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The Problem of Trans-National Libel

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Forum shopping in trans-national libel cases—"libel tourism"—has a chilling effect on journalism, academic scholarship, and scientific criticism. The United States and Britain (the most popular venue for such cases) have recently attempted to address the issue legislatively. In 2010, the United States passed the SPEECH Act, which prohibits recognition and enforcement of libel judgments from jurisdictions applying law less speech-protective than the First Amendment. In Britain, consultation has closed and the Parliamentary Joint Committee has issued its report on a broad-ranging libel reform bill proposed by the Government in March 2011. This Article questions the extent to which the SPEECH Act and the Draft Defamation Bill will accomplish their stated aims. The SPEECH Act provides little protection for hard-hitting investigative and accountability journalism by professional news organizations with global assets. The proposed British bill has important substantive limits. Moreover, even if Parliament approves reform legislation discouraging libel tourism, such actions may shift to other claimant-friendly jurisdictions. Global harmonization of libel law is neither realistic nor desirable. Instead, this Article proposes a two-fold approach. On the legal front, it supports the liberalizations of Britain's proposed libel reform legislation and calls for foreign courts, when assessing the significance of contacts to the forum in cases affecting the United States, to consider seriously the importance of extensive First Amendment protections for political speech to the American concept of democracy. In addition, the Article calls for voluntary initiatives such as: 1) new approaches to help defend trans-national defamation claims when they are brought; and 2) measures to reduce the number of trans-national libel cases by improving the way in which the press does its job. The defense measures explored include the development of community-funded (rather

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than media-supported) libel defense funds; the formation of pro bono libel review consortia; and alternative approaches to increasing the availability of libel insurance. The recommended press-improvement measures include expanded access to documents, as well as the enhancement of accountability measures such as best-practices education, journalistic self-criticism, and updated codes of conduct.

INTRODUCTION

Trans-national libel cases decried by critics as "libel tourism"[1] have been much in the news since American author Rachel Ehrenfeld was successfully sued for libel in London under English law by Saudi Arabian billionaire banker Khalid bin Mahfouz. The suit was brought in London despite the fact that the book in which she accused him of funding terror had not been published in England, and only twenty-three copies had been sold there via Amazon.[2] Since the *Ehrenfeld* case, journalists, newspapers, university book publishers, editors of academic journals and science commentators have all been targets of defamation suits brought by wealthy businessmen, corporate entities, academics, and others.[3] Prompted by this spate of trans-national libel actions, the discussion has centered on how differences among nations' defamation laws can be used strategically to constrain expression on matters ranging from politics and the global fight against terrorism to scientific and academic critique.[4] The concern about

1. The phrase refers to a particular example of forum shopping: defamation plaintiffs choosing to sue in jurisdictions with relatively insignificant ties to the case but claimant-favorable substantive law. For discussions of "libel tourism," see, e.g., Trevor C. Hartley, *"Libel Tourism" and Conflict of Laws*, 59 INT. & COMP. L.Q. 25 (2010); Robert L. McFarland, *Please Do Not Publish This Article in England: A Jurisdictional Response to Libel Tourism*, 79 MISS. L.J. 617, 625 (2010) ("the libel tourist is ordinarily attempting to circumvent the First Amendment by suing the American speaker in a foreign court."). Although the practice is not new, recent cases have engendered extensive attention. *See, e.g.*, Raymond W. Beauchamp, *England's Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 FORDHAM L. REV. 3073, 3075-76 (2006) (describing some pre-*Ehrenfeld* trans-national libel cases); Ellen Bernstein, *Libel Tourism's Final Boarding Call*, 20 SETON HALL J. SPORTS & ENT. L. 205, 210 (2010) (same).

2. Bin Mahfouz v. Ehrenfeld, [2005] EWHC 1156 (QB) (Eng.). Ehrenfeld did not appear in the English suit, and a default judgment was entered against her, ordering payment of £10,000 in damages, reimbursement of the plaintiff's legal costs, and prohibiting distribution of her book, FUNDING EVIL, in the United Kingdom. The Ehrenfeld case sparked a widespread discussion of libel tourism in popular commentary. *See, e.g.*, Editorial, *Libel Tourism*, N.Y. TIMES, May 25, 2009, *available at* http://www.nytimes.com/2009/05/26/opinion/26tue2.html?_r=1&scp=1&sq; *Libel Tourism Writ Large: Are English Courts Stifling Free Speech Around the World?*, ECONOMIST (Jan. 8, 2009), *available at* http://www.economist.com/node/12903058.

3. *See infra* Section I.A.

4. These have been dubbed the "political censorship cases" by Professors Garnett and Richardson. Richard Garnett & Megan Richardson, *Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-Border Libel Cases*, 5 J. PRIV. INT. L. 471, 490 (2009) (distinguishing

such chilling effects is particularly pressing now that publication is global rather than local, because countries with the most speech-repressive libel laws can effectively set the limits on what can be said world-wide.[5] Most observers agree that libel tourism actions today pose a significant threat to free expression.[6]

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these cases from those brought in the UK by Hollywood celebrities against American publishers.). For discussions of libel tourism cases brought by celebrities such as Cameron Diaz, Arnold Schwarzenegger, Roman Polanksi, Jennifer Lopez, Marc Antony, Britney Spears, and David Hasselhoff, *see., e.g.,* Robert Balin, Laura Handman & Erin Reid, *Libel Tourism and the Duke's Manservant*, 3 MLRC BULL. 97, 99 (2009); Bernstein, *supra* note 1, at 206-07; Sarah Staveley-O'Carroll, Note, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 N.Y.U.J.L. & LIBERTY 252, 266, n. 70 (2009). *See also Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. On Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 3, 6 (2009) [hereinafter *H.R. 6146 Hearing*] (statement of Linda R. Handman); Christopher Hope, *New rules to discourage 'libel tourism' in Britain*, TELEGRAPH (Mar.14, 2011), *available at* http://www.telegraph.co.uk/news/uknews/phone-hacking/8634176/Phone-hacking-timeline-of-a-scandal.html. Those kinds of celebrity cases are not a focus of this paper.

5. The United Nations Human Rights Committee released a report in 2008 concluding that British defamation law has "served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as "libel tourism[ ]" because "the Internet and the international distribution of foreign media [ ] create the danger that a State party's unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest." U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland*, ¶ 25, U.N. Doc. CCPR/C/GBR/CO/6 (July 30, 2008), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/433/42/PDF/G0843342.pdf?OpenElement. *See also* Securing the Protection of our Enduring and Established Constitutional Heritage Act, Pub. L. No. 111-223, Findings, Sec. 2 (4), 124 Stat. 2380 (2010) (codified at 28 U.S.C.A. §§ 4101-4105 (West 2011)) [hereinafter SPEECH Act, 28 U.S.C.A.] (quoting U.N. Human Rights Comm'n Report).

6. *See id.*; Hartley, *supra* note 1, at 32 (concluding that "libel tourism is a genuine problem . . . [that can] unjustifiably undermine free speech in other countries."). The U.S. Congress found the inhibiting threat of some foreign libel laws to be "dramatic," threatening free speech and "the interest of the citizenry in receiving information on matters of importance[.]" SPEECH Act, 28 U.S.C.A., *supra* note 5 Sec. 2(4). *See also* SPEECH Act, 28 U.S.C.A., *supra* note 5 Sec. 2(2). For academic commentary viewing libel tourism as a problem, *see e.g.*, Balin et al., *supra* note 4; Bernstein, *supra* note 1; Michelle Feldman, *Putting the Brakes on Libel Tourism: Examining the Effects Test as a Basis for Personal Jurisdiction Under New York's Libel Terrorism Protection Act*, 31 CARDOZO L. REV. 2457 (2010); Heather Maly, Note, *Publish At Your Own Risk or Don't Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-Guaranteed*, 14 J.L. & POL'Y 883 (2006); Todd W. Moore, Note, *Untying Our Hands: The Case for Uniform Personal Jurisdiction Over "Libel Tourists,"* 77 FORDHAM L. REV. 3207 (2009); R. Ashby Pate, *Blood Libel: Radical Islam's Conscription of the Law of Defamation into a Legal Jihad Against the West—And How to Stop It*, 8 FIRST AM. L. REV. 414 (2010); Doug Rendleman, *Collecting A Libel Tourist's Defamation Judgment?*, 67 WASH. & LEE L. REV. 467 (2010); Thomas Sanchez, Note, *London, Libel Capital No Longer?: The Draft Defamation Act of 2011 and the Future of Libel Tourism*, 9 U.N.H. L. REV. 469 (2011); Staveley-O'Carroll, *supra* note 4; Tara Sturtevant, Comment, *Can the United States Talk the Talk & Walk the Walk When It Comes to Libel Tourism: How the Freedom to Sue Abroad Can Kill the Freedom of Speech at Home*, 22 PACE INT'L L. REV. 269 (2010); Daniel C. Taylor, Note, *Libel Tourism: Protecting Authors and Preserving Comity*, 99 GEO. L.J. 189 (2010); Michelle A. Wyant, *Confronting the Limits of the*

In response, the U.S. Congress passed the Securing the Protection of our Enduring and Established Constitutional Heritage Act—informally, the SPEECH Act—in 2010.[7] That legislation prohibits recognition and enforcement within the United States of foreign defamation judgments inconsistent with First Amendment protections[8] or based on an exercise of foreign court jurisdiction inconsistent with American constitutional due process requirements.[9] The federal legislation followed various state statutory enactments designed to deter libel tourism.[10]

In the United Kingdom, some saw such American legislation as a "humiliation"[11] and libel tourism as an "international scandal."[12] Re-

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First Amendment: A Proactive Approach for Media Defendants Facing Liability Abroad, 9 SAN DIEGO INT'L L.J. 367 (2008). *See also* DREW SULLIVAN, LIBEL TOURISM: SILENCING THE PRESS THROUGH TRANSNATIONAL LEGAL THREATS, A REPORT TO THE CENTER FOR INTERNATIONAL MEDIA ASSISTANCE (Jan. 6, 2010), *available at* http://cima.ned.org/publications/research-reports/libel-tourism-silencing-press-through-transnational-legal-threats [hereinafter SULLIVAN, LIBEL TOURISM REPORT].

A few commentators question the chilling effect of foreign libel actions. *See, e.g.*, David F. Partlett, *The Libel Tourist and the Ugly American: Free Speech in an Era of Modern Global Communications*, 47 U. LOUISVILLE L. REV. 629, 647-48 (2009); Timothy Zick, *Territoriality and the First Amendment: Free Speech at–and Beyond–Our Borders*, 85 NOTRE DAME L. REV. 1543 (2010); John J. Walsh, *The Myth of 'Libel Tourism,'* N.Y.L.J., Nov. 20, 2007, at 2 (characterizing the issue as little more than a "myth."). *See also* MINISTRY OF JUSTICE, REPORT OF THE LIBEL WORKING GROUP 5-7, 9 (Mar. 23, 2010), *available at* http://www.justice.gov.uk/publications/docs/libel-working-group-report.pdf; HARRY MELKONIAN, DEFAMATION, LIBEL TOURISM, AND THE SPEECH ACT OF 2010: THE FIRST AMENDMENT COLLIDING WITH THE COMMON LAW 241-77 (2011). It is also true that self-interested media entities naturally have incentives to exaggerate and publicize the problem. Nevertheless, there is a strong consensus that trans-national libel actions have become a critical threat to freedom of expression for speakers and publishers.

7. SPEECH Act, 28 U.S.C.A., *supra* note 5.

8. *Id.* § 4102(a).

9. *Id.* § 4102(b).

10. In response to the Ehrenfeld case, New York passed the Libel Terrorism Protection Act in 2008, informally known as Rachel's Law. Libel Terrorism Protection Act, Ch. 66, Sess. Laws of N.Y. 2008 (codified at N.Y. C.P.L.R. §302(d) and §5304(b)(8) (McKinney 2011)) (extending New York's long-arm jurisdiction to foreign defendants in libel cases and prohibiting New York courts from recognizing foreign libel judgments unless the law applied in the foreign forum "provides at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions"). Other states—including Illinois, Florida and California—followed suit. Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights?, Hearing Before the S. Comm. on the Judiciary, 111th Cong., 36 (Feb. 23, 2010) [hereinafter SPEECH Act Hearing] (statement of Bruce D. Brown) (noting that Hawaii, New Jersey, Utah and Arizona introduced, and Illinois, California and Florida passed, statutes to prevent enforcement of foreign libel judgments.) For additional discussions of the U.S. legislative responses, *see* MELKONIAN, *supra* note 6, at 241-77; Hartley, *supra* note 1, at 32-33; Andrew R. Klein, *Some Thoughts on Libel Tourism*, 38 PEPP. L. REV. 375, 381-85 (2011); Sanchez, *supra* note 6 at 488-94; Staveley-O'Carroll, *supra* note 4, at 252. *See also* 155 CONG. REC. H6773 (daily ed. June 15, 2009) (statement of Rep. King).

11. HOUSE OF COMMONS, CULTURE, MEDIA AND SPORT COMMITTEE, SELECT COMMITTEE ANNOUNCEMENT (Feb. 24, 2010), *http://www.parliament.uk/business/committees/committees-archive/culture-media-and-sport/cms100224/*. *See also* HOUSE OF COMMONS, CULTURE, MEDIA AND SPORT COMMITTEE, SECOND REPORT OF SES-

acting to various pressures to reform defamation law,[13] the British government released a Draft Defamation Act 2011 on March 15, 2011 for public consultation and pre-legislative review.[14] As part of its sweeping overhaul of Britain's "outdated, arcane"[15] reputation-protecting libel laws, the draft defamation bill targets libel tourism.[16] The public consultation period closed over the summer, and the Parliament's Joint Committee on the Draft Defamation Bill recently released its report, by-and-large supporting the draft legislation, but recommending significant changes that would further protect freedom of speech.[17] The matter is now returned to the Government, awaiting further action.[18]

SION 2009-10: PRESS STANDARDS, PRIVACY AND LIBEL, *available at* http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362i.pdf.

12. David Pallister, *MPs Demand Reform of Libel Laws*, GUARDIAN, Dec. 18, 2008, *available at* http://www.guardian.co.uk/media/2008/dec/18/mps-demand-reform-of-libel-laws (quoting Member of Parliament).

13. For example, perhaps most significantly, members of Parliament from each major party called for reform of the libel laws beginning in 2008. Sanchez, *supra* note 6, at 493. Moreover, an extensive Libel Reform Campaign, spearheaded by English PEN, the Index on Censorship and Sense About Science, attempted to foster grassroots public support for libel reform in England since 2009. *See* THE LIBEL REFORM CAMPAIGN, http://www.libelreform.org/ (last visited Dec. 18, 2011); Sense About Science, *Launch of the Libel Reform Campaign*, http://www.senseaboutscience.org/pages/launch-of-the-libel-reform-campaign.html, (last visited Dec. 18, 2011). In 2009, English PEN and Index on Censorship published FREE SPEECH IS NOT FOR SALE, a report finding extensive concern over the censorious effects of British libel laws and making proposals for reform. FREE SPEECH IS NOT FOR SALE: THE IMPACT OF ENGLISH LIBEL LAW ON FREEDOM OF EXPRESSION, A REPORT BY ENGLISH PEN & INDEX ON CENSORSHIP 9 (2009) [hereinafter FREE SPEECH IS NOT FOR SALE], http://libelreform.org/our-report (last visited Dec. 21, 2011). *See also* Sanchez, *supra* note 6, at 494. The British press as well has also strongly pushed for reform. *See, e.g.*, Editorial, *Libel Reform: A Good Start,* GUARDIAN, (Jan. 8, 2011), *available at* http://www.guardian.co.uk/commentisfree/2011/jan/08/libel-reform-good-start-editorial; National Union of Journalists, *NUJ Welcomes Clegg Libel Reform Plans*, Jan. 7, 2011, http://www.nuj.org.uk/innerPagenuj.html?docid=1873 (last visited Jan. 31, 2012).

14. MINISTRY OF JUSTICE, DRAFT DEFAMATION BILL CONSULTATION, CONSULTATION PAPER CP3/11 (Mar. 2011), *available at* http://www.justice.gov.uk/downloads/consultations/draft-defamation-bill-consultation.pdf [hereinafter DRAFT DEFAMATION BILL]. *See also* Christopher Hope, *New rules to discourage 'libel tourism' in Britain*, TELEGRAPH (Mar. 14, 2011), *available at* http://www.telegraph.co.uk/news/uknews/law-and-order/8379196/New-rules-to-discourage-libel-tourism-in-Britain.html.

15. *See* Nick Clegg, *We will end the libel farce*, GUARDIAN (Mar. 15, 2011), http://www.guardian.co.uk/commentisfree/2011/mar/15/libel-law-reform-free-press (last visited Mar. 16, 2011).

16. The Ministerial Foreword to the consultation draft says that the bill seeks to "address the perception that our courts are an attractive forum for libel claimants with little connection to this country." DRAFT DEFAMATION BILL, *supra* note 14, at 3. *See also* Rachel McAthy, *Defamation bill targets 'libel tourism'*, JOURNALISM.CO.UK, 15 Mar. 2011, *available at* http://www.journalism.co.uk/news/defamation-bill-targets-libel-tourism-/s2/a543214/.

17. HOUSE OF LORDS, HOUSE OF COMMONS, JOINT COMMITTEE ON THE DRAFT DEFAMATION BILL, DRAFT DEFAMATION BILL—FIRST REPORT, 2011, HL Paper 203, HC 930-I, *available at* http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm [hereinafter JOINT COMMITTEE REPORT].

18. MINISTRY OF JUSTICE, DRAFT DEFAMATION BILL: SUMMARY OF RESPONSES TO CONSULTATION CP(R) 3/11 (Nov. 24, 2011) at 4, *available at* http://www.justice.gov.uk/

It is thus a particularly propitious moment to address both the U.S.'s and the UK's responses to the phenomenon of trans-national libel actions. Section I focuses on recent cases, the differences between British and American defamation law, and the U.S.'s Congressional response. Section II portrays and opines on the current American debate on the SPEECH Act. Section III describes and assesses the British Draft Defamation Bill and makes a choice-of-law recommendation. Section IV explores voluntary measures to help reduce the threat.

I. THE "LIBEL TOURISM" PROBLEM: CLAIMANT-FRIENDLY FOREIGN DEFAMATION LAW AND THE AMERICAN CONGRESSIONAL RESPONSE

The current discrepancies between countries' defamation laws invite libel arbitrage with a concomitant chilling effect on expression. What is notable about many of the foreign claimants' defamation actions in the United Kingdom and other European countries is that they appear to be brought not to collect damages,[19] but to intimidate the press and critics, i.e., to achieve political ends, deter investigation, and suppress discussion of public issues.

A. Recent Cases and the Chilling Effect

At the risk of over-simplification, recent trans-national libel cases can be divided into two categories for purposes of discussion: strategic political cases and strategic academic critique cases. One high-profile strand of the political cases concerns terrorism. *Bin Mahfouz v. Ehrenfeld*, a case widely characterized as reflecting the use of libel law to suppress political discussion, served as the prime example on which the U.S. Congress relied in its discussions of libel tourism in 2010.[20] Rachel Ehrenfeld was not the only target of Khalid

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downloads/consultations/draft-defemation-bill-consult-summary-responses.pdf [hereinafter CONSULTATION RESPONSES SUMMARY].

19. In his dissent in *Berezovsky v. Michaels*, Lord Hoffman stated:

> Mr. Berezovsky is not particularly concerned with damages . . . . The plaintiffs are forum shoppers in the most literal sense. They have weighed up the advantages to them of the various jurisdictions that might be available and decided that England is the best place in which to vindicate their international reputations. They want English law, English judicial integrity and the international publicity which would attend success in an English libel action.

Berezovsky v. Michaels, [2000] 1 W.L.R. 1004, 1024 (H.L.) (Eng.) (Lord Hoffman).

20. S. Rep. No. 111-224, at 3 (2010). After the English judgment was entered against Ehrenfeld, she sued Bin Mahfouz in the Southern District of New York, seeking a declaration that the English default judgment would be unenforceable in the United States. The Southern District granted Bin Mahfouz' motion to dismiss for lack of personal jurisdiction and denied Ehrenfeld's request for jurisdictional discovery. Ehrenfeld v. Bin Mahfouz, 2006 WL 1096816 (S.D.N.Y. 2006). On appeal, the Second Circuit affirmed in part (and certified a question to the New York state court regarding the extent of New York's long-arm statute). Ehrenfeld v. Bin Mahfouz, 489 F.3d

Bin Mahfouz' libel claims, however; he is said to have threatened or filed over thirty defamation actions against those associating him with funding terror.[21] Bin Mahfouz did not attempt to enforce his money judgment against Ehrenfeld,[22] instead maintaining a web site describing his defamation challenges.[23] These included the threat of a defamation action in English courts against Cambridge University Press for publishing *Alms for Jihad*, a book by two Americans also charging Bin Mahfouz with funding terrorists.[24] Although the authors apparently stood by their book, the Press apologized to Bin Mahfouz and paid a substantial monetary settlement, pulped all the remaining copies of the book, and asked libraries world-wide to remove the volume from their shelves.[25] Whether because the books were destroyed, as in *Alms for Jihad*, or simply enjoined from sale in Britain (and possibly elsewhere in the European Union as a result of the British injunction), as in Ehrenfeld's *Funding Evil*, the ultimate consequence of Bin Mahfouz' actions was to make unavailable in many jurisdictions books whose facts and arguments about financial support of terrorism contained much more than assertions about Bin

542 (2d Cir. 2008). The New York Court of Appeals accepted the certified question and held that bin Mahfouz would not be deemed to "transact business" in New York under New York's long-arm statute by serving on Ehrenfeld in New York documents required under English procedural rules. Ehrenfeld v. Mahfouz, 9 N.Y.3d 501, 851 N.Y.S.2d 381, 881 N.E.2d 830 (N.Y. 2007). The Second Circuit dismissed Ehrenfeld's suit on the basis of the opinion of the New York Court of Appeals. Ehrenfeld v. Mahfouz, 518 F.3d 102 (2d Cir. 2008). In response, the New York legislature passed the Libel Terrorism Protection Act. *See* Staveley-O'Carroll, *supra* note 4, at 276.

21. *See, e.g.*, Sanchez, *supra* note 6, at 477.

22. Staveley-O'Carroll, *supra* note 4, at n. 106; *H.R. 6146 Hearing*, *supra* note 4, at 12 (statement of Rachel Ehrenfeld).

23. The Bin Mahfouz web site, which contains separate pages for "US Civil Suits" and "Litigation," can be found at http://www.binmahfouz.info/faqs_4.html (last visited Dec. 18, 2011).

24. For descriptions of this matter, see, e.g., SPEECH Act Hearing, *supra* note 10, at 4 (statement of Kurt Wimmer); Balin et al., *supra* note4, at 102-03; Garnett & Richardson, *supra* note 4 at 478; Staveley-O'Carroll, *supra* note 4 at 267-68.

There are additional foreign party libel cases brought in Britain over terrorism charges as well, such as the action in which Tunisian politician Rashid Ghannouchi won a £165,000 defamation verdict against Dubai-based Al Arabiya television for a report that he had links to al-Qaeda. Ghannouchi v Al Arabiya [2007] EWHC 2855 (QB) (cited in Al-Amoudi v. Kifle, [2011] EWHC 2037 (QB)). The British court exercised jurisdiction because the program, although in Arabic and broadcast to an Arabic-speaking audience, was accessible in England via satellite. Al-Amoudi v. Kifle, [2011] EWHC 2037 (QB). *See also* Sanchez, *supra* note 6, at 476. In Veliu v. Mazrekaj, [2006] EWHC 1710 (QB), a London-based Kosovar Albanian claimant sued a Kosovo newspaper (published in Zurich but read by the 20,000 member Albanian community in London) regarding an article in Albanian connecting him with terrorist bombings in London in 2005. Veliu was an offer of amends case, in which the starting point was fixed at £180,000. *Id.*

25. SPEECH Act Hearing, *supra* note 10, at 4 (statement of Kurt Wimmer). *See also* Garnett & Richardson, *supra* note 4, at 478. The American Library Association refused to comply. *Id.* This is obviously a different fact pattern than that at issue in *Ehrenfeld*, if only because Cambridge University Press is based in England. Nevertheless, it is an example of the extent to which threats of defamation claims can successfully chill speech.

Mahfouz. With respect to writing about terror, reports suggest that libel initiatives have had a deterrent effect.[26]

Another strand of the recent political libel tourism cases consists of strategic actions brought by wealthy and powerful Eastern European businessmen seeking to deflect charges of criminal activity or corruption at home or in the United States by suing for defamation in England.[27] Such actions have targeted both the large institutional press and small, niche-readership organs. On one end of the size spectrum for defendants, the English High Court of Justice, Queens Bench, issued a default judgment in favor of Ethiopian-born Saudi billionaire Mohammed Al Amoudi in his libel action against the publisher of the U.S.-based political magazine Ethiopian Review.[28] Similarly, Ukrainian billionaire Rinat Akhmatov prevailed in English libel suits against two Ukrainian news organs with negligible British readership.[29] On the other end of the size spectrum, English courts have heard and upheld defamation claims against the American magazine Forbes by Russian oligarch Boris Berezovsky in

26. *See* Ehrenfeld v. Mahfouz, No. 04 Civ. 9641(RCC), 2006 WL 1096816 at 2 (S.D.N.Y. 2006) (Westlaw) (recounting Ehrenfeld's claims of her own and other authors' self-censorship with regard to writing about Saudi Arabia and terror); Staveley-O'Carroll, *supra* note 4, at n.95 (same).

27. Hartley, *supra* note 1, at 32 ("It has been said that wealthy businessmen in East European countries have found the threat of libel proceedings in England to be an effective means of securing the removal from websites in their countries of material that reveals corrupt activities on their part.").

28. Ethiopian Review, *UK high court decides in Al Amoudi vs. Elias Kifle*, ETHIOPIANREVIEW.COM, http://www.ethiopianreview.com/content/32025 (last visited Mar. 21, 2011) (linking to judicial order.) *See also* Kristen Schweizer, *Billionaires May Lose From Push to Halt U.K. Libel Tourism,* BLOOMBERG, Feb. 22, 2011, *available at* http://www.bloomberg.com/news/2011-02-22/sheikhs-billionaires-may-lose-from-attack-on-u-k-libel-tourism.html.

29. *See, e.g.*, Akhmetov v. Serediba, [2008] All E.R. 38 (Q.B.). *See also* Partlett, *supra* note 6, at 654-55 (describing lawsuits in London by Ukrainian billionaire Rinat Akhmetov against two Ukrainian news organizations with very few subscribers in England). *See also* Balin et al., *supra* note 4, at 110; *Libel Tourism Writ Large*, *supra* note 2, at 48; Hartley, *supra* note 1, at 32. The Washington Times was apparently sued in an English court by an international businessman with a contract to sell cell phones in Iraq even though there had been only a minimal number of hits from England on the paper's website. Balin et al., *supra* note 4, at 109-110. An Icelandic bank sued a Danish newspaper in England over reports criticizing the bank's tax advice, even though the paper's web site on which the articles were posted had very limited traffic. *Id.* at 110. The case was settled for significant damages, reimbursement of legal costs, and a public apology on the paper's site. *Id.* Older cases brought in England by non-residents against non-British publications include a suit by former Greek Prime Minister Andreas Papandreou against TIME magazine. *See* Douglas W. Vick & Linda Macpherson, *Anglicizing Defamation Law in the European Union*, 36 VA. J. INT'L L. 933, 935 (1996) (noting such early cases of what came to be called libel tourism). *See also* McFarland, *supra* note 1, at n.35 ("Three main groups have emerged as frequent libel tourists. First, celebrities . . . . The second group . . . is international business moguls . . . . The third group . . . is . . . citizens of Middle Eastern countries with alleged ties to terrorism.").

connection with an article accusing him of corruption.[30] Recently, the Court of Appeal allowed a libel by innuendo case by the wife of a former long-time mayor of Moscow to proceed against the Sunday Times for an article stating that she, Russia's wealthiest woman, had bought a £100 million home in England.[31] The claim could be deemed defamatory because the claimant had not identified such a property in her response to a Russian property disclosure decree and could therefore be deemed to have violated Russian law. While Ukrainian gas company billionaire Dimitry Firtash's high-profile defamation suit against the Kyiv Post was recently dismissed,[32] this group of political defamation claimants has been quite successful in England overall—despite having few ties to England, international (rather than specifically English) reputations, and complaining of both speech and speakers with tangential English connections.[33]

With respect to the second category of libel tourism cases—academic critique—defamation law has threatened scientific inquiry and academic freedom of expression. On the science front, an American medical device manufacturer brought a case in England in 2007 against Dr. Peter Wilmshurst, a British cardiologist. The suit was based on statements questioning the efficacy of the company's product that he made at a conference in the United States, and were quoted on a Canadian web site.[34] Although the action was ultimately

30. Berezovsky v. Michaels, [2000] 1 WLR 1004; [2000] 2All ER 986 (HL) (Eng.). *See also* Bernstein, *supra* note 1, at 212. Berezovsky was the subject of an arrest warrant for money laundering in Brazil. *See* Gabriel Houbabi, *Brazil Court Issues Berezovsky Arrest Warrant for Money Laundering*, JURIST (July 13, 2007), http://jurist.law.pitt.edu/paperchase/2007/07/brazil-court-issues-berezovsky-arrest.php (last visited Dec. 21, 2011). He was also tried *in absentia* in his native Russia for embezzlement. *Berezovsky embezzlement trial starts in Moscow*, FORBES (Sept. 5, 2007), http://www.forbes.com/feeds/afx/2007/09/05/afx4084239.html (last visited Dec. 21, 2011).

31. Baturina v. Times Newspapers Ltd., [2011] EWCA Civ 308 (Eng.).

32. *See News: Draft Defamation Bill to be published today*, INFORRM'S BLOG (Mar. 15, 2011), http://www.inforrm.wordpress.com/2011/03/15/ (explaining that Firtash's case against the Kyiv Post was dismissed on Feb. 24, 2011 "because there was no substantial connection with the jurisdiction.").

33. In several of the cases, the claimants had rather tarnished global—rather than specifically English—reputations, even if they could show some minimal connections to the UK. In the *Berezovsky* case, for example, Boris Berezovsky had achieved global notoriety and, as Lord Hoffman noted in dissent, his reputation in England "was merely an inseparable segment of his reputation worldwide." Berezovsky v. Michaels, [2000] 1 WLR 1004, 1022-23. In these sorts of cases, plaintiffs with otherwise tarnished reputations might see success in a British libel case as a strategic way to improve their global standing and/or "launder" their reputations at home, rather than in England.

34. Max Henderson, *Cardiologist will fight libel case 'to defend free speech,'* SUNDAY TIMES (LONDON) (Nov. 26, 2009), *available at* http://business.timesonline.co.uk/tol/business/law/article6932252.ece; Barry Meier, *Device Maker Sues A Doctor Who Called Its Product Flawed*, NY TIMES (Jan. 14, 2009), *available at* http://www.nytimes.com/2009/01/14/health/research/14heartside.html?scp=1&sq=.]The plaintiff in the 2007 Wilmshurst case brought another defamation action against him based on his explanation in a 2009 BBC program of the original claim against him. Sara Rear-

dismissed because the plaintiff ceased corporate operations in 2010, Wilmshurst reported that fighting the lawsuit over three years had cost him a great deal of time and over £100,000 of his own funds in expenses.[35] More recently, the Real Climate web-site, run by climate scientists, has been threatened with litigation in England by an apparently controversial journal whose peer review processes Real Climate criticized.[36] Recently, the defamation case brought in England against the science magazine Nature by Egyptian scientist Mohamed El Naschie, a former editor-in-chief of the science magazine Chaos, Solitons and Fractals, went to trial.[37] Proponents of British libel reform claim that the threat of libel suits "is preventing scientific journals from discussing what is good and bad science."[38]

The easy availability of foreign fora for libel suits has also threatened the sharp critiques and challenges traditional in academic culture in the context of book reviews. For example, Professor Joseph Weiler, NYU Law Professor and Editor-in-Chief of the European Journal of International Law, was recently tried for criminal libel in France, in an action commenced by an Israeli author, over his failure to remove a German academic's critical book review of her work from a New York web site associated with the Journal.[39] Al-

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don, *UPDATED: Whistle-Blowing Cardiologist Sued Again Under U.K. Libel Law*, SCIENCE (Mar. 25, 2011), *available at* http://news.sciencemag.org/scienceinsider/2011/03/whistle-blowing-cardiologist-sue.html. *See also The Price of Truth*, ECONOMIST (Mar. 17, 2011), *available at* http://www.economist.com/node/18396275 (discussing various cases described by Britain's then justice secretary as attempts to "stifle" scientific debate, including the Wilmshurst action); Tim Wogan, *A Chilling Effect?*, SCIENCE (June 2010), *available at* http://www.sciencemag.org/content/328/5984/1348.full (noting, in addition to the Wilmhurst case, a recent claim against Danish radiologist Henrik Thomsen, and a suit by an Israeli company against a UK publisher whose web site had featured a published paper challenging the efficacy of the company's product.).

35. *See* Sanchez, *supra* note 6, at 475-76.

36. Shanta Barley, *Real Climate faces libel suit*, GUARDIAN, (Feb. 25, 2011), *available at* http://www.guardian.co.uk/environment/2011/feb/25/real-climate-libel-threat. *See also The effects of the English libel laws on bloggers*, SENSE ABOUT SCIENCE, http://www.senseaboutscience.org.uk/index.php/site/other/542/ (last visited Mar. 16, 2011) (describing poll responses regarding chilling effect of libel threat).

37. *See* Alok Jha, *Nature magazine accused of libel*, GUARDIAN (Nov. 18, 2011), *available at* http://www.guardian.co.uk/science/2011/nov/18/nature-libel-trial; Chelsea Whyte, *El Naschie questions journalist in Nature libel trial*, NEWSCIENTIST (Nov. 16, 2011), http://www.newscientist.com/article/dn21169-el-naschie-questions-journalist-in-nature-libel-trial.html (last visited Dec. 18, 2011).

38. *See* Jha, *supra* note 37 (quoting spokesman for the Libel Reform campaign). Science writer Simon Singh gives examples of the chilling effect. Simon Singh, *English Libel Law Is a Vulture Circling the World*, GUARDIAN (Mar. 10, 2011), *available at* http://www.guardian.co.uk/commentisfree/libertycentral/2011mar/10/english-libel-law-simon-singh. Singh battled a lengthy libel action by the British Chiropractic Association. *See* Simon Rogers, *How Many Libel Cases Are There?*, GUARDIAN (Apr. 15, 2010), *available at* http://www.guardian.co.uk/news/datablog/2010/apr/15/libel-cases-general-election?.

39. The book review, of Dr. Karin Calvo-Goller's The Trial Proceedings of the International Criminal Court, ICTY and ICTR Precedents, was written by Professor Thomas Weigend, Director of the Cologne Institute of Foreign and International

though the French Tribunal de Grande Instance ultimately dismissed the criminal charge and required the claimant to pay Weiler EU 8000 in what are essentially punitive damages,[40] the lengthy and expensive process—which the damages award would be unlikely to cover—led to significant concern about the effect of libel laws on academic freedom.[41] More broadly, the fact that libel claims constitute criminal charges not just in France, but in other countries as well, also doubtless has an intimidating effect on speech.[42] This is particularly true when criminal actions for defamation can be instituted by private parties or when local law requires public prosecutors presumptively to go forward with private complaints.[43]

It is the very nature of the chilling effect to be hidden. The existence of self-censorship is not readily established by objective proof.[44]

Criminal Law and Dean of the Faculty of Law at the University of Cologne. When Professor Weiler refused to take down the critical review and instead offered Dr. Calvo-Goller the opportunity to post her own reply, she brought the criminal defamation action in France. *NYU Law Professor Charged With Criminal Libel in French Court for Refusing to Take Down Critical Book Review*, CITIZEN MEDIA LAW PROJECT, http://www.citmedialaw.org/blog/2010/nyu-law-professor-charged-criminal-libel-french-court-refusing-take-down-critical-book-rev (last visited Nov. 12, 2011). The academy was abuzz about the case. *See, e.g.*, Jennifer Howard, *Libel Case, Prompted by an Academic Book Review, Has Scholars Worried*, THE CHRONICLE OF HIGHER ED. (Apr. 25, 2010) http://chronicle.com/article/Libel-Case-Prompted-by-an-/65224/ (last visited Dec. 22, 2011).

40. Jennifer Howard, *French Court Finds in Favor of Journal Editor Sued for Libel Over Book Review*, THE CHRONICLE OF HIGHER EDUCATION (Mar. 2, 2011), *available at* http://chronicle.com/article/French-Court-Finds-in-Favor-of/126599/; Joseph Weiler, *In the Dock, In Paris —The Judgment*, EJIL TALK! (Mar. 4, 2011), http://www.ejiltalk.org/in-the-dock-in-paris-%E2%80%93-the-judgment-by-joseph-weiler-2/ (last visited Mar. 16, 2011).

41. *See* Lori Fisler Damrosch, Bernard H. Oxman, Richard B. Bilder, & David D. Caron, *Editorial Comment, Book Reviews and Libel Proceedings*, 104 AM. J. INT'L L. 226 (2010); Editorial, *Book Reviewing and Academic Freedom*, 20 EUR. J. INT'L. L. 967 (2009). *See also* Kevin J. Heller, *Criminal Libel for Publishing a Critical Book Review? Seriously?*, OPINIOJURIS BLOG (Feb. 12, 2010), http://opiniojuris.org/2010/02/12/criminal-libel-for-publishing-a-critical-book-review-seriously/ (last visited Nov. 12, 2011); Adam Liptak, *From a Book Review to a Criminal Trial in France*, NY TIMES, Feb. 21, 2011, *available at* www.nytimes.com/2011/02/22/us/22bar.html; Kate Sutherland, *Book Reviews, The Common Law Tort of Defamation, and the Suppression of Scholarly Debate*, 11 GERMAN L. J. 656 (2010); *France v. Weiler*, CITIZEN MEDIA LAW PROJECT, http://www.citmedialaw.org/threats/france-v-weiler (last visited Nov. 12, 2011).

42. Allen Edward Shoenberger, *Connecticut Yankee Speech in Europe's Court: An Alternative Vision of Constitutional Defamation Law to New York Times v. Sullivan?*, 28 QUINNIPIAC L. REV. 431, 458-72 (2010).

43. *Id.* at 463. A recommendation to shift most criminal libel cases to the civil courts in France was made in 2008 in the Guinchard Report. RAPPORT AU GARDE DE SCEAUX, L'AMBITION RAISONNEE D'UNE JUSTICE APAISEE, COMMISSION SUR LA REPARTITION DES CONTENTIEUX PRESIDEE PAR SERGE GUINCHARD (2008), *available at* http://www.ladocumentationfrancaise.fr/rapports-publics/084000392/index.shtml, at 290.

44. For examples of the chilling effect claimed by authors, see *H.R. 6146 Hearing*, *supra* note 4, at 14 (statement of Rachel Ehrenfeld); *id.* at 41 (statement of Laura R. Handman). *See also* Singh, *supra* note 38 (describing two examples); JOINT COMMITTEE REPORT, *supra* note 17, at 18, 25. Of course, admissions of self-censorship are rare, and those that do exist, by libel reformers, can be dismissed as self-interested.

Moreover, litigation is always in some sense strategic, libel plaintiffs will always want to find jurisdictions with claimant-friendly laws, and claimants genuinely concerned about their reputations may care less about monetary recovery than judicial exoneration. "It is unsurprising that plaintiffs in defamation and privacy matters would forum-shop."[45] Furthermore, to be sure, the English cases that are commonly grouped into the libel tourism category do not all reflect the same degree of connection between England and the parties. There is also variability in the degree of connection deemed sufficient by local courts. At least in some of the English cases, the claimants did have *some* connections with the forum. Nevertheless, there is something troubling about the strategic character of current libel tourism actions to the extent that they reflect the use of law to reinforce power, intimidate critics, and deflect political discussion. And the combination of the plaintiffs' and defendants' weak ties to England and the focus of the disputed speech in these cases suggest that these ties should not be considered sufficient for the routine exercise of jurisdiction or for the application of English law by English courts.[46]

Nevertheless, it is notable that from large newspapers to NGOs, American speakers have been threatened with libel cases in the United Kingdom and have often settled them. *See* Staveley-O'Carroll, *supra* note 4, at 266 & n. 69 (describing British libel litigations against the Washington Times, Forbes, and Human Rights Watch); Maurice Chittenden and Steven Swinford, *Libel threat to force US papers out of Britain*, SUNDAY TIMES (LONDON) (Nov. 8, 2009), *available at* http://business.timesonline.co.uk/. *See also The price of truth*, ECONOMIST (Mar. 17, 2001), *available at* http://www.economist.com/node/18396275?story_id=18396275&fsrc=rss ("an English-language paper in Kiev, for example, now blocks British internet users from its website, to avert another costly libel action brought by one of the touchy Ukrainian tycoons who have used English courts to settle scores with the local media.").

45. Partlett, *supra* note 6, at 655.

46. For example, although the lower court in Boris Berezovsky's libel action against Forbes magazine for an article accusing him of corruption had found that Berezovky's connections to England were tenuous, a divided House of Lords reversed that finding on appeal and concluded that Berezovsky's English connections were sufficient to justify exercise of the English court's jurisdiction. Berezovsky v. Michaels, [2000] 1 W.L.R. 1004 (HL) (Eng.). Berezovsky traveled frequently to London, had an ex-wife and children living in England, and had a business reputation there. Nevertheless, as the dissenting judges noted, those English connections should not weigh heavily in the jurisdictional analysis. Berezovsky's reputation in England was based on his activities in Russia and "[h]is reputation in England is merely an inseparable segment of his reputation worldwide." *Id.* at 1022-23 (Lord Hoffman). The allegedly defamatory statements were made in an American magazine with relatively small English circulation and concerned Berezovsky's Russian—and not English—activities. The dispute as a whole had little to do with England. *Id.* at 1025. As Lord Hoffman put it, "[t]he plaintiffs are forum shoppers in the most literal sense." *Id.* at 1024. In his view, the trial judge was "entitled to decide that [] the English court should not be an international libel tribunal for a dispute between foreigners which had no connection with this country." *Id.* at 1025. *See also id.* at 1026 (Lord Hope of Craighead). A similar argument can be made with regard to the English connections the Court of Appeal found sufficient in King v. Lewis, [2004] EWCA Civ. 1329, in which American boxing promoter Don King was permitted to sue American lawyer Judd Burstein for accusations of anti-Semitism he had leveled at King on a boxing

B. The Lure of London: "A Town Called Sue"[47]

Thus far, England has been the most common forum choice for libel tourists because of claimant-friendly defamation law.[48] In contrast to American doctrine, the plaintiff makes out a prima facie case of defamation under current English law simply by establishing that the defendant has published a defamatory statement about her.[49] The falsity of the statement is presumed and it is the defendant who has the burden of proving its truth as a defense.[50] There is no counterpart to the American "actual malice" rule.[51] England also applies the multiple publication rule, meaning that each publication of the offending material is considered a separate tort.[52] While recent British case-law developments have expanded defenses to defamation—including adoption of a qualified privilege for "responsible reporting"

website. King was deemed to have an English reputation that could have been harmed by Burstein's accusations because he had managed English boxers. *Id. See also* Balin et al., *supra* note 4, at 111.

47. *See* Sarah Lyall, *Britain, Long a Libel Mecca, Reviews Laws*, NY TIMES (Dec. 10, 2009), *available at* http://www.nytimes.com/2009/12/11/world/europe/11libel.html?_r=1&scp=1&sq=libel%20tourism%20bill&st=cse (on "London's reputation as "a town called sue"); *Reforming Libel Law: A City Named Sue*, ECONOMIST (Nov. 14, 2009), *available at* http://www.economist.com/node/14845167. *See also H.R. 6146 Hearing*, *supra* note 4, at 15 (statement of Bruce D. Brown) (same). While England is not the only libel tourist destination against American speakers, its convenience, shared language, and status as a "publishing hub" have led to London's popularity. Staveley-O'Carroll, *supra* note 4, at n 68 (identifying Singapore, New Zealand, and Kyrgystan as additional venues with plaintiff-friendly libel laws).

48. *See, e.g.,* Hartley, *supra* note 1, at 26.

49. *See H.R. 6146 Hearing*, *supra* note 4, at 46 (statement of Laura Handman). For summary comparisons of American and English defamation law, see, e.g., Michael Socha, Comment, *Double Standard: A Comparison of British and American Defamation Law*, 23 PENN. ST. INT'L L. REV. 471 (2004); Kyu Ho Youm, *The Interaction Between American and Foreign Libel Law: US Courts Refuse to Enforce English Libel Judgments*, 49 INT'L & COMP. L.Q. 131 (2000). *See also* NICK BRAITHWAITE, THE INTERNATIONAL LIBEL HANDBOOK: A PRACTICAL GUIDE FOR JOURNALISTS 85 (1995) (describing English libel law).

50. *See, e.g.*, Balin et al., *supra* note 4, at 102-03; Staveley-O'Carroll, *supra* note 4; Maly, *supra* note 6, at 900.

51. Balin et al., *supra* note 4, at 103-04.

52. *See* Berezovsky v. Forbes, [2000] 1 W.L.R. 1004, 1012 (Lord Steyn) (each communication is a separate libel under English precedent). *See also* Sanchez, *supra* note 6, at 480-81; Staveley-O'Carroll, *supra* note 4, at 261. In the United States, by contrast, Keeton v. Hustler Magazine, 465 U.S. 770 (1984) endorsed the single publication rule in defamation cases. The multiple publication rule in English libel law is associated with the venerable case of Duke of Brunswick v. Harmer, (1849) 117 Eng. Rep. 175 (Q.B.). In that case, the court found an actionable defamatory publication when the Duke of Brunswick sent his manservant to purchase a copy of an article that had been published almost twenty years previously. For a history of the multiple publication rule, *see* Itai Maytal, *Libel Lessons From Across the Pond: What British Courts Can Learn From the United States' Chilling Experience With the "Multiple Publication Rule" in Traditional Media and the Internet*, 3 J. INT'L MEDIA & ENT. L. 121 (2010).

on matters of public interest[53]—the privileges are limited and English courts still apply them conservatively.[54]

Damage awards "can be high by international standards"[55] and the losing party normally pays the expenses of the litigation.[56] Because English law is both pro-claimant and, in principle, shifts fees to the losing party, foreign defendants reasonably fear liability for extensive costs and fees. To make matters worse, barristers are permitted to represent libel plaintiffs on a "no win, no fee" basis, with the possibility of high "success fees,"[57] so that libel plaintiffs have little disincentive not to sue.[58] English courts will also issue injunctions on publication.[59]

Moreover, transnational litigation has become a profitable area for UK lawyers.[60] Defamation suits in the United Kingdom are a spe-

53. Reynolds v. Times Newspapers, [1999] [1999] 4 All E.R. 609 (H.L.) (Eng.); Jameel v. Wall Street Journal, [2007] 1 A.C. 359 (H.L.) (Eng.). *See also* Russell L. Weaver, Andrew T. Kenyon, David E. Partlett & Clive P. Walker, *Defamation Law and Free Speech: Reynolds v. Times Newspapers and the English Media*, 37 VAND. J. TRANSNAT'L L. 1255 (2004) (describing empirical assessment of the effect of the Reynolds rule on British press); Socha, *supra* note 49, at 482-84 (describing liberalizations in the Defamation Act of 1996). *See also* Kyu Ho Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?*, 13 COMM. L. & POL'Y 415 n.32 (2008) (discussing "growing receptiveness of English courts to more press freedom by modernizing their traditional strict liability rule.").

54. Although the House of Lords expanded the application of the responsible reporting privilege in Jameel v. Wall Street Journal, *supra* note 53, the burden of proof is still on the defendant, the court must find the reporting fair, reasonable, and necessary to the article, and the notion of the public interest is more narrowly interpreted than in the United States. *See H.R. 6146 Hearing, supra* note 4, at 47-8 (statement of Laura Handman). *See also* FREE SPEECH IS NOT FOR SALE, *supra note* 13; Staveley-O'Carroll, *supra* note 4, at 259.

55. Hartley, *supra* note 1, at 26.

56. *See H.R. 6146 Hearing, supra* note 4, at 6 (statement of Laura Handman). *See also* Balin et al., *supra* note 4, at 102; McFarland, *supra* note 1, at 626-27.

57. *See* JOINT COMMITTEE REPORT, *supra* note 17, at 50 (describing British Conditional Fee Agreements—CFAs or "no win, no fee" agreements—which "may involve a "success fee" charged by the winning side's lawyers of up to 100% of their costs, potentially doubling the costs of libel action for a losing party[,]" and the fact that "most parties on a CFA presently take out insurance, known as "after-the-event" or ATE insurance[,]" whose "premiums are also likely to be charged to the losing party.").

It should be noted that in early 2011, the European Court of Human Rights held in Mirror Group Newspapers Ltd. (MGN) v. UK, [2011] ECHR 66, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?key=40690&table=F69A27FD8FB86142BF01C1166DEA398649&portal=hbkm&action=html&source=external-click&highlight=&sessionid=68239786&skin=hudoc-en, that the payment of a success fee in a British privacy case on a conditional fee basis unduly interfered with the defendant newspaper's freedom of expression protected under Article 10 of the Declaration of Human Rights. The rationale of the court would appear to apply to success fees as part of CFAs in the defamation context as well.

58. *See H.R. 6146 Hearing, supra* note 4, at 6 (statement of Laura Handman); Balin et al., *supra* note 4, at 102; McFarland, *supra* note 1, at 626-27.

59. Balin et al., *supra* note 4 at 106.

60. *See* Bernstein, *supra* note 1, at 222 (discussing "British libel lawyers who actively recruit American celebrities as clients").

cialization of the bar.[61] As law firms increasingly develop focused areas of expertise, and as profitability for firms increasingly hinges on international practices, the British libel bar doubtless identifies an expanding market in trans-national defamation cases. English law firms with specialized libel expertise have been accused of "ambulance chasing"—soliciting the interest of potential libel tourist plaintiffs abroad.[62]

In addition to differences regarding the level of protection for speakers in substantive defamation law, both English choice of law in defamation cases and British courts' approaches to personal jurisdiction in such suits have been claimant-friendly in trans-national cases. English courts will apply English law to torts committed in England, including publication of defamation in England. Publication under English law occurs in England "each time an item is communicated to another person" there, and each publication constitutes a distinct tort.[63] Under current English choice of law rules, because English courts will apply English law to defamation actions in which the plaintiff limits his claim to a remedy for English publication.[64] Since each communication of an allegedly defamatory statement is a separate publication under English law,[65] English courts apply their own libel law even if foreign publication is much greater than English publication and even if neither the plaintiff nor the defendant is domiciled in England.[66]

With respect to jurisdiction over defendants not domiciled in England (or in a member state of the European Union),[67] English courts apply English jurisdictional rules.[68] Under those rules, English

61. For a listing of UK firms specializing in defamation law as identified by a company providing guides to the legal profession, see, e.g., PSB Law LLP, *Defamation/reputation Management: An Introduction,* CHAMBERS AND PARTNERS, http://www.chambersandpartners.com/uk/Editorial/45166# (last visited Dec. 22, 2011).

62. *See, e.g.*, Bernstein, *supra* note 1, at 220, 222-23. *See also H.R. 6146 Hearing*, *supra* note 4, at 42 (statement of Laura Handman) ("[v]irtually every demand letter we receive these days from a U.S. lawyer is now accompanied by one from a British solicitor"); Partlett, *supra* note 6, at 655 (on specialized British bar). SULLIVAN, LIBEL TOURISM REPORT, *supra* note 6, at 15.

63. Hartley, *supra* note 1, at 26-7. *See also* Sanchez, *supra* note 6, at 481-83; Staveley-O'Carroll, *supra* note 4, at 261.

64. Hartley, *supra* note 1, at 27.

65. *Id.* at 26.

66. *Id.* at 27.

67. If the defendant is a domiciliary of another Member State of the European Union, jurisdiction is determined under EU law, namely the Brussels I Regulation. Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC) (*Brussels I*). *See* Hartley, *supra* note 1 at 28 and citations therein. Accordingly, in cross-border libel cases in which jurisdiction is claimed under Brussels I, Article 5(3), the claimant may sue in the place where the material is distributed, but must limit the claim to the damage caused by the publication in the forum territory. *Id.* at 28-29 (describing rule in *Shevill v. Presse Alliance SA*). The issue of EU jurisdiction rules is beyond the scope of this paper.

68. Hartley, *supra* note 1, at 28.

courts can exercise jurisdiction if the defamatory item was distributed in England.[69] Although English courts—unlike continental courts—will apply the deference rule of *forum non conveniens* when the courts of another country would be a more appropriate forum, in practice they do not ordinarily do so in libel cases because they consider any distribution of the challenged item in England to constitute a publication in England, thereby making England an appropriate forum.[70] Because, according to Professor Hartley, most international libel plaintiffs can claim to have some kind of reputation in England, defendants are not able to avail themselves of the only exception to this *forum non conveniens* rule: namely, when the plaintiff does not have a significant English reputation.[71] Indeed, it is said that British courts have expanded their assertion of jurisdiction on the theory that the Internet gives plaintiffs a greater interest in the protection of their reputations.[72] Moreover, English courts "take the view that material on the Internet is published in England whenever it can be downloaded in England . . . . [T]his means that *all* material on the Internet is regarded as being published in England."[73] Similarly, books available in England through e-retailers are also considered published there.[74] Keeping in mind today's global media markets and multi-national media companies, "it is fair" to conclude, as does Professor Hartley, that "the requirement of publication in England no longer constitutes a significant safeguard against exorbitant jurisdiction."[75]

Also, even though English courts purport to make the plaintiff whole only for damages resulting from publication in England, the remedies they impose are in fact not that limited. This is particularly true with respect to injunctions. If an author is enjoined from making

69. *Id.* at 29. In tort cases, English civil procedure rules provide for jurisdiction if damage was sustained in England or damage elsewhere resulted from an act committed in England. *Id.*

70. *Id.* at 29. British courts may apparently also deny jurisdiction on the basis of "abuse of process" under certain circumstances. *See* Staveley-O'Carroll, *supra* note 4, at 64; Jennifer McDermott & Chaya F. Weinberg-Brodt, *Growth of 'Libel Tourism' in England and U.S. Response*, N.Y.L.J., June 4, 2008, at 4. However, this has been rare in libel cases. Staveley-O'Carroll, *supra* note 4, at 264 (citing to an English case in which the court opined that "it will only be in rare cases that it is appropriate to strike out an action as an abuse on the ground that the claimant's reputation has suffered only minimal damage and/or there has been no real and substantial tort within the jurisdiction.").

71. Hartley, *supra* note 1, at 29-30. It could be said that English courts do not require plaintiffs to do much to prove their reputations in England. *See also* n.47, *supra*.

72. Staveley-O'Carroll, *supra* note 4, at 262.

73. Hartley, *supra* note 1, at 30. *See also* McFarland, *supra* note 1; Sanchez, *supra* note 6.

74. Hartley, *supra* note 1, at 30.

75. *Id.*

her work available via Amazon in England, the impact of that remedy extends far beyond England's borders.[76]

There are also significant practical differences to litigating defamation in England. Most importantly, the financial burden of litigating a defamation case can be enormous. It is reported that the cost of English and Welsh libel actions was apparently 140 times higher than the European average in 2008.[77] From exorbitant fees to the requirement of representation by both barristers and solicitors, the English legal system is an invitation to wealthy plaintiffs and an undeniable deterrent to defendants with limited purses.[78]

The United Kingdom is not the only forum for libel tourists, however. Other Commonwealth countries, such as Australia, New Zealand and Singapore, as well as Kyrgyztan and even France (with its criminal libel laws) have also seen libel claims against defendants with limited ties to the fora.[79] Moreover, members of the European Union will normally recognize and enforce other Member States' civil and commercial judgments.[80] Thus, defamation judgments under even the most onerous of EU Members' libel laws would presumably be recognized and enforced elsewhere in the European Union.

C. *The SPEECH Act*

The SPEECH Act is the first American national legislation designed to address the libel tourism problem.[81] It provides that U.S. courts shall not recognize or enforce foreign defamation judgments unless the defamation law applied by the foreign courts provided at

76. *Id.* at 31-32 ("a remedy granted for publication in England will almost always have an impact on freedom to publish").

77. *See* FREE SPEECH IS NOT FOR SALE, *supra* note 13, at 5 (citing to A COMPARATIVE STUDY IN DEFAMATION PROCEEDINGS ACROSS EUROPE, PROGRAMME IN COMPARATIVE MEDIA LAW AND POLICY, Centre for Socio-Legal Studies, University of Oxford, December 2008)). *See also* Sanchez, *supra* note 6, at 483-84 (reporting that UK libel costs in libel cases "easily exceed[ ] $1,000,000," and noting that American Professor Deborah Lipstadt and her publisher spent over £2,000,000 in English historian David Irving's defamation case, in which defendants were ultimately victorious at trial.).

78. Staveley-O'Carroll, *supra* note 4, at 259 (noting that "litigation costs can run into the millions because British cases typically require multiple attorneys, each of whom may charge as much as L 1300 per hour.") Hartley, *supra* note 1, at 26 ("No wonder that the rich and famous come from the four corners of the globe to bring libel actions in England."). *See also id.* at 32.

79. *See, e.g.*, Balin et al., *supra* note 4, at 99 n.4; Staveley-O'Carroll, *supra* note 4, at 263; Sturtevant, *supra* note 6, at 280-82. *See also* MELKONIAN, *supra* note 6, at 277 n.56 (citing to German court exercise of jurisdiction over the New York Times over a story appearing on the newspaper's website).

80. *Brussels I*, *supra* note 67.

81. *See supra Introduction.* In addition to state statutes, the SPEECH Act was preceded by judicial decisions denying enforcement to foreign libel actions on grounds of public policy. *See, e.g.*, Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992). For an argument that some "un-American" judgments should nevertheless still sometimes be enforced, *see* Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783 (2004).

least as much protection for freedom of speech and the press as the First Amendment and the law of the state in which the domestic court is located,[82] or unless the party opposing recognition would have been found liable by a domestic court applying U.S. federal and local law.[83] The burden of making either of these showings is on the foreign judgment holder seeking to enforce the foreign judgment.[84] The Act also provides that a domestic court shall not recognize or enforce a foreign judgment for defamation unless the U.S. court determines that the exercise of personal jurisdiction by the foreign court comported with the due process requirements imposed on domestic courts by the U.S. Constitution.[85] Again, the burden is on the libel claimant to show that U.S. due process standards for personal jurisdiction would have been met by the foreign court's process.[86]

The SPEECH Act contains a separate provision that allows a judgment defendant to bring an action for a declaration that the foreign defamation judgment is "repugnant to the constitution or laws of the United States."[87] A judgment would be repugnant to the constitution or laws of the United States when it would not be enforceable under the provisions of the Act.[88] For declaratory judgments, the burden of establishing non-enforceability is on the party bringing the action.[89] Legislative history suggests that the reason for this provision was to allow American defendants to "clear [their] name[s]"[90] even if the judgment holder did not seek to enforce the judgment here. The statutory provision for such declaratory judgments also establishes nationwide service of process.[91]

The statute also contains a specific provision extending Section 230 Internet provider immunity to ISPs found liable for defamation in foreign courts.[92] Thus, foreign defamation judgments against the providers of interactive computer services, such as the hosts of message boards and blogs, would not be recognized or enforced if

82. SPEECH Act, 28 U.S.C.A., *supra* note 5, at § 4102 (a)(1)(A).

83. *Id.* at § 4201(a)(1)(B).

84. *Id.* at § 4102 (a)(1)(A)(2).

85. *Id.* at § 4102 (b)(1): "Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that the exercise of personal jurisdiction by the foreign court comported with the due process requirements that are imposed on domestic courts by the Constitution of the United States."

86. *Id.* at § 4102 (b)(2). An appearance in foreign court by the libel defendant does not bar any of the defenses in the statute, including lack of personal jurisdiction. *Id.* at § 4102 (d).

87. *Id.* at § 4104(a)(1).

88. *Id.*

89. *Id.* at § 4104(a)(2).

90. S. Rep. No. 111-224 at 4 (2010).

91. SPEECH Act, 28 U.S.C.A., *supra* note 5, at § 4104(b).

92. *Id.* at § 1402(c).

inconsistent with Section 230 of the Communications Decency Act (which protects against liability for user generated content).[93]

The SPEECH Act contains an attorney's fees provision as well, pursuant to which a party prevailing in its opposition to recognition or enforcement of the foreign judgment under the SPEECH Act would be granted reasonable fees "absent exceptional circumstances."[94]

II. WHAT'S REALLY AT STAKE—ASSESSING THE SPEECH ACT

The Internet and the global businesses it enables pose an often-noted challenge to territoriality.[95] Because both reputations and publication are now so often global, local differences in defamation regimes pose a much more practical problem than in the past.[96] Has the United States responded adequately?[97]

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93. Communications Act of 1934, 47 U.S.C. § 230.

94. SPEECH Act, 28 U.S.C.A., *supra* note 5, at § 1405. This attorneys fee provision does not seem to apply in the declaratory judgment actions permitted under the statute (except, presumably, to the extent that there is a counterclaim for enforcement in the declaratory judgment action). *Id. See* MELKONIAN, *supra* note 6, at 254 (discussing indirect effect of this clause on the exercise of comity, and *id.*, at 255-56 (asserting that the attorney's fees provision renders § 4102(a)(1)(B) "somewhat illusionary.").

95. *See, e.g.*, Hartley, *supra* note 1; Garnett & Richardson, *supra* note 4 at 473 ("[u]ntil recently, transnational libel actions did not occur often and so the scope for conflict with legal regimes which were less generous to claimants was limited. However, the huge increase in Internet publications in the past ten years has led to a proliferation of libel litigation particularly before English courts."); Partlett, *supra* note 6.

96. In addition to the effect of global communications, changes in legal culture may have helped fuel the increase in foreign libel actions against American speakers. The legal profession is arguably becoming increasingly specialized, both in the United States and abroad. A recent report notes that several important British law firms have developed expertise in libel law, and may have taken to soliciting business for this area of expertise. SULLIVAN, LIBEL TOURISM REPORT, *supra* note 6, at 15. When wealthy clients seeking to avoid press attention have access to lawyers with structural incentives to develop particular areas of expertise, we can anticipate an increase in sophisticated libel claims.

97. One could be cynical about the furor over libel tourism. As evidenced by the very title of New York's "Libel Terrorism Act," there may be linkages between critiques of libel tourism and American anti-terror rhetoric. *See* Partlett, *supra* note 6, at 640-41 (noting connection in the rhetoric). *See also* MELKONIAN, *supra* note 6, at 2 ("The term *libel tourism* has . . . morphed into the even more politically loaded epithet of *libel terrorism*. . ."); *id.* at 242 ("[l]ibel tourism is sometimes even referred to as libel terrorism undoubtedly to create an even more urgent need for restricting the law of comity.") Some commentators have referred to some English libel cases as "soft jihad," or "lawfare" by proponents of "radical Islam." Brooke Goldstein & Aaron Eitan Meyer, *"Legal Jihad:" How Islamist Lawfare Tactics Are Targeting Free Speech*, 15 ILSA J. INT'L & COMP. L. 395 (2009). The Legal Project at the Middle East Forum and The Federalist Society sponsored a conference in 2009 entitled *Libel Lawfare: Silencing Criticism of Radical Islam*. *See* Pate, *supra* note 6, at 414-16 (describing conference and criticizing participants' failure "to provide an adequate definition for libel lawfare[,]" and suggesting a distinction between individual libel lawfare and global libel lawfare). This might lead some observers to suspect that Congressional disquiet

A. *The Current Debate: The SPEECH Act as American Legal Imperialism or Insufficient Response to Foreign Judicial Overreaching?*

The discussion of American libel tourism legislation—whether regarding state law or federal bills—has been largely bi-modal. Scholars argue either that such legislation is an unduly robust extra-territorial assertion of U.S. constitutional law, or that it is an example of inappropriate foreign (e.g., English) legal imperialism.

On one side of the debate in the legal literature are those who claim that U.S. courts should routinely recognize and enforce foreign libel judgments against American speakers, even if the defendants and the publication at issue have insignificant contacts with the foreign forum. On this view, American courts have an obligation to enforce even "un-American" foreign judgments because not doing so in the defamation context constitutes nothing more than extraterritorial enforcement of the First Amendment.[98] At a minimum, critics on this flank argue that U.S. courts should engage in case-by-case review of such foreign judgments, determining when recognition of the judgment should be considered contrary to American public policy.[99]

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about libel tourism was little more than a disguised attempt by a government interested in expanding its power by stoking public fears of terrorism.

Instead of a story of libel tourism hijacked to promote anti-terror policy, however, an alternative reading is available. On this version of the story, those opposed to libel tourism were able to use the fortuitous link between the *Ehrenfeld* case and terrorism as a hook to induce legislative attention to a much broader problem when free-expression flag-waving would have been ineffective. The fact that the American legislative response has been cloaked in post-9/11 anti-terrorist rhetoric should not distract us from the reality that libel actions abroad against both the press and academics do in fact pose a significant threat of chilling important public discussion—and not just about terror.

98. This view rests on American courts' typical willingness to recognize and enforce foreign judgments in the United States even when the foreign court did not apply law equivalent to U.S. law, so long as the trial met certain fundamental requirements of procedural fairness. *See. e.g.,* Partlett, *supra* note 6. *See also* Garnett & Richardson, *supra* note 4, at 474 (arguing that unavailability of recovery under U.S. law "is itself a powerful reason to adjudicate not only to afford the claimant a right to redress but also to prevent U.S. free speech law having global or "imperialist" effect . . ."); Klein, *supra* note 10; Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 172 (2004); Rosen, *supra* note 81; Zick, *supra* note 6, at 1588 ("The extraterritorial application of Sullivan may be viewed by other nations as a form of rights imperialism.").

99. One could make the following argument: Broadly speaking, there appear to be three types of situations covered by the SPEECH Act. One is the prototypical libel tourism situation—where neither the claimant nor the defendant has significant connections to England, but the material appeared on the Internet or a few copies of the book were sold in England. The second situation is where there is a real and substantial connection to England, but also to a number of other jurisdictions. An example of this kind would be a claimant with significant English connections and reputation, but a defendant with no British connections, minimal publication in England, and a topic of public interest in the United States. The third situation is where there is a real and substantial connection to England, but not particularly to other places, such as the United States, with regard to the speech at issue. An example of this third category might be an American who traveled to London and carried a sign around

Such scholars might prefer the SPEECH Act to have been formulated not in constitutional terms, but in more modest choice of law terms, allowing American courts to refuse to enforce a foreign libel judgment based on a faulty choice of law analysis.[100]

On the opposite side of the debate are those who oppose what they see as English libel law imperialism. These critics call for legislation that would allow American courts to issue declaratory judgments labeling foreign libel judgments against American authors repugnant, and to assert long arm jurisdiction over foreign libel plaintiffs solely on the ground of their foreign lawsuits against the American defendants.[101] Though differing as to the best remedy, they all agree that legislation that simply prohibits recognition and enforcement of foreign libel judgments in the United States is not sufficiently speech-protective by failing to impose costs on claimants who sue U.S. speakers abroad.

While the absolutism of the SPEECH Act may be overbroad, non-recognition is clearly appropriate at least in the prototypical case of libel tourism where neither the defendant nor the plaintiffs have real ties to the foreign forum.[102] Moreover, there is no *a priori* metric that would allow us to distinguish between degrees of repressiveness with regard to speech, and a rational argument could be made—and has been made by the British movement to change English libel law—that the current British law is unduly repressive. Therefore, non-recognition is not excessively offensive even with respect to another common category of cases, where the connections are more extensive both to the foreign forum and others. Also, European courts frequently refuse to enforce American tort judgments or limit the

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Trafalgar Square asserting that David Cameron was a crook. Although the SPEECH Act would appear to cover all three of these situations, a good argument could be made that the first—and perhaps the second—are far better candidates for non-recognition of judgments than the third. But the SPEECH Act is a blanket prohibition and may be read to deprive the courts of discretion to distinguish among these situations. If a U.S. court were free to determine, in the usual way, whether a damage award from a foreign state was based on a highly repressive law and therefore contrary to U.S. policy, then, arguably, the United States would be sending a less dismissive message to the British courts.

100. *See* McFarland, *supra* note 1 (arguing that "the proper solution to these competing concerns [free speech and reputation] should be grounded on jurisdictional restraint rather than substantive hubris. U.S. courts should refuse recognition and enforcement of foreign libel judgments only where those judgments are issued by a tribunal lacking jurisdiction."); Doug Rendleman, *Collecting A Libel Tourist's Defamation Judgment*, 67 WASH. & LEE L. REV. 467, 486-87 (2010); Zick, *supra* note 6, at 1610 ("foreign libel tourism has been met in the United States by a form of reactive libel protectionism . . . . Libel protectionism effectively supplants the speech laws and policies of other states, giving the First Amendment "a kind of global constitutional status."") (citation omitted).

101. *See, e.g.*, Bernstein, *supra* note 1, at 223-24.

102. For a view that this result would have obtained under the ordinary principles of comity, without a need for a "sledgehammer-like" statute, *see* MELKONIAN, *supra* note 6, at 273.

damages awarded because of differences in the law regarding punitive damages. In any event, the SPEECH Act is more modest than prior proposed federal legislation.[103] Moreover, while it denies domestic effect to some foreign libel judgments, it nevertheless does not necessarily eliminate judicial discretion.[104] It does not seek to impose punishment on the foreign libel litigant simply for having commenced a suit abroad, nor does it expand long-arm jurisdiction on that basis alone.

103. The SPEECH Act is more moderate than other libel tourism bills previously considered by Congress, which had called for more aggressive extensions of American law. *See, e.g.*, Free Speech Protection Act of 2009, H.R. 1304, 111th Cong. (2009). This legislation would have created a federal cause of action against any person who brought a defamation action in a foreign court when the "speech at issue in the foreign lawsuit does not constitute defamation under United States law." *Id.*, Sec. 3(a). The proposed legislation also provided for treble damages if "the person or entity bringing the foreign lawsuit which gave rise to the cause of action intentionally engaged in a scheme to suppress rights under the first amendment to the Constitution of the United States." *Id.*, Sec. 3(b). Corresponding legislation was also introduced in the Senate. Free Speech Protection Act of 2009, S. 449, 111th Cong. (2009). *See also* 155 CONG. REC., H6771-H6773 (daily ed. June 15, 2009); Balin et al, *supra* note 4 at 101; Bernstein, *supra* note 1, at 214-15, 224; Taylor, *supra* note 6, at 205-207. Concerns were expressed about the constitutionality of certain provisions included in prior anti-libel tourism statutory proposals. *See, e.g., H.R. 6146 Hearing*, *supra* note 4, at 60, 69-70, 73 (statements of Linda Silberman). Critics also warned about British response. *See, e.g*, Garnett & Richardson, *supra* note 4, at 480-81. Yet others argued in support of extension of jurisdiction by American courts in libel tourism situations. *See, e.g.,* Moore, *supra* note 6 (arguing for the extension of long-arm jurisdiction over foreigners who file defamation actions against American parties in foreign courts after a judgment has been obtained.) In any event, more aggressive legislation that would nevertheless avoid some of the objections to New York's libel law and the proposed federal Libel Terrorism Protection Act could surely be crafted. The legislative history of the SPEECH Act shows that Congress considered the possibility of more far-reaching legislation and chose to limit itself (not only because it had questions about the constitutionality of the assertion of jurisdiction in prior bills, but also because of concerns of international comity). *See* Transcript, Markup of H.R. 2765, H. Comm. on the Judiciary 11-12 (June 10, 2009), http://judiciary.house.gov/hearings/transcripts/transcript090610.pdf (last visited Dec. 22, 2011). *See also* Staveley-O'Carroll, *supra* note 4, for a discussion of comity in the context of New York's Rachel's Law.

104. Admittedly, it is unclear whether U.S. courts will interpret the SPEECH Act to require "exact congruence" between American and foreign law. Sanchez, *supra* note 6, at 511. *Cf.* Pontigon v. Lord, 340 S.W. 2d 315 (2011) (in what appears to be the first case addressing application of the SPEECH Act, remanding for consideration of the Act in connection with a recognition of a Canadian defamation judgment). The inquiry required under the SPEECH Act is complex. Professor Melkonian recognizes that the determination of whether U.S. and foreign law are "equal," as required by the statute, is "more obtuse" than the inquiry whether foreign law is "repugnant" to U.S. policy under traditional principles of comity, (*see* MELKONIAN, *supra* note 6, at 262), and expressing the concern that "the language of the libel tourism laws may preclude comity where it should be granted[,]" (*id.* at 270); he nevertheless argues that the Act does not prohibit American courts from engaging in comity analysis. *Id.* at 268.

B. The SPEECH Act's Unintended Consequences for Important Categories of Speech

Regardless of where we come out on the debate, however, the practical limit of the SPEECH Act is that it is unlikely to achieve its stated goals or to reduce the chilling effect of libel tourism. Although the Act is likely to have some salutary effects, it will principally reassure speakers unaffiliated with global information providers and unburdened by significant assets outside the United States. It gives far less consolation to members of the global institutional press and publishers with assets abroad.

The SPEECH Act is likely to have both a symbolic and actual (albeit limited) speech-protective effect. In recognizing a cause of action for declaratory judgments regarding foreign libel judgments, the legislation creates an opportunity for American speakers to provide a public counter-story without undertaking foreign litigation. Moreover, the Act can deter some forum shopping through its attorney's fees and national personal jurisdiction provisions. Symbolically, the Act helps to put pressure on English law and English judges.

Despite American non-recognition, however, the foreign defamation judgment will still stand and may be enforceable elsewhere. Especially in light of the European Union regulations regarding recognition of judgments in the EU,[105] a British libel judgment could be satisfied not only from the defendant's assets in Britain, but from assets in other EU member countries as well. Thus, a company with assets outside the United States will still be vulnerable to enforcement of British judgments anywhere in the European Union.

Unlike impoverished bloggers who do not wish to travel to the United Kingdom or the rest of the European Union, the large, mainstream, institutional news organizations with the resources to fund hard-hitting accountability journalism must remain extremely concerned about libel judgments. The economic reality of news and media organizations today is that they are often multi-national in character. American media companies maintain extensive operations, agents, and assets in members of the European Union.[106] American publishers as well have world-wide connections and assets.[107] These assets and interests outside the United States would be available to satisfy foreign libel judgments.

Ironically, then, regardless of the SPEECH Act, libel tourism will continue to deter precisely the type of responsible news reporting, fact investigation, or expert professional commentary that is most socially beneficial and accurate. An unintended consequence of the

105. *Brussels I*, *supra* note 67.

106. Thus, entities like News Corp, for example, would not be much aided by the SPEECH Act's protections. *See* Maly, *supra* note 6, at 922-23.

107. Hartley, *supra* note 1, at n.32.

statute in operation is that it will be far less protective of the traditional journalist with training in journalistic and editorial standards than of the hypothetical individual blogger with no European assets, no connection with the institutional press, and little if any commitment to mainstream journalism standards. As a practical matter then, the SPEECH Act reserves its highest level of practical protection for speakers most isolated from the international stage.

This is particularly worrisome because of the handicaps under which the traditional press with foreign assets already operates. Self-censorship triggered by libel tourism could well be the death knell for any hope of reviving a truly effective democratic press. Volumes have been written in the past several years about the dire economic circumstances currently facing mainstream journalism. Concern for the bottom line by consolidated, publicly held news organizations has already led to be blurring of the boundary between news and entertainment, reduced commitment to resource-intensive investigative reporting, closure of foreign news bureaus, and wholesale firing of experienced print journalists.[108] Certain kinds of investigative reporting also draw much of their life blood from comments on deep background or by anonymous sources. This is particularly true with respect to investigative reporting in countries where whistleblowers have neither de jure nor de facto protection from retaliation. It is not unlikely that writers involved in at least some libel tourism suits brought for political purposes would have relied on confidential sources and therefore have difficulty proving the truth of their stories.[109] Legal regimes requiring the libel defendant to prove the truth of her statement create structural problems for the kind of investigative journalism which relies on confidential sources whose identities could not be revealed to prove truth. In such circumstances, risk-averse news organizations will rationally reduce their support for this kind of risky journalism. Libel tourism is a reason for doing so, or at least can provide the excuse.

The threat of a foreign libel suit in the academic context is perhaps even more powerful than the threat of defamation actions against the institutional press. Libel tourism is likely to inhibit all scholars, particularly those publishing on controversial issues or using anonymous sources. Whether or not they are affiliated with academic institutions, authors whose publishers have international

108. *See generally* STEVEN WALDMAN & THE WORKING GRP. ON INFO. NEEDS OF COMMUNITIES, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE (June 2011), http://hraunfoss.fcc.gov/edocs_public/attachment/DOC-30706A1.pdf (last visited Mar. 15, 2012).

109. Especially in countries with widespread corruption or those without credibly enforced whistleblower protections, it is highly unlikely that the reporters' sources would be willing to be identified. Without being able to produce these sources, the defamation defendant in an English action cannot realistically win.

assets and connections will face the chilling effect of trans-national libel actions. It is also to be expected that academic publishers—limited in number and not very profitable to begin with—will likely be easily intimidated by threats of foreign libel actions in receptive jurisdictions.[110] Scholars' ability to self-publish through the Internet is of no help. The unwritten rules of advancement in academic life still endow high-ranking university presses with significant power vis-à-vis authors: more wish to publish with Harvard or Oxford University Press than can do so. Also, the relationship between author and academic publisher is not at all like the relationship between newspaper and journalist. In the mainstream press, journalists are typically employed by their newspapers or television stations, develop reputations that enhance the institutional reputation of their employers, and function as elements in complex reporting structures including editors. They are unlikely to be fired simply because of one story and traditionally receive litigation support from their employers, so long as they were acting in the course of their employment. By contrast, authors do not have such ongoing relationships with their publishers. Even if a work's publisher helps defend against a libel suit over a book it has already published, it is very easy for the press to refuse to publish the author's next offering for reasons of risk-aversity. Indeed, publishers are likely to avoid authors who have been defendants in libel suits even if the suit involved a different publisher.[111] Scholars who do not have university affiliations are entirely at the mercy of their publishers.[112] On the academic front, libel tourism is likely to be most inhibiting to academic researchers who do not have the support of large, heavily-endowed institutions, to scholars who focus on controversial public issues, and to those who use anonymous sources.[113] Commercial publishers as well have refused to

110. Jan-Jaap Kuipers, *Towards a European Approach in the Cross-Border Infringement of Personality Rights*, 12 GERMAN L.J. 1681, 1686 (2011).

111. *Libel Tourism Writ Large*, *supra* note 2, at 48 (comments of Floyd Abrams); Staveley-O'Carroll, *supra* note 4, at 269.

112. This is not just a hypothetical concern—Rachel Ehrenfeld has testified that she has had difficulties finding publishers for work in her field. *H.R. 6146 Hearing*, *supra* note 4, at 4 (statement of Rachel Ehrenfeld).

113. What about the claims that "[t]he structure of the Internet militates against the suppression of speech of public interest[,]" and that "defamation litigation will be a hollow threat in deterring speech[?]" Partlett, *supra* note 6, at 658. Professor Partlett may be right that "[t]he publicity in the wake of the [Ehrenfeld] ligitation stimulated a market for her book that one doubts would have been otherwise available[ ]" and that "[i]nformation will leak out." *Id.* Indeed, Wikileaks may count as an object lesson. But we should not dismiss reports of publishers' wariness to deal with authors who have been defamation defendants. Publishers would not necessarily expect a positive effect on sales of other books that might be found defamatory under foreign law, and profits from expected notoriety would not necessarily lead them to take more litigation risk. The press and publishers have choices in what to publish and can always devise rational explanations for more risk-averse elections. More generally, while the decentralized nature of the Internet may push expression to be disseminated once created, regardless of defamation law, it does not address what

publish books in the United Kingdom because of concern about libel suits.[114]

In sum, then, a fundamental practical failing of the SPEECH Act is that it leaves open too broad a field for libel tourism's chilling effect. But the solution is not the adoption of even more aggressive legislation. Certainly, a statute permitting a very extensive exercise of personal jurisdiction (based simply on the claimant's commencement of a foreign lawsuit, for example) would raise significant constitutional questions under U.S. law. Even if a narrowly drafted statute of this kind would pass constitutional muster, as some commentators have suggested,[115] it is unlikely that a foreign court would recognize and enforce a judgment issued by an American court against the foreign plaintiff in such circumstances. Accordingly, the legislation would again help only those defendants who have been sued by a claimant with significant assets in the United States. Even with respect to such claimants, claw-back provisions in existing UK legislation would allow persons required to pay treble damages, for example, to claim them back.[116] Moreover, even though more aggressive options are still open to Congress if it finds the SPEECH Act approach insufficiently effective, there is the possibility of backlash from foreign jurisdictions whose judicial pronouncements are disregarded. For example, Professor Hartley has suggested that legislation imposing treble damages on an English libel plaintiff "would invite retaliation."[117] While it is true that European courts have routinely chosen not to recognize and enforce American tort judgments against European defendants because of inconsistent approaches to punitive damages and high damage awards, statutory provisions significantly more aggressive than the SPEECH Act would likely be seen in England and the rest of the European Union as even more inconsistent with general principles of comity.

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factors deter or diminish the creation of expression in the first place. The argument that the volume of speech overall might not be substantially reduced also says nothing about whether particular expressions that would contribute to the quality of discourse would not be constrained. Simply put, the story of Wikileaks cannot be told without assessing the effects on speech of the reactions to Wikileaks.

114. Staveley-O'Carroll, *supra* note 4, at 268 (discussing the fact that American best-seller *House of Bush, House of Saud* was not published or distributed in Britain because of libel action concerns); Arlen Specter & Joe Lieberman, *Foreign Courts Take Aim at Our Free Speech*, WALL ST. J., July 14, 2008. *See also* Duncan Campbell, *British libel laws violate human rights, says UN*, GUARDIAN (Aug. 14, 2008), *available at* http://www.guardian.co.uk/uk/2008/aug/14/law.unitednations.

115. *See, e.g.*, Moore, *supra* note 6; Taylor, *supra* note 6 (criticizing provisions granting defendants in trans-national actions the right to sue the foreign defamation judgment-holder for damages).

116. Moore, *supra* note 6, at n.42.

117. Hartley, *supra* note 1, at n.42.

III. Assessing the British Government's Pending Libel Reform

On the British side, efforts to reform "draconian"[118] English libel law[119] most recently resulted in the government's Draft Defamation Bill, although commentators were far from unanimous on the need for reform.[120] Now that consultations have been completed on the bill and the joint Parliamentary committee has released its report, it is time for the Government to decide whether and how to revise the bill for submission to Parliament.

A. *The Draft Defamation Bill*

With respect to the issue of libel tourism, the draft legislation contains three particularly significant elements.[121] First, the bill states that "[a] statement is not defamatory unless its publication has caused or is likely to cause substantial harm to the reputation of the claimant."[122] Second, the draft adopts a single publication rule for statute of limitations purposes, pursuant to which any libel action for a statement would be "treated as having accrued on the date of first publication"[123] so long as the subsequent publication was not

118. *See, e.g.*, Rosa Prince, *Britain's 'draconian' libel laws to be reformed*, Telegraph (July 9, 2010), *available at* http://www.telegraph.co.uk/news/7881792/Britains-draconian-libel-laws-to-be-reformed.html. *See also* Max Henderson, *Scientists urge reform of 'lethal' libel law*, Sunday Times (London) (Dec. 10, 2009), *available at* http://www.timesonline.co.uk/tol/news/science/medicine/article6951054.ece. One member of Parliament characterized British courts as "Soviet-style organ[s] of censorship." Staveley-O'Carroll, *supra* note 4, at 283; Bernstein, *supra* note 1, at 225; Garnett & Richardson, *supra* note 4 at 477; *Libel Tourism Writ Large*, *supra* note 2.

119. Government committees have studied reform for some time. *See, e.g.*, Hartley, *supra* note 1, at n.2 (2010) (noting that responses to libel tourism are already currently being considered by a committee of the House of Commons). Last summer, a member of Parliament proposed a private Member's bill on defamation. *See* Rachel McAthy, *Government to lead libel reform with new Defamation Bill*, Online Journalism News (July 9, 2010), *available at* http://www.journalism.co.uk/2/articles/539552.php; *Improving a Reputation*, Economist (May 27, 2010), *available at* http://www.evernote.com/pub/englishpen/libel#n=0b58e5ae-a7b1-4432-b7ac-85cc5311d35d. The Lester bill was shelved in favor of the currently pending proposal. Anthony White QC & Eddie Craven, *Opinion: "Draft Defamation Bill – Proposals, Problems and Practicalities", Part 1*, Inforrm's Blog (Mar. 31, 2011), *available at* http://inforrm.wordpress.com/2011/04/03/opinion-draft-defamation-bill-proposals-problems-and-practicalities-part-1-anthony-white-qc-and-eddie-craven/.

120. *See, e.g.*, Alastair Mullis & Andrew Scott, Something Rotten in the State of English Libel Law?: A Rejoinder to the Clamour for Reform of Defamation (Jan. 2010), http://www.lse.ac.uk/collections/law/news/libel.pdf (last visited Dec. 22, 2011) ("We are concerned . . . that the critique of the libel regime is too broad and the reforms proposed too sweeping and indiscriminate."). *See also* Consultation Responses Summary, *supra* note 18, at 6 (summarizing the result of consultations as follows: "[v]iews were divided between those who supported the provision in the draft Bill [on actions against a person not domiciled in the UK or a Member State], those who wanted it to extend further to cover all cases with a foreign element, and those who didn't consider libel tourism to be a problem requiring attention.").

121. The Draft Defamation Bill has ten clauses, many of which do not pertain directly to libel tourism and will not be addressed here.

122. *Id.*, Clause 1.

123. *Id.*, Clause 6(3).

made in a manner "materially different" from the first.[124] Third, the legislation "aims to address the issue of 'libel tourism'"[125] jurisdictionally. It states that, with respect to persons not domiciled in the United Kingdom, another European Union Member State, or in a contracting party to the Lugano Convention,[126]

> [a] court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.[127]

The draft statute also indicates that it only applies to England and Wales.[128] Notably—although probably more for domestic British defamation suits than for trans-national actions, the proposed bill states that "[t]rial [is to be] without a jury unless the court orders otherwise,"[129] and it revises provisions on defenses.[130]

B. Benefits, Limits, and a Suggestion

While the draft libel reform bill articulates the goal of balancing free speech and the protection of reputation, there is likely to be significant debate about whether it does so appropriately. Upon its springtime release, British observers noted that the draft bill has "had a mixed reception."[131] On the one hand, the recently published report of the Joint Committee on the Draft Defamation Bill concluded that it did not "strike a fair balance" between protecting reputation and free speech "in some important respects."[132] On the other hand, some people worry that it significantly changes current British defamation law in favor of defamation defendants without sufficiently searching analysis.[133]

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124. *Id.*, Clause 6(4). The proposed bill provides that "in determining whether the manner of subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters)—(a) the level of prominence that a statement is given; (b) the extent of the subsequent publication." *Id.* at Clause 6(5).

125. *Id.*, Annex B – Explanatory Notes, Note 46, at 82.

126. *Id.*, Clause 7(1). The reason for this limitation is to "avoid conflict with European jurisdictional rules[.]" *Id.*, Annex B – Explanatory Notes, Note 46, at 82.

127. *Id.*, Clause 7(2).

128. *Id.*, Clause 10(3).

129. *Id.*, Clause 8.

130. *Id.*, Clause 2 (Responsible publication on matter of public interest), Clause 3 (Truth), Clause 4 (Honest opinion), Clause 5 (Privilege).

131. David Alan Green, *The draft libel reform bill is a good thing*, NEW STATESMAN (Mar. 17, 2011), *available at* http://www.newstatesman.com/blogs/david-allen-green/2011/03/draft-bill-libel-claim.

132. JOINT COMMITTEE REPORT, *supra* note 17, at 3.

133. Despite a ringing endorsement of the free press in the Deputy Prime Minister's introduction of the draft libel bill, some observers conclude that it completely

The proposed bill, if adopted, would definitely reduce casual libel tourism of the prototypical sort.[134] The element most designed to address libel tourism is the proposed bill's jurisdictional provision. The primary goal of English reforms, from the point of view of protecting against libel tourism, should be that English courts limit the transnational defamation cases they hear. In helping defendants when England is not "clearly the most appropriate" place to bring an action,[135] the proposed bill is clearly designed to go in that direction.

The legislation would also stop English courts from presuming harm to reputation in England simply from global communication of the defendant's allegedly defamatory speech. If the courts were to engage in rigorous assessments of the actual damage to the plaintiff's reputation in England, speech-friendly results would follow in many libel tourism cases where claimants did not have significant British reputations subjected to substantial harm. Similarly, the adoption of a single publication rule for statute of limitations purposes would cer-

upends traditional English libel law. *See, e.g.*, Alastair Mullis, *The Government's Defamation Bill – Insufficiently Radical? Part 1*, INFORRM'S BLOG, (Mar. 18, 2011), *available at* http://inforrm.wordpress.com/2011/03/18/opinion-the-government%e2%80%99s-defamation-bill-%e2%80%93-insufficiently-radical-part-1-alastair-mullis/ [hereinafter Mullis, *Insufficiently Radical?*]. *See also* CONSULTATION RESPONSES SUMMARY, *supra* note 18, at 5-7, 47-50 (describing differences in views of respondents on various aspects of the draft bill including its libel tourism-related jurisdictional provision).

134. *See* Sanchez, *supra* note 6. *See also* Jodie Ginsburg, *UK acts to halt libel tourism, help free speech*, REUTERS (Mar. 15, 2011), http://uk.reuters.com/article/2011/03/15/uk-britain-libel-idUKTRE72E57E20110315 (last visited Mar. 16, 2011) (discussing deterring English suits when the claimant's connections to England are truly "trivial.").

135. DRAFT DEFAMATION BILL, at Clause 7(2). This is consistent with Professor Hartley's thoughtful approach: he suggests that reforms could be made either to choice of law or to jurisdiction under English law (Hartley, *supra* note 1 at 25, 32) "so as to give effect to the superior interest of foreign countries in cases where neither party is domiciled in England and the defendant has not specially targeted England." *Id.* at 34. Professor Hartley also suggests that English courts could change their application of *forum non conveniens* to adopt "some kind of single-publication rule for this purpose." *Id.* at 37. "In determining whether England is an appropriate forum for the proceedings, all instances of publication shall be taken together as if they constitute a single tort, even if the claim is limited to a remedy for publication in England." Id. The draft legislation does not address *forum non conveniens*.

Professor Hartley is of course right that changes to the application of *forum non conveniens* could do much to eliminate the threat of English libel tourism to American defendants. As the English Supreme Court could adopt a single publication rule for purposes of *forum non conveniens* analysis, difficulties one might expect with legislative processes might be avoided. (Professor Hartley suggests that this could be done by Supreme Court reversal of lower court decisions such as Berezovsky v. Michaels, [2000] 1 WLR 1004. *See* Hartley, *supra* note 1, at n.50). However, as Professor Hartley himself recognizes, rule changes would have to be accompanied by a cultural and attitudinal shift on the part of British judges. *See* Garnett & Richardson, *supra* note 4, at 474 ("[p]rotection of claimant reputation and preservation of English legal sovereignty from U.S. domination are therefore twin forces influencing the approach of English courts.") For an argument doubting the likelihood of such a shift, see, e.g., McFarland, *supra* note 1, at 128. Without that, expensive *forum non conveniens* litigation would itself impose inhibiting burdens on American speakers.

tainly provide relief for some defendants, although its extent is not clear. The expansion of English defenses to libel actions might also help defendants.[136]

The draft bill has been criticized for being both excessively and insufficiently defendant-protective.[137] To those who find it too protective, it should be noted that the bill still affords judges a great degree of discretion to hear trans-national libel cases. For example, with respect to the injury requirement, how will courts determine whether a statement "has caused or is likely to cause substantial harm" to the claimant's reputation? What should count as "substantial" harm? Even if the phrase "has caused" harm is unexceptionable, how is a court to determine whether a statement "is likely to" cause substantial harm?[138] Although a reasonable reading requires that the substantial harm to the claimant's reputation must be in Britain, the statute does not explicitly say so, and provides no guidance regarding the factors courts should assess to characterize the claimant's British reputation.

The draft bill's single publication rule is also limited. The rule still gives courts significant discretion to determine whether and to what extent the subsequent publication was made in the same manner as the prior publication. It is not clear how the proposed Clause 6 of the bill would apply to Internet republication of a prior print statement, for example, or to the publication of a prior statement on an obscure blog with few followers.[139] To the extent that the single pub-

136. See discussion of defenses in MINISTRY OF JUSTICE, REPORT OF THE LIBEL WORKING GROUP, *supra* note 6, at 22-33.

137. *See, e.g.*, Mullis, *Insufficiently Radical?*, *supra* note 133 (recommending that the jurisdictional provision "should be abandoned.").

138. In the Explanatory Notes to the draft bill, the Ministry of Justice states that the "is likely to" language is intended "to cover situations where the harm has not yet occurred at the time the action is commenced." DRAFT DEFAMATION BILL, Annex B – Explanatory Notes, Note 6, at 73. Since harm would not yet have occurred in these situations, however, on what basis would courts establish that the statement was defamatory? The Explanatory Notes refer to prior cases in which courts required a "threshold of seriousness" in what is defamatory, but this too is a vague standard. *Id.*, Note 7. The Note 7 regarding Clause 1 states that "[t]here is . . . currently potential for trivial cases to be struck out on the basis that they are an abuse of process because so little is at stake[,]" *id.*, but it also points to Jameel v. Dow Jones & Co., [2005] EWCA Civ 75 for the proposition that "there needs to be a real and substantial tort." *Id. See also* Garnett & Richardson, *supra* note 4, at 482 (calling for a "real and substantial tort" and discussing Jameel v. Dow Jones, in which the action was dismissed for abuse of process). Yet, there would seem to be a broad spectrum between the two poles of "real and substantial tort" and "trivial cases [with] so little at stake."

139. The Explanatory Notes state that "the definition in subsection (2) is intended to ensure that publication to a limited number of people are covered (for example where a blog has a small group of subscribers or followers)." DRAFT DEFAMATION BILL, Annex B – Explanatory Notes, Note 42, at 81. But will the fact that the publication is to a blog with a small following mean that the republication will not be deemed to have been made in a different manner? Explanatory Note 44 gives as a "possible example" a situation where "a story has first appeared relatively obscurely in a section of a website where several clicks need to be go through to access it, but has subse-

lication rule will not apply whenever a court would find that a republication of a defamatory statement increased the level of prominence of the publication even a little bit, the ambit of the rule's protection is quite narrow.[140] The draft bill also confirms that courts will continue to have the discretion to extend the one year limitation period for libel "where it is equitable to do so."[141] While this provision is designed to "provide a safeguard against injustice,"[142] it creates uncertainty—also a chilling effect.

Another important limit of the draft libel reform bill is that it excludes consideration of costs.[143] As mentioned, one of the critical reasons for the chilling effect of British libel tourism is that English libel litigation is prohibitively expensive.

Finally, the draft bill's jurisdictional provision is also a source of concern. It requires courts to determine whether Britain is "clearly the most appropriate place" to sue in a trans-national matter. But what is to constitute such a "clear" showing? While it is laudable that courts should "consider the overall global picture" in asserting jurisdiction, and while a comparative assessment of damage seems called for by the provision,[144] the "range of factors" to be considered by courts is not clearly set out either in the proposed bill or its Explanatory Notes.[145] The upside is that for libel actions not involving British

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quently been promoted to a position where it can be directly accessed from the home page of the web site, thereby increasing considerably the number of hits it receives." *Id.*, Note 44, at 82. This example focuses more on the format of the republished statement, rather than the numerosity of its audience.

140. *See* Sanchez, *supra* note 6, at 501-02 (on remaining discretion).

141. DRAFT DEFAMATION BILL, Annex B – Explanatory Notes, Note 45, at 82.

142. *Id.*

143. *See* Eric Pfanner, *In Britain, Curbing Lawsuits Over Libel*, NY TIMES (Mar. 20, 2011), *available at* http://www.nytimes.com/2011/03/21/business/media/21cache.html?ref=world&pagewanted=print.

144. DRAFT DEFAMATION BILL, *supra* note 141, at 83.

145. *Id.* The Explanatory Notes state that courts will have a "range of factors" to take into account, "including, for example, whether there is reason to think that the claimant would not receive a fair hearing elsewhere." *Id.* Under what kinds of circumstances could there be such a conclusion? One possibility is that the drafters were thinking of the *Berezovsky* case, in which the claimant said that he was compelled to sue in England because even a successful lawsuit in Russia would be discounted as a result of his prominence in his home country. But another possibility—not addressed in the Explanatory Notes—is that a court could find the *Sullivan* rule in the United States to be a hurdle to a "fair hearing." If so, the jurisdictional provision in the proposed statute would not be of particular help to American defendants.

With respect to Professor Hartley's jurisdictional proposal, it requires a showing that the defendant's communication targeted England "more than any other" country. The proposal would be particularly helpful for Internet communication and publications distributed world-wide via e-commerce sites. Nevertheless, it would require an assessment of whether and how extensively the defendant had made the challenged communication available in England. Although Professor Hartley sees this option as perhaps preferable because "it is more clear-cut and less open to argument[,]" that difference is one of degree rather than kind. This change would require overruling some English court decisions that rejected a targeting analysis for jurisdiction in Internet cases. *See* Garnett & Richardson, *supra* note 4, at 476. Moreover, while the

domiciliaries, the statutory presumption seems to be that British courts will hear the claims only if Britain is clearly the best forum. The downside is that the courts have great discretion in making that determination.[146]

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suggestion is quite sensible, it could be challenged for imposing too high a burden for claimants to meet and for inviting extensive litigation as well. *See* MINISTRY OF JUSTICE, REPORT OF THE LIBEL WORKING GROUP, *supra* note 6, at 12 (discussing complexities of targeting notion).

The Ministry of Justice Report of the Libel Working Group suggested the possibility of amending the jurisdictional rules in defamation cases to include a "list of non-exhaustive criteria" to be considered, such as:

> —The level of targeting of a publication at a readership in this jurisdiction compared with elsewhere
> —The level of publication in this jurisdiction compared with elsewhere
> —Whether the claimant has a reputation to protect specifically in England and Wales
> —Whether a significant amount of damage is done in this jurisdiction compared with elsewhere
> —The level of connection of the claimant to England and Wales (including domicile) compared with elsewhere
> —The level of connection of the defendant to England and Wales (including domicile) compared with elsewhere

MINISTRY OF JUSTICE, REPORT OF THE LIBEL WORKING GROUP, *supra* note 6, at 13.

Like Professor Hartley, Professors Garnett and Richardson also focus on restraining the exercise of English jurisdiction. Garnett & Richardson, *supra* note 4 at 482. Approvingly citing to recent Canadian cases requiring "a real and substantial connection between the forum and the action before jurisdiction can be exercised[,]" Garnett and Richardson suggest that English courts adopt a middle ground between current English practice and U.S. views on jurisdiction, asking domestic courts to "exercise restraint when dealing with foreign defendants and limit jurisdiction to cases where harm to the claimant in the forum was reasonably foreseeable." *Id.* at 484. They argue that, like their Canadian counterparts, English judges should "examine all the factors surrounding the action and the parties including where the publication had its greatest impact[,]" as well as considering the intention of the person posting the material . . ." *Id.* at 483. They also call for courts to apply *forum non conveniens* doctrine "more rigorously in libel cases." *Id.* at 485.

146. Professor Hartley proposes an amendment to the English civil procedure rules on jurisdiction to prohibit jurisdiction in defamation cases unless "(a) the claimant is domiciled in England and Wales; or (b) the defendant has taken significant steps to make the offending material available in England and Wales and has targeted that jurisdiction more than any other." Hartley, *supra* note 1, at 37. (He would use this language even if the European Union were to extend *Brussels I*, its jurisdictional regulation, to defamation actions involving defendants domiciled outside the EU, and therefore make EU law rather than English law "the main focus of attention for finding a solution to the problem of libel tourism." *Id.*)

Another jurisdictional solution was proposed by English PEN, pursuant to which "[n]o case should be accepted in this jurisdiction unless at least 10 percent of copies of the relevant publication have been circulated here." FREE SPEECH IS NOT FOR SALE, *supra* note 13, at 9, 12. While this suggestion has the virtue of providing numerical certainty, it may be criticized as arbitrary and over-inclusive. *See* MINISTRY OF JUSTICE, REPORT OF THE LIBEL WORKING GROUP, *supra* note 6, at 13 (discussing how "readership levels of publications in this jurisdiction may not be what one might expect.").

Finally, Professors Garnett and Richardson's jurisdictional approach would engage courts in inquiring whether the defendant intended to harm the plaintiff or could have reasonably foreseen the harm in the forum. A subjective intent to harm standard would often presumably lead to a pro-defendant result. But the foreseeabil-

If English courts take jurisdiction in trans-national libel cases, there will of course be a choice-of-law issue, which will be decided under English choice-of-law rules.[147] The English rules provide that the law of the jurisdiction with the closest connection be applied. That is extremely malleable, but suggests that if the plaintiff is elsewhere, English law should not apply. Even if the plaintiff has some connections with England, however, English courts should carefully take into account U.S. First Amendment-based policies when they assess the significance of the connections of the defendant and the communication with the United States.[148] An expansive notion of

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ity standard, depending on how it was interpreted, would tend in the other direction and overly valorize reputation interests.

147. The Rome II regulation excludes defamation. European Parliament and Council, Regulation No 864/2007, On the Law Applicable to Non-Contractual Obligations (EC) (Rome II), 2007 O.J. (L 199/40), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0040:en:PDF (English version). For a recent article discussing the defamation exclusion of Rome II, *see* Kuipers, *supra* note 110.

148. This is why Professor Melkonian's recent call for the exercise of comity to solve libel tourism problems is unduly limited. *See* MELKONIAN, *supra* note 6, at 271. As for choice of law analysis in trans-national libel cases, Professor Hartley has suggested that English law could be changed to provide for a single publication. He notes that the EU Commission may legislate further with regard to choice of law in tort, entailing the need to address the issue with respect to EU law. Until that happens, however, the proposed solution looks to change merely English choice of law rules. Id. On this model, the "applicable law for the tort of defamation shall be the law of the country with which the tort is most closely connected." Hartley, *supra* note 1, at. 35. The proposal with respect to choice of law *in toto* is as follows:

> (a) The provisions for this [section] shall apply for the purpose of determining the applicable law in proceedings for defamation in which the defendant is not domiciled in any part of the United Kingdom;
> (b) For the purpose of this [section] all instances of publication of defamatory material anywhere in the world shall be treated as a single tort and given equal weight, even if the claim is restricted to a remedy for publication in the United Kingdom or some part thereof.
> (c) The applicable law for the tort of defamation shall be the law of the country with which the tort is most closely connected.

Id. Professor Hartley suggests that this rule, in turn, should define the place where the tort occurred as the one place "with which the relevant elements, taken as a whole, are most closely connected." Ultimately, as Professor Hartley recognizes, even if a single-publication rule were adopted for choice of law and jurisdiction purposes, however, another rule would have to be adopted "to determine where the tort is deemed to have occurred." MINISTRY OF JUSTICE, REPORT OF THE LIBEL WORKING GROUP, *supra* note 6, at 38. How do we decide where the tort is most closely connected? Which are the relevant elements the judge should consider? Moreover, depending on how the idea of connections to the place of the tort is interpreted, it is possible that the court weighing the connections might not take account of the strength of American interests in freedom of speech and press in any given case.

Professors Garnett and Richardson propose that English courts apply the law of the country with the strongest connection to the case, while recognizing that "a test based on closest connection would be difficult to apply in some cases where the links are evenly spread." Garnett & Richardson, *supra* note 4, at 486. (Garnett and Richardson conclude, as does Hartley, that a change of this kind to Rome II is unlikely. *Id.*) Like Professor Hartley's proposal, the Garnett and Richardson option would also entail discretionary factor-counting by British courts and would not necessarily forefront the strength of American interests in political speech even when central in the particular case. The same objection applies to the recent suggestion by Professors

free speech and free press is fundamental to the American conception of democracy, and this commitment should weigh heavily in the forum court's choice-of-law determination when it believes that the libel action would be likely to suppress open discourse in the United States about political, governmental, and economic activity.[149] Such considerations should focus on the likely effect in the United States, and avoid inquiries into the libel tourist's strategic or censorious intent.[150] Of course, consideration of such policies, and of their importance to the operation of the U.S. constitutional system, would not necessarily be dispositive, but would rather depend on the nature and significance of contacts with England and other countries.[151]

Partlett and McDonald, with respect to libel tourism generally, that "the way forward is to have a high level dialogue among courts and informed commentators that will clear the political brush and dispose us to clear reasoning allowing an evolution of norms." David Partlett & Barbara McDonald, *International Publications and Protection of Reputation: A Margin of Appreciation But Not Subservience?*, 62 ALA. L. REV. 477, 511 (2011).

149. Courts should bear in mind that free speech is a prominent value not only in the United States, but also in international human rights law and treaties. *See* Universal Declaration of Human Rights, Art. 19, GA Res. 217A (III), U.N. GAOR, 3d Sess., Resolutions, at 71, U.N. Doc. A/810 (1948); International Convention on Civil and Political Rights, Art. 19(2), Dec. 16, 1966, 999 U.N.T.S. 171.

150. Of course, courts do sometimes engage in this kind of intent inquiry. For example, in the United States, anti-SLAPP (Strategic Lawsuits Against Public Participation) statutes require courts to determine whether a defamation action was brought as an attempt to censor the defendant's exercise of rights. *See generally* Carson Hilary Barylak, Note, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845 (2010). Such a judicial inquiry would also be required if an English court were to decide whether a defamation claim should be considered an abuse of rights. *See* Garnett & Richardson, *supra* note 4, at 487-490. Abuse of rights, which is referred to in Article 17 of the European Convention on Human Rights (ECHR), has grounded "a small but developing jurisprudence in the European Court of Human Rights to suggest that where a complaint about a rights violation is motivated by concerns which have more to do with furthering political causes than vindicating the right, this may be a basis to strike out the complaint." *Id.* at 488. While this jurisprudence has so far been concerned with hate speech, Professors Garnett and Richardson contend that it could extend to Article 8 of the ECHR "where the right to reputation is used as a tool of political censorship." *Id.* The authors conclude that "[s]uch a development might include the *Ehrenfeld*-type case where a non-US claimant (or for that matter a US claimant) seeks to prevent a US publisher from releasing material which there is a very high public interest to know—such as allegations of supporting terrorism." *Id.* Unlike the pure libel tourism case, this approach would apply to "the more squarely English-focused case of Alms for Jihad . . ." *Id.* Indeed, Garnett and Richardson "suggest that it is these kinds of cases that English judges, considering their role in protecting freedom of speech under the ECHR, as well as more generally, should be especially concerned to address." *Id.* Nevertheless, this Article suggests that an effects-based, rather than intent-based, inquiry would likely be more administrable. The principal difficulty with the abuse of rights proposal made by Garnett and Richardson is that it involves courts in the assessment of the claimant's motivations. While Garnett and Richardson are right that courts should be able to dismiss cases "where the right to reputation is used as a tool of political censorship[,]" *id.*, the claimant and defendant will frequently disagree as to that issue and engage in expensive litigation on abuse of rights.

151. For example, while the kind of speech involved in defamation cases brought by Hollywood royalty to squelch paparazzi and scandal sheets may well be protected under American law, it is unlikely to implicate the American governmental interest in

C. *The Parliamentary Joint Committee Reaction*

The report of the Parliamentary Joint Committee to review the Draft Defamation Act 2011 remarked that "[f]or a Bill that is overdue, the Government's current draft may be thought modest."[152] With respect to matters of particular significance for trans-national libel cases, the Joint Committee Report recommended speech-protective enhancements:[153] replacing the draft Bill's test of "substantial harm" to reputation with a "stricter" test requiring a showing of "serious and substantial harm"[154]; "extending qualified privilege to peer-reviewed articles in scientific or academic journals"[155]; approving additional protections for online publishers;[156] and clarifying that "the single publication rule should protect anyone who republishes the same material in a similar manner after it has been in the public domain for more than one year."[157] Although its Report expressed the

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the core political speech necessary to the functioning of its democratic and political system. How would this suggestion differ from or change a "connection" analysis like the one proposed by Professor Hartley? If the court did not give significant weight to the American interest in free speech and press, it might define the place of the tort or the parties' connections with Britain more broadly than otherwise. Similarly, if there were a third jurisdiction involved whose laws were also less favorable to the press than those of the United States, the British court might conclude that the weight of connections favored the third state.

One way to think about the consideration suggested above would be in terms of the comparative impairment test developed in the United States, pursuant to which courts facing true conflicts would apply the law of the jurisdiction whose interests would be more impaired by non-application. *See* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963). California cases have used this approach. *See, e.g.,* McCann v. Foster Wheeler LLC, 225 P.3d 516 (Cal. 2010); Bernhard v. Harrah's Club, 546 P.2d 719 (Cal. 1976). *See also* Symeon C. Symeonides, *Choice of Law in American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 325-30 (2011) (discussing *McCann*). Admittedly, the comparative impairment analysis has been subject to critique. *See, e.g.*, William H. Allen & Erin A. O'Hara, *Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1027-40 (1999); Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1158 (2010); Leo Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 HASTINGS L.J. 255, 268 (1978); Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 576, 604-17 (1980); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 316-18 (1990). *But see* Rosen, *supra* note 81, at 818-21 (criticizing these critiques). In any event, the key suggestion of this Article is to ask British and other foreign courts in trans-national libel cases to assess the significance of the contacts in context, including their impact on the States concerned. One need not embrace governmental interest methodology or its comparative impairment refinement to do so.

152. JOINT COMMITTEE REPORT, *supra* note 17, at http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20303.htm (Summary).

153. The details of the JOINT COMMITTEE REPORT with regard to other matters are not addressed here.

154. JOINT COMMITTEE REPORT, *supra* note 17, at 6, 8, 25-26, 39.

155. *Id.* at 7. *See also id.* at 32-33, 43.

156. *Id.* at 4.

157. *Id.* at 38. The Report also suggests that the Government clarify that "merely transferring a paper-based publication onto the internet, or vice versa, does not in

Joint Committee's belief that "the extent of libel tourism ha[d] been exaggerated in some quarters," it nevertheless concluded that "[f]oreign parties should not be allowed to use the courts in this country to settle disputes where the real damage is sustained elsewhere or where another jurisdiction is more appropriate."[158] It recommended that additional guidance be provided for judicial interpretation of the libel tourism provisions, and suggested that courts "have regard to the damage caused elsewhere in comparison to the damage caused here."[159] The Report also suggested that the Government develop a "coherent and principled vision" for the interaction of privacy, reputation and freedom of expression, suggesting the Joint Committee's recognition that privacy tourism might undermine attempts to limit libel tourism.[160]

The Joint Committee's recommendations would, by and large, enhance protection for defamation defendants, although they would not do so as expansively as in the United States. For example, the Joint Committee Report rejected as "inappropriate" calls for a "radical overhaul" of the British "responsible journalism" defense that would "dramatically widen" its scope, bringing the defense "closer to the Unites States model, by focusing on whether the author was acting recklessly and maliciously."[161] In addition, although the Joint Committee Report rejected the suggestion to eliminate outright the ability of corporations to sue for defamation, it endorsed the requirement that corporate defamation plaintiffs must show a "serious financial loss" and obtain judicial permission before bringing a libel claim[162] By contrast, the precise impact on trans-national libel litigation of the Joint Committee's recommended procedural changes designed to reduce the high cost of libel litigation is not certain.[163]

The Government's next step with regard to libel reform legislation is not clear at this point. Significant changes could be made to the Draft Defamation bill in response to the consultations and the

itself amount to republishing in a "materially different" manner, unless the extent of its coverage in the new format is very different." *Id.*

158. *Id.* at 8.

159. *Id.* at 8. *See also id.* at 36-37, 43.

160. *Id.* at 5.

161. Joint Committee Report, *supra* note 17, at 25-26. The Committee did suggest, however, that "when deciding whether publication was responsible, the court should have regard to any reasonable editorial judgment of the publisher on the tone and timing of the publication." *Id.* at 28. Yet, if the British Parliament or courts decide to condition the responsible publication defense on the publisher's attempts to solicit and print the claimant's version of the story, such a resolution would clash directly with the U.S. Supreme Court's rejection of a newspaper right of reply statute under the First Amendment in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), as recently noted by Professor Melkonian. MELKONIAN, *supra* note 6, at 267.

162. JOINT COMMITTEE REPORT, *supra* note 17, at 59-60. *See also id.* at 3.

163. *Id.* at 3. The Joint Committee's recommendations regarding arbitration and mediation in defamation cases are beyond the scope of this Article.

Joint Committee Report.[164] Perhaps the next draft bill will focus, as the Joint Committee suggests, on procedural approaches to early resolution and cost control. We are left not only with the question whether Parliament will enact the bill into law, but also—perhaps most importantly—how the British courts will exercise their discretion under it. The Joint Committee's liberalizing recommendations notwithstanding, much anti-press sentiment has been generated in England by revelations of widespread telephone hacking by Rupert Murdoch's *News of the World* tabloid and this might well either decrease enthusiasm for generally press-protective libel reform in English law or delay such developments to coincide with the conclusion of the Government's Leveson Inquiry.[165]

Perhaps careful diplomacy would be a useful component of the American response.[166] In tandem with diplomacy, it is also important

164. In addition, the Government will likely consider, in redrafting its bill, the recent decision of the European Court of Justice in Cases C-509/09 and C-161/10, eDate Advertising GmbH v. X and Olivier Martinez and Robert Martinez v. MGN Ltd., Oct. 25, 2011, *available at* http://curia.europa.eu/juris/celex.jsf?celex=62009CJ0509&lang1=en&type=NOT&ancre= (last visited Dec. 22, 2011). The Grand Chamber of the ECJ, in addressing infringement of personality rights in connection with online content, interpreted Article 5(3) of *Brussels I*, and, in connection with Article 3 of the Directive on electronic commerce, ruled that, subject to the derogations in Article 3(4), "Member States must ensure that . . . the provider of an electronic commerce service is not made subject to stricter requirements than those provided for by the substantive law applicable in the Member State in which that service provider is established." *Id.*

165. One of the results of the tabloid scandal has been the government appointment of a commission headed by Lord Justice Brian Leveson to inquire into the "culture, ethics and practices" of British newspapers. John F. Burns, *Inquiry Into Press Tactics Turns Tables on Tabloids*, NY TIMES (Nov. 25, 2011), *available at* http://www.nytimes.com/2011/11/26/world/europe/british-inquiry-into-press-tactics-turns-the-tables-on-tabloids.html?_r=1&scp=3&sq=leveson&st=cse.*See also* THE LEVESON INQUIRY: CULTURE, PRACTICE AND ETHICS OF THE PRESS, http://www.levesoninquiry.org.uk/ (last visited Dec. 20, 2011). Although defamation law is not included in the Leveson Inquiry's brief, the existence of the Inquiry may well have indirect effects on the consideration of libel reform.

166. *See* Zick, *supra* note 6, at 1611 ("In the community of states . . . the process of First Amendment norm transmission will involve persuasion rather than dictation. If it is to occur at all, First Amendment globalism will result from diplomacy, contacts among judges and lawyers of various nations, transnational processes, and the work of nongovernmental organizations."); McFarland, *supra* note 1 (also arguing for diplomacy). One can understand even the SPEECH Act is as an element of diplomacy—a double signal to England. On the one hand, it, obviously, constitutes a statement that England's courts are handling free speech issues badly in the context of defamation involving U.S. speakers. Simultaneously, however, it sends a second message—that even though Congress considered more stringent reactions to English courts, it chose not to go as far as some had recommended. What could be considered, in context, the relative modesty of the SPEECH Act, then, could be seen as a demonstration of American sensitivity to the different balances other countries strike between reputation and free speech. At the same time, the possibility of more aggressive Congressional reaction could serve to ensure timely consideration by England. Diplomacy goes beyond the signaling functions of legislation, however. It can be helpful in what Professor Zick has called "First Amendment norm transmission." Zick, *supra* note 6, at 1611.

to keep the issue of forum shopping in libel cases in the news, to maintain both public and lawmaker attention to its resolution.[167]

Even if broad British libel reform is ultimately effected, however, England is not the only relevant jurisdiction. And even if British law were reformed to deter libel tourists, it is not clear that other countries with similar laws would follow suit. Nor would potential libel tourists face obstacles suing in other hospitable fora. It might be thought that the solution to the problem of libel tourism should be the international harmonization of substantive libel law or the adoption of an international agreement on choice of law.[168] However, harmonization is both worrisome from the perspective of free expression, and likely unfeasible as a practical matter.[169]

Some would disagree, suggesting that the SPEECH Act goes too far in adopting a general rule of non-recognition rather than a case-by-case approach that allows courts to determine when non-recognition would be appropriate and when it would not. *See H. R. 6146 Hearing, supra* note 4, at 60 (statement of Linda Silberman). *See also* MELKONIAN, *supra* note 6; Partlett, *supra* note 6, at 656 ("It is likely that foreign courts and governments will react adversely to a frontal attack on their long-recognized jurisdiction and on the usual standards of comity under conflicts rules. Hence, we have the perfect ingredients for a mutually destructive game of chicken.") There is also the potential sword of Damocles in the existing state law actions permitted by statutes such as New York's Libel Terrorism Protection Act. The SPEECH Act appears silent on the question of preemption.

167. Politicians are sensitive to media coverage, especially such coverage as they believe might have public impact. The success of the electronic campaign for libel reform undertaken by English PEN demonstrates that grass-roots movements supporting free speech can be generated via publicity. Media discussion can also serve to clarify for those from less speech-protective cultures what kinds of threats to democratic values Americans fear in strategic libel tourism. It may even help shift judicial attitudes in countries with different perceptions of the free speech/reputation balance, by providing context.

168. On this view, harmonized rules will not necessarily undermine free speech in fundamental ways, given that globalization has already spread American speech ideas to much of the rest of the world, and that the valorization of free speech over reputation in New York Times v. Sullivan, 376 U.S. 254 (1964) was less a foundational American commitment than a product of its time and legal culture. *See* Partlett, *supra* note 6, at 659 (claiming *Sullivan* was "a product of its social and legal culture"). Professor Melkonian argues that the apparent absolutism of constitutional defamation law in the U.S. has been diluted by a line of cases interpreting the First Amendment requirement of "actual malice" in public figure defamation as an inquiry close to the "Reynolds defence" under British law. MELKONIAN, *supra* note 6, at 16-96). *See also* Thomas S. Leatherbury, *ALI Takes Position on Foreign Judgments (Including Those Against the Media)*, 23 COMM. LAW. 25, 27 (2005) (quoting the American Law Institute proposed draft on recognition and enforcement of final judgments and noting developments in Europe that "may result in greater sensitivity to principles akin to the First Amendment."); Zick, *supra* note 6, at 1588, 1626 (arguing for multilateral treaties regarding enforcement of foreign judgments as more coherent responses to libel tourism, and seeing a "more cosmopolitan" First Amendment extending its influence beyond American borders).

169. Substantive harmonization is likely either to fail or to lead to problematic compromises on otherwise fundamental social and political commitments regarding free speech and press. While it is important not to exaggerate differences between American and European speech regimes, optimism about the similarities should not blind us to the persistently wide variations in different countries' balances between reputation, privacy and free speech. Even if American views of the importance of

IV. SELF-HELP: EXPLORING VOLUNTARY INITIATIVES

Given the uncertainties in the British legal landscape, the general constraints of time and cooperation on purely legal responses to libel tourism, and the possibility that today's libel tourists will simply recast their libel complaints as violations of privacy rights,[170] a prag-

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speech freedoms are increasingly influential world-wide—itself a not-indisputable proposition—general influence is quite distinct from compatibility at a granular level. There may also be disagreement about whether some of the observed shifts in the American balance of speech and reputation are desirable. Contrary to the predictions of some optimists, harmonization is less likely to export the protections of the First Amendment abroad than to import at least some reputation-promoting European rules that might well chill important kinds of critical speech in the United States. *See* Justin S. Hemlepp, *"Rachel's Law" Wraps New York's Long-Arm Around Libel Tourists; Will Congress Follow Suit?*, 17 J. TRANSNAT'L L. & POL'Y 387, 391 (2008) ("Persuading a world wary of 'American legal hegemony' [ ] to abandon its traditions and instead embrace American-style press freedoms is a mammoth, if not impossible, task indeed."); Wyant, *supra* note 6 (arguing against harmonization); Zick, *supra* note 6, at 1622 (recognizing that "processes and mechanisms associated with transnationalism, including multinational treaties that establish global speech standards, may pose some threat to First Amendment protections currently available within U.S. borders.") International treaties are not easy to conclude, particularly in those circumstances. *See* Garnett & Richardson, *supra* note 4 at 481 (suggesting that while agreement to an international model law would be "highly desirable in the longer term, [such an agreement] is unlikely to be reached in the short term . . ."). There is no guarantee that even multi-lateral agreements will command world-wide adherence. *See* MELKONIAN, *supra* note 6, at 272 (describing the failure of the 1936 International Convention Concerning the Use of Broadcasting in the Cause of Peace). *Cf.* Partlett & McDonald, *supra* note 148, at 506-07 (arguing for the benefits of a "polyphonic" regime, where courts "speak[ ] in different voices and arriv[e] at different conclusions about the weight of basic values . . .").

Even an international treaty on jurisdiction or choice of law in defamation cases is an unlikely prospect. An international treaty regarding jurisdiction and enforcement of judgments more generally was proposed in the Hague Conference on Private International Law, but failed—apparently in part due to differences regarding defamation actions. Garnett & Richardson, *supra* note 4, at 481; McFarland, *supra* note 1, at 631. Only a treaty regarding enforcement of judgments based on forum selection clauses in contracts was agreed to at the Hague Convention. Hague Convention on Private International Law, Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, *available at* http://www.hcch.net/upload/conventions/txt37en.pdf.

One can argue that this Article's doubts about harmonization tacitly assume that American speech law is better than any conflicting country's and should thus apply, even with respect to genuine transnational problems where both the United States and less speech-prioritizing countries have real and substantial interests. That is not the intent. In many instances of foreign libel actions against American defendants, a focus on American governmental interests in the choice of law analysis will help courts make a careful and context-specific analysis about which law should apply. Even in situations closer to equipoise in terms of forum connections and interests, this Article contends that it is less dangerous for American free speech interests domestically to leave things as they are, with each country recognizing and enforcing only defamation judgments consistent with its own speech traditions.

170. *See* MELKONIAN, *supra* note 6, at 279-95 (noting both that breach-of-privacy judgments may replace the threat of foreign libel judgments and that, unlike defamation law where some congruence between U.S. and British law can be observed, privacy law in England and the EU is "unalterably" contrary to U.S. principles); Stephen Bates, *More Speech: Preempting Privacy Tourism*, 33 HASTINGS COMM. & ENT. L.J. 379 (2011) (calling for extension of the SPEECH Act to trans-national privacy

matic response to the current situation suggests exploration of voluntary initiatives to reduce the chilling threat of foreign libel law and to promote the accuracy and reliability of information.[171] A push for doctrinal change cannot be the sole solution to the problem of trans-national libel. Legal responses depend on cooperation from foreign courts and legislatures, are likely to take time, can be limited in their effectiveness, and do not necessarily address the values and attitudes brought to bear by courts in the actual application of legal rules. To the extent that "in a field such as defamation[,] values and attitudes are often as important as the black-letter rule[,]"[172] a broad public conversation about the strategic use of legal arbitrage and the development of self-help measures by speakers could be useful in influencing international attitudes promoting expression.

Thoughtfully designed voluntary changes could help foster a cooperative spirit prompting non-U.S. courts to apply their libel laws with more sensitivity to U.S. speech interests in appropriate cases. Voluntary measures designed to increase press accuracy could not but help improve chances of speedy libel reform in England. This is particularly true in light of the press-skepticism generated by the high-profile British phone-hacking scandal that led to the demise of Rupert Murdoch's News of the World tabloid.[173] Moreover, for those who have been defamed on the Internet, the development of technolo-

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claims); Sanchez, *supra* note 6 at 514-20 (describing a move from libel tourism to privacy tourism).

171. One type of self-help suggestion for Internet publishers that appears in the literature is website disclaimers, visitor agreements, and the use of geo-location technology to prevent access to their sites. *See, e.g.*, Wyant, *supra* note 6, at 411-15 (discussing these options). *See also* Blake Cooper, Note, *The U.S. Libel Law Conundrum and the Necessity of Defensive Corporate Measures in Lessening International Internet Libel Liability*, 21 CONN. J. INT'L L. 127 (2005) (recommending user agreements, geolocation technology, and cyberliability insurance). These suggestions are not further explored here, as contract-based solutions will not predictably be effective (seeWyant, *supra* note 6,. at 412-13) and access-blocking technology is neither foolproof (*see id.* at 413-14) nor desirable as a policy matter.

172. Hartley, *supra* note 1, at 35. Professor Partlett has argued that, without internationally binding rules, "the production of information will be influenced by non-legal norms that will grow in cyberspace." Partlett, *supra* note 6, at 660. In his view, "[t]he challenge that technology has bequeathed the law cannot be solved by law alone. It will depend on norms that promote coordination and cooperation among actors." *Id.* This Article joins in Professor Partlett's sense that improvements in journalistic professionalism, for example, would promote cooperative norms in the production of information in cyberspace. Nevertheless, it expresses concern about the degree to which Professor Partlett's approach would compromise on the *Sullivan* rule in the global speech environment.

173. For archives of the extensive newspaper coverage of the tabloid phone hacking scandal, see, e.g., Times Topics, *Anatomy of the News International Scandal*, NY TIMES (Nov. 29, 2011), *available at* http://www.nytimes.com/interactive/2010/09/01/magazine/05tabloid-timeline.html?ref=newsoftheworld, and *Phonehacking*, GUARDIAN, *available at* http://www.guardian.co.uk/media/phone-hacking.

gies providing extra-judicial self-help may be a welcome alternative.[174]

A. *Defending Suits: Alternative Avenues for Financial Support*

Since expense is a major culprit in the chilling effect of foreign libel actions, reducing it would help mitigate the threat. Doing so effectively, however, requires attention to developing structures for financial support that properly align speaker and funder incentives.

1. A New Type of Private Legal Defense Fund—Community Support

Thus far, the principal suggestion to help reduce the high cost of waging libel actions in destinations like England has been the creation of a media-funded insurance company and/or a joint libel defense fund to help defendants.[175] While the idea is attractive, the participants' incentives render unlikely a media-funded libel defense war chest for the industry as a whole. What incentives would careful news organizations have to commit scarce resources to libel defense funds that would provide financial aid to the most irresponsible of their traditional competitors and to careless new media participants? Why would they pour money into a global fund covering entities whose news cultures they might not understand or share, and over whom they would not realistically have much control? Instead, money might more readily and realistically come from crowd-funding or community support—from those interested in particular areas of reporting.[176] Targeted (and publicized) libel defense funds could be supported by grants from individuals and organizations with interests in promoting public discussion on particular issues that have become or are likely to become targets of strategic libel actions

174. *See* MELKONIAN, *supra* note 6, at 299 (describing technology allowing a burgeoning reputation-management industry to monitor the Internet for statements about their clients and "saturate the internet with positive statements about the client with the result that the defamatory statements are simply buried and effectively neutralized."). This option, of course, has its own troubling implications.

175. *See* SULLIVAN, LIBEL TOURISM REPORT, *supra* note 6, at 31 (report written for the Center for International Media Assistance). While the Report notes that "[t]here are many ways to structure such a system[,]"the proposal centers in the Report on a media-funded libel defense fund. *Id.* ("It is possible to create a joint legal defense fund that might rely on donors, funds from participating organizations, pro bono lawyers, retained lawyers, and insurance . . . . The organization could build a defense fund to pay high deductibles . . . . The system would minimize the risk for insurance companies . . . ") *See also* Cooper, *supra* note 171, at 153-54 (recommending cyberliability insurance).

176. *See* Clare Dyer, *Charity sets up find to defend researcher being sued for libel*, BMJ 2008 (Dec. 2, 2008), *available at* http://www.bmj.com/content/337/bmj.a2822.full (last visited Mar. 10, 2011) ("The registered charity HealthWatch has set up a fund to support Peter Wilmshurst . . .").

abroad.[177] The benefit of this approach by comparison to a public funding option[178] is that the proposal poses little or no risk of government censorship.[179] The approach also presents fewer threats to

177. For example, if organizations outside the press or the academy were to organize a libel defense fund for statements regarding terrorism—a funding proposition more likely than an undifferentiated and press-based global libel defense fund—the existence of such a fund might deter strategic suits to deflect attention from that political issue. The same kind of funding might be found to support the libel exposure of scientific inquiry or other academic critique. This is a notion akin to interest group support, crowd-funding of journalism, and foundation financing. Grass-roots electoral fundraising on the web and electronic press experiments in crowd-funding some stories teach us that this kind of funding could come not only from interested organizations, but also from individual Internet donations.

Of course, there is nothing to prevent rich individuals today from paying the defense fees of American journalists and academics sued for libel abroad. But creating funding structures that would avoid journalists having to request funds from individual donors after suits are brought would certainly reduce both transaction costs and chill. Skeptics might question why such funding approaches, if they are truly viable, have not yet developed through private negotiation. The lack of such development thus far is not necessarily evidence of a flawed model. Instead, it may reflect the fact that transactions costs of many kinds—including coordination and administrability problems and, potentially, tax treatment of such donations—would need to be addressed before a robust system of targeted libel defense funding could become operational and efficient.

178. This Article does not explore any public funding strategies for such libel defense funds. Governmentally-funded libel defense war-chests could presumably be made available for libel tourism cases where the speakers at issue have insufficient funds to fight the action abroad. In order to create the right incentives, the government libel defense fund should probably operate only during a transition period—before private sources develop as suggested above, and before relevant changes were made in the laws of libel tourism destinations. A public subsidy approach is unlikely to be either realistic or speech-neutral, however. Given current U.S. Congressional attempts at drastic cutting of government speech subsidies in the context of public broadcasting, a libel defense fund project is even less likely to be achievable. More importantly, this option is troubling because of concerns about government censorship in the allocation of such funds. The central issue posed by such a funding option is how to structure the government subsidy in order to minimize the dangers of government speech selection. Although we could attempt to develop structural safeguards to prevent government from choosing preferred and politically acceptable speech to protect, it is wise to be skeptical about the likely effectiveness of such "Chinese walls."

179. One can respond that this approach may lead to narrow and politicized protections for speech, and skew the kinds of investigative journalism or academic critique in which speakers would engage. It could be argued that a system under which litigation support would be targeted to issues of concern to ideological interest groups could skew coverage decisions in politicized ways. Journalists, academics, and the institutions that support them might fear being compromised—or be concerned about the appearance of being compromised—by their associations through funding with groups pursuing particular agendas.

But libel tourism is already politicized, and this is a much more realistic vehicle for collecting adequate private funding than the theoretically more neutral but practically unlikely call for press organizations to create a pool of libel funds themselves. Moreover, because of structural factors, it is likely that at least institutional supporters of these kinds of targeted libel defense funds would have no objection to being identified publicly. Because identification is tied to accountability, transparency in identification should reduce concerns about politicized processes. As for the concern about the impact of funding on journalistic independence, there is theoretically a broad market for contending legal defense funds. Just as non-profit news organiza-

editorial freedom than proposals grounded on enhanced libel insurance.[180]

2. Encouragement of Pro Bono Libel Review

Scholars have also proposed reliance on training resources and *pro bono* pre-publication review by knowledgeable lawyers.[181] Many currently publish without the benefit of libel counsel. Some help in terms of training, informational resources, and financial aid for libel

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tions develop ways to deal with the possibilities of conflict with their funders, sensitivity to this issue could lead to minimized threats here as well.

180. Some commenters have focused on insurance as a hedge against the threat of libel tourism. *See* SULLIVAN, LIBEL TOURISM REPORT, *supra* note 6, at 30-31; Wyant, *supra* note 6, at 414-15. However, news organizations complain about the dearth of libel insurance and the high cost of premiums for what insurance does exist. Only the largest media have access to such insurance and even that has limits. *See, e.g.*, SULLIVAN, LIBEL TOURISM REPORT, *supra* note 6, at 30. *Cf.* Wyant, *supra* note 6, at 414-15 (describing availability of e-commerce media liability insurance).

The problem is that the risk posed by libel actions is particularly difficult for insurance companies to value. Therefore, the private insurance market may develop more broadly and robustly if mechanisms could be developed to help insurance companies better assess the risks of libel judgments. One way this can happen would be if one (or several) independent fact-checking institutions or consortia were to be established. If the insurance companies were convinced that the independent fact-checking entities were reliable, they might be more willing to provide insurance (perhaps on a per story basis) if the speaker chose to avail itself of such independent review. This suggestion is akin to Drew Sullivan's notion that a joint legal defense fund system "might retain lawyers or use pro bono lawyers to review articles before publication . . . . The system would minimize the risk for insurance companies . . ." SULLIVAN, LIBEL TOURISM REPORT, *supra* note 6, at 31.

This is a less desirable alternative than the libel defense fund discussed above, however, because it makes insurers and independent fact-checkers the arbiters of journalistic process and accuracy—a result that is itself in tension with free speech and press norms. It makes news organizations and academics accountable to fact-checking organizations and insurance companies that are far less committed to free speech norms. Some commentators observe that courts have increasingly transformed aspirational journalistic codes of practice and ethics into minimum standard requirements to assess journalist behaviors in tort cases. *See* Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039 (2009). Surely the same consequence would arise if insurance companies (whose principal goal is profit rather than free speech) were to partner with fact-checkers (whose independence and journalistic values could, over time, be subordinated to their work for risk-averse insurance companies). Moreover, independent review of the journalistic process by outside entities—particularly if they work in concert with insurance coverage—would be heavily resisted by typical journalists. Reporters would probably refuse to make their notes and sources available to outside entities in connection with most, if not all, controversial investigative stories. It is precisely because of these concerns that this Article does not make a specific recommendation supporting this version of the insurance option.

181. The recent LIBEL TOURISM REPORT recommends pro bono libel defense and pre-publication review *See* SULLIVAN, LIBEL TOURISM REPORT, *supra* note 6 at 33. The LIBEL TOURISM REPORT notes that "[m]any of the organizations facing transnational legal threats have sought and received assistance for free from attorneys" but "[i]n Europe, pro bono legal assistance is less common [than in the United States]." *Id.* at 33.

defense is already available.[182] One can imagine a world-wide consortium of libel law experts whose pro bono efforts—including training non-specialist lawyers, publishers, editors in the intricacies of foreign law—could be coordinated by an institution such as a bar association and accessible via online communication.[183] Whether such a program could be adequately staffed is an empirical question, although there may be ways of creating incentives for this kind of service.[184] Importantly, however, it must be recognized that such efforts can themselves exert subtle censorship effects. It is possible that this type of legal involvement—particularly prior to publication—might lead to excessive risk-aversity on the part of authors, journalists and publishers.[185]

B. Improving Press Processes and Bolstering Accuracy

At least with respect to cross-border defamation actions that are not merely strategic or political exercises, the costs of distinct libel regimes would also likely be reduced if the press were to improve its internal processes and make changes to bolster accuracy. The principal suggestion of this kind in the literature is that journalistic "best practices" education be promoted, especially in the developing world.[186] This would be particularly useful for promoting high journalistic standards in places with less developed and sophisticated

182. *See* SULLIVAN, LIBEL TOURISM REPORT, *supra* note 6, at 33. The London-based Media Libel Defence Initiative (MLDI) provides financial help for journalists in defamation cases and trains journalists and lawyers. *Id.* The International Senior Lawyers Project Media Working Group also defends journalists in individual cases and helps push law reform efforts. *Id.* The Center for Global Communication Studies at the University of Pennsylvania's Annenberg School of Communication has created globalmedialaw.com to provide legal resources and information on media law issues. *Id.* However, the LIBEL TOURISM REPORT notes that "[m]any of the organizations facing transnational legal threats have sought and received assistance for free from attorneys" but "[i]n Europe, pro bono legal assistance is less common [than in the United States]." *Id.* at 33.

183. This kind of program would naturally be most useful for those whose institutional affiliations do not provide pre-publication libel review, as do most major newspapers, for example. However, it might provide all journalists the possibility of an alternative review—either to contest their institutional lawyers' assessments, or to permit franker discussion by journalists at any point during their story developments.

184. If, for example, bar associations were to authorize continuing legal education (CLE) or other like credit for this kind of effort, there would probably be an increase in volunteers. Of course, there will be limitations. For example, we can expect that such pro bono efforts would be more likely for publication reviews than for full-fledged trials.

185. This is particularly true with respect to pre-publication review by lawyers. After all, those who know about foreign libel law will simply be able to opine about the risk of losing a libel suit in England on the given facts, for example. In addition to their likely risk-aversity in interpreting foreign law, these pro bono lawyers will by definition be constraining the journalists' work to conform to the standards of less speech-protective jurisdictions.

186. *See, e.g.*, SULLIVAN, LIBEL TOURISM REPORT, *supra* note 6, at 34-35.

independent press traditions.[187] In addition to journalists in developing countries, however, we should certainly expand education initiatives for journalism "best practices" to bloggers, citizen journalists, and any reporters with little experience in investigative journalism. Real differences could also be made by focusing on access to information and other practical ways of enhancing professionalism.

1. Seeking Improved Access to Documents

The expansion of electronic access to information would be a most helpful tool both for improving press accuracy and for easing the burdens of demonstrating truth. Accuracy would likely be improved with increased online access to government data at all levels—to be used both by journalists to develop stories and check facts, and by those assessing story credibility and monitoring the press. To be sure, there are significant hurdles to information access.[188] Nevertheless, whatever their limits in operation, government open records policies in the United States have made millions of documents easily accessible.[189] As improved accuracy doubtless leads to fewer targets for bona fide trans-national libel initiatives,[190] it would be helpful to press for

187. *Id.* at 34.

188. This is certainly true with respect to private industry documents, but also with respect to government documents. Despite the Freedom of Information Act (FOIA) (5 U.S.C. § 552 (2006), *amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, *further amended by* OPEN FOIA Act of 2009, Pub. L. No. 11-83, 123 Stat. 2142, 2184), and similar "sunshine laws" at the state level (*e.g.*, Florida "Sunshine Law," Fla. Stat. Ann. § 286.011 (West 2011)), and despite the Obama Administration's initiative to enhance digital availability of federal administrative documents, (*see* Memorandum on Transparency and Open Government from President Barack Obama to the Heads of Exec. Dep'ts & Agencies, 74 Fed. Reg. 4685, 4685 (Jan. 21, 2009)), the system of document access in the United States is far from perfect. In addition, "scoop mentality" and competition among journalists and news organizations would likely be in tension with information-sharing initiatives. There is also an increasing social concern about privacy with respect to the massive collections of information now available about individuals. *See, e.g,* Somini Sengupta, *F.T.C. Settles Privacy Issue at Facebook*, NY TIMES (Nov. 29, 2011), *available at* http://www.nytimes.com/2011/11/30/technology/facebook-agrees-to-ftc-settlement-on-privacy.html. Finally, access to information can come with its own challenges. Journalists may in fact find themselves awash in information, and needing to develop efficient and reliable ways to sort through it. The "curating" problem is necessarily part of the "access to information" issue at a time of such informational abundance.

189. For example, many private companies' governmental filings (such as Securities and Exchange Commission filings) are accessible, often without the need for an FOIA request. *See, e.g.*, http://www.sec.gov/edgar/searchedgar/webusers.htm (last visited Dec. 22, 2011) (linking to EDGAR, searchable SEC company filing database). On the private side, foundations and educational institutions have also created massive databases of information relating to important public issues—such as elections and charitable contributions—that they typically make available for non-profit purposes. *See, e.g.*, Center for Responsive Politics, OPENSECRETS.ORG, http://www.opensecrets.org/ (last visited Dec. 22, 2011) (election funding and expenditures database).

190. Admittedly, improving how the press does its job cannot fully eliminate the threat to speech posed by the most strategic and political of libel actions abroad. But it is a good in itself, and likely to be better than nothing in terms of reducing libel

enhanced public access at least to government documents both in the United States and internationally.

2. Promoting Journalistic Accountability

Professional education and access to documents can only go partway to improve journalism processes and content quality in the media today. A third critical factor is attention to accountability. Internally, news organizations can focus on accountability by appointing ombudsmen and hiring "public editors," as some already do.[191] Externally, professional critique of the performance of journalists can serve to focus attention on accountability. Even today, some journalism magazines provide such evaluations.[192] Bloggers too have taken to commenting on the originality, accuracy, and completeness of news reporting. Google allows for instantaneous fact checking; Twitter and other social media enable crowd-sourcing of stories. Particularly if both individual news organizations and news-industry institutions attend to the complex project of adapting and updating their codes of conduct in light of such changed technologies, a spirit of constructive criticism could help trigger improved reporting. Building structures of professional accountability and inviting examination and self-examination by journalists can generate significant public benefits—including, hopefully, both judicial deference and an enhanced likelihood of trust across borders.[193] The combination of all the kinds of efforts could deter libel forum shopping substantially.

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tourism. Moreover, even strategic libel claimants may be deterred by the prospect of losing hard-fought legal actions against well-funded defendants known for their responsible and professional processes. The possible cost to plaintiffs of such losses in publicity alone can counsel caution.

191. The New York Times, for example, has a Public Editor who "serves as the reader's representative" and "monitors the paper's journalistic practices." *See The Public Editor*, NY TIMES, *available at* http://www.nytimes.com/ref/opinion/brisbane-bio.html.

192. For example, some professional journalism magazines in the US, such as the Columbia Journalism Review, address not only issues such as the future of journalism generally, but also monitor particular press stories. *See, e.g., Darts and Laurels 2011 Archive*, COLUM. J. REV., *available at* http://www.cjr.org/search.php?cx=006826800055823875920 5%3Awmx8nk4zs1o&cof=FORID%3A11&ie=UTF-8&q=darts+and+laurels+2011&x=4&y=9.

193. Do today's circumstances make it unrealistic to call for improvements in press processes? News organizations are haunted by the bottom line. Newsrooms are working with reduced staff, the electronic news media are operating in a competitive twenty-four-hour news cycle with little time to develop and check stories, and there is the perception that the sensation-seeking public will only be satisfied with maximum drama all the time. Many television critics despair of the result and decry the thinness, polarization, and narrow focus of modern news and public affairs coverage. This Article takes the position that this is precisely the moment for the revival of professional standards.

Some may argue that the second difficulty inherent in calling for improved journalism is that American defamation law protects even those who are sloppy in their journalism—i.e., even those who did *not* comply with appropriate professional standards. An insistence on self-perfection on the part of the press cannot be the full

CONCLUSION

In the final analysis, the worrisome libel tourism cases are those that threaten to censor academic freedom and speech important to democracy. The context is complex. Academic publishers constitute a buyer's market that can set highly risk-averse standards for controversial work regarding matters of public importance. The traditional print press today is economically stressed. News organizations face significant incentives to avoid expensive and controversial investigative coverage that would advance public policy goals of transparency and accountability. At the same time, technology permits anyone—including the least legally sophisticated—to take on the functions of journalists and pundits. But ISPs are private economic entities and not public fiduciaries, and they cannot be expected to resist ideologically-driven and potentially costly challenges to controversial content they distribute.

Strategic libel tourism in these circumstances poses a particularly pernicious threat to speech of public interest. The American legislative response thus far is unlikely to assist in promoting high-quality investigative journalism by globally networked entities. As for the United Kingdom, although Britain's jurisdictionally oriented libel reform, if adopted, could be helpful, the extent to which it will encourage adequate restraint there or elsewhere is uncertain. Differences between states as to the proper balance between reputation and speech that are exploited by libel tourists will not disappear. If it is for each state to determine that balance for itself, then the orderly functioning of the international system requires that the forum consider the extent to which a particular case implicates the balance struck not only in the forum itself but in other affected states as well. This entails variations in degree. Doctrinal flexibility as to both jurisdiction and choice of law, sensitivity to cases that engage basic values of academic freedom and the proper functioning of democratic governance in the affected political system, and voluntary initiatives can help courts measure those variations. Civil and criminal libel actions can be, and have been, used by states to regulate their own political systems. That is reason enough for concern when the effects constrain the exercise of freedom of speech protected by international law or the law of the state. There is all the more reason for concern when the effect, even if unintended, is that these constraints impair the functioning of political democracy under the constitutional system of another country.

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response to libel tourism. If it is, critics might say, then the defendant has already lost the protections that American free speech values had constitutionally guaranteed. But the First Amendment does not protect sloppy speech *because* false statements are constitutionally desirable. And it is not the purpose of this Article to argue for global export of the First Amendment. If speakers could be helped to avoid inadvertent libel problems, both they and society as a whole would benefit.