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INTERNATIONAL PUBLICATIONS AND PROTECTION OF REPUTATION: A MARGIN OF APPRECIATION BUT NOT SUBSERVIENCE?

David Partlett[*]
Barbara McDonald[**]

> "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."
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> - Cardozo, J., in *Loucks v. Standard Oil Co. of New York*

* Dean and Asa Griggs Candler Professor of Law, Emory University School of Law.
** Professor of Law, University of Sydney.

INTRODUCTION

Legal rights are tied to remedies. What is the value of a right unless it can be remedied? The law of defamation protects a right to one's reputation; the law then, as remedies lawyers would say, is a feeble thing if no remedy is available for vindication of a defamatory wrong. In our globalizing world, the remedy is to be found in a court whose jurisdictional reach enables the effective execution of the judgment. Part I of our Article sets out the background to international defamation litigation. Part II examines the law relating to enforcement of judgments in defamation. Core constitutional law values drive American courts, Congress, and some legislatures, to depart dramatically from the usual assumptions about enforcement of the judgments of civilized nations conforming to norms of due process or natural justice.[1]

Part III of the Article argues that the lack of consistency in defamation is not surprising, given differing weighting to freedom of speech around the world. Defamation law is strongly reflective of attitudes and national values, and it would be unusual to find universal accord. A country seared by two world wars is unlikely to cleave to the precise values and their articulation, as one not so deeply touched. A country with faith in government regulation is, likewise, unlikely to adopt deep scepticism of that regulation. What has changed exponentially in the last decade is the greater potential of clashes of these values as the world has become interdependent and wired through the Internet.

It is on such a stage that plaintiffs roam to find favorable jurisdictions in which to vindicate rights. Forum shoppers have a long and distinguished history. The King's Courts in England grew in power and prestige because aggrieved parties found in those courts superior process and rights vindication.[2] The Courts in England and New York, for example, have been resorted to for 150 years to resolve shipping disputes.[3]

Into these well-ploughed tracks has stepped in recent days a new globe trotter—the libel tourist. He or she is regarded by many (particularly by American commentators) as an odious character.[4] This character, de-

1. *See* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1215 (9th Cir. 2006). *See also* Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1586 (2010). ("[C]ourts in the United States have generally refused to enforce foreign libel judgments.").

2. For this jurisdictional growth of the King's Courts stemming from the twelfth century, see DAVID J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 39–42 (1999). *See also* 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 463–464 (2d ed. 1911).

3. *See generally* Gerard J. Mangone, *Commerce By Water*, 11 DEL. LAW. 28 (Spring 1993).

4. The odious label has fiercely adhered through the association of the libel plaintiff with the tragic events of September 11, 2001. Take the long and persistent newspaper campaign in the United States—see Eric Pfanner, *A Fight to Protect Americans from British Libel Law*, N.Y.TIMES, May 25, 2009, at B3.

scribed in the pages to follow, typically has sued in the English courts for defamation regarding a publication that has appeared, albeit fleetingly, in England. The publisher and the traduced person may have little connection with England. Without the protections of the First Amendment, the allegedly defamed person has a greater chance of success, upsetting the publisher and others imbued with First Amendment presumptions. The claimant is not interested in harnessing the full array of enforcement weapons. She is not intent upon obtaining the usual defamation remedy—damages. This satisfaction with less than the law's full remedial teeth makes litigation more possible, and for First Amendment defenders, more nefarious.

We argue that the libel tourist's status ought to be reconsidered. Painted as a dastardly intruder on free speech, he should, we submit, be seen more charitably. First, we seek to identify him more accurately. We see that the litigation he initiates engages comparative law scholarly exchange among courts of good will. They will learn much in paying attention to the words of fellow judges in foreign courts, regardless of whether judgments may be unenforceable in the defendant's domestic courts. There may always be disagreement about the balancing of fundamental rights, but the quality of the law benefits from dialogue.[5] The world is a better place, so far as law makes it so,[6] if a Cardozo sits down with Atkin,[7] Holmes with Pollock,[8] Higgins with Frankfurter,[9] Lord Hoffmann with Jean-Paul Costa.[10] No values should be impregnable from reasoned argument. In the end, we conclude that in a world of market-states, engagement is critical.[11]

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5. Note the subtle recognition of American law by Justice Kirby in the Australian High Court. S*ee Dow Jones & Co., Inc. v Gutnick*, (2002) 210 CLR 575, 596 (Austl.), *available at* http:// www.austlii.edu.au/ au/ cases/ cth/ HCA/ 2002/ 56.html (¶9); *Australian Broad., Corp. v O'Neill* (2006) 227 CLR 57, 95 (Austl.), *available at* http:// www.austlii.edu.au/ au/ cases/ cth/ HCA/ 2006/ 46.html (¶113).

6. *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977) (It is important to recognize that law alone does not make society better). As Gilmore says, "In Hell there will be nothing but law, and due process will be meticulously observed." *Id.*

7. Note that in the seminal case of Donoghue v. Stevenson, [1932] A.C. 562 (H.L.) 598 (appeal taken from Scot.), *available at* http:// www.bailii.org/ uk/ cases/ UKHL/ 1932/ 100.html, Lord Atkin carefully refers to Justice Cardozo's similarly seminal opinion in MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

8. *See generally* THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874–1932 (Mark DeWolfe Howe ed. 1942).

9. *See* Sir Owen Dixon, *Mr. Justice Frankfurter: A Tribute from Australia*, *reprinted in* 67 YALE L.J. 179 (1957).

10. Even Justice Scalia might seek comparative wisdom. His jurisprudential stances in the United States Supreme Court give pause as to how gladly he would join debate with Lord Hoffman, Justice Michael Kirby and many other distinguished jurists. *See* Jane Stapleton, *The Benefits of Comparative Tort Reasoning: Lost in Translation*, 1 J. TORT L. 6 (2007), *available at* http:// www.bepress.com/ jtl/ vol1/ iss3/ art6. For a framework for wider consideration by courts of matters raising broad transnational issues, see Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002); Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005).

11. *See* VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 71–102

I. SEPARATED BY OUR COMMON LANGUAGE

Despite the seemingly universal recognition in the great international covenants of the twentieth century of the need to protect personal reputations, there remain significant differences in the twenty-first century in the manner and extent of that protection in various western countries. Defamation law has developed differently in different countries, even those sharing an English common law ancestry. Some of this divergence is rooted in fundamental constitutional enactments. Other divergence is relatively recent, due to local legislative reform, changing constitutional contexts, new ways of interpreting old laws, or shifting societal and legal attitudes to both facts and matters of principle. There are now significant differences between the principles of defamation law in the United States, the United Kingdom, Canada, and Australia, as well as marked differences in European civil law countries.[12] The same could be said of privacy laws.

More detail is given below, but briefly, in public interest cases, the claimant suing in England or Australia has considerable advantage over a public figure counterpart in the United States because the former can still rely on strict liability, the presumption of damage, and the presumption of falsity, while the defendant bears the burden of proving defenses such as responsible journalism[13] or reasonable conduct.[14] After developing the public figure principles in *New York Times v. Sullivan*, the Supreme Court of the United States also overturned other entrenched advantages for a claimant where the matter was one of public concern. In *Gertz v. Robert Welch, Inc.*,[15] the United States Supreme Court held that even private citizens must show some fault—that is, at least negligence—and must prove actual damage where the publication is about a matter of public concern. By *Philadelphia Newspapers, Inc. v. Hepps*,[16] the common law presumption

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(2010) (arguing that of the models for constitutional interpretation—resistance, convergence, and engagement—the last is preferable); PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY (2002).

12. For a comparative view see KONRAD ZWEIGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 685–708 (3rd ed. 1998) (Tony Weird trans., 3d ed. 1998) and ERIC BARENDT, FREEDOM OF SPEECH, 198–246 (2d ed. 2005). *See also generally* RAYMOND E. BROWN, THE LAW OF DEFAMATION IN CANADA (2d ed. 1999) (describing the law in Canada).

13. *See* Jameel v. Wall Street Journal Europe Sprl, [2006] UKHL 44, [2007] 1 A.C. 359 (H.L.) (appeal taken from Eng.), *available at* http://www.bailii.org/uk/cases/UKHL/2006/44.html.

14. E.g., under the extended qualified privilege to speak freely on governmental matters, or under the statutory qualified privilege defense. *See Defamation Act 2005* (NSW) s 30 (Austl.), *available at* http:// www.legislation. nsw.gov.au/ viewtop/ inforce/ act+ 77+ 2005+ FIRST+ 0+ N/ (typical of the now uniform state laws in Australia). In Scotland, the plaintiff does not even need to prove publication to a third party; publication to the plaintiff will be sufficient. *See* Mackay v. M'Cankie, (1883) 10 R. 537 (Scot.).

15. 418 U.S. 323 (1974).

16. 475 U.S. 767 (1985). Professor Anderson points out that that case nicely illustrates how difficult a claimant's burden of proving falsity can be: how was the claimant to prove that he did not, as alleged, have ties to organized crime? David A. Anderson, *Protection of Reputation and Privacy:*

that a defamatory publication was false was also overturned in relation to matters of public concern.

While the First Amendment to the Constitution of the United States sets that country apart in its paramount protection of free speech, the *European Convention on Human Rights*[17] incorporates freedom of speech as a primary value in Article 10, but expressly as one that must be balanced against other protected interests such as national security, prevention of crime or disorder, or the reputation and rights of others. The United Kingdom has no explicit constitutional or legislative protection of free speech other than, now, protection by way of the *Human Rights Act 1998*, which requires courts to give effect to the provisions of the European Convention. Australia has had to rely on the limited freedom of expression, found only recently by the High Court to be implied in the federal constitution, and now also explicit in some state or territory enactments.[18]

Other differences are procedural, but no less important in their effect. In the United States, each party to litigation pays its own costs regardless of whether it wins or loses the case, unless the case is judged frivolous.[19] Coupled with contingency fees, this system is usually seen as benefiting claimants because they know that even if they lose their case, they will not be required to pay both their own and their opponent's legal fees. But in the defamation context, it also allows media defendants to defend actions through the courts without the spectre of having to carry the claimant's high contingency fee arrangement with his or her lawyers if their defense fails. The opposite situation prevails in England, where the general rule, highly unpopular with the media and now some other influential politicians like former Secretary of State for Justice Jack Straw,[20] is that the unsuccessful party pays the other party's costs, and where this may now extend to costs payable under a conditional fee arrangement between the claimant and his or her lawyers. In Australia, contingency fee arrangements are common for claimants, but fees in damages claims will generally be

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An American Perspective, in MARKESINIS & DEAKIN'S TORT LAW 730–31 (Simon Deakin et al. eds., 5th ed. 2003).

17. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

18. *See, e.g.*, *Human Rights Act 2004* (ACT) (Austl.), *available at* http:// www.legislation. act.gov.au/ a/ 2004-5/ current/ pdf/ 2004-5.pdf; *Charter of Human Rights and Responsibilities Act 2006* (VIC) (Austl.), *available at* http:// www.austlii. edu.au/ au/ legis/ vic/ consol_act/ cohrara 2006433/.

19. *See* Anderson, *supra* note 16, at 733–34.

20. *See* Isabel Oakoshott & Steve Swinford, *Jack Straw Pledges Action to End Libel Tourism*, THE SUNDAY TIMES, Nov. 22, 2009, http:// business.timesonline.co.uk/ tol/ business/ law/ article 6926997.ece.

chargeable only on a time/service basis without a success fee.[21] Nevertheless, they can be considerable.

Wide variations in laws or standards are ubiquitous and not unique to defamation law, and it is arguable that the ramifications should be no different. The manufacturer who produces and distributes goods and products around the world must meet the standards for products in whatever country the goods are sold. It would be no answer to a claim for injury caused by goods used in Paris, Sydney, or New York that the goods were produced in Outpost Island, whose laws are designed to encourage and privilege its struggling entrepreneurs by negating liability for defective products. If an entrepreneur wishes to have the benefit of international markets, he or she will have to bear the brunt of their liability rules.[22] Similarly, there is nothing new in an author having to consider the defamation laws of the country where his or her book will be distributed, particularly if the subject of the book resides or operates in that country. An international publishing market has long opened up a legal minefield. Any international journalist, commentator, or filmmaker who strayed outside his or her borders for persons of interest or subject matter faced the prospect of defamation proceedings according to the relevant foreign laws, if the publication occurred in the subject's country. These laws can be crippling and restrictive, as publishers in Singapore have discovered, particularly if the publisher allegedly defamed the premier political family, the Lees.[23]

What is new, of course, is the borderless Internet and the emergence of international citizens. Every posting is a publication. Every publication is across national and jurisdictional boundaries. Publishers do not necessarily choose their markets; the market chooses them. Many years ago a leading Australian judge remarked that the law limps behind medicine, reacting as it can to medical advances, discoveries, know-how, and opportunities.[24] The same could be said for law and communication. The law has limped behind the Internet, with courts, in the absence of legislation,

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21. For example, § 324 of the *Legal Profession Act 2004* (NSW) (Austl.), *available at* http:// www.austlii. edu.au/ au/ legis/ nsw/ consol_ act/ lpa2004179/, prohibits a conditional costs agreement in relation to a claim for damages, including an uplift fee on the successful outcome of the claim.

22. *See, e.g.*, *New York Times* articles regarding defective products from China: David Barboza, *China to Revise Rules on Food and Drug Safety*, N.Y. TIMES, June 7, 2007, http:// www.nytimes.com/ 2007/ 06/ 07/ business/ worldbusiness/ 07safety.html?ref=melamine; Jim Yardley, *More Candy From China, Tainted, Is in U.S.*, N.Y. TIMES, Oct. 1, 2008, http:// www.nytimes.com/ 2008/ 10/ 02/ world/ asia/ 02milk.html?ref=melamine.

23. *See* Eric Ellis, *Singapore libel case a test of Murdoch's bona fides*, THE SYDNEY MORNING HERALD (Austl.), Jan. 7, 2008, at 12, *available at* http:// www.smh.com.au/ business/ singapore-libel-case-a-test-of-murdochs-bona-fides-20080106-1kg3.html. *See also* RUSSELL L. WEAVER, ANDREW T. KENYON, DAVID F. PARTLETT AND CLIVE P. WALKER, THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH 187 (2006).

24. *See Mount Isa Mines v Pusey* (1970) 125 CLR 383, 395 (Austl.) [Windeyer, J.].

having little option but to apply or adapt old common law principles to new situations.[25]

Such was the problem in *Dow Jones & Co. v Gutnick*.[26] Joseph Gutnick, a gold and diamond miner and financier resident in Melbourne in the state of Victoria, sued Dow Jones, which is based in New Jersey, for what he alleged was a defamatory article in *Barron's Online*, an internet magazine.[27] He was represented by Geoffrey Robertson, QC, an internationally renowned libel barrister of the London Bar.[28] The magazine had hundreds of paid subscribers in Victoria and more in other states in Australia, where Gutnick was well known.[29] The High Court of Australia applied the conventional choice of law rule in tort that the appropriate law is the law of the place where the tort is committed and held that, as in any defamation case since *Duke of Brunswick v. Hamer*[30] in 1849, the tort was committed each time and wherever the defamatory statement was published to a third party.[31] Third parties had downloaded and could download the *Barron's* article in Victoria; therefore, that was where publication to them took place, and Victorian law applied. As Dow Jones is an American corporation and Gutnick "indubitably a public figure,"[32] Dow Jones would obviously have preferred to have been governed by United States' law, which

25. The challenges for the law in the world of the internet and rapid technological change in communications are well discussed in JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD (2006) and JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT (2008).

26. (2002) 210 CLR 575 (Austl.), *available at* http:// www.austlii. edu.au/ au/ cases/ cth/ HCA/ 2002/56.html.

27. *See id.* at 576.

28. *See id.* at 577.

29. *See id.* at 576.

30. (1849) 117 Eng. Rep. 75 (Q.B.); 14 Q.B. 185 (Eng.).

31. *See Gutnick*, 210 CLR at 653. By contrast in the United States there is a "single publication rule." *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 773 (1984) ("The 'single publication rule' has been summarized as follows: 'As to any single publication, (a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered in the one action; and (c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.'" (quoting RESTATEMENT (SECOND) OF TORTS § 577A(4) (1977).)). To counter the problem of endless possible actions from internet publications, a House of Commons Select Committee on press standards, privacy and libel recently recommended that a short limitation period be introduced for internet publications. *See* COMMITTEE PROCEEDINGS, HOUSE OF COMMONS, CULTURE, MEDIA AND SPORT COMMITTEE, SECOND REPORT: PRESS STANDARDS, PRIVACY AND LIBEL ¶ 230 ("In order to balance these competing concerns, we recommend that the Government should introduce a one year limitation period on actions brought in respect of publications on the internet."), *available at* http:// www.publications. parliament.uk/ pa/ cm200910/ cmselect/ cmcumeds/ 362/ 36206.htm. For a discussion of libel tourism in the European context, see Trevor C. Hartley, *'Libel Tourism' and Conflict of Laws*, 9 INT'L & COMP. L.Q. 25 (2010). The new coalition Government of the UK announced in July 2010 that it is to publish a draft defamation bill that will be put out for consultation and pre-legislative scrutiny in the new year. *See* Mark Sweney, *UK government plans major review of libel law*, THE GUARDIAN, July 9, 2010, http:// www.guardian. co.uk/ media/ 2010/ jul/ 09/ libel-law-review.

32. David F. Partlett, *The Libel Tourist and the Ugly American: Free Speech in an Era of Modern Global Communications*, 47 U. LOUISVILLE L. REV. 629, 645 (2009).

would require Gutnick, and probably most of the subjects of Dow Jones's publications, to prove actual malice by the company, an almost impossible task.[33]

Not all judges appeared happy that this issue was left to the courts to resolve. Justice Kirby in *Dow Jones & Co. v. Gutnick* commented:

> The idea that this Court should solve the present problem by reference to judicial remarks in England in a case, decided more than a hundred and fifty years ago, involving the conduct of the manservant of a Duke, despatched to procure a back issue of a newspaper of minuscule circulation, is not immediately appealing to me. The genius of the common law derives from its capacity to adapt the principles of past decisions, by analogical reasoning, to the resolution of entirely new and unforeseen problems. When the new problem is as novel, complex and global as that presented by the Internet in this appeal, a greater sense of legal imagination may be required than is ordinarily called for. Yet the question remains whether it can be provided, conformably with established law and with the limited functions of a court . . . .[34]

The result of the application of the common law rules, that the tort of defamation is committed in the place of publication and that publication occurs in the place of receipt rather than the place of transmission, is that a cause of action in defamation may arise in several states or countries and, because of choice of law rules, be subject to several state or national regimes. The most common choice of law rule for a tort is that of *lex loci delicti*—the law of the place of commission of the tort.[35] That is now the rule in Australia for both intranational and international torts,[36] while in relation to defamation actions, uniform state defamation legislation in 2005 included a standard choice-of-law provision appointing, as the applicable law, the law with which the harm occasioned by the publication has its closest connection, taking into account the claimant's place of residence or business, the extent of the publication and the harm suffered in each jurisdiction.[37]

European choice of law rules, including those of England, have recently been brought into harmony through the adoption of the new "Rome

33. *See* David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503 (2001) (examining defamation data showing the high hurdle of the law).

34. *Gutnick*, (2002) 210 CLR at 619–620 (Austl.) (referring to *Hamer*, 117 Eng. Rep. 75, 14 Q.B. 185). *See Human Rights Act*, *supra* note 18, for recognition that the English/Australian rule is compatible with Article 10 of the European Convention on Human Rights.

35. *See* W. Union Tel. Co. v. Hill, 50 So. 248, 253 (Ala. 1909).

36. The rule is also subject to the public policy exception discussed below. *See infra* Part II.B.

37. *See, e.g.*, *Defamation Act 2005*, *supra* note 14. *See also* David Rolph, *A Critique of the National, Uniform Defamation Laws*, 16 TORTS L. J. 207, 210 (2008) (Austl.).

II" regulation by the European Parliament and the Council of the European Union.[38] The regulation came into effect on January 11, 2009, and is binding on all member states except Denmark, but most unfortunately only for torts *other* than defamation and invasion of privacy.[39] The regulation provides that the law applicable to a noncontractual obligation will be the law of the country in which damage occurs. It is subject to displacement where both plaintiff and defendant habitually reside in another country[40] or where it appears to the court that the circumstances of the case are manifestly more closely connected to another country; in both cases, the law of the other country applies.[41] Apart from the general rule, the new regulation makes specific provision for a number of areas, including product liability[42] and infringement of intellectual property rights.[43] It excludes a number of substantive areas, including "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation."[44] Surprisingly, one commentator has remarked "[t]he substantive areas excluded from this new scheme will be truly peripheral: those obligations which predate the start of the legislation, and a few marginalia and other relics, of which the law of defamation is the most notable, remain outside it."[45]

Despite this implication of triviality, it appears that the issue of choice of law in defamation and privacy was one which was so contentious—more contentious in fact than any other of the excluded areas—that any hope of either consensus or compromise was abandoned. The Vice President of the European Commission, Franco Frattini, agreed with the Committee on Legal Affairs that to accept a provision that could not obtain even the slightest consensus would reopen "la boîte de Pandore."[46] The broadcast and print media strongly lobbied for a "country of origin" rule; then a compromise was put forward but rejected as too generous to press editors.[47] The Commission then undertook to review this area of the law

38. *See* Council Regulation 864/2007, The Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40 (EC) [hereinafter Rome II], *available at* http:// eur-lex.europa.eu/ LexUriServ/ LexUriServ. do?uri= OJ:L: 2007: 199:0040: 0040:EN: PDF.

39. *See id.* art. 1 ¶ 2(g), at 43.

40. This will lead to some odd situations where there are multiple parties involved. *See* Trevor C. Hartley, *Choice of Law for Non-Contractual Liability: Selected Problems Under the Rome II Regulation*, 57 INT'L & COMP. L.Q. 899, 900 (2008).

41. The new European choice of law rule is not subject to the renvoi doctrine. *See* Rome II, *supra* note 38, art. 24, at 47. Article 26 includes a public policy exception. There is also a limited right for parties to choose the applicable law. *See id.* art. 14. at 46.

42. *See id.* art. 5, at 44.

43. *See id.* art. 8, at 45.

44. *Id.* art. 1 ¶ 2(g), at 43.

45. Adrian Briggs, *When in Rome, Choose as the Romans Choose*, 125 L.Q. REV. 191, 191 (2009).

46. ANDREW DICKINSON, THE ROME II REGULATION: THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS 57, n.389 (James F. Fawcett ed., 2008).

47. *Id.* at 648–657.

again and report back.[48] Dickinson comments: "Whatever conclusions it may reach, its report when published seems likely to reignite the controversy."[49]

In England, the situation is further complicated by an earlier lack of consensus for changes to the rules relating to defamation. Defamation actions (but not privacy actions) were also specifically excluded, after strong lobbying from Fleet Street media, from legislation in England in 1995.[50] The result in England is that defamation claims are governed by the old common law "double actionability" rule, which leads to the application of the law of the forum.[51] Privacy claims, however, are governed by the 1995 Act, which generally imposes the law of the country in which the events constituting the tort occurred,[52] although procedure and quantification of damages are governed by the law of forum.[53] It probably makes no difference that the privacy action is based on an equitable claim like breach of confidence.[54]

Assuming that the place of publication is accepted most commonly as the place of the occurrence of the tort, the rule gives the victims of transnational publications a wide choice of forums.

When litigants take advantage of the cross-national publication of an article either to sue in a jurisdiction with which they have little personal connection or obviously to avoid restrictions in the law or legal system of their own place of residence, they now attract the pejorative description of "libel tourist," or a variant of another species viewed with equal disdain, the "forum shopper": litigants who will seek out the most advantageous forum, in terms of law and procedure, in which to bring their actions against the defendant. Even if they choose a forum where they have close links and a reputation to protect, the *defendant* may not be based in the jurisdiction and may argue that it should be governed by its home jurisdiction.

But values may fluctuate widely from place to place, and when the tourists get their souvenirs home or take them to another country, they may find that they have lost their appeal and seem suddenly useless and

48. *See id.*

49. *Id.* at 237.

50. *See* Private International Law (Miscellaneous Provisions) Act 1995, c. 42, § 13 (U.K.) [hereinafter PILA], *available at* http://www.legislation.gov.uk/ukpga/1995/42/enacted/data.pdf.

51. *See* DICKINSON, *supra* note 46, at 9 n. 31. The double actionability rule required that the tort must be actionable both in the forum and in the place where it occurred. *Id.* at 9. The rule was sometimes displaced. *Id.*

52. *See* PILA, *supra* note 50, § 11.

53. *See id.* §14(3)(b); *see also* Harding v. Wealands [2006] UKHL 32, [2007] 2 A.C. 1 (H.L.) [32] (appeal taken from Eng.), *available at* http:// www.publications. parliament.uk/ pa/ ld200506/ ldjudgmt/ jd060705/ hardin.pdf; DICKINSON, *supra* note 46, at 10.

54. *See* DICKINSON, *supra* note 46, at 12 (citing TIONG MIN YEO, CHOICE OF LAW FOR EQUITABLE DOCTRINES (2004)); *id.* 238–39.

incongruous. Perhaps they cost the tourists more than they were worth. In short, the libel tourist may buy things that do not travel well. Let us identify these characters.

A. Notorious Libel Tourists

The most notorious plaintiff in the world of international defamation law is the Saudi billionaire Sheikh Khalid bin Mahfouz. He has reportedly brought or threatened over 30 libel cases in English courts, typically premised on the alleged falsehood of statements suggesting that he has been involved in funding al-Qaeda, Osama bin Laden, or other terrorist enterprises.[55] His most famous case was not a hard-fought victory—it was a default judgment against Rachel Ehrenfeld for defamatory statements in which he was accused of funding terrorist activities.[56] Despite the damages award and Ms. Ehrenfeld's failure to obtain declaratory relief that the judgment was unenforceable in American court, Sheikh Mahfouz was rather quick to declare that he had no intention of enforcing the judgment in the United States[57]—in fact he appears not to have attempted to enforce any such judgments in the United States. Sheikh Mahfouz obtained a judgment in a similar action against Jean-Charles Brisard, a French citizen who specializes in terrorism and its financing.[58] In this case, without the impediment of the First Amendment, bin Moufouz sought to enforce the judgment.[59]

In cases where judgment would not have to be enforced in a foreign jurisdiction, Sheikh Mahfouz has often negotiated for nonmonetary settlements. Such suits are often against publishers rather than individual authors (probably because most major publications have circulation in the United Kingdom or at least have a website accessible to English internet users). For example, Sheikh Mahfouz threatened to sue the English division of Random House over the publication of Craig Unger's book *House of Bush, House of Saud* in the U.K.; the publisher agreed to cancel publication.[60] Similarly, the threat of a lawsuit by Mr. Mahfouz motivated

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55. *See* Samuel A. Abady & Harvey Silverglate, Op-Ed., *'Libel Tourism' and the War on Terror*, BOSTON GLOBE, Nov. 7, 2006, at A11.

56. *See* Bin Mahfouz v. Ehrenfeld, [2005] EWHC (QB) 1156 (Eng.), *available at* http:// www.bailii.org/ ew/ cases/ EWHC/ QU/ 2005/ 1156.html.

57. *See* Abady & Silverglate, *supra* note 55, at A11.

58. *See* Mahfouz v. Brisard, [2006] EWHC (QB) 1191 (Eng.), *available at* http:// www.bailii.org/ ew/ cases/ EWHC/ QB/ 2006/ 1191.html.

59. Bin Mafouz sought to enforce the judgment in France and Switzerland. *See* Jean-Charles Brisard, *French and Belgium Judgments Against Khalid Bin Mahfouz*, JCB BLOG (May 20, 2005, 5:53 PM), http:// jcb.blogs.com/ jcb_ blog/ 2005/ 05/ french_ and_ belg.html. The decision was confirmed by the French Court of Appeals. *See* Jean-Charles Brisard, *French Court of Appeal Decision Against Khalid Bin Mahfouz*, JCB BLOG (Jan. 30, 2006, 5:52 AM), http:// jcb.blogs.com/ jcb_ blog/ 2006/ 01/ french_ court_ of.html.

60. *See* Arlen Specter & Joe Lieberman, *Foreign Courts Take Aim at Our Free Speech*, WALL ST.

Cambridge University Press to issue an apology and destroy all remaining copies of Clinton Bennet's book *Alms for Jihad*.[61] Mr. Mahfouz did delight, it seems, in placing his victories upon his website.[62] Other similarly situated plaintiffs have brought or threatened defamation suits in English courts with varying success.[63]

Another group of plaintiffs notorious for bringing defamation actions in English courts contrasts starkly with the Sheikh Mahfouz-type. This group is comprised of Hollywood-affiliated actors who have made a practice of suing tabloids for false statements about their personal lives. Actress Cameron Diaz brought suit against the publisher of a tabloid over statements that she had been involved in an affair; she received monetary compensation and an admission of the falsity of the statements to settle the case.[64] Similarly, actress Kate Hudson received a damages payment for distress and an admission of falsity in settlement of a libel claim against a tabloid that had suggested the actress had an eating disorder.[65] And Britney Spears brought a libel suit against the English division of an American tabloid for suggesting her marriage had ended; the settlement offer included no monetary compensation, but required a published apology and an admission that the statements were untrue. Spears settled with the magazine for undisclosed damages.[66] Brad Pitt and Angelina Jolie have recently begun an action for breach of privacy in London against *The*

J., July 14, 2008, at A15.

61. *See id.* Oddly, despite the fact that the both of these books were surely available for purchase in the U.K. via the internet, it does not appear that Sheikh Mahfouz has brought libel claims against either Mr. Unger or Mr. Bennet as individuals, as he did against Ms. Ehrenfeld.

62. *See* BIN MAHFOUZ INFORMATION, FAQS, http:// www.binmahfouz.info/ faqs_5.html (last visited Feb. 19, 2011). The battle with Rachel Ehrenfeld is fought in cyberspace. Her website represents a vituperative attack on the Sheik, raising, among other things, the issue of his sexual orientation. It is a battle of good and evil in the wake of September 11 terrorist attack. *See* AMERICAN CENTER FOR DEMOCRACY, http:// www.acdemocracy.org/ first-amendment.cfm (last visited Mar. 2, 2011).

63. *See, e.g.*, Jameel v. Wall Street Journal Europe Sprl, [2006] UKHL 44, [2007] 1 A.C. (H.L.) 359 (appeal taken from Eng.), *available at* http:// www.publications. parliament.uk/ pa/ ld200506/ ldjudgmt/ jd061011/ jamee-1.htm (Saudi trading company and its president sued kfor defamation; court reversed summary relief in their favor due to proper assertion of the *Reynolds* defense as publication was made for public benefit); Jameel v. Dow Jones & Co., [2005] EWCA (Civ) 75, [2005] Q.B. 946 (Eng.), *available at* http:// www.bailii.org/ ew/ cases/ EWCA/ Civ/ 2005/ 75.html (plaintiffs were Saudi trading company and its president; libel action dismissed due to minimal publication of allegedly defamatory material in the U.K.). Also, Nadhmi Auchi, an Iraqi resident of the U.K., used the threat of a libel suit to convince the English periodical *The Observer* to remove material from its website relating to Mr. Auchi's possibly fraudulent business activities. *See* Oliver Marre, *Suit Shopping: Is Libel Tourism a Threat to Free Speech—or Just to Neocons?*, THE AM. CONSERVATIVE, Apr. 6, 2009, at 18, *available at* http:// www.amconmag.com/ article/ 2009/ apr/ 06/ 00018/.

64. *See Actress Diaz Wins Libel Damages*, BBC NEWS (July 29, 2005), http:// news.bbc. co.uk/ 2/ hi/ entertainment/ 4727487.stm.

65. *See Damages for Hudson over Pictures*, BBC NEWS (July 20, 2006), http:// news.bbc. co.uk/ 2/ hi/ entertainment/ 5198208.stm.

66. *See Magazine Publishes Spears Apology*, BBC NEWS (July 19, 2006), http:// news.bbc. co.uk/ 2/ hi/ entertainment/ 5194020.stm.

News of the World over allegedly false and intrusive allegations that they had agreed to separate and divide up their children and fortunes.[67]

Recent prominent cases include *Lewis v. King*, in which the English Court of Appeal upheld a judgment giving leave to the plaintiff, an American boxing promoter, to serve New York lawyer Judd Burstein with process out of the jurisdiction, after alleged libels on two California-based websites had been published in the United Kingdom to the plaintiff's boxing associates.[68] In another example in 2009, Conrad Black, a Florida prisoner, sued directors of Hollinger Inc., a Chicago-based company, for libels posted on its website which had been published in Canada.[69]

B. Who is Truly a Tourist?

In the international context of defamation, commentaries often fail to make critical distinctions. We suggest an analysis fashioning three classifications.

> 1. Where the victim brings a defamation action outside his own country of residence or domicile, in the *forum of publication where the publisher also resides* or has its operations and assets. There is nothing particularly "21st century" about people suing for defamation in foreign countries. After all, it was a Russian, Princess Irina Youssoupoff, who was awarded 25,000 pounds in 1933 when she sued in England for the defamation in MGM's film *Rasputin, the Mad Monk*, which portrayed her as having been seduced by Rasputin.[70] In 1938 Shirley Temple and Twentieth Century Fox sued Graham Greene and the short-lived *Night and Day* magazine for a suggestive article about her film *Wee Willie Winkie* based on Rudyard Kipling's story.[71] She recovered 2,000 pounds, and

67. *See* Stephen Brook, *Brad Pitt and Angelina Jolie Sue the News of the World*, THE GUARDIAN (Feb. 8, 2010), http:// www.guardian.co.uk/ media/ 2010/ feb/ 08/ brad-pitt-angelina-jolie-sue. Pitt and Jolie accepted undisclosed damages to settle the claim on July 22, 2010. *See* Mark Tran, *News of the World Pays Out to Brad Pitt and Angelina Jolie*, THE GUARDIAN (July 22, 2010), http:// www.guardian. co.uk/media/ 2010/jul/22/brad-pitt-angelina-jolie-news-of-the-world.

68. [2004] EWCA (Civ) 1329 (Eng.), *available at* http:// www.bailii.org/ ew/ cases/ EWCA/ Civ/ 2004/ 1329.html.

69. *See* Black v. Breeden [2009] O.J. No. 1292 (S.C.J.) (QL). Black was released from prison pursuant to this superior court decision, which was affirmed by the Ontario Court of Appeals on August 13, 2010. *See* Black v. Breeden, (2010) 265 O.A.C. 177 (Can. Ont.), *available at* http:// www.ontariocourts. on.ca/ decisions/ 2010/ august/ 2010ONCA 0547.htm.

70. *See* Youssoupoff v. Metro-Goldwyn-Mayer Pictures Ltd. [1935] 1 *Times Law Reports* 581, 584. To the appellant's argument that it was not defamatory "to say of a woman of good character that she has been ravished by a man of the worst possible character," Lord Justice Scrutton in the Court of Appeal said, "I really have no language to express my opinion of that argument." *Id.*

71. *See* THE GRAHAM GREENE FILM READER: REVIEWS, ESSAYS, INTERVIEWS, AND FILM STORIES 449–51 (David Parkinson ed., 1993).

Twentieth Century Fox 1,000 pounds, for the suggestion that they would star in and make lurid films.[72]

2. Where the victim brings the defamation action in *his own forum*, for publications by foreigners occurring there. An example is *Shevill v. Presse Alliance SA* in which the plaintiff, a Yorkshire resident, sued *France-Soir*, which "had a wide circulation" in France but sold only about 250 copies per day in England and Wales, and five per day in Yorkshire.[73] The House of Lords held that she could sue in the United Kingdom.[74] At the very least, the victim could enjoin the local distributors to prevent local publication, even if the foreign publisher or author is out of reach, but damages may be another matter.[75] Local rules of jurisdiction and service of process may determine whether the foreign publisher is amenable to the jurisdiction. If the defendant has no assets in the forum, the plaintiff may have to follow the defendant to its home country to enforce the judgment against assets there.[76]

3. Where *neither plaintiff nor defendant resides in the forum*, but the plaintiff is able to sue in that forum because the publication has been published there. English courts remain the forum of choice for many foreign nationals who have been defamed and who can find even a small number of publications in England on which to base their actions. In a case brought in England by prominent Russian businessman and politician Boris Berezovsky and another against the American *Forbes* magazine, Lord Hoffman noted that the claimants were "forum shoppers in the most literal sense," complimenting them on their careful and astute strategy:

> They have weighed up the advantages to them of the various jurisdictions that might be available and decided that England is the best place in which to vindicate their international reputations. They want English law, English judicial integrity and the international publicity which would attend success in an English libel action.[77]

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72. *See id.* at 450.
73. *See* Shevill v. Presse Alliance S.A. [1996] A.C. 959 (H.L.) 981.
74. *See id.* at 983.
75. *See id.* at 981–82.
76. *See id.* at 982.
77. Partlett, *supra* note 32, at 647 (quoting Berezovsky v. Michaels [2000] 1 W.L.R. 1004 (H.L.) 1023). Lord Hoffmann has renewed his defense of such actions in "The Libel Tourism Myth," Fifth Dame Anne Ebsworth Memorial Lecture (Feb. 6, 2010) (edited version available at http://www.indexon censorship.org/ 2010/ 02/ the-libel-tourism-myth/). In Mardas v. New York Times

Again, the judgment there may be of little actual monetary value if it cannot be enforced in the forum, and again, the plaintiff will have to enforce it elsewhere. On the other hand, some claimants have preferred France as a forum because of its more streamlined criminal procedures and remedy of a prompt retraction.[78]

The first situation is not one that would strike a defendant as problematic: the defendant can be expected to know the law of its own place of business. Further, the plaintiff may not be well-known in the forum, and if the publication is not widespread, the damages recoverable may be modest. It is the second and third situations with which we are most concerned, and which both raise the same two questions in relation to enforcement of judgments:

- What are the legal principles that govern the recognition and enforcement of foreign defamation judgments?

- What are the ramifications to the enforcement of foreign judgments of the often wide divergence in defamation law and procedure around the world?

The debate currently raging in the United States on the "Libel Tourism" bills and legislation, discussed below, in fact reflects an issue not infrequently met in courts around the world when faced with a foreign judgment from a place whose laws contrast starkly with those of the forum. There is no doubt that the communication revolution calls for resolution or at least an attempt at resolution by lawmakers around the world of some of the legal problems, but consensus is unlikely. In the meantime, it is dangerous as always to rush into extreme laws couched as prohibitions, immunities, or absolute rules.[79]

Here we look at the existing principles for the enforcement of foreign judgments and suggest a more nuanced approach and one that may draw upon the European courts' approach to cultural and consequent legal divergence between member states.

[2008] EWHC (QB) 3135, [2009] E.M.L.R. 8, ¶¶ 38–40, Justice Eady refused to strike out a claim by the Plaintiff, who resided in Greece, against the *New York Times* and *International Herald Tribune* for publications on its website.

78. *See*, *e.g.*, Partlett, *supra* note 32, at 639; Michael Evans & Jean-Luc Soulier, *French Connection to Libel*, THE GUARDIAN, April 25, 2005, at 14.

79. *See* Partlett, *supra* note 32, at 639.

II. Recognition and Enforcement of Foreign Judgments

A. Australian and English Rules

The Australian and English principles on recognition and enforcement of foreign judgements, like similar laws of many countries, reflect internationally accepted principles. Let us assume the plaintiff has obtained a defamation judgment in the English court against an Australian media company and its employee, and that neither has sufficient assets in England to cover the debt.

Both at common law and under the Australian Foreign Judgments Act of 1991 (which is similar to the Foreign Judgments Reciprocal Enforcement Act 1933 (UK)), there are a number of matters that the plaintiff must prove in order to persuade an Australian court to register and enforce the English judgment:

1. The jurisdiction of the foreign court. At common law the English court must have had "international jurisdiction"—that is, a jurisdiction recognized by the Australian court[80]—for the English court to hear the case, for example, because the defendants were in England or submitted to jurisdiction or had property there.[81] Under the Australian Act, the judgment must now be from a proclaimed country that gives reciprocal enforcement to Australian judgments.[82] These include the United Kingdom, Canada, France, and Germany.[83]

2. The judgment must have been final and conclusive[84] and for a certain amount at common law, but by statute may include an interlocutory judgment or order.[85]

3. The parties in the enforcement proceedings must be identical with those in the original proceedings.[86]

4. The judgment must be enforceable in the foreign forum itself.[87]

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80. Reid Mortensen, Private International Law in Australia 130 (2006).
81. *See id.* at 131–133.
82. *See Foreign Judgments Act 1991* (Cth) s 5(1) (Austl.), *available at* http:// www.comlaw.gov.au/ comlaw/ Legislation/ ActCompilation1.nsf/ 0/922EA8 5CAA9A89 F4CA2571 23007EB777/ $file/ Foreignjudgments Act1991.pdf.
83. *See id.* s 3(1).
84. *See id.* s 5(4)(a).
85. *See id.* s 5(4)–(5).
86. *See* Mortensen, *supra* note 80, at 137.
87. *See Foreign Judgments Act 1991*, *supra* note 82, at s 3(1).

The defendants could, however, challenge the Australian enforcement proceedings or apply to have registration set aside on a number of bases, the fourth of which is most interesting in a defamation context:

1. The judgment was obtained by fraud.[88]

2. The denial of natural justice in the original proceedings.[89]

3. The judgment was penal or made for foreign taxation or government purposes.[90]

4. The recognition and enforcement of the judgment would be manifestly contrary to local public policy.[91]

B. The Role of Public Policy in International Litigation

The enforcement of judgment rules are not the only context in which local public policy may play a role in private international law issues. The other context is the forum's choice of law: the court may refuse to apply usual choice-of-law rules if doing so would lead to a result contrary to local public policy.[92] This position is well-accepted in many countries and is, for example, in the European Union's general choice-of-law rules for torts. Article 26 of the Rome II Regulation provides that the application of a law of a country may be refused "only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum."[93] While that regulation does not apply to defamation and privacy, there is nothing to suggest that the same approach would not be applied by the courts in such cases.

Writing in 1993, Carter described public policy as "essentially an escape route" from the rigidity of choice of law or enforcement rules.[94] It seems to be an escape route that is rarely taken, perhaps because of the use of the word "manifestly" in most legislation, placing a heavy onus on those who wish to assert that public policy would be offended and possibly

88. *See id.* s 7(2)(a)(vi).
89. *See id.* s 7(2)(a)(v).
90. *See id.* s 7(2)(a)(xi)
91. *See id. See also* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, art. 27, Sept. 27, 1968, 1262 U.N.T.S. 153 (also known as the Brussels Convention).
92. *See* PILA, *supra* note 50, at c. 42 § 14(3)(a)(i) (U.K.)
93. Rome II, *supra* note 38, at art. 26.
94. P.B. Carter, *The Role of Public Policy in English Private International Law*, 42 INT'L & COMP. L.Q. 1, 1 (1993).

because of the judicial caution illustrated by Judge Cardozo, who famously said in *Loucks v. Standard Oil Co. of New York*:

> Even though the statute is not penal, it differs from our own. We must determine whether the difference is a sufficient reason for declining jurisdiction. A tort committed in one state creates a right of action that may be sued upon in another unless public policy forbids. That is the generally accepted rule in the United States. . . . If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare. . . .
>
> Our own scheme of legislation may be different. . . . A right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. . . .
>
> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.[95]

Cardozo's approach is shared by the European Court of Justice, which emphasized in relation to Article 27 of the Brussels Convention that recourse should only be had to public policy in exceptional cases of unacceptable or fundamental variance with the legal order of the forum.[96] Carter supports this judicial caution, describing the automatic injection of local standards into a transnational situation as "blatant judicial chauvinism."[97]

There are many, although not frequent, examples of courts refusing to enforce the judgments of another country or refusing to apply its law because of public policy. Matrimonial matters figure largely because of the widely varying cultural and religious influences on laws relating to marriage, divorce, and custody of children. Another area relates to restrictions on damages and remedies.[98] It is argued that any breach of fundamental

95. 120 N.E. 198, 200–02 (N.Y. 1918).

96. *See* Case C-38/98, Régie Nationale des Usines Renault SA v. Maxicar SpA, 2000 E.C.R. I-2973, quoted in DICKINSON, *supra* note 46, at 627.

97. Carter, *supra* note 94, at 2.

98. *See* Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.L., 422 F. Supp. 405 (1976)

rights and freedoms set out in the European Convention on Human Rights should be regarded as against the public policy of the forum, as it reflects widely accepted policies.[99] But any comparison of the protection of reputation and privacy in England and France would immediately show how different the laws of the two countries are, and yet they both stand as results of the balancing of protection of those interests with freedom of expression.

In *Oppenheimer v. Cattermole*, Lord Cross in the House of Lords said of a harsh German law confiscating the property of German Jews living abroad: "To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all."[100]

While accepting outright rejection of the foreign law in such an "unacceptably repugnant" example, Carter argues for a less rigid approach in other situations: "is there not room for the view that in assessing a foreign law an 'all or nothing' approach will not always be appropriate? Must it not be recognised that there is an 'intermediate' type of foreign law which, although intrinsically repugnant, cannot always be treated as *unacceptably* so?"[101] There may be a situation, for example, where the existence of a repugnant law does not *in fact* lead to a situation that the forum would consider repugnant.

Would a better reason for refusing to enforce a foreign law, therefore, be another ground, more commonly used in matrimonial matters, that enforcement of the foreign judgment would lead to unacceptably unjust results in the particular case? While this has the disadvantage of unpredictability, it does have the advantage of flexibility and of leaving the court some room to show respect but not subservience towards other judicial systems and cultural ideals. It reflects the approach of the European courts that the case must be exceptional before a foreign law can be adjudged "against public policy."[102]

Finally, would it be better to accept the premise that foreign law could be rejected *per se* by the forum, yet at the same time expect that such a

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(where an Illinois court refused to apply a Mozambique limitation on damages for personal injury occurring in Mozambique). In *Benefit Strategies Group Inc. v. Prider* [2004] SASC 365, ¶¶ 98–99, per Justice Gray, it was accepted that an Australian court would not enforce a Californian judgment which had awarded punitive damages five times the amount of compensatory damages. The Australian common law position from a series of High Court cases is that punitive damages must be moderate. *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*, (1985) 155 CLR 448 (Austl.). There is arguably also evidence of a general legislative policy restricting punitive damages, not available in most states for negligence and not available in defamation actions under uniform Defamation Acts of 2005; *see, e.g.*, *Defamation Act 2005* (NWS) s 37.

99. *See* DICKINSON, *supra* note 46, at 628.

100. Oppenheimer v. Cattermole, [1976] A.C. 249 (H.L.) 278 (appeal taken from Eng.).

101. Carter, *supra* note 94, at 4 (emphasis added).

102. *See* DICKINSON, *supra* note 46, at 627.

decision be arrived at only by way of assessing the relevant foreign law and giving its lawmakers a "margin of appreciation," possibly a narrow one, to reflect purely local or national ideals? Faced with the reality that "it is not possible to find in the domestic law of the various [European] Contracting States a uniform European conception of morals,"[103] the European Court of Human Rights has had to employ this concept when assessing and reviewing an application of national laws in particular circumstances, and although it is a term better known to European public international lawyers, it seems to be one that is particularly appropriate in the context of enforcement of defamation or privacy judgments which have involved a nuanced balancing of interests under Article 8 (private and family life) and Article 10 (freedom of expression).[104]

C. Enforcement of English Libel Judgments in United States Courts

The tension between the policy of freedom of speech embodied by the First Amendment and the potential enforcement of orders issued by foreign courts has found expression in both American courts and legislatures. Those areas are respectively examined below.

1. Case Law

There is a general rule in American common law that, pursuant to the principle of comity, judgments rendered by foreign courts are entitled to recognition and enforcement in American courts.[105] This general rule has several exceptions. Section 482(2)(d) of the *Restatement (Third) of the Foreign Relations Law of the United States* expresses the exception that is particularly relevant to the enforcement of English libel actions in United States courts: a United States court will not enforce a foreign judgment if "the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought."[106]

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103. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976). The *Handyside* case is quoted and discussed as part of a more general analysis of the "margin of appreciation" in P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 83–84 (3d ed. 1998). For a discussion of the concept in the context of engagement, see JACKSON, *supra* note 11, at 314 n.106.

104. *See* Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221.

105. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §481 (1987). ("Except as provided in § 482, a final judgment of a court of a foreign state . . . is conclusive between the parties, and is entitled to recognition in courts in the United States.").

106. *Id.* § 482(2)(d). See also Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984), where the D.C. Court of Appeals commented that:

> . . . [T]here are limitations to the application of comity. When the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to

A few United States courts have held English libel judgments unenforceable due to policy differences between the English and American laws of libel and defamation. One example is *Bachchan v. India Abroad Publication, Inc.*[107] There, a New York court held an English defamation judgment against a New York wire service unenforceable. The court emphasized the difference in burdens under English and American defamation law, concluding that the difference was significant enough that enforcement of an English defamation judgment would constitute a violation of the First Amendment.[108]

Another such case is *Telnikoff v. Matusevitch*,[109] where the Maryland Court of Appeals held the enforcement of an English libel judgment to be repugnant to the public policy of Maryland. The judgment had been obtained by an English citizen (so not a case of libel tourism) against a resident of Maryland for libellous content of a letter that he wrote that was published in an English magazine. The case originated as a declaratory judgment action in federal court; on appeal, the D.C. Circuit Court of Appeals certified to the Maryland Court of Appeals the question of whether recognition of the English judgment would be repugnant to Maryland public policy.[110] In reaching its affirmative answer to the certified question, the court engaged in a thorough comparison of English and American libel law, as well as the doctrine of comity.[111] Though the court premised its decision on Maryland common law and public policy, it analogized freely to the policies derived from the First Amendment.[112]

Other cases not dealing squarely with libel show a trend toward deciding cases that would otherwise involve complex issues of the enforceability of foreign judgments on grounds of justiciability and personal jurisdiction. The Ninth Circuit struggled with the issue of the enforceability of a for-

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> legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.

Courts often note that mere inconsistency with United States law will not justify non-enforcement of a foreign judgment; rather, such judgment must be repugnant to public policy. *See* Yahoo! Inc. v. La Ligue Contre Le Racisme, 433 F.3d 1199, 1214–15 (9th Cir. 2006).

107. 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

108. *See id.* at 664–65.

109. 702 A.2d 230 (Md. 1997). The slight U.S. connections and the robust English jurisdictional elements have caused even those sympathetic to First Amendement prerogatives to criticize the decision. Zick, *supra* note 1, at 1587–88. *See also* Montre D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1245 (2007) (finding the courts enforcing foreign libel judgments engage in "state action" attracting First Amendment protections). *Cf.* Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 186 (2004) (enforcement does not constitute state action.).

110. *See Telkinoff*, 702 A.2d at 236.

111. *See id.* at 236–39.

112. *See id.* at 239–40.

eign judgment in tension with the First Amendment's guarantee of freedom of speech in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*.[113] In that case, a French organization dedicated to the elimination of anti-Semitism secured an order from a French court requiring an Internet service provider to take action (in the United States) that would prevent French internet users from accessing the website containing Nazi propaganda. The Internet service provider sued in federal court, seeking a declaratory judgment that the French court's order was not recognizable or enforceable under United States law. The district court granted the declaratory relief sought, reasoning that considerations of comity were outweighed by the French order's inconsistency with the guarantees of the First Amendment (namely, free speech).[114] On appeal, the circuit court, sitting en banc, reversed on grounds of ripeness. The court noted the difficulty of the First Amendment questions raised, especially with respect to the extraterritorial effects, if any, of the First Amendment.[115] Though this case was not a libel case, it illustrates some of the problems involved in determining whether an order issued by a foreign court is unenforceable due to conflict with First Amendment rights. It also demonstrates the difficulties faced by United States plaintiffs seeking to use the Declaratory Judgment Act as a way to preemptively protect their First Amendment rights (e.g., establishing personal jurisdiction and ripeness).[116]

Another illustrative case is *Ehrenfeld v. Mahfouz*.[117] There, American author Rachel Ehrenfeld responded to a judgment entered against her by an English court for libel against Sheikh Khalid bin Mahfouz[118] by suing in federal court for a declaratory judgment that the order against her would be unenforceable in United States court as repugnant to the policy of free speech embodied by the First Amendment. In contrast to *Yahoo!*, the court did not even discuss the merits. Rather, it held that case had to be dismissed for lack of personal jurisdiction over Sheikh Mafouz (whose only contacts with the New York forum were related to his suit in the English court against Ms. Ehrenfeld).[119]

113. 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *rev'd*, 433 F.3d 1199 (9th Cir. 2006).
114. *See* 433 F.3d at 1201.
115. *See id.* at 1217.
116. *See also* Sarl Louis Feraud Int'l v. Viewfinder, Inc., 406 F. Supp. 2d 274, 284 (S.D.N.Y. 2005) (holding unenforceable as contrary to the First Amendment a French damage judgment based on photographs posted on the Internet freely accessible to American viewers).
117. 518 F.3d 102 (2d Cir. 2008).
118. *See* Mahfouz v. Ehrenfeld, [2005] EWHC (QB) 1156, (2005) All E.R. 361 (Eng.).
119. *See Ehrenfeld*, 518 F.3d at 105–06.

2. Statutes

The legislatures of several states, and more recently Congress, have addressed the issue of enforcing English libel judgments in United States courts. New York's Libel Terrorism Protection Act,[120] which was passed in response to Rachel Ehrenfeld's failure to obtain declaratory relief against Sheikh bin Mahfouz,[121] is fairly representative of the statutes that states have passed to deal with the problem. The law functions by using two mechanisms, one jurisdictional and one substantive. As for its jurisdictional arm, the statute provides for personal jurisdiction over anyone who obtains a defamation judgment against a New York resident in a foreign court, for the purposes of seeking declaratory relief as to the non-enforceability of the defamation judgment.[122] Substantively, the statute precludes enforcement of a foreign defamation judgment unless the issuing 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."[123] Presumably then, a defamation judgment obtained in an English court (or any other foreign court) would be enforceable in a New York court only to the extent that the plaintiff had satisfied the "actual malice" requirement of *New York Times v. Sullivan*[124]—and if the plaintiff had not shown "actual malice" in the foreign court, lack of personal jurisdiction would not prevent the defendant from obtaining a declaratory judgment as to the foreign judgment's non-enforceability. At least two other states have enacted similar statutes.[125]

On August 10, 2010, President Obama signed the Securing the Protection of Our Enduring and Established Constitutional Heritage Act.[126] The Act is designed to protect the "free expression rights of United States authors and publishers . . . ."[127] The evil identified is the "person[]" who "chill[s] the first amendment" by "seeking out foreign jurisdictions that do

120. *See* N.Y. C.P.L.R. §§ 302 & 5304 (McKinney 1997). It is odd that the statute is called the Libel Terrorism Protection Act, when it would appear more appropriate for it to be called the Libel Tourism Prevention Act. The name is a Freudian slip revealing that, as Partlett has argued, the heat of the debate has been fueled by the litigation brought in the English High Court by bin Mafouz against Rachel Ehrenfeld. The very invocation of the atrocity of September 11, 2001 is so fraught with emotion that it clouds rational debate. *See generally* Partlett, *supra* note 32.

121. *See* Ehrenfeld v. Mahfouz, 518 F.3d 102 (2d Cir. 2008). Note the capacity of states in the United States to influence and impact foreign relations. For a stark example, see *Medellín v. Texas*, 552 U.S. 491 (2008).

122. *See* N.Y. C.P.L.R. § 302(d). Essentially, the statute would supply the personal jurisdiction that was denied in *Ehrenfeld*, 518 F.3d at 105.

123. N.Y. C.P.L.R. § 5304(b)(8). This is something like a codification of the holdings of *Bachchan v. India Abroad Publications Inc.*, 154 Misc. 2d 228 (N.Y. Sup. Ct. 1992), and *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997).

124. *See infra* notes 142–45 and accompanying text.

125. *See* 735 ILL. COMP. STAT. 5/12-621 (2005); CAL. CIV. PROC. CODE § 1716 (West 2007).

126. Pub. L. No. 111-223, 124 Stat. 2380 (2010).

127. *Id.* at sec. 2, 124 Stat. at 2380.

not provide the full extent of free-speech protections to authors and publishers that are available in the United States . . . ."[128]

Ignoring the different claims of plaintiffs who would seek protection of reputation from foreign courts, even citizens of those foreign courts, like Mr. Gutnick, the Act prohibits any United States federal or state court from enforcing a defamation judgment where the law applied by the court has not adopted a rule at least as protective of publishers as *New York Times v. Sullivan*.[129] This is the exclusive path to free-speech salvation: the new rules presently emerging in Canada, England, and Australia would not pass muster. Under § 4104, "[a]ny United States person against whom a foreign judgment is entered . . . may bring an action in district court . . . for a declaration that the foreign judgment is repugnant to the Constitution or laws of the United States."[130] The foreign plaintiff need not have attempted to enforce the judgment; it is sufficient if he has obtained a judgment that would not have been enforceable in a United States court. Furthermore, the protections for Internet service providers under § 230 of the Communications Act of 1934 apply to guard these providers.[131] Taken together, the protections enshrined in these statutes suggest that an Australian like Mr. Gutnick or Canadian like Mr. Black could be subject to a declaratory judgment of a federal district court for bringing a defamatory action against a United States publisher for a widely distributed publication in his home jurisdiction—Australia or Canada. If a Gutnick or Black should attempt to enforce his Australian or Canadian judgment, he would be subject to an order paying attorneys' fees of the defendant party. This effectively imposes American defamation law on foreign plaintiffs, although the sting of the tort is in their home. In one bow to comity, punitive provisions of an earlier bill were scotched. That bill required an award of damages to the person sued for defamation, which would encompass: (1) the amount of any judgment from the foreign suit; (2) the costs and legal fees associated with the foreign suit; and (3) the harm caused due to decreased opportunities to publish, conduct research, or generate funding.[132] In addition, the court could *treble* damages upon finding that the plaintiff in the foreign libel suit "engaged in a scheme to suppress First Amendment rights . . . ."[133]

The legislation does not reach the American citizen who goes to a foreign court to bring a defamatory claim and enforces any judgment issued

128. *Id.*
129. *See id.* at sec. 3, § 4102, 124 Stat. at 2381–82.
130. *Id.* at sec. 3, § 1404, 124 Stat. at 2383.
131. *See* Communications Act of 1934, 47 U.S.C. § 230 (2006). For discussion of the prevailing case law, see VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS: CASES AND MATERIALS 896–902 (12th ed. 2010).
132. *See* Free Speech Protection Act of 2009, H.R. 1304, 111th Cong. (2009), § 3(c)(2).
133. *Id.* at § 3(d).

in that jurisdiction or another non-U.S. jurisdiction. Yet one could argue that the crimp on free exercise of public speech may be as great.

Certainly the line is drawn for the United States on enforceability; foreign plaintiffs and those governments concerned with protecting their citizens' reputations will have to live with this strongly stated policy.

Elsewhere, however, the courts, in the absence of legislative direction, will look to public policy on relating to enforcement of a foreign judgment. In Europe, for example, it has been suggested that any public policy flowing from procedural due process is illegitimate, seeing that European values are converging.[134] The public policy exception is still applicable under American rules where the judgment or cause of action[135] violates the forum's public policy. And indeed, the non-enforcement must follow where the judicial system does not provide impartial tribunals or procedures compatible with requirements of due process of law. The *Telnikoff* case[136] can be contrasted with *Ashenden*,[137] which inquired into the nature of the English legal system. The court in the latter case found that the English law and procedure, as a system, comported with American notions of fairness and due process; thus, the court would not be concerned with procedural differences that might require a different outcome in an American forum.[138] Interestingly, the court said as an aside that a judgment from "Cuba, North Korea, Iran, Iraq, Congo, or some other nation whose adherence to the rule of law and commitment to the norm of due process are open to serious question" would be a different matter.[139] The *Ashenden* case declined to require that English and American standards should be completely compatible.[140] So it would seem under *Ashenden* that recognition requires a basic fairness. The matter in reserve and of course of great import in defamation law is the influence of constitutional proscriptions. It is generally agreed that "public policy" should lead only exceptionally to nonrecognition of foreign judgments, and in the *Telnikoff* case, it may be that an important question was not adequately posed. That is, even where

134. *See* Peter Hay, *Comments on Public Policy in Current American Conflicts Law*, *in* DIE RICHTIGE ORDNUNG: FESTSCHRIFT FÜR JAN KROPHOLLER ZUM 70. GEBURTSTAG 91 (Dietmar Baetge, Jan von Hein & Michael von Hinden eds., 2008) (internal citations omitted).

135. *See id.* at 93 (citing UNIF. FOREIGN-MONEY JUDGMENT RECOGNITION ACT § 4(b)(3) (1962), and much clearer, UNIF. FOREIGN-MONEY JUDGMENT RECOGNITION ACT § 4(c)(3) (2005)). Review of the cause of action underlying the foreign judgment is not foreclosed as it might be in the context of interstate judgments, *see supra* note 12, because the merger doctrine does not apply to international judgments. *See* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS §§ 24.3, 24.21 (5th ed. 2010). A recent example is *Aguerre v. Schering-Plough Corp.*, 924 A.2d 571, 580 (N.J. Super. Ct. App. Div. 2007), *cert. denied*, 937 A.2d 977 (N.J. 2007) (defendant may proceed to show that the settlement underlying the Argentine judgment was coerced and that the judgment therefore might contravene New Jersey public policy as expressed in its "whistleblower" statute).

136. Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997).

137. Society of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000).

138. *See id.* at 481–82.

139. *Id.* at 477.

140. *See id.* at 478.

First Amendment requirements are invoked, the forum's own interests may not be triggered. In the *Telnikoff* case, after all, foreign parties were enforcing a foreign libel judgment.[141] But, perhaps it is that the constitutional value may be overriding, as it would be in the European analogue in the concept of "Ordre Public Universel."[142] As we will argue later, such is the compelling rhetorical force, and thus political acceptance, of the articulation of First Amendment values under *New York Times v. Sullivan*, that it is likely that even with tangential connections to the enforcing forum, non-enforcement would follow. This leads to a rather attenuated line between non-enforcement on the basis of international concepts of due process, on the one hand, and of basic values inherent in the forum, on the other. While some basic values will be more contingent and depend upon the valence of the forum's interest in the subject matter or the parties, the First Amendment is a standout. *Telnikoff* ought not to be regarded as anomalous. Furthermore, as a trump card, Congress has spoken.

D. The Contrast Between English and United States Libel Law

American libel law parted ways with its English counterpart in 1964 when the Supreme Court held in *New York Times v. Sullivan* that a public figure must prove "actual malice" before recovering damages for a false statement made against him.[143] Because this requirement has never been incorporated into English law, England has earned a reputation as the most plaintiff-friendly forum in which to bring a suit in libel.[144] This has led plaintiffs from other countries to bring libel claims in English courts, often against parties who publish mostly outside of England.

The substantive aspect of English libel law that makes it most plaintiff-friendly, apart from the lack of the "actual malice" requirement, is that after the plaintiff shows an allegedly false statement against him, the defendant then has the burden to present a valid defense, which often requires that he show that the allegedly libellous statement was "true as to fact" or "fair as to comment."[145] Furthermore, the plaintiff is entitled to a presumption of damage—i.e., a libel plaintiff generally does not have to show any sort of special damage flowing from the libellous statement; such damage is assumed upon a showing of a "real and substantial tort."[146]

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141. *See* Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635, 644 (2000).

142. *See* Hay, *supra* note 134, at 99.

143. *See* New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964).

144. In a recent lecture, Lord Hoffmann argues that English law is moving closer to that of European countries as an answer to the charge that the United Kingdom has the world's most illiberal libel laws. *See* "The Libel Tourism Myth," *supra* note 77.

145. *See* Lowe v. Associated Newspapers Ltd., [2006] EWHC (QB) 320, [2007] Q.B. 580 (Eng.).

146. *See* Jameel v. Wall St. Journal Europe Sprl., [2006] UKHL 44, [2007] 1 A.C. (H.L.) 359

A frequent obstacle faced by the aspiring libel tourist filing suit in England is the jurisdictional requirement imposed by the court in *Jameel v. Dow Jones & Co*.[147] In that case, the plaintiff (a prominent Saudi businessman affiliated with Sheikh Khalid bin Mahfouz) brought a libel claim against a United States newspaper premised on the falsehood of statements posted on its website. The allegedly libellous items were posted in the United States, but were available online in England. The plaintiff was only able to show five instances where people in England downloaded the allegedly libellous material (three of these people were members of plaintiff's legal team).[148] The court dismissed the complaint as an abuse of process, reasoning that in light of the minimal publication within England, the plaintiff had failed to show a "real and substantial tort" and could at most have suffered insignificant damage to his reputation.[149]

However, the jurisdictional rule from *Jameel v. Dow Jones* has not precluded success against libel defendants whose work was mainly published outside of England. For example, as mentioned above, Sheikh Khalid bin Mahfouz, the most notorious of the libel tourists, brought suit against author Rachel Ehrenfeld and her publisher premised on the alleged falsity of accusations that he had funded al-Qaeda and other terrorist organizations.[150] Though the book (*Funding Evil: How Terrorism is Financed—and How to Stop It*) was published principally in the United States, it was available for purchase online in England and its first chapter was posted on a news website. After a hearing that took place just three months after *Jameel v. Dow Jones*, the court found in favor of Sheikh Mahfouz, who secured a default judgment for damages and declaration of falsity. The court made no reference to the specific number of copies of Ms. Ehrenfeld's book that had been purchased online in England or the number of times English users viewed the chapter posted online.[151] Also, it should be noted that neither Ms. Ehrenfeld nor her publisher elected to defend themselves, opting instead to allow the default judgment[152] and defend against its enforcement in the United States.[153]

(appeal taken from Eng.).

147. [2005] EWCA (Civ) 75, [2005] Q.B. 946 (Eng.).

148. *See id.* at [17].

149. *Id.* at [70], [77].

150. *See* Mahfouz v. Ehrenfeld, [2005] EWHC (QB) 1156, (2005) All E.R. 361 (Eng.).

151. Ms. Ehrenfeld herself puts the number of books purchased online in England at twenty-three. Rachel Ehrenfield, *How I Fight "Libel Tourism,"* THE GUARDIAN (March 27, 2009), http:// www.guardian. co.uk/ commentisfree/ libertycentral/ 2009/ mar/ 27/ freedom-of-speech-al-qaida.

152. Under English civil procedure rules, a party may make a special appearance to assert jurisdictional challenges, etc., without exposing themselves to liability. U.K. R. CIV. PRO. 11, *available at* http:// www.justice. gov.uk/ civil/ procrules_ fin/ menus/ rules.htm.

153. *See* Ehrenfeld v. Mahfouz, 518 F.3d 102, 105–06 (2d Cir. 2008) (denying Ms. Ehrenfeld's request for declaratory judgment on the unenforceability of English judgment against Ms. Ehrenfeld due to lack of personal jurisdiction over Sheikh Mafouz). For other cases where foreign courts have exercised jurisdiction over cases defendants whose publication were primarily in other countries, see

Another aspect of English law that enters into the equation is that there is a damages cap of £10,000 for undefended libel judgments.[154] However, this cap, which would typically be much smaller than the amount needed to defend a libel action, is illusory. In practice, the judgment is usually augmented by the plaintiff's attorneys' fees, which are in turn augmented by the allowance of "no win no fee" arrangements in the area of libel law.[155] Under such arrangements, plaintiffs' lawyers are only paid if successful, and in addition may charge a "success fee" equal to as much as their normal fee (as opposed to a contingency fee representing a percentage of the judgment, as in the United States).[156] Both the normal fee and the success fee are typically chargeable to the losing party, in addition to any damages granted in the judgment. This gives plaintiffs' lawyers an incentive to charge a high normal fee, make "no win, no fee" arrangements with clients, and pass on their regular and success fees to the losing side in attorneys' costs. Ordinarily, the risk to the plaintiff is that if he loses, he will be responsible for the other side's attorneys' fees and costs—but that risk is offset in the case of libel tourists because of the likelihood that the other side will accept a default judgment instead of defending against the action.[157]

III. THE LAW AS AN EXPRESSIVE MEDIUM

It will be seen that American rules on conflicts and recognition of judgments are in their form much like those found in England, Australia, and Europe. The reasons are not profound. It is in the commercial interests of nations in a globalizing world to have in place a system of legal recognition, easing commercial intercourse between international actors. The world has become a marketplace, and just as Lord Mansfield saw in the *Law Merchant*, efficient commerce requires a system of coordinating norms and rules.[158]

Lewis v. King, [2004] EWCA (Civ) 1329, [44] (holding that jurisdiction in England was permissible for comments published on two websites even though all relevant events occurred in the United States); *Austl. Broad. Corp. v O'Neill*, (2006) 227 CLR 57 (Austl.) (plaintiff could successfully bring a claim under Australian defamation law against a United States publisher whose only contact with Australia was internet publication). *See also* Eric Barendt, *Jurisdiction in Internet Libel Cases*, 110 PENN ST. L. REV. 727 (2006).

154. *See* Defamation Act, 1996 c. 31, § 9(1)(c) (U.K.).

155. *Paying for Legal Services*, THE LAW SOCIETY, http:// www.law society.org.uk/ choosingandusing/ payingforservices/ nowinnofee.law (last visited Mar. 2, 2011).

156. *See id.*

157. *See* Geoffrey Wheatcroft, *The Worst Case Scenario*, THE GUARDIAN, Feb. 28, 2008, at 32, *available at* http://www.guardian.co.uk/commentisfree/2008/feb/28/pressandpublishing.law; *see also Paying for Legal Services*, *supra* note 155.

158. *See* ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 217 (2009) ("The globalization of business has profoundly undermined the territorial basis of lawmaking.").

Tensions arise, however, where purposes and values embodied in the law are not coincident. We have discussed this briefly in relation to recognition and enforcement of judgments. No body of law is a better example of the clash of values than defamation. As one of us has argued elsewhere, the law of defamation as it coincides with the First Amendment of the U.S. Constitution is strongly expressive of American values of free speech.[159] The rhetoric of the marketplace of ideas, of the chilled public speech, of the Republican form of government in the American town meeting, and of the People's voice against government, is a deep-set American constitutional law value. Those values are instilled through constitutional moments in the history of the Republic: the first of these being the American Revolution; the second, the Civil War; and, finally, the New Deal. To this may be added the Civil Rights movement of the 1960s. The courts have taken the words of the First Amendment and fashioned an irresistible rhetorical tradition. At least on one vector, this argument accepts Robert Tsai's thesis in his book *Eloquence and Reason*, in which he proposes a thesis of adjudication for facilitation.[160] It looks at the constitutional text and perceives the court's function as one of persuasion, exercising judicial authority and finding value in maintaining rhetorical engagement. The courts, through their careful elaboration and interpretation, enter a dialogue about the nature of rights and the functions of courts.[161]

In order to bend the public discourse about protection of speech, the Supreme Court, beginning with its landmark decision *New York Times v. Sullivan* in 1964, began its effective obliteration of reputation as a revered right in public speech. The citizens were to be protected through exchange of ideas. Very little credence was given to earlier concerns about inflammatory public speech causing social harm; perhaps the last glimmer of that stems from Justice Jackson's concerns as he returned from the Nuremburg trials at the end of World War II. Jackson, in a series of cases of which *Beauharais*[162] is the prime example, was concerned about the harm that some speech may have in a civil society. He had seen, of course, the consequences in Germany during the Weimar Republic. Thus some speech could, in a rhetorical vein, be like the shout of "fire" in a crowded thea-

159. *See* Partlett, *supra* note 31, at 630–32.

160. *See* ROBERT TSAI, ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE xii, 140–62 (2008).

161. *See* Mark Tushet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999). *See also* TSAI, *supra* note 160, at 144–49. High rhetoric reaches its zenith in First Amendment jurisprudence. That sonorous language is commonly found when supporting free speech even beyond United States courts. *See, e.g.*, Green v. Associated Newspapers Ltd. [2004] EWCA (Civ) 1462, [81], [2005] Q.B. 972, [977] (Eng.). Justice Keydon, in *Australian Broadcasing Corp. v O'Neill*, takes a dim view of rhetoric replacing reasoned logical argument: "In some of these passages there is, with respect, a certain appeal to emotion, even a degree of shrillness and fustian. These qualities are evident in non-judicial writings also." (2006) 227 CLR 57, 149 (Austl.).

162. Beauharais v. Illinois, 343 U.S. 250 (1952).

tre. However, that rhetorical tradition gave way to the tradition of the marketplace of ideas. In Germany, not surprisingly, human dignity, as a value, trumps free speech.[163] The interesting issue, much more an American constitutional issue, but one that will touch the law of defamation, will be whether the economic events of the last eighteen months will create another constitutional moment, where a new faith in regulation and in the importance of social solidarity may move the American courts to a new interpretation of the Constitution and, particularly, in the balance between free speech, privacy, and reputation, that comports more with the European notions of the balance. In addition, the rhetoric of open speech upon which we "stake all"[164] left no room for reputation in the public sphere. The earlier and more subtle concern that "good people" be driven from public life was scotched.[165] An ebbing of faith in the free market in the economic sphere may weaken its hold in the non-economic arena, although the recent opinion of the overwhelming majority of the Supreme Court in Snyder v. Phelps[166] reveals an abiding faith in free speech rights trumping other values.

A. A Polyphonic World[167]

In a world of libel tourists, competing courts, and instantaneous communications through the Internet on a global stage, it may be said that we have a Tower of Babel. Judges like Justice Kirby in the *Gutnick* case have bemoaned such Babel and called for international regulation. Our point, consonant with that of Robert Schapiro,[168] is that to have courts speaking in different voices and arriving at different conclusions about the weight of basic values is not an unsatisfactory state of affairs, but rather, salutary. The "polyphonic" regime is more likely through evolutionary testing to be protective of fundamental rights. The Congress's recent action in cementing the First Amendment from attacks from libel tourists will sharpen debate among nations that, while they do not hew to the same definitions, do

163. *See* RONALD J. KROTOSZYNSKI, THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE 114–18 (2006) (discussing "Dignity as the 'Preferred' Freedom").

164. "To many this is, and always will be, folly; but we have staked upon it our all." United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.). This was quoted along with Justice Brandeis's concurrence from *Whitney v. California*, 274 U.S. 357, 372 (1927), in *New York Times v. Sullivan*. 376 U.S. 254, 270 (1964).

165. WEAVER, ET AL., *supra* note 23, at 4–5. The theoretical underpinnings of free speech are much debated, and clarity is therefore lacking. *See* Andrew T. Kenyon, *What Conversation? Free Speech and Defamation Law*, 73 MOD. L. REV. 697, 718 (2010) (describing the bases and suggesting speech be seen in one dimension as "creating publics"; he urges more room for "agonistic and combative speech.").

166. 131 S. Ct. 1207 (2011).

167. *See* ROBERT SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009).

168. *See id.* at 97–105.

cling to the same fundamental values as expressed in law.[169] Already elements of public opinion in England push for a balance of free speech and reputation that would diminish the opportunity for forum shopping.[170] These will clash with the proponents of forum shopping like Lord Hoffman.[171] Congress in the recent Speech Act recited as evidence of the baleful influence of libel tourists the findings of the Human Rights Committee of the U.N., expressing concern that the UK libel law will "affect freedom of expression worldwide on matters of valid public interest."[172] The Committee urges the utility of the "public figure" exception. Given the usual American skepticism reserved for findings of the Human Rights Committee, it is something of an irony that it is cited as a fundamental basis justifying the legislation.

The English courts do have a long and well-deserved reputation of reliability and expertise in the law of libel. So it is with a specialized libel bar and independent well-respected judges that a plaintiff may approach the court and sue for defamatory imputation that he or she perceives in the publication. Because the English courts will accept jurisdiction in most cases where publication has occurred in the jurisdiction, as we have seen above, the court will proceed to a judgment on the claim. The defendant may or may not appear, but as in *Ehrenfeld*, even if the defendant does not appear, the court will still engage in reasoned elaboration to analyze the substance of the plaintiff's claim. It is entirely plain and clear that a judgment rendered in an English court, in these circumstances, against an American public figure will not be entitled to the enforcement of that judgment in an American court. We have seen the strong place of the public policy of free speech as dissuading any American court from enforcement of such a judgment that is now instantiated in legislation. Thus the original judgment, in our view, is much more in terms of a declaration, often called for by reformers in the law of defamation.[173] The claim in this sense bears a likeness to the suggestion of Judge Pierre Leval, who presided over *Westmoreland v. CBS Inc.*,[174] which would bifurcate defamation actions between substantive liability issues and damages. Extrajudicially, Leval has supported a form of "no-money, no-fault suit" as "en-

169. *See* Andrew R. Klein, *Some Thoughts on Libel Tourism*, 38 PEPP. L. REV. 101 (2010) (effectively arguing for tolerance and understanding of nations' varying interests).

170. *See id.* at 120–22 (citing legislation recently introduced into the United Kingdom Parliament)

171. *See id.* at 122–23 (discussing Lord Hoffman's opposition to the bill introduced by Lord Lester that would require a more substantial impact on a claimant's reputation in jurisdiction).

172. Securing the Protection of Our Enduring and Established Constitutional Heritage Act, Pub. L. No. 111-223, 124 Stat. 2380, 2380 (2010).

173. *See* The Report of the Libel Reform Project of the Annenberg Washington Program, Proposal for Reform of Libel Law (1988). *Cf.* Mark A. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1 (1983) (finding plaintiffs sue not only to repair their reputation, but also to seek revenge or to deter future acts of defamation).

174. 596 F. Supp. 1170 (S.D.N.Y. 1984).

hanc[ing] the primary objective of the law of defamation: the restoration of a falsely damaged reputation."[175] Often, as commentators have pointed out, it is vindication of the reputation that is most strongly sought, and the damages award is a secondary matter.[176] Proceeding along these lines, we can certainly say that the resistance to enforcement by an American court would underline free speech protections. To be sure there may be remedies within England that are sought, such as the destruction of copies of the defamatory material, but here again, the world of the Internet plays an important part in securing free speech. Copies of the offending material are always available, and ironically, the very action brought by the plaintiff is likely to stimulate, via press reportage, the sale of that material through the Internet. The spread of the calumny is an important factor for the traduced individual. McDonald's Restaurants discovered this when pressing their claim in the "McLibel" litigation.[177] The less effective the damages remedy, the more reluctant an aggrieved person will be to provide undue publicity.

The *in terrorem* impact of a damages award given by the English courts will be curtailed by two factors. First, the plaintiff may not have a broad reputation within the jurisdiction (that is, England); and second, under the *Elton John* case[178] in England, the damages are truncated in any event and would be considerably less than damages given in an actionable case in the United States. The "libel tourist" is usually a person of international reputation—and often of intrigue—and thus will have a reputation in many jurisdictions around the world where the media penetrates and obsessively focuses on a person's celebrity.[179] Accordingly, most libel tourists will pass the test of forum non conveniens.[180] Alarmed at the defensive legislation enacted in the United States, a Select Committee of the House of Commons has very recently recommended that additional legislative

175. Pierre N. Leval. *The No-Money, No-Fault Libel Suit: Keeping* Sullivan *in its Proper Place*, 101 HARV. L. REV. 1287, 1302 (1988).

176. *See generally* RANDALL P. BEZANSON ET AL., LIBEL LAW AND THE PRESS: MYTH AND REALITY (1987).

177. *See* McDonald's Rests. Ltd. v. Helen Marie Steel & David Morris, [1997] EWHC (QB) 366 (Eng.); *see also* Telnikoff v. Matusevitch, 702 A.2d 230, 236 (1997). The litigation persisted over ten years, in which McDonald's prevailed, but suffered adverse publicity, giving vent to defamatory imputations in the pamphlet that sparked the litigation. In the polyphonic vein, the European Court of Human Rights declared that the English law and lack of legal aid breached the Convention. *See* Steel and Morris v. the United Kingdom, No. 68416/01, 41 Eur. H.R. Rep. 22 (2005).

178. *See* John v. MGN Ltd. [1996] 2 All E.R. 35, [1997] Q.B. 586 (Eng.) (suggesting that awards be constrained by reference to damages in personal injury cases). *Cf.* Gleanor Co. Ltd. v. Abrahams [2004] 1 A.C. 628 (H.L.) [49] (Eng.) (suggesting reference to damages in personal injury cases as a controversial position creating a "ceiling" for libel damages).

179. *See* PATRICIA LOUGHLAN, BARBARA MCDONALD & ROBERT VAN KRIEKEN, CELEBRITY AND THE LAW, 80–84 (2010).

180. *See generally* Andrew R. Klein, *Foreign Plaintiffs, Forum Non Conveniens and Consistency*, *in* SELECTED ESSAYS ON CURRENT LEGAL ISSUES 193 (David Frenkel & Carsten Gerner-Beuerle eds., 2008).

hurdles be put up where parties have little connection with the United Kingdom:

> We recommend that the Ministry of Justice and the Civil Justice Council consider how the Civil Procedure Rules could be amended to introduce additional hurdles for claimants in cases where the UK is not the primary domicile or place of business of the claimant or defendant. We believe that the courts should be directed to rule that claimants should take their case to the most appropriate jurisdiction (ie [sic] the primary domicile or place of business of the claimant or defendant or where the most cases of libel are alleged to have been carried out).[181]

The Lord Chancellor has since set up a Working Group on Libel which will consider, inter alia, libel tourism.[182] But as we have pointed out, not every litigant in a case with multinational aspects is a "tourist," and may have a connection or a standing or a reputation in a country which it is legitimate to protect by that country's laws. No doubt the lobbying efforts of the press in the United States and England have been vigorous and effective. For the English courts to strip themselves of jurisdiction, or for Parliament to oblige this step, would represent a marked victory for the First Amendment. In any event, a great advantage is to be garnered from a proliferation of courts dealing with defamation, and indeed, privacy matters. Courts speaking in different voices, in a world where different jurisdictions are respected, promises to improve the quality of the most important element in any articulation of fundamental rights—their justification in a dynamic world.[183] Scholars routinely engage with colleagues from both common law and civil law countries about rights and remedies. It is this very kind of conversation in which courts should usefully engage.[184]

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181. HOUSE OF COMMONS, CULTURE, MEDIA AND SPORT COMMITTEE, PRESS STANDARDS, PRIVACY AND LIBEL, SECOND REPORT OF SESSION 2009–10 [215], *available at* http:// www.publications. parliament.uk/ pa/ cm200910/ cmselect/ cmcumeds/ 362/ 362i.pdf at 56 (last visited Mar. 2, 2011). *See also* Klein, *supra* note 180.

182. *See id.* at [206]. In a move than can be viewed as significant convergence, the U.K. Ministry of Justice has issued a Draft Defamation Bill. Ministry of Justice, Draft Defamation Bill, Consultation Paper CP3/11 (March 2011), *available at* http:// www.justice.gov.uk/ consultations/ docs/ draft-defamation-bill-consultation.pdf. In includes, inter alia, adoption of a single publication rule. TO address libel tourism, the bill requires that England and Wales be "the most appropriate jurisdiction in which to bring an action in respect of the statement." *Id.* at 34, ¶84.

183. *See* JACKSON, *supra* note 11, at 74.

184. *See, e.g.*, Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261 (1987). It must be conceded that some Justices of the United States Supreme Court, Justice Scalia being the most notable, have shown hostility to addressing foreign or international norms when interpreting the United States Constitution. *See also* Dixon, *supra* note 9.

So it is that we have been engaged in the drama of enforcement, but in reality it is a sideshow. In a changing world of communications, values are challenged and are in flux. We see the balance between reputation and free speech as dynamically changing. For example, in England, under *Reynolds*,[185] or in Australia, under *Lange*,[186] or most recently in Canada under *Quan*,[187] we see a reorientation towards a greater degree of freedom of speech in public matters. Yet it does not go all the way; there is no sense in which an Australian or English court would be concerned that its rules were not fully reflected in the law as administered in the United States, or elsewhere, in Europe for example.[188] Comity between our courts will persist, and with the availability of technological means to fashion judgments that do not unduly trench upon the rights and interests of other nations, good public policy ought to be that the libel tourist is welcome, and that cries against this villainous fellow ought to be treated with circumspection.

CONCLUSION

Courts often strive to reduce the transaction costs of matters and dealings that cross international borders.[189] The law in one critical vector is an apparatus to coordinate the intercourse between actors domestic and foreign.[190] Law, on another and equally critical vector, is the expressive voice of a polity. This is especially the case in constitutional law or basic law.[191] The law is not only a mechanism for coordination, but is at the same time culture-establishing and -reflecting. This is the reason why we can expect harsh discord in a world where information is a cloud of electrons, and the Internet instantaneously obtainable. It is a force for good and evil, just as

185. Reynolds v. Times Newspapers Ltd., [2001] AC 127 (Eng.).

186. Lange v Austl. Broad. Corp., (1997) 189 CLR 520 (Austl.). The Australian free speech protection is widened to the limits of the *Reynolds* defense in recent Australian-wide uniform legislation. *See, e.g.*, Defamation Act, *supra* note 14. For a discussion of Australia's speech rules, see Kenyon, *supra* note 165, at 715–16.

187. Quan v. Cusson [2009] 3 S.C.R. 712 (Can.); *see also* Grant v. Torstar [2009] 3 S.C.R. 640 (Can.).

188. The tolerance for other rules—the margin of appreciation—is nicely illustrated in the case of *Times Newspapers Ltd. (No. 1 & 2) v. United Kingdom*, [2009] E.M.L.R. 14. In this case, the *Times* claimed that the traditional rule that each publication, i.e. download, constitutes a separate cause of action constituted "an unjustifiable and disproportionate restriction on its right to freedom of expression" under Article 10 of the European Convention on Human Rights. *Id.* at ¶ 3. The court reviewed the English rule that was applied by the Australian High Court in *Gutnick*. This is compared with the United States "single publication rule." On balance, the court concluded that the English rule was a "justified and proportionate restriction on the [Times'] right to freedom of expression." *Id.* at ¶ 49.

189. *See* Harold J. Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413 (1963); LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 42 (1983).

190. *See* PETER H. SCHUCK, THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE 419–55 (2000).

191. *See generally* JACKSON, *supra* note 11, at 1–15.

the printing press was at its invention and throughout its history. Privacy and reputation are weighed and protected to a greater extent in Europe. Social solidarity and governmental regulation as a common goal is valued. In the United States, the faith in the marketplace holds sway, albeit recently with less arrogance. For Americans, fear of government regulation is ever present and, accordingly, the pre-eminence of free speech as the panacea has become an article of deep faith. It is one that defies the crisis of market failure and is strongly defended in the recent Supreme Court decision in *Snyder*.[192] This faithful credo would have been confidently defended two years ago. One sees now the cracks.

Even the champion of the self-regulatory market, Richard Posner, has suggested that free market assumptions need examination.[193] In the interplay of political economy and the law, it was intriguing to speculate whether the shaken faith and governmental reorganization of the economy would constitute an American constitutional moment that would shift the rhetoric and thus substance of free speech jurisprudence; a door partially opened was, however, slammed shut by the Court. At the same time, the opinion in England on the balance between reputation and free speech, and the toleration of forum shopping is being tested. The report of the Parliamentary Select Committee and the Draft Defamation Bill will create momentum for restriction. Even though reforms are adopted, plaintiffs with bona fide residence in England, or in a Commonwealth country, will have a legitimate right to sue, although they will force obduracy in American courts. The conflict in the balance will subsist, and the way forward is to have a high level dialogue among courts and informed commentators that will clear the political brush and dispose us to clear reasoning allowing an evolution of norms. As the nation-state gives way to the market-state,[194] with its porous borders and fluid relationships, a convergence may be fashioned, and the libel tourist may be seen as a typical world citizen of the new international regulatory order. The premium in such an international order will not be a rigid adherence to traditional values, but, as the Europeans are discovering, that the flex necessary to make the law workable is a margin of appreciation and engagement where decision-making institutions recognizes a tapestry of values and evolution within the law.

192. 131 S. Ct. 1207 (2011).

193. *See generally* RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009). *See also* Adrian Vermeule, Essay, *The Invisible Hand in Legal and Political Theory*, 96. VA. L. REV. 1417, 1440–43 (2010) (describing the problems in the marketplace of ideas where media are minded to ignore norms of truthtelling).

194. *See* BOBBITT, *supra* note 11, at 17 (describing the decline of the nation-state and the emergence of the "market-state").