Comparative Perspectives on Freedom of Expression
Comparative Perspectives on Freedom of Expression

GLOBAL PAPERS SERIES
VOLUME II

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Series Note

The Global Papers Series involves publications of papers by nationally and internationally prominent legal scholars on a variety of important legal topics, including administrative law, freedom of expression, defamation and criminal law. The books in this series present the work of scholars from different nations who bring diverse perspectives to the issues under discussion.
Introduction: Comparative Perspectives on Freedom of Expression

This volume contains papers from the seventh and eighth Free Speech Discussion Fora held at the University of Notre Dame’s London Law Centre (London, England), on May 19–20, 2014,¹ and at the University of Louisville’s Brandeis School of Law (Louisville, Kentucky), on December 2–3, 2015.² These gatherings brought together noted scholars and practicing lawyers from different parts of the globe. The topic of the London forum focused on “The Intersection Between Free Speech and Crime.” By the time of the Louisville forum, this topic had assumed increased significance, especially with the attack on

¹ The London event was cosponsored by the University of Notre Dame’s London Law Centre (U.K.), Stetson University College of Law (U.S.), Emory University School of Law (U.S.), the Windsor University Faculty of Law (Canada), the University of Luxembourg Faculty of Law, Economics and Finance (Luxembourg), and the University of Louisville’s Louis D. Brandeis School of Law (U.S.).

² The Louisville event was cosponsored by the Luxembourg University Faculty of Law, Economics and Finance (Luxembourg), the Emory University School of Law (U.S.), the Pázmány Péter Catholic University Faculty of Law (Hungary), the University of Paris I (Sorbonne) and IMODEV (France), the U. Aix-Marseille Faculty of Law (France), and the University of Louisville’s Louis D. Brandeis School of Law (U.S.)
Charlie Hebdo, the subsequent attempts by France to restrict radical Muslim speech, and France’s handling of Dieudonné. However, participants were given the freedom to address these issues from any of a variety of angles, including providing a perspective on the criminal regulation of Internet speech, criminalization of incitement to violence, or from the perspective of the issues being raised by the United Nations Office of Drugs and Crime (whether free speech and a free press can provide a check on criminal misconduct).

This book also includes papers from the Third Defamation Discussion Forum held in May 21–22, 2014, at the University of Luxembourg Research Unit in Law. With the continuation of that forum, series the organizers underlined the importance of defamation proceedings as concerns their impact on free speech and publication activity of the media. The topics for the Luxembourg forum included “Libel Tourism” and “The Evolution of Defamation Standards.”

The powerful and thoughtful papers in this volume promote thought and inquiry, often by exploring intersections between areas of law that reveal unique perspectives and vantage points. Professor András Koltay’s contribution, The Clear and Present Danger Doctrine in Hungarian Hate Speech Laws and the Jurisprudence of the European Court of Human Rights, traces the development of the so-called “clear and present danger” doctrine through its tortuous history in the U.S. Supreme Court over a number of decades, eventually resulting in the Court’s landmark decision in Brandenburg v. United States.4 Brandenburg establishes the proposition that government cannot punish an individual for advocating illegal action unless it can show that the individual intended to incite imminent lawless conduct, and that the speech was likely to result in imminent lawless conduct. Professor Koltay observes that the Hungarian Constitutional Court has shown a willingness to impose the clear and present danger test in evaluating advocacy to action cases. While the European Court of Human Rights has been less willing to impose the clear and present danger test, the European Court has shown some sensitivity to the constitutional and free speech values that underlie the test.

Professor Christopher J. Roederer’s paper, Obscenity from Fifty Shades of Gray to Virtually Free: Patently Offensive and Socially Valuable Materials that Appeal to Our Shameful and Morbid Interests in Sex, examines the intersection

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3. The Luxembourg event was cosponsored by the Luxembourg University Faculty of Law, Economics and Finance (Luxembourg), the Emory University School of Law (U.S.), the Johannes Gutenberg University Faculty of Law and Economics (Germany), and the University of Louisville’s Louis D. Brandeis School of Law (U.S.).

of sex-based obscenity and criminal law. Professor Roederer argues that, given the Supreme Court decisions protecting other “offensive” forms of expression, it is anomalous to pick out sex-related obscenities for continued disfavor. He argues that he “cannot see any principled anchor for the criminalization of sex-related obscenities on this slippery slope, at least when those materials involve consenting adults.” There is little, to no reliable evidence that sex related obscenities are more offensive, harmful, or less socially valuable than other obscene material, he notes that American culture has embraced the obscene in everything from sex to violence. He argues that the U.S. Supreme Court’s test for evaluating obscenity is “virtually empty,” impossible to apply, and discriminates “against some forms of expression based not only on its content, but on controversial moral and political viewpoints,” and is therefore constitutionally suspect.

Professor Kevin W. Saunders penned *Media Induced Criminality*, which takes issue with the U.S. Supreme Court’s decision in *Brown v. Entertainment Merchant’s Association*. Brown held that the State of California could not prohibit the sale of violent video games to minors. He examines that decision through a comparative free expression lens in an effort to refute the idea that there is no correlational link between violent video games and violent juvenile actions. He looks at data from a variety of countries, including China, Korea, Japan, Germany and elsewhere, and argues that differences in rates of violence are irrelevant. He observes that a “growing body of science demonstrates that certain media influences contribute to aggression and the development of brain function characteristic of delinquent or criminal behavior remains intact.”

Professor Louis J. Virelli III’s article, *The First Amendment, Criminal Law and Judicial Recusal*, examines the interrelationship between judicial recusal and the First Amendment. He does so through the lens of a federal circuit court’s decision to remove United States District Judge Shira Scheindlin from a case challenging the New York City Police Department’s highly controversial “stop-and-frisk” policies. In the article, he seeks to reveal the connections between criminal law recusal and the First Amendment, and to offer some normative suggestions regarding how to best manage those connections.

5. 131 S. Ct. 2729 (2011).
6. The “stop-and-frisk” policy refers to an NYPD practice of suspicion-less stopping and searching of individuals in public settings without the constitutionally required reasonable suspicion.
Professor Russell Weaver’s article, *Free Speech and True Threats in the Digital Era*, examines the so-called “true threats” doctrine as it has been applied in U.S. Supreme Court decisions. While the article notes that the true threats doctrine, as applied by the Court, is consistent with traditional free speech rules, the doctrine is subject to potential abuse and can be used to persecute people with certain political ideas. The article illustrates this risk by discussing Johnny Lee Spencer’s poem, “Die Nigger Die,” which concerns the assassination of a black president. The evidence shows that Spencer did nothing to indicate that he intended to kill President Obama, other than write the poem, and did not even own a weapon. Moreover, his poem was posted on the Internet for a year before it was discovered by federal authorities, and there was no evidence that anyone had taken any action against President Obama. Nevertheless, Spencer was prosecuted, decided to plead guilty, and sent to prison.

Professor Colin Miller’s article, *Freedom of Character: Creating a Constitutional Character Evidence Test*, examines the case of *State v. Skinner*. In *Skinner*, an accused was convicted of attempted murder and related crimes based in part on rap lyrics that he had written, such as, “Crackin’ your chest when I show you how the force spits, makin’ your mother wish she would have had an abortion.” In *Skinner*, the Appellate Division of the Superior Court of New Jersey saw no impropriety when the trial court admitted the writings as an exception to the prohibition against using character evidence offered by the prosecution. The evidence was used to prove the defendant’s motive and intent to commit the crimes charged. According to the court, “although writing about evil things and expressing evil thoughts is not a bad act, this court and the Supreme Court have recognized that when a defendant’s writing reflects his bad acts or a propensity to act badly, Evidence Rule 404(b) applies.” Miller discusses ways to reconcile the use of this evidence with traditional First Amendment principles.

Professor Russell Weaver’s second article is entitled *The Criminalization of Speech: Comparative Perspectives*. That article compares U.S. free speech law to French free speech law. It analyzes the foundations of expression in both countries, and notes how France and the U.S. diverge on speech that relates to Holocaust denial, degradation of human dignity, and in other areas. The articles notes, in particular, that France permits restrictions on speech that simply would not be permitted in the United States (e.g., restrictions on Holocaust denial).

8. Id.
Professors Irene Bouhadana, William Gilles, and Mr. Jean Harivel respond to Professor Weaver’s article in their contribution, *Freedom of Expression and the Values of the French Republic, Article Dedicated to the Memory of the Victims of the Terrorist Attacks of 2015 in France*. In that article, they argue that “the foundations of freedom in France include the ‘freedom to do everything which does not harm others.'” In other words, freedom is defined by a negative; a definition that has existed in French law since the French Revolution. Lacking a positive definition, the concept of freedom is limited by the obligation to respect the right of others to enjoy their own freedoms. The limits or restrictions, which must be commensurate with their intended purpose, may originate from the law, but can also come from other factors such as morality, ethics, regulatory actions or arbitrary power. As a result, the authors defend the French approach to free expression.

Professor Eric Segall’s article, *What Are True Threats? We Don’t Need the First Amendment to Tell Us*, examines the U.S. Supreme Court’s decision in *Elonis v. United States*. In that case, defendant made statements that some regarded as threats against his ex-wife, and Professor Segall concludes that it “is absurd (and dangerous) to suggest that the First Amendment requires a jury to find that the person who posted these threats on the internet (and many other similar comments) could only be convicted if a jury found that he ‘subjectively’ intended to threaten his estranged wife, the police, the judge hearing his case, and children in nearby schools.” He views these statements as “horrific and threatening,” and argues that they are not entitled to First Amendment protection. In particular, he argues that there is nothing in the text or history of the First Amendment that requires a subjective standard of proof in true threat cases, especially when the legislature prefers a reasonable person standard. Noting the great confusion in the lower courts on what standard to apply to “true threats” cases, he argues that the Court should make clear that a “reasonable person standard” is permissible in true threat cases.

Professor Michael Losavio’s *Speech, Fear and the Internet of Encrypted Things* focuses on the need to balance the desire to engage in anonymous speech and the dangers presented by encryption. He notes that protections for private speech co-exist in an “information space of possible criminalization of speech and its’ attributes by the state, where anonymity and privacy may be limited, banned and broken.” He notes the essential difficulties: “The use of ‘anonymous’ speech protected by information technologies such as encryption and steganography can support the development of important though unpopular movements; it also aids vile and murderous conspiracies, some of whom, ironically, loath the free exchange of ideas.” This contribu-
tion’s importance has increased since big IT companies are refusing to cooperate with investigating authorities in assisting a decryption or breaking of PIN codes of devices originally manufactured by them.

Professor Carlo Pedrioli’s *Pope Francis and the Limits of Freedom of Expression* focuses on comments made by Pope Francis in response to the *Charlie Hebdo* attacks. In that article, he uses the Pope’s comments to examine the limits of freedom of expression from a religious perspective. Somewhat different from the traditional U.S. perspective on free speech, the Pope’s perspective is consistent with the existing theology of the Catholic Church. Pedrioli offers a detailed and contextualized summary of the papal remarks, an overview of relevant principles and application to the *Charlie Hebdo* cartoons of, on the one hand, U.S. free speech law and, on the other, Catholic theology.

This volume concludes with three papers from the Defamation Discussion Forum that expands the comparative view on freedom of expression through the lens of defamation standards.

The first, written by Professor Paul Marcus, is entitled *The Evolution [or is it Revolution] of Defamation Standards in the United States: The Impact of New York Times v. Sullivan*. In this article, Marcus argues that the “old days of outraged plaintiffs winning whopping judgments in defamation cases without any showing of purposeful behavior and truly harmful consequences are long gone in the U.S.” In other words, *New York Times v. Sullivan* transformed litigation in the United States. He concludes that the “change, for me, is certainly worth it if one believes, as did the influential American scholar Alexander Meiklejohn, that ‘in a democracy the citizen as ruler is our most important public official.’”

Professor Russell Weaver’s article, *Striking the Balance Between Free Speech, Defamation and Reputation* is in essential agreement with the Marcus article. He notes that the common law of defamation was pro-plaintiff, and provided substantial protections for individual reputation at the cost of freedom of expression. However, he notes that courts around the world have tweaked (or, sometimes, radically altered) their defamation laws to shift the balance more towards speech and away from protection of reputation, but that they have taken different approaches to this endeavor with varying results. Although the *N.Y. Times* decision involved the most dramatic shift away from reputation in favor of speech, it has also had the greatest impact.

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10. Id.
The final article, Dr. Lawrence Siry’s *Pressing Reform: The Connected Developments of Press Regulation and Defamation Law in the UK*, suggests that British defamation law has changed significantly with the passage of the Defamation Act of 2013. That Act limits the potential for libel tourism and gives speakers more clarity regarding their right to criticize others. However, he raises questions regarding the UK’s efforts towards press regulation. For example, he asks whether the law will protect expression as well as regulate against abuses. He leaves us with a question as well: “Will these developments foster the free exchange of ideas, or will publishers be more reluctant to publish articles that may shock and/or offend?” He concludes that the “jury is out.”

Freedom of expression has been, and will necessarily be subject to controversy. There is a constant tension between free speech and speech restricting measures, especially restrictions imposed as part of the war on terror. In this context, it is helpful to comparatively examine U.S. and European approaches to freedom of expression. The editors hope that the articles contained in this volume will contribute to an understanding of the role of free expression in an ever more digitalized world in which speech frequently crosses borders and oceans, rapidly crosses borders, bringing constant challenges to freedom of expression.