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ACTUAL MALICE IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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The Inter-American Court of Human Rights decided four cases in recent years that represent a positive step for freedom of expression in nations that belong to the Organization of American States. In 2004 and again in 2008, the court stopped short of adopting a standard that would require proof of actual malice in criminal defamation cases brought by public officials. In 2009, however, the court seemed to adopt the actual malice rule without calling it that. The court's progress toward actual malice is chronicled in this article. The article concludes that the court's decision not to explicitly use the phrase "actual malice" may be a positive development for freedom of expression in the Americas.

Since its inception in 1979, the Inter-American Court of Human Rights, based in San José, Costa Rica, has moved to protect freedom of expression under the American Convention on Human Rights. Article 13 of that convention, which has been ratified by twenty-five of the thirty-four members of the Organization of American States,¹ protects a range of activities under the

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¹ Notably, Canada has not signed or ratified the treaty, which is also called the "Pact of San José," and the United States has signed but not ratified it. See General Information of the Treaty: B-32, at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm. OAS member states that have ratified the agreement are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad & Tobago, Uruguay and Venezuela. *Id.* OAS member states besides Canada and the United States that have not ratified the treaty are Antigua y Barbuda, Bahamas, Belize, Guyana, St. Kitts & Nevis, St. Lucia and St. Vincent & Grenadines. *Id.*

heading of “freedom of thought and expression.”² Most of the Inter-American Court’s interpretations of Article 13 have come during the last dozen years, and in that time the court has held that Chile could not ban the Martin Scorsese film *The Last Temptation of Christ*;³ Peru could not revoke citizenship and shareholding control from a broadcaster who criticized the Peruvian Intelligence Services for torture, abuse and corruption;⁴ Chile could not censor copies of a former military

² American Convention on Human Rights, art. 1.1, Nov. 22, 1969, O.A.S.T.S. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]. Article 13 states:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others; or
- b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Id. (English translation reproduced here is available at the Web site of the Organization of American States, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm) (last visited Dec. 4, 2012).

³ Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile, 2001 Inter-Am. Ct. H.R. (Ser. C) No. 73 (Feb. 5, 2001).

⁴ Case of Ivcher-Bronstein v. Peru, 2001 Inter-Am. Ct. H.R. (Ser. C) No. 74 (Feb. 6, 2001).

officer's book that was critical of the Chilean Navy;⁵ Chile had to provide government-held information about a deforestation project;⁶ Venezuela could not criminally convict a former brigadier general who appeared on television to criticize the military for using flamethrowers as punishment against its own soldiers;⁷ Colombia violated the free-speech rights of an outspoken senator by failing to protect him from extrajudicial execution;⁸ Brazil had to provide government-held information about the military's involvement in the detention, torture and disappearance of seventy people in the 1970s;⁹ and Argentina could not hold magazine journalists liable for privacy invasion after they wrote about an illegitimate child of former President Carlos Saúl Menem.¹⁰

In the area of criminal defamation, the Inter-American Court of Human Rights has moved cautiously toward an actual malice standard for statements about public officials. In separate cases in 2004, the court held that Costa Rica and Paraguay, respectively, should reverse criminal libel convictions and reform criminal libel statutes.¹¹ Although protective of freedom of expression, these

⁵ Case of Palamara-Iribarne v. Chile, 2005 Inter-Am. Ct. H.R. (Ser. C) No. 135 (Nov. 22, 2005).

⁶ Case of Claude-Reyes et al. v. Chile, 2006 Inter-Am. Ct. H.R. (Ser. C) No. 151 (Sept. 19, 2006).

⁷ Case of Usón Ramírez v. Venezuela, 2009 Inter-Am. Ct. H.R. (Ser. C) No. 207 (Nov. 20, 2009).

⁸ Case of Manuel Cepeda-Vargas v. Colombia, 2010 Inter-Am. Ct. H.R. (Ser. C) No. 213 (May 26, 2010).

⁹ Case of Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil, 2010 Inter-Am. Ct. H.R. (Ser. C) No. 219 (Nov. 24, 2010).

¹⁰ Case of Fontevecchia and D'Amico v. Argentina, 2011 Inter-Am. Ct. H.R. (Ser. C) No. 238 (Nov. 29, 2011).

¹¹ Herrera Ulloa v. Costa Rica, 2004 Inter-Am. Ct. H.R. (Ser. C) No. 107 (July 2, 2004); Ricardo Canese v. Paraguay, 2004 Inter-Am. Ct. H.R. (Ser. C) No. 111 (Aug. 31, 2004).

decisions were nevertheless criticized for failing to articulate a standard by which to measure the appropriateness of a criminal punishment for defamation.¹² Scholars suggested, for example, that the Inter-American Court could adopt a U.S.-style actual malice standard.¹³ Other suggestions included a standard of gross negligence; another that would require a showing of lack of good faith; and a third standard that would have measured whether the message was communicated with specific intent to cause harm.¹⁴

In two recent criminal libel cases,¹⁵ the Inter-American Court came closer to embracing the actual malice standard famously articulated by the Supreme Court of the United States for civil defamation in *New York Times Co. v. Sullivan*¹⁶ and for criminal defamation in *Garrison v. Louisiana*.¹⁷ However, the Inter-American Court, at least in its original Spanish-language opinions in those two cases, does not explicitly use the phrase “actual malice,” nor does the court cite the *Sullivan* opinion. After reviewing the state of understanding and acceptance of the actual malice standard internationally, this article discusses the Inter-American Court’s slow march toward adopting actual malice as a requirement in criminal defamation prosecutions. The article then discusses the merits of the Court’s seeming reluctance to tie itself too closely to the United States or the

¹² See Jo M. Pasqualucci, *Criminal Defamation and the Evolution of the Doctrine of Freedom of Expression in International Law: Comparative Jurisprudence of the Inter-American Court of Human Rights*, 39 VAND. J. TRANSNAT’L L. 379, 401-03 (2006).

¹³ See *id.* at 402-03 (citations omitted).

¹⁴ See *id.*

¹⁵ *Kimel v. Argentina*, 2008 Inter-Am. Ct. H.R. (Ser. C) No. 177 (May 2, 2008); *Donoso v. Panama*, 2009 Inter-Am. Ct. H.R. (Ser. C) No. 193 (Jan. 27, 2009).

¹⁶ 376 U.S. 254 (1964).

¹⁷ 379 U.S. 64 (1964).

Sullivan opinion, even while essentially applying the legal standard dictated by the Supreme Court in that case. The article concludes the Inter-American Court has achieved the best of both worlds by essentially adopting the actual malice standard without providing the basis for criticism that could come with an explicit citation to the Supreme Court's *Sullivan* opinion.

GLOBAL REACTIONS TO ACTUAL MALICE

The late *New York Times* Supreme Court reporter Anthony Lewis wrote that the Supreme Court's opinion in *Sullivan* was "stunning" and "written in the grand style, reordering a whole area of the law as few modern Supreme Court opinions do – or can, really."¹⁸ In its March 9, 1964, opinion by Justice William J. Brennan, the Supreme Court held that the First Amendment prohibited states from allowing civil liability for defamation unless plaintiffs could prove statements about public officials were made with knowledge of falsity or reckless disregard for the truth.¹⁹ The rule was later extended to public figures²⁰ and to criminal defamation statutes.²¹ Although stopping short of granting absolute immunity for statements about public officials, as three justices urged,²² Brennan's majority opinion was nonetheless revolutionary because it imposed a

¹⁸ ANTHONY LEWIS, MAKE NO LAW 154-55 (1991).

¹⁹ 376 U.S. at 279-80.

²⁰ *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

²¹ *Garrison*, 379 U.S. 64.

²² See 376 U.S. at 293 (Black, J., concurring, joined by Douglas, J.); 376 U.S. at 298 (Goldberg, J., concurring in result, joined by Douglas, J.).

heavy burden on defamation plaintiffs to prove that erroneous statements were made with a high degree of fault, not just negligently or innocently.²³

Critical to the *Sullivan* opinion were the Court's background passages about the role of free expression in society. Justice Brennan cited past Supreme Court opinions to make the point that freedom of speech guarantees accountability of government leaders and allows citizens to participate in democratic decision-making.²⁴ Further, the Court held, the United States committed itself to allowing a broad range of voices into the marketplace of ideas and letting the people, rather than the government, decide what was true and valuable.²⁵

The Court also alluded to the "safety valve" and self-fulfillment, or autonomy, rationales for freedom of expression.²⁶ The safety valve theory holds that allowing citizens to let off steam through speech can forestall violence.²⁷

²³ See LEWIS, *supra* note 18, at 156.

²⁴ *Sullivan*, 376 U.S. at 269 (citations omitted). Both before and after *Sullivan*, scholars have elaborated on the value of free speech to facilitate self-governance and to keep government officials in check. See, e.g., Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (1977) ("Interestingly, the most influential free-speech theorists of the eighteenth century — those who drafted the First Amendment and their mentors — placed great emphasis on the role free expression can play in guarding against breaches of trust by public officials."); Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 256 (1961) ("[T]he First Amendment, as seen in its constitutional setting, forbids Congress to abridge the freedom of a citizen's speech, press, peaceable assembly, or petition, whenever those activities are utilized for the governing of the nation.").

²⁵ *Sullivan*, 376 U.S. at 270 (quoting Judge Learned Hand, *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). Justice Oliver Wendell Holmes memorably evoked the marketplace of ideas rationale for free speech in the early twentieth century. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market.").

²⁶ *Sullivan*, 376 U.S. at 269-70.

²⁷ See THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970).

The self-fulfillment explanation values free speech not for its content or consequence but merely for its importance to human beings as a natural or fundamental right.²⁸ As a result of all this, Brennan wrote, the Court considered the case “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”²⁹

If the actual malice rule was revolutionary for the United States, it generally has been difficult to accept for judges and legislators in most countries around the world. Harvard Law School Professor Alan Dershowitz said in 1988 that “[t]he United States is the only country in the world whose law requires ‘actual malice’ before a public person can win a libel suit.”³⁰ One prominent international media law scholar, Kyu Ho Youm, noted that the Canadian Supreme Court has said actual malice is a purely American phenomenon,³¹ and the Korean Supreme Court also rejected the actual malice standard in favor of reputational interests.³² Australia and the United Kingdom explicitly declined to

²⁸ See David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

²⁹ *Sullivan*, 376 U.S. at 270.

³⁰ ALAN M. DERSHOWITZ, *TAKING LIBERTIES* 62 (1988) (cited in Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law?*, 16 HASTINGS COMM. & ENT. L. J. 235, 259 n.197 (1994)).

³¹ See The 2010 JIMEL Colloquium: *Recent Developments in International Defamation Law*, 3 J. INT’L MEDIA & ENT. L. 289, 305 (2010-11) (comments of Kyu Ho Youm).

³² See Kyu Ho Youm, *Freedom of Expression and the Law: Rights and Responsibilities in South Korea*, 38 STAN. J. INT’L L. 123, 137 (2002).

adopt actual malice and, instead, chose other methods for protecting freedom of expression.³³

Still, in 2004, Youm concluded that Argentina, Bosnia, Hungary, Pakistan, the Philippines and Taiwan had essentially adopted actual malice while India had applied a close variation of the doctrine.³⁴ The Supreme Court of Japan in 1986 discussed the importance of striking a balance between reputation and freedom of expression; although the court did not adopt the actual malice rule, one concurring justice did discuss the rule favorably.³⁵ Although many foreign courts stopped short of adopting actual malice, Youm nonetheless concluded that the *Sullivan* opinion had helped forge a broad international consensus about the importance of political expression and the role of the “citizen-critic.”³⁶ He also suggested that the rule might be more well-received internationally if it were easier to understand and explain.³⁷

In the late 1990s, observers began encouraging the Inter-American Court of Human Rights³⁸ to follow the example of the European Court of Human

³³ See Kyu Ho Youm, *New York Times v. Sullivan: Impact on Freedom of the Press Abroad*, COMM. LAW. 14-16 (2004).

³⁴ *Id.* at 12-14. For additional discussion of these countries’ approaches, see Kyu Ho Youm, “Actual Malice” in *U.S. Defamation Law: The Minority of One Doctrine in the World?*, 4 J. INT’L MEDIA & ENT. L. 1 (2011-12).

³⁵ See Youm, *supra* note 33, at 16.

³⁶ *Id.*

³⁷ *Id.*

³⁸ The court, which is based in San José, Costa Rica, describes itself as “an autonomous judicial institution of the Organization of American States established in 1979, and whose objective is the application and interpretation of the American Convention on Human Rights and other treaties concerning this same matter.” Welcome, Inter-American Court of Human Rights, <http://www.corteidh.or.cr/index.cfm?&CFID=2125857&CFTOKEN=19919647>. Individuals may not directly file a petition or appeal with the Inter-American Court. Instead, only OAS member states that are parties to the American Convention and have accepted the court’s contentious

Rights by staking out a more aggressive position on freedom of expression issues and granting less deference to national governments.³⁹ The European Court may not have explicitly endorsed the actual malice test from U.S. jurisprudence,⁴⁰ but the court in the 1986 *Lingens v. Austria* case held that Article 10 of the European Convention on Human Rights prevented a state from imposing defamation liability for value judgments about a public official without proof of falsity.⁴¹ One scholar concluded that the European Court generally applied a “good faith” or “professional practice fault standard” that was commendable but not as protective of freedom of speech as the actual malice standard.⁴²

The actual malice rule is not the only American legal concept which foreign courts have viewed somewhat skeptically. Citing foreign law in constitutional interpretation has generated vigorous debate and disagreement in national constitutional courts around the world, including in the U.S. Supreme

jurisdiction, as well as the Inter-American Commission, may refer cases to the Inter-American Court. Inter-American Commission on Human Rights, Petition and Case System, <http://www.oas.org/en/iachr/docs/pdf/HowTo.pdf>.

³⁹ See Edward J. Pauw & Ari Chaim Shapiro, *Defamation, the Free Press, and Latin America: A Roadmap for the Inter-American Court of Human Rights and Emerging Democracies*, 30 U. MIAMI INTER-AM. L. REV. 203, 210-11 (1998). For a review of the court’s early freedom of expression jurisprudence, see Claudio Grossman, *Freedom of Expression in the Inter-American System for the Protection of Human Rights*, 25 NOVA L. REV. 411 (2001).

⁴⁰ The 2010 JIMEL Colloquium, *supra* note 31, at 303-07 (comments of Kyu Ho Youm (“Indeed, the European Court of Human Rights has sometimes ruled more liberally in free press cases than the U.S. Supreme Court, although it has yet to embrace ‘actual malice’ as such.”)).

⁴¹ Case of *Lingens v. Austria*, Application No. 9815/82, July 8, 1986, *available at* http://portal.uclm.es/descargas/idp_docs/jurisprudencia/lingens%20eng%20-%20libertad%20de%20expresion.%20libertad%20de%20opinion%20y%20de%20informacion.%20libertad%20de%20prensa%20y%20.pdf.

⁴² Dan Kozlowski, “For the Protection of the Reputation or Rights of Others”: The European Court of Human Rights’ Interpretation of the Defamation Exception in Article 10(2), 11 COMM. L. & POL’Y 133, 174-75 (2006).

Court.⁴³ Reliance on foreign law has been criticized for lacking democratic legitimacy since a foreign court or legislature is not accountable or otherwise responsive to citizens of another nation.⁴⁴ Unlike some political, cultural and even legal concepts (such as bankruptcy and commercial law), constitutional law in particular may not lend itself to cross-border transfer because of its close identification with national sovereignty, legitimacy and independence.⁴⁵ Some nations may be motivated by financial or political incentives to explicitly adopt legal concepts from the United States, but for other countries, “[A]voiding American influence just because it is American often appears to be a driving force.”⁴⁶ The balance is particularly complicated for the Inter-American Court of Human Rights because the United States, though obviously a singular regional power, has not ratified the American Convention nor subjected itself to the contentious jurisdiction of the Inter-American Court.⁴⁷

Some nations – South Africa is one – have explicitly authorized in their constitutions the reliance on foreign law in constitutional interpretation.⁴⁸ But Justice Antonin Scalia, among others, argues that reliance on foreign law inherently leads to overreaching and manipulation, since a constitutional court

⁴³ Although a lengthy discussion is beyond the scope of this article, on this topic see generally Jacob Foster, *The Use of Foreign Law in Constitutional Interpretation: Lessons from South Africa*, 45 UNIV. OF SAN FRAN. L. REV. 79 (2010).

⁴⁴ See *id.* at 119.

⁴⁵ See Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in GOVERNANCE IN A GLOBALIZING WORLD 253-68 (Joseph S. Nye & John D. Donahue eds., 2000); Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907, 912 (2005).

⁴⁶ Schauer, *The Politics*, *supra* note 45, at 260.

⁴⁷ See *supra* note 1 and accompanying text.

⁴⁸ See Foster, *supra* note 43, at 119.

would rely on its own relevant precedents if they existed.⁴⁹ Even the Constitutional Court of South Africa pointed to the U.S. actual malice standard as an example of a foreign legal concept that was outside the global mainstream and, therefore, of limited relevance in South African defamation cases.⁵⁰ Scholars, too, note the actual malice rule must be considered extreme in the comparative global context, yet the rule is well-known around the world because of the *Sullivan*-based First Amendment evangelizing of U.S. journalists.⁵¹

British libel law has attracted much criticism due to its pro-plaintiff nature, expansive jurisdiction leading to libel tourism and high costs for defendants.⁵² While Great Britain is making efforts to reform its libel law and address these concerns, the prospect of adoption of an actual malice standard for statements about public officials and public figures has been met with a resounding thud.⁵³ The United Nations Human Rights Committee suggested Britain should consider adopting the actual malice doctrine, but the suggestion may have been counterproductive in some quarters by causing a backlash against foreign, particularly American, interference.⁵⁴ Instead, the British government seems to be focusing its efforts on reform elsewhere, with the phone

⁴⁹ See *id.* at 85-86.

⁵⁰ See *id.* at 113 (citing *Khumalo v. Holomisa*, 2002 (8) BCLR 771 (CC), at para. 40 (S. Afr.) (stating that *New York Times v. Sullivan* “represents the high-water mark of foreign jurisprudence protecting the freedom of speech and many jurisdictions have declined to follow it.”)).

⁵¹ See Schauer, *The Politics*, *supra* note 45, at 258 n.23.

⁵² See, e.g., Stephen Bates, *Libel Capital No More? Reforming British Defamation Law*, 34 HASTINGS COMM. & ENT. L. J. 233, 233-34 (2012).

⁵³ See *id.* at 241-42 (citing criticisms by a member of the House of Lords and by a media lawyer, who called *Sullivan* “a defamer’s charter.”).

⁵⁴ See *id.* at 248.

hacking scandal – resulting in the closing of Rupert Murdoch’s *News of the World* and the 2012 Leveson Report – drawing attention to limiting invasions of privacy by the press rather than expanding speech protections in case of alleged defamation.⁵⁵

Developments in the inter-American human rights system have demonstrated that the actual malice formulation is not easily understood. Argentine legislators, for example, proposed in 1999 to include an actual malice requirement in their country’s statutory defamation law, but the proposed statute equated actual malice with “criminal intent or gross fault and negligence.”⁵⁶ However, at another point in the draft legislation, which was undertaken in part to settle a complaint of human-rights violation brought to the Inter-American Commission on Human Rights in Washington, D.C.,⁵⁷ the Argentine legislators gave a definition of actual malice that more closely resembles the one adopted by the U.S. Supreme Court. The legislation would have required a defamation proponent to prove not only that a false statement

⁵⁵ See The Leveson Inquiry, *An Inquiry Into the Culture, Practice and Ethics of the Press*, Nov. 29, 2012, available at <http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp>.

⁵⁶ Organization of the American States, *Annual Report of the Inter-American Commission on Human Rights 1999 (Annex)*, 1999 IACHR 79 (Apr. 13, 2000).

⁵⁷ The commission is made up of seven members and was established in 1959. Its function is to promote defense of human rights by investigating claims of abuses, making reports and carrying out initiatives, visiting OAS countries and analyzing the validity of individual petitions seeking relief from human rights abuses. Individuals may make a complaint of human rights abuses to the commission, but individuals may not directly access the Inter-American Court of Human Rights; only the commission and nations that have ratified the American Convention and submitted themselves to the court’s jurisdiction may bring a matter before the Inter-American Court. See Inter-American Commission on Human Rights, *Petition and Case System*, <http://www.oas.org/en/iachr/docs/pdf/HowTo.pdf>. As a functional matter, the commission is the gatekeeper for the cases that are heard by the Inter-American Court.

was made but that it was made “despite the fact that the author knew it was untrue or acted in rash disregard for the truth.”⁵⁸

The Inter-American Commission noted that Argentina’s Supreme Court held in *Vago v. Ediciones La Urraca S.A.* that proof of damages in a defamation case required “those that deem themselves affected by false or inaccurate information [to] prove that the person who produced said information acted with malice.”⁵⁹ Although this has been described as Argentina’s judicial adoption of the actual malice standard,⁶⁰ it could also be interpreted to refer to common-law malice, ill will or hatred that the U.S. Supreme Court has specifically said is not the same thing as actual malice.⁶¹ Still, scholarly observers consider that Argentina is among the foremost nations to adopt a U.S.-style actual malice doctrine for defamation.⁶²

It would not be appropriate to harshly criticize those in OAS member states and the inter-American human rights system who confuse malice and actual malice, given that the U.S. Supreme Court itself recognized the possibility

⁵⁸ OAS, *Annual Report*, *supra* note 56.

⁵⁹ Organization of the American States, *Annual Report of the Inter-American Commission on Human Rights 1999 (Chapter II: Assessment of the Situation of Freedom of Expression in the Hemisphere)*, 1999 IACHR 15 (1999) (citation omitted).

⁶⁰ *Id.* (stating that Argentina had in this case enshrined the actual malice standard in its defamation law). Provincial courts following the Argentina Supreme Court’s lead later adopted the actual malice test. See Organization of the American States, *Annual Report of the Inter-American Commission on Human Rights 2004 (Chapter II: The Situation of Freedom of Expression in the Hemisphere)*, ¶ 36, 2004 IACHR 15 (2004).

⁶¹ See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (“Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will.”).

⁶² See, e.g., Kyu Ho Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?*, 13 COMM. L. & POL’Y 415, 417-18 (2008); Susana N. Vittadini Andrés, *U.S. Actual Malice Doctrine in Argentine Constitutional Law*, TAMKANG J. OF INT’L AFFAIRS, <http://www2.tku.edu.tw/~ti/Journal/9-1/912.pdf>.

for confusion and suggested U.S. judges not use the term “actual malice” in jury instructions but rather use the phrase “publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.”⁶³ In fact, the author of the constitutional actual malice test on the U.S. Supreme Court, Justice Brennan, regretted choosing that term in his later years.⁶⁴ In his majority opinion in *New York Times Co. v. Sullivan*, Brennan suggested the phrase came from state court decisions, including prominently the 1908 Kansas Supreme Court decision of *Coleman v. MacLennan*.⁶⁵ In that Kansas case, the term “actual malice” seemed to refer to proven or established malice, as opposed to mere inferred malice.⁶⁶ The Kansas court had used another phrase – good faith – that more aptly described the concept that a defamation plaintiff had to prove lack of sufficient efforts to discover the truth on the part of the defendant.⁶⁷

After its creation by the Inter-American Commission on Human Rights in 1997, the Special Rapporteur for Freedom of Expression⁶⁸ repeatedly urged OAS

⁶³ *Masson*, 501 U.S. at 511 (calling the term actual malice “an unfortunate one”).

⁶⁴ See SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 227 (2010).

⁶⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (citing *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908)).

⁶⁶ 98 P. at 286.

⁶⁷ *Id.* (“According to the greater number of authorities, the occasion giving rise to conditional privilege does not justify statements which are untrue in fact, although made in good faith, without malice and under the honest belief that they are true. A minority allows the privilege under such circumstances.”).

⁶⁸ This office is based in Washington, D.C., and has approximately a half-dozen staff attorneys who advise the Inter-American Commission on Human Rights about cases; prepare reports; carry out promotional and educational activities on the right to freedom of expression; conduct visits to OAS member states; and promote the adoption of legislative, judicial and administrative measures that favor freedom of expression. See *Mandate of the Office of the Special Rapporteur for Freedom of Expression*, <http://www.oas.org/en/iachr/expression/mandate/>. One scholar wrote, “In creating the Office of Special Rapporteur, the Commission’s main objective was to reinforce and protect the

member states to adopt an actual malice standard in their defamation law. In 1999, for example, the Special Rapporteur told member states in the commission's annual report that "the acceptance of the doctrine of 'actual malice' and the resulting amendment of libel and slander laws" was "one practical consequence" of balancing the protection of the rights of honor and reputation of private persons with the free and open discussion necessary with regard to the activities of public officials engaged in the public's business.⁶⁹ The Special Rapporteur suggested that lack of an actual malice standard was, at least in some ways, more harmful to freedom of speech than the routine murder of journalists in certain Latin American countries.⁷⁰ The Special Rapporteur has stressed that merely allowing truth as a defense is not sufficient; OAS member states have been encouraged to put the burden of proving falsity, and knowledge of falsity, on the plaintiff.⁷¹

In 2000, the Special Rapporteur drafted, and the Inter-American Commission adopted, a document titled "Declaration of Principles on Freedom

observance, respect, and development of freedom of expression in the Americas, especially given the fundamental role that right plays in building and strengthening the democratic system of government and in protecting other rights." Santiago A. Canton, *The Role of the OAS Special Rapporteur for Freedom of Expression in Promoting Democracy in the Americas*, 56 U. MIAMI L. REV. 307, 310 (2002).

⁶⁹ Organization of the American States, *Annual Report of the Inter-American Commission on Human Rights 1999 (Chapter III: Final Thoughts and Recommendations)*, 1999 IACHR 48 (1999).

⁷⁰ *Id.* The Special Rapporteur also urged nations to repeal their *desacato* laws, which punish contempt, insult, offense or threat against a public official in the performance of official responsibilities. *Id.*

⁷¹ Organization of the American States, *Annual Report of the Inter-American Commission on Human Rights 1999 (Chapter II: Assessment of the Situation of Freedom of Expression in the Hemisphere)*, 1999 IACHR 15 (1999).

of Expression.”⁷² Its Principle 10 stated that “a public official, a public person or a private person who has voluntarily become involved in matters of public interest” should never be allowed to pursue criminal defamation charges.⁷³ Further, the declaration stated that public officials and public figures, plus private figures involved in matters of public interest, should prevail on civil defamation claims only after proving “that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.”⁷⁴

The Special Rapporteur did not say if this protection should be afforded only to journalists, nor did the declaration define “social communicators.” But since Principle 10 referred to “news,” it could be inferred that only journalists, or those purveying newsworthy information, might enjoy the protection of the actual malice-like doctrine being proposed. The Special Rapporteur also did not explain why the declaration would impose liability on a showing of gross negligence rather than recklessness, or whether in fact any difference between the two was intended.

In commentary about the declaration’s Principle 10, the Inter-American Commission on Human Rights asserted that the declaration advocated an actual

⁷² Organization of the American States, *Annual Report of the Inter-American Commission on Human Rights 2000 (Chapter II: Declaration of Principles on Freedom of Expression)*, 2000 IACHR 11 (2000).

⁷³ *Id.* at ¶ 10 (“Principles”).

⁷⁴ *Id.*

malice standard, though the manner in which the commission described actual malice might seem odd to U.S. lawyers and judges accustomed to the *New York Times Co. v. Sullivan* formulation. The commission described actual malice as a “legal doctrine used to protect the honor of public officials or public figures,”⁷⁵ when in reality actual malice is designed to protect commentators about public officials and public figures from being held liable for defamation. Instead of the “gross negligence” term used by the Special Rapporteur, the commission used the phrase “manifest negligence,” and later equated actual malice with malice.⁷⁶ The possibility exists that these differences were not intended to be significant, and perhaps they could be ascribed to document translation. But language matters, particularly in the case of actual malice.

RELUCTANCE ABOUT ACTUAL MALICE

It was against a backdrop of some confusion and uncertainty, but also some apparent willingness to accept the framework behind the actual malice standard, that the Inter-American Court of Human Rights took up two cases in 2004 that gave the Court the opportunity to consider the role the actual malice doctrine might play in protecting speech freedom. The court ultimately stopped short of applying the actual malice doctrine even while valuing and protecting the right to freedom of speech.

⁷⁵ *Id.* at ¶ 46 (“Interpretation”).

⁷⁶ *Id.*

Herrera Case

In 1995, Costa Rican journalist Mauricio Herrera published a series of articles in the daily newspaper *La Nación* that discussed the involvement of a Costa Rican diplomat, Félix Przedborski, in the “biggest financial, political and military scandal in the history” of Belgium.⁷⁷ The Belgian press already had accused Przedborski and others of receiving hidden commissions in the sale of Italian military helicopters to Belgium.⁷⁸ Press accounts in several Belgian publications linked the scandal to the assassination of André Cools, Belgian budget minister and vice prime minister.⁷⁹ Herrera, an investigative and political reporter at *La Nación* for twelve years, determined that the accusations made in the Belgian press were newsworthy to Costa Rican readers because Przedborski served as an honorary Costa Rican ambassador at the International Atomic Energy Agency in Vienna, Austria.

Herrera undertook an investigation to verify the accusations made against Przedborski. He consulted numerous sources familiar with the situation and made what he called “exhaustive attempts,” which were ultimately unsuccessful,

⁷⁷ Herrera Ulloa v. Costa Rica, 2004 Inter-Am. Ct. H.R. (Ser. C) No. 107, at ¶ 66.a (July 2, 2004), (“Testimony of Mauricio Herrera Ulloa, alleged victim in the case”). Except where otherwise noted, citations are to the Inter-American Court’s official English translation of the opinion, although the opinion was first officially published by the court in Spanish. Because page numbers differ between the English and Spanish versions, paragraph citations – which do not differ in the English and Spanish versions – are used.

⁷⁸ *Id.*

⁷⁹ *Id.*

to reach Przedborski.⁸⁰ Herrera interviewed various sources in the Costa Rican government, including at the Ministry of Foreign Relations, who confirmed they were aware of the published accusations against Przedborski.⁸¹ The Costa Rican ambassador to Belgium had filed an official report expressing worry about the numerous appearances of Przedborski in the Belgian press coverage of the scandal.⁸² The government of Costa Rica eventually undertook a review of its foreign service and decided to revoke the titles of honorary diplomats, including Przedborski.⁸³ In his investigation, Herrera did not come across any information to contradict the accusations against Przedborski.

After Herrera's first article about Przedborski was published in May 1995, a lawyer for Przedborski appeared at *La Nación* but declined to answer any questions for publication.⁸⁴ Another lawyer for Przedborski refused to answer written questions submitted by Herrera.⁸⁵ But Przedborski himself authored an article published by *La Nación* to explain his version of events.⁸⁶ Nevertheless, after the second round of articles in December 1995, Przedborski initiated both civil and criminal actions against Herrera and *La Nación* in the Costa Rican courts.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at ¶ 95.g.

Przedborski alleged that, in three articles published in May 1995 and one article published in December 1995, Herrera had committed the crimes defined by Costa Rica's Penal Code as defamation,⁸⁷ slander⁸⁸ and "publication of offenses."⁸⁹ However, the Criminal Court of the First Judicial Circuit of San José acquitted Herrera in 1998 because the court found he lacked the requisite degree of fault under Penal Code sections defining "crimes against honor."⁹⁰ But approximately one year later, the Supreme Court of Costa Rica reversed the lower court judgment after concluding the court erred in its determination that Herrera lacked knowledge and intent.⁹¹

Herrera was convicted in 1999 in the Criminal Court of the First Judicial Circuit of San José, which concluded at that point that he published the articles with knowledge of their offensive character and with intent to dishonor and affect the reputation of Przedborski.⁹² For the criminal conviction, the court imposed a small fine. The court also ordered Herrera and *La Nación* to publish an explanation of the judgment with the same prominent placement in the

⁸⁷ Código penal de Costa Rica, Título II, Artículo 146 (1970). Article 146 punishes defamation by establishing a fine for "dishonoring another person or publishing information capable of affecting another person's reputation." (Spanish-English translations, unless indicated otherwise, are by the author).

⁸⁸ Código penal de Costa Rica, Título II, Artículo 147 (1970). Article 147 punishes slander by establishing a fine approximately two-and-one-half times greater than the fine for defamation for those who "falsely attribute to another person the commission of a criminal act."

⁸⁹ Código penal de Costa Rica, Título II, Artículo 152 (1970). Article 152 punishes those who publish or reproduce a third party's statements dishonoring another person, including defamation and slander, as if the publisher or reproducer were the original author of speaker of the statements.

⁹⁰ *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (Ser. C) No. 107, at ¶ 95.q (July 2, 2004).

⁹¹ *Id.* at ¶ 95.s.

⁹² *Id.* at ¶ 95.t.

newspaper as had been given the articles about Przedborski. The court also imposed a larger civil fine on *La Nación* and Herrera for the “moral damage” caused as a result of the articles about Przedborski.⁹³ The court ordered the newspaper to remove the links from its Web edition to copies of the articles about Przedborski and create instead a link to the court’s judgment. The Supreme Court of Costa Rica affirmed the sentence in 2001.

On March 1, 2001, Herrera was listed in Costa Rica’s Registro Judicial de Delincuentes, an official government list of convicted persons, as required by Costa Rican law.⁹⁴ That same day, attorneys for the newspaper and reporter presented a petition for reprieve to the Inter-American Commission on Human Rights. The commission recommended that Costa Rica de-list Herrera as a convict and withhold the judgment requiring *La Nación* to publish on its web edition a link to the court’s judgment.⁹⁵ Costa Rica declined to follow the commission’s recommendation. The commission then submitted the case to the Inter-American Court of Human Rights.

Herrera and his wife, Laura Mariela González Picado, testified before the Inter-American Court that the conviction had caused them extreme psychological suffering.⁹⁶ Herrera said he was traumatized by the criminal prosecution and that his career was badly damaged, given that the sources he tried to interview identified him as the “convicted journalist” and were reluctant

⁹³ *Id.* at ¶ 95.u.

⁹⁴ *Id.* at ¶ 95.dd.

⁹⁵ *Id.* at ¶ 11.

⁹⁶ *See id.* at ¶¶ 61-66.a.

to share information with him.⁹⁷ Finally, Herrera told the human rights tribunal that one of the most pernicious effects of the conviction was that he found himself practicing self-censorship in that he feared to publish articles that might result in another criminal complaint.⁹⁸

In 2004, the Inter-American Court concluded that the criminal and civil penalties Costa Rica levied against Herrera violated his rights under Article 13 of the American Convention on Human Rights. The court stated: “Without effective freedom of expression, exercised in all its forms, democracy is enervated, pluralism and tolerance start to deteriorate, the mechanisms for control and complaint by the individual become ineffectual and, above all, a fertile ground is created for authoritarian systems to take root in society.”⁹⁹ While recognizing that freedom of expression is not absolute, the court stated that restrictions on speech such as that of Herrera must meet three requirements: (1) the restrictions must be clearly spelled out in the law; (2) the restrictions must be designed to protect the rights and reputations of others, national security, public order, or public health and morals; and (3) the restrictions must be necessary in a democratic society.¹⁰⁰

The court stopped short of adopting an actual malice standard — although lawyers for Herrera and the newspaper had urged on the court the U.S.

⁹⁷ *Id.* at ¶ 66.a.

⁹⁸ *Id.*

⁹⁹ *Id.* at ¶ 116.

¹⁰⁰ *Id.* at ¶ 120.

Supreme Court's jurisprudence on that issue¹⁰¹ – but nevertheless applied a test that produced a similar result. First, the court spent some time delineating the free speech interests at stake. The court stated that freedom of expression includes not only the right to share a point of view but also the right to receive opinions, news and information from others.¹⁰² The court stated that the right to receive speech was just as important for an individual as the right to express one's own message.¹⁰³ As had the U.S. Supreme Court in *Sullivan*, the Inter-American Court also discussed the value of free speech in ensuring democratic participation and guaranteeing government officials' accountability, as well as the idea that free speech was a fundamental individual right.¹⁰⁴

The court then concluded that the criminal punishment imposed on Herrera violated the American Convention because it was not necessary in a democratic society. Specifically, the court said that the information relayed by Herrera about Przedborski was of legitimate public interest.¹⁰⁵ The court did not use the term "actual malice," but it did speak in language that evoked that concept:

Those individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny

¹⁰¹ See *id.* at ¶¶ 66.c, 66.e, 102.5.

¹⁰² *Id.* at ¶ 110.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at ¶¶ 112, 113, 115, 125-129.

¹⁰⁵ *Id.* at ¶ 131.

and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate.¹⁰⁶

Canese Case

Ricardo Canese is a Paraguayan industrial engineer who lived in exile in Holland from 1977 to 1984 because of his opposition to the military dictatorship of former Paraguayan President Alfredo Stroessner.¹⁰⁷ Canese began in about 1978 to investigate and write about the functioning of the Itaipú dam and hydroelectric station, one of the world's largest hydroelectric plants and a joint Brazilian-Paraguayan project located on the Paraná River.¹⁰⁸ In 1990 and 1991, Canese presented allegations to the Paraguayan government that CONEMPA, a consortium of Paraguayan companies holding a monopoly on all Paraguayan work at Itaipú, had engaged in tax evasion and other improper activities.¹⁰⁹

In 1991, Canese was elected as a representative of the minor political party *Asunción para Todos* to a municipal post, and in 1993, the same party nominated him to run for president of the republic.¹¹⁰ The 1993 presidential elections came during a transition period for Paraguay, given that the country had been governed by the Stroessner dictatorship from 1954 to 1989. Another presidential

¹⁰⁶ *Id.* at ¶ 129.

¹⁰⁷ Ricardo Canese v. Paraguay, 2004 Inter-Am. Ct. H.R. (Ser. C) No. 111, at ¶ 69.1 (Aug. 31, 2004).

¹⁰⁸ *Id.* at ¶ 69.2.

¹⁰⁹ *Id.* at ¶ 69.3.

¹¹⁰ *Id.* at ¶ 69.6.

candidate, Juan Carlos Wasmosy of the *Partido Colorado*, had been president of CONEMPA. During the campaign, in August 1992, Canese was interviewed by journalists from two Paraguayan publications, *Noticias* and *ABC Color*, about Wasmosy.

In August 1992, *Noticias* published an article quoting Canese as having said that “Wasmosy amassed his fortune thanks to Stroessner” and that “Wasmosy . . . passed from bankruptcy to the most spectacular wealth, thanks to support from the dictator’s family, which allowed him to assume his chairmanship of CONEMPA.”¹¹¹ The same day, *ABC Color* published an article quoting Canese as having said that “Wasmosy was the Stroessner family’s front man in CONEMPA, and the company transferred substantial dividends to the dictator.”¹¹² Wasmosy was elected president of Paraguay in 1993.

In October 1992, three former directors of CONEMPA, Ramón Jiménez Gaona, Oscar Aranda and Hermann Baumann, initiated a criminal complaint against Canese for defamation¹¹³ and *desacato*, or insult.¹¹⁴ Although none of the three CONEMPA directors was named in the *Noticias* and *ABC Color* articles, the directors contended that Canese’s statements defamed CONEMPA and thereby

¹¹¹ *Id.* at ¶ 69.7.

¹¹² *Id.*

¹¹³ A new Paraguayan criminal code took effect Nov. 26, 1998, and modified the definition of defamation and reduced the associated penalties. *See id.* at ¶ 69.30. The current version of the Paraguayan criminal code punishes as defamation any statement to a third person that another person has committed an act when such statement is capable of damaging the other person’s reputation. Código penal de la República del Paraguay: Ley No. 1160 (1997), Capítulo VII, Artículo 151.

¹¹⁴ The Paraguayan criminal law punishes as insult a statement of negative opinion or judgment about another person. *See* Código penal de la República del Paraguay: Ley No. 1160 (1997), Capítulo VII, Artículo 152.

personally injured the reputations of its directors. Canese was convicted of defamation and insult by a judge in a criminal trial court in 1994. He was sentenced to four months imprisonment and a small fine.¹¹⁵ Canese also was adjudged civilly liable for defamation. An appellate court subsequently reduced the criminal sentence to two months' imprisonment.¹¹⁶

As a result of his conviction and various associated judicial orders, Canese was prevented from leaving Paraguay from 1994 to 1997.¹¹⁷ Subsequently, he was prevented on several additional occasions from leaving the country. After a new president succeeded Wasmosy, Canese was named Paraguayan vice minister of mines and energy, but he still could not leave Paraguay without filing a writ of *habeas corpus* each time.¹¹⁸

Approximately six years after his conviction, Canese successfully appealed to the Supreme Court of Paraguay. In 2002, that court voided Canese's criminal conviction and sentence, absolving Canese of any responsibility or penalty associated with his statements and expunging the government's records of the investigation of his case.¹¹⁹ Later, the Paraguayan Court took the remarkable step of imposing all costs associated with the prosecution on the original complainants, the three CONEMPA directors.¹²⁰ Despite this judicial action vacating the conviction and clearing Canese of any wrongdoing, the Inter-

¹¹⁵ *Canese v. Paraguay*, at ¶ 69.15.

¹¹⁶ *Id.* at ¶ 69.20.

¹¹⁷ *Id.* at ¶ 60.a.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at ¶ 69.49.

¹²⁰ *Id.* at ¶ 69.50.

American Commission of Human Rights and the Inter-American Court of Human Rights continued to entertain the case brought by Canese alleging that his human rights were violated.¹²¹

In its 2004 decision, the Inter-American Court relied heavily on the precedent it had set just two months earlier in *Herrera v. Costa Rica*. The court stated that, as in *Herrera v. Costa Rica*, the press in *Canese v. Paraguay* played an important role in enabling democracy; the court considered it particularly important that Canese's statements about Wasmosy had come during a political campaign.¹²² Similar to *Herrera*, the court in *Canese* emphasized the importance of the right to receive information, the role of free expression in democracy to ensure government accountability and citizen participation, and the value of free speech to promote tolerance and to facilitate the search for truth in the marketplace of ideas.¹²³

The court concluded that Canese exercised his protected right of expression about a public figure and with respect to issues of public concern.¹²⁴ The court repeated its statement from *Herrera* that public officials are subject to intense public scrutiny, and it added the gloss that "in the context of the public debate, the margin of acceptance and tolerance of criticism by the State itself, and by public officials, politicians and even individuals who carry out activities

¹²¹ *Id.* at ¶¶ 70-71.

¹²² *Id.* at ¶ 88.

¹²³ *Id.* at ¶¶ 77, 81-83, 85-86, 88, 90, 97-98.

¹²⁴ *Id.* at 62.

subject to public scrutiny, must be much greater than that of individuals.”¹²⁵

Despite the Paraguayan Supreme Court’s vacation of Canese’s conviction, the Inter-American Court held that Paraguay violated Canese’s human rights under Article 13 of the American Convention by undertaking a criminal prosecution that lasted approximately a decade and that resulted in his being unable to leave the country for long periods of time.¹²⁶ As in *Herrera*, though, the court in *Canese* did not explicitly adopt an actual malice standard.

Aftermath of Herrera and Canese Cases

In light of the Inter-American Court’s failure to explicitly adopt the actual malice standard in the *Herrera* and *Canese* cases, some OAS member nations argued that Article 13 of the American Convention did not require a defamation plaintiff to prove actual malice. For example, Jamaica argued before the Inter-American Commission in 2008 that it could not be held responsible for failing to require a civil plaintiff to prove that a newspaper and its journalists acted with actual malice in republishing an Associated Press report alleged to be defamatory.¹²⁷ The Associated Press reported in 1987 that U.S. authorities were investigating allegations that American firms paid kickbacks to Jamaican government officials, including then-Minister of Tourism Eric Abrahams.¹²⁸ The

¹²⁵ *Id.* at ¶ 103.

¹²⁶ *Id.* at ¶¶ 106-08.

¹²⁷ Organization of the American States, *Annual Report of the Inter-American Commission on Human Rights 1999 (Chapter III: The Petition and Case System)*, 2008 IACHR 876 (2008).

¹²⁸ *Id.* at ¶ 18.

Associated Press report was picked up by the three largest newspapers in Jamaica, the *Daily Gleaner*, the *Sunday Gleaner* and the *Star*, all of which were owned by the Gleaner Company and overseen by Editor-in-Chief Dudley Stokes.¹²⁹

Abrahams sued the Gleaner Company and Stokes, and he succeeded in Jamaican courts to achieve a default judgment of defamation liability, even though the newspapers had “published an apology indicating that, at the time they published the allegedly libelous information, they honestly believed it to be true and accurate.”¹³⁰ Nonetheless the Jamaican Supreme Court awarded Abrahams compensatory damages of \$80.7 million (Jamaican), though the award was later reduced to \$35 million (Jamaican). Stokes and the newspapers argued that the damage award was disproportionate and that the American Convention’s Article 13 was violated when the Jamaican courts imposed defamation liability and damages on behalf of a public official without requiring proof of actual malice. Jamaica responded that “the ‘actual malice’ standard is not incorporated into Article 13 of the American Convention and therefore is not binding on Jamaica.”¹³¹

Ultimately the Inter-American Commission did not pass judgment on the actual malice issue because it said its scope of adjudication was confined to determining whether damages were out of proportion. On that question, the

¹²⁹ *Id.* at ¶ 17.

¹³⁰ *Id.* at ¶ 24.

¹³¹ *Id.* at ¶ 42.

commission acknowledged that the damage award was very large but concluded that it did not violate the rights spelled out in the convention. The Jamaica case pointed out the need for the Inter-American Court of Human Rights to clarify whether actual malice was a requirement for defamation liability under the American Convention.

ACTUAL MALICE IN DEED, NOT IN NAME

Four years after addressing the issue in *Herrera and Canese*, the Inter-American Court in 2008 again considered the proper legal standard for a nation to impose criminal liability for defamation. The court continued to move cautiously but, by 2009 the court had essentially applied the actual malice standard. Yet the court refrained from citing *Sullivan* or explicitly adopting the American version of the actual malice doctrine.

Kimel Case

Eduardo Kimel was an Argentine journalist who published a book called *La Masacre de San Patricio* about the murder of five priests during Argentina's military dictatorship in 1976.¹³² In the book, Kimel wrote that the federal judge who examined evidence in the case went through the motions of an investigation but allowed the investigation to stall after evidence suggested the order for the

¹³² Kimel v. Argentina, 2008 Inter-Am. Ct. H.R. (Ser. C) No. 177, at ¶ 41 (May 2, 2008).

murders was given by the country's military leaders.¹³³ The judge in the case brought a criminal defamation charge against Kimel, and he was ultimately found guilty, fined and sentenced to serve one year in jail.¹³⁴

The case was brought to the Inter-American Commission based on the argument that Argentina had violated Kimel's Article 13 right to freedom of expression, and the commission found sufficient merit in the argument to refer the case to the Inter-American Court. Prior to the court entering a judgment, however, the commission, Kimel and Argentina engaged in negotiations that resulted in Argentina admitting that it violated Article 13.¹³⁵ But the question of what would constitute sufficient reparation from Argentina to Kimel remained unresolved and that matter went before the Inter-American Court for decision. In the course of deciding that question in 2008, the court issued an opinion that touched on the standard for defamation liability.

Within the context of the test it had applied in *Herrera and Canese* in 2004, the Inter-American Court in *Kimel* stated that criminal defamation was not categorically unnecessary and therefore in violation of the convention.¹³⁶ However, according to the English version of the court's opinion, a nation's judiciary must "carefully analyze[]" whether imposition of criminal defamation is justified, "pondering the extreme seriousness of the conduct of the individual who expressed his opinion, his actual malice, the characteristics of the unfair

¹³³ *Id.* at ¶ 42.

¹³⁴ *Id.* at ¶¶ 43-50.

¹³⁵ *Id.* at ¶ 18.

¹³⁶ *Id.* at ¶¶ 77-78.

damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception.”¹³⁷ However, the Spanish-language version of the opinion does not use in this passage the term *real malicia*, the most commonly accepted rendering in Spanish of “actual malice,” but rather uses the word *dolo*, most commonly translated as “intent.”¹³⁸ There is no indication why the Spanish-language version of the opinion would use “intent” while the English-language version would use “actual malice” to define the requisite degree of fault.

Further, the court re-emphasized that the burden of proving the nature of the speaker’s conduct rested with the plaintiff. The court also stressed that while competing rights might be “apparently contradictory,” the freedom of speech should not be undermined because it is “a milestone of democracy.”¹³⁹ As with *Herrera* and *Canese*, the court emphasized the role of free speech in ensuring government accountability¹⁴⁰ and also discussed the right to receive information¹⁴¹ and the marketplace of ideas.¹⁴²

Notwithstanding this speech-protective language, the court also said that “journalists have the duty to verify reasonably, though not necessarily in an

¹³⁷ *Id.* at ¶ 78.

¹³⁸ The Inter-American Court’s decisions are written and published first in Spanish, with English translations generally following a few weeks later.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at ¶¶ 87-88.

¹⁴¹ *See id.* at ¶ 53.

¹⁴² *Id.* at ¶ 57.

exhaustive manner, the truthfulness of the facts supporting their opinion.”¹⁴³

Because of that, the court held, “[I]t is valid to claim equity and diligence in the search for information and the verification of the sources. This implies the right not to receive a manipulated version of the facts.”¹⁴⁴ The court did not elaborate further on this cryptic and seemingly unnecessary commentary. It could be seen as granting a right in the defamation plaintiff to sue for “manipulated” facts, and to place a burden on the defendant to show “equity and diligence.”

However, it could also be that the court simply meant to inch closer to the actual malice standard without actually using that specific phrase. By saying that journalists should be expected to reasonably but not exhaustively verify facts, the court essentially acknowledged that a good faith effort at the truth — one made without actual knowledge of falsity or reckless disregard for truth — was legally sufficient to avoid defamation liability and preserve the freedom of speech. So the court could be understood to suggest here that journalists and other speakers who are equitable, diligent and non-manipulative of facts will exercise good faith and will not be guilty of actual malice. In that sense, then, the court’s commentary could merely confirm that the inter-American human rights system, like the U.S. Supreme Court, now recognizes that not only must defamation plaintiffs prove the comments at issue were false but also that — at least in the case of public officials and public figures speaking on matters of

¹⁴³ *Id.* at 79.

¹⁴⁴ *Id.*

public concern — the speaker knew they were false or recklessly disregarded their truth or falsity.

Yet it is clear that, in *Kimel*, the Inter-American Court determined that it did not have to decide whether to apply the actual malice standard because Kimel's allegedly defamatory statements about the judge's performance were opinions or value judgments not capable of objective verification and, therefore, not capable of defamation.¹⁴⁵ As for damages, the court ordered Argentina to pay Kimel a total of \$30,000 (US) and to expunge the conviction and its effects from Kimel's records within six months. The court also ordered Argentina to adapt its domestic law to the requirements of Article 13 and the rest of the American Convention.¹⁴⁶

Donoso Case

In the context of an intense 1999 national debate about the powers of Panamanian Attorney General José Antonio Sossa to authorize wiretapping and secret recording of telephone conversations, a lawyer named Tristán Donoso called a press conference to allege that the attorney general signed off on secretly tape recording Donoso speaking with a client who was under criminal investigation.¹⁴⁷ Donoso further alleged that the attorney general used the tape to make an allegation to leaders of the National Bar Association that Donoso was

¹⁴⁵ *Id.* at ¶¶ 92-93.

¹⁴⁶ *Id.* at ¶¶ 127-28.

¹⁴⁷ *Donoso v. Panama*, 2009 Inter-Am. Ct. H.R. (Ser. C) No. 193, at ¶ 46 (Jan. 27, 2009).

part of an illegal conspiracy.¹⁴⁸ The next day, the attorney general lodged a criminal defamation complaint against Donoso for allegedly accusing the attorney general falsely of committing the crime of illegal wiretapping and recording telephone conversations. Donoso ultimately was convicted of criminal defamation and was fined and sentenced to imprisonment for eighteen months.¹⁴⁹ The court that convicted Donoso specifically found that he “was not certain” about the truth of the statements he made about Sossa during the press conference.¹⁵⁰

In its decision in 2009, the Inter-American Court found that Panama had violated Donoso’s rights under Article 13 by convicting him of criminal defamation. As in previous cases, the court first explained the importance of the right to receive information and the value of free speech for self-governance and government accountability.¹⁵¹ Then the court stated that Sossa was a public official and the matter of his powers to wiretap and record telephone conversations was a matter of public concern.¹⁵² The court concluded that Donoso had made a true statement that Sossa disclosed the contents of a private telephone conversation to third parties, and Donoso had made a false statement

¹⁴⁸ *Id.* at ¶¶ 69, 95.

¹⁴⁹ *Id.* at ¶ 107.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at ¶¶ 109, 115.

¹⁵² *Id.* at ¶ 121.

that Sossa had illegally ordered the wiretapping and recording in the first place.¹⁵³

However, the Inter-American Court held, various pieces of evidence indicated that Donoso did not know the statement was false at the time he made it during the press conference. For example, at the time of Donoso's comments, the attorney general was the only person legally authorized to order wiretapping; the attorney general had the tape in his possession; someone in the attorney general's office had forwarded a copy of the recorded conversation to the Catholic Church; the recording was played at the attorney general's office to leaders of the National Bar Association; and the attorney general did not respond to a letter from Donoso asking him for a meeting to talk about the recording.¹⁵⁴

As with the *Kimel* opinion, the English-language version of the *Donoso* opinion uses the phrase "actual malice" when describing the analysis a national court should engage in during a defamation case brought by a public official.¹⁵⁵ But as with *Kimel*, the Spanish-language version of *Donoso* does not use *real malicia* but instead refers merely to *dolo*, or "intent." Hence, it appears the court's objective, given that the Spanish-language version was authored first by the court and then later translated by staff to English, was to apply the actual malice standard without actually using that phrase. Unlike *Kimel*, in which the court ultimately determined the degree of fault in erroneous statement was irrelevant

¹⁵³ *Id.* at ¶ 124.

¹⁵⁴ *Id.* at ¶ 125.

¹⁵⁵ *Id.* at ¶ 120.

since the statements were subjective opinions rather than objective facts, the court in *Donoso* concluded that Donoso's level of knowledge of the truth of his statements mattered since his statements were of a factual, or verifiable, nature.

It is clear the *Donoso* court purposely chose to use *dolo* rather than *real malicia* in the key passage because, at another point in the opinion, the court did use *real malicia* in describing the arguments by one of the attorneys.¹⁵⁶ So the court knew how to use *real malicia* when it wanted to, but chose in the key holding to use *dolo* instead. This would seem to indicate the court's reluctance in actually committing to the phrase "actual malice," even though the court seemed perfectly comfortable applying the legal concept of actual malice.

Even before the court reached its conclusion that Donoso's Article 13 rights were violated, Panama eliminated criminal libel liability for statements about certain public officials.¹⁵⁷

Aftermath of Kimel and Donoso Cases

Following the Inter-American Court's use of the actual malice standard in *Kimel*, the Special Rapporteur immediately began using the new requirement in its communications about various criminal defamation cases. Relying on *Kimel*, the Special Rapporteur reprimanded Ecuador and its president, Rafael Correa, for *desacato* and criminal defamation cases brought against Ecuadoran

¹⁵⁶ *Id.* at ¶ 208.

¹⁵⁷ *Id.* at ¶ 209.

journalists.¹⁵⁸ In one case, Correa filed a *desacato* charge against *La Hora* newspaper for an editorial criticizing his administration, and in another case the journalist Nelson Fuentala was sentenced to sixty days of prison time for criminal defamation after criticizing a provincial government official.¹⁵⁹ The Special Rapporteur reminded Correa and Ecuador “that public figures who consider that a journalist has caused intentional harm to their honor, with actual malice, should seek civil recourse.”¹⁶⁰

Following *Kimel* and *Donoso*, there was some evidence the actual malice requirement was taking deeper root throughout the region. In 2011, the Special Rapporteur congratulated Argentina and Uruguay for incorporating the actual malice standard into legislative enactments and judicial opinions.¹⁶¹ In 2010, the Argentina Supreme Court had held in a civil defamation case brought against the newspaper *El Diario La Mañana* that

With regard to information referring to public figures, when the news item contains false or inaccurate expressions, those who consider themselves affected must demonstrate that those who made said expression or accusation knew the news item was false and acted with the

¹⁵⁸ Organization of the American States, *Annual Report of the Inter-American Commission on Human Rights 2007 (Report of the Office of the Special Rapporteur for Freedom of Expression)*, 2008 IACHR 4 (Mar. 8, 2008).

¹⁵⁹ *Id.* at ¶ 199.

¹⁶⁰ *Id.*

¹⁶¹ Organization of the American States, *Annual Report of the Inter-American Commission on Human Rights 2010 (Report of the Office of the Special Rapporteur for Freedom of Expression)*, 2010 IACHR 156 (Mar. 4, 2011).

knowledge that it was false or with evident recklessness with regard to its veracity.¹⁶²

Still, notwithstanding progress, the inclinations to punish journalists remain strong in some quarters. A Uruguayan prosecutor sought to jail journalist Álvaro Alfonso for the crime of defamation based on publication of his book *Secrets of the Communist Party*.¹⁶³ The prosecutor argued that Alfonso acted with actual malice in writing that a Communist former Uruguayan legislator collaborated with the country's military dictatorship from 1973 to 1985 by identifying his Communist comrades.¹⁶⁴ In other places, progress remains slow. The Special Rapporteur noted in 2011 that Costa Rica's Legislative Assembly had once again tabled a bill that has been pending for more than a decade to reform the country's criminal code to incorporate an actual malice standard for criminal defamation.¹⁶⁵

DISCUSSION AND CONCLUSION

The results of all four Inter-American Court cases discussed in this article favored freedom of expression over reputation. The four opinions share some similarities and important differences. In all four cases, the Inter-American

¹⁶² *Id.* at ¶ 9.

¹⁶³ *Id.* at ¶ 406.

¹⁶⁴ *Id.*

¹⁶⁵ Organization of the American States, *Annual Report of the Inter-American Commission on Human Rights 2011 (Report of the Office of the Special Rapporteur for Freedom of Expression)*, ¶ 131, 2011 IACHR 1 (Dec. 30, 2011).

Court of Human Rights explained the rationales behind freedom of expression, including self-governance, accountability and enabling the search for truth in the marketplace of ideas. These same concepts were discussed in the Brennan majority opinion in *New York Times v. Sullivan*. The Inter-American Court, however, also repeatedly emphasized the importance of the right to receive information, a concept to which the U.S. Supreme Court has given some credence but has not fully explored or enthusiastically embraced.¹⁶⁶

The Inter-American Court repeatedly emphasized across these four opinions that it does not view criminal defamation as antithetical to Article 13 of the American Convention, as long as the balance takes into account the importance of free expression. Still, the court determined that all four applications of criminal libel to speech violated Article 13 in these cases. The court looked favorably on Panama's decision to do away with criminal libel. Although free speech advocates might disagree with the Inter-American Court's assessment that criminal libel and freedom of expression can coexist in a single society, the reality is that various American states have been living with a similar balance for decades.¹⁶⁷

¹⁶⁶ See, e.g., *United States v. Am. Library Ass'n*, 539 U.S. 194, 216 (2008) (citation and quotation omitted).

¹⁶⁷ See Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL'Y 433, 479 (2004) (noting that approximately half the states still criminalize libel in some form); David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 COMM. L. & POL'Y 303, 305 (2009) (arguing "criminal libel can be, and often is, a legitimate way for the law to deal with expressive deviance that harms the reputations of private figures in cases that have nothing to do with public issues").

Analysis of the four opinions also reveals some unanswered questions. For example, when criminal and civil liability were both sought for a single alleged defamation, the Inter-American Court tended to focus on the criminal proceedings without specifying under what conditions an actual malice standard is mandated for civil defamation lawsuits. Both the Inter-American Commission and the Special Rapporteur have argued vigorously in favor of an actual malice requirement in Article 13, but the Inter-American Court has been more cautious. In fact, the court arguably has not yet explicitly adopted the phrase “actual malice” even though the court has essentially applied the concept in *Donoso*. It remains a mystery why the court has not adopted *real malicia* in its Spanish-language opinions, preferring instead *dolo*, or intent, while the English-language versions of both *Kimel* and *Donoso* did state that actual malice was a requirement of the American Convention. The origin and significance of this discrepancy are unclear.

Scholars have noted that citation to foreign law may seem undemocratic and illegitimate.¹⁶⁸ Other scholars, meanwhile, advocate that the U.S. Supreme Court should proactively seek to spread its influence on free speech matters throughout the world.¹⁶⁹ It could be argued that foreign courts’ reluctance to adopt actual malice as a requirement in defamation actions brought by public

¹⁶⁸ See *supra* note 44 and accompanying text.

¹⁶⁹ See, e.g., LEE BOLLINGER, UNINHIBITED, ROBUST AND WIDE-OPEN 118 (2010) (“[T]he Court must speak more directly to the broader world. We need actively and deliberately to try to influence the rest of the world to embrace what we have come to believe is vital to a good society.”).

officials is a demonstration of lack of commitment to free expression values and principles. However, it might be the case instead that the reluctance is due to a desire to maintain national sovereignty and credibility rather than seeming overly influenced by the United States.¹⁷⁰ The Inter-American Court of Human Rights, for example, in the four cases discussed here has assiduously avoided using the phrase “actual malice” or citing the *Sullivan* opinion even while progressively moving to, in essence, adopt that standard.

The court’s failure to spell out clearly its adoption of actual malice could be seen as negative. The court’s delicate tap dance may have resulted in some confusion. As has been discussed, some courts and legislators in OAS member states seem to be unclear on whether the American Convention requires proof of knowledge of falsity or recklessness, or whether proof of lack of good faith or mere negligence would suffice. In addition, there has been some confusion whether the burden of proof could be properly placed on a defamation plaintiff to prove truth if he can; journalists, in particular, have sometimes been targeted for defamation and required to prove the truthful basis for their statements.

However, it may actually be advantageous for the Inter-American Court not to explicitly incorporate the phrase “actual malice” or cite to the *Sullivan* opinion. Not citing *Sullivan* will allow the court to avoid the problem of democratic illegitimacy in the eyes of some, achieving instead what one scholar

¹⁷⁰ See *supra* note 46 and accompanying text.

has called “indigeneity.”¹⁷¹ Even while adroitly avoiding this problem, the court has essentially achieved the effect of the actual malice standard. In *Donoso*, in particular, the court reviewed the factual basis for Donoso’s statements about the Panamanian Attorney General and concluded that Donoso did not speak with knowledge of falsity or reckless disregard for the truth. U.S. scholars who have concerns about the Inter-American Court’s failure to explicitly adopt actual malice by use of that term would do well to remember that U.S. judges often order jury instructions to exclude the confusing term “actual malice,”¹⁷² and Justice Brennan himself, who popularized the term in *Sullivan*, later regretted its use because of the confusion and misunderstandings it can cause.¹⁷³ By citing to *Herrera* and *Canese* rather than to *Sullivan*, the Inter-American Court in *Kimel* and especially *Donoso* has made a version of the actual malice rule its own rather than relying wholly on an American import.¹⁷⁴

In the context of international human rights courts, the fundamental concern of courts everywhere – potential lack of enforcement tools and the need to maintain legitimacy through credibility – is enhanced.¹⁷⁵ Judges on international rights tribunals, then, must be particularly strategic when choosing

¹⁷¹ Schauer, *The Politics*, *supra* note 45, at 253.

¹⁷² See *supra* note 63 and accompanying text.

¹⁷³ See *supra* note 64 and accompanying text.

¹⁷⁴ On the value of internal authenticity and originality in law, see Schauer, *The Politics*, *supra* note 45.

¹⁷⁵ See, e.g., Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 216 (2003); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 115 (1994).

which national authorities to cite.¹⁷⁶ An empirical review of worldwide constitutions and judicial decisions concluded that the influence of U.S. constitutional principles is waning, but that no competitor is taking its place; in other words, “[T]he notion that a particular constitution can serve as a dominant model for other countries may itself be obsolete.”¹⁷⁷ One scholar concluded that the Inter-American Court frequently cites authorities from the European Court of Human Rights,¹⁷⁸ and this type of horizontal transjudicial communication might simply be more natural than the odd mix of not-quite-horizontal and not-quite-vertical transjudicial communication between the Inter-American Court and the U.S. Supreme Court.¹⁷⁹

The reaction to the *Kimel* and *Donoso* cases has yet to be fully realized, but there are at least two reasons to believe the decisions could have long-lasting and widespread impact. First, the cases, especially *Donoso*, largely have moved beyond the misunderstandings of the actual malice doctrine that were present in earlier Inter-American Court opinions. This clarity – at least as much as can be achieved with the notoriously difficult definition of actual malice – should assist OAS member nations in their considerations of whether to adopt the concept, even if not the name. In *Donoso*, the Court clearly articulated and applied the

¹⁷⁶ See Slaughter, *A Typology*, *supra* note 175, at 119.

¹⁷⁷ David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 851 (2012).

¹⁷⁸ Erik Voeten, *Borrowing and Nonborrowing Among International Courts*, 39 J. LEGAL STUD. 547, 563 (2010).

¹⁷⁹ For more on vertical, horizontal and mixed transjudicial communication, see Slaughter, *A Typology*, *supra* note 175.

actual malice standard to protect a journalist from criminal and civil liability after he, in good faith, accused the Panamanian Attorney General of ordering illegal wiretaps.

But the language of the opinion goes even further and begins to lay the groundwork for application of the actual malice rule to public figures as well as public officials. The Inter-American Court concluded that, among the reasons for imposing an actual malice rule, a significant factor was that the attorney general in question and other public officials “voluntarily expose themselves to control by society, which results in a great risk of having their honor affected.”¹⁸⁰

Further, the court said, public officials such as Sossa have “great social influence and easy access to the media to provide explanations or to account for any events in which they take part.”¹⁸¹ These same factors apply to public figures and are among the reasons the U.S. Supreme Court has cited for extending actual malice to defamation claims by public figures.¹⁸²

The Inter-American Court’s exposition of the rationale behind the actual malice rule – that individuals in prominent positions in democratic societies have opened themselves up to criticism and have remedies to address it – is reason for optimism that the actual malice rule might grab hold in the OAS member states. In some of the nations that have declined to adopt actual malice, jurists seem to have categorized the rule as an American phenomenon with no

¹⁸⁰ Donoso v. Panama, 2009 Inter-Am. Ct. H.R. (Ser. C) No. 193, at ¶ 122 (Jan. 27, 2009).

¹⁸¹ *Id.*

¹⁸² Curtis Publ’g Co. v. Butts, 388 U.S. 130 (1967).

application to their own situations.¹⁸³ But the Inter-American Court has grasped that the actual malice rule is a progressive approach to ensuring vigorous public discussion of public affairs. The *Donoso* case represents the first time the Inter-American Court of Human Rights has so completely applied the rule at the heart of the actual malice formulation, and the court's understanding of that rule would seem to promise hope for greater acceptance and use throughout the Americas.

¹⁸³ See, e.g., *supra* note 31 and accompanying text.