

Comparative Perspectives on Freedom of Expression

CAROLINA ACADEMIC PRESS
GLOBAL PAPERS SERIES

Edited by
Russell L. Weaver and Steven I. Friedland

VOLUME I

Recent Developments in Administrative Law and
Alternative Dispute Resolution

VOLUME II

Comparative Perspectives on Freedom of Expression

VOLUME III

Comparative Perspectives on Administrative Procedure

VOLUME IV

Privacy in a Digital Age

VOLUME V

Comparative Perspectives on Remedies

VOLUME VI

Cybersurveillance in a Post-Snowden World

Comparative Perspectives on Freedom of Expression

GLOBAL PAPERS SERIES
VOLUME II

Edited by

Russell L. Weaver

PROFESSOR OF LAW AND DISTINGUISHED UNIVERSITY SCHOLAR
UNIVERSITY OF LOUISVILLE
LOUIS D. BRANDEIS SCHOOL OF LAW

Mark D. Cole

PROFESSOR OF MEDIA AND TELECOMMUNICATIONS LAW
LUXEMBOURG UNIVERSITY FACULTY OF LAW, ECONOMICS AND FINANCE

Steven I. Friedland

PROFESSOR OF LAW AND SENIOR SCHOLAR
ELON UNIVERSITY SCHOOL OF LAW



CAROLINA ACADEMIC PRESS
Durham, North Carolina

Copyright © 2017
Carolina Academic Press, LLC
All Rights Reserved.

Print ISBN 978-1-61163-730-4
eISBN 978-1-53100-639-6

Library of Congress Cataloging-in-Publication Data

Names: Weaver, Russell L., 1952- editor. | Cole, Mark D., 1972- editor. |
Friedland, Steven I., editor.
Title: Comparative perspectives on freedom of expression / edited by Russell
L. Weaver, Mark D. Cole, and Steven I. Friedland
Description: Durham, North Carolina : Carolina Academic Press, 2015. |
Series: The global papers series ; volume II | Includes papers presented
at the seventh Free Speech Discussion Forum was held at the University of
Notre Dame's London Law Centre on May 19-20, 2014, and was cosponsored by
the University of Notre Dame's London Law Centre, Stetson University
College of Law, Emory University School of Law, the Windsor University
Faculty of Law (Canada), the University of Luxembourg Faculty of Law, and
the University of Louisville's Louis D. Brandeis School of Law and papers
from the Third Defamation Discussion Forum that was also held in May at
the University of Luxembourg Faculty of Law co-sponsored by the Luxembourg
University Faculty of Law, the Emory University School of Law, the
Johannes Gutenberg University Faculty of Law, and the University of
Louisville's Louis D. Brandeis School of Law. | Includes bibliographical
references and index.
Identifiers: LCCN 2015000197 | ISBN 9781611637304 (alk. paper)
Subjects: LCSH: Libel and slander--Congresses. | Freedom of
speech--Congresses. | Libel and slanders--Criminal provisions--Congresses.
Classification: LCC K930.A6 F74 2015 | DDC 345/.0256--dc23
LC record available at <https://lcn.loc.gov/2015000197>

Carolina Academic Press, LLC
700 Kent Street
Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Contents

Series Note	xi
Introduction: Comparative Perspectives on Freedom of Expression <i>Russell L. Weaver, Steven I. Friedland, & Mark D. Cole</i>	xiii

**Part One • Free Speech Discussion Forum, University of
Notre Dame's London Law Centre, May 19 – 20, 2014**

The Clear and Present Danger Doctrine in Hungarian Hate Speech Laws and the Jurisprudence of the European Court of Human Rights <i>András Koltay</i>	3
I. Introduction	3
II. The development of the doctrine in the United States	4
III. The Hungarian Constitutional Court on criminal hate speech	11
1. The roles and powers of the Constitutional Court	11
2. The legal background of the restriction of hate speech	13
3. The decisions of the Constitutional Court on hate speech regulation	15
A. The first hate speech decision	15
B. The second hate speech decision	23
C. The third hate speech decision	24
D. The fourth hate speech decision	28
E. The relationship between the clear and present danger doctrine and “imminent danger”	30
F. The new Criminal Code	31
IV. The jurisprudence of the European Court of Human Rights in respect of the restriction of hate speech	32
1. The role of Article 17	32
2. The Holocaust denial cases	34

3. The criteria for determining the acceptable restriction of speech	35
A. The tone, form, addressees and purpose of the opinion published	38
B. The status of the applicant	39
C. The duty and responsibility of the media in respect of the democratic provision of information	40
D. The increased protection granted to literary and scientific works	40
E. The severity and proportionality of the (criminal law) sanction applied against the communicator	40
F. The effect of the opinion published	41
4. Summary	43
V. Conclusion	43
Obscenity from Fifty Shades of Grey to Virtually Free: Patently Inoffensive and Socially Valuable Materials that Appeal to our Shameful and Morbid Interests in Sex	45
<i>Christopher J. Roederer</i>	
I. The Ubiquity of the Obscene	49
II. Obscenity Is a Legal Anomaly	54
III. “We” Don’t Really Know It When We See It	60
IV. What Community? What Standards?	63
V. Offensive? We Are What We Eat, Not What We Claim Suits Our Taste	66
VI. “Serious” Value?	67
VII. The Obscene Is Political	72
Conclusion	74
Media Induced Criminality	77
<i>Kevin W. Saunders</i>	
I. The Impact of Violent Media on Children	79
II. Rejection of the Science by United States Courts	82
III. A Comparative View	85
IV. Conclusion	93

The First Amendment, Criminal Law, and Judicial Recusal	95
<i>Louis J. Virelli III</i>	
I. Judge Scheindlin’s Removal from <i>Floyd</i>	96
II. Implications	99
1. Content-Based Speech	100
2. Public Employee Speech	102
3. Attorney Speech	106
III. Structural and Institutional Issues	108
IV. First Amendment Implications	112
Free Speech and “True Threats” in a Digital Era	115
<i>Russell L. Weaver</i>	
I. The “True Threat” Doctrine	117
II. Potentially Troubling Applications of the Doctrine	122
Conclusion	124
Freedom of Character: Creating a Constitutional Character Evidence Test	127
<i>Colin Miller</i>	
I. Introduction	127
II. Free Speech and the Character Evidence Prohibition	128
A. The Free Speech Origins of the Character Evidence Prohibition	128
B. Free Speech Character Evidence and the Federal Rules of Evidence	130
C. Proposals for a Modified Rule 403 in Free Speech Cases	131
III. Creating a First Amendment Test for Protected Speech Character Evidence	132
A. <i>Dawson</i> and the First Amendment Limitation on Character Evidence	132
B. Constitutional Trumps on the Rules of Evidence	133
C. Creating a Constitutional Character Evidence Test	135

**Part Two • Free Speech Discussion Forum, University of Louisville's
Brandeis School Of Law, December 2 – 3, 2015**

The Criminalization of Speech: Comparative Perspectives	141
<i>Russell L. Weaver</i>	
I. French Criminalization of Speech	144
II. Contrast with the United States	149
Conclusion	157
 Freedom of Expression and the Values of the French Republic	 159
<i>Irene Bouhadana, William Gilles, and Jean Harivel</i>	
Article Dedicated to the Memory of the Victims of the Terrorist Attacks of 2015 in France	159
The Legal Basis of the Assertion of the Freedom of Expression	160
A) The Freedom of Expression as a Component of the Motto of the French Republic	160
B) The Freedom of Expression Protected by the Rule of Law	163
Contemporary Manifestations of the Freedom of Expression	166
A) Freedom of Expression and the Expression of Politicians	166
B) Freedom of Expression and Expression of the Press	167
1) Affirming the Freedom of the Press	167
2) The Non-Legal Limits to Freedom of Expression: Freedom of the Press and the Private Censorship of Certain Social Networks	168
C) Freedom of Expression and the Expression of the Artist: the Limits of the Incitement to Racial Hatred	170
 What are True Threats? We Don't Need the First Amendment to Tell Us	 175
<i>Eric J. Segall</i>	
Introduction	175
A. True Threats	177
B. Specific Cases	179
Conclusion	185

Speech, Fear and the Internet of Encrypted Things	187
<i>Michael Losavio</i>	
Technology and Change	189
The Value and Scope of Anonymity	189
The Costs of Anonymity	191
The Internet of Things, The Internet of Everything	192
Preservation of Anonymous Speech	196
Conclusion	196
Pope Francis and the Limits of Freedom of Expression	197
<i>Carlo A. Pedrioli</i>	
I. Introduction	197
II. The Comments of Pope Francis	200
III. U.S. Law and Freedom of Expression	204
IV. Catholic Theology and Freedom of Expression	211
V. Conclusion	218
Part Three • Defamation Discussion Forum, Third Defamation Discussion Forum, University of Luxembourg Research Unit In Law, May 21 – 22, 2014	
The Evolution [or Is It Revolution] of Defamation Standards in the United States: The Impact of <i>New York Times v. Sullivan</i>	223
<i>Paul Marcus</i>	
I. U.S. Defamation Law Prior to 1964	223
A. The Influence of the English Common Law	224
B. State of Mind of the Defendant	224
C. Truth As a Defense	225
D. Money Damages Awarded	225
II. The Supreme Court Changes the Landscape: <i>New York Times v. Sullivan</i>	226
III. Public Figures and Actual Malice	230
A. Public Figures	230
B. Proving Actual Malice	233
IV. Conclusion	235

Striking the Balance: Free Speech, Defamation and Reputation	237
<i>Russell L. Weaver</i>	
I. The Common Law of Defamation	239
II. The U.S.'s Departure from the Common Law	242
III. The Extension of Qualified Common Law Privilege in Australia	247
IV. <i>Reynolds</i> and England's Expansion of Qualified Privilege	249
Conclusion	251
Pressing Reform: The Connected Developments of Press Regulation and Defamation Law in the UK	253
<i>Lawrence Siry</i>	
Introduction	253
1. The Royal Charter — a New Chapter in Press Regulation	255
1.1 News of the World	256
1.2 Old Regime	259
1.3 The Leveson Report	260
1.4 Royal Charter	262
1.5 Implications on Free Speech	265
2. Defamation Reform 2013	266
2.1 Old Regime	266
2.2 Defamation Act of 2013	271
2.3 Potential Impact of Reforms to Press Regulation and Defamation	275
Conclusions	276

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.

Russell L. Weaver*
Mark D. Cole**
Steven I. Friedland***

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

* Professor of Law and Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law.

** Professor of Media and Telecommunications Law, Luxembourg University Faculty of Law, Economics and Finance.

*** Professor of Law, Senior Scholar, & Director, Center for Engaged Learning in Law, Elon University School of Law.

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.³ 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

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.).

4. 395 U.S. 444 (1960).

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*.⁵ *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.⁶ 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."⁷ 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."⁸ 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 article 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).

7. 2012 WL 3762431 (N.J. Super. A.D., Aug. 31, 2012).

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*⁹ 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* decision¹⁰ involved the most dramatic shift away from reputation in favor of speech, it has also had the greatest impact.

9. 376 U.S. 254 (1964).

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.

