or discharge if an employee refuses to cross a picket line which has been established in full compliance with the British Columbia Labour Code". The appellant trade union is the bargaining agent under a federal certification for the employees of Purolator Courier Incorporated ("Purolator"). That company has a principal place of operations in Ontario but, prior to the month of June, 1981 when it locked out its employees in a labour dispute, it had a place of operations in Vancouver. That dispute is as yet unresolved. Prior to the lock-out, Dolphin did business with Purolator making deliveries within its area for Purolator. Since the lock-out,

Dolphin has done business in a similar manner with another company, known as Supercourier Ltd. ("Supercourier"), which is incorporated in Ontario. There is a connection between Supercourier and Purolator, the exact particulars of which are not clearly established in the evidence, but it appears that Dolphin carries on in roughly the same manner with Supercourier as it had formerly done with Purolator and about twenty per cent of its total volume of business originates with Supercourier. This is about the same percentage of business as was done with Purolator before the lock-out.

In October of 1982 the appellant applied to the British Columbia Labour Relations Board for a declaration that Dolphin and Supercourier were allies of Purolator in their dispute with the appellant. A declaration to this effect would have rendered lawful the picketing of the place of business of Dolphin under British Columbia legislation. The Board, however, declined to make the declaration sought, on the basis that it had no jurisdiction because the union's collective bargaining relationship with Purolator and any picketing which might be done were governed by the *Canada Labour Code*, R.S.C. 1970, c. L-1. In the face of this finding it became common ground between the parties that where the *Labour Code of British Columbia*, R.S.B.C. 1979, c. 212, does not apply, the legality of picketing falls for determination under the common law because the *Canada Labour Code* is silent on the question. In November of 1982 the individual appellants, on behalf of the appellant union, advised Dolphin that its place of business in Vancouver would be picketed unless it agreed to cease doing business with Supercourier. An application was made at once for a quia timet injunction to restrain the threatened picketing. No picketing occurred, the application being made before its commencement.

The matter came before Sheppard L.J.S.C. and on November 30 he granted the injunction in these terms:

"... that the Defendants and each of them and anyone acting for them or under their instructions, and anyone who has knowledge of such Order, be restrained from picketing or causing to be picketed the Plaintiff's place of business or near 30 West Pender Street, Vancouver, or elsewhere in the Province of British Columbia pending the trial or other disposition of this action."

He declined to find that Purolator and Dolphin were in fact allies, and said:

"On the material before me, I cannot agree with Counsel's interpretation of the facts. Clearly, the plaintiff is owned by persons who have no relationship with the persons who own Supercourier or Purolator. On a balance of probabilities and on the material before me, I find that even if Supercourier is a subterfuge set up by Purolator to circumvent the labour dispute, (a hypothesis which I find not to have been proven on the material) the plaintiff had no knowledge of this arrangement."

He then went on to say:

"On these facts, it appears to me that \* \* \* what the Union proposes in picketing the plaintiff applicant is secondary picketing for the purpose either of the tort of inducing breach of contract, or of the tort of civil conspiracy in that the predominant purpose of the picketing is to injure the plaintiff rather than the dissemination of information and the protection of the defendant's interest. Accordingly, I find that the plaintiff is entitled to an injunction to restrain the picketing."

\* \* \*

[Conducting its own review, the SCC concluded that the respondent was a non-affiliated third party,

that the anticipated picketing would constitute tortuous secondary picketing, and that the purpose was to injure the plaintiff. Although the Court assumed that the picketing would be peaceful, it determined that some employees of the respondent and other trade union members of customers would decline to cross the picket lines, and that the business of the respondent would be disrupted to a considerable extent.]

Freedom of Expression

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[The Court then catalogued philosophical and precedential support for free speech and the importance of free expression under the Charter.]

The question now arises: Is freedom of expression involved in this case? In seeking an answer to this question, it must be observed at once that in any form of picketing there is involved at least some element of expression. The picketers would be conveying a message which at a very minimum would be classed as persuasion, aimed at deterring customers and prospective customers from doing business with the respondent. The question then arises. Does this expression in the circumstances of this case have Charter protection under the provisions of s. 2(b), and if it does, then does the injunction abridge or infringe such freedom?

The appellants argue strongly that picketing is a form of expression fully entitled to Charter protection and rely on various authorities to support the proposition [cites omitted]. They reject the American distinction between the concept of speech and that of conduct made in picketing cases,<sup>+</sup> and they accept the view of Hutcheon J.A. in the Court of Appeal, in adopting the words of Freedman C.J.M. in *Channel Seven Television Ltd. v. National Association of Broadcast Employees and Technicians*, [1971] 5 W.W.R. 328, that "Peaceful picketing falls within freedom of speech".

The respondent contends for a narrower approach to the concept of freedom of expression. The position is summarized in the respondent's factum:

"4. We submit that constitutional protection under section 2(b) should only be given to those forms of expression that warrant such protection. To do otherwise would trivialize freedom of expression generally and lead to a downgrading or dilution of this freedom."

Reliance is placed on the view of the majority in the Court of Appeal that picketing in a labour dispute is more than mere communication of information. It is also a signal to trade unionists not to cross the picket line. The respect accorded to picket lines by trade unionists is such that the result of the picketing would be to damage seriously the operation of the employer, not to communicate any information. Therefore, it is argued, since the picket line was not intended to promote dialogue or discourse (as would be the case

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<sup>+</sup> [Ed. note: The U.S. Supreme Court has held that laws against secondary picketing do not violate the First Amendment rights of union workers. Under U.S. labor law, it is illegal for unions to strike a "neutral" company, with which it does not have a direct labor dispute, to pressure the neutral into ceasing to do business with the employer with whom the union does have a dispute. The Court has reasoned that secondary picketing is simply a call for others to perform illegal acts. Thus, it is entitled to no more constitutional protection than a speech urging competitors to fix prices or a solicitation to a safecracker to help rob a bank. See *International Brotherhood of Teamsters v. Vogt, Inc.*, 354 U.S. 945, 77 S.Ct. 1166 (1957)].

where its purpose was the exercise of freedom of expression), it cannot qualify for protection under the Charter.

On the basis of the findings of fact that I have referred to above, it is evident that the purpose of the picketing in this case was to induce a breach of contract between the respondent and Supercourier and thus to exert economic pressure to force it to cease doing business with Supercourier. It is equally evident that, if successful, the picketing would have done serious injury to the respondent. There is nothing remarkable about this, however, because all picketing is designed to bring economic pressure on the person picketed and to cause economic loss for so long as the object of the picketing remains unfulfilled. There is, as I have earlier said, always some element of expression in picketing. The union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of the picketing, and that it solicits the assistance of the public in honouring the picket line. Action on the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression. That freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct. We need not, however, be concerned with such matters here because the picketing would have been peaceful. I am therefore of the view that the picketing sought to be restrained would have involved the exercise of the right of freedom of expression.

#### Section 1 of the Charter

It is not necessary, in view of the disposition of this appeal that I propose, to deal with the application of s. 1 of the Charter. It was, however, referred to in the Court of Appeal and I will deal with it here. It will be recalled that the Chambers judge in granting the injunction did so on the basis that the picketing involved the commission of two common law torts, that of civil conspiracy to injure and that of inducing a breach of contract. [The opinion discusses these common law claims. McIntyre, J., explained the narrowing, by statute and judicial decision, of the tort of conspiracy to injure, citing with approval a law review article observing that this tort “stands condemned, almost universally, as the vehicle of judicial anti-unionism.” For this reason, the sole basis by which the Court considered the claim was for the tort of inducing Dolphin Delivery’s workers, who were not in dispute with their own employer, to breach their own collective bargaining agreement to observe the picket lines.]

The question then is: Can an injunction based on the common law tort of inducing a breach of contract, which has the effect of limiting the Charter right to freedom of expression, be sustained as a reasonable limit imposed by law in the peculiar facts of this case.

[Despite the sparse record, the] evidence before the Chambers judge, together with the assumptions and findings referred to above, provide a sufficient basis for the consideration of this question.

From the evidence, it may well be said that the concern of the respondent is pressing and substantial. It will suffer economically in the absence of an injunction to restrain picketing. On the other hand, the injunction has imposed a limitation upon a Charter freedom. A balance between the two competing concerns must be found. It may be argued that the concern of the respondent regarding economic loss would not be sufficient to constitute a reasonable limitation on the right of freedom of expression, but there is another basis upon which the respondent's position may be supported. This case involves secondary picketing--picketing of a third party not concerned in the dispute which underlies the picketing.

The basis of our system of collective bargaining is the proposition that the parties themselves should, wherever possible, work out their own agreement.

[McIntyre, J., explained why he believed that the union's free speech interests in secondary picketing were entitled to less weight. Quoting a leading labour law scholar, Professor Paul Weiler:] [U]nions should not be permitted to picket the business of a third party. Such a secondary employer is not involved in the primary dispute, it does not have it within its power to make the concessions that will settle the new contract, and thus it should not be the target of a weapon whose legitimate purpose is to extract such economic concessions.

It should be noted here that in the Province of British Columbia, secondary picketing of the nature involved in this case, save for the picketing of allies of the employer, has been made unlawful by the combined effect of ss. 85(3) and 88 of the *British Columbia Labour Code*, R.S.B.C. 1979, c. 212, as amended. This statute, of course, does not apply in this case, but it is indicative of the legislative policy, in respect of the regulation of picketing in that Province. It shows that the application of s. 1 of the Charter to sustain the limitation imposed by the common law would be consistent with legislative policy in British Columbia. I would say that the requirement of proportionality is also met, particularly when it is recalled that this is an interim injunction effective only until trial when the issues may be more fully canvassed on fuller evidence. It is my opinion then that a limitation on secondary picketing against a third party, that is, a non-ally, would be a reasonable limit in the facts of this case. I would therefore conclude that the injunction is "a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society".

Does the Charter apply to the Common Law?

In my view, there can be no doubt that it does apply. Section 52(1) of the Constitution Act, 1982 provides:

"52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

52. (1) La Constitution du Canada est la loi supreme du Canada; elle rend inoperantes les dispositions incompatibles de toute autre regle de droit."

The English text provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". If this language is not broad enough to include the common law, it should be observed as well that the French text adds strong support to this conclusion in its employment of the words "*elle rend inoperantes les dispositions incompatibles de tout autre regle de droit*". (Emphasis added.) To adopt a construction of s. 52(1) which would exclude from Charter application the whole body of the common law which in great part governs the rights and obligations of the individuals in society, would be wholly unrealistic and contrary to the clear language employed in s. 52(1) of the Act.

Does the Charter apply to private litigation?

This question involves consideration of whether or not an individual may found a cause of action or defence against another individual on the basis of a breach of a Charter right. In other words, does the

Charter apply to private litigation divorced completely from any connection with Government? This is a subject of controversy in legal circles and the question has not been dealt with in this Court. One view of the matter rests on the proposition that the Charter, like most written constitutions, was set up to regulate the relationship between the individual and the Government. It was intended to restrain government action and to protect the individual. It was not intended in the absence of some governmental action to be applied in private litigation.

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I am in agreement with the view that the Charter does not apply to private litigation. It is evident from the authorities and articles cited above that that approach has been adopted by most judges and commentators who have dealt with this question. In my view, s. 32 of the Charter, specifically dealing with the question of Charter application, is conclusive on this issue. Section 32 is reproduced hereunder:

"32. (1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

32. (1) La présente charte s'applique:

- a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;
- b) à la législature et au gouvernement de chaque province pour tous les domaines relevant de cette législature."

Section 32(1) refers to the Parliament and Government of Canada and to the legislatures and governments of the Provinces in respect of all matters within their respective authorities. In this, it may be seen that Parliament and the Legislatures are treated as separate or specific branches of government, distinct from the executive branch of government, and therefore where the word 'government' is used in s. 32 it refers not to government in its generic sense--meaning the whole of the governmental apparatus of the state--but to a branch of government. The word 'government', following as it does the words 'Parliament' and 'Legislature', must then, it would seem, refer to the executive or administrative branch of government. This is the sense in which one generally speaks of the Government of Canada or of a province. I am of the opinion that the word 'government' is used in s. 32 of the Charter in the sense of the executive government of Canada and the Provinces. This is the sense in which the words 'Government of Canada' are ordinarily employed in other sections of the *Constitution Act*, 1867. Sections 12, 16, and 132 all refer to the Parliament and the Government of Canada as separate entities. The words 'Government of Canada', particularly where they follow a reference to the word 'Parliament', almost always refer to the executive government.

It is my view that s. 32 of the Charter specifies the actors to whom the Charter will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation. It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. Action by the executive or administrative branches of government will generally depend upon legislation, that is, statutory authority. Such action may also depend, however, on the common law, as in the case of the prerogative. To the extent that it relies on statutory authority which constitutes or results in an infringement of a guaranteed right or freedom, the Charter will apply and it will be unconstitutional. The action will also be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a Charter right or freedom. In this way the

Charter will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom.

The element of governmental intervention necessary to make the Charter applicable in an otherwise private action is difficult to define. We have concluded that the Charter applies to the common law but not between private parties. The problem here is that this is an action between private parties in which the appellant resists the common law claim of the respondent on the basis of a Charter infringement. The argument is made that the common law, which is itself subject to the Charter, creates the tort of civil conspiracy and that of inducing a breach of contract. The respondent has sued and has procured the injunction which has enjoined the picketing on the basis of the commission of these torts. The appellants say the injunction infringes their Charter right of freedom of expression under s. 2(b). \*\*\*

\* \* \*

I find [Prof. Hogg's conclusion that the Charter precludes enforcement of private arrangements in derogation of a guaranteed right to be] troublesome and, in my view, it should not be accepted as an approach to this problem. While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of Charter application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the Charter precludes the making of the order, where a Charter right would be infringed, it would seem that all private litigation would be subject to the Charter. In my view, this approach will not provide the answer to the question. A more direct and a more precisely-defined connection between the element of government action and the claim advanced must be present before the Charter applies.

An example of such a direct and close connection is to be found in *Re Blainey and Ontario Hockey Association, supra*. In that case, proceedings were brought against the hockey association in the Supreme Court of Ontario on behalf of a twelve year old girl who had been refused permission to play hockey as a member of a boys' team competing under the auspices of the Association. A complaint against the exclusion of the girl on the basis of her sex alone had been made under the provisions of the *Human Rights Code*, 1981, S.O. 1981, c. 53, to the Ontario Human Rights Commission. It was argued that the hockey association provided a service ordinarily available to members of the public without discrimination because of sex, and therefore that the discrimination against the girl contravened this legislation. The Commission considered that it could not act in the matter because of the provisions of s. 19(2) of the *Human Rights Code*, which are set out hereunder:

"19.--(1) ...

(2) The right under section 1 to equal treatment with respect to services and facilities is not infringed where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex."

\* \* \*

\* \* \* In the *Blainey* case, a law suit between private parties, the Charter was applied because one of the parties acted on the authority of a statute, i.e., s. 19(2) of the Ontario Human Rights Code which infringed the Charter rights of another. *Blainey* then affords an illustration of the manner in which Charter

rights of private individuals may be enforced and protected by the courts, that is, by measuring legislation--government action--against the Charter.

As has been noted above, it is difficult and probably dangerous to attempt to define with narrow precision that element of governmental intervention which will suffice to permit reliance on the Charter by private litigants in private litigation. Professor Hogg has dealt with this question, at p. 677, *supra*, where he said:

"... the Charter would apply to a private person exercising the power of arrest that is granted to "any one" by the Criminal Code, and to a private railway company exercising the power to make by-laws (and impose penalties for their breach) that is granted to a "railway company" by the Railway Act; all action taken in exercise of a statutory power is covered by the Charter by virtue of the references to "Parliament" and "legislature" in s. 32. The Charter would also apply to the action of a commercial corporation that was an agent of the Crown, by virtue of the reference to "government" in s. 32."

It would also seem that the Charter would apply to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures. It is not suggested that this list is exhaustive. Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the Charter rights of another, the Charter will be applicable. Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of Charter causes of action or Charter defenses between individuals.

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BEETZ J.--I agree with the reasons of the majority in the British Columbia Court of Appeal for holding that in the circumstances and on the evidence of this case, the picketing which has been enjoined would not have been a form of expression and that no question of infringement of s. 2(b) of the Canadian Charter of Rights and Freedoms could accordingly arise.

This reason suffices for the dismissal of the appeal with costs.

It is unnecessary for me to express any view on other issues in order to reach this conclusion. However, given the importance of these issues, I wish to state that I otherwise agree with the reasons for judgment written by my brother McIntyre.

WILSON J.--I agree with the reasons of my colleague, McIntyre J., with the exception of his reasons dealing with the application of s. 1 of the Charter.

\* \* \*

The path-breaking Australian case on the relationship between the common law and the Constitution is *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520, which is also

a major case in the law of libel against public officials. We consider that case below, but in sum the High Court of Australia followed the Canadian approach in rejecting an assertion that the application of the common law actually violated the Constitution, while reconsidering how the common law should actually be applied in Australia in light of constitutional concerns.

Although *Dolphin Delivery* directly contradicts its equivalent American case cited in *Shelley v. Kraemer* (*AFL v. Swing*, 312 U.S. 321, 326 (1941)), the result in some other cases are probably not that different. Suppose Nigel Windsor of Manitoba wishes to host a backyard barbecue for his neighbours; being a bigot, he declines to invite the Lemieux family from across the street, because of their French Canadian background and their Catholic religion. If M. Lemieux sues Mr. Windsor, will a court order Mr. Windsor to invite the Lemieuxs to his party? Suppose the Lemieux family tries to crash the party, and Mr. Windsor calls the police. Can the M. Lemieux be prosecuted for trespass? Could Windsor file a common law tort action for trespass? It would appear that, on both sides of the border, the Lemieuxs can be excluded, and probably can be sued as well as prosecuted for trespass.

Professor John Nowak offers a way to reconcile and make sense out of these cases. See Robert Glennon & John Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 Sup.Ct. Rev. 221; Nowak & Rotunda §12.5. He notes that the aggrieved party in these cases is claiming that the state has unconstitutionally preferred the alleged wrongdoer's challenged practice over the aggrieved party's constitutional rights. (The preference is apparent: otherwise the state would have passed a statute prohibiting the alleged wrongdoer from interfering with the plaintiff's rights.) In each case, the plaintiff's asserted right and the defendant's challenged conduct are incompatible: the issue is whether the Constitution requires the state to prefer one over the other. This inquiry "has nothing to do with finding a minimum quantum of state activity" and thus explains, according to Nowak, why cases where the aggrieved party is challenging racial discrimination almost always find state action. The Court is comparing the plaintiff's right to equal treatment with the defendant's right to exercise a "private" choice to be a racist. Absent extreme examples (like the racist dinner party host), the defendant loses.

The question whether the constitution requires a private defendant to conform its behavior to norms like equality or free expression has provoked considerable controversy in Canada. Consider *MCKINNEY V. UNIVERSITY OF GUELPH*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545, which held that an autonomous university's mandatory retirement age did not violate the Charter's prohibition on age discrimination. (An Ontario age discrimination statute that did apply to private conduct explicitly covered only those under age 65.) Justice LaForest reasoned that the Charter is limited to restraining the government because only the government needs to be restrained to preserve individual rights. This sparked a strong dissent from Wilson, J., suggesting (although the majority denied it) that this reflected a traditional liberal view that "the role of government should be strictly confined" and that "social and economic ordering should be left to the private sector." In her view, the majority's opinion is too reflective of libertarian American ideals to be appropriate for Canadian law. First, she argued that the American Revolution left Americans with a deep distrust of powerful states, and thus

enshrined in the U.S. Constitution "the belief that unless the state is strictly controlled it poses a great danger to individual liberty.... Canada does not share this history." Indeed, the decision by Canadian colonists not to join the American Revolution, coupled by the mass migration of United Empire Loyalists from the American colonies meant that the Province of Canada, from its inception, had as its core value a trust of the very government from which Americans rebelled. Second, she canvassed the essential role played by the Canadian government in developing the country economically and maintaining a social safety net. She concluded that "regulation has always played a role in the governance of Canadian society and that laissez faire ideology never really took hold in Canada. Third, she notes that "one of the realities of modern life is that 'private' power when left unchecked can and does lead to problems which are incompatible with the Canadian conception of a just society."

Although Wilson, J.'s first point clearly distinguishes the two countries, it is less clear whether the latter two are more descriptive of historical differences or of differences in the dominant political philosophy. The U.S. government, after all, also played a huge role in developing our nation, notwithstanding the myth of laissez faire; many in the United States share her view that private power can be inconsistent with a just society. The constitutional question is whether private power should be constrained by judicial application of constitutional principles or only to the extent that the legislature regulates the conduct by ordinary legislation.

### III. Case Study of Constitutional Values and the Common Law: Libel

#### NEW YORK TIMES CO. v. SULLIVAN

SUPREME COURT OF THE UNITED STATES  
376 U.S. 254; 84 S. Ct. 710; 11 L. Ed.2d 686 (1964)

[Before Warren, C.J., and Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg, JJ.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

[Sullivan is one an elected Commissioners of the City of Montgomery, Alabama, responsible for supervising the police and fire departments. His] complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960. Entitled "Heed Their Rising Voices," the advertisement began by stating that "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." It went on to charge that "in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . ." Succeeding paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

[Although no statement referred to Sullivan by name, he complained that he was libeled by (1) a statement that "truckloads of police armed with shotguns and tear-gas ringed the Alabama State College campus," when in fact police were just deployed near the campus; (2) a statement that the dining hall "was padlocked in an attempt to starve" the entire student body into submission when they refused to register for classes, when in fact only most of the student body had protested by boycotting classes rather than refusing to register and the dining hall was not padlocked; (3) a statement that "southern violators" had assaulting Dr. Martin Luther King, Jr., and arrested him seven times, when the officers denied any assault and he had only been arrested four times. Based on these claims, a jury in the Circuit Court of Montgomery County awarded him damages of \$500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed. *273 Ala. 656, 144 So. 2d 25.*]

Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel.  
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\* \* \*

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous per se" and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made "of and concerning"

respondent. The jury was instructed that, because the statements were libelous per se, "the law . . . implies legal injury from the bare fact of publication itself," "falsity and malice are presumed," "general damages need not be alleged or proved but are presumed," and "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown." An award of punitive damages -- as distinguished from "general" damages, which are compensatory in nature -- apparently requires proof of actual malice under Alabama law, and the judge charged that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages." He refused to charge, however, that the jury must be "convinced" of malice, in the sense of "actual intent" to harm or "gross negligence and recklessness," to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners' contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

In affirming the judgment, the Supreme Court of Alabama sustained the trial judge's rulings and instructions in all respects. *273 Ala. 656, 144 So. 2d 25*. It held that "where the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tend to bring the individual into public contempt," they are "libelous per se"; that "the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff"; and that it was actionable without "proof of pecuniary injury . . . , such injury being implied." *Id., at 673, 676, 144 So. 2d at 37, 41*. It approved the trial court's ruling that the jury could find the statements to have been made "of and concerning" respondent, stating: "We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." *Id., at 674-675, 144 So. 2d at 39*. In sustaining the trial court's determination that the verdict was not excessive, the court said that malice could be inferred from the Times' "irresponsibility" in printing the advertisement while "the Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement"; from the Times' failure to retract for respondent while retracting for the Governor, whereas the falsity of some of the allegations was then known to the Times and "the matter contained in the advertisement was equally false as to both parties"; and from the testimony of the Times' Secretary that, apart from the statement that the dining hall was padlocked, he thought the two paragraphs were "substantially correct." *Id., at 686-687, 144 So. 2d at 50-51*. The court reaffirmed a statement in an earlier opinion that "There is no legal measure of damages in cases of this character." *Id., at 686, 144 So. 2d at 50*. It rejected petitioners' constitutional contentions with the brief statements that "The First Amendment of the U.S. Constitution does not protect libelous publications" and "The Fourteenth Amendment is directed against State action and not private action." *Id., at 676, 144 So. 2d at 40*. Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the Times. *371 U.S. 946*. We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.<sup>3</sup> We further hold that under the proper safeguards the evidence presented in this case is

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<sup>3</sup> Since we sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press as applied to the States by the Fourteenth Amendment, we do not decide the questions presented by the other claims of violation of the Fourteenth Amendment. The individual petitioners contend that the judgment against them offends the Due Process Clause because there was no evidence to show that they had

constitutionally insufficient to support the judgment for respondent.

I.

[First, the Court disposed of two claims that the judgment was insulated from its review. The application of a state rule or law in a civil action was reaffirmed to constitute "state action" subject to the Fourteenth Amendment. Second, the fact that the alleged libel took place in a "commercial advertisement" did not preclude application of the First Amendment.]

II.

Under Alabama law as applied in this case, a publication is "libelous per se" if the words "tend to injure a person . . . in his reputation" or to "bring [him] into public contempt"; the trial court stated that the standard was met if the words are such as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust . . ." The jury must find that the words were published "of and concerning" the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once "libel per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. *Alabama Ride Co. v. Vance*, 235 Ala. 263, 178 So. 438 (1938); *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 494-495, 124 So. 2d 441, 457-458 (1960). His privilege of "fair comment" for expressions of opinion depends on the truth of the facts upon which the comment is based. *Parsons v. Age-Herald Publishing Co.*, 181 Ala. 439, 450, 61 So. 345, 350 (1913). Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. *Johnson Publishing Co. v. Davis*, *supra*, 271 Ala., at 495, 124 So. 2d, at 458.

The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

[The Court distinguished prior precedents rejecting constitutional challenges to libel verdicts, which did not involve sanctioning expression critical of the official conduct of public officials. The Court emphasized the First Amendment's role in guaranteeing expression related to public questions. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."].

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published or authorized the publication of the alleged libel, and that the Due Process and Equal Protection Clauses were violated by racial segregation and racial bias in the courtroom. The Times contends that the assumption of jurisdiction over its corporate person by the Alabama courts overreaches the territorial limits of the Due Process Clause. The latter claim is foreclosed from our review by the ruling of the Alabama courts that the Times entered a general appearance in the action and thus waived its jurisdictional objection; we cannot say that this ruling lacks "fair or substantial support" in prior Alabama decisions. See *Thompson v. Wilson*, 224 Ala. 299, 140 So. 439 (1932); compare *N. A. A. C. P. v. Alabama*, 357 U.S. 449, 454-458.

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive," *N. A. A. C. P. v. Button*, 371 U.S. 415, 433, was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney v. Patterson*, 76 U.S. App. D. C. 23, 24, 128 F.2d 457, 458 (1942), cert. denied, 317 U.S. 678. Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. [Sweeney concluded that libel per se, which required the allegation of crime, gross incompetence, or gross immorality, was not met by a claim that a Congressman was blocking a Jewish nominee for a federal judgeship on religious grounds. Balancing the public interest in free debate and the individual interest of the libeled plaintiff, Judge Edgerton wrote]:

"Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. . . . Whatever is added to the field of libel is taken from the field of free debate."<sup>13</sup>

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains "half-truths" and "misinformation." Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," surely the same must be true of other government officials, such as elected city commissioners.<sup>14</sup> Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from

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<sup>13</sup> See also Mill, *On Liberty* (Oxford: Blackwell, 1947), at 47:

". . . To argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion . . . all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct."

<sup>14</sup> The climate in which public officials operate, especially during a political campaign, has been described by one commentator in the following terms: "Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent." Noel, *Defamation of Public Officers and Candidates*, 49 *Col. L. Rev.* 875 (1949).

For a similar description written 60 years earlier, see Chase, *Criticism of Public Officers and Candidates for Office*, 23 *Am. L. Rev.* 346 (1889).

criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. See Levy, *Legacy of Suppression* (1960), at 258 et seq.; Smith, *Freedom's Fetters* (1956), at 426, 431, and *passim*. That statute made it a crime, punishable by a \$5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. \*\*\*

Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which "The people, not the government, possess the absolute sovereignty." The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was "altogether different" from the British form, under which the Crown was sovereign and the people were subjects. "Is it not natural and necessary, under such different circumstances," he asked, "that a different degree of freedom in the use of the press should be contemplated?" *Id.*, pp. 569-570. Earlier, in a debate in the House of Representatives, Madison had said: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Congress, p. 934 (1794). Of the exercise of that power by the press, his Report said: "In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . ." 4 *Elliot's Debates, supra*, p. 570. The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.<sup>15</sup>

Although the Sedition Act was never tested in this Court,<sup>16</sup> the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground

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<sup>15</sup> The Report on the Virginia Resolutions further stated:

"It is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; . . . which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct. Nor can there be a doubt . . . that a government thus intrenched in penal statutes against the just and natural effects of a culpable administration, will easily evade the responsibility which is essential to a faithful discharge of its duty.

"Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." 4 *Elliot's Debates, supra*, p. 575.

<sup>16</sup> The Act expired by its terms in 1801.

that it was unconstitutional. See, e. g., Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H. R. Rep. No. 86, 26th Cong., 1st Sess. (1840). Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter "which no one now doubts." Report with Senate bill No. 122, 24th Cong., 1st Sess., p. 3. Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." Letter to Mrs. Adams, July 22, 1804, 4 *Jefferson's Works* (Washington ed.), pp. 555, 556. The invalidity of the Act has also been assumed by Justices of this Court. These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. It is true that the First Amendment was originally addressed only to action by the Federal Government, and that Jefferson, for one, while denying the power of Congress "to controul the freedom of the press," recognized such a power in the States. See the 1804 Letter to Abigail Adams quoted in *Dennis v. United States*, 341 U.S. 494, 522, n. 4 (concurring opinion). But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions.

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude," and which allows as punishment upon conviction a fine not exceeding \$500 and a prison sentence of six months. Alabama Code, Tit. 14, § 350. Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case -- without the need for any proof of actual pecuniary loss -- was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 70.

The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in *Smith v. California*, 361 U.S. 147, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale. We said:

"For if the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And

the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. . . . [His] timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." (361 U.S. 147, 153-154.)

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions -- and to do so on pain of libel judgments virtually unlimited in amount -- leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.<sup>19</sup> Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

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. An oft-cited statement of a like rule, which has been adopted by a number of state courts,<sup>20</sup> is found in the Kansas case of *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908). The State Attorney General, a candidate for re-election and a member of the commission charged with the management and control of the state school fund, sued a newspaper publisher for alleged libel in an article purporting to state facts relating to his official conduct in connection with a school-fund

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<sup>19</sup> Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about "the clearer perception and livelier impression of truth, produced by its collision with error." Mill, *On Liberty* (Oxford: Blackwell, 1947), at 15; see also Milton, *Areopagitica*, in *Prose Works* (Yale, 1959), Vol. II, at 561.

<sup>20</sup> E. g., *Ponder v. Cobb*, 257 N. C. 281, 299, 126 S.E.2d 67, 80 (1962); *Lawrence v. Fox*, 357 Mich. 134, 146, 97 N.W.2d 719, 725 (1959); *Stice v. Beacon Newspaper Corp.*, 185 Kan. 61, 65-67, 340 P.2d 396, 400-401 (1959); *Bailey v. Charleston Mail Assn.*, 126 W. Va. 292, 307, 27 S.E.2d 837, 844 (1943); *Salinger v. Cowles*, 195 Iowa 873, 889, 191 N. W. 167, 174 (1922); *Snively v. Record Publishing Co.*, 185 Cal. 565, 571-576, 198 P. 1 (1921); *McLean v. Merriman*, 42 S. D. 394, 175 N. W. 878 (1920). Applying the same rule to candidates for public office, see, e. g., *Phoenix Newspapers v. Choisser*, 82 Ariz. 271, 276-277, 312 P. 2d 150, 154 (1957); *Friedell v. Blakely Printing Co.*, 163 Minn. 226, 230, 203 N. W. 974, 975 (1925). And see *Chagnon v. Union-Leader Corp.*, 103 N. H. 426, 438, 174 A. 2d 825, 833 (1961), cert. denied, 369 U.S. 830.

The consensus of scholarly opinion apparently favors the rule that is here adopted. E. g., 1 Harper and James, *Torts*, § 5.26, at 449-450 (1956); Noel, *Defamation of Public Officers and Candidates*, 49 *Col. L. Rev.* 875, 891-895, 897, 903 (1949); Hallen, *Fair Comment*, 8 *Tex. L. Rev.* 41, 61 (1929); Smith, *Charges Against Candidates*, 18 *Mich. L. Rev.* 1, 115 (1919); Chase, *Criticism of Public Officers and Candidates for Office*, 23 *Am. L. Rev.* 346, 367-371 (1889); Cooley, *Constitutional Limitations* (7th ed., Lane, 1903), at 604, 616-628. But see, e. g., American Law Institute, *Restatement of Torts*, § 598, Comment a (1938) (reversing the position taken in Tentative Draft 13, § 1041 (2) (1936)); Veeder, *Freedom of Public Discussion*, 23 *Harv. L. Rev.* 413, 419 (1910).

transaction. The defendant pleaded privilege and the trial judge, over the plaintiff's objection, instructed the jury that

"where an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and in such a case the burden is on the plaintiff to show actual malice in the publication of the article."

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Such a privilege for criticism of official conduct<sup>21</sup> is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. In *Barr v. Matteo*, 360 U.S. 564, 575, this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter" of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy. But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr v. Matteo, supra*, 360 U.S., at 571. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. As Madison said, see *supra*, p. 275, "the censorial power is in the people over the Government, and not in the Government over the people." It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.

We conclude that such a privilege is required by the First and Fourteenth Amendments.

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MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." *Ante*, p. 283. I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if "actual malice" can be proved against them. "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their

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<sup>21</sup> The privilege immunizing honest misstatements of fact is often referred to as a "conditional" privilege to distinguish it from the "absolute" privilege recognized in judicial, legislative, administrative and executive proceedings. See, e. g., Prosser, *Torts* (2d ed., 1955), § 95.

criticisms of the Montgomery agencies and officials. I do not base my vote to reverse on any failure to prove that these individual defendants signed the advertisement or that their criticism of the Police Department was aimed at the plaintiff Sullivan, who was then the Montgomery City Commissioner having supervision of the city's police; for present purposes I assume these things were proved. Nor is my reason for reversal the size of the half-million-dollar judgment, large as it is. If Alabama has constitutional power to use its civil libel law to impose damages on the press for criticizing the way public officials perform or fail to perform their duties, I know of no provision in the Federal Constitution which either expressly or impliedly bars the State from fixing the amount of damages.

The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. The factual background of this case emphasizes the imminence and enormity of that threat. One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment. Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called "outside agitators," a term which can be made to fit papers like the Times, which is published in New York. The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages. Viewed realistically, this record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the Times' publication. Moreover, a second half-million-dollar libel verdict against the Times based on the same advertisement has already been awarded to another Commissioner. There a jury again gave the full amount claimed. There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the Times or any other newspaper or broadcaster which might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking \$5,600,000, and five such suits against the Columbia Broadcasting System seeking \$1,700,000. Moreover, this technique for harassing and punishing a free press -- now that it has been shown to be possible -- is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.

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MR. JUSTICE GOLDBERG, with whom MR. JUSTICE DOUGLAS joins, concurring in the result.

[The concurring justices agreed with Justice Black that the Constitution provided "an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses."]

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## HILL v. CHURCH OF SCIENTOLOGY OF TORONTO

SUPREME COURT OF CANADA  
[1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129

The judgment of La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

CORY J. -- On September 17, 1984, the appellant Morris Manning [a prominent criminal defence and constitutional rights litigator], accompanied by representatives of the appellant Church of Scientology of Toronto ("Scientology"), held a press conference on the steps of Osgoode Hall [home of the Law Society – the bar association] in Toronto. Manning, who was wearing his barrister's gown, read from and commented upon allegations contained in a notice of motion by which Scientology intended to commence criminal contempt proceedings against the respondent Casey Hill, a Crown attorney. The notice of motion alleged that Casey Hill had misled a judge of the Supreme Court of Ontario and had breached orders sealing certain documents belonging to Scientology. The remedy sought was the imposition of a fine or the imprisonment of Casey Hill.

[2] At the contempt proceedings, the allegations against Casey Hill were found to be untrue and without foundation. Casey Hill thereupon commenced this action for damages in libel against both Morris Manning and Scientology. On October 3, 1991, following a trial before Carruthers J. and a jury, Morris Manning and Scientology were found jointly liable for general damages in the amount of \$300,000 and Scientology alone was found liable for aggravated damages of \$500,000 and punitive damages of \$800,000. Their appeal from this judgment was dismissed by a unanimous Court of Appeal.

### I. Factual Background

[At the time the defamatory statements were made, Casey Hill was employed as counsel with the Crown Law Office, Criminal Division of the Ministry of the Attorney General for the Province of Ontario. He had given advice to the Ontario Provincial Police ("OPP") regarding a warrant which authorized a search of the premises occupied by Scientology. During the execution of the search warrant, approximately 250,000 documents, comprising over 2 million pages of material, were seized. These documents were stored in some 900 boxes at an OPP building in Toronto. Litigation to quash the warrant and return the seized documents continued for the next 14 months, after which a judge ruled that the solicitor-and-client privilege applied to 232 of the seized documents he had reviewed and ordered that they remain sealed pending further order of the court.

[A series of bureaucratic snafus resulted in the release of sealed, privileged information to an official in an unrelated ministry. Well-known Toronto criminal attorney Clayton Ruby, who had been litigating the matter for Scientology, was outraged and demanded an explanation within five days. When he was informed by Hill's superior that a response would be delayed, he retained Manning, who advised Scientology to commence contempt proceedings against Hill and others. This was based on second- and third-hand information relayed to Manning about Hill's cavalier attitude toward the release of the sealed documents. Subsequent proceedings demonstrated that Hill had no role or responsibility in the document release.

[Evidence in the libel trial demonstrated that Scientology had created a file tracking Hill as "Enemy Canada," and that Scientology was aware prior to commencing the proceedings against Hill and making public allegations against him that, although sealed envelopes had been improperly released, they had not been actually opened or seen by any unauthorized persons. During the trial, Scientology continued to attack Hill's character and repeat the libel, even though they knew it to be false.]

### III. Analysis

[62] Two major issues are raised in this appeal. The first concerns the constitutionality of the common law action for defamation. The second relates to the damages that can properly be assessed in such

actions.

[63] Let us first review the appellants' submissions pertaining to defamation actions. The appellants contend that the common law of defamation has failed to keep step with the evolution of Canadian society. They argue that the guiding principles upon which defamation is based place too much emphasis on the need to protect the reputation of plaintiffs at the expense of the freedom of expression of defendants. This, they say, is an unwarranted restriction which is imposed in a manner that cannot be justified in a free and democratic society. The appellants add that if the element of government action in the present case is insufficient to attract Charter scrutiny under s. 32, the principles of the common law ought, nevertheless, to be interpreted, even in a purely private action, in a manner consistent with the Charter. This, the appellants say, can only be achieved by the adoption of the "actual malice" standard of liability articulated by the Supreme Court of the United States in the case of *New York Times v. Sullivan*, *supra*.

[64] In addition, the appellant Morris Manning submits that the common law should be interpreted so as to afford the defence of qualified privilege to a lawyer who, acting on behalf of a client, reads and comments in public upon a notice of motion which he believes, in good faith, has been filed in court, and which subsequently is filed. Let us consider first whether the Charter is directly applicable to this case.

(A) Application of the Charter

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[68] La Forest J., writing for the majority in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, stressed the importance of this limitation on the application of the Charter to the actions of government [found by the Court in *Dolphin Delivery*]. He said this at p. 262:

"The exclusion of private activity from the Charter was not a result of happenstance. It was a deliberate choice which must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual."

[69] La Forest J. warned that subjecting all private and public action to constitutional review would mean reopening whole areas of settled law and would be "tantamount to setting up an alternative tort system" (p. 263). He expressed the very sage warning that this "could strangle the operation of society" (p. 262).

[The Court rejected the notion that neither Hill's status as a public official nor financial support provided by the Attorney General for this litigation transformed this private libel action into state action. It noted that he was impugned as an individual, not simply as a government agent, and found it irrelevant that the government was funding his lawsuit. Scientology's personal attacks continued in the litigation, arguing that it was designed to retaliate for the contempt proceeding and was "a risk-free opportunity . . . to pick up some easy money".]

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(2) Section 52: Charter Values and the Common Law

(a) Interpreting the Common Law in Light of the Values Underlying the Charter

(i) Review of the Decisions Dealing With the Issue

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[85] In *R. v. Salituro*, [[1991] 3 S.C.R. 654]; the Crown called the accused's estranged wife as a witness. The common law rule prohibiting spouses from testifying against each other was found to be inconsistent with developing social values and with the values enshrined in the Charter. At page 670, Iacobucci J., writing for the Court, held:

"Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins, supra*, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."

Further, at p. 675 this Court held:

"Where the principles underlying a common law rule are out of step with the values enshrined in the Charter, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with Charter values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed."

[86] Unlike the present appeal and the decisions of this Court in *B.C.G.E.U., Swain, and Dagenais*, the common law rule in *Salituro* was not alleged to infringe a specific Charter right. Rather, it was alleged to be inconsistent with those fundamental values that provide the foundation for the Charter. Although the Court in *Salituro* considered whether Parliament had, through the *Evidence Act*, intended to preserve the common law rule, it did not undertake an analysis similar to that which would be required under s. 1 to determine if the Charter breach was justifiable. Rather, it proceeded to balance, in a broad and flexible manner, the conflicting values. The reasons examined the origins of the impugned common law rule and the justifications which had been raised for upholding it. These concerns were weighed against the Charter's recognition of the equality of women and, more specifically, against the concept of human dignity which inspires the Charter. It was held that the values which were set out in the common law rule did not represent the values of today's society which are reflected in the provisions of the Charter.

[87] In *B.C.G.E.U., supra*, McEachern C.J.B.C. on his own motion issued an injunction against a union picketing in front of the courthouse; it was held that the common law rule giving rise to the picketing injunction breached s. 2(b). The breach was then found to be justified following a traditional s. 1 analysis.

[88] Subsequently, in *R. v. Swain, supra*, Lamer C.J. observed that the s. 1 analysis, which has evolved since *R. v. Oakes*, [1986] 1 S.C.R. 103, may not always provide the appropriate framework by which to evaluate the justifications for maintaining a common law rule. In *R. v. Swain*, the Crown raised the insanity defence, over objections by the accused, on the basis of the common law rule which authorized such a procedure. That rule was found to violate s. 7 of the Charter. At pages 978-79, Lamer C.J. held:

"Before turning to s. 1, however, I wish to point out that because this appeal involves a Charter challenge to a common law, judge-made rule, the Charter analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. For example, having found that the existing common law rule limits an accused's rights under s. 7 of the Charter, it may not be strictly necessary to go on to consider the application of s. 1. Having come to the conclusion

that the common law rule enunciated by the Ontario Court of Appeal limits an accused's right to liberty in a manner which does not accord with the principles of fundamental justice, it could, in my view, be appropriate to consider at this stage whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice.

If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the Charter. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. Of course, if it were not possible to reformulate the common law rule so as to avoid an infringement of a constitutionally protected right or freedom, it would be necessary for the Court to consider whether the common law rule could be upheld as a reasonable limit under s. 1 of the Charter."

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#### (ii) Approach That Should Be Followed

[91] It is clear from *Dolphin Delivery*, *supra*, that the common law must be interpreted in a manner which is consistent with Charter principles. This obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values. As was said in *Salituro*, *supra*, at p. 678:

"The courts are the custodians of the common law, and it is their duty to see that the common law reflects the emerging needs and values of our society."

[92] Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The Charter represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the Charter.

\* \* \*

[97] When the common law is in conflict with Charter values, how should the competing principles be balanced? In my view, a traditional s. 1 framework for justification is not appropriate. It must be remembered that the Charter "challenge" in a case involving private litigants does not allege the violation of a Charter right. It addresses a conflict between principles. Therefore, the balancing must be more flexible than the traditional s. 1 analysis undertaken in cases involving governmental action cases. Charter values, framed in general terms, should be weighed against the principles which underlie the common law. The Charter values will then provide the guidelines for any modification to the common law which the court feels is necessary.

[98] Finally, the division of onus which normally operates in a Charter challenge to government action should not be applicable in a private litigation Charter "challenge" to the common law. This is not a situation in which one party must prove a prima facie violation of a right while the other bears the onus of defending it. Rather, the party who is alleging that the common law is inconsistent with the Charter should bear the onus of proving both that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified. In the ordinary situation, where government action is said to violate a Charter right, it is appropriate that the government undertake the

justification for the impugned statute or common law rule. However, the situation is very different where two private parties are involved in a civil suit. One party will have brought the action on the basis of the prevailing common law which may have a long history of acceptance in the community. That party should be able to rely upon that law and should not be placed in the position of having to defend it. It is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with Charter values but also that its provisions cannot be justified.

[99] With that background, let us first consider the common law of defamation in light of the values underlying the Charter.

#### (b) The Nature of Actions for Defamation: The Values to Be Balanced

[100] There can be no doubt that in libel cases the twin values of reputation and freedom of expression will clash. As Edgerton J. stated in *Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir. 1942), at p. 458, *cert. denied* 317 U.S. 678 (1942), whatever is "added to the field of libel is taken from the field of free debate". The real question, however, is whether the common law strikes an appropriate balance between the two. Let us consider the nature of each of these values.

##### (i) Freedom of Expression

[The Court emphasized the importance of free speech in a democracy. But it noted that "freedom of expression has never been recognized as an absolute right. The Court next cited several precedents illustrating s.1's requirement of balancing interests, including *Keegstra* (hate speech) and *Butler* (pornography), excerpted above in Chapter 3.]

[106] Certainly, defamatory statements are very tenuously related to the core values which underlie s. 2(b). They are inimical to the search for truth. False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society. This concept was accepted in *Globe and Mail Ltd. v. Boland*, [1960] S.C.R. 203, at pp. 208-9, where it was held that an extension of the qualified privilege to the publication of defamatory statements concerning the fitness for office of a candidate for election would be "harmful to that 'common convenience and welfare of society'". Reliance was placed upon the text Gately on *Libel and Slander in a Civil Action: With Precedents of Pleadings* (4th ed. 1953), at p. 254, wherein the author stated the following:

"It would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation."

##### (ii) The Reputation of the Individual

[107] The other value to be balanced in a defamation action is the protection of the reputation of the individual. Although much has very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation.

[108] Democracy has always recognized and cherished the fundamental importance of an individual.

That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

[The Court traced the historic recognition of harm from false statements, from the Biblical injunction against being a false witness to Roman penalties for defamation to the creation of the common law action designed to replace the duel as a means of repairing character assaults.]

[118] In the present case, consideration must be given to the particular significance reputation has for a lawyer. The reputation of a lawyer is of paramount importance to clients, to other members of the profession and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyer's professional life. \* \* \*

(c) The Proposed Remedy: Adopting the *New York Times v. Sullivan* "Actual Malice" Rule  
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[123] At the outset, it is important to understand the social and political context of the times which undoubtedly influenced the decision in *New York Times v. Sullivan*, *supra*. [The Court discussed the critical importance of the challenged advertisement in protesting segregation, the weak case against the defendants there, and the huge jury verdict.]

(d) Critiques of the "Actual Malice" Rule

(i) Comments on the Decision in the United States

[127] The "actual malice" rule has been severely criticized by American judges and academic writers. It has been suggested that the decision was overly influenced by the dramatic facts underlying the dispute and has not stood the test of time. *See, for example*, R. A. Epstein, "Was *New York Times v. Sullivan* Wrong?" (1986), 53 U. Chi. L. Rev. 782, at p. 787; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), at p. 767. Commentators have pointed out that, far from being deterred by the decision, libel actions have, in the post-*Sullivan* era, increased in both number and size of awards. They have, in this way, mirrored the direction taken in other tort actions. It has been said that the *New York Times v. Sullivan*, decision has put great pressure on the fact-finding process since courts are now required to make subjective determinations as to who is a public figure and what is a matter of legitimate public concern.

[128] Perhaps most importantly, it has been argued the decision has shifted the focus of defamation suits away from their original, essential purpose. Rather than deciding upon the truth of the impugned statement, courts in the U.S. now determine whether the defendant was negligent. Several unfortunate results flow from this shift in focus. First, it may deny the plaintiff the opportunity to establish the falsity of the defamatory statements and to determine the consequent reputational harm. This is particularly true in cases where the falsity is not seriously contested.

[129] Second, it necessitates a detailed inquiry into matters of media procedure. This, in turn, increases the length of discoveries and of the trial which may actually increase, rather than decrease, the threat to speech interests.

[130] Third, it dramatically increases the cost of litigation. This will often leave a plaintiff who has

limited funds without legal recourse.

[131] Fourth, the fact that the dissemination of falsehoods is protected is said to exact a major social cost by deprecating truth in public discourse.

[132] A number of jurists in the United States have advocated a reconsideration of the *New York Times v. Sullivan* standard. These include one of the justices of the Supreme Court who participated in that decision. In *Dun & Bradstreet, Inc., supra*, White J. stated, in a minority concurring opinion with which Burger C.J. concurred on this point, that he had "become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation" (p. 767). He went on to state at pp. 767-69:

"In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in *Gertz*: "There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." ... Yet in *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters.... Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality. The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests ...

Also, by leaving the lie uncorrected, the *New York Times* rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting "our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty." ...

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results." [Emphasis added.]

[The Court noted that the House of Lords had declined to adopt the actual malice standard, as did the Australian High Court. The Australian court noted that under Australian common law, the *Sullivan* standard gave inadequate protection to the reputation of public officials.]

## (iv) The Position Taken by International Law Reform Commissions

[136] International law reform organizations have also criticized the *New York Times v. Sullivan* rule. The Australian Law Reform Commission's Report No. 11, *Unfair Publication: Defamation and Privacy* (the Kirby Committee Report) (1979), criticized the concept of "public official" on the basis that "a minor elected official or public servant [would be] in a more vulnerable position than a prominent businessman" (p. 252). The United Kingdom Report of the Committee on Defamation (the Faulks Committee Report) (1975), held that the rule "would in many cases deny a just remedy to defamed persons" (p. 169). Finally, the Irish Law Reform Commission's Report on the Civil Law of Defamation (the Keane Final Report) (1991), stated that "while the widest possible range of criticism of public officials and public figures is desirable, statements of fact contribute meaningfully to public debate only if they are true" (p. 82).

(e) Conclusion: Should the Law of Defamation be Modified by Incorporating the *Sullivan* Principle?

[137] The *New York Times v. Sullivan* decision has been criticized by judges and academic writers in the United States and elsewhere. It has not been followed in the United Kingdom or Australia. I can see no reason for adopting it in Canada in an action between private litigants. The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements. It is the means by which the individual may protect his or her reputation which may well be the most distinguishing feature of his or her character, personality and, perhaps, identity. I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility.

\* \* \*

[139] None of the factors which prompted the United States Supreme Court to rewrite the law of defamation in America are present in the case at bar. First, this appeal does not involve the media or political commentary about government policies. Thus the issues considered by the High Court of Australia in *Theophanous, supra*, are also not raised in this case and need not be considered.

[140] Second, a review of jury verdicts in Canada reveals that there is no danger of numerous large awards threatening the viability of media organizations. Finally, in Canada there is no broad privilege accorded to the public statements of government officials which needs to be counterbalanced by a similar right for private individuals.

[141] In conclusion, in its application to the parties in this action, the common law of defamation complies with the underlying values of the Charter and there is no need to amend or alter it.

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## (f) Should the Common Law Defence of Qualified Privilege be Expanded to Comply with Charter Values?

[The Court explained that when defamatory words are published in privileged circumstances, the *bona fides* of the defendant is presumed. However, the presumption can be rebutted by evidence that the defendant's dominant motive was malicious. For these purposes, malice includes not only spite or ill-will but also an ulterior purpose that conflicts with the sense of duty that justifies the privilege, as well as evidence that the defendant spoke in knowing or reckless disregard for the truth.]

[149] The principal question to be answered in this appeal is whether the recitation of the contents of

the notice of motion by Morris Manning took place on an occasion of qualified privilege. If so, it remains to be determined whether or not that privilege was exceeded and thereby defeated.

[150] The traditional common law rule with respect to reports on documents relating to judicial proceedings is set out in *Gatley on Libel and Slander* (8th ed. 1981), at p. 252, in these words:

"The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication without malice of a fair and accurate report of what takes place before that tribunal is privileged."

[151] The rationale behind this rule is that the public has a right to be informed about all aspects of proceedings to which it has the right of access. This is why a news report referring to the contents of any document filed as an exhibit, or admitted as evidence during the course of the proceedings, is privileged. However, the common law immunity was not extended to a report on pleadings or other documents which had not been filed with the court or referred to in open court. \* \* \*

[153] Both societal standards and the legislation have changed with regard to access to court documents. When the qualified privilege rule was set out, court documents were not open to the public. Today, the right of access is guaranteed by legislative provision, in this case s. 137(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. As well, s. 2(b) of the Charter may in some circumstances provide a basis for gaining access to some court documents. \* \* \*

[154] The public interest in documents filed with the court is too important to be defeated by the kind of technicality which arose in this case. The record demonstrates that, prior to holding the press conference, Morris Manning had every intention of initiating the contempt action in accordance with the prevailing rules, and had given instructions to this effect. In fact, the proper documents were served and filed the very next morning. The fact that, by some misadventure, the strict procedural requirement of filing the documents had not been fulfilled at the time of the press conference should not defeat the qualified privilege which attached to this occasion.

[155] This said, it is my conclusion that Morris Manning's conduct far exceeded the legitimate purposes of the occasion. The circumstances of this case called for great restraint in the communication of information concerning the proceedings launched against Casey Hill. As an experienced lawyer, Manning ought to have taken steps to confirm the allegations that were being made. This is particularly true since he should have been aware of the Scientology investigation pertaining to access to the sealed documents. In those circumstances he was duty bound to wait until the investigation was completed before launching such a serious attack on Hill's professional integrity. Manning failed to take either of these reasonable steps. As a result of this failure, the permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated.

[156] The press conference was held on the steps of Osgoode Hall in the presence of representatives from several media organizations. This constituted the widest possible dissemination of grievous allegations of professional misconduct that were yet to be tested in a court of law. His comments were made in language that portrayed Hill in the worst possible light. This was neither necessary nor appropriate in the existing circumstances. While it is not necessary to characterize Manning's conduct as amounting to actual malice, it was certainly high-handed and careless. It exceeded any legitimate purpose the press conference may have served. His conduct, therefore, defeated the qualified privilege that attached to the occasion.

\* \* \*

The following are the reasons delivered by

[205] L'HEUREUX-DUBE J. -- I have had the advantage of reading the reasons of my colleague Justice Cory and, except on one point, generally agree with them as well as with his disposition of this appeal. [L'Heureux-Dube, J., concluded that there is a right to publish details of judicial proceedings before they are heard in open court, but such publication does not enjoy the protection of qualified privilege if it is defamatory. As Duff J. noted in the extract from p. 364 of *Gazette Printing* set out above, no such privilege is necessary if the statements published are true, and no such privilege is desirable if they are not true."]

### LANGE v AUSTRALIAN BROADCASTING CORPORATION

HIGH COURT OF AUSTRALIA  
(1997) 189 CLR 520

**[Ed. note: The High Court's discussion of the scope of the implied freedom for political communication was discussed in an excerpt added to chapter 2. The following excerpt discusses the application of the implied right to the common law of defamation.]**

[The former Prime Minister of New Zealand alleged that the ABC had defamed him. The defendant claimed that the news story was constitutionally protected. The Court reaffirmed the existence of an implied right for political communication.]

The common law and the Constitution

A person who is defamed must find a legal remedy against those responsible for publishing defamatory matter either in the common law or in a statute which confers a right of action. The right to a remedy cannot be admitted, however, if its exercise would infringe upon the freedom to discuss government and political matters which the Constitution impliedly requires. It is necessary, therefore, to consider the relationship between the Constitution and the freedom of communication which it requires on the one hand and the common law and the statute law which govern the law of defamation on the other.

It is appropriate to begin with the Parliament at Westminster. To say of the United Kingdom that it has an "unwritten constitution" is to identify an amalgam of common law and statute and to contrast it with a written constitution which is rigid rather than fluid. The common law supplies elements of the British constitutional fabric. Sir Owen Dixon wrote:<sup>50</sup>

The British conception of the complete supremacy of parliament developed under the common law; it forms part of the common law and, indeed, it may be considered as deriving its authority from the common law rather than as giving authority to the common law. But, after all, the common law was the common law of England. It was not a law of nations. It developed no general doctrine that all legislatures by their very nature were supreme over the law.

With the establishment of the Commonwealth of Australia, as with that of the United States of America, it became necessary to accommodate basic common law concepts and techniques to a federal system of government embodied in a written and rigid constitution. The outcome in Australia differs from that in the United States. There is but one common law in Australia which is declared by this court as the

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<sup>50</sup> "Sources of Legal Authority", reprinted in *Jesting Pilate* (1965) 198 at 199-200

final court of appeal. In contrast to the position in the United States, the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations.<sup>51</sup> The distinction is important for the present case and may be illustrated as follows.

The First Amendment to the United States Constitution prohibits Congress from making any law abridging "the freedom of speech, or of the press". This privilege or immunity of citizens of the United States may not be abridged by the making or "the enforcement" by any State of "any law". That is the effect of the interpretation placed on the Fourteenth Amendment.<sup>52</sup> A civil lawsuit between private parties brought in a State court may involve the State court in the enforcement of a State rule of law which infringes the Fourteenth Amendment. If so, it is no answer that the law in question is the common law of the State, such as its defamation law. The interaction in such cases between the United States Constitution and the State common laws has been said to produce "a constitutional privilege" against the enforcement of State common law.<sup>54</sup>

This constitutional classification has also been used in the United States to support the existence of a federal action for damages arising from certain executive action in violation of "free-standing" constitutional rights, privileges or immunities.<sup>55</sup> On the other hand, in Australia, recovery of loss arising from conduct in excess of constitutional authority has been dealt with under the rubric of the common law, particularly the law of tort.<sup>56</sup>

It makes little sense in Australia to adopt the United States doctrine so as to identify litigation between private parties over their common law rights and liabilities as involving "State law rights". Here, "[w]e act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute".<sup>57</sup> Moreover, that one common law operates in the federal system established by the Constitution. The Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature. It placed upon the federal judicature the responsibility of deciding the limits of the respective powers of State and Commonwealth governments. The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form "one system of jurisprudence".<sup>59</sup>

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<sup>51</sup> cf *Black & White Taxi Co v Brown & Yellow Taxi Co* 276 US 518 at 533-4 (1928) ; *Erie Railroad Co v Tompkins* 304 US 64 at 78-9 (1938)

<sup>52</sup> *New York Times Co v Sullivan* 376 US 254 at 264-5 (1964) ; *Time Inc v Hill* 385 US 374 at 387-8, 409-10 (1967) ; *Time Inc v Firestone* 424 US 448 at 452-3 (1976) ; *Dun & Bradstreet Inc v Greenmoss Builders Inc* 472 US 749 at 755, 765-6 (1985); Tribe, *American Constitutional Law*, 2nd ed (1988) para 18-6

<sup>54</sup> *Gertz v Robert Welch Inc* 418 US 323 at 327, 330, 332, 342-3 (1974)

<sup>55</sup> *Bivens v Six Unknown Federal Narcotics Agents* 403 US 388 (1971)

<sup>56</sup> *Northern Territory v Mengel* (1995) 185 CLR 307 at 350-3, 372-3 129 ALR 1

<sup>57</sup> Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *Australian Law Journal* 240 at 241. See also *Western Australia v Commonwealth* (1995) 183 CLR 373 at 487 128 ALR 1 (*Native Title Act case*)

<sup>59</sup> *McArthur v Williams* (1936) 55 CLR 324 at 347; cf ; *Thompson v R* (1989) 169 CLR 1 at 34-5 86 ALR 1

Covering cl 5 of the Constitution renders the Constitution "binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State". Within that single system of jurisprudence, the basic law of the Constitution provides the authority for the enactment of valid statute law and may have effect on the content of the common law.

Conversely, the Constitution itself is informed by the common law. This was explained extra-judicially by Sir Owen Dixon:<sup>60</sup>

We do not of course treat the common law as a transcendental body of legal doctrine, but we do treat it as antecedent in operation to the constitutional instruments which first divided Australia into separate colonies and then united her in a federal Commonwealth. We therefore regard Australian law as a unit. Its content comprises besides legislation the general common law which it is the duty of the courts to ascertain as best they may . . . The anterior operation of the common law in Australia is not just a dogma of our legal system, an abstraction of our constitutional reasoning. It is a fact of legal history.

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Under a legal system based on the common law, "everybody is free to do anything, subject only to the provisions of the law", so that one proceeds "upon an assumption of freedom of speech" and turns to the law "to discover the established exceptions to it".<sup>62</sup> The common law torts of libel and slander are such exceptions. However, these torts do not inhibit the publication of defamatory matter unless the publication is unlawful -- that is to say, not justified, protected or excused by any of the various defences to the publication of defamatory matter, including qualified privilege. The result is to confer upon defendants, who choose to plead and establish an appropriate defence, an immunity to action brought against them. In that way, they are protected by the law in respect of certain publications and freedom of communication is maintained.

The issue raised by the Constitution in relation to an action for defamation is whether the immunity conferred by the common law, as it has traditionally been perceived, or, where there is statute law on the subject the immunity conferred by statute, conforms with the freedom required by the Constitution. In 1901, when the Constitution of the Commonwealth took effect and when the Judicial Committee was the ultimate court in the judicial hierarchy, the English common law defined the scope of the torts of libel and slander. At that time, the balance that was struck by the common law between freedom of communication about government and political matters and the protection of personal reputation was thought to be consistent with the freedom that was essential and incidental to the holding of the elections and referenda for which the Constitution provided. Since 1901, the common law -- now the common law of Australia -- has had to be developed in response to changing conditions. The expansion of the franchise, the increase in literacy, the growth of modern political structures operating at both federal and State levels and the modern development in mass communications, especially the electronic media, now demand the striking of a different balance from that which was struck in 1901. To this question we shall presently return.

The factors which affect the development of the common law equally affect the scope of the freedom which is constitutionally required. "[T]he common convenience and welfare of society" is the criterion of the protection given to communications by the common law of qualified privilege.<sup>65</sup> Similarly, the

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<sup>60</sup> "Sources of Legal Authority", reprinted in *Jesting Pilate* (1965) 198 at 199

<sup>62</sup> *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283

<sup>65</sup> *Toogood v Spyring* (1834) 1 CM & R 181 at 193 149 ER 1044 at 1050

content of the freedom to discuss government and political matters must be ascertained according to what is for the common convenience and welfare of society. That requires an examination of changing circumstances and the need to strike a balance in those circumstances between absolute freedom of discussion of government and politics and the reasonable protection of the persons who may be involved, directly or incidentally, in the activities of government or politics.

Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives.<sup>67</sup> The common law and the requirements of the Constitution cannot be at odds. The common law of libel and slander could not be developed inconsistently with the Constitution, for the common law's protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the Constitution.

In any particular case, the question whether a publication of defamatory matter is protected by the Constitution or is within a common law exception to actionable defamation yields the same answer. But the answer to the common law question has a different significance from the answer to the constitutional law question. The answer to the common law question *prima facie* defines the existence and scope of the personal right of the person defamed against the person who published the defamatory matter; the answer to the constitutional law question defines the area of immunity which cannot be infringed by a law of the Commonwealth, a law of a State or a law of those Territories whose residents are entitled to exercise the federal franchise. That is because the requirement of freedom of communication operates as a restriction on legislative power. Statutory regimes cannot trespass upon the constitutionally required freedom.

However, a statute which diminishes the rights or remedies of persons defamed and correspondingly enlarges the freedom to discuss government and political matters is not contrary to the constitutional implication. The common law rights of persons defamed may be diminished by statute but they cannot be enlarged so as to restrict the freedom required by the Constitution. Statutes which purport to define the law of defamation are construed, if possible, conformably with the Constitution. But, if their provisions are intractably inconsistent with the Constitution, they must yield to the constitutional norm.

The common law may be developed to confer a head or heads of privilege in terms broader than those which conform to the constitutionally required freedom, but those terms cannot be any narrower. Laws made by Commonwealth or State parliaments or the legislatures of self-governing territories which are otherwise within power may therefore extend a head of privilege, but they cannot derogate from the common law to produce a result which diminishes the extent of the immunity conferred by the Constitution.

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The law of defamation

The law of defamation does not contain any rule that prohibits an elector from communicating with other electors concerning government or political matters relating to the Commonwealth. Nevertheless, in so far as the law of defamation requires electors and others to pay damages for the publication of communications concerning those matters or leads to the grant of injunctions against such publications, it effectively burdens the freedom of communication about those matters. That being so, the critical question in the present case is whether the common law of defamation as it has traditionally been understood, and the New South Wales law of defamation in its statutory form, are reasonably appropriate and adapted to serving the legitimate end of protecting personal reputation without unnecessarily or

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<sup>67</sup> *Theophanous* (1994) 182 CLR 104 at 140 124 ALR 1

unreasonably impairing the freedom of communication about government and political matters protected by the Constitution.

The purpose of the law of defamation is to strike a balance between the right to reputation and freedom of speech.<sup>68</sup> It is not to be supposed that the protection of reputation is a purpose that is incompatible with the requirement of freedom of communication imposed by the Constitution. The protection of the reputations of those who take part in the government and political life of this country from false and defamatory statements is conducive to the public good. The constitutionally prescribed system of government does not require -- to the contrary, it would be adversely affected by -- an unqualified freedom to publish defamatory matter damaging the reputations of individuals involved in government or politics. The question then is whether the common law of defamation, as it has traditionally been understood, and the statute law regulating the publication of defamatory matter are reasonably appropriate and adapted to the protection of reputation having regard to the requirement of freedom of communication about government and political matters required by the Constitution.

*Theophanous* and *Stephens* decided that in particular respects the law of defamation throughout Australia was incompatible with the requirement of freedom of communication imposed by the Constitution. However, those cases did so without expressly determining whether the law of defamation in its common law and statutory emanations has developed to the point that it is reasonably appropriate and adapted to achieving a legitimate end that is compatible with the system of government prescribed by the Constitution. Because that is so, those cases ought not to be treated as conclusively determining that question, which should be examined afresh. In the present case, however, it is necessary to examine only the effect of the defamation law of New South Wales on government and political matters. This is because the argument in this court was conducted on the footing that the plaintiff's action was to be determined solely by regard to the defamation law of that State.

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<sup>68</sup> *Theophanous* (1994) 182 CLR 104 at 131-2, 154-5, 178 124 ALR 1

In New South Wales, the principal defences to the publication of defamatory matter concerning government and political matters are truth in respect of a matter that is related to a matter of public interest or an occasion of qualified privilege, fair comment on a matter relating to the public interest, fair report of parliamentary and similar proceedings, common law qualified privilege<sup>76</sup> and the statutory defence of qualified privilege contained in s 22 of the *Defamation Act 1974* (NSW) (the Defamation Act).<sup>77</sup> Without the statutory defence of qualified privilege, it is clear enough that the law of defamation, as it has traditionally been understood in New South Wales, would impose an undue burden on the required freedom of communication under the Constitution. This is because, apart from the statutory defence, the law as so understood arguably provides no appropriate defence for a person who mistakenly but honestly publishes government or political matter to a large audience. In *Lang v Willis*,<sup>79</sup> this court held that election speeches made to large audiences of unidentified persons are not necessarily privileged even if the speeches deal with matters of general interest to the electors. In that respect, the common law as hitherto understood in Australia has simply reflected the English common law.

The basis of this common law rule is that reciprocity of interest or duty is essential to a claim of qualified privilege at common law.<sup>80</sup>

Only in exceptional cases has the common law recognised an interest or duty to publish defamatory matter to the general public.<sup>81</sup> However, the common law doctrine as expounded in Australia must now be seen as imposing an unreasonable restraint on that freedom of communication, especially

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<sup>76</sup> Section 11 of the Defamation Act 1974 (NSW) states that the provision of a statutory defence "does not of itself vitiate, diminish or abrogate any defence or exclusion of liability available apart from this Act". As a result, the common law defence of qualified privilege still applies in New South Wales.

<sup>77</sup> Section 22 states:

"(1) Where, in respect of matter published to any person:

(a) the recipient has an interest or apparent interest in having information on some subject;  
 (b) the matter is published to the recipient in the course of giving to him information on that subject;  
 and  
 (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances,  
 there is a defence of qualified privilege for that publication.

"(2) For the purposes of subsection (1), a person has an apparent interest in having information on some subject if, but only if, at the time of the publication in question, the publisher believes on reasonable grounds that that person has that interest.

"(3) Where matter is published for reward in circumstances in which there would be a qualified privilege under subsection (1) for the publication if it were not for reward, there is a defence of qualified privilege for that publication notwithstanding that it is for reward."

<sup>79</sup> (1934) 52 CLR 637

<sup>80</sup> *Adam v Ward* [1917] AC 309 at 334

<sup>81</sup> *Duncombe v Daniell* (1837) 8 Car & P 222 173 ER 470 ; *Adam v Ward* [1917] AC 309 ; *Chapman v Lord Ellesmere* [1932] 2 KB 431 ; *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632 ; *Lang v Willis* (1934) 52 CLR 637 ; *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448; *Stephens* (1994) 182 CLR 211 at 261; 124 ALR 80

communication concerning government and political matters, which "the common convenience and welfare of society" now requires. Equally, the system of government prescribed by the Constitution would be impaired if a wider freedom for members of the public to give and to receive information concerning government and political matters were not recognised. The "varying conditions of society" of which Cockburn CJ spoke in *Wason v Walter*<sup>83</sup> now evoke a broadening of the common law rules of qualified privilege. As McHugh J pointed out in *Stephens*,<sup>84</sup> that has come about in a number of ways:

In the last decade of the twentieth century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials. Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and political life of Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government or administration, or in any part of the country, is not of relevant interest to the public of Australia generally.

Because the Constitution requires "the people" to be able to communicate with each other with respect to matters that could affect their choice in federal elections or constitutional referenda or that could throw light on the performance of ministers of State and the conduct of the executive branch of government, the common law rules concerning privileged communications, as understood before the decision in *Theophanous*, had reached the point where they failed to meet that requirement. However, the common law of defamation can and ought to be developed to take into account the varied conditions to which McHugh J referred. The common law rules of qualified privilege will then properly reflect the requirements of ss 7, 24, 64, 128 and related sections of the Constitution.

Accordingly, this court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion -- the giving and receiving of information -- about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. Consequently, those categories now must be recognised as protecting a communication made to the public on a government or political matter. It may be that, in some respects, the common law defence as so extended goes beyond what is required for the common law of defamation to be compatible with the freedom of communication required by the Constitution. For example, discussion of matters concerning the United Nations or other countries may be protected by the extended defence of qualified privilege, even if those discussions cannot illuminate the choice for electors at federal

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<sup>83</sup> (1868) LR 4 QB 73 at 93

<sup>84</sup> (1994) 182 CLR 211 at 264; 124 ALR 80 at 114

elections or in amending the Constitution or cannot throw light on the administration of federal government.

Similarly, discussion of government or politics at State or Territory level and even at local government level is amenable to protection by the extended category of qualified privilege, whether or not it bears on matters at the federal level. Of course, the discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable. Thus, the extended category of common law qualified privilege ensures conformity with the requirements of the Constitution. The real question is as to the conditions upon which this extended category of common law qualified privilege should depend.

At common law, once an occasion of qualified privilege is found to exist, the privilege traditionally protects a communication made on that occasion unless the plaintiff is actuated by malice in making the communication.<sup>85</sup> But, apart from a few exceptional cases, the common law categories of qualified privilege protect only occasions where defamatory matter is published to a limited number of recipients. If a publication is made to a large audience, a claim of qualified privilege at common law is rejected unless, exceptionally, the members of the audience all have an interest in knowing the truth. Publication beyond what was reasonably sufficient for the occasion of qualified privilege is unprotected. Because privileged occasions are ordinarily occasions of limited publication -- more often than not occasions of publication to a single person -- the common law has seen honesty of purpose in the publisher as the appropriate protection for individual reputation. As long as the publisher honestly and without malice uses the occasion for the purpose for which it is given, that person escapes liability even though the publication is false and defamatory. But a test devised for situations where usually only one person receives the publication is unlikely to be appropriate when the publication is to tens of thousands, or more, of readers, listeners or viewers.

No doubt it is arguable that, because qualified privilege applies only when the communication is for the common convenience and welfare of society, a person publishing to tens of thousands should be able to do so under the same conditions as those that apply to any person publishing on an occasion of qualified privilege. But the damage that can be done when there are thousands of recipients of a communication is obviously so much greater than when there are only a few recipients. Because the damage from the former class of publication is likely to be so much greater than from the latter class, a requirement of reasonableness as contained in s 22 of the Defamation Act, which goes beyond mere honesty, is properly to be seen as reasonably appropriate and adapted to the protection of reputation and, thus, not inconsistent with the freedom of communication which the Constitution requires.

Reasonableness of conduct is the basic criterion in s 22 of the Defamation Act which gives a statutory defence of qualified privilege. It is a concept invoked in one of the defences of qualified protection under the Defamation Codes of Queensland and Tasmania. And it was the test of reasonableness that was invoked in the joint judgment in *Theophanous*. Given these considerations and given, also, that the requirement of honesty of purpose was developed in relation to more limited publications, reasonableness

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<sup>85</sup> *Mowlds v Fergusson* (1939) 40 SR(NSW) 311 at 327-9; ; *Horrocks v Lowe* [1975] AC 135 at 149

of conduct seems the appropriate criterion to apply when the occasion of the publication of defamatory matter is said to be an occasion of qualified privilege solely by reason of the relevance of the matter published to the discussion of government or political matters. But reasonableness of conduct is imported as an element only when the extended category of qualified privilege is invoked to protect a publication that would otherwise be held to have been made to too wide an audience. For example, reasonableness of conduct is not an element of that qualified privilege which protects a member of the public who makes a complaint to a minister concerning the administration of his or her department. Reasonableness of conduct is an element for the judge to consider only when a publication concerning a government or political matter is made in circumstances that, under the English common law, would have failed to attract a defence of qualified privilege.

In *Theophanous*,<sup>90</sup> the joint judgment also required the defendant to prove that it was unaware of the falsity of the matter published and that it did not publish the matter recklessly. That is a requirement that has little practical significance. The defendant must establish that its conduct in making the publication was reasonable in all the circumstances of the case. In all but exceptional cases, the proof of reasonableness will fail as a matter of fact unless the publisher establishes that it was unaware of the falsity of the matter and did not act recklessly in making the publication.

It may be that, if a statutory provision were to require the additional elements of want of knowledge of falsity and absence of recklessness, as required by *Theophanous*, it would not, on that account, infringe the freedom of communication which the Constitution requires. For present purposes, it is necessary only to state that their absence from s 22 of the Defamation Act cannot have the consequence that the provisions of that Act infringe the constitutional freedom. Moreover, these are not requirements of the common law, as it has traditionally been understood, and there is no reason why they should be engrafted on the expanded common law defence of qualified privilege.

Having regard to the interest that the members of the Australian community have in receiving information on government and political matters that affect them, the reputations of those defamed by widespread publications will be adequately protected by requiring the publisher to prove reasonableness of conduct. The protection of those reputations will be further enhanced by the requirement that the defence will be defeated if the person defamed proves that the publication was actuated by common law malice to the extent that the elements of malice are not covered under the rubric of reasonableness. In the context of the extended defence of qualified privilege in its application to communications with respect to political matters, "actuated by malice" is to be understood as signifying a publication made not for the purpose of communicating government or political information or ideas, but for some improper purpose.

In *Theophanous*, the court held that, once the publisher proved it was unaware of the falsity of the material, had not acted recklessly, and had acted reasonably, malice could not defeat the constitutional defence. But once the concept of actuating malice is understood in its application to government and political communications, in the sense indicated, we see no reason why a publisher who has used the occasion to give vent to its ill will or other improper motive should escape liability for the publication of false and defamatory statements. As we have explained, the existence of ill will or other improper motive

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<sup>90</sup> (1994) 182 CLR 104 at 137; 124 ALR 1

will not itself defeat the privilege. The plaintiff must prove that the publication of the defamatory matter was *actuated* by that ill will or other improper motive. Furthermore, having regard to the subject matter of government and politics, the motive of causing political damage to the plaintiff or his or her party cannot be regarded as improper. Nor can the vigour of an attack or the pungency of a defamatory statement, without more, discharge the plaintiff's onus of proof of this issue.

Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.

Once the common law is developed in this manner, the New South Wales law of defamation cannot be said to place an undue burden on those communications that are necessary to give effect to the choice in federal elections given by ss 7 and 24 and the freedom of communication implied by those sections and ss 64 and 128 of the Constitution. It is true that the law of defamation in that State effectively places a burden on those communications although it does not prohibit them. Nevertheless, having regard to the necessity to protect reputation, the law of New South Wales goes no further than is reasonably appropriate and adapted to achieve the protection of reputation once it provides for the extended application of the law of qualified privilege. Moreover, even without the common law extension, s 22 of the Defamation Act ensures that the New South Wales law of defamation does not place an undue burden on communications falling within the protection of the Constitution. That is because s 22 protects matter published to any person where the recipient had an interest or apparent interest in having information on a subject, the matter was published in the course of giving information on that subject to the recipient, and the conduct of the publisher in publishing the matter was reasonable in the circumstances.

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By reason of matters of geography, history, and constitutional and trading arrangements, however, the discussion of matters concerning New Zealand may often affect or throw light on government or political matters in Australia. That being so, it may be that further and better particulars can be provided which bring the publications within the expanded defence. We express no view as to whether the publication can be brought within that defence, but the possibility should not be regarded as foreclosed by the orders that the court now makes.

## IV. Constitutional Values and the Common Law

### A. Incorporating values into common law jurisprudence

The explicit reconsideration of the common law in light of “Charter values” reflected in *Dolphin Delivery* and *Hill* reflects a marked change in Canadian jurisprudence. Racially restrictive covenants are now outlawed by statute, but at the same time that *Shelley v. Kraemer* was being litigated in the United States, the Supreme Court of Canada was only willing to block enforcement of a covenant on technical grounds, expressly refusing to find these agreements offensive to public policy. *Noble v. Alley*, [1951] S.C.R. 64. Historically, Canadian courts took a cautious approach to public policy, invoking it only “in clear cases where the harm to the public is substantially incontestable and does not depend upon the ‘idiosyncratic inferences of a few judicial minds.’” *Re Millar*, [1938] S.C.R. 1, 7-8 (Duff, C.J.C.). Recently, *Canada Trust Co. v. Ontario Human Rights Commission* (1990), 74 O.R. (2d) 481, 69 D.L.R. (4th) 321 (C.A.) distinguished these precedents and held that a charitable trust excluding Catholics and Jews was unenforceable as against public policy. The court, however, emphasized the many statutory declarations of public policy in this area.

In light of the constitutional approach in the United States, it is noteworthy to consider the insights of the trial judge, whose approach in refusing to enforce restrictive covenants on public policy grounds was not accepted by the Supreme Court of Canada in *Noble, supra.*:

Ontario and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.

*In re Wren*, [1945] O.R. 778, 783 (H.C.).

Although in *Hill* the Supreme Court of Canada re-affirmed the common law of libel after considering Charter values, the common law was required to give way in *DAGENAIS v. CBC*, [1994] 3 S.C.R. 835. CBC planned to broadcast a fictional account of sexual and physical abuse of children in a Catholic institution. At the time, Dagenais was on trial for sexual and physical abuse of young boys at a Catholic training school. Under the common law, judges are allowed to issue publications bans upon a demonstration that there is a real and substantial risk of interference with the right to free trial, and on that basis the CBC programme was banned during pendency of the trial. According to the majority opinion by Lamer, C.J., the pre-*Charter* common law rule gave unwarranted primacy to the right to a fair trial over the

interests in free expression, a balance that “is inconsistent with the principles of the *Charter*, and in particular, the equal status given by the *Charter* to ss. 2(b) [free expression] and 11(d) [fair trial].” *Id.* at 877. Thus, “it is necessary to reformulate the common law rule governing the issuance of publication bans that reflects the principles of the *Charter*. *Id.* at 878. Applying the substance of the *Oakes* test for assessing legislation under s.1, the Court held that the new common law rule would permit publication bans only when *necessary* to prevent a risk to fair trial, only where reasonably available alternative measures will not prevent the risk, and only where the benefits outweigh to harms. *Id.*

Similarly, in *R.W.D.S.U., LOCAL 558 v. PEPSI-COLA CANADA BEVERAGES (WEST) LTD.*, [2002] 1 S.C.R. 156, the court resolved what it described as a conflict among lower courts concerning the common law of picketing by rejecting a well-established Ontario decision that made secondary picketing *per se* illegal, as insufficiently protective of Charter values of free expression.

The reasons given in *Hill* make clear the majority’s view that, on the merits, the pre-*Charter* common law of libel need not be altered in light of Charter values. The Ontario Court of Appeal in *Hill* took another approach, however, in rejecting the defendants’ claim that the *New York Times v. Sullivan* standard should be adopted by Canadian courts. Initially, the Court observed that the defendants’ argument would require “a major alteration to the common law.” To do so, the Court reasoned, “would be contrary to the established rule that changes to the common law should be slow and incremental out of deference to the legislature.” 114 D.L.R. (4<sup>th</sup>) 1, 32. The opinion then quoted *Watkins v. Olafson*, [1989] 2 S.C.R. 750, 61 D.L.R. (4<sup>th</sup>) 577, 583-84 [an opinion regarding the common law of damages in tort]:

Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.

There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.

Even when reviewing the common law to incorporate Charter values, the court of appeal noted that the Supreme Court had previously applied the same amount of caution about

reformulating the common law. 114 D.L.R. (4<sup>th</sup>) at 32-33, quoting *R. v. Salituro*, [1991] 3 S.C.R. 654, 68 C.C.C. (3d) 289, 301:

Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. None the less, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins, supra*, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

Note that the Supreme Court of Canada's opinion in *Hill* did not cite this portion of *Salituro*, but cited rather another portion of the opinion where the Court wrote: "The courts are the custodians of the common law, and it is their duty to see that the common law reflects the emerging needs and values of our society." This potential tension remains unaddressed by the Supreme Court. (In the recent *Pepsi-Cola* case, *supra*, the Court cited both cases and went out of its way to suggest that its holding was not a major change in the common law.)

Caution in changing the common law, even to account for Charter values, has been particularly emphasized where there is evidence that Parliament relied upon its understanding of background common law norms in enacting legislation, so that any change in common law would have a far-reaching effect. See, e.g., *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10 (changes in common law definition of charity rejected in part because of parliamentary reliance on traditional common law test in defining charitable organisations for purposes of *Income Tax Act*).

The role of the Supreme Court of Canada as a general court of appeal even allows it to use constitutional values to affect the interpretation of provincial statutes. An illustration is *BRITISH COLUMBIA (PUBLIC SERVICE EMPLOYEE RELATIONS COMMISSION) v. BRITISH COLUMBIA GOVERNMENT AND SERVICE EMPLOYEES' UNION (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3, which concerned the legality under the *British Columbia Human Rights Code* of a requirement that forest firefighters be able to run 2.5 km in a specified time, a requirement that disproportionately affected women. The statute prohibits discrimination against a person regarding any condition of employment on the basis of sex, but does not apply to a "bona fide occupational requirement" (BFOR). The Court used the case to reformulate the legal standards regarding this area of employment law, holding that a BFOR requires evidence that a standard challenged as disproportionately affecting a protected class "is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer." *Id.* at ¶54. In adopting this standard, the Court abolished a pre-existing distinction the cases interpreting human rights legislation had used between instances of "direct discrimination" and those where facially neutral standards were applied

with disproportionately adverse impact to protected classes. Although the Court acknowledged that these initial statutory interpretation decisions (some of which preceded the adoption of the Charter) may have been based on the idea that discrimination in the latter instance was “less deserving of legal censure,” the Court noted that its jurisprudence regarding discrimination in violation of the equality provisions of s. 15 of the Charter had rejected this distinction, and applied the same reasoning to the *B.C. Human Rights Code*. *Id.* ¶149.

Although Australian law is less developed in this area, the High Court of Australia has reaffirmed the need for the common law to develop according to constitutional principles. Thus, citing *Lange*, the court reconsidered prior decisions and held that a uniform federal choice-of-law rule was constitutionally required, so that Australian Capital Territory courts were required to apply New South Wales law to a tort claim where the tort occurred in New South Wales. *John Pfeiffer Pty Ltd v Rogerson*, (2000) 203 CLR 503; 172 ALR 625.

By way of comparison, although constitutional values may influence the way that the U.S. Supreme Court interprets federal statutes, William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007 (1989), the U.S. Supreme Court has no jurisdiction to review state statutes other than to find them unconstitutional. The final arbiter of the interpretation of Pennsylvania statutes is the Supreme Court of Pennsylvania.

## B. Legal realism and the constitutionalization of the American common law

One way to explain why the U.S. Supreme Court would hold that the U.S. Constitution applied to common law actions is that this was the only means by which the Court could prevent enforcement of racist covenants<sup>+</sup> or prejudicial libel verdicts. In *Shelley v. Kraemer*

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<sup>+</sup> Actually, this holding was not necessary in *Shelley*, although it might not have been apparent at the time the case was decided. Section 1 of the Civil Rights Act of 1866, codified at 42 U.S.C. §1982, provides that all citizens “shall have the same right ... to .. inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens...” Writing for the court of appeals in *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33 (8<sup>th</sup> Cir. 1967), Judge Harry A. Blackmun (as he then was) reviewed Supreme Court precedent and concluded that the statute was to be interpreted as enforcing rights guaranteed under the Fourteenth Amendment - thus limiting its scope to state action. In particular, Blackmun, J., relied upon the Court’s decision in the *Civil Rights Cases*, 109 U.S. 3, 22-24, 3 S.Ct. 18, 30 (1883), holding that the Thirteenth Amendment was solely concerned with slavery and not “to adjust what may be called the social rights of men and races in the community.” In light of the aforementioned limits on the Fourteenth Amendment, Congress therefore did not have the constitutional power to outlaw private racial discrimination. (Note that private discrimination outlawed by the Civil Rights Act of 1964 was upheld based on Congress’ power to regulate interstate commerce.) The Supreme Court reversed, 392 U.S. 409, 88 S.Ct. 2186 (1968). Justice Stewart’s majority opinion carefully sidestepped contrary language in prior precedents as off-point or *dictum*, and read the plain language and legislative history of the Act to conclude that private discrimination was intended to be outlawed by Congress. The Court also declined to follow the *Civil Rights Cases*’ restrictive reading of the Thirteenth Amendment, finding that it authorized Congress to outlaw any

and *New York Times v. Sullivan*, the U.S. Supreme Court, as a limited court of appeal, was required to accept without further review the determination by the Missouri Supreme Court that racist covenants were not void as against public policy, and by the Alabama Supreme Court that the libel verdict was an appropriate balance of reputational and speech interests. In identical cases, the Supreme Court of Canada or the High Court of Australia, as general courts of appeal, could simply have reversed the judgment.

These two cases are not the only instances where the U.S. Supreme Court has created constitutional doctrines to ensure that the common law adequately balances constitutional values. Professors Jim Pfander and David Meyer suggest several other areas where constitutional law might not have been created were the U.S. Supreme Court a “general court of appeal” like the Supreme Court of Canada or the High Court of Australia. These include:

- The implied cause of action for injuries suffered when federal agents unreasonably searched a home and seized property in a manner inconsistent with the Fourth Amendment. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971). In Canada and Australia, police misconduct is typically litigated under common law principles. (Indeed, in *Lange*, the High Court explicitly noted the difference between American and Australian law in this respect.) Pfander suggests that the U.S. Supreme Court was unwilling to subject Americans to the vagaries of state trespass and related doctrines.
- A limit on excessive punitive damages. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996), the Court held that an award of \$4 million for falsely representing that a repainted BMW was “new” (the jury set compensatory damages at \$4,000) was so excessive that it constituted a violation of due process. At the same time, the Court expressly refused to “draw a bright line marking the limits of a constitutionally acceptable punitive damage award.” 517 U.S. at 571. Subsequently, the Court held that punitive damages based in part on the jury’s desire to punish the manufacturer for harming nonparties amounted to a taking of property from the manufacturer without due process, although it was permissible to consider nonparty harm in determining reprehensibility. *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). The constitutional problem was only raised by the court’s inability to directly review the judgment of the Alabama Supreme Court in *BMW* and the Oregon Supreme Court in *Philip Morris* that the jury’s award was reasonable and proper. Cf. *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, where the Supreme Court of Canada directly reviewed a jury’s award of \$1 million in punitive damages as well as the antecedent instructions given by the trial judge. Having regard for the “reprehensible” conduct of the defendant in terminating rent payments and withholding claims based on unsupported allegations of arson, the majority concluded that although the award was higher than they would have imposed, it was “within rational limits.”

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“badges or incidents” of slavery, which included inability to purchase property.

The law of property. Re-consider the discussion in the Concluding Note of Chapter 6 concerning the constitutionalization of property law in the United States. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), the majority implied that a change in the common law that deprived owners of the use of their land might well constitute an unconstitutional taking if compensation were not provided. In this context, note that the U.S. Supreme Court is unable, as a limited court of appeal, from simply reversing the lower court's judgment as to the legitimacy of the change in the common law.

- Custodial disputes before family court judges. The U.S. Supreme Court has no general authority to review state court decisions concerning visitation rights for children. In *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000), the Court found that the Fourteenth Amendment granted custodial parents certain fundamental rights to make decisions concerning their children. The Court thus invalidated, on constitutional grounds, a state court order requiring a mother to grant visitation rights to the children's grandparents (the parents of the children's deceased father). The Court emphasized that the mother's rights were not absolute, but faulted the state court for failing to give any material weight to the mother's views and affording an unwarranted presumption in favor of the grandparents' visitation. Clearly, the justices did not believe that the state court judge had properly exercised discretion, but general review on this ground is not permitted in the American federal system.

#### **HYPOTHETICAL G: FREE SPEECH AND THE COMMON LAW**

The Food & Beverage Union is on strike against Coca-Cola, but the strike is not succeeding at bringing Coke back to the bargaining table. The Union decides to picket supermarkets in the U.S. and Canada, asking the local Supermarket Workers Union's workers to not cross the picket line, and asking consumers to boycott the supermarkets, as long as they carry "scab" Coke products.

Under the U.S. National Labor Relations Act, the common law is pre-empted by federal labor law. The federal law prohibits the F&B Union's conduct, known as "secondary picketing." Likewise, secondary picketing is prohibited under the British Columbia Labour Code. If a provincial statute did not prohibit secondary picketing, the conduct would still be actionable as a common law tort of intentional interference with contractual relations.

*(1) If the U.S. NLRB seeks a court order barring picketing, why isn't this a violation of the First Amendment?*

*(2) In light of the broad definition of expression protected by s. 2(b) of the Canadian Charter, why wouldn't a court order enforcing a B.C. Labour Board directive to cease picketing be unconstitutional?*

*(3) How would a Canadian judge resolve a dispute between Safeway's claim for an injunction to prevent a common law tort and the Union's claim that its conduct is protected by the Charter?*

*(4) In hearing a common law claim brought by Safeway against the Union, if the trial court granted the injunction after a trial that was not conducted in a manner consistent with principles of fundamental justice, could the Union raise s. 7 on appeal?*

*(5) Turning to the consolidated cases in Shelley v Kraemer, do you agree with the Missouri and Michigan Supreme Courts that racially restrictive covenants are not contrary to public policy?*

*(a) If you were a U.S. Supreme Court justice, would you reverse these judgments on the ground that the common law of property invalidates covenants that are void as contrary to public policy?*

*(6) In NY Times v. Sullivan, the Alabama courts held that accusations of misconduct in office are unprivileged libels; in contrast, the Kansas courts (and many other state courts) have created a privilege for criticism of official conduct requiring proof of malice. Why didn't the U.S. Supreme Court in Sullivan simply reverse because of the better reasoned holdings of these other courts?*

*(7) Does the Supreme Court of Canada believe that false speech must be protected in order to avoid deterring some true political speech that is essential for the democratic political process?*

*(8) What is the difference between evaluating Charter challenges under s. 1 and incorporating "Charter values" into the common law as was done in the Hill case?*