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The Problem of Trans-National Libel

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Abstract: 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 U.S. passed the SPEECH Act, which prohibits recognition and enforcement of libel judgments from jurisdictions applying law less protective than the First Amendment. On March 15, 2011, the British Ministry of Justice proposed a draft Defamation Act 2011 with provisions designed, inter alia, to discourage libel tourism. This Article questions the extent to which the SPEECH Act and the proposed Defamation Act 2011 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 and, controversial in Britain, may well not be adopted. Even if Parliament approves it, the site of libel tourism may shift to other claimant-friendly jurisdictions. Global harmonization of libel law is neither realistically feasible nor desirable. Instead, this Article proposes a two-fold approach. On the legal front, it supports the procedural focus of Britain’s proposed bill, but also calls for foreign courts to apply a governmental interest analysis to choice of law in trans-national defamation cases threatening core political speech in the United States. On the policy front, it calls for: 1) measures to improve the way in which the press does its job in order to reduce the number of trans-national libel cases; and 2) new approaches to help defend the claims when they are brought. The recommended press-improvement measures include expanded access to, and efficient use of, documents, journalistic self-criticism, and best-practices education. The defense measures explored include the development of alternative, community-based support for libel defense funds; the formation of pro bono libel review consortia; and the promotion of the availability of libel insurance by means designed to help insurers more accurately assess libel risk.
THE PROBLEM OF TRANS-NATIONAL LIBEL

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Introduction:

Trans-national libel cases decried by critics as “libel tourism” have been much in the news since American author Rachel Ehrenfeld was successfully sued for libel

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2 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) (noting that even Wikipedia defines the terms); 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.”)
under English law in London by Saudi Arabian billionaire banker Khalid bin Mahfouz, despite the fact that the book in which she accused him of funding terror had not been published in England and only 23 copies had been sold there via Amazon. Most observers – including American journalists, academics and legislators, British government officials, and the United Nations Human Rights Committee – agree that such trans-national libel cases pose a significant threat to media reporting. The chilling effect of libel tourism has not solely targeted the institutional press, however. In addition to journalists and news organizations, actions subsequent to *Ehrenfeld* have been brought against book publishers, editors of academic journals, and science commentators by, *inter alia*, wealthy businessmen, American companies, academics, and Hollywood stars. The concern about chill 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.

Against a background of inflammatory rhetoric about terrorism, Congress responded to the Ehrenfeld story in 2010 by passing the Securing the Protection of our Enduring and Established Constitutional Heritage Act – informally, the SPEECH Act. That legislation prohibits recognition and enforcement within the United States of foreign

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4 *See* Sections I.A & II.C, *infra*.  
5 *See* Section I.A, *infra*.  
6 *See* Section II.A, *infra*.  
defamation judgments inconsistent with First Amendment protections or based on an exercise of foreign court jurisdiction inconsistent with American constitutional due process requirements.

Now, the British government has released for public consultation and pre-legislative review a draft Defamation Act 2011 that is intended, inter alia, to target libel tourism. As part of its sweeping overhaul of Britain’s “outdated, arcane” reputation-protecting libel laws, the draft defamation bill contains the following: a showing that statement must have caused “substantial harm” in order to be considered defamatory; a single publication rule to prevent end-runs to the one-year statute of limitations for

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8 28 USC § 4102(a) (2010).

9 28 USC § 4102(b) (2010).


13 Draft Defamation Act 2011, supra note 10, Requirement of substantial harm, Clause 1, Annex A at 54/1.
defamation;\textsuperscript{14} an end to the presumption in favor of a jury trial;\textsuperscript{15} and, with respect to
defamation actions against persons not domiciled in the UK or other member states, a
prohibition on the exercise of jurisdiction “unless the court is satisfied that . . . England
and Wales is clearly the most appropriate place in which to bring an action . . .”\textsuperscript{16}
Parliament has not yet passed the measure, and a “healthy debate” is expected.\textsuperscript{17}

It is thus a particularly propitious moment to address both the United States’ and
Britain’s responses to the phenomenon of trans-national libel actions. This Article argues
that the SPEECH Act falls short in addressing the particularly pernicious effects of trans-
national forum-shopping for libel law. It also claims that the British draft bill, while in
many ways quite helpful, is insufficient.

Ironically, the SPEECH Act is likely to undercut precisely the kind of socially
beneficial, high-quality investigative journalism by globally-networked entities that
American libel law is ideally geared to promote. Many of today’s mainstream news
organizations and other speakers have international connections and assets available to
satisfy foreign libel judgments. Because it concerns itself with non-recognition of foreign
judgments in the United States, the SPEECH Act does not eliminate the chilling effect on
these organizations of such judgments abroad. Simply put, the SPEECH Act provides
more protection to sloppy, ideologically-partisan U.S. bloggers than to responsible
American speakers with foreign assets whose commitment to hard-hitting journalism or
scholarship can be undermined by the threat of libel suits under foreign law.

\textsuperscript{14} Draft Defamation Act 2011, supra note 10, Single publication rule, Clause 6, Annex A at 54/4.
\textsuperscript{15} Draft Defamation Act 2011, supra note 10, Trial by jury, Clause 8, Annex A at 54/6.
\textsuperscript{16} Draft Defamation Act 2011, supra note 10, Jurisdiction, Clause 7, Annex A at 54/5.
\textsuperscript{17} Ministerial Foreword, supra note 10, at 4.
Nor does the British government’s recent Draft Defamation Act 2011 solve the problem of libel tourism. First, the draft British legislation is in its early days and the ultimate outcome cannot be predicted. Second, although a number of its provisions – and particularly its jurisdictional focus and British injury requirement – would be quite helpful, the proposed bill has substantive limits. It does not guide courts in making jurisdictional determinations or define how to gauge the substantiality of harm in England. The current bill also fails to address the proper methodology for choice of law. While it is likely to be useful in deterring English suits when the claimants’ connections to England are truly “trivial,” there will be circumstances in which English courts might appropriately decide to exercise jurisdiction according to the bill’s principles, but should nevertheless resist applying English law. This Article proposes that when foreign courts decide to hear trans-national defamation cases involving American speakers, they should engage in a government interest type of choice of law analysis – comparing the relative government interests on a case-by-case basis – in order to determine the most appropriate libel doctrine in cases threatening core political speech in the United States.

Finally, although England is the most common venue for trans-national libel actions, other countries also boast libel laws more restrictive than those of the United States. Even if British law were reformed as proposed, libel tourists could likely find other inviting fora – including countries in which libel is still a criminal offense that can be prosecuted at the instance of a private claimant. Although one response to this

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19 See Section I.A, infra.
would be to call for global substantive harmonization of defamation law, that solution faces both normative and practical challenges that make it unrealistic.

The complexities of diplomatic agendas, the often-glacial and ambiguous (if not ambivalent) course of legal change, the fact that legal adjustments in one libel tourist destination do not necessarily translate to other venues, and the likelihood that what may ultimately be most significant in trans-national libel cases is the degree to which courts addressing the claims have a full understanding of all the governmental interests implicated in such disputes all suggest that doctrinal change cannot be the sole, or even the primary, solution. To the extent that “in a field such as defamation[] values and attitudes are often as important as the black-letter rule[,]” a broad public conversation about the strategic use of legal arbitrage and the development of "self-help" measures by speakers might well be useful in influencing international attitudes promoting expression.

Therefore, in addition to legal change, this Article argues in support of voluntary efforts to manage the threat of trans-national libel suits. That approach requires exploration of ways to reduce both the number and impact of such claims. Doing so, the Article claims, must involve new kinds of strategies: 1) to improve how the press does its job in order to reduce the number of claims; and 2) to help defendants contest the claims, in order to reduce the chilling effect of extensive litigation expenses. The combination of such efforts is likely to deter libel forum shopping substantially.

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20 Hartley, supra note 2, at 35.

21 For a discussion of why this would likely be the case, even with respect to strategic political claimants, see Section IV, infra.
On the defense front, this Article proposes a new type of legal defense fund – based on a crowd-sourcing or community support (rather than a media self-funding) model – in order to reduce economic pressure on transnational libel defendants. It also suggests exploration of ways to incentivize libel insurers to increase the availability and amount of insurance. One such possibility would be story reviews by independent fact checking organizations – but the desirability of such an option would depend on whether it could be structured carefully enough to avoid its own censorship effects. The Article also considers ways of enhancing pro bono libel review, while recognizing the need to avoid the subtle self-censorship that such legal involvement might entail.

As for strategies on how to help speakers improve accuracy, the centerpiece of the approach is a push for enhanced electronic access to and use of documents. Transparency and access to documents would ease research and fact-checking, promote accuracy, enable better self-monitoring and outside professional critique, and simplify proof of truth in situations involving anonymous sources. An emphasis on professional standards and accountability would help as well. Accordingly, the Article supports expanded education initiatives for journalism “best practices,” more general deployment of ombudsmen or “public editors,” and increased support for professional journalistic self-criticism.

Section I describes the libel tourism problem and American legislative responses. Section I.A focuses on recent high-profile trans-national libel cases; Section I.B addresses English libel law prior to the Draft Defamation Act 2011; and Section I.C canvasses the American statutory initiatives, focusing principally on the federal SPEECH Act.
Section II seeks to assess the SPEECH Act. It begins in Section II.A with a discussion of whether concern about libel tourism is just part of a moral panic regarding terror. It proceeds in Section II.B to describe the bi-modal critique of the Act in the current literature, as an example of either American or English legal imperialism. Section II.C concludes that what is most troublesome about the SPEECH Act is that it leaves unprotected the very entities whose speech is most beneficial and also most threatened in today’s global information environment.

Section III.A describes the British government’s recently-released draft Defamation Act 2011. Section III.B assesses the bill with respect to libel tourism, and concludes that many of the bill's provisions would be quite helpful. Nevertheless, the Section finds significant substantive limits in the draft legislation. Section III.C then recommends that Britain go further than the provisions in the draft bill and consider adopting an interest analysis for choice of law in trans-national libel cases that threaten political speech in the United States. Recognizing that Britain cannot truly halt the global phenomenon of libel tourism, Section III.D then argues against global harmonization of substantive libel law.

Section IV then introduces voluntary solutions to the problem. It proposes: 1) a new manner to fund libel defense coffers, 2) an alternate approach to enhance the availability of libel insurance, and 3) the development of pro bono libel review consortia. Section IV also argues for improvements in press practices and accuracy grounded in enhanced access to documents, “best practices” education, and enhanced professional accountability.
I. The Libel Tourism Problem:

Although libel tourism is not in itself new, it has recently led to significant public and legislative attention. A number of highly-publicized libel actions against American defendants under foreign law seem to reflect the use of libel law to suppress political discussion. Professors Garnett and Richardson call these the “political censorship cases.” Most observers agree that forum-shopping in trans-national libel cases strategically designed to censor opposition is a significant problem. The

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22 See Bernstein, supra note 24, at 210 (noting that “[t]hough the practice has not always had such a catchy name, libel tourism has existed for decades[,]” and providing example of Liberace’s suit against the English Daily Mail in 1959). See also 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).

23 Garnett & 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). They distinguish these cases from those defamation actions brought in the UK by Hollywood celebrities against American publishers. Id. American celebrities (such as Cameron Diaz, Jennifer Lopez and Marc Antony, Britney Spears, and David Hasselhoff) are classic libel tourism cases. See Ellen Bernstein, Libel Tourism’s Final Boarding Call, 20 SETON HALL J. SPORTS & ENT. L. 205, 206-07 (2010); Staveley-O’Carroll, supra note 24, at 266, n. 70; 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 (2009) [hereinafter H.R. 6146 Hearing] at 6 (statement of Linda R. Handman). These kinds of cases are not of particular significance for this paper.


It is the case that a few commenters 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
preamble of the SPEECH Act characterizes the inhibiting threat of “the libel laws of some foreign countries” as “dramatic[,]” threatening free speech and the “the interest of the citizenry in receiving information on matters of importance[,]” 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.” This is because “the Internet and the international distribution of foreign media [] create the danger that one country’s unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest.” Nevertheless, the chilling effect of trans-national libel cases has not been limited to speech about terror or focused 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 (March 23, 2010). 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. For examples of the chilling effect claimed by authors, see Libel Tourism: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 111th Cong. 14 (2009) (statement of Rachel Ehrenfeld); id. at 41 (statement of Laura R. Handman). It is the very nature of the chilling effect that what has been self-censored is not readily apparent.

25 SPEECH Act, 28 U.S.C. 4102 Findings, Sec. 2 (4). Congress made a finding that “foreign libel judgments inconsistent with United States first amendment protections are increasingly common.” SPEECH Act, 28 USC 4102, Sec. 2(5).

26 SPEECH Act, 28 U.S.C. 4102 Findings, Sec. 2(4) (2010). See also id. at Sec. 2(2).

27 SPEECH Act, 28 U.S.C. 4102, Findings, Sec. 2 (4) (quoting U.N. Human Rights Comm’n Report). In fact, Paragraph 49 of the draft comments on freedom of expression currently being formulated by the United Nations Human Rights Committee specifically addresses defamation and supersedes the earlier comment (No. 10) that had not addressed defamation at all. See http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/2bb2f14bf558182ac12563ed0048df17?OpenDocument. Paragraph 49, while not recommending wholesale adoption of the United States’s approach to defamation law, certainly goes much further in that direction than does current English defamation law, for example.

solely on the institutional press. In sum, in a careful analysis of the application of British defamation law to trans-national libel suits, Professor Trevor Hartley recently concluded that “libel tourism is a genuine problem . . . [that can] unjustifiably undermine free speech in other countries.”

In the United States, a widespread discussion of libel tourism was sparked by the Ehrenfeld case. In England, libel tourism was one of the triggers used by the Libel Reform campaign spearheaded by English PEN, the Index on Censorship and Sense About Science harnessed the Internet to generate public support for libel reform generally. The March 15, 2011 release of the Draft Defamation Act 2011 for consultation and pre-legislative review is the current result.

A. Recent High – Profile Cases and the Chilling Effect:

The prime example on which the U.S. Congress relied in its discussions of libel tourism was Saudi billionaire banker Khalid bin Mahfouz’s successful suit in England

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29 Hartley, supra note 2, at 32.


31 See http://www.libelreform.org/, last visited March 16, 2011. A recent British study suggests that true libel tourism has not played a significant factor in British defamation cases. See Claire Ruckin, New figures highlight minimal impact of libel tourism on defamation cases, Sept. 1, 2010, available at http://www.legalweek.com/legal-week/news/1730793/new-figures-minimal-impact-libel-tourism-defamation?WT.rss_f=News&WT.rss_a=New+figures+highlight+minimal+impact+of+libel+tourism+on+defamation+cases+, last visited Sept. 6, 2010 (discussing Sweet & Maxwell report that only three of 83 British libel cases in the period 2008-2010 could properly be classified as libel tourism). Although some critics immediately took issue with the study’s findings, the chilling effect of a policy cannot be measured by comparative numbers of lawsuits.

against American author Rachel Ehrenfeld for her claims in *Funding Evil: How Terrorism is Financed and How To Stop It* that he had funded terrorist groups. Although Bin Mahfouz received a default judgment in an English court because Ehrenfeld chose not to defend in London, he did not attempt to enforce his money judgment, instead maintaining a web site describing his defamation challenges. The court’s issuance of an injunction in Britain meant that Ehrenfeld’s book could not be sold there (or even probably elsewhere in the European Union.) Ehrenfeld was not the only subject of Bin Mahfouz’ claims or threats of litigation, however. He apparently filed over thirty defamation lawsuits against authors who tied him to funding terror.

33 Senate Report 111-224 at 3 (2010). The lawsuit that triggered the passage of New York’s anti-libel tourism law and the SPEECH Act was Bin Mahfouz v. Ehrenfeld, [2005] EWHC 1156 (QB). The English court found the Amazon purchases in England to be a sufficient English publication to ground jurisdiction. Ehrenfeld did not defend the English suit, and a default judgment was entered against her. She thereupon sued 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 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 that 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 to reverse the court’s decision. See Staveley-O’Carroll, supra note 24, at 276. See also Garnett & Richardson, supra note Error! Bookmark not defined., at 478; Staveley-O’Carroll, supra note 24, at 267-68. See also U.S. Senate Committee on the Judiciary, Hearing on S. 2765, Feb. 23, 2010 [hereinafter SPEECH Act Hearing] (statement of Kurt Wimmer). Although the authors stood by their book, the Press apologized and paid a settlement to Bin Mahfouz, pulped all the remaining copies of the book, and asked libraries world-wide to remove the book from their shelves. Id. See also Garnett & Richardson, supra note 23, at 478. The American Library Association refused to comply. See SPEECH Act Hearing (statement of Kurt Wimmer). This is obviously a different fact pattern

34 Staveley-O’Carroll, supra note 24, at n. 106; H.R. 6146 *Hearing*, supra note 23 (Ehrenfeld testimony).

35 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.

36 Bin Mahfouz also threatened an English defamation action against Cambridge University Press in connection with a similar claim about him in *Alms for Jihad*, a book by two Americans. See, e.g., Balin et al., supra note 24, at 102-03; Garnett & Richardson, supra note Error! Bookmark not defined., at 478; Staveley-O’Carroll, supra note 24, at 267-68. See also U.S. Senate Committee on the Judiciary, Hearing on S. 2765, Feb. 23, 2010 [hereinafter SPEECH Act Hearing] (statement of Kurt Wimmer). Although the authors stood by their book, the Press apologized and paid a settlement to Bin Mahfouz, pulped all the remaining copies of the book, and asked libraries world-wide to remove the book from their shelves. Id. See also Garnett & Richardson, supra note 23, at 478. The American Library Association refused to comply. See SPEECH Act Hearing (statement of Kurt Wimmer). This is obviously a different fact pattern
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 simply assertions about Bin Mahfouz.

Wealthy and powerful Eastern European businessmen as well have used defamation law strategically, as a tool for political censorship – seeking to deflect charges of criminal activity or corruption at home or in the United States by suing for defamation in England.37 Such actions have targeted both the large institutional press and small, niche-readership organs. Recently, for example, 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 US-based political magazine Ethiopian Review.38 English courts have heard and upheld defamation claims against the American magazine Forbes by Russian oligarch Boris Berezovsky in connection with an article accusing him of corruption.39 Ukrainian billionaire Rinat Akhmatov prevailed in English libel suits against two Ukrainian news organs with 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.

37 Hartley, supra note 2, 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.”)


negligible British readership. And while Ukrainian gas company billionaire Dimitry Firtash’s high-profile defamation suit against the Kyiv Post was recently dismissed, 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 charges by speakers with tangential English connections.

Defamation law has threatened scientific inquiry and academic freedom of expression as well. On the science front, the English courts have not yet decided the case brought in 2007 against Dr. Peter Wilmhurst, a British cardiologist, by an American medical device manufacturer over statements, made at a conference in the US and quoted on a Canadian web site, questioning the efficacy of the company’s product. More

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40 See, e.g., Akhmetov v. Serediba, [2008] All E.R. (Q.B.). See also Partlett, The Libel Tourist and the Ugly American, supra note 24, 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 24, at 110; Writ Large, supra note 30 at 48; Hartley, supra note 2, 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.”). 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 24, 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 2, 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.”)

41 See News: Draft Defamation Bill to be published today, Inforrm’s Blog, 15 March 2011, available at 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.”)

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.43

The easy availability of foreign fora for libel suits has also threatened the sharp critiques and challenges traditional in academic culture and beneficial to the growth of knowledge.44 The story of Professor Joseph Weiler, NYU Law Professor and Editor-in-Chief of the eminent European Journal of International Law, is a case in point.45 Professor Weiler 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. Although the
Tribunal de Grande Instance ultimately dismissed the criminal charge and required the claimant to pay Weiler EU 8000 in punitive damages, the lengthy and expensive process led to significant concern about the effect of libel laws on academic freedom. More broadly, the fact that libel claims not just in France, but in other Eastern European countries as well, constitute criminal charges also doubtless has an intimidating effect on speech. This is particularly true when criminal actions for defamation can be instituted by “politically connected” private parties or when local law requires public prosecutors presumptively to go forward with private complaints.

Both academic speech and investigative, accountability journalism are particularly vulnerable to the threat of defamation actions in countries with plaintiff-friendly libel laws. The censoring effect of speech regulation is also reflected more in what is not there, not just what is. From large newspapers to NGOs, American speakers

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50. See Section II.C, infra.
have been threatened with such libel cases in the United Kingdom and often settled them. With respect to writing about terror, reports suggest that libel initiatives have been effective.

To be sure, 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 British courts. At least in some of these cases, the claimants did have some connections with the English forum. But the combination of the plaintiffs’ and defendants’ ties to England and the focus of the disputed speech in these cases suggest that the ties should not be considered sufficient for the routine exercise of jurisdiction or by the application of English law by English courts.

51 See Staveley-O’Carroll, supra note 24, at 266 & n. 69 (describing British libel litigations against the Washington Times, Forbes, and Human Rights Watch). See also The price of truth, Economist Online, March 17, 2001, available at http://www.economist.com/node/18396275?story_id=18396275&fsrc=rss, last visited March 21, 2011 (“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.”) See also Maurice Chittenden and Steven Swinford, Libel threat to force US papers out of Britain, SUNDAY TIMES, Nov. 8, 2009, available at http://business.timesonline.co.uk/, last visited March 10, 2011.

52 See Ehrenfeld v. Mahfouz, 2006 WL 1096816 at 2 (S.D.N.Y.2006) (recounting Ehrenfeld’s claims of her own and other authors’ self-censorship in writing about Saudi Arabia and terror); Staveley-O’Carroll, supra note 24, at n.95 (same).

53 There is one category of strategic libel plaintiff – the Hollywood celebrity – whose cases are not the focal point of this Article. From Liberace to Arnold Schwarzenegger, Roman Polanski, Cameron Diaz, Britney Spears and others, entertainers have sought to deter the international press from discussing them by suing the international press in United Kingdom courts. Balin et al., supra note 24, at 99 (citing to libel suits brought in England by celebrities such as Britney Spears, Sylvester Stallone and Cameron Diaz); Bernstein, supra note 24, at 206 (“Analysts estimate that one-third of the libel suits brought in England and Wales during the period of October 2007 to October 2008 were filed by celebrities, many of whom were Americans on libel holiday.”) See also Christopher Hope, New rules to discourage ‘libel tourism’ in Britain, THE TELEGRAPH ONLINE, March 14, 2011, available at www.telegraph.co.uk, last visited March 15, 2011.

54 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 Berezovsky’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,
What is notable about many of the defamation actions in the UK by foreign claimants against American publishers is that they appear to be brought not to collect damages, but to intimidate the press and critics—to achieve political ends, deter investigation, and suppress discussion of public issues. Often, as in the Bin Mahfouz case, no attempt is made to enforce the English judgment abroad. In several of the cases, the claimants have rather tarnished global—rather than specifically English—reputations, even if they can show some minimal connections to the UK. To be sure, litigation is

[2000] 1 W.L.R. 1004 (HL) (E). 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 (opinion of 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; [2005] I.L. Pr. 16 at [3], 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 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 24, at 111.

55 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 decide 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.E.) (Lord Hoffman).

Examples abound of state actors suing in defamation to repress opposition speech and suppress dissent. This was something of a regular practice in Singapore, a country noted to have restrictive libel laws and abridged media freedom. See, e.g., SULLIVAN, LIBEL TOURISM REPORT, supra note 24, at 21-22. Former Minister Lee Kuan Yew brought several libel suits during his time in office, including one against business news outlet Bloomberg. See Tara Sturdevant, Note, Can the United States Talk the Talk and 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. Rev. 269, 280-81 (2010). Lee’s son, Lee Hsien Loong, was successful in case in 2008 against the Far East Economic Review. http://news.bbc.co.uk/2/hi/asia-pacific/7632830.stm. See also New York Times to pay damages to Singapore’s leaders, CPJ, March 26, 2010, available at http://cpj.org/2010/03/, last visited March 10, 2011.

56 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.
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.”

Nevertheless, there is something more 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.

**B. The Lure of London: “A Town Called Sue”**

Thus far, England has been the most common forum choice for libel tourists. In fact, British defamation lawyers apparently quip when they come to the United States – in an homage to Johnny Cash – that they have just arrived from “a town named Sue.”

This is because English libel law differs significantly from its American counterpart, both substantively and procedurally. Indeed, “English libel law is generally regarded as the most claimant-friendly in the world.” It is that reality that the drafters of the Defamation Act 2011 have sought to mitigate.

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While England is not the only libel tourist destination, its convenience, shared language, and status as a “publishing hub” have led to London’s popularity. Staveley-O’Carroll, *supra* note 24, at n 68 (identifying Singapore, New Zealand, and Kyrgyzstan as venues with plaintiff-friendly libel laws).

In contrast to US doctrine, the plaintiff has made out a prima facie case of defamation under current English law simply by establishing that the defendant has published a defamatory statement about her.\textsuperscript{61} The falsity of the statement is presumed and it is the defendant who has the burden of proving its truth as a defense.\textsuperscript{62} There is no counterpart to the American “actual malice” rule.\textsuperscript{63} England also applies the multiple publication rule, meaning that each publication of the offending material is considered a separate tort.\textsuperscript{64} While recent British case-law developments have expanded defenses to defamation – including adoption of a qualified privilege for “responsible reporting” on matters of public interest\textsuperscript{65} – the privileges are limited and English courts still apply them conservatively.\textsuperscript{66}


\textsuperscript{62} See, e.g., Balin et al., supra note 24, at 102-03; Staveley-O’Carroll, supra note 24; Heather Maly, 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, 900 (2006).

\textsuperscript{63} Balin et al., supra note 24, at 103-04.

\textsuperscript{64} See Berezovsky v. Forbes, [2000] 1 W.L.R. 1004, 1012 (per Lord Steyn) (each communication is a separate libel under English precedent). See also Staveley-O’Carroll, supra note 24, at 261. In the United States, by contrast, Keeton v. Hustler Magazine, 465 U.S. 770 (1984) established the single publication rule in defamation cases.


\textsuperscript{66} Although the House of Lords expanded the application of the responsible reporting privilege in Jameel v. Wall Street Journal, the burden of proof is still on the defendant, the court must find the reporting
Damage awards “can be high by international standards” and the losing party pays the expenses of the litigation. Because English law is both pro-claimant and shifts fees to the losing party, foreign defendants reasonably fear liability for extensive costs and fees, and because barristers are permitted to represent libel plaintiffs on a “no win, no fee” basis, libel plaintiffs have no disincentive to sue. English courts will also issue injunctions on publication.

Moreover, transnational litigation has become a profitable area for UK lawyers. Testimony from American libel defense practitioners at a Congressional hearing indicates that the largest percentage of libel letters the firms’ clients receive is from British lawyers. Defamation in the UK is a specialized bar. As law firms increasingly specialize and develop areas of expertise, and as profitability for firms increasingly hinges on international practices, the British libel bar must see an expanding market in trans-national defamation cases. English law firms with specialized libel expertise have

fair, reasonable, and necessary to the article, and the notion of the public interest is more narrowly interpreted than in the United States. See 6146 Hearing, supra note 23 (Handman testimony). See also Staveley-O’Carroll, supra note 24, at 259; 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)

67 Hartley, supra note 2, at 26.

68 See 6146 Hearing, supra note 23, at 6 (Handman statement). See also Balin et al., supra note 24, at 102; McFarland, supra note 2, at 626-27.

69 See 6146 Hearing, supra note 23, at 6 (Statement of Laura Handman); Balin et al., supra note 24, at 102; McFarland, supra note 2, at 626-27.

70 Balin et al., supra note 24, at 106.

71 See Bernstein, supra note 24, at 222 (discussing “British libel lawyers who actively recruit American celebrities as clients”).

72 U.S. Senate Committee on the Judiciary, Hearing on S. 2765, Feb. 23, 2010 (statement of Kurt Wimmer).
been accused of "ambulance chasing" – soliciting the interest of potential libel tourist plaintiffs abroad.\textsuperscript{73}

In addition to differences between the level of protection to 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. But publication under English law occurs in England “each time an item is communicated to another person” there, and each publication constitutes a distinct tort.\textsuperscript{74} 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,\textsuperscript{75} and because each communication of an allegedly defamatory statement is a separate publication under English law,\textsuperscript{76} English courts always apply English 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.\textsuperscript{77}

\textsuperscript{73} See, e.g., Bernstein, supra note 24, at 220, 222-23. See also Partlett, The Libel Tourist and the Ugly American, supra note 24, at 655 (on specialized British bar). Sullivan, Libel Tourism Report, supra note 24, at 15.

\textsuperscript{74} Hartley, supra note 2, at 26-7. Staveley-O’Carroll, supra note 24, at 261; Hartley, supra note 2, at 26-7. See also Berezovsky v. Forbes, [2000] 1 W.L.R. 1004, 1012 (per Lord Steyn) (each communication is a separate libel under English precedent). In the United States, by contrast, Keeton v. Hustler Magazine, 465 U.S. 770 (1984) established the single publication rule in defamation cases. 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).

\textsuperscript{75} Hartley, supra note 2, at 27.

\textsuperscript{76} Id. at 26.

\textsuperscript{77} Id. at 27.
With respect to jurisdiction over defendants not domiciled in England (or in a member state of the European Union), English courts apply English jurisdictional rules. Under those rules, English courts can exercise jurisdiction if the defamatory item was distributed in England. 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. 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. Indeed, it is said that British courts have expanded their

78 Jurisdiction if the defendant is a domiciliary of another member state of the European Union is determined under EU law, namely the Brussels I Regulation. Id. 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 28-9 (describing rule in *Shevill v. Presse Alliance SA*). The issue of EU jurisdiction rules is beyond the scope of this paper.

79 Id. at 28.

80 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.

81 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 24, 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 24, at 264 (citing to Mardas v. New York Times, English case in which court opines 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.”) But see Draft Defamation Act 2011, supra (citing Jameel and abuse of process favorably regarding defamation cases).

82 Hartley, supra note 2, at 29-30. It could be said that English courts do not require plaintiffs to do much to prove their reputations in England. For businessmen, for example, limited circles of business acquaintances and trips to England seem sufficient. See, e.g., Berezovsky v. Michaels, [2000] 1 WLR 1004 (allowing defamation action by Russian oligarch about claims tying him to organized crime allowed to
assertion of jurisdiction on the theory that the Internet gives plaintiffs a greater interest in the protection of their reputations. 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.” Similarly, books available in England through e-retailers are also considered published in England. 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.”

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 her work available via Amazon in England, the impact of that remedy extends far beyond England’s borders.

There are also significant practical differences to litigating defamation in England. Most importantly, the cost of litigating a defamation case is enormous. It is reported that the cost of English and Welsh libel actions was apparently 140 times higher

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83 Staveley-O’Carroll, supra note 24, at 262.
84 Hartley, supra note 2, at 30. See also McFarland, supra note 2.
85 Hartley, supra note 2, at 30.
86 Id.
87 Id. at 31-32 (“a remedy granted for publication in England will almost always have an impact on freedom to publish
than the European average in 2008. 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.

The U.K. is not the only forum for libel tourists, however. Other Commonwealth countries – such as Australia and New Zealand, as well as Singapore, Kyrgyzstan and even France (with its criminal libel laws) have also seen libel claims against defendants with limited ties to the fora. Moreover, members of the European Union will recognize and enforce other member states’ judgments. Thus, defamation judgments under even the most onerous of EU members’ libel laws – including criminal actions for libel (particularly those brought by private parties) – would presumably be recognized and enforced elsewhere in the European Union.

C. State Statutes and the Federal SPEECH Act

Both states and Congress have taken steps to address the impacts of foreign libel judgments against American defendants. The Ehrenfeld story led to a legislative reaction in New York, which passed the Libel Terrorism Protection Act in 2008,
informally known as Rachel’s Law (in honor of Rachel Ehrenfeld). Other states – including Illinois, Florida and California, followed suit.

Most notably, Congress then passed the SPEECH Act – which is the first national legislation designed to address the libel tourism problem. The legislation provides that United States courts shall not recognize or enforce foreign defamation judgments unless the defamation law applied by the foreign courts provided at 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, or unless the party opposing recognition would

92 Libel Terrorism Protection Act, N.Y. C.P.L.R. 302(d) and 5304(b)(8). New York’s Rachel’s Law provides that New York courts should not recognize 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.” N.Y. C.P.L.R. 5304(b)(8). In addition, it extends long-arm jurisdiction to foreign defendants. Section 302(d) of the New York CPLR provides that:

The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person’s liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to section fifty-three hundred four of this chapter, to the fullest extent permitted by the United States constitution, provided:

1. the publication at issue was published in New York, and
2. that resident or person amenable to jurisdiction in New York
   (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or
   (ii) may have to take actions in New York to comply with the foreign defamation judgment. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision. See also Klein, supra note 30 (describing US legislative responses).

93 Statement of Bruce D. Brown, SPEECH Act Hearing, supra note 36 (noting that in addition to New York, Illinois, California and Florida – which passed libel tourism laws to prevent enforcement of foreign libel judgments – Hawaii, New Jersey, Utah and Arizona also introduced such bills.) See also Steveley-O’Carroll, supra 24 at 252.


have been found liable by a domestic court applying US federal and local law.\textsuperscript{96} The burden of making either of these showings is on the foreign judgment holder seeking to enforce the foreign judgment.\textsuperscript{97} The Act also provides that a domestic court shall not recognize or enforce a foreign judgment for defamation unless the US court determines that the exercise of personal jurisdiction by the foreign court comported with the due process requirements imposed on domestic courts by the US Constitution.\textsuperscript{98} The burden is on the libel claimant to show that US due process standards for personal jurisdiction would have been met by the foreign court’s process.\textsuperscript{99}

The SPEECH Act also creates a separate provision for declaratory judgments that allows a judgment defendant to bring a declaratory judgment action for a declaration that the foreign defamation judgment is “repugnant to the constitution or laws of the United States.”\textsuperscript{100} A judgment would be repugnant to the constitution or laws of the US when it would not be enforceable under the provisions of the Act.\textsuperscript{101} For declaratory judgments, the burden of establishing non-enforceability is on the party bringing the declaratory judgment action.\textsuperscript{102} Legislative history suggests that the reason for this provision was to

\textsuperscript{96} 28 USC § 4201(a)(1)(B) (2010).
\textsuperscript{97} 28 USC § 4102 (a)(1)(A)(2)(2010).
\textsuperscript{98} 28 USC § 4102 (b)(1) (2010): “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.”
\textsuperscript{99} 28 USC § 4102 (b)(2) (2010). An appearance in foreign court by the libel defendant does not bar any of the defenses in the statute, including lack of personal jurisdiction. 28 USC § 4102 (d) (2010).
\textsuperscript{100} 28 USC § 4104(a)(1) (2010).
\textsuperscript{101} Id.
\textsuperscript{102} 28 USC § 4104(a)(2) (2010).
allow American defendants to “clear [their] name[s]” 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.

There is also a specific provision extending the Section 230 Internet provider immunity to ISPs found liable for defamation in foreign courts. Thus, foreign defamation judgments against the providers of interactive computers services, such as the hosts message boards and blogs, would not be recognized or enforced if inconsistent with Section 230 of the Communications Decency Act (which protects against liability for user generated content). This provision was adopted in response to a suggestion from Public Citizen.

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 on statutory grounds under the SPEECH Act would be granted reasonable fees “absent exceptional circumstances.”

The SPEECH Act is a more moderate version of other libel tourism bills considered by Congress and New York's "Rachel's Law." Previous congressional bills had called for more aggressive extensions of American law. The New York statute

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104 28 USC § 4104(b) (2010).
105 28 USC § 1402(c) (2010).
106 Communications Act of 1934, 47 USC § 230.
107 28 USC § 1405 (2010). 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.
108 See, e.g., The Libel Terrorism Protection Act, H.R. 1304, S. 449 111th Cong. (2009). This legislation would have created a federal cause of action against any person who brought a defamation
extends long-arm jurisdiction to an extraordinary degree. 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).  

II. What’s Really At Stake? Assessing the SPEECH Act:

A. Is Concern About Libel Tourism Just Moral Panic Regarding Terror?

One could be cynical about the furor over libel tourism. As evidenced by the very title of New York’s "Libel Terrorism Act", libel tourism legislation has been linked to American anti-terror rhetoric. Commentators talk about at least some English libel cases as being part of a “soft jihad,” or “lawfare” by proponents of “radical Islam.”

Some have expressed concern about the constitutionality of certain provisions included in prior anti-libel tourism statutory proposals (see, e.g., H.R. 1464 Hearing, Statement of Linda Silberman). Critics have also warned about British response. See, e.g., Garnett & Richardson, supra note 23, at 480-81. Yet others have argued in support of extension of jurisdiction by American courts in libel tourism situations. See, e.g., Moore, supra note 24 (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.


See note 33, supra.


This is troubling to the extent that it can stoke public fear about a radical Islamic agenda being pursued on multiple fronts against the United States. A public panic triggered by fanning fears of terrorism can lead, among other things, to a pacified population content to cede power to a government promising security. Is apparent Congressional concern about libel tourism, then, really nothing more than a self-interested attempt by government to maintain a high pitch of concern – a moral panic – about terrorism?  

A different reading is also available. Instead of a story of libel tourism hijacked to promote anti-terror policy, an alternative story could be told: that those opposed to libel tourism were able to use the fortuitous link between the Ehrenfeld case and terror as a hook to induce legislative attention to a much broader problem. On this view, terror became a useful tool to get through legislation that a mere reliance on the desirability of free expression would not have accomplished. 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.

On this account, the evolution in libel tourism and its effects are due, inter alia, to technological change such as the Internet. The Internet and the global businesses it

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113 Those of this view might argue, for example, that Congressional failure to approve a federal shield law for journalists supports skepticism about how much libel tourism legislation is really about protecting American journalists and free expression.
enables pose an often-noted challenge to territoriality. These days, publication is global rather than local, and – often – so are reputations. In the new information environment, the traditional geographic constraints that permitted inconsistent defamation regimes to coexist have been undermined by technology. Now, countries with the most speech-repressive libel laws can effectively set the limits on what can be said world-wide.

B. The Current Debate: 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 assertion of US constitutional law extraterritorially, or that it is an example of inappropriate foreign legal imperialism.

On one side of the debate in the legal literature are those who claim that US 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

114 See, e.g., Hartley, supra note 2; Garnett & Richardson, supra note 23, 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, The Libel Tourist and the Ugly American, supra note 24.

115 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 solicit business for this area of expertise. SULLIVAN, LIBEL TOURISM REPORT, supra note 24, 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.
even “un-American” foreign judgments because American courts traditionally recognize and enforce foreign judgments in the United States even when the foreign court did not apply law equivalent to US law, so long as the trial met certain fundamental requirements of procedural fairness, and that making an exception for defamation cases is nothing more than extraterritorial export of the First Amendment. At a minimum, critics on this flank argue that US courts should engage in case-by-case review of such foreign judgments, determining when recognition of the judgment should be considered to be contrary to American public policy. Such scholars might prefer the SPEECH Act to have been formulated not in constitutional terms, but in more modest choice of law terms,

See, e.g., Testimony of Linda Silberman; Partlett, The Libel Tourist and the Ugly American, supra note 24. Garnett & Richardson, supra note 23, at 474 (arguing that unavailability of recovery under US law “is itself a powerful reason to adjudicate not only to afford the claimant a right to redress but also to prevent US free speech law having global or “imperialist” effect. . . ”). See also Klein, supra note 30; Mark D. Rosen, Exporting the Constitution, 53 EMORY L.J. 171, 172 (2004); Mark D. Rosen, Should “Un-American” Foreign Judgments Be Enforced?, 88 MINN. L. REV. 783 (2004); Zick, supra note 24, at 1588 (“The extraterritorial application of Sullivan may be viewed by other nations as a form of rights imperialism.”).

The following would be this sort of 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 kind of situation is where there is a real and substantial connection to England, but also to a number of other jurisdictions as well. 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 Trafalgar Square asserting that David Cameron was a crook. Although the SPEECH Act would appear to cover all three of these types of 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 deprives the courts of discretion to distinguish among these situations. If a US 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 US policy, then, arguably, the United States would be sending a less dismissive message to the British courts.
allowing American courts to refuse to enforce a foreign libel judgment based on a faulty choice of law analysis. ¹¹⁸

On the opposite side of the debate are those who reject 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 asserting long arm jurisdiction over foreign libel plaintiffs solely on the ground of their foreign lawsuit against the American defendants. ¹¹⁹ Although there are variations in the degree to which commentators support the most aggressive versions of this point of view, they all agree that legislation that principally prohibits recognition and enforcement of foreign libel judgments in the United States would not be sufficiently speech-protective without imposing costs on claimants who sue US 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. 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 might not be excessively offensive with respect to

¹¹⁸ See McFarland, supra note 2 (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 24, TAN 381 (“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)

¹¹⁹ See, e.g., Bernstein, supra note 24, at 223-24.
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 damages awarded because of differences in law regarding punitive damages. The SPEECH Act is far more modest than the other proposed legislation described above. It simply denies domestic effect to the foreign libel judgments. 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 simply on that basis.

C. 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 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. It gives far less consolation to members of the global institutional press and publishers with assets outside the United States.

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 SPEECH 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. And the incorporation of the Section 230 provision
makes it less likely that ISPs will simply knuckle under to take-down pressure by libel tourists.

However, despite American non-recognition, the foreign defamation judgment will still stand and be enforceable outside the United States. Especially in light of the European Union regulations regarding recognition of judgments in the EU, 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 many assets outside the US will still be vulnerable to enforcement of British judgments anywhere in the EU.

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 have extensive operations, agents, and assets in members of the European Union. American publishers as well have world-wide connections and assets.

Ironically, then, the type of responsible news reporting, investigation or expert, professional commentary that is most socially beneficial and perhaps more likely to follow professional norms of accuracy is precisely the type of speech that that libel tourism will continue to deter, regardless of the SPEECH Act. An unintended

120 Brussels I.

121 Thus, entities like News Corp, for example, would not be much aided by the SPEECH Act’s protections. See Heather Maly, 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, 922-23 (2006).

122 Hartley, supra note 2, at n. 32.
consequence of the 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, the SPEECH Act would reserve 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 last straw 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 line between news and entertainment, reduced commitment to resource-intensive investigative reporting, closure of foreign news bureaus, and wholesale firing of experienced print journalists.\textsuperscript{123} 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

\textsuperscript{123} 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.
the truth of their stories. Legal regimes requiring the libel defendant to prove the truth
of her statement create structural problems for 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 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. On the
academic front, libel tourism is likely to be inhibiting not only to scholars at major
universities with campuses and relationships around the world, but also those publishing
with academic presses and other publishers with international assets and connections, and
on academic researchers who are independent of large, heavily-endowed institutions,
those who choose to focus their scholarly work on controversial public issues, and those
who use anonymous sources. It is also to be expected that academic publishers – limited
in number and not very profitable – will likely be easily intimidated by threats of foreign
libel actions in receptive jurisdictions. 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 Yale 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 the mainstream press, journalists are typically employed
by their newspapers or television stations, develop reputations that enhance the

124 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.)
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.\textsuperscript{125} Scholars who do not have university affiliations are entirely at the mercy of their publishers. This is not just hypothetical – Rachel Ehrenfeld has testified that she has had difficulties finding publishers for work in her field.\textsuperscript{126} (There are high profile stories of commercial publishers as well refusing to publish books in the United Kingdom because of concern about libel suits.)\textsuperscript{127} On the academic front, libel tourism is

\textsuperscript{125} \textit{Writ Large, supra} note 30, at 48 (comments of Floyd Abrams); Steveley-O’Carroll, \textit{supra} note 24, at 269. It is to be expected that academic publishers will likely be easily intimidated by threats of foreign libel actions in receptive jurisdictions. First, because of the limited markets for their books, academic publishers are not highly profitable. There are only a limited number of such publishers. Even if the ability to self-publish through the Internet would theoretically constrain the possible behavior of such publishers, 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 Yale University Press than the presses can handle. Also, the relationship between author and academic publisher is not at all like the relationship between newspaper and journalist, as noted above in text. In the realm of the mainstream press, journalists are employed by their newspapers or television stations, develop reputations that enhance the institutional reputation of their employers, are elements in complex reporting structures including editors. They are unlikely to be fired simply because of what they did on one particular story. And they doubtless receive litigation support from their employers, so long as they were acting in the course of their employment. By contrast, authors who seek to have their books published by an academic press are not in such a web of relationships. They are not employees. It is very easy for the press to refuse to publish their next work, even if they help defend a libel suit against the book they have already published.

\textsuperscript{126} \textit{H.R. 6146 Hearing, supra} note 23, at 4 (statement of Rachel Ehrenfeld).

\textsuperscript{127} Steveley-O’Carroll, \textit{supra} note 24, at 268 (discussing the fact that American best-seller \textit{House of Bush, House of Saud} was not published or distributed in Britain because of libel action concerns); Arlen Specter & Joe Lieberman, \textit{Foreign Courts Take Aim at Our Free Speech,} WALL ST. J, July 14, 2008. \textit{See
likely to be most inhibiting to independent academic researchers, those who do not have the support of large, heavily-endowed institutions, those who choose to focus their scholarly work on controversial public issues, and those who use anonymous sources.

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[?]”\(^\text{128}\) Professor Partlett may be right that “[t]he publicity in the wake of the [Ehrenfeld] litigation stimulated a market for her book that one doubts would have been otherwise available[]” and that “[i]nformation will leak out.”\(^\text{129}\) 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.\(^\text{130}\) The press and publishers always have choices in what to publish and can devise rational explanations for more risk-averse elections.

More generally, the fact that some speech of public interest will likely be disseminated over the Internet regardless of defamation law does not mean that valuable contributions may not be impaired. The argument that the volume of speech overall might

\(^{128}\) Id. at 658.

\(^{129}\) Id.

\(^{130}\) Indeed, it may be that the uptick in book sales had much to do with the fact that the Ehrenfeld action was about a book concerning terrorism. Libel tourism cases will not always have such notoriety.
not be substantially diminished says nothing about whether particular expressions that would contribute to the quality of discourse would not be constrained. The story of Wikileaks cannot be told without assessing the effects on speech of the reaction to Wikileaks. While the decentralized nature of the Internet may permit expression to be disseminated once created, it does not address what factors undermine its creation in the first place.

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 US law. Even if a narrowly drafted statute of this kind would pass constitutional muster, as some commentators have suggested, 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. Moreover, even though more aggressive options are still open to Congress if it finds the SPEECH Act approach insufficiently effective, there is the

\[131\] See, e.g., Moore, supra note 24. For a recent article critical of provisions granting defendants in trans-national actions to sue the foreign defamation judgment holder for damages, see Daniel C. Taylor, Note, Libel Tourism: Protecting Authors and Preserving Comity, 99 GEO. L.J. 189 (2010).

\[132\] Moore, supra note 24, at n. 42.
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.” 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 EU as more inconsistent with general principles of comity.

III. Hot off the Presses: Assessing the British Government's March 2011 Draft Defamation Bill

Efforts have been ongoing for some time to reform “draconian” English libel law. Although changes have yet to be adopted and English commentators are far from

133 Hartley, supra note 2, at n. 42.


unanimous on the need for reform, the Ministry of Justice just released a draft bill for public consultation and pre-legislative review on March 15, 2011.

O’Carroll, supra note 24, at 283; Bernstein, supra note 24, at 225; Garnett & Richardson, supra note 23 at 477; Writ Large, supra note 30.


Last summer, a member of Parliament proposed a private Member’s bill on defamation. See Rachel McAlvy, Government to lead libel reform with new Defamation Bill, Online Journalism News, journalism.co.uk, available at http://www.journalism.co.uk/2/articles/539552.php (July 9, 2010) (describing Lord Lester’s bill, heard by the House of Lords for the second time in July). See also Jordan, supra (summarizing proposals for reform of English defamation law prior to 2011 draft bill). Lord Anthony Lester’s bill would replace the current “fair comment” defense with a more liberal “honest opinion” alternative, and the “responsible publication” with a “public interest” defense; eliminate jury trials in most libel cases; and apparently set limits on contingency fees. Improving a Reputation, THE ECONOMIST, May 27, 2010, available at http://www.evernote.com/pub/englishpen/libel#n=0b58e5ae-a7b1-4432-b7ac-85cc5311d35d. With respect to libel tourism, the bill would require foreign libel plaintiffs to show that they had suffered “substantial harm” in England. Id. It should be noted, however, that the bill would not shift the burden on the defendant to prove the truth of the speech. Id. This bill has very significant elements in common with the draft defamation bill released for comment by the government yesterday.


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) (“We agree that it is timely for a general review of the operation and impact of the law to be undertaken with the object of identifying necessary reform. . . . We are concerned, however, that the critique of the libel regime is too broad and the reforms proposed too sweeping and indiscriminate. The public commentary on libel law has been remarkably one-sided, and in some respects dangerously over-simplified. We are nervous that the important societal functions performed by libel law have been underplayed. Libel reform should be coherent, not piecemeal and un(der)-principled.”). See also Paul Tweed, The Global Libel Debate Blog, available at http://www.globallibeldebate.com/default.aspx?CATID=1585 (“The priority afforded to this US “Libel Tourism” legislation is as inappropriate and unnecessary as it is bewildering. . . . [W]e have this media frenzy persistently criticising our defamation laws – legislation which, in my respectful opinion, has contributed in no small measure to ensuring that our broadsheets are among the most credible in the world.
A. The Draft Bill

While the draft libel reform bill currently in consultation in England articulates a goal of balancing free speech and the protection of reputation, it significantly changes current British defamation law in favor of defamation defendants. With respect to the issue of libel tourism, the draft contains three particularly significant elements. 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.” 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” so long as the subsequent publication was not made in a manner...

In the absence of such laws, it would effectively be impossible for the man on the street to have access to any form of justice, while encouraging the often one sided propaganda that is regularly exhibited in the American press.”); US Freedom of Expression and Media Round Up – 4 September 2010, International Forum for Responsible Media Blog, available at http://inforrm.wordpress.com/2010/09/04/us-freedom-expression-and-media-law-round-up-4-september-2010/#more-3972, last visited 9/3/2010 (characterizing SPEECH Act as “wholly unnecessary piece of legislation” and asking “why should a US citizen or company who chooses to publish a book or article in England not be subject to its laws, like everyone else?”)


Several of the libel law changes suggested by British reformers are probably too radical to be adopted and are not part of the current bill. For example, English PEN suggested, among other things, “abolishing the recovery of success fees from losing defendants in libel cases and mandatory cost-capping of base costs to limit the level of fees . . . exempt[ing] interactive online services and interactive chat from liability . . . [exempt[ing]] large and medium sized corporate bodies and associations from libel law unless they can prove malicious falsehood.” FREE SPEECH IS NOT FOR SALE, supra note 66, at 10, 12. These changes would likely require a fundamental re-calibration of the interests in reputation and free speech in England.

Draft Defamation Act 2011, supra, Clause 1.

Id. at Clause 6(3).
Third, the legislation “aims to address the issue of “libel tourism”” 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,

> “[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.”

The draft statute also indicates that it only applies to England and Wales. 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,” and revises provisions on defenses.

**B. Benefits and Limits**

The British government’s proposed bill, if adopted, would definitely reduce casual libel tourism of the prototypical sort. The element most designed to address libel

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141 Id. at 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).


143 Draft Defamation Act 2011, supra, at Clause 7(1). The reason for this limitation is to “avoid conflict with European jurisdictional rules[]” Draft Defamation Act 2011, Annex B – Explanatory Notes, Note 46, at 82.

144 Draft Defamation Act 2011, supra, at Clause 7(2).

145 Id. at Clause 10(3).

146 Id. at Clause 8.

147 Id. at Clause 2 (Responsible publication on matter of public interest), Clause 3 (Truth), Clause 4 (Honest opinion), Clause 5 (Privilege).
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 in situations where England is not “clearly the most appropriate” place to bring an action, the Draft 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, defendant-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 limitations

\[\text{Draft Defamation Act 2011, supra, at Clause 7(2). This is consistent with Professor Trevor Hartley’s thoughtful approach: Professor Hartley suggests that reforms could be made either to choice of law or to jurisdiction under English law (Hartley, supra note 2 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.}

\[\text{Professor Hartley also suggests that English courts could change their application of \textit{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 \textit{forum non conveniens}.}

\[\text{Professor Hartley is of course right that changes to the application of \textit{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 \textit{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; [2000] 2All ER 986 (HL); King v. Lewis, [2004] EWCA Civ. 1329 (CA), cited in Hartley, supra note 2, 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 23, at 474 (“[p]rotection of claimant reputation and preservation of English legal sovereignty from US 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 2, at TAN 128 (“After Berezovsky it would be foolish to depend on \textit{forum non conveniens} in English courts. English judges, acting with the authorization of the House of Lords, are likely to give little deference to the interests of comity and convenience wrapped up in the doctrine. Because all three categories of typical libel tourists have reputations to protect in England the English courts are unlikely to dismiss the libel tourist’s claims.”) Without that, expensive \textit{forum non conveniens} litigation would itself impose inhibiting burdens on American speakers.}
purposes would also certainly provide relief for some defendants, although the extent of that relief is not clear. Expansion of English defenses to libel might also help libel defendants.¹⁴⁹

The draft bill has been criticized for being too defendant-protective.¹⁵⁰ But it may in fact be insufficiently so, principally because of the degree of discretion it still affords judges 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 “has caused” harm is unexceptionable, how is a court to determine whether a statement “is likely to” cause substantial harm?¹⁵¹ Although the reasonable reading would require that the substantial harm to the claimant’s reputation must be in Britain, the statute does not explicitly say so, and provides no guidance for what courts should assess to characterize the claimant’s British reputation.

¹⁴⁹ See discussion of defenses in MINISTRY OF JUSTICE, REPORT OF THE LIBEL WORKING GROUP, supra note 24, at 22-33.


¹⁵¹ 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 Act 2011, 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, 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.”
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.\footnote{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)” Id., 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 subsequently been promoted to a position where it can be directly accessed from the home page of the website, 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.}

To the extent that the single publication 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. 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.”\footnote{Draft Defamation Act 2011, Annex B – Explanatory Notes, Note 45, at 82.} While this provision is designed to “provide a safeguard against injustice,”\footnote{Id.} it creates uncertainty – also an element leading to a chilling effect.

The draft bill’s jurisdictional provision is also concerning. It requires courts to determine whether Britain is “clearly the most appropriate place” to sue in a transnational matter. But what is to constitute such a “clear” showing? While it is laudable that courts are to “consider the overall global picture” in asserting jurisdiction, and while
a comparative assessment of damage seems called for by the provision, the “range of factors” to be considered by courts is not clearly set out either in the proposed bill or its Explanatory Notes. The up-side is that for libel actions not involving British domiciliaries, the statutory presumption seems to be that British courts will only hear the

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155 Id., Note 47, at 83.

156 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 worldwide 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 23, at 476. Moreover, while the 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 24, 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, including:

“-- 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”


Like Professor Hartley, Professors Garnett and Richardson also focus on restraining the exercise of English jurisdiction. Garnett & Richardson, supra note 23, at 482. Approvingly citing to recent Canadian cases requiring “a real and substantial connection between the forum and the action before jurisdiction can be exercises[,]” Garnett and Richardson suggest that English courts adopt a middle ground between current English practice and US 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.”156 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. . 156 Id. at 483. They also call for courts to apply forum non conveniens doctrine “more rigorously in libel cases.” Id. at 485.
claims if Britain is clearly the best forum. The down-side is that the courts have great discretion in making that determination.\textsuperscript{157}

Another limit of the draft libel reform bill is that it excludes consideration of costs and damages.\textsuperscript{158} But one of the critical reasons for the chilling effect of British libel tourism is that English libel litigation is prohibitively expensive. If England were to adopt limits to attorney’s fees, then the inhibitory impact of British libel suits’ cost would be significantly reduced. Given how radical such changes would be, however, it is difficult to count on those developments.

It must also be remembered that the Draft bill is simply in the consultation process until June and might change significantly as a result of debate. British observers have noted that the draft bill has “had a mixed reception.”\textsuperscript{159} Perhaps careful diplomacy

\begin{itemize}
\item \textsuperscript{157} 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.” Id. 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.)
\item Another proposed jurisdictional solution is that 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.” \textsc{Free Speech Is Not For Sale, supra} note 66, at 9, 12. While this suggestion has the virtue of providing numerical certainty, it may be criticized as arbitrary and over-inclusive. \textsc{See Ministry of Justice, Report of the Libel Working Group, supra}, at 13 (discussing how “readership levels of publications in this jurisdiction may not be what one might expect.”)
\item Finally, Professors Garnett and Richardson’s jurisdictional approach would courts to inquire into 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 foreseeability standard, depending on how it was interpreted, would tend in the other direction and overly valorize reputation interests.
\item \textsuperscript{158} \textsc{See Pfanner, supra} note 11.
\item \textsuperscript{159} David Alan Green, The draft libel reform bill is a good thing, \textsc{New Statesman}, March 17, 2011, \textit{available at} \url{http://www.newstatesman.com/blogs/david-allen-green/2011/03/draft-bill-libel-claim}, last visited March 19, 2011.
\end{itemize}
would be a useful component of the American response at this point.\footnote{See Zick, supra note 24, at text accompanying footnotes 383-84 ("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 2 (also arguing for diplomacy). One way to understand even the SPEECH Act is as an element of diplomacy – a double signal to England. On the one hand, obviously, it constitutes a statement that England’s courts are handling free speech issues badly in the context of defamation involving US speakers. But, simultaneously, 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. The relative modesty of the SPEECH Act, then, could be seen to demonstrate American sensitivity to the different balances other countries might 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.” Id. Some would disagree, suggesting that even the SPEECH Act goes too far in adopting a general rule of non-recognition rather than a case-by-case approach. See Testimony of Linda Silberman, supra note 108. See also Partlett, The Libel Tourist and the Ugly American, supra note 24, 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 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. Politicians are exquisitely sensitive to media coverage, especially media coverage that 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 the threat of strategic libel tourism. It might even help shift judicial attitudes in countries with different ways of perceiving the free speech/reputation balance, by providing context. See, e.g., Zick, supra note 24.} In tandem with diplomacy, it is also important to keep the issue of forum shopping in libel cases in the news, to maintain both public and lawmaker attention to its resolution.\footnote{Politicians are exquisitely sensitive to media coverage, especially media coverage that 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 the threat of strategic libel tourism. It might even help shift judicial attitudes in countries with different ways of perceiving the free speech/reputation balance, by providing context. See, e.g., Zick, supra note 24.}

Even if British libel reform is ultimately effected, however, England is not the only relevant jurisdiction. If English laws were to become less claimant-protective, it is not clear that all the Commonwealth countries would necessarily follow suit. Nor is it true that potential libel tourists would face obstacles suing in other hospitable fora. While some theorists have concluded that America has been successfully exporting its free speech regime elsewhere in the world through a process of global interchange,\footnote{See, e.g., Zick, supra note 24.} we
should still be skeptical of the degree to which other countries will accept the particularly defendant-protective posture of American doctrine in free speech cases.

In sum, the current British draft libel reform legislation is, for American speakers, a mixed bag. The question with which we are left is not only whether Parliament will enact the bill into law, but also – perhaps most importantly – how the British courts will exercise their discretion under it.

**D. A Call for Interest Analysis for Choice of Law in Trans-national Libel Cases:**

The jurisdictional approach of the Draft Defamation Act 2011 could significantly reduce the prototypical libel tourism action, especially if liberally interpreted by the British courts. But the proposed bill does not address the more complex issue of choice of law in a true trans-national case. This Article argues that even when British courts decide to hear trans-national defamation cases involving Americans, they should choose not to apply English law in certain circumstances.

Thoughtful suggestions for choice of law analysis in trans-national libel cases have been made recently. For example, Professor Hartley has recently suggested that English law could be changed to provide for a single publication rule for choice of law in defamation cases. 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.” Ultimately,

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163 Professor Hartley notes that the EU Commission may legislate further with regard to choice of law in tort, leading to the need to address the issue with respect to EU law. Until that happens, however, the proposed solution looks to change English choice of law rules. Id.

164 Id. at 35. The proposal with respect to choice of law *in toto* is as follows:
as Professor Hartley recognizes, even if a single-publication rule were adopted for choice of law and jurisdiction, however, another rule would have to be adopted “to determine where the tort is deemed to have occurred.” This is a holistic approach that gives the judge much discretion in identifying and weighing the connections. 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.

An alternative option that would take such interests into account is worth considering. Whatever one might think of interest analysis as a methodology in conflict of laws generally, defamation law in foreign cases against American defendants presents a special case in which the application of some features of that approach may be helpful. Because of the importance of free speech and the free press to the American

“(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.”

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.”

MINISTRY OF JUSTICE, REPORT OF THE LIBEL WORKING GROUP, supra note 24, at 38.

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, at 486. (Like Hartley, Garnett and Richardson conclude 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 fact-counting by British courts and would not necessarily forefront the strength of American interests in political speech.

The use of interest analysis in choice of law generally is controversial. This paper does not weigh in on that debate. Rather, I propose that strategic defamation suits brought to achieve political ends should be treated as a special case.
conception of democracy, it is appropriate to devote particular attention to that
governmental interest. That interest should weigh heavily when the forum court
concludes that the libel action would be likely to suppress open debate in the United
States salient to political discourse. English courts engaging in choice of law analysis
should consider carefully the degree to which the case at issue implicates the fundamental
interest of the United States in maintaining free and open debate about political,
governmental, and economic activity. While it may be that in at least some such cases,
the effect in the United States would be precisely what was strategically intended by the
libel tourist, a focus on the effects of the suit on the United States’ interest in free speech
and open political discussion would minimize contested inquiries into the plaintiff’s
intent.¹⁶⁸

¹⁶⁸ 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.
The fact that a British court might find the plaintiff’s purpose ambiguous or complex should not
necessarily be a bar to this kind of analysis. In cases of ambiguity, but where there is some evidence of
censorious goals, the British court could simply choose to err on the side of restraint because of the
significance of the American interest in free speech.

With respect to English law, an assessment of whether a defamation claim should be considered an
abuse of rights would also require such judicial inquiry. See Garnett & Richardson, supra note 23, at 487-
490. Professors Garnett and Richardson suggest consideration of “the possibility of arguing abuse of
rights as a vehicle to intervene where a claimant’s motives in invoking a right may be questioned – and in
particular where it may be argued that the right is being used “for the purpose of destroying or limiting
[the] rights and freedoms [of] others.”” Id. at 487 (citations omitted). 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 Professors Garnett and
Richardson recognize that this jurisprudence has so far been concerned with hate speech, they 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 case 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 paper 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
This is not to say that British courts should always defer to American free speech interests. For example, in defamation cases brought by Hollywood royalty to squelch paparazzi and scandal sheets, the kind of speech involved may well be protected under American law, but it is unlikely to implicate the American governmental interest in the core political speech necessary to the functioning of its democratic and political system.\textsuperscript{169}

In a true conflict situation, where both states have interests that are in tension, the court would have to weigh very carefully the extent to which the decision to impose a significant libel award, or not to do so, would impair the respective interests of the two states.\textsuperscript{170} In that exercise, the 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.\textsuperscript{171}

**D. The Pros and Cons of Harmonization and International Treaty Proposals:**

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. Even as to Ehrenfeld, Garnett and Richardson seem to hedge their bets: “Such developments might include the Ehrenfeld-type case . . .” Id. at 488 (emphasis supplied).

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 might otherwise be the case. Similarly, if there were a third jurisdiction involved whose laws were also less favorable to the press than the United States, the British court might conclude that the weight of connections favored the third state.

With respect to the “comparative impairment” method of resolving true conflicts, see Bernhard v. Harrah’s Club, 546 P.2d 719 (Cal. 1976).

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\textsuperscript{170}  With respect to the “comparative impairment” method of resolving true conflicts, see Bernhard v. Harrah’s Club, 546 P.2d 719 (Cal. 1976).

Since even major liberalizations to British law cannot halt libel tourism given the potential availability of other foreign fora, it might be thought that the solution to the problem of libel tourism should be international harmonization of substantive libel law. Whether this is by treaty or the development of international norms, scholars of this view suggest that state-centric approaches are passé. Professor David Partlett argues, for example, that the American prioritization of free speech over reputation in *New York Times v. Sullivan* was “a product of its social and legal culture” (an artifact of the national standards needed in its time), but that as “the technological revolution has pushed beyond the national sphere, a new framework for analysis is needed for information in the global setting.” On this view, harmonized rules will not necessarily

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172 See, e.g., Law Commission, *Defamation and the Internet: A Preliminary Investigation*, Scoping Study No. 2, December 2002, at ¶ 4.54, 39, available at [www.lawcom.gov.uk/docs/defamation2.pdf](http://www.lawcom.gov.uk/docs/defamation2.pdf), last visited Nov. 15, 2010 (recognizing concerns about “global risk” of trans-national libel, but not recommending reform at the time of the report because “any solution would require an international treaty, accompanied by greater harmonisation of the substantive law of defamation.”) See also Garnett & Richardson, *supra* note 23 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. . .”); Zick, *supra* note 24, at 1588 (multilateral treaties regarding enforcement of foreign judgments might produce a more coherent and legitimate approach to the treatment of foreign libel judgments . . .”). Cf. Partlett, *The Libel Tourist and the Ugly American, supra* note 24, at 632 (critically characterizing the current debate – a “disputation” featuring “the caricature of the rogue [libel tourist]” – as a “poor way to carry forward analysis[.].”) and suggesting that “a conversation must be commenced,” leading to the development of norms that will “evolve over time, under the aegis of informed sensitive courts and insightful scholarship that reaches for consensus and understanding in a global setting.”) Professor Partlett argues that “technology creates an international commons, where nations’ laws have a limited role[,]” and that “[i]n the absence of internationally binding rules, made by supranational bodies, the development of norms will depend upon the nurturing of a culture of cooperation between players . . . [that will] promote reciprocity and not conflict. . .” Id. at 632. Others also see a more cosmopolitan First Amendment extending its influence beyond American borders, (see, e.g., Zick, *supra* note 24, at 1588 and 1626) and developments in Europe that “may result in greater sensitivity to principles akin to the First Amendment (Thomas S. Leatherbury, *ALI Takes Position on Foreign Judgments (Including Those Against the Media),* 23 COMM. LAW. 25, 27 (2005), quoting American Law Institute proposed draft on recognition and enforcement of final judgments).


174 Id. at 638-39.
undermine free speech in fundamental ways, given that globalization has already spread American speech ideas to much of the rest of the world.\textsuperscript{175} Even some scholars skeptical of world-wide harmonization of substantive libel law suggest that the solution might be the adoption of an international agreement on choice of law.

The idea of a single harmonized substantive standard is very attractive, especially for genuinely transnational conflicts over genuinely conflicting values (which even an international choice of law treaty would probably not be able to resolve). Yet, such substantive harmonization is troubling from the point of view of those wishing to maximize speech-protective results.\textsuperscript{176} Defamation laws necessarily reflect each country’s notion of the appropriate balance between reputation, privacy and free speech.\textsuperscript{177} To the extent that there are wide variations in how different countries balance these factors, attempts to achieve substantive harmonization will either fail or lead to problematic compromises on otherwise fundamental social and political commitments. Because of these concerns, this Article does not call for substantive harmonization of libel law.

\textsuperscript{175} See Zick, \textit{supra} note 24. \textit{See also} Partlett, \textit{Libel Tourist and the Ugly American, supra} note 24, at 641 (“in recent years, even in Commonwealth countries with their faith in the common law tradition to weigh and protect rights, the balance has been shifting in favor of free expression.”)

\textsuperscript{176} This is the case both for those who wish to export American speech norms abroad, and also for those concerned about the effects of foreign law on freedom of speech domestically in the US. With respect to the former, it is unlikely that global substantive harmonization of libel laws would extend the American conception of freedom of speech world-wide. The opposite is likely to occur. Zick, \textit{supra} note 24, at 1622 (“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.”); id. at 1611. \textit{See also} 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, \textit{supra} note 24 (arguing against harmonization).

A critical obstacle in the path of harmonization is the problem of feasibility. International agreements often take a very long time to be negotiated and thereafter enter into force. There is no guarantee that even multi-lateral agreements will command world-wide adherence. Even an international treaty on jurisdiction or choice of law in defamation cases is an unlikely prospect.\(^{178}\)

Moreover, there are underlying issues of value raised by the prospect of compromises having significant impacts on free speech issues. With regard to changes in English libel law, even the media-protective current British proposal does not reach as far in the direction of protecting speech as does *New York Times v. Sullivan*.\(^{179}\) Contrary to the predictions of some, harmonization is less likely to export the protections of the First Amendment abroad than to import at least some reputation-promoting European rules

\(^{178}\) Substantive harmonization is likely to be difficult to achieve when different countries have historically balanced freedom of speech and reputation differently. International treaties are not easy to conclude, particularly in those circumstances. The history of the recently-proposed Hague convention on the recognition of foreign judgments – which apparently “fell apart due, in part, to differences regarding libel actions[,]” – suggests skepticism about a treaty-based solution in the near future, even if only with respect to jurisdiction and choice of law. An international treaty regarding jurisdiction and enforcement of judgments was proposed in the Hague Conference on Private International Law, but failed. Only a treaty regarding enforcement of judgments based on forum selection clauses in contracts was agreed to. Garnett & Richardson, *supra* note 23, at 481; McFarland, *supra* note 2, at 631.

\(^{179}\) Some scholars argue that technology requires the recalibration of the balance between reputation and free expression struck in the United States at the time of *Sullivan*. Professor Partlett, for example, contends that “the Internet and the globalization of public affairs have turned the world into a version of the village, where reputation and privacy are critical for persons whose fame is global, and even for those persons of little notoriety who are caught in situations that pique the idle curiosity of the cyberspace audience.” Partlett, *The Libel Tourist and the Ugly American*, *supra* note 24, at 640. He also questions whether English libel judgments really do exert a significant chilling effect, concluding that “foreign laws do not unduly affect U.S. coverage[]” Id. at 648. and that the fear of the chilling effect “is much overblown.” Id. at 658. While Professor Partlett admits that American journalists publishing overseas “seem to be somewhat more conservative than those who publish in the United States,” he concludes “perhaps not decidedly so.” Id. But how much chill must be demonstrated before the chilling effect should be considered significant? Doesn’t the very definition of the chilling effect – as it refers to things absent rather than present – make it very difficult to measure?

Professor Partlett claims that practical considerations – such as US courts’ disinclination to enforce foreign libel judgments – “may [\] more than offset” the chilling effect, (Id. at 648-49) that conclusion makes many assumptions. One could question whether speakers in fact engage in the kind of analytical risk-assessment that would be required to reach that conclusion. Maybe, instead, they publish material that does not require engaging in that analysis.
that might well chill important kinds of critical speech in the United States. Even if
American approaches to speech have begun to influence other countries at a level of
generality (or attitude), that is a far cry from concluding that a standard as speech-
protective as the actual malice standard for speech about public figures would be
acceptable to the British, for example, even if one were considering only the bilateral
context of the United States and the United Kingdom. General influence is quite distinct
from compatibility at a granular level.

Perhaps *Sullivan* – as a case focused on protecting core political speech in a
fraught social context – becomes more important, rather than less relevant, at a time of
increasingly cross-border, global information flow. And perhaps reputation, while
potentially global, is also more ephemeral and malleable than at the time of *Sullivan* – as
public attention wanes more quickly, as those attacked have access to global resources to
respond, and as society seems increasingly to accept redemption. The appropriate
metaphor may not be the village as much as the airport, and the representative Michael
Vick. Particularly when persons with otherwise tarnished reputations seek to use libel
judgments to improve their global and/or local standing, libel law seems to be being used
for different strategic purposes than intended.

For reasons having nothing to do with libel laws, today’s media environment is
already far from the kind of fearless press we should promote. Nor is the American
jurisprudence of defamation as expansive and robust as speech absolutists might like to
claim. It risks too much of what the First Amendment values to engage in the doctrinal
compromises that would be entailed domestically in any serious process of substantive
harmonization.\textsuperscript{180} With global dissemination of speech merely a tweet away, there is much to worry about if harmonization does not list in favor of speech over reputation.

But perhaps even more troublesome is the domestic impact on free speech of an internationally harmonized standard. Any attempts to cabin the harmonized standard to international libel contexts is likely to fail, at least over the long term. Even if the increasingly voluble and polarized political debate in the United States might be improved by a domestic defamation law less speech-protective than the current \textit{Sullivan} standard, such a desirable outcome is still in tension with fundamental assumptions of the First Amendment for domestic speech.

Doesn’t this Article’s doubts about harmonization simply assume that American speech law is better than any conflicting country’s and should control, even with respect to genuine transnational problems where both the United States and less speech-prioritizing countries have real and substantial interests? Isn’t this ultimately the kind of American legal imperialism that is criticized by scholars and dismissed by English jurists?\textsuperscript{181} 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, as described below, will help courts make a careful and context-specific analysis

\textsuperscript{180} \textit{See} Wyant, \textit{supra} note 24, at 401-402. \textit{Cf.} Zick, \textit{supra} note 24, at TAN 441, 470-74 (while “[r]ather than exportation of the First Amendment, the flattening of territorial borders may lead to the importation of foreign speech standards and principles[,]” “alarmism over invading foreign speech norms, the Europeanization of the First Amendment, and loss of constitutional sovereignty seems unwarranted.”) For a view that while “[f]ree speech is a crucial ingredient of democracy, . . . it surely does not turn on any one particular brand of liability rule[,]” and that “one cannot claim superiority for one [Sullivan] over the other [British libel rules], see Partlett, \textit{The Libel Tourist and the Ugly American}, \textit{supra} note 24, at 658-59. Professor Partlett argues that “the production of information will be influenced by non-legal norms that will grow in cyberspace. Here in globalization is the possibility of deliberative, democratic conversation that enhances democratic culture and individual self-realization. . . . The courts may play a central role, but will not do so if compromised by rent-seeking legislation found in Rachel’s law. . . . Free speech, as in any liberty, does not come wrapped in one flag.” Id. at 659-660.

\textsuperscript{181} \textit{See} n. 117, \textit{supra}.
about which law should apply. Even in situations closer to equipoise in terms of governmental 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 their own speech traditions.

IV. Self-Help: Exploring Voluntary Solutions

Most articles on libel tourism have discussed legal solutions, with few focusing on non-legal changes. Yet 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.\footnote{Moreover, legal responses have been criticized as increasingly irrelevant in a context in which “technology creates an international commons, where nations’ laws have a limited role.” Partlett, The Libel Tourist and the Ugly American, supra note 24, at 632. Professor David Partlett has argued that, without internationally binding rules, “the production of information will be influenced by non-legal norms that will grow in cyberspace.” Id. 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.}

Voluntary initiatives, on the other hand, can be useful both defensively, and as part of cooperative efforts to develop global respect for speech-protective norms.\footnote{Professor Partlett has said that “[t]he vice may be in new technologies, but its solution may also be there as media groups respond to the lack of harmonization by taking self-censoring measures sensitive to the laws and regulations of foreign jurisdictions.” Partlett, The Libel Tourist and the Ugly American, supra note 24, at 632. But one need not succumb to Professor Partlett’s apparent support for media self-censorship to imagine both defensive voluntary measures that would reduce the chilling threat of foreign libel law and initiatives to promote the accuracy and reliability of information. The latter initiatives would hopefully help foster the kind of cooperative spirit that might lead non-US courts to apply their libel laws with more sensitivity to US speech interests.}

Accordingly, this Article first suggests methods for generating practical self-help ideas for speakers. For example, the chilling effect of the threat of libel tourism could be
minimized by voluntary changes on two fronts: 1) reducing the costs of defending libel suits abroad; and 2) improving internal processes and bolstering accuracy. The benefit of speaker-focused alternatives is that they do not depend on changes in foreign legal rules and can be implemented immediately. To the extent that improvements to accuracy enhance the reputations of institutional speakers, such voluntary efforts can help shift the attitudes of those applying the legal rules on defamation.

Reducing the costs of defending libel suits abroad would require structures for financial support that would match speaker and funder incentives. As for improving accuracy, increased access to documents, enhanced journalistic self-criticism, and worldwide dissemination of “best practices” education might be fruitful.

A. Defending Suits: Exploring Alternative Avenues for Financial Support

Since expense is a major culprit in the chilling effect of foreign libel actions, reducing the expense would help mitigate the threat. Libel actions, especially in England, are extremely expensive. Between the high cost of libel counsel, the typical involvement of both barristers and solicitors, and fee shifting, the legal costs of litigating are prohibitive for any but the richest corporate defendants.184

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

A report written for the Center for International Media Assistance suggested recently that news organizations could respond to the high cost of waging libel actions in destinations like England by creating an insurance company and/or a joint libel defense

184 See, e.g., FREE SPEECH IS NOT FOR SALE, supra note 66, at 10; Staveley-O’Carroll, supra note 24, 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 £1300 per hour.”)
fund to help defendants.\textsuperscript{185} While the Report notes that “[t]here are many ways to structure such a system[,]”\textsuperscript{186} the proposal centers in the Report on a media-funded libel defense fund.

A significant legal defense fund should certainly have a deterrent effect on strategic libel tourism by making the fights less one-sided. While the idea of a libel defense fund is attractive, the participants’ incentives make a media-funded version unlikely. 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 of a media-funded libel defense war chest for the industry as a whole, funding might more readily and realistically come from those interested in particular areas of reporting.\textsuperscript{187} Targeted (and publicized) libel defense funds 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 abroad. So, for example, if organizations outside the press or the academy were to organize a libel defense fund for free speech in terror writing – a funding proposition

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\textsuperscript{186} 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 . . . ”)
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\textsuperscript{187} See Clare Dyer, \textit{Charity sets up find to defend researcher being sued for libel}, BMJ 2008; 337:a2822, Dec. 2, 2008, available at \url{http://www.bmj.com/content/337/bmj.a2822.full}, last visited March 10, 2011 (“The registered charity HealthWatch has set up a fund to support Peter Wilmhurst. . . ”)
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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-sourcing of journalism, and foundation financing. Grass-roots electoral fundraising on the web and electronic press experiments in “crowd-sourcing” some stories teach us that this kind of funding could come not only from interested organizations, but also from individual donations via the web.\(^{188}\) The key to this proposal is the alignment of funding sources with participant incentives.

The proposal poses little or no risk of government censorship. Some might respond that this approach might lead to narrow and politicized protections for speech, and skew the kinds of investigative journalism or academic critique in which speakers would engage. A system under which litigation support would be targeted to issues of concern to ideological interest groups could, it might be argued, skew decisions about what is to be covered 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 with funding by groups with 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

\(^{188}\) 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 transaction costs and reduce chill.
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 funders 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 organizations develop ways to deal with the possibilities of conflict with their funders, sensitivity to this issue could lead to minimized threats here.\textsuperscript{189}

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 tax treatment of such donations and coordination and administrability problems – would need to be addressed before a robust system of targeted libel defense funding could become operational and efficient.

2. \textit{Insurance Based on Independent Story Review}

\textsuperscript{189} This Article does not explore any public funding strategies for such libel defense funds. It would be possible to explore the possibility of a governmentally-funded libel defense war-chest 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 are made in the laws of libel tourism destinations. I am skeptical about whether a public subsidy approach is either realistic or able to be speech-neutral, however. Given current Congressional attempts at drastic cutting of government speech subsidies in the context of public broadcasting, a libel defense fund project would be even less likely to be passed. More importantly, this option is troubling because of concerns about government censorship in the allocation of such funds. The central issue posed by this funding option is how to structure the government subsidy in order to minimize the dangers of government speech selection. Although we could attempt to construct 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.”
In addition to libel defense funds, some commenters have focused on insurance as a hedge against the threat of libel tourism.\textsuperscript{190} 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.\textsuperscript{191}

The problem is that the risk posed by libel actions is particularly difficult for insurance companies to value. Therefore, the private insurance market might develop more broadly and robustly if mechanisms could be developed to help insurance companies better assess the risks of libel judgments. One way this might 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.\textsuperscript{192}

This is a less desirable alternative than the libel defense fund, however, because it makes insurers and independent fact-checkers the arbiters of journalistic process and

\textsuperscript{190}See SULLIVAN, LIBEL TOURISM REPORT, supra note 24, at 30-31; Wyant, supra note 24, at 414-15. Another suggestion that appears in the literature for self-help responses in the context of Internet publishers is website disclaimers, visitor agreements, and the use of geo-location technology to prevent access to their sites. See, e.g., Wyant, supra note 24, at 411-415 (discussing these options). See also Cooper, supra note 185 (recommending user agreements, geolocation technology, and cyberliability insurance). These suggestions are not further explored here, as contract-based solutions will not predictably be effective (see id. at 412-13) and access-blocking technology is neither foolproof (see id at 413-14) nor desirable as a policy matter.

\textsuperscript{191}See, e.g., SULLIVAN, LIBEL TOURISM REPORT, supra note 24, at 30. While one article on libel tourism suggests that “the insurance companies have responded to the demand for e-commerce insurance” (see Wyant, supra note 24, at 414), and while it characterizes obtaining insurance as a “duty of the corporate risk manager, (see id. at 115), it nevertheless recognizes the uncertainty of e-commerce media liability insurance (see id. at 415).

\textsuperscript{192}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 24, at 31.
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. Those arbiters of journalistic practice would not be motivated by equivalent commitments to free speech. Professor Amy Gajda has perceptively noted that journalistic codes of practice and ethics, adopted by journalistic organizations for their own reasons, have been transformed into minimum standard requirements used by courts to assess journalist behaviors in tort cases.193 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. They 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 regarding the insurance option. Instead, it seeks to identify the factors deserving of extensive consideration in the debate over the structure of the insurance alternative. The ultimate question is whether there are ways to structure insurance-related options that would reduce the threat to speech norms significantly enough to make the experiment worth-while.

3. Encouragement of Pro Bono Libel Review:

Scholars have also proposed reliance on training resources and *pro bono* pre-publication review by knowledgeable lawyers.\(^{194}\) Some help in terms of training, informational resources, and financial aid for libel defense is already available.\(^{195}\) More broadly, one can imagine a world-wide consortium of libel law experts whose pro bono efforts could be coordinated by an institution such as a bar association and accessible via online communication.\(^{196}\) Training of journalists and lawyers could be very useful to those who currently publish without the benefit of libel counsel.\(^{197}\) It could also serve to acquaint non-specialist lawyers with the intricacies of foreign law. As for pre-publication review, although major news organizations legal departments or outside counsel can provide that service, independent pro bono libel review would be a helpful resource for

\(^{194}\) The recent Libel Tourism Report recommends *pro bono* libel defense and pre-publication review *See* SULLIVAN, *LIBEL TOURISM REPORT, supra* note 24, 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.

\(^{195}\) *See* SULLIVAN, *LIBEL TOURISM REPORT, supra* note 24, 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 as well 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.*

\(^{196}\) Some pro bono libel assistance already exists in England. *See* SULLIVAN, *LIBEL TOURISM REPORT, supra* note 24, 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 as well 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.

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journalists and organizations without access to libel lawyers. And it might provide journalists an alternative review – either to contest their institutional lawyers’ assessments, or to permit franker discussion by journalists at any point during their story developments.

Whether such a program could be adequately staffed is an empirical question. There may be ways of creating incentives for this kind of service.\(^{198}\) Moreover, we can expect that such pro bono efforts would be more likely for publication reviews than for full-fledged trials. Perhaps most 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. 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 the likelihood that they are likely to be risk-averse in their interpretations of foreign law, these pro bono lawyers will by definition be constraining the journalists’ work to conform to the standards of less speech-protective jurisdictions.

A. Improving Processes/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 likely be reduced if the press were to improve its internal processes and make changes to bolster accuracy. While the principal suggestion of this kind in the literature is that journalistic “best

\(^{198}\) If, for example, bar associations were to authorize CLE credit for this kind of effort, there would likely be an increase in volunteers.
practices” education be promoted, especially in the developing world, this Article suggests that real differences could also be made by focusing on access to information and other practical ways of enhancing professionalism.

1. Seeking Enhanced Access to Documents:

The most helpful tool for both improving press accuracy and easing the burdens of demonstrating truth would be the expansion of electronic access to information. For example, 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 by those assessing story credibility. Broad and timely access to data would also help journalists find supporting documentation for information gleaned from anonymous sources on which they could not rely to prove truth in a libel trial. Freely available information would also help other journalists engaged in monitoring their industry. The point here is that with access to information and reduced transactions costs in its use, the inadvertent error or overstatement can be much more easily avoided than in the past. Improved accuracy in turn leads to fewer targets for trans-national libel initiatives.

To be sure, there are significant hurdles to information access. While the Obama administration has called for widespread electronic access to federal government documents, differential compliance by government departments has led to delays in the implementation of this initiative. Many state and local governments limit access to their documents online. Access to private industry documents in the US is even harder. Much information in the private sector is considered trade-secret or trade-sensitive. It is highly unlikely that it would be made generally available to reporters for the purposes addressed
“Scoop mentality” and competition among journalists and news organizations will be in tension with information-sharing initiatives. With respect to access to international documents and information, the extent of their availability is extremely variable. Finally, there is an increasing social concern about privacy with respect to the massive collections of information now available about individuals.

None of these realities should derail the recommendation here that the press focus its energies on enhancing access to information. Whatever their limits in operation, government open records policies have made millions of documents easily accessible. “Google” has become a verb, referring to search for instantly available information about practically anything. Social networks create the possibility of crowd-sharing information. Foundations and educational institutions have created massive databases of information relating to important public issues – such as elections, charitable contributions – that they typically make available for non-profit purposes. Many private companies’ governmental filings (such as SEC and FCC filings) are accessible, often without the need for an FOIA request. 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 part of the “access to information” issue at a time of such informational abundance.

2. **Journalistic Self-Criticism:**

Significant attention must be paid to improving the journalism process and content quality in the media today. The critical factor is accountability. The press would
surely be enhanced with more general deployment of ombudsmen or “public editors” by
news organizations. Internal professional scrutiny would be likely to promote higher
professional standards. At the same time, external accountability through public criticism
could help improve professionalism. Journalism magazines have historically assessed the
performance of participants in their profession. Now, bloggers have taken to
commenting on the originality, accuracy, and completeness of news reporting. Building
structures of professional accountability and inviting examination and self-examination
by journalists would generate significant public benefits.

But do today’s circumstances make it unrealistic to call for improvements in press
processes? Unlike the newspapers of the 1970s, whose private ownership and supra-
normal profits generated commitments to journalistic excellence through noblesse oblige,
or the television networks of the time, whose FCC-protected oligopoly permitted the
pursuit of news and the public interest without fear of competition, traditional news
organizations today are haunted by the bottom line. Newsrooms are working with
reduced staff, the electronic news media are operating in a competitive 24-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 maximal 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 particularly the moment for the revival of professional standards.

3. “Best Practices” Education:
One suggestion in the literature for voluntary responses to libel tourism is the expansion of education initiatives for journalism “best practices.” This would be particularly useful for promoting high journalistic standards in places with less developed and sophisticated press traditions. 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.

Will promoting high levels of ethics, professionalism, and accuracy in reporting deter strategic libel plaintiffs who are suing abroad for political reasons? Will the truth of what was said deter such plaintiffs’ attempts to use claimant-friendly libel law to censor opposition? 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 tourism. Even strategic libel claimants might 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 might counsel caution.

Conclusion

See, e.g., SULLIVAN, LIBEL TOURISM REPORT, supra note 24, at 34-5.

Id. at 34.

Some might argue that the second difficulty for calling for improved journalism is that American defamation law protects even those who are sloppy in their journalism – 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 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 be benefited.
There is widespread agreement that libel tourism has become a significant chilling force on American authors and journalists. Congress’ first federal statute dealing with the subject – the SPEECH Act – cannot adequately counteract the effects of forum-shopping foreign libel actions on speakers with assets in England, Commonwealth, and European countries, or the professional and personal need to visit those venues.

While we could hope that substantive changes in British libel law resulting from the consultation process on the Draft Defamation Act 2011 – could help American speakers in the long run, negotiating those reforms will take time. It is also unclear whether the ultimate changes to British defamation law will adequately protect American speech interests in many trans-national libel contexts beyond the most trivial. Given the discretion allowed judges under the proposed reforms, much will depend on how the rules, if adopted, are implemented. The libel reform legislation currently proposed in Britain could be quite helpful in the most prototypical, obvious libel tourism case – where, for example, none of the parties have any relevant connections with England – if the courts were to apply its provisions liberally. With respect to trans-national libel cases where there are more genuine transnational interests, however, the proposed legislation does not purport to guide British courts. The Article suggests that even when British courts choose to exercise jurisdiction in trans-national defamation cases, they should also apply government interest methodology in their choice of law decisions. It recommends that the forum court consider deferring to American free speech interests when the British libel suit is likely to have the effect of censoring core political speech – the kind of speech that American constitutional culture defines as foundational to
democracy – in the United States. Diplomacy and continuing publicity about the problem of libel tourism might assist in promoting such changes.

In the meantime, speakers need to explore voluntary responses to libel tourism. Since the expense of fighting foreign actions is a major reason behind their chilling effect, one type of self-help response must focus on ways of reducing the expense for defendants and thereby making such actions less attractive for plaintiffs. First, it would be helpful to develop new ways of funding libel defense funds, rather than relying on press self-funding. Community support is a potentially viable alternative worth exploring. Second, we should consider whether independent story review could be structured to promote the availability of defamation insurance without unduly compromising journalistic independence and editorial content control. Third, we should enhance the availability of pro bono libel counseling, again with a view to reducing any subtle self-censorship triggered by legal involvement.

In addition to helping speakers defend against libel actions, we should consider ways of enhancing press accuracy. Perhaps the most important tool in that connection is access to, and efficient use of, information. The Article argues for enhanced electronic access to documents as a useful way both to help prove truth, and to enable professional assessment and critique of journalistic work. As professional standards will most often improve the work of the press, an expansion of journalistic “best practices” education is also critical. And since accountability requires watch-dogs, journalistic self-criticism must be expanded – both internally, with more institutional ombudsmen, and externally, with more journalism reviews, academic attention to content and quality, and competitive critique within the profession.
In the final analysis, the libel tourism cases to be concerned about are not those brought by Hollywood stars. Rather, they are the cases that threaten to censor academic freedom and speech important to democracy. The press today is economically under siege. Press organizations face significant incentives to avoid expensive and controversial accountability coverage. Academic publishers, always of slender purses, are a buyer’s market that can set highly risk-averse standards for controversial work regarding matters of public importance. ISPs are economic and not fiduciary entities, and cannot be expected to resist challenges to user-generated content for ideological reasons that cut against the bottom line. The threat of strategic libel tourism in these circumstances should not be minimized. Nor should we underestimate, however, the possibility of improvement through a joint strategy of legal change, community support, speaker self-improvement, and enhanced professional accountability.