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Some Thoughts on Libel Tourism

Andrew R. Klein*

- I. INTRODUCTION
- II. LIBEL TOURISM BACKGROUND
- III. LEGISLATIVE RESPONSE
 - A. *United States*
 - B. *England*
- IV. COMITY CONCERNS AND SOME SUGGESTIONS
- V. CONCLUSION

I. INTRODUCTION

It is a privilege to contribute to the *Pepperdine Law Review's* symposium honoring Justice Allen M. Linden. As others have noted, Justice Linden is a leading figure in the field of tort law, not only in his home country of Canada, but also in the United States and throughout the world. It is fitting, therefore, for a diverse group of tort scholars to recognize his accomplishments by addressing the fascinating question of whether the world still needs U.S. tort law.

During the past generation, many have looked to U.S. tort law as a beacon. Indeed, U.S. courts frequently grapple with the extent to which foreign litigants can use the American system, which is generally viewed as welcoming to those harmed by tortious conduct.¹ This paper, however, considers situations where the dynamic is nearly the opposite—cases where plaintiffs file lawsuits abroad, and then return to the United States to enforce judgments based on more plaintiff-friendly foreign law. The particular topic

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1. See Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1137 (2007) (“The substantive tort law and related procedural mechanisms available in U.S. courts are generally much more favorable to plaintiffs, and produce much larger recoveries, than the law and procedures available in foreign courts.”); Lory Barsdate Easton, *Getting Out of Dodge: Defense Pointers on Jurisdictional Issues in Aviation Torts Litigation*, 20 AIR & SPACE LAW. 9, 9 (2006) (“One very clear trend in U.S. products liability litigation over the past several years has been an increase in litigation brought by overseas plaintiffs arising from overseas incidents and injuries.”).

addressed in this paper is “libel tourism,” a phrase used to describe cases where plaintiffs sue for defamation in a foreign jurisdiction and then seek to enforce judgments in the United States, where the outcome might have been different because of protections for speech embodied in the United States Constitution.²

A number of commentators have discussed libel tourism at length,³ and this paper will not provide a treatise on the topic. Rather, the paper will review recent reactions from legislators, courts, and commentators, and then offer some thoughts about whether these reactions appropriately balance concerns of comity and free speech. Ultimately, the paper concludes that U.S. attempts to address the issue of libel tourism have been quite broad and suggests a more cautious approach that would better contribute to maintaining America’s role as a leader in the evolving world of tort law.

II. LIBEL TOURISM BACKGROUND

Courts and commentators have expressed concern about libel tourism for years, but a recent decision of the New York Court of Appeals thrust the issue into the spotlight.⁴ In *Ehrenfeld v. Bin Mahfouz*, Rachel Ehrenfeld wrote a book entitled, *Funding Evil: How Terrorism is Financed—and How to Stop It*, which was published by a Chicago-based publisher.⁵ The book asserted that Khalid Salim Bin Mahfouz, a Saudi Arabian financier, provided support for al Qaeda and “other ‘Islamist terror groups.’”⁶ Although published in the United States, twenty-three copies were sold in the United Kingdom via internet purchase, and a chapter of the book was

2. See Tara Sturtevant, *Can the United States Talk the Talk & Walk the Walk When it Comes to Libel Tourism: How the Freedom to Sue Abroad Can Kill the Freedom of Speech at Home*, 22 PACE INT’L L. REV. 269, 269 (2010); Doug Rendleman, *Collecting a Libel Tourist’s Defamation Judgment?*, 67 WASH. & LEE L. REV. 467, 468 (2010) (“A libel tourist is a forum shopper with two scarce attributes. First, a forum-shopping plaintiff usually prefers to sue his defendant in the United States because of its courts’ discovery, jury trials, and generous damages. But a libel tourist is a forum shopper who shuns the United States.”). England is the primary venue for libel tourists. However, nations such as Singapore, New Zealand, Kyrgyzstan, and Australia are also popular libel tourism destinations. See Sturtevant, *supra*, at 280; Sarah Staveley-O’Carroll, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 N.Y.U. J. L. & LIBERTY 252, 263 (2009).

3. See, e.g., Sturtevant, *supra* note 2, at 269; Rendleman, *supra* note 2, at 467; Staveley-O’Carroll, *supra* note 2, at 252; Todd W. Moore, *Untying Our Hands: The Case for Uniform Personal Jurisdiction Over “Libel Tourists”*, 77 FORDHAM L. REV. 3207 (2009); Richard Garnett & Megan Richardson, *Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-Border Libel Cases*, 5 J PRIVATE INT’L L. 471 (2009); Raymond W. Beauchamp, *England’s Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 FORDHAM L. REV. 3073 (2006).

4. *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830 (N.Y. 2007).

5. *Id.* at 831–32.

6. *Id.* at 832.

available on ABC News's website in the United Kingdom.⁷ Bin Mahfouz subsequently sued Ehrenfeld for defamation in England.⁸ Ehrenfeld refused to appear in that action "because of the cost of litigating in England, the procedural barriers facing a libel defendant under English law and [Ehrenfeld's] disagreement in principle with defendant's alleged attempt to chill her speech in New York by suing in a claimant-friendly libel jurisdiction to which she lacked any tangible connection."⁹

An English court entered a default judgment against Ehrenfeld and her publisher, awarding damages and prohibiting additional publications of defamatory statements about Bin Mahfouz in England and Wales.¹⁰ Although Bin Mahfouz did not attempt to enforce the judgment in the United States, Ehrenfeld filed a declaratory judgment action in federal court in New York, seeking an order that the English default judgment was unenforceable in the United States.¹¹ The district court dismissed the action, finding that it did not have personal jurisdiction under section 302(a)(1) of the New York Civil Practice Law And Rules (CPLR).¹²

Ehrenfeld appealed to the Second Circuit, which certified the jurisdictional question to the New York Court of Appeals.¹³ Responding to the certified question, the New York court affirmed the federal district court's decision:

Confronted, as we are, with a demand letter sent by English solicitors requesting—among other things—"[a]n undertaking to the High Court in England" not to repeat [Ehrenfeld's] alleged defamatory statements as well as [Bin Mahfouz's] service of documents and other mailings related to the English action, we, too, conclude that [Bin Mahfouz] has not purposely availed himself of the laws of New York.¹⁴

7. *Id.*

8. *Id.*

9. *Id.* at 832–33.

10. *Id.* at 833.

11. *Id.*

12. N.Y. C.P.L.R. § 302(a)(1) (McKinney 2008) (“(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state . . .”).

13. *Ehrenfeld*, 881 N.E.2d at 831 (“[W]hether CPLR 302(a)(1) confers personal jurisdiction over a person ‘(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.’” (citation omitted)).

14. *Id.* at 836.

The *Ehrenfeld* case crystallized several issues that have become targets for critics of libel tourism. First, it appears that the English judgment was inconsistent with U.S. law—or at least that Bin Mahfouz would have had a more difficult time succeeding in a defamation action against Ehrenfeld had he filed suit in the United States. Ever since the landmark case of *New York Times v. Sullivan*,¹⁵ the Supreme Court has interpreted the First Amendment as requiring plaintiffs to clear hurdles that were not part of a common law defamation action in an effort to balance the Constitution’s protection of speech with each state’s authority to protect its citizens’ reputations through tort law.¹⁶ Generalizing a bit, at least in cases that touch on matters of public concern, a plaintiff must prove some level of fault regarding the defendant’s knowledge of the truth or falsity of an alleged defamatory statement.¹⁷ In addition, the Supreme Court has held that, under the First Amendment, plaintiffs must prove a statement’s falsity, rather than requiring defendants to prove a statement’s truth.¹⁸

These First Amendment protections have no direct analogue in England. There, defamation law presumes the falsity of a statement, and a defendant must prove truth as a defense.¹⁹ In addition, with only a few exceptions, defamation in England is a strict liability tort—that is, plaintiffs do not normally need to prove fault regarding a defendant’s knowledge of falsity. One exception involves “fair comment” for “responsible journalism” based on disclosed and accurate facts.²⁰ Perhaps Ehrenfeld could have raised this

15. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

16. *Id.* at 279–80 (“The constitutional guarantees [of freedom of speech and freedom of the press] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974) (“[W]e conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.”).

17. See *N.Y. Times*, 376 U.S. at 279–80; see also *Gertz*, 418 U.S. at 347 (“We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (“[P]ermitt[ing] recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.”).

18. See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (“We believe that the common law’s rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.”).

19. See *Sturtevant*, *supra* note 2, at 275 (“In England, defamatory statements by their nature are presumed false. A defendant may, as a defense, plead that his statements were true and thus justified. However, to mount this defense, the defendant must prove the substantial truth of every material fact. A material fact is defined as anything that ‘adds weight to the imputation.’ Proving truth is no simple task.” (quoting *Beauchamp*, *supra* note 3, at 3078)); see also *Moore*, *supra* note 3, at 3212; *Staveley-O’Carroll*, *supra* note 2, at 257.

20. See *Staveley-O’Carroll*, *supra* note 2, at 257 (“British courts have carved out limited

argument had she defended her action in England. But, even if she had, Bin Mahfouz's path to success in his defamation action undoubtedly was easier in England than in the United States.²¹

A second important issue highlighted by *Ehrenfeld* is the fact that the English court issued a judgment against Ehrenfeld despite her very limited contact with England. This is consistent with English defamation law's focus on the right to reputation, with little regard to where the defendant lives.²² American critics of libel tourism argue that judgments in England (or elsewhere) can have a chilling effect on speech in the United States, even when authors and others engaging in speech make efforts to avoid contact with foreign jurisdictions.²³ This is understandable in an era where technology permits words to spread throughout the world, whether or not a speaker instigates distribution. The problem is exacerbated by England's use of the "multiple publication" rule, which "holds that every publication of the disputed work, in any forum throughout the world, gives rise to a separate tort" and, potentially, a new cause of action.²⁴ This means that a

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."); Kyu Ho Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?*, 13 COMM. L. & POL'Y 415 (2008) (discussing *Jameel v. Wall St. Journal Eur. Sprl.*, [2006] UKHL 44 (appeal taken from Eng.), which held that responsible reporting on a matter of public interest is protected from defamation claims, as well as *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609 (H.L.) 625 (appeal taken from Eng.), which set forth a ten-factor test to determine "responsible journalism"); see also *infra* notes 54–55 and accompanying text.

21. Indeed, precedent does exist where U.S. courts have refused to enforce defamation judgments in England because they are not consistent with U.S. constitutional law. See *Bachchan v. India Abroad Publ'ns, Inc.*, 585 N.Y.S.2d 661 (Sup. Ct. 1992); see also Moore, *supra* note 3, at 3213–14.

22. See Garnett & Richardson, *supra* note 3, at 473–74 ("[F]rom the English (and Commonwealth) perspective, vindicating a claimant's right to reputation is the core of a libel action and such a policy should not depend upon whether the defendant is local or foreign. Indeed, the right to reputation is enshrined in Article 8 of the European Convention on Human Rights (ECHR) which has been implemented by the UK in the Human Rights Act of 1998." (citing European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221)).

23. See *Staveley-O'Carroll*, *supra* note 2, at 268–69 (stating that some authors and publishers try to minimize risk by not publishing work in the United Kingdom, but even then "avoiding physical publication in the United Kingdom does not necessarily save American publishers from liability there"); Moore, *supra* note 3, at 3214–15. With regard to *Ehrenfeld*, one commentator stated: "Although Ehrenfeld faced little risk of having to pay Bin Mahfouz damages in New York, she could not remove the 'sword of Damocles' hanging over her head. It undermined her reputation as a counter-terrorism expert and threatened her credit history." *Staveley-O'Carroll*, *supra* note 2, at 275. But see Garnett & Richardson, *supra* note 3, at 478 (noting that "Ehrenfeld's book still remains in print in the US and there has been no effort by Mahfouz to enforce the order All in all, there is little evidence that authorities such as *Ehrenfeld* have directly 'chilled' free speech in the US.").

24. See *Staveley-O'Carroll*, *supra* note 2, at 260–61; Garnett & Richardson, *supra* note 3, at 471;

limitations period might not expire until a publication is unavailable in any format—including online.²⁵

Finally, *Ehrenfeld* shows that even if a U.S. court ultimately wants to do something about a foreign defamation judgment, it might have trouble obtaining jurisdiction. Unlike English and other Commonwealth courts, which take jurisdiction almost on the basis of publication alone,²⁶ U.S. courts interpret due process as requiring a defendant to have minimum contacts with a state before personal jurisdiction can attach.²⁷ This can lead to anomalous situations where one U.S. citizen sues another U.S. citizen for defamation in England,²⁸ with the defendant later having trouble seeking relief (for example, filing a declaratory judgment action to prevent enforcement of a judgment) in her home state because the original plaintiff did not have sufficient contacts in that jurisdiction.

see also infra notes 53–65 and accompanying text (discussing proposed changes to English libel laws).

25. *See* *Staveley-O'Carroll*, *supra* note 2, at 260–69. In the United States, by contrast, a “single publication” rule applies, meaning that a limitations period runs from the date of the first publication. *See* *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.”).

26. *See* *Garnett & Richardson*, *supra* note 3, at 471–72.

27. *See* *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”); *see also* *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (“[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State”); *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830, 834–35 (N.Y. 2007); *Garnett & Richardson*, *supra* note 3, at 472 (in the defamation context, “[m]inimum contacts may be established by a substantial circulation of publications in the forum state or where the publication in the forum was accompanied by other significant contacts such as soliciting subscriptions and responses from forum residents.” (citations omitted)). U.S. courts also apply an “effects test” when determining personal jurisdiction, looking to whether the “forum was targeted by the defendant’s publications.” *Id.* (citing *Calder v. Jones*, 465 U.S. 783, 789–90 (1984); *Fielding v. Hubert Burda Media Inc.*, 415 F.3d 419 (5th Cir. 2005); *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002); *Remick v. Manfredy*, 238 F.3d 248 (3d Cir. 2001)).

28. *See* *Garnett & Richardson*, *supra* note 3, at 476–77 (“[S]uch actions likely . . . appear as a cynical attempt by US residents to forum shop internationally to evade their own freedom of expression laws [R]ecently, it has been suggested that . . . U[.]S[.] celebrities (mainly Hollywood actors) have filed libel suits in England against US publishers, with numbers expected to rise in the future. English courts clearly have become a magnet for celebrity litigation.” (citation omitted)).

III. LEGISLATIVE RESPONSE

A. *United States*

In light of the issues noted above, the response to *Ehrenfeld* was swift and largely negative. This section of the paper describes the major events. First, the section discusses the New York legislature's response to the decision—the Libel Terrorism Protection Act.²⁹ Next, the section describes proposed federal legislation aimed at deterring libel tourism.³⁰ The section then reviews some proposals for change to defamation law being considered in England itself.³¹ Before heading into this discussion, it is important to note that principles of comity normally lead U.S. courts to honor valid judgments from a foreign court.³² As one will see, however, this was not the intent of American legislative responses to cases like *Ehrenfeld*.

In 2008, the New York legislature passed the Libel Terrorism Protection Act.³³ The act was designed to address the issue of obtaining personal jurisdiction over a plaintiff in a foreign defamation action, as well as the substantive issue of whether a New York court would enforce a foreign judgment.³⁴ On the procedural issue, the legislature essentially amended its long-arm statute to permit its courts to take jurisdiction in cases like *Ehrenfeld*:

The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who

29. 2008 N.Y. Laws ch. 66, § 3 (codified at N.Y. C.P.L.R. 302, 5304 (McKinney 2008)); see *infra* notes 33–36 and accompanying text.

30. See *infra* notes 40–51 and accompanying text.

31. See *infra* notes 52–63 and accompanying text.

32. See *infra* note 38 and accompanying text (discussing exception to this general rule when enforcement of the foreign judgment would be “repugnant” to U.S. public policy); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481–82 (1987); Yaad Rotem, *The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments*, 10 CHI. J. INT’L L. 505, 510–11 (2010) (“[T]o . . . ensure that its own judgments are recognized abroad, some form of cooperation of the forum with the foreign country is therefore inevitable.”). By way of analogy, a similar exception to the Full Faith and Credit Clause of the Constitution operates between states. See *Nevada v. Hall*, 440 U.S. 410, 421–22 (1979) (“A judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter. . . . But this [Court’s precedents] . . . clearly establish[] that the Full Faith and Credit Clause does not require a State to apply another State’s law in violation of its own legitimate public policy.” (citation omitted)).

33. N.Y. C.P.L.R. 302, 5304.

34. *Id.*

has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person's liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to [N.Y. C.P.L.R. § 5304], to the fullest extent permitted by the United States constitution, provided:

1. the publication at issue was published in New York, and
2. that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision.³⁵

Next, regarding the substantive issue, the New York legislature decided that a New York court need not recognize a foreign defamation judgment if the judgment was inconsistent with constitutional principles regarding free speech and freedom of the press:

A foreign country judgment need not be recognized if:

....

... the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication 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.³⁶

Shortly after enactment of the New York law, at least three other states followed suit, passing statutes designed to deter libel tourists.³⁷

The states' responses raise a number of concerns. First, non-recognition provisions raise comity issues, assuming one begins from the perspective that U.S. courts should honor fairly-rendered judgments issued elsewhere unless the foreign decision is "repugnant" to United States public policy.³⁸

35. *Id.* § 302(d) (alteration in original).

36. *Id.* § 5304(b)(8).

37. CAL. CIV. PROC. CODE §§ 1716–1717 (West Supp. 2009); 735 ILL. COMP. STAT. 5/2-209 (b-5), 5/12-621 (b)(7) (2009); FLA. STAT. § 55.605 (2)(h) (2009).

38. See Moore, *supra* note 3, at 3218 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(d) (1987)); Charles W. Mondora, *The Public Policy Exception, "The Freedom of Speech, or of the Press," and the Uniform Foreign-Country Money Judgments Recognition Act*, 36 HOFSTRA L. REV. 1139, 1140 (2008) (quoting the public policy exemption of the Foreign-Country Money Judgments Recognition Act).

Whether non-adherence to First Amendment doctrine rises to this level is an issue addressed in more detail below.³⁹ Second, having individual states enact their own laws raises serious concerns about consistency, particularly in an area where the sensitivities of foreign nations are at stake and where principles of federal constitutional law are driving the laws' enactments.

On the latter point, federal legislators quickly stepped into the breach and proposed national legislation aimed at libel tourism. The first was a House of Representatives bill proposed by Darrell Issa of California and Steve Cohen of Tennessee.⁴⁰ The bill, which the House passed unanimously in 2008,⁴¹ recognized that U.S. courts normally enforce foreign judgments as a matter of comity but declared that this should not include foreign judgments inconsistent with U.S. constitutional rights of free speech.⁴² With that set out, the bill concluded:

Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation that is based upon a publication concerning a public figure or a matter of public concern unless the domestic court determines that the foreign judgment is consistent with the First Amendment to the Constitution of the United States.⁴³

As it goes, the Cohen-Issa Libel Tourism Bill simply would have codified on a federal level the notion that foreign defamation judgments inconsistent with First Amendment principles are “repugnant” to U.S. policy—a view that does have some backing in legal precedent.⁴⁴

In 2009, however, members of the House and Senate proposed a law that would have gone substantially further. The proposed legislation, called the Free Speech Protection Act (FSPA), specifically provided overseas defendants an opportunity to seek a declaratory judgment in a U.S. court precluding the collection of a foreign defamation judgment.⁴⁵ In addition, the FSPA would have provided the foreign defamation defendant the ability

39. See *infra* note 44 and accompanying text.

40. H.R. 6146, 110th Cong. (as passed by House, Sept. 27, 2008).

41. See Sturtevant, *supra* note 2, at 288.

42. H.R. 6146, 110th Cong. § 1(a)(5)–(6) (as passed by House, Sept. 27, 2008).

43. *Id.* § 2(a).

44. See RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 5 cmt. at 80 (2006) (citing *Telnikoff v. Matusevich*, 702 A.2d 230 (Md. 1997); *Louis Feraud Int'l S.A.R.L. v. Viewfinder Inc.*, 406 F. Supp. 2d 274 (S.D.N.Y. 2005); *Bachan v. India Abroad Publ'ns., Inc.*, 585 N.Y.S.2d 661 (Sup. Ct. 1992); *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)).

45. H.R. 1304, 111th Cong. (2009); S. 449, 111th Cong. (2009).

to counter-sue in the United States for damages based on the amount of the foreign judgment, reasonable legal fees, and any harm suffered by the foreign defendant due to diminished opportunities to publish, research or obtain funding.⁴⁶ The FSPA would have tripled damages upon a finding that the foreign plaintiff “intentionally engaged in a scheme to suppress First Amendment rights.”⁴⁷

The 110th Congressional session ended without further action on the competing bills. In 2010, however, members of the 111th Congress reconciled their differences, and passed new legislation with language similar to what was originally in the Cohen-Issa bill.⁴⁸ The new legislation, however, dropped the FSPA’s damages section, save for reasonable attorney’s fees where a foreign defendant succeeds in a declaratory action based on the provisions of the statute.⁴⁹ President Obama signed the legislation into law on August 10, 2010.⁵⁰ As discussed below, the new legislation represents a move in the right direction toward finding a solution to the libel tourism problem that appropriately balances the right to free speech with concerns about comity and the ability of other nations to enforce their own values with regard to the protection of reputation.⁵¹

46. See Free Speech Protection Act of 2009, S. 449, 111th Cong. § 3(c) (2009).

47. H.R. 1304 § 3(d); see also S. 449 § 3(d).

48. See Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act, Pub. L. No. 111-223, 124 Stat. 2380 (2010) (to be codified at 28 U.S.C. § 4101–05). The exact language reads:

Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that—

(A) the defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located; or

(B) even if the defamation law applied in the foreign court’s adjudication did not provide as much protection for freedom of speech and press as the first amendment to the Constitution of the United States and the constitution and law of the State, the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the first amendment to the Constitution of the United States and the constitution and law of the State in which the domestic court is located.

Id. § 3, 124 Stat. at 2381 (to be codified as 28 U.S.C. § 4102(a)).

49. See *id.* § 3, 124 Stat. at 2383–84 (to be codified as 28 U.S.C. § 4105). The new law also provides a broad removal provision that would allow a foreign defendant to remove a case to federal court if the foreign plaintiff seeks enforcement of a judgment in state court. See *id.* § 3, 124 Stat. at 2383 (to be codified as 28 U.S.C. § 4103). Removal would be proper without regard to complete diversity of the parties and regardless of the amount in controversy. See *id.* (to be codified as 28 U.S.C. § 4103(3)).

50. See Editorial, *No More ‘Libel Tourists’: Congress Steps in to Protect Writers; Now Britain Must Do its Part*, WASH. POST, Aug. 13, 2010, available at 2010 WLNR 16160988 (Aug. 13, 2010).

51. See *infra* note 78 and accompanying text.

B. England

Action, however, has not been limited to the U.S. side of the Atlantic. At the same time that U.S. legislators have been debating legislation directed at libel tourism, policy makers in England have been debating changes to their own defamation laws. During the recent parliamentary campaign in England, for example, Nick Clegg, leader of the Liberal-Democrat Party (now a member of the governing coalition) made statements that could well have come from an American frustrated by libel tourists:

Our libel law and practice have turned a country once famed for its traditions of freedom and liberty into a legal farce where people and corporations with money can impose silence on others at will.

....

Libel tourism is making a mockery of British justice, with foreign plaintiffs able to bring cases against foreign defendants when the publications in question may have sold just a handful of copies in England.⁵²

More recently, Mr. Clegg's words have been put into motion, as Lord Lester of Herne Hill introduced a defamation bill that would modify English common law in a way that would, in some respects, move it closer to U.S. law.⁵³ The Defamation Bill contains twenty-two clauses, three of which are particularly significant to the discussion in this paper.

Clause 1 of the Defamation Bill clarifies and essentially codifies the rule of *Reynolds*.⁵⁴ The clause would create a defense of "responsible publication" for statements on matters of "public interest."⁵⁵ The Defamation Bill then lays out a series of factors that parallel the factors American courts use to determine actual malice or negligence in a U.S. defamation action.⁵⁶

52. *Libel Laws Making Mockery of Justice, Say Lib Dems*, B.B.C. NEWS (Jan. 18, 2010, 17:29 GMT), http://news.bbc.co.uk/2/hi/uk_news/politics/8466297.stm.

53. See Defamation Bill, 2010–11, H.L. Bill [3] (U.K.), available at <http://www.publications.parliament.uk/pa/ld201011/ldbills/003/11003.i-ii.html>.

54. See Defamation Bill cl. 1; *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609 (H.L.) 625 (appeal taken from Eng.); see also *supra* note 20 and accompanying text.

55. See Defamation Bill cl. 1.

56.

Those circumstances may include (among other things)—

- (a) the nature of the publication and its context;
- (b) the nature and seriousness of anything alleged about the claimant;
- (c) what information the defendant had before publication;
- (d) what steps (if any) were taken by the defendant to verify what was published;

Clause 10 of the Defamation Bill would create a single publication rule, so that “the first occasion on which the publication is made available to the public generally (or to any section of the public) is to be regarded for all purposes as the date of publication of each subsequent publication.”⁵⁷ Application of such a rule would overturn at least 150 years of precedent in England and eliminate the situation where each republication of an allegedly defamatory statement creates a new cause of action.⁵⁸

Clause 13 of the Defamation Bill speaks directly to the issue of libel tourism.⁵⁹ It applies to defamation actions where “the words or matters complained of have also been published outside the jurisdiction.”⁶⁰ In such cases the bill provides that: “No harmful event is to be regarded as having occurred in relation to the claimant unless the publication in the jurisdiction can reasonably be regarded as having caused substantial harm to the claimant’s reputation having regard to the extent of publication elsewhere.”⁶¹

Should Lord Lester’s bill become law, it would go a long way toward bringing English defamation law into line with U.S. law. Not everyone, however, has cheered such a move. During a second reading of Lord Lester’s bill in the House of Lords on July 9, 2010, Lord Hoffman of Chedworth⁶² offered extensive criticism of the proposed legislation, both defending English law’s historical protection of reputation⁶³ and also criticizing legislation in the United States as “an extraordinary example of

(e) if appropriate, whether the defendant gave the claimant an opportunity to comment before publication;

(f) whether there were factors supporting urgent publication;

(g) the extent of the defendant’s compliance with any relevant code of conduct or other relevant guidelines

Id. at cl. 1(4); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (“The constitutional guarantees [of freedom of speech and freedom of the press] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”).

57. Defamation Bill cl. 10(1)(a).

58. *Lord Lester’s Defamation Bill—Main Provisions*, PRESS GAZETTE, (June 2, 2010), <http://www.pressgazette.co.uk/story.asp?storycode=45524>; *see also supra* note 25 and accompanying text.

59. *See* Defamation Bill cl. 13.

60. *Id.* at cl. 13(1).

61. *Id.* at cl. 13(2).

62. Lord Hoffman had a long career as a lawyer and judge and ended his career as a Law Lord of Appeal in the Ordinary. *See The Rt Hon Lord Hoffmann, PC*, DEBRETTS, <http://www.debretts.com/people/biographies/browse/h/19052/Leonard%20Hoffmann+HOFFMANN.aspx> (last visited Nov. 7, 2010).

63. During debate, Lord Hoffman quoted with favor a passage from a Canadian Supreme Court opinion: “An individual’s reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy.” 720 Parl. Deb., H.L. (5th ser.) (2010) 431 (U.K.), *available at* <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/100709-0001.htm> (quoting WIC Radio Ltd. v. Simpson, [2008] 2 S.C.R. 420 (Can.)).

American extraterritoriality—something which [the United States is] very fond of, and something of which I hope the Minister has taken note.”⁶⁴ At the end of his statement, Lord Hoffman expressed hope for a slower reform process, rather than passing something because of pressure from abroad:

I am anxious that because of the head of steam that has been got up as a result of the Americans, we should not proceed with precipitate haste. It is true that the reports of earlier committees have taken a long time to bear fruit, and sometimes there has been a poor crop; but the Government are committed to reform and there should be no undue delay in taking a little time for careful and dispassionate consideration. There are matters such as libel tourism and the working of the public interest defence about which we simply do not have enough information to make a proper judgment.⁶⁵

IV. COMITY CONCERNS AND SOME SUGGESTIONS

Lord Hoffman’s comments highlight a concern about the collateral effect of U.S. legislation aimed at curbing libel tourism. Such legislation has the ability to impact much more than just defamation actions—it might well create foreign policy friction among nations that, in the normal course of business, would respect valid judgments rendered in one another’s courts.⁶⁶ A number of commentators have raised the same concern about the spate of U.S. legislation designed to curb libel tourism. Professor Douglas Rendleman, for example, argues that a broad-brush rejection of all foreign defamation judgments “is both too blunt and too broad.”⁶⁷ Others have agreed, asserting that U.S. legislation violates longstanding international legal principles by attempting to create rules of law for other countries.⁶⁸ The result might undermine “policies of comity that are necessary for strong international relations at a time when the United States needs them most.”⁶⁹

64. *Id.* at Column 432.

65. *Id.* at Column 433.

66. *See supra* note 32 and accompanying text. It is fair to note, however, that the *failure* to curb libel tourism also creates the potential for foreign policy friction. So, in the end, action by more than one country would be the ideal way to address the issue. *See infra* note 87 and accompanying text.

67. Rendleman, *supra* note 2, at 487 (arguing that the idea “that a foreign nation’s substantive law is ‘repugnant’ unless it is identical to ours is itself a repugnant one”).

68. *See Moore, supra* note 3, at 3236 (citing John J. Walsh, *The Myth of ‘Libel Tourism’*, 238 N.Y. L.J. 2, col. 3 (2007)); Rendleman, *supra* note 2, at 484 (“As a matter of constitutional law, are we to suppose that the U.S. Constitution’s First Amendment applies to conduct and litigation in a foreign nation?”).

69. *See Moore, supra* note 3, at 3236; Staveley-O’Carroll, *supra* note 2, at 278 (stating that

Concerns about comity should lead critics of libel tourism to step back as they consider a response. Certainly, it is legitimate to address a clash of policy and mores when faced with the possibility of enforcing foreign judgments. The American Law Institute, for example, lists a series of circumstances where non-recognition is appropriate,⁷⁰ including a situation where “the judgment or the claim on which the judgment is based is repugnant to the public policy of the United States.”⁷¹ Does this include a defamation judgment that might not pass First Amendment muster? A number of courts have held that this is the case.⁷² I would preach caution in reaching this conclusion, however, and advocate for a consistent approach to the issue, rather than patchwork legislation. From that perspective, this paper offers several thoughts.

First, uniformity is important in addressing libel tourism, so federal legislation is preferable to individual state responses. The new U.S. SPEECH Act⁷³ is a step in the right direction. It could be improved, however, by making clear that the federal constitution *alone* sets the standard for determining the enforceability of a foreign judgment, rather than opening the door to evaluation of foreign judgments on the basis of state laws that might impose additional requirements on defamation plaintiffs.⁷⁴ Given the possibility of foreign relations friction that might follow a policy of non-enforceability, the federal government—and federal courts—should play the primary role in determining what violates public policy when free speech is at issue. One way of accomplishing this would be to include broad removal sections in the legislation, not only for those who face a proceeding to enforce a foreign defamation judgment,⁷⁵ but also for those who face a declaratory judgment action seeking non-enforcement.⁷⁶ This suggestion is not meant to be disrespectful of state

legislation in U.S. raises “comity concerns and resentment from long-time allies”).

70. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, *supra* note 44, § 5.

71. *Id.* § 5(a)(vi).

72. *See supra* note 21.

73. *See supra* note 48 and accompanying text.

74. The new U.S. law states that:

[A] domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic courts determines that—(A) the defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States *and by the constitution and law of the State in which the domestic court is located*

SPEECH Act, Pub. L. No. 111-223, § 3, 124 Stat. 2380, 2381 (2010) (to be codified at 28 U.S.C. § § 4102(a)(1)) (emphasis added).

75. *Id.* § 3, 124 Stat. at 2383 (to be codified as 28 U.S.C. §4103) (permitting removal based on diversity in “any action brought in a State domestic court to enforce a foreign judgment for defamation . . . without regard to the amount in controversy between the parties.”).

76. *See Rendleman, supra* note 2, at 487 (“Congress might consider general federal legislation to create a uniform national approach by establishing either exclusive federal-court jurisdiction or concurrent federal-state court jurisdiction over foreign-nation judgments with final review by the

policy determinations in the area of defamation and speech. Rather it recognizes the federal government's special role in matters of foreign affairs and international relations.

Second, it is unduly provocative and potentially unproductive for federal legislation to provide monetary penalties beyond non-enforcement.⁷⁷ This assertion is not based merely on comity grounds, but also on grounds that affirmative reasons exist for the United States (and other countries) to maximize the number of situations where foreign judgments are recognized on a reciprocal basis. As Professor Yaad Rotem recently argued, doing so generally "engender[s] cooperation and reduce[s] the overall costs of litigation" for all nations involved.⁷⁸ The recent changes to U.S. legislation eliminating the possibility of damages against foreign defamation plaintiffs (as the FSPA originally provided), combined with the obvious sensitivity of many in England to the issue of libel tourism, represent steps in the right direction in this regard.

Third, to the extent possible, U.S. legislation, or at least judicial interpretation of the legislation, should explicitly focus on the core First Amendment policy of fostering robust and unfettered public debate,⁷⁹ rather than tying itself to every particular detail of First Amendment doctrine. The language in the current statute is not clear on this point. The law states that a foreign judgment shall not be recognized or enforced unless it "provided for as much protection for freedom of speech and press . . . as would be provided by the first amendment to the Constitution of the United States . . ."⁸⁰ Does this mean that even "'minor' deviations" from case law interpreting the First Amendment would make a foreign judgment unenforceable in the United States?⁸¹ For example, *New York Times v.*

U.S. Supreme Court."). Without such provisions, a situation might arise where a foreign judgment is enforceable in one state because it is found to satisfy First Amendment principles, but not in another where speech protections are broader.

77. Professor Rendleman agrees. See Rendleman, *supra* note 2, at 486-87. Writing when the FSPA was still pending in Congress, he stated: "The FSPA's remedies provisions for injunctions, damages, trebling, and clawback add insult to disrespect. Congress ought to refuse to pass it." *Id.* at 487.

78. Rotem, *supra* note 32, at 509. However, Rotem also cautions that nations have been "reluctant to recognize foreign judgments in order to protect local defendants, to encourage an incoming transfer of assets and capital, and to allow additional litigation and increased income for certain influential groups." *Id.* The article provides a thorough economic analysis supporting the notion that nations should generally enforce one another's judgments.

79. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

80. SPEECH Act, § 3, 124 Stat. at 2381 (to be codified as 28 U.S.C. § 4102(a)(1)).

81. See Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1305-06 (1998) (criticizing the implicit holding in *Bachchan v. India Abroad Publ'ns, Inc.*, 585 N.Y.S.2d 661 (Sup. Ct. 1992) that even "minor"

Sullivan states that plaintiffs should prove “actual malice” by “clear and convincing evidence.”⁸² Does this mean that if England changes its defamation rules as Lord Lester’s bill proposes, but permits a plaintiff to prove a fault standard by a “preponderance of the evidence,” all judgments would be categorically unenforceable? Doing so would be overly formalistic, rather than truly sensitive to the policy involved.

Fourth—and in connection with the previous point—there should be no general presumption that it is inherently wrong to sue an American in another country. As Professor Rendleman wrote: “Filing a defamation lawsuit in a foreign nation is not tortious misconduct. . . . Courts and legislatures should reject the idea that a particular substantive category of foreign-nation judgments, those for libel, can never be collected in the United States.”⁸³ A case like *Ehrenfeld* is on the extreme end of the spectrum—Ehrenfeld did little to inject her work into the foreign markets and, notwithstanding the internet, she did little to promote her work or ideas there.⁸⁴ In this type of situation, concerns that the foreign judgment might chill her ability to engage in speech in the United States easily could outweigh concerns about respect for English defamation law.⁸⁵ But it is not hard to imagine a situation much closer to the line. What if an author published a book in the United States but aggressively marketed it overseas? What if sales and distribution there were much wider than in *Ehrenfeld*? In such a case, comity would dictate more respect for the judgment if the foreign plaintiff sought to enforce it in the United States against the author. In short, it is reasonable to take into account the extent to which a speaker has actively disseminated her ideas in other countries in deciding whether enforcement of a foreign judgment is “repugnant to the public policy of the United States.”⁸⁶

Finally, it is worth noting that defamation reform efforts in England, such as Lord Lester’s bill, should be viewed as an opportunity for a cooperative approach to the problem of libel tourism, particularly in those cases where the speaker’s contact with the United Kingdom is minimal. Other mechanisms could be adopted as well—perhaps English courts could adopt broader use of forum non conveniens where neither the plaintiff nor defendant have strong contacts with the country or, in the long-term, perhaps

deviations from American free-speech standards violate public policy and render judgments unenforceable).

82. See *N.Y. Times*, 376 U.S. at 279–80, 286.

83. Rendleman, *supra* note 2, at 487.

84. See *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830, 832–34 (N.Y. 2007).

85. See *id.* at 836 (“Plaintiff also asserts that the alleged chill caused by the English judgment has been felt by certain publishers who have accepted her work in the past, but decline to do so now for unspecified reasons, and by other authors engaged in the investigation of international terrorism whom she alleges must now tailor their writing to avoid foreign libel suits.”).

86. This assumes that the judgment comports with the other factors laid out in the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481–82 (1987).

a number of countries could pursue efforts at resolving differences through treaty negotiations.⁸⁷ In the end, nations on both sides of the libel tourism debate should look for ways to respect historical approaches to protection of reputation and free speech, even if those approaches differ among nations. Given that technology has changed the way that information is disseminated across the globe—and no doubt will continue to do so—any other approach is bound to engender conflict that is unsatisfactory to all involved.

V. CONCLUSION

Does the world still need U.S. tort law? The answer is surely yes. But should U.S. law govern all tortious conduct across the globe? Here the answer is certainly not. The issue of libel tourism provides a timely and interesting example of tensions that can arise when U.S. law differs from that of other nations, especially in a world where “conduct” can quickly and easily cross borders. Balancing the interests of free speech, individual reputation, and comity is not an easy thing to do. But it is best done in an environment where legislators and judges respect the policies of other nations and act judiciously when taking steps to protect their own mores and values. This paper has attempted to contribute to the debate in that spirit, and hopefully in a spirit that reflects the important work and remarkable career of Justice Allen Linden.

87. See Staveley-O’Carroll, *supra* note 2, at 288–89 (noting that a treaty would be the best approach, but suggesting that it is impractical in the short term as it would “take years to establish” at best).
