

British defamation reform: an American perspective

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For many years, there have been considerable differences between US and British defamation law. The rift developed in the 1960s when the United States Supreme Court rendered its landmark decision in *New York Times v Sullivan*,¹ thereby constitutionalising the tort of defamation and making it much more difficult for public officials (and, ultimately, others) to recover for defamation.² Despite recent developments in Britain, in particular the House of Lords' decisions in *Reynolds v Times Newspapers*³ and *Jameel v Wall Street Journal Europe SPRL*⁴ there is still a wide gulf between US and English defamation law.

One aspect of the divide that may gall the British is the fact that US courts generally refuse to enforce British defamation judgments on public policy grounds.⁵ I have heard British academics take great offence at the idea that US courts would reject British judgments as repugnant to public policy. And, of course, those who take offence have considerable arguments on their side. The usual expectation is that countries will enforce foreign judgments based on principles of comity.⁶ Indeed, unless courts respect foreign judgments, they can hardly expect foreign courts to respect their own judgments.⁷ A British academic argued at an academic conference a couple of years ago that there is no reason why the US should reject British defamation judgments. After all, Britain respects the rule of law, has a tradition of protecting freedom of expression, and has every right to expect that its judgments will be enforced in the United States.

My sense is that US courts have essentially gotten it right, and they should not enforce British defamation judgments. As I explain more fully below, in formulating its defamation

1 376 US 254 (1964).

2 See *New York Times v Sullivan*, 376 US 254 (1964).

3 [2001] 2 AC 127 (HL).

4 [2006] UKHL 44, [2007] 1 AC 359.

5 See *Bachchan v India Abroad Publications Inc.*, 154 Misc 2d 228, 585 NYS2d 661 (Sup Ct 1992); *Telnikoff v Matusevitch*, 347 Md 561, 702 A2d 230 (Md App 1997). US courts have also refused to enforce non-defamation foreign free speech judgments. See e.g. *Sarl Louis Feraud International v Viefvinder Inc.*, 406 F Supp 2d 274 (SDNY 2005) (refusing to enforce a default judgment by a French high-fashion clothing designer obtained in France against a US corporation for unauthorised use of intellectual property and unfair competition).

6 See *Hilton v Guyot*, 159 US 113, 144 (1895): “Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings, and due notice.”

7 *Ibid.*

rules, the US Supreme Court recognised that defamation litigation involves a balance between speech and reputation, and decided to strike a constitutional balance that cuts decidedly in favour of free expression. Based on the available evidence, if the US enforces British defamation judgments, it runs a very serious risk of completely undermining the *New York Times* decision and the pro-free-speech balance that was struck in that case. No society should be required to compromise its fundamental values in order to enforce a foreign judgment.

1 The evolution of US defamation law

Until 1964, US defamation law did not differ fundamentally from British defamation law. Before that time, defamation liability rules were determined largely by the individual states who were free to strike the balance they deemed appropriate between speech and protection of reputation, and the balance they struck could (if they wished) differ markedly from the balance struck in other states.⁸

Of course, for much of US history, the First Amendment to the United States Constitution (which contains the guarantee of free speech) did not apply to the states, and therefore the states possessed broad authority to determine the content of defamation liability rules. This situation changed in 1940 when the Supreme Court decided *Cantwell v Connecticut*⁹ incorporating the First Amendment into the Fourteenth Amendment, and making it applicable to the states. Nevertheless, in its post-Cantwell decisions, the court flatly rejected the idea that defamatory speech was entitled to any constitutional protection. For example, in *Chaplinsky v New Hampshire*¹⁰ the court held that there are:

certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.¹¹

Likewise in *Smith v People of the State of California*¹² the court held that the First Amendment does not “prohibit the States from abridging free speech by the enactment of defamation or libel laws.”¹³

Until the decision in the *New York Times* case, most US states continued to adhere to the common law and to (more or less) follow British precedent.¹⁴ As a result, for nearly two centuries, the differences between US and British defamation law were not great. Of course, because the US eventually expanded to 50 states, and each state was free to define the tort of defamation in the way that it chose, there were undoubtedly variances between the states. However, on balance, US defamation law was not hugely different than British defamation law.

US divergence from British law came in two landmark decisions handed down by the United States Supreme Court in 1964. In the first, *Garrison v Louisiana*¹⁵ the court flatly rejected the idea that individuals (or the media, for that matter) could be criminally

8 See *New York Times v Sullivan*, 376 US 254 (1964).

9 310 US 296, 303 (1940).

10 315 US 568 (1942).

11 *Ibid.* at 571–2.

12 361 US 147, 157 n. 2 (1959).

13 *Ibid.*

14 See R L Weaver, A T Kenyon, D F Partlett and C P Walker, *The Right to Speak III: Defamation, free speech and reputation* (Durham NC: Carolina Academic Press 2006), pp. 35–6 (hereafter *The Right to Speak II*).

15 379 US 64 (1964).

prosecuted for libellous statements. *Garrison* was followed by the *New York Times* decision which imposed constitutional restrictions on the tort of defamation for the first time. In particular, the court held that public officials could not recover for defamation unless they could prove that the defendant had acted with “actual malice.”¹⁶ The court defined actual malice to mean that the defendant knew that the defamatory statement was false, or had acted with reckless disregard for whether it was true or false.¹⁷

In subsequent cases, the Court held that “public figures” were also required to satisfy the actual malice standard in order to recover in a defamation case.¹⁸ Although the court refused to apply the actual malice standard to defamation actions brought by private individuals, it did hold that enhanced protections should apply to them, depending on whether the individuals were regarded as “purely private individuals”¹⁹ or as private individuals not involved in matters of public interest.²⁰

In order to understand the social and constitutional implications of the *New York Times* decision, it is important to realise that the case grew out of the social ferment of the 1960s, and the civil rights protests that occurred during that era. The lawsuit was filed in response to an advertisement published in the *New York Times*, which discussed an incident that occurred between police and students in Montgomery, Alabama, and allegedly defamed the police commissioner, Sullivan.²¹ Even though only 394 copies of the advertisement were circulated in Alabama,²² a jury awarded Sullivan \$500,000 in damages.²³ It did so under an

16 376 US, at 277: “What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.”

17 Ibid. at 279–80: “The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”

18 See *Curtis Publishing Co. v Butts*, 388 US 130, 154–5 (1967); *Associated Press v Walker*, 388 US 130, 154–5 (1967): “[T]he public interest in the circulation of the materials here involved, and the publisher’s interest in circulating them, is not less than that involved in *New York Times*. [B]oth Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled ‘public figures’ under ordinary tort rules. Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements. [L]ibel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard.”

19 See *Dun & Bradstreet Inc. v Greenmoss Builders Inc.*, 472 US 749 (1985): holding that states retained substantial discretion regarding the liability standards to be applied to defamation actions brought by purely private individuals.

20 See *Gertz v Robert Welch Inc.*, 418 US 323 (1974): holding that private individuals could recover in a defamation action based on standards lower than the actual malice standard.

21 The advertisement, entitled “Heed Their Rising Voices”, was signed by the “Committee to Defend Martin Luther King and the Struggle for Freedom in the South,” and stated that “We in the South who are struggling daily for dignity and freedom warmly endorse this appeal.” Among other things, the advertisement alleged that: “thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity” and “are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern [freedom]”. The advertisement also referred to a “wave of terror” in the South, and concluded with an appeal for money to support various civil rights causes, including “the struggle for the right to vote” and the “legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery”.

22 *Sullivan*, 361 US at 260, note 3.

23 Ibid. at 267.

Alabama law that required the defendant to prove the truth of its assertions, and that allowed the jury to presume damages without any showing of pecuniary injury.²⁴

In reversing the judgment, the court rejected the common law presumption of damages, and struck the balance between speech and reputation firmly in favour of freedom of expression.²⁵ The court emphasised that the nation had made “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”, and that speech on public issues “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”.²⁶ Indeed, the court noted that the advertisement in question had been placed as part of an “expression of grievance and protest on one of the major public issues of our time.”²⁷ Since a certain amount of erroneous statement is inevitable in public debate, the court held that constitutional liability standards must be limited in order to provide “breathing space” for freedom of expression.²⁸

In order to create that breathing space, and avoid the potential “chilling effect” of defamation judgments, the court articulated the actual malice standard. The court’s stated intent was to make it much more difficult for public officials to recover for injury to reputation. The court took particular note regarding the repressive effect of earlier seditious libel prosecutions, and emphasised that libel judgments could have a similarly repressive effect on freedom of expression.²⁹ In the court’s view, the mere fact that an official’s reputation had suffered injury “affords no more warrant for repressing speech”.³⁰

2 The contrast with British defamation law

With the decision in the *New York Times* case, the US had moved decisively away from British defamation law. At the time, British defamation law was decidedly more pro-plaintiff, and tended to cut the balance between reputation and freedom of expression decisively in favour of reputation.³¹ As a British commentator noted, “English law has in the main been too jealous of defending the reputations of politicians and insufficiently alert to the legitimate interests of the electorate in consuming political information about those who govern us.”³²

Given the necessity for brevity, I will make no effort to summarise the state of British defamation at the time of the *New York Times* decision. That is done quite competently and fully elsewhere. It is fair to say that, while British law provided some protections for speech, those protections were decidedly more limited than the expansive protections provided by the *New York Times* decision. Indeed, until the decisions in *Reynolds* and *Jameel*, the chasm between US and British defamation law was quite wide.

24 *Sullivan*, 361 US at 260, note 3.

25 *Ibid.* at 270–1.

26 *Ibid.* at 271.

27 *Ibid.*

28 *Ibid.* 271–2.

29 *Ibid.* at 273: “If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment.”

30 *Ibid.* at 272.

31 *Ibid.* at 17–18.

32 I Loveland, *Political Libels* (Oxford: Hart Publishing 2000), p. ix.

3 The impact of the *New York Times* decision and the contrast to the United Kingdom

Because of the *New York Times* decision, the US media began to function quite differently than the British media. For those familiar with the British press, this observation may seem counter-intuitive. Indeed, I taught at the University of Leeds in the late 1980s, and even I began to question whether there was a meaningful difference between the way in which the British media functioned and the US media functioned. Indeed, if anything (as I discuss below) I might have argued that the British press was *more* aggressive than the US press.

At the time, there was considerable debate regarding the content of US defamation law, and major debates about whether the *New York Times* decision was providing enough protection for speech. Indeed, the Libel Resource Defense Center was disseminating information suggesting that defamation litigation and defamation judgments were on the rise in the United States³³ and also suggesting that defamation judgments were being awarded in the United States with much higher frequency and in much higher amounts.³⁴

Because of the data, as well as because of a perception that the cost of defamation litigation was skyrocketing in the United States,³⁵ some very thoughtful commentators began to express serious concerns about the state of US defamation law. Professor Richard Epstein of the University of Chicago Law School proclaimed that “the onslaught of defamation actions is greater in number and severity than it was in the ‘bad old days’ of common law libel”.³⁶ Professor Rodney Smolla (now President of Furman University), stated that “an astonishing shift in cultural and legal conditions has caused a dramatic proliferation of highly publicized libel actions brought by well-known figures who seek, and often receive, staggering sums of money”.³⁷ As a result, some commentators began to view the *New York Times* decision as not providing sufficient protection for the US media, and to argue that US law should provide even greater protection to newspapers and broadcasters. One commentator suggested that public officials not be allowed to recover in defamation actions unless they can prove that the defendant intentionally defamed them (in other words, a reckless disregard for the truth would be insufficient).³⁸ Others argued for a complete ban on defamation actions by public officials.³⁹

During my year at Leeds, I frequently read British newspapers, and was struck by the seeming aggressiveness and boldness of the British press, although not always the accuracy.⁴⁰ As a result, I began to think about the seeming inconsistency between what I thought that I was seeing in the United Kingdom, and the concerns being raised by prominent US commentators. The *New York Times* decision was premised on the idea that harsh defamation laws would chill reporting and have an undesirable impact on the press and its efforts to report on matters of public interest. If the British media could function

33 See R A Epstein, “Was *New York Times v Sullivan* wrong?” (1986) 53 *University of Chicago Law Review* 782.

34 Libel Defense Resource Center, press release 1 (26 September 1991).

35 See *Herbert v Lando*, 443 US 159 (1973): suggesting that \$6m was spent on discovery in a defamation case.

36 Epstein, “*New York Times*”, n. 33 above, p. 783.

37 R A Smolla, “Let the author beware: the rejuvenation of the American law of libel” (1983) 132 *University of Pennsylvania Law Review* 1.

38 See M Garbus, “25 years after ‘*Times v Sullivan*’: what remains to be done” (1989) 201 *NYLJ* 2–3 (attributing the idea to Professor Theodore Silver).

39 See *ibid*; A Lewis, “*New York Times v Sullivan* reconsidered: time to return to ‘the central meaning of the First Amendment’” (1983) 83 *Columbia Law Review* 603, p. 625

40 I stopped reading one of the “quality” newspapers after it published a completely hopeless piece on the US Constitution. My letter to the editor produced only a curt reply: “Thank you very much. Unfortunately, we will be unable to publish your letter.”

under far less protective defamation laws, and still report quite aggressively and boldly, then had the United States Supreme Court simply “got it wrong” in the *New York Times* decision? Do we really need to be fearful about the chilling effect of defamation law on free speech? Or was there some other factor that caused the British press to function far more differently than the US press?

In an effort to resolve the seeming inconsistency between the concerns being raised in the United States, and what I thought that I perceived in the United Kingdom, I began a multi-year empirical project designed to gain greater insight into how the media was functioning in both the United States and the United Kingdom. The goal was to interview journalists, editors, producers and defamation lawyers, in an attempt to learn more about what they decide to publish, and, more importantly, what they decide not to publish. Over time, the research project was expanded to Australia.

When the project began, although the *New York Times* decision was settled law in the United States, both England and Australia were about to undergo major upheavals in the state of their defamation law. In England, neither *Reynolds* nor *Jameel* had been decided, and therefore there had been no extension of common law qualified privilege. In addition, although the developments in Australia preceded *Reynolds*, they had not occurred yet either, and the developments in Australia were momentous. Initially, the Australian High Court decided two cases articulating an “implied” constitutional right to free expression⁴¹ (interesting decisions since the framers of the Australian Constitution had deliberately chosen not to include a Bill of Rights, or protections for free expression, in the Australian Constitution),⁴² and then articulated constitutional protections against defamation liability in *Theophanous v The Herald & Weekly Times Ltd.*⁴³ The Australian High Court followed these decisions with its landmark decision in *Lange v Australian Broadcasting Corporation*⁴⁴ which extended common law qualified privilege to matters relating to political and governmental matters. *Lange* provided a defence against defamation liability when the plaintiff had reasonable grounds to believe that the defamatory allegations were true, did not believe that they were false, and had made proper inquiry to verify the allegations.⁴⁵

Even though the interviews began before either *Reynolds* or *Lange* was decided, they continued over enough years to allow conclusions to be drawn regarding the impact of those decisions. Indeed, in Australia, interviews were conducted before the *Theophanous* decision, after that decision but before *Lange*, and then after *Lange*. As a result, the interviews produced a solid basis for evaluating the impact of those decisions. In the United Kingdom, interviews were conducted before *Reynolds* was decided, as well as a few years afterwards, but have not been conducted following the decision in *Jameel*. As a result, although it is possible to draw conclusions about how *Reynolds* affected British media practices, the evidence is incomplete regarding *Jameel*. I hope to conduct the post-*Jameel* interviews in the near future.

The early interviews (in other words, the interviews that were conducted prior to *Reynolds* and *Lange*) suggested that many of my impressions and concerns were simply wrong. After conducting extensive interviews in both the United States and the United Kingdom, I found that the British media was nowhere near as aggressive or bold as I had

41 See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; see also *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211.

42 See R L Weaver and K Boehringer, “Implied rights and the Australian Constitution: a modified *New York Times Inc. v Sullivan* goes down under” (1998) 8 *Seton Hall Constitutional Law Journal* 10.

43 (1994) 182 CLR 104.

44 189 CLR 520, 562–4 (Aust HC 1997).

45 See *The Right to Speak III*, n. 14 above, pp. 82–7.

assumed, and indeed that its reporting was significantly affected by British defamation law.⁴⁶ By contrast, any fears that I might have had regarding the impact of American defamation law on the US media were almost completely dissipated.⁴⁷ Indeed, as the interviews continued (over a period of years), my research ultimately confirmed that the underpinnings of the *New York Times* decision were essentially correct. In other words, although the British media seemed quite chilled by the possibility of defamation liability, US media outlets were not chilled at all.⁴⁸

A. GENERAL STATEMENTS REGARDING THE IMPACT OF DEFAMATION LAWS ON REPORTING

At the outset of each interview, I usually allowed the interviewee to provide an overview statement regarding the effect of defamation law on his/her reporting. Quite frankly, I did not expect to learn much from these overview statements. Indeed, I expected both the British and US media to complain about the oppressiveness of the defamation laws to which they were subject. On this score, my expectation was fulfilled in the English interviews. A solicitor for *The Times* (London) complained that British law gave plaintiffs an “easy run” by making papers “guilty [of defamation] until proven innocent”.⁴⁹ An editor complained that even quite small errors could lead to judgments.⁵⁰ A programming director for Thames Television stated that defamation cases are high risk because juries almost always find against media defendants, even though only the strongest cases are ever litigated, and often render relatively large judgments.⁵¹

Although I expected US interviewees to feel similarly oppressed by US defamation law, this expectation turned out to be unfounded. US interviewees expressed far less concern about the possibility of defamation litigation than their British counterparts. For example, a presenter for National Public Radio’s *Morning Edition* flatly stated that defamation laws had no impact on his coverage.⁵² Other interviewees expressed similar sentiments, including reporters for national news programs and local television stations.⁵³ In fact, only one interviewee, a lawyer for a major network, expressed any concerns at all about the impact of US defamation laws, and those concerns were quite limited.⁵⁴

B. SUITS AND THREATS OF SUIT

Of course, the general questions could reveal only so much, and I was much more focused on how the media would respond to more pointed questions on a variety of topics. When I began to probe with more specific questions about how the media

46 See *The Right to Speak III*, n. 14 above, pp. 131–50.

47 Ibid. pp. 183–200.

48 Ibid. pp. 131–200.

49 Interview with anonymous solicitor for *The Times* (London) (29 May 1992) (hereafter Anonymous *Times* (London) Solicitor Interview).

50 Interview with an anonymous editor for *The Guardian* (29 May 1992) (hereinafter Anonymous *Guardian* Editor Interview).

51 Interview with anonymous programming director for Thames Television (London) (4 June 1992) (hereafter Anonymous Thames Director Interview).

52 Interview with anonymous presenter, National Public Radio’s *Morning Edition*, at Washington DC (23 July 1992) (hereafter Anonymous NPR Presenter Interview); telephone interview with anonymous *60 Minutes* producer (13 October 1992) (hereafter Anonymous *60 Minutes* Producer Interview).

53 Telephone interview with anonymous NBC *Nightly News* producer (22 September 1992) (hereafter Anonymous NBC *Nightly News* Producer Interview); telephone interview with anonymous local news anchor in Louisville KY (8 July 1992) (hereafter Anonymous Local News Anchor Interview); telephone interview with anonymous CBS vice president (hereafter Anonymous CBS Vice President Interview) (22 September 1992).

54 See *The Right to Speak III*, n. 14 above, p. 185.

functioned, it rapidly became clear that the general statements made by the British media were backed up by considerable substance. At the time, British newspapers and broadcasters were receiving a fairly large number of defamation complaints. Even quality newspapers, which were less inclined to sensationalise, regularly received threatening letters from solicitors regarding their coverage. These letters could average two or more per week.⁵⁵ If the paper or broadcaster felt that a statement was inaccurate, it would usually offer to retract the statement⁵⁶ and might even offer a small damages payment.⁵⁷ Some papers made such retractions in response to about one-third of the letters they received.⁵⁸ Of course, some matters could not be settled, and about 5 to 10 per cent of all letters ultimately resulted in litigation.⁵⁹

By contrast, the reason that US newspapers and broadcasters were less concerned about defamation liability was because they were being threatened with suit, and actually sued, far less frequently than their British counterparts.⁶⁰ The *Louisville Courier-Journal* was, for example, being sued only once every two years or so.⁶¹ The *Washington Post* was receiving only three or four letters a year from lawyers threatening suit,⁶² and was rarely sued.⁶³ Although the *New York Times* might have received one letter a month from lawyers, it was sued only about once a year.⁶⁴ A presenter for a national radio program was simply unaware of whether his broadcasting corporation had ever received threatening letters or had been sued.⁶⁵ One of the executive producers for *60 Minutes*, an investigative news program, had only been sued twice in his eight years with that program.⁶⁶

C. THE INVOLVEMENT OF LAWYERS

The threat of defamation actions, and more importantly the threat of having to pay costs if a media outlet lost a defamation action, had a major impact on day-to-day news coverage in the United Kingdom. As a rule, the British media found that the most efficient way to avoid retractions and damages settlements was by acting with caution. Although newspapers and broadcasters could insure themselves against defamation losses, few found it feasible to

55 Anonymous *Times* (London) Solicitor Interview, n. 49 above (2–3 letters a fortnight, and a writ a month); Anonymous Legal Manager, News International (London) (4 June 1992) (hereafter Anonymous News International Legal Manager) (3–4 letters per week); Anonymous *Guardian* Editor Interview, n. 50 above (100–120 letters from solicitors per year); Anonymous Lawyer, Thames Television (London) (4 June 1992).

56 *Ibid.*

57 *Ibid.*

58 Anonymous *Guardian* Editor Interview, n. 50 above. However, if Thames Television found that they had an adequate defence, and were able to convince opposing solicitors of this fact, in nearly 99% of all cases. Anonymous Thames Director Interview, n. 51 above.

59 Anonymous News International Legal Manager, n. 55 above; Anonymous Thames Director Interview, n. 51 above.

60 Anonymous NBC *Nightly News* Producer Interview, n. 53 above; Anonymous Local News Anchor Interview, n. 53 above (2 letters from lawyers a year and hardly ever sued); Anonymous CBS Vice President Interview, n. 53 above.

61 Interview with anonymous *Louisville Courier-Journal* editor, in Louisville KY (1 July 1992) (hereafter Anonymous *Courier-Journal* Editor Interview).

62 Telephone interview with anonymous *Washington Post* counsel (6 July 1992) (hereafter Anonymous *Washington Post* Counsel Interview).

63 *Ibid.*

64 Telephone interview with Anonymous *New York Times* legal counsel (7 July 1992) (hereafter Anonymous NY *Times* Legal Counsel Interview).

65 Anonymous NPR Presenter Interview, n. 52 above. NPR receives threatening letters very infrequently, perhaps once a year. Anonymous Interview with NPR counsel at Washington DC (23 July 1992) (hereafter Anonymous NPR Counsel Interview).

66 Anonymous *60 Minutes* Producer Interview, n. 52 above.

do so.⁶⁷ Insurance was often expensive⁶⁸ and usually carried a very high deductible.⁶⁹ So, virtually all British publishers found that the best way to protect themselves against liability was through careful reporting and careful review practices.

The thoroughness of the British review process was startling by American standards. Most newspapers and broadcasters employed teams of lawyers who would review each day's paper or programme for material that might be defamatory. *The Guardian*, for example, had several lawyers who would review each day's paper before it was published.⁷⁰ *The Times* had an in-house staff of three solicitors who performed this task, and also employed a barrister who came in during the evening to make spot checks.⁷¹ Thames Television had two lawyers who spent up to 70 per cent of their time on defamation issues.⁷² These two lawyers could not review all programmes, but they tried to review as many as they could, and they made a special point of reviewing high-risk investigative programmes.⁷³

The situation in the US was markedly different. Unlike their British counterparts, US newspapers and broadcasters did not have teams of lawyers that combed through copy searching for material that might be defamatory,⁷⁴ and did not seem so focused on avoiding defamation liability. Most US papers and broadcasters allowed editors and producers to decide for themselves whether material was potentially defamatory,⁷⁵ and to also decide for themselves whether to consult or involve counsel.⁷⁶ If an editor or producer felt comfortable with a piece, he or she might simply decide to publish or air it without any input from counsel.⁷⁷ Undoubtedly, this more nonchalant approach (compared to the British media) related to the fact that the US newspapers and broadcasters were threatened with defamation suits and actually sued far less frequently than their British counterparts.

D. THE "LEGALLY ADMISSIBLE EVIDENCE" STANDARD

Of course, the differences noted thus far (regarding threats of litigation, actual litigation and the involvement of lawyers in the editorial process) are important, but these differences take us only so far in evaluating how the British and American media were functioning. However, as the interviews continued, there was mounting evidence of major differences in the reporting process, as well as in terms of outputs.

67 Anonymous *Guardian* Editor Interview, n. 50 above.

68 Ibid.

69 Anonymous Thames Director Interview, n. 51 above.

70 Anonymous *Guardian* Editor Interview, n. 50 above.

71 Anonymous *Times* (London) Solicitor Interview, n. 49 above; Anonymous News International Legal Manager, n. 55 above (News International which controls a number of papers including *The Sun* and *The Times* also has a lawyer who comes in at night to review "every sentence with legal danger").

72 Anonymous Thames Director Interview, n. 51 above.

73 Ibid.

74 There are some exceptions. CBS routinely asks legal counsel to review investigative programs. Anonymous CBS Vice President Interview, n. 53 above. In addition, those who publish internationally may be more inclined to use pre-publication lawyer reviews as a matter of routine. Telephone interview with an anonymous staff counsel for Cable News Network (CNN) (9 July 1992) (hereinafter Anonymous CNN Counsel Interview). But they do so because of the risk under foreign laws. Ibid.

75 Telephone Interview with Anonymous Legal Counsel for Central Broadcasting System (CBS) 12 October 1992 (hereafter Anonymous CBS Legal Counsel Interview); Anonymous NBC *Nightly News* Producer Interview, n. 53 above; Anonymous *Washington Post* Counsel Interview, n. 62 above; Anonymous Local News Anchor Interview, n. 53 above; Anonymous CBS Vice President Interview, n. 53 above; Anonymous *Washington Post* Counsel Interview, n. 62 above.

76 Ibid.

77 Ibid.

In Britain, if a lawyer flagged a piece as “potentially defamatory”, at most media outlets, the lawyer’s action would then trigger a secondary review process in which newspapers, editors (and sometimes lawyers) would meet with the reporters who wrote the story in an effort to determine the basis for allegations.⁷⁸ Throughout the process, the focus was on legal sufficiency.⁷⁹ Counsel for News International stated that he focused on three basic issues: 1) Is the statement true? 2) Can he prove it? 3) Is the person mentioned likely to file suit?⁸⁰ Other organisations used similar criteria.⁸¹

All British media organisations indicated that, as a matter of journalistic ethics, they did not want to print or broadcast anything that was untrue. However, all stated that they were not able to publish everything that they believed was true. Most focused on whether, if it was called on to account for a story, their organisation would have “legally admissible evidence” with which to defend itself.⁸² At Thames Television, one of the solicitors would meet with the editor and reporter in an attempt to determine the basis for any allegations that were being made.⁸³ This was a cooperative process under which the solicitor tried to understand and accommodate the needs of programme makers.⁸⁴ However, the process was also pragmatic. Editors considered whether, even if evidence was admissible, the sources were willing to go “into the box” and testify. Editors might be reluctant to rely on information learned from a source that they could not expose⁸⁵ or who was likely to go “wobbly” on them.⁸⁶ Editors would also consider whether information was learned under the “lobby system” and was therefore deemed to be off the record.⁸⁷

After considering this melange of factors, editors would decide whether to publish. This decision was often a “team” decision which involved the editor and the reporter as well as, perhaps, the head of the department.⁸⁸ This process could produce a variety of results. Although editors sometimes decided to scrap a piece,⁸⁹ this option was rarely chosen.⁹⁰ More commonly, editors tried to save a piece by rewriting or altering it in a way that would limit their legal exposure.⁹¹ In rewriting a piece, editors might delete segments that were not legally supportable,⁹² attempt to present the subject in a more balanced fashion,⁹³ or change

78 Anonymous *Times* (London) Solicitor Interview, n. 49 above; Anonymous News International Legal Manager, n. 55 above; Anonymous *Guardian* Editor Interview, n. 50 above; Anonymous Thames Director Interview, n. 51 above.

79 Anonymous *Times* (London) Solicitor Interview, n. 49 above; Anonymous News International Legal Manager, n. 55 above; Anonymous *Guardian* Editor Interview, n. 50 above; Anonymous Thames Director Interview, n. 51 above.

80 Anonymous News International Legal Manager, n. 55 above.

81 Anonymous Thames Director Interview, n. 55 above.

82 Ibid.

83 Ibid.

84 Ibid.

85 Anonymous *Times* (London) Solicitor Interview, n. 49 above; Anonymous News International Legal Manager, n. 55 above.

86 Anonymous *Times* (London) Solicitor Interview, n. 49 above.

87 Anonymous News International Legal Manager, n. 55 above.

88 Anonymous *Times* (London) Solicitor Interview, n. 49 above.

89 Anonymous *Guardian* Editor Interview, n. 50 above.

90 Anonymous *Times* (London) Solicitor Interview, n. 49 above; Anonymous *Guardian* Editor Interview, n. 50 above; Anonymous Thames Director Interview, n. 51 above (the interviewee could only remember one instance in which Thames Television was forced to “kill” a programme in its entirety).

91 Anonymous *Times* (London) Solicitor Interview, n. 49 above; Anonymous *Guardian* Editor Interview, n. 50 above.

92 Anonymous *Times* (London) Solicitor Interview, n. 49 above.

93 Anonymous Thames Director Interview, n. 51 above.

a statement of fact to an opinion in order to make the statement a “comment” and thereby invoke the privilege of fair comment.⁹⁴

When US editors or producers involved their lawyers, they used a process that was similar to that used by their English counterparts. The attorney examined the statement, and examined the reporter’s sources in an effort to ascertain whether there was adequate evidence to support the assertion.⁹⁵ In some instances, the attorney might even have urged the paper to do additional investigative work.⁹⁶ In other instances, the lawyer might have recommended that part of a piece be rewritten or softened,⁹⁷ or that an effort be made to present something in a more balanced way.⁹⁸ Nevertheless, if there was adequate evidence to support a claim, something would have been printed or broadcast even though it contained hard-hitting allegations.⁹⁹

Thus, the possibility of defamation suits had some impact on reporting in the United States. However, most interviewees indicated that the impact was minimal. Few editors or producers reported that they had ever killed a story for fear of defamation liability.¹⁰⁰ Moreover, few indicated that they were unable to make a statement for fear of liability. They were often reluctant to rely entirely on confidential sources.¹⁰¹ In addition, if they had inadequate support for a piece, they might seek additional support.¹⁰² Alternatively, they might soften a statement¹⁰³ or attempt to present it in a more balanced way. But there was a very good chance that the allegation would still be made. Moreover, the overall focus was on journalistic integrity rather than on legal sufficiency.

E. THE IMPACT OF PARTICULARLY LITIGIOUS INDIVIDUALS

Even though few stories were scrapped, Britain’s defamation laws took an inevitable toll on reporting, especially when rich and litigious individuals were involved. The media would print allegations against public officials and others, but they rarely did so except when there was strong supporting evidence.¹⁰⁴ One editor referred to the Mills tidal basin incident that occurred in the United States (where then-Congressman Wilbur Mills was found drunk and naked, late at night, with a stripper, in the tidal basin next to the Jefferson Memorial).¹⁰⁵ The editor suggested that the facts in that case were so strong that, had a similar incident occurred in Britain, it would have been widely reported and commented on. Indeed, the British Wilbur would probably have been the subject of much derisive comment.

However, a very different picture emerges when British editors were asked about a case like Watergate. That case was slow developing, and was initially based on inside sources. In some instances sources were unknown even to the reporters themselves and were unwilling to be publicly revealed. Thus, it was difficult for editors and publishers to produce legally

94 Anonymous *Times* (London) Solicitor Interview, n. 49 above.

95 Anonymous *Washington Post* Counsel Interview, n. 62 above; Anonymous Local News Anchor Interview, n. 53 above.

96 Anonymous *60 Minutes* Producer Interview, n. 52 above; Anonymous CBS Legal Counsel Interview, n. 75 above.

97 Ibid.

98 Anonymous *60 Minutes* Producer Interview, n. 52 above.

99 Ibid. Anonymous CBS Legal Counsel Interview, n. 75 above.

100 Anonymous *60 Minutes* Producer Interview, n. 53 above.

101 Anonymous CBS Legal Counsel Interview, n. 75 above.

102 Ibid.

103 Ibid.

104 Anonymous *Guardian* Editor Interview, n. 50 above.

105 Ibid.

admissible evidence substantiating their allegations of misconduct. Nevertheless, the Watergate story was published in the United States. Would the same type of story have been reported in England? British editors and defamation lawyers uniformly stated that, without legally admissible evidence, they would have been unable to print such allegations.¹⁰⁶ Even *The Sun* newspaper, one of the tabloids, suggested that it would have been “reluctant to run” such a story.¹⁰⁷ Moreover, if a libel suit had been brought, news sources might have “dried up”. The sources, who in the case of Watergate were governmental insiders, might have feared retaliation and refused to provide further information. As a result, the investigation might not have continued to conclusion and the full extent of the scandal might never have been revealed.

In deciding whether to publish, British editors routinely considered whether the subject of the article was someone who was likely to sue.¹⁰⁸ Some individuals were regarded as particularly litigious¹⁰⁹ and British editors were less inclined to take risks as to these individuals.¹¹⁰ The chilling effect of British defamation law was dramatically revealed by the case of Robert Maxwell, the British publishing magnate who died mysteriously off the coast of the Canary Islands in 1991. Following his death, it was discovered that Maxwell had suffered serious financial reverses, and had looted his companies, thereby causing major losses to British pensioners. Some suggested that Maxwell’s financial problems would have come to light earlier except for Maxwell’s litigious nature which caused the British press to be reluctant to make allegations against him.¹¹¹

British editors confirmed that Maxwell’s litigious nature affected their reporting on him.¹¹² British editors and lawyers flatly stated that they were well aware of Maxwell’s litigious nature¹¹³ and that they were quite careful about reporting on him.¹¹⁴ One defamation lawyer stated that the British media was “scared” of Maxwell because he used the libel laws “savagely”.¹¹⁵ Another lawyer indicated that Maxwell routinely demanded proof that “one hundred per cent” of all allegations made against Maxwell were accurate.¹¹⁶ A solicitor for the London *Times* stated that Mr Maxwell was quick to serve defamation writs, and that he would do so if the newspaper got so much as a word wrong.¹¹⁷ The British media made statements suggesting that Maxwell’s threats had a

106 Anonymous *Guardian* Editor Interview, n. 50 above.

107 Anonymous News International Legal Manager, n. 55 above.

108 *Ibid.*

109 *Ibid.*

110 Anonymous Thames Director Interview n. 51 above.

111 Columnist Anthony Lewis argued that Maxwell evaded “proper scrutiny” because of “Britain’s stringent libel law, which makes it dangerous to write critically about a scoundrel like Maxwell. Whenever anyone suggested wrongdoing by Maxwell, he sued . . . The threat of a libel suit is so potent in silencing critics in Britain because the law is so favorable to libel plaintiffs. Nearly everyone who sues the press gets a cash settlement or wins a jury verdict at trial – and keeps it on appeal.” A Lewis, “Britain’s plaintiff-friendly libel laws shielded Maxwell’s scams from scrutiny”, *LA Daily Journal*, 16 December 1991, p. 2; see R O’Connor, “The debate over Britain’s libel laws: discussions have intensified since the death of Robert Maxwell”, *Editor and Publisher*, 29 February 1992, p. 22.

112 *Ibid.*

113 Anonymous *Times* (London) Solicitor Interview, n. 49 above.

114 *Ibid.*

115 Anonymous Thames Director Interview, n. 51 above; see also Anonymous News International Legal Manager, n. 55 above (media was “afraid” of Maxwell).

116 Anonymous News International Legal Manager, n. 55 above.

117 *Ibid.*

chilling effect which prevented them from publishing allegations that could not be easily proved in court.¹¹⁸

Publishers would make allegations against Maxwell when they had strong evidence to support their allegations. But, when the media lacked compelling proof, it would not publish. Thus, the media withheld items that would have been aired against someone who was less litigious.¹¹⁹ For example, editors were much more willing to print allegations against Rupert Murdoch, another British publishing magnate who was regarded as less litigious.¹²⁰ The net effect is that many things that were known about Maxwell went unreported, including his financial reverses.¹²¹ Although Maxwell is now dead, later interviews confirmed that there were other litigious individuals about whom the British media would report gingerly, if at all.¹²²

Consistent with the much lower level of defamation litigation, there was no Maxwell parallel in the United States. In other words, there was no particularly litigious individual who scared newspapers and stunted their coverage of him.¹²³ Some media reported that they received threats designed to discourage them from airing allegations.¹²⁴ For example, CBS's *60 Minutes* was routinely threatened that it would be sued if it aired particular stories.¹²⁵ But those threats did not have much effect on coverage.¹²⁶ In rare instances, editors would soften or alter stories to protect themselves, but they rarely killed a story.¹²⁷ Moreover, they did not seem to fear any particular individual like the British media feared Maxwell.¹²⁸ Interestingly, while Maxwell was alive, the US media did not fear him, and he made no attempt to bully the US press in the way that he did the British press.

F. THE ABSENCE OF A PLAINTIFFS' DEFAMATION BAR

Reflective of the lower level of defamation litigation in the United States, one simple fact stands out: lawyers who specialise in defamation litigation are virtually non-existent in the United States. In some respects, this fact is absolutely astounding. In many other countries, the United States is perceived as an extremely litigious country, and this perception of litigiousness relates primarily to torts litigation. Plaintiffs' lawyers in the United States can take cases on a contingency fee basis, and therefore have an incentive to take good cases even though the plaintiff may be impecunious. So, if there was a significant amount of defamation litigation, and the litigation were economically worthwhile, one would expect to find a significant number of plaintiff defamation lawyers.

So, why are plaintiffs' defamation lawyers a rare and endangered species in the United States? In fact, there is very little incentive for a lawyer to take a defamation case on a contingency fee basis. The *New York Times* decision creates a daunting standard of proof,

118 Anonymous News International Legal Manager, n. 55 above.

119 Ibid.

120 Anonymous Thames Director Interview, n. 51 above.

121 Ibid.

122 See *The Right to Speak Ill*, n. 14 above, pp. 233–4.

123 Anonymous NBC *Nightly News* Producer Interview, n. 53 above; Anonymous CBS Vice President Interview, n. 53 above.

124 Anonymous Local News Anchor Interview, n. 53 above.

125 Anonymous *60 Minutes* Producer Interview, n. 52 above.

126 Anonymous *60 Minutes* Producer Interview, n. 52 above; Anonymous Local News Anchor Interview, n. 53 above. Again, the one major exception is provided by those who publish internationally. CNN will consider an individual's litigious nature in deciding what to publish. Anonymous CNN Counsel Interview, n. 74 above.

127 Ibid.

128 Ibid.

and the burden falls squarely on the plaintiff.¹²⁹ Moreover, that decision limits the quantity of damages that an individual can receive, and precludes the imposition of punitive damages.¹³⁰ Finally, defamation judgments are subject to independent appellate review.¹³¹ As a result, even when an attorney is able to obtain a trial court judgment in a defamation case, the judgment is usually overturned on appeal. Even for plaintiffs who are not subject to the actual malice standard, post-*New York Times* decisions limit the scope of recovery in defamation cases, and a lawyer simply cannot expect to obtain a huge award in a defamation case that is anything like one that might be obtained in a personal injury case. As a result, most plaintiffs' lawyers find greener pastures outside of the defamation arena.

Of course, attorneys could agree to handle defamation cases on a fee-for-service basis. However, few plaintiffs have any real incentive to pay out of pocket to finance defamation litigation. Such litigation is expensive. And, under the American rule, the prevailing party cannot recover its costs. So, the plaintiff might spend enormous amounts of money out of pocket and the possible financial returns are likely to be minimal. Moreover, the allegedly defamatory allegations will be front page news for years until the case is resolved. Few plaintiffs willingly make such an investment under such circumstances.

The *New York Times* decision does not prevent all defamation litigation. Some plaintiffs' lawyers do file defamation lawsuits on behalf of outraged plaintiffs. However, the attorney is usually someone who does not understand the intricacies of defamation law, or the economics of defamation litigation. Once the lawyer begins to learn more about defamation litigation today, the case usually disappears.

G. COSTS: THE THREE HUNDRED POUND GORILLA

Of course, one of the critical differences between the US and Britain is the British rule requiring the losing party in litigation to pay the other party's costs. In the US, by contrast, costs are rarely recoverable. In a British defamation case, legal representatives' fees can be quite high, and indeed can dwarf the defamation damage award. As a result, Britain's defamation rules do not function in isolation, but rather operate in conjunction with the cost rules.¹³² Moreover, as noted earlier, the media often feared that it was "required to prove that it got everything right or it faced the prospect of being ordered to pay costs".

Costs rule have had a significant effect on publication decisions.¹³³ In deciding what to publish, the media considers the likelihood that the plaintiff will sue and whether the defendant has the resources to fund a legal action. Even people of moderate means might legitimately be concerned about the financial impact of having to pay costs and may not have the means to fight back. As a result, the media can use lawyers to delay and intimidate a person of moderate means who is aggrieved by an article. In contrast, the rich and powerful can use the costs rule to intimidate the media. The rich know that the media often makes commercial decisions about what to publish and whether to settle suits, and they can use this information to bully the media into submission. If a case involves an important political story, and the media believes that it has "got it right" and has the evidence to support the story, then the media will as a general rule publish the allegations. Otherwise, the cost calculations can influence publication decisions.

129 See *New York Times v. Sullivan*, 376 US, at 277.

130 *Ibid.*

131 *Ibid.*

132 See *The Right to Speak III*, n. 14 above, pp. 177–80, 237–9.

133 *Ibid.*

Nevertheless, the costs rule forces the British media to make sophisticated business judgments about which cases to fight, and which cases to settle. If the media has got it wrong on a particular story, then it is usually quick to issue a retraction and, in some instances, to offer costs and, perhaps, a small amount in compensation. The media was generally reluctant to issue corrections, especially if it believed that it had got it right, because it felt that the correction might reflect adversely on media credibility. As a result, the media was sometimes willing to litigate, especially when the allegedly defamatory piece involved investigatory allegations against a politician. On the other hand, if a case was regarded as having insignificant news impact, such as a gossip column, then the media might have paid a small amount simply to avoid the potential for costs. Of course, whether the media would fight ultimately depended on whether legally admissible evidence was available to support its allegations.

Once defamation litigation commenced, the costs rule could create a quagmire that made it difficult for either party to extricate itself from the litigation. In “small” cases, both parties might have been desperate to get out of the case. Once costs had been incurred, however, both parties would have been reluctant to admit error, as well as reluctant to offer a small sum to get out of the case, for fear of having to pay the other side’s legal fees.

4 The impact of extensions of common law qualified privilege

There can be no doubt that the decisions in *Reynolds* and *Jameel* have moved British defamation law closer to US law. However, it is not clear that the extension of common law qualified privilege in those cases (or, for that matter, the prior extension of common law qualified privilege in the *Lange* decision from Australia) has sufficiently closed the gap to justify US enforcement of British or Australian defamation judgments.¹³⁴

We concluded our empirical interviews in 2005. Since *Reynolds* was decided in 2001, enough evidence was available to allow us to draw conclusions about how that decision had affected the British media. In addition, since *Lange* was decided by the Australian High Court even earlier (1997), it was possible for us to draw conclusions about how that decision had affected Australian media practices. In other words, there was considerable evidence on the question of how expanded common law qualified privilege had affected media practices in the two countries.

The evidence suggested that neither *Lange* nor *Reynolds* had significantly altered how the Australian and English media reported on matters of public interest. In regard to Australia, the evidence suggested that virtually all Australian media companies continued in the same way after *Lange* was decided as before.¹³⁵ As Dean David Partlett and I concluded in 2004: “While *Theophanous* and *Lange* have had some impact on reporting in Australia, most reporters, editors, producers and defamation lawyers agree that the decision has not ‘come up to expectations’.”¹³⁶ Even though the Australian media was slightly more willing to take risks after *Lange* was decided, it continued to apply a legally admissible evidence standard in deciding what to publish.¹³⁷ As a result, the Australian media remained “fairly reluctant to publish allegations that it believes to be true when it lacks legally admissible evidence, either because it is unable to obtain that evidence or because its only sources have chosen to remain anonymous”.¹³⁸

134 See *The Right to Speak III*, n. 14 above, pp. 201–37.

135 See R L Weaver and D F Partlett, “Defamation, the media and free speech: Australia’s experiment with expanded qualified privilege” (2004) 36 *George Washington International Law Review* 377.

136 *Ibid.* p. 430.

137 *Ibid.* p. 431.

138 *Ibid.*

Even though *Reynolds* marked a sea change in British defamation law, the evidence suggests that it did not have a huge impact on British media practices either. Although one British newspaper decided to chart a new journalistic course following that decision¹³⁹ the overwhelming majority of British newspapers and media outlets continued to function as before.¹⁴⁰ In other words, they continued to apply the legally admissible evidence standard in deciding whether to publish or to withhold information.

The bottom line is that, as positive as the *Lange* and *Reynolds* decisions might have been, they have not provided the level of protection to the Australian and English media that was provided to the US media by the *New York Times* decision.¹⁴¹ The net effect is that neither the Australian nor the English media feels as free to report matters that it believes to be in the public interest as does the US media.¹⁴² Moreover, neither *Lange* nor *Reynolds* altered the prevailing rules on cost recovery.

5 Enforcement of British judgments

Based on the evidence, a very strong argument could have been made prior to the holdings in *Reynolds* and *Jameel* for refusing to enforce British (and, for that matter, Australian) defamation judgments. Unlike the US, which had chosen to strike the balance between speech and reputation decisively in favour of free expression, Britain had moved decisively in the opposite direction. In the balance between speech and reputation, Britain had opted to provide greater protection to reputation.

In the United States, the right to freedom of expression has usually been treated as a “preferred” right. While US courts have not always been consistent in their approach to free expression, the general trend is towards preferring speech. As a result, US free speech jurisprudence differs from the rest of the world in important respects.¹⁴³ For example, although many European countries permit restrictions on hate speech, usually with an eye towards protecting human dignity and promoting other values such as equality,¹⁴⁴ US decisions have generally been hostile to hate speech restrictions.¹⁴⁵ Likewise, even though many European countries make it a crime to deny the Holocaust,¹⁴⁶ or to exhibit or display Nazi symbols, the United States does not criminalise Holocaust denial,¹⁴⁷ and does not make it illegal to display Nazi regalia, advocate Nazi ideas,¹⁴⁸ or march on behalf of Nazi principles.¹⁴⁹

The justifications offered for protecting speech are not necessarily much different in the US than in other countries. In the US, references are made to the “marketplace of ideas”

139 Weaver and Partlett, “Defamation”, n. 135 above, pp. 226–7.

140 Ibid.

141 Ibid.

142 Ibid.

143 See R L Weaver and D E Lively, *Understanding the First Amendment* 2nd edn (Los Angeles: LexisNexis 2006) (hereafter *Understanding the First Amendment*).

144 The right to human dignity receives explicit protection under French law. See Law of 29 July 1881, Article 35-querter. It is also protected by the European Union. Article VI of the Charter of Fundamental Rights provides that “dignity for every human being is not merely a fundamental right in itself, it in fact constitutes the very foundation of all fundamental rights”.

145 See *RAV v City of St Paul*, 505 US 377 (1992); *Dawson v Delaware*, 503 US 159 (1992); see also *Understanding the First Amendment*, n. 143 above, pp. 131–43.

146 See R L Weaver, N Delpierre and L Boissier, “Governmentally imposed truth: an examination of France’s Holocaust denial law” (2009) 41 *Texas Technical University Law Review* 495 (hereafter “Governmentally declared truth”), www.ihr.org/books/harwood/dsmrd01.html.

147 Ibid.

148 See *Hess v Indiana*, 414 US 105 (1973); *Brandenburg v Ohio*, 395 US 444 (1969).

149 See *Village of Skokie v National Socialist Party of America*, 69 Ill 2d 605, 373 NE2d 21 (Ill 1978).

metaphor as a justification for protecting speech. This theory, propounded by Justice Holmes in a dissenting opinion in *Abrams v United States*¹⁵⁰ states that “the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”¹⁵¹ Despite the impressiveness of Justice Holmes’ rationale, the marketplace theory has its critics (including me). One problem with the theory is that there is no assurance that the marketplace of ideas will lead us to “truth”.¹⁵² As Professor C Edwin Baker has recognised, truth is not always “objective”, and therefore there can be no assurance that speech has led us to the truth, and various factors (e.g. media monopolies) can distort the free-speech marketplace.¹⁵³ Moreover, in the US, we do not have a Truth Commission or other body which tells us what is true or untrue. As a result, even if the marketplace of ideas could lead us to truth, there can be no authoritative determination that truth has been “found”.

A more compelling justification for protecting speech is that free speech is essential to the functioning of the democratic process.¹⁵⁴ In any democratic system, the people are the source of political power, and they control the government and elected people through the ballot box. If the people are to cast informed votes, they must have the freedom to speak out on public issues, must be able to try to persuade each other and to sway the democratic process, and must have the right to hear the views of others. In other words, power should flow from the people to the government, rather than vice versa, and governments should not have the power to declare truth, or to repress speech that they regard as inconsistent with their declared truths. On the contrary, it is up to the people to declare their wishes through their votes. This is the reason that, although the US balances free-speech interests against other competing interests, it usually cuts that balance much differently than other countries do.¹⁵⁵

The US did not come easily or lightly to these conclusions regarding the importance of the democratic process, or the importance of free expression in that process. Interestingly, while the US shares a common heritage with England, we reach somewhat different conclusions regarding the importance and impact of that heritage. Perhaps the differences are explained by the American Revolution, and the US Declaration of Independence, and its articulation of a vision regarding the rights of man.¹⁵⁶

In the US, decisions like *New York Times* show concern regarding a history of speech repression. After Gutenberg invented the printing press in the fifteenth century, thereby enabling private individuals to more freely communicate with each other, governments went to great lengths to limit its use.¹⁵⁷ For example, the British government imposed licensing

150 250 US 616 (1919).

151 *Ibid.* at 630.

152 See C E Baker, “Scope of the First Amendment Freedom of Speech” (1978) 25 *UCLA Law Review* 964, p. 965.

153 *Ibid.*

154 *Ibid.*

155 See “Governmentally declared truth”, see n. 146 above.

156 The US Declaration of Independence provides, in part, that: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”

157 See W T Mayton, “Seditious libel and the lost guarantee of a freedom of expression” (1984) 84 *Columbia Law Review* 91, 97–8.

restrictions which required a printer to obtain a licence to print, and (of course) allowed the government to withhold permits from those whose publications it found objectionable (often materials critical of the government).¹⁵⁸ In addition, in 1606, in its decision in *de Libellis Famosis*,¹⁵⁹ the Star Chamber created the crime of seditious libel¹⁶⁰ which made it a crime to criticise the government or governmental officials (and, at one point, the clergy as well), and enforced that crime through criminal and other sanctions.¹⁶¹ The crime was justified by the notion that criticism of the government might cause “disrespect for public authority”.¹⁶² Moreover, since the goal was to maintain respect for public authority, and true criticism could undermine respect as easily as false criticism, truth was not a defence.¹⁶³ Indeed, since true criticisms might be more believable than lies, and therefore more harmful, they were punished more severely.¹⁶⁴ There were similar press restrictions in the American colonies.¹⁶⁵

Fifteenth- and sixteenth-century press restrictions might have made sense in an era dominated by monarchies who claimed that they were placed on their thrones by God and who also claimed that their decrees were manifestations of God’s will. But, as democracies began to take root, people began to reject the idea that the government is the repository of all wisdom, as well as the idea that governments should be insulated from criticism. In the Declaration of Independence, the American revolutionaries mapped out a new relationship between people and their governments. As democracy began to take root, we accepted the idea that a citizen’s right to criticise goes hand-in-hand with the citizen’s right to vote. As a result, in a stirring opinion in *West Virginia State Board of Education v Barnette*,¹⁶⁶ Justice Jackson forcefully stated that:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.¹⁶⁷

Justice Jackson’s sentiment has been reinforced in a number of subsequent United States Supreme Court decisions¹⁶⁸ and strongly reflects the bias against governmentally declared truth.¹⁶⁹

The point is that the US attitude towards freedom of expression was not arrived at easily or lightly. As a result, when the *New York Times* decision expresses concern regarding the chilling effect of defamation litigation, and the need to protect the media against that

158 See *Lovell v City of Griffin*, 303 US 444, 451 (1938).

159 77 Eng Rep 250 (Star Chamber 1606).

160 For a thorough discussion of the history of seditious libel, see Law Commission Working Paper No 72, *Treason, Sedition and Allied Offences* (London: Law Commission 1977); J Schenk Koffler and B L Gershman, “The new seditious libel” (1984) 69 *Cornell Law Review* 816.

161 See Law Commission, *Treason*, n. 160 above; Koffler and Gershman, “The new seditious libel”, n. 160 above.

162 *De Libellis Famosis*, see n. 159 above.

163 *Ibid*; see also W R Glendon, “The trial of John Peter Zenger” (1996) 68 *NY State Bar Journal* 48, p. 49.

164 See S D Krauss, “An inquiry into the right of criminal juries to determine the law in America” (1998) 89 *Journal of Criminal Law and Criminology* 111, p. 183, n. 290.

165 See *The Right to Speak Ill*, n. 14 above, pp. 6–7.

166 319 US 624 (1943).

167 *Ibid*. at 641.

168 See e.g. *Federal Election Commission v Wisconsin Right to Life Inc.*, 127 S. Ct. 2652, 2685 (2007); *Texas v Johnson*, 491 US 397, 415 (1989).

169 See *Texas v Johnson*, 491 US 397, 414 (1989): “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”

chilling effect, it is expressing deeply held constitutional convictions that go to the essence of the US democratic system. The US regards those convictions seriously enough that it applies independent appellate review in defamation cases, and those convictions are not to be brushed aside with a simple conclusory statement to the effect that the US has an obligation to enforce foreign judgments. When foreign judgments conflict with fundamental constitutional principles, it is not clear that the constitutional principles should give way to the foreign judgment.

Given the significant differences between US defamation law and British defamation law (and, for that matter, Australian defamation law), a strong argument can be made for refusing to enforce English (and Australian) defamation judgments. If foreign defamation judgments, particularly English judgments, were enforceable in the United States, England would likely be a magnet for defamation litigation.¹⁷⁰ Because England's libel laws have historically been plaintiff-friendly, plaintiffs have had financial and litigational incentives to sue there even if they had little connection to the forum.¹⁷¹ For example, Roman Polanski, an author and a fugitive from US justice who was living in France, sued in Britain even though he could not appear in person for fear of extradition.¹⁷² Polanski received a £50,000 judgment.¹⁷³ There is also evidence that others have used English law when they have little connection to England.¹⁷⁴ The *Telnikoff* decision shows how an English decision might be applied to a US resident, and the *Bachchan* decision shows how English libel law can be applied to international news communications that may have only limited connections to England and English interests.

If England became the centre of defamation litigation and British defamation judgments were enforceable in the United States, the *New York Times* decision would be effectively undone. Extremely litigious individuals would likely resort to English courts to vindicate their rights. Not only are English standards of proof different, and less protective, but plaintiffs have the potential to recover costs. Moreover, since the costs of litigation can be quite high, the prospect of an English defamation judgment could be quite chilling for a US or international media organisation. As a result, it is likely that US news organisations would become much more risk adverse (in a similar way to that shown by the data on English and Australian media outlets).¹⁷⁵

The problem is aggravated by the fact that jurisdictional rules have eased in recent years, thereby enhancing the possibility that far-flung jurisdictions (with more draconian defamation laws) can assert jurisdiction in libel cases.¹⁷⁶ Illustrative is the Australian holding in *Dow Jones v Gutnick*,¹⁷⁷ in which an Australian citizen sued in Australia over an article in *Barron's* magazine that alluded to his participation in illegal activities with an individual recently convicted of tax evasion, which was available online through the *Wall Street Journal* website.¹⁷⁸ Australia's High Court held that defamation occurs where the damage to

170 See H Maly, "Publish at your own risk or don't publish at all: forum shopping trends in libel litigation leave the First Amendment un-guaranteed" (2006)14 *Journal of Law and Policy* 883, p. 905.

171 *Ibid.* pp. 905–6; see also G Robertson QC and A Nicol, *Media Law* 3rd edn (London: Sweet & Maxwell 1992), p. 65.

172 Maly, "Publish", n. 170 above, pp. 905–6.

173 *Ibid.*

174 See R Donadio, "Libel without borders", *New York Times*, 7 October 2007.

175 See *The Right to Speak Ill*, n. 14 above, pp. 138–50.

176 See *Dow Jones v Gutnick* (2002) 210 CLR 575, 606–7. (Austl); *King v Lewis* [2004] ILPr 31 (QBD) (UK).

177 (2002) 210 CLR 575, 606–7 (Austl).

178 *Ibid.* at 594.

reputation occurs, and that damage occurs at the point of download.¹⁷⁹ In other words, Gutnick could sue in Australia even though the article was published and placed online in the United States. The decision's impact was mitigated by the fact that Gutnick's Australian damages were limited to the harm caused in Australia (rather than worldwide).¹⁸⁰ Nevertheless, Britain takes a similar attitude towards jurisdiction, and its jurisprudence allows for the imposition of costs.¹⁸¹

If the US is going to maintain its constitutionally stated goal of providing breathing space for free expression, it is difficult to comprehend how it is possible for US courts to enforce foreign free-speech judgments. Are US courts really willing to accept the proposition that the US media should be subject to English defamation standards, and English cost recovery rules? The answer, as those cases that have examined the issue have decided, is an emphatic "no".

Conclusion

In the defamation area, the United States Supreme Court used the *New York Times* decision to map out a new constitutional approach that makes it difficult for public officials and public figures to recover for defamation. The *New York Times* decision produced a sea change in US defamation litigation. As a result, even though the United States is widely regarded as far more litigious than the rest of the world, especially in the torts arena, defamation litigation rates are much lower in the US than they are elsewhere.¹⁸² In other words, the *New York Times* decision achieved its intended effect of producing breathing space for First Amendment rights.

It is difficult to argue that the US should be willing to forfeit that breathing space by enforcing free-speech judgments from other countries, particularly defamation judgments from the United Kingdom. If the US were to enforce foreign defamation judgments, libel plaintiffs would be likely to flock to the UK and other jurisdictions with lower liability standards to bring suit, and the end result would be a circumvention of the *New York Times* standards, and a chilling impact on free speech in the United States. This reluctance is reinforced by the fact that England and a number of other countries (e.g. Australia) permit the recovery of costs, including attorneys' fees, and the amount of these costs can sometimes dwarf the damages caused by reputational injury.

There is some mild hope of a convergence between US and British defamation law. It will be interesting to see how the British media has responded to the decision in *Jameel*. Of course, the question is whether *Jameel* has had only a very limited impact on media practices (as was true of *Lange* and *Reynolds*) or whether it has produced a revolution similar to that precipitated by the *New York Times* decision. If a revolution has occurred, it may make sense to consider whether British defamation judgments should be enforced in the United States. However, it will be necessary to assess carefully the impact of British cost rules even under *Jameel*. Based on the existing evidence, there is no basis for reconsideration.

It is possible to argue for enforcement of foreign defamation judgments that have little or no connection to the United States so that enforcement would not adversely affect US

¹⁷⁹ *Dow Jones v Gutnick*, n. 177 above, at 607.

¹⁸⁰ *Ibid.* at 604.

¹⁸¹ See *King v Lewis* [2004] ILPr 31 (QBD); see also Maly, "Publish", n. 170 above, p. 915.

¹⁸² See D A Logan, "Libel law in the trenches; reflections on current data on libel litigation" (2001) 87 *Virginia Law Review* 503, p. 519.

free-speech interests.¹⁸³ But it is far from clear that such a limitation would be feasible, or how it might be applied. In *Telnikoff*, a dissenting Judge Chasanow took issue with the court's refusal to enforce an English defamation judgment, noting that the case involved a libel judgment obtained by one British resident against another British resident, and that England should have discretion to allow recovery against its own citizens.¹⁸⁴ By contrast, the majority described the defendant as a resident of Maryland. Moreover, the broader issues (the composition of a reporting staff) directly related to the public interest and to broader social issues.

183 See C A Stern, "Foreign judgments and the freedom of speech: look who's talking" (1994) 60 *Brook Law Review* 999.

184 *Telnikoff v Matusевич* 347 Md 561, 702 A 2d 230, 251-60 (Md 1997) (Chasanow J, dissenting).

