An End Run Around the First Amendment: 'Libel Tourists' Take Aim Overseas

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In the throes of the American Civil Rights movement as Southern blacks flexed their political might against segregation, a city commissioner in Alabama sued the country's most prominent newspaper, *The New York Times*. L.B. Sullivan's libel suit sought to silence the implication of his critics that he was part of a racist Southern oligarchy responsible for the violent suppression of black protests in Montgomery. It failed, and an uniquely American brand of free speech was born.

In deciding that landmark free-speech case, *New York Times v. Sullivan*,[1] the U.S. Supreme Court noted how libel suits such as Sullivan's threatened "the very existence of an American press virile enough to publish unpopular views on public affairs."

Throughout modern American history, linking a person to an unpopular group has often led to a rash of libel suits against the press. It happened with communism in the 1940s, organized crime in the 1970s, and homosexuality in the 1980s under the stigmatizing glare of the AIDS epidemic. Yet in the more than four decades since the *New York Times* decision, American libel plaintiffs have found it acutely difficult to muzzle the press.

But these free speech protections apply only on American soil, which means they cannot be used against the latest wave of libel litigants who bring suits overseas – foreigners accused of terrorism ties. A confluence of events has inspired this most recent attempt to end-run the First-Amendment and chill speech in America, including the attacks of Sept. 11, 2001, the international distribution of journalism over the Internet, and stark differences in defamation laws between the United States and the rest of the world. England has become the forum of choice for those seeking to repair a besmirched reputation, injecting even more life into this

[1] 376 U.S. 254 (1964) (holding that libel actions brought by public officials against critics of official conduct are limited to instances where "actual malice" can be proven).

latest incarnation of libel litigant. Because of policy concerns deeply rooted in English history, that country observes laws that tend to protect reputation over free speech.

Together, these factors have produced the "libel tourist," a forum shopper who does not reside in England but who is able to bring a libel action in courts across the pond based on often-tenuous business, family, or other ties creating a reputation there. These so-called libel tourists will use the integrity and publicity that comes from an overseas judgment as proof that their names were unjustly smeared, allowing them to cast doubt on the credibility of American journalists.

"They give the patina of legitimacy from a legal judgment in the U.K., one of the oldest democracies, that American journalists are slamming the subjects of their articles and books," said Rory Lancman,[2] an assemblyman in the New York state legislature who introduced the first legislation to combat the problem. "They go essentially into a kangaroo court for libel purposes, get a default judgment, and waive it around."

The archetype of the libel tourist is the wealthy Saudi businessman Sheikh Khalid bin Mahfouz, whose real or threatened suits in England have forced numerous authors, news media outlets and publishers (many from America) to apologize, print corrections, pay damages, or even pulp books that have linked him to terror since 2002. Highly-publicized litigation on both sides of the Atlantic between he and American terror author Rachel Ehrenfeld led to a New York state law to deal with libel tourists and three similar bills introduced before the U.S. Congress this spring.

Numerous factors help explain the influence of libel tourism on American journalism, including the history of the tort of defamation, the differences in American and English views of free speech, and a comparison of the modern defamation law in those countries. These details

[2] Interviewed July 23, 2008.

demonstrate how the Internet has become a conduit for a collision of ideologies between two nations separated by nearly 3,500 miles of ocean. On the one side of the Atlantic, the press enjoys broad discretion to pursue journalistic ends with little fear of libel. On the other side, free speech concerns take second seat to those involving reputation, making England a friendly forum for libel plaintiffs.

I. HOW THE HISTORY OF DEFAMATION GAVE RISE TO LIBEL TOURISM

Defamation is an intentional tort – a wrongful act – that injures another person's reputation. A defamatory statement is one that tends to harm the reputation of another by lowering him in the estimation of the community or by deterring others from dealing with him.[3] Defamation comes in two forms: slander, if the statement is spoken; libel, if the statement is written.

A. What is the value of a good name?

At its core, the fundamental question underlying the law of defamation seems simple: What is the value of one's good name? Perhaps Iago summed it up neatly when he said that a good name is the jewel of the soul "Who steals my purse steals trash; . . . But he that filches from me my good name/Robs me of that which not enriches him/And makes me poor indeed."[4] More than two-and-a-half centuries after William Shakespeare penned those words, American lawyer Van Vechten Veeder[5] suggested in his seminal article on defamation[6] that no other law, systematically formulated, may reflect a society's history better than the law defamation.[7]

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[3] RESTATEMENT (SECOND) OF TORTS § 559 (1977).
[4] WILLIAM SHAKESPEARE, OTHELLO THE MOOR OF VENICE, Act III, sc. 3 (Gerald Eades Bentley ed., Penguin Books 1970) (1622).
[5] Van Vechten Veeder – biography, http://www.fjc.gov/servlet/tGetInfo?jid=2457.
[6] Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903) (discussing the origins of the tort of defamation).
[7] Veeder, *supra* note 5, at 546. ("Since the law of defamation professes to protect personal character and public institutions from destructive attacks, without sacrificing freedom of thought and the benefits of public discussion,

The origins of the law of defamation date back to the beginning of organized society.[8] "In medieval England, as in other cultures, duels, armed raids and other violent retaliation were regarded as natural, honorable responses to defamation."[9] Long after law developed to provide justice to aggrieved reputations, duels remained an honorable means to settle the score. But duels and blood feuds in the early Middle Ages tore apart nascent societies by causing instability, and there arose a need to mend rifts peacefully.

Historically, attacks on reputation in England, to which the United States owes its legal traditions, were dealt with in three ways during the middle ages and beyond. First, spiritual courts treated defamation as a sin.[10] "[I]t's broadest claim was the correction of the sinner for the soul's health."[11] Second, feudal lords resolved defamation controversies for their subjects in local courts, but these courts contributed little to later defamation law because, in part, their decisions varied widely.[12] Finally, the king's court criminalized political or seditious statements against aristocrats. This final means would have the most dramatic impact on future defamation law.

B. In England, "Loose Talk was Noose Talk"

In 1275, the statute *De Scandalum Magnatum* made it a crime to disparage the king, his lords, and other high officials.[13] The infamous Star Chamber enforced the law with a heavy hand, and it eventually assumed jurisdiction of ordinary defamation as well as speech attacking

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the estimate formed of the relative importance of these objects, and the degree of success attained in reconciling them, would be an admirable measure of the culture, liberality, and practical ability of each age").

[8] Veeder, *supra* note 5, at 548.

[9] Bruce W. Sanford, LIBEL AND PRIVACY § 2.1 at 2.1 (2d ed. 1991 & Supp. 1996-1).

[10] Veeder, *supra* note 5, at 549-50.

[11] Veeder at 550.

[12] *Id.*

[13] The original statute provided: "Whereasmuch as there have been aforetimes found in the country devisers of tales . . . whereby discord or occasion of discord hath arisen between the king and his people or great men of this realm . . . it is commanded that none be so hardy as to tell or publish any false news or tales whereby discord or occasion of discord or slander may brow between the king and his people or the great men of the realm; he that doth so shall be taken and kept in prison until he hath brought him into the court which was first author of the tale." Veeder, *supra* note 5, at 553 (citing 3 Edward I, c. 34; Statutes at Large, I, 97).

the government and its supporters.[14]

The introduction of the printing press in England by William Caxton in 1476 led to the mass distribution of written ideas and, consequently, to a headache for the crown.[15] The written word, once a tool available only to the learned, experienced a wide distribution. But press licensing and other means of censorship could not entirely contain the problem, and the Star Chamber stepped in. In the early 1600s, it decided the case *De Libellis Famosis*, which became the formal starting point of the English law of libel.[16] For those libels made in public, truth was *not* a defense because the harm arose out of the public manner in which the accusation was made.[17] To the Star Chamber, loose talk was noose talk – the crown imposed severe punishment for public libels, many distributed anonymously, in hopes of deterring them. The Star Chamber was abolished in 1640, but censorship remained largely the same due to licensing systems, judges' predispositions, and additional statutes that carried on the Star Chamber's traditions.

C. Free Speech in the Colonies Allows Truth as a Defense

It was this English notion of criminalizing political or seditious libel that was on the minds of those who drafted the U.S. Constitution. "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government," wrote Supreme Court Justice Louis Brandeis in his concurring opinion for *Whitney v. California*.[18] Of course, it was not until *The New York Times* case that this reasoning cemented the American law of defamation. The outcome of that case was the result of centuries of hard thought on the notion of free speech in a liberal democracy.

In the 1720s, the political climate in colonial America began to form hardened views

[14] Veeder, *supra* note 5, at 555.
[15] *Id.* at 562.
[16] *Id.* at 566.
[17] *Id.*
[18] *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (upholding the conviction of a person who had engaged in speech that violated state Criminal Syndicalism Act.)

against the English tradition of criminalizing speech against the government. Critical in fanning this public sentiment were the views of "Cato," whose widely read essays described free speech as "the Right of every Man . . ."[19] In following with the English tradition, the truth of a defamatory statement made publicly was not a defense. However, there was an air of change in 1734 after the case of John Peter Zenger, the publisher of the *New York Weekly Journal*.

Zenger's paper published articles critical of New York's colonial governor, William Cosby, after he replaced the chief justice of New York for deciding a lawsuit against the governor.[20] The governor sued Zenger for printing seditious libels "tending to raise factions and tumults among the people of the province, inflaming their minds with contempt of His Majesty's government, and greatly disturbing the peace thereof."[21] Zenger's lawyer in Philadelphia, Andrew Hamilton, argued that Zenger should have the liberty to write the truth, and the jury acquitted.[22] The notion of truth as a defense to libel helped redefine the law of defamation in America and laid the foundation for future press freedoms and, by implication, the law of defamation.

D. Free Speech Withstands Trial and Error in a New Country

In the coming years, early Americans would ultimately reject longstanding English notions that suppressed freedom of expression. After the adoption of the U.S. Constitution and the Bill of Rights, the Sedition Act of 1798 was the first historical event to "crystallize a national awareness of the central meaning of the First Amendment." [23] The law made it a crime to write

[19] T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FOURTH ESTATE: THE LAW OF MASS MEDIA 27 (9th ed. 2005). The views of Cato were published in Benjamin Franklin's *Pennsylvania Gazette* as well as the *New York Weekly Journal.*
[20] The Historical Society of the Courts of the State of New York, http://www.courts.state.ny.us/history/zenger.htm
[21] *Id.* citing Bench Warrant for Arrest of John Peter Zenger, Nov. 2, 1734.
[22] CARTER ET AL., *supra* note 19, at 31.
[23] *Sullivan,* 376 U.S. 254, 273 (1964).

or speak anything "false, scandalous and malicious" against the United States government.[24] The Act was attacked as unconstitutional even though it incorporated truth as a defense to any charges. It expired by its own terms in 1801, but not before it had crystallized the idea that discussion of public matters was guaranteed by the Constitution and that neither good-faith errors nor libels could overcome this right.[25]

The experience with a seditious libel law later became instructional to American judges as they developed free-speech principles. The discussion has been rich and deep, including Justice Brandeis' classic formulation of the principle of free expression in public matters that comes from *Whitney v. California*, and other justices' words are no less defining. "[T]he ultimate good desired is better reached by free trade of ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ." wrote Supreme Court Justice Oliver Wendell Holmes, Jr.[26] "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all institutions." said Supreme Court Justice Hugo Black.[27] These powerful ideas laid the foundation for the *New York Times* case, widened the divide that set America apart from England in its handling of libels against the press.

II. MODERN ENGLISH AND AMERICAN DEFAMATION LAW PROVIDE FERTILE GROUND FOR LIBEL TOURISTS

Scholars have written volumes about defamation in both countries, and this report does not suppose to be a comprehensive restatement of each nation's laws. Further, the focus here is on defamation as it pertains to news media who libel public officials or figures; in the United

[24] *Id.* at 273-74.
[25] *See id.* at 273.
[26] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (upholding conviction under Espionage Act of 1917 using "clear and present danger" test).
[27] *Bridges v. California*, 314 U.S. 252, 270 (1941) (contempt of court convictions for newspaper editorials and telegram discussing pending court cases could not pass "clear and present danger" test and as such violated U.S. Constitution).

States, at least, a different set of rules apply to such suits involving strictly private individuals. The key, then, is to understand that differences in defamation laws and policy in the United States and England have made libel tourism a conundrum for American journalists.

The fact that the First Amendment's robust speech protections do not legally extend beyond the political boundaries of this nation is a simple yet surprising revelation for some journalists. Another stark fact is that that most of the rest of the world, including Australia, New Zealand, Canada, and England, have rejected the American tradition of speech protection. "Believing that the American model places far too much weight on freedom of the press side of the balance, and far too little on the reputational side, the rest of even the developed democratic world has been satisfied to leave largely in place defamation remedies and standards" contrary to American free-speech principles, wrote First Amendment scholar and Harvard professor Frederick Schauer in his essay, "*The Exceptional First Amendment*."[28]

Still, the idea that some speech performs a larger function in society that is worthy of protection from normal defamation liability is an underlying theme in both America and England. This was the central reasoning in *New York Times* to subject all defamation actions to scrutiny under the First Amendment. "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ." wrote Justice William J. Brennan.[29] In England, the nation's highest court, the House of Lords, discussed this very principle in a recent case: "The interest is that of the public in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed," the court said in *Jameel*

[28] Frederick Schauer, "The Exceptional First Amendment," KSG Working Paper No. RWP05-021 (Feb. 2005), *available at* http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP05-021.
[29] 376 U.S. 254, 270.

v. Wall Street Journal Europe.[30] Nevertheless, the countries do not agree on how to balance freedom of speech against a person's interest in protecting his reputation.

The following sections explain the differences in English and American free speech laws and policies that have allowed libel tourists to exploit English defamation law.

A. The Burden of Proof Shifts

Perhaps the most notable difference between the libel laws in England and America lies in the burdens placed on the parties in litigation. In the United States, a *plaintiff* must prove that the alleged libel is false. In England, the news media *defendant* must prove that the alleged libel is true. This burden of proving truth is an anathema for American journalists because it ignores the "he said, she said" nature of the business. Journalism, especially the investigative type, relies on information from sources that would not be considered reliable evidence in a court of law, although such information is certainly relevant to the public.

B. Errors Give Rise to Liability

American law allows for inevitable journalistic errors in order to give freedom of expression the "breathing space" it needs.[31] The idea is to allow most speech, including some false statements, to be vetted in the "marketplace of ideas."[32] Meanwhile, English courts follow laws that seem to deter such errors, believing there is little value to allowing them into the debate on public issues.

American law shields the news media from liability for good-faith errors with the "actual malice" standard where public officials are involved.[33] Under this standard, a libel plaintiff will prevail only if he can show that the news media published a defamatory statement knowing it

[30] [2006] UKHL 44, [2007] 1 A.C. 359, [134] (Eng.) (quoting *Loutchansky v. The Times Newspapers Ltd.*, [2001] EWCA Civ. 1805 (Eng.)).
[31] *New York Times*, 376 U.S. 254, 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))
[32] *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes and Brandeis, JJ., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").
[33] *Id.* at 283.

was false or with reckless disregard for the truth.[34] This actual malice standard means that the news media's conduct must go well beyond mere negligence – failure to use reasonable care – in ensuring that news reports are free from inaccurate and defamatory statements.

In England, the news media can be held liable under a lesser standard resembling negligence if it does not take reasonable steps to verify the information it publishes.[35] English judges have cast serious doubts as to the value of allowing mistruths into the public dialog. "No public interest is served by publishing or communicating false ideas," Lord Bingham wrote in *Jameel*.[36] Thus, English law seems geared toward preventing most mistakes, even if censorship is a byproduct. This doctrine was rejected by American courts. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so," Justice Brennan said in *New York Times.*[37]

C. Content is "Published" in Differing Locations

In America, a newspaper that distributes a libelous statement generally can only be sued for libel once, regardless of the number of people who read the statement and only within a short

[34] *Id.*; *see also St. Amant v. Thompson*, 390 U.S. 727, 730 (1968) (the "reckless disregard for truth" component of "actual malice" means "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication").

[35] This negligence standard for evaluating "responsible journalism" applies when the defense of qualified privilege is invoked. *Jameel*, [2006] UKHL 44, [2007] 1 A.C. 359, [32] ("there is no duty to publish and the public has no interest to read material which the publisher has not taken reasonable steps to verify"). In determining whether the qualified privilege applies, English courts will analyze whether: 1) the publication concerned a matter of public interest; 2) the defamatory statement was justifiable; and 3) the steps taken to gather and publish the information were responsible and fair. *Id.* at [48]-[53]. "The media bears a duty to inform the public at large about significant social issues and . . . the public possesses a valid interest in receiving this information such that statements published by the media in this context are eligible for the qualified privilege in libel law." Martin Roger Scordato, *The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law*, 40 CONN. L. R. 174 (Nov. 2007) (citing *Reynolds v. Times Newspaper Ltd.*, [2001 2 A.C. 127, 195 (H.L.) (Eng.)).

[36] [2006] UKHL 44, [2007] 1 A.C. 359, [32].

[37] *New York Times*, 376 U.S. at 279.

timeframe beginning when the statement is first disseminated.[38] This is called the "single publication rule."[39] Under the rule, a libelous statement is considered "published" in the place where it was created.

Meanwhile, in England, a newspaper that distributes a libelous statement can be sued wherever – and, for that matter, virtually *when*ever – the libelous statement is read and damages a reputation.[40] Under this "multiple publication rule," a libelous statement is "published" where and when it is read. From a journalist's point of view, this rule has led to some frightening outcomes. For example, in *Duke of Brunswick v. Harmer*[41] the Duke sued a newspaper after his servants bought two back issues containing a defamatory statement.[42] The newspaper, *The Weekly Dispatch,* argued the action was barred because the editions were published *17 years before*.[43] But the court held that the delivery of the two copies constituted two new "publications."[44] More recent English courts deliberating on the *Harmer* rule have found it "firmly entrenched" [45] in the country's law – so much so, in fact, that English courts have applied it to publications on the Internet.[46]

D. Addressing Cyberlibel

Because the Internet spreads huge amounts of information with little deference to political boundaries, the differences between American and English law and policy toward the medium are perhaps most critical to understanding libel tourism. The Internet's vast ability to disseminate ideas has led to varying treatment of defamatory content in cyberspace. Much like it

[38] *See* RESTATEMENT (SECOND) OF TORTS §577A at cmt. c.
[39] RESTATEMENT (SECOND) OF TORTS §577A(2).
[40] *Loutchansky*, [2001] EWCA Civ 1805 at [57].
[41] [1849] 14 Q.B. 185 (Eng.).
[42] *Loutchansky*, at [57].
[43] *Id.*
[44] *Id.*
[45] *Id.* at [62].
[46] *Id.* at [73]-[76].

protects other news mediums, American law largely insulates Internet content providers from libel liability. English law, to the contrary, does not protect them as soundly.

The American approach rests on the general principle that the Internet's great potential for distributing information should be fostered to invigorate the "marketplace of ideas." To further this goal, the U.S. Congress passed § 230 of the Communications Decency Act in 1996. The Act contains law and policy that protects Internet Service Providers (ISPs) from liability.[47] Courts have interpreted § 230 as providing broad immunity to ISPs for content posted by third parties, even when those ISPs knew or had reason to know that there was defamatory content present.[48] In providing this wide shield, American courts seem to have abandoned, at least for cyber libels, the traditional defamation rule that one who publishes a defamatory statement is subject to the same liability as the author of the defamatory statement.[49]

English law does not shield ISPs so rigorously. The English Defamation Act of 1996 provides a defense to ISPs.[50] However, unlike in America, the defense generally fails if the ISP does not use reasonable care when publishing of defamatory statements on their sites.[51] Thus, one English court held that the defense did not apply when an ISP knew of defamatory content stored on its server and, as such, contributed to its publication by not removing it upon request.[52]

E. Jurisdiction over Internet Content Varies

Courts in America and abroad have sided differently on the question of whether the

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[47] 47 U.S.C. § 230.

[48] *Zeran v. America Online, Inc.*, 129 F. 3d 327 (4th Cir. 1997) (Internet service provider AOL not liable for third-party postings that advertise offensive merchandise even though AOL aware of postings); *Blumenthal v. Drudge,* 992 F. Supp. 44 (D.D.C. 1998) (Internet service provider AOL not liable for allegedly defamatory content posted on electronic publication Drudge Report available on AOL, even though AOL could have removed allegedly defamatory content).

[49] RESTATEMENT (SECOND) OF TORTS §581(1), cmt. c.

[50] Defamation Act, 1996, sched. 1.

[51] *Id*. Section 1(1)(a)-(c) of the Act states: "In defamation proceedings a person has a defense if he shows that: (a) he was not the author, editor or publisher of the statement complained of, (b) he took reasonable care in relation to its publication *and* (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement." (emphasis added).

[52] *Godfrey v. Demon Internet Ltd.*, [1999] EWHC Q.B. 244 (Eng.).

ability to download a libelous statement via the Internet is enough to create jurisdiction where the statement is viewed. In America, the most recent court decisions have required more than the mere ability to download Internet content in a particular location to create jurisdiction there. Generally, these cases require that the libel defendant know where the plaintiff's reputation will be harmed and that the defendant directed his conduct to persons in that location.[53] These holdings are supported by concerns of due process: Would it be fair to force a party to be subject to litigation where they do not at least have minimum contacts?

Foreign courts have taken a different approach. In 2002, the highest court in Australia found that a news article about an Australian businessman, written in the United States and published in the *Wall Street Journal Online* and *Barron's Online*, could be the subject of a defamation action in Australia.[54] Instead of asking whether there were minimum contacts, the Australian court focused on where the defamatory content was "published." Dow Jones argued that the content was published in New Jersey where it was uploaded onto the Internet, a rationale that conformed with the American rule. However, the Australian court applied traditional rules of defamation law and decided that publication occurs where the content is read and damage to reputation occurs.

The *Gutnick* decision fueled criticism worldwide. It "could expose publishers to libel laws anywhere in the world without regard to domestic constitutional protections," read a business column in the Canadian newspaper *The Globe and Mail*. "The decision makes Internet

[53] *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) (Internet content must be "expressly targeted at or directed to the forum state" to support jurisdiction, and that jurisdiction would be proper only if the "newspapers manifested an intent to direct their website content" to that forum state); *see also Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) (defendant must know where the plaintiff's reputation will be harmed and the article or its sources must connect to that location for jurisdiction to be proper in Internet defamation case); *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2002) (no personal jurisdiction over German media company because "knowledge that sufficient harm would be suffered . . . is conspicuously lacking").

[54] *Dow Jones & Co. v. Gutnick*, [2002] H.C.A. 56 (Austl.).

libel law a race to the lowest level of protection of free speech."[55] One predicted consequence was that publishers would restrict their content to limit liability. "As a result (of *Gutnick*), publishers are now subject to new and unforeseen liabilities and are likely to begin constructing 'virtual borders' around their Internet presence to avoid exposure to restrictive foreign defamation laws."[56]

The legacy of *Gutnick* is similarly predictable. Because it was based on defamation law traditions from common law countries, it is foreseeable that other such nations will view its reasoning as persuasive. The English Court of Appeal looked favorably on *Gutnick's* reasoning in a 2004 case involving American boxing promoter Don King.[57] In that case, the Court found England had jurisdiction to hear King's libel suit against a New York lawyer because King had a reputation in England, a hotbed of boxing, and because the defamatory statements posted on two boxing websites were downloaded there.[58]

These differences in law and policy have laid the groundwork for libel tourism. The historic underpinnings of defamation law and the English willingness to favor reputation interests over those of free speech have made her courts the favored venues of libel forum shoppers.

III. THE INEVITABLE RISE OF LIBEL TOURISM

Non-resident litigants in England have been capitalizing on that country's libel laws for

[55] Vern Krishna, *Internet Ruling by Court a Threat to Free Speech,* The Globe and Mail (Canada), Jan. 13, 2003, at B10; *see also* Editorial, *A Blow to Online Freedom*, N.Y.Times, Dec. 11, 2002, at A34 ("To subject distant providers of online content to sanctions in countries intent on curbing free speech – or even to 190 different libel laws – is to undermine the Internet's viability.").
[56] Aaron Warshaw, Note, *Uncertainty From Abroad: Rome II and the Choice of Law for Defamation Claims*, 32 BROOK. J. INT'L L. 269, 272 (2006).
[57] *King v. Burstein*, [2004] EWCA Civ. 1329 (Eng.).
[58] *Id.*

years.[59] Then in the mid 1990s, certain London-based law firms began taking defamation cases on a contingency basis,[60] an indication that the pro-reputation laws and policies were creating a burgeoning libel practice among plaintiffs' lawyers. Reports from the news media and industry newsletters have perpetuated the London nickname "A Town Called Sue." Over the decades, prime ministers and movie stars are among the non-English plaintiffs who have attained favorable judgments.[61] Americans have crossed the Atlantic to avoid the more pro-speech defamation laws in their own country.[62] Russian oligarchs made London their choice venue for libel suits in the 1990s.[63] One such dispute involved two influential Russians who sued *Forbes* magazine.

Berezovsky v. Michaels,[64] which wound its way through the English court system starting in 1997, aptly demonstrates how English courts will allow libel suits even when the plaintiffs have arguably tenuous ties to the country. Furthermore, it contains a rich debate among English judges on whether to allow forum shoppers to exploit England's libel laws.

In *Berezovsky*, the English House of Lords in 2000 settled the issue of what amount of ties a foreign libel litigant needs in England to use the country's libel laws. The court held 3-2 that because the Russian businessmen's "substantial" or "significant" connections with England created reputations there, that nation was a proper jurisdiction for litigating their libel suit against

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[59] *Where Suing For Libel is a National Specialty; Britain's Plaintiff-Friendly Laws Have Become a Magnet for Litigators*, N.Y. Times, July 22, 2000, *available at* http://nytimes.com/archives; *A Town Called Sue No Longer?* LibelLetter (Libel Def. Res. Ctr., New York, N.Y.), Dec. 1997, at 1; *see also Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997) (English libel judgment against American citizen not enforceable in Maryland because it is based on policies repugnant to law of that state); *Bachchan v. India Abroad Publ'ns*, 154 Misc. 2d 228, 585 N.Y.S. 2d 661 (Sup.Ct. 1992) (English libel judgment obtained by Indian national based on story transmitted by New York wire service not entitled to enforcement in New York).

[60] *London Firm Taking Defamation Cases on Contingency Basis*, LibelLetter (Libel Def. Res. Ctr., New York, N.Y.), Feb. 1995, at 1.

[61] *British Law Rejected Again*, LibelLetter (Libel Def. Res. Ctr., New York), Feb. 1995, at 1.

[62] *See King v. Burstein*, [2004] EWCA Civ. 1329 (Eng.).

[63] *Reports of Links to al-Qaida Spark Libel Boom*, The Guardian (Eng.), Oct. 16, 2003, *available at* http://www.guardian.co.uk/media/2003/oct/16/pressandpublishing.alqaida.

[64] [2000] 1 W.L.R. 1004 (Eng.).

Forbes.[65] Boris Berezovsky was a businessman and held a senior post in the Russian government and Nikolai Glouchkov was a high-ranking official in Aeroflot, a Russian airline, when *Forbes* magazine published the article *Godfather of the Kremlin?* in 1996. The article alleged both were involved in organized crime and corruption in Russia.[66] About 785,000 copies of the magazine were sold in the United States and Canada, but only 13 in Russia.[67] The court estimated that the article had been seen by about 6,000 readers in Great Britain based on the sale of 1,900 magazine copies and because of the article's availability on the Internet.[68]

After the two men sued in 1997, *Forbes* moved to dismiss because the plaintiffs' connections to England were insignificant compared to their connections with Russia.[69] The trial court granted that motion, holding that the two plaintiffs' ties to England were "tenuous" and because *Forbes* was an American magazine with "no connection with anything which has occurred in this country."[70] The English Court of Appeal overruled the trial court's decision, reasoning that Berezovsky's connections were "substantial" in England, where he did business, had family, and kept an apartment.[71] Similarly, the appeals court found Glouchkov's connections "significant" due to his business ties there.[72]

The House of Lords upheld the Court of Appeals decision. However, in dissenting, Lord Hoffman called Berezovsky and Glouchkov "forum shoppers in the most literal sense":[73]

> [T]he notion that Mr. Berezovsky, a man of enormous wealth, wants to sue in England in order to secure the most precise determination of the damages

[65] *Id.* at [1010]-[11].
[66] *Id.* at 1007. *See also Berezovsky Withdraws Defamation Suit Against Forbes,* MediaLawLetter (Media Law Res. Ctr., New York, N.Y.), March 2002, at 27.
[67] *Berezovsky*, 1 W.L.R. at 1004.
[68] *Id.* at [1008].
[69] *Id.* at [1008]-[09]. The motion sought to dismiss the case on the grounds of *forum non conveniens* and the court applied *Spiliada Maritime Corp. v. Cansulex*, [1987] A.C. 460, which inquires whether Great Britain is a suitable forum and whether there is another jurisdiction that is more suitable.
[70] *Berezovsky*, at [1016].
[71] *Id.* at [1010]-[11].
[72] *Id.* at [1011].
[73] *Id.* at [1024].

> appropriate to compensate him for being lowered in the esteem of persons in this country who have heard of him is something which would be taken seriously only by a lawyer . . . The common sense of the matter is that he wants the verdict of an English court that he has been acquitted of the allegations in the article, for use wherever in the world his business may take him. He does not want to sue in the United States because he considers that *New York Times v. Sullivan* . . . makes it too likely that he will lose. He does not want to sue in Russia for the unusual reason that other people might think it was too likely that he would win. He says that success in the Russian courts would not be adequate to vindicate his reputation because it might be attributed to his corrupt influence over the Russian judiciary."[74]

He further explained that both men "want English law, English judicial integrity and the international publicity which would attend success in an English libel action."[75] Such was the libel landscape in England by late summer in 2001, when the World Trade Center towers came down.

IV. LIBEL TOURISM AND THE 'ARAB EFFECT': *BIN MAHFOUZ V. EHRENFELD*

Around the time it became clear that airliners laden with jet fuel had been used as weapons on Sept. 11, 2001, the first front in what would widely be labeled the "war on terror" was taking form. It did not materialize on a physical battlefield, but rather with the efforts of journalists to ferret out information.

Who were these 19 hijackers? How did this happen? The mobilization of journalists to find answers in the wake of the attacks and their subsequent successes and failures became perhaps the best wide-scale modern illustration of the fourth estate rationale – that a liberal democracy functions properly only when its people are well informed. Libel tourism's impact in this post-9/11 context is that the foreign libel judgments against American authors allow England's less strenuous free-speech protections to supplant their own. The results is less information regarding terrorism because of the chilling effect from real or threatened libel suits

[74] *Id.* at [1023]-[24].
[75] *Id.*

by the wealthy Arab businessmen accused of terror connections, a development dubbed the "Arab effect."[76]

Legal action by foreign libel litigants against American journalists who write about terror "sends an unmistakable message to other writers and publishers that scrutinizing the activities of that litigant, and others of similar wealth and combativeness, is a perilous legal, professional and financial course," said a recent legal brief signed by a coalition of media organizations and filed in a case involving libel tourism and terrorism reporting.[77]

Rachel Ehrenfeld came to the United States from Israel because of this country's unique brand of free speech, but she soon discovered that those free-speech safeguards could not prevent a chilling effect from abroad. After being sued for libel in England by a Saudi businessman over terror financing allegations in her book, "Funding Evil: How Terrorism is Financed and How to Stop It," publications that had previously featured her work rejected a different piece about a Saudi-owned company.[78] "We know in general that Saudis are funding terrorism – they have been doing it for a long time," said Ehrenfeld,[79] director of the New York-based American Center for Democracy. "What the public doesn't know is who and how they do it in detail."

Ehrenfeld's case is not unusual, some books focusing on terror have been pulped[80] and other writers have had to make changes to books published in England in order to avoid libel suits. "To the extent that Saudis can use British law against Americans, libel tourism has

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[76] Samuel A. Abady and Harvey Silverglate, *'Libel Tourism' and the War on Terror*, The Boston Globe, Nov. 7, 2006, at A11.
[77] Brief of Amici Curiae at 1, *Ehrenfeld v. bin Mahfouz*, 489 F.3d 542 (2nd Cir. N.Y. 2007) (No. 06-2228-cv).
[78] *Id.* at 16.
[79] Interviewed July 11, 2008.
[80] The book, *Alms for Jihad*, by J. Millard Burr and Robert O. Collins, was pulped by Cambridge University Press in 2007 after Sheikh Khalid bin Mahfouz sued the publisher. Rachel Donadio, *Libel Without Borders*, N.Y. Times, Oct. 7, 2007, *available at* www.nytimes.com/archives; *see also* press release, "Sheikh Khalid Bin Mahfouz receives comprehensive apology from Cambridge University Press," *available at* http://www.binmahfouz.info/news_20070730.html.

potentially a real chilling effect," said Craig Unger[81], author of *The New York Times* best-seller "House of Bush, House of Saud," a slightly altered version of which was distributed in England.

Across the Atlantic, however, the term "Arab effect" is viewed as misleading. It suggests that Arab libel litigants are unjustly using English libel laws because they are not English citizens. "The English law question is not whether someone is a national, an English citizen; what England is concerned with is whether they have a substantial reputation here," said Laurence Harris,[82] an English libel lawyer. Another focus is the justification for the allegations in the journalistic work. "After 9/11, journalists started to look at subjects such as terror and terrorism funding – and the quality of that writing was extremely variable," he said.

The news media has been a frequent target in English libel claims brought by nonresident Arabs since Sept. 11, 2001.[83] Reports from the news media variously have estimated that bin Mahfouz has threatened to sue, or has sued, for libel in the English court system between 30 and 40 times.[84] Responding to reports of his terror connections, bin Mahfouz has launched his own website,[85] which lists corrections and apologies from news media and authors from America and Europe.[86] More recently, bin Mahfouz has confronted allegations that he is responsible, as a libel tourist, for suppressing evidence about alleged links between terror and Saudi financing.[87]

"The Sheikh and his family abhor terrorism and have been distressed by these allegations

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[81] Interviewed July 26, 2008.
[82] Interviewed July 25, 2008.
[83] *See bin Mahfouz v. Brisard,* [2006] EWHC 1191 (QB); *Amoudi v. Brisard,* [2006] EWHC 1062 (QB); *Jameel v. The Wall Street Journal Europe,* [2006] UKHL 44; *bin Mahfouz v. Ehrenfeld,* [2005] EWHC 1156 (QB); *Dow Jones v. Yousef Abdul Latef Jameel,* 2005] EWCA Civ 75*; Al Rajhi Banking & Investment Corp. v. The Wall Street Journal Europe,* [2003] EWHC 1776 (QB).
[84] *See* Abady, *supra* note 76; interview with Ehrenfeld. However, in a letter to one publication in 2007, bin Mahfouz, through his lawyer, said he has sued only four publications and has received corrections and apologies from many others without threat of litigation. "Letter to The Spectator", *available at* http://www.binmahfouz.info/news_20071121.html.
[85] http://www.binmahfouz.info/.
[86] USA Today, Los Angeles Times, Fortune Magazine and The Washington Post are among them, according to www.binmahfouz.info.
[87] *See* "Letter to The Spectator," *available at* http://www.binmahfouz.info/news_20071121.html.

and have been keen to stress they're not true," said Harris, who represented bin Mahfouz in his highly-publicized legal battle with Ehrenfeld. The litigant has fought such a battle that suing journalists who write about the funding of terrorism "is his mission, his jihad, if you want," Ehrenfeld said of bin Mahfouz. "He's responsible for London becoming the libel Mecca."

Originally published in New York in 2003 and distributed in England through the Internet, Ehrenfeld's book and its allegations concerning bin Mahfouz have led to litigation on both sides of the Atlantic. Bin Mahfouz and his two sons sued Ehrenfeld in London in 2004 claiming the allegations were libelous.[88] In the book, Ehrenfeld claimed that the bin Mahfouz family is one of the main sponsors of al Qaida and other terrorist organizations.[89] The book also alleges that the National Commercial Bank of Saudi Arabia, owned by the bin Mahfouz family, was used as a conduit for financing the terrorist organization.[90] The book claimed that in 1999 the Saudi government audited both the bank and bin Mahfouz and found that the bank had channeled money to charities acting as fronts for al Qaida.[91]

Twenty-three copies of the book were sold in England over the Internet and the first chapter of the book was separately made available on an ABC News website.[92] Ehrenfeld did not fight the libel action in the English court, which subsequently entered a default judgment against her on Dec. 7, 2004.[93] Justice Eady of the English High Court, Queen's Bench Division, also issued a "declaration of falsity" regarding the allegations and awarded £30,000 in damages and another £30,000 in litigation costs to him.[94] Bin Mahfouz did not seek to enforce the judgment in America.

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[88] *Ehrenfeld v. Bin Mahfouz*, 518 F.3d 102, 103 (2nd Cir. N.Y. 2008).
[89] *Bin Mahfouz v. Ehrenfeld*, [2005] EWHC 1156 at [16] (QB) (Eng.).
[90] *Id.*
[91] *Id.*
[92] *Id.* at [22].
[93] *Id.* at [21].
[94] *Id.* at [74]-[75].

Instead of fighting the libel suit in England, Ehrenfeld took a different route. She detailed bin Mahfouz's English suit in a new preface to the subsequent paperback release and added to the front cover, which now says: "The book the Saudis don't want you to read."[95] She also sued bin Mahfouz in U.S. District Court for the Southern District of New York on Dec. 8, 2004 – a day after the English court entered its default judgment – and asked the American court to declare the foreign judgment unenforceable.[96] Despite significant case law in the United States suggesting she would prevail since the English libel judgment did not afford Ehrenfeld the robust free speech protections in the First Amendment, the U.S. Court of Appeals for the Second Circuit Court noted the "pernicious" effect of libel tourism "to chill free speech in the United States" but declined to find it had jurisdiction over bin Mahfouz based on the mere fact that, through a foreign libel suit, he had "transacted business in New York by scheming to 'chill her speech.'"[97]

Ehrenfeld said it was a strategic decision not to fight the English case because she is American and her book was published here. Additionally, she called the English "declaration of falsity" a joke. Bin Mahfouz's links to terror have "never been tried on the merits. For the English court to make such a decision is outrageous." However, Harris pointed out that Ehrenfeld had the opportunity to justify the allegations, and could have defended the allegations as privileged due to their public interest value. Ehrenfeld's reply was that she is an American, her book was written in America, and any libel suit concerning it should be heard in American courts.

V. CAN LEGISLATURES SOLVE THE PROBLEM OF LIBEL TOURISM?

There was a thread of irony in haling Ehrenfeld into an English court based on arguably

[95] *Id.* at [66].
[96] *Ehrenfeld v. bin Mahfouz*, 2005 U.S. Dist. LEXIS 4741 (S.D.N.Y. Mar. 23, 2005).
[97] *Ehrenfeld*, 518 F.3d at 104.

scant distribution of her book in England while the U.S. court found bin Mahfouz's connections lacking in New York. The culprit was in New York's long-arm statute – the procedural mechanism empowering a court there to subject parties with non-traditional ties to its holdings. Soon after, the state's legislators set out to change that.

A. The New York Legislature Addresses Libel 'Terrorism'

On April 28, New York enacted the "Libel Terrorism Protection Act" to deal with foreign defamation judgments such as bin Mahfouz's.[98] The Act, also known as "Rachel's Law," is the first successful legislation in America to address libel tourism. First, it gives New York courts jurisdiction over foreign litigants based on their defamation suits abroad, regardless of whether enforcement of that foreign judgment is sought in America.[99] Second, the law directs courts to bar enforcement of foreign defamation judgments if they do not measure up to the federal and New York state constitutions.[100]

Lancman, the New York state assemblyman (D-Queens) and the primary sponsor of the bill, said the term "terrorism" in the Act's title reflects the pernicious effect of English suits by wealthy, non-resident Arabs accused of terror links. "We view bin Mahfouz as part and parcel of an effort on the part of terrorism sympathizers and facilitators to use the courts to stifle efforts to win the war on terrorism," he said.

Further, he said, the legislation is a counterpunch to what he views as the exportation of British free speech principles across the Atlantic. "If we lose our freedom to expose what terrorists are doing, we lose our freedom. Much of what has been exposed has been exposed by journalists since 9/11," he said.

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[98] 2008 Sess. Law News of N.Y. Ch. 66 (S. 6687-C) (McKinney's).
[99] *Id.* at N.Y. C.P.L.R. §302(d). Provides for jurisdiction over a foreign defamation litigant who obtains a judgment against any person who is a resident of New York or is a person or entity amenable to jurisdiction there.
[100] *Id.* at N.Y. C.P.L.R. § 5304(b)(8).

But Harris, the British lawyer, said he did not think that the New York law would bring significant changes. United States courts already have been unwilling to enforce foreign libel judgments if they do not meet First Amendment free-speech principles, he said.[101] However, Harris was not aware that the Act allowed New Yorkers to sue regardless of whether the foreign libel litigant enforced the judgment in the United States. That new ability could be a useful tool for journalists. An unenforced foreign judgment that is at odds with the First Amendment can have a powerful chilling effect on personal liberty and the public dissemination of ideas.[102] It was likely, for example, that bin Mahfouz never would have sought to enforce his foreign judgment against Ehrenfeld in America because he knew it would be unenforceable here and because the English judgment would have lost its validity in his campaign to discredit her and other journalists who link him to terrorism funding.[103] Still, Ehrenfeld did not want bin Mahfouz's foreign judgment to go unanswered. "I sued bin Mahfouz not for money – although he did cause me a lot of damages. I sued him on principle," she said.

Not all believe that Ehrenfeld's American suit against bin Mahfouz was warranted. John J. Walsh, a New York media law lawyer, called libel tourism a "myth" in a recent column published in the *New York Law Journal.*[104] Ehrenfeld's argument in her stateside suit – that libel tourists like bin Mahfouz use English laws to harass and intimidate her and other terrorism writers – is unfair to the English legal system, he said.[105] "At a time in our history when American policies and attitudes on a wide variety of subjects are antagonizing authorities and

[101] *See Matusevitch v. Telnikoff*, 347 Md. 561 (1997) (British libel judgment unenforceable because it is repugnant to public policies of Maryland and United States).
[102] Brief of Amici Curiae, *supra* note 77, at 13.
[103] *See id.* at 15.
[104] John J. Walsh, *The Myth of 'Libel Tourism*,' The New York Law Journal, Nov. 20, 2007, *available at* http://www.clm.com/publication.cfm/Id/177.
[105] *Id.*

populaces in other countries around the world, that is truly an unseemly spectacle," he wrote.[106]

Walsh suggested that American media cannot expect to be free from liability for the publication of damaging words anywhere outside the United States, especially as international law has slowly adapted to the Internet age.[107] He also said that attempts to vilify English libel courts threaten the legal concept known as "comity," which provides that nations should give effect to each other's laws and judgments, including those protecting reputation.[108]

B. The U.S. Congress Weighs In

Following New York state's lead, members of the U.S. Congress introduced three bills this spring to deal with libel tourism, two of which seem to deter – and even punish – the use of foreign libel laws against American news media.

The first of the three proposed bills is comparatively innocuous. H.R. 6146 would bar enforcement of a foreign defamation judgment unless it is consistent with the First Amendment.[109] The bill has been referred to the House Committee on the Judiciary.[110] The two identical bills introduced in the House and Senate are more heavy-handed.[111] Although the term "libel tourism" never appears in the bills, their findings make it clear that Congress has set its sights on the practice.[112]

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[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] Rep. Steve Cohen, D-Tenn., introduced the bill on May 22. The bill has 16 co-sponsors: Reps. Howard L. Berman, D-Calif.; Howard Coble, R-N.C.; Arthur Davis, D-Ala.; Wally Herger, R-Calif.; Sheila Jackson-Lee, D-Texas; Zoe Lofgren, D-Calif.; Adam B. Schiff, D-Calif.; Robert Wexler, D-Fla.; Marsha Blackburn, R-Tenn.; John Conyers Jr., D-Mich.; Luis V. Gutierrez, D-Ill.; Darrell E. Issa, R-Calif.; Henry C. "Hank" Johnson Jr., D-Ga.; Jerrold Nadler, D-N.Y.; Mark Udall, D-Colo.; John A. Yarmuth, D-Ky.
[110] Status as of July 28, 2008.
[111] H.R. 5814, introduced April 16, 2008, was the first bill before Congress to address foreign defamation judgments against American writers. The bill's primary sponsor, Rep. Peter King, R-N.Y., was not available for interview. The bill has six cosponsors: Reps. Paul C. Broun, R-Ga.; Vito Fossella, R-N.Y.; Ted Poe, R-Texas; John B. Shadegg, R-Ariz.; Frank R. Wolf, R-Va.; Howard Coble, R-N.C.; Sue Wilkins Myrick, R-N.C.; Edward R. Royce, R-Calif.; and Anthony D. Weiner, D-N.Y. S. 2977 was introduced by Sen. Arlen Specter, R-Pa., on May 6, 2008. It has two cosponsors: Sens. Joseph Lieberman, I-Conn., and Charles Schumer, D-N.Y.
[112] Free Speech Protection Act, H.R. 5814 and S. 2977, 110th Cong. § 2(5) (2008).

The bills, both called the Free Speech Protection Act of 2008, allow an American to sue in order to have a domestic court bar enforcement of a foreign libel judgment.[113] The Act gives the domestic court jurisdiction over the foreign libel litigant based on the fact that the litigant has sued an American in a court outside the United States.[114] Moreover, the extensive damages allowed by the Act appear intended to deter or punish. They deter foreign libel litigants from suing Americans by essentially nullifying the foreign judgment.[115] For example, under the Act damages available to an American who has been sued for libel abroad include an amount equal to the foreign defamation judgment, litigation costs, and an amount representing the harm caused "due to decreased opportunities to publish, conduct research, or generate funding."[116] The Act further punishes libel tourists by allowing *treble* damages if the foreign libel litigant "intentionally engaged in a scheme to suppress First Amendment rights."[117]

In an opinion piece published by *The Wall Street Journal* in July, Sens. Arlen Specter, R-Pa., and Joe Lieberman, I-Conn., sponsors of the Act's Senate version, wrote that the Act countered the recent trend of non-resident Arabs using English libel laws against Americans who write about terrorism. "These suits intimidate and even silence writers and publishers," they said[118]

But Harris, the English lawyer, offered three reasons why the federal legislation would have little impact. First, he said, the Act would undermine a decision of the English courts. This runs contrary to the established legal principle, accepted in both England and the United States,

[113] *Id.* at §3(a) and §3(c)(1).
[114] *Id.* at §3(b).
[115] *Id.* at §3(c)(2)(A)-(C).
[116] *Id.*
[117] *Id.* at §3(d).
[118] Arlen Specter and Joe Lieberman, *Foreign Courts Take Aim at our Free Speech*, WALL ST. J., July 14, 2008, at A15.

that decisions on issues already adjudicated generally should not be re-litigated.[119] Second, he said, the Act effectively would allow a U.S. court to take jurisdiction over an English matter, which is contrary to public policy in the U.K. Finally, he said, libel litigants who use English courts typically do not have assets in America that can be seized to satisfy the Act's potential damage awards.

"A decision of a U.S. court under this newly-created right of action will not be recognized by probably most, if not all, of foreign courts outside the U.S.," he said. "On more of a political and legal point, people in the U.K. will find it pretty offensive the way that this bill seems to describe the English court."

All three of the bills' chances for passage this Congress seem slim as Congress addresses other concerns, including a law to aid homeowners in crisis, an energy bill, and a long-awaited federal shield law for reporters. All three bills remain in committee, and no hearings have been scheduled.

VI. THE FUTURE OF LIBEL TOURISM IN THE COURTS

Libel tourism will probably continue in English courts for a long time, whether its plaintiffs are accused of terror or belong to another unpopular group. Even as the Internet grows in importance and efficiency in distributing news media reports over oceans and continents with a click of a button, the law and policy of English libel is somewhat static. Her courts seem satisfied with addressing the unique and ubiquitous medium with existing rules.

The fact that America's tradition of protecting free speech more than reputation is not shared by most of the rest of the world also poses an obstacle. This ideological divide brings the issue into focus: Should information distributed within England's borders be subject to its laws, whether the information originates there or not?

[119] This legal concept is known as *res judicata*, and it intends to bring stability to the legal system.

The good news for the American news media is that English defamation law seems to be moving toward more press protections. In 2006, the English House of Lords made it easier for news media defendants in England to successfully use a qualified privilege for reporting on matters of public interest in *Jameel v. Wall Street Journal Europe*.[120] Under *Jameel*, which clarified a prior decision creating the privilege in *Reynolds v. Times Newspaper Ltd.*,[121] the news media have a qualified privilege against liability for defamation if: 1) the publication concerned a matter of public interest; 2) the defamatory statement was justifiable; and 3) the steps taken to gather and publish the information were responsible and fair.[122]

Harris argued that, in some ways, the *Jameel* and *Reynolds* decisions have provided broader free-speech protections for the press than *Sullivan*. While that decision protects the press by focusing on reporting involving a "public figure," the English privilege can be invoked more generally if a public matter is involved. "In that sense, it might be thought that the English law has moved beyond *Sullivan* because it covers matters of public interest," he said.

But in contrast, the English qualified privilege is defeated if the report does not involve "responsible journalism." This naturally requires judges to assess whether journalists were at fault in their reporting techniques. As Harris noted, "that's more stringent than *Sullivan.*"

[120] *Jameel*, *supra* note 30.
[121] [2001] 2 A.C. 127 (H.L.) (Eng.).
[122] *Jameel*, *supra* note 30, at [48]-[53].