The Right to Speak Ill

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Defamation, Reputation and Free Speech

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To Ben and Kate, with love, RLW

To Esther, Thais, Dick, and Ruth, ATK

To Nan, Will and Anne, DFP

'Life is the crummiest book I ever read,
There isn't a hook, just a lot of cheap shots,
Pictures to shock and characters an amateur would never dream up' (Brett Gurewitz, Stranger than Fiction, 1994) CPW

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Preface

To trace the law of defamation is to transverse centuries of the common law from its origins in the ecclesiastical courts to its place in modern political discourse. The printing press had its influence on the fabric of the law, as has the digital revolution. Courts, including the Star Chamber, have teased antique doctrine to accommodate changing societies, and legislatures have intervened frequently, and with mixed results, to reform the law.

This book brings authors together to write on a subject that has until recently, been deeply rooted in particular communities. Not so now. The watershed legal development was the landmark United States Supreme Court decision, *New York Times v. Sullivan*.[1] The decision builds upon the notion that representative democracies can function optimally only when political debate is open. Many obstacles stand in the way of political debate, but the rules of defamation with their tendency to chill speech is one obstacle that should be overcome. Speech can be maximized, while reputation is given less moment.[2]

The principles embodied in *Sullivan* derived from the First Amendment, yet they spoke to values common to all democracies, particularly after the Second World War when the discourse of rights grew powerfully. Both England and Australia rest the legitimacy of their respective political systems upon representative democracy and upon legal traditions of individual rights, including freedom of expression. The *Sullivan* principles diffused in ways noted in the following pages. Their absorption depended upon the legal, political and social culture obtaining in Australia and England. Crafting its own rule, each jurisdiction proposed to reach the same result, to avoid chilling of political speech by taming overly aggressive defamation doctrine. After a searching analysis of their own social and political traditions and constitutional law structures, the courts in England and Australia crafted a law of defamation in the 1990s that gave a new

1. 376 U.S. 254 (1964).

2. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L.REV. 691 (1986).

weighting to the protection of political free speech. The new doctrines, although to some extent reflecting the aspirations of the United States Supreme Court, represent a fabric that is woven with vital differences, as we point out, and reflect a growing commonality of concern for the value of free speech in public life which is shared by at least three jurisdictions.

This book, we hope, makes a significant contribution in reciting the law as it has evolved under the influence of the free speech imperative in three different legal systems. But, for us, that is not enough. Our aim is to probe beyond case law analysis to examine publishers' behavior in the shadow of the law and how, in particular, doctrinal changes influence willingness to publish political speech. Our methodology has been to interview those actors most involved with the development and publication of political speech. We have interviewed journalists, editors, producers and defamation lawyers. Our conclusions are drawn from this empirical material, as well as from comparisons of the relevant legal doctrines in each country. In its approach, the book builds on earlier empirical research into defamation law and the media, which has focused on one or two countries' approaches.[3] This book is unique in the breadth of jurisdictions it considers, and in the long time frame during which interviews were conducted for the project. These interviews began in the early 1990s, a time when both England and Australia continued to adhere (with some modifications) to common law

3. For an examination of pre-*Reynolds* research on English and U.S. defamation law, *see* Russell L. Weaver and Geoffrey Bennett, *Is the New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153 (1993). There has been extensive work focused solely on the U.S. *See, e.g.*, RANDALL P. BEZANSON, GILBERT CRANBERG AND JOHN SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY (New York: Free Press, 1987); David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503 (2001) (reporting on the findings of the Libel Defense Resource Center, http://www.medialaw.org); Brian C. Murchison, John Soloski, Randall P. Bezanson, Gilbert Cranberg and Roselle L. Wissler, *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7 (1994). For other work examining England, *see* Russell L. Weaver, Andrew T. Kenyon, David F. Partlett and Clive P. Walker, *Defamation Law and Free Speech: Reynolds v. Times Newspapers and the English Media*, VAND. J. TRANS-NAT'L L. 1255 (2004); ERIC BARENDT, LAURENCE LUSTGARTEN, KENNETH NORRIE AND HUGH STEPHENSON, LIBEL AND THE MEDIA: THE CHILLING EFFECT (Oxford: Oxford University Press 1997) (the study also included Scotland). For empirical analysis involving Australia, *see* Russell L. Weaver & David F. Partlett, *Defamation, the Media, and Free Speech: Australia's Experiment with Expanded Qualified Privilege*, 36 G.W.I. L. REV. 377 (2004); Tim Marjoribanks and Andrew T. Kenyon, *Journalistic Practice and Defamation Law in Australia and the U.S.*, 25 AUSTRALIAN JOURNALISM REV. 31 (2003) (includes comparisons with the United States). For interview-based work about England and Australia, *see* Andrew T. Kenyon, *Lange and Reynolds Qualified Privilege: Australian and English Defamation Law and Practice*, 28 MELB. U. L. REV. 406 (2004).

defamation liability rules. In addition, the interviews continued following more recent defamation protections. Thus, the interviews provide a basis for evaluating the impact of recent decisional changes. For the first time, empirical material preceding and following important changes to defamation law in major defamation jurisdictions have been drawn on to understand more about the legacy of *New York Times v. Sullivan*.

Russell Weaver participated in all of the interviews in all three countries and took the prime responsibility for their narration; David Partlett participated in some of the interviews. During the fieldwork, potential interviewees were identified by their status within prominent news organizations (e.g., editor, investigative reporter, in-house or external defamation lawyer), and each was individually contacted. While the overwhelming majority of interviews were conducted face-to-face, a few were conducted by phone or by e-mail. All interviews were recorded by notes that were taken on computer.

The book is broken into three parts. Part I summarizes the defamation rules in the subject countries. The law is described before and after *New York Times v. Sullivan* and the key 1990s cases in England and Australia. It is important to note that ongoing efforts exist to create uniform defamation law across Australia's states and territories. In 2005, state and territory governments agreed reform proposals that would create uniform defamation law,[4] if they pass through the various parliaments. Many previous efforts have failed to be enacted, although none has progressed quite as far as the current proposals. In any event, the reforms are not substantial for the purposes of this book. They do not change common law burdens of proof nor the Australian approach to legal costs. They follow many of the elements of the plaintiff's case and defences that are described in later chapters for the state of Victoria. Importantly, the proposals leave the *Lange* defense unchanged;[5] and apply a privilege defense similar to that under s. 22 of New South Wales' Defamation Act 1974 right across Australia.[6] Part II of the book analyzes how defamation rules function in practice, and how those rules affect the press' functioning. As noted above, Part II is based on extensive interviews with reporters, producers, editors and defamation lawyers in the three subject countries. Part III, the most difficult part for four authors from three countries to compose, attempts to draw evaluative judgments about the trade-offs made

4. *See e.g.* Defamation Bill 2005 (Vic); Defamation Bill 2005 (NSW).

5. *See Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520; and *see* chapter 4.

6. *See further* ANDREW T. KENYON, DEFAMATION: COMPARATIVE LAW AND PRACTICE (London: UCL Press, 2005).

in the affected countries. The limited scale of the proposed reforms to Australian defamation law—if indeed they are enacted—does not substantially effect the book's analysis of differences between the United States, English and Australian defamation law and the media.

Portions of this book were previously published in other places including the following: Russell L. Weaver, Andrew T. Kenyon, David F. Partlett & Clive P. Walker, *Defamation Law & Free Speech: Reynolds v. Times Newspapers and the English Media*, 37 VAND. J. TRANS-NAT'L LAW 1255 (2004); Russell L. Weaver & David Partlett, *Defamation, the Media & Free Speech: Australia's Experiment with Expanded Qualified Privilege*, 36 GEO. WASH. INT'L. L. REV. 377 (2004); Russell L. Weaver & Geoffrey J.G. Bennett, *Is the New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153 (1993). However, no other publication contains the full and extensive range of analysis, interview results and conclusions found in this book.

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RLW, ATK, DFP, CPW
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