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London, Libel Capital No Longer? The Draft Defamation Act 2011 and the Future of Libel Tourism

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I. INTRODUCTION

In the past decade, London emerged as the forum of choice for "libel tourists"—strategic, often foreign, plaintiffs who bring defamation[1] actions in a jurisdiction with plaintiff-friendly libel laws, even if they and the defamatory material at issue lack a substantial connection with that jurisdiction.[2] England's defamation laws and procedures make it significantly easier for claimants to commence and prevail in libel actions than do the laws and procedures of many other countries, particularly the United States.[3] As a result, English courts have entertained several high-profile defamation cases involving foreign parties who have only tenuous connections to England, such as disputes between a Saudi billionaire and a U.S. journalist;[4] a

1. Defamation is an intentional tort that is defined as "[t]he act of harming the reputation of another by making a false statement to a third person." BLACK'S LAW DICTIONARY 448 (8th ed. 2004). Specifically, a defamatory statement tends to lower the reputation of a person "in the estimation of the community or to deter third persons from associating or dealing with her." Aaron Warshaw, Note, *Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims*, 32 BROOK. J. INT'L L. 269, 269 n.1 (2006). Defamatory meaning is defined similarly in England. *See, e.g.*, Ellen Bernstein, Comment, *Libel Tourism's Final Boarding Call*, 20 SETON HALL J. SPORTS & ENT. L. 205, 219 (2010).

Modern defamation law encompasses both libel and slander. *See* Michelle Feldman, *Putting the Brakes on Libel Tourism: Examining the Effects Test as a Basis for Personal Jurisdiction Under New York's Libel Terrorism Protection Act*, 31 CARDOZO L. REV. 2457, 2461 n.25 (2010). Libel refers to defamatory publications in written form, and slander refers to "transient publications such as spoken words." RUSSELL L. WEAVER ET AL., THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH 18 (2006). For the purposes of this Note, the terms "libel" and "defamation" will be used interchangeably.

2. *See* HARRY MELKONIAN, DEFAMATION, LIBEL TOURISM, AND THE SPEECH ACT OF 2010: THE FIRST AMENDMENT COLLIDING WITH THE COMMON LAW 2 (2011); Doug Rendleman, *Collecting a Libel Tourist's Defamation Judgment?*, 67 WASH. & LEE L. REV. 467, 468–69 (2010).

3. *See infra* Section II.

4. *See* Bin Mahfouz v. Ehrenfeld, [2005] EWHC (QB) 1156, [22], [73]–[75] (Eng.) (ordering a default judgment against a U.S. author, where only twenty-three copies of her allegedly libelous book had been purchased in the United Kingdom).

Russian businessman and a U.S. magazine;[5] and a French director and a U.S. publisher.[6] Cases like these have cemented London's reputation as the "libel capital of the world."[7]

The establishment of that notorious title, reflecting the notion that England does not value free expression as highly as other countries, has helped ignite a movement to reform English libel laws and procedures.[8] On March 15, 2011, the U.K. Ministry of Justice unveiled a draft bill entitled the Draft Defamation Act 2011,[9] proposing a substantial overhaul of English libel laws as well as the procedures applied in libel actions.[10] The Draft Act aims to combat the perception that England is a refuge for libel tourism by, among other reforms, requiring English courts to determine whether England is the most appropriate forum in which the action should be heard before exercising jurisdiction.[11]

The Draft Defamation Act comes less than one year after the enactment of the Securing the Protection of Our Enduring and Established Constitutional Heritage ("SPEECH") Act of 2010 in the Unit-

5. *See* Berezovsky v. Forbes, Inc., [2000] E.M.L.R. 643 (H.L.) (appeal taken from Eng.) (exercising jurisdiction over U.S.-based magazine *Forbes*, even though *Forbes*'s U.K. circulation comprised only 0.2% of its total distribution); *see also* Daniel C. Taylor, Note, *Libel Tourism: Protecting Authors and Preserving Comity*, 99 GEO. L.J. 189, 194 (2010).

6. *See* Polanski v. Condé Nast Publ'ns Ltd., [2005] UKHL 10, [12] (appeal taken from Eng.) (exercising jurisdiction over the publisher of U.S.-based magazine *Vanity Fair*, despite the fact that the magazine's circulation in England and Wales was less than five percent of its U.S. distribution).

7. *See* Nick Clegg, Comment, *An End to the Libel Farce*, GUARDIAN, Mar. 16, 2011, at 33 ("London is the number one destination for libel tourism, where foreign claimants bring cases against foreign defendants to [English] courts—even when the connection with England is tenuous at best."); Eric Pfanner, *A Fight to Protect Americans from British Libel Law*, N.Y. TIMES, May 25, 2009, at B3.

8. *See infra* Section III.

9. *See* UNITED KINGDOM MINISTRY OF JUSTICE, DRAFT DEFAMATION BILL CONSULTATION PAPER CP3/11 annex a, at 6 (clause 10(1)) (March 2011), http://www.justice.gov.uk/consultations/docs/draft-defamation-bill-consultation.pdf [hereinafter CONSULTATION PAPER AND DRAFT BILL].

10. *Id.* at 6; annex a, at 6 (clause 10(3)). For internal consistency, all references to the Draft Act's effect on English libel laws and procedures also apply to Wales.

11. *Id.* at 3; *see id.* annex a, at 5–6 (clause 7 of draft bill addressing actions brought against persons not domiciled in the United Kingdom or a Member State).

ed States.[12] The SPEECH Act prohibits U.S. courts, both state and federal, from recognizing or enforcing defamation judgments rendered by a foreign court unless that court applied a standard that was as protective of free speech as a U.S. court would have applied.[13] In the context of libel tourism, this means that a libel tourist cannot force a U.S. author or publisher to comply with a foreign judgment[14] unless a U.S. court finds that the judgment comported with First Amendment principles.

This Note analyzes the efficacy of the Draft Defamation Act and its impact on the enforcement of English defamation judgments in U.S. courts. Specifically, it proposes that the Draft Act's procedural clauses will effectively reduce the prevalence of libel tourism in England. Moreover, this Note argues that, in light of the Draft Act's reforms as well as longstanding principles of international comity, U.S. courts should not narrowly construe the SPEECH Act to require exact congruence between U.S. and English defamation laws. Finally, this Note presents evidence suggesting that England's problem of libel tourism could be supplanted by the new phenomenon of privacy tourism. Thus, in addition to modifying and enacting the Draft Defamation Act, English policymakers should consider reviewing and possibly reforming English privacy laws.

This Note proceeds in four sections. Section II provides a background to issues related to libel tourism, including its prevalence in England and the U.S. response to it. Section III reviews the Draft Defamation Act's procedural clauses related to libel tourism. Section IV analyzes the Draft Act's potential to eradicate libel tourism and its effect on U.S. courts' construction and application of the SPEECH Act. Section IV also proposes modifications to the Draft Act, including the adoption of a defamation-specific choice-of-law

12. 28 U.S.C. §§ 4101–05 (West, Westlaw through 2010 Sess.); *see also* Press Release, The White House, Statement by the Press Secretary on H.R. 2765, H.R. 5874 and S. 1749 (Aug. 10, 2010), http://www.whitehouse.gov/the-press-office/2010/08/10/statement-press-secretary-hr-2765-hr-5874-and-s-1749.

13. § 4102(a).

14. Unless a U.S. court recognizes or enforces the foreign judgment, the U.S. defendant will not be required to comply with the judgment's order, which often includes paying monetary damages to the foreign claimant and ceasing distribution of the defamatory publication. *See infra* Section II.D.

rule. Finally, Section V explores the interplay between English defamation and privacy laws, considering whether the Draft Act's aim to eliminate libel tourism inadvertently opens the door to the development of privacy tourism.

II. BACKGROUND

This section explores the problem of libel tourism in England,[15] beginning with a discussion of its emergence and evolution, as exemplified by a sampling of libel tourism cases. Next, it reviews the procedures applied in English defamation cases and compares them with those applied in U.S. defamation cases. It then provides a brief comparison of the core differences between U.S. and English libel laws. Next, it considers the chilling effect that libel tourism poses for free speech internationally. Finally, it discusses the U.S. response to libel tourism, focusing on the SPEECH Act.

A. *Libel Tourism in London*

The phrase, "libel tourism," was coined after several U.S. celebrities sought redress in England for defamatory statements published in the United States.[16] Actor-turned-politician Arnold Schwarzenegger was one of the first to do so; in 1990, he sued U.S. author Wendy Leigh in England after she alleged in an unauthorized biography that

15. Libel tourism is not a problem limited to England, and several other jurisdictions have been identified as being appealing to libel tourists. *See* Tara Sturtevant, Comment, *Can the United States Talk the Talk & Walk the Walk When It Comes to Libel Tourism: How the Freedom to Sue Abroad Can Kill the Freedom of Speech At Home*, 22 PACE INT'L L. REV. 269, 280–82 (2010) (discussing libel tourism in Singapore and Australia); *see also infra* note 250. But England is clearly the leading libel-tourism destination. *See* Clegg, *supra* note 7, at 33; Robert L. McFarland, *Please Do Not Publish This Article in England: A Jurisdictional Response to Libel Tourism*, 79 MISS. L.J. 617, 625–26 (2010). This Note, therefore, limits the discussion of libel tourism to libel actions brought in England.

16. Christopher Hope, *New Rules to Discourage 'Libel Tourism' in Britain*, DAILY TELEGRAPH (U.K.), Mar. 14, 2011, http://www.telegraph.co.uk/news/uknews/8379196/New-rules-to-discourage-libel-tourism-in-Britain.html.

he held pro-Nazi views.[17] Initially, the English courts were, for the most part, only available to non-English public figures like Schwarzenegger who could justify basing their libel actions in England by virtue of their "international reputations."[18] But the growth of Internet publications in the 1990s "made it inevitable that publications would transcend international borders."[19] Accordingly, a variety of libel claimants "began to have more choices as to fora (and, therefore, substantive libel law) than they ever had before."[20] London soon emerged as the most popular forum.[21]

During the 2000s, libel tourism in London "evolved into a cottage industry dominated by international businessmen and celebrities."[22] For example, in 2003, Polish-born film director Roman Polanski, a resident of France, brought a defamation action against U.S. publishing company Condé Nast Publications, owner of the U.S.-based magazine *Vanity Fair*, in London, stemming from the publication of a July 2002 article, which stated that, in 1969, Polanski had induced sexual favors from a Swedish model while en route to California to attend the funeral of his recently murdered wife.[23] Despite the fact that *Vanity Fair*'s circulation in England dwarfed in compar-

17. *Id.*; Alex Spillius, *US Law to Counter 'Libel Tourism' in British Courts*, DAILY TELEGRAPH (U.K.), July 28, 2010, http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7915063/US-law-to-counter-libel-tourism-in-British-courts.html; *see also* WENDY LEIGH, ARNOLD: AN UNAUTHORIZED BIOGRAPHY (1990). *But see* Bernstein, *supra* note 1, at 210 (noting that libel tourism existed well before the 1990s, citing U.S. entertainer Liberace's 1959 English defamation suit against the *Daily Mail* as an example).

18. *See* Sarah Staveley-O'Carroll, Note, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 N.Y.U. J. L. & LIBERTY 252, 265–66 (2009).

19. Feldman, *supra* note 1, at 2464.

20. *Id.*

21. *See id.*

22. Staveley-O'Carroll, *supra* note 18, at 266. In 2008, it was estimated that celebrities had filed one-third of all libel suits in England and Wales that year. Robert Verkaik, *London Becomes Defamation Capital for World's Celebrities*, INDEP., Oct. 13, 2008, http://www.independent.co.uk/news/uk/home-news/london-becomes-defamation-capital-for-worlds-celebrities-959288.html.

23. Polanski v. Condé Nast Publ'ns Ltd., [2005] UKHL 10, [1]–[4] (appeal taken from Eng.).

ison to that in the United States,[24] the English court accepted jurisdiction over the case, and Polanski—despite his inability to personally appear in the English court to testify[25]—ultimately prevailed, winning £50,000 in damages.[26] Similarly, in 2008, Rinant Akhmetov, one of Ukraine's wealthiest businessmen, sued two Ukrainian news organizations in London for defamation, even though neither organization had a substantial readership in England; in fact, one of the organizations had less than 100 subscribers in England.[27]

Libel tourism has infiltrated several other areas of discourse as well, including scientific and political speech. For example, in 2007, U.S. manufacturer NMT Medical, Inc. sued English cardiologist Peter Wilmshurst in London, basing its defamation claim on criticisms of its research that Wilmshurst voiced while attending a U.S. conference; the criticisms were subsequently published in an online journal.[28] Wilmshurst defended himself against multiple libel claims

24. In 2002, *Vanity Fair* had a 1.13 million-copy circulation in the United States and a 53,000-copy circulation in England and Wales. *Id.* at [12].

25. Polanski, a fugitive of the United States, was permitted to testify via video link from Paris because he would have faced extradition if he had set foot in England. Clare Dyer, *Polanski Wins Right to Use Video Link in Libel Case*, GUARDIAN, Feb. 11, 2005, http://www.guardian.co.uk/media/2005/feb/11/film.law?INTCMP=ILCNETTXT3487. Polanski has lived in France, where he is in no danger of being extradited to the United States, since pleading guilty in a California court to unlawful sexual intercourse with a thirteen-year-old girl. *Polanski*, [2005] UKHL at [38].

26. Mark Honigsbaum, *Polanski Wins £50,000 Libel Damages*, GUARDIAN, July 23, 2005, http://www.guardian.co.uk/uk/2005/jul/23/film.world.

27. *See* Akhmetov v. Serediba, [2008] All E.R. (D) 39 (Eng.); *Hacks v Beaks*, ECONOMIST, May 10, 2008, at 52; *Libel Tourism: Writ Large*, ECONOMIST, Jan. 10, 2009, at 48. Akhmetov received an undisclosed settlement from one of the organizations and a £50,000 settlement from the other. *Libel Tourism: Writ Large*, *supra* note 27, at 48.

28. David Leigh, *US Medical Firm Takes Trip to UK Courts to Sue Consultant*, GUARDIAN, Nov. 10, 2009, at 12; Ian Sample, *Setback for US Company Suing Cardiologist Peter Wilmshurst for Libel*, GUARDIAN, Dec. 1, 2010, http://www.guardian.co.uk/science/2010/dec/01/company-suing-peter-wilmshurst-libel. Wilmshurst's statements related to a study of the ability of a device "designed to close a specific type of hole in the heart called a patent foramen ovale" to decrease migraines. Sample, *supra* note 28.

brought by NMT Medical for nearly four years.[29] Although the litigation appeared to come to an end in April 2011, when NMT Medical entered liquidation, Wilmshurst had incurred well over £100,000 in legal costs by that point.[30] In the political context, Sheikh Rashid Ghannouchi, the leader of Tunisia's An Nahda political party, won one of the largest libel-damages awards in the past decade—£165,000—after the High Court of Justice found that the Dubai-based television network Al Arabiya had defamed him by broadcasting a report that Ghannouchi had links to al-Qaeda and was involved in the 2005 London bombings.[31] Although the broadcast was in Arabic, the court exercised jurisdiction over the case because the broadcast was accessible in England via satellite.[32]

Cases similar to Ghannouchi's have given rise to a subset of libel tourism known as "libel terrorism," a "politically loaded epithet . . . which refers to the use of defamation lawsuits by purported members of terrorist groups who attempt to stifle free speech concerning their activities by bringing defamation claims in jurisdictions" with plaintiff-friendly libel laws.[33] The terrorist attacks on September 11, 2001 provided "the impetus for the growth of libel tourism in recent years," as journalists and scholars began to investigate terrorism and the individuals who financially support it.[34] After a number of foreign businessmen were identified as financiers of terrorist organizations, several of them filed, or threatened to file, defamation suits in England against U.S. authors and journalists.[35]

Sheikh Khalid bin Mahfouz is the most infamous name associated with libel terrorism (and libel tourism in general). Before his

29. Hannah Devlin, *US Company Suing Cardiologist for Libel Goes Into Liquidation*, TIMES (U.K.), Apr. 21, 2011, http://www.thetimes.co.uk/tto/health/news/article2993637.ece.

30. *Id.*; *Libel-Law Reform: The Price of Truth*, ECONOMIST, Mar. 19, 2011, at 19.

31. Press Release, Carter-Ruck, Sheikh Rashid Ghannouchi—£165,000 Libel Award Follows False Al Qaeda Allegations (Nov. 14, 2007), http://www.carter-ruck.com/Miscellaneous?page=20.

32. *The Report—APPENDIX: CASE STUDIES*, LIBEL REFORM CAMPAIGN, http://www.libelreform.org/the-report?start=6 (last visited Apr. 27, 2011).

33. MELKONIAN, *supra* note 2, at 2.

34. Feldman, *supra* note 1, at 2464.

35. *Id.* at 2464–65.

death in 2009, the Saudi billionaire had threatened to file at least thirty defamation suits in England against various authors and publishers.[36] He was also responsible for the most prominent libel tourism action ever filed—the one he brought against Dr. Rachel Ehrenfeld, the U.S. author of the 2003 book *Funding Evil: How Terrorism Is Financed—and How to Stop It*,[37] who has since been referred to as the "poster child" of libel tourism.[38] In *Funding Evil*, Ehrenfeld examined "the international web of financing supporting the activities of militant Islam throughout the world" and, citing numerous government documents, identified bin Mahfouz as a leading financier of terrorist organizations, such as al-Qaeda.[39] In January 2004, she received a letter from bin Mahfouz's lawyers, denying that bin Mahfouz had "ever knowingly financed terrorism of any description" and threatening to sue her for defamation if she did not withdraw her book from circulation, destroy all unsold copies, publicly apologize to bin Mahfouz, donate money to a charity of his choice, and pay his legal fees.[40]

After Ehrenfeld refused to comply with these demands, bin Mahfouz sued her for libel in the High Court in London.[41] Despite the fact that *Funding Evil* was published and promoted in the United States, the High Court found that it had jurisdiction over the case because twenty-three copies of the book had been sold in the United Kingdom via online retailers and because the first chapter was ac-

36. *Id.* at 2457–58; *see also* Bernstein, *supra* note 1, at 213 (noting that the "most feared overseas claimants" are Saudis who "place a high value on the defence of their reputations") (internal quotation marks omitted).

37. *See generally* RACHEL EHRENFELD, FUNDING EVIL: HOW TERRORISM IS FINANCED—AND HOW TO STOP IT (2003).

38. *See* Todd W. Moore, Note, *Untying Our Hands: The Case for Uniform Personal Jurisdiction Over "Libel Tourists,"* 77 FORDHAM L. REV. 3207, 3207 (2009); Abby Wisse Schachter, *Praise for Leahy's and Sessions' First-Amendment Protecting "SPEECH Act,"* N.Y. POST, June 23, 2010, http://www.nypost.com/p/blogs/capitol/praise_for_leahy_and_sessions_first_0ZrkgNNBImcipY5hZ7tc2K.

39. McFarland, *supra* note 15, at 617; *see* Taylor, *supra* note 5, at 190.

40. RACHEL EHRENFELD, FUNDING EVIL, UPDATED: HOW TERRORISM IS FINANCED AND HOW TO STOP IT, at xi (expanded ed. 2005) (internal quotation marks omitted).

41. McFarland, *supra* note 15, at 618; *see* Bin Mahfouz v. Ehrenfeld, [2005] EWHC (QB) 1156 (Eng.).

cessible in the United Kingdom via a website.[42] Ehrenfeld chose not to appear in the action,[43] and, as a result, the court entered a default judgment against her, ordering that she cease distribution of *Funding Evil* in the United Kingdom and pay bin Mahfouz £10,000 in damages as well as his legal costs.[44] Ehrenfeld's dilemma will be further discussed in Part D of this section, where the U.S. legislative reaction to libel tourism will be discussed.

B. *Why London?*

The common link between the libel tourism cases discussed in Part A is that the English courts exercised jurisdiction over and, in some cases, issued judgments against non-English residents despite their tenuous connections with England. Collectively, these cases demonstrate the willingness of English courts to exercise jurisdiction "over defamation actions based on where the defamatory content is *accessed* rather than where it is *produced*, even when the access is relatively minimal."[45] Astoundingly, "one hit" on a website in England may be "enough for a multimillion-pound libel action in London."[46] Conversely, U.S. courts engage in a much narrower exercise of jurisdiction over foreign defendants. English courts' broad exercise of jurisdiction, however, is not the only reason that libel tourists prefer England to the United States. England is also an attractive forum because England's substantive libel laws allow libel tourists to achieve favorable judgments that would likely be unattainable under U.S. libel laws.[47]

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42. *Bin Mahfouz*, [2005] EWHC (QB) at [22]; *see also* Taylor, *supra* note 5, at 193 n.16.

43. *See* Taylor, *supra* note 5, at 191 n.4 ("Ehrenfeld initially retained the law firm Morgan, Lewis & Bockius to represent her in the U.K. case, but she ultimately elected not to defend against Bin Mahfouz's libel allegations.").

44. *Bin Mahfouz*, [2005] EWHC (QB) at [73]–[75].

45. Taylor, *supra* note 5, at 193 (emphasis in original).

46. Sarah Lyall, *Britain, Long a Libel Mecca, Reviews Laws*, N.Y. TIMES, Dec. 11, 2009, at Al (quoting Memorandum from Advance Publications, Inc., et al. to House of Commons Committee, U.K. Parliament (Mar. 2009), *available at* http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcumeds/memo/press/ucps4502.htm).

47. *See, e.g.*, Moore, *supra* note 38, at 3210.

1. *Procedures*

Libel tourists prefer and are able to commence libel actions in England because of three chief aspects of English procedures that differ from U.S. procedures: (1) the application of the multiple publication rule; (2) the broad exercise of jurisdiction over foreign defendants; and (3) the application of fee-shifting provisions.

a. *Statute of Limitations and "Publication"*

The statute of limitations on defamation claims runs for one year in England and one to three years in the United States, depending on the state.[48] In both countries, the limitations period begins to run on the date that the defamatory statement on which the claim is based is published.[49] But U.S. and English courts differ on what constitutes a "publication" for purposes of defamation actions.[50] In the United States, most courts adhere to the single publication rule ("SPR"), under which a claimant can bring only one action for damages based on a single publication of a defamatory statement regardless of its level of distribution, unless the statement has been republished in a new format or edition.[51]

48. *See* 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, 3088 (2006); Kyu Ho Youm, *Libel Law and the Press: U.S. and South Korea Compared*, 13 UCLA PAC. BASIN L.J. 231, 236 (1995).

49. *See* Itai Maytal, *Libel Lessons from Across the Pond: What British Courts Can Learn from the United States' Chilling Experience with the "Multiple Publication Rule" in Traditional Media and the Internet*, 3 J. INT'L MEDIA & ENT. L. 121, 128, 134 (2010).

50. Staveley-O'Carroll, *supra* note 18, at 260.

51. Maytal, *supra* note 49, at 128–29. Under the Uniform Single Publication Act, a plaintiff can bring only one cause of action for defamation "founded upon any single publication . . . such as any one edition of a newspaper or book or magazine" to recover damages for the reputational injury he suffered in *all* jurisdictions in which publication occurred. UNIF. SINGLE PUBL'N ACT § 1, 14 U.L.A. 377 (1990); *see also* RESTATEMENT (SECOND) OF TORTS § 577A Reporter's Note (1977) (noting that most states now follow the SPR).

Conversely, English courts apply the multiple publication rule ("MPR"),[52] under which a separate cause of action accrues every time that defamatory material is accessed—regardless of when it was first published.[53] In other words, "every individual sale or distribution of defamatory material, such as a newspaper, magazine, or book, is treated as a distinct publication with a separate basis for liability and a separate statute of limitations."[54] England's adherence to the MPR is significant to libel tourism because it provides the basis for English courts to apply English law in defamation actions lacking a substantial connection to England, as, under the MPR, every time the material is accessed in England, "a separate actionable tort against the plaintiff's reputation [occurs] in" England.[55]

Presently, the divergence between the MPR and SPR is most relevant in the context of defamation actions involving online publications.[56] In this context, under the SPR, publication occurs when the material is first uploaded online, not every time that the material is accessed.[57] Thus, the starting date of the limitations period is when the material is uploaded, "even if copies of the material continue to be made and be published years later."[58] While no U.S. court encountering this issue has found that the MPR should apply in the Internet context,[59] English courts continue to apply the MPR in such

52. Maytal, *supra* note 49, at 124. The MPR is also known as the *Duke of Brunswick* rule because it was first pronounced in the 1849 case, *Duke of Brunswick v. Harmer*, [1849] 14 Q.B. 185, where the court held that the sale of a back copy of a seventeen-year-old *Weekly Dispatch* newspaper containing libelous statements constituted a separate publication. The court found that the sale of the copy was actionable "despite the fact that the Duke had ordered his servant to obtain a copy of the relevant edition of the *Weekly Dispatch* from its publisher, Harmer," reasoning that the back copy would "lower the reputation of the [Duke] in the mind of an agent." Bríd Jordan, *The Modernization of English Libel Laws and Online Publication*, 14 NO. 7 J. INTERNET L. 3, 5 (2011).

53. Maytal, *supra* note 49, at 126.

54. *Id.*

55. Taylor, *supra* note 5, at 197.

56. *See* Maytal, *supra* note 49, at 131–38 (discussing the divergent approaches).

57. Jordan, *supra* note 52, at 6.

58. *Id.*

59. Maytal, *supra* note 49, at 132. In 2002, the New York Court of Appeals applied the SPR in a case involving an online publication and noted that the MPR's application in this context would cause the "endless retriggering of the

cases.[60] For example, in *Loutchansky v. Times Newspapers Ltd.*,[61] the English Court of Appeal rejected the argument that the SPR should apply, where a Russian businessman brought two libel actions against the *Times* exactly one year apart, with the first action based on news articles that the *Times* published in print, and the second based on the *same* articles after they had been made available in the *Times*'s online archive.[62] The court found that the one-year statute of limitations did not bar the second libel action, emphasizing that the MPR is a "well established principle of English law" that would not inhibit publishers from maintaining online archives responsibly.[63] Thus, under *Loutchansky*, the statute of limitations on defamation claims in England essentially lasts until the publication is no longer accessible in print or online—which may never occur.[64]

b. *Jurisdictional Determination*

After a libel plaintiff brings a defamation claim within the applicable statute of limitations, the court must ensure that it has adequate jurisdictional grounds to compel a foreign defendant to appear in its jurisdiction and defend against the plaintiff's claim. In comparison with U.S. courts, the jurisdictional connections that English courts require of foreign defendants are rather tenuous.[65] English courts may exercise jurisdiction over a foreign defendant: "(1) where the

statute of limitations, multiplicity of suits and harassment of defendants." Firth v. State, 775 N.E.2d 463, 466 (N.Y. 2002).

60. *See* Maytal, *supra* note 49, at 134–38.

61. [2002] E.M.L.R. 14, [2002] Q.B. 783, [2002] 1 All E.R. 652 (Eng.).

62. *Id.* at [73]–[76].

63. *Id.* at [72], [74]. The *Times* subsequently filed an application before the European Court of Human Rights, arguing that the application of the MPR in the case breached its right to freedom of expression under Article 10 of the European Convention of Human Rights. Times Newspapers Ltd. v. United Kingdom, [2009] E.M.L.R. 14. The court dismissed the application, finding that the MPR did not violate Article 10 because the delay between Loutchansky's two libel actions did not prevent the *Times* from arguing a reasonable defense. *Id.* at [49]–[50].

64. Andrew R. Klein, *Some Thoughts on Libel Tourism*, 38 PEPP. L. REV. 375, 379–80 (2011).

65. Moore, *supra* note 38, at 3214; *see also* McFarland, *supra* note 15, at 644 (noting that, unlike U.S. courts, English courts do not follow a constitutional view of personal jurisdiction).

defendant is present in England and served with process there; (2) where the defendant submits to the jurisdiction of the English court; or (3) where the plaintiff obtains judicial authorization to serve a summons outside the territorial borders of England."[66] Although a defendant who is served outside of England can challenge the judicial authorization on grounds of *forum non conveniens*,[67] English courts have broadly interpreted these principles, so that, in a defamation action, "all the plaintiff must do to establish English jurisdiction is to prove that statements were published in England."[68] For example, in *Bin Mahfouz v. Ehrenfeld*,[69] the High Court found that the exercise of jurisdiction over Rachel Ehrenfeld was proper even though only twenty-three copies of her book had been purchased in the United Kingdom.[70]

U.S. courts take a much narrower approach to the jurisdictional inquiry, focusing on whether the exercise of personal jurisdiction over a foreign defendant complies with the Due Process Clause of the Fourteenth Amendment.[71] To exercise personal jurisdiction over a foreign defendant, the defendant must have either: (1) a "substantial, continuous, and systematic" presence in the forum; or (2) certain "minimum contacts" with the forum that relate to the litigation and

66. McFarland, *supra* note 15, at 643.

67. Under the doctrine of *forum non conveniens*:

> [T]he defendant . . . [can] contest the plaintiff's choice of forum on grounds of substantial inconvenience, fairness and justice. The doctrine allows a court having adjudicative jurisdiction to decline exercise of its jurisdiction whenever the particular circumstances of the case establish that it would be inappropriate or unjust to hear the case.

Id. at 646. English courts, however, have rarely applied the doctrine in defamation cases. *Id.*; Staveley-O'Carroll, *supra* note 18, at 264.

68. McFarland, *supra* note 15, at 644.

69. [2005] EWHC (QB) 1156 (Eng.).

70. *Id.* at [22].

71. Moore, *supra* note 38, at 3222. In determining whether the exercise of personal jurisdiction over a defendant is proper, a U.S. court first applies either "an applicable federal statute governing personal jurisdiction or, absent that, the long-arm statute of the state in which the court resides. A long-arm statute is a state statute that specifies under what conditions a court sitting in that particular state may hale a foreign party into its forum." *Id.*

make the assertion of jurisdiction reasonable.[72] Non-resident defendants' minimum contacts are sufficient to justify a U.S. court's exercise of personal jurisdiction over them where they have either purposefully availed themselves of the privilege of conducting activities within the forum or purposefully directed their conduct at the forum.[73] For example, in *Calder v. Jones*,[74] the U.S. Supreme Court found that the *National Enquirer*'s president and one of its reporters, both Florida residents, purposefully directed their magazine at California because the magazine's widest circulation was in California and the defendants were aware that the "brunt of the harm" of a defamatory statement would be felt there.[75] As a result, they should have "reasonably anticipate[d] being haled into court there to answer for the truth of the statements" published.[76] But the mere fact that defamatory material entered the forum, even if foreseeable, is an insufficient basis to exercise personal jurisdiction over a non-resident defendant.[77]

c. *Costs*

Finally, England is a procedurally attractive forum for libel tourists because it is extremely expensive and inconvenient for many defendants to litigate there. English libel actions are notoriously expensive; it is estimated that the attorneys' fees required for just initiating a defense are approximately $200,000, with total costs eas-

72. *See, e.g.*, Feldman, *supra* note 1, at 2470 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Since 1945, the U.S. Supreme Court has "enunciated several factors to be considered in determining whether the exercise of jurisdiction is reasonable," including "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 2470 n.83 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985)). The burden rests on the defendant to prove that the court's exercise of jurisdiction over him or her would be unreasonable. Moore, *supra* note 38, at 3224.

73. Feldman, *supra* note 1, at 2471.

74. 465 U.S. 783 (1984).

75. *Id.* at 785–86, 789.

76. *Id.* at 790 (internal quotation marks omitted).

77. McFarland, *supra* note 15, at 640.

ily exceeding $1,000,0000.[78] Libel trials can also last for years and attract unwanted media attention.[79] For example, after English historian David Irving sued Emory University Professor Deborah Lipstadt in England for defamation in 1996,[80] Lipstadt and her publisher spent over £2,000,000 over the course of four years before they finally prevailed at trial.[81] English fee-shifting rules also incentivize libel tourists to file their actions in England, as the rules require that the losing party pay the winning party's legal costs.[82] Additionally, many barristers agree to represent libel claimants on a "no win, no fee" arrangement, thereby insulating claimants from financial liability should they not prevail.[83]

2. *Substantive Laws*

The core divergence between U.S. and English libel laws is that English law presumes that a defamatory statement is false while U.S. law presumes that a defamatory statement is true.[84] As a result, in

78. Bernstein, *supra* note 1, at 221; Taylor, *supra* note 5, at 200 n.66 (citing David Kohler, *Forty Years After* New York Times v. Sullivan: *the Good, the Bad, and the Ugly*, 83 OR. L. REV. 1203, 1205–06 (2004)).

79. McFarland, *supra* note 15, at 649.

80. Irving alleged that Lipstadt and her publisher, Penguin Books Limited, defamed him by publishing statements in her book that alleged he was a "Nazi apologist and an admirer of Hitler, who has resorted to the distortion of facts and to the manipulation of documents in support of his contention that the Holocaust did not take place." Irving v. Penguin Books Ltd., [2000] EWHC (QB) 115, [1.2] (Eng.); *see also* DEBORAH LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (1994).

81. *See* Steve Busfield, *Irving Loses Holocaust Libel Case*, GUARDIAN, Apr. 11, 2000, http://www.guardian.co.uk/books/2000/apr/11/irving.uk.

82. *See id.* (noting that Irving would likely be liable for the defendants' legal costs); McFarland, *supra* note 15, at 626 & n.42; Staveley-O'Carroll, *supra* note 18, at 259; Taylor, *supra* note 5, at 200. Conversely, in most U.S. proceedings, each party pays his own attorney. Rendleman, *supra* note 2, at 478–79.

83. McFarland, *supra* note 15, at 627.

84. *See* MELKONIAN, *supra* note 2, at 50–51. Specifically, a defamatory statement is presumed false in England once the plaintiff demonstrates that he or she was identified in the writing at issue and that the writing was published. Bernstein, *supra* note 1, at 219–20. Conversely, in the United States, the plaintiff generally has the burden to prove:

England, once a plaintiff shows that a defamatory statement was published about him or her, the burden is placed on the author or publisher to prove the truth of the statement in order to escape liability.[85] Proving truth, however, is not an easy task, as a defendant is required to "prove the substantial truth of every material fact."[86] Additionally, attempting to prove the truth of a statement is dangerous because if the defendant tries but fails to do so, he or she could face an aggravated-damages judgment.[87]

Conversely, in the United States, the plaintiff most prove that the defamatory statement is false,[88] and, if the plaintiff is a public official or public figure, that the defendant acted with actual malice—that is, with knowledge that the statement was false or with reckless disregard as to whether the statement was false or not.[89] Actual ma-

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(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

RESTATEMENT (SECOND) OF TORTS § 558 (1977).

85. MELKONIAN, *supra* note 2, at 50–51.

86. Beauchamp, *supra* note 48, at 3078.

87. Staveley-O'Caroll, *supra* note 18, at 257.

88. *See, e.g.*, Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 775–76 (1986); *see also* MELKONIAN, *supra* note 2, at 50–51.

89. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279–80, 285–86 (1964) (announcing the actual malice standard and that it applies in defamation actions brought by public officials); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 162–63 (1967) (holding that the actual malice standard applies in defamation actions brought by public figures). The Supreme Court did not define "public official" in *Sullivan* but stated in *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." In *Butts*, the Court defined "public figures" as those who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." 388 U.S. at 164.

The actual malice standard has not been extended to apply in defamation actions brought by private individuals because they lack "the same degree of access to the media to rebut defamatory comments" as public officials and public figures, who voluntarily expose themselves to public scrutiny. Gertz v. Robert Welch, Inc., 418 U.S. 323, 363 (1974) (Brennan, J., dissenting). But private individuals

lice must be proven by clear and convincing evidence, which is a difficult undertaking.[90] Litigation involving the standard nearly always concerns whether the publisher acted with reckless disregard,[91] which, generally, can be proven only where there is "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[92] Courts have not precisely defined how much evidence is sufficient,[93] and where the standard is strictly applied, claimants "have little chance of prevailing without evidence that the publisher actually knew the statements were false," evidence that is rarely available in any defamation case.[94] As a result, in the United States, defendants who publish statements concerning matters of public concern or regarding public figures, while not impervious to defamation liability, are strongly safeguarded against it.[95]

Defendants are not nearly so insulated from liability in English defamation actions, as the burden rests on defendants to prove the truth of the statement at issue, regardless of the plaintiff's status as a public or private figure.[96] But, in the past decade, the English courts have taken some steps to protect media defendants, most notably through the *Reynolds* defense, which may apply where the defendant published an article containing a defamatory statement but engaged in responsible and fair journalistic methods, had justification for including the statement, and the article as a whole concerned a matter of public interest.[97]

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who are so involved in a matter of public interest that they are public figures for the purposes of that sole matter must prove actual malice. *Id.* at 345.

90. *See, e.g.*, MELKONIAN, *supra* note 2, at 20.

91. *Id.* at 20.

92. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

93. *See* Murphy v. Boston Herald, Inc., 865 N.E.2d 746, 752–53 (Mass. 2007).

94. MELKONIAN, *supra* note 2, at 24 (discussing *St. Amant*).

95. David F. Partlett, *The Libel Tourist and the Ugly American: Free Speech in an Era of Modern Global Communications*, 47 U. LOUISVILLE L. REV. 629, 643 (2009). *But see* MELKONIAN, *supra* note 2, at 31–37 (discussing the tension between the traditional actual malice standard as announced in *Sullivan* and the more relaxed, objective approach announced in *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989)).

96. MELKONIAN, *supra* note 2, at 44–45.

97. *See* Jameel v. Wall Street Journal (Europe), [2006] 3 W.L.R. 642 (Eng.). The *Reynolds* defense was first announced in *Reynolds v Times Newspapers Ltd.*,

C. *The International Chilling Effect*

With the expansion of libel tourism, publishers based in the United States and other countries have begun rejecting or withholding publication of certain works in fear that libel lawsuits will be filed against them in England, where more speech-restrictive laws apply.[98] For example, according to Rachel Ehrenfeld, after the English court entered a default defamation judgment against her, the judgment tarnished her reputation in the United States, as two publishers that had previously published her work rejected a well-researched but potentially controversial article that she submitted for consideration.[99] Similarly, in 2004, Random House, Inc. chose to withhold publication of the book *House of Bush, House of Saud: The Secret Relationship Between the World's Two Most Powerful Dynasties* in the United Kingdom lest that members of the Saudi royal family would sue for defamation.[100] And, in 2007, Cambridge University Press chose to withhold publication of the book *Alms for Jihad* after a threatened libel action; its decision "was not based on a 'lack of confidence' in the book, but rather solely on a 'fear of incurring costly legal expenses and getting involved in a lengthy trial.'"[101]

Authors self-censoring their work to comply with restrictive libel laws is another byproduct of libel tourism's chilling effect. For example, in a March 2011 editorial printed in the *Guardian*, English science writer Simon Singh, who was personally sued in England for

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[1998] 3 W.L.R. 862 (Eng.). While the *Reynolds* defense provides some protection for journalists, it is still not as protective of free speech as U.S. defamation laws. *See* Kyu Ho Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?*, 13 COMM. L. & POL'Y 415, 445 (2008).

98. *See* Bernstein, *supra* note 1, at 222; Taylor, *supra* note 5, at 202–03; Patrick Wintour, *'Laughing Stock' Libel Laws to Go, Says Clegg*, GUARDIAN, Jan. 7, 2011, at 12.

99. Ehrenfeld v. Bin Mahfouz, No. 04 Civ. 9641(RCC), 2006 WL 1096816, at *2 (S.D.N.Y. Apr. 26, 2006).

100. Patrick Barrett, *'Libel Tourism' Scotches Bush Book*, GUARDIAN, Mar. 24, 2004, http://www.guardian.co.uk/media/2004/mar/24/pressandpublishing.politicsandthemedia; *see also* CRAIG UNGER, HOUSE OF BUSH, HOUSE OF SAUD: THE SPECIAL RELATIONSHIP BETWEEN THE WORLD'S TWO MOST POWERFUL DYNASTIES (2004).

101. Taylor, *supra* note 5, at 201; *see also* Partlett, *supra* note 95, at 652.

libel by the British Chiropractic Association,[102] discussed self-censorship in the scientific community due to libel tourism.[103] Specifically, Singh discussed an email exchange that he had with a U.S. researcher, who had submitted a paper for publication consideration to an English journal and a U.S. journal, both of which have international circulations.[104] The English journal rejected the paper on the basis that it could have legal implications under English libel laws.[105] And while the U.S. journal made a publication offer, it later demanded edits to be made in order to avoid the "serious risk of being sued in London according to English libel law."[106]

While both the withholding of publications and self-censorship are negative effects of libel tourism, perhaps the greatest danger of libel tourism is that authors will begin to avoid writing about controversial, but important, subject matters altogether.

D. *The U.S. Reaction*

After Saudi billionaire Sheikh Khalid bin Mahfouz won a default defamation judgment in London against U.S. author Rachel Ehrenfeld, Ehrenfeld sought her own relief in a U.S. court, a choice that publicized the issue of libel tourism and led to a national outcry against it. To be clear, Ehrenfeld did not appear in London to defend herself in the English court; rather, as she puts it herself:

> I did not lose because there was a trial and I couldn't prove my case. I lost by default. I refused to acknowledge the British jurisdiction over me because I'm not a British citizen.

102. *See* Simon Rogers, *How Many Libel Cases Are There?*, GUARDIAN, Apr. 15, 2010, http://www.guardian.co.uk/news/datablog/2010/apr/15/libel-cases-general-election.

103. Simon Singh, *English Libel Law Is a Vulture Circling the World*, GUARDIAN, Mar. 10, 2011, http://www.guardian.co.uk/commentisfree/libertycentral/2011/mar/10/english-libel-law-simon-singh.

104. *Id.*

105. *Id.*

106. *Id.*

> I don't live there. I didn't see any reason why I should go to court there or pay huge financial expenses.[107]

Bin Mahfouz never attempted to enforce his judgment against Ehrenfeld, seemingly satisfied with publicizing the judgment on the Internet.[108] Nevertheless, Ehrenfeld sought a declaration in the Southern District of New York that the judgment was unenforceable in the United States.[109] A U.S. court, however, cannot order a declaratory judgment[110] unless it first determines that it may exercise personal jurisdiction over the foreign defendant.[111] Finding that bin Mahfouz lacked sufficient minimum contacts with New York, the court dismissed the action on the basis that the exercise of personal jurisdiction over him would be improper.[112] Ehrenfeld appealed the decision to the Second Circuit, which upheld the dismissal.[113]

But Ehrenfeld did not stop there. Dissatisfied with the Second Circuit's decision and having spent "many sleepless nights worried that Mahfouz [would] try to enforce the English judgment against

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107. Melissa Parker, *Dr. Rachel Ehrenfeld Interview: Terrorism Funding Expert on SPEECH Act and 9/11*, SMASHING INTERVIEWS MAG. (Sept. 8, 2010), http://smashinginterviews.com/interviews/newsmakers/dr-rachel-ehrenfeld-interview-terrorism-funding-expert-on-speech-act-and-911 (quoting Ehrenfeld).

108. MELKONIAN, *supra* note 2, at 4.

109. Ehrenfeld v. Bin Mahfouz, No. 04 Civ. 9641(RCC), 2006 WL 1096816, at *1 (S.D.N.Y. Apr. 26, 2006).

110. By issuing a declaratory judgment, a U.S. court "[declares] the rights and other legal relations of any interested party." Moore, *supra* note 38, at 3221 (citing 28 U.S.C. § 2201(a) (2006)). Declaratory judgments "have the force and effect of a final judgment or decree . . . ." *Id.*

111. McFarland, *supra* note 15, at 658. In the context of libel tourism, "[t]his presents a substantial problem . . . because the prospective defendant is a foreign citizen pursuing a foreign judgment in a foreign court." *Id.*; *see also* Moore, *supra* note 38, at 3221.

112. *Ehrenfeld*, 2006 WL 1096816, at *6.

113. Ehrenfeld v. Mahfouz, 518 F.3d 102, 105 (2d Cir. 2008). Initially, the Second Circuit found that the case presented a novel question of New York law regarding the scope of New York's long-arm statute and certified the question to New York's highest state court, the New York Court of Appeals. Ehrenfeld v. Mahfouz, 489 F.3d 542, 548, 550 (2d Cir. 2007). The Court of Appeals determined that New York did not have personal jurisdiction over bin Mahfouz because he had not transacted business in New York within the meaning of the long-arm statute. Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830, 838 (N.Y. 2007).

[her] in New York,"[114] Ehrenfeld began a campaign for legislative action to be taken to prevent libel tourists from enforcing their foreign judgments in U.S. courts against U.S. citizens.[115] And her efforts succeeded: In March 2008, the New York Senate and Assembly unanimously passed the Libel Terrorism Protection Act ("LTPA").[116] Otherwise known as "Rachel's Law," the LTPA was the model on which the federal SPEECH Act was based.[117]

Before discussing the SPEECH Act, a brief discussion of the enforcement of foreign judgments by U.S. courts is in order. Generally, the enforcement of foreign judgments is governed by the principle of international comity,[118] which the U.S. Supreme Court first announced in the 1895 decision *Hilton v. Guyot*.[119] Comity stands for the policy that U.S. courts will "extend recognition . . . to judgments of courts from other nations except in situations where the foreign law or judgment is contrary to American public policy" or the foreign court lacked jurisdiction.[120] Non-recognition of foreign

114. Libel Tourism: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 12 (2009).

115. *See* MELKONIAN, *supra* note 2, at 4.

116. *Id.* at 4, 245. The LTPA took two steps to protect U.S. authors like Ehrenfeld from libel tourists who may seek to enforce their foreign judgments in New York. First, it amended New York's statute regarding the enforcement of foreign money judgments to permit New York courts to reject foreign judgments where the foreign court applied a standard less protective of free speech than a New York court would have applied. N.Y. C.P.L.R. § 5304(b)(8) (MCKINNEY 2008). Second, it amended New York's long-arm statute to permit New York courts to exercise personal jurisdiction over a foreign defendant to the full extent allowed by the U.S. Constitution. *Id.* § 302(d).

117. MELKONIAN, *supra* note 2, at 4, 245–46.

118. Warshaw, *supra* note 1, at 289; Rendleman, *supra* note 2, at 473.

119. 159 U.S. 113 (1895).

120. MELKONIAN, *supra* note 2, at 180; *see* McFarland, *supra* note 15, at 654. In *Hilton*, the Supreme Court announced the following rule of comity:

> When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima

judgments is rare,[121] even in cases where there are differences in the substantive laws applied.[122] In the defamation context, in only two cases have U.S. courts refused to enforce foreign judgments on the basis that they were contrary to First Amendment principles.[123]

Despite U.S. courts' ability to refuse the recognition or enforcement of foreign defamation judgments pursuant to the longstanding public-policy and jurisdiction exceptions to international comity, federal legislators in the U.S. House of Representatives and Senate quickly responded to New York's enactment of the LTPA with competing federal legislation,[124] a compromise of which was signed into

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> facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and *by the comity of our own country, it should not be given full credit and effect*.

159 U.S. at 205–06 (emphasis added).

Nearly two-thirds of the states have adopted the Uniform Foreign Money-Judgments Recognition Act or the Uniform Foreign-Country Money Judgments Recognition Act, "which permit state courts to refuse to enforce foreign judgments that violate the public policy of the individual state or the United States as a whole." Taylor, *supra* note 5, at 199; *see also* Moore, *supra* note 38, at 3220.

121. Rendleman, *supra* note 2, at 473.

122. *See* McFarland, *supra* note 15, at 654 (noting that the public policy exception has been strictly construed and that "U.S. courts have . . . tolerated difference in substantive law and extended respect to the foreign judgment").

123. Taylor, *supra* note 5, at 199; *see* Telnikoff v. Matusevitch, 702 A.2d 230, 249–50 (Md. 1997) (denying recognition of the plaintiff's judgment because "principles governing defamation actions under English law . . . are . . . contrary to Maryland defamation law"); Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661, 664–65 (N.Y. Sup. Ct. 1992) (refusing to enforce an English defamation judgment because doing so would violate the public policy of New York).

124. Taylor, *supra* note 5, at 206. *See* Securing the Protection of Our Enduring and Established Constitutional Heritage Act, H.R. 2765, 111th Cong. (2009); Free Speech Protection Act of 2009, H.R. 1304, 111th Cong. (2009); Free Speech Protection Act of 2009, S. 449, 111th Cong. (2009). Soon after New York enacted the LTPA, but prior to the enactment of the SPEECH Act, Illinois, Florida, and California enacted legislation nearly identical to the LTPA's discretionary prohibition against the enforcement of foreign defamation judgments. *See* CAL. CIV. PROC. CODE §§ 1716-17 (West Supp. 2011); FLA. STAT. ANN. § 55.605(2)(h) (West Supp. 2011); 735 ILL. COMP. STAT. ANN. 5/2-209(b-5), 5/12-621(b)(7) (West Supp. 2010).

law on August 10, 2010 in the form of the SPEECH Act.[125] The SPEECH Act is quite similar to the LTPA, but it does not simply authorize U.S. courts to refuse recognition or enforcement of foreign defamation judgments that are contrary to First Amendment principles; rather it mandates it: Specifically, 28 U.S.C. § 4102(a)(1)(A) states that a U.S. court

> shall not recognize or enforce a foreign judgment for defamation unless . . . [it] 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 the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located.[126]

U.S. courts must also not recognize or enforce foreign defamation judgments where the foreign court's exercise of personal jurisdiction was inconsistent with U.S. due process requirements.[127] Saliently, § 4105 provides that the party opposing the enforcement of the judgment is entitled to attorneys' fees if such party prevails.[128]

The SPEECH Act does require U.S. courts to recognize or enforce a foreign defamation judgment, even where the foreign court applied substantive law that did not comport with First Amendment principles, if the judgment creditor (the libel tourist) is able to demonstrate that "the party opposing recognition or enforcement of the foreign judgment" (the U.S. author or publisher) "would have been found liable for defamation" by a U.S. court.[129] In other words, if the libel tourist can prove that he or she would have prevailed in the foreign adjudication had U.S. law been applied, a U.S. court will enforce or recognize the foreign judgment. The actual effect of this provision is questionable, however, as it "effectively forces a new trial in the American venue," requiring the libel tourist to prove his

125. Taylor, *supra* note 5, at 205; Press Release, *supra* note 12.
126. 28 U.S.C. § 4102(a)(1)(A) (West, Westlaw through 2010 Sess.).
127. *Id.* § 4102(b)(1).
128. *Id.* § 4105. Section 4104(a)(1) also permits a U.S. person against whom a foreign defamation judgment has been entered to seek a declaratory judgment that the foreign judgment is "repugnant" to U.S. law.
129. *Id.* § 4102(a)(1)(B).

case under U.S. law, "with the added zinger that if . . . [he or she] loses, [he or she] will be liable for attorney's fees under [§] 4105."[130]

The SPEECH Act has been equally lauded and derided. While some have celebrated its enactment as essential to the protection of free-speech rights,[131] others have criticized its "broad-brush rejection of all foreign judgments" as being "too blunt and too broad" and possibly damaging to the United States' foreign relations.[132] In the context of libel tourism, while the Act may provide extra certainty to U.S. authors and publishers that they will not be forced to comply with foreign judgments unless a U.S. court determines otherwise, it does (and can do) nothing to prevent U.S. authors and publishers from being sued for defamation in foreign courts in the first place.

III. THE DRAFT DEFAMATION ACT 2011

At the same time that the SPEECH Act was being drafted in the United States, English policymakers were debating changes to their own libel laws.[133] In July 2008, the U.N. Human Rights Committee issued a report, finding that English libel laws have "served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as libel tourism."[134] Five months later, three influential Members of Parliament from each major political party urged the government to reform England's libel laws, including "the 'international scandal' of libel tour-

130. MELKONIAN, *supra* note 2, at 255–56.

131. *See* Kristen Rasmussen, *SPEECH Act Protects Against Libel Tourism*, 34 NEWS MEDIA & L. 20 (2010); Editorial, *No More 'Libel Tourists': Congress Steps In to Protect Writers; Now Britain Must Do Its Part*, WASH. POST, Aug. 13, 2010, *available at* 2010 WLNR 16160988; Editorial, *A Victory for Writing*, N.Y. TIMES, July 23, 2010, at A22.

132. Klein, *supra* note 64, at 387 (quoting Rendleman, *supra* note 2, at 487) (internal quotation marks omitted).

133. *Id.* at 385; *see also* MELKONIAN, *supra* note 2, at 262.

134. Duncan Campbell, *British Libel Laws Violate Human Rights, Says UN*, GUARDIAN, Aug. 14, 2008, http://www.guardian.co.uk/uk/2008/aug/14/law.unitednations; LIBEL REFORM CAMPAIGN, FREE SPEECH IS NOT FOR SALE (2009), http://www.libelreform.org/the-report?showall=1 (hereinafter FREE SPEECH REPORT].

ism."[135] Subsequently, Justice Minister Bridget Prentice promised that the libel laws' efficacy would be formally examined, marking the first time since 1843 that the government promised an expansive reform of England's libel laws.[136]

In November 2009, English Pen and Index on Censorship published the results of a year-long inquiry into England's libel laws in a report titled *Free Speech Is Not For Sale*.[137] The report found that "lawyers, publishers, journalists, bloggers and [non-governmental organizations]" were concerned that the laws were stifling freedom of expression both in the United Kingdom and internationally and offered ten reformation recommendations.[138] Taking the initiative to formulate specific reforms, Lord Lester of Herne Hill, a long-time defender of free expression and campaigner for human rights,[139]

135. David Pallister, *MPs Demand Reform of Libel Laws*, GUARDIAN, Dec. 18, 2008, http://www.guardian.co.uk/media/2008/dec/18/mps-demand-reform-of-libel-laws. Michael Gove, a member of the Conservative Party, Norman Lamb, a member of the Liberal Democrat party, and Dennis MacShane, a member of the Labour Party, led the initiative. *Id.* According to Lord Lester, "[n]ever before . . . have the three main political parties been committed to using Parliament to reform law." *Lord Lester: 'The Law is the Enemy of Free Speech,'* INDEP., Aug. 26, 2010, http://www.independent.co.uk/news/media/press/lord-lester-the-law-is-the-enemy-of-free-speech-2062103.html [hereinafter *Lord Lester*].

136. *Libel Reform Campaign Welcomes Government's Draft Defamation Bill*, LIBEL REFORM CAMPAIGN (Mar. 15, 2011), http://www.libelreform.org/news/490-libel-reform-campaign-welcomes-governments-draft-defamation-bill [hereinafter *LRC Welcomes Draft Bill*]. It should be noted that some modifications to English libel laws were made in the 1952 and 1996 Defamation Acts. *Id.*

137. *See* FREE SPEECH REPORT, *supra* note 134. English Pen, founded in 1921, is an association devoted to promoting literature and supporting writers. *About English Pen*, ENGLISH PEN, http://www.englishpen.org/aboutenglishpen (last visited Apr. 29, 2011). Index on Censorship, founded in 1972, is England's leading organization promoting freedom of expression. *About Index on Censorship*, INDEX ON CENSORSHIP, http://www.indexoncensorship.org/about-index-on-censorship (last visited Apr. 29, 2011).

138. FREE SPEECH REPORT, *supra* note 134.

139. Lord Lester, a member of the House of Lords, "was a prime mover behind the Human Rights Act, the Equality Act, the Civil Partnership Act, and the Forced Marriage (Civil Protection) Act, which were preceded by Bills which he introduced in Parliament." *Lord Lester*, *supra* note 135; *see also Lord Lester of Herne Hill*, U.K. PARLIAMENT, http://www.parliament.uk/biographies/anthony-lester/26915 (last visited Apr. 29, 2011).

published a draft defamation bill in May 2010,[140] containing twenty-two clauses, including one directly aimed at libel tourism.[141] And, in July 2010, one month before President Obama signed the SPEECH Act into law, the Ministry of Justice committed to developing options for libel reform via draft legislation by March 2011.[142]

The Ministry of Justice delivered on its promise and, on March 15, 2011, introduced a draft bill, entitled the Draft Defamation Act 2011, for public consultation and pre-legislative review.[143] The Draft Act aims to ensure that an appropriate balance is struck between freedom of speech and the protection of reputation as well as to "ensure that the threat of libel proceedings is not used to frustrate robust scientific and academic debate, or to impede responsible investigative journalism and the valuable work undertaken by non-governmental organisations."[144] It contains ten clauses,[145] four of

140. *What Does Lord Lester's Defamation Bill Propose?*, GUARDIAN, May 27, 2010, http://www.guardian.co.uk/law/2010/may/27/lord-lester-defamation-bill-analysis.

141. For a copy of Lord Lester's Draft Defamation Bill, see *Lord Lester's Private Members' Defamation Bill*, GUARDIAN, May 27, 2010, http://www.guardian.co.uk/law/2010/may/27/lord-lester-defamation-bill. Subsection (2) of the thirteenth clause addressed defamatory publications published outside the jurisdiction and stated: "No harmful event is to be regarded as having occurred in relation to the claimant unless the publication in the jurisdiction can reasonably be regarded as having caused substantial harm to the claimant's reputation having regard to the extent of publication elsewhere." *Id.*

142. Jordan, *supra* note 52, at 4–5.

143. *See* CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, at 3.

144. *Id.*

145. Substantively, the Draft Act provides four defenses for defamation defendants. First, it essentially codifies the *Reynolds* defense by providing a defense for defendants who show that they acted responsibly in publishing a statement concerning a matter of public interest. *Id.* annex a, at 1 (clause 2). Second, it replaces the defense of justification with a defense of truth for defendants who show that a statement that "conveys two or more distinct imputations" is substantially true. *Id.* annex a, at 2 (clause 3(1)–(2)). Third, it clarifies the current defense of fair comment by creating the defense of honest opinion, applicable where a defendant proves that the statement at issue was an opinion on a matter of public interest that "an honest person could have held." *Id.* annex a, at 2–3 (clause 4). Finally, it extends the protections of absolute and qualified privilege, including providing absolute privilege to fair and accurate reports of proceedings in any court outside the United Kingdom and qualified privilege to fair and accurate reports of proceedings at a scientific or academic conference. *Id.* annex a, at 3–4 (clause 5).

which concern procedural reforms that are relevant to libel tourism: (1) the adoption of an SPR; (2) the requirement that courts refuse to exercise jurisdiction in libel actions brought against non-resident defendants unless England is clearly the most appropriate forum; (3) the requirement that claimants prove that the publication of defamatory statements caused substantial harm to their reputations; and (4) the presumption that a defamation trial will not be tried by a jury.[146]

A. *Adoption of the Single Publication Rule*

The Draft Defamation Act's sixth clause introduces an SPR, which would require libel claimants to bring a defamation claim against a publisher within one year from the date of the defamatory material's *first* publication—even if the publisher subsequently published the same, or substantially the same, material.[147] Under the currently applicable MPR, publishers are potentially liable for a separate cause of action every time that defamatory material, which they published, is accessed—regardless of whether the claimant had already brought a defamation action regarding the material.[148]

The SPR would not apply, however, where the manner of the subsequent publication was "materially different" from the manner of the first publication.[149] To determine whether the manner of publication is "materially different," the clause provides that courts may consider "the level of prominence that a statement is given" and "the extent of the subsequent publication."[150] The Draft Act's explanatory notes offer an instructive example:

> [W]here a story has first appeared relatively obscurely in a section of a website where several clicks need to be gone through to access it, but has subsequently been promoted to a position where it can be directly accessed from the home

146. *See id.* annex a, at 1, 4–6 (clauses, 1, 6–8).
147. *Id.* annex a, at 4 (clause 6(1)).
148. *See supra* Section II.B.1.a.
149. CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, annex a, at 5 (clause 6(4)).
150. *Id.* annex a, at 5 (clause 6(5)).

> page of the site, thereby increasing considerably the number of hits it receives.[151]

Notwithstanding the adoption of an SPR, the clause makes clear that courts would still have discretion under section 32A of the Limitation Act 1980 to allow defamation actions to proceed outside the one-year limitations period where it is equitable to do so.[152]

B. *Jurisdiction*

The Draft Act's seventh clause addresses the jurisdictional issue directly related to libel tourism: when libel actions are brought against defendants not domiciled in the United Kingdom or a Member State.[153] Presently, English courts have broad discretion to decline jurisdiction over such defendants under the doctrine of *forum non conveniens*,[154] but this doctrine is rarely applied.[155] This clause makes *forum non conveniens* superfluous in that it mandates that a court shall not exercise jurisdiction in defamation actions brought against non-resident defendants unless it is "satisfied that, of all the places in which the statement complained of has been published, England . . . is *clearly the most appropriate place* in which to bring an action in respect of the statement."[156] While the clause does not delineate factors that courts should consider in assessing whether England is the most appropriate forum, the explanatory notes offer some guidance via the following example: "[I]f a statement was published 100,000 times in Australia and only 5,000 times in England, that would be a good basis on which to conclude that the most appropriate jurisdiction in which to bring an action in respect of the statement was Australia rather than England."[157]

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151. *Id.* annex b, at 82 (Explanatory Note paragraph 44).
152. *Id.* annex a, at 5 (clause 6(6)).
153. *Id.* annex a, at 5–6 (clause 7). The clause also applies to libel actions brought against persons who are not domiciled "in a state which is for the time being a contracting party to the Lugano Convention." *Id.* annex a, at 5 (clause 7(1)(c)).
154. *Id.* at 34 (paragraph 82).
155. *See supra* Section II.B.1.
156. CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, annex a, at 5 (clause 7(2)).
157. *Id.* annex b, at 83 (Explanatory Note paragraph 47). This clause is intended to comport with the existing procedural framework for libel claims. *Id.* annex b, at

C. *Requirement of Substantial Harm*

The Draft Act's first clause would impose a new requirement on libel claimants to demonstrate that a defamatory statement caused them "substantial harm."[158] Unlike U.S. proceedings, libel is currently actionable in England without proof of damages, that is, once claimants prove that they were identified in a defamatory statement, the court presumes that they suffered damages as a result of the statement's publication.[159] This clause would remove that presumption; it provides: "A statement is not defamatory unless its publication has caused or is likely to cause substantial harm to the reputation of the claimant."[160]

D. *Presumption of Trial Without Jury*

Currently, juries preside over defamation trials upon application by either party "unless the court considers that the trial requires any prolonged examination . . . which cannot conveniently be made with a jury."[161] The Draft Act's eighth clause would establish the presumption that a judge, rather than a jury, will decide a defamation

83 (Explanatory Note paragraph 48). For example, under Civil Procedure Rule ("CPR") 6.36, a claimant must receive permission from the court before serving a claim form on a non-resident defendant outside of the United Kingdom. Civil Procedure Rule 6.36, U.K. Ministry of Justice, *available at Service of Documents*, MINISTRY OF JUSTICE, http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part06.htm#IDAXA3EC (last visited Apr. 29, 2011). Thus, if the Draft Defamation Act's jurisdictional clause is enacted, and a libel claimant applied under CPR 6.36 to serve a claim form outside of the United Kingdom, "the court would refuse to exercise its discretion to grant permission if it thought that it would not have jurisdiction to hear the claim as a result of this clause." CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, annex b, at 83 (Explanatory Note paragraph 48).

158. CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, annex a, at 1 (clause 1).

159. *Id.* at 8 ("The Proposals" paragraph 1); *see supra* Section II.B.2.

160. *Id.* annex a, at 1 (clause 1). If enacted, the clause would essentially codify the holding of *Jameel v. Dow Jones & Co.*, [2005] EWCA (Civ) 75 (Eng.), where it was held that libel claimants must establish "a real and substantial wrong." *Id.* at [50]; CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, at 8 ("The Proposals" paragraph 7).

161. *Id.* annex b, at 83–84 (Explanatory Note paragraph 50).

trial.[162] The clause is motivated by the goal of making defamation trials more efficient, as judges could resolve preliminary issues—such as whether claimants have suffered substantial harm to their reputations—at an early stage rather than at trial.[163] Ideally, this efficiency would lead to early dismissals and settlements, which would significantly reduce the costs of libel litigation.[164]

IV. ANALYSIS

This section will evaluate the effect of the Draft Defamation Act on libel tourism actions brought in England as well as the potential enforcement of those actions in the United States. Part A analyzes the efficacy of the Draft Act in relation to its goal of curbing libel tourism. Part B considers the advantages of incorporating a choice-of-law provision into the Draft Act. Finally, Part C discusses the interplay between the Draft Defamation Act and the SPEECH Act, considering whether U.S. courts will enforce future English defamation judgments that will be rendered in accordance with the enacted version of the Draft Act.

A. *The Efficacy of the Draft Defamation Act*

The reception of the Draft Defamation Act was mixed. While many commentators welcomed it as an adequate first step in the reformation of English libel laws,[165] many others were quick to point out its deficiencies.[166] In relation to libel tourism, however, the Act

162. *Id.* annex a, at 6 (clause 8).
163. *See id.* at 36–38.
164. *See id.*
165. *See, e.g.*, *LRC Welcomes Draft Bill*, *supra* note 136. For example, Jonathan Heawood, Director of English PEN, stated that while English PEN was "delighted that the government has delivered a wholesale draft bill . . . it's essential that this opportunity delivers real reform. . . ." *Id.* Similarly, Dr. Evan Harris of the Libel Reform Campaign welcomed the draft bill but expressed "that it does not yet reflect the extent of full libel reform that is required to properly protect free expression." *Id.*
166. The chief criticisms of the Act have been its failures to address the exorbitant costs associated with libel litigation, impose restrictions on corporations and powerful public figures bringing libel actions, and reverse the presumption that an

has been widely praised.[167] For example, John Kampfner, Chief Executive of Index on Censorship, haled the Act as "a big step forward toward ending the practice of libel tourism . . . ."[168] Liberty, a U.K. human rights group, similarly declared that it "could help stem frivolous or abusive threats of libel and prevent powerful interests coming to Britain to shut down criticism and debate."[169]

The Draft Act, however, did not address all of the concerns raised by critics and, as will be discussed, it is not without its flaws. But the Draft Act's procedural clauses take effective steps toward eliminating libel tourism: Its SPR clause limits the number of actions a libel claimant may bring against a publisher, an essential reform in the wake of Internet publishing and online news archives; its jurisdictional clause ensures that there is a substantial connection between the underlying publication and England; its substantial harm clause requires that the claimant actually suffered reputational harm due to the publication; and its presumption-of-trial-without-jury

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allegedly defamatory statement is false. *See* Dominic Crossley, *Libel Reform? Defamation Is the Least of Our Problems*, GUARDIAN, Mar. 16, 2011, http://www.guardian.co.uk/law/2011/mar/16/libel-reform-defamation-least-of-problems; Geoffrey Robertson, *London Is Still a Town Named Sue*, NEW STATESMAN (Apr. 20, 2011), http://www.newstatesman.com/law-and-reform/2011/04/libel-bill-media-speech; Georgina Stanley, *Libel Reform—Too Timid, Too Dangerous, Too Bad*, LEGAL WEEK (Mar. 22, 2011), http://www.legalweek.com/legal-week/analysis/2036375/libel-reform-timid-dangerous-bad?WT.rss_f=&WT.rss_a=Libel+reform+-+too+timid%2C+too+dangerous%2C+too+bad.

167. *See* Arthur Bright, *British Libel Reform—Now With Real Proposed Legislation!*, CITIZEN MEDIA L. PROJECT (Apr. 5, 2011), http://www.citmedialaw.org/blog/2011/british-libel-reform-now-real-proposed-legislation; Katy Dowell, *Focus: Defamation, Clauses Célèbres*, LAW. (Mar. 28, 2011), http://www.thelawyer.com/focus-defamation-clauses-célèbres/1007461.article ("Although a lot's unclear about libel tourism, it does send a message to foreign litigants—come here at your peril . . . ." (quoting Niri Shan)); Roy Greenslade, *Three Cheers for Libel Reform Bill*, GUARDIAN, Mar. 15, 2011, http://www.guardian.co.uk/media/greenslade/2011/mar/15/medialaw-kenneth-clarke ("The draft defamation bill . . . will choke off 'libel tourism' . . . .").

168. Eric Pfanner, *In Britain, Curbing Lawsuits Over Libel*, N.Y. TIMES, Mar. 21, 2011, at B8.

169. Press Release, Liberty, Liberty Welcomes Government Moves on Libel Reform (Mar. 15, 2011), http://www.liberty-human-rights.org.uk/media/press/2011/liberty-welcomes-government-moves-on-libel-reform.php.

clause could lead to more efficient management of cases, thereby reducing the high costs of libel litigation. Collectively, these clauses serve as a strong barrier against libel tourists.

1. *The SPR Clause*

The Draft Act's SPR clause would sensibly bring English defamation law into the Internet age,[170] as its adoption would prevent libel tourists (as well as all other libel claimants) from bringing multiple actions against the same defendant based on subsequent "publications" of the same material.[171] Media defendants, particularly major newspapers that maintain online news archives, will likely be the most appreciative of the clause because its adoption means that they will potentially no longer face separate liability every time that one of their articles, containing an allegedly defamatory statement, is "published" in England—that is, every time that it is accessed there. Rather, a libel claimant will be limited to bringing a single defamation action against the defendant within one year after the defamatory material was first made available.

But the SPR clause does not entirely absolve defendants from separate liability for subsequent publications of the same material. Indeed, the clause gives discretion to courts to determine whether a subsequent publication is "materially different" from its original publication, thereby constituting a separate publication on which a new cause of action may be based.[172] But neither the explanatory notes nor the clause itself provide guidance to courts for situations "where older material gains a second life and new exposure" through

170. The SPR clause has been one of the most well-received reforms in the Draft Act. *See* Siobhain Butterworth, *A Minor Triumph for Libel Reform*, GUARDIAN, Mar. 16, 2011, http://www.guardian.co.uk/law/2011/mar/16/libel-reform-medialaw ("If yesterday's draft defamation bill becomes law and a new single publication rule is introduced, it would be a triumph."); Charlotte Williams, *Trade Bodies Welcome Libel Law Reform*, THEBOOKSELLER.COM (Mar. 21, 2011), http://www.thebookseller.com/news/trade-bodies-welcome-libel-law-reform.html.

171. *See* CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, annex a, at 4–5 (clause 6). In England, a defamatory statement is "published" every time the statement is accessed. *See supra* Section II.B.1.a.

172. CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, annex a, at 4–5 (clause 6); *see supra* Section III.A.

third parties.[173] Because the clause provides English courts a large amount of discretion in determining whether a publication is "materially different" (as well as whether the statute of limitations may be extended beyond one year),[174] courts could broadly construe the "materially different" provision to hold publishers responsible for the material's new level of prominence even when the publishers did nothing to draw newfound attention to it. Ideally, English courts will cautiously use their discretion in interpreting this provision in order to provide libel defendants with reasonable assurance that "stale" claims cannot be brought against them.

2. *The Jurisdictional Clause*

While the SPR clause is an important reform, it is not the Draft Defamation Act's key clause relating to libel tourism. Rather, the Draft Act's principal measure aimed at eradicating libel tourism is its jurisdictional clause, which requires courts to consider the overall global context in defamation actions brought against non-resident defendants.[175] This clause directly serves the Draft Act's goal of combating "the perception that [English] courts are an attractive forum for libel claimants with little connection to" England because it would ensure that all libel actions brought in English courts have a legitimate connection to England;[176] only if England is "clearly the most appropriate" forum will a court exercise jurisdiction.[177] But this broad language risks the clause being inconsistently applied, with some courts finding, and others not finding, that England is the most appropriate forum in factually similar scenarios.[178] To address

173. *The Defamation Bill – Libel Law for the 21st Century?*, IP & MEDIA L. (Mar. 20, 2011), http://ipmedialaw.wordpress.com/2011/03/20/the-defamation-bill-libel-law-for-the-21st-century.

174. CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, annex a, at 4–5 (clause 6); *see also id.* annex b, at 82 (Explanatory Note paragraph 45).

175. *Id.* annex a, at 5–6 (clause 7).

176. *Id.* at 3.

177. *Id.*

178. *See id.* The explanatory notes indicate that courts will need to consider "a range of factors" in making the jurisdictional determination but identify only one factor that courts should consider: "whether there is reason to think that the clai-

this potential problem and provide guidance to courts, the clause should be modified to require courts to consider (1) whether the defamatory material had a substantial impact in England; and (2) whether the defendant intentionally directed the material at England. Neither factor should be determinative; rather, an excess in one may justify the exercise of jurisdiction despite a deficiency in the other.

It should first be noted that one of the Draft Act's explanatory notes does address the first proposed factor, noting that courts should not exercise jurisdiction where the extent of the defamatory material's publication in England is minimal in comparison with the level of publication in other jurisdictions.[179] Based on this note, courts could narrowly interpret the jurisdictional clause and refuse to exercise jurisdiction in actions brought against non-resident defendants anytime that the defamatory material at issue was more widely distributed in another jurisdiction. Such a result would likely be desirable to U.S. authors and publishers who mainly promote and distribute their works in the United States, as they could still distribute their works in England without fear of being sued there, so long as the distribution level in England is less than that in the United States. This narrow interpretation, however, could also lead to undesirable results for U.S. authors and publishers. Consider the following example: A U.S.-based publisher posts a defamatory article, concerning a matter of U.S. public interest unrelated to England, on its website. Nevertheless, the article proves to be more popular in England than the United States, with more English readers accessing it online. It would seem unjust for an English court to exercise jurisdiction solely on this basis in light of the facts that the article neither concerned nor was directed at England. Thus, while the extent of the material's distribution in England is certainly a relevant factor, it should not be a determinative one.

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mant would not receive a fair hearing elsewhere." *Id.* at 34 & annex b., at 83 (Explanatory Note paragraph 47).

179. *See id.* annex b, at 83 (Explanatory Note paragraph 47). In the explanatory note's example, the fact that only 5,000 copies of a publication were published in England while 100,000 were published in Australia, would mean that England should not have jurisdiction. *Id.* This example seemingly indicates that English courts will consider the overall global context even where claimants limit their recovery to reputational harm suffered in England.

The jurisdictional clause would be clearer and more efficacious if it were modified to also require that courts consider whether the defendant intentionally directed the defamatory material at England, thereby making it reasonable to conclude that the defendant should have foreseen that the material could cause reputational harm in England. Merely foreseeing that a publication *could* reach England, however, would, by itself, not support a finding of intentional direction. As Professor Robert L. McFarland has argued:

> [F]oreseeability of the transitory nature of speech and its potential for effects elsewhere in the world is an inadequate basis for the exercise of personal jurisdiction over the speaker. There must be more to establish a nexus between the speaker and the foreign forum such that the speaker should foresee the foreign nation's interest in exercising its power over the speaker.[180]

This Note proposes that the requisite nexus between England and a non-resident defendant should exist where the defendant took affirmative steps to make defamatory material available in England, even if the level of distribution in England is not necessarily as extensive as that in other jurisdictions. This standard is justified on the basis that non-resident defendants who intentionally direct defamatory material at England should reasonably foresee that England has an interest in regulating their conduct and applying its laws.[181] While direct evidence of a defendant's intentional direction may not be

180. McFarland, *supra* note 15, at 638.

181. *See supra* Section II.B.1.b. Professor Trevor C. Hartley has advocated for a similar approach in the form of an amendment to U.K. Practice Direction 6B, concerning the serving of a claim form outside of the United Kingdom. Trevor C. Hartley, *'Libel Tourism' and Conflict of Laws*, 59 INT'L & COMP. L.Q. 25, 37 (2010). Specifically, he proposes that Rule 3.1(9)—which provides that a tort occurs where either damage "was sustained within the jurisdiction" or "resulted from an act committed within the jurisdiction"—should not apply in libel actions unless the claimant is domiciled in England or "has taken significant steps to make the offending material available in England . . . and has targeted that jurisdiction more than any other." *Id.* at 29, 37 (citing *Practice Direction 6B—Service Out of the Jurisdiction*, MINISTRY OF JUSTICE, http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part06b.htm (last visited May 1, 2011)).

easy for a libel claimant to produce, there are a number of circumstantial factors that could be assessed, such as whether the defendant modified the material for an English audience, whether the defendant has a history of distributing publications in England, and whether the publication's subject matter solely concerned a matter of public interest in England.[182]

3. *The Substantial Harm Clause*

Even if the jurisdictional clause remains unmodified and its application uncertain, the Draft Defamation Act's substantial harm clause poses another barrier to libel tourism. The clause replaces the presumption that a defamatory statement harms a libel claimant's reputation with the requirement that claimants prove that the statement substantially harmed (or will substantially harm) their reputations.[183] This requirement has the ability to be instrumental to the curbing of libel tourism. By requiring courts to analyze the seriousness of the statement at issue and whether that statement could negatively affect the claimant's reputation with respect to the statement's subject matter,[184] the clause could lead to the early dismissal of improper libel-tourism and other frivolous libel actions that were able to survive the jurisdictional inquiry.

But the clause should be clarified. English case law already requires courts to determine that libel actions involve a "threshold of seriousness" and to dismiss actions where that threshold is not satis-

182. The latter factor corresponds with one of the Act's explanatory notes, which states that an English court's exercise of jurisdiction is more likely to be unreasonable where the subject matter of the publication concerned foreign matters to which England has no interest. CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, annex b, at 35 (Explanatory Note paragraph 86).

183. *Id.* annex a, at 1 (clause 1).

184. *See* Dario Milo, *UK Defamation Bill Paves the Way for South Africa*, INFORRM'S BLOG (Apr. 6, 2011), http://inforrm.wordpress.com/2011/04/06/uk-defamation-bill-paves-the-way-for-south-africa-dario-milo ("If, for example, a convicted mass murderer sues over an allegation that he is a disgraceful human being, such an allegation is not likely to cause substantial harm to the reputation of the claimant given his existing bad reputation. A substantial harm test would ensure that such a claimant would not even get out of the starting blocks in a defamation case.").

fied.[185] It is unclear whether the substantial harm clause is intended to establish a higher threshold in libel actions or whether the clause is meant to merely codify the current state of the case law. Moreover, neither the clause nor the Draft Act's explanatory notes provide any guidance to courts on how to assess whether substantial harm has occurred (or is likely to occur).[186] Therefore, it is unclear how claimants are to make a showing of "substantial harm."

4. *Concluding Thoughts*

Finally, the Draft Defamation Act does not take any explicit steps to reduce the excessive costs associated with libel litigation. Some proponents of English libel reform have emphasized that "the real issue with libel is not the law itself but that in practice it has become too expensive to pursue," thereby allowing "rich claimants to tactically use costs as a weapon."[187] Others have called for the adoption of caps on attorneys' fees.[188] But, in relation to this issue, the Draft Act's presumption-of-trial-without-jury clause should not be overlooked. By allowing judges to preside over defamation trials, the Draft Act aims to create more effective management of libel cases from the onset, thereby leading to early dismissals of frivolous or improper actions.[189] While this will likely result in frontloading of costs,[190] frontloading is not necessarily a bad thing.[191] In fact, it may

185. CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, annex b, at 73 (Explanatory Note paragraph 7).

186. For example, must an actor prove that he lost (or will lose) a film role? Must a company show that its profits dropped (or are likely to drop)?

187. Stanley, *supra* note 166.

188. *See Reforming Libel: What Should a Defamation Bill Contain?*, LIBEL REFORM CAMPAIGN 2 (Mar. 10, 2011), http://www.senseaboutscience.org.uk/PDF/What%20should%20a%20defamation%20bill%20contain.pdf.

189. Barrister Adam Speker, for example, has indicated that the removal of the right to trial by jury in conjunction with the substantial harm clause could have "quite an impact on practice, procedure and—at least in the longer term—costs." Dowell, *supra* note 167.

190. CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, at 8; Dowell, *supra* note 167 ("Substantial harm means a huge amount of frontloading on costs because there'll be interlocutory hearings about what has to be disclosed to show the harm.").

191. CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, at 8.

send a clear message to libel tourists that the English courts are no longer hospitable to their claims. Moreover, while the Draft Act raises numerous questions of interpretation, it is important to note that the Draft Act is currently under pre-legislative review and will likely be substantially altered before being enacted.[192] Therefore, it is likely that a subsequent version of the Act will address some of the major concerns with the current version.

B. *Considering Choice of Law*

To help further the Draft Defamation Act's aim to eliminate libel tourism in England, a rule on choice of law could be adopted, requiring English courts to apply foreign laws in limited circumstances. The adoption of a choice-of-law rule akin to the place-of-harm approach proposed for the Rome II Regulation[193] would provide a safety net of sorts for non-resident libel defendants who are sued in England because the English court would need to determine whether the application of English defamation laws is appropriate before automatically applying them.

Under current English choice-of-law rules, defamatory material published in another country is "actionable in England if, and only if, it is actionable under the foreign law . . . [and] actionable as a tort under English law."[194] English courts will apply English laws in the resulting actions only if the claimants limit their claims to harm they suffered in England, which virtually all claimants do.[195] As a result, English laws apply in defamation actions even where the underlying publication was more widely distributed in another jurisdiction.[196]

192. *See id.* at 4 (encouraging all interested persons to take part in the consultation).

193. The Rome II Regulation, binding on all members of the European Union, including the United Kingdom, applies to non-contractual actions. Warshaw, *supra* note 1, at 273–74. A defamation choice-of-law provision was proposed but removed after E.U. Members failed to agree on how the provision should be drafted. *Id.* at 274; *see also* Hartley, *supra* note 181, at 35.

194. Hartley, *supra* note 181, at 27. This rule is known as the "double-actionability" rule. *Id.*

195. *Id.*

196. *Id.*

The adoption of a defamation-specific choice-of-law rule would be a small step that could go a long way in legitimizing English defamation judgments in the minds of critics who view English defamation laws as repugnant to First Amendment principles. Additionally, the inclusion of such a rule in the Draft Defamation Act could earn instantaneous goodwill with U.S. courts, which have been willing to apply English law in cases where England has a greater interest in having its laws applied.[197] For example, in *Love v. Associated Newspapers, Ltd.*,[198] the Ninth Circuit chose to apply English law in an action brought by Beach Boys member Brian Wilson against the English newspaper *Mail on Sunday* because nearly all of the newspapers had been distributed in England and because California had no legitimate interest in having its laws applied.[199]

To find a suitable choice-of-law clause for the Draft Defamation Act, one may need to look no further than a provision that was intended for, but ultimately not included in Rome II. The first draft of Rome II included a place-of-harm choice-of-law approach for defamation claims, providing that the applicable law is

> the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur . . . . [B]ut a manifestly closer connection with a particular country may be deemed to exist having regard to factors such as the country to which a publication or broadcast is principally directed or the language of the publication or broadcast or sales or audience size in a given country as a proportion of

197. *See* Richard Garnett & Megan Richardson, *Libel Tourism Or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-Border Libel Cases*, 5 J. PRIVATE INT'L L. 471, 472 (2009) ("In terms of choice of law, the [United States] does not apply a strict law of the place of publication rule but instead seeks the law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties.").

198. 611 F.3d 601 (9th Cir. 2010).

199. *Id.* at 610–11 ("Even if California has an interest in protecting the right of an entertainer with economic ties to the state . . . that interest is not nearly as significant as England's interest in (not) regulating the distribution of millions of copies of a newspaper and millions of compact discs by a British paper primarily in the United Kingdom.").

> total sales or audience size or a combination of these factors.[200]

While a choice-of-law rule, in practice, could be just as difficult to apply as the Draft Act's jurisdictional and substantial harm clauses, its inclusion in the Draft Act is a worthwhile consideration because it would serve the legitimate function of forcing English courts to consider the overall global context of the underlying defamatory publication. Importantly, it could result in an English court applying the laws of a foreign country that has a greater interest in the outcome of the case, even where the English court's exercise of jurisdiction is proper.

C. *American Enough?: The Enforcement of Future English Defamation Judgments*

As discussed in Part A, the Draft Defamation Act has the potential to reduce the prevalence of libel tourism in England and is certainly a step towards the harmonization of U.S. and English defamation procedures, as evidenced by its adoption of the SPR and limitation on the exercise of jurisdiction over non-resident defendants.[201] Arguably, the Draft Act is also a step towards the convergence of U.S. and English defamation laws, as its substantive clauses—particularly its defense for the responsible publication of defamatory statements concerning matters of public interest[202]—would make English defamation laws more defendant friendly.[203] Nevertheless, in light of the SPEECH Act's restrictive language, the prospect of

200. Warshaw, *supra* note 1, at 294–95. The place-of-harm rule was ultimately removed because publishing groups feared that the rule "would make it necessary to employ legal advisors with expertise in each foreign jurisdiction, which would create practical and financial burdens in addition to a chilling effect caused by self-censorship out of fear of suit under foreign defamation laws." *Id.* A later-introduced place-of-publication rule was also scrapped, and the defamation provision was ultimately entirely excluded from Rome II. *Id.*

201. *See supra* Sections II.B, IV.A.

202. CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, annex a, at 1–2 (clause 2).

203. *See* MELKONIAN, *supra* note 2, at 258–61 (arguing that the protections afforded to libel defendants by U.S. defamation laws and the *Reynolds* privilege are functionally similar).

U.S. courts recognizing or enforcing future English defamation judgments rendered in accordance with the Draft Defamation Act (or, rather, the version of the Draft Act that is ultimately enacted) is dubious. This Note proposes that, to the extent possible, U.S. courts applying the SPEECH Act should focus less on determining whether the substantive law applied in the foreign proceeding comports with all of the technicalities of U.S. defamation laws and more on whether the foreign country applied laws that serve an overarching goal similar to that of U.S. laws.

Sections 4102(b)(1) and 4102(a)(1)(A) of the SPEECH Act bar a U.S. court from recognizing or enforcing a foreign defamation judgment unless the U.S. court is satisfied that (1) the foreign court's exercise of jurisdiction over the U.S. defendant comported with U.S. due process requirements and (2) the law applied by the foreign court provided at least as much protection for free speech as the law that the U.S. court would have applied, respectively.[204] Section 4102(b)(1)'s jurisdictional requirement will likely be a non-issue in future enforcement actions involving English defamation judgments because of the Draft Defamation Act's robust jurisdictional clause.[205] Section 4102(a)(1)(A) is more problematic. Even if the English court's exercise of jurisdiction comports with U.S. due process requirements, a U.S. court applying § 4102(a)(1)(A) would likely still not enforce the judgment because the English court applied defamation laws divergent from U.S. defamation laws.[206] The

204. 28 U.S.C. §§ 4102(a)(1)(A), (b)(1) (West, Westlaw through 2010 Sess.). The SPEECH Act, particularly § 4102(a)(1)(A), has sparked controversy, with several scholars lambasting it as improperly imposing U.S. free-speech standards on other countries. *See* McFarland, *supra* note 15, at 662 ("England's substantive speech jurisprudence, while certainly in conflict with American jurisprudence, is not irrational. Unless it is conceded that there is a supreme international law, then it is not possible to demand English adherence to" U.S. standards); Rendleman, *supra* note 2, at 487 ("The idea . . . that a foreign nation's substantive law is 'repugnant' unless it is identical to ours is itself a repugnant one."). These commentators fear that the SPEECH Act will have negative implications on principles of comity and, concomitantly, foreign relations. *See* Klein, *supra* note 64, at 387–91; McFarland, *supra* note 15, at 666–67; Rendleman, *supra* note 2, at 484–87.

205. *See* CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, annex a, at 5–6 (clause 7); *supra* Section IV.A.

206. *See, e.g.*, Heather Maly, Note, *Publish At Your Own Risk Or Don't Publish At All: Forum Shopping Trends in Libel Litigation Leave the First Amendment*

core divergence is that English law presumes that allegedly defamatory statements are false, thereby placing the burden on the defendant to prove the statement's truth, while U.S. law presumes that such statements are true and requires the claimant to prove their falsity and, in some cases, that the defendant acted with actual malice.[207] This divergence has been the chief reason why U.S. courts have refused to enforce English defamation judgments in cases predating the SPEECH Act.[208] The Draft Defamation Act does nothing to address it, leaving the presumption of falsity in place.

Whether U.S. courts will interpret § 4102(a)(1)(A) to require exact congruence between U.S. laws and the foreign laws at issue is entirely speculative, as no U.S. court has yet interpreted the SPEECH Act.[209] But such an interpretation is entirely plausible. Professor Harry Melkonian has suggested that § 4102(a)(1)(A) shifts a U.S. court's inquiry from assessing whether "the foreign law [is] repugnant to American public policy" to deciding "the infinitely more obtuse question—are the laws equal."[210] And the SPEECH Act's legislative history indicates that whether the foreign law applied a presumption of falsity will be an essential consideration and, possibly, a deal breaker. For example, in introducing the Act, Con-

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Un-Guaranteed, 14 J. L. & POL'Y 883, 916 (2006) ("Most foreign judgments in libel suits have . . . not been enforced in the [United States], as the judgments are considered repugnant to our Constitution. These decisions recognize that attempts to chill speech do not comport with the protections afforded by the First Amendment . . . .").

207. *See supra* Section II.B.2.

208. *See, e.g.*, Telnikoff v. Matusevitch, 702 A.2d 230, 249 (Md. 1997) (refusing to enforce Telnikoff's English defamation judgment in part because: "Telnikoff was not required to prove that Matusevitch's letter contained a false statement of fact, which would have been required under . . . Maryland law. Instead, falsity was presumed, and the defendant had the risky choice of whether to attempt to prove truth."); Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661, 664 (N.Y. Super. Ct. 1992) (refusing to enforce Bachchan's English defamation judgment because "the failure of Bachchan to prove falsity in the High Court of Justice in England makes his judgment unenforceable here").

209. *But see* Pontigon v. Lord, No. ED 95677, 2011 WL 1522565, at *1, 5 (Apr. 19, 2011) (reversing and remanding the registration of a Canadian defamation judgment because the lower court did not review and apply 28 U.S.C. §§ 4101–05 as well as other relevant laws).

210. MELKONIAN, *supra* note 2, at 262.

gressman Steve Cohen emphasized that English defamation laws are "contrary to our own constitutional tradition," using the presumption of falsity as his prime example.[211] Thus, a narrow construction of § 4102(a)(1)(A), requiring that the foreign law at issue did not apply a presumption of falsity, is likely. A danger of this type of construction is that even if England abolished the presumption, any "minor deviations from [U.S.] case law interpreting the First Amendment" could still render an English judgment unenforceable.[212]

Conversely, a broader construction of § 4102(a)(1)(A), focusing on whether the foreign law comports with the First Amendment's chief aim of preserving "uninhibited, robust, and wide-open" debate,[213] rather than whether all of the numerous defamation rules developed by U.S. courts are applied, could lead to at least some English defamation judgments being enforced in the United States—even if the presumption of falsity remains.[214] This type of construction should be applied, at least in relation to future English defamation judgments, because, if nothing else, the SPEECH Act was intended to serve a pro-speech function: specifically, to encourage U.S. authors and publishers to not be inhibited by other countries'

211. 156 CONG. REC. H6127 (daily ed. July 27, 2010) (statement of Rep. Cohen).

212. Klein, *supra* note 64, at 389 (internal quotation marks omitted). Professor Andrew R. Klein has posited the following illustrative question: "*Sullivan* states that plaintiffs should prove actual malice by clear and convincing evidence. Does this mean that if England changes its defamation rules . . . but permits a plaintiff to prove a fault standard by a preponderance of the evidence, all judgments would be categorically unenforceable?" *Id.* at 390 (internal quotation marks omitted).

213. New York Times Co. v. Sullivan, 376 U.S. 254, 270–71 (1964).

214. Professor Melkonian has argued that the *Reynolds* defense, which is essentially codified in the Draft Defamation Act's second clause, "does indeed provide 'as much protection for freedom of speech' as the First Amendment because the *Reynolds* standard immunises more types of speech from defamation liability than does the" U.S. actual-malice standard. MELKONIAN, *supra* note 2, at 259; *see also* Butterworth, *supra* note 170 (noting that "[t]he creation of a public interest defence doesn't add much to the *Reynolds* privilege"). He has also indicated that the SPEECH Act's requirement that U.S. courts consider the specific facts of the case at hand should allow for U.S. courts to enforce foreign defamation judgments where "the underlying publication is unrelated to the United States or the interests of its citizens and the defendant purposefully availed itself of foreign markets." MELKONIAN, *supra* note 2, at 257. In such a situation, the foreign law would be "equivalent to First Amendment in the circumstances of that case." *Id.*

speech-restrictive laws. The Act allows for this by preventing U.S. authors and publishers from being forced to comply with foreign judgments that are inconsistent with First Amendment jurisprudence. As a result, foreign-judgment creditors cannot force a U.S. author or publisher to comply with "un-American" judgments. But the Act does nothing to prevent those creditors from forcing U.S. authors and publishers, who may have assets in the foreign country at issue, to comply with the judgment in *that* country.[215] With most major U.S.-based publishers holding assets in the United Kingdom, the efficacy of this function is dubious.[216]

Perhaps, then, the most valuable function of the SPEECH Act is that it has placed added pressure on English policymakers to reform English libel laws and procedures.[217] The Draft Defamation Act's explanatory notes directly refer to the SPEECH Act as evidence of the "widespread perception" of libel tourism and its resulting chilling effect on free expression.[218] And in introducing the Draft Defamation Act, U.K. Deputy Prime Minister Nick Clegg emphasized: "These reforms will create libel laws that will be a foundation for free speech, instead of an international embarrassment. In a modern, liberal and open society dissent should be celebrated, and debate should be raucous. The press should be free—and in our society, they will be."[219] Even the most ardent free-speech enthusiasts would be hard pressed to find fault with Clegg's goals for the Draft Act.

As a result, even if the Draft Act's reforms do not bring English defamation laws into exact congruence with U.S. laws, in enforcement proceedings involving English defamation judgments, U.S. courts should carefully consider England's interest in the case at is-

215. Mark A. Fischer & Franklin Levy, *The SPEECH Act: Speaking Softly?*, DUANE MORRIS (Oct. 12, 2010), http://www.duanemorris.com/articles/speech_act_libel_ laws_3841.html.

216. *Id.*

217. *See* Roy Greenslade, *Obama Seals Off US Journalists and Authors from Britain's Libel Laws*, GUARDIAN, Aug. 11, 2010, http://www.guardian.co.uk/media/greenslade/2010/aug/11/medialaw-barack-obama ("The US's response to our libel laws has already played a key role in advancing the campaign for reform in the UK.") (quoting Jo Glanville, editor of the Index on Censorship).

218. CONSULTATION PAPER AND DRAFT BILL, *supra* note 9, at 33 (paragraph 79).

219. Clegg, *supra* note 7, at 33.

sue as well as the Draft Act's goal of preserving "uninhibited, robust, and wide-open" debate before denying enforcement. The English presumption of falsity, although certainly in conflict with fundamental principles of U.S. defamation laws, is one justifiable way to balance the right to free expression against the need to protect reputation. To further the longstanding principles of comity and extend respect to England's reform efforts, U.S. courts should carefully assess England's interest in having its laws applied—as well as the overall purpose and effect of those laws—before declaring English laws insufficient or not "American enough."

V. PRIVACY: THE NEW LIBEL CLAIM?

On March 30, 2008, the following headline engulfed the front page of the U.K. tabloid *News of the World*: "F1 Boss Has Sick Nazi Orgy With 5 Hookers."[220] Those salacious words and the corresponding article referred to Max Mosley, the Formula One President and son of Nazi sympathizer Oswald Mosley.[221] The article's allegations included that Mosley had a "depraved Nazi-style orgy in a torture dungeon" with five hookers on March 28, 2008, during which he "bark[ed] orders in German as he lash[ed] girls wearing mock death camp uniforms . . . ."[222] Additionally, the newspaper published several photos from the March 28 incident that were obtained from a secret video recording.[223] Mosley filed suit against *News of the World*, and the High Court ultimately determined that "there was no evidence that the gathering . . . was intended to be an enactment of Nazi behavior or adoption of any of its attitudes."[224] After being awarded an unprecedented £60,000 in damages, Mosley told the

220. Mosley v. News Group Newspapers Ltd., [2008] EWHC (QB) 1777, [1] (Eng.).
221. *Id.* at [1], [154].
222. *Id.* at [26].
223. *Id.* at [27]. Two photos were described as depicting a "medical inspection," which was described as "mocking the humiliating way Jews were treated by SS death camp guards in WWII." *Id.* at [31]. The following week, *News of the World* published a follow-up article, repeatedly alleging that the March 28 incident had a Nazi theme. *Id.* at [36].
224. *Id.* at [232].

press that the judgment "demonstrates that [*News of the World*'s] Nazi lie was completely invented and had no justification."[225] Although the case hinged on whether the Nazi allegations were false, Mosley's action against *News of the World* was not for defamation; rather, it was for breach of privacy.[226]

Mosley's case demonstrates that the line between English libel and privacy actions is becoming blurred and that the laws are morphing into a "protection of reputation lump."[227] While both libel and privacy laws are related to the protection of reputation, they are different in that libel actions are based on reputational harms caused by the publication of falsities while privacy actions are based on reputational harms caused by the publication of truths that are embarrassing or very personal.[228] But as exemplified by the plights of public figures like former South Carolina governor Mark Sanford and singer Britney Spears, the publication of truthful information can be just as damaging to one's reputation as the publication of lies.[229]

One of the major criticisms of the Draft Defamation Act has been that it failed to address English privacy laws, which are now

225. Siobhain Butterworth, *Privacy, Libel or Protection of Reputation?*, GUARDIAN, Apr. 8, 2011, http://www.guardian.co.uk/law/butterworth-and-bowcott-on-law/2011/apr/08/privacy-libel-protection-of-reputation.

226. Mosley argued that "the content of the published material was inherently private, . . . that there had been a pre-existing relationship of confidence between the participants, such that the woman who filmed the event breached that confidence and that the journalist concerned must have appreciated that the woman was so doing." *See Mosley*, [2008] EWHC (QB) 1777 at [5].

227. Butterworth, *supra* note 225 (internal quotation marks omitted).

228. *See* MELKONIAN, *supra* note 2, at 279.

229. In June 2009, Mark Sanford, the Republican governor of South Carolina, became "a national laughingstock" after the press widely reported his six-day disappearance and then his admission to having an affair with an Argentine woman. *Mark Sanford*, TIMES TOPICS, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/s/mark_sanford/index.html (last updated Nov. 10, 2010). Similarly, the reputation of singer Britney Spears was in shambles throughout 2007, as the media was "busily writing off Ms. Spears because of her bizarre behavior—her public scenes, questionable parenting skills and a shaky comeback performance at the MTV Awards—and her tortured personal life after divorcing her former backup dancer, Kevin Federline." *Britney Spears*, TIMES TOPICS, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/people/s/britney_spears/index.html (last visited May 1, 2011).

the focus of much litigation involving media defendants.[230] Some English media lawyers have indicated that English privacy laws pose a larger threat to free speech than libel laws.[231] One lawyer has speculated that, if the Draft Act closes the English courts to wealthy and powerful claimants, they will simply "shoehorn what are defamation claims into privacy actions."[232] And evidence suggests that they may already be doing so.[233] For example, London media lawyer Mark Stephens has remarked on the potential proliferation of "privacy tourism," indicating that he has seen "seven threatening letters sent by London law firms to American media and internet sites about photos taken of American citizens in America."[234]

Ironically, the Draft Defamation Act may end the problem of libel tourism only to create the problem of privacy tourism. This unintended result is possible for two reasons. First, as demonstrated by Mosley's privacy action against *News of the World*, both privacy and libel actions are often based on the publication of embarrassing material that individuals would prefer to keep private. Thus, many libel actions could alternatively be brought as privacy actions in which falsity need not be proven. Consider, for example, a 2005 *National Enquirer* story that alleged that U.S. actress Cameron Diaz had an affair with a married man and included a photo of her embracing the

230. *See* Duncan Lamont, *Freedom of Speech Triumphant?*, CHARLES RUSSELL (Mar. 30, 2011), http://www.charlesrussell.co.uk/UserFiles/file/pdf/Media%20&%20Entertainment/Freedom.pdf; *see also* Frances Gibb, *Writers To Be Shielded from Threat of Libel*, TIMES (U.K.), Mar. 16, 2011, http://www.thetimes.co.uk/tto/law/article2947717.ece ("[P]rivacy laws, which are increasingly used by the rich and powerful, will not be included in the reforms . . . .").

231. Frances Gibb, *Will Privacy Be the New Libel?*, TIMES (U.K.), Mar. 16, 2011, http://www.thetimes.co.uk/tto/law/columnists/article2948528.ece.

232. *Id.* (statement of Niri Shan of Taylor Wessing).

233. *See* Frances Gibb, *MPs 'Gagged' as the Rich and Famous Wage a Privacy War*, TIMES (U.K.), Apr. 2, 2011, http://www.thetimes.co.uk/tto/law/article2970636.ece (discussing the rise in gag orders granted by English courts to protect the private lives of celebrities and other public figures from being reported in the press).

234. *Libel Tourism: Writ Large*, *supra* note 27, at 48.

man.[235] Diaz denied the story and, in a prototypical case of libel tourism, brought a libel action against the tabloid, which ultimately settled.[236] Alternatively, Diaz could have brought a privacy action against the tabloid, alleging that it invaded her privacy by publishing intimate details of her personal life as well as a photo of her in a place where she had a reasonable expectation of privacy. Should the Draft Defamation Act result in less attractive English libel laws, the latter option may, indeed, become the most practical one.

Second, like English libel laws, English privacy laws are much more plaintiff friendly than those of the United States. Unlike U.S. privacy laws, under which the First Amendment interests of the press generally outweigh the privacy interests of individuals, especially public figures like Diaz,[237] English privacy laws, modeled after the European Convention on Human Rights, state that privacy rights and freedom of expression "are of equal value."[238] But in the past decade, English courts have given privacy an expansive application, seemingly favoring individuals' privacy rights over press free-

235. Ian Herbert, *Celebrities Flock to 'More Favourable' British Courts to Sue for Libel*, INDEP., Aug. 2, 2007, http://www.independent.co.uk/news/uk/crime/celebrities-flock-to-more-favourable-british-courts-to-sue-for-libel-459934.html.

236. *Id.* This case is an example of libel tourism because both Diaz and the *National Enquirer* were domiciled in the United States, the article was not of particular relevance to England, and it had only been accessed 279 times by U.K. Internet users. Maurice Chittenden & Steven Swinford, *Libel Threat to Force Papers Out of Britain*, TIMES (U.K.), Nov. 8, 2009, http://www.thesundaytimes.co.uk/sto/business/article189837.ece.

237. Gary Wax, *Popping Britney's Personal Safety Bubble: Why Proposed Anti-Paparazzi Ordinances in Los Angeles Cannot Withstand First Amendment Scrutiny*, 30 LOY. L.A. ENT. L. REV. 133, 140 (2009). Generally, in the United States, individuals have no right to privacy when they are in public places. *Id.* The U.S. right to privacy has evolved into four separate torts: "(1) intrusion upon seclusion; (2) public disclosure of private facts; (3) false light; and (4) appropriation (of name or likeness)." *Id.* at 141.

238. Patrick J. Alach, *Paparazzi and Privacy*, 28 LOY. L.A. ENT. L. REV. 205, 220 (2008). In 2000, the European Convention on Human Rights ("ECHR") was formally incorporated into English law. *See* Maya Ganguly, Comment, *Private Pictures, Public Exposure: Paparazzi, Compromising Images, and Privacy Law on the Internet*, 26 WIS. INT'L L.J. 1140, 1149 (2009). ECHR Article 10 "ensures freedom of expression while recognizing that there are restrictions to this freedom, namely the privacy of others," which is discussed in Article 8. *Id.* at 1148.

dom.[239] For example, in 2004, the House of Lords held that the *Mirror* newspaper had unlawfully infringed on supermodel Naomi Campbell's right to privacy and breached a duty of confidence after it printed an article, stating that she was receiving treatment for drug addiction, as well as photos of her, on a public street, leaving a Narcotics Anonymous meeting.[240] Lord Hope of Craighead reasoned that a person of ordinary sensibilities in Campbell's position would have found the publication of the article and photos offensive and that Campbell's treatment for addiction was akin to private and confidential information.[241] Similarly, in 2010, *Hello!* magazine settled a privacy action with actor Jude Law based on the publication of photos of him and his children on a public beach, agreeing to pay him £9,500 in damages and not to publish any photos of him in places where he has a reasonable expectation of privacy or of his children until they reach the age of eighteen.[242] Such results would be unfathomable in the United States, where magazines regularly publish stories concerning celebrities' addictions and photos of celebrities and their children.

English privacy laws are becoming increasingly controversial and, simultaneously, attractive to public figures because of the rise of the "super-injunction,"[243] a type of gag order that forbids the press

239. *See* MELKONIAN, *supra* note 2, at 289.

240. *See* Campbell v. MGN Ltd., [2004] UKHL 22, [2] (appeal taken from Eng.).

241. *Id.* at [124].

242. Mark Sweney, *Hello! Pays Jude Law Privacy Damages*, GUARDIAN, Apr. 8, 2010, http://www.guardian.co.uk/media/2010/apr/08/hello-jude-law-privacy-damages. J.K. Rowling, the author of the immensely popular *Harry Potter* book series, won a landmark case in England, which established that English privacy laws protect the children of celebrities from the publication of unauthorized photos, unless their parents have exposed them to publicity. Clare Dyer, *JK Rowling Wins Ban on Photos of Her Son*, GUARDIAN, May 8, 2008, at 5.

243. *See* David Leppard, *Prime Minister To Be Told Gagging Cannot Be Scrapped*, TIMES (U.K.), Apr. 24, 2011, http://www.thesundaytimes.co.uk/sto/news/uk_news/ Society/article611417.ece; Roland Watson & Richard Ford, *Cameron 'Uneasy' Over UK Privacy Laws*, TIMES (U.K.), Apr. 22, 2011, http://www.thetimes.co.uk/tto/law/article2994681.ece. Alan Rusbridger, the editor of the *Guardian*, penned the term "super-injunction" after the *Guardian* was prohibited from reporting the contents of an internal report of the oil trader Trafigura. Roy Greenslade, *Law Is Badly in Need of Reform as Celebrities Hide Secrets*, EVENING STANDARD, Apr. 20, 2011, http://www.thisislondon.co.uk/markets/article

from reporting the injunction's very existence, let alone the details giving rise to it.[244] Recently, the U.K. press has used the super-injunction term more broadly to refer to gag orders obtained by usually male celebrities, athletes, and businessmen to prevent their adulteries from being publicized.[245] As of May 2011, it is estimated that thirty-five such injunctions have been granted.[246] And, in a controversial decision issued on April 20, 2011, Justice Eady granted a rare "contra mundum order"—effectively, a worldwide ban—barring a woman from selling intimate pictures of a well-known man.[247] Justice Eady justified the order on the basis that it would "protect the mental health of the man and his family. . . . It is thought to be the first time such an order has been related to the details of an individual's private life."[248] While it is not known whether a non-U.K. individual has successfully obtained a super-injunction, at the rather rapid rate that English courts are granting them, it is reasonably likely that a non-U.K. public figure will try to do so at some point.[249]

Ultimately, with the Draft Defamation Act making English libel laws less plaintiff friendly, it is entirely possible that London will soon no longer be a libel haven for foreign claimants. While libel

-23943177-law-is-badly-in-need-of-reform-as-celebrities-hide-secrets.do; Alan Rusbridger, *Trafigura: Anatomy of a Super-Injunction*, GUARDIAN, Oct. 20, 2009, http://www.guardian.co.uk/media/2009/oct/20/trafigura-anatomy-super-injunction.

244. *See* Greenslade, *supra* note 243; Rusbridger, *supra* note 243.

245. *See* Greenslade, *supra* note 243; Leppard, *supra* note 243. Some of the injunctions granted to public figures have been traditional super-injunctions, "where even the existence of a court order can't be disclosed." Frances Gibb & Michael Savage, *Judges Humiliated by One Little Tweet*, TIMES (U.K.), May 10, 2011, http://www.thetimes.co.uk/tto/law/article3013669.ece.

246. Gibb & Savage, *supra* note 245. For example, on April 20, 2011, a Premier League footballer was granted a super-injunction, preventing Imogen Thomas, a former Miss Wales and star of *Big Brother*, from revealing details of their six-month affair. Leppard, *supra* note 243.

247. Watson & Ford, *supra* note 243.

248. *Id.*

249. The efficacy of super-injunctions—and English privacy laws in general—"were thrown into turmoil" in May 2011, when a user of the social networking site Twitter published the names of several celebrities who allegedly had obtained super-injunctions to hide scandalous information. Gibb & Savage, *supra* note 245. This circumvention of the gag orders has "prompted immediate calls for an overhaul of the privacy laws," with U.K. Prime Minister David Cameron calling for a more effective balance of privacy and free expression. *Id.*

tourists may react to this development by bringing libel actions in other jurisdictions,[250] it is also possible that they will begin to morph their libel actions into privacy actions, as it is just as easy for intimate or embarrassing truths to cross international borders as it is for defamatory falsehoods. Thus, as England focuses on stripping London of its status as the global libel capital via reformation of its libel laws, without addressing the concerns posed by its privacy laws, it risks London being one day dubbed the privacy capital of the world.

VI. CONCLUSION

The Draft Defamation Act is an important piece of legislation that has received a great deal of media attention in early 2011. It marks an important first step in the curbing of libel tourism in London as well as the reformation of English libel laws in general. In this Note, I have sought to contribute to the scholarship regarding libel tourism by examining the prevalence and dangers of libel tourism, analyzing the English and U.S. legislative reactions to it, and making my own proposals. Libel tourism poses a threat to free expression, and, while the SPEECH Act and the Draft Defamation Act take steps to protect authors and publishers from it, neither Act is without flaws. The SPEECH Act poses comity concerns, especially if it is narrowly construed and applied. And the Draft Defamation

250. Libel tourism has not been exclusive to England. In the past two years, high-profile libel-tourism actions have been brought in Australia, France, and Germany. *See* Kai Falkenberg, *Libel Tourism Spreads to Germany*, FORBES (Mar. 22, 2010), http://blogs.forbes.com/docket/2010/03/22/libel-tourism-spreads-to-germany (discussing a libel suit brought against the *New York Times* in the German Federal Court of Justice); *Libel Tourism*, LAW REPORT (Nov. 10, 2009), http://www.abc.net.au/rn/lawreport/stories/2009/2737300.htm (discussing a libel suit brought by a U.S. company in Australia against a U.K. blogger); Peter Wood, *Libel Tourism En Vacances*, NAT'L ASS'N OF SCHOLARS (Mar. 15, 2010), http://www.nas.org/polArticles.cfm?doc_id=1211 (discussing a criminal defamation suit brought in the Tribunal Grande Instance de Paris against New York University School of Law Professor Joseph Weiler); *see also* Charles Arthur, *Evony Drops Libel Case Against British Blogger Bruce Everiss*, GUARDIAN, Mar. 31, 2010, http://www.guardian.co.uk/technology/2010/mar/31/evony-libel-case-bruce-everiss; Adam Liptak, *From Four Paragraphs of Mild Criticism to a Criminal Trial*, N.Y. TIMES, Feb. 22, 2011, at A14.

Act does not address some major issues, particularly the high costs of libel litigation and the abolition of the presumption of falsity. Despite its imperfections, I conclude that the Draft Act's procedural clauses present an effective barrier to libel tourists. But modifying the Draft Act to more clearly define the jurisdictional and substantial harm clauses and to include a choice-of-law rule would help bolster the Draft Act's aim to eradicate libel tourism.

Domestic legislation, however, can only go so far to address an international problem. Just as the Draft Defamation Act's reforms might not result in the enforcement of English defamation judgments by U.S. courts, the Draft Act cannot prevent libel tourists from bringing their actions in other jurisdictions with favorable libel laws and procedures. Moreover, neither the Draft Act nor the SPEECH Act considers other laws concerning the protection of reputation, namely privacy. Thus, strategic libel tourists may continue to use the English courts—to the dismay of U.S. and other non-English authors and publishers—by shoehorning their libel actions into privacy claims. No matter what the future holds for libel (and, potentially, privacy) tourism, the Draft Defamation Act is likely to be just one of the first of many domestic legislative efforts in the 2010s to address the regulation of speech in the international context.