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LIBEL TOURISM LAWS: SPOILING THE HOLIDAY AND SAVING THE FIRST AMENDMENT?

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INTRODUCTION

On April 28, 2008, New York Governor David Paterson signed into law the Libel Terrorism Protection Act,[1] the nation's first legislative attempt at protecting American authors and publishers from

[1] N.Y. C.P.L.R. 302(d) (McKinney 2009); N.Y. C.P.L.R. 5304(b)(8) (McKinney 2009).

a recent explosion of forum-shopping, aptly called "libel tourism." Instead of suing American members of the media in the United States, wealthy litigants increasingly file suit in claimant-friendly countries, where the publication and the parties have little connection and the plaintiff is more likely to win. Since its enactment, New York's bold and controversial law, which allows a New York defendant to obtain an order barring enforcement of the foreign libel judgment, has become a national model. Illinois passed its own libel tourism law in August 2008,[2] and, at the time of publication, Congress is currently considering two variations of a similar federal statute, one of which unanimously passed the House of Representatives in September 2008.[3]

While many heralded the New York law as a victory for free speech, even its supporters have identified potential constitutional and policy problems with it.[4] This note explores whether the problem of libel tourism is sufficiently serious to merit such a legislative response and, if so, whether the New York law is good policy and stays within constitutional parameters. Part I describes the factors that created the forum-shopping trend and assesses the extent of any resulting chilling effect on American authors and publishers. Part II considers how U.S. courts have responded to the phenomenon by not enforcing foreign libel judgments on public policy grounds. Part III discusses the *Ehrenfeld v. Bin Mahfouz* case,[5] which triggered a national response culminating in the New York legislature's rejoinder as well as similar federal bills. Part IV explores potential constitutional and policy problems posed by the New York law, including (1) jurisdictional overreaching; (2) comity concerns;

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[2] 735 ILL. COMP. STAT. 5/2-209 (b-5) (2009); 735 ILL. COMP. STAT 5/12-621 (b)(7) (2009).
[3] The House unanimously passed H.R. 6146, 110th Cong. (2008) in September 2008. *See* Press Release, Congressman Steve Cohen, Congressman Cohen Passes Libel Tourism Bill (Sept. 27, 2008), http://cohen.house.gov/index.php?option=content&task=view&id=634 (last visited Apr. 21, 2009). The House is now considering a more robust bill, The Libel Terrorism Protection Act, H.R. 1304, 111th Cong. (2009), while the Senate is considering its companion bill, S. 449, 111th Cong. (2009). See *infra* Part III.B for a description of these bills.
[4] *See, e.g.*, David D. Siegel, "*Libel Terrorism*" *Bill*, N.Y. L.J., Mar. 12, 2008, at 2.
[5] Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830 (N.Y. 2007).

(3) overbreadth; (4) vagueness; and (5) redundancy and inadequacy concerns. Part V concludes that, while the New York law provides an important first step towards protecting authors from the threat of foreign libel judgments, federal legislation should avoid its jurisdictional overreaching and achieve greater deterrence by modeling a remedy after state anti-SLAPP statutes.[6] This model would allow defendants to recover damages from those true libel tourists who file spurious claims abroad with the purpose of chilling their speech. Such legislation, which singles out and punishes libel tourists, would deter future harassment of American authors and publishers and provide a remedy for those with assets subject to enforcement abroad.

I. LIBEL TOURISM: THE UNITED KINGDOM'S PERFECT STORM OF LIBEL AND JURISDICTIONAL LAWS

Although the U.S. legal system derives in large measure from English common law, libel jurisprudence and civil procedure in the two countries vary dramatically. This fact, in conjunction with the emergence of Internet publishing and distribution, has given rise to the current libel forum-shopping trend.

A. AMERICAN VERSUS BRITISH LIBEL LAWS

U.S. libel law, based on First Amendment jurisprudence since 1964, weighs in favor of free speech and a free press, whereas British law, which only recognized the right to free speech in 1998,[7] favors the plaintiff and her interest in an untarnished reputation.

American free speech jurisprudence is grounded in the "fourth estate" principle that the press provides an essential check on the

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[6] Anti-SLAPP ("strategic lawsuit against public participation") laws allow a court to dismiss an underlying libel suit if the court finds it to be a meritless claim filed primarily to chill the defendant's exercise of her First Amendment rights. *See infra* Part V.

[7] The United Kingdom adopted the right to free speech with the Human Rights Act, 1998, c. 42 (Eng.), which incorporates into domestic law Article 10 of the European Convention on Human Rights. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222.

powers of the government by keeping the public informed; thus its ability to freely report the news requires the utmost protection. In its landmark decision in *New York Times v. Sullivan*, the U.S. Supreme Court noted that the First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[8] In an effort to give the press the "breathing space" necessary to report on issues affecting the public without having to censor itself for fear of making a mistake, the Court placed strict limitations on libel suits. The plaintiff has the burden of proving that the disputed statement was false, and—if the plaintiff is a public figure[9]—she must prove that the media defendant acted with "actual malice," meaning that the defendant either knew the statement was false or showed reckless disregard as to its truth or falsity.[10] The plaintiff must demonstrate this high level of fault with "convincing clarity"; evidence of mere negligence will not suffice.[11] The Supreme Court eliminated the common law presumption of falsity and strict liability, thereby requiring the plaintiff to prove fault in addition to falsity even where the plaintiff is a private figure.[12]

In New York, an international publishing hub, the media enjoys some of the country's strongest speech protections. New York courts have called for "the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events'" and "particular vigilance . . . in safeguarding the free press against undue interference."[13] In keeping with this tradition, when an article reports on a matter of public concern, New York courts require

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[8] N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964).
[9] *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 162–63 (1967) (Warren, C.J., concurring) (extending the "actual malice" rule for public officials to all public figures).
[10] *Sullivan*, 376 U.S. at 279–80.
[11] *Id.* at 285–88.
[12] *See* Phila. Newspapers v. Hepps, 475 U.S. 767, 767 (1986); Gertz v. Robert Welch, Inc., 418 U.S. 323, 346–47 (1974).
[13] O'Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277, 281 (N.Y. 1988).

that even plaintiffs who are private figures must prove a high level of fault and show that the publisher acted in a "grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."[14]

British courts, on the other hand, still adhere to a strict liability regime, which holds publishers liable for statements which they believed to be true and which they published without negligence.[15] A plaintiff merely has to show that the statement was directed at her, has a defamatory meaning, and was published by the defendant.[16] British law presumes the falsity of the disputed statement and places the burden of proving truth on the defendant,[17] even where the plaintiff is a public figure and the speech would constitute core political discourse in the United States.[18] Proving truth can be an insurmountable burden, particularly when journalists rely on confidential sources. If the defendant tries and fails to prove truth, he faces an aggravated damages judgment.[19]

British courts have carved out limited exceptions to the strict liability regime for "fair comment," which protects reasonable opinions based on disclosed, accurate facts, and for "responsible journalism," which protects factually inaccurate statements on matters of public interest.[20] Until recently, the "qualified privilege" for

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[14] Chapadeau v. Utica Observer-Dispatch, 341 N.E.2d 569, 571 (N.Y. 1975).

[15] RODNEY A. SMOLLA, LAW OF DEFAMATION § 1.9 (2d ed. 1999).

[16] *See Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 3 (2009) [hereinafter *Hearing*] (written statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP).

[17] Heather Maly, *Publish at Your Own Risk or Don't Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-guaranteed*, 14 J.L. & POL'Y 883, 900 (2006).

[18] SMOLLA, *supra* note 15, § 1.9.

[19] *See Hearing*, *supra* note 16, at 3 (written statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP).

[20] For a discussion of the "fair comment" defense, see *Kemsley v. Foot*, [1952] A.C. 345, 348 (H.L.). For a discussion of the "responsible journalism" or "qualified privilege" defense, see *Jameel v. Wall St. Journal Eur.* S.P.R.L. [2006] UKHL 44, [2007] 1 A.C. 359 (appeal taken from Eng.) (H.L.) (recognizing "a proper degree of protection for responsible journalism when reporting matters of public concern") and *Reynolds v.*

responsible journalism has been interpreted narrowly, but in *Jameel v. Wall Street Journal*,[21] the British House of Lords expanded its application in response to growing concerns over the rule's limited scope.[22] In *Jameel*, a Saudi businessman and the company he controlled sued the Wall Street Journal Europe for publishing an article that he claimed listed him as someone whose bank account was being monitored for possible links to terrorist organizations.[23] The court recognized a defense to libel because (1) the article dealt with a matter of genuine public interest; (2) the disputed statement made a "proper contribution to the whole thrust of the publication"; (3) the publisher acted fairly and reasonably in obtaining and publishing the material; and (4) the article at issue was "of considerable public importance, and the inclusion of the names a necessary ingredient."[24]

The *Jameel* decision signaled an effort by British courts to expand speech protections, but British libel law still trails American First Amendment jurisprudence. Significantly, the "responsible journalism" privilege places the same heavy burden of proof on the defendant as the strict liability rule,[25] whereas American jurisprudence keeps the burden of proof on the plaintiff. *Jameel* requires that the judge, with 20/20 hindsight, find the reporting "fair," "reasonable," and a "necessary ingredient" to the article,[26] while the American

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Times Newspapers Ltd., [2001] 2 A.C. 127, 205 (H.L.) (appeal taken from Eng.) (describing factors to consider in determining whether the defendant was responsible).

[21] Jameel v. Wall St. Journal Eur. S.P.R.L. [2006] UKHL 44, [2007] 1 A.C. 359 (appeal taken from Eng.) (H.L.).

[22] *See* Kyu Ho Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?*, 13 COMM. L. & POL'Y 415, 417 (2008).

[23] Jameel v. Wall St. Journal Eur. S.P.R.L. [2006] UKHL 44, [2007] 1 A.C. 359 (appeal taken from Eng.) (H.L.).

[24] *Id.* at 360, 377 ("[T]he publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication.").

[25] *See generally* Youm, *supra* note 22, at 445 ("[T]he qualified privilege of 'responsible journalism' in U.K. law is still far from the kind of protection the American First Amendment recognizes for the news media. This is glaringly evident when the burden of proof under the 'responsible journalism' standard is no different from the burden of proof under the strict liability rule of the English common law of libel.").

[26] Jameel v. Wall St. Journal Eur. S.P.R.L. [2006] UKHL 44, [2007] 1 A.C. 359 (appeal taken from Eng.) (H.L.).

"actual malice" standard for public figures protects the defendant so long as he did not deliberately print falsehoods.[27] Finally, British courts have interpreted the protected area of "public interest" reporting much more narrowly than have American courts.[28]

B. AMERICAN VERSUS BRITISH CIVIL PROCEDURE

In addition to conflicting libel laws, American and British courts differ sharply on civil procedure. Several aspects of British jurisprudence, including its (1) fee-shifting provision, (2) statute of limitations, (3) adherence to the multiple publication rule, (4) broad view of personal jurisdiction, and (5) limited use of forum non conveniens and "abuse of process" principles, make the United Kingdom a more favorable forum for the plaintiff.

1. The United Kingdom's Fee-Shifting Provision

Fee-shifting rules create a significant financial incentive to bring suit in the United Kingdom, because the losing party bears the costs associated with the litigation.[29] Since the burden of proof lies with the defendant, the odds favor a plaintiff victory. Litigation costs can run into the millions because British cases typically require multiple attorneys, each of whom may charge as much as £1,300 per hour.[30]

2. The United Kingdom's Statute of Limitations on Internet Material

The plaintiff has another incentive to file suit in the United Kingdom if the statute of limitations has already expired elsewhere.

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[27] *See* N.Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964).

[28] *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (extending the meaning of "public interest" to cover advertisements with prescription drug prices); *Hearing*, *supra* note 16 (testimony of Laura R. Handman, Partner, Davis Wright Tremaine LLP).

[29] *See Hearing*, *supra* note 16, at 6 (written statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP).

[30] *See id.*; *Writ Large*, ECONOMIST, Jan. 8, 2009, at 48 ("The cost of litigation is so high ($200,000 for starters, and $1m-plus once you get going), that [small non-British news outlets and authors] cannot afford to defend themselves. The plaintiffs often win by default, leaving their victims humiliated and massively in debt.").

In the United States, the statute of limitations usually begins with the date of the first publication,[31] but in the United Kingdom, it does not begin until the publication is no longer available in print format or online, which, in the Internet era, can take years.[32]

3. The United Kingdom's "Multiple Publication Rule"

The statute of limitations disparity stems from the fact that British and American courts differ on what constitutes "publication"—a highly contentious battle in the era of Internet publishing. Most U.S. states, including New York, adhere to the "single publication rule," which holds that any one edition of a book, article, motion picture, broadcast, or similar "aggregate communication" constitutes a single publication, so a plaintiff can only bring one action to recover for damages suffered in all jurisdictions.[33] Courts adopted this rule to protect a publisher from the "multiple lawsuits and undue harassment" that might result from mass publications.[34] In recent years, American courts have applied the single publication rule to material posted on the Internet as well.[35] British courts, however, adhere to the older "multiple publication rule," which holds that

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[31] *See, e.g.*, Ogden v. Ass'n of U.S. Army, 177 F. Supp. 498, 502 (D.D.C. 1959) ("[I]t is the prevailing American doctrine that the publication of a book, periodical, or newspaper containing defamatory matter gives rise to but one cause of action for libel, which accrues at the time of the original publication, and that the statute of limitations runs from that date."). *See generally* Lori A. Wood, *Cyber-Defamation and the Single Publication Rule*, 81 B.U. L. REV. 895 (2001) (providing a history of the single publication rule and its application to Internet libel cases).

[32] *Compare* Firth v. State, 775 N.E.2d 463, 465–66 (N.Y. 2002) (finding a libel claim barred by New York's one-year statute of limitations where the disputed speech was initially posted on the Internet more than a year before plaintiff filed suit), *with* Loutchansky v. Times Newspapers Ltd. [2001] EWCA Civ. 1805, [2002] Q.B. 783, 813, 817–18 (appeal taken from Eng.) (H.L.) (rejecting the American single publication rule in an Internet libel action), *aff'd*, Times Newspapers Ltd. (Nos. 1 and 2) v. United Kingdom, 451 Eur. Ct. H.R. (2009) (holding that the United Kingdom's internet publication rule does not violate the right to free expression under Article 10 of the European Convention on Human Rights).

[33] *See* RESTATEMENT (SECOND) OF TORTS § 577A (1977); Wood, *supra* note 31, at 897.

[34] *See* Wood, *supra* note 31, at 897.

[35] Thus, the statute of limitations on an Internet libel suit begins running when the article is originally "published" on the Web. *See, e.g.*, *Firth*, 775 N.E.2d, at 465–66.

every publication of the disputed work, in any forum throughout the world, gives rise to a separate tort.[36] This rule dates back to an 1849 case in which the Duke of Brunswick's manservant went to the office of a newspaper and obtained a seventeen-year-old back issue of the paper.[37] The court held that this single purchase constituted a new "publication," which gave rise to an actionable tort once the manservant read it and thought less of the plaintiff.[38] To the dismay of journalists worldwide, British courts have continued to apply this Victorian-era case in the modern information age, which has led to the absurd result that a single Internet hit in the United Kingdom constitutes a "publication" for libel purposes.[39]

4. The United Kingdom's Broad Interpretation of Personal Jurisdiction

The *Duke of Brunswick* line of reasoning has led to the sharpest divide between British and American civil procedure—their respective views on personal jurisdiction. Britain's expansive notion of its own jurisdiction stands in stark contrast to the narrow American view. Based on long-standing principles of due process, American law prohibits a court from exercising jurisdiction over a non-resident if it would be unfair or burdensome for the defendant.[40] In order to justify jurisdiction, the foreign defendant must have certain "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[41] In the libel context, where the disputed material is found

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[36] *See, e.g.*, Loutchansky v. Times Newspapers Ltd., [2001] EWCA Civ. 1805, [2002] Q.B. 783 (appeal taken from Eng.) (H.L.).

[37] Duke of Brunswick v. Harmer, (1849) 117 Eng. Rep. 175 (Q.B.) (upholding a libel claim despite the statute of limitations having long since expired, on the grounds that a single publication was sufficient to trigger liability in the newspaper defendant).

[38] *Id.* at 176–77.

[39] *See, e.g.*, King v. Lewis, [2004] EWCA Civ. 1329 [¶ 2] (appeal taken from Wales) ("It is common ground that by the law of England the tort of libel is committed where publication takes place, and each publication generates a separate cause of action. The parties also accept that a text on the Internet is published at the place where it is downloaded.").

[40] *See* Int'l Shoe v. Washington, 326 U.S. 310, 316–17 (1945).

[41] *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

online, U.S. courts have interpreted the "minimum contacts" standard to require that Internet activity expressly target the forum state.[42] New York, in particular, has long protected the free speech interests of non–New York residents by allowing them to defend defamation suits in the jurisdiction where they reside.[43] Before the New York legislature passed the Libel Terrorism Protection Act, New York's long-arm statute specifically excluded defamation from long-arm jurisdiction, even for statements published and read in New York.[44]

Like American courts, British courts consider jurisdiction proper where the defendant caused a tort to occur within the forum.[45] Under the British "multiple publication rule," however, every online hit within the United Kingdom constitutes a separate "publication" in that jurisdiction, thus giving rise to a potentially actionable tort. Relying on this rationale, British courts have had no trouble allowing jurisdiction over foreign defendants, even where the disputed speech did not target the British forum and the "publication" consisted of only a few dozen Internet hits or hard copies bought online in the United Kingdom.[46]

In recent years, British courts have become more amenable to granting jurisdiction based on the notion that, in the Internet Age, plaintiffs have a greater interest in protecting their reputations.[47] In *King v. Lewis*, the English Court of Appeal noted that the "Internet publisher's very choice of a ubiquitous medium[] at least suggests a robust approach to the question of *forum*: a global publisher should not be too fastidious as to the part of the globe where he is made a

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[42] *See, e.g.*, Young v. New Haven Advocate, 315 F.3d 256, 262 (4th Cir. 2002).
[43] *See* Jennifer McDermott & Chaya F. Weinberg-Brodt, *Growth of 'Libel Tourism' in England and U.S. Response*, N.Y. L.J., June 4, 2008, at 4.
[44] N.Y. C.P.L.R. 302(a)(2)–(3) (McKinney 2009).
[45] *See, e.g.*, King v. Lewis, [2004] EWCA Civ. 1329 (appeal taken from Wales).
[46] *See* GEOFFREY ROBERTSON & ANDREW NICHOL, MEDIA LAW 127 (5th ed. 2007); *see, e.g.*, Bin Mahfouz v. Ehrenfeld, [2005] EWHC 1156 (appeal taken from Eng.) (finding jurisdiction over a New York author based on the online availability of the first chapter of her book and the Internet sale of twenty-three copies of the work in the United Kingdom). For more on the *Ehrenfeld* case, see *infra* Part III.A.
[47] *See* McDermott & Weinberg-Brodt, *supra* note 43.

libel defendant."[48] There, the court allowed Florida resident and boxing promoter Don King to sue a New York resident for libel based on allegations of anti-Semitism that had been made on a California website.[49] The court based its decision on the fact that King had a reputation to defend in England, where boxing was very popular, and that by posting the article online, the plaintiff had made himself vulnerable to a global forum.[50] In *Mardas v. New York Times*, a more recent case, a British court granted jurisdiction to a Greek national's claim against American and French newspapers for an article alleging that he had spread false rumors to The Beatles about the Maharishi forty years earlier.[51] The court held that even if only "a few dozen" people had accessed the article online, that sufficed to create a cause of action, given that the plaintiff had previously lived in England and had made a reputation there.[52]

In a high-water mark for the "multiple publication rule," the High Court of Australia explored the British rule and upheld it, finding that every download, anywhere in the world, constitutes a separate tort.[53] In *Dow Jones & Co. v. Gutnick*, the Australian Court granted jurisdiction over an American newspaper because it had made the disputed article available on its website, even though it limited access to paying subscribers.[54] The Court reasoned that although the newspaper was headquartered in America, where it was written, printed, published online, and primarily read, its website accepted online subscriptions from the residents of the Australian state of Victoria, so jurisdiction there was proper.[55]

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[48] King v. Lewis, [2004] EWCA Civ. 1329 [¶ 31] (appeal taken from Wales).
[49] *Id.* at ¶¶ 3–4, 6–8.
[50] *Id.* at ¶¶ 4, 13, 27–32.
[51] Mardas v. N.Y. Times Co., [2008] EWHC 3135 [¶ 38].
[52] *Id.* at ¶ 31.
[53] Dow Jones & Co. v. Gutnick, (2002) 210 C.L.R. 575; *see* ROBERTSON & NICHOL, *supra* note 46, at 130.
[54] Dow Jones & Co. v. Gutnick, (2002) 210 C.L.R. 575.
[55] *Id.* at 586.

5. The United Kingdom's Limited Use of Forum Non Conveniens and "Abuse of Process"

Theoretically, forum non conveniens principles should limit the multiple publication rule and protect Americans from being dragged into court in the United Kingdom if they can show that some other available jurisdiction is clearly more appropriate.[56] In reality, forum non conveniens does little to rein in the reach of British libel courts, since its activation hinges on the discretion of judges, who tend to view their jurisdiction broadly.[57] British courts generally justify jurisdiction on the ground that the tort occurred there in the form of an Internet hit or "publication."[58] They have also argued, without irony, that since such actions could not "survive" in the United States, there is therefore "little point in addressing how much more convenient [a U.S. forum] would be."[59]

British courts may also deny jurisdiction as an "abuse of process" if they find that the disputed material bears little connection to the forum, the claimant does not do business or have connections to England, and no "real and substantial" tort was committed there.[60] Like forum non conveniens, however, libel courts rarely invoke this principle.[61] Although one British court bucked the trend and denied

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[56] *See* Spiliada Maritime Corp. v Cansulex Ltd., [1987] A.C. 460 [461] (holding that forum non conveniens principles require the court to identify the forum in which "the case could most suitably be tried for the interests of all the parties and for the ends of justice").

[57] *See* Aidan Eardley, *Libel Tourism in England: Now the Welcome Is Even Warmer*, 17 ENT. L.R. 35–38 (2006) *Hearing*, *supra* note 16 (testimony of Laura R. Handman, Partner, Davis Wright Tremaine LLP); Aidan Eardley, *Libel Tourism in England: Now the Welcome Is Even Warmer*, 17 ENT. L. REV. 35–38 (2006).

[58] *See, e.g.*, Dow Jones & Co. v. Gutnik, (2002) 210 C.L.R. 575; Mardas v. N.Y. Times Co., [2008] EWHC 3135; King v. Lewis, [2004] EWCA Civ. 1329 (appeal taken from Wales).

[59] King v. Lewis, [2004] EWCA Civ. 1329 [¶ 18] (appeal taken from Wales).

[60] McDermott & Weinberg-Brodt, *supra* note 43.

[61] *See, e.g.*, Mardas v. New York Times, [2008] EWHC 3135 [¶ 12] ("[I]t will only be in rare cases that it is appropriate to strike out an action as an abuse on the ground that the claimant's reputation has suffered only minimal damage and/or that there has been no real and substantial tort within the jurisdiction.").

jurisdiction to the most blatant Internet forum shoppers,[62] courts have generally done little to rein in libel plaintiffs.[63]

In an era of online publishing and distribution,[64] the multiple publication rule creates a particularly severe threat, since it puts all writers, publishers, and even lay people with an online presence at the mercy of British and Australian courts. In *Gutnick*, the High Court of Australia responded to this concern, noting that in "all except the most unusual of cases, identifying the person about whom the material is to be published will readily identify the defamation law to which that person may resort."[65] However, globalization has helped to produce businessmen, politicians, celebrities, and other public figures with reputations and relationships that span multiple countries.[66] With such broad definitions of "publication" and "jurisdiction," British and Australian courts have paved the way for rampant forum-shopping.

C. LONDON, A TOWN NAMED "SUE"[67]

Thanks to this perfect storm of favorable libel laws and procedure, the rise of the Internet, and the emergence of super-wealthy businessmen and celebrities with international reputations, London

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[62] Yousef Jameel v. Dow Jones & Co., [2005] EWCA Civ. 75 [¶¶ 1–4] (appeal taken from Eng.) (denying jurisdiction where the article was never published and only available online and where only five English subscribers had accessed the article, three of them for the plaintiff). Yousef is the brother of Mohammed Jameel, the plaintiff in *Jameel v. Wall St. Journal Eur.* S.P.R.L. [2006] UKHL 44, [2007] 1 A.C. 359 (appeal taken from Eng.) (H.L.), which recognized the responsible journalism defense.

[63] *See, e.g.*, Mardas v. N.Y. Times Co., [2008] EWHC 3135; King v. Lewis, [2004] EWCA Civ. 1329 (appeal taken from Wales); Richardson v. Schwarzenegger, [2004] EWHC 2422 (appeal taken from Eng.); ROBERTSON & NICHOL, *supra* note 46, at 130.

[64] Via websites like amazon.com, for example.

[65] Dow Jones & Co. v. Gutnick, (2002) 210 C.L.R. 575, 609.

[66] ROBERTSON & NICHOL, *supra* note 46, at 131. Besides the absurdity of this rule in practice, it also ignores a technical point that one must take an affirmative step to access and retrieve online material from its foreign server; the Web-publisher, on the other hand, does nothing to avail herself of the foreign forum. *See id.*

[67] Bruce D. Brown stated that London lawyers joke when they arrive in the United States that they have just flown in from "a town named Sue," in reference to London's position as a libel hub. *Hearing*, *supra* note 16 (testimony of Bruce D. Brown, Partner, Baker & Hostetler, LLP).

has become the global capital for defamation suits.[68] The hallmark of libel tourism is that the parties and/or the publication have little connection to the foreign forum.[69] In the past twelve years, the trend has evolved into a cottage industry dominated by international businessmen[70] and celebrities.[71]

More recently, libel tourism has spilled into the non-profit world. The New York–based Human Rights Watch spent thousands of pounds defending a report on mass murder, which mentioned the plaintiff, despite having "full confidence in the accuracy of [the] report."[72] In addition to the significant financial costs libel tourism places on non-profits and NGOs, the burden of proving truth puts

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[68] The United Kingdom is not the only locale with plaintiff-friendly libel laws. Singapore, New Zealand, and Kyrgyzstan also fall into this category, but England's proximity to the United States and its publishing hub make it the more popular libel destination. *See Hearing*, *supra* note 16, at 6 n.29 (written statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP).

[69] For example, the *Washington Times* is currently defending itself in the United Kingdom over an article on cell phone contracts in Iraq, despite the fact that there were no hard copies sold in the United Kingdom and only "forty or so" hits on its website. *See Hearing*, *supra* note 16, at 6 (written statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP). Similarly, *Forbes* is currently facing litigation in two different jurisdictions within the United Kingdom (Northern Ireland, and England) , as well as in Ireland, over an article published in its domestic edition. *See id.*

[70] For example, in 2008, Ukrainian billionaire Rinat Akhmetov sued two Ukrainian news organizations in London. *See* Akmetov v. Serediba, [2008] All E.R. (Q.B.) (Lexis Nexis summary). Although one of the defendants had only one hundred subscribers in England, it quickly apologized and settled the case. Akhmetov then won a second default judgment against a Ukrainian news website, which publishes only in Ukrainian and has a "negligible number of readers in England." *Writ Large*, *supra* note 30. Similarly, a Tunisian businessman won a default judgment against a Dubai-based satellite television network for allegations of terrorist connections. *See* Doreen Carvajal, *Britain, A Destination for "Libel Tourism,"* INT'L HERALD TRIB., Jan. 20, 2008. The court permitted jurisdiction over the matter because Britons could access the show via satellite, even though it was broadcast only in Arabic. *See id.*

[71] Many celebrities—including Jennifer Lopez, Marc Anthony, Britney Spears, David Hasselhoff, and Cameron Diaz—have filed libel suits in the United Kingdom, and the number of suits continues to rise. *See Hearing*, *supra* note 16, at 6 (written statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP); Robert Verkaik, *London Becomes Defamation Capital for World's Celebrities*, INDEPENDENT (London), Oct. 13, 2008, at 4. Celebrity claims have doubled in the past three years and now make up one-third of all libel suits in England and Wales. Verkaik, *supra.*

[72] *Writ Large*, *supra* note 30.

them in an untenable situation because their reports rely on confidential informants who risk persecution if they speak publicly.[73]

D. THE CHILLING EFFECT

The specter of libel tourism has begun to chill the speech of American writers and advocates because they know that "reporting on critical issues such as the financing of terrorism" will expose them to "legal, professional[,] and financial perils."[74] A U.N. committee recently reported that British libel law has "served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work."[75] Libel forum-shopping in the United Kingdom has become so common that when American media lawyers advise their clients about publishing matters of "global concern"—especially subjects related to international finance, global terrorism, celebrities, and any other high-profile figures—they warn them of liability abroad.[76]

British publishers have already honed the sensitivity to libel suits that American publishers are now developing. In one recent instance, United Kingdom–based Cambridge University Press published *Alms for Jihad*,[77] a book written by two American authors about terrorist financing through Muslim charities. Although the publisher's lawyers claimed to have carefully reviewed the manuscript ahead of time for anything that might subject them to liability, once on the shelf, Saudi billionaire Khalid Bin Mahfouz

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[73] *See id.*

[74] N.Y.C. Bar Ass'n, Comm. on Commc'ns & Media Law, The Libel Terrorism Protection Act, http://www.public-integrity.org/ltpa.pdf.

[75] *See* U.N. Human Rights Comm., *Consideration of Reports Submitted by States*, ¶ 25, Commc'n No. CCPR/C/GBR/CO/6 (July 7–25, 2008), 47 Eur. Ct. H.R. SE 19.

[76] *See Hearing*, *supra* note 16, at 3 (oral statement of Bruce D. Brown, Partner, Baker & Hostetler, LLP); *id.* (oral statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP) (noting that virtually every demand letter her firm receives is accompanied with another one from a British solicitor, with jurisdiction based on a few dozen Internet hits); Sarah Lyall, *Are Saudis Using British Libel Law to Deter Critics?*, N.Y. TIMES, May 22, 2004, at B7.

[77] J. MILLARD BURR & ROBERT O. COLLINS, ALMS FOR JIHAD (2006).

threatened suit based on a few passages claiming he had funded terrorist activities.[78] Bin Mahfouz is a giant among libel tourists—he has threatened or actually brought defamation suits in England at least twenty-nine times,[79] and—at the time of publication—he has secured forty-eight "corrections" to books and articles published in the United States, the United Kingdom, Ireland, and France.[80] With Bin Mahfouz's litigious reputation, Cambridge University Press responded with an all-out effort to preempt the libel suit: destroying all unsold copies of the book, asking libraries around the world to remove it from their shelves, issuing a formal apology to Bin Mahfouz, posting a public apology on its website, and paying Bin Mahfouz's legal costs and unspecified damages.[81] The authors stood by their scholarship; the publisher's decision had nothing to do with "a lack of confidence in the book," but rather "a fear of incurring costly legal expenses and getting involved in a lengthy trial."[82]

Authors and publishers have attempted to minimize the risk of litigation in the United Kingdom by simply not publishing their work there. Craig Unger's *House of Bush, House of Saud*[83] hit the best-seller list in the United States and has secured distribution in Germany, Spain, and Brazil. Yet readers will not find the book in the United Kingdom because its British publisher canceled plans to publish it due to fears of a libel suit.[84] As British libel jurisprudence demonstrates, however, avoiding physical publication in the United

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[78] *See* Cinnamon Stilwell, *Libel Tourism: Where Terrorism and Censorship Meet*, S.F. CHRON., Aug. 29, 2008; Press Release, Kendall Freeman, Solicitors Acting for Sheikh Khalid, Sheikh Khalid Bin Mahfouz Receives Comprehensive Apology from Cambridge University Press (July 30, 2007), *available at* http://www.binmahfouz.info/news_20070730.html.

[79] Ehrenfeld v. Bin Mahfouz, No. 04 Civ. 9641, 2006 WL 1096816 (S.D.N.Y. Apr. 26, 2006) (citing Pl.'s complaint), *aff'd*, 518 F.3d 102 (2d Cir. 2008).

[80] *See* Bin Mahfouz Information, http://www.binmahfouz.info/news.html (last visited Apr. 13, 2009).

[81] *See* Stilwell, *supra* note 78.

[82] *Id.*

[83] CRAIG UNGER, HOUSE OF BUSH, HOUSE OF SAUD: THE SECRET RELATIONSHIP BETWEEN THE WORLD'S TWO MOST POWERFUL DYNASTIES (2005).

[84] *See, e.g.*, Lyall, *supra* note 76; Adam Cohen, Editorial, *'Libel Tourism': When Freedom of Speech Takes a Holiday*, N.Y. TIMES, Sept. 14, 2008, at A24.

Kingdom does not necessarily save American publishers from liability there.[85]

The threat of libel litigation poses a particularly severe form of harassment to media defendants. From a financial perspective, both large and small media entities face risks. Large media are more likely to have assets in the United Kingdom, against which a judgment may be enforced, while individual authors and small publishers will face either potentially crippling litigation costs if they attempt to defend themselves or risk default judgment if they decide not to defend themselves.[86] As a result, American publishers are increasingly unwilling to publish material that exposes the embarrassing, suspicious, or criminal dealings of wealthy people.

From a professional perspective, a journalist is especially vulnerable to such attacks because her livelihood depends on her reputation. A declaration of falsity, even if granted by a British court as a default judgment, calls the journalist's credibility into doubt. News organizations and publishing houses tend to steer clear of authors who have been sued for libel, because they represent a risk of future litigation.[87] Even if the foreign claimant fails to enforce the libel judgment (a situation described in depth below),[88] the specter of the verdict inhibits the author's ability to publish. Accordingly, American writers have become less likely to tackle the sensitive issues that could threaten their careers and make them litigation targets.[89]

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[85] *See supra* Part I.B; Memorandum of Law of Amici Curiae Amazon.com et. al. in Support of Plaintiff's Motion to Dismiss, Ehrenfeld v. Bin Mahfouz, No. 04 Civ. 9641, 2006 WL 1096816 (S.D.N.Y. Apr. 26, 2006), *aff'd*, 518 F.3d 102 (2d Cir. 2008) ("Increasingly, publishers are being subjected, based on *de minimis* availability of their works abroad, to the jurisdiction of foreign courts . . . at the behest of libel tourists such as Mr. Bin Mahfouz. These judgments cause concrete and specific harm to U.S. publishers.").

[86] *See, e.g.*, Memorandum of Law of Amici Curiae Amazon.com, No. 04 Civ. 9641, 2006 WL 1096816.

[87] *Writ Large*, *supra* note 30 (quoting free speech advocate Floyd Abrams as commenting that a book publisher will be nervous about an author who has written a "libelous" book).

[88] *See infra* Part III.A.

[89] *See* Pl.'s Aff. ¶ 25 a–c, Ehrenfeld v. Bin Mahfouz, 2006 WL 1096816 (S.D.N.Y.). Ehrenfeld notes that after Bin Mahfouz brought a libel action against her in London, two publishers that had consistently published her articles in the past declined her

Thus, British law effectively usurps American free speech jurisprudence. It chills the speech of American writers and publishers who have done little to avail themselves of British forums other than making their work available online.

II. U.S. COURTS RESPOND BY BARRING ENFORCEMENT OF FOREIGN LIBEL JUDGMENTS

U.S. courts have a long history of comity with their British counterparts. Yet state and federal decisions in New York, Maryland, and California over the last two decades suggest a trend towards barring enforcement of foreign judgments on the grounds that they contravene First Amendment principles.

In the first such case, *Bachchan v. India Abroad Publications, Inc.*, an Indian businessman sued to enforce a £40,000 English libel judgment against a New York–based news service that had published an article about the plaintiff in India.[90] In what has become the seminal case in this area, Judge Shirley Fingerhood of the New York Supreme Court applied a rigorous constitutional analysis.[91] She denied enforcement, noting that this result was "constitutionally mandatory" under CPLR § 5304(b),[92] because the foreign decision had been issued without the protections for free speech required by the U.S. and New York

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work with uncharacteristic evasiveness. She describes censoring herself in response and not publishing everything her research revealed. Ehrenfeld cites other examples of this "chilling effect," including Gerald Posner's book on the Saudis, GERALD POSNER, SECRETS OF THE KINGDOM (2005), "which improbably contains no reference to either Mahfouz or the Muwafaq Foundation" (his charity organization that has been linked to terrorism); LORETTA NAPOLEONI, MODERN JIHAD: TRACING THE DOLLARS BEHIND THE TERROR NETWORKS (2003), from which the author removed everything that connected Mahfouz to al Qaeda for the paperback version; and JOEL MOWBRAY, SAUDI AMERICA (2005), which HarperCollins has held off on publishing due to liability concerns.

[90] Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661, 661–63 (N.Y. Sup. Ct. 1992).

[91] *Id.* at 663–65.

[92] N.Y. C.P.L.R. 5304(b)(4) (McKinney 2009) ("A foreign country judgment need not be recognized if . . . the cause of action on which the judgment is based is repugnant to the public policy of this state . . . .").

constitutions.[93] The opinion suggested that because British libel courts provide inferior protections for free speech, New York courts should *always* bar their enforcement.[94] Judge Fingerhood's decision has received wide praise and won recognition from every court that has considered it, including the Second Circuit,[95] the D.C. Circuit,[96] the Maryland Court of Appeals,[97] and the Northern District of California.[98]

Three years after *Bachchan* was decided, a D.C. district court extended the non-enforcement rule to apply to a case in which a U.S. citizen had properly availed himself of the British forum; he had made the disputed statement in a London newspaper while residing in the United Kingdom.[99] Citing *Bachchan*, the court held that recognition of a London libel judgment under principles of comity "would be repugnant to the public policies of the State of Maryland and the United States," and, alternatively, that it would violate First Amendment principles because the foreign claimant was a public

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[93] *Bachchan*, 585 N.Y.S.2d at 662.

[94] *Id.* at 664 ("The protection to free speech and the press embodied in [the First A]mendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution.").

[95] *See* Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 481 (2d Cir. 2007); *see also* Abdullah v. Sheridan Square Press, Inc., No. 93 Civ. 2515, 1994 WL 419847, at *1 (S.D.N.Y. May 4, 1994) (citing *Bachchan* in dismissing a libel claim under English law because it would be "antithetical to the First Amendment protections accorded the defendants").

[96] Matusevitch v. Telnikoff, 877 F. Supp. 1, 3–4 (D.D.C. 1995).

[97] Telnikoff v. Matusevitch, 347 Md. 561, 599–601 (1997).

[98] Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1192–93 (N.D. Cal. 2001), *rev'd en banc on other grounds*, 433 F.3d 1199 (9th Cir. 2006) (citing *Bachchan*, 585 N.Y.S.2d 661, in holding unenforceable a French judgment, which had been rendered under a law that violated First Amendment principles, because it required an internet service provider to block access to Nazi material displayed or offered for sale on the Web).

[99] *See* Matusevitch v. Telnikoff, 877 F. Supp. 1. For a description of the facts, see *Telnikoff v. Matusevitch*, 347 Md. 561, 564–68 (1997).

figure and the British court had failed to consider the defendant's intentions or degree of fault.[100]

In 2007, the Second Circuit adopted and clarified the *Bachchan* rule. In *Sarl Louis Feraud International v. Viewfinder, Inc.*, the court considered whether to uphold a French default judgment for copyright infringement against a New York website owner who had posted the plaintiff's clothing designs without permission.[101] The district court held that since U.S. copyright law does not protect clothing designs, it should not enforce the French judgment, which was rendered under a copyright regime that does protect such designs. The Second Circuit found that the lower court should have followed the *Bachchan* test and first determined "whether the intellectual property regime upon which the French Judgments were based impinged on rights protected by the First Amendment."[102] After *Viewfinder*, a court must first assess "the level of First Amendment protection required by New York public policy concerning the challenged conduct" and then determine whether the foreign regime provides "comparable protections."[103]

While courts have been willing to bar enforcement of foreign libel judgments, at least one court has denied relief when the foreign litigation had not yet concluded. In *Dow Jones & Co. v. Harrods, Ltd.*, the District Court for the Southern District of New York denied an American newspaper's motion seeking a declaratory judgment to preclude the owner and chairman of a British department store from pursuing a libel suit in the United Kingdom.[104] The court cited ripeness problems: "should the London Action produce a judgment based on application of principles that would vitiate public policies

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[100] Matusevitch v. Telnikoff, 877 F. Supp. at 3–7 ("[S]ince there appears to be no proof that [Matusevitch] made the statements with actual malice, [he] enjoys the constitutional protection for speech directed against public figures.").
[101] Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 477 (2d Cir. 2007).
[102] *Id.* at 481.
[103] Margaret A. Dale & Julie A. Tirella, *Enforcing Foreign Judgment as Offensive to Public Policy*, N.Y. L.J., Oct. 17, 2007, at 4.
[104] Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003).

of the United States, Dow Jones will then accrue a justiciably ripe occasion to challenge . . . any effort to enforce the judgment . . . ."[105]

III. THE *EHRENFELD* PROBLEM AND THE EMERGENCE OF "LIBEL TOURISM" LAWS

The increasing popularity of libel forum-shopping suggests that U.S. court decisions barring enforcement of foreign judgments have done little to stem the problem. An extremely wealthy plaintiff probably considers a damages award a mere pittance. Indeed, libel tourists often forgo enforcing judgments, having presumably achieved their primary objectives—to win a verdict of falsity and discourage similar speech.[106] This tactic puts media defendants at risk. Unless the foreign plaintiff attempts to collect the judgment in the United States or otherwise avails herself of the domestic forum, the media defendant cannot secure a declaratory judgment barring its enforcement and thus may never clear her name and credit history.

A. THE EHRENFELD CASE

In 2004, repeat libel-player Sheikh Khalid Bin Mahfouz filed suit against American author Rachel Ehrenfeld for stating in her book *Funding Evil: How Terrorism is Financed*[107] that he had financially supported terrorists prior to September 11, 2001.[108] Bin Mahfouz complained that this allegation injured his reputation in the United Kingdom, where he owns five homes and is "well known to the . . . financial community."[109] Unlike Cambridge University Press, Ehrenfeld had almost no connection to the United Kingdom. She lived and worked in New York, where the book was published; she had never lived in the United Kingdom; her book

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[105] Harrods, Ltd., 237 F. Supp. 2d at 446.
[106] *See, e.g.*, Siegel, *supra* note 4. Sheikh Khalid Bin Mahfouz, for example, never attempted to enforce his London libel judgment against New York author Rachel Ehrenfeld. *See infra* Part III.A.
[107] RACHEL EHRENFELD, FUNDING EVIL: HOW TERRORISM IS FINANCED (2003).
[108] Bin Mahfouz v. Ehrenfeld [2005] UKHC 1156 [¶ 16] (appeal taken from Eng.).
[109] *Id.* at ¶ 27.

was never published in the United Kingdom; and, according to her, she had never taken "any steps to cause the Book to be made available to purchasers in England or to facilitate its availability there through internet sources."[110] Her only link to the United Kingdom stemmed from two facts: (1) approximately twenty-three copies of *Funding Evil* had been sold there via online distributors; and (2) the first chapter of her book, which mentions Mahfouz and his alleged connections to terrorism, was available online at ABCNews.com.[111] Given her lack of financial resources, the formidable procedural burdens she would face, and her principled opposition to Mahfouz's tactic, Ehrenfeld did not contest the suit.[112] In May 2005, the British court entered a default judgment against her and (1) found her liable for damages of £30,000 and costs (including attorneys' fees of £30,000); (2) found that the disputed statements were defamatory and false; (3) required her to publish "a suitable correction and apology"; and (4) continued the court's initial injunction against the book.[113] Ehrenfeld had no assets in the United Kingdom, however, so Bin Mahfouz could not enforce the judgment there, and he made no attempt to enforce it in New York where she did have assets.

Ehrenfeld responded by filing suit against Bin Mahfouz in New York to obtain a declaratory judgment barring enforcement of the foreign verdict.[114] She argued that the New York court had personal jurisdiction over Bin Mahfouz because throughout his libel suit against her, he had "taken numerous steps and engaged in repeated acts directed at [intimidating her] in New York."[115] The District Court for the Southern District of New York rejected this argument,

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[110] Pl.'s Aff. ¶ 4, June 9, 2005, Ehrenfeld v. Bin Mahfouz, No. 104 Civ. 9641, 2005 WL 6143421 (S.D.N.Y.).
[111] *See* Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830, 832 (N.Y. 2007).
[112] *See* Pl.'s Aff. ¶ 7, June 9, 2005, Ehrenfeld v. Bin Mahfouz, No. 104 Civ. 9641, 2005 WL 6143421 (S.D.N.Y.).
[113] *See id.* at ¶ 9; Bin Mahfouz v. Ehrenfeld [2005] EWHC 1156 [¶ 75] (appeal taken from Eng.).
[114] *See* Ehrenfeld v. Bin Mahfouz, 2006 WL 1096816.
[115] *See* Pl.'s Aff. at ¶ 11, Ehrenfeld v. Bin Mahfouz, No. 104 Civ. 9641, 2005 WL 6143421 (S.D.N.Y.).

holding that New York's long-arm statute[116] only permits jurisdiction if the defendant transacts business in the forum and the cause of action arises out of those contacts.[117] On appeal, the Second Circuit certified to the New York Court of Appeals the question of whether C.P.L.R. 302(a)(1) extends personal jurisdiction over a defendant "(1) who sued a New York resident in a non-U.S. jurisdiction; and (2) whose contacts with New York stemmed from the foreign lawsuit and whose success in the foreign suit resulted in acts that must be performed by the subject of the suit in New York."[118] The New York Court of Appeals denied relief, finding that Bin Mahfouz had not established sufficient contacts with New York to fall under its jurisdiction and that simply serving documents on Ehrenfeld as required under British procedural rules did not amount to "transacting" business for jurisdictional purposes.[119] The court concluded that Ehrenfeld's argument for expanding New York procedural rules in order to confer jurisdiction upon libel tourists must be "directed to the Legislature."[120]

Although Ehrenfeld faced little risk of having to pay Bin Mahfouz damages in New York,[121] she could not remove the "sword of Damocles" hanging over her head.[122] It undermined her reputation as a counter-terrorism expert and threatened her credit history.

B. LIBEL TOURISM LAWS

The *Ehrenfeld* decision sparked a national public outcry,[123] and the New York legislature responded just five months later by

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[116] N.Y. C.P.L.R. 302(a)(1) (McKinney 2009).
[117] Ehrenfeld v. Bin Mahfouz, 2006 WL 1096816 at *3.
[118] Ehrenfeld v. Bin Mahfouz, 489 F.3d 542, 545 (2d Cir. 2007).
[119] Ehrenfeld, 881 N.E.2d, 830, 834–36 (N.Y. 2007).
[120] *Id.* at 834 n.5.
[121] *See* Siegel, *supra* note 4 ("Mr. Bin Mahfouz's judgment, with or without the declaration, has scant prospect of New York enforcement under CPLR 5304(b)(4), which rejects recognition if the claim on which the judgment is based is 'repugnant' to New York public policy.").
[122] *Hearing*, *supra* note 16, at 3 (written statement of Rachel Ehrenfeld).
[123] *See, e.g.*, Cohen, *supra* note 84.

unanimously passing the Libel Terrorism Protection Act, which abrogated the Court of Appeals' decision.[124]

The Act makes two additions to the C.P.L.R. First, it codifies the *Bachchan* rule that courts need not recognize foreign defamation judgments unless the law applied in the foreign jurisdiction "provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions."[125] Since no other jurisdiction provides the same level of protection for speech as the United States, this limitation applies to virtually every foreign defamation judgment.[126]

Second, the law modifies New York's personal jurisdiction rules by attaching long-arm jurisdiction to foreign defendants, provided that the publication at issue was published in New York, and that the domestic plaintiff is a resident of New York or amenable to jurisdiction there and has assets in New York or may have to take actions in New York to comply with the foreign judgment.[127] Thus, the Act provides writers and publishers with "the security of a judicial statement," ensuring that the foreign judgment will not be recognized.[128] Finally, the law was designed to work retroactively, giving Ehrenfeld a new chance to sue Bin Mahfouz.[129]

State and federal legislators have taken note. In August 2008, Illinois enacted its own "Rachel's Law,"[130] which is modeled after the New York bill and provides both long-arm jurisdiction over foreign

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[124] David D. Siegel, *"Libel Terrorism" Bill: Governor Signs Bill to Deter Libel Claimants from Suing in Foreign Courts to Try to Inhibit Free Speech in NY*, SIEGEL'S PRAC. REV., May 2008, at 2.

[125] N.Y. C.P.L.R. 5304(b)(8) (McKinney 2009).

[126] Joel Stashenko, *'Libel Tourism' Bill Protecting Authors Passed by Legislators*, N.Y. L.J., Apr. 3, 2008, at 1 ("Mr. Lancman [the bill's co-sponsor] said he knows of no other country with stronger libel laws for defendants than the United States, effectively making all foreign libel judgments void in New York.").

[127] *See* N.Y. C.P.L.R. 302(d).

[128] Siegel, *supra* note 4, at 2.

[129] N.Y. C.P.L.R. 302(d)(2).

[130] The Libel Terrorism Protection Act, S.B. 2722, 95th Gen. Assem., Public Act 095-0865 (Ill. 2008) (enacted).

"libel tourists" and grounds for non-enforcement of foreign defamation judgments.[131]

In September 2008, the U.S. House of Representatives passed H.R. 6146, sponsored by Representative Steven Cohen (D., Tenn.). Similar to the New York law, it provides grounds for non-recognition of a foreign defamation judgment "unless the court determines that the foreign judgment is consistent with the [F]irst [A]mendment."[132] The bill omits the New York law's more controversial provision, which extends long-arm jurisdiction to foreign defendants on the basis of their litigation efforts against the domestic plaintiff. Although the House passed the bill,[133] the Senate failed to consider it before the 110th congressional term ended.

Representative Peter King (R., N.Y.) authored a second, more robust and controversial bill, H.R. 1304, entitled "The Free Speech Protection Act," while Senator Arlen Specter (R., Pa.) introduced its companion bill in the Senate (with co-sponsors Joe Lieberman (I., Conn.) and Charles Schumer (D., N.Y.)).[134] Like the New York law and H.R. 6146, this bill creates a cause of action allowing the domestic author to obtain a court order declaring the foreign judgment unenforceable if the court determines that the disputed statement would "not constitute defamation under United States law."[135] The bill originally provided long-arm jurisdiction over the foreign defendant based solely on the foreigner's act of filing suit against the United States person.[136] Responding to concerns of jurisdictional

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[131] 735 ILL. COMP. STAT. ANN. 5/2-209(b-5) (2009); 735 ILL. COMP. STAT. ANN. 5/12-621(b)(7) (2009).

[132] An Act to Prohibit Recognition and Enforcement of Foreign Defamation Judgments, H.R. 6146, 110th Cong. (as passed by House, Sept. 27, 2008).

[133] 154 CONG. REC. H10258 (daily ed. Sept. 27, 2008).

[134] Free Speech Protection Act of 2009, H.R. 1304, 111th Cong. (2009); S. 449, 111th Cong. (2009). *See generally* Arlen Specter & Joe Lieberman, Op-Ed., *Foreign Courts Take Aim at Our Free Speech*, WALL ST. J., July 14, 2008, at A15.

[135] *See* H.R. 1304 § 3(a); S. 449 § 3(a)(1).

[136] H.R. 5814 § 3(b), 110th Cong. (2008) ("It shall be sufficient to establish jurisdiction over the person or entity bringing a foreign lawsuit described in subsection (a) that such person or entity has filed the lawsuit against a United States person, or that such United States person has assets in the United States against which the

overreaching, Congress modified the provision to require that the U.S. defendant have "assets in the United States against which the claimant in the foreign lawsuit could execute if a judgment in the foreign lawsuit were awarded."[137] The bill goes further than the others by allowing U.S. authors to countersue for damages, which a court may award based on (1) "the amount of the foreign judgment"; (2) "the costs, including all legal fees, attributable to the foreign lawsuit that have been borne by the United States person"; and (3) the "harm caused to the United States person due to decreased opportunities to publish, conduct research, or generate funding."[138] Under this bill, the domestic court may award treble damages if the fact-finder determines that the plaintiff brought the foreign lawsuit as part of an intentional scheme to suppress First Amendment rights.[139] Civil procedure scholar David Siegel has publicly advocated this type of robust approach, arguing that it would discourage future libel tourism.[140] It would also protect media defendants who have assets abroad, because it gives them the opportunity to recover damages lost in the foreign judgment.

IV. CONSTITUTIONAL AND POLICY PROBLEMS POSED BY THE NEW YORK LAW

The New York law has enjoyed broad, bipartisan support from legislators, the media, and the public and has inspired two bills in Congress and one law in Illinois. However, it raises a host of constitutional and policy questions regarding: (1) a possibly unconstitutional stretch of personal jurisdiction; (2) comity concerns and resentment from long-time allies; (3) possible overbreadth; (4) vagueness, which could allow foreign courts to circumvent the doctrine; and (5) redundancy and inadequacy, be-

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claimant in the foreign action could execute if a judgment in the foreign lawsuit were awarded.").

[137] H.R. 1304 § 3(b); S. 449 § 3(b). The quoted text represents the language of the bill at the time of publication.

[138] *Id.* § 3(c)(2).

[139] *Id.* § 3(d).

[140] *See* Siegel, *supra* note 4.

cause—without the long-arm provision—it may merely codify the common law and fail to deter future libel tourism.

A. PERSONAL JURISDICTION

The most common concern with the New York law is its assertion of personal jurisdiction over a foreign defendant based solely on the defendant's efforts to sue the U.S. author or publisher.[141] Critics argue that such provisions violate long-standing principles of due process, which prohibit a court from exercising jurisdiction over a non-resident unless such jurisdiction is fair and predictable because he has had sufficient "minimum contacts" with the forum.[142] In interpreting the "minimum contacts" requirement, a court must consider "the relationship among the defendant, the forum, and the litigation."[143] New York courts have limited long-arm jurisdiction to extend only to the foreign defendant who transacts business, "commits a tortious act," or "owns, uses or possesses any real property" within the state.[144]

The new long-arm provision extends jurisdiction to any person who obtains a foreign defamation judgment against a resident of New York or a person amenable to jurisdiction there, regardless of the foreign claimant's own ties to the state.[145] The Advisory Committee on Civil Practice has questioned the constitutionality of this provision and opposed the New York bill largely for this reason, predicting that it would face court challenges.[146]

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[141] Several commentators have expressed concern that the New York law will face constitutional challenges for this reason. *See, e.g.*, Paul H. Aloe, *Unraveling Libel Tourism*, N.Y. L.J., June 18, 2008, at 5; Joel Stashenko, *Civil Practice Committee Finds Fault with Libel Terrorism Bill*, N.Y. L.J., Mar. 4, 2008, at 2; Thomas F. Gleason, *Who Should Fix the Libel Tourism Problem?*, N.Y. L.J., Mar. 17, 2008, at 3.

[142] Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945) (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[143] Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

[144] N.Y. C.P.L.R. 302(a)(1)–(4) (McKinney 2009).

[145] *See id.* at 302(d).

[146] In advising the New York legislature to reject the bill, Committee Member Mark C. Zauderer noted, "Courts will have to determine whether somebody seeking to take advantage of this procedure can do so constitutionally in a situation in which the foreign libel plaintiff has absolutely no ties in New York." Stashenko, *supra* note 126, at 2.

Supporters of the New York law argue that if the foreign defendant intended to control the speech of a plaintiff in New York, then asserting jurisdiction over her seems fair.[147] They cite the *Ehrenfeld* court, which suggests that if the legislature amended New York law to allow the broadest reach of jurisdiction consistent with the Constitution, then long-arm jurisdiction over foreign "libel tourists" would be permissible.[148] They note that the language of C.P.L.R. 302(d) provides some basis for what its sponsors thought might establish "minimum contacts": it requires that the disputed work was published in New York and that there is "some impact in New York, either because the libel defendant can be found here, is subject to jurisdiction here, or would have to take some action here."[149]

Proponents of the law cite a divided Ninth Circuit en banc decision in *Yahoo! Inc. v. La Ligue Contre le Racism et L'Antisemitisme*, where a U.S. auction website violated a French law banning the sale and display of Nazi memorabilia.[150] A French court issued an order banning the Nazi-related material from Yahoo!'s website. Yahoo! responded by seeking a judgment in California declaring the French Court's orders unenforceable in the United States.[151] The Ninth Circuit, while refusing Yahoo! the declaratory judgment, ultimately found jurisdiction over the French party based on the *Calder* "effects" test under which a defendant must have (1) committed an intentional act expressly aimed at the forum state;

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[147] *See* Gleason, *supra* note 141, at 3 n.13.

[148] Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830, 837 (N.Y. 2007) ("By contrast [to California's long-arm statute which is "coextensive with federal due process requirements"], we have repeatedly recognized that New York's long-arm statute does not confer jurisdiction in every case where it is constitutionally permissible.") (internal citations omitted). For an argument in favor of the bill, see Comm. on Commc'n & Media Law, *supra* note 74, at 13.

[149] Aloe, *supra* note 141, at 3.

[150] *See* Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (en banc).

[151] *See* Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1185–86 (N.D. Cal. 2001), *rev'd en banc on other grounds*, 433 F.3d 1199 (9th Cir. 2006).

and (2) caused harm that the defendant knew was likely to be suffered in the forum state.[152]

However, the salient facts of *Yahoo!* may distinguish it from the typical libel tourism case. George F. Carpinello, chair of the New York Advisory Committee on Civil Practice, noted that the Ninth Circuit based its finding of personal jurisdiction on three contacts that the French plaintiffs had with California: (1) they sent a cease-and-desist letter to Yahoo! in California; (2) they served process to Yahoo! in California; and, most importantly, (3) the French plaintiffs obtained two orders from the court directing Yahoo! to perform "significant acts" in California (by making changes to its servers there) under threat of a financial penalty, which would be felt at Yahoo!'s corporate headquarters in California.[153] According to Carpinello, the *Yahoo!* decision does not open the doors for jurisdiction over a foreign plaintiff "merely by virtue of the fact that a New York resident has been found liable by a foreign court in a defamation matter."[154]

Ehrenfeld might contend that she, like the *Yahoo!* plaintiffs, would have to take significant actions in New York to comply with the British judgment because: (1) it prohibited her from publishing her book in the United Kingdom, which would require her to contact her publisher in New York and halt the online distribution of her book; (2) she would have to use her assets in New York to pay the substantial damages demanded; and (3) she would have to write and publish a correction and apology, presumably in New York where

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[152] *Yahoo!*, 433 F.3d at 1206–07 (citing Calder v. Jones, 465 U.S. 783 (1984)).

[153] Letter from George F. Carpinello, Chair, Advisory Comm. on Civil Practice, to J.R. Drexelius, Counsel to Senator Volker, Kevin Engle, Counsel to Senator John DeFrancisco, Richard Ancowitz, Program & Counsel, Assembly Standing Comm. on the Judiciary, Seth Agata, Principal Legislative Coordinator, N.Y. State Assembly Program and Counsel, Marty Rosenbaum, Program & Counsel, Assembly Standing Comm. on Codes, Clayton Rivet, Program and Counsel, Assembly Standing Comm. on Codes, and Mariya S. Treisman, Assistant Counsel to the Governor, (Mar. 5, 2008) (on file with the New York University Journal of Law & Liberty); *see also Yahoo!*, 433 F.3d at 1209–11.

[154] Letter from George F. Carpinello, *supra* note 153.

she lives.[155] However, unlike Yahoo!, Ehrenfeld did not have to take significant action in New York to avoid the imminent enforcement of a financial penalty, since the U.K. court had already issued the judgment against her and she faced little threat of its enforcement.[156]

Ultimately, the constitutionality of the long-arm provision will depend on interpretation by the courts. It may withstand constitutional scrutiny if it is interpreted narrowly to require a significant enough effort by the foreigner to affect freedom of speech in New York, thus aligning with the *Yahoo!* decision and satisfying the "minimum contacts" standard. Since the statute stipulates that it only reaches as far as is permissible under the U.S. Constitution,[157] courts may avoid striking it down and simply interpret it to avoid constitutional problems.

B. COMITY CONCERNS

Although the United States has no treaties requiring the recognition or enforcement of foreign country judgments,[158] the New York libel tourism law violates long-standing rules of comity with the United Kingdom and Australia and threatens to breed resentment against the United States. American political leaders may be wary about alienating such longtime allies. One judge on the Australian High Court in *Gutnick* expressed such resentment when he referred to Dow Jones's attempt to limit its liability of enforcement within the United States as "American legal hegemony."[159]

As a policy matter, the New York law may inspire foreign judges to levy exorbitant damages awards against U.S. authors, since judges will expect them to ignore the awards anyway. This could significantly hurt those media organizations with assets abroad.

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[155] *See supra* Part III.A.
[156] *See supra* Part III.A.
[157] N.Y. C.P.L.R. 302(d)
[158] *See Hearing*, *supra* note 16, at 1 (written statement of Linda Silberman, Professor, New York University School of Law).
[159] Dow Jones & Co. v. Gutnick, (2002) 210 C.L.R. 575, 588.

However, denying comity negatively impacts a relatively small group of people—the litigants who bring such suits, their lawyers, and the handful of libel judges who hear their cases. In fact, many in the United Kingdom sympathize with American authors. British public officials and members of the press have expressed outrage that their courts are suppressing speech in other countries. In December 2008, Denis MacShane, a senior Labour Party Member of Parliament, launched an attack on the British courts, comparing them to "Soviet-style organ[s] of censorship" and calling libel tourism "an international scandal" and "a major assault on freedom of information."[160] A parliamentary committee has formed to conduct an inquiry into libel tourism and press regulation.[161] British journalists have been pushing for libel reform as well. Alan Rusbridger, the editor of the British newspaper *The Guardian*, has described his own ordeal being sued by Tesco, a grocery store giant based in the United Kingdom, and the subsequent chilling effect the lawsuit had on his paper.[162]

Thus, although denying comity poses potential problems, such as the risk of increased foreign libel awards, it will probably continue to inspire more calls for reform rather than breed resentment. Regardless, First Amendment principles overshadow such concerns. The United States' interest in international goodwill pales in comparison to its fundamental interest in protecting free speech.[163]

C. OVERBREADTH CONCERNS

The language of the New York law raises the following questions regarding its scope.

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[160] *Writ Large*, *supra* note 30, at 2.
[161] *See id.*
[162] Alan Rusbridger, *A Chill on* 'The Guardian,' N.Y. REV. BOOKS, Jan. 15, 2009, at 1.
[163] *See, e.g.*, Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1193 (N.D. Cal. 2001), *rev'd en banc on other grounds*, 433 F.3d 1199 (9th Cir. 2006) (finding that absent a treaty or legislation "addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment").

1. Does the New York Law Allow Courts to Prohibit Recognition of Foreign Judgments That Are Consistent with U.S. Law?

Under the New York law, courts should not bar enforcement of foreign judgments if the foreign jurisdiction "provided at least as much protection for freedom of speech and press *in that case* as would be provided by both the United States and New York constitutions."[164] Since no other jurisdiction provides as much protection for speech as do the United States and New York, courts may interpret the law to prohibit recognition of *all* foreign libel judgments, even those which are fully consistent with domestic libel law—for example, where the speech was intentionally defamatory and false.[165] This broad approach would effectively codify the common law rule under *Bachchan* and *Viewfinder*, which suggests that New York courts should bar enforcement if the foreign libel *regime* impinges on First Amendment protections.[166]

However, New York courts will likely interpret the provision narrowly based on the legislature's decision to insert the language "in that case," which was meant to give courts some flexibility.[167] This view requires that the foreign judgment mirror the *result* of the same case had it been tried in New York. It solves the overbreadth problem by allowing courts to decide the non-enforcement issue on a case-by-case basis, consistent with how C.P.L.R. 5304 traditionally has been applied.[168] Thus, New York courts will likely interpret the law to require that the *outcome* of the foreign suit comports with First Amendment principles.

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[164] N.Y. C.P.L.R. 5304(b)(8) (McKinney 2009) (emphasis added).
[165] *See, e.g.*, Letter from George F. Carpinello, *supra* note 153. It is important to note, however, that this letter was written before section 5304(b)(8) was amended to include the phrase "in that case."
[166] *See, e.g.*, Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474 (2d Cir. 2007); Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).
[167] Aloe, *supra* note 141, at 5.
[168] *Id.*

2. Is the New York Law Correct in Requiring a Connection Between the Libel Suit and the Domestic Forum?

The New York law allows courts to bar enforcement of foreign libel judgments so long as the author published the disputed work in New York and is amenable to jurisdiction there.[169] To comply with traditional conflict-of-laws doctrine, federal bills should similarly include a "territorial nexus" between the libel suit and the United States, thus triggering non-enforcement only when domestic interests are actually undermined or affected.[170] Otherwise, libel tourist statutes may open the door for libel-defense tourism: foreign libel defendants who published their works in the foreign forum and were properly subject to jurisdiction there would move their assets to the United States in order to enjoy protection from enforcement. While this transfer of assets would provide something of a financial windfall for the United States, it detracts from the American court system's credibility as a forum for fair adjudication of defamation suits, particularly since the very purpose of such laws is to prevent forum-shopping.

One might argue that U.S. courts should never use their authority to enforce laws that contravene core constitutional principles like the right to speak freely and criticize public figures without having the burden of proving the statement's truth.[171] Under this rationale, so long as the author comports with long–standing jurisdictional rules, the American court should not enforce a judgment that offends First Amendment principles, regardless of whether the author availed herself of the foreign forum or published the disputed work domestically. In fact, in the Internet Age, traditional boundaries have evaporated; articles published in the United Kingdom may be available online in the United States. Thus, by recognizing a foreign

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[169] *See* N.Y. C.P.L.R. 302(d) (McKinney 2009). The domestic plaintiff must also either have assets in New York or have to take actions there to comply with the foreign judgment. *Id.*

[170] *See Hearing*, *supra* note 16 (oral statement of Linda Silberman, Professor, New York University School of Law); *cf.* Aloe, *supra* note 141.

[171] *See Hearing*, *supra* note 16, at 14–16 (responses of Laura R. Handman, Partner, Davis Wright Tremaine LLP to Questions for the Record).

judgment, the U.S. court would help deprive U.S. citizens of information of public concern.[172] Significantly, however, the New York law merely requires a territorial nexus in order to obtain a declaratory judgment preemptively, before the libel plaintiff ever sues to enforce it. New York courts still have authority to bar enforcement of foreign judgments deemed repugnant to public policy when the libel plaintiff does seek to collect on the judgment.[173] Thus, if the author has no connection to New York, and the publication was not published there, then under basic conflict-of-laws principles, the courts have no reason to invoke U.S. public policy interests, particularly before there exists a threat of enforcement.[174]

D. VAGUENESS

The New York law also poses vagueness problems, since it fails to explain how the court should measure a foreign jurisdiction's protections for freedom of speech. Presumably, with respect to the New York law, the foreign court must have applied principles consistent with the First Amendment, *New York Times v. Sullivan*,[175] and article I, section 8 of the state constitution,[176] but it remains unclear what procedural safeguards the foreign court must also adopt. For instance, will courts require the right to a trial by jury, the burden of proof on the plaintiff, and standards for granting a motion to dismiss or summary judgment?[177] A foreign court might skirt the problem by borrowing U.S. free speech principles and procedures and thus rendering the judgment enforceable in the domestic jurisdiction, despite failing to apply the substantive

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[172] *See id.*
[173] N.Y. C.P.L.R. 5304(b)(4) (McKinney 2009).
[174] *See Hearing*, *supra* note 16 (oral statement of Linda Silberman, Professor, New York University School of Law).
[175] N.Y. Times v. Sullivan, 376 U.S. 254 (1964).
[176] N.Y. CONST. art. 1, § 8 ("Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.").
[177] Aloe, *supra* note 141.

meaning of the doctrines.[178] This shortcoming should warrant little concern, however, for two reasons: (1) U.S. courts will continue building on current case law that determines the scope of necessary free speech safeguards; and (2) if the foreign jurisdiction does resolve a case in a manner clearly antithetical to U.S. libel jurisprudence, the domestic court will likely bar its enforcement.[179]

E. REDUNDANCY AND INADEQUACY CONCERNS

1. Does the New York Law Merely Codify the Common Law?

Some legal scholars have argued that if courts strike down as unconstitutional the provision conferring personal jurisdiction over foreign libel tourists[180] or, at the very least, interpret it narrowly to avoid constitutional problems, the New York law would become redundant as a mere codification of the *Bachchan* and *Viewfinder* rules, which already give courts the power to bar enforcement of foreign libel judgments.[181] In fact, courts in every state in the country already have the power to bar enforcement of foreign judgments on public policy grounds.[182] Many states have adopted uniform foreign money-judgments recognition acts, which allow courts to deny enforcement of foreign fines.[183]

However, if courts interpret the personal jurisdiction provision to stay within constitutionally permissible bounds, the New York law does provide some measure of additional relief for New York

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[178] *Id.*

[179] *See* Sarl Louis Feraud Int'l. v. Viewfinder, Inc., 489 F.3d 474 (2d Cir. 2007); Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

[180] N.Y. C.P.L.R. 302(d) (McKinney 2009).

[181] *See* Stashenko, *supra* note 126 (noting that Mr. Carpinello argues that the New York libel terrorism bill is unnecessary because article 54 of the C.P.L.R. already gives New York courts the "leeway to enforce or not to enforce foreign judgments on a case-by-case basis").

[182] *See Hearing*, *supra* note 16, at 4–5 (written statement of Linda Silberman, Professor, New York University School of Law).

[183] *See* Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199, 1218–19 (9th Cir. 2006) (en banc) (citing Huntington v. Attrill, 146 U.S. 657, 673–74 (1892)); *see also, e.g.*, Uniform Foreign Money-Judgments Recognition Act, CAL. CIV. PROC. CODE § 1713 (West 2008).

authors. First, it extends jurisdiction to the limits of the Fourteenth Amendment, like the California long-arm statute in the *Yahoo!* case.[184] Thus, rather than having to prove that the foreign defendant transacted business in New York, the author has a lighter burden of establishing jurisdiction over the defendant. Second, the law saves the domestic author from having to argue the ripeness of her claim; once a foreign judgment is levied against her—even if no efforts are made to enforce it—she has a cause of action, assuming she can establish personal jurisdiction over the defendant.

One might argue that the law's meager benefits do not outweigh its many problems since U.S. courts will bar enforcement of the foreign judgment if the foreign plaintiff ever seeks to enforce it. Although an important point, this view fails to appreciate the impact on authors and publishers who never have the chance to free themselves of foreign libel judgments, particularly those individuals and small media entities who lack the resources to contest the foreign action.

2. Does the New York Law Deter Future Libel Tourism?

The New York law's most significant policy problem lies in its failure to prevent future libel tourism, since billionaire libel tourists do not appear to be very concerned with enforcing their foreign judgments in the United States.[185] As Bin Mahfouz demonstrates with his website,[186] the London falsity judgment is far more powerful as a public relations tool and as a cloud hanging over the journalist. Until American authors know that they will not be dragged into foreign courts for spurious libel suits—which they may or may not be able to strike down at home—they will continue to censor their work and the American public will lose the benefits of a free press.

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[184] Ehrenfeld v. Bin Mahfouz, No. 04 Civ. 9641, 2006 WL 1096816, at *5 (S.D.N.Y. Apr. 26, 2006) (citing Pl.'s Comp.), *aff'd*, 518 F.3d 102 (2d Cir. 2008).
[185] *See* Siegel, *supra* note 4, at 3; *see also supra* Part III.
[186] *See* Bin Mahfouz Information, http://www.binmahfouz.info/en_index.html (last visited Apr. 13, 2009).

V. RECOMMENDATIONS

Although an international treaty setting personal jurisdiction and libel norms would provide the best solution, it may take years to establish. Instead, federal and state legislators considering new libel tourism legislation should consider the strengths and weaknesses of the New York law. Its non-enforcement provision provides an important starting point because it gives a writer the opportunity to clear her name if a libel tourist sues her abroad and never attempts to enforce the judgment in the United States. But to avoid the pitfalls of the New York law, legislators should also consider the following principles.

First, federal laws should avoid jurisdictional overreaching; they must only allow jurisdiction over foreign plaintiffs where the traditional "minimum contacts" standard is satisfied.[187] According to the Ninth Circuit, this requires more from a foreign plaintiff than simply filing suit against a domestic author, although obtaining a foreign court order requiring the U.S. author to take some significant action in the United States under threat of a financial penalty may suffice.[188] Fortunately, many international businessmen and celebrities who file such suits are based in the United States, have assets here, or maintain sufficient contacts with the forum such that this requirement will not pose too great a hurdle.[189]

Second, federal bills should give teeth to the New York approach by including safeguards that deter future libel tourism. As civil procedure expert David Siegel has noted, "The plaintiff in *Ehrenfeld* probably laughingly dismisses the idea of collecting on his judgment, like a tycoon ignoring a dime on the sidewalk."[190] Some media lawyers and commentators have advocated for a bill modeled after anti-SLAPP statutes, which twenty-five states have adopted in an effort

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[187] *See* Int'l Shoe v. Washington, 326 U.S. 310, 316–17 (1945).
[188] Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (en banc).
[189] *See Hearing*, *supra* note 16, at 14 (written statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP).
[190] *See* Siegel, *supra* note 4, at 3.

to deter frivolous libel suits.[191] These laws allow courts to dismiss an underlying libel suit if the court finds it to be a meritless claim filed primarily to chill the defendant's exercise of his First Amendment rights.[192] Although a domestic court would not be able to dismiss the foreign suit, this approach has the benefit of providing an immediate response to libel tourism—once the plaintiff files the foreign suit, the domestic author can file the anti-SLAPP claim. This may have the effect, as it often does domestically, of causing the libel plaintiff to drop the charges because a successful anti-SLAPP action requires the libel plaintiff to cover the defendant's attorney's fees and costs for both suits.[193] This fee-shifting provision eases the financial burden of bringing suit for small media entities and individual authors who, under the New York law, must pay the litigation costs associated with obtaining the declaratory judgment.

To compound this deterrent effect, particularly given that the people most likely to bring such suits are extremely wealthy, the federal law should provide a remedy for damages equal to double the foreign judgment.[194] This serves not only to deter future libel forum-shopping and harassment of U.S. authors, but also to protect larger media organizations that have assets overseas against which a foreign judgment may be enforced.[195] It also protects smaller publishers, who lack the capital to defend themselves abroad but who

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[191] *See, e.g.*, *Hearing*, *supra* note 16, at 9–10 n.30 (written statement of Bruce D. Brown, Partner, Baker & Hostetler, LLP); *id.* at 14 n.64 (written statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP) (citing twenty-five states with anti-SLAPP statutes: Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, and Washington).

[192] *See id.* at 9 (written statement of Bruce D. Brown, Partner, Baker & Hostetler, LLP).

[193] *See, e.g.*, Scott Jaschik, *A University Press Stands Up – And Wins,* INSIDE HIGHER ED, Aug. 16, 2007, http://www.insidehighered.com/news/2007/08/16/yaleup (describing how KinderUSA dropped its libel claim against Yale University Press over allegations that it funds terrorism after Yale University Press filed an anti-SLAPP suit against KinderUSA in California).

[194] For support of this approach, see *Hearing*, *supra* note 16, at 3 (written statement of Bruce D. Brown, Partner, Baker & Hostetler, LLP).

[195] For support of this approach, see *id.* at 14 (written statement of Laura R. Handman, Partner, Davis Wright Tremaine LLP).

are most vulnerable to the credibility effects of a libel suit. The freelance journalist, for example, may have difficulty finding a publisher or raising money if he is subject to a foreign judgment equivalent to $200,000.[196] Having a U.S. judgment in his favor for $400,000 would probably moot such concerns, even if the award were never enforced, because if the foreign plaintiff ever tried to collect on his judgment, the U.S. court would not only bar its enforcement, but levy its own judgment. U.S. courts would only need to implement the statute once or twice before causing a libel tourist to hesitate before filing his next suit.

Some legal scholars have expressed concern that this type of remedy is too aggressive and may inspire the United Kingdom to adopt an "anti-anti-suit injunction."[197] However, the fact that libel forum-shopping has increasingly garnered public criticism within the United Kingdom should mitigate such concerns; in fact, drawing attention to what a Member of Parliament has called an "international scandal" may encourage continued reform abroad.[198] Even if British courts refuse to recognize the damages award from the U.S. anti-SLAPP judgment, the media defendant still succeeds in clearing her name and credit history, as described above. Ultimately, the importance of the First Amendment interests at stake should override such comity concerns.[199]

Courts might need guidance on how to determine whether a foreign plaintiff intended to chill First Amendment rights. Such federal legislation should be used sparingly and only target the real instances of libel tourism, where the parties and publication have little connection to the foreign forum. For example, it seems intuitively unfair for a U.S. court to issue an award against a foreign

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[196] For information on the costs of libel litigation in England, see *Writ Large*, *supra* note 30.

[197] *See, e.g.*, *Hearing*, *supra* note 16 (oral statement of Linda Silberman, Professor, New York University School of Law).

[198] *See supra* Part IV.B. For a discussion of the trend towards libel reform within the United Kingdom, see *Hearing*, *supra* note 16, at 10–12 (responses of Laura R. Handman, Partner, Davis Wright Tremaine LLP to Questions for the Record).

[199] *See supra* Part IV.B.

plaintiff who lives in London and sues over an American publication that was widely published in London, since its impact would be felt where the plaintiff lives and works and plans to work in the future. He should not have to litigate the case in the United States or pay a damages award when he visits the United States at some time in the future. Fortunately, libel tourists tend to stick out—on the street and in the courts—so in most cases, judges will be able to distinguish the real cases of libel tourism based on the plaintiff's and the disputed work's minimal connections to the foreign forum.

VI. CONCLUSION

Despite its problems, the New York law provides an important step towards safeguarding free speech. Its jurisdictional provision may go beyond constitutional limits, but even without it, the law smoothes the way for New York authors to clear their names and prevent enforcement of foreign libel judgments. Federal legislation should build on the New York law by avoiding its jurisdictional overreaching, while at the same time giving it teeth by including a damages remedy that will deter future libel forum-shopping. This approach would avoid constitutional problems while allowing an affirmative measure that will hit enough real tourists to dampen their libel-holiday adventures. Rather than exporting American law, such legislation will prevent British law from being imported.[200] It will help ensure that the United States remains a "center for vigorous debate and investigative journalism" and "a hospitable climate for the free exchange of ideas."[201]

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[200] *Hearing*, *supra* note 16, at 3 ("The problem with libel tourism is not that U.K. law has refused to evolve along the same path as ours, it is that U.K. law now threatens to undo the free speech protections we have chosen for ourselves at home.") (written statement of Bruce D. Brown, Partner, Baker & Hostetler, LLP).

[201] The New York City Bar Association's argument for passage of the New York bill aptly applies to the need for federal legislation. *See* Comm. on Commc'n & Media Law, *supra* note 74, at 4.