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Liberty of Expression in Ireland and the Need for a Constitutional Law of Defamation

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NOTES

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I. INTRODUCTION

In the last several years, Irish courts have awarded ever larger damages to defamation plaintiffs.[1] Because Irish libel law weighs heavily in their favor, these plaintiffs, who are often political figures and other well known public figures,[2] generally prevail in court.[3]

One such plaintiff was Noelle Campbell-Sharp, who won a 1997 judgment against the IRISH INDEPENDENT, a prominent newspaper company.[4] Campbell-Sharp was best known as owner of *Irish Tatler* magazine, which had recently gone bankrupt.[5] Hugh Leonard, a well-known Irish playwright and columnist, had criticized Campbell-Sharp in her weekly column.[6] Leonard mistakenly claimed that Campbell-Sharp owed him payment for some articles she had written,[7] Campbell-Sharp had actually just sold *Irish Tatler* to a larger publishing company when she commissioned the articles.[8] Campbell-Sharp won damages of IR£70,000.[9] With costs, the judgment against the newspaper came to over £200,000.[10]

Irish journalists and law reformers have charged that defamation liability decisions such as *Campbell-Sharp v. Independent Newspapers (IRE) Ltd.* have seriously impeded freedom of expression.[11] Freedom of the press is particularly endangered, as liability costs have forced Irish newspapers to be cautious about publishing controversial material and have

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1. *See, e.g.*, Michael Foley, *Papers Would Not Have Risked Calling Aitken a Liar Under Irish Libel Law*, IRISH TIMES, June 23, 1997, at 13, available in 1997 WL 12011235.

2. *See id.*

3. *See, e.g.*, Foley, *supra* note 1, at 13.

4. *See* Campbell-Sharp v. Independent Newspapers (IRE), Ltd., No. 5557 (Ir. H. Ct. May 6, 1997).

5. *See* Plaintiff's Statement of Claim (Sept. 28, 1992), Pleadings at 8, *Campbell-Sharp* (No. 5557).

6. *See* Transcript of Jury Action (Apr. 29, 1997), at 6, *Campbell-Sharp* (No. 5557).

7. *See id.* at 6-7 (citing Hugh Leonard, Leonard's Log, IRISH INDEPENDENT, Apr. 26, 1992, at 3L).

8. *See id.* at 8-10.

9. *See infra* text accompanying notes 172-73. In U.S. dollars, the judgment comes to $100,562, or $287,320 with costs. *See* N.Y. TIMES, Feb. 4, 1997, at C17 (as of February 3, 1999, an Irish *punt* was worth 1.4366 U.S. dollars).

10. *See* Letter from Michael Kealey, Solicitor for the Dublin law firm of McCann FitzGerald and Counsel for the SUNDAY INDEPENDANT, to author (Jan. 30, 1998) (on file with author).

11. *See infra* note 182.

discouraged investigative reporting.[12] Further, newspaper publishers commonly ask attorneys to read each weekly edition for potentially defamatory statements prior to printing.[13] Concerns about liability have also prevented the release or even publication of certain books in Ireland.[14]

Yet the Irish Constitution has always recognized a right to freedom of expression, as well as a host of other personal rights.[15] After centuries of British rule ended in 1921, and most of Ireland had achieved independence, the new Irish state chose to draft a written constitution recognizing specific freedoms, rather than to adopt the English model of an unwritten constitution.[16] The current constitution of the Republic of Ireland, *Bunreacht na hÉireann*, recognizes the right of the citizens "to express freely convictions and opinions."[17] It also calls for the State to prevent the media from undermining public order or morality, while it preserves the media's right of liberty of expression, including criticism of Government policy.[18]

The problem is not that this language has been interpreted to guarantee an insufficient freedom of expression; rather, the problem is that Irish courts have largely failed to interpret this language at all, and when they have done so, it has been in dicta.[19] In contrast, the United States has an established tradition of constitutional review of defamation cases. In the 1964 United States Supreme Court decision, *New York Times v. Sullivan*, the Court held that the First Amendment's guarantee of freedom of the press and free speech placed certain limits on the traditional common law of defamation.[20] From that point on, defamation cases were subject to constitutional judicial review. In Ireland, however, there is no established tradition of constitutional judicial analysis, and the substantive influence of *Bunreacht na hÉireann* upon Irish jurisprudence is minimal in comparison to the influence of the U.S. Constitution upon

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12. *See infra* notes 180-83 and accompanying text.

13. Interview with Paula Mullooly, former Solicitor, McCann FitzGerald, in Dublin, Ireland (May 1997).

14. For instance, Kitty Kelley's recent bestseller, THE ROYALS, was not for sale in Ireland until after September 23, 1997, due to distributors' liability fears. *See* Michael Foley, *Chain to Import Book on Royals*, IRISH TIMES, Sept. 23, 1997, at 8, *available in* 1997 WL 12026198.

15. *See infra* Part II.

16. *See* JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 8-13 (2d ed. 1992) (discussing the adoption of a written constitution in Ireland in 1922).

17. IR. CONST. art. 40.6.1.i.

18. *See id.*

19. *See infra* Part III.B.

20. New York Times v. Sullivan, 376 U.S. 254, 285-86 (1964).

American jurisprudence. Instead, Irish courts have emphasized a continued adherence to traditional English common law, which has served as virtually the sole source of law in defamation cases.[21]

Understanding the present state of Irish defamation law requires an understanding of why Irish courts tend to approach Ireland's constitution with what is essentially an English constitutionalist perspective. This judicial attitude is unexpected, in part, because Ireland fought a bloody war against the British in this century in order to break free from British rule. One might expect that the Irish would be equally eager to break from, or at least critique, British common law and constitutionalism. An American commentator summed up this apparent irony well:

> The struggle [for Irish independence] was conceived in the bitterness of a racial memory, conducted by both sides to the accompaniment of . . . 'atrocities', and concluded in an atmosphere of enduring animosity. Yet [it] is surprising that Irish leadership retained so much of its English political heritage. It is almost as if there had been a serious failure of political imagination.[22]

Judicial and constitutional conservatism have allowed Irish defamation law to remain remarkably close to its English common law origins. But the common law of defamation was not designed for a modern democracy with a free press, and Ireland's libel laws have a profound effect upon freedom of expression. If Ireland is to be a modern democracy, as its constitution asserts that it is, and the European Convention on Human Rights demands, it must protect a core area of free expression in order to allow the press (without the fear of repercussion) to keep the public informed about matters of concern. Once this minimum degree of freedom of expression is attained, Irish courts can begin to weigh other interests, including the right to one's good name, against free speech interests.

Reforming Irish defamation law is therefore essential to Ireland's status as a democracy. It is also required by Ireland's constitutional guarantee of freedom of expression. Ireland's Supreme Court should review current defamatory law and impose necessary reforms in order to render it constitutional.

Part II of this Note will examine Irish constitutional history, with attention to the conservative, traditionally often English,

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21. *See infra* notes 89-94 and accompanying text.

22. LOREN P. BETH, THE DEVELOPMENT OF JUDICIAL REVIEW IN IRELAND 1937-1966, at 2 (1967). Beth goes on to suggest that the reason for Ireland's failure to break away from English constitutionalism may actually lie in the fact that the Irish were never very completely Anglicized, as the American colonists were, and in the fact that Americans had the opportunity to develop a unique political approach before independence. *See id. See also* discussion infra Part I.

influences that have led to Ireland's avoidance of an American-style constitutional review. In Part III, this Note will describe the current Irish defamation law accompanied by an analysis of the Irish decision, *Campbell-Sharp v. Independent Newspapers (IRE), Ltd.* This section will also survey the impact of defamation law on freedom of expression. Part IV will discuss the level of freedom of expression required by the Irish Constitution and the European Convention on Human Rights and propose reforms to the law of defamation. Part V will conclude with some final comments.

II. IRISH CONSTITUTIONAL HISTORY AND ORIGINS OF THE CRISIS IN DEFAMATION LAW

The Irish were bold enough to fight and win a war of independence from Great Britain in this century.[23] Even now, the Irish remain in many respects suspicious of governmental authority, which they associate with British oppression.[24] Yet the Irish Constitution that was born from the ashes of British rule is essentially a conservative document, solicitous of the legal status quo.[25] A number of political forces in play during the early years of the Irish State, some of which continue today, meant that the Irish constitution was sometimes more strongly influenced by British principles of governance than more modern constitutional ideals found in the United States. Without understanding the political context surrounding the birth of the Irish Constitution, neither the current role of the Constitution in Irish law nor the particular balance the Constitution strikes as to freedom of the press makes sense, at least from the perspective of American constitutionalism.

The history of the modern Irish state began with the Easter Rising of 1916, in which a small band of rebels occupied the O'Connell Street General Post Office in the heart of Dublin and fought off British forces for several days before they were captured.[26] Most of the leaders of the uprising were shot

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23. *See* JOHN O'BIERNE RANELAGH, A SHORT HISTORY OF IRELAND 182-200 (1983) (discussing the uprising that resulted in the creation of the Irish Free State).

24. For example, suspicion is perhaps an important reason why Ireland has abolished the death penalty.

25. *See* RANELAGH, *supra* note 23, at 210.

26. *See* AODOGÁN O' RAHILLY, WINDING THE CLOCK: O'RAHILLY AND THE 1916 RISING 207-25 (1991). For a contemporary poet's reaction to the Easter Rising see WILLIAM BUTLER YEATS, *Easter 1916*, in SELECTED POEMS AND THREE PLAYS 83, 83-85 (M. L. Rosenthal ed., 1986). For an account of the events leading to the rising, as well as the rising itself and its aftermath, see RANELAGH, *supra* note 23, at 175-85.

immediately afterwards, without trials, and outrage at their treatment by the British renewed popular interest in Irish independence.[27] Although a military failure, the uprising marked the beginning of a war that would end in late 1921 with the signing of a peace treaty between Great Britain and Ireland.[28] The Articles of Agreement for a Treaty between Great Britain and Ireland declared the existence of an Irish Free State that had "the same constitutional status . . . as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa."[29] The Treaty provided for a right to full internal governance, a military force, and international status as an independent state.[30] The Treaty also provided that a provisional government would govern Ireland until December 16, 1922, when a new constitution of the Irish free state, confirmed by the British Parliament, would take effect.[31]

The Treaty barely passed in *Dáil Éireann*, the Irish Parliament whose members had been elected in 1920 through electoral machinery put in place by an act of the British Parliament that same year.[32] Those who opposed the Treaty, led by Eamon de Valera, did so on the grounds that it provided peace at the expense of a united Ireland, since the counties of Northern Ireland were allowed to vote to remain British.[33] Civil war ensued in the south of Ireland, during which the majority government, consisting of *Fine Gael* party members and led by Michael Collins, drafted the Constitution of the Irish Free State.[34] Great Britain was consulted during the drafting, and in fact required some of the more republican[35] provisions to be altered.[36] Although Collins

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27. *See* CASEY, *supra* note 16, at 4.

28. *See id.* at 5.

29. ANGELA CLIFFORD, THE CONSTITUTIONAL HISTORY OF EIRE/IRELAND 27 (1985) (quoting Articles of Agreement for a Treaty between Great Britain and Ireland, 1922).

30. *See* CASEY, *supra* note 16, at 6 (citing LEO COHN, THE CONSTITUTION OF THE IRISH FREE STATE 50 (1932)).

31. *See id.* at 7-8.

32. *See id.* at 5-6. The vote was 64-57. *See id.* at 6.

33. *See id.* at 8.

34. *See id.*

35. "Republican" refers, in this context, to Irish movements advocating Irish unity, i.e., the union of Northern Ireland with the Republic of Ireland in the South. *See* RANELAGH, *supra* note 23, at 211. Therefore, De Valera's Fianna Fáil party, formed in the waning days of the Civil War and composed of those who opposed the Treaty, is referred to as Republican. *See* JOHN BOWMAN, DE VALERA AND THE ULSTER QUESTION 1917-1973, at 93-95 (1982). During the Civil War this party called itself the I.R.A. (Irish Republican Army) party, since it remained committed to Irish independence it saw as incomplete. *See* RANELAGH, *supra* note 23, at 190-294 (discussing the formation of the I.R.A.).

36. *See* CASEY, *supra* note 16, at 87. A committee of nine men, chaired by Michael Collins, who was also serving as Chair of the Provisional Government and

and his colleagues had intended the Irish Free State to be unconditionally autonomous, with no remaining obligations to Britain, the Constitution adopted in 1922 contained an oath to the Crown and procedural provisions appropriate for a commonwealth.[37]

In addition to concern that Great Britain would not ratify the 1922 Constitution, the framers had another incentive to temper the republican influence upon the document: the *Fine Gael* government feared that any hopes of Northern Ireland joining the Free State would be dashed if the language offended the majority of Protestants in the North.[38] At the same time, the *Fine Gael* government faced pressure from *Fianna Fail* criticisms that the Constitution was likely only to further demonstrate the State's continued dependence on Great Britain.[39]

The 1922 Constitution did enumerate certain fundamental rights, including: trial "in due course of law," jury trial for serious criminal offenses, a habeas corpus provision, inviolability of one's dwelling, freedom of conscience and religious belief, and a right to free primary education.[40] Article 9 guaranteed freedom of expression, assembly and association, but subjected these freedoms to "regulating" statutes.[41]

None of these rights was enforced, however, since judicial review of the constitutionality of statutes was nonexistent under the 1922 Constitution.[42] This lack of judicial review was due in part to the fact that the Constitution contained a free amendment clause that provided for constitutional amendment through the same procedure as ordinary legislation.[43] Thus, the Irish Parliament, the *Oireachtas*, could easily render moot a ruling of unconstitutionality by amending the Constitution.[44] Although the

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Minister of Finance to the *Dail*, was given the task of drafting the document. Brian Farrell, *The Drafting of the Irish Free State Constitution: I*, 5 IRISH JURIST 115, 117 (1970). Among those most involved were Hugh Kennedy, later Attorney General and Chief Justice of the Supreme Court, James Douglas, a young Quaker republican, and C.J. France, an American lawyer affiliated with a U.S.-based republican organization. *See id.* at 117-18.

37. *See* Farrell, *supra* note 36, at 127-31; CASEY, *supra* note 16, at 9.

38. *See, e.g.*, Farrell, *supra* note 36, at 121-22 & n.30.

39. *See id.* at 125. Collins wished the Constitution to be as simple as possible, with minimal references to the Crown, in order to "give answer" to De Valera's accusations. *See id.*

40. CASEY, *supra* note 16, at 12-13.

41. *See id.* at 13.

42. *See id.* at 12.

43. *See id.* at 13.

44. *See id.* The heart of English constitutionalism is the superior power of Parliament over all other sources of law. *See id. See also* BETH, *supra* note 22, at 7 (discussing the new Constitution and parliamentary emphasis).

free amendment clause was to expire after eight years, it was indefinitely extended.[45] The effect of the clause was that any bill in conflict with the Constitution was simply to be regarded as a constitutional amendment.[46]

The lack of judicial review could also be attributed to the fact that judges, who had been trained in the English system, continued to judge as though Parliament, rather than the Constitution, was the supreme authority.[47] Judges were Irish-born, but educated in England,[48] usually conservative,[49] and often Protestant.[50] Not surprisingly, Irish independence did not signal the end or even the decline of English common law in Ireland. Irish judges today refer often to English common law, and even to recent English decisions. Unless Irish law or the Constitution has specifically refused to adopt a rule, all common law is presumed to have survived Ireland's break from Britain.[51] In a judicial system where common law and the legislature reign supreme, there is little room for the development of constitutional judicial review.

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45. *See* CASEY, *supra* note 16, at 13.

46. *See id.*

47. *See* BETH, *supra* note 22, at 4. It is interesting to note that scholars disagree on to what extent the later 1937 Constitution was meant to preserve the supremacy of the legislature. Casey claims that even the 1922 Constitution "plainly rejected" the British doctrine of sovereignty of parliament. CASEY, *supra* note 16, at 12. Beth, on the other hand, claims that "[t]here is little doubt" that the Bunreacht "was intended to embody this principle" of parliamentary supremacy, despite the new addition of a Bill of Rights. BETH, *supra* note 22, at 7.

48. For an account of the poor state of legal education in Ireland in the eighteenth and nineteenth centuries, see J.F. McEldowney & Paul O'Higgins, *The Common Law Tradition in Irish Legal History, in* THE COMMON LAW TRADITION: ESSAYS IN IRISH LEGAL HISTORY 13, 15-16 (J.F. McEldowney & Paul O'Higgins eds., 1990).

49. *See* CASEY, *supra* note 16, at 13. *See also* BETH, *supra* note 22, at 6-7 ("Judicial attitudes the world over are notoriously conservative, especially on matters involving the judiciary itself. This has been a particularly pronounced tendency of common law judges . . . ."). Beth suggested in 1967 that despite legal realist criticism, in the last two hundred years the common law tradition had increasingly encouraged a reluctance to engage in creative jurisprudence which amounted to "judicial eunuchism." *Id. But see* Kevin Myers, *An Irishman's Diary*, IRISH TIMES, Feb. 19, 1998, at 19, *available in* 1998 WL 6227212 (criticizing the authoritarian judicial "tampering" with the Constitution in order to curtail freedom of the press: "As the stars of the bishops of the old order wane in our night skies, a new stellar episcopacy rises to replace them, bearing not mitres but wigs, not croziers but staffs. Believe me, they will be no more clement than the last lot, and probably a damned sight more pompous . . . .").

50. *See* BETH, *supra* note 22, at 17.

51. *See, e.g.*, Corway v. Independent Newspapers (IRE), Ltd., [1996] 1 I.L.R.M. 432, *available in* LEXIS, INTLAW Library, IRECAS File. ("It is safe to assume the that the Oireachtas [the Dáil] considered that the common law offences of blasphemy and blasphemous libel would have been carried over under the Constitution as not being inconsistent with it.").

Nor did judicial conservation and exaltation of common law end with the repeal of the 1922 Constitution in 1937.[52] In 1932, the *Fianna Fáil* party, though defeated in the Civil War, won control of the *Dáil* through general election.[53] Eamonn de Valera, leader of *Fianna Fáil*, became Prime Minister, *Taoiseach*, and the party's first act was to introduce the Constitution (Removal of Oath) Bill.[54] For de Valera, the 1922 Constitution represented a concession to British rule, and by 1935 he had decided to destroy it completely.[55] De Valera had the clout both to declare to the public that a new constitution was to be drafted and to control every element of the drafting process.[56] The committee appointed for this purpose was made up of his own civil service employees, rather than ministers.[57]

The constitution adopted in 1937 and still in effect today, the *Bunreacht na hÉireann*, contains stronger provisions describing personal rights and an expanded power of the courts to review legislation for constitutionality.[58] The American influence on this language is considerably more visible than it was in the 1922 constitution.[59] Articles 40 to 44 of *Bunreacht na hÉireann* make up the section entitled Fundamental Rights.[60] Among the rights guaranteed are inviolability of the dwelling, freedom of association and assembly, property rights, and freedom of religion.[61] Provisions in other sections guarantee criminal rights, and voting rights.[62] Freedom of expression is contained in Article 40.6.1.i:

> The State guarantees liberty for the exercise of the following rights, subject to public order and morality:
>
> i. The right of the citizens to express freely their convictions and opinions.
>
> The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

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52. *See* CASEY, *supra* note 16, at 19-20.
53. *See id.* at 15.
54. *See id.* at 15-16.
55. *See* Ronan Fanning, *Mr. de Valera Drafts a Constitution*, *in* DE VALERA'S CONSTITUTION AND OURS 33, 35 (Brian Farrell ed., 1988).
56. *See id.* at 36.
57. *See id.* at 39.
58. *See* BETH, *supra* note 22, at 4; J.M. KELLY, THE IRISH CONSTITUTION 671 (Gerald Hogan & Gerry Whyte eds., 3d ed. 1994).
59. *See* BETH, *supra* note 22, at 1.
60. *See* KELLY, *supra* note 58, at 671.
61. *See* CASEY, *supra* note 16, at 309.
62. *See id.*

> The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.[63]

This provision clearly guarantees some right of free speech, although perhaps not an absolute right.[64] Yet, there is little judicial interpretation of this passage. Freedom of expression, especially as it may be affected by current libel law, is not a well-developed judicial concept.[65]

This dearth of interpretation is not due to a lack of constitutional language to authorize judicial review. In fact, the passage providing for judicial review in the *Bunreacht* is unambiguous. Article 34.3.2 states:

> Save as otherwise provided in this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court or Supreme Court.[66]

In addition, Article 34.4.4 forbids laws to be excepted from judicial review.[67] And in a provision unlike any in the older Constitution, the President of Ireland is empowered to refer any constitutionally questionable statute to the Supreme Court for review.[68]

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63. IR. CONST. art. 40.6.1.i.

64. In fact, the Supreme Court decided in 1965 in Ryan v. Attorney General that no personal right is absolute. *See* KELLY, *supra* note 58, at 686 (citing Ryan v. Attorney Gen., [1965] I.R. 294).

65. *See, e.g.*, Nial Fennelly, *The Irish Constitution and Freedom of Expression*, *in* CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW 185 (Dierdre Curtin & David O'Keeffe eds., 1992).

66. IR. CONST. art. 34.4.2.

67. *See id.* art. 34.4.4.

68. *See id.* art. 26.1. The Provision states:

> The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof.

Id. It is noteworthy that the review provided above is not prompted by an affected individual's challenge, and therefore is performed without a fact setting. At least one scholar finds this type of review insufficient as a result, especially since Article 34.3.3 forbids any later judicial review once a statute has been reviewed subject to Presidential referral. *See* BETH, *supra* note 22, at 5. Beth is similarly troubled by the condition in Articles 26.2.2 and 34.4.5 that no dissenting or concurring opinions may be published in constitutional review cases. *Id. See also* CASEY, *supra* note 16, at 267-71.

Despite the inclusion of these provisions for fundamental rights and judicial review, which were obvious influences of the U.S. Constitution, the *Bunreacht* contained other elements which tended to undermine these provisions. Notably, Article 46 allows amendment of the Constitution by legislation passed by both houses of the *Oireachtas* after a majority vote by referendum.[69] In addition, an amendment passed in 1941 provides that whenever the Supreme Court decides the constitutionality of a statute, it publishes and acknowledges only a majority opinion, and no concurring or dissenting opinions.[70]

These provisions reflect de Valera's purpose in enumerating individual rights: their inclusion was meant to signify "primarily . . . a statement of the powers of the legislature."[71] They were to be mere "headlines to the legislature," according to a statement de Valera made during debate over his draft in the *Dáil*.[72] In fact, scholars have wondered why he included the judicial review provision at all,[73] as he believed courts had no power to interfere should the *Oireachtas* neglect to uphold a constitutional right.[74]

So in a fundamental sense, de Valera had little interest in enforcing individual rights. His purpose in drafting a new constitution was not the creation of an innovative rights-based constitutional state. He viewed the new Constitution as the ending of an old regime more than the beginning to of new one.[75] His "designs had less to do with inaugurating a brave new world than with bringing an old and—from de Valera's perspective—desperately unhappy world to a close."[76] In addition, in drafting

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69. *See* Thomas A. Finlay, *The Constitution of Ireland in a Changing Society*, *in* CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW, *supra* note 65, at 137, 137.

70. *See id.* at 138.

71. BETH, *supra* note 22, at 6. *See also* KELLY, *supra* note 58, at 16-17.

72. KELLY, *supra* note 58, at 671 (quoting 68 Dáil *Debates* 2167 (June 1937)). De Valera continued, "I think the Legislature ought to be enabled in its own judgment to decide [what the public interest consists in] and not the courts . . . . The Legislature has the responsibility . . . of seeing, in the passing of its laws, that the rights of the individual . . . and the rights of the community . . . do not conflict and are properly coordinated." *Id.* (quoting 68 Dáil Debates 2167 (June 1937)).

73. *See* BETH, *supra* note 22, at 4. Beth confesses that he cannot answer the question, but suggests that it may be that it followed naturally in a written constitution, influenced by the memory of past British abuses, and the examples of America, Australia, and Canada. *See id.* at 6.

74. *See* KELLY, *supra* note 58, at 671 (citing de Valera's response to this issue during the *Dáil* debate on adopting the Constitution).

75. *See* Fanning, *supra* note 55, at 33-34.

76. *Id.* at 34. Some have noted that de Valera's distrust of things British was in some respects itself the source of the failure of the Irish Constitution to break away from Ireland's British legal heritage. *See* BETH, *supra* note 22, at 5.

the 1937 Constitution, de Valera was influenced by pro-Catholic pressures as well as the need to fashion a cohesive concept of Irish nationhood that could serve to unite the Irish people.[77] The bitter Civil War was still a fresh memory, and to a large extent Ireland remained divided into two political camps.[78] De Valera was sensitive to the fact that he himself had been unwilling to recognize the Irish government in the past, and that the legitimacy and independence of the Irish state could not be taken for granted.[79] The Constitution was meant to assert once again, and finally, that Ireland was a viable political state, independent of Great Britain.[80] But although de Valera was addressing real needs of Ireland at the time, his focus on asserting separateness may actually have assured that the resulting document describes a state that could only understand itself in relation to its former oppressor—a state not yet ready to develop its own unique approach to governance.[81] Some have suggested that while the U.S. Constitution by its language creates a state and a set of supreme laws, the Irish Constitution, rather than being performative, is a diplomatic or rhetorical instrument meant to convey a statement about Irish statehood.[82]

Thus, while the language of *Bunreacht na hÉireann* declared more extensive personal rights than its predecessor, and contained a

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For instance, he apparently was reluctant to give Irish courts much power because he saw them as survivors of English rule which would only enforce the English status quo, and he intended to institute at a later point an entirely different court system. *See id.* This new system was formed only in 1961. *See id.*

77. *See* Fanning, *supra* note 55, at 40-43. The Catholic influences on the Irish Constitution have been discussed at length by others, and are not crucial to an understanding of defamation law and judicial review in Ireland. Suffice it to say that de Valera's Constitution fell just short of declaring that the Catholic Church is the one true Church, and authority to govern is seen as flowing from God, through the People, to their elected officials. *See id.* at 40-41; IR. CONST. pmbl. In addition, Catholicism served as an important unifier for the Irish, since under the British oppression had often been specifically anti-Catholic, and therefore for the Irish, Catholicism was an integral part of their national identity and their new liberty, just as Israel felt itself free at last to become a Jewish religious state. *See* Fanning, *supra* note 55, at 42 (discussing the importance of the Catholic Church to unite a divided people).

78. *See* Fanning, *supra* note 55, at 42.

79. *See id.* at 40-43.

80. *See id.* at 42-43.

81. Fanning suggests that it is a testament to the success of the Constitution that de Valera's concerns regarding the legitimacy of the Irish State now seem rather dated, since now the Irish do take nationhood for granted. *See id.* at 44.

82. *See, e.g.*, Peter Sutherland, *Twin Perspectives: An Attorney General Views Political and European Dimensions*, *in* DE VALERA'S CONSTITUTION AND OURS, *supra* note 55, at 174 (quoting John Kelly, *The Constitution: Law and Manifesto*, 35 ADMINISTRATION 209 (1988)) ("[T]he Constitution was conceived in part as a manifesto rather than as bare law.").

strengthened judicial review provision, it nevertheless reflected a continued Irish ambivalence to written constitutionalism and fundamental rights jurisprudence. An early Supreme Court case predating the *Bunreacht*, *The State (Ryan) v. Lennon*, addressed this ambivalence.[83] The three justices struggled over whether certain unenumerated rights are so fundamental that they cannot be abridged by the *Oireachtas* through amendment.[84] The majority adopted the positivist view that the Court has the jurisdiction to recognize only those rights to which the Constitution gives expression.[85] Chief Justice Kennedy dissented, arguing the natural law position that divine law trumps human law, and therefore the *Oireachtas* had exceeded its authority in gutting fundamental criminal provisions of the Constitution through ordinary legislative procedure.[86]

The net effect of the absence of judicial interpretation of the *Bunreacht* was that common law (and legislative statutes) continued to act as the supreme authority for determining the legal rights and obligations of Irish citizens. Likewise, the Irish courts' initial strict adherence to precedent contributed to the continued primacy of English common law. The courts adopted the House of Lords rule that even the Supreme Court must abide by its own previous decisions.[87]

In sum, the *Bunreacht* was framed in a context of "American" influences such as written constitutionalism, enumerated fundamental rights, and a power of judicial review on the one hand, and "English" influences such as the supremacy of Parliament over the constitution and courts, and a strong common law tradition maintained by a naturally conservative, English-educated judiciary on the other side. In addition, the attempt to fashion a uniquely Catholic modern state drew much of the attention and imagination of those responsible for shaping Ireland's constitutionalism.[88] De Valera's new constitution, *Bunreacht na hÉireann*, was therefore unlikely to herald any radical legal shift away from English constitutional and common law principles. This English conservatism and general ambivalence toward an American notion of individual rights remain distinguishing characteristics of Irish jurisprudence, and

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83. KELLY, *supra* note 58, at 672 (citing The State (Ryan) v. Lennon [1935] I.R. 170).

84. *See id.*

85. *See id.* at 672 (citing The State (Ryan) v. Lennon [1935] I.R. 170 (Fitzgibbon, J., concurring)).

86. *See id.* at 673.

87. *See* BETH, *supra* note 22, at 9.

88. *See id.* at 2.

as a result, the Supreme Court has hesitated to review the constitutionality of the law of defamation.

III. CURRENT IRISH DEFAMATION LAW AND ITS EFFECTS ON FREE EXPRESSION

Before discussing what constitutional review of defamation would or should look like, it is necessary to understand current defamation law, and how it is damaging to free speech.

A. *Irish Law of Defamation*

1. The Origins of Irish Defamation Law

Before the Republic of Ireland won its independence in 1921, Irish courts applied the common law of England, and jurists generally believed that they had achieved uniformity with England as regards the law of defamation.[89] In fact, despite this "predominant and almost embarrassing desire"[90] to conform to English law, Irish law and practice was somewhat distinctive, especially in procedure.[91] Nevertheless, Irish civil defamation law, both common law and statute, is very similar to English common law, and is often distinguished only in its tendency to maintain traditional common law with greater vigor.[92] The main statute governing defamation is the Defamation Act (1961), which alters the common law in limited areas.[93] English and Irish sources have sometimes defended the common law as sufficiently protective of free expression, but the common law does not contain any explicit mechanisms for upholding the right of free expression, and thus provides little protection.[94]

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89. *See* MARC MCDONALD, IRISH LAW OF DEFAMATION 1-2 (1987) [hereinafter IRISH LAW OF DEFAMATION]. For instance, one Irish judge stated in 1874: "The law of libel in England and the law of libel in Ireland are the same—the same in principle and in practice." *Id.* (quoting Stannus v. Finlay [1874] I.R. 8 CL 264, 290.)

90. *Id.* at 2.

91. *See id.* The situation may be likened to American states' adoption of language identical to a federal rule, where over time that language may be interpreted quite differently in different states.

92. *See id.* McDonald notes that often Irish judges clung to an outdated English common law principle, only to see England reform or eliminate its law shortly afterwards. *See id.* To some extent that remains a common pattern even now in defamation law. *See id.* at 2-3 & n.11.

93. *See* CASEY, *supra* note 16, at 461.

94. *See, e.g.*, Eoin O'Dell, *Does Defamation Value Free Expression? The Possible Influence of* New York Times v. Sullivan *on Irish Law*, 12 DUBLIN U. L. J.

Defamation law is traditionally grounded in the idea that a person's good name is a valuable economic commodity, and when someone loses her good name, she has suffered an injury not just to her feelings, but to her livelihood.[95] Monetary damages in libel and slander suits are meant to compensate for this very real injury when it results from false publications.[96]

The civil law of defamation was traditionally judge-made. With the advent of the new Irish state, this body of law remained relatively unchanged despite the eventual enactment of the Defamation Act (1961).[97] In the absence of judicial review, the development of which was stilted by the Supreme Court's adoption of the rule of precedent, the constitutionality of the restriction placed on expression by this very traditional body of law has rarely been questioned.[98]

2. Prima Facie Case

Under the common law and the Defamation Act, a plaintiff must make out the prima facie case that: (1) a statement is defamatory, (2) it was made of and concerning the plaintiff, and (3) it was "published" to a third party.[99] Because an injury to reputation may be hard to quantify, but nevertheless naturally follows from certain kinds of accusations, at common law the presumption in a libel suit is that an injury has been suffered.[100] A plaintiff in a slander suit, on the other hand, must prove actual damages.[101] A jury determines whether a plaintiff has proven the prima facie case and decides upon any defenses presented by the defendant.[102] If the jury finds for the plaintiff, it determines the damages as well.[103]

Proving a statement is defamatory or has a defamatory effect is relatively easy; it is said that the law in Ireland "starts from the premise that the maker of a disparaging statement is liable . . . .

50, 57 (1990) (quoting the "Spycatcher" case, Attorney Gen. v. Guardian Newspapers 1 W.L.R. 1248 (1987) (Bridge, L.J., dissenting)) [hereinafter *Defamation Value*].

95. *See* Marc McDonald, *Defamation Reform—A Response to the LRC Report*, 10 IRISH L. TIMES 270, 270-71 (1992) [hereinafter *Defamation Reform*].

96. *See id.* at 271.

97. *See* CASEY, *supra* note 16, at 461.

98. *See id.* at 461-65.

99. *See* LAW REFORM COMMISSION, CONSULTATION PAPER ON THE CIVIL LAW OF DEFAMATION 6 (1991) [hereinafter COMMISSION PAPER].

100. *See id.*

101. *See id.* at 36.

102. *See* BRYAN M.E. MCMAHON & WILLIAM BINCHY, IRISH LAW OF TORTS 631-32, 661 (2d ed. 1990).

103. *See, e.g., infra* text accompanying notes 172-74.

[It] starts, therefore, with an easily established and potentially immense range of liability . . . ."[104] A plaintiff must show that the "statement tends to lower the person in the eyes of society, or in the estimation of 'right-thinking members of society generally' or . . . tends to hold that person up to ridicule, hatred, or contempt, or causes the person to be shunned or avoided."[105] Defamation is one of the few civil causes of action in Ireland which is tried before a jury, precisely because liability depends upon the opinion of "right-thinking citizens."[106] Unlike civil procedure in the United States, Irish procedure does not provide for summary judgment. Instead, a case goes to a jury as soon as a judge determines that the statement at issue is "capable" of having a defamatory meaning.[107]

Ireland's defamation scheme is one of strict liability: fault or intent is not relevant to the prima facie case, nor does it constitute a defense. All that is required in the way of fault is malice presumed from the making of the defamatory statement, sometimes called "malice in law."[108] The use of the word "maliciously" in a statement of claim is purely a formality.[109]

3. Defenses

Plaintiffs do not have to prove that a defamatory statement is false, but if a defendant can prove that the words complained of are true "in substance and fact" she may invoke the defense of "justification."[110] The law therefore imposes a difficult burden of proof upon the defendant to persuade the jury through admissible evidence that the entire defamatory statement is factually true.[111] In practice, courts require a high degree of accuracy for this

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104. IRISH LAW OF DEFAMATION, *supra* note 89, at 6.

105. COMMISSION PAPER, *supra* note 99, at 7 (quoting Sim v. Stetch [1936] 2 All E.R. 1237, 1240 (Lord Atkin)). The test is an objective one; the intent of the defamer is irrelevant to whether a statement is defamatory. *See id.* at 10.

106. *Id.* at 7.

107. *See* MCMAHON & BINCHY, *supra* note 102, at 631-32.

108. *See* COMMISSION PAPER, *supra* note 99, at 29-30.

109. *See id.* at 30.

110. United States common law calls this the defense of "substantial truth." JOHN WADE ET. AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 855 (9th ed. 1994).

111. *See* IRISH LAW OF DEFAMATION, *supra* note 89, at 6. It is difficult to underestimate the importance of the issue of burden of proof as to a statement's truth. In the recent English case of *McDonald's v. Greenpeace* (known as the McLibel case), the environmentalist defendants were considered to have won a great victory notwithstanding a verdict and liability, when they were able to prove in court the truth of four out of seven of the claims they made about McDonald's food and practices (including one claim that McDonald's marketing exploited children). *See* John Vidal, *McLibel 2: The Dogged Duo Return with 63 Objections*, GUARDIAN (London), Jan. 13, 1999, at 10, *available in* 1999 WL 5105847.

defense, and journalists in particular have often complained that the justification defense is seldom available to them because their sources are unwilling to testify in court.[112] Further, if a defendant strives too hard to prove the truth of the statement, by introducing disparaging evidence concerning the plaintiff or engaging in strenuous cross-examination of the plaintiff, and the jury remains unconvinced that she has met her burden, she may actually cause more damage to her case. A jury may award the plaintiff aggravated damages based on these further attacks on her character, and no privilege protects the defendant from these damages.[113] As a result, defendants commonly refrain from attempting this defense.[114]

"Fair comment" is the other important substantive defense available. To successfully employ this defense, a defendant must prove that "the words complained of were fair comment on a matter of public interest."[115] Again, this defense places a heavy burden on the defendant, who must prove all of the following elements: 1) the statement consists of comment, 2) the comment is supported by fact, 3) its subject matter is of public interest, and 4) the comment is "fair."[116] In addition, the defense is defeated if, after all these elements are proven, the plaintiff is able to prove that the statement was motivated by "malice."[117] Malice here differs from "presumed malice" at issue in the prima facie case—it is a test referring to publication of a statement actually motivated by spite or by ulterior motives.[118] Fairness is determined by the

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112. *See* COMMISSION PAPER, *supra* note 99, at 179.

113. *See* IRISH LAW OF DEFAMATION, *supra* note 89, at 111-12.

114. *See id.* at 114-15.

115. COMMISSION PAPER, *supra* note 99, at 43.

116. *Id.* at 57. Fairness consists of the existence of a logical connection between the comment and its supporting facts. *See* IRISH LAW OF DEFAMATION, *supra* note 89, at 209.

117. *See* COMMISSION PAPER, *supra* note 99, at 57. The determination of fairness is an objective test applied before the subjective test of malice. *See id.*

118. *See* IRISH LAW OF DEFAMATION, *supra* note 89, at 223-24. Note that in defamation law, "publication" refers to any communication of a statement to a third party, whether public or private. *See* HENRY MURDOCH, A DICTIONARY OF IRISH LAW 431 (2d ed. 1993).

McDonald may define this kind of malice too narrowly—he says it is the actual content of the statement that must not be motivated by spite or ill will, and therefore the dispassionate judgment of a critic who harbors ill will should qualify for the defense. *See* IRISH LAW OF DEFAMATION, *supra* note 89, at 223-24. It is doubtful that Irish courts and juries construe malice so narrowly that, once a jury suspects a wrong or improper motive in the mind of the publisher, they may disallow the defense. *See* COMMISSION PAPER, *supra* note 99, at 74-75. In addition, some courts appear to allow malice to be found where a publisher was motivated by profit. *See id.* at 75.

objective test of whether the comment is one "an honest, albeit prejudiced, person might make in the circumstances."[119]

The requirement that a "fair comment" be based on facts proven to be true makes this defense particularly difficult to establish. The defense of fair comment derives from nineteenth century courts' unwillingness to apply a qualified privilege to public comment, under which an untrue statement would nevertheless be protected as long as it was not made with actual malice.[120] The courts chose to make the fair comment defense harder to prove by requiring, in addition to malice, proof of the facts upon which the comment relies.[121] This requirement leads to lengthy discussions as to the distinction between facts and comment, and such discussions lead, in turn, to byzantine formalities in pleading.[122] Moreover, courts require the facts forming the basis for a comment to be expressly stated or indicated as such in the statement; otherwise, the statement is treated as an assertion of fact and the defense of fair comment is inapplicable.[123]

Whether a matter is of public interest is a question of law, to be decided by a judge.[124] While there is no agreed-upon definition of public interest, one authority lists the following subjects as qualifying for the defense: 1) the public conduct of a public official, 2) political or state matters, 3) Church matters, 4) the administration of justice, 5) the management of public institutions, 6) the administration of local affairs, 7) books, pictures, works of art, public performances, 8) any place or type of public entertainment, 9) anything that may be fairly said to invite comment.[125]

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119. COMMISSION PAPER, *supra* note 99, at 57 (citing Chernesky v. Armadale Publishers, 90 D.L.R. (3d) 321, 345 (1978) (Dickson, J., dissenting).

120. For a discussion of qualified privilege defenses, see COMMISSION PAPER, *supra* note 99, at 88-103; IRISH LAW OF DEFAMATION, *supra* note 89, at 142-208. For instance, qualified privileges protect statements made out of legal, and sometimes moral duties, and in judicial proceedings. *See* COMMISSION PAPER, *supra* note 99, at 88-89.

121. *See* IRISH LAW OF DEFAMATION, *supra* note 89, at 213-14.

122. *See* COMMISSION PAPER, *supra* note 99, at 59. For example, attorneys generally plead fair comment as a "rolled up plea": "Insofar as the words complained of consist of allegations of fact, they are true in substance and in fact, and insofar as they consist of opinion they are fair comments made in good faith and without malice upon the said facts, which are matters of public interest." *Id.* at 59. Despite its appearance, this plea is not asserting the defense of justification, it is merely addressing the element of fair comment requiring true supporting facts. *See id.* at 59-60.

123. *See id.* at 60-61.

124. *See id.* at 71.

125. *See id.* at 71-72 (citing LIBEL AND SLANDER 315-24, paras. 732-46 (8th ed.)).

In light of the lack-of-malice and supporting-facts requirements, as well as the relatively narrow conception of public interest, it is no wonder that the fair comment defense rarely prevails. And, again, there is a powerful incentive not to even raise the defense, since a failed attempt to prove the truth of supporting facts may, like a failed attempt to prove justification, result in aggravated damages.[126]

Section 21 of the Defamation Act of 1961 provides a defense for unintentional defamation under some conditions.[127] An innocent (i.e., without malice) defamer may promptly retract the statement and make an offer of amends with an attached affidavit explaining the mistake; if the defamed party then refuses the offer, the defamer may raise a complete defense in a subsequent suit.[128] Absence of malice is hard to prove, however, and many have criticized the number of formalities required for this defense as overly burdensome.[129]

4. Remedies

Compensatory damages are available to a plaintiff according to the jury's estimation of the extent of actual injury to her reputation.[130] Although defamation law is premised upon this reputational injury, compensatory damages may also include compensation for emotional distress.[131] Plaintiffs in libel cases have assumed damages; they need not prove their injury, and a showing of actual damages will not increase compensation.[132] In addition, "aggravated compensatory damages" may be awarded for further injury to the plaintiff's feelings and dignity caused by particularly offensive conduct by the defendant during the course of a trial, whether inside or outside the courtroom.[133] Aggravated

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126. *See id.* at 62.

127. *See* IRISH LAW OF DEFAMATION, *supra* note 89, at 229-30; COMMISSION PAPER, *supra* note 99, at 104-06.

128. *See id.*

129. *See* IRISH LAW OF DEFAMATION, *supra* note 89, at 231-33; COMMISSION PAPER, *supra* note 99, at 106-07. It may be difficult to prepare the affidavit on time, for instance. *See* IRISH LAW OF DEFAMATION, *supra* note 89, at 231.

130. *See id.* at 240.

131. *See id.*

132. *See id.* at 241-42.

133. *See id.* at 240-41. *See also* COMMISSION PAPER, *supra* note 99, at 116-17. Conduct affecting aggravated damages includes conduct at trial, as when a defendant fails in an attempt to prove justification or supported facts, discussed above, or the bad reputation of the plaintiff for damages purposes—a particularly harsh rule for defendants. *See id.* at 117. Conduct may also include statements to the press, etc. For instance, during a recent libel case, *De Rossa v. Irish Independent*, comments made on a radio show by the journalist who first wrote

compensatory damages are considered distinct from punitive damages, but in practice this line becomes hazy.[134] Punitive damages are somewhat controversial, and are reserved for exceptional cases.[135] Nominal damages are available where a plaintiff seeks not compensation, but a declaratory judgement.[136]

Juries receive little guidance as to the amount of damages to award.[137] An important factor in determining damages is the "character, reputation, and position of a plaintiff."[138] While plaintiffs are presumed to have good reputations, evidence of a plaintiff's prominence may convince a jury to award greater damages.[139] Proving bad character, however, is one of the avenues available to the defendant for mitigation of damages.[140] A defendant may appeal a jury award on grounds of excessive damages; however, juries have wide discretion in this area and courts are reluctant to upset a verdict.[141] Generally damages are reduced only where a court finds that they are "perverse," the result of a "gross blunder," or "unreasonably large."[142]

B. *A Typical Case: Campbell-Sharp v. Independent Newspapers (IRE)*

Campbell-Sharp v. Independent Newspapers[143] is in many ways a typical Irish libel case. The plaintiff is a public figure—she is known as a media mogul and a socialite. The defendant is an Irish newspaper. The source of the claim is an accusation which, although possibly defamatory, seems relatively trivial, yet the damages awarded are very high. The case therefore provides a useful illustration of how Irish courts generally deal with defamation suits. In addition, the case demonstrates how decisions that seem somewhat unwise yet not outrageous begin to have a cumulative invidious effect upon freedom of expression.

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the statement at issue subjected him not only to aggravated damages, but also to a contempt of court action. Marie O'Halloran, *Dunphy Must Attend High Court for Contempt Hearing*, IRISH TIMES, Aug. 1, 1997, at 7, available in 1997 WL 12016966.

134. *See* COMMISSION PAPER, *supra* note 99, at 116.

135. *See* IRISH LAW OF DEFAMATION, *supra* note 89, at 241.

136. *See id.*

137. *See id.* at 242, 244-45.

138. *Id.* at 246 (quoting Barrett, C.J., in Barret v. Independent Newspapers, S.Ct., unreported, Mar. 12, 1986).

139. *See id.* at 246-47.

140. *See* COMMISSION PAPER, *supra* note 99, at 117-118.

141. *See* IRISH LAW OF DEFAMATION, *supra* note 89, at 243.

142. *Id.* at 244.

143. No. 5557 (Ir. H. Ct. May 6, 1997).

In April of 1992, Hugh Leonard's weekly column, "Leonard's Log," appeared in the Sunday Independent.[144] As usual, Leonard had written daily journal entries of light criticism and gossip about theater and entertainment, along with various personal comments and anecdotes. Campbell-Sharp objected to the following passage:

> *Thursday*
>
> A lady telephoned on behalf of Noelle Campbell-Sharp and asks if I should be gracing "Phil the Fluthers" Ball in Killarney. It is only a few months since . . . Ms. Campbell-Sharp's publishing company went to the wall owing me £5,000.00 for services rendered.
>
> The lady did not call then with her commiserations or to ask me if I was in need of a crust. But I am glad to see that she herself to no-one's surprise avoided the workhouse. I hope she will forgive my not attending the Kerry Ball. To use an expression much in vogue across the Atlantic, I gave at the office.[145]

Leonard was referring to an agreement he had signed after negotiations with Noelle Campbell-Sharp, in which he was commissioned to write several pieces on Irish hotels and restaurants for a travel book.[146] Campbell-Sharp was a prominent businesswoman, as well as a flamboyant public figure in Ireland in the 1980s, known for her ostentatious lifestyle, her extravagant parties, and her business sense.[147] Her chief claim to fame, however, was her ownership of *Irish Tatler* (IT), Ireland's leading beauty magazine, through her publishing company, Irish Tatler Publications Limited.[148] Leonard was never paid for his articles, as the publishing company that had bought out the *Irish Tatler* became insolvent.[149]

The gist of Leonard's passage was that someone who had claimed to be calling on Campbell-Sharp's behalf had tried to sell Leonard an expensive ticket to a charity ball that Campbell-Sharp

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144. *See* Plaintiff's Statement of Claim (Sept.28, 1992), Pleadings at 6, *Campbell-Sharp* (No. 5557).

145. *Id.* at 7 (quoting Hugh Leonard, Leonard's Log, IRISH INDEP., Apr. 26, 1992, at 3L). A statement of claim is equivalent to a complaint in the United States.

146. Transcript of Jury Action (Apr. 29, 1997), at 7-9, *Campbell-Sharp* (No. 5557).

147. *See, e.g.*, Liam Fay, *Deceiving to Flatter*, SUNDAY TIMES (London), Nov. 29, 1998, at 30, *available in* 1998 WL 21855516.

148. Campbell-Sharp's celebrity in Ireland is similar in different ways to that of both Helen Gurley-Brown (former editor of Cosmopolitan) and Donald Trump. See, for example, Fay, *supra* note 147, at 30, for an account of a radio interview with Mrs. Campbell-Sharp in which she expresses her admiration for Napoleon and for the corrupt Irish politician Charles Haughey.

149. *See* Plaintiff's Statement of Claim (Sept. 28, 1992), Pleadings at 10-11, *Campbell-Sharp* (No. 5557).

was organizing. Leonard commented that in light of the debt he was owed, which he was unlikely to recover, he had already made a sort of charity donation to Campbell-Sharp.

Leonard was wrong in one important regard: at the time he had agreed to write the travel pieces, Campbell-Sharp had just sold her publishing company to Robert Maxwell, a British publishing magnate, and she was serving only as company director, not owner.[150] The Maxwell Group declared insolvency soon afterwards.[151] It was not technically Campbell-Sharp, therefore, who owed a debt to Leonard, but the insolvent Maxwell Group.

In her pleading, Campbell-Sharp contended that Leonard had accused her of being "a selfish and/or dishonourable person, uncaring for the welfare of a person who had rendered his service to her publishing company for which she had not paid him."[152] Leonard was liable for such an accusation she contended, and the Sunday Independent was liable for knowingly publishing the statement in an attempt to profit from it.[153]

Leonard and Independent Newspapers (IRE) Ltd. responded in pleadings that the statement was not defamatory.[154] They also raised the defense of justification—that the statement was "true in substance and in fact," and in the alternative, the defense of fair comment—that the statement constitutes commentary on a matter of public interest, supported by true facts, and made in good faith without malice.[155] The defendants also stated, for purposes of mitigation of damages, that Campbell-Sharp had suffered no injury and that they had published the statement without actual malice.[156]

At trial, Campbell-Sharp's barristers emphasized malice; they argued that Leonard must have known that Maxwell had bought out IT, because the transaction was reported in the Irish Independent when it occurred.[157] Furthermore, Leonard knew from signing his contract that Campbell-Sharp was no longer in charge of the company.[158] Leonard was depicted as a sophisticated reviewer of culture who wined and dined throughout France at others'

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150. *See id.* at 8.
151. *See id.* at 11.
152. *Id.* at 7.
153. *See id.* at 7-8.
154. Defendant's Defence (Feb. 5, 1993), Pleadings at 14, *Campbell-Sharp* (No. 5557). A "defence" is the equivalent of an answer to a complaint in the United States.
155. *Id.*
156. *See id.* at 15.
157. *See* Transcript of Jury Action (Apr. 29, 1997), at 5-6, *Campbell-Sharp* (No. 5557).
158. *See id.* at 9-11.

expense.[159] Campbell-Sharp's attorneys portrayed her as grieving yet powerless to act as she watched the company she had once owned fall into mismanagement and financial troubles.[160] The thrust of the plaintiff's case centered, then, not on liability, but on the proper amount of damages. The plaintiff's attorneys argued that malice existed because the defendant knew that the statement was untrue. Her attorney's emphasized the weight of the injury to Campbell-Sharp's good name, and they sought general sympathy for their client.[161] In addition, the lawyers' emphasis on blameworthiness probably encouraged jurors to find Leonard liable although fault should be irrelevant to this determination.

After both sides had finished presenting evidence, Mr. Clarke, representing the defendants, and Mr. Mackey, representing the plaintiff, debated at length as to whether the defenses of justification and fair comment, as well as aggravated damages and punitive damages, should be allowed to go to the jury.[162] Plaintiff's arguments against instructing the jury on the fair comment defense conflated the question of intent, legally relevant only to damages, with a determination of public interest. Mackey argued that Leonard's testimony that he was motivated to write the article because he found Campbell-Sharp's invitation "cheeky," undercut the defense's argument that the article was of public interest.[163] The court accepted Mackey's argument that the defense of fair comment failed for lack of public interest.[164]

The court reluctantly allowed the jury to consider the defense of justification, a defense which rested on the theory that reasonable readers of the Sunday Independent might understand "her company" to mean merely that Campbell-Sharp was "intimately connected" with the company.[165] Here the court blurred the distinction between subjective considerations of perception and objective considerations

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159. *See id.* at 6-7.

160. *See id.* at 12.

161. In his opening statement for the plaintiff, Mr. Mackey began discussing damages on what became the third page of a thirty-plus page statement, when transcribed. *See id.* at 6. Throughout the statement, Mackey asked the jury to imagine Campbell-Sharp's feelings upon reading the article. *See id.* at 14. In fact, in the guise of clearing up a confusion in pleadings, Mackey went on to read excerpts from defendants' counsel's correspondence to plaintiff's counsel, in order to excite animus against the defendant. *See id.* at 20. For instance, he denounced one excerpt: "Your letter does not identify any inaccuracy in the article . . .", as "one of the most hypocritical letters that has ever been written in a libel case . . . ." *Id.*

162. Transcript of Evidence of Action (May 6, 1997), at 3-17, *Campbell-Sharp* (No. 5557).

163. *See id.* at 7.

164. *See id.* at 27.

165. *See id.* at 8, 13.

of truth: for the purposes of the justification defense, words must be true *in their ordinary meaning.*[166] The jury must determine what a reasonable reader would understand words to mean, so questions of truth collapse back into perception. Yet Justice Geoghegan pointed out that objectively speaking, a corporation is its own entity and can belong to no one.[167] "[H]er company" can be neither true nor false, because it is nonsense in a legal sense.[168] Thus, the entire basis of Campbell-Sharp's claim that she was falsely defamed rests on the factual falsity of a statement which has no meaning. Nevertheless, the judge instructed the jury that they were to consider what meaning the ordinary reader would impute to the statement.[169]

Plaintiff's counsel succeeded in submitting the question of aggravated compensatory damages, which arise under Irish law when a defendant has been accused of having defamed the plaintiff further before or during trial.[170] During the course of the trial, the Sunday Independent had published articles summing up the testimony of key witnesses; the tone of the articles was at times sarcastic or mocking of Campbell-Sharp.[171] The judge instructed the jury to award additional damages for Campbell-Sharp's added hurt and distress, if the articles made such comments "wrongfully."[172]

After deliberating for about an hour and a half, the jury awarded £70,000 ($100,562) in "ordinary" compensatory damages, and none in aggravated damages.[173] In addition, because she won, Campbell-Sharp was entitled to "costs," which in Ireland includes attorney's fees.[174] Attorneys for the defense estimate their clients' total liability at £200,000 ($287,320).[175]

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166. *See, e.g., id.* at 34 (Justice Geoghegan's charge to the jury).

167. *See id.* at 12-13.

168. *See id.* Justice Geoghegan noted that a "person cannot own a company, they can only own shares in the company." *Id.* at 12.

169. *See id.* at 41.

170. *See* COMMISSION PAPER, *supra* note 99, at 116 for a description of aggravated compensatory damages.

171. *See* Transcript of Evidence of Action (May 6, 1997), at 59, *Campbell-Sharp* (No. 5557).

172. *See id.* at 60.

173. *See id.* at 61, 64.

174. *See id.* at 64-65, 72 (defense counsel acknowledging entitlement to costs, but later arguing that one witness for the defense had constituted an unnecessary cost).

175. *See* Letter from Michael Kealey, to author, *supra* note 10. The SUNDAY INDEPENDENT'S appeal of the award was later dismissed by the Supreme Court. *Campbell-Sharpe (sic) Libel Case Lawyers Forced to Cut Legal Fees Further*, IRISH TIMES, Dec. 15, 1998, at 4, *available in* 1998 WL 24529687. Campbell-Sharp's lawyers submitted a bill for costs of £350,000 but the Taxing Master reduced the figure to £244,391 and then later adjusted the brief fees bringing the total costs down to £212,591. *See id.*

C. *Defamation Law's Effect on Freedom of Expression*

Campbell-Sharp v. Independent Newspapers (IRE), Ltd. is not an unusual defamation case, nor does it involve a record-breaking judgment, although Campbell-Sharp did win a very high award. What is striking about the case, and its disposition, is how so much can have been made out of so little. From the perspective of American defamation law, the fact that a mundane comment in a "fluffy" editorial column could be the basis for years of litigation ending in a judgment of this size seems bizarre, especially in light of the fact that the statement at issue was only technically false.

Among the problems most apparent from the example of this case are: 1) the inability of "public interest" to encompass editorial statements about well-known figures, corporations and other entities, 2) the problems associated with attempting to parse out facts from opinions and objective issues from subjective ones, 3) the related problem of malice, difficult enough for defendants where it is correctly applied, as to some damages issues and the defense of public comment, but nearly insurmountable where it bleeds into consideration of questions in which fault is supposedly irrelevant, 4) excessive jury awards that seem based on punishment or emotional hurt rather than compensating injury to reputation, and 5) the awarding of attorneys' fees to the winner, which fees, when coupled with excessive jury awards, can bankrupt publishers and other members of the media with a single blow.

Excessive and unreasonable defamation liability can affect freedom of expression in several ways. First, the financial burden of defending such suits can force media companies out of business. A second problem is self-censorship by media companies. In an attempt to ward off liability, newspapers eliminate controversial comments and discourage investigative reporting. Also, book publishers hesitate to publish controversial authors, and booksellers hesitate to stock these authors.[176] Meanwhile, individual journalists, writers, and others who inform the public avoid making controversial comments about public figures, in order to ensure publication and avoid individual liability. Even private citizens become wary of speaking out against the government or those with power, money, or political clout. The result is that less information is available to the public, and the public is less free to debate the information that is available. In addition, the public's tolerance for censorship in other

176. *See, e.g.*, Foley, *supra* note 14, at 8 (discussing one bookstore's importation of Kitty Kelley's controversial book THE ROYALS).

areas grows as they become accustomed to restraining their expression in order to avoid defamation liability. Those in government, big business, and others with power, removed from press scrutiny, are free to engage in corrupt behavior. Finally, a powerful few become better able to manipulate the public as the public becomes increasingly ignorant.

The pressures of excessive defamation liability are quite real in Ireland, and the result is significant self-censorship. The incentives to sue for libel are strong: liability is easy to achieve,[177] awards can be enormous, and plaintiffs lose little even when their cases do not prevail.[178] Powerful interests routinely use libel threats to control their publicity.[179] Politicians make up nearly a quarter of all libel plaintiffs.[180] Irish journalists recount situations where the press has been unable to expose the truth about corrupt political figures and businesspeople, either for fear of liability or because they were enjoined by a court of law.[181] Journalists are often advised by

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177. About twenty out of one hundred defamation suits against media defendants go to trial, and the media wins about four of those. *See* Foley, *supra* note 1, at 13.

178. The losing party usually bears all costs in defamation cases. *See Irish Media Label Defamation Practice Unfair*, INT'L COM. LITIG., July/August 1997, at 4, *available in* LEXIS, NEWS Library, CURNWS File. These costs may include attorney's fees for two senior counsel and one junior counsel, as well as brief fees. *See id.* But the chances of success are high enough that plaintiff's attorneys are often willing to take on clients on a "no-win, no-fee basis," similar to a contingency fee basis in the United States, so that clients have little to lose in filing suit. *Id.*

179. *See* Fintan O'Toole, *Libel Laws Can Protect Your Good Name or They Can Be Used To Hide Bad Deeds*, IRISH TIMES, Aug. 2, 1997, at 5, *available in* 1997 WL 12018283. The Irish Times received twenty-five libel threats in 1988, and seventy in 1996. *See id.*

180. *See* Marie McGonagle, *Supreme Court Could Seize on De Rossa Case to Set Guidelines*, IRISH TIMES, Aug. 5, 1997, at 5, *available in* 1997 WL 12017156.

181. *See* O'Toole, *supra* note 179, at 5. For other journalists' criticism of libel laws, see *Computimes: Could Cogair Be Saved?*, IRISH TIMES, Oct. 20, 1997, at 18, *available in* 1997 WL 12029125; Carol Coulter, *Finance Editor Wins Top Award, 'Irish Times' Writers Take Three Honours at Media Event*, IRISH TIMES, Oct. 18, 1997, at 10, *available in* 1997 WL 12030713; Ruth Dudley Edwards, *A Great Year for the Virtues of Honesty and Humility*, IRISH TIMES, Jan. 4, 1999, at 14, *available in* 1999 WL 6180911 (celebrating the defeat of a defamation suit brought by Thomas "Slab" Murphy, "a very senior member of the IRA [who] had for many years bolstered his already healthy finances by suing or threatening to sue anyone who suggested he was a prosperous smuggler or even a foot-soldier in the IRA."); Garret Fitzgerald, Opinion, *Tribunal Reveals Dangerous Lack of Democratic Vigilance*, IRISH TIMES, July 12, 1997, at 14, *available in* 1997 WL 12013792 (decrying journalists' cozy relationships with politicians); Mary Holland, Opinion, *Attacks on Media Must Not Deter Them From Doing Job*, IRISH TIMES, Oct. 9, 1997, at 16, *available in* 1997 WL 12029125 (blaming libel laws for lackluster investigative reporting in Ireland, and suggesting that corrupt politicians Ray Burke and Charles Haughey were exposed only because the stories fell in journalists' laps); Kevin Myers, Editorial, *An Irishman's Diary*, IRISH TIMES, Jan.

counsel to publish apologies for past statements they know are true, replacing these statements with false information; on occasion, governmental investigations have subsequently proven journalists right, but many more misdeeds remain hidden.[182] In one recent and infamous instance, a journalist was killed for exposing mafia activity.[183] On many other occasions, fear of liability prevents stories from being published or renders them harmlessly vague.[184] The size of the potential liability at stake in any one defamation suit is such that bankruptcy is a real danger for smaller, and even medium-sized Irish newspapers.[185] In addition, some books are not sold new in Ireland because they would expose bookstores to liability.[186]

Society's lowered expectations of free speech resulting from libel laws facilitates other governmental efforts to control expression. For instance, the Minister for Communications is authorized by law to direct broadcasters not to broadcast "matter . . . [which] would be likely to promote, or incite to, crime or

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22, 1999, at 15, *available in* 1999 WL 6183837; Kevin Myers, *An Irishman's Diary*, IRISH TIMES, Feb. 6, 1998, at 17, *available in* 1998 WL 6224856. Kevin Myers, Editorial, *An Irishman's Diary*, IRISH TIMES, Oct. 18, 1997, at 15, *available in* 1997 WL 12030826 ("We have the least free press in what is called the free world . . . . [E]very newspaper in Ireland spends fortunes fighting off libel actions; lawyers rock with joyous laughter at the very mention of our libel laws."); Opinion, *Now Is the Time to Halt Any Grubby Slide in Our Political System*, IRISH TIMES, Aug. 30, 1997, at 14, *available in* 1997 WL 12022072. *But see* Opinion, *Debate on Libel Laws Must Cover Press Ownership*, IRISH TIMES, Aug. 5, 1997, at 12, *available in* 1997 WL 12017198 (criticizing the press for "displays of muscle put on from time to time by powerful newspaper group").

182. *See generally* O'Toole, *supra* note 179, at 5. O'Toole mentions several instances. One involved the discovery of Bord Telecom chairman Michael Smurfit's financial interest in the property his company bought for its headquarters. *See id.* Another involves Goodman International's abuse of the export credit insurance system. *See id.*

183. *See Aer Lingus Fraud Trial Told of Veronica Guerin Libel Action*, IRISH TIMES, Oct. 22, 1998, at 19, *available in* 1998 WL 13628148; Kathy Sheridan, *Rivals to Do Battle Over a Reputation Which Cost Veronica Guerin Her Life*, IRISH TIMES, Apr. 25, 1998, at 11, *available in* 1998 WL 6238847.

184. *See* McGonagle, *supra* note 180, at 5.

185. *See* O'Toole, *supra* note 179, at 5. O'Toole predicts that one large award would cause the Irish Times "severe difficulties," and likely bankrupt the Sunday Business Post. *Id.* Smaller papers' vulnerability may be leading to a further concentration of power in the larger papers, and less media diversity and competition. *See id.* O'Toole would prefer to replace the current libel laws with a system of media regulations that encourages professional standards while supporting free and diverse journalism. *See id.* See also two articles on threats to student newspapers, Roddy O'Sullivan, *Student Media*, IRISH TIMES, Jan, 20, 1999, at 8, *available in* 1999 WL 6183350, and Roddy O'Sullivan, *Trinity Paper Tries to Make Its Pride Survive a Fall*, IRISH TIMES, Jan. 20, 1999, at 8, *available in* 1999 WL 6183352.

186. *See, e.g.*, Foley, *supra* note 14, at 8.

would tend to undermine the authority of the State . . . ."[187] In addition, the Official Secrets Act cloaks all cabinet decisions in secrecy, and the Freedom of Information Act, only recently enacted, is weaker legislation than many had hoped.[188] Contempt of court is imposed too freely in order to maintain the authority of the judiciary.[189] For the last fifty-two years Ireland has banned books advocating the "unnatural prevention of conception or the procurement of abortion or miscarriage."[190]

In light of the current state of free expression in Ireland, Part IV of this Note will explore what Irish sources of law, such as the Constitution, demand in terms of freedom of expression, and, after discussing some constitutional models, will attempt to develop an analysis for guiding the reformation of Ireland's defamation statute.

IV. DEVELOPING A CONSTITUTIONAL LAW OF DEFAMATION

It has been argued that Irish libel laws greatly hamper freedom of expression and a free press. What should be the roles of these freedoms in Ireland? What do the *Bunreacht* and other sources of law require, and what kind of constitutional analysis will bring about the proper result? Finally, if such an analysis is applied to defamation law, what will this body of law look like afterwards?

A. *Do Irish Sources of Law Demand a Higher Level of Freedom of Expression?*

Given the present state of free expression in Ireland, and the problems of censorship and self-censorship resulting from the

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187. In the only Supreme Court decision involving a freedom of expression attack on a statute, the Broadcasting Act, the Court upheld the Minister's refusal to allow the broadcast of an interview with a representative of Sinn Fein. The State (Lynch) v. Cooney, [1982] I.R. 337, *available in* LEXIS, INTLAW Library, IRECAS File. The Court reasoned that, as the political arm of the Irish Republican Army, Sinn Fein advocates the violent overthrow of the State, and the Minister's decision was therefore not irrational or capricious. *See id.* The case is troubling, among other reasons, because the Court allowed the Minister to base his decision to ban the Sinn Fein member's appearance based solely on his membership in a political group, rather than on any reason to believe the member would actually advocate violence during the interview. *See id.*

188. *See* Michael Foley, *Ireland Out of Line with European Partners on Press Freedom*, IRISH TIMES, Jan. 31, 1998, at 14, *available in* 1998 WL 6223788 [hereinafter *Out of Line*].

189. See CASEY, *supra* note 16, at 437-38.

190. *Book Ban to End*, TIMES (London), June 18, 1998, *available in* LEXIS, NEWS Library, CURNWS File.

current state of defamation law, the question must be asked whether Ireland's constitution or other sources of law demand greater expression than now exists.

First, what does the *Bunreacht* require? As mentioned in Part II, Article 40 contains the *Bunreacht's* freedom of expression clause.[191] Article 40.6.1 states: "The State guarantees liberty for the exercise" of the right "of the citizens to express freely their convictions and opinions," but this right is "subject to public order and morality."[192] The guarantee seems to be further qualified in the language following, which says that "the education of public opinion being, however, a matter of such grave import to the common good," the "organs of public opinion," while "preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State."[193] Commentators have argued at length about how to understand this guarantee. But certainly this language enumerates some individual right of freedom of expression, while it also asserts the importance of the media's role in informing the public and criticizing the government.

Article 5 of the *Bunreacht* declares that Ireland is a democratic state.[194] A democracy surely requires an informed public, which requires in turn active and free "organs of public opinion." If personal freedom of expression and the means to inform the public are necessary elements of the Irish democratic state, then if a statute fails to adequately protect these core values, it is surely unconstitutional, regardless of any other language that may restrict free expression in some contexts.

Yet the *Bunreacht* also protects reputational interests: "The State shall . . . by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."[195] This provision would presumably prohibit the state from eliminating defamation law altogether, but if the right to one's good name is read more broadly to mean that it qualifies the right to speak the truth on matters of public interest and fully air political opinions and convictions, then it undermines the very legitimacy of a democratic state.[196] Constitutional analysis should therefore begin with the question of whether free expression is

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191. *See supra* text accompanying note 63.
192. IR. CONST. art. 40.6.1.i.
193. *Id.*
194. *See id.* art. 5; Defamation Value, *supra* note 94, at 62.
195. IR. CONST. arts. 40.3.1-2.
196. This understanding of the centrality of free speech in a democratic state is the premise of O'Dell's article. *See Defamation Value, supra* note 94, at 57.

adequately protected in light of democratic values before any attempt is made to balance the right to free expression with the right to one's good name.[197]

An application of such a standard to Ireland's present situation makes it clear that speech is not adequately protected in Ireland. Books are not sold, exposés are not published, investigative reporting is discouraged. Public figures who are disparaged in the press must respond with a lawsuit, or risk conceding the truth of a report by their inaction. Most importantly, libel laws have placed a veil over the activities of shady business and political interests, perhaps proving the converse of the late U.S. Supreme Court Justice Brandeis's adage that sunlight is the best disinfectant for corruption.[198]

Even if we do not accept the argument that democratic values require defamation reform, if the *Bunreacht*'s freedom of expression guarantee is to mean anything, notwithstanding its qualifiers, it must be understood as supporting more freedom of expression than currently exists. Article 5 of the *Bunreacht,* therefore, demands that libel laws be reformed.

Aside from the *Bunreacht,* a second source of Irish law also requires better protection of the liberty of self-expression. As a member state of the European Community, Ireland is bound by Community law, including the European Convention on Human Rights.[199] Article 10(1) of the Convention, which Ireland has signed,[200] states: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas . . . ."[201] Article 10(2) may, however, subject this right to such restrictions "as are prescribed by law and necessary in a democratic society for the protection . . . of the

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197. For the argument that the right to express pure political speech must be an absolute right in a democracy, see Professor Thomas McCoy, Lecture to his First Amendment class at Vanderbilt University Law School (Jan. 14, 1999) (notes on file with author).

198. *See* LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1913).

199. *See Defamation Value, supra* note 94, at 75. As of January 1998, the UK had plans to incorporate the European Convention into its law, which would leave Ireland as the only European Union member that had not made the Convention part of its domestic law. *See Out of Line, supra* note 187, at 14. At present the Irish Supreme Court is considering judgment on the appeal of the de Rossa case, mentioned in McGonagle, *supra* note 180. Counsel for the defendant advanced for the first time before that Court arguments based upon the European Convention, particularly the proportionality of harm argument, *infra* at note 206.

200. *See* Michael Foley, *Defamation Once Again,* IRISH TIMES, Nov. 12, 1997, at 21, *available in* 1997 WL 12034991 [hereinafter *Defamation Once Again*]. Interview with Michael Kealey, Solicitor, McCann Fitzgerald, in Dublin, Ireland (March 12, 1999); *see also Newspaper Claims Libel Award to De Rossa Was Excessive,* IRISH TIMES, Dec. 9, 1998, *available in* 1998 WL 24529146.

201. *Defamation Value, supra* note 94, at 75 (quoting European Convention on Human Rights, art. 10(1)).

reputation and rights of others . . . ."[202] One Irish scholar, Eoin O'Dell, suggests that because a "democratic society" is built upon pluralism, tolerance, and broadmindedness, an "uninhibited, robust and wide-open debate"[203] actually enhances the authority of the state, and thus for the purposes of defamation law, this clause imposes no restrictions on the freedom of expression.[204] Allowing reputational interests to restrict certain kinds of true political speech can hardly be said to serve the needs of democratic society.[205] And indeed, the European Court of Human Rights has held that "necessary" restrictions on expression are those that both serve a "pressing social need" in a democracy and that are proportionate to that need.[206] In light of media's important role in imparting information to the public, relevant considerations include the value of the information, its context, and the aim it seeks to further.[207] Moreover, commentary and value-judgments are to be given wide latitude even when based on facts that are not wholly accurate.[208]

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202. *Id.* (quoting European Convention on Human Rights, art. 10(2)).

203. *Id.* at 52 (deriving the phrase from Justice Brennan's majority opinion in *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), the seminal case that first constitutionalized U.S. defamation law).

204. *See id.* at 62, 76.

205. Furthermore, O'Dell points out that in the freedom of expression decision *Barthold v. Germany*, the European Court of Human Rights held that "it cannot be reasonably considered as necessary in a democratic society to suppress true statements which are expressed in fair and moderate language, and which are appropriate to back up legitimate criticism expressed in relation to a state of affairs of public concern." *Id.* at 77 (quoting Barthold v. Germany, 6 Eur. H.R. Rep. 82, para. 80 (1984)). And in a criminal libel case, the Court held that restricting and punishing certain kinds of political opinions violated the Convention, noting that requiring a defendant to prove the truth of a value judgment infringed the right to a hold a free opinion. *See id.* at 78 (citing Lingens v. Austria, 4 Eur. H.R. Rep. 373 (1981), paras. 39-46 & n.107). *But see id.* (citing X v. Germany, 9235/81, 29 Eur. Comm'n H.R. Dec. & Rep. 194), which discussed a case in which the Court held that a German commission permissibly enjoined the display of posters asserting that the Holocaust had been a hoax, on the ground that the injunction protected the reputations of Jews in the community.

206. *See id.* at 76. O'Dell argues that Ireland's current strict liability scheme of defamation is disproportionate to the end of protecting reputation, since in light of the right of freedom of expression, the right of reputation should be protected by the means least restrictive of expression. *See id.* at 76-77.

In addition, the Convention has been held to mean that the level of damages awarded in defamation cases must be proportional to the harm done by a statement. *See* McGonagle, *supra* note 180, at 5 (citing Tolstoy v. UK, Eur. H. R. Rep. (1995)).

207. *See* McGonagle, *supra* note 180, at 5 (citing Thorgeirson v. Iceland, Eur. H.R. Rep. (1992)).

208. *See id.* (citing *Thorgeirson*). In addition, the Court has held that the level of damages awarded in defamation cases must be proportionate to the harm done by the statement. *See id.* (citing *Thorgeirson*).

In addition to the question of exactly how much more protection the *Bunreacht* demands, another question remains: by what means is a right to be protected in the Irish constitutional scheme? This Note mentioned in its Introduction the constitutional provision that appears to address this question: the *Bunreacht* expressly establishes judicial review as the method for protecting fundamental rights.[209] However, as stated earlier, there is no strong tradition of constitutional review in Ireland, and in fact the Irish have at times distrusted judicial power and leaned toward a more parliamentarian notion of rights.[210] But the constitutional language is clear, and if Ireland is to be a democratic state, it must have some means of actually enforcing its guarantees. Some have argued that it is the *Oireachtas* which should reform defamation. But leaving reform to legislation is both impractical and unwise. Impractical because, as many commentators have pointed out, politicians have little incentive to foster criticism of government, and much to gain from the status quo as potential plaintiffs.[211] Unwise because it is not merely policy that urges reform—it is the need to protect individual rights and to preserve full public debate.

Since the mid-1960s, the tide has slowly begun to turn towards increased judicial review and American-style constitutionalism.[212] In 1964, three years after the judiciary's constitutionally-mandated reformulation finally occurred, the Supreme Court overturned its own rule of precedent.[213] The next year, despite its initial defeat, Chief Justice Kennedy's natural law position (that the *Bunreacht* could protect rights not enumerated specifically in its provisions) won acceptance in *Ryan v. Attorney General*,[214] where the Court recognized an extra-constitutional right of bodily integrity.[215] Scholars believe that *Ryan* may be the most important event in the development of Irish judicial review, signaling a "heightened awareness of citizens' rights."[216]

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209. *See* IR. CONST. art. 34.3.2; text accompanying notes 66-68.

210. *See* text accompanying notes 69-76.

211. *See Defamation Reform*, *supra* note 95, at 275.

212. *See* BETH, *supra* note 22, at 9-13.

213. *See id.* at 9-10. The rule of precedent, discussed in the text accompanying notes 97-98, held that the Supreme Court itself was to be bound by its own precedent.

214. [1965] I.R. 294 at 335, *available in* LEXIS, INTLAW Library, IRECAS File.

215. *See* BETH, *supra* note 22, at 675. For the importance of this Catholic contribution to natural rights analysis, see *supra* note 77 and accompanying text.

216. CASEY, *supra* note 16, at 24. See also BETH, *supra* note 22, at 45; Finlay, *supra* note 69, at 140. Finlay notes that since *Ryan*, several unenumerated personal rights have been acknowledged, including freedom from torture, the right to litigate, the right to work, and the right of privacy within marriage. *See* Finlay, *supra* note 69, 140. Perhaps ironically, it may be that the

Scholars have identified several factors that have helped to propel interpretation of the *Bunreacht* in the direction of judicial review and enforcement of individual rights. First, there is the logical force of the text itself: its provisions on these subjects bear relatively few other readings.[217] Second, the *Bunreacht* explicitly continued in force all older law not in conflict with constitutional provisions. Because many older laws were flatly inconsistent, the Court was asked frequently to invalidate laws.[218] Third, the *Bunreacht*'s Catholic aspects, which have led to much natural rights-based jurisprudence, have therefore aided incidentally in the move towards a more American constitutionalism.[219]

In sum, the *Bunreacht* guarantees a right of free expression that current defamation law fails to adequately protect. The European Convention provides a similar guarantee, and the European Court of Human Rights has read this guarantee broadly in light of the importance of the media's role in democratic society, while seeking also to protect reputational interests. The *Bunreacht* provides judicial review as the means of enforcing the guarantee of constitutional rights, and therefore the Supreme Court has the power to hear a challenge to current defamation law.

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less "legal" nature of the *Bunreacht* allows courts to more easily find new personal rights, even if it may have caused initial reluctance to engage in constitutional review. For articles dealing with judicial powers generally and judicial review, see generally Donal Barrington, *Some Problems of Constitutional Interpretation, in* CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW, *supra* note 65, at 169 (1992); James Casey, *Changing the Constitution: Amendment to Judicial Review, in* DE VALERA'S CONSTITUTION AND OURS, *supra* note 55, at 152; Declan Costello, *The Irish Judge as Law-Maker, in* CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW, *supra* note 65, at 159; Fennelly, *supra* note 65, at 183; Brian Walsh, *The Judicial Power, Justice and the Constitution of Ireland, in* CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW, *supra* note 65, at 145.

217. *See* BETH, *supra* note 22, at 12.

218. *See id.* at 12.

219. *See id.* at 12-13. In addition, scholars have suggested that the Irish have become increasingly aware of their constitutional rights. See, for instance, Walsh, who wonders whether the Irish are now as enthusiastic on the subject as Americans were said to be in an article in THE ECONOMIST, in 1952:

> At the first sound of a new argument over the United States Constitution and its interpretation, the hearts of Americans leap with fearful joy. The blood stirs powerfully in their veins and a new lustre (sic) brightens their eyes. Like King Harry's men before Harfleur, they stand like greyhounds in the slips, straining upon the start. Last week, the old bugle note rang out, clear and thrilling, calling Americans to a fresh debate on the Constitution . . . .

Walsh, *supra* note 216, at 157 (quoting THE ECONOMIST, May 10, 1952).

B. *The Extent of the Bunreacht's Protection of Free Expression as it Relates to Defamation Law, and in Light of Other Constitutional Interests*

Ireland's defamation law does not sufficiently protect the constitutional guarantee of liberty of expression if, as now, it hampers the ability of the press to investigate and report accurate news of political concern to Irish citizens—what might be called "pure political speech." But the *Bunreacht* probably does impose some limits on freedom of expression where the most crucial underlying values inherent in a democratic state are not implicated. Guidance in determining how to weigh different constitutional interests of free expression and reputation against each other should come from the *Bunreacht* and its cultural context.

One model for balancing different rights at stake in defamation law was presented by Ireland's Law Reform Commission, in its Report on the Civil Law of Defamation, published in December of 1991.[220] The Commission sets out three relevant rights: the reputational rights enumerated in Article 40.3, the rights of free expression found in 40.6.1, and an unenumerated freedom to communicate.[221] The Commission's discussion of constitutional rights first examines the language of the Constitution's reputational guarantee.[222] Discussion on liberty of expression ensues with a different approach from its preceding analysis on reputational rights.[223] Rather than first describing the right in isolation, then suggesting that in practice, a need to balance rights may be necessary, the Commission notes the importance of a reading of this provision that balances

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220. The Law Reform Commission is a body authorized by the government to study and recommend legal reforms. *See generally* COMMISSION PAPER, *supra* note 99. It first published a Paper on the Civil Law of Defamation, over 460 pages long, which represents a comprehensive and detailed examination of current Irish law, followed by a comparison with U.S. law, and finally by a presentation of its own equally comprehensive reforms. *See generally id.* It begins with a few sentences on the purpose of the torts of libel and slander, and then devotes less than a page to setting out the constitutional rights that must be balanced in reforming these torts. *See id.* In the Commission's Report, published later that year, the Commission acknowledged that its Paper had "provoked some spirited discussion as to the role which can, or should, be played by the Constitution in shaping a reformed law of defamation," and that some commentators had argued that the Commission's constitutional analysis was inadequate. LAW REFORM COMMISSION, REPORT ON THE CIVIL LAW OF DEFAMATION 1-2 (Dec. 1991) [hereinafter COMMISSION REPORT]. It responded with an appendix to its Report, laying out the constitutional basis for its approach. *See id.* at 110-24

221. *See* COMMISSION REPORT, *supra* note 220, at 110-13.

222. *See id.* at 110-11

223. *See id.* at 111-12.

expression against reputation.[224] The Commission then completely sidesteps the issue of constitutional limitations on defamation that may be imposed by this right, by quoting a passage from a Supreme Court case that considered the defamation issue of qualified privilege: "The articulation of public policy on a matter such as this would seem to be primarily a matter for the legislature."[225] Accepting this statement uncritically, the Commission grants itself discretion to limit expression according to its perception of public policy.

The Commission's approach to balancing rights of expression and reputation is somewhat dismissive of free expression, and it fails to grasp that a certain minimum level of free expression and free press must be absolutely assured in defamation law if the guarantee is to be more than a fiction.[226] Better guidance for shaping the law of defamation is provided by an approach that looks at the nature of each of these rights separately before trying to fit them together.

The *Bunreacht*'s guarantee of free expression is couched in language that appears to limit its scope. Freedom of expression is protected subject to the interests of "public order and morality."[227] One commentator has said that an interest in "public order and morality" has little bearing on defamation law other than to provide a larger context for understanding the nature of the freedom of expression guarantee.[228] That interest usually arises instead in the context of obscenity restrictions or issues of access to broadcasting.[229]

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224. *See id.* at 112. The Commission thus is able to immediately assert the constitutionality of the tort of defamation as a limitation on the right of expression. *See id.*

225. *Id.* at 112 (quoting Hynes-O'Sullivan v. O'Driscoll, [1988] I.R. 436, 449 (Henchy, J., concurring)). At issue was a qualified privilege defense for those who pass on defamatory material in the mistaken belief that they have a duty or interest in receiving the information, or both. *See* CASEY, *supra* note 16, at 463 (citing Hynes). The court had refused to hold that the Constitution's freedom of expression guarantee required such a defense, and determined that the defense would insufficiently protect the right to one's good name. *See id.* (citing *Hynes*).

Commentators have questioned whether the Court's decision struck the proper balance between the rights of expression and reputation. *See id.* at 463-64.

226. *See supra* text accompanying notes 194-98.

227. IR. CONST. art. 40.6.1.

228. *See* CASEY, *supra* note 16, at 435.

229. *See id.* at 435-36. In addition, one scholar points out that the rights of assembly and association are also "subject to public order and morality," yet when the issue has arisen, courts have tolerated little restriction of this type on the right of association. *See* Fennelly, *supra* note 65, at 187.

The second clause of Art. 40.6.1(i) states in addition that the media "shall not be used to undermine public order or morality or the authority of the State." IR.

Another possible textual limitation on freedom of expression is suggested by the language of the first clause, expressly protecting only "convictions and opinions."[230] Supreme Court Justice Costello has found in two decisions that Article 40.6 contains no "right to communicate" one's opinions, but only to "hold" them, but nevertheless has held that the right to communicate was an unenumerated right protected by Art. 40.3.1.[231] An argument can be made that the phrase "convictions and opinions" protects opinions but not facts,[232] but many commentators have rejected this narrow reading. Fennelly argues that the interpretation is unlikely because protecting only opinions would lead to extremely complex parsing of statements to determine which words were entitled to constitutional protection.[233] O'Dell argues that even a narrow reading of this phrase would necessitate some protection for "perceptions of facts," if not facts themselves.[234] Moreover, current defamation law allows liability for false information even if its publisher has a

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CONST. art. 40.6.1.i. O'Dell argues that the "authority of the State" language imposes no restriction because the State has no interest in restricting speech, which actually strengthens a democratic state in the long run. *See Defamation Value, supra* note 94, at 60. This argument is essentially the same as was made in the preceding section: no restriction can be read into the constitution of a democratic state if that restriction would undermine the state's claim to legitimacy, namely, majority rule by an informed public. *See supra* text accompanying notes 194-97.

230. IR. CONST. art. 40.6.1.i.

231. *See* Fennelly, *supra* note 65, at 186 (citing Paperlink v. Kearney, [1984] I.L.R.M. 373). Fennelly also makes the point that the third clause of this section limits freedom of expression with respect to "blasphemous, seditious or indecent matter," which must include some factual material; therefore, if facts are not included in the first clause's convictions and opinions language, this limitation would be superfluous. *Id.*

232. For instance, the Law Reform Commission's approach examines dictionary definitions of "opinion" and "conviction," and determines that neither encompass factual statements. *See* COMMISSION REPORT, *supra* note 220, at 113. The Commission acknowledges that the unenumerated "right to communicate" includes communication of facts, but is only a qualified right, and is therefore trumped by the fundamental right to one's good name. *See id.* at 122. Furthermore, the Commission makes the dubious conclusion that "education of public opinion" and "criticism of government policy" encompass only opinions. *See id.* at 113. This would seem to be at least a debatable point, since surely the statement "the Government's action in 1994 caused thousands to lose their jobs" is as much a criticism of government policy as the statement "the Government's action in 1994 was stupid"; yet the former statement is factual. Lastly, the Commission finds that even if "rightful liberty of expression" may encompass some factual assertions, it applies only to organs of public opinion, and not to citizens generally. *Id.* at 113-15. The Commission thus concludes that the Constitution does not require the protection of true assertions. *See id.* at 122-24.

233. *See generally* Fennelly, *supra* note 65, at 186-92.

234. *Defamation Value, supra* note 94, at 59.

subjective belief of its truth, so O'Dell's interpretation would actually support some minimal defamation reform.[235]

Finally, the *Bunreacht*'s guarantee of freedom of expression must be read against the government's duty to protect the "good name" of its citizens. *Bunreacht na hÉireann* states:

> 3. 1° The State guarantees in it laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2° The State shall, in particular, by its law protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.[236]

Much of the preceding analysis in this Note discusses minimal protections any democratic state must provide in order to function as a democracy. However, any constitutional analysis must take into account some unique elements of Irish law and culture. The Irish attach enormous importance to reputation. American cases such as *New York Times v. Sullivan,* that were so quick to assert the importance of free speech as against a common law right to vindicate one's name, were born of a different culture from those of many Irish cases.[237] Ireland is still largely agrarian, sparsely populated and poor, although it has experienced increased prosperity in the last few years.[238] An individual's success, and until recently, survival, depended upon her good name.[239] Ireland's history of English oppression, followed by civil war, serve to make reputation even more important, and tenuous. For instance, once denounced as a "souper," a label for those who denied their Catholicism in order to receive English food, a person immediately lost all status in her community.[240] During Ireland's civil war in the 1920's, one's reported allegiance to one army or the other, each claiming to represent the true Irish government, was, of course, a life-or-

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235. *See id.*

236. IR. CONST. arts. 40.3.1-2.

237. In addition, *New York Times v. Sullivan* involved a very unconvincing reputational interest, since an Alabama resident was suing a paper with a very tiny circulation in Alabama. *See* New York Times v. Sullivan, 376 U.S. 254, 260 n.3 (1964).

238. For a discussion of the Irish economy since the 1950s, see RANELAGH, *supra* note 23, at 240-44.

239. Marie McGonagle has suggested that Ireland's history of dispossession and poverty have contributed to the high value the Irish people place on reputation. *See Defamation Once Again, supra* note 200, at 21 (quoting Marie McGonagle).

240. *See* Malachy McCourt, *Commentary on Surviving Poverty in Free Ireland,* L.A. TIMES, Nov. 26, 1998, at B7, *available in* 1998 WL 18897821.

death concern.[241] Perhaps as a result of this history, Irish attachment to reputation has an almost sacred quality, and defaming someone's character is an act deserving great moral condemnation.[242] The tort of defamation thus has an important role to play in enabling an individual to vindicate her name, although no cases have explored exactly what protections defamation law must provide for reputation.[243] The constitutional language requires the state to ensure that individuals may vindicate their good name against "unjust attack"; it is thought that the release of truthful information is not unjust unless, perhaps, it relates to events long past and irrelevant to the public interest.[244]

In sum, the *Bunreacht's* freedom of expression guarantee is particularly concerned with protecting commentary, or "opinions and convictions," and assuring that the media is able to provide for debate on matters of concern to the public. Read in relation to the whole of Article 40, the apparent limitation on the right for the sake of "public order and morality" was not necessarily intended to authorize restraint of speech every time policy seems to outweigh the value of the information. Similarly, the phrase "convictions and opinions" probably does not exclude facts from protection. The *Bunreacht* also protects the right to protect one's reputation from "unjust attack." This protection is a serious matter for Irish citizens, and probably forbids a constitutional law of defamation that weighs so heavily in favor of defendants as in the United States.

C. *Proposed Reforms of the Law of Defamation*

In the preceding section, this Note discussed the nature of Ireland's freedom of expression and reputation guarantees. With this discussion in mind, this Note will suggest some reforms that will allow both of these rights to be adequately protected.[245]

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241. *See supra* text on Irish history accompanying notes 32-34.

242. Ireland is not alone in this respect. See, for instance, Religion professor Susannah Heschel's article condemning Jews who have supported Independent Counsel Kenneth Starr's investigation and exposure of intimate details of President Clinton's private life. *See* Eric J. Greenberg, *The Case for Teshuvah: In Wake of Schorsch Call for Resignation, Other Leading Rabbis Say Clinton Can Redeem Himself*, JEWISH WEEK, Sept. 18, 1998, at 1 (paraphrasing Susannah Heschel).

243. *See Defamation Value*, *supra* note 94, at 64.

244. *See id.* at 65.

245. Among the articles recently suggesting defamation reforms, or critiquing the Law Reform Commission's approach, are Eoin O'Dell, *Reflections on a Revolution in Libel*, 9 IRISH L. TIMES 181 (Aug. 1991); *Defamation Reform*, *supra* note 95, at 270. In addition, the Law Review Commission's comprehensive study of defamation law presents a detailed set of proposals for reform in its Paper and

The *Bunreacht* clearly protects pure opinions, or subjective beliefs. Yet defamation law assumes that a statement is false. A defendant therefore must prove that a statement is true in order to avoid liability (justification), unless she can argue the defense of fair comment, which requires that the comment be based on true facts on a subject of public interest.[246] This scheme fails to protect pure opinions that are not considered to relate to a subject of public interest, because a defendant cannot prove such opinions to be true. Irish courts have construed public interest narrowly, so most opinions fall outside the fair comment defense.[247]

But if the Supreme Court or lawmakers shift the burden to the plaintiff to prove the falsity of a statement, then pure opinions, whether or not in the public interest, will not incur liability, because plaintiffs will be unable to prove them false. This shift in the burden of proof would have several advantages besides enforcing the *Bunreacht's* protection of "convictions and opinions." Much of the complex and uncertain task of distinguishing between fact and opinion would become unnecessary. Plaintiffs would be able to sue on convictions based on untrue statements, but only to the extent that they could disprove a verifiable statement. The defense of fair comment could then be eliminated, a move that has the benefit of avoiding judicial discretion on the value judgment of whether a statement addresses a subject of public interest. This burden shift would also bring the tort of defamation into conformity with other common law torts, in which the plaintiff carries the burden of proving the main elements of the tort.

The Law Reform Commission proposed such a burden shift in its Report, reversing its earlier recommendation.[248] The U.S. Supreme Court adopted this alteration in the common law in *Philadelphia Newspapers, Inc. v. Hepps*.[249] In a majority opinion in a later case, *Milkovich v. Lorain Journal Co.*, Justice Rehnquist rejected the suggestion that all opinions should be privileged, and relied on the presumption of truth to protect opinions rather than

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its Report. These publications, while they have not yet been adopted in the Oireachtas, have spurred greater debate among legal scholars. This Note does not attempt to outline and critique all of the LRC's proposals, but instead seeks to touch on some of the most important areas of reform.

246. *See supra* text accompanying notes 115-26.

247. *See id.*

248. *Compare* COMMISSION PAPER, *supra* note 99, at 321-26 (upholding the burden on the defendant to prove truth), *with* COMMISSION REPORT, *supra* note 220, at 55-57 (acknowledging that it may be unreasonable for the defendant to carry this burden).

249. 475 U.S. 767, 778-79 (1986).

on "an artificial dichotomy between 'opinion' and fact."[250] A conviction such as, "In my opinion Mayor Jones, a professed Communist, shows his abysmal ignorance by accepting the teachings of Marx and Lenin," cannot be proven false in a court of law; a plaintiff would therefore be unable to rebut the presumption of truth.[251] On the other hand, "In my opinion Mayor Jones is a liar" implies certain instances of lying which, if proven false, could be the basis of a successful suit.[252] The abolition of the presumption of falsity is therefore an important first reform of Irish defamation law.

In addition to shifting the truth/falsity presumption, several commentators have recommended a move from strict liability to the requirement of some kind of fault. O'Dell has argued forcefully that this move is required by the *Bunreacht's* protection of "convictions," which include perceptions of fact.[253] Therefore, if a publisher holds an honest belief in the truth of a fact, this belief would seem to require some protection.[254] The Law Reform Commission has proposed the adoption of a defense of reasonable care.[255] The Commission adopted this position to address the reality that even after thorough research, a publisher with the best of intentions could still publish a false statement that has a defamatory effect on an individual. The Commission took note of the American decision that the First Amendment requires some showing of fault before an individual can be held liable in a defamation suit.[256] But in U.S. case law, the standard of care differs according to the plaintiff: recklessness is the minimum level of fault in cases brought by public figures, while negligence is sufficient for private figures.[257] The Commission found this distinction between plaintiffs undesirable and insufficiently protective of reputation, and adopted instead a universal defense of reasonable care.[258] Under this standard, a defendant would have the opportunity to prove that the defendant had not been negligent or otherwise at fault for publishing a false statement.[259] A defendant who succeeds in such a defense is responsible only for specific financial loss resulting from the publication, and not general damages.[260] This is a major shift from traditional common

250. Milkovich v. Lorain Journal Co. 497 U.S. 1, 18 (1990).
251. *See id.*
252. *See id.*
253. *See Defamation Value*, *supra* note 94, at 59-60, 66-70.
254. *See id.*
255. *See* COMMISSION REPORT, *supra* note 220, at 49-55.
256. *See* COMMISSION PAPER, *supra* note 99, at 316-17.
257. *See* COMMISSION REPORT, *supra* note 220, at 49.
258. *See id.* at 49-50.
259. *See* COMMISSION PAPER, *supra* note 99, at 317-18.
260. *See id.*

law, but the burden of proof falls on the defendant to prove lack of negligence—a very hard standard to satisfy.

This fault standard represents a middle ground between the U.S. requirement that public figures prove "actual malice," and the current strict liability standard. It would appear to preserve the right to vindicate one's good name against "unjust attacks," since false information reported after diligent research is arguably not "unjust."

Probably neither placing the burden of proving falsity on the plaintiff, nor allowing a reasonable care defense, would have warded off liability in *Campbell-Sharp v. Independent Newspapers (IRE), Ltd.*,[261] however, because Campbell-Sharp proved she was technically not Leonard's debtor. In addition, although Leonard's mistake was an honest and understandable one, he probably would not have succeeded in his defense of reasonable care, since Campbell-Sharp was able to prove in hindsight that the truth was available to Leonard at the time.[262]

Although a U.S.-type distinction between plaintiffs is probably inappropriate in Ireland, freedom of expression probably demands a privilege for defaming public officials regarding their conduct in office. Public officials should not be allowed to win private damages for criticism of their conduct insofar as they are state actors. Allowing such suits is too similar to a criminal sanction for criticizing the government, and restrains some of the speech that is most important to a democracy. In this respect, the *New York Times v. Sullivan*[263] analysis of the Alien and Sedition Acts offers an important lesson for Irish lawmakers and courts.[264]

Defamation damages are in particular need of reform. The outcome in the *Campbell-Sharp*[265] case seems unreasonable because although Leonard's accusation that Campbell-Sharp owed him money cast her in a bad light, it seems unlikely that Campbell-Sharp suffered any lasting injury to her reputation. More emphasis could be placed on the existence of an injury. At present, the injury is presumed in libel, but juries seem to base

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261. No. 5557 (Ir. H.Ct. May 6, 1997).

262. McDonald believes arguments benefiting from this kind of hindsight present a real problem for the viability of this defense. *See Defamation Reform*, *supra* note 95, at 272-73.

263. 376 U.S. 254 (1964). That decision adopted a constitutional rule requiring "public officials" to prove actual malice. *See id.* at 283.

264. McDonald points out, however, that statutory defamation reform is unlikely precisely because legislators are among the most common plaintiffs in defamation suits. *See Defamation Reform*, *supra* note 95, at 275.

265. No. 5557 (Ir. H. Ct. May 6, 1997).

damages not on injury to reputation, but on emotional hurt, damage to dignity, and the attitude of the alleged defamer.[266]

In addition, freedom of expression would be better protected if courts required that damages be proportionate to harm, taking into account the importance of freedom of expression. Appeal from a judgment could be available based on this principle, which has been adopted already by the European Court of Human Rights.[267]

Aggravated damages are a particularly pernicious element of the present damages scheme. Courts must no longer be allowed to impose aggravated damages based on the unsuccessful attempt to prove either the truth of a statement or a plaintiff's bad character. Such conduct naturally falls under a privilege for speech relevant to a judicial proceeding. To allow damages based on this conduct is to undermine any protections for speech that defamation law affords. This reform, in conjunction with a proportionate damages requirement, would have provided a better result in the *Campbell-Sharp* case, and may have prevented the suit altogether, if Campbell-Sharp was motivated primarily by the potential for a huge damage award. This reform nevertheless ensures that plaintiffs can continue to vindicate attacks on their reputation and receive fair compensation for their injuries.

Finally, current defamation law grants courts wide discretion in granting injunctions.[268] A plaintiff may obtain an ex parte injunction against publication of supposedly defamatory materials pending a hearing, before the material has been printed. At that ex parte hearing, a court may grant a further injunction on publication until the case has gone to trial. Although some authorities emphasize that such interlocutory injunctions must not be issued lightly, judges appear to employ tests of varying strictness.[269] The Law Reform Commission is right in recommending that injunctions be limited to cases where a plaintiff can prove the likelihood of success on the merits, and not just the "defamatory" nature of the statement.[270] Disturbingly,

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266. *See Defamation Reform*, *supra* note 95, at 271.

267. *See supra* discussion accompanying notes 198-208.

268. *See* IRISH LAW OF DEFAMATION, *supra* note 89, at 258-59. Irish courts' jurisdiction over injunctions in defamation actions is fairly recent, dating only from 1877. *See id.*

269. *See* COMMISSION PAPER, *supra* note 99, at 129-33, 364-65; IRISH LAW OF DEFAMATION, *supra* note 89, at 258-63. In fact, ex parte injunctions may be the easiest to obtain. *See* IRISH LAW OF DEFAMATION, *supra* note 89, at 260. *See also IRT Law Report, Evidence of Justification Needed to Defeat Libel Interlocutory Injunction Claim*, IRISH TIMES, Jan. 18, 1999, at 18, *available in* 1999 WL 6182959 (reporting on the decision of Reynolds v. Malocco (Ir. H. Ct. Dec. 11, 1998)).

270. *See* COMMISSION PAPER, *supra* note 99, at 364. For an example of a recent controversy over a libel injunction, see Marie McGonagle, *Battle Over Bank*

under current law plaintiffs can not only easily block the publication of disparaging materials, they can also prevent the press from reporting the fact of the injunction.[271] The Law Reform Commission's recommendation that this ban be lifted should be adopted,[272] as ex ante restraints on free speech are particularly damaging to public debate, and beyond the scope of the *Bunreacht's* reputation guarantee, which merely allows vindication after the fact.

V. CONCLUSION

This Note has suggested that Irish defamation law is in need of reform, because the current combination of statute and common law has produced an atmosphere in which the press is justifiably afraid to criticize those in the public eye, and defamation suits have become big business. It has examined the sources of Irish defamation law, and some of the conditions under which they have developed. Further, it has borrowed from several models of defamation reform, including U.S. law and the recommendations of the Law Review Commission, and provided its own suggestions for reform. Most importantly, however, this Note has made the argument that any reform of defamation should be constitutionally based, and developed through judicial review, and has argued that the Irish Constitution both allows and demands that this development occur.

The *Bunreacht* supports a broad freedom of expression, one that may be narrower than the protection provided by the U.S. First Amendment, but one that is fuller than current libel laws provide. That guarantee of freedom of expression is best served by placing the law of defamation within a careful constitutional interpretation analysis that takes account of both reputational interests and the need for full public debate. Such an analysis should not pit these guarantees against each other haphazardly

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Story Raises Important Issues, IRISH TIMES, Mar. 9, 1998, at 16, *available in* 1998 WL 6230718, relating the story of a series of television reports investigating an Irish bank's involvement with certain offshore accounts. *See also* Marie McGonagle, *This Decision Enhances the Reputation of the Press and the Judiciary*, IRISH TIMES, Mar. 21, 1998, at 4, *available in* 1998 WL 6232973 (discussing the lifting of the injunction in the NIB/RTE case); Editorial, *Serving the Public Interest*, IRISH TIMES, Mar. 21, 1998, at 17, *available in* 1998 WL 6233074 (reporting the Supreme Court's refusal to extend the injunction).

271. *See Defamation Reform*, *supra* note 95, at 272. McDonald points out that this ban prevents the public from learning what writers are effectively being blacklisted as a result of such prior restraints. *See id.*

272. *See* COMMISSION PAPER, *supra* note 99, at 364.

in each case to see which seems more important on particular facts. It should instead attempt to build a body of law that will protect the core interests of each guarantee simultaneously. A constitutional law of defamation based on such an analysis might adopt among other measures, the specific reforms suggested here: a shift in the burden of proving falsity, a new reasonable care defense, a proportional damages rule, the elimination of aggravated damages, and the abolition of injunctions in most circumstances.

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