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CAN THE UNITED STATES TALK THE TALK & WALK THE WALK WHEN IT COMES TO LIBEL TOURISM: HOW THE FREEDOM TO SUE ABROAD CAN KILL THE FREEDOM OF SPEECH AT HOME

Tara Sturtevant

INTRODUCTION

There is a relatively new legal phenomenon with which legal scholars, practitioners, and law students alike are not generally familiar; this new hindrance is called “libel tourism.” The new phenomenon ultimately eradicates our Constitutionally-protected First Amendment rights to free speech and freedom of the press. This legal loophole of “libel tourism” refers to “obtaining libel judgments in foreign countries where libel laws do not have the free speech protections”¹ as this country affords, and subsequently trying to enforce such judgments here in the United States. A person who is allegedly libeled “can generally bring suit in any jurisdiction in which the libelous statement may have been published.”² Due to the rise in “modern commerce,”³ such as technological advances and Internet accessibility worldwide, a published document has the potential to show up in nearly any jurisdiction in the world. “Effectively . . . this means that a libel plaintiff can choose to sue virtually anywhere the work may have been sold,” with the detrimental effect of stripping “U.S. authors of the protections they would have under U.S. law even though the publication occurred in the United States.”⁴ Under doctrines of

¹ Paul H. Aloe, *Unraveling Libel Terrorism*, 239 N.Y. L.J. 1, 4 (2008).

² *Id.*

³ *Id.*; see also Raymond W. Beauchamp, *England's Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 *FORDHAM L. REV.* 3073, 3136 (2006).

⁴ Aloe, *supra* note 1, at 4.

reciprocity and comity, the U.S. can enforce foreign judgments that were rendered in countries that recognize and enforce U.S. judgments. However, notions of comity espoused by the United Nations, international treaties, and federal and state legislation, which blindly enforce libel judgments rendered abroad, or fail to review them, simply undercut our domestic legal system, libel law, and our Constitutional right to freedom of speech.

It may be tempting to justify giving preclusive effect to foreign judgments by citing the important U.S. policy considerations of *res judicata*. The most important policies espoused by *res judicata*, fairness and consistency, however, fall by the wayside when American courts tolerate libel tourism. It is neither consistent nor fair to enforce a libel judgment that would never have been rendered in any jurisdiction within the United States. Our libel law is clear, and in the conflict between freedom of speech and protection of reputation that arises in libel cases, courts often favor the former.

The First Amendment rights of freedom of speech and freedom of the press are widely recognized and treasured concepts under the law of the United States. To undercut such by enforcing judgments that are generally inconsistent with these rights would have grave and detrimental effects on our citizens. How can we tell American journalists to report the news and express themselves freely, while simultaneously allowing a foreign judgment to be enforced against them? How can we allow laws contrary to our own to be victorious on our own soil? Congress must be adamant in the protection of its citizens' freedoms afforded by the U.S. Constitution and give U.S. courts the jurisdiction to review foreign libel judgments, for either invalidation or enforcement.

Part I of this comment explains the background and importance of the First Amendment rights of freedom of speech and the press under the U.S. Constitution. It also discusses defamation law in the United States and compares such to defamation laws abroad. For example, England is one of the prime fora where defamation plaintiffs are much more likely to prevail than under U.S. law. Part II will shed some light on libel tourism by discussing *Ehrenfeld v. Mahfouz*,⁵ a seminal case which subsequently led to

⁵ *Ehrenfeld v. Mahfouz*, 851 N.Y.S.2d 381 (2007). Biz Mahfouz, a Saudi national, obtained a libel judgment against New York journalist, Ehrenfeld. When Ehrenfeld sought a declaratory judgment requesting that Mahfouz's libel

New York's adoption of section 302(d) of the New York Civil Practice Law and Rules ("N.Y. C.P.L.R."),⁶ Part III of this comment discusses the possibility of libel plaintiffs using doctrines of issue and claim preclusion in the United States after obtaining judgments abroad. Such *res judicata* principles cannot properly be applied to such instances for the same reasons that foreign judgments cannot be blindly enforced in the United States.

There must be broad jurisdictional power granted to United States courts to review foreign libel judgments because failure to do so could result in unlimited international forum shopping. If a libel plaintiff tries to enforce such a judgment in the United States, there is no significant prejudice that can result from a United States court reviewing whether or not the judgment offends the law of the United States and its notions of justice. If the federal and state governments adopt legislation similar to section 302(d) of the N.Y. C.P.L.R., which grants New York courts the jurisdiction to review libel judgments rendered abroad (even to simply invalidate the foreign judgment, not only to decide whether it is enforceable), then consistency, fairness, and the overall American legal system will not be threatened by the corrosive practice of libel tourism.

This comment concludes by exploring possible solutions to libel

judgment be deemed unenforceable on public policy and constitutional grounds, the United States District Court for the Southern District of New York granted Mahfouz's motion to dismiss for want of personal jurisdiction. On review, the United States Court of Appeals for the Second Circuit affirmed the lower court's decision that there was no personal jurisdiction over Mahfouz, as he did not maintain the minimum contacts with New York requisite for the court to exercise jurisdiction over the matter. *Id.*

⁶ N.Y. C.P.L.R. § 302(d) (McKinney 2008). "The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person's liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable . . . to the fullest extent permitted by the United States constitution, provided: 1. the publication at issue was published in New York, and 2. that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision (April 28, 2008)." *Id.*

tourism, including the amendment to Title 28 of the United States Code, which has been passed by the House of Representatives and is awaiting approval in the Senate.⁷ It is imperative for such legislation to be approved by the Senate, along with added jurisdictional power, as the right of free speech is looming in the balance. Part IV also discusses the perpetuation of terrorism, which is a frequently overlooked impediment of libel tourism. Completely dismissing libel foreign judgments may place a strain on international relations where reciprocity is practiced. Therefore, by giving American courts jurisdiction to review and a chance to invalidate those judgments that do not coincide with our law, such tension may be avoided because the judgment will not be simply and blindly disregarded due to its foreign nature.

I. WHY IT IS EASIER TO WIN ELSEWHERE: DEFAMATION LAW IN THE UNITED STATES AND ABROAD

A. *Right to Freedom of Speech/Press & U.S. Libel Law*

“Congress shall make no law . . . prohibit[ing] the free exercise thereof; or abridging the freedom of speech, or of the press”⁸ “Freedom of speech and press, historically considered and taken up by the Federal Constitution, means principally, although not exclusively, immunity from previous restraints or censorship.”⁹ The First Amendment is embedded in our legal system primarily to promote the expression and the dissemination of ideas without the fear of persecution by the government. The pre-Revolution colonists, similar to the English, feared prosecution if they expressed any opinion contrary or offensive to the Crown. As a primary notion of liberty, the founding fathers intentionally ensured that free-dom of expression would be an inherent right granted to all in this newly independent country.

The 18th-century framers of the U.S. Constitution guaranteed

⁷ H.R. REP. NO. 110-6146 (2008) (This bill, known as the ‘Cohen-Issa libel tourism bill,’ . . . will amend U.S. code to prohibit recognition and enforcement of foreign defamation judgments.) Congressman Steven Cohen, *Libel Tourism Bill Passes*, available at http://cohen.house.gov/index.php?option=com_content&task=view&id=639&Itemid=124.

⁸ U.S. CONST. amend. I (emphasis added).

⁹ 16A AM. JUR. 2D *Constitutional Law* § 454 (2008).

freedom of the press by writing that protection into the First Amendment of the Bill of Rights. Even so, the Supreme Court of the United States—the highest court in America—for years refused to protect the media from libel lawsuits that relied on the First Amendment. Instead, libel laws varied from state to state without a single coherent rule in the nation.¹⁰

As the country began to develop, the importance of free speech in a flourishing democratic nation, envisioned by the founding fathers, began to take hold. Thus, as history shows, freedom of speech was long protected and supreme in comparison to any rights and protections of reputation. Today, “hundreds of libel lawsuits are filed against newspapers, magazines, and radio and television stations in the United States.”¹¹ However, few are successful when it is clear that a libel defendant’s First Amendment rights will be seriously abridged if prevented to express their views freely. One important motivation behind this protection is to stimulate public debate, especially concerning politics. Although veracity of the allegedly libelous statement is presumed, the libel plaintiff has the opportunity to disprove this presumption. The libel plaintiff has to prove the falsity of the defamatory statement to prevail; falsity of the statement is an essential element to a libel claim.¹² If falsity is proved, then freedom of speech is no longer a defense.¹³ The Constitution is not intended to protect intentional misrepresentations or malicious statements about others.

In the United States, “a communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”¹⁴ Unlike slander, which is an oral form of defamation, libel is a written form of defamation which does not require actual proof of harm to be actionable. Therefore, it may seem like this is a small hurdle to overcome, and that libel suits require a low burden of proof for a plaintiff. However, after the seminal case of *N.Y. Times Co. v. Sullivan*, the law “established the

¹⁰ Steven Pressman, *An Unfettered Press: Libel Law in the United States*, <http://usinfo.org/enus/government/overview/libellaw.html> (last visited Feb. 8, 2010).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ RESTATEMENT (SECOND) OF TORTS § 559 (1977).

Constitutional standard to be applied in libel and defamation cases.”¹⁵ “The Supreme Court’s decision in *NY Times Co. v. Sullivan*¹⁶ was an expansive decision, making the Court’s first constitutional foray into defamation law a bold one.”¹⁷ “The Court held that in order for a plaintiff who is a public official to succeed with a defamation claim against a defendant whose speech is directed at the plaintiff’s official duties, the plaintiff must show with clear and convincing evidence that the speech was made with ‘actual malice,’ meaning that the defendant had knowledge that the speech was false or acted with reckless disregard as to the truth.”¹⁸ *NY Times Co. v. Sullivan* infused the First Amendment protections into the standard for determining libel suits. “Libel can claim no talismanic immunity from constitutional limitation.”¹⁹

“In actions concerning private figures, the justifications in *NY Times Co.* . . . are not as readily applicable.”²⁰ Because private figures do not have a public platform to address defamatory statements or the power to defend against such, private citizens are given less of a hurdle to cross in a libel suit. All that private figures have to prove is falsity of the alleged defamatory statement.²¹ While the First Amendment continues to be a consideration, a plaintiff who is a public figure has a much greater burden to overcome in satisfying the aforementioned constitutional requirements. Private plaintiffs must simply show evidence of the defamatory statement’s falsity, while public figures have to show

¹⁵ Heather Maly, *Publish at Your Own Risk or Don’t Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-Guaranteed*, 14 J.L. & POL’Y 883, 893 (2006).

¹⁶ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). When a N.Y. newspaper published an advertisement concerning grievances, alleged abuses and seeking support for the movement known as the “Negro Right to Vote” movement, the Commissioner of Montgomery, Alabama brought a libel suit against the paper. When the circuit court, affirmed by the Supreme Court of Alabama, entered a \$500,000 judgment in favor of the plaintiff, the U.S. Supreme Court granted certiorari. The U.S. Supreme Court reversed, claiming that the judgment below was “constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct . . .” *Id.*

¹⁷ Beauchamp, *supra* note 3, at 3083.

¹⁸ *Id.*

¹⁹ *N.Y. Times Co.*, 376 U.S. at 269.

²⁰ Maly, *supra* note 15, at 895.

²¹ *Id.*

the defendant's actual knowledge of its falsity or actual malice to prevail in a libel action.²² Nevertheless, there is still some threshold in the United States to prove that the statement was false and that burden is rightfully placed on the plaintiff (public or private).

B. Freedom of Speech & Libel Laws Abroad: An Easier Judgment

1. England: The Libel Capital

There are no similar First Amendment protections outside of the United States, and this is especially true in England. Hence, free speech abroad is often an afterthought to a more important and more protected right of reputation.

In England, defamatory statements by their nature are presumed false. A defendant may, as a defense, plead that his statements were true and thus justified. However, to mount this defense, the defendant must prove the substantial truth of every material fact. A material fact is defined as anything that 'adds weight to the imputation.' Proving truth is no simple task.²³

Therefore, there is an extremely large burden on the defendant to unequivocally prove every detail of his statement, which in essence turns out to be almost impossible in the majority of cases. Hence, English libel law affords an opportunity to bring a frivolous suit in a foreign forum, and places a nearly impossible burden in the hands of a defendant, who would have otherwise had a valid defense in the United States.

In the United States, the plaintiff has to meet his burden of proof in order to establish the statement's falsity before the burden shifts to the defendant. This seems to be reasonable, as the one seeking the relief should initially be required to prove why such relief should be granted in light of the possibility that the defendant's freedom of speech may be stifled. Although there are some free speech considerations in the United Kingdom, English jurisprudence clearly gives more credence to the protection of

²² *Id.* at 897.

²³ Beauchamp, *supra* note 3, at 3078.

reputation.²⁴ The *Ehrenfeld v. Mahfouz* case demonstrates “how the British libel laws are used to circumvent the stricter American laws.”²⁵

2. *Ehrenfeld v. Mahfouz*

In the recent New York case, *Ehrenfeld v. Mahfouz*, Rachel Ehrenfeld sought declaratory relief asking the court to invalidate a libel default judgment entered against her in England. Dr. Ehrenfeld’s book, *Funding Evil: How Terrorism Is Financed and How to Stop It*, focused on international terrorism, as this was her specialty and area of expertise.²⁶ In the book, she asserts that the “defendant . . . Mahfouz (a Saudi Arabian businessman), financier and former head of the National Commercial Bank of Saudi Arabia . . . provided direct and indirect monetary support to al Qaeda and other ‘Islamist terrorist groups.’”²⁷ The book was published in the United States; twenty-three copies, however, were purchased in the United Kingdom and a chapter of the book was accessible on ABC news’ website.²⁸ This gave Mahfouz the opportunity to bring a libel suit in Britain without having to prove Ehrenfeld’s statements to be false. Moreover, actual malice or actual knowledge of falsity was not a consideration to the English court, as the initial burden of proof was on the defendant, Ehrenfeld, to prove the truth of the statements in her book. Additionally, free speech concerns were of little consequence to the English court. Ehrenfeld “elected not to appear in the English action [as defendant]. . . because [of] the costs, . . . the procedural barriers facing a libel defendant under English law, and her disagreement in principle with the defendant’s alleged attempt to chill her speech in New York by suing in a claimant-friendly libel jurisdiction in which she lacked any tangible connection.”²⁹

The English court returned a default judgment for the plaintiff, Mahfouz, against absent Ehrenfeld in the amount of £10,000 (\$15,681) intended for Mahfouz and each of his sons.³⁰ Further,

²⁴ See generally *id.*; Maly, *supra* note 15.

²⁵ Maly, *supra* note 15, at 906.

²⁶ *Ehrenfeld*, 851 N.Y.S.2d at 383-84.

²⁷ *Id.* at 832.

²⁸ *Id.*

²⁹ *Id.* at 832-33.

³⁰ *Id.* at 833.

Ehrenfeld was required under the English judgment to give a public apology to the plaintiff.³¹ Lastly, the court granted a permanent injunction against allowing her book, now considered to be defamatory, to enter England and awarded legal fees to Mahfouz.³²

Ehrenfeld then brought her own action in the States, seeking “a declaratory judgment that, under federal and New York law, defendant could not prevail on a libel claim against her based upon the statements at issue in the English action and that the . . . default judgment is unenforceable in the United States and, particularly, in New York State.”³³

The New York Court of Appeals ultimately decided that they would first need personal jurisdiction over Mahfouz to consider Ehrenfeld’s claim.³⁴ Libel tourism was not an issue that they wanted to address if personal jurisdiction was lacking, and ultimately the court found that under *International Shoe*³⁵ and its progeny, there were not enough meaningful or minimum contacts with New York to warrant jurisdiction over Mahfouz.³⁶ “The Court was unmoved that free speech principles were involved, that the defendant had owned condominiums in New York City or that he had been indicted by a grand jury and was a defendant in several civil actions arising out of the September 11th terrorist attacks.”³⁷ Therefore, Ehrenfeld’s claim was dismissed based on lack of personal jurisdiction, and the court swept the issue of libel tourism under the carpet. Although the New York Court failed to invalidate the judgment based on jurisdictional grounds, the English judgment could not actually be enforced in New York

³¹ *Ehrenfeld*, 851 N.Y.S.2d at 883.

³² *Id.*

³³ *Id.*

³⁴ *See generally id.*

³⁵ *See generally* *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (When the Defendant, a company based in Delaware, failed to pay unemployment to the State of Washington, the courts ultimately concluded that Washington had personal jurisdiction over the matter, because the defendants had “minimum contacts” with the State to warrant *in personam* jurisdiction. The court developed the minimum contacts test to determine whether a court has personal jurisdiction over a litigant).

³⁶ *See generally* *Ehrenfeld v. Mahfouz*, 851 N.Y.S.2d 381 (2007).

³⁷ Paul H. Aloe, *2006-2007 Survey of New York Law: Article: Civil Practice*, 58 SYRACUSE L. REV. 713, 742 (2008).

unless Mahfouz sued to domesticate it in New York.³⁸ Although Mahfouz did not try to enforce the judgment in New York, speech was chilled nonetheless, as Ehrenfeld's United Kingdom publisher promptly ceased publication of her book in the United Kingdom based on the English judgment. Therefore, New York's failure to invalidate the judgment was indeed harmful to Ehrenfeld and free expression generally. However, "the story did not end there . . . because the case drew a reaction from the New York Legislature in the form of the so-called 'Libel Terrorism Bill.'"³⁹

3. N.Y.'s Response to *Ehrenfeld*; The Libel Terrorism Bill

The court decided in *Ehrenfeld* that section 302 of the N.Y. C.P.L.R. did not confer jurisdiction to New York, in order to declare a British libel judgment invalid. Following this decision, section 302 was amended to create an expansive long arm statute allowing "nonrecognition of certain foreign libel judgments."⁴⁰

The Libel Terrorism Protection Act . . . creates a specific ground for nonrecognition of such judgments. This new subdivision . . . provides:

(d) Foreign defamation judgment. The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person's liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to section fifty-three hundred four of this chapter, to the fullest extent permitted by the United States Constitution, provided: 1) the publication at issue was published in New York, and 2) that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation

³⁸ *Id.* at 743.

³⁹ Aloe, *supra* note 1, at 3.

⁴⁰ *Id.*

judgment.”⁴¹

In addition to giving New York long arm jurisdiction to deal with matters described above, The Libel Terrorism Act also amends New York’s version of the Uniform Foreign-Country Money Judgments Recognition Act of 2005, section 5304 of the N.Y. C.P.L.R. Before the amendment, “[the New York] Court of Appeals mandated that . . . foreign judgments are generally to be recognized, even where the underlying cause of action is not one that would give rise to relief in New York.”⁴² However, section 5304(b)(8) now:

[P]ermits nonrecognition where the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.⁴³

Reciprocity has long been a requirement of enforcing a foreign judgment in the United States. The late nineteenth century Supreme Court case of *Hilton v. Guyot*, held that the United States would not enforce foreign judgments from countries that did not extend the same courtesy.

[J]udgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiffs’ claim.⁴⁴

However, this requirement has almost become moot. Since almost all developed nations have reciprocity with the United States today, the question now becomes whether the foreign judgment is repugnant to our legal system and therefore should not be enforced. Reciprocity can never be dispositive in determining foreign judgment enforcement.

⁴¹ *Id.*; N.Y. C.P.L.R. § 302(d) (McKinney 2008).

⁴² Aloe, *supra* note 1, at 5.

⁴³ *Id.*; N.Y. C.P.L.R. § 5304(b)(8) (McKinney 2008).

⁴⁴ *Hilton v. Guyot*, 159 U.S. 113, 123 (1895).

Although under principles of reciprocity and comity, recognition of foreign judgments may seem fair and conducive to a working relationship between nations, libel tourism is an illustration of how this courtesy can be abused. Without the type of legislation enacted in New York, litigants can go to a foreign nation where libel is often a strict liability tort.⁴⁵ This offers an opportunity for plaintiffs to engage in forum shopping by bringing a suit in another country in order to make an “end run” around the First Amendment.⁴⁶ There are countries other than England that allow for such behavior. For example, “Singapore has been called a ‘libel paradise,’ and New Zealand, Kyrgyzstan, and Australia are also noted for being friendly to plaintiffs.”⁴⁷ “So many options for the libel tourist only heighten the problem, as well as the demand for an American solution.”⁴⁸

4. Singapore: A Libel Paradise

Singapore is called a “libel paradise” for a good reason. A defamation suit usually leads to a prompt settlement, rarely reaching litigation, because the defendants know that defending a defamation suit in Singapore is virtually a sure defeat. In 2002, Singapore’s Senior Minister Lee Kuan Yew, Prime Minister Goh Chok Tong, and Lee’s eldest son, Deputy Prime Minister, all brought a libel suit against the United States business news wire Bloomberg.⁴⁹ The subject of the alleged libel was an article written by a Bloomberg contributor regarding concerns of nepotism after Lee appointed his daughter-in-law to a high government position.⁵⁰ It was only a mere three weeks from the time the article was published to the time that the parties settled.⁵¹ This was one of the speediest settlements ever recorded. Bloomberg seemed to be cognizant of the long history of victorious defamation lawsuits

⁴⁵ Michael F. Sutton, *Legislating the Tower of Babel: International Restrictions on Internet Content and the Marketplace of Ideas*, 56 FED. COMM. L.J. 417, 422 (2004).

⁴⁶ *Id.*

⁴⁷ Beauchamp, *supra* note 3, at 3076.

⁴⁸ *Id.*

⁴⁹ Eric Ellis, *Singapore Authorities Use Libel Laws to Silence Critics*, AUSTRALIAN, Sept. 26, 2002, <http://www.singapore-window.org/sw02/020926au.htm>.

⁵⁰ *Id.*

⁵¹ *Id.*

brought primarily by Singapore's leaders. "Foreign publishers have spent millions in fruitless attempts to defend libel actions brought against titles that have earned an international reputation for accuracy and credibility . . . no foreign publisher has ever successfully defended a libel action in a Singapore court when opposing a Singapore politician."⁵² However, the article in the Bloomberg matter was never published in Singapore, it only appeared on Bloomberg's website.⁵³ Bloomberg employed 180 persons in Singapore and had over 3000 subscribers that it did not want to lose.⁵⁴ Bloomberg's acquiescence to Singapore's libel haven was understandable considering its economic interests in Singapore. However, the article that was the center of the dispute was removed from their website, chilling any expression of opposition or concern over the affairs of Singapore's ruling party. As a result, another haven for libel tourists continues to quiet American speech.

5. Australia: Another Easy Judgment

Australia and the United States share their legal roots in English common law; however, they have diverged onto two distinct paths when it comes to defamation law.⁵⁵ The battle between freedom of speech, reputation, and privacy plays out differently in Australia than in the United States. Australia holds "reputational and privacy interests"⁵⁶ in higher regard than free speech. The difference may be attributed to the fact that the First Amendment rights afforded by the United States Constitution explicitly safeguard free speech, while Australia has no such constitutional safeguard.

Also, Australian defamation law does not have "anything comparable to the requirement in the United States that public figures suing for defamation demonstrate that the defendant acted 'with actual malice'—that is, with knowledge that the defamatory statement was false or with reckless disregard of whether it was

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Ellis, *supra* note 49.

⁵⁵ Michael Newcity, *The Sociology of Defamation in Australia and the United States*, 26 TEX. INT'L L.J. 1, 2 (1991).

⁵⁶ *Id.* at 4.

false or not.”⁵⁷ Australian lawmakers defend this lack of a special requirement for public figures by arguing that it would be unjust to add an extra burden to those in the public eye, simply because of their status.⁵⁸ Due to the fact that “Australia is a commonwealth organized under the authority of the British monarchy,”⁵⁹ the falsity of the alleged libelous statement is presumed, which places the burden on the defendant of a libel suit to prove veracity.⁶⁰

The 2001 Australian case of *Gutnick v. Dow Jones*⁶¹ is a prime example of how libel tourism works. Gutnick, an Australian entrepreneur, obtained a libel judgment against Dow Jones for alleged defamatory information that appeared on the Wall Street Journal’s website, of which many subscribers were from Australia.⁶² Dow Jones appealed to the High Court of Australia, contending that Australia’s libel laws chilled American notions of free speech and that the court did not have jurisdiction over the matter. The High Court responded by affirming the libel judgment, reasoning that the Internet allowed for Australian subscriptions and that “common law adapts even to radically different environments,”⁶³ such as the World Wide Web. Since the Internet was allowing for the dissemination of Dow Jones’s articles in Australia, then Dow Jones could rightfully be bound by the laws of Australia. Now, what happens when foreign libel plaintiffs try to enforce their judgments in the United States?

⁵⁷ *Id.* at 3 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

⁵⁸ *Id.*

⁵⁹ Blake Cooper, *The U.S. Libel Law Conundrum and the Necessity of Defensive Corporate Measures in Lessening International Internet Libel Liability*, 21 CONN. J. INT’L L. 127, 139 (2005).

⁶⁰ *Id.*

⁶¹ *Dow Jones & Co. v. Gutnick* (2002) 210 C.L.R. 575 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2002/56.html>. “Joseph Gutnick, an Australian international entrepreneur with business connections in the U.S., sued Dow Jones, publisher of *Barron's Magazine*, a financial publication focused mainly on developments in the U.S. markets, in Victoria, Australia, over the content of an article . . . which alleged Mr. Gutnick was the chief customer of Nachum Goldberg, a convicted tax-evading money launderer, and that Gutnick also had evaded taxes and laundered money through Goldberg, using his influence with Goldberg to buy Goldberg’s silence.” Cooper, *supra* note 59, at 141-42.

⁶² *Dow Jones & Co. v. Gutnick* (2002) 210 C.L.R. 575 (Austl.). available at <http://www.austlii.edu.au/au/cases/cth/HCA/2002/56.html>.

⁶³ *Id.* ¶ 90; see also Kurt Wimmer, *Toward a World Rule of Law: Freedom of Expression*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 207 (2006).

C. Enforcement of Foreign Judgments

The doctrine of comity⁶⁴ has been followed in the United States common law for many years. “Foreign judgments are deemed to be ‘valid’ if the foreign court properly asserted personal jurisdiction and if the foreign tribunal utilized procedures that were not fundamentally unfair.”⁶⁵ “If these conditions are met, the Restatement instructs that the foreign judgment should be enforced unless ‘the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.’”⁶⁶ This is considered to be the public policy exception to enforcement of foreign judgments. Further, the United States is a party to the Convention on the Recognition & Enforcement of Foreign Arbitral Awards, an international treaty which goes beyond foreign judgments and allows for reciprocal members to enforce arbitral awards country to country.⁶⁷ While these treaties and laws seem to promote uniformity and recognition across borders, there are still limitations. “Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”⁶⁸

But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.⁶⁹

Section 4 of the Uniform Foreign-Country Money Judgments Recognition Act of 2005, gives a list of limitations on foreign

⁶⁴ Comity is “a practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts.” BLACK’S LAW DICTIONARY 284 (8th ed. 2004).

⁶⁵ Mark D. Rosen, *Should “Un-American” Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 792 (2004) (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 92(1971)).

⁶⁶ *Id.*

⁶⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (entered into force in the U.S. Dec. 29, 1970), *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en#EndDec.

⁶⁸ *Hilton*, 159 U.S. at 163-64.

⁶⁹ *Id.*

judgment enforcement. Grounds for non-recognition of a foreign judgment are as follows:

(1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend; (2) the foreign-country judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case; (3) the foreign-country judgment or the [cause of action] [claim for relief] on which the foreign-country judgment is based is *repugnant to the public policy* of this state or of the United States; (4) the foreign-country judgment conflicts with another final and conclusive judgment; (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court; (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action; (7) the foreign-country judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the foreign-country judgment; or (8) the specific proceeding in the foreign court leading to the foreign-country judgment was not compatible with the requirements of due process of law.⁷⁰

Many factors of non-recognition could have been found in the *Ehrenfeld* case. Nevertheless, the general majority of libel tourism cases fall within the third limitation of the act, which does not hold a judgment viable for recognition if the cause or claim is repugnant to public policy. The fora where libel tourists shop often presume falsity of an allegedly defamatory statement, as discussed above, which in essence creates a presumption of guilt that is extremely difficult to overcome. Furthermore, the protections of the First Amendment and admiration for free speech are not shared by these frequently shopped nations. Procedural rules and evidentiary rules are also not aligned with the United States. The foregoing reasons illustrate the distaste and incompatibility such foreign libel judgments exude from our domestic libel law—a general repugnance. Therefore, a foreign plaintiff has a great opportunity

⁷⁰ UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c) (2005) (emphasis added), available at http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufmjra62.pdf.

to obtain a libel judgment from an American defendant abroad.

II. RES JUDICATA

A libel plaintiff may try to enforce a foreign libel judgment in the United States through principles of *res judicata* if the court refuses to enforce such a judgment based on the non-recognition factors listed in section 4(c) of the Uniform Foreign-Country Money Judgments Recognition Act. Professor Jay Carlisle describes the doctrine of *res judicata* as referring to:

[A] variety of concepts dealing with the preclusive effects of a judgment on subsequent litigation. Claim preclusion is the doctrine that once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. Issue preclusion basically precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether the tribunals or causes of action are the same. Its typical application occurs when one of the parties to a civil action argues that preclusive effect should be given to one or more issues determined in an earlier civil action between the same parties in the same jurisdiction.⁷¹

These principles have been used by foreign litigants in United States courts trying to give preclusive effect to issues already litigated in a foreign country. In 1999, the case of *Smith v. Toronto-Dominion Bank* gave a Canadian judgment preclusive effect in the Tenth Circuit.⁷² The court contended that there was “no reason why the two Canadian judgments, which decided the parties’ rights concerning the two underlying mortgages, should be

⁷¹ Jay Carlisle, *Second Circuit 1999-2000 Res Judicata Developments*, 20 QUINNIPIAC L. REV. 75, 76 (2000).

⁷² *Smith v. Toronto-Dominion Bank*, No. 98-4008, 1999 U.S. App. LEXIS 1184, at *2 (10th Cir. Jan. 19, 1999). *Smith*, the plaintiff, held a mortgage with the defendant, a Canadian bank, for a Canadian condominium that plaintiff owned. *Id.* In 1994, the bank brought suit in Toronto, Canada for delinquent payments on the mortgage. *Id.* A default judgment was entered against *Smith* in the Toronto court. *Id.* In this case, *Smith* brought suit for wrongful foreclosure on the mortgage, and the lower court, affirmed here, granted summary judgment for the defendants based on the 1994 Canadian judgment that decided the issue of foreclosure and payment delinquency against *Smith*. *Id.*

denied recognition in this case.”⁷³ The court stated, however, that issue preclusion can only apply if “Utah law would recognize a judgment rendered by a Canadian court.”⁷⁴ In its analysis, the court cited *Hilton v. Guyot*:

[T]he principles of comity require recognition of a foreign judgment if there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment.⁷⁵

Therefore, the court concluded that the plaintiff had a full and fair opportunity to be heard in the Canadian proceeding and gave recognition to the Canadian judgment and its preclusive effect on the United States case.

It is clear from the court’s analysis that in order to give a foreign judgment preclusive effect in the United States, that judgment must be recognizable by United States courts under the doctrine of comity and the Uniform Foreign-Country Money Judgments Recognition Act. In other words, recognition of a judgment is a prerequisite to giving it preclusive effect. A foreign litigant cannot try to use *res judicata* principles when a foreign judgment is repugnant to U.S. law, or when an American defendant is deprived of due process considerations. An issue of liability under a libel claim may turn on different facts in different fora. For example, if Mahfouz was to bring suit in the U.S., as opposed to England, the fact that he was a public official would place a heavier burden on him to prove actual malice on the part of Ehrenfeld. Therefore, the issue turned on different facts and subsequent burden of proof specific to English law, hence, cannot be given the same effect in this country. “To be entitled to any recognition, then, the foreign court’s proceedings must have comported with American ideas of fundamental fairness, including our concept of

⁷³ *Id.* at *16.

⁷⁴ *Id.* at *5.

⁷⁵ *Id.* at *6 (citing *Hilton v. Guyot*, 159 U.S. 113, 202 (1895)).

the permissible bases for personal jurisdiction.”⁷⁶

In 1992, New York Supreme Court refused to give recognition or preclusive effect to an English libel judgment in the case of *Bachchan v. India Abroad Publications, Inc.*⁷⁷ Although this was a case of first impression in New York, the Supreme Court held that they were not able to enforce or give any weight to the English judgment, due to the fact that it did not “comport with the constitutional standards for adjudicating libel claims.”⁷⁸ Moreover, it was determined that the standards used by the High Court of England did not meet the safeguards of the right to freedom of speech or freedom of the press available in the United States.⁷⁹ Under English law, any published statement, which adversely affects a person’s reputation or the respect in which that person is held, is *prima facie* defamatory.⁸⁰ “A plaintiff’s only burden is to establish that the words complained of that refer to them, were published by the defendant, and bear a defamatory meaning”⁸¹ Statements of fact are to be presumed false and the defendant must plead justification for the issue of truth to be brought before the jury.⁸²

In the United States, the burden of proving truth is not placed on the libel defendant; rather, the burden of proving falsity of the statement is placed on the plaintiff. To do otherwise, or to follow English libel law, would be considered “unconstitutional, because fear of liability may deter”⁸³ free speech. Such a chilling of free speech would be accomplished by enforcing English libel judgments in the United States, and the court would decide that the

⁷⁶ Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 71 (1984).

⁷⁷ *Bachchan v. India Abroad Publ'ns, Inc.*, 585 N.Y.S.2d 661 (1992). The (libel) “judgment was granted in an action brought in the High Court of Justice in London, England, by an Indian national against the New York operator of a news service which transmits reports only to a news service in India. The story held to be defamatory was written by a reporter in London, wired by defendant to the news service in India, which sent it to newspapers there. It was reported in two Indian newspapers, copies of which were distributed in the United Kingdom.” *Id.* at 661.

⁷⁸ *Id.* at 662.

⁷⁹ *Id.*

⁸⁰ *Id.* at 663.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Bachchan*, 585 N.Y.S.2d at 664.

“protection of free speech and the press embodied in . . . [the First] [A]mendment [of the United States Constitution] would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the US Constitution.”⁸⁴

III. ENDING THE TOURISM

A. *The Cohen-Issa Libel Tourism Bill*

The *Ehrenfeld* case prompted New York to act by extending New York’s long-arm statute, but one state’s endeavor seems to be a miniscule victory in the larger jurisdictional scheme of the country.

As a step in the right direction, the House of Representatives, led by Tennessee’s Ninth District Representative, Steve Cohen, recently passed the “Cohen-Issa Libel Tourism Bill” (hereinafter “the Libel Tourism bill”). This bill has enjoyed bipartisan support and passed unanimously in fall of 2008.⁸⁵ Ratification is now pending in the U.S. Senate. The bill will amend Title 28 of the United States Code (Judiciary and Judicial Procedure) to “prohibit recognition and enforcement of foreign defamation judgments.”⁸⁶ The legislative findings were as follows:

(1) The [F]irst amendment of the Constitution of the United States prohibits the abridgment of freedom of speech. (2) Freedom of speech is fundamental to the values of American democracy. (3) In light of the constitutional protection our Nation affords to freedom of speech, the Supreme Court has modified the elements of the common law tort of defamation to provide more protection for defendants than would be available at common law, including providing special protections for political speech. (4) The courts of other countries, including those that otherwise share our Nation’s common law and due process traditions, are not constrained by the first amendment and thus may provide less protection to defamation defendants

⁸⁴ *Id.*

⁸⁵ H.R. REP. NO. 110-6146 (2008).

⁸⁶ *Id.*

than our Constitution requires. (5) While our Nation's courts will generally enforce foreign judgments as a matter of comity, comity does not require that courts enforce foreign judgments that are repugnant to our Nation's fundamental constitutional values, in particular its strong protection of the right to freedom of speech. (6) Our Nation's courts should only enforce foreign judgments as a matter of comity when such foreign judgments are consistent with the right to freedom of speech.⁸⁷

These findings are consistent with most of the concerns expressed in this comment. The foregoing concerns have thankfully prompted Congress to action, and hopefully the Senate will ratify this legislation. If ratified, this bill will essentially amend Chapter 181 "Foreign Judgments" of Title 28 of the United States Code, as follows:

Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation that is based upon a publication concerning a public figure or a matter of public concern unless the domestic court determines that the foreign judgment is consistent with the First Amendment to the Constitution of the United States.⁸⁸

This ratification will notably give the United States' courts the power to refuse to enforce damages against defendants who are faced with libel suits similar to the defendant in *Ehrenfeld*. However, the bill only concerns public figures and matters of public concern. Therefore, defendants cannot use this proposed legislation to escape foreign libel judgments where the plaintiff is a private figure. This does not warrant much discussion because it is an improbable or rare circumstance that would lead to such a case. Unlike public figures, private libel claimants usually find their allegedly defamatory statements published locally rather than abroad. The situations that would allow a private libel plaintiff to sue abroad are too remote to warrant discussion in this comment.

However, the more tangible problem with the Libel Tourism bill lies in the fact that it has not yet been passed and the potential for presidential veto (if and when it is ratified by the Senate) has risen since January 20, 2009 and after President Barack Obama

⁸⁷ *Id.* § 1(a).

⁸⁸ *Id.* § 2.

has taken office. President Obama was widely criticized during his presidential campaign for implementing a police force in Missouri during the final days leading up to the 2008 Presidential Election. This police force was said to be ordered to “threaten libel prosecutions against Obama’s political opposition” if anyone was to speak out against Obama in a misleading or false way.⁸⁹ Free speech activists and many of the conservative Obama opposition point out that free speech and free press is the cornerstone of politics and freedom.⁹⁰ Open public debate is to be encouraged, even if it calls for public questioning of candidates running for the most powerful position in the country. If libel suits are used to threaten any political opposition that may question a candidate’s views and background, then free speech will be stifled. Hence, there is a good possibility that if the President holds reputation and conformity in higher regard than free speech, the Libel Tourism bill may never leave the President’s desk.

As the law stands today, the individual states, most of which have adopted the Uniform Foreign-Country Money Judgments Recognition Act, have the discretion to enforce a foreign libel judgment based on the policy consideration exception in the Act, *supra*. Therefore, the Libel Tourism bill only creates a national recognition of an existing law, which is already in force in various individual states.⁹¹ This bill identifies “the principles that guide recognition and enforcement of foreign country judgments and attempts to create a national solution in the form of a coherent federal statute.”⁹² The American Law Institute and other legal scholars feel that this national recognition is necessary and more “precise” than the already existing state laws.⁹³ In effect, however, it stands almost identical to already existing state laws that address the enforcement of foreign judgments. Therefore, while

⁸⁹ Andrew C. McCarthy, *Obama’s Assault on the First Amendment*, NAT’L REV. ONLINE, Oct. 1, 2008, <http://article.nationalreview.com/?q=M2MxMWJINzcwMDU3ZTJkYjRmZjU3N2U0OGNlZmE1ZDg=&w=MA==>. (McCarthy admonishes Obama – “The Prophet of Change is only to be admired, not questioned.”).

⁹⁰ *Id.*

⁹¹ *Libel Tourism: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 6146 (2009) (statement of Linda J. Silberman, Martin Lipton Professor of Law, N.Y.U.).

⁹² *Id.*

⁹³ *Id.*

national awareness is extremely important and provides a step in the right direction, national legislation is still lacking a cohesive element that would adequately combat libel tourism.

B. Proposed Legislation is Lacking: What Needs to be Done

1. The Greatest Overlooked Concern of Libel Tourism: Terrorism

While the words tourism and terrorism look and sound extremely similar, it was no mistake when New York named their anti-libel tourism act the “Libel Terrorism Bill.” Terrorism has its long claws deeply embedded into free speech. Most of the Middle East does not recognize freedom of expression, and radical Islamist-associated terrorist groups, like al Qaeda, will try to quell the disturbances resulting from free speech concerning their organizations. There are many wealthy Middle Eastern businessmen who share the same fundamentalist views with the same types of terrorists, or even the same terrorists, that attacked the United States on September 11, 2001⁹⁴. For example, Ehrenfeld tried to expose those who financially fund terrorism, such as Saudi businessman, Mahfouz. Mahfouz once ran the largest bank in Saudi Arabia and had connections with the royal family of Saudi Arabia. “There is no freedom of expression in Saudi Arabia, so it is the duty of others to expose what is happening. With the help of British libel lawyers, Mr. Mahfouz has launched thirty-three suits against those who are investigating this important area of public concern.”⁹⁵

When power and money meet terror and hate, the result is a catastrophe, as evidenced by the September 11, 2001 attack. One of the most patriotic acts occurs when a journalist does his job, “a job that is defined and defended by the First Amendment . . . posing questions, raising concerns, exposing mistakes, and voicing dissent are . . . essential to the national interest”⁹⁶ It is difficult to

⁹⁴ Dore Gold, *The Saudi State and Terrorism*, MIDDLE E. FORUM, Apr. 4, 2003, <http://www.meforum.org/537/the-saudi-state-and-terrorism>.

⁹⁵ Dominic Kennedy, *MPs Accuse Courts of Allowing Libel Tourism; Britain 'Being Used for Soviet-style Censorship'*, TIMES (London), Dec. 18, 2008, at 27, available at <http://business.timesonline.co.uk/tol/business/law/article5362364.ece>.

⁹⁶ Steven V. Roberts, *Patriot and Professionals: Journalists as Responsible Citizens*, in RIGHTS VS. PUBLIC SAFETY AFTER 9/11; AMERICA IN THE AGE OF

disagree that an essential national and international interest is to uncover and combat terrorism. One way to accomplish this end is to cut off the financial support to groups such as al Qaeda, Hamas, and the Taliban. This starts with indentifying the wealthy and powerful men and women behind terrorist organizations. Without funding, terrorism would cease to exist. If the money sources are investigated, unveiled, and stopped, the likelihood of terrorist attacks would decrease.

English courts have been criticized by their own law enforcement agencies “of using ‘Soviet-style’ English libel laws to help the rich and powerful to hide their secrets.”⁹⁷ An example is “the British-Iraqi businessman Nadhmi Auchi, who has a conviction for corruption in France and is linked to a fundraiser for Barack Obama, was accused of using the [English libel] law to stifle debate.”⁹⁸ Like *Mahfouz*, this is just another instance of a Saudi official trying to silence existing reports of his actions, while probably still funding terrorism.⁹⁹ “The chilling effect of international libel suits is not limited to the publication of information, but could also extend further to the investigative process. The effect of these judgments could discourage other scholars from investigating terrorism funding or mentioning such individuals as Mr. Mahfouz by name.”¹⁰⁰ “The media is a part of the intelligence process, and they can only fulfill their role as investigators with the support of the government and the law.”¹⁰¹

2. United States Jurisdiction to Invalidate Foreign Libel Judgments

Some may argue that libel defendant Rachel Ehrenfeld never suffered any actual harm because Mahfouz never tried to enforce his English judgment in the United States. However, more is to be said of the power to invalidate judgments, even in a similar situation such as Ehrenfeld’s. The new Libel Tourism bill (awaiting ratification by the Senate) appears to provide the answer

TERRORISM 77 (Amitai Etzioni & Jason H. Marsh eds., 2003).

⁹⁷ *Id.* at 77.

⁹⁸ *Id.*

⁹⁹ Beauchamp, *supra* note 3, at 3076.

¹⁰⁰ Maly, *supra* note 15, at 934.

¹⁰¹ *Id.* at 935 (citing GEOFFREY ROBERTSON & ANDREW NICOL, *MEDIA LAW* 35 (4th ed. 2002)).

to all problems resulting from libel tourism. If the foreign judgment is not consistent with the First Amendment, then it will not be enforced in the United States. However, there remains an unaddressed problem within the Libel Tourism bill because the bill does not speak of invalidating judgments, even when said judgments are not sought to be enforced in the United States.

At first glance, the power to invalidate foreign judgments may seem like overreaching, but libel tourism will only be fully addressed when United States courts are given the jurisdiction to hear claims for declaratory relief seeking to invalidate foreign judgments. Even if a foreign judgment is not sought to be enforced in the United States, it does not necessarily mean that the chilling effects on free speech do not remain. In turn, because Ehrenfeld's book was essentially "blacklisted" from England, there is a bleak possibility for future publications by the same publisher. "In her complaint filed in the Southern District of New York, Dr. Ehrenfeld claimed that '[i]f this action is dismissed, writers will be afraid to do their jobs properly and aggressively, and the search for the truth behind issues of the highest and most urgent public interest will be compromised.'"¹⁰² "In the amicus curiae brief submitted on behalf of Dr. Ehrenfeld to the New York court, several members of the media and international communities jointly contended that[,] should the British judgment be allowed to stand, the impact would be felt by numerous authors and publishers alike by giving effect and credibility to the tactics of 'libel tourists' such as Mahfouz."¹⁰³ Therefore, it appears that the effects of an unenforced judgment may be great. Such judgments serve as deterrents to all other journalists from writing freely. And for those that continue to write, the publishers are going to be circumspect of any material they publish that can subject them to a lawsuit. For example, Cambridge University Press decided to scrap publishing plans for a book about jihad and radical Islam, because of fear of a libel action in English courts, "which seem at the moment to side with those who finance extremism rather than those who seek to curb it."¹⁰⁴

¹⁰² Maly, *supra* note 15, at 934 (referencing the Memorandum of Law submitted to the New York Supreme Court on behalf of Ehrenfeld).

¹⁰³ *Id.* (quoting Brief for Amazon.com et al. as Amici Curiae Supporting Plaintiffs, *Ehrenfeld v. Mahfouz*, No. 04-CV-09641, 2005 WL 696769 (S.D.N.Y. Mar. 23, 2005)).

¹⁰⁴ Kennedy, *supra* note 9.

England is not a remote country, and many publishers have offices and investments in England. Therefore, they will not risk having their assets attached in a libel suit in order to publish material that will likely invite claims for libel. In effect, the fear of libel suits not only chills free speech, but also freezes freedom of speech in its entirety.

Personal jurisdiction, as espoused by *International Shoe* and its progeny, is not sufficient in matters concerning libel tourism. If the courts are unable to establish that the defendant at issue maintained minimum contacts with the state, then the court will dismiss the case for lack of personal jurisdiction. Although it could be argued that Mahfouz's ownership of condominiums in New York City constituted minimum contacts to warrant jurisdiction, the Court disagreed. This is explicitly why the Libel Tourism bill, currently being reviewed by the Senate, is incomplete and needs to include a long arm jurisdictional element, as the New York's Libel Terrorism Protection Act does. The New York statute states:

The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment.¹⁰⁵

This exemplifies the precise language needed yet currently lacking in the bill pending in the Senate. Therefore, personal jurisdiction will be effectively asserted over the person who holds a libel judgment if the court has personal jurisdiction over the party against whom the judgment is rendered. There is nothing unjust in declaring that if libel plaintiffs want to sue and obtain a judgment against an American defendant, then such plaintiffs must be prepared to have an American court review the judgment. By expanding the reach to obtain personal jurisdiction, chilled speech will begin to thaw and foreign judgments repugnant to our constitutionally protected rights will be rightfully invalidated.

Recently, other advocates for jurisdictional changes on a federal level to combat libel tourism believe that the legislation must be narrow and not lean toward a broad long-arm sweep. Such

¹⁰⁵ N.Y. C.P.L.R. § 302(d) (McKinney 2008).

arguments are based upon the concern for overreaching and negative impacts on foreign relations. Todd W. Moore of Fordham Law School recently advocated that Congress should start with a statute similar to New York's Libel Terrorism bill and add the "effects test" to the jurisdictional requirement. Moore argues for a seemingly "long-arm type" of legislation, and adds a minimum contacts test. The "effects test," espoused in *Calder v. Jones*, is essentially the minimum contacts test for defamation suits.¹⁰⁶ It provides that when a defamation action is brought, the work had to not only be published in the state to have jurisdiction, but also required that the harm from the allegedly defamatory statements must have had its primary effect in that state.¹⁰⁷ However, adding the effects test to federal or state long-arm statutes simply undercuts the effectiveness of a long-arm statute. The purpose of such a statute is to "extend" jurisdictional reach to grab a defendant who otherwise would not be subject to personal jurisdiction under the minimum contacts test.

Furthermore, Mr. Moore believes that review of libel foreign judgments should be limited to assessing enforcement only and should never invalidate such a judgment.¹⁰⁸ He defends this position by stating that:

Absent an international consensus on jurisdiction regarding unenforced foreign defamation judgments, the most the United States can do is protect its citizens within its own borders without unduly interfering with foreign sovereignties. Given the legal variations between countries, the different standards used to enforce judgments from other nations, and the resulting difficulties in predicting foreign countries' enforcement of U.S. laws, the most a U.S. court system can do to cull the reluctance to publish facilitated by foreign lawsuits is grant U.S. parties the power to vindicate their domestic rights.¹⁰⁹

Yet, to fully vindicate one's domestic rights, invalidation of such a foreign libel judgment must be an option for a United States court. Rachel Ehrenfeld experienced the chilling effects on her

¹⁰⁶ *Calder v. Jones*, 465 U.S. 783 (1984).

¹⁰⁷ Todd W. Moore, *Untying Our Hands: The Case for Uniform Personal Jurisdiction over "Libel Tourists"*, 77 *FORDHAM L. REV.* 3207, 3225 (2009).

¹⁰⁸ *Id.* at 3247-48.

¹⁰⁹ *Id.* at 3248-49.

work when United Kingdom publishers recalled her book. Although Mahfouz never tried to enforce his judgment here in the United States, his judgment placed enough fear on publishers abroad to make them cut into Ehrenfeld's free expression and "wallet." As discussed in the onset of subsection III.B.2, *supra*, without the power to invalidate a repugnant foreign libel judgment, the court will not effectively support the First Amendment and will not limit those who attempt to stifle free speech.

CONCLUSION

"If the Freedom of Speech is taken away, then dumb and silent we may be led, like sheep to the slaughter."¹¹⁰ Our founding fathers knew that the freedom to express oneself, the freedom to promote debate, and stir emotion and thought in others, were the cornerstones of a flourishing democratic society. Furthermore, the old adage that "the pen is mightier than the sword" still holds weight in a society where corruption, hate, greed, and clear motives to destroy others pervade many of the world's rich and powerful figures. In many cases, the only way to counter such grave forces is by revealing the truth to the public. In no instance shall false representation about a person be tolerated, and libel suits are warranted when falsity can be shown. However, libel tourism protects primarily those who have something to hide; those who would likely fail in a libel suit in the United States. Congress is on the right path to protect United States citizens with the new Libel Tourism bill. United States courts, however, need to have broad long-arm jurisdiction to review all libel judgments attained against individual United States citizens abroad. Even if a foreign libel plaintiff never tries to enforce his judgment here in the States, the chilling effects on speech still remain. Therefore, courts require this jurisdictional power to invalidate libel judgments that would have never been rendered in a United States court. Courts need the applicable power in order to convey to the world that the United States strictly enforces First Amendment rights, and will not allow these rights to be abridged by international forum shopping.

¹¹⁰ Thinkexist.com, George Washington Quotes, http://thinkexist.com/quotation/if_the_freedom_of_speech_is_taken_away_then_dumb/323858.html (last visited Feb. 8, 2010).