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PUBLISH AT YOUR OWN RISK OR DON'T PUBLISH AT ALL: FORUM SHOPPING TRENDS IN LIBEL LITIGATION LEAVE THE FIRST AMENDMENT UN-GUARANTEED

*Heather Maly**

INTRODUCTION

Dr. Rachel Ehrenfeld's British publisher declined to publish her new book, *Funding Evil: How Terrorism is Financed and How to Stop It*, after a wealthy Saudi, whose name appears in the book, threatened to sue the publisher for defamation.[1] Nevertheless, Dr. Ehrenfeld was sued in a British court after twenty-three copies of her book were sold through online retailers to individuals in the United Kingdom (UK), and after the first chapter was posted on the ABC News website.[2] Dr. Ehrenfeld's book traces the money underwriting terrorist organizations, and it alleged that Khalid Salim A Bin Mahfouz, a Saudi banker, funds terrorist activity. Mr. Mahfouz's lawsuit claimed that statements in the book linking him to Al Qaeda and other entities defamed him in England, where he

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[1] Sarah Lyall, *Are Saudis Using British Libel Laws to Deter Critics?*, NY TIMES, May 22, 2004, at B1.

[2] Mahfouz v. Ehrenfeld, [2005] EWHC (Q.B.D.) 1156 (Eng). The total number of unique visitors to the ABCnews.com website during the month was approximately 211,000, so the court inferred that a significant portion of those visitors would have accessed the relevant pages. *Id.*

conducts business and owns homes.[3] Dr. Ehrenfeld decided not to challenge the suit, and Mr. Mahfouz won a default judgment against her.[4] Dr. Ehrenfeld then sought a declaratory judgment from the Southern District of New York to prevent enforcement of the decision in the United States (US) as a violation of her rights under the First Amendment.[5]

Dr. Ehrenfeld was not the first author to connect Mr. Mahfouz to terrorist organizations and thereafter face a defamation action in the UK.[6] Mr. Mahfouz claims to have successfully sued or settled with over thirty other publications that have alleged that he has links to terrorism.[7] Many of those actions have been successful simply because the defendants settled with Mr. Mahfouz, due to the high cost of libel litigation.[8] Further, it is Mr. Mahfouz himself who faces lawsuits, in the US, for his alleged financial involvement and thus support of recent terrorist attacks.[9]

Dr. Ehrenfeld's case is not unique. Throughout the world, and often in the UK, journalists must defend themselves against libel laws stricter than those in their own country.[10] American journalists relying on the protections of the First Amendment are finding that foreign courts willingly assert jurisdiction over them if the material they publish is viewed in those countries.[11]

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[3] *Id.*

[4] *Id.*

[5] Ehrenfeld v. Mahfouz, 04-CV-09641, 2005 WL 696769 (S.D.N.Y Mar. 23, 2005).

[6] Lyall, *supra* note 1 (citing a lawsuit that Mahfouz won against *The Mail on Sunday* for similar accusations); Jeffrey Toobin, *Let's Go: Libel*, THE NEW YORKER, Aug. 8, 2005 (describing Mahfouz's website citing libel victories).

[7] Thomas Lipscomb, *Another First Amendment Landmark Case?*, EDITOR & PUBLISHER, Mar. 21, 2005, *available at* http://www.public-integrity.org/publications/publications85.htm.

[8] *Id.* For example, *The Wall Street Journal*, *The Washington Post* and *The New York Times* have all settled actions with Mr. Mahfouz. *Id.* Further, his website lists several recent suits, the court decisions, and often formal apologies from the publishers. Bin Mahfouz Information, www.binmahfouz.info (last visited Jan. 25, 2005).

[9] Lipscomb, *supra* note 7.

[10] David Kohler, *Forty Years After* New York Times v. Sullivan*: The Good, The Bad, and the Ugly*, 83 OR. L. REV. 1203, 1204-05 (2004).

[11] *See* Mahfouz v. Ehrenfeld, [2005] EWHC (Q.B.D.) 1156 (Eng.) (inferring that since a number of people in the UK viewed the ABC news

Disseminating information over the Internet provides courts with justification for extending their jurisdiction beyond traditional geographic boundaries.[12] The actions of unrelated third parties—readers of articles online, online book purchasers—substantiate jurisdiction in foreign defamation disputes.[13] For publishers, it is difficult, if not impossible, to anticipate all of the laws they may be subject to under such unlimited jurisdiction.[14] American courts have previously protected authors and publishers by refusing to enforce foreign judgments that cannot be reconciled with the US Constitution.[15] However, such relief is not available when the foreign defendant has assets in the jurisdiction where the action is pursued since this creates jurisdiction over the American defendant by the foreign state.[16]

The Internet is a new medium that simply highlights recurring issues in international libel litigation.[17] In defamation actions pursued abroad, the problem often lies in the conflict between the foreign jurisdiction's substantive laws and the laws of the defendant's home country. In the US, the First Amendment protects speech to promote an open exchange of ideals. In contrast, many foreign nations acknowledge the importance of expression, but are equally protective of an individual's interest in his or her reputation.[18] This Note examines the differences between libel laws of the US and the UK, as an example of the liability American media companies can face under foreign laws.

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website, a significant number of those people would have accessed the alleged defamatory material); Dow Jones & Co. v. Gutnick [2002] 210 C.L.R. 575, 607 (Austl.) (substantiating jurisdiction based on subscription access to the publication's website).

[12] Brian P. Werley, *Aussie Rules: Universal Jurisdiction Over Internet Defamation*, 18 TEMP. INT'L & COMP. L.J. 199, 200 (2004).

[13] *See* Mahfouz v. Ehrenfeld, [2005] EWHC (Q.B.D.) 1156 (Eng.) (substantiating jurisdiction because the book was available and purchased through online retailers); *Dow Jones & Co.*, 210 C.L.R. at 607 (substantiating jurisdiction based on subscription access to the publication's website).

[14] Werley, *supra* note 12, at 231.

[15] *See, e.g.,* Bachchan v. India Abroad Publications, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992); Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997).

[16] Werley, *supra* note 12, at 229.

[17] *Dow Jones,* 210 C.L.R. at 605.

[18] *See* discussion *infra* Part I.

Part I of this Note examines US and British libel law jurisprudence, and contrasts the two models through a discussion of a UK case involving an American media company. Part II compares jurisdictional controversies within the US with the decisions of foreign courts to exercise jurisdiction over American defendants. Part III returns to Dr. Ehrenfeld's case and considers its potential for success based on past attempts to enforce foreign libel judgments in the US. Part IV analyzes the chilling effect that foreign libel laws could have on members of the American media if the trend of libel judgments in foreign courts continues or intensifies. This section also examines potential solutions to the conflicts in defamation law and proposes that the most feasible means of resolving the conflict lies within the status quo.

I. LIBEL LAWS

Throughout the world, freedom of expression is regarded as essential to democracy, but in practice this can mean different things in different places. In the US, speech is accorded the highest value and injury to one's reputation is sometimes an unfortunate consequence of maintaining this freedom.[19] Elsewhere, the value placed on free expression may not override a person's interest in protecting their reputation. In some countries, defamation laws allow the courts to impose criminal sanctions on the defendant, thus creating a potential chill on the media.[20] Australia and Canada have both broadened the scope of their protection of free expression in matters of political concern, but explicitly refuse to expand the rule to mirror the protection of speech afforded in the US.[21]

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[19] *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 281 (1964).

[20] John Di Bari, *A Survey of the Internet Jurisdiction Universe*, 18 N.Y. INT'L. L. REV. 123, 157-60 (2005) (citing examples of criminal sanctions imposed for defamation in Germany, Italy and Zimbabwe). *See also* Rachel L. Swarns, *Government and Media Spar in Zimbabwe*, N.Y. TIMES, June 1, 2002, at A3; *Despite Court Order, Zimbabwe Deports American Journalist*, N.Y. TIMES, May 17, 2003, at A5.

[21] *See generally* Lange v. Australian Broadcasting Corp. [1997] 189 C.L.R. 520 (Austl.) (supporting a qualified privilege pertaining to information on politics or government, as long as reporting is reasonable and not done with

While each European country operates under its own laws, the European Convention on Human Rights (ECHR) is influential in the interpretation and development of these laws. The ECHR was drawn up by Western European nations in response to the perceived threat that communism in Eastern Europe could become to human rights, and this treaty created the European Court of Human Rights to ensure observance of the articles of the Convention.[22] The ECHR advocates the right to freedom of expression as one of the essential foundations of a democratic society, but allows exceptions to this freedom, including for the protection of reputation.[23] The exceptions must be balanced against

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malice); Hill v. Church of Scientology of Toronto [1995] 2 S.C.R. 1130 (Can.) (specifically refusing to adopt the *New York Times* standards of US law). *See also* Leonard Leigh, *Of Free Speech and Individual Reputation:* New York Times v. Sullivan *in Canada and Australia*, *in* IMPORTING THE FIRST AMENDMENT 49 (Ian Loveland ed., 1998); Kyo Ho Youm, *Impact of Freedom of the Press Abroad,* 22 Fall COMM. LAW. 12 (overview of countries that have expanded their law regarding freedom of expression).

[22] GEOFFREY ROBERTSON & ANDREW NICOL, MEDIA LAW, 35 (4th ed. 2002). The ECHR set forth a catalogue of civil and political rights and freedoms and eventually established the European Court of Human Rights as a mechanism of enforcement of the obligations of the signatory states. All judgments are only binding on the Member States concerned. *See* European Court of Human Rights, Historical Background and Judgments, http://www.echr.coe.int (last visited Mar. 5, 2006). The UK was the first signatory in 1953, and the ECHR has since been ratified by all 41 Member States of the Council of Europe. It did not become law in the UK until its provisions were adopted by Parliament, which was done through the Human Rights Act of 1998, which came into force in October of 2000.

[23] Article 10 of the European Council on Human Rights and Fundamental Freedoms provides:

> 1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers . . .
>
> 2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, *for the protection of the reputation or rights of others*, for preventing the disclosure of information

the freedom of expression, but this balancing test is by no means equally weighted, in that the exceptions are interpreted strictly and narrowly.[24] For example, restrictions that require journalists to prove the truth of the allegedly defamatory statements will often be held unnecessarily prohibitive of speech.[25] European Court of Human Rights decisions are only binding on the signatory countries involved in a particular case, but the decisions influence the laws in the signatory countries to the ECHR, including the UK. British Judges do pay heed to the freedom of expression principle as defined by the ECHR and interpreted by the Court.[26]

British and American jurisprudence values the freedom of expression, but the two countries differ as to how essential the freedom of speech is in relation to other interests, such as reputation, in order to protect the freedom of expression. American

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> received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id. (emphasis added).

[24] ROBERTSON & NICOL, *supra* note 22, at 38. The state bears the burden of proving that the restriction at issue is necessary in a democratic society and that there is a pressing social need for the restriction. *Id.*

[25] Lingens v. Austria, 8 Eur. Ct. H.R. 407, 419 (1986). Plaintiff was the publisher of an Austrian magazine that printed two articles accusing the Chancellor of protecting former members of the Nazi party for political reasons. Plaintiff was required to prove the truth to escape conviction under Austrian law, and was ultimately convicted of criminal defamation. He brought this action for a violation of his rights under Article 10. *Id.* at 408-16. The court held that the requirement that Lingens prove the truth of the allegations was impossible and infringed the freedom of opinion, which is a fundamental right under Article 10. *Id.* at 420-21. Though this case specifically deals with statements of opinion, it does indicate the importance placed on the freedom of expression, specifically when weighed against protection of reputation. Further, the case focused on political speech, which receives more protection than individual reputation. *See also* Oberschlick v. Austria, 19 EHRR 389 (1991). Oberschlick was an Austrian journalist who claimed that some of the statements made in a speech by politician and candidate Walter Grabher-Meyer resembled the beliefs of the NSDAP (the equivalent of the Nazi party). He attempted to have Grabher-Meyer prosecuted, and after this was unsuccessful, published the full criminal information. Grabher-Meyer successfully brought a defamation suit, and Oberschlick appealed to the European Court of Human Rights. In overturning his conviction, the court held that freedom of political debate is the core of the concept of a democratic society.

[26] ROBERTSON & NICOL, *supra* note 22, at xii.

courts uphold the First Amendment and focus on the value of free expression in society.[27] In consequence, the libel jurisprudence protects speech more so than individual reputations.[28] British law has been slow to extend the freedom of expression to matters beyond political speech, and remains highly protective of individual reputation.[29] The British libel law imposes much more stringent requirements on media defendants than comparable US law, and many identical cases would likely be decided differently in each country.[30] The differences between British and American law are significant in application and contribute directly to the uncertainty in the American media about which defamation laws control and where they might be brought to defend suit.[31]

A. United States Libel Laws and the First Amendment

The First Amendment garners a near sacred place in American society.[32] It "forbids Congress from making any law which abridges the freedom of speech."[33] This constitutional safeguard "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[34] Free speech is respected as a necessity to democratic self-government and is prized for its protection of the free exchange of ideas.[35] As a result of the First Amendment's role in society, speech and interests of open dialogue are accorded more

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[27] *See infra* Part I.A.1.

[28] *See infra* Part I.A.2.

[29] *See infra* Part I.B.1.

[30] David Hooper, Sullivan v. Reynolds*: How Does the Actual Malice Principle in* Sullivan *Compare with the Responsible Journalism Test in* Reynolds?, 2005 Issue No. 3 MEDIA L. RESOURCE CENTER BULL. 103, 103 (2005).

[31] *See infra* Part I.B.2.

[32] Stephen Sedley, *The First Amendment: A Case for Import Controls?, in* IMPORTING THE FIRST AMENDMENT 23, 23 (Ian Loveland ed., 1998).

[33] U.S. CONST. Amend. I

[34] Roth v. United States, 354 U.S. 476, 484 (1957).

[35] Whitney v. California, 274 U.S. 357, 375-76 (1927).

weight than injury to reputation.[36] Consequently, allegedly defamatory speech involving public officials, public figures and matters of public concern are protected by a high burden of proof to establish libel.[37]

1. Philosophy Behind the First Amendment

The First Amendment was adopted with no debate, and many of the Framers themselves were unsure what it would mean in practice.[38] Through scholarship and jurisprudence, various theories have been enunciated and defended. Justice Hugo Black, for example, proposed the idea that the First Amendment is absolute and prohibits any restraint on speech.[39] Alexander Meiklejohn promoted the notion that free speech is a necessity for self-government.[40] Justice Holmes defined the search for truth, or marketplace of ideas theory.[41] Other theories contend that free speech promotes self-fulfillment and autonomy,[42] or that it serves as a safety valve maintaining a balance between stability and change.[43] There is no generally accepted view on what free speech is and what it protects, and in many ways First Amendment jurisprudence could be the result of the political and social climate at the time an issue comes before the court.[44] For this reason, it is

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[36] *See generally* New York Times v. Sullivan, 376 U.S. 254 (1964); Curtis Publ'g v. Butts, 388 U.S. 130 (1967); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

[37] *Id.*

[38] GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 42 (2004).

[39] Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 864, 874 (1960).

[40] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24-27 (1948).

[41] Abrahams v. United States, 250 U.S. 616, 630 (1919) (Holmes, dissenting).

[42] David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

[43] THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 11-15 (1966).

[44] STONE *supra note* 38, at 4-5 (suggesting that the only time the government has sought to punish speech and criticism is when the country is involved in war).

necessary to look at the two primary theories—specifically the democratic self-government notion and the marketplace of ideas theory—to understand its current role.

One theory of the First Amendment contends that it is a necessary element of self-government: For people to govern themselves they must be free to pass their own judgment.[45] Philosopher Alexander Meiklejohn felt this principle could be deduced "from the basic American agreement that public issues shall be decided by universal suffrage."[46] In his concurring opinion in *Whitney v. California*, Justice Brandeis set forth the history of the First Amendment and its intended value for self-government.

> Those who won our independence believed that the final end of the state was to make men free to develop their facilities, and that in its government the deliberative forces should prevail over the arbitrary . . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[47]

Justice Brandeis' democratic self-government paradigm suggests that speech is not the end goal but rather a means to a free-society. This view is concerned with the protection of those more personal actions, such as thought and communication, that allow individuals to participate in the public act of governing.[48] This freedom extends beyond politics to all means by which individuals obtain knowledge, including education and public discussion of issues.[49] Further, within the democratic self-government theory of the First Amendment, there is also the theory

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[45] MEIKLEJOHN, *supra note* 40, at 26.

[46] *Id*.

[47] 274 U.S. 357, 375-76 (1927).

[48] Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

[49] *Id.* at 256-57.

that identifies self-government, not through individual decision making as Meiklejohn suggests, but in the process in which citizens identify the government as their own.[50] Official limitations on public discourse would imply the democratic illegitimacy of the state because any such results would only be achieved by limiting the citizens' ability to participate in the democratic process.[51]

On the other hand, freedom of expression can also be seen as an end in itself. In his marketplace-of-ideas theory, Justice Holmes suggests that more benefit is gained by society through free expression.[52] He stated that the "best test of truth is the power of the thought to get itself accepted in the competition of the market."[53] Judge Learned Hand expressed a similar sentiment about the First Amendment: "It presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[54] The more people air competing opinions and explain the values of their views, the more likely people in society will understand the options and make the best choices in all contexts. Free speech is justified based on the overall benefits to society, and not due to the particular benefits that the individual speaker may receive.[55] These views require tolerance of all speech, and Justice Holmes required a showing of "clear and present danger" to stifle speech.[56] This model does endorse a function conducive to self-government because the marketplace of ideas allows people to make informed voting choices based on a plethora of all relevant information. But, it suggests that free speech exists for the primary purpose of truth

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[50] Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2367-68 (2000).

[51] *Id.*

[52] Abrahams v. United States, 250 U.S. 616, 630 (1919) (Holmes, dissenting).

[53] *Id. See also* Gitlow v. New York, 268 U.S. 652 (1925) (Holmes, dissenting).

[54] United Statea v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

[55] Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth,* 1984 DUKE L.J. 1, 4-5 (1984).

[56] *Abrahams*, 250 U.S. at 630-31.

and not good government.[57]

2. Libel Law Jurisprudence

These competing theories of the First Amendment affect its interpretation and application in the courts. Though the language of the First Amendment could imply otherwise, the rights protected are by no means absolute.[58] The tort of defamation imposes restrictions on what can be spoken and printed.[59] The Supreme Court has alternated between the paradigms of self-government and "the marketplace of ideas" in its decisions, depending on the interest to be protected.[60] *New York Times v. Sullivan*,[61] and its progeny, established the Constitutional standard to be applied in libel and defamation cases.

In *New York Times,* the Respondent Sullivan was an elected official who supervised the police department in Montgomery County, Alabama. He claimed that an advertisement printed in The *New York Times* contained defamatory statements pertaining to police activity against students during civil rights demonstrations.[62] Though he was not named specifically in the ad, the reference to the police, he argued, implicated him as the Commissioner of Public Affairs.[63] It was not disputed that some of the statements in the ad were not accurate depictions of the events described.[64]

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[57] Ronald J. Krotosyzynski, Jr., *The Chrysanthemum, The Sword and the First Amendment: Disentangling Culture, Community and Freedom of Expression,* 1998 WIS. L. REV. 905, 919 (1998).

[58] Koningsberg v. California, 366 U.S. 36, 49 (1961).

[59] 50 AM. JUR. 2d Libel and Slander § 118. Defamation is a false publication that causes injury to a person's reputation, or exposing him to contempt, public hatred, ridicule, shame or disgrace, or which affects him adversely in his trade or business. *Id*. at § 6. "Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words." RESTATEMENT (SECOND) OF TORTS § 568 (1977).

[60] Krotosyzynski, *supra* note 57, at 923.

[61] 376 U.S. 254 (1964).

[62] *Id.* at 256.

[63] *Id.*

[64] *Id.* at 258.

The Court in *New York Times* was more concerned with the nature of the speech sought to be protected, rather than which litigant should prevail.[65] As the Court suggested, this approach recognizes the value of speech in the larger public context.[66] First, the decision brought libel under the standards of the First Amendment, proclaiming, "libel can claim no talismanic immunity from constitutional limitations."[67] After discussing the importance of freedom of speech, the court concluded that injury to the reputation of public officials is not a sufficient justification for silencing speech.[68] The potential harm from silencing speech is not saved by an "exception for a test of truth."[69] To safeguard against self-censorship by the media and constraints on public discourse about public officials, the Court held that to recover for libel a plaintiff must prove that a "statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard for whether it was false or not."[70]

This presents a difficult barrier for plaintiffs to overcome in bringing defamation actions. The court balanced the constitutional implications of the different forms of speech—specifically if and what kind of defamatory speech is considered protected speech under the First Amendment—rather than balancing the interests of the individual parties.[71] This distinction reflects the importance placed on public dialogue, as a free society should be able to contemplate matters of public concern, including the conduct of public officials.[72] Public officials who feel they have been wronged by erroneous speech are encouraged to respond with speech, rather than to seek repression of the allegedly erroneous speech or to seek damages.[73]

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[65] Melville B. Nimmer, *The Right to Speak From* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942 (1968).

[66] *New York Times,* 376 U.S. at 269.

[67] *Id.*

[68] *Id.* at 273.

[69] *Id.* at 271.

[70] *Id.* at 279-80.

[71] Nimmer, *supra* note 65, at 942.

[72] *Id*. at 950.

[73] *Id.*

New York Times was a narrow decision limited to a libel action pursued by a public official, and the Court made no attempt to determine who would qualify as a public official.[74] The plaintiff was an elected official, and this was sufficient.[75] Speech served by the First Amendment, however, is not limited to the subject of public officers. In *Curtis Publishing v. Butts* and *Association Press v. Walker*,[76] the *New York Times* rule was expanded to cover public figures who were not government officials. The scope of constitutionality for speech on public figures was determined not by newsworthiness but by an analogy to public officials.[77] In *Curtis Publishing*, the Court held that the Founders did not intend to limit freedom of discussion to discussion of government, because a free press promotes truth in general.[78] Individuals who garner a certain amount of public interest could be labeled public figures, and they tend to have access to the media to rebut defamatory accusations.[79] This analysis focuses on the ability to respond to accusations and the assumption of risk in the public role rather than principles of promoting individual participation in self-government. As discussed in *New York Times*, some plaintiffs will be unable to overcome the barriers of this standard, but it avoids the evil of self-censorship that could occur when a when a speaker must prove the truth of a statement to succeed in his or her defense.[80] Rather than allow separate state libel laws for public figures, the Supreme Court enacted a more rigorous federal standard.[81]

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[74] *New York Times,* 376 U.S. at 284.

[75] In a later case, the Court described public officials as "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." Rosenblatt v. Baer, 383 U.S. 75 (1966).

[76] 388 U.S. 130 (1967). (Plurality opinion) (cases decided together).

[77] Harry Kalvern, Jr., *The Reasonable Man and the First Amendment:* Hill*,* Butts*, and* Walker, 1967 SUP. CT. REV. 267, 287 (1967).

[78] *Curtis Publ'g,* 388 U.S. at 147.

[79] *Id.* at 154-55.

[80] 376 U.S. at 279. *See* Gertz v. Welch, 418 U.S. 323, 340-41 (1974).

[81] *Curtis Publ'g,* 388 U.S. at 155. Since this was a plurality opinion, there was not an agreed upon standard to judge libel actions for public figures. The Court did agree that public figures should be treated like public officials. *Id.* at 162.

In actions involving private figures, the justifications used in *New York Times* and *Curtis Publishing* are not as readily applicable. Private figures do not thrust themselves into the spotlight as do public officials or figures, and private figures do not have effective opportunities for rebuttal available to them.[82] The need to protect an individual's reputation becomes more crucial in these situations in which unwanted public exposure leaves individuals more vulnerable to injury.[83] In *Gertz v. Welch,* the Court declined to apply the *New York Times* standard to private figures, and deferred to state law, as states had an interest in compensating private individuals for injury to reputation.[84] *Gertz* does require that a plaintiff show fault to recover damages.[85]

In *Philadelphia Newspapers v. Hepps*,[86] the Court also recognized a heightened protection of speech as to matters of public concern involving private figures, though it affirmed that this standard is less forbidding than when the plaintiff is a public figure involved in a matter of public concern.[87] In these instances, since the public could benefit from the dissemination of information, the balance favors protecting speech.[88] The Court held that "where a newspaper publishes speech of public concern, the Plaintiff cannot recover damages without also showing that the

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[82] *Gertz*, 418 U.S. at 344-45. The Petitioner was a reputable attorney who agreed to represent a Chicago police officer accused of murder. An article in Respondent's paper called him a 'Communist-fronter,' claimed he had a criminal record and also accused him of arranging a 'frame-up' of his client. *Id*. at 325-26. Petitioner Gertz was not a public figure in that he had achieved no general fame and he "did not thrust himself into the vortex of the public issue." *Id.* at 351-52.

[83] *Id.* at 345.

[84] *Id.* at 345-47.

[85] *Id.* at 347. The Court also recognized the danger of self-censorship resulting from punitive damages. As a result, a private defamation plaintiff who wants to recover punitive damages must meet the high actual malice standards of *New York Times*; otherwise, the individual will be limited in recovery to actual damage sustained. *Id.* at 350.

[86] 475 U.S. 767 (1986). Hepps was the principle stockholder of a corporation that franchised a chain of convenience stores. A series of articles was published linking him and the corporation to organized crime. He then brought the defamation suit. *Id.* at 768-70.

[87] *Id.* at 776.

[88] *Id.* at 776-77.

statements at issue are also false."[89] The plaintiff must show fault on the part of the publisher regarding the adequacy of the investigation to recover damages, and to an extent this will include evidence of the falsity of the allegations.[90] This standard imposes less of a burden on plaintiffs than the requirement of showing "actual malice" or "knowledge of falsity" as in the *New York Times* standards. It does not have the same deterrent effect on the media, because the burden is on the plaintiff to prove the falsity of the allegedly defamatory statement.[91] The Court decided that the balance should favor protecting true speech.[92] Some false speech may be allowed to stand because the plaintiff cannot meet the burden, but the Court judged that this is preferable to have true speech deterred.[93] Placing the burden of proof on the plaintiff, rather than the publisher, makes it much less likely that speech of public concern will be deterred.[94]

These cases overwhelmingly favor the interests of speech over reputation. In summary, in defamation actions, the court considers both the plaintiff's role in society and the nature of the information at issue. Starting with *New York Times*, public figures bringing defamation actions must show that the alleged defamatory statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard for whether or not it was false.[95] This standard has been extended to public figures, but the Court does not require as exacting a standard for speech involving private figures.

The various US approaches favor speech, and in contrast, UK law shows more deference to the presumed injury to individual reputation. The balance between the freedom of expression and individual reputation shifts differently, such that free speech interests are not perceived as being a sufficient justification to protect potentially false speech.

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[89] *Id.* at 769.
[90] *Id.* at 778.
[91] *Id.* at 777.
[92] *Id.* at 793.
[93] *Id.* at 776.
[94] *Id.* at 777.
[95] *New York Times,* 376 U.S. at 279-80.

B. United Kingdom Libel Laws

The freedom of expression does not have the same constitutional origins or statutory protections in Great Britain that it has in the US, but it does nonetheless constitute a respected value in British law.[96] No definitive statement exists in the statutory law to define the scope of free speech; rather the freedom exists where neither common law nor statute restricts it.[97] The courts acknowledge in their opinions the importance of protecting the freedom of expression and its importance in the political process.[98] British judges, however, are not swayed by lengthy arguments of the underlying political or moral philosophy behind freedom of speech and expression, nor is it usual for them to discuss these principles in their opinions.[99] While freedom of expression and the dissemination of information are important in the context of libel, reputation is still accorded significant importance, except in matters of political speech. There are limited exceptions to the strict libel law standards for free speech concerns.[100]

1. Libel Law Jurisprudence

The British defamation laws predominantly treat all plaintiffs the same, regardless of whether they are public or private figures.[101] In libel cases in Great Britain, the court presumes that a

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[96] ERIC BARENDT ET AL., LIBEL AND THE MEDIA: THE CHILLING EFFECT 1 (1997).

[97] *Id.* at 29. Article 10 of the ECHR was incorporated into British Law. Though it does create a statutory right of freedom of expression, the limits are not defined. ROBERTSON & NICOL, *supra* note 22.

[98] Reynolds v. Times Newspapers [2001] 2.A.C. 127, 200 (U.K.). *See, e.g.,* Derbyshire County Council v. Times Newspapers, Ltd., [1993] A.C. 534 (refusing a common law right of government institutions to bring an action for defamation damages as contrary to public policy for prohibiting speech).

[99] Barendt, *supra* note 96, at 30. This stands in contrast to their American counterparts whose speech related opinions often consist of thorough discussions of the underlying principles.

[100] *Id.* at 178.

[101] Rodney A. Smolla, Law of Defamation §1.9 (2d. ed. 1999).

contested statement is defamatory.[102] The defendant typically has the burden to prove the truth of the allegedly defamatory statement to defeat the charges.[103] This has changed little from common law origins and remains a great challenge for the defendant.[104] In 2002, the British government adopted the Human Rights Act of 1998 that guarantees a freedom of expression in accordance with Article 10 of the European Convention on Human Rights.[105] This covenant reflects the ideal that freedom of speech is itself an aim and a cornerstone of democratic society.[106] Though there is now a statutory recognition of freedom of expression, the judiciary is still extremely protective of individual reputations.[107]

In a defamation action, the plaintiff needs to show that the work identified him or her, conveyed a defamatory meaning, and was published by the defendant or in circumstances in which the defendant controlled the publication.[108] A statement is generally understood as defamatory if it is calculated to injure the reputation of an individual in the eyes of the reasonable members of the public.[109] This standard does allow some room for leeway depending on the context of the statement. Whether a statement is defamatory will be measured by its ordinary meaning or the innuendo it coveys.[110] The ordinary meaning prong is a factual question based on how the words would be understood by ordinary

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[102] *Id*.

[103] *Id.*

[104] *Id.*

[105] Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, art. 10, 1, 213 U.N.T.S. 221, 230 (modified Nov. 1, 1998).

[106] ROBERTSON & NICOL, *supra* note 22 at x.

[107] *Id.* Article 10(2) does allow signatory countries to limit the freedom of expression to protect reputation. The European Court of Human Rights has adopted a balancing approach when looking at the right to freedom of expression compared with the exception for the enumerated protections, including the protection of reputation. The permissible restriction must be 'necessary in a democratic society' to further the stated goals. This creates a presumption of freedom of expression when balancing the competing interests. BRANDT, *supra* note at 96.

[108] SIR BRIAN NEILL & RICHARD RAMPTON, DUNCAN AND NEIL ON DEFAMATION §5.01 (2nd ed. 1983).

[109] BARENDT, *supra* note 96.

[110] NEILL & RAMPTON, *supra* note 108, at § 4.02

people using their general knowledge and common sense.[111] Innuendos are interpreted in context and based on any relevant extrinsic circumstances.[112]

Since the allegedly defamatory statements are presumed false and actionable, the defendant must prove the truth of the statements or establish another privilege to defeat the charges.[113] In addition to challenging any of the previously named elements of a prima facie case,[114] the defendant can either claim a justification or a privilege. Under the justification defense, the defendant bears the burden of proving the truth of the words in substance or in fact.[115] This burden presents a difficult barrier for defendants to overcome when faced with a libel suit.[116] For example, David Irving, a leading figure in the Holocaust denial, accused Deborah Lipstadt of defaming him in her book *Denying the Holocaust—The Growing Assault on Truth and Memory*. In defense, Lipstadt was required to prove that the Holocaust happened to defeat the claim.[117] By the time she succeeded, she had run up a considerably

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[111] *Id.* at § 4.04

[112] *Id.* at § 4.18

[113] BARENDT, *supra* note 96, at 9.

[114] The work identified him or her, conveyed a defamatory meaning, and was published by the defendant or in circumstances in which the defendant controlled the publication. *Supra* note 100.

[115] NEILL & RAMPTON, *supra* note 108, at §§ 11.01 and 11.03. It should be noted that the defendant's state of mind in publishing the work is irrelevant.

[116] The procedures and costs of proving the truth of a defense can be significant. Media defendants may not be able to produce witnesses that they relied on and promised confidentiality to. Claimants may plead in the most exaggerated sense of the meaning of the alleged defamatory statement, and so the media defendant must prove the truth in this meaning and other perceived innuendo. The costs of the process can be significant. The discovery process and ability to cross-examine the libel plaintiff, who almost always must take the stand, do lessen the difficulties slightly. ROBERTSON & NICOL, *supra* note 22, at 114-17.

[117] Irving v. Penguin Books, [2001] EWCA Civ 1197. Irving is a published historian. In her book, Lipstadt identifies Irving as a denier of the Holocaust who skews data to reach unreliable conclusions. In the course of the trial, Lipstadt brought forth numerous expert witnesses discrediting his theories, among them that gas chambers were an impossibility. The entire legal battle lasted approximately five years. Deborah Lipstadt, Irving v. Penguin UK *and Deborah Lipstadt: Building a Defense Strategy, an Essay*, 27 NOVA L. REV. 243 (Winter 2002). In an interesting follow-up, David Irving was arrested in Austria

high legal bill.[118]

British law has exceptions that can save defendants from overcoming the burden of proving the truth of the underlying statement at issue. The courts do acknowledge that there may be higher priorities in the wider public interest.[119] The "fair comment" exception may apply to opinions made by the author on a matter of public interest.[120] The statement must also be based on fact, reasonably seen as an opinion that the author could express based on those facts, and made without malice.[121] The legal rules for this defense can be very technical and juries still often look at whether the truth of the underlying allegation has been proven.[122]

Another exception to the British libel laws is an absolute privilege exception that mainly applies to comments made by members of Parliament, but members of the press can claim this defense for fair and accurate reporting on judicial proceedings.[123] The libel laws further recognize a qualified privilege when reporting on a government entity, reasoning that due to the public interest, government bodies should be open to criticism and these institutions should be unable to prohibit speech.[124] The qualified privilege exception assumes that a legal, moral or social duty exists from the publisher communicating the information to the reader receiving it.[125] This privilege, however, is rather vague and the

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on November 11, 2005 and charged with Holocaust denial. The charges specifically stem from statements he made in two speeches in 1989 alleging that the Nazi gas chambers did not exist. Richard Bernstein, *Austria Refuses Bail to Briton Accused of Denying Holocaust*, N.Y. TIMES, Nov. 26, 2005, at A3. He has since pled guilty and been sentenced to three years in prison by an Austrian court. AP, *Austria Imposes 3-Year Sentence on Notorious Holocaust Denier*, N.Y. TIMES, Feb. 21, 2006, at A.

[118] Sarah Lyall, *Where Suing for Libel is a National Specialty,* NY TIMES, July 22, 2000, at B9. Her legal costs are reported to exceed three million dollars.

[119] Reynolds v. Times Newspapers [2001] 2.A.C. 127 (U.K.). (Nicholls)

[120] NEILL & RAMPTON, *supra* note 108, at § 12.01.

[121] *Id.* at § 12.02.

[122] Russell L. Weaver et al, *Defamation Law and Free Speech:* Reynolds v. Times Newspapers *and the English Media*, 37 VAND. J. TRANSNAT'L L. 1255, 1269 (2004).

[123] Barendt et al., *supra* note 96 at 13.

[124] Derbyshire County Council v. Times Newspapers [1993] A.C. 534 (U.K.).

[125] NEILL & RAMPTON, *supra* note 108, at § 14.01 and § 14.04.

circumstances of each case determine its application.[126]

Reynolds v. Times Newspaper[127] is the leading UK case on qualified privilege, though it leaves the news media uncertain as to how much protection and what type of protection it actually provides upon subsequent interpretation.[128] Regardless of this uncertainty, the case represents an expansion of defamation law beyond the previous narrow parameters.[129] Plaintiff Albert Reynolds, the former Irish Prime Minister, brought the suit for defamation against the British mainland edition of a national newspaper. The publication related to a political crisis in Ireland resulting in the plaintiff's resignation as prime minister.[130] He claimed that the words in the article injured his reputation by implying that he deliberately and dishonestly misled the House of Representatives and his cabinet colleagues.[131] The trial jury awarded Reynolds no damages, but the court refused to recognize the defense of qualified privilege thus burdening the defendant with the costs.[132] Both parties appealed the decision, and the Court of Appeals set the verdict aside due to jury misdirection and ruled that the publication was not covered by the qualified privilege.[133] The decision was appealed to the House of Lords to determine the issue of qualified privilege.[134]

In *Reynolds*, the court refused to adopt a new qualified privilege encompassing all political speech, as the defendants proposed, because it would fail to provide adequate protection for reputation.[135] The court also thought it unsound to distinguish between political matters and other matters of public concern.[136]

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[126] *Id.* at § 14.03.

[127] [2001] 2.A.C. 127 (U.K.).

[128] Weaver, *supra* note 122, at 1260-61.

[129] Ian Cram, *Reading Uncertainty in Libel Law After* Reynolds v. Times Newspapers*?* Jameel *and the Unfolding Defense of Qualified Privilege,* ENT. L. R. 2004, 15(5), 147-150.

[130] [2001] 2.A.C. 127, 191 (U.K.).

[131] *Id.*

[132] *Id.* at 192.

[133] *Id.*

[134] *Id.*

[135] *Reynolds,* 2.A.C. at 204.

[136] *Id.*

The court decided that the qualified privilege should be available upon the established test of whether there has been a duty to publish the material to the intended recipients and whether they had an interest in receiving it, taking into account all of the circumstances of the publication.[137]

The leading opinion by Lord Nicholls of Birkenhead acknowledges and praises the importance of the freedom of expression.[138] He sees the freedom to disseminate and receive information as essential to the political process.[139] In looking at this right in light of the common law's strict protection of reputation, he considers the laws of other countries, including the malice standard of *New York Times*, and declines to adopt this standard due to the potential implications of such a decision.[140] Ultimately, he sees the qualified privilege test as elastic and lists a non-inclusive list of ten factors that should be weighed.[141] These

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[137] *Id.* at 205. Though the court adopted a qualified privilege, it ultimately dismissed the appeal. This was not a publication which was should in the public interest be protected as privilege absent proof of malice. *Id.* at 206.

[138] *Id.* at 200.

[139] *Id.*

[140] *Id.* at 198-201. "Malice is notoriously difficult to prove." It would encourage people to publish quickly absent sufficient proof in the interest of getting the scoop. *Id.* at 201.

[141] *Id.* at 204-05. The factors that he names are: 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation that commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. Approaching the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing. *Id.* at 205.
Whether or not the matter is a qualified privilege is a matter for the judge. Lord Nicholls feels that the uncertainty will be resolved over time as a body of case law develops. *Id*.

factors cover such concerns as the quality of the newsgathering, the nature of the information and the importance of the information.[142] But, he concludes, with matters of public concern, the court should give the freedom of expression particular importance in this balance, and any doubts should be resolved in favor of publication.[143]

The opinion suggests that in matters of public concern the press will receive more protection against defamation actions in the future since doubts should favor the press, but it does not necessarily cause a considerable change in how the courts approach freedom of expression issues.[144] The judgment still leaves wide latitude for courts to adopt their own interpretations of the circumstances upon considering the nature of the information or the tone of the piece, and thus members of the media may be uncertain as to how the rule will be applied.[145] Further, earlier in the decision *Reynolds* affirms that considerable importance is still placed on protecting reputation.[146] In application, the criteria in *Reynolds* are subject to rather high standards that may be difficult to overcome.[147] This privilege requires more than subject matter that is of public interest.[148]

On its face, the opinion could arguably resemble the *Gertz* and *Philadelphia Newspapers* decisions, in that it seems to offer more

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[142] *Id.*

[143] *Id.* at 205.

[144] Ian Loveland, *A New Legal Landscape? Libel Law and Freedom of Political Expression in the United Kingdom,* EUR. HUM. RTS. L. REV. 2000, 5, 476-92.

[145] Weaver, *supra* note 122, at 1315.

[146] *Reynolds,* 2.A.C. at 201.

[147] *See generally* Jameel v. Wall Street Journal Europe [2004] E.M.L.R. 11, 209. The *Wall Street Journal* published an article describing a U.S. and Saudi government investigation into terrorism funding. The Jameel Group was named as a possible subject of the investigation. In looking at whether the subject matter is of public interest or concern, the court considered the urgency of the dissemination as relevant. While terrorism may be of general public interest, there was no public interest in publishing the specific names of an ongoing investigation in the United States at that point in time or without further confirmation. *Id.* So, the qualified privilege defense was rejected. It has been suggested that this case reads the qualified privilege too narrowly. *See* Cram, *supra* note 129.

[148] McCartan Turkington Breen v. Times Newspapers [2001] 2 A.C. 277.

protection to the press in publications on matters of public concern that it previously did. In practice, certain journalistic decisions could ruin the defense[149] or matters of public concern could be interpreted too narrowly.[150] Further, public concern exceptions could, in the extreme, be limited to political matters, as the court is willing to show more tolerance in this arena.[151] Ultimately, the standard in *Reynolds* implies that the defense of qualified privilege will be judged on whether the work at issue was published in line with standards of responsible journalism and whether the subject matter of the publication is of such a nature that it is in the public's interest for it to be published.[152]

2. An Example of the Plaintiff-Friendly Libel Laws Attracting "Libel Tourists"

The United Kingdom has notoriously plaintiff-friendly laws for defamation that attract "libel tourists" who try to take advantage of the pro-plaintiff laws.[153] For example, film director Roman Polanski recently succeeded in a libel suit in the UK against American magazine *Vanity Fair*, for defamatory statements contained in the magazine.[154] Polanski is a resident and citizen of France, and a fugitive from justice in the United States.[155] At trial he had to testify via video because his fears of extradition prevented him from entering the UK, his chosen venue.[156] He won

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[149] Arguably, there is always something more that a journalist could have done in investigating a story. A publisher's success under *Reynolds* could depend on the ability to convince a judge that it was the right editorial decision to publish when it did. Meryl Evans, *The* Reynolds *Privilege in Practice*, 2003 Issue No. 3 MEDIA L. RESOURCE CENTER BULL. 23, 33 (2003).

[150] *See supra* note 122.

[151] Evans, *supra* note 149.

[152] Jameel v. Wall Street [2005] H.R.L.R 10, 387.

[153] Toobin, *supra* note 6.

[154] Polanski v. Conde Nast Publications, UKHL 10 (2005).

[155] *Id.* at ¶3, 7.

[156] The reason that he could not appear in Great Britain was fear of extradition to the United States where he plead guilty to the charge of unlawful sexual intercourse with a minor after being indicted on 6 related charges.

a verdict of £50,000.[157] The lawsuit arose from an article in which *Vanity Fair* recounted a story of the sexual advances Polanski allegedly made toward a woman just after the death of his wife.[158] It is generally agreed that the story is true, but that the date of the incident was incorrectly reported.[159] He further contests some statements he allegedly made that appeared in the article and portray him as insensitive in the wake of his wife's murder.[160]

Polanski had no real ties to the UK, and *Vanity Fair*'s circulation there was minimal compared with its larger American audience.[161] If Polanski's predominant concern was vindicating his reputation, the action would have more of an impact in the US where the article was more widely read, or in France where Polanski lived. But, since the UK is the "libel capital of the Western world," it provided the more plaintiff-friendly forum.[162] In the US, Polanski would be considered a public figure, and, thus, subject to the more press protective principles first defined in *New York Times* and extended in *Curtis Publishing*.[163] Under British law, the qualified privilege would not apply since this is not a matter of public concern, and so *Vanity Fair* had to establish truth to defeat the suit. This case demonstrates how the British libel laws are used to circumvent the stricter American laws.

II. JURISDICTION

The Internet has created a world without jurisdictional

Graydon Carter, *Roman Holiday*, VANITY FAIR, Oct. 2005, at 80, 92, *available at* http://www.vanityfair.com/commentary/content/articles/ 050919roco02.

[157] *Id.*

[158] *Polanski,* UKHL 10 at ¶ 3. Members of the Charles Manson cult murdered Polanski's wife Sharon Tate. The article claimed that he told the woman he would "make another Sharon Tate out of [her]" *Id.*

[159] Simon Freeman, *Polanski's £ 50,000 Libel Victory*, TIMES ONLINE, July 22, 2005, http://www.timesonline.co.uk/printFriendly/0,,1-21704484-2,00.html.

[160] *Polanski,* UKHL 10 at ¶5.

[161] Polanski v. Conde Nast Publications UKHL 10 ¶12 (2005). The circulation in England and Wales at the time was 53,000 compared to 1.13 million in the United States. *Id.*

[162] *Be Reasonable*, TIMES ONLINE, May 19, 2005, http://www.timesonline.co.uk/printFriendly/o,,1-41-1618105-41,00.html.

[163] *See supra* Part I.A.2 for a complete discussion of these tests.

boundaries and expanded the potential for forum shopping.[164] An article posted on the Internet can be viewed in any country with telephone or cable access.[165] This raises the question as to whether a person or company that posts something online is risking suit in any country in the world.[166] It would be difficult, if not impossible, to anticipate and comply with the laws of every country. No international treaty or convention has been able to solve this compliance problem.[167] In the absence of a universally accepted international standard, each court conducts its own analysis of long-arm jurisdiction to determine whether its forum may resolve cases involving international parties. As some defamation decisions indicate, even the most minimal contact by a foreign party with the forum country can justify jurisdiction.[168]

Two standards typically control a determination of jurisdiction in defamation cases involving foreign parties: US courts follow an established due process standard and focus on the contacts with the forum state; many foreign courts, specifically the UK, look to where the harm, or injury to one's reputation, occurred.[169] In defamation cases, different interpretations as to when and where publication occurs further influence courts' reasoning regarding jurisdiction. Considering the current differences in libel law standards, the issue of jurisdiction can be determinative of a case's outcome. When a court cannot exert jurisdiction over a foreign party, the party will be free from the duties imposed by the laws of that country. The question of jurisdiction in the age of the Internet, and in light of the unique circumstances that arise with the tort of defamation, poses unique issues for courts. Absent a universal standard, judges are cognizant of the reasoning of courts all over the world in reaching decisions.

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[164] Bari, *supra* note 20, at 123.

[165] Dr. Georgios I. Zekos, *Personal Jurisdiction After* Dow Jones & Co Inc v. Gutnik, INTELL. PROP. & IT LAW 10.3(3), June 8, 2005 (UK).

[166] Timofeeva, *supra* note 20, at 201.

[167] Bari, *supra* note 20, at 166-67.

[168] *See generally* Mahfouz v. Ehrenfeld [2005] EWHC (Q.B.D.) 1156, *Dow Jones*, 210 C.L.R. at 594.

[169] Bari, *supra* note 20, at 165.

A. Jurisdictional Approaches in the United States

International Shoe v. Washington[170] established the standard for determining jurisdiction across state lines in the US, and while the borderless nature of the Internet challenges the current notion of jurisdiction, the *International Shoe* standards are still substantially applicable.[171] Under *International Shoe*, the defendant must have established minimum contacts with the forum state, and an assertion of jurisdiction must comport with due process, measured by "traditional notions of fair play and substantial justice."[172] This standard of due process is met when defendants have purposefully availed themselves of privileges of the forum state, such that they could reasonably anticipate being subject to suit there.[173] The success of *International Shoe* and its

[170] 326 U.S. 310 (1945). International Shoe was a Delaware corporation engaged in the manufacture and sale of shoes. It did not maintain a place of business in Washington, but it did employ between 12 and 13 salespeople who resided in Washington. They were under direct supervision from the company, their principle activities were confined to Washington and they received commission based on their sales in Washington. The issue was whether the Washington court had jurisdiction over International Shoe for its activities in the state. *Id.* at 311-14. The Court held that the operations within the state established sufficient contact with the state to make the forum reasonable and just according to the "traditional conception of fair play and substantial justice" to permit the state to enforce the obligations that the defendant has incurred there. *Id.* at 320.

[171] Dennis T. Yokoyama, *You Can't Always Use the* Zippo *Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV.1147, 1162-63 (2005).

[172] 326 U.S. at 316. Here, I am distinguishing in personam jurisdiction, as in *International Shoe,* from traditional notions of general jurisdiction such as citizenship in the forum state, incorporation in the forum state, or service of process on the individual in the forum state. *See, e.g.,* Milliken v. Meyer, 311 U.S. 457, 462-63 (1940), Burnham v. Superior Court, 495 U.S. 604 (1990).

[173] World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980). Here, defendants were automobile dealers in the New York area. An automobile that the defendants sold was involved in an accident in Oklahoma. The Court said that it was reasonable to anticipate that the car might be used in Oklahoma, but that alone was not enough to assert jurisdiction over the defendants. They did not direct activity outside of the tri-state area, and thus the plaintiff's unilateral activity was too attenuated for the federal court in Oklahoma's exercise of jurisdiction to meet due process requirements.

progeny results from its flexibility and ability to evolve with changing notions of commerce.[174]

The Internet creates a world unconstrained by traditional geographical boundaries. As a result, notions of personal jurisdiction in this borderless realm are difficult to reconcile with the established standards. While the standards of *International Shoe* cannot be seamlessly applied to Internet jurisdiction, a leading case confronting Internet jurisdiction, *Zippo Manufacturing Company v. Zippo Dot Com*,[175] attempts to parallel *International Shoe*.[176] The manufacturer of Zippo lighters brought suit in the Western District of Pennsylvania under the Lanham Act for trademark and dilution claims against a computer news service using the domain names zippo.com, zippo.net and zipponews.com. The website operator is a California corporation with its principal place of business in California. Its contacts with Pennsylvania occurred exclusively over the Internet.[177] In *Zippo*, the court ultimately found that the Internet contacts with the state if Pennsylvania were sufficient to substantiate jurisdiction.[178] *Zippo* created a sliding scale along which jurisdiction can be measured based upon the level of interactivity between the defendant and the forum state.[179] This scale ranges from passive sites in which the defendant merely posts information on the web to more active sites in which the defendant clearly enters into contracts and conducts business over the Internet.[180] Interactive sites that purposefully avail themselves of the jurisdiction's laws are impliedly subject to jurisdiction there as well.[181] The sliding scale model lends doubt and confusion due to the gray area in the middle of the spectrum, but it represents the notion that a defendant must actively seek out contact in the forum state to be subject to in personam jurisdiction

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[174] Yokoyama, *supra* note 171, at 1163.
[175] 952 F. Supp. 1119 (W.D. Pa. 1997).
[176] Yokoyama, *supra* note 171, at 1163.
[177] 952 F. Supp. at 1121.
[178] *Id* at 1127.
[179] *Id.* at 1124.
[180] *Id.*
[181] *Id.*

in that state.[182]

Defamation is a non-physical tort without distinct geographical parameters, and the process of publication—including investigating, writing, printing, and disseminating—may occur in several different jurisdictions.[183] As a result, defamation cases do not easily fold into the standard parameters established in *International Shoe*, and the Supreme Court has considered the uniqueness of the tort in its jurisdictional analysis.[184] In *Keeton v. Hustler Magazines*, the defendant publisher produced a nationwide magazine such that the Court said, "[t]here is no unfairness in calling it to answer for the contents of the publication wherever a substantial number of copies are regularly sold and distributed."[185] The circulation in the forum state was sufficient to assert jurisdiction, as the defendant purposefully directed content in the forum state.[186]

The Supreme Court has also held that a plaintiff's lack of contact with the forum state does not necessarily limit imposition of personal jurisdiction over non-resident defendants.[187] In *Calder v. Jones*, the court built upon *World-Wide Volkswagen v. Woodson*, and based its determination of jurisdiction on the effects that conduct in Florida could have in California.[188] In *Calder*, the

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[182] Yokoyama, *supra* note 171, at 1166. The gray area referred to could be an interactive registration service to access sites but which involves no other overt commerce. While the defendant may be aware that there is contact with a forum state, there is not necessarily control or specific targeting to a forum state in those situations. These can be distinguished from revenue-generating transactions.

[183] James R. Pielemeier, *Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation*, 133 U. PA. L. REV. 381, 393 (1985).

[184] *See generally* Calder v. Jones, 465 U.S. 783, 788-89 (1984) (reasoning that the petitioner intentionally aimed the actions in California and that the injury would be felt in the state in which respondent lives and works). Keeton v. Hustler Magazine, 475 U.S. 770 (1984).

[185] 475 U.S. at 781. The respondent published a national magazine and the petitioner was a New York resident with limited contacts in the forum state of New Hampshire. New Hampshire was the only state that would not have barred the action due to the expiration of the statute of limitations since it had not yet run in New Hampshire.

[186] *Id.* at 774-75.

[187] *Id.* at 779.

[188] 465 U.S. at 789.

respondent brought a libel action against the writer and editor of an allegedly defamatory article that appeared in the National Enquirer.[189] Jones was a California resident, and both the writer and editor were Florida residents with no relevant contacts in California.[190] The magazine's largest circulation was in California and the respondent lived and worked in California, so the Court held that the circumstances were such that petitioners could reasonably anticipate being brought to answer suit there.[191] This "purposeful availment" test is satisfied when the nonresident committed an intentional act that was expressly aimed at the forum and caused harm to the plaintiff, most of which the defendant knew would occur in that forum.[192]

The Internet should affect the analysis in defamation cases because its borderlessness affects the circumstances upon which defamation cases are based. There has been no clear standard to emerge involving jurisdiction and the Internet, and more specifically, pertaining to personal jurisdiction and the Internet. In approaching this issue, the courts have built on pre-existing standards applied to traditional print publications.[193] For instance, in *Young v. New Haven Advocate*[194] it was not sufficient, for asserting jurisdiction, that the defendant placed information on the Internet that could be read in the forum state.[195] Rather, a

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[189] *Id.* at 784.

[190] *Id.* at 785-86. Both the distributor and the national magazine made no objection to the jurisdiction of the California court. *Id.* at 785.

[191] *Id.* at 790.

[192] *Id.* at 788-90.

[193] *See generally* Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002) (refusing to recognize jurisdiction in Texas when there were no substantial contacts with Texas and the Internet bulletin posting at issue was not targeted to Texas); Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002) (holding that the defendant newspapers did not have sufficient Internet contacts with the forum state as they did not manifest intent to target Virginia readers).

[194] 315 F.3d 256 (4th Cir. 2002).

[195] *Id.* at 263. Connecticut sent prisoners to correctional facilities in Virginia due to overcrowding in the state's own prison system. A newspaper in Connecticut reported on the controversy that arose from this as well as a class action lawsuit that had been filed against the warden. The warden brought this action for libel relying on the newspapers Internet based contacts to establish jurisdiction. *Id*. at 258-60.

defendant needs to manifest intent to target and focus on readers in the forum state.[196] By requiring that the publishers intentionally target content over the Internet to the forum state, the publisher has the ability to limit where they will be brought to suit. Among the fifty states, this could help insulate small publishers from suit in foreign states due to their online publications. There is uncertainty as to whether this would apply in an international context.

In *Keeton*, the Court focused on the defendants' contact with the forum state and relied on this contact to substantiate jurisdiction.[197] *Hustler* knew that the magazine was published in New Hampshire, and by publishing in that state, *Hustler* assumed a risk of being sued there.[198] In *Calder*, the Court seems to adopt a different view of contact by relying on the defendant's knowledge of impact in the forum state and the inherent wrongfulness of the publication.[199] In *Young*, the court's approach recognizes the problems that the Internet could have for publishers if mere posting online was sufficient.[200] That court analyzed whether a publisher had intentionally targeted the state at issue.[201] How the Supreme Court will determine defamation law jurisdiction on the Internet has yet to be established, and in an international context, the problems may be more challenging because of the different weight placed on the location of the harm. Only in *Calder* did the harm play a significant impact in the Court's analysis, and by using the reasoning of this case, it would be easy to substantiate jurisdiction in an international forum if the defendant knew that the content would be directed there and would cause harm in that jurisdiction.

B. Jurisdictional Analysis in an International Context

In defamation suits, the benefits and consequences of forum shopping among U.S. states may be limited because differences in substantive law are restricted by the supremacy of the First

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196 *Id.*
197 475 U.S. at 778-79.
198 *Id.* at 779.
199 465 U.S. at 788-89.
200 315 F.3d at 263.
201 *Id.*

Amendment.[202] When defamation occurs on an international scale, conflicting international standards on freedom of speech gives rise to contrary outcomes. This threat to foreign defendants should compel a more forgiving jurisdictional analysis, to prevent plaintiffs from regularly shopping for and pursuing actions in the forum with the most favorable laws for recovery. But, often the jurisdictional analysis reflects the underlying laws and values of the home country. For example, in the UK and Australia, compensating the harm to the plaintiff's reputation is the dominant concern of the courts; therefore, jurisdiction is justified based on where that harm occurs.[203]

When the Australian case *Dow Jones v. Gutnik*[204] was decided, Internet publishers everywhere trembled at the decision's potential impact on their way of doing business.[205] This was the first major decision by the highest court of a country ruling on the jurisdictional reach of the Internet.[206] The plaintiff Gutnik was an Australian citizen engaged in business activity both in Australia and abroad.[207] An article in *Barron's* magazine alluded to his participation in illegal activities with an individual recently convicted of tax evasion, and the article was available online

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[202] Only cases involving private figures and matters of private concern have not been given explicit First Amendment protection. Even in matters involving private figures and matters of public concern, the Court has established a minimum standard for both fault and falsity. *See Gertz*, 418 U.S. at 345-47; *Philadelphia Newspapers*, 475 U.S. at 769. The states are free to adopt stricter rules than that. Further, in *Keeton*, the Court only resolved the jurisdictional issue and specifically declined to determine which choice of law would apply. 465 U.S. at 778 n.9.

[203] Dow Jones v. Gutnik (2002) 210 C.L.R. 575, 606-07. (Austl.); King v. Lewis [2004] I.L.Pr. 31 (Q.B.D.) (U.K.).

[204] Though this note primarily focuses on the UK and the US, the impact of this Australian decision on the jurisdictional issue deserves to be mentioned. Gutnik is an Australian citizen who is the chairman of a publicly traded company with activities in both Australia and abroad. The company is engaged in philanthropic, political, sporting and religious activity. *Dow Jones*, 210 C.L.R. at 594.

[205] Bari, *supra* note 20, at 123.

[206] Felicity Barringer, *Internet Makes Dow Jones Open to Suit in Australia*, N. Y. TIMES, Dec. 11, 2002, at C6.

[207] *Dow Jones*, 210 C.L.R. at 594.

through the *Wall Street Journal* website.[208] Gutnik sued strictly for damage to his reputation in his home state of Victoria, Australia, despite his connections to the United States and an interest in his reputation there.[209]

The publication process could implicate several possible forums. The article was written in New York, uploaded onto the Internet in New Jersey, and, for the purposes of this decision, read in Victoria, Australia.[210] Dow Jones argued for a single publication rule determining that the upload location was the place of publication for consistency and conformity in law, but the court decided to evaluate the place where the defamation occurred based on the policies underlying the law that made the conduct illegal.[211] The Court ultimately decided that defamation occurs where the damage to reputation occurs, so the place of publication is the location of the download.[212] Since this action was limited to harm that occurred in Australia, the Court limited the suit to damages for the harm to his reputation only in Victoria.[213]

The Court weighed the various policy concerns pertaining to the reach of the Internet and the differing laws of the countries involved, and they also considered comparable case law in other countries when reaching this decision.[214] The court found two compelling reasons for exercising jurisdiction. First, Australia's interest in compensating the harm to Gutnik's reputation in their territory; and second, the concern about American encroachment into Internet litigation since many web servers operate in the US.[215] Acknowledging that the rationale in the decision could create jurisdiction anywhere in the world, the court tried to limit the potential reach of the decision and suggested limits to scale back the potential for numerous lawsuits throughout the world for

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[208] *Id.* Of the 550,000 subscribers to the website, approximately 1,700 resided in Australia. Only a small amount of the overall print version was also sold in Australia. Werley, *supra* note 14, at 202.

[209] *Dow Jones*, 210 C.L.R. at 595.

[210] *Id.* at 606-07.

[211] *Id.* at 598-601.

[212] *Id.* at 607.

[213] *Id.* at 604.

[214] Bari, *supra* note 20, at 129.

[215] *Dow Jones*, 210 C.L.R. at 613-14.

the same piece of speech.[216] Regardless, this decision implies that the online publisher of any article containing allegedly defamatory material viewed in Australia could be brought to suit in Australia, and by extension of this law, anywhere else in the world where the alleged defamatory article was read.

The *Dow Jones* approach is similar to the approach used in the UK. In *King v. Lewis*, publication was held to be where the information was accessed.[217] It did not matter whether the information was targeted to England, only that it was viewed there.[218] The British courts have adopted the view that "publication is regarded as taking place where the defamatory words are published in the sense of being heard or read."[219] The location of the harm is the location of the reputational injury. The result is that even though the circumstances of the case might indicate both minimal contact and minimal reputation damage in the UK (such as in *King*, *Polanski* and *Mahfouz*), the court will still assert jurisdiction regardless of more appropriate fora.

In the US, the defendant must perform conduct intentionally directed at the proposed jurisdiction to be found liable in that jurisdiction.[220] When information is posted on a website, the plaintiff needs to establish that the information was purposefully directed at the forum state.[221] The place of publication is not solely where the harm occurs. In contrast, in some foreign jurisdictions

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[216] *Id.* at 609. For example, if the suit concerned damage to reputation in a foreign state, the action would be considered under the laws of that state. Also, the court suggested that plaintiffs are unlikely to sue in a given forum unless the judgment would be of real value, and they cannot sue unless they have an established reputation in that forum. *Id.*

[217] King v. Lewis [2004] I.L.Pr.31 (Q.B.D.) King is a well-known boxing promoter. He was engaged in a public battle with Judd Bernstein over a rematch between boxers Mike Tyson and Lennox Lewis. The suit was based on statements Mr. Bernstein made in an interview about Mr. King that appeared on the boxingtalk.com website. King claimed the statements implied that he is an anti-Semite and this damaged his reputation among the boxing community in London. *Id*.

[218] *Id.*

[219] *Id. See e.g,* Berezovsky v. Michaels [2000] 1 W.L.R. 1004.

[220] Calder v. Jones, 465 U.S. 783 (1984).

[221] Young v. New Haven, 315 F.3d 256 (4th Cir. 2002). *See also* Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002).

reputation is protected above speech, and thus, jurisdiction is determined by the place of injury, which is where the information is received. By making the location of the harm determinative of jurisdiction, the Court in *Dow Jones* created uncertainty for online publishers concerning which rule of law to use as a guide.[222] The competing interests of the parties and the law in general seem to be balanced as in other defamation cases, but by placing the paramount importance on reputation, the courts seem to acknowledge but disregard the greater impact this approach could have on speech and foreign publishers in general.

III. ENFORCEMENT

Rachel Ehrenfeld's case is of particular interest right now because she is asking a US court not to enforce the default judgment entered against her in England. She argues that recognition of the English judgment would violate the US Constitution since the two countries operate under conflicting defamation laws.[223] US case law, as it stands, supports her position.[224] Courts are not required to give effect to foreign judgments that are contrary to public policy.[225] Most foreign judgments in libel suits have thus far not been enforced in the US, as the judgments are considered repugnant to our Constitution.[226] These decisions recognize that attempts to chill speech do not comport with the protections afforded by the First Amendment; however, this counter-measure is of limited relief to American

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[222] Werley, *supra* note 14, at 231.

[223] Ehrenfeld v. Mahfouz, No. 1:04-CV09641 (S.D.N.Y Mar. 23, 2005).

[224] *See, e.g.,* Bachchan v. India Abroad Pubs., 585 N.Y.S. 2d 661 (1992). *See also,* Telnikoff v. Matusevitch, 702 A.2d 230 (1997). There is a question as to whether this action is ripe for adjudication since Mahfouz has not attempted to enforce the action in the United States. This issue will be discussed later in the section.

[225] Jeremy Maltby, *Note: Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in US Courts*, 94 COLUM. L. REV. 1978, 1983-87 (1994).

[226] *See, e.g., Bachchan*, 585 N.Y.S.2d 661. *See also Telnikoff*, 702 A.2d 230.

publishers.

A. US Case Law

Justice Cardozo wrote: "The courts are not free to refuse to enforce a foreign right . . . unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal[th]."[227] Court decisions among the several states are enforced pursuant to the Full Faith and Credit Clause of the Constitution.[228] Typically, state courts will enforce international judgments as a matter of policy, though there is no corresponding federal requirement.[229] This principle of recognition attempts to balance the relationship of civil governments to each other as well as the rights of the individual parties.[230] However, New York, along with several other states, has enacted laws allowing for the non-recognition of foreign money judgments when the cause of action on which the judgment is based is repugnant to public policy.[231] As expected, determining which judgments are repugnant to public policy is difficult, and sometimes arbitrary. The result is that this ambiguous and vague phrase can take different incarnations depending on either substantive or procedural differences among foreign states. The New York law, and similar sister state laws, apparently reflect a policy that enforcement of the foreign law would diminish comparable law in the United States.[232]

In libel actions, some courts have held that differences among foreign nations in standards of proof and protection of speech are

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[227] Loucks v. Standard Oil of New York, 224 N.Y. 99, 111 (1918).

[228] U.S. CONST. Art. IV. Sec. 1.

[229] Arthur von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach,* 81 HARV. L. REV. 1601, 1602 (1968).

[230] *Id.* at 1603-04.

[231] N.Y. C.P.L.R. § 5304. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §117.

[232] *See, e.g.,* Telnikoff v. Matusevitch, 702 A.2d 230, 250 (1997) (reasoning that recognition of the English defamation judgment could lead to a wholesale circumvention of fundamental public policy).

sufficient to qualify as repugnant.[233] In *Bachchan v. India Abroad Publications*,[234] a New York court refused to enforce an English defamation action in the US, because it was repugnant to the US Constitution.[235] The story at issue was written by a reporter in London working for a New York newspaper and was transmitted to papers in India and the US and distributed in the UK.[236] The court did not consider which jurisdiction would have been appropriate or the interests of other foreign states in enforcing the judgment, and instead focused on the substantive law in question.[237] The court here held that the standard of proof in English defamation cases violates the US Constitution and results in a chilling effect on the media.[238] The repugnance lay in the domestic effect of recognizing the judgment in the US.[239] The case suggests that First Amendment rights are so fundamental that laws without such a right are per se repugnant.[240]

The New York court seemed to approach the case as if the two laws were inherently in conflict and struck the law down with only a cursory analysis of the actual law and judgment at issue.[241] In *Telnikoff v. Matusevitch*, the Maryland court reached the same conclusion, but the judgment was reached after a thorough analysis of the history and application of the two countries' laws before refusing enforcement.[242] Telnikoff was an English citizen who

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[233] Telnikoff,702 A.2d at 250; Bachchan v. India Abroad Publications, 585 N.Y.S.2d 661 (1992).

[234] 585 N.Y.S.2d 661 (1992). *See also* Maltby, *supra* note 225, at 1983-93.

[235] *Bachchan*, 585 N.Y.S.2d at 665.

[236] *Id.* at 661-62.

[237] It is arguable that freedom of speech was not being exercised based on the circumstances of this case. The story was predominantly written and published and caused the complaining party damage outside of the United States. Based on these circumstances, the court would not necessarily be violating the First Amendment in enforcing the judgment because American speech concerns are not as significantly involved. Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking,* 60 BROOK. L. REV. 999, 1035 (1994).

[238] *Bachchan*, 585 N.Y.S.2d at 664.

[239] Stern, *supra* note 237, at 1030.

[240] *Id*. at 1000.

[241] *Id.* at 999.

[242] Telnikoff, 702 A.2d at 239-51.

brought the suit in British court for the alleged defamatory statements Matusevitch, an American citizen, made in a letter published in the *Daily Telegraph* responding to statements that Telnikoff had made in a radio broadcast.[243] Telnikoff was successful in the UK, and then came to the US to have the judgment enforced under principles of comity.[244] The court observed that the standards governing defamation law in the two countries are "totally different . . . in virtually every significant respect."[245] These differences were "rooted in historic and fundamental public policy differences concerning freedom of the press and speech."[246] The court reached its decision acknowledging the concern that "recognition of English defamation judgments could lead to wholesale circumvention of fundamental public policy."[247]

The above cases start with a foreign complainant's attempt to enforce the judgment in the US, and the analysis changes slightly when the enforcement by the foreign plaintiff has not yet been sought in the US. In such a situation, whether the US court can assert jurisdiction becomes a potential bar to an assertion of one's First Amendment rights. This precise issue was recently considered in *Yahoo! v. La Lingue Contra Le Racisme et L'Antisemitisme* (LICRA)[248] by an en banc Ninth Circuit Court.[249] The American company's auction site contained Nazi memorabilia that could be accessed in France by French citizens in violation of French laws prohibiting Nazi memorabilia.[250] The French court ordered certain measures to be taken to restrict access or remove the merchandise from the site and instituted significant fines for

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[243] *Id*. at 232-36. The alleged defamatory statements included accusing Telnikoff of being a racist, an anti-Semite, and a proponent of racial purity. *Id.*

[244] *Id*.

[245] *Id.* at 248.

[246] *Id.*

[247] *Id*. at 250.

[248] 433 F.3d 1199 (9th Cir. 2006). Yahoo! was sued in France because its US web site, accessible in France, contained Nazi paraphernalia; France has laws prohibiting such speech.

[249] *Id.* at 1202-03.

[250] *Id.*

non-compliance.[251] Yahoo! sought declaratory relief in the US, claiming that the French order would infringe on the First Amendment and as such was unenforceable in the US.[252] The District Court decided in favor of Yahoo! and granted the declaratory relief because enforcement of the French judgment against the U.S.-based company would effectively chill speech and is contrary to public policy.[253]

In *Yahoo!*, the District Court looked to *Bachchan* and *Telnikoff* for guidance, and considered the new issue in light of the problems created by the extensive reach of the Internet.[254] In this case, the French ruling has a simultaneous chilling effect in the United States because the Internet makes the information widely available.[255] As such, the First Amendment concerns regarding the potential chilling effect on speech outweigh the principal of comity.[256] The en banc court, however, did not see the issue ripe for adjudication.[257] There was no indication that the French judgment would be enforced against Yahoo! as the company was already mostly in compliance and also the French order does not impact users in the US.[258] The court chose to act prudentially, but leaves open the possibility to revisit the First Amendment issue should the impact of the order be felt by American users.[259]

The outcome of the *Yahoo!* case could influence a judgment in Dr. Ehrenfeld's pending case. *Yahoo!* raises the important question as to whether the plaintiff in a libel suit is required to seek enforcement in US courts before US courts can consider the merits

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[251] *Id.*

[252] *Id.* at 1201.

[253] 160 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001), *rev'd*, 379 F.3d 1120 (9th Cir. 2004), *rehearing en banc granted*, 399 F.3d 1010 (9th Cir. Feb. 10, 2005) (NO. 01-17424).

[254] Yahoo!, 160 F. Supp 2d at 1192.

[255] *Id.* at 1192.

[256] *Id.* at 1193.

[257] *Yahoo!*, 433 F.3d at 1201. On the eleven judge panel, eight judges held that the court had personal jurisdiction over the defendants. Of this eight, five judges concluded that the issue was ripe for adjudication and three concluded that it was not. Three judges determined that the issue should be dismissed for lack of personal jurisdiction. *Id.*

[258] *Id.* at 1218-20.

[259] *Id.* at 1223-24.

of their claim, and more specifically the First Amendment conflicts. In *Yahoo!* the court held that the issue was not ripe for adjudication, but the factual differences between the two cases do not necessarily guarantee the same result. The French order aims to restrict content in France but says nothing of comparable content in the US or any other territory where the site might reach. Ehrenfeld's case directly implicates freedom of expression because it focuses on speech involving a matter of public concern without regard to context. There is no indication of an attempt to enforce the French order against Yahoo!, unless circumstances change. Also, without direct implications in the US, the court in *Yahoo!* is concerned that this would amount to an extraterritorial application of the First Amendment.[260] One concern expressed regarding Dr. Ehrenfeld's situation is that if Mahfouz never attempts to enforce the monetary judgment in the US, she will always be forced to deal with the implications of the judgment in the British courts. It affects her reputation and credibility as a journalist, and the looming monetary judgment could cause financial harm both in terms of her credit as well as the imminent possibility of having to honor the judgment or fight it legally.[261] It is unclear whether Mahfouz will seek enforcement of the judgment in the US. This tactic could simply be used to dissuade future investigations by those skeptical of his political ties.[262] His website citing victories against journalists and including their court ordered apologies could then be his warning statement.

The enforcement of an English libel judgment could have the effect of chilling the speech of US media companies. On a larger scale, the *Yahoo!* decision by the Ninth Circuit could be seen as implicitly accepting the foreign judgment in spite of US laws. Yahoo! would either have to completely abide by the French order or risk incurring substantial fines for non-compliance that may

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[260] *Yahoo!*, 433 F.3d at 1217-18.

[261] Brief for Amazon.com et al. as Amici Curiae Supporting Plaintiffs, Ehrenfeld v. Mahfouz, 04-CV-09641, 2005 WL 696769 (S.D.N.Y Mar. 23, 2005), *available at* http://www.public-integrity.org/publications/publications061105.htm.

[262] Lyall, *supra* note 1.

someday be enforced.[263] In essence, it would be subject to the speech restrictions of French law despite the legal protections afforded to it in the company's home country.[264] But, the court was clear that the decision could change should the impact of the speech restrictions be felt on American soil.[265] The *Bachchan* and *Telnikoff* cases and the District Court's ruling in *Yahoo! v. LICRA* suggest that enforcement would chill speech in the US.[266] Either enforcement of a judgment or denial of a declaratory judgment would suggest that there are limits to the First Amendment's guarantee. On the other hand, principles of comity are widely recognized and accepted among foreign nations, and enforcement of a foreign judgment might not have such a troublesome impact by suggesting that the First Amendment offers less protection than previously thought.[267]

An author or publisher facing a libel lawsuit in a foreign court cannot necessarily rely on the US courts to disregard the judgment as their sole means of protection. With the globalization of the media, many publishing companies have global offices and assets. In those cases, the defamed party does not necessarily need the assistance of US courts to enforce the judgment. The judgment can be enforced against the assets in the foreign state, even if the defendant also has assets in the US.[268] Any magazine or newspaper that has a foreign news office in London or transacts other business in the United Kingdom will be subject to suit there regardless of

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[263] Yahoo! v. LICRA, 160 F. Supp. 2d 1181, 1185 (N.D. Cal. 2001). The order assed fines of approximately $13,000 per day for non-compliance after a three-month allowance period. *Id*.

[264] *Id.* at 1192-93.

[265] This enforces the proposition that Americans should abide by foreign laws when operating in a foreign country. Ronald J. Krotoszynski, *Defamation in the Digital Age: Some Comparative Law Observations on the Difficulty of Reconciling Free Speech and Reputation in the Emerging Global Village*, 62 WASH. & LEE L. REV. 339, 351 (2005).This could have interesting implications if applied to defamation law.

[266] *See Bachchan*, 585 N.Y.S.2d at 234-35; *Telnikoff*, 702 A.2d at 250-01; *Yahoo!*, 169 F. Supp. 2d at 1192-93.

[267] Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 862 (2004).

[268] Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 349 (1964).

whether the principle nature of their work is reporting for a US-based publication or whether their work is actually published in the UK. Ehrenfeld's situation is unique in today's world since, as an individual author, she does not have assets in the UK like many international publishing companies; her situation now seems more the exception than the rule.[269]

IV. THE CONFLICT

Both the US and the UK recognize the value of a free and open discussion of public affairs.[270] The countries, however, place different weight on what speech is protected, and as a result, create serious implications for the value of free speech. This impacts the conduct of American journalists in the global media market. The possibility of being subject to libel suits in countries not offering the same protections as the First Amendment can force journalists to think twice about potential consequences before publishing their work.[271] The limitations imposed by foreign courts could encourage responsible journalism, but professional standards and the market for news arguably encourage this responsibility already.[272] However, these limitations could also cause a chilling effect on the media and stymie their willingness to publish controversial, yet important, information by taking away First Amendment protections.[273]

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[269] Rachel Ehrenfeld is currently unable to travel in the UK because of the judgment pending against her, which potentially hinders professional opportunities. Rachel Ehrenfeld, *Banned in The U.K.,* FrontPageMage.com, Oct. 26, 2005, http://www.frontpagemag.com/Articles/ReadArticle.asp ?ID=19950.

[270] *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 273 (1964); Reynolds v. Times Newspaper, [2001] 2.A.C. 127, 200 (U.K.).

[271] To an extent, this has already happened. In an ABA-sponsored survey on Global Internet Jurisdiction, more than half of the media company respondents indicated that they have adjusted their business operations in response to the risk posed by Internet jurisdiction and its implications. Michael Geist, *Global Internet Jurisdiction: The ABA/ ICC Survey* (Apr. 2004), *available at* www.abanet.org/buslaw/newsletter/ 0023/materials/js.pdf.

[272] Keith Schilling, *The Americanization of English Libel Laws*, ENT. L. REV. 2000, 11(3), 48-49.

[273] *See generally* Kohler, *supra* note 10, at 1206-13 (discussing possible stories that would not have come to light with a less restrictive defamation

It is difficult to resolve a conflict between two nations that is based on inherent differences between each nation's priorities. Both countries promote free expression and consider it a means to a democratic government, and so the roots of the concept of freedom of expression are similar.[274] The differences in application, though, are substantial, and in the global media market, create considerable discrepancy as to which libel law governs various publications.[275] In application, one law trumps the other.[276] Principles of comity in respecting foreign law and foreign judgments seem to be disregarded because of the importance placed on regulating speech and the interests to be protected.[277]

American defendants will undoubtedly continue to be sued in foreign jurisdictions without First Amendment protections, and there are currently no clear recourses available to American defendants, publishers, courts or policy makers faced with this problem. Even more problematic for those involved with American media, is that the domestic solutions that do exist seem insufficient. Americans would reject the first hint of a solution that would diminish the protections of the First Amendment in the

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standard than *New York Times*); Weaver, *supra* note 122, at 1287-88 and 1311-12 (discussing the possibility of a hypothetical Watergate situation under British law).

[274] *See* discussion *supra* Part I.

[275] For example, in *Polanski*, discussed *supra* Part I.B.2, *Vanity Fair* could have been subject to suit in the US where it publishes, in the UK where it had a small circulation, or in France where Polanski lives and the magazine also has a small circulation. What if he had been filming a movie in the Czech Republic when the article was released? This further raises the question of whether he could have sued in the Czech Republic for the damage done to his reputation there.

[276] For example, when looking at the relevant cases in both the U.K. and the U.S., each country decides to adopt their own laws and specifically refuses to enforce the other. In *Reynolds,* the Court did consider the American law in reaching their decision. 2 A.C. at 198-201. Further, in *Polanski,* the British court was willing to apply U.K. laws over an American publisher for a predominantly American publication. *Dow Jones*, 210 C.L.R. at 612-13. In the US, by refusing to enforce foreign libel judgments in both *Bachchan* and *Telkinoff*, the American courts recognize supremacy of American law over the British courts' decisions. Telnikoff v. Matusevitch, 702 A.2d 230, 250 (1997); Bachchan v. India Abroad Publications, 585 N.Y.S.2d 661 (1992).

[277] *Telnikoff*, 702 A.2d at 250; *Bachchan*, 585 N.Y.S.2d at 661.

US.[278] Many foreign states, fearful of any implication of the supremacy of US law, have expressed disdain for a policy adopting the standards for free speech as established by the US Constitution and courts.[279] This entrenched conflict in substantive law and fundamental public policies means that any potential solution for the media will be not easily be found in terms of jurisdiction and enforcement.

Potential solutions have been proposed, though they are neither easy nor satisfactory. One potential solution involves setting a universal jurisdiction for cases involving the Internet as the means of distribution, or more clearly defining jurisdictional rules for international defamation.[280] A second solution focuses on an international agreement establishing a universal protocol in defamation cases involving foreign parties.[281] Finally, the third, and most feasible option, argues that the solution exists partially within the status quo. By expanding the current law of conflicting countries, the solution could be remedied more satisfactorily than by attempting to define international defamation standards.[282]

A. An Internet-Based Solution

One solution suggests that Internet jurisdiction should be based on contact with the forum state without regard to the substantive law of the defendant's home state. This satisfies the reputation-protective nature underlying many nations' defamation laws by allowing the allegedly defamed to vindicate his or her reputation in the home country where the injury is most likely felt. A major concern regarding this effects-based approach, as adopted by both

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[278] Ken Kraus, *Enforcement of Foreign Media Judgments in the Aftermath of* Gutnik v. Dow Jones & Co.*,* 21 SPG COMM. LAW. 1, 25-27 (2003).

[279] *See generally* Dow Jones v. Gutnik (2002) 210 C.L.R. 575, 606-07. (Austl.); Reynolds v. Times Newspaper, [2001] 2.A.C. 127, 200 (U.K.). *See also* Jonathan Harris, *Forum Shopping in International Libel*, L.Q.R. 2000, 116 (OCT), 562, 568.

[280] *See supra* Part IV.A.

[281] This is not a new solution, and an international agreement certainly has been attempted, especially for jurisdictional concerns. *See, e.g., Kraus, supra* note 278.

[282] *See supra* Part IV.C.

Australia and the UK, is the chilling effect on publishers being afraid of foreign suit from using the Internet to disseminate information.[283] In this worse case scenario, publishers could simply choose to not post articles and information online as a means to avoid the risk.[284] Imposition of suit based on effect-based jurisdiction could cause more impact on multi-national media companies while having little effect on independent publishers.[285] At first glance, this does not seem problematic, but the media entities regulated by the market and public opinion might choose silence instead of risk, while individual and potentially irresponsible bloggers could fill the void left open.[286] If a publisher assumes that by putting information on the web, they are assuming the risk of suit in various foreign entities, they may simply choose not to assume the risk if the threat and costs of suits increase.[287]

It is unreasonable to require publishers to exercise control over who visits their sites. The technology surrounding the Internet is constantly evolving, and there has been some suggestion that it is possible to attach significance to the geographical location of those active on the Internet.[288] Websites and Internet Service Providers

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[283] Bari, *supra* note 20, at 164-68.

[284] *Id.*

[285] Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1217 (1998). For example, bloggers with no foreign assets could defame at will because suit in a foreign jurisdiction would mean little since the judgment could not be enforced locally. Large media entities could refrain or restrict publishing since this effect-based approach poses more of a risk to their continued viability.

[286] This is certainly a worse case scenario and too extreme to likely ever happen. But regardless, this effects-based approach highlights the inconsistent treatment of various publishers. In international defamation actions, the standard fails to punish defamatory speech and instead, real success is often determinative on whether the speaker has assets in a particular location. While that summation simplifies the problem, if vindicating injury to reputation is the goal, this seems to miss the mark unless the actual judgment is all the alleged defamed individual hopes to achieve.

[287] This will be looked at through a cost-benefit analysis later in this section.

[288] Dan Jerker B. Svantesson, *Geo-Location Technologies and Other Means of Placing Borders on the 'Borderless' Internet*, 23 J. MARSHALL J. COMPUTER & INFO. L. 101, 101 (2004). According to the estimates of two expert witnesses in the *Yahoo!* case, it is possible to achieve a filtering success rate of

(ISPs) do filter content based on user location.[289] It is not uncommon for larger sites to require users who visit and read content on the site to register.[290] Publishers could attempt to block access to every country with objectionable laws, but this is not an easy undertaking.[291] This is an unsatisfactory alternative because many online publishers might not have the means to accomplish this 'blackout',[292] due to the high costs of such measures.[293] This

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90% through geographical identification of IP addresses and a declaration of nationality

[289] Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1962 (2005). According to the estimates of two expert witnesses in the *Yahoo!* case, it is possible to achieve a filtering success rate of 90% through geographical identification of IP addresses and a declaration of nationality. A third expert doubts this number due to its reliance on users to respond truthfully under the honor system. Yahoo! v. LICRA, 433 F.3d 1199, 1201 (9th Cir. 2006).

[290] *See, e.g. Dow Jones,* 2 C.L.R. at 129.

[291] A publisher would literally have to block access to the entire country with unfavorable laws. There could be no click-through contract or the like since a third party's actions can substantiate suit. The contract would not be able to be one enforceable between the actual parties. Also, corporations would have to hire lawyers familiar with each country's laws or make a publishing judgment based on the least offensive material to satisfy the most stringent country's laws. Content filtering may help to avoid liability internationally, but it could also result in a global chilling effect on both speech and online commerce. Jay Wahlquist, *The World Summit on the Information Society: Making the Case for Private Industry Filtering to Control Extraterritorial Jurisdiction and Transnational Internet Censorship Conflicts,* 1 INT'L L. & MGMT. REV. 283, 289 (2005).

[292] This was one of the problems cited in *Yahoo!*. Yahoo! claimed it did not have the means to restrict access of the content from France, thus resulting in a chill on its speech. Yahoo! v. LICRA, 160 F. Supp. 2d 1181, 1184-85 (N.D. Cal. 2001). However, Google is currently blocking certain search results on the Google.cn website in cooperation with the Chinese government. Joseph Kahn, *So Long Dalai Lama: Google Adapts to China*, N.Y. TIMES, Feb. 12, 2006, at § 4. Google does disclose when searches are being censored. *Id.* Due to the size of the Chinese market, it might be more damaging to completely pull out of the market. David Barboza, *Version of Google in China Won't Offer E-Mail or Blogs*, N.Y, TIMES, Jan. 25, 2006, at § C3. This does suggest that the technology is possible, but it does not necessarily mean that it is financially worthwhile in many situations. In both the *Yahoo!* case and a similar case involving CompuServe in Germany, the Internet Service Provider chose to block the offensive content rather than spend resources utilizing nation specific targeting. Wahlquist*, supra* note 291 at 289-90.

could also disproportionately affect ISPs, as they become a target for such actions even if individual users place the offensive content online.[294] Further, evasive measures exist for those who do not want to be linked to, and thus limited by, their geographic location, and this would stymie efforts at jurisdiction control.

Suppose the international community adopts an approach similar to the one adopted by the US in *Young v. New Haven Advocate*[295] and requires that the publisher purposefully targets the forum state to be subject to jurisdiction there. A website operator who knows the location of a visitor to his or her site can limit the contacts with certain jurisdictions based on that information.[296] Through advertising and content, a publisher can target certain countries and avoid others. This would improve the ability to anticipate applicable laws and avoid jurisdictions with unfavorable laws. This is also not as tenuous a link to jurisdiction as mere accessibility of a website in a forum.

Either of the above suggestions limiting Internet jurisdiction ultimately limit the ability of a party to bring suit for defamation. An individual named in a potentially defamatory article might not have the means to view or read such article and respond to the allegations. In the alternative, an individual may be able to read and access the information but not pursue the action in their home jurisdiction because the site did not specifically target that country.

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[293] A blogger interested in world politics who regularly airs complaints about foreign leaders should not be provided less protection against foreign defamation actions than the large media conglomerate who can afford to impose the viewing restriction, especially since it might not be necessary to have this blocking protection due to the number of people who view the site. Arguably, this solution might achieve a market balance in a way. Independent American bloggers and the like will unlikely have foreign assets, and so the judgment will not be enforced in the US. This underestimates the legal expenses in defending suit here and the effect of having a defamation judgment on record in a foreign country. The media entities with the means to limit viewing also likely have assets in those countries, and so the restriction option works for them in the way that the enforcement option, as used in *Bachchan*, will not.

[294] Wahlquist*, supra* note 291, at 292. There is a greater incentive to go after ISPs than individual users as the effects of actions to restrict content will have greater reach than merely targeting individual users. *Id.*

[295] 315 F.3d 256 (4th Cir. 2002).

[296] Svantesson, *supra* note 288, at 103-04.

Reputation-protective countries might take issue with the restrictions, and to an extent they already have.[297] The restrictions limit an individual's ability to vindicate their reputation, which is counter to the intent and goals of some individual defamation laws.[298]

The Internet solution is not limited to issues focused on access of information. While apparently rational, the place of uploading information to the web neither should nor could become the controlling forum. Defendants would not have to anticipate suit in foreign states because they could choose the applicable laws by choosing where to publish or, as pertains to the Internet, upload.[299] This solution is appealing to American media because it allows them to continue to operate solely under the protections of US law, and could give the broadest reach and force of the First Amendment. This solution then puts the US in the position to become a host location to many media companies, by offering more media protective laws.[300] But, this solution, while arguably the most media protective, is also highly unrealistic. It imposes US defamation law on foreign nations when the defamatory statement at issue is published electronically despite the fact the US approach to freedom of expression represents a minority approach.[301] It could potentially cause a race to the bottom that would heighten the resolve of foreign courts to assert jurisdiction in their own systems.[302] Courts have already refused to recognize this definition of publication and are unlikely to start to do so at the expense of their own laws for the purposes of certainty in the international

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[297] *See* discussion *supra* Part II.B.

[298] *See* discussion *supra* Part I.

[299] Dow Jones v. Gutnik (2002) 210 C.L.R. 575, 632-33 (Austl.).

[300] *Id.*

[301] Krotoszynski, *supra* note 265, at 350.

[302] Both *Reynolds* and *Dow Jones* considered US law in reaching their decision and specifically refused to adopt it as counter to the reputational interests protected in both the UK and Australia. Reynolds v. Times Newspaper, [2001] 2.A.C. 127, 198-201 (U.K.); *Dow Jones*, 210 C.L.R. at 612-13. There is also the risk that the U.S. could become a safe haven for unpopular speech, such as hate speech. Joel R. Reidenberg, *Technology and Internet Jurisdiction,* 153 U. PA. L. REV. 1951, 1958 (2005).

arena.[303]

This solution further poses a considerable imposition to plaintiffs wanting to bring suit, and a plaintiff's inconvenience should factor into a courts' decision when considering whether to assert jurisdiction. This could be rectified by allowing plaintiffs to pursue a suit in their home state while using the substantive law of the defendant's state.[304] However, it is unlikely that one country's court will accept another's country's law as superior to their own when different interests are valued.[305] The plaintiff would not suffer the inconvenience of bringing suit in a foreign state, but the application of the differing laws of the foreign state might be as great an imposition to suit.

B. An International Agreement

The potential of a jurisdiction-based solution, while appealing, may not resolve the issue, especially since there is currently no uniform rule to determine jurisdiction. A uniform, global set of standards for information published on the Internet presents an alternate, though likely impossible, solution to this problem.[306] This model has been applied in other contexts. For example, the Internet Corporation for Assigned Names and Numbers (ICANN) maintains the uniformity of domain names and other unique identifiers.[307] The Berne Convention oversees international copyright protection,[308] and the Hague Convention is attempting to resolve uncertainty in online contracts through Internet jurisdiction

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[303] *See* discussion *supra* Part II.B.

[304] The court in *Dow Jones* did suggest that if the action was for defamation in more than one state, due consideration might be given to the laws of that state when reaching the jurisdiction. Since this case was limited to damage caused in Victoria, there was no need to fully analyze this option. 210 C.L.R. at 609.

[305] Werley *supra* note 14, at 222-23.

[306] Bari, *supra* note 20, at 167. *See also,* Marc H. Greenberg *A Return to Lilliput: The* LICRA v. Yahoo! *Case and the Regulation of Online Content in the World Market*, 18 BERKELEY TECH. L. J. 1191, 1250 (2003).

[307] *See* www.icann.org.

[308] 18 Am. Jur. 2d Copyright and Literary Property § 202.

through an international treaty.[309] In defamation contexts, the possibility that such an agreement will be adopted on an international scale is unlikely.[310] It is doubtful that a country will forfeit its own laws or limit the effect of such laws to an international standard based on different ideals.[311] In defamation actions, the contested issue involves each country's values, and it would likely be harder to reach a consistent arrangement when values are at issue.[312] In the US, any agreement that diminishes First Amendment protection would likely suffer constitutional challenges at home.[313]

However, an international agreement need not sweep so broadly. If it is unrealistic to assume that countries would reach an agreement on defamation law in general due to differing values as to what speech should be protected, there is no reason that the agreement could not be limited in its scope. For example, an agreement could limit jurisdiction to the plaintiff's home venue or the publisher's home venue. This could limit libel tourism but it still does not adequately protect reputational interests, as it might exclude a person's place of business or any other basis for jurisdiction in a location where a person's reputation may have been injured. The agreement could also focus on damages, such as limiting recovery of damages to actual injury suffered in that jurisdiction, or limiting the number of locations in which a party could pursue a defamation action for a particular publication. These limitations could rein in forum shopping, but it leaves the question as to whether parties would agree to this more willingly

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[309] Members of the Hague convention have attempted this with enforcement. Krause, *supra* note 278, at 25-26. Part of the problem in reaching an agreement in the Hague Convention is that it would require the US to enforce foreign judgments. It could mean that a business would be vulnerable to suit anywhere in the world. Denis T. Rice, *Problems in Running a Global Internet Business: Complying with the Laws of Other Countries*, 797 PLI/PAT 11, 36 (2004).

[310] Bari, *supra* note 20, at 167. *See also Greenberg, supra* note 306, at 1250.

[311] *Id.*

[312] Timofeeva, *supra* note 20, at 223. "Given the divergent policies and values embraced by governments throughout the world, arriving at an international agreement seems nearly impossible at this time." *Id*.

[313] Bari, *supra* note 20, at 167.

than another international jurisdiction or defamation-based agreement. In the alternative, the proposed international agreement could focus on the choice of law and be reached as a compromise over two conflicting sets of laws among nations.[314]

C. A Solution Within the Current Law

One impetus of the decision in *New York Times* was free exchange of ideas and information, and as such, the Court determined that speech should be over-protected rather than under-protected.[315] The Court feared that requiring a showing of truth to prevent unreasonably high libel judgments would result in self-censorship.[316] This self-censorship, as compelled by the state through libel laws, limits public debate.[317] With limited legal protection for speech, publishers would err on the side of caution by choosing not to publish, rather than risk the threat of suit.[318] When the Court extended the *New York Times* "actual malice" standard beyond matters involving public officials, it implicitly recognized the value of free speech in those other contexts.[319]

British journalists recognize the chilling effect that their

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[314] *Krotoszynski, supra* note 265, at 351. For example, if the Europeans do not like the US antitrust laws, they could agree to recognize a safe harbor for defamation actions pursued in their nations while the US agrees to recognize a safe harbor for certain antitrust violations. *Id.*

[315] Harry Kalvern, Jr. *The* New York Times *Case: A Note on "the Central Meaning on the First Amendment"* 1964 SUP. CT. REV. 191, 213 (1964) (discussing the effects of the Supreme Court decision and its potential impact on the tort of defamation).

[316] New York Times v. Sullivan, 376 U.S. 254, 279 (1964).

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions- and to do so on pain of libel judgments virtually unlimited in amount leads to a comparable self-censorship . . . .The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

Id.

[317] *Id.*

[318] *Id.*

[319] *See* discussion *supra* Part I.A.2.

country's laws have on their work.[320] Publication decisions are made not just by the author and editors, but also attorneys, based on the availability of proof and the potential for a lawsuit.[321] British journalists even suggest that a journalism-spurred investigation like Watergate would not have been able to happen in the UK due to the reluctance of publishers to publish legally inadmissible evidence.[322] The British courts are cognizant of the potential chilling effect on the media and allow exceptions.[323] In *Reynolds*, the freedom to disseminate political information was said to be essential to the proper functioning of the established democracy, but the Court stopped short of extending media protection in the vein of the *New York Times* standard since the protection of reputation is "conducive to the public good."[324] If no privilege is found to exist on balance with protecting one's reputation, then the only means for relief is proving the truth of the statements.[325] This can be difficult.[326] Imposing this reputation-protective standard on American publishers circumvents US laws and could chill US speech if Americans are increasingly forced to defend defamation cases under British laws. The decisions in the *Polanski* and *Ehrenfeld* cases in the UK suggest the ease with which the First Amendment can be disregarded simply by changing jurisdictions.[327]

This concern over a chilling effect is validated by the fact that Dr. Ehrenfeld's British publisher cancelled publication of her book on the mere threat of a lawsuit.[328] Another journalist, Craig Unger, faced a similar fate in England over his book on the relationship between the Saudi Royal Family and the Bush family.[329] The

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[320] *See generally* Weaver, *supra* note 109 (reporting interviews with journalists on *Reynolds* and its implications in their profession).

[321] *Id.*

[322] Weaver, *supra* note 122, at 1287-88, 1311-12.

[323] Reynolds v. Times Newspaper, [2001] 2.A.C. 127, 192 (U.K.).

[324] *Id.* at 200-01.

[325] *See supra* Part I.B.1.

[326] *See* discussion *supra* Part I.B.2.

[327] *Supra* Parts I.B.2. and III.C.

[328] Lyall, *supra* note 1.

[329] *Id.* Unger's book, *House of Bush, House of Saud: The Secret Relationship Between the World's Two Most Powerful Dynasties,* became a

British publisher of Unger's book claimed that the lawsuit was inevitable, and though Unger's book was good, it was not worth the trouble of a long and expensive suit.[330] The mere threat of suit limits the reach of the author's publication in print form and prevents the information from being received in the UK. If the trend continues or worsens, publishers could take more affirmative steps to limit the reach of the information to these jurisdictions, by either limiting online sales or online postings. In such a case, speech is no longer chilled, but rather frozen, because the speech is effectively cut off from a segment of the population, such as the entire UK audience or even the American audience, based on the extent of the preventative measures enacted to limit the threat of suit.

The chilling effect of international libel suits is not limited to the publication of information, but could also extend further to the investigative process.[331] The effect of these judgments could discourage other scholars from investigating terrorism funding or mentioning such individuals as Mr. Mahfouz by name.[332] In her complaint filed in the Southern District of New York, Dr. Ehrenfeld claimed, "If this action is dismissed, writers will be afraid to do their jobs properly and aggressively, and the search for the truth behind issues of the highest and most urgent public interest will be compromised."[333] In the Amici Curiae brief submitted on behalf of Dr. Ehrenfeld to the New York court, several members of the media and international communities jointly contended that should the British judgment be allowed to

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bestseller in the U.S. and was published in Germany, Spain and Brazil, among other places. One publishing company even considered going as far as setting up a separate legal entity solely to publish this book in the UK. Like several other publishing companies, however, they feared the almost inevitable libel suit. *Id.* It is unlikely that the *Reynolds* qualified privilege would extend to Unger, and so his only likely defense would have been to prove the truth of the allegations. *See supra* note 141.

[330] *Id.*

[331] Brief for Amazon.com, *supra* note 261.

[332] *Id.*

[333] Mike Dodd, *Ehrenfeld: International Libel Law Battle 'IS ABOUT FREEDOM OF SPEECH,'* PA NEWS, June 16, 2005 (quoting the Memorandum of Law submitted to the New York Supreme Court on behalf of Ehrenfeld).

stand, the impact would be felt by numerous authors and publishers alike by giving effect and credibility to the tactics of "libel tourists" such as Mahfouz.[334] The media is a part of the intelligence process, and they can only fulfill their role as investigators with the support of the government and the law.[335]

Despite the potential chilling effect threatened by international libel suits, the law as it stands does provide potential remedial measures that are currently more realistic and workable than creating universal Internet jurisdiction or an international agreement. The constantly evolving technology and the substantive differences underlying the law of international defamation make the previous two options currently insufficient to address the problem. Expansive definitions of the current law and current remedial measures offer sufficient protection in this evolving controversy.

Expanding the definition of qualified privilege may reconcile the different laws. The laws recognize the same fundamental idea, the importance of freedom of expression, though they accord value to open discussion and reputation differently.[336] While it may be impossible to completely rectify them now, British law is moving in the direction of expanding qualified privilege.[337] By working within the established guidelines of the qualified privilege exception, there could be a more balanced solution to the current conflict of libel laws and thus a more balanced protection for journalists. In *Reynolds*, the court suggests a circumstantial test for evaluating the qualified privilege.[338] This test specifically leaves room for interpretation.[339] It is even arguably similar to the actual malice standard in *New York Times*.[340] In his opinion, Lord Nicholls said that the law was supposed to be protective of the press,[341] so it should ideally live up to that requirement. However, the decision also considered the importance of valuing reputation

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[334] Brief for Amazon.com et al, *supra* note 261.
[335] ROBERTSON & NICOL, *supra* note 22, at xviii.
[336] *See* discussion *supra* Part I.A.1 and Part I.B.2.
[337] Weaver, *supra* note 122, at 1315-16.
[338] *See* discussion *supra* Part I.B.2.
[339] Reynolds v. Times Newspaper, [2001] 2.A.C. 127, 204 (U.K.).
[340] ROBERTSON & NICOL, *supra* note 22, at 133.
[341] *Reynolds,* 2 A.C. at 205.

in a democratic society, suggesting that it is a necessary element of the public good.[342]

By adhering to the reputation-protective common law, the UK courts could unnecessarily chill speech and harm the public discourse without fully achieving the common law's aim. No one knows how the law of *Reynolds* will be interpreted or how far the qualified privilege will be extended.[343] A subsequent case suggests that it will not be as protective as originally hoped.[344] The circumstances listed in *Reynolds* do propose a broad reading and application of qualified privilege, but until these circumstances are actually tested in court, there is no way to know for sure. Part of the problem may not be the judiciary but rather the press lawyers who err on the side of caution, and urge against publication if there is the slight possibility of legal action.[345] The law may be more restrictive in its letter than its spirit, and members of the media have failed to use the courts to protect their freedoms.[346] The press could also invoke the free expression principle in Article 10 of the ECHR to challenge restrictions on their freedom.[347] By reading into the circumstances literally on such criteria as the urgency of the publication, the privilege might not be met and the defendant would be forced to prove the truth of the allegation. This also could cause considerable disadvantage to book publishers who likely do not have as strong an argument to make concerning the urgency of the publication.[348] When it concerns a matter of public

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[342] *Id.* at 201. Lord Nicholls does not seem to have much faith in the press or their decision-making ability in terms of adequately protecting the reputation of individuals. This seems to form a basis for the restrictions in the judgment. *Id*. at 202.

[343] Weaver, *supra* note 122, at 1315.

[344] Jameel v. Wall Street Journal Europe [2004] E.M.L.R.11; Cram, *supra* note 129. While the court recognized that terrorism was a public concern, this did not outweigh the reputation interests of the individual linked for participation in terrorism funding absent some urgency in disseminating the information.

[345] ROBERTSON & NICOL, *supra* note 22, at xiii.

[346] *Id.* at xiv. The excessive costs of libel suits and the risk that the losing party might potentially incur the litigation costs of both parties is further hindrance to pursuing or defending a claim. *Id*. at 76-79.

[347] *Id.*

[348] Evans, *supra* note 149, at 33.

interest, the reasonableness of the investigative process and the subject matter should outweigh the injury to reputation.

If any of the above public international law solutions are unworkable, large media companies may be able to minimize the risks of the status quo. There are inherent conflicts in the substantive laws of the various countries that make a satisfactory international agreement untenable. But the media is a big business, and the current global model allows publishers to broaden their reach, and thus their audience considerably. If *Barrons Online* has an audience in Australia and a few assets there, it might be worth risking an occasional libel suit to reap the everyday profits associated with running a global business,[349] especially if the damages are limited to the actual publication in that jurisdiction.[350] In many situations, the costs of either instituting effective prohibitive measures to prevent publication in certain areas or the cost of defamation suits might not be so significant as to outweigh the benefits of foreign publication. International corporations assume the risk of liability in brick and mortar transactions in foreign jurisdictions, and so there is no reason to assume that this assumption of risk will not factor into their determination to invest in foreign media markets.[351] There is the further benefit to American publishers of not having the First Amendment protections watered down through an international agreement. But, the benefits may not always outweigh the costs, and the problem of international libel litigation might rise to the point of forcing action or silencing global speech.

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[349] The Supreme Court of Victoria's opinion suggests that the policy arguments against the court asserting jurisdiction over Dow Jones are driven by the belief of the superiority of US law and not grounded in business interest. Joseph Gutnick v. Dow Jones & Company, (2001) VSC 305, ¶61 (Austl.). This suggests a belief that the consequences of the decision will not derail the business objectives of the company or cause them to limit publication.

[350] This is one area of international defamation law that might benefit from an international agreement. If damages are limited to injury incurred in the jurisdiction in which the action is being pursued, media companies risk the punitive penalties that plaintiff-friendly libel countries could confer.

[351] Wahlquist, *supra* note 291.

CONCLUSION

The conflicts surrounding US law and foreign libel laws concern a number of different issues and could have an enormous impact on the practices of the media in the emerging global market. Since part of the conflict arises from differences in underlying substantive law values, the issue in an international context cannot be easily dealt with through long-arm jurisdiction or principles of comity. It is impossible to say that one law is superior to another, and unrealistic to assume that one should control the other in practice. Freedom of expression is protected in both the UK and the US, and maybe this should be the starting point towards more harmonization in the law. Instead of trying to change the law directly, those brought to suit could try to change it slowly within the confines of the developing qualified privilege doctrine. Defendants like Conde Nast might not be protected, but authors like Deborah Irving and Rachel Ehrenfeld might have more of a chance at success.