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# Please Do Not Publish this Article in England: A Jurisdictional Response to Libel Tourism

Robert L. McFarland



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Please Do Not Publish this Article in England:  
A Jurisdictional Response to Libel Tourism

Robert L. McFarland<sup>1</sup>

Anyone interested in First Amendment jurisprudence is no doubt aware of, an probably disturbed by, the story of Dr. Rachel Ehrenfeld's recent plight in England. Ehrenfeld, a counter-terrorism expert, was recently sued in England by Sheikh Khalid bin Mahfouz, a wealthy citizen of Saudi Arabia and former chairman of the National Commercial Bank of Saudi Arabia.<sup>2</sup> Mahfouz's suit alleged that statements in Ehrenfeld's book, *Funding Evil: How Terrorism is Financed and How to Stop It*, defamed him and damaged his English reputation.<sup>3</sup>

Despite the fact that Ehrenfeld's book was published in the United States and the suit was brought by a foreign citizen, the English High Court authorized use of England's long-arm powers and allowed the libel action to proceed. England's interest in the civil action between the Saudi citizen and the American author was founded on the purchase of 23 copies of the book in England via Amazon.com. The court also relied on an internet contact finding that "the first chapter was separately available on www.ABCnews.com" and, accordingly, viewable anywhere in England.<sup>4</sup> Ehrenfeld refused to appear and the English court entered a default judgment of £20,000.<sup>5</sup>

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<sup>1</sup> Associate Professor of Law, Faulkner University, Thomas Goode Jones School of Law. The author extends his thanks to Steven Wilson and Justin Seamon for their research assistance.

<sup>2</sup> See *Bin Mahfouz v. Ehrenfeld* [2005] EWHC 1156 (QB); see also *Ehrenfeld v. Mahfouz*, No. 04 Civ. 9641(RCC), 2006 WL 1096816 at \*1 (S.D.N.Y.) ("Bin Mahfouz is a citizen of Saudi Arabia and was formerly the chairman and general manager of the National Commercial Bank of Saudi Arabia."). According to *Forbes.com*'s list of global billionaires, Mahfouz's net worth is estimated to be \$3.2 billion. See <http://www.forbes.com/lists/2006/10/JKTG.html> (last visited Mar. 12, 2009). Mahfouz has successfully obtained numerous libel judgments in Britain against publishers linking him to the world-wide financing of terrorism. See [http://www.binmahfouz.info/faqs\\_4.html](http://www.binmahfouz.info/faqs_4.html) (last visited Feb. 24, 2009). Mahfouz's British libel action against Cambridge University Press resulted in the destruction of all copies of the 2006 book *Alms for Jihad*. See David Glenn, *Cambridge U. Press Seeks to Destroy All Copies of Book on Terrorism to Settle Libel Lawsuit by Saudi Businessman*, THE CHRON. OF HIGHER ED., Aug. 10, 2007, at 13. Mahfouz has pursued similar libel actions against foreign publishers in Belgium. See Ken Silverstein, *Top Investigator in 9/11 Victims' Lawsuit Faces Libel Action*, L.A. TIMES, Feb. 26, 2003 at A18.

<sup>3</sup> Ehrenfeld's book "alleges that the Bin Mahfouz family is one of the main sponsors of Al Qaeda and other terrorist organizations." *Bin Mahfouz v. Ehrenfeld*, *supra* note 1 at ¶ 16.

<sup>4</sup> See *id.*

<sup>5</sup> See *id.* at ¶ 74-75. The court also awarded Mahfouz fees and costs in excess of £30,000. Dr. Ehrenfeld's account of the English litigation against her is available at RACHEL EHRENFELD,

Unfortunately, Dr. Ehrenfeld's experience is not unusual.<sup>6</sup> British courts are increasingly an international hot spot for trans-national libel disputes.<sup>7</sup> A string of recent English libel decisions filed against American authors and publishers<sup>8</sup> are, in essence, a travel brochure sent out to the citizens of the world. Visit England: while here, hire an English Solicitor, at little to no cost to you,<sup>9</sup> and allow our courts to vindicate your international reputation. Such "libel tourism" actions are springing up elsewhere around the globe.<sup>10</sup>

The libel tourism industry has generated a great deal of criticism.<sup>11</sup> Two state legislatures have already responded. In New York, Ehrenfeld's plight resulted in passage of "Rachel's Law" (a/k/a The Libel Terrorism Protection Act of 2008).<sup>12</sup> Illinois also adopted a similar legislation.<sup>13</sup>

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FUNDING EVIL: HOW TERRORISM IS FINANCED AND HOW TO STOP IT xi-xvi (2nd Ed. 2005).

<sup>6</sup> For a detailed account of a British libel battle and the extent such actions interfere with First Amendment interests see DEBORAH E. LIPSTADT, *HISTORY ON TRIAL: MY DAY IN COURT WITH DAVID IRVING* (2005). Professor Lipstadt, the Dorot Professor of Modern Jewish and Holocaust Studies at Emory University, was sued in England for statements identifying David Irving as a Holocaust-denier. See *id.* at xviii.

<sup>7</sup> See, e.g., Geoffrey Wheatcroft, Op-Ed., *The Worst Case Scenario: British Libel Law Means Our Press Is Vulnerable and the Wealthy are Shielded From Criticism*, THE GUARDIAN, Feb. 28, 2008 at 32.

<sup>8</sup> *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004 (H.L.); *Lewis v. King* [2004] EWCA Civ 1329; *Dow Jones & Co., Inc. v. Jameel* [2005] EWCA Civ 75; *Richardson v. Schwarzenegger* [2004] EWHC 2422 (QBD).

<sup>9</sup> British law firms are permitted to represent libel plaintiffs on the basis of a "no win, no fee" arrangement. See Wheatcroft, *supra* note \_\_\_\_ at \_\_\_\_ ("[England's] libel law has always been heavily weighted in favour of the plaintiff. Unlike the defendant in a criminal case or other civil suits - or in a US libel action - he is assumed to be in the wrong, and must prove that 'the words complained of' are true. Under 'no win, no fee', the plaintiff is gambling someone else's money, while the defendant is on a hiding to nothing.").

<sup>10</sup> See notes \_\_\_\_ - \_\_\_\_ and accompanying text.

<sup>11</sup> See, e.g., Arlen Specter & Joe Lieberman, Op-Ed., *Foreign Courts Take Aim at Our Free Speech*, WALL ST. J., July 14, 2008 at A15; Adam Cohen, Op-Ed., "Libel Tourism": *When Freedom of Speech Takes a Holiday*, N.Y. TIMES, Sept. 15, 2008 at A24; *Writ Large: Are English Courts Stifling Free Speech Around the World?*, ECONOMIST, Jan. 8, 2009; Floyd Abrams, Op-Ed., *Foreign Law and the First Amendment*, WALL ST. J., April 30, 2008 at A15.

<sup>12</sup> N.Y. CIV. PRAC. LAW § 302(d) (McKinney 2008). For a summary of the New York

Congress is now considering a proposed federal legislative response.<sup>14</sup> Even the United Nations Council on Human Rights has voiced concern that England's libel laws are interfering with international expressive rights.<sup>15</sup>

It is clear that policy-makers in the United States, as well as all authors, publishers lawyers and scholars, are concerned about the growth in the libel tourism industry abroad. The problem of foreign libel judgments in the global communication era is not, however, a recent development.<sup>16</sup> In 1953, Dean Prosser noted this problem of international libel exposure in the

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legislation *see* David D. Siegel, "Libel Terrorism" Bill, 239 N.Y.L.J. 2, Mar. 12, 2008. *See also* notes \_\_\_ – \_\_\_ *supra* and accompanying text.

<sup>13</sup> 735 ILL. COMP. STAT. 5/2-209 (West 2008). *See also* notes \_\_\_ – \_\_\_ and accompanying text.

<sup>14</sup> In 2008, the House passed H.R. 6146. This resolution provides that U.S. courts may not en foreign libel judgments "unless the court determines that the foreign judgment is consistent with the first amendment." *See* H.R. 6146, 110th Cong. (as passed by the House, Sept. 27, 2008). The Senate did not consider the resolution prior to the adjournment of the 110th Congress.

In addition to H.R. 6146, Representative Peter King (R., N.Y.) and Senators Arlen Specter (R., Pa.) and Joe Lieberman (I., Ct.) introduced the Free Speech Protection Act of 2008 in the 110th Congress. *See* H.R. 5841 and S.B. 2722, 110th Cong. (2008). Unlike H.R. 6146, the Free Speech Protection Act would have created a new federal tort allowing the American author or publisher to sue the foreign libel plaintiff and seek compensatory and punitive damage. In effect, the act would punish a foreign libel plaintiff for seeking a civil remedy in foreign courts. The Free Speech Protection Act also proposed long-arm jurisdiction based solely on the foreign plaintiff's filing of a foreign suit against "and U.S. person." *See id.* *See also* Specter and Lieberman, *supra* note \_\_\_. The 110th Congress did not vote on the FSPA of 2008 prior to adjournment.

The 111th Congress is now considering the Free Speech Protection Act of 2009. *See* H.R. 1304 (introduced Mar. 4, 2009) and S.449 (introduced Feb. 13, 2009). The FSPA of 2009 is discussed in more detail *supra* at notes \_\_\_ - \_\_\_ and accompanying text.

<sup>15</sup> *See* Duncan Campbell, *British Libel Law Violates Human Rights, U.N. Says*, THE GUARDIAN, Aug. 14, 2008 at \_\_\_\_\_.

<sup>16</sup> "In an era of global publishing, particularly over the Internet, the hazards of foreign speech and defamation laws are very much an American problem. And they have the potential to affect a wide range of defendants - from large media corporations to individuals clicking and clacking into cyberspace from their home PCs." Bruce D. Brown, *Write Here. Libel There. So Beware*, WASH. POST, April 23, 2000 at \_\_\_\_\_. *See also, e.g.*, Floyd Abrams, *Foreign Law and*

first footnote of his well-known article *Interstate Publication*.<sup>17</sup> Unfortunately, Dean Prosser sat the international component of the problem aside and focused his attention on the complexity of publication within the United States.<sup>18</sup> A number of scholars since then have examined the question of recognition and enforcement of international libel judgments.<sup>19</sup> Yet American authors and publishers remain concerned about their exposure in foreign courts.<sup>20</sup>

Foreign libel actions filed against American authors give rise to a quandary. On one hand, foreign speech laws rarely provide American defendants with the same level of protection as that secured by the First Amendment.<sup>21</sup> On the other hand, well-rooted doctrines of private

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*the First Amendment*, WALL ST. J., April 30, 2008 at A15.

<sup>17</sup> 51 Mich. L. Rev. 959.

<sup>18</sup> *Id.* Shortly after publication of Prosser's article, many states adopted the Uniform Intrastate Publication Act. This act adopted the single-publication rule and, therefore, reduced the number of conflicts between states in state defamation litigation.

<sup>19</sup> See Jeremy Maltby, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 Colum. L. Rev. 1978, 1982 (1994); 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, 3076-77 (2006); Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 Brook. L. Rev. 999 (1994); Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law?*, 16 Hast. Comm. & Ent. L.J. 235 (1994). For a summary of the European approach to this issue see DAVID I. FISHER, *DEFAMATION VIA SATELLITE: A EUROPEAN LAW PERSPECTIVE* (1998).

<sup>20</sup> See, e.g., CHARLES J. GLASSER JR., *INTERNATIONAL LIBEL AND PRIVACY HANDBOOK: A GLOBAL REFERENCE FOR JOURNALISTS, PUBLISHERS, WEBMASTERS, AND LAWYERS*, xv-xvi (2006). "[T]here is no doubt that being sued for libel is something to avoid. When questions of international law appear, it raises the stakes even higher. The threat of libel litigation is now exacerbated by the reach of the Internet. . . . Given that libel suits are often ruinous, if not emotionally grueling, given that words are sent instantly around the world and archived forever, are there guidelines that reporters and editors should use? What is needed is a global approach requiring that reporters and editors review their practices and philosophy toward global newsgathering, and that they develop an understanding for the basic moral engine that drives each nation's media laws." *Id.*

<sup>21</sup> See, e.g., *id.* at xvi (2006) ("In many nations, there is no constitutional right to press freedom, but the constitution does recognize the personal rights (also called 'dignitary rights' in some jurisdictions). In many of these nations, there simply is no 'First Amendment' that trumps other rights."); see also, e.g., *Telnikoff v. Matusevitch*, 702 A.2d 230, 248 (Md. Ct. App. 1997) (noting that "English defamation law flatly rejects the principles set forth in *New York Times*

international law, foreign relations and conflict of laws jurisprudence strongly favor the recognition of foreign judgments even when the receiving court disagrees with the policies or merits underlying the foreign decision.<sup>22</sup>

Rejection of any foreign court's reasoned judgment respecting the balance between speech, privacy and reputation solely on the basis that the foreign balance differs from *New York Times Co. v. Sullivan*<sup>23</sup> and its progeny<sup>24</sup> reeks of parochialism and invites retaliatory responses from foreign courts. Yet Ehrenfeld's case and others like it vividly demonstrate the need to do something to prevent foreign courts from stripping substantive rights away from American authors and publishers. This article argues that the solution to these competing concerns is found in jurisdictional restraint rather than substantive rights.

This article examines the thorny problem of libel tourism and the foreign libel judgment. Part I defines libel tourism. Part II then explores the current range of responses available to an American author or publisher sued in a foreign tribunal on the basis of statements published

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*Co. v. Sullivan and Gertz v. Robert Welch, Inc.*”);

<sup>22</sup> See REST. (SECOND) CONFLICT OF LAWS § 92 (1971). This deference rests on respect for the co-equal foreign sovereign's right to define the contours of substantive rights and liabilities within its borders. Justice Story, in his classic *Commentaries on the Conflict Between Foreign and Domestic Laws*, writes:

[I]t is the province of every sovereignty to administer justice in all places within its territory and under its jurisdiction, to take cognizance of crimes committed there, and of the controversies, that arise within it. Other nations ought to respect this right ... To undertake to examine the justice of a definitive sentence is an attack upon the jurisdiction of the sovereign, who has passed it. Hence Vattel deduces the general rule, that, in consequence of this right of jurisdiction, the decision made by the judge of the place within the extent of his authority, ought to be respected, and to take effect even in foreign countries.

JOSEPH STORY, COMMENTARIES ON THE CONFLICT BETWEEN FOREIGN AND DOMESTIC LAWS § 585. Judge Cardozo, in *Loucks v. Std. Oil Co.*, eloquently summarized the common law's attitude regarding foreign judgments: “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.”120 N.E. 198, \_\_\_ (N.Y. Ct. App. 1918).

<sup>23</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>24</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1975); *Time, Inc. v. Firestone* 424 U.S. 448 (1976); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

originally in the United States. Part III then argues for a measured strategic response to foreign libel judgments combining judicial restraint with necessary legislative and diplomatic responses. Specifically, domestic courts should recognize or enforce foreign libel judgments only where the foreign tribunal's judgment rests on an adequate jurisdictional footing. In the most egregious libel tourism cases, like Ehrenfeld's, the reviewing court should reject the foreign tribunal's judgment on a jurisdictional rather than substantive basis. This approach will then result in opportunities for the political branches to engage in much needed dialogue with foreign nations regarding protection of expressive rights.

### I. What is "Libel Tourism"?

What is "libel tourism"? The phrase refers to international forum shopping where the libel tourist files a libel action in a forum whose substantive and procedural laws are favorable to the libel plaintiff.<sup>25</sup> The libel tourist's target is often an American author or publisher and his goal is usually circumvention of the First Amendment.<sup>26</sup>

#### A. Libel Tourism in English Courts

England is a well-known destination for libel tourists.<sup>27</sup> There are several reasons why

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<sup>25</sup> See *Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. on Commercial and Admin. Law of the H. Judic. Comm.*, 111th Cong. (2009) (statement of attorney Laura R. Handman, a partner in the firm Davis Wright Tremaine LLP). See also Andrew M. Grossman, *Combating Libel Tourism: Federal Efforts Needed*, Backgrounder No. 2244 Feb. 25, 2009 (available at [www.heritage.org/Research/LegalIssues/bg2244.cfm](http://www.heritage.org/Research/LegalIssues/bg2244.cfm) last visited March 12, 2009).

<sup>26</sup> *Id.*

<sup>27</sup> Three main groups have emerged as frequent libel tourists. First, celebrities, frequently American stars, travel to England to sue, among others, the *National Enquirer*. See *id.* According to one source, celebrities accounted for one-third of all libel actions brought in the United Kingdom in 2007. See Robert Verkaik, *London Becomes Defamation Capital for World's Celebrities*, *The Independent*, Oct. 13, 2008.

The second group of libel tourists are international business moguls. See *Libel Tourism: Hearing on H.R. 6146 supra* note \_\_\_\_\_. The most famous example of such a libel tourist is Boris Berezovsky, the Russian businessman, who's suit against *Forbes* was allowed to proceed by the House of Lords. See *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004 (H.L.).

The third group of libel tourists are plaintiffs like Mahfouz, citizens of middle eastern countries with alleged ties to terrorism. The number of libel suit filed by men like Mahfouz are significant enough that many in England refer to such libel actions as the "Arab Effect". See

libel tourists are attracted to English courts. First, England's substantive libel laws are attractive to the libel plaintiff. England's libel scheme, unlike the U.S. approach, remains one of strict liability.<sup>28</sup> The *prima facie* case of libel merely requires proof of publication of a statement having susceptible of defamatory meaning.

English courts also reject the single-publication rule which is widely accepted in American courts.<sup>29</sup> Thus, each time a defamatory statement is reprinted or downloaded a separate cause of action accrues.<sup>30</sup> This multiple publication approach, combined with England's very broad definition of publication very broadly,<sup>31</sup> enables libel plaintiffs to greatly extend the statute of limitations on their libel claims.<sup>32</sup> The English multiple publication rule, in the context of internet publications,<sup>33</sup> also allows English courts to greatly expand their jurisdictional interest in

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Richard N. Winfield, *British Libel Laws: Cutting Off Crucial Information* (2006) (reviewing CHARLES J. GLASSER JR., *INTERNATIONAL LIBEL AND PRIVACY HANDBOOK: A GLOBAL REFERENCE FOR JOURNALISTS, PUBLISHERS, WEBMASTERS, AND LAWYERS* (2006)) available at [www.firstamendmentcenter.org/commentary.aspx?id=17223](http://www.firstamendmentcenter.org/commentary.aspx?id=17223) (last visited Mar. 13, 2009).

<sup>28</sup> See *Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. on Commercial and Admin. Law of the H. Judic. Comm.*, 111th Cong. (2009) (statement of attorney Laura R. Handman, a partner in the firm Davis Wright Tremaine LLP). "Stark difference exist between U.S. and English libel law. In many ways, libel laws in the U.S. and England constitute mirror images of each other, with the burden of proof shifted to defendant in the U.K. and the plaintiff in the U.S. English libel law is essentially based on a system of strict liability - you make a mistake, you pay. Under English law, any published statement that adversely affects an individual's reputation or the respect in which a person is held is *prima facie* defamatory. The plaintiff's only burden is to establish that the allegedly defamatory statements apply to them, were published by the defendant and have a defamatory meaning." *Id.* (citations omitted).

<sup>29</sup> See *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004, \_\_\_ (H.L.). The single publication has been adopted in numerous state jurisdictions as a means of defining the place of publication and limit the potential nefarious results invited by the English approach. See, e.g., E.H. Schloper, *Conflict of laws with respect to the "single publication" rule as to defamation, invasion of privacy, or similar tort*, 58 A.L.R. 2d 650.

<sup>30</sup> See, e.g., *King v. Lewis*, [2005] E.M.L.R. at 2 ("by the law of England the tort of libel is committed where publication takes place, and each publication generates a separate cause of action.").

<sup>31</sup> For example, text posted on the internet is "published" everywhere it is downloaded. See *id.*

<sup>32</sup> See *Louchansky v. Times Newspapers Ltd.* [2002] QB 57.

<sup>33</sup> See *id.*

libel controversies.

England's fee shifting rules also invite libel litigation.<sup>34</sup> The English rule, shifting all fees to the losing party, is well known. One of the justifications for this rule is that the plaintiff's risk of bearing the defendant's fees discourages the filing of frivolous claims. Even this incentive has been removed in the context of libel disputes because barristers are permitted to represent libel plaintiffs under "no win, no fee" fee agreements. These agreements allow the plaintiff's firm to bring libel cases on behalf of their clients with the firm agreeing to bear the risk of loss. Thus, the disincentive for the libel plaintiff, the threat of bearing the opposing party's fees, is removed.

Although there have been some reforms in English libel law in recent years intending to extend protection for speech rights,<sup>35</sup> English law does not accord with First Amendment jurisprudence.<sup>36</sup> The House of Lords has also adopted an expansive view of English jurisdiction in libel cases. Combine these factors with the "no win, no fee" arrangements and libel plaintiffs are sure to come. This sort of libel forum shopping enables the libel tourist to evade the First Amendment interests of the American author or publisher.

There are numerous recent examples of the phenomenon. Mahfouz's above-described action against Dr. Ehrenfeld well illustrates the problem. Mahfouz also has pursued numerous additional libel actions in Britain (one notable action is Mahfouz's suit against Cambridge University Press which resulted in the pulping of every copy of the book *Alms for Jihad*).<sup>37</sup>

Another well-known example is the libel suit filed by Russian businessman Boris

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<sup>34</sup> See *Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. on Commercial and Admin. Law of the H. Judic. Comm.*, 111th Cong. (2009) (statement of attorney Laura R. Handman, a partner in the firm Davis Wright Tremaine LLP) ("Another stark difference between the English and American systems emerges around the issue of attorneys fees. In England, the courts allow fee shifting. . . . This substantially increases the cost of litigation as most libel cases in the Great Britain [sic] require multiple attorneys.").

<sup>35</sup> In *Jameel (Mohammed) v. Wall Street Journal Europe*, the House of Lords announced a privilege of "fair comment" in an effort to protect "responsible journalism." [2006] UKHL 44. This privilege indicates that English jurists are aware of then chilling impact of England's libel laws on journalism there and are now offering some protection to journalists. The fair comment privilege, however, does not offer the publisher the same level of security guaranteed by the First Amendment. See Kyu Ho Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?*, 13 *Comm. L. & Pol'y* 415, 445 (2008).

<sup>36</sup> See, e.g., CHARLES J. GLASSER JR. *supra* note \_\_\_\_ at 273-74.

<sup>37</sup> See *supra* note 3.

Berezovsky against *Forbes* magazine.<sup>38</sup> Berezovsky, a citizen and resident of Russia, sued *Forbes*, an American magazine, in England alleging that an article researched in Russia and published in America damaged a portion of his reputation residing in Britain.<sup>39</sup> On the basis of less than .02% of *Forbes*' total circulation making its way into Britain, the House of Lords determined that England had a sufficient interest in the controversy to acquire jurisdiction over the foreign defendants and compel them to pay a Russian citizen substantial damages and also publish an apology.<sup>40</sup> The House of Lords authorization of Berezovsky's action has been a boondoggle to the libel tourism industry in England.

## B. *Libel Tourism Around the World*

England is the primary but not the exclusive destination for libel tourists<sup>41</sup> In *Dow Jones v. Gutnick*<sup>42</sup>, the High Court of Australia authorized jurisdiction over an American newspaper on the basis of evidence that Australian citizens viewed information on the newspaper's website.<sup>43</sup> The Australian court reasoned that any internet contacts with Australia were sufficient to give Australia an interest in regulating the speech of the American newspaper. In support of this conclusion, the Australian court cited the *Berezovsky* holding.<sup>44</sup>

*Gutnick* well illustrates that underlying all the substantive conflicts of expressive rights on full display in the libel tourism cases lies an even more disturbing trend in foreign courts: the rapid expansion of adjudicative jurisdiction resting on isolated, random and insignificant contacts with the forum. As discussed in Part II, the exercise of jurisdiction in cases like *Gutnick* offends traditional notions of fair play and substantial justice. These judgments should be ignored on grounds that the foreign tribunal's exercise of judicial power is unreasonably broad and violates

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<sup>38</sup> *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004 (H.L.).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See *Singapore to Charge a WSJ Editor With Contempt*, WALL ST. J., Mar. 16, 2009 at B5; see also *Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. on Commercial and Admin. Law of the H. Judic. Comm.*, 111th Cong. (2009) (statement of attorney Laura R. Handman, a partner in the firm Davis Wright Tremaine LLP) (explaining that in addition to England, Australia, New Zealand, Singapore and Kyrgyzstan have all entertained libel suits against American authors or publishers in their tribunals).

<sup>42</sup> [2002] H.C.A. 54.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

fundamental principles of due process.

C. *Is Libel Tourism Just Ordinary Forum Shopping?*

In some ways then libel tourism gives rise to the same juridical complications traditionally associated with forum shopping. There are three attributes of libel tourism, however, that complicate this particular variant of forum shopping.

First, libel tourism is complex because it arises in the context of international publication in an era of instantly global communications. A statement published on the internet, for example, instantly gives rise to potential effects everywhere the internet is accessible in the world. Where the forum's procedural and jurisdictional laws broadly define the forum's jurisdiction and choice of law the non-resident author or publisher may be broadly exposed to international police power. Because these issues arise in the international context, they must be resolved without the overarching framework provided by the the Full, Faith and Credit or Supremacy Clauses in similar disputes between states. Thus, any solution to the problem of libel tourism necessarily requires attention to sovereignty, jurisdiction, comity and foreign relations. Several recent cases illustrate the complexity of such analysis.<sup>45</sup>

Second, libel tourism is complex given the great diversity in the various normative approaches to defamation (both procedural and substantive) in private international law. Add to this the fact that libel actions present notoriously difficult choice of law issues presented by defamation disputes. These complexities are highlighted by recent failed efforts to achieve consensus regarding the recognition of foreign libel judgments. For example, the Brussels and Lugano Conventions failed to achieve consensus regarding the recognition and enforcement of foreign libel judgments despite obtaining consensus regarding the enforcement of a broad range of civil judgements. Similarly, efforts to ratify a new convention on the recognition of foreign judgments at the Hague feel apart due, in part, to difference regarding libel actions.

Third, and perhaps most importantly, libel tourism exposes the growing international conflict regarding the proper scope of free expression. American citizens publish statements with the expectation of the rights secured by the First Amendment. In the United Kingdom, on the other hand, an individual's interest in privacy and reputation is given greater weight than free expression. If the United Kingdom acquires jurisdiction over the American publisher on the basis of a statement contained in a book purchased via the internet and then imposes its own libel law then the American speaker will be denied her First Amendment rights. This is exactly what happened to Dr. Ehrenfeld.

So what can be done to protect the American author or publisher from the libel tourist?

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<sup>45</sup> See *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992); *Matusевич v. Telnikoff*, 877 F. Supp. 1 (D.C. Dist. Ct. 1995);

The following section examines the options presently available to the American author/publisher.

## II. *Responding to foreign libel litigation*

When an American author or publisher is threatened with a foreign libel lawsuit there are several options available to them. This section explores the advantages and disadvantages to the options presently available.

As an initial matter, the reaction of most ordinary American authors notified that they are being sued overseas will probably be similar to that of Professor Deborah Lipstadt. In 1995, Professor Lipstadt received a letter threatening an English libel action on the basis of statements contained in her scholarly book *Denying the Holocaust: The Growing Assault on Truth and Memory*.<sup>46</sup> According to Lipstadt, her initial reaction to the letter was laughter: “After reading but a few lines, I laughed aloud. . . . Given that virtually everything I said about [the prospective plaintiff] could be traced to a reliable source, I was certain that [providing my lawyers with all of my source material] would be the end of the matter. . . . As it turned out, I was wrong on all counts.”<sup>47</sup> Lipstadt’s laughter turned into five expensive, inconvenient and emotionally draining years fighting the libel action in Britain while trying to maintain her life in the United States.<sup>48</sup>

It is never fun or convenient to be sued anywhere. Still, the plight of the American author/publisher threatened with an English libel proceeding is uniquely frustrating. Unless the author or publisher has specifically targeted the foreign market or purposefully directed their statements into that market then there would be no reason to expect the foreign nation would have authority to regulate speech. This instinctive response is a natural starting point for inquiry into the options available to the author.

### A. *Contest the Jurisdiction of the English Court*

What gives England the right to regulate the speech of an American citizen? This fundamental question will probably be the first question on the American author’s mind.

Historically, courts were powerless to enter judgments against non-residents.<sup>49</sup> Judicial

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<sup>46</sup> See LIPSTADT *supra* note \_\_\_\_ at xvii-xviii.

<sup>47</sup> *Id.* at xvii-xix.

<sup>48</sup> *Id.*

<sup>49</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1878). Sovereignty over non-residents could be accomplished if the non-resident held property within the state. But unless the defendant or the defendant’s property were physically present within the state’s borders, there was no jurisdiction. *Id.* at 733. *Pennoyer* also permitted entry of a personal judgment against a non-resident

power was coterminous with territorial sovereignty over people and property. Substantial increase in interstate (and international) commerce led the U.S. Supreme Court to replace the rigid requirements of physical presence with the more flexible “minimum contacts” test.<sup>50</sup> The familiar *International Shoe* standard allows a U.S. forum to compel a non-resident defendant to appear in its courts but only if the non-resident has “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>51</sup>

The minimum contacts standard allows a broader realm of judicial power, but the test is not unlimited. At its core, the *International Shoe* standard is a question of fairness and the test is one of reasonableness.<sup>52</sup> Considering a non-resident’s activities which bring her in contact with the forum, would an average person “reasonably anticipate being hauled into court there”?<sup>53</sup> The Court has repeatedly emphasized that whether the non-resident “purposefully availed” herself of the protection of the forum’s laws is the central question. Incidental and minor contacts between the non-resident and the forum are not enough to satisfy the constitutional standard.

Applying this approach to the Ehrenfeld dispute demonstrates its . As discussed above, traditional comity analysis allows any court presented with a foreign judgment for recognition or enforcement to review the jurisdiction of the foreign tribunal. If England’s attempt to compel Ehrenfeld to appear in its courts does not satisfy the minimum contacts test then England’s judgment may be ignored on the basis that it lacked power. A judgment entered without jurisdiction is void and unenforceable.<sup>54</sup>

This brings us to the central issue: would England’s assertion of power over an American author, like Dr. Ehrenfeld, satisfy due process? This challenging question requires a close examination of the *International Shoe* standard as applied to libel actions.

### 1. *Libel actions and the “Effects Test”*

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defendant where the defendant voluntarily appeared to respond to the complaint. *Id.*

<sup>50</sup> *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* *See also*, REST. (SECOND) CONFLICT OF LAWS § 24 *cmnt. b* (“One basic principle underlies all rules of jurisdiction. This principle is that a state does not have jurisdiction in the absence of some reasonable basis for exercising it.”).

<sup>53</sup> *Calder v. Jones*, 465 U.S. 781, 790 (1984) (*citations omitted*).

<sup>54</sup> *See, e.g.*, REST. (SECOND) CONFLICT OF LAWS § 24 *cmnt. e*.

In *Calder v. Jones*<sup>55</sup>, the Court examined the contours of jurisdiction in an interstate libel dispute. The plaintiffs in the action, Shirley Jones and her husband, sued the National Enquirer, a reporter and the president and editor of the national magazine for libel in California state court.<sup>56</sup> The reporter and editor were both Florida residents whose personal contacts with California were limited.<sup>57</sup> The alleged libel was published in an article written in Florida based, in part, on the reporter's telephone calls with contacts in California. The reporter and editor of the article challenged the jurisdiction of the California court arguing that their limited personal contacts with California did not satisfy the minimum contacts test.<sup>58</sup>

The Court disagreed and held that jurisdiction was "proper because of [the defendants'] intentional conduct in Florida calculated to cause injury to [Jones] in California."<sup>59</sup> *Calder* appears to be a simple case. It is a relatively short opinion. The rationale of the case is easy to memorize: "Jurisdiction over [non-resident defendants] is therefore proper in California based on the 'effects' of their Florida conduct in California."<sup>60</sup> Without reading carefully, *Calder* appears to broadly authorize jurisdiction in libel cases allowing courts to assert jurisdiction where ever the alleged publication travels (as it is foreseeable that a statement published on the internet, for example, is instantly global).<sup>61</sup> Indeed, some courts wrongly consider the effects test to be an alternative to the traditional minimum contacts test.

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<sup>55</sup> 465 U.S. 781.

<sup>56</sup> *Id.* at 785-86.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* The reporter and editor also argued that the First Amendment entitled them to more robust protection from foreign libel suits. The California state court determined that such protection was warranted in order to avoid a potential chilling effect on the defendants' speech. *Id.* In reversing the decision, the Supreme Court specifically rejected this argument: "We also reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. The infusion of such considerations would needlessly complicate an already imprecise inquiry. Moreover, the potential chill on protected First Amendment activity is already taken into account in the constitutional limitations on the substantive law governing such suits." *Id.* at 790 (citations omitted).

<sup>59</sup> *Id.* at 791.

<sup>60</sup> *Id.* at 785.

<sup>61</sup> See Tara Blake Barfinkel, *Jurisdiction over Communication Torts: Can You Be Pulled Into Another Country's Court System for Making a Defamatory Statement Over the Internet? A Comparison of English and U.S. Law*, 9 *Transnat'l Law*. 489, 530 (Fall 1996) (describing the tendency to broadly interpret *Calder's* effects test as broadening the jurisdiction of courts in interstate libel disputes).

A closer reading of *Calder* demonstrates that the Court did not intend to broadly authorize a special category of libel jurisdiction and did not dramatically alter the traditional minimum contacts test in libel cases. The Court’s citations in support of the “effects test” are instructive.

The first authority cited in support of considering the effects of non-forum activities is the Court’s prior decision in *World-Wide Volkswagen Corp. v. Woodson*.<sup>62</sup> There the Court held that Oklahoma’s attempt to compel a New York auto dealer and distributor to appear in a products liability action in Oklahoma violated due process.<sup>63</sup> The plaintiffs in the case argued that out-of-state auto dealers should be subjected to jurisdiction in Oklahoma because “an automobile is mobile by its very design and purpose [and] it was ‘foreseeable’ that the [automobile] would cause injury in Oklahoma.”<sup>64</sup> The Court rejected this argument noting that “‘foreseeability’ alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.”<sup>65</sup> Instead, the Court explained that plaintiff must point to conduct on the part of the defendant so connected with the forum state that the defendant “should reasonably anticipate being hauled into court there.”<sup>66</sup>

The argument advanced by those supporting jurisdiction in many libel cases is remarkably similar to the argument rejected by the Court in *World-Wide Volkswagen*. Speech, like an automobile, travels. In an era of global communication, it is foreseeable that speech will cross borders (state or national) instantly. Ehrenfeld’s book, for example, was published in America but later purchased in Britain via an internet bookseller. A chapter of her book was posted on an American news agency’s website. The English court based its jurisdiction over Ehrenfeld on these contacts.

Admittedly, it is foreseeable that Ehrenfeld’s speech could make its way into England (what could she do to prevent this from occurring but remain silent?). But the ability to foresee that her speech would make its way into England is not enough. According to the Court’s holding in *World Wide Volkswagen*, Ehrenfeld must reasonable expect to be “hauled into court” based on her speech. Because *Calder* cites *World Wide Volkswagen* in support of its holding it is clear that the Court did not intend to create a special zone of speech jurisdiction following the speech wherever it might travel.

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<sup>62</sup> 444 U.S. 286 (1980).

<sup>63</sup> *Id.* at \_\_\_\_.

<sup>64</sup> *Id.* at \_\_\_\_.

<sup>65</sup> *Id.* at \_\_\_\_.

<sup>66</sup> *Id.* at \_\_\_\_.

The Court's other citation in support of its holding in *Calder* is also instructive. In support of its determination that the California effects of the National Enquirer editor's activities justified California's exercise of jurisdiction over the non-residents, the Court cited section 37 of the Restatement (Second) of Conflicts of Laws. This section deserves careful attention. Section 37 provides:

A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects *unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.*<sup>67</sup>

The basic rule of reasonableness is preserved by this provision. A state may not focus solely on the plaintiff's injury within the forum (i.e., the effects within the forum) and ignore the publisher's relationship with the forum. Traditional notions of fair play and substantial justice require that a non-resident publishers conduct be such that he should reasonably expect to be subject to the judicial power of the forum.<sup>68</sup>

In essence, the *Calder* holding makes clear that the effects of a non-resident's activities within a forum are relevant to the application of the *International Shoe* test. *Calder*, however, did not supplant the *International Shoe* test in speech cases. The inquiry remains one focused on the non-resident's contacts with the forum. Specifically, the court must conduct a qualitative evaluation of the non-resident's contacts to determine whether they amount to a purposeful availment of the protection of the forum's laws.<sup>69</sup> Foresight that speech could enter the forum not, on its own, a sufficient contact with the forum.

A recent string of circuit cases support the conclusion that *Calder*'s effects test does not create a broad zone of speech jurisdiction.<sup>70</sup> Other circuit cases in the context of internet

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<sup>67</sup> REST. (SECOND) CONFLICT OF LAWS § 37 (1971) (emphasis added).

<sup>68</sup> "A state has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere. The state may exercise judicial jurisdiction on the basis of such effects over the individual who did the act, or who caused the act to be done, provided that the nature of these effects and of the individual's relationship to the state are such as to make the exercise of jurisdiction fair to the individual and reasonable from the standpoint of the international and interstate systems." *Id.* at *cmnt. a.*

<sup>69</sup> *See Hansen v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>70</sup> *See Remick v. Manfredy*, 238 F.3d 248, 258 (3rd Cir. 2001) (interpreting *Calder*'s effects test to be limited to situations where the publisher "expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the activity"); *Young v. New*

activities having effects in foreign jurisdictions reinforce the modern tendency to limit application of the effects test in the context of internet conduct.<sup>71</sup>

2. *Is publication within the forum a sufficient contact?*

*Keeton v. Hustler Magazine, Inc.*<sup>72</sup>, decided on the same day as *Calder*, held that Hustler Magazine, a mass media defendant who had “continuously and deliberately exploited the [forum-state’s] market,” had satisfied traditional minimum contacts test.<sup>73</sup> The Court determined that Hustler Magazine’s “regular monthly sales of thousands of magazines within the forum” could not be characterized as “random, isolated, or fortuitous” contacts but were instead continuous and systematic contacts with the forum sufficient to subject Hustler to jurisdiction in the forum.<sup>74</sup>

One clear implication of *Keeton* is that not every published statement is a sufficient basis for jurisdiction over the non-resident publisher. Due process precludes the assertion of judicial power over any non-resident who’s statements travel into the forum as a result of random,

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Haven Adv., 315 F.3d 256, 262-63 (4th Cir. 2002) (rejecting the argument that *Calder* authorized jurisdiction over non-residents who maintain Internet websites accessible in the forum); Revell v. Lidov, 317 F.3d 467, 475 (5th Cir. 2002) (rejecting the argument that *Calder* authorized jurisdiction over non-residents who post information to electronic bulletin boards accessible via the Internet in the forum); Reynolds v. Int. Am. Athletic Fed., 23 F.3d 1110 (6th Cir. 1994) (rejecting the argument that *Calder* authorized jurisdiction over non-resident publishers who issue press release which would foreseeably be disseminated in the forum); Madara v. Hall, 916 F.2d 1510, 1519 (11th Cir. 1990) (rejecting the argument that *Calder* authorized jurisdiction over non-resident publisher who had knowledge that independent publisher might reprint statements in forum).

<sup>71</sup> See, e.g., *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002) (“Applying the traditional due process principles governing a State’s jurisdiction over persons outside of the State based on Internet activity requires some adaptation of those principles because the Internet is omnipresent - when a persona places information on the Internet, he can communicate with persons in virtually every jurisdiction. If we were to conclude as a general principle that a person’s act of placing information on the Internet subjects that person to personal jurisdiction in each State in which the information is accessed, then the defense of personal jurisdiction, in the that a state has geographically limited judicial power, would no longer exist. The person placing information on the Internet would be subject to personal jurisdiction in every state.”).

<sup>72</sup> 465 U.S. 770 (1984).

<sup>73</sup> *Id.* at \_\_\_\_\_.

<sup>74</sup> *Id.* at \_\_\_\_\_.

isolated, or fortuitous action.<sup>75</sup>

Consider an individual who posts a statements to a blog. The blog is hosted on a server located in state A and the blogger is a resident of state A. Given the nature of the internet, any reasonable blogger could foresee that individuals in state B could view the statements from computers located there. But, as discussed above, the blogger's knowledge that her statements are viewable anywhere in the world does not transform each of her posts into systematic contacts with state B (and every other forum in the world). There must be more.

Unlike Hustler Magazine, Inc., who received economic benefit from the forum by circulated thousands of magazines within the forum every month, the blogger's statements made their way into state B in a foreseeable but indirect manner. The blogger's statements were not purposefully directed to the state B market. The posts were uploaded to a global forum and were therefore not purposefully directed to any specific forum. It would be unreasonable to subject our blogger to state B's judicial power merely because the blogger posted statements to her server in state A.<sup>76</sup> As noted by several circuit courts, such a reading of *Calder* and *Keeton* would eviscerate personal jurisdiction in the context of internet communications.<sup>77</sup>

This analysis supports the conclusion that state or federal courts would lack jurisdiction over a non-resident publisher solely on the basis of isolated statements entering the forum. Likewise, when a foreign forum lacks contacts sufficient to compel a non-resident, like Ehrenfeld, to appear before its tribunals then the foreign court lacks jurisdiction to enter judgment in the case. Authors like Ehrenfeld should argue that attempts to exercise *in personam* jurisdiction over them on the basis of random or isolated contacts are foreign attempts to expand the adjudicative jurisdiction of tribunals beyond the bounds of fundamental fairness.

### 3. *Challenging Jurisdiction in England*

While personal jurisdiction jurisprudence moored to the due process clauses offers the American author/publisher some protection from libel suits in foreign jurisdictions, the jurisdictional shield is not likely to be effective if asserted as a defense in an English libel lawsuit. Why? England has adopted an expansive view of its adjudicative jurisdiction in libel disputes.

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<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., Glenn Harlan Reynolds, 'Libel in the Blogosphere: Some Preliminary Thoughts. Berkman Center for Internet & Society - Bloggership: How Blogs are Transforming Legal Scholarship Conference. Available at SSRN: <http://ssrn.com/abstract=898013>

<sup>77</sup> See *supra* note \_\_\_ and accompanying text.

England follows a procedural, as opposed to constitutional, view of judicial power over persons.<sup>78</sup> Except in cases proceeding pursuant to the provisions of the Brussels Convention, an English court to exercise personal jurisdiction in three circumstances: (1) where the defendant is present in England and served with process there; (2) where the defendant submits to the jurisdiction of the English court; or (3) where the plaintiff obtains judicial authorization to serve a summons outside the territorial borders of England.<sup>79</sup> Where extra-territorial service is authorized, the defendant is permitted to challenge the propriety of the long-arm authorization or move for dismissal on grounds that England is *forum non conveniens*.

These principles have been interpreted very broadly in the context of libel. English judges liberally authorize extra-territorial service in libel actions. The leading English cases discussing English jurisdiction in international libel disputes are *Berezovsky*<sup>80</sup>..

In *Berezovsky*, a Russian government official and businessman, sued an American magazine, its editor and the author of an article for libel in England. The plaintiff applied for extra-territorial service pursuant to an English rule authorizing long-arm service where “the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within [the forum].”<sup>81</sup> The defendants argued that England had an insufficient interest in the controversy and that a U.S. or Russian forum would be more appropriate. The House of Lords rejected this argument and held that because the Russian businessman had a reputation in England and defamatory material was published there England had jurisdiction to hear the case.<sup>82</sup>

*Berezovsky* is a welcome-mat for libel tourists. Applying to House’s reasoning, anyone who’s anyone has a reputation to protect in London. Thus, all the plaintiff must establish to create English jurisdiction is that the defamatory statements were published in England. With the ability to access nearly any statement on the internet, it is hard to imagine a situation where England would not obtain jurisdiction pursuant to *Berezovsky*’s reasoning.

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<sup>78</sup> See Tara Blake Garfinkle, *Jurisdiction Over Communication Torts: Can You Be Pulled Into Another Country’s Court System for Making a Defamatory Statement Over the Internet? A Comparison of English and U.S. Law*, 9 *Transnat’l Law*. 489, 515 (1996).

<sup>79</sup> See, e.g., Amit M. Sachdeva, *International Jurisdiction in Cyberspace: A Comparative Perspective*, 13(8) *C.T.L.R.* 245, 251 (2007) (citations omitted).

<sup>80</sup> *Berezovsky v. Michaels* [2000] 1 *W.L.R.* 1004 (H.L.).

<sup>81</sup> *Id.* at 1004 n.1. (citing R.S.C., Ord. 11, r. 1(1)(f)).

<sup>82</sup> *Id.* at 1012-13 (“[This] is a case in which all the constituent elements of the torts occurred in England. The distribution in England of defamatory material was significant. And the plaintiffs have reputations in England to protect.”).

Consider the application of this analysis in Mahfouz's suit against Ehrenfeld. The English court determined that English jurisdiction was appropriate on the basis of only two contacts: (1) the purchase of twenty-three copies of her book (purchased from an internet book seller) in England; and (2) evidence that the first chapter of her book was viewable in England via a U.S. news agency's website. Unlike the defendants in *Calder* and *Keeton*, Ehrenfeld had no reason to believe that her conduct would subject her to England's sovereignty. She had not purposefully availed herself of the protections of English law. Unlike the plaintiffs in *Calder*, Mahfouz is not a resident of the forum and Ehrenfeld had no reason to expect her statements to have a specific effect in England. These distinctions demonstrate that Ehrenfeld's contacts with England are tenuous, at best, and would not satisfy the core reasonableness inquiry sufficient to satisfy due process in an American forum.<sup>83</sup> Yet they are sufficient in England.

This discussion highlights the fundamental conflict underlying the dispute concerning expressive rights. The English libel judgments are most offensive because England is imposing its substantive policy on individual authors and publishers whose contacts with England are random, isolated and insufficient to support jurisdiction. Imposing adjudicative jurisdiction on non-residents in a manner that violates American notions of due process, in other words, is the first offense.

There are two important implications to this conclusion: (1) English default judgments rendered in cases like Ehrenfeld's should be unenforceable in American forums, applying the common law's approach to recognition of foreign judgments, because the English courts lack jurisdiction over the parties; and (2) American courts need not respond to English judicial overreaching by relying on the public policy exception where the jurisdictional exception is available. These points will both be discussed in more detail below.

The American author/publisher should consider challenging the jurisdiction of the English court. However, it is unlikely that the English courts will demonstrate judicial restraint. Thus, the author/publisher will need to consider other options.

#### B. *Challenge the English Venue as Forum non Conveniens*

Both English<sup>84</sup> and American<sup>85</sup> courts recognize the equitable doctrine of *forum non*

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<sup>83</sup> See notes \_\_\_-\_\_\_ *supra* and accompanying text.

<sup>84</sup> See *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] A.C. 460 (holding that doctrine of *forum non conveniens* requires plaintiff applying for extraterritorial service to establish that "England is the most appropriate forum to try the action.").

<sup>85</sup> See generally 57 A.L.R. 4th 973.

*conveniens*.<sup>86</sup> This doctrine allows the defendant to contest the plaintiff's choice of forum on grounds of substantial inconvenience, fairness and justice.<sup>87</sup> The doctrine allows a court having adjudicative jurisdiction to decline exercise of its jurisdiction whenever the particular circumstances of the case establish that it would be inappropriate or unjust to hear the case.<sup>88</sup> As an equitable doctrine, trial judges are generally given wide latitude to consider "a legion" of factors in determining whether to dismiss an action *forum non conveniens*.<sup>89</sup>

While it is logical to expect the doctrine of *forum non conveniens* to offer a useful shield to the non-resident author/publisher, the reality is that English courts have generally ignored the doctrine in the context of libel lawsuits. In *Berezovsky*, for example, the House of Lords reversed a lower courts determination that the Russian's libel suit should be dismissed *forum non conveniens*.<sup>90</sup> Lord Nolan, rejecting the lower judges conclusion that the Russian's libel lawsuit had "no connection with anything which has occurred in [England]," and rejected *forum non conveniens* on the basis of the rather absurd conclusion that a lawsuit brought by a foreign citizen against foreign defendants challenging statements contained in an article researched and written and originally published thousands of miles away from the British empire was "solely concerned with the plaintiffs' reputations in England."<sup>91</sup> Lord Hoffman rightly noted, in dissent, that "the notion that Mr. Berezovsky, a man of enormous wealth, wants to sue in England in order to secure the most precise determination of the damages appropriate to compensate him for being lowered in esteem of persons in [England] who have heard of him is something which would be taken seriously only by a lawyer."<sup>92</sup>

After *Berezovsky* it would be foolish to depend on *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

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<sup>86</sup> See generally RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS, 274-76 (5th Ed. 2006).

<sup>87</sup> *Id.*

<sup>88</sup> See, e.g., *Spiliada Maritime supra* note \_\_\_\_ at 474.

<sup>89</sup> *Id.* at 465.

<sup>90</sup> See *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004, 1017 (H.L.)

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1023.

courts are unlikely to dismiss the libel tourist's claims.<sup>93</sup>

### *C. Appear and Vigorously Contest the English Libel Action*

If the American author has the time, money and fortitude then she might consider appearing and contesting the English libel lawsuit. This option might be instinctively appealing assuming that the author has some support for her statements or believe her statements were expression of protected opinions. After all, the mere allegation of libel or slander is potentially harmful to the credibility of the author. She may be tempted to appear and respond. There are, however, several significant reasons why this option will be unattractive to most American authors (even assuming their words are accurate and true).

First, putting up a legal defense in an English defamation action is a notoriously difficult, expensive and risky endeavor even for sophisticated English defendants. English media defendants, for example, often settle defamation charges in an effort to avoid the complicated and expensive proceedings.

A central justification for such settlements is the fact that England's defamation standards favor the plaintiff. If the plaintiff establishes publication of a statement which tends to harm the plaintiff's reputation then the defendant must prove that the statement is true to avoid liability. Contrast this with the U.S. approach requiring the plaintiff to prove falsity and malice. "That difference in the burden of proof can make all the difference."<sup>94</sup> Additionally, unlike an American defamation lawsuit, the English rule regarding attorneys' fees subjects the libel defendant to the threat of paying the libel plaintiff's attorneys' fees.

These disincentives to litigating the merits are compounded where the defendant is a foreign publisher. Litigating a case in a forum thousands of miles away is inconvenient (to say the least). The average American author will probably be challenged to finance a defamation defense. Without the support of their publisher the American author will, most likely, be unable to mount a vigorous defense in England.<sup>95</sup> The English defamation plaintiff, on the other hand, may be operating under a risk-free "no win, no fee" arrangement.

Then there is the reality of actually litigating the case. Although the English substantive

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<sup>93</sup> There is one example of an undisturbed dismissal of an internet libel lawsuit on grounds of *forum non conveniens*. See *Dow Jones & Co. Inc. v. Yousef Jameel*, [2005] EWCA 56.

<sup>94</sup> *Id.* at xii.

<sup>95</sup> The number of people involved in Professor Lipstadt's defense well illustrates the unlikelihood that one could mount a successful defense without substantial support. See *id.* at 307-310).

law heavily tips the scales in favor of the defamation plaintiff, the American author might put up a successful defense. But this will only occur at great personal cost. Consider the example of Professor Lipstadt's successful defense in England. After years of litigation, a lengthy trial and multiple appeals, Professor Lipstadt successfully defended herself in English court against David Irving's defamation allegations. This "victory" was, by no means, cheap or easy.<sup>96</sup>

In addition to these costs, libel trials are often show trials attracting unwanted attention and invasions of the author's privacy.<sup>97</sup>

An additional risk in appearing in the English lawsuit is that the American author may also be waiving the jurisdictional objections to the forum discussed above. If the American author appears and, due to the rigorous nature of English libel law, loses the case, then it will certainly be more difficult to argue against recognition or enforcement in a U.S. court. The American author will be forced to rely on the public policy exception to enforcement and, for the reasons stated above, this option is not appealing.

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<sup>96</sup> In the prologue of *History on Trial: My Day in Court with David Irving*, Professor Lipstadt summarizes the process of obtaining a defense verdict in England as follows:

For four years I prepared for this trial by immersing myself in the works of a man who exuded contempt for me and for much of what I believed. I lost many nights of sleep, worried that because of some legal fluke Irving might prevail. For ten weeks in the winter of 2000, I had to sit barely fifteen feet from him and silently listen as he openly expressed that contempt in front of a judge and the world media. My scholarly work was deconstructed and my attire, personality and personal beliefs were dissected in the press. Much of what was reported about me - for example, my age, sources of support, and political beliefs - was simply wrong. But I had no way of challenging it. Through the course of the trial, at the insistence of my attorneys, I did not give interviews or testify in court. Though my words were at the heart of this struggle, I had to depend on others to speak for me. For someone who fiercely prized controlling her life - even when it was better not to - this was excruciatingly difficult.

[Cite Lipstadt, *supra*].

<sup>97</sup> See NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL*, 3 (1986) ("Although trials for libel seldom attract as much attention as cases involving murder or sex, legal conflicts over reputation (which can, sometimes, include questions of sex and violence) often receive extensive publicity. In fact, law professor Leon Green once complained that 'the highly publicized libel action today is a sort of show piece to attract attention to the court house and dress an ordinary personal injury action in 'Million Dollar Old Lace' for the advertisement of the lawyers and of the party plaintiff.'").

Finally, the American author, by appearing in the English action, runs the risk of substantially increasing her financial exposure. Damages are capped in an English default judgment and the attorneys' fees are likely to remain low. In a contested action the fees will greatly increase and the damages will likely exceed the default judgment cap.<sup>98</sup> Unless the American author maintains assets in England, there is little practical incentive to appear.

Professor Lipstadt vigorous and successful defense is admirable and worthy of much respect. It is unlikely, however, that many American authors will have either the ability or the desire to put up a similar fight. Indeed, many English libel plaintiff know that American authors cannot or will not appear in England. Consider David Irving's own words:

A few years before filing the suit, Irving told a sympathetic audience that libel defendants are full of bluster upon learning they are to be sued. When they discover the onerous nature of fighting a libel suit in the United Kingdom, they "crack up and cop out." Irving may well have anticipated that I would decide this battle was not worth pursuing and would agree to settle with him by issuing some sort of apology or retraction of my words. I was, after all, five thousand miles away and had to mount a defense in a foreign country whose laws heavily favored my opponent. Lawsuits can be exceedingly long and exceptionally expensive.<sup>99</sup>

Such financial, emotional and physical burdens imposed upon the libel defendant definitely impinge upon expression. Such intrusion are precluded in the U.S. by *Sullivan*. In England, however, such intrusions are permitted and, in some ways, encouraged by English law. Although Lipstadt's road to victory was not easy her victory over David Irving demonstrates the ability of American authors to avoid liability in England by directly responding to the plaintiff's allegations and putting up a vigorous defense.

#### *D. Default and Collaterally Attack the Judgment in a U.S. Court*

The next option is to ignore the English action and challenge recognition or enforcement of the foreign libel judgment if and when it is presented in an American court for enforcement. A civil judgment is of little concern until it is recognized or enforced in a forum having jurisdiction over the judgment debtor or the judgment debtor's assets. This defensive option has some utility. However, there are two problems with this approach: (1) it is not entirely clear that American courts will refuse enforcement of the foreign libel judgment; and (2) what happens if the foreign libel plaintiff never presents the judgment to an American court for enforcement or recognition?

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<sup>98</sup> The cap on damages in default judgments is £10,000. One well-known English libel firm advertises libel verdicts ranging from £10,000 to £175,000. See [www.carter-ruck.com/articles/Defamation\\_NotWhatDrOrdered.html](http://www.carter-ruck.com/articles/Defamation_NotWhatDrOrdered.html) (*last visited* March 12, 2009).

<sup>99</sup> *Id.* at xxi (citation omitted).

There are many who argue that foreign libel judgments should never be enforced in American courts. This argument is usually grounded on the differences in substantive and constitutional law between the foreign and domestic forum. Before examining whether foreign libel judgments will be recognized in American courts, it is important to consider the broader issue.

1. *The General Approach to Recognition or Enforcement of Foreign Judgments in American Courts*

Whether, and to what degree, foreign judgments are cognizable or enforced<sup>100</sup> is a basic and essential question of law. This question is of such fundamental import that the framers incorporated the Full Faith and Credit<sup>101</sup> and Supremacy<sup>102</sup> Clauses into the Constitution. These clauses require recognition and enforcement of judgments rendered by sister courts within the Union.<sup>103</sup> Although similar interests are implicated by international judgments, the constitutional conflicts clauses do not resolve the question of the force or effect of international judgments in U.S. courts.<sup>104</sup> In fact, the validity and effect of foreign judgments is a question of state law despite the national interests implicated. Any domestic court presented with a libel judgment rendered by an international tribunal must therefore determine whether it is enforceable by application of state common law.<sup>105</sup>

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<sup>100</sup> There is an important distinction between recognition of foreign judgments and enforcement of foreign judgments. Judgments are legally recognized when they are used for *res judicata* or collateral estoppel purposes. While judgments are enforced only after entered as judgments in the forum. *See, e.g.,* Johnathan H. Pittman, *The Public Policy Exception to the Recognition of Foreign Judgments*, 22 Vand. J. Transnat'l L. 969, 969-70 (1989).

<sup>101</sup> U.S. CONST. art. IV § 1.

<sup>102</sup> U.S. CONST. art. VI.

<sup>103</sup> For a summary of the policies and interests served by these clauses *see* REST. (SECOND) CONFLICT OF LAWS § 117.

<sup>104</sup> *See, e.g.,* REST. (SECOND) CONFLICT OF LAWS § 117 *cmnt. c.*

<sup>105</sup> Surprisingly, there are no treaties or federal statutes establishing a national policy regarding the recognition and enforcement of international judgments. Under the auspices of the Hague Convention, extensive efforts to craft a multilateral treaty regarding the recognition of foreign judgments have been made. The United States initially took a leading role in these negotiations in an effort to secure agreement of foreign nations to recognize U.S. judgments abroad. However, efforts to draft a treaty stalled, in part, to disagreements regarding the scope of

Determining whether a foreign judgment is entitled to recognition or enforcement usually begins with the principle of comity articulated by Justice Story in *Hilton v. Guyot*.<sup>106</sup> There the Court announced the following general rule of comity:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of the nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.<sup>107</sup>

This rule encourages recognition of foreign judgments even where the foreign judgment does not mirror rights or remedies available in domestic courts. The wise purpose underlying the *Hilton* rule is the mitigation of international conflict by extending respect to co-equal sovereigns despite potential differences in substantive law. The *Hilton* rule has been adopted by most states in their common law regarding recognition and enforcement of foreign judgments.<sup>108</sup> This pervasive application of the *Hilton* rule and the resulting liberal extension of comity to foreign judgments is reflected in section 98 of the Restatement (Second) of Conflict of Laws: “A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are

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foreign libel judgments and regulation of the speech and commerce on the internet.

The American Law Institute has also adopted a proposal for a new federal statute regarding recognition of foreign judgments in the United States. [CITE ALI’s proposal].

For now, questions related to the enforcement and effect of foreign judgments are a question of state law despite the national interests in foreign relations implicated in the issue. [CITE Uniform FMJCAct].

<sup>106</sup> 159 U.S. 113 (1895).

<sup>107</sup> *Id.* at 158.

<sup>108</sup> *See, e.g.*, REST. (SECOND) CONFLICT OF LAWS § 98 cmt. c.

concerned.”<sup>109</sup>

There are at least three public interests served by the policy favoring recognition of foreign judgments. First, recognition of foreign judgments serve the public’s interest in finality of litigation.<sup>110</sup> Second, comity advances diplomatic interests which are broader than the private controversy before the court. Finally, extension of respect for foreign judgments is vital to securing fair treatment of American judgments in foreign courts.<sup>111</sup>

There are two traditional exceptions to the general rule that foreign judgments are enforceable. First, judgments entered by courts lacking jurisdiction over the person or subject-matter are void and unenforceable. Second, a catch-all exception allows a court to refuse enforcement of foreign judgments on the basis they are repugnant to the public policy of the forum.

Historically, the public policy exception has been narrowly construed. U.S. courts have, instead, tolerated difference in substantive law and extended respect to the foreign judgment. Because refusal to recognize or enforce a foreign judgment is, at its core, a rejection of the sovereignty of the foreign tribunal, courts should be reluctant to refuse recognition on grounds of differing substantive policy. Refusal to recognize the adjudicative power of a foreign nation will impact diplomatic relations beyond the scope of the private dispute before the court. Even in the limited judicial context, the maxim “you’ve got to give respect to get respect” is here at play. If American courts blithely reject the judgment of foreign courts in matters of speech, then America should expect recognition of its judgments regarding other substantive matters in foreign tribunals?

## 2. *Recognition and Enforcement of Foreign Libel Judgments*

Despite the dangers implicit in refusing recognition of foreign judgments, some argue that First Amendment interests are so fundamental that American courts must refuse recognition of all foreign libel judgments unless the foreign tribunal extends First Amendment protections to the libel defendant. This argument has gained traction in both state and federal courts.

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<sup>109</sup> *Id.* For a good discussion of the second restatements approach and underlying policies see Mark D. Rosen, *Exporting the Constitution*, 53 Emory L.J. 171, 175-79 (2004).

<sup>110</sup> *Id.* at cmt. b.

<sup>111</sup> See, e.g., Arthur T. von Mehren, *Recognition and Enforcement of Foreign Adjudications: A Survey and Suggested Approach*, 81 Harv. L. Rev. 1601 (1961). See also *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 519 (explaining that the United Nations Convention requires contracting states to provide equal treatment of foreign judgments in their own courts).

The best example is *Bachchan v. India Abroad Publications, Inc.*<sup>112</sup> There an English libel judgment creditor sued to enforce his English judgment in New York.<sup>113</sup> The trial judge determined that “if ... the public policy to which the foreign judgment is repugnant is embodied in the First Amendment to the United States Constitution or the free speech guaranty of the Constitution of this State, the refusal to recognize the judgment should be, and is deemed to be, ‘constitutionally mandatory.’”<sup>114</sup> After determining that the English libel judgment at issue was repugnant to the policy of free expression, the court refused to recognize the English judgment.<sup>115</sup>

Another English libel judgment was presented for recognition and enforcement in *Matusevitch v. Telnikoff*.<sup>116</sup> Judge Urbina, citing *Bachchan*, held that Maryland law permitted rejection of the English judgment on grounds that the libel judgment was “repugnant to the public policies of Maryland and the United States.”<sup>117</sup>

Despite the fact that American courts have, historically, been reluctant to refuse recognition of foreign judgments on the basis of underlying conflict of laws<sup>118</sup>, these cases offer support to the American author/publisher’s argument that the foreign judgment should not receive recognition. However, as discussed in more detail in Part III below, there is controversy

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<sup>112</sup> 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

<sup>113</sup> *Id.* at 662-63.

<sup>114</sup> *Id.* at 231 (citing David D. Siegel, 7B McKinney’s Consolidated Laws, Practice Commentaries [5304:1]).

<sup>115</sup> *Id.* at 235.

<sup>116</sup> 877 F.Supp. 1 (D.C. Dist. Ct. 1995).

<sup>117</sup> *Id.* at 4.

<sup>118</sup> *See, e.g.*, REST. (SECOND) CONFLICT OF LAWS § 117 cmt. c. (“The fact that suit on the original [foreign] claim could not have been maintained in a State of the United States does not mean that a judgment rendered on the claim in a foreign nation will necessarily be refused enforcement by the courts of that state. In fact, enforcement will usually be accorded the judgment except in situations where the original claim is repugnant to fundamental notions of what is descent and just in the State where enforcement is sought. Even in cases where a valid foreign judgment would not be enforced, it may nevertheless be recognized and held to conclude the parties as to the issues decided.”)

regarding non-recognition on grounds of conflicting speech policy.<sup>119</sup>

3. *What happens if the Libel Tourist never attempts to Enforce the English Judgment?*

One curious thing about libel tourists: not all of them attempt to collect their English judgments in U.S. courts. For example, Mahfouz, despite obtaining a substantial default judgment in his action against Ehrenfeld, has not presented the judgment to any U.S. court for enforcement.

Such a situation leaves an American author/journalist in a precarious situation. In her testimony before Congress, Dr. Ehrenfeld described the uncomfortable situation:

In 2005 the British court granted Mahfouz a judgment by default, awarding him hundreds of thousands of dollars, and other sanctions. Until the New York legislature passed the Libel Terrorism Protection Act last May, I spent many sleepless nights worried that Mahfouz will try to enforce the English judgment against me in New York. His deliberate non-enforcement left it hanging over my head like a sword of Damocles, which aggravated the chilling effects. Mahfouz, also uses a dedicated website to advertise my judgment, with more than 40 other names of those he threatened and sued in London. Mahfouz's suit has never been tried on the merit. Yet the British judgment affected my ability to publish. The threat he wields over me, and over others, chilled American publishers, especially those with assets overseas, from publishing books containing information on terror financiers. Mahfouz also chilled my ability to travel to the U.K., lest I be arrested to enforce the British judgment against me. I run the same risk in Europe and in most Commonwealth states due to the reciprocal enforcement of

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<sup>119</sup> See Mark D. Rosen, *Should Un-American Judgments Be Enforced?*, 88 Minn. L. Rev. 783, 785 (2004) (“While [some] foreign judgments may well be ‘un-American’ insofar as they come from non-American polities and reflect political values that are at variance with American constitutional law, neither the foreign judgments themselves, nor their enforcement by an American court, is unconstitutional.”); Linda J. Silberman and Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 Ind. L.J. 635, 644 (criticizing *Telnikoff* on the ground that the court failed to identify sufficient U.S. interests in the private dispute warranting non-recognition on public policy grounds); Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who’s Talking*, 60 Brook. L. Rev. 999, 1033-34 (1994) (criticizing *Bachchan* on the ground that “neither the United States nor New York has an interest in applying the Free Speech Clause [to the dispute between the parties], while England apparently does have an interest in applying its law of defamation.”).

judgments.<sup>120</sup>

As this statement illustrates, the non-recognition shield is inadequate to completely remedy interference with expressive rights. Accordingly, some suggest more aggressive measures to combat foreign libel judgments.

*E. Direct Collateral Attack: Declaratory and/or Injunctive Relief in a U.S. Court*

Rather than requiring the American author/publisher to wait for the libel tourist to come to town, some suggest that courts should entertain actions for declaratory relief and award the American author a judgment declaring the foreign libel judgment void.<sup>121</sup> Such a declaratory judgment would then have preclusive effect in all U.S. courts thereby preventing domestic enforcement of the foreign judgment.

Ehrenfeld vigorously pursued this strategy.<sup>122</sup> Her effort to obtain declaratory relief against Mahfouz demonstrates a significant impediment to this strategy: the challenge of obtaining personal jurisdiction over the foreign plaintiff.<sup>123</sup>

No American court may enter declaratory relief until it first acquires personal jurisdiction over the foreign plaintiff. Due process requires the defendant in the declaratory action (the foreign libel plaintiff) to have sufficient minimum contacts with the forum state before the courts of that forum may enter a declaratory judgment against that person. This presents a substantial

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<sup>120</sup> *Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. on Commercial and Admin. Law of the H. Judic. Comm.*, 111th Cong. (2009) (statement of Dr. Rachel Ehrenfeld).

<sup>121</sup> *See, e.g.,* Raymond W. Beauchamp, *England's Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions From Chilling American Speech*, 74 *Fordham L. Rev.* 3073, 3133 (arguing that U.S. federal courts should protect American publishers from English defamation actions by declaring the foreign judgment unenforceable in U.S. courts).

<sup>122</sup> On December 8, 2004, prior to the entry of a final judgment in the English libel action against her, Ehrenfeld filed a civil action against Mahfouz in federal court seeking a declaration that the statements at issue in Mahfouz's English civil action "do not give rise to liability for defamation under the laws of the United States or New York State and that in fact under these laws the default judgment obtained from the English Court is unenforceable in the United States." *See* Ehrenfeld v. Mahfouz, No. 04 Civ. 9641(RCC), 2006 WL 1096816 at \*2 (S.D.N.Y.).

<sup>123</sup> Ehrenfeld filed her declaratory action against Mahfouz in the United States District Court for the Southern District of New York.

problem in the context of a declaratory action against the libel tourist because the prospective defendant is a foreign citizen pursuing a foreign judgment in a foreign court. In Ehrenfeld's case, for example, the New York Court of Appeals held that Second Circuit held that New York could not exercise personal jurisdiction over Mahfouz.<sup>124</sup>

Two states have adopted legislation intending to remove this jurisdictional impediment to declaratory relief. Last year, both New York<sup>125</sup> and Illinois<sup>126</sup> amended their long-arm statutes

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<sup>124</sup> [DESCRIBE NY litigation - second cir. case here].

<sup>125</sup> The New York libel long-arm statute provides as follows:

(d) Foreign defamation judgment. 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 is 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.

N.Y. CIV. PRAC. LAW § 302(d) (McKinney 2008).

<sup>126</sup> The Illinois libel long-arm statute provides as follows:

(b-5) Foreign defamation judgment. 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 Illinois or, if not a natural person, has its principle place of business in Illinois, for the purposes of rendering declaratory relief with respect to that resident's liability for the judgment, or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to this Code, to the fullest extent permitted by the United States Constitution, provided: (1) the publication at issue was published in Illinois; and (2) that resident (i) has assets in Illinois which might be

adding new provisions specifically tailored to libel tourism disputes. These amendments authorize use of the states' long-arm power to subject the foreign libel plaintiff to jurisdiction in state court "to the fullest extent permitted by the United States constitution."<sup>127</sup>

The critical problem with these legislative responses is that, as applied in many cases against foreign plaintiffs, personal jurisdiction will not exist. As discussed above, due process requires the plaintiff to point to sufficient contacts between the defendant and the forum establishing the defendant's purposeful availment of the benefits and burdens of the forum such that exercise of state jurisdiction over him does not offend traditional notions of fair play and substantial justice.<sup>128</sup> Where the only contact between the defendant and the forum is the service of papers related to the foreign litigation then it is unlikely that the minimum contacts test has been satisfied.

The Ninth Circuit struggled with an analogous situation in *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*.<sup>129</sup> In *Yahoo!* an en banc court considered the question of personal jurisdiction in a suit brought by a U.S. based online auction service provider seeking a declaration that a French judgment banning the sale of Nazi memorabilia was unenforceable.<sup>130</sup> The en banc court determined that exercise of personal jurisdiction over the French defendants in the declaratory action was justified because those defendants had previously sought the protection of California's laws by seeking enforcement of injunctive orders.<sup>131</sup>

[Analysis of *Yahoo!* will be extended here with a focus on the concurrence].

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used to satisfy the foreign defamation judgment, or (ii) may have to take actions in Illinois to comply with the foreign defamation judgment. The provisions of this subsection (b-5) shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to, on, or after the effective date of this amendatory Act of the 95th General Assembly.

735 ILL. COMP. STAT. 5/2-209 (West 2008).

<sup>127</sup> *See id.*

<sup>128</sup> *See* notes \_\_\_ - \_\_\_ and accompanying text.

<sup>129</sup> 433 F.3d 1199 (9th Cir. 2006) (en banc).

<sup>130</sup> *Id.* at \_\_\_.

<sup>131</sup> *Id.* Three judges in a special concurrence dissented from the majority's analysis. *Id.* at 1224 (Ferguson, J., concurring). These judges would have dismissed Yahoo!'s declaratory action for lack of personal jurisdiction because the French defendants had not purposefully directed any conduct into the

Compare Ehrenfeld's effort to obtain declaratory relief against Mahfouz with *Yahoo!*. Mahfouz's only contacts with New York were : (1) the letter his attorney mailed to Ehrenfeld; and (2) the papers he served on her relating to his English lawsuit.<sup>132</sup> These contacts, according to the Second Circuit, are insufficient to satisfy the due process test. This jurisdictional limitation appropriately constrains the power of the court to disputes where the forum has an expected and reasonable interest in the controversy.

Recent legislative efforts to broaden personal jurisdiction in order to obtain declaratory (or substantive) relief against the libel tourist are also constrained by the due process clause and therefore probably lack jurisdiction over libel tourists having no contacts with those states. This result may appear unfair or unjust as applied in disputes between the libel tourist and the American author/publisher. It is not wise, however, to ignore the broader jurisprudential landscape in an effort to protect the author or publisher. Much more is at stake:

Whether foreign judgments are enforced affects not only the parties to the foreign lawsuit, but also the sovereign interests of the country that has issued the judgment, the interests of the country that is asked to enforce the judgment, and the stability of the international business and legal system. Due undoubtedly to this array of interests, a system of cooperation among countries has emerged with regard to the enforcement of foreign judgments.<sup>133</sup>

These interests counsel against a rush to ignore foreign libel judgments on grounds that judgment rests on procedural and substantive safeguards which fail to satisfy *Sullivan*.<sup>134</sup>

### *III. What Should be Done to Combat Libel Tourism: A Proposed Response*

Libel tourism cases do threaten First Amendment interests of American authors and publishers. If a libel lawsuit in Alabama chills speech in New York then certainly a libel lawsuit in England has the same effect. However, unlike the conflict in *Sullivan*, the conflict presented by libel tourism cases is not resolved by any "supreme law of the land." Foreign libel cases generate a clash between co-equal sovereign nations (and the adjudicative authority of their respective tribunals) and this necessitates a different solution than that secured in *Sullivan*. U.S.

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<sup>132</sup> *Id.*

<sup>133</sup> Rosen, *supra* note \_\_\_\_ at 175-76.

<sup>134</sup> *See Yahoo! supra* note \_\_\_\_ at 1228 (Ferguson, J. concurring) (noting that the foreign relations implications of the exercise of jurisdiction where a litigant seeks a declaration that a foreign judgment is unenforceable should require the court from abstaining and "deferring to the Executive and Congress to assess the foreign consequences [of invalidating a foreign judgment].").

courts can no more demand England's adherence to the First Amendment than England can demand U.S. judicial adherence and recognition of its Public Order Acts.<sup>135</sup>

The *Sullivan* standard is uniquely American<sup>136</sup> and it has great merit. Our polity is one that cherishes free, robust and uninhibited debate, especially on matters of public import. But ours is not the only rationale balance of speech, privacy and reputation interests. England's substantive speech jurisprudence, while certainly in conflict with American jurisprudence, is not irrational. Unless it is conceded that there is a supreme international law then it is not possible to demand English adherence to the American experiment.

The underlying power struggle at issue in the libel tourism cases is not a conflict that will be resolved by pre-emptive declaratory judgments or injunctions against the foreign proceedings. Even if Ehrenfeld, for example, obtained a declaratory judgment against Mahfouz before he obtained his English default judgment, in order to avoid many of the harms of the British litigation (i.e., threat of collection or enforcement in England, distress at the pending English proceedings) she would be required to present the U.S. declaratory judgment to an English court for recognition. It is highly unlikely that the English court would enforce the U.S. declaration. This spiraling battle between judges leads nowhere.

Instead of seeking a judicial solution to the problem, courts should return to the principles of judicial restraint embedded in the doctrine of comity. Although it is difficult to extend respect to foreign tribunals attempting to police the world and regulate substantive rights abroad, the jurisprudential principles underlying comity remain relevant and important. It would be wise, at least in U.S. tribunals, to treat the judgments of foreign courts as American judges would like their judgments to be treated. Accordingly, courts should not throw respect for foreign judgments out the window simply because a foreign judgment implicates speech.

Private litigants with a reasonable expectation of First Amendment protection will not be left in the lurch. An American author or publisher whose contacts with the foreign forum are random, isolated or incidental does not expect and has no reason to expect "being hauled into court there." Such authors or publishers are then shielded from abusive foreign judgments by the fundamental principle of due process. American courts should carefully scrutinize the jurisdiction underlying a foreign libel judgment and refuse recognition or enforcement where the foreign court's exercise of judicial power over the author/publisher violates due process. However, where the American author or publisher purposefully avails herself of the protections and benefits of the foreign jurisdiction then there is no reason why the author or publisher should expect an American court to step in protect the speaker from substantive liabilities arising in that jurisdiction.

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<sup>135</sup> [Cite Public Order Act of 1986 chpt. 64].

<sup>136</sup> See CHARLES J. GLASSER JR. *supra* note \_\_\_\_ at \_\_\_\_.

This jurisdictional approach is consonant with comity. Justice Story's *Commentaries on Conflict of Laws* assumes, as a general premise underlying all conflicts analysis, that a foreign judgment announced without by a tribunal lacking judicial power is void. This premise still serves as the backbone to all conflicts between co-equal tribunals. Thus, if Mahfouz ever presents his default judgment in a U.S. court, the court should deny enforcement, not on grounds of public policy, but rather on the ground that the English tribunal's attempt to exercise jurisdiction in the case violates Ehrenfeld's right to due process.

Importantly, this strategic focus on unreasonable assertions of adjudicative jurisdiction of foreign tribunals serves a shared interest in global judicial restraint. England's exercise of jurisdiction over Ehrenfeld and others like her clearly disrespects American adjudicative power as well as American constitutional law. However, the appropriate response must be one of judicial restraint rather than a broadening of judicial power. This strategy would properly call attention to the power struggle underlying all substantive conflicts rather than focusing the world on one example of conflicting substantive law.

Some will argue that this approach leaves many American authors and publishers in a precarious position because they hold assets in England or are targeting the English market. The jurisdictional shield will be of no use to the author or publisher whose contacts with England are sufficient to satisfy due process. I accept this criticism as valid, but offer two responses.

First, short of conquering England, American legislators or judges may not ignore England's sovereignty. England has the sovereign right to regulate speech within its borders. If a U.S. citizen travels to London and begins distributing material denying the holocaust in the middle of Trafalgar Square then most would concede England's right to regulate the speech of the U.S. citizen. Why? Because the speaker is physically present within the realm of England's territorial jurisdiction. A U.S. court's subsequent refusal to enforce a libel suit resulting from the American's speech activities in Trafalgar Square would be tantamount to granting all American citizens extraterritorial immunity from all foreign speech regulations which fail to conform with *Sullivan*.

Second, England's regulation of speech, if properly constrained, will encourage authors and publishers desiring greater protection of their expressive rights to locate themselves in the United States. Careful authors and publishers would locate all their assets in the United States and publish only within the United States. These authors and publishers might consider withdrawing completely from the English market in an effort to avoid oppression of speech rights. English citizens would sense the implosion of the English media and rightly demand recognition of greater substantive protections for authors and publishers. There are already calls for such change in England. If such changes are not adopted, then authors and publishers should not subject themselves to the sovereignty of the foreign nation.

In U.S. courts, then, American authors or publishers should not be granted offensive weapons with which they may collaterally attack the authority of the foreign tribunal. Instead, courts should carefully scrutinize the jurisdiction of the foreign court when a foreign libel judgment is present for recognition or enforcement. If the foreign tribunal's exertion of power is inconsistent with *International Shoe* and its progeny<sup>137</sup>, then the reviewing court should reject the foreign judgment on jurisdictional grounds. However, if the foreign tribunal's jurisdiction is established, then the reviewing court should enforce the foreign judgment in the shared interest of comity between nations.

In addition to this judicial response, Congress should adopt comprehensive legislation regarding the recognition and enforcement of foreign judgments. Foreign libel judgments are one piece of a much larger issue. The recent international financial crisis, the threat of international terrorism and the problem of international piracy are three clear examples of the increasing interconnectedness of co-equal sovereign nations.

Previous efforts in the Hague Conference to achieve international consensus on the recognition of foreign judgments were derailed when dispute emerged regarding the strict liability regime in American products law. This controversy illustrates the danger in accepting a policy-based refusal to recognize foreign judgments effecting speech rights. Americans injured by products produced in foreign nations and directed into the American market might confront similar policy-based objections to the American tort judgment when it is presented for collection in the foreign court. It is important to secure the enforcement of American judgments abroad. The path to this goal does not begin with a federal statute precluding enforcement of foreign libel judgments.<sup>138</sup>

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<sup>137</sup> It is important to note that this suggested jurisdictional review should be more rigorous than ordinary review of libel jurisdiction over non-residents. In *Calder*, the Court noted that one reason First Amendment concerns were ignored in the jurisdictional effects analysis was the fact that both states were bound by the First Amendment. This, the Court explained, insured that First Amendment interests would be protected even if the Florida defendants were subjected to jurisdiction in California. Because there is no guarantee of First Amendment protection in libel tourism cases, the reviewing court should consider the non-recognition of procedural protections for speech as a ground of denying the foreign court's effort to claim jurisdiction solely on the basis of the effects of speech. This limitation would ensure non-recognition of most cases where the U.S. author or publisher's contacts with the foreign forum are limited to the effects of speech published outside the forum. This would protect speech originally published in the United States from foreign regulation.

<sup>138</sup> See Rosen *supra* note \_\_ at 232 ("The categorical refusal to enforce [foreign libel] judgments harms plaintiffs that have prevailed abroad, undermines the ability of foreign countries to advance political commitments that diverge from American constitutional values, and creates needless costs and uncertainty for the international community.).

Thus, rather than adopting isolated non-recognition statutes such as the Free Speech Protection Acts currently receiving hearing in Congress, legislators should begin working toward the adoption of a comprehensive federal statute regarding the recognition and enforcement of foreign judgements. The ALI's recently proposed federal statute is an excellent starting point for this discussion.<sup>139</sup>

Congress should not adopt even more aggressive standards authorizing American citizens to sue foreign libel plaintiffs in federal court. First, such legislation would most likely be unconstitutional as applied to many foreign litigants due to the problem of acquiring jurisdiction over them. Second, such legislation directly impedes diplomatic efforts to obtain recognition and enforcement of American judgments. Third, such legislation improperly places in the hands of federal trial judges matters implicating the foreign relations of the United States.

Rather than pursue this strategy, Congress should work with the President to vigorously pursue diplomatic solutions to the problem of libel tourism. Because England's courts have become the haven of most libel tourists, a bilateral solution seems like a potentially viable response. Arguably, the recent explosion of the libel tourism industry in England resulted from the House of Lord's decision in *Berezovsky*. English jurists, scholars and citizens have criticized the result in *Berezovsky*. Is it possible to reach agreement regarding adjudicative jurisdiction with England in a manner that would protect American authors and publishers? Based on the increasing level of criticism in England it seems quite possible to reach a diplomatic solution.

In addition to these efforts, the State Department should be encouraged to renew its efforts to achieve multilateral solutions to the recognition and enforcement of foreign judgements. Recognition and enforcement of judgments is a fundamental issue of law and in an increasingly globalized world there must be renewed effort to secure recognition and enforcement of judgments issued by tribunals having adjudicative authority. The international rule of law depends on it.

### *Conclusion*

The desire to confront abusive foreign libel judgments is understandable. It is clear that such foreign lawsuits impinge upon expressive rights protected by the First Amendment and difficult to read of Professor Lipstadt's experience and shrug it off. Nor is it hard to sympathize with Dr. Ehrenfeld, who's efforts to bring public exposure to matters of significant public concern resulted in an English judgment against her.

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<sup>139</sup> See RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2005).

This article is intended to highlight, not diminish, the import of such abusive foreign libel judgments. These judgments are part of a greater and ongoing struggle to secure expressive rights around the globe. It is therefore tempting to encourage state and federal judges as well as members of Congress to respond to declare foreign judgments in conflict with First Amendment rights null and void.

This article is premised, however, on the maxim “don’t win the battle and lose the war.” In their effort to protect expressive rights in individual cases by denying enforcement or declaring foreign judgments generally void, policymakers and judges would actually be expanding the adjudicative power of tribunals by agreeing that this is matter for the courts. Such an expansion of judicial authority may actually diminish U.S. expressive rights abroad.

Ironically, libel tourism suits highlight a global effort to suppress speech and draw needed attention to the importance of expressive rights. These suits have resulted in criticism around the world. Rather than using the resulting momentum generated by criticism only to increase judicial intervention, our policymakers should use this opportunity to pursue diplomatic solutions which would secure greater protection of expressive rights and recognition of U.S. judgments throughout the international community.