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More SPEECH: Preempting Privacy Tourism

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by
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On August 10, 2010, President Barack Obama signed the SPEECH Act (Securing the Protection of our Enduring and Established Constitutional Heritage). This prevents American courts from enforcing foreign defamation judgments—in practice, mostly British ones—unless

> 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.[1]

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1. Pub. L. No. 111-223 (H.R. 2765), Aug. 10, 2010; 28 U.S.C. § 4102(a)(1)(A). The law also allows enforcement even if the defamation law applied in the foreign court's adjudication did not provide as much protection for freedom of speech and press as the First Amendment to the Constitution of the United States and the constitution and law of the State. The party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the First Amendment to the Constitution of the United States and the constitution and law of the State in which the domestic court is located. 28 U.S.C. § 4102(a)(1)(B). The burden is on the party seeking enforcement to establish consistency with First Amendment standards. 28 U.S.C. § 4102(2). The law also bars enforcement of foreign defamation judgments (i) where the foreign court's exercise of personal jurisdiction did not comport with constitutional due

Congress enacted the bill even though it appeared that no foreign defamation judgment had been collected in the United States in recent decades.[2] Although plaintiffs had attempted to do so in the past, American courts had refused to comply. Nonetheless, witnesses testified that the very possibility that British libel judgments could be enforced in the United States imposed a chilling effect on publishing.[3] This was enough to spur Congress to act.

The new law addresses the menace of so-called "libel tourism." However, another danger lurks: privacy tourism. Here, too, plaintiff-friendly Britain poses the gravest threat. And here, too, although it appears that no plaintiffs have collected foreign judgments in the United States—or even brought any cases against American citizens to trial—the very possibility of such litigation is creating a chill. Before privacy tourism becomes a serious hindrance to American media, Congress should extend the SPEECH Act to cover privacy judgments.

I. Libel Tourism

Libel tourism, according to the Congressional Research Service, is "the phenomenon whereby a plaintiff brings a defamation suit in a country with plaintiff-friendly libel laws, even though the parties might have had relatively few contacts with the chosen jurisdiction prior to the suit."[4] Discussions of libel tourism typically begin with Rachel Ehrenfeld.[5] In 2003, Bonus Books published her *Funding Evil: How Terrorism Is Financed and How to Stop It*.[6] Sheikh Khalid Bin Mahfouz, a Saudi billionaire, and two of his sons sued Ehrenfeld and her publisher in Britain over the book's allegations that he was

process; or (ii) where the defendant provides an interactive computer service, unless the judgment is consistent with Section 230 of the Communications Act. 28 U.S.C. §§ 4102(b)–(c).

2. *See* ANNA S. HENNING & VIVIAN S. CHU, CONG. RESEARCH SERV., R40497, "LIBEL TOURISM": BACKGROUND AND LEGAL ISSUES 3 (2010), at 8.

3. *See e.g.*, H.R. REP. NO. 111-154, at 4 (2009); *Libel Tourism: Hearing Before the Subcomm. on Commercial & Admin. L. of the House Comm. on the Judiciary*, 111th Cong. 18 (2009) [hereinafter *Libel Tourism*] (statement of Bruce D. Brown, Libel Defense Attorney, Baker & Hostetler), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:47316.pdf.

4. ANNA S. HENNING & VIVIAN S. CHU, CONG. RESEARCH SERV., R40497, "LIBEL TOURISM": BACKGROUND AND LEGAL ISSUES 1 (footnote omitted).

5. *See e.g.*, S. REP. NO. 111-224, at 3 (2010); H.R. REP. NO. 111-54, at 3–4 (2009), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr154.111.pdf.

6. RACHEL EHRENFELD, FUNDING EVIL: HOW TERRORISM IS FINANCED AND HOW TO STOP IT (2003).

involved in funding terrorism.[7] Mahfouz, who died in 2009, was a frequent litigant who, by one estimate, sued or threatened to sue critics in Britain at least thirty-three times.[8] In the Ehrenfeld case, neither the plaintiff nor the defendant lived in Britain, and the book had not been published there, but twenty-three copies had been sold there via the Internet. In addition, an excerpt featuring Mahfouz had been available online.[9] Ehrenfeld did not defend herself (simply challenging jurisdiction can cost over $100,000 in Britain).[10] The court awarded Mahfouz a default judgment as well as attorneys' fees totaling around $225,000.[11]

Ehrenfeld filed suit in New York seeking a declaratory judgment that the British ruling was unenforceable in the United States, but the court held that it lacked jurisdiction over Mahfouz.[12] In response, New York enacted "Rachel's Law," officially called the Libel Terrorism Protection Act, which instructs state courts not to enforce foreign defamation judgments unless the country's defamation law offers "at least as much protection for freedom of speech and press" as the U.S. and New York constitutions.[13] The New York statute also provides for injunctive relief against those seeking enforcement of such judgments.[14] Several other states enacted similar laws.[15]

7. Mahfouz v. Ehrenfeld, [2005] EWHC (Q.B.) 1156, [16] (Eng.).

8. *See* Douglas Martin, *Khalid bin Mahfouz, Saudi Banker, Dies at 60*, N.Y. TIMES, Aug. 27, 2009, http://www.nytimes.com/2009/08/27/world/middleeast/27mahfouz.html; S. REP. NO. 111-224, at 9 (2010) (describing additional views of Sen. Kyl). *See also Libel Tourism*, *supra* note 2, at 14 (statement of Rachel Ehrenfeld) (referring to the "nearly forty cases" in which Mahfouz had been involved). *See also Mahfouz*, EWHC (Q.B.), [35]–[38] (Eng.) (illustrating examples of some of Mahfouz's other cases).

9. *Mahfouz*, EWHC (Q.B.) [22] (Eng.).

10. PROGRAMME IN COMPARATIVE MEDIA LAW AND POLICY, A COMPARATIVE STUDY OF COSTS IN DEFAMATION PROCEEDINGS ACROSS EUROPE 187 (2008), http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamationreport.pdf; CULTURE, MEDIA, AND SPORT COMMITTEE, PRESS STANDARDS, PRIVACY, AND LIBEL, Vol. 2 (2010) [hereinafter *Press Standards, Privacy, and Libel Vol 2.*] (testimony of Charmain Gooch, Director, Global Witness), *available at* http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362ii.pdf.

11. *Libel Tourism, supra* note 2, at 3 (statement of Re. Trent Franks).

12. *See* Ehrenfeld v. Mahfouz, 518 F.3d 102 (2d Cir. 2008); EMILY C. BARBOUR, CONG. RESEARCH SERV., R 41417, THE SPEECH ACT: THE FEDERAL RESPONSE TO "LIBEL TOURISM" 4–5 & n.29, 9 (2010), *available at* http://www.fas.org/sgp/crs/misc/R41417.pdf.

13. N.Y. CPLR § 5304(b)(8). *See also* BARBOUR, *supra* note 9, at 8–9; Rachel Ehrenfeld, *California Acts to Stop Libel Tourism,* HUFFINGTON POST, May 5, 2009, http://www.huffingtonpost.com/dr-rachel-ehrenfeld/california-acts-to-stop-l_b_196666.html.

14. *See* CONG. RESEARCH SERV., *supra* note 9, at 8–9.

Many libel suits or threatened suits involving Americans have been settled before trial. For example, Mahfouz sued Cambridge University Press over *Alms for Jihad: Charity and Terrorism in the Islamic World*, written by two Americans, Robert Collins and J. Millard Burr, for alleging that he was tied to terrorism.[16] The publisher settled the case for a "substantial" amount, issued an apology, pulled all remaining copies of the book, and urged libraries to destroy their copies.[17] When the wife of the first president of Pakistan threatened to sue an American publisher in Britain over *From Plassey to Pakistan: The Family History of Iskander Mirza*, by Maryland resident Humayun Mirza, the publisher agreed to destroy the first printing of the book.[18] *Art Journal*, based in New York, paid $75,000 and issued an apology to an Israeli scholar who threatened to sue in Britain over a negative book review.[19]

Transnational forum shopping, of course, is commonplace. In fact, thanks to the size of jury awards, the United States is frequently the favored forum.[20] But this is not the case when the litigation involves free expression. With the First Amendment's expansive protection of speech, the United States "remains a recalcitrant outlier to a growing international understanding of what the freedom of

15. *See* CAL. CIV. PRO. CODE § 1717(c)(2009); 735 Ill. Comp. Stat. 5/12-621(b)(7) (2008); FLA. STAT. § 55.605(2)(h)(2005); BARBOUR, *supra* note 9, at 8–9. The SPEECH Act probably preempts Rachel's Law and comparable laws. *See id.* at 11–13.

16. *See Libel Tourism*, *supra* note 3, at 22 (statement of Bruce D. Brown).

17. *Id.;* Mahfouz's website says that libraries were asked only to insert an erratum sheet. Press Release, Kendall Freeman, Sheikh Khalid Bin Mahfouz Receives Comprehensive Apology from Cambridge University Press (July 30, 2007), *available at* http://www.binmahfouz.info/news_20070730.html. However, *Library Journal* reported that Cambridge asked libraries to take the book out of circulation. Andrew Albanese & Jennifer Pinkowski, *ALA to Libraries: Keep Alms for Jihad, Pulped in the UK*, LIBR. J., Aug. 23, 2007, *available at* http://www.libraryjournal.com/lj/community/legislation/851425-270/story.csp.

18. *See Libel Tourism*, *supra* note 3, at 18–19 (statement of Bruce D. Brown).

19. *See* Marc Perelman, *Israeli Art Critic Wins Legal Battles*, FORWARD, July 4, 2008, *available at* http://www.forward.com/articles/13662/.

20. *See* ANDREW BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 28 ¶ 2.14 (2003); Emil Petrossian, *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257, 1266 (2007).

expression entails."[21] Accordingly, plaintiffs file libel suits in jurisdictions less protective of speech whenever possible.[22]

Americans have faced libel litigation in Canada, Brazil, Australia, Indonesia, Singapore, New Zealand, Kyrgyzstan, France, and elsewhere.[23] But Britain has proven to be the destination of choice for libel tourists. A report from the British Ministry of Justice in March 2010 listed fifty libel tourism cases filed there.[24] London has repeatedly been called the "libel capital of the world."[25]

Why is Britain so appealing to libel tourists, especially when compared to the United States? Substantively, British law strongly favors libel plaintiffs:

- It requires the defendant to prove truth, whereas in the United States and most other countries, the plaintiff must generally prove falsity.[26] For instance, when David Irving sued American

21. Frederick Schauer, *The Exceptional First Amendment 2* (John F. Kennedy School of Government, Harvard University, Faculty Working Paper RWP05-021, February 2005), *available at* http://web.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=2554.

22. *See* ANNA S. HENNING & VIVIAN S. CHU, CONG. RESEARCH SERV., R40497, "LIBEL TOURISM": BACKGROUND AND LEGAL ISSUES (2010), at 1.

23. *See Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights? Before the S. Comm. On the Judiciary*, (Feb. 23, 2010) (testimony of Kurt Wimmer, Partner, Covington & Burling, LLP) [hereinafter *Wimmer Testimony*], *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=4414&wit_id=9121; *Libel Tourism*, *supra* note 2, at 49, n.29 (statement of Laura R. Handman, Partner, Davis Wright Tremaine, LLP); BARBOUR, *supra* note 9, at 1–2; Drew Sullivan, *Libel Tourism: Silencing the Press Through Transnational Legal Threats—A Report to the Center for International Media Assistance* 19–21 (Jan. 6, 2010), http://cima.ned.org/sites/default/files/CIMA-Libel_Tourism-Report.pdf; Adam Liptak, *From a Book Review to a Criminal Trial in France*, N.Y. TIMES, Feb. 21, 2011, at A14.

24. MINISTRY OF JUSTICE, REPORT OF THE LIBEL WORKING GROUP 52–63 (2010), *available at* http://www.justice.gov.uk/publications/docs/libel-working-group-report.pdf.

25. *See, e.g.* Mark Stephens, *England and Wales*, in INTERNATIONAL LIBEL AND PRIVACY HANDBOOK 283 (Charles J. Glasser Jr. ed., 2d ed. 2009); Doreen Carvajal, *Britain, a Destination for "Libel Tourism"* N.Y. TIMES, Jan. 20, 2008, *available at* http://www.nytimes.com/2008/01/20/technology/20iht-libel21.1.9346664.html.

26. *See* CULTURE, MEDIA, AND SPORT COMM., PRESS STANDARDS, PRIVACY, AND LIBEL, Vol. 1 (2010), at ¶ 117 [hereinafter *Press Standards, Privacy and Libel Vol. 1*]; RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:9 (2d ed. 2010); English PEN and Index on Censorship, *Free Speech Is Not for Sale: The Impact of English Libel Law on Freedom of Expression* 8 (2009), *available at* http://libelreform.org/reports/LibelDoc_LowRes.pdf. The UN Human Rights Committee suggested that Britain consider adopting "enhanced pleading requirements (e.g., requiring a plaintiff to make some preliminary showing of falsity and absence of ordinary journalistic standards)." Human Rights Comm., *International Covenant on Civil and Political Rights: Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant—United Kingdom of Great Britain and Northern Ireland*, July 7–25, 2008, ¶ 25, U.N. Doc. CCPR/C/GBR/CO/6, CCPR 93d Sess. (2008) [hereinafter *Human Rights Comm.*], *available at* http://www.statewatch.org/

historian Deborah Lipstadt for having called him a Holocaust denier and a disreputable historian, her legal team had to submit evidence of the existence of gas chambers at Auschwitz in order to show what Irving had misrepresented or suppressed information.[27]

- Where a defendant cannot prove the truth of the defamatory assertion, the only other broadly applicable defense in Britain is the *Reynolds* defense, which covers "responsible journalism."[28] However, *Reynolds* is narrowly applied only to coverage of matters deemed to be in the public interest,[29] and, although courts are divided, it may cover only journalist defendants.[30] Moreover, mounting a *Reynolds* defense is pricey: it can cost from $150,000 to over $300,000.[31]
- British libel claims are weighed according to the same standard regardless of the plaintiff's status. In fact, Britain's Supreme Court Procedure Committee in 1991 rejected a higher standard for public figures, in part because "it would be quite contrary to the tradition of our common law that citizens are not divided into different classes."[32] By contrast, public officials and public

news/2008/jul/uk-un-hr.pdf. The plaintiff in a British libel case must establish the elements of publication, identification, and defamatory meaning. PROGRAMME IN COMP. MEDIA L. & POL., *supra* note 10, at 51. The U.S. Supreme Court has held that a public-figure plaintiff must prove falsity, and so must a private-figure plaintiff where the speech is of public concern. Phila. Newspapers v. Hepps, 475 U.S. 767 (1986); N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

27. *See generally* DEBORAH E. LIPSTADT, HISTORY ON TRIAL: MY DAY IN COURT WITH DAVID IRVING (2005).

28. Reynolds v. Times Newspapers, [2001] 2 AC 127 (H.L.)(Eng.).

29. *See id.*; Jameel v. Dow Jones & Co., [2005] EWCA (Civ.) 75[¶28](Eng.); BARBOUR, *supra* note 9, at 3–4; Stephens, *supra* note 20, at 273–74.

30. *Compare* Kearns v. General Counsel of the Bar, [2003] EWCA (Civ) 331 [¶ 8] (Eng.) (holding that the "Reynolds defense" is limited to the mass media), *with* Seaga v. Harper, [2008] UKPC 9 (holding that the defense applies generally), *and* Lord Hoffmann, *The Libel Tourism Myth*, Dame Anne Ebsworth Memorial Lecture, Feb. 6, 2010, *available at* http://www.indexoncensorship.org/2010/02/the-libel-tourism-myth/. For American law's equal treatment of media and nonmedia defendants, *see* Dun & Bradstreet Inc. v. Greenmoss Builders Inc., 472 U.S. 749, 773 & n.4 (1985) (White, J., concurring).

31. *Press Standards, Privacy, and Libel Vol. 2*, *supra* note 7, at 246 (testimony of Mark Stephens, Senior Member, Intellectual Property and Media, Finer Stephens Innocent LLP), *available at* http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362ii.pdf. *See also* MINISTRY OF JUSTICE, *supra* note 24, at 24 (stating that "[r]egional media editors often have limited budgets and therefore see *Reynolds* as a defence of last resort").

32. Reynolds v. Times Newspapers Ltd., [1998] 3 All ER 961 (Civ.), § 13 (Eng.). *See Human Rights Comm.*, *supra* note 21, at 7 ¶ 25 (recommending that Britain consider an actual malice test for public officials and prominent public figures); Stephens, *supra* note 25, at 273.

figures must meet the higher "actual malice" standard to prevail in the United States under *New York Times v. Sullivan* and its progeny.[33] Revealingly, one British lawyer calls *Sullivan* "a defamer's charter."[34]

- Unlike American plaintiffs, British plaintiffs can win damages without proving harm to their reputations. British law creates an "irrebuttable presumption . . . that the publication of a defamatory article causes damage to the reputation of the person defamed."[35] Indeed, a plaintiff need not even have a reputation in Britain before the appearance of the publication.[36]
- Britain follows the multiple-publication rule, whereas the United States follows the single-publication rule. That means that in Britain, a new libel can arise each time an individual accesses an article—potentially rendering the one-year statute of limitations meaningless, especially for material in online archives.[37]

These five factors help explain why plaintiffs win an estimated ninety percent of British libel cases.[38] Their victories also tend to remain intact, too. Whereas American appellate courts closely examine facts as well as law in libel cases and overturn nearly three-quarters of adverse libel judgments, no such rule applies in Britain.[39]

Then there is the matter of money. Costs of libel litigation in Britain are by far the highest in Europe.[40] A plaintiff's lawyer who

33. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

34. *Press Standards, Privacy, and Libel Vol. 2*, *supra* note 7, at 43 (testimony of Rod Christie-Miller, Schillings Lawyers).

35. Mardas v. N.Y. Times Co., [2008] EWHC (Q.B.) 3135, [12] (Eng.). *See also Press Standards, Privacy, and Libel Vol. 1*, *supra* note 21, at 36 ¶ 118; Stephens, *supra* note 21, at 272. The First Amendment requires a plaintiff to come forth with evidence of "actual injury." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

36. *See* Jameel v. Dow Jones & Co., [2005] EWCA Civ. 75, [28].

37. *See* MINISTRY OF JUSTICE, *supra* note 19, at 81; *Press Standards, Privacy, and Libel Vol.* 1, *supra* note 21, at 57 ¶¶ 218–222; *Press Standards, Privacy, and Libel Vol.* 2, *supra* note 7, at 16 (testimony of Keith Mathieson, Reynolds Porter Chamberlain LLP); JOSHUA ROZENBERG, PRIVACY AND THE PRESS 204 (OUP Oxford 2004); Sullivan, *supra* note 18, at 18–19. However, the European Court of Human Rights did say that the passage of "a significant lapse of time" might violate the European Convention on Human Rights. Times Newspapers v. United Kingdom, Apps. No. 3002/03 & 23676/03, 14 ¶ 48 (Eur. Ct. H. R. 2010). For the American approach, *see* Shively v. Bozanich, 80 P.3d 676, 685, 688 (Cal. 2003); Thomas H. Golden & Stephen B. Vogel, *United States*, *in* INTER. LIBEL AND PRIVACY HANDBOOK 58 (Charles J. Glasser Jr. ed., 2d ed. 2009).

38. *See* Sullivan, *supra* note 16, at 19.

39. *See Libel Tourism*, *supra* note 3, at 19 (testimony of Bruce D. Brown).

40. *See* PROGRAMME IN COMPARATIVE MEDIA LAW AND POLICY, *supra* note 6, at 187; *Press Standards, Privacy, and Libel Vol. 2*, *supra* note 7, at 244.

agrees to a Conditional Fee Arrangement ("CFA") receives nothing if the client loses, but receives a "success fee" paid by the other side if the client prevails—an arrangement unique in Europe.[41] Previously, the success fee amounted to as much as 100 percent of the base fee, but in January 2011, the European Court of Human Rights in Strasbourg deemed such large fee enhancements an infringement on free expression.[42] The court did not indicate what level of success fee would be permissible; one proposal would cap the fees at ten percent.[43] Plaintiffs can also seek after-the-event ("ATE") insurance to cover the defendant's legal fees should the defendant win. The insurance company generally charges no premium if the defendant wins, but a successful plaintiff can recover the cost of the ATE premium from the defendant, along with legal fees (including a success fee) and damages.[44] Even in the absence of CFAs and ATE insurance, some British firms representing plaintiffs vary their rates depending on whether their clients prevail. Fees are discounted for unsuccessful clients but "enhanced" for successful ones, when the losing defendants must pay.[45] Such rules matter to American defendants, given that American courts routinely enforce foreign judgments for attorneys' fees.[46]

Little of this would matter to Americans if Britain followed prudent rules for jurisdiction. Although the British courts, in theory, will accept jurisdiction over a libel case only if the publication caused "real and substantial" harm to the plaintiff's reputation in Britain,[47] the requirement has proved all but toothless because jurisdiction may exist even if only a handful of Britons read the publication.[48] The contrast with American law is particularly stark with regard to online libel. To maintain a libel lawsuit for Internet speech, the Fourth

41. *See Press Standards, Privacy, and Libel*, *supra* note 21, at 61 ¶ 236; PROGRAMME IN COMPARATIVE MEDIA LAW AND POLICY, *supra* note 6, at 161.

42. MGN Ltd. v. United Kingdom, App. No. 39401/04 (Eur. Ct. H. R. 2011).

43. *See id.* ¶¶ 115–20.

44. *See* PROGRAMME IN COMPARATIVE MEDIA LAW AND POLICY, *supra* note 6, at 11, n.18.

45. *See, e.g.*, Carter-Ruck, *Media Law: Funding*, http://www.carter-ruck.com/Media%20Law/Funding.asp (last visited Mar. 19, 2011).

46. *See, e.g.*, Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 438 (3d Cir. 1971) (enforcing British judgment that included attorneys' fees).

47. *See* Berezovsky v. Michaels, [2000] 2 All ER 98, [2000] WLR 1004, [2000] All ER (D) 643 (House of Lords, May 11, 2000); H.R. REP. NO. 111-154, at 3 (2009).

48. *See Libel Tourism*, *supra* note 2, at 134–35 (response by Bruce D. Brown to post-hearing questions). *Cf.* H.R. REP. NO. 111-54, at 3 (comparing American and British treatment of jurisdiction in defamation cases).

Circuit, in an influential decision, stressed that the speech must be "targeted" at the jurisdiction.[49] Mere accessibility is not enough. The British Court of Appeal, however, expressly rejected that standard in 2004, stating that a defendant who publishes on the Internet "has 'targeted' every jurisdiction where his text may be downloaded."[50] Accordingly, the court allowed one American (boxing promoter Don King) to sue another American (a lawyer named Judd Burstein) in Britain.[51]

To address the chilling effect of libel tourism, Congress considered several legislative options.[52] All would have instructed American courts not to enforce foreign libel judgments that fall short of First Amendment standards. The SPEECH Act further allowed libel defendants to seek declaratory judgments on the enforceability of the foreign judgments, and provided for attorneys' fees.[53] In an approach modeled after anti-SLAPP (strategic lawsuit against public participation) laws, other bills would have allowed libel defendants to file countersuits against libel-tourist plaintiffs.[54] In the countersuit, the libel defendant could seek an injunction declaring the judgment unenforceable, as well as damages—treble damages in some circumstances. Jurisdiction over the libel-tourist plaintiff would rest on the American service of process, but the House Judiciary Committee deemed this jurisdictional approach unduly aggressive.[55] Critics contended that other countries might respond by authorizing countersuits against American plaintiffs; that claiming personal jurisdiction over a foreign defendant might violate due process; and that in any event, American courts need not claim overly expansive jurisdiction just because British courts do.[56] In the SPEECH Act,

49. Young v. New Haven Advocate, 315 F.3d 256, 258 (4th Cir. 2002).

50. Lewis v. King, [2004] EWCA (Civ) 1329, [34] (Eng.).

51. *See id.* at ¶¶ 3–5.

52. *See* ANNA C. HENNING & VIVIAN S. CHU, CONG. RESEARCH SERV., R40497, "LIBEL TOURISM": BACKGROUND AND LEGAL ISSUES 3 (2010), at 6–9 (summarizing bills); *Libel Tourism*, *supra* note 2, at 5.

53. Pub. L. No. 111-223, 124 Stat. 2381 (2010). The attorneys' fees are limited to the enforcement action, and not available in the action for a declaratory judgment. *See* S. REP. NO. 111-224, at 4 (2010) (Conf. Rep.).

54. *See* Free Speech Protection Act of 2009, S. 449 & H.R. 1304, 111th Cong. §3(a)–(d) (2009); HENNING & CHU, *supra* note 46, at 13–14 (summarizing bills); *Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights? Before the S. Comm. On the Judiciary*, at 6–9 (Feb. 23, 2010) (testimony of Bruce D. Brown, Libel Attorney, Baker & Hostetler LLP) [*hereinafter* Brown 2010 Testimony] (arguing for anti-SLAPP approach), *available at* http://judiciary.senate.gov/pdf/10-02-23Brown%27sTestimony.pdf.

55. *See* BARBOUR, *supra* note 9, at 10.

56. *See* H.R. REP. NO. 111-154, at 6; HENNING & CHU, *supra* note 46, at 16.

Congress addressed the issue of enforcing foreign libel judgments without providing for countersuits.[57]

II. Breach of Privacy in Britain

Modern British privacy law principally rests on the 1950 European Convention on Human Rights, as construed and applied by the European Court of Human Rights. Article 8 of the convention provides, "[e]veryone has the right to respect for his private and family life, his home and his correspondence." Under Article 10, "Everyone has the right to freedom of expression."[58] The European Court, along with the British courts that follow its precedents, seeks to balance the two.

However, privacy often seems to trump what one Strasbourg judge dismissively called the "fetish of the freedom of the press."[59] In *Von Hannover v. Germany*, an especially far-reaching case, the court concluded that the press had infringed the rights of Princess Caroline of Monaco by publishing photographs of her and her family taken in public.[60] These photos did not advance "any debate of general interest," the court said, but rather served solely "to satisfy the curiosity of a particular readership."[61] For the Strasbourg court, photographing people in public without their consent can violate the privacy protection of Article 8, with Article 10's guarantee of free expression providing no defense. Princess Caroline has another case currently pending before the court, again challenging the publication of photographs of her and her family.[62]

Although the European Convention on Human Rights is sixty years old, rulings of the Strasbourg court interpreting it became (mostly) binding on British courts starting just over a decade ago. International agreements have no effect in Britain until Parliament incorporates them into domestic law, which occurred with the Human

57. *See* 28 U.S.C. §§ 4101–4105 (2011).

58. European Convention on Human Rights, Rome 4.XI.1950, Arts. 8, 10, *available at* http://conventions.coe.int/treaty/en/Treaties/Html/005.htm.

59. Von Hannover v. Germany, App. No. 59320/00 (Eur. Ct. H. R. 2004) (Zupancic, J., concurring).

60. *Id*. at ¶¶ 11–17.

61. *Id*. at ¶ 65.

62. *See* Press Release, European Court of Human Rights, Hearing, 2 (Oct. 13, 2010), *available at* http://ns3.riss.ro/codex/contents.nsf/vWebAccessDocuments/9AD8AB686BAD7999C22577BE00412A72/$file/Grand_Chamber_Hearing_Springer_v__Germany_and_von_Hannover_v__Germany_13_10_10.pdf.

Rights Act of 1998, that took full effect in 2000.[63] The Human Rights Act directs British judges to apply the rulings of the European Court except where they conflict with rulings of the House of Lords.[64] Despite the relatively brief history of Article 8 privacy cases in Britain, by one estimate they now outnumber libel ones.[65]

In a British case for breach of privacy, sometimes called misuse of private information,[66] the judge follows the Strasbourg court in balancing the Article 8 privacy right against the Article 10 right of free expression. This entails a two-part test, as illustrated below.

The first inquiry examines whether the plaintiff had a reasonable expectation of privacy.[67] One case involved a photo of the author J. K. Rowling with her husband and eighteen-month-old son on a public street, published in the *Sunday Express*.[68] Rowling sued on her son's behalf. The judge dismissed the case, but the Court of Appeal reinstated it, stating that under *Von Hannover*, even "routine acts such as a visit to a shop or a ride on a bus" can fall within a reasonable expectation of privacy.[69] To determine whether a reasonable expectation of privacy exists, the Court of Appeal said a judge must take into account a host of factors:

> the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.[70]

63. *See* ROZENBERG, *supra* note 31, at 227; *Press Standards, Privacy, and Libel Vol.* 1, supra note 21, at 12 ¶ 10.

64. *See* Human Rights Act, 1998, c. 42, § 2(1); Murray v. Express Newspapers, [2008] EWCA (Civ.) 446 [20] (Eng.); Ash v. McKennitt, [2005] EWHC 3003 (Q.B.) [62] (Eng.).

65. *See* David Eady, Speech at the University of Hertfordshire (Nov. 10, 2009), 13, *available at* http://www.judiciary.gov.uk/NR/rdonlyres/1D20B7A7-62FB-461D-BA12-2437CB8CF61A/0/justiceeadyunivofhertfordshire101109.pdf.

66. Lord Neuberger of Abbotsbury, Master of the Rolls, *Privacy and Freedom of Expression: A Delicate Balance*, Speech at Eton (Apr. 28, 2010), 6, *available at* http://www.judiciary.gov.uk/NR/rdonlyres/D034D005-2956-4E2A-903C-41B74287F9FF/0/morprivacyfreedomexpression28042010.pdf.

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

68. Murray v. Express Newspapers, [2008] EWCA (Civ.) 446 [1] (Eng.).

69. *Id.* at ¶ 56.

70. *Id.* at ¶ 36.

For an editor on a deadline trying to decide whether to publish a photo, this calculus can be complex and uncertain. The fact that the photograph has already been published, moreover, may not be a defense as "there will be a fresh intrusion of privacy when each additional viewer sees the photograph and even when one who has seen a previous publication of the photograph, is confronted by a fresh publication of it."[71]

Not all cases involve photography. Prince Charles successfully sued the *Mail on Sunday* for publishing excerpts of his diaries, even though he acknowledged distributing copies of them to at least fourteen people.[72] In another case, Justice David Eady of the Queen's Bench—the leading force behind British privacy law[73]—ruled that a woman named Niema Ash had breached the privacy of the singer Loreena McKennitt by publishing a book about their former friendship.[74] *Von Hannover* demonstrated the need for "respect for private life, on some occasions, in relatively public circumstances,"[75] the judge said, adding that even "trivial," "anodyne," and "banal[]" information might be covered by a reasonable expectation of privacy.[76] Thus, Ash had a right under Article 10 to tell her own story, but she could not discuss her ex-friend's private life in doing so.[77]

If a given plaintiff does have a reasonable privacy expectation, a British court moves on to the next step in the analysis: determining whether the publication advanced the public interest.[78] A leading

71. Douglas v. Hello Ltd., [2005] EWCA (Civ.) 595 [105] (Eng.).

72. *See* HRH The Prince of Wales v. Associated Newspapers, [2006] EWHC 522 (Ch) [14] (Eng.). The defense maintained that the diaries had been circulated to between fifty and seventy-five people. *Id.*

73. *See* Matthew Norman, *Eady Has a Fight on His Hands to Rebuild Temple of Privacy*, INDEPENDENT, Feb. 8, 2010 (referring to "the temple to privacy [Justice Eady] so painstakingly constructed"), *available at* http://www.independent.co.uk/news/media/opinion/matthew-norman/matthew-norman-eady-has-a-fight-on-his-hands-to-rebuild-temple-of-privacy-1892208.html; Frances Gibb, *How Red-Top Lawyer Mr. Justice Eady Became Privacy Judge*, TIMES, July 25, 2008, *available at* http://business.timesonline.co.uk/tol/business/law/article4393286.ece (stating that "Mr. Justice Eady has created almost single-handedly what is now a privacy law in Britain"). *But see Press Standards, Privacy, and Libel Vol. 1*, *supra* note 21, at 27 ¶¶ 75–76 (stating that Justice Eady has not dominated the development of British privacy law).

74. McKennitt v. Ash, [2005] EWHC (Q.B.) 3003 (appeal taken from Eng.).

75. *Id.* ¶ 50.

76. *Id.* ¶ 58.

77. *Id.* at ¶ 77.

78. This is the same term but not necessarily the same standard as in the *Reynolds* defense for defamation. *See* Campbell v. MGN Ltd., [2002] EWCA Civ. 1373 [61] (Eng.)

case involved Naomi Campbell.[79] Campbell conceded that the *Daily Mirror* was justified in revealing that she was attending Narcotics Anonymous meetings in 2001 because she had repeatedly denied using illegal drugs.[80] However, the House of Lords in *Campbell v. MGN Ltd.* said that the newspaper had breached her privacy by publishing a photo of her on a public street outside the meeting place, along with some details of her treatment due to the public interest not extending that far.[81]

A valid public interest is not dispositive; rather, the public interest is weighed against the expectation of privacy. "[E]ven where there is a genuine public interest, . . . sometimes such interests . . . have to yield to the individual citizen's right to the effective protection of private life."[82] In Prince Charles's case, the court concluded that the public would be interested in his journals—his "every thought and action [are], in some quarters at least, a matter of endless fascination"—but that wasn't enough.[83] The contents of the journals were not "*necessary* in a democratic society for the protection of the rights and freedoms of others."[84] This necessity test sets a remarkably high bar; one could argue that not even the Pentagon Papers could qualify as truly necessary to protect anyone's rights and freedoms. Elsewhere, Justice Eady has given *public interest* a somewhat more generous definition, though he still called it "a very high test" whether the information "make[s] a contribution to a debate of general interest."[85] In Justice Eady's view, a court assessing the public interest must "investigat[e] the defendant's motive for using the right of free speech and grad[e] those motives (as between at one extreme e.g. 'political speech' and at the other what has been called in the

(stating that "[w]e do not believe that the same test of public interest applies to justify publication in these two very different torts").

79. "Even the judges know who Naomi Campbell is," wrote one judge. *Id.* at ¶ 127 (Baroness Hale of Richmond).

80. *Id.* at ¶¶ 23–24 (Lord Nicholls of Birkenhead), ¶¶ 36, 42 (Lord Hoffmann).

81. *See* Campbell v. MGN Ltd., [2004] UKHL 22 [117, 124] (Lord Hope of Craighead) [147, 156] (Baroness Hale of Richmond), [165, 169] (Lord Carswell). The Strasbourg court's *Von Hannover* decision was issued a short time later. The 2011 Strasbourg case limiting CFA fees was a continuation of the Campbell litigation. MGN Ltd. v. United Kingdom, App. No. 39401/04 (Eur. Ct. H. R. 2011).

82. McKennitt v. Ash, [2005] EWHC (Q.B.) 3003, [57].

83. HRH The Prince of Wales v. Associated Newspapers, [2006] EWHC 522 (Ch) [133].

84. *Id.* (emphasis in original).

85. Mosley v. News Group Newspapers Ltd., [2008] EWHC 1777 (Q.B.) [131] (internal quotation marks and citation omitted).

House of Lords 'tittle tattle')."[86] In another case, Justice Eady barred a defendant from revealing, among other things, details of dinner-table conversations with Tony Blair. These details fell on the "tittle-tattle" end of the scale, despite Blair's prominence.[87]

A high-profile privacy case involved Max Mosley, the head of Formula 1 racing and the son of the 1930s fascist leader Sir Oswald Mosley.[88] A Murdoch tabloid, the *News of the World*, charged that Max Mosley had participated in a Nazi-themed sadomasochistic ("S&M") orgy with five prostitutes.[89] The newspaper published photographs of the orgy and posted excerpts of a video taken by one of the prostitutes.[90] Mosley admitted to the S&M session and the five prostitutes, but insisted that the Nazi allegation was a lie.[91] He sued the *News of the World* for invasion of privacy (and later for libel as well).[92] In *Mosley v. News Group Newspapers, Ltd.*, Justice Eady concluded that Mosley was truthful: Although one woman had worn a German military jacket and Mosley had spoken in German, there had been no Nazi theme.[93] In the judge's view, the newspaper would have been justified in revealing a Nazi orgy at least to Mosley's Formula 1 bosses.[94] Doing so, Justice Eady said, would have advanced the public interest.[95] However, the revelation of a Nazi-less S&M orgy failed to pass the public-interest test.[96] The judge ordered the *News of the World* to pay close to $100,000, seemingly a record-setting damage award for a privacy case.[97] Including Mosley's legal fees (without any

86. David Eady, *Privacy and the Press: Where Are We Now?*, Speech to Conference on Justice (Dec. 1, 2009), *available at* http://www.judiciary.gov.uk/docs/speeches/eady-j-justice-conf.pdf, at 4. *See also Mosley*, [2008] EWHC 1777 (Q.B.) [15].

87. *See* Lord Browne of Madingley v. Associated Newspapers, [2007] EWHC 202 (Q.B.) [59].

88. Mosley v. News Group Newspapers Ltd., [2008] EWHC 1777 (Q.B.) [1], [26].

89. *Id.* at ¶ 1.

90. *Id.* at ¶¶ 1–2, 5, 27.

91. *Id.* at ¶¶ 36, 44.

92. Oliver Luft, *Max Mosley Launches Libel Action Against News of the World*, GUARDIAN, Apr. 3, 2009, *available at* http://www.guardian.co.uk/media/2009/apr/03/max-mosley-news-of-the-world.

93. *Mosley*, [2008] EWHC 1777, [36], [123].

94. *Id.* at ¶ 122.

95. *Id.*

96. *Id.* at ¶ 123.

97. *Id.* at ¶ 236. *See also* Afua Hirsch, *Privacy Law Will Grow, Bar Chief Predicts*, GUARDIAN, Dec. 15, 2008, *available at* http://www.guardian.co.uk/media/2008/dec/15/privacy-madonna-daily-mail; Leigh Holmwood & Stephen Brook, *Max Mosley Wins £60,000 in News of the World Privacy Case*, GUARDIAN, July 24, 2008, *available at* http://www.guardian.co.uk/media/2008/jul/24/privacy.newsoftheworld2; *Mosley Wins Court Case Over Orgy*, BBC NEWS, July 24, 2008, *available at* http://news.bbc.co.uk

success fee—he had no CFA) and its own legal fees, the case cost the *News of the World* over $1.5 million.[98]

The editor of *Private Eye*, Ian Hislop, derided Justice Eady's public-interest analysis in *Mosley*. Hislop told a Parliamentary committee,

> [Justice Eady] said[,] "We are a grown up cosmopolitan country, whatever we do behind doors is entirely up to us—unless there are Nazis in it, and then [disclosure] is in the public interest." Is it? The judgment makes no sense. Is [it] your right to dance about as a Nazi private? Or is it you are only allowed to dance about as a German officer? It is a silly case.[99]

As Hislop suggested, the public-interest test remains vague. In a March 2010 speech, Justice Eady admitted that "it may be quite difficult to anticipate the assessment the judge will make" in a privacy case.[100] He added, "[t]here is quite often no right or wrong answer. That is integral to the process. [D]ifferent persons may come up with different answers on the same set of facts."[101] The lack of clarity engenders a chilling effect. In the wake of *Mosley*, the *News of the World*'s editor, Colin Myler, said that "I probably now spend an equal time talking to lawyers as to journalists."[102]

Most privacy cases in Britain settle. In 2008 and 2009, only the *Mosley* proceeded through a full trial.[103] In those two years, British newspapers reached settlement agreements in privacy lawsuits or threatened suits involving Sienna Miller, Madonna, and Ashley Cole,

/2/hi/7523034.stm; Helen Pidd, *Punishment That Was Not a Crime: Why Mosley Won in the High Court*, GUARDIAN, July 25, 2008, *available at* http://www.guardian.co.uk/media/2008/jul/25/mosley.privacy.

98. ROZENBERG, *supra* note 31, at 38(2) INDEX ON CENSORSHIP 98, 103 (2009).

99. *Press Standards, Privacy, and Libel Vol. 2*, *supra* note 7, at 195 (testimony of Ian Hislop, Editor, *Private Eye*).

100. David Eady, *Launch of New Centre for Law, Justice and Journalism*, Speech Delivered at City University, London, (Mar. 10, 2010), *available at* http://www.judiciary.gov.uk/NR/rdonlyres/A49A9837-1D07-496D-934B-2379879EFAD8/0/eadyjcityuniversity10032010.pdf, at 6.

101. *Id. Cf.* JIH v. News Group Newspapers Ltd., [2011] EWCA (Civ.) 42 (Eng.) [3] (stating that a court's task in balancing privacy and free expression "can involve a significant degree of subjectivity").

102. *Press Standards, Privacy, and Libel Vol. 2*, *supra* note 7, at 176 Q769 (testimony of Colin Myler, Editor, *News of the World*).

103. *Press Standards, Privacy, and Libel Vol. 1*, *supra* note 21, at 24 ¶ 61.

among others.[104] According to the Parliamentary committee, "[t]he high costs of litigation, combined with the legal uncertainty, owing to the small amount of case law, undoubtedly discourages the media from contesting privacy cases."[105] The cycle perpetuates itself: Cases settle due to the paucity of case law, which prevents the development of further case law.

In addition to awarding damages after the fact—even damages for "hurt feelings"[106]—British courts will grant an injunction to block what is likely to constitute a breach of privacy.[107] Total numbers are unknown, as no agency keeps track.[108] Such orders have grown increasingly frequent.[109] The *Wall Street Journal* has reported that some British papers are served with an injunction nearly every month.[110] In 2003, a court barred the press from revealing the name and whereabouts of the former Mary Bell, who, at age eleven in 1968, had murdered two four-year-olds.[111] The court said that publicity would endanger Bell's already shaky mental health.[112] The fact that she had cashed in on her notoriety, receiving "a substantial sum" for cooperating with the author Gitta Sereny on the 1998 book *Cries Unheard*, was immaterial.[113] Injunctions have targeted potential sources as well as publishers. In a 2006 case, Justice Eady enjoined a man from telling the media about his wife's extramarital affair.[114]

Some of the orders, including those in the Mary Bell case, are *contra mundum* or John Doe injunctions, enforceable against anyone

104. *See* Afua Hirsch, *Judge in Max Mosley Trial Hits Back at Criticism Over Privacy Cases*, GUARDIAN, Dec. 1, 2009, *available at* http://www.guardian.co.uk/uk /2009/dec/01/david-eady-privacy-trials-media.

105. *Press Standards, Privacy, and Libel Vol. 1*, *supra* note 21, at 24 ¶ 62. *But see Press Standards, Privacy, and Libel Vol. 2*, *supra* note 7, at 482 (speech of Sir David Eady to the Intellectual Property Lawyers' Association, Feb. 18, 2009) [hereinafter *Eady Speech*] (stating that "[t]he rarity of contested claims is largely because there are so few stories where there is any hope of a public interest defence").

106. McKennitt v. Ash, [2005] EWHC 3003 (Q.B.) ¶ 162; Archer v. Williams, [2003] EWHC 1670 (Q.B.) ¶¶ 73, 75.

107. To get a preliminary injunction, plaintiffs must demonstrate that they are likely to win at trial. *See* Human Rights Act, 1998, c. 42, § 12(3).

108. *See Press Standards, Privacy, and Libel Vol. 1*, *supra* note 21, at 18 ¶ 37, 27 ¶ 75.

109. *See* JIH v. News Group Newspapers Ltd., [2011] EWCA (Civ.) 42 [34] (Eng.).

110. Cassell Bryan-Low, *Stars Boost Use of U.K. Gag Rules*, WALL ST. J., Oct. 8, 2010.

111. *See* X (Formerly Known as Mary Bell) & Y v. O'Brien, [2003] EWHC 1101 (Q.B.), [9], [41]–[42], [60]–[61] (Eng.).

112. *Id.*

113. *See id.* at ¶ 6.

114. CC v. AB, [2006] EWHC 3083 (Q.B.), [58] (Eng.).

who receives notice of them.[115] Moreover, some of the injunctions are secret; a news outlet can be held in contempt of court for revealing their existence.[116] In one instance, the attorneys behind a secret injunction told editors of *The Guardian* that they were forbidden to publish details of an upcoming Parliamentary debate if it included discussion of the injunction.[117] And some injunctions are both *contra mundum* and secret, such as one that Justice Eady issued in late 2009 barring any media outlet from publishing images of Tiger Woods naked or involved in sexual activity.[118]

To be sure, Britain is not the only country with plaintiff-friendly privacy laws. The European Court of Human Rights covers the forty-seven member states of the Council of Europe.[119] But as with libel tourism, Britain is likely to become a popular forum for privacy tourists owing to the expansive jurisdiction, the multiple-publication rule, and the availability of CFAs and ATE insurance. Jeremy Dear of the National Union of Journalists has said, "Britain has long been the libel capital of the world. Now it's in danger of becoming the privacy capital."[120]

III. Publication of Private Facts in the United States

American privacy law differs sharply from British privacy law. Not only is the United States committed to "the principle that debate on public issues should be uninhibited, robust, and wide-open,"[121] but in addition, "state action to punish the publication of truthful information seldom can satisfy constitutional standards."[122]

Like the British action for breach of privacy, the American tort for publication of private facts employs a two-part test. However, the threshold question in the United States is not whether the plaintiff

115. *See Press Standards, Privacy, and Libel Vol. 1*, *supra* note 21, at 18 ¶ 36. A news outlet need not be formally served with the injunction. "[E]ven though the newspaper is not a party, it can still be liable for criminal contempt if it publishes the story knowing of the prohibition against the 'persons unknown.'" Eady Speech, *supra* note 86, at 479.

116. *See Press Standards, Privacy, and Libel Vol. 1*, *supra* note 21, at 31 ¶¶ 94–95.

117. *Id.* at 31–33 ¶¶ 94–102.

118. Justice Eady's now-public order in *Woods v. X & Y* is at http://tmz.vo.llnwd.net/o28/newsdesk/1210_schillings_doc_wm.pdf.

119. *See* EUROPEAN COURT OF HUMAN RIGHTS, COUNTRY FACT SHEETS, 2009, *available at* http://www.echr.coe.int/NR/rdonlyres/C2E5DFA6-B53C-42D2-8512-034BD3C889B0/0/FICHEPARPAYS_ENG_MAI2010.pdf, at 3.

120. Mariah Blake, *Private Matters*, COL. J. REV., Sept.-Oct. 2007, at 19 (quoting Jeremy Dear).

121. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

122. Smith v. Daily Mail Publ'g Co., 433 U.S. 97, 102 (1979).

had a reasonable expectation of privacy. Rather, it is whether the revelation would be highly offensive to a reasonable person.[123] Judge Posner said in *Haynes v. Knopf* that the revelation must be "not merely embarrassing and painful but deeply shocking" and "shameful" to qualify for protection under privacy law.[124] The threshold is a high one, as Judge Posner's examples illustrate:

> Most people in no wise deformed or disfigured would nevertheless be deeply upset if nude photographs of themselves were published in a newspaper or a book. They feel the same way about photographs of their sexual activities, however "normal," or about a narrative of those activities, or about having their medical records publicized. Although it is well known that every human being defecates, no adult human being in our society wants a newspaper to show a picture of him defecating.[125]

Judge Posner concluded that revelations about the *Haynes* plaintiff's "heavy drinking, his unstable employment, his adultery, [and] his irresponsible and neglectful behavior toward his wife and children" fell short of "highly offensive."[126] As the House of Lords observed in *Campbell*, this is a much "stricter test" than reasonable expectation of privacy.[127]

The American test, moreover, is objective. It asks whether a reasonable person would find the revelation highly offensive. The Florida Supreme Court explained in 1944 that "[t]he protection . . . must be restricted to 'ordinary sensibilities,' and cannot extend to supersensitive or agoraphobia."[128] As the Mary Bell case illustrates, by contrast, British courts inquire into the particular vulnerabilities of

123. *See* RESTATEMENT (SECOND) OF TORTS , § 652D(a) (1977).

124. Haynes v. Knopf, 8 F.3d 1222, 1230, 1234–35 (7th Cir. 1993).

125. *Id.* at 1229.

126. *Id.* at 1230.

127. Campbell v. MGN Ltd., [2004] UKHL 22, [22] (Eng.).

128. Cason v. Baskin, 20 S.2d 243, 251 (Fla. 1944) (quoting 41 Am. Jur. 934). *See also* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 397 (1960) ("The law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive about . . . publicity.") (footnote omitted); Roscoe Pound, *Interests of Personality*, part 1, 28 HARV. L. REV. 343, 363 (1915) ("[A]s the injury [in invasion of privacy] is mental and subjective, the difficulties . . . must, at least, confine legal securing of the interest to ordinary sensibilities. Here, as in many other cases, in a weighing of interests the over-sensitive must give way.").

the plaintiff.[129] There, those afflicted with depression, anxiety, or other mental troubles may be accorded more generous privacy rights than those not afflicted.

The other issue in an American court is not the "very high test" of whether the revelation advanced a narrowly defined public interest, but rather whether the revelation was of "legitimate concern to the public."[130] Here, the courts defer to local standards. According to the Restatement, "[A]ccount must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores."[131] When the community cares about "the misfortunes and frailties of neighbors and 'public figures,'" for example, a court will generally protect speech on those topics against a claim for publication of private facts.[132] Something falls outside the realm of "legitimate public interest," according to the Restatement, only when "the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern."[133] To a substantial extent, then, American law protects information that interests the public. This is not so in Britain, where a judge wrote in 2010, "[i]t is not enough for information to be interesting to the public. Publication of the information must be in the public interest."[134]

Additionally, in an American court, material that is of legitimate concern to the public cannot lead to liability regardless of how offensive it may be. British courts take a different approach. As noted, one British court has said that "even where there is a genuine public interest . . . sometimes such interests . . . have to yield to the individual citizen's right to the effective protection of private life."[135]

129. X (Formerly Known as Mary Bell) & Y v. O'Brien, [2003] EWHC 1101 (Q.B.) (Eng.).

130. RESTATEMENT (SECOND) OF TORTS, § 652D(b) (1977). The Restatement asserts that the test of "legitimate concern to the public" is required by the First Amendment as well as by common law. *Id.*, cmt. d (*citing* Cox Broadcasting v. Cohn, 420 U.S. 469 (1975)). *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974) (stating, with regard to determining whether news coverage advanced the public interest, that "[w]e doubt the wisdom of committing this task to the conscience of judges").

131. RESTATEMENT (SECOND) OF TORTS, § 652D, cmt. h (1977).

132. Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir. 1940).

133. RESTATEMENT (SECOND) OF TORTS, § 652D, cmt. h (1977).

134. DFT v. TFD, [2010] EWHC 2335 (Q.B.) [19] (Eng.).

135. McKennitt v. Ash, [2005] EWHC 3003 (Q.B.) [57].

In cases involving the news media, American courts often recast "legitimate public interest" as "newsworthy."[136] This standard is broad and extends beyond front-page topics and news of government to embrace the full range of "information concerning interesting phases of human activity."[137] It embraces equally the details of United Nations deliberations and "the chitchat of a society editor,"[138] as well as "detailed reports of the piquant facts in matrimonial litigation and the colorful escapades and didoes of well-known persons,"[139] "silly news,"[140] and many other "matters of genuine, even if more or less deplorable, popular appeal."[141] In making the newsworthiness evaluation, American courts substantially defer to newsroom judgments. "Absent clear abuse, the courts will not second-guess editorial decisions as to what constitutes matters of genuine public concern."[142] By contrast, the cases involving Naomi Campbell, Prince Charles, and Max Mosley demonstrate that British judges are quick to second-guess editorial decisions.

As in Britain, many American privacy cases involve photographs. In a 1980 case, *High Society Celebrity Skin* magazine published a topless photo of the actress Ann-Margret, taken from the film *Magic*. A federal judge held that the newsworthy defense applied:

> [T]he fact that the plaintiff, a woman who has occupied the fantasies of many moviegoers over the years, chose to perform

136. *See, e.g.* Haynes v. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993); Shulman v. Group W. Prods., 74 Cal. Rptr. 2d 843, 852–53 (1998).

137. Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980). *See also* Jenkins v. Dell Publ'g Co., 251 F.2d 447, 451 (3d Cir. 1958) ("A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news.").

138. Gautier v. Pro-Football, Inc., 278 A.D. 431, 435 (N.Y. App. Div. 1951).

139. Goelet v. Confidential, Inc., 5 A.D.2d 226, 229 (N.Y. App. Div. 1958).

140. Themo v. New Eng. Newspaper Publ'g Co., 27 N.E.2d 753, 754 (Mass. 1940).

141. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977).

142. Huggins v. Moore, 94 N.Y.2d 296, 303 (1999) (citation omitted). *See also* Ross v. Midwest Commc'ns Inc., 870 F.2d 271, 275 (5th Cir. 1989) (stating that "judges, acting with the benefit of hindsight, must resist the temptation to edit journalists aggressively"); *Shulman*, 74 Cal. Rptr. 2d 862 (stating that "[t]he courts do not, and constitutionally could not, sit as superior editors of the press"); RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977) ("To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term [*news*], as a glance at any morning paper will confirm."). *But see* Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039, 1042–43 (2009) (arguing that courts are increasingly determining newsworthiness in privacy cases based on whether the news organization complied with professional ethics codes).

> unclad in one of her films is a matter of great interest to many people. . . . [I]t is not for the courts to decide what matters are of interest to the general public.[143]

Nude photos of an actress would have zero chance of satisfying Britain's public-interest standard. In 1982, a case before the New York Court of Appeals involved a photo taken of an African-American man named Clarence W. Arrington without his consent.[144] This photo was used as the cover of *The New York Times Magazine* to illustrate an article on "The Black Middle Class: Making It."[145] The article said that the black middle class "has been growing more removed from its less fortunate brethren," an elitist attitude not held by the subject of the photo.[146] Arrington sued and although the court acknowledged that "others quite reasonably took the article's ideas to be ones he shared," he lost.[147] In the court's evaluation, the article fell within the scope of the "freely defined" public interest, and the photo was related to the topic.[148] Arrington's humiliation was "part of the price every person must be prepared to pay for a society in which information and opinion flow freely."[149] Under such precedents as *Von Hannover* and *Campbell*, Arrington would easily have won in Britain.

Moreover, whereas Britain requires the defendant to demonstrate that the revelation was in the public interest, American courts place the burden on the plaintiff to demonstrate that the revelation was *not* of legitimate public concern.[150] According to one commentator, this obligation to prove a negative "puts the plaintiff at a tremendous disadvantage."[151] But, as one California appellate court explained, a contrary approach—the approach taken by Britain—would "read the

143. Ann-Margret v. High Society Magazine, 498 F. Supp. 401, 405 (S.D.N.Y. 1980) (citations omitted).

144. Arrington v. N.Y. Times Co., 434 N.E.2d 1319 (N.Y. 1982).

145. *Id.* at 1320.

146. *Id.*

147. *Id.*

148. *Id*. at 1322.

149. *Id. But cf.* M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 515 (Ct. App. 2001) (finding *Sports Illustrated* potentially liable for publishing a photograph of a Little League team in which some of the children had been sexually abused by their coach).

150. *See* Ross v. Midwest Commc'ns, 870 F.2d 271, 273 (5th Cir. 1989); Shulman v. Group W. Prods., 74 Cal. Rptr. 2d 843, 852 (Cal. 1998).

151. Geoff Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 148 n.6 (1997).

rights of free speech and press out of the Constitution."[152] The First Amendment thus requires that the burden fall on the plaintiff, contrary to the plaintiff-friendly British rule.

In addition, the American tort for publication of private facts is reasonably clear. It is "one of the more commonly litigated and well-defined areas of privacy law."[153] On the other hand, British privacy law, as noted, is murky. This uncertainty magnifies the chilling effect.

Finally, the presumption against prior restraints makes it virtually inconceivable that an American judge would enjoin publication of material to prevent an invasion of privacy.[154] The standard for restraining speech before publication can be gauged by famous dicta in *Near v. Minnesota*: "No one would question but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops."[155] In a 1979 case, a federal district court ordered the magazine, *The Progressive*, not to publish an article that purported to reveal the secrets of the hydrogen bomb.[156] "A mistake in ruling against *The Progressive* will seriously infringe cherished First Amendment rights," the judge held—but "[a] mistake in ruling against the United States could pave the way for thermonuclear annihilation."[157] It is difficult to envision how the harms resulting from even the most egregious invasion of privacy could reach the level of ambushed troops, much less thermonuclear annihilation, so as to justify an injunction.

Thus, as with libel, privacy law favors plaintiffs in Britain and defendants in the United States. First, an American plaintiff must prove that the revelation would be highly offensive, objectively defined, whereas a British plaintiff must show merely that it falls within a reasonable expectation of privacy, subjectively defined. Second, an American plaintiff must demonstrate that the revelation is not of legitimate interest to the public or newsworthy, broadly defined, whereas a British defendant must show that the information advances a narrowly defined public interest. Third, clarity lessens the chilling effect of privacy law in the United States; British privacy law is anything but clear. Finally, injunctions to prevent unlawful

152. Diaz v. Oakland Tribune, Inc., 188 Cal Rptr. 762, 770 (Ct. App. 1983).

153. *Shulman*, 74 Cal. Rptr. 2d at 852.

154. *Cf.* Org. for a Better Austin v. Keefe, 402 U.S. 415, 420 (1971) (ordering an injunction vacated in a privacy case).

155. Near v. Minn., 283 U.S. 697, 716 (1931).

156. United States v. Progressive Inc., 467 F. Supp. 990 (W.D. Wisc. 1979).

157. *Id.* at 996.

invasions of privacy are almost unthinkable in the United States but commonplace in Britain.

IV. Counterarguments

One might argue that extending the SPEECH Act to cover privacy is unnecessary or at least premature on five grounds.

First, even without extending the SPEECH Act, an American court might refuse to enforce a British privacy judgment as contrary to public policy. That is what happened in *Matusevitch v. Telnikoff* and *Bachchan v. India Abroad Publishers*, where courts refused to enforce British libel judgments as repugnant to the public policy embodied in the First Amendment.[158] Indeed, the Congressional Research Service was unable to cite a single case in which an American court had enforced a British libel judgment.[159] But even if a libel or privacy judgment cannot be enforced, its existence may blot the record of an author, perhaps hampering applications for jobs or loans.[160] Travel may also be constrained. Ehrenfeld told the House Judiciary Committee that the Mahfouz judgment was preventing her from visiting Britain or other European countries that reciprocally enforce British judgments.[161] British judgments can be enforced across the European Union except for Denmark.[162] In the realm of libel, moreover, the mere possibility that British law might stretch

158. Matusevitch v. Telnikoff, 877 F. Supp. 1, 4 (D.D.C. 1995), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998); Telnikoff v. Matusevitch, 702 A.2d 230, 238 (Md. 1997); Bachchan v. India Abroad Pubs., 585 N.Y.S.2d 661, 665 (N.Y. Sup. Ct. 1992); H.R. REP. NO. 111–154, at 4–5 (2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr154.111.pdf. Linda J. Silberman of New York University School of Law criticized the *Matusevitch* holding before the House Judiciary Committee. *See Libel Tourism*, *supra* note 2, at 60, 72 (statement of Linda J. Silberman, Davis Write Tremaine, LLP). *See also* Sarl Louis Feraud Int'l v. Viewfinder Inc., 489 F.3d 474, 480 (2d Cir. 2007) (declining to enforce French judgment in a copyright case that impinged on First Amendment rights); Michelle A. Wyant, *Confronting the Limits of the First Amendment: A Proactive Approach for Media Defendants Facing Liability Abroad*, 9 SAN DIEGO INT'L L. J. 367, 410 (2008).

159. HENNING & CHU, *supra* note 46, at 8.

160. *See* S. REP. NO. 111-224, at 2 (2010); BELL, *supra* note 13, at 170 ¶ 4.80; Sullivan, *supra* note 16, at 30.

161. *See Libel Tourism*, *supra* note 2, at 12 (statement of Rachel Ehrenfeld). Mahfouz's lawyer responded that Ehrenfeld had nothing to fear unless she planned to bring a great deal of money with her: "We abolished debtors' prisons some time ago." *Writ Large*, ECONOMIST, Jan. 8, 2009, *reprinted in Libel Tourism*, *supra* note 2, at 32–33 (statement of Bruce D. Brown).

162. *See Libel Tourism*, *supra* note 2, at 136 (response by Bruce D. Brown to post-hearing questions).

across the Atlantic created a chilling effect on American publishers.[163] At a hearing on what became the SPEECH Act, one attorney testified that "[v]irtually every demand letter we receive these days from a U.S. lawyer is accompanied by one from a British solicitor."[164] The resulting self-censorship, according to the House Judiciary Committee, "threatens First Amendment rights."[165] Now, the same thing is happening with privacy law. London media attorney Mark Stephens told *The Economist* that he knew of seven instances in a single month in which British lawyers representing American citizens had threatened to file privacy suits against American media outlets.[166]

Second, perhaps the SPEECH Act already reaches privacy torts. The statute covers attempts to enforce defamation judgments and defines defamation as "any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in criticism, dishonor, or condemnation of any person."[167] One could argue that invasion of privacy represents a "similar claim alleging that forms of speech . . . have caused . . . emotional distress," especially given the mention of another privacy tort, false light.[168] But that argument might be a stretch; in any event, the uncertainty of its success until litigated leaves the chilling effect intact. Clarity—merely adding the word "privacy" to the list of causes of action—would reduce the chilling effect.

Third, the doctrine of comity argues for American courts to enforce foreign judgments wherever possible.[169] Maintaining friendly relations with other countries requires granting their laws maximal respect. But comity has its limits.[170] Some countries, for example, refuse to enforce American antitrust judgments, which are said to

163. H.R. REP. NO. 111-154, at 4 (2009).

164. *Id.* (quoting testimony of Laura R. Handman),

165. *Id.*

166. *Writ Large*, *supra* note 148, at 33.

167. 28 U.S.C. § 4101(1) (2010).

168. For this point, I am indebted to Michael W. Macleod-Ball, Chief of Staff and First Amendment Counsel, ACLU Washington Legislative Office.

169. *See* Hilton v. Guyot, 159 U.S. 113, 202–03 (1859). Many states have adopted the Uniform Foreign Money-Judgments Recognition Act of 1962 or the Uniform Foreign-Country Money Judgments Recognition Act of 2005, which incorporates principles from *Hilton*. *See* HENNING & CHU, *supra* note 46, at 7–8.

170. *See* Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 627 (5th Cir. 1996) ("We decline ... to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action.").

favor plaintiffs.[171] Moreover, the exercise of extravagant jurisdiction—as Britain does with libel and threatens to do with privacy—also menaces international relations and invites retaliation.[172] In addition, concerns about comity contributed to Congress's decision to adopt the SPEECH Act over the more far-reaching bills that provided for countersuits, jurisdiction over foreign defendants, and treble damages.[173] However, these concerns did not prevent the passage of the SPEECH Act itself.

Fourth, British privacy law may be on the verge of change. Editors have denounced the privacy rulings,[174] a justice minister has talked of introducing reform legislation in Parliament,[175] a judicial committee is examining the use of injunctions in privacy cases,[176] and although Justice Eady remains a judge, he has not been reappointed as senior judge in charge of libel and privacy cases.[177] However, these "reforms" may further constrict speech. Max Mosley, for example, has petitioned the Strasbourg court to require a news outlet planning a potentially invasive article to notify the subject of the article before publication, so that he or she can seek an injunction. Mosley also wants privacy trials to be held behind closed doors.[178] Noting the convergence of print and online media, one witness before the Parliamentary committee called for the regulation of British newspapers by Ofcom, the agency that regulates broadcast and

171. *See* BARBOUR, *supra* note 9, at 13 & nn. 92–93.

172. *See* Petrossian, *supra* note 16, at 1276–77.

173. *See* H.R. REP. NO. 111-154, at 6 (2009); BARBOUR, *supra* note 9, at 10; *Libel Tourism*, *supra* note 2, at 60, 69–70 (statement of Linda J. Silberman).

174. *See* Paul Dacre, *Society of Editors: Paul Dacre's Speech in Full*, PRESS GAZETTE, Nov. 9, 2008, *available at* http://www.pressgazette.co.uk/story.asp? storycode=42394.

175. Christopher Hope, *Privacy Law to Stop Rise in Gagging Orders by Judges*, TELEGRAPH, Aug. 17, 2010, *available at* http://www.telegraph.co.uk/news/uknews/law-and-order/7949432/Privacy-law-to-stop-rise-in-gagging-orders-by-judges.html.

176. *See* Press Release, Judiciary of England and Wales, Committee to Examine "Super-Injunctions" (Apr. 6, 2010), *available at* http://www.judiciary.gov.uk/media/media-releases/2010/1510.

177. *See* Press Release, Judiciary of England and Wales, Appointment of New Judge in Charge of the Queen's Bench Jury and Non-Jury Lists (Sept. 13, 2010), *available at* http://www.judiciary.gov.uk/media/media-releases/2010/news-release-2510; *Judge Behind "Backdoor Privacy Law" and Footballer Super-Injunctions to Step Down*, DAILY MAIL, Sept. 15, 2010, *available at* http://www.dailymail.co.uk/news/article-1312114/Mr-Justice-Eady-Judge-backdoor-privacy-law-step-down.html.

178. *See Press Standards, Privacy, and Libel Vol. 1*, *supra* note 21, at 28–29 ¶¶ 77, 80–81; *Press Standards, Privacy, and Libel Vol. 2*, *supra* note 7, at 57 (testimony of Max Mosley); Gavin Phillipson, *Max Mosley Goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions*, 1 J. OF MEDIA L. 73, 81–82 (2009).

telecommunications.[179] Further, reforms of libel law are also under consideration in Britain, as the House Judiciary Committee acknowledged in its report, but they did not prevent or postpone passage of the SPEECH Act.[180] As attorney Bruce D. Brown told the Senate Judiciary Committee, "[W]e need not wait for the glacial pace of reform abroad to bear fruit in order to take steps in Congress today to protect our own free speech traditions."[181]

Fifth, one might argue that privacy tourism does not yet represent a problem. American courts have apparently not yet enforced a foreign privacy judgment inconsistent with the First Amendment, and they have not even been asked to do so. Indeed, it appears that no litigant has sued an American media outlet in Britain for invasion of privacy. But a similar argument was raised concerning libel tourism.[182] In Britain, both Lord Hoffmann and Justice Eady were outspoken in denying that libel tourism represented any problem.[183] The House of Representatives report on the SPEECH Act referred to the number of libel tourist lawsuits as "admittedly small" and said that enforcement of a foreign judgment contrary to First Amendment standards was merely a "disturbing possibility."[184] Nonetheless, Congress acted. With privacy, as with libel, lawsuits need not be tried or even filed, but merely threatened.[185] As media lawyer Kurt Wimmer told the Senate Judiciary Committee during a hearing on libel tourism, "[t]he impact of the sword of Damocles is not that it falls, but that it hangs."[186]

V. Conclusion

In their renowned article in 1890, Samuel D. Warren and Louis D. Brandeis advocated a tort to protect individuals against a "press [that] is overstepping in every direction the obvious bounds of propriety and of decency."[187] They envisioned a far-reaching cause of action,

179. *Press Standards, Privacy, and Libel Vol. 2*, *supra* note 7, at 47 (testimony of Jonathan Coad, Swan Turton Solicitors).

180. *See* H.R. REP. NO. 111-154, at 6–7; SMOLLA, *supra* note 21, at § 1:9.50.

181. Brown 2010 Testimony, *supra* note 48.

182. *See* John J. Walsh, *The Myth of "Libel Tourism,"* N.Y. L. J., Nov. 20, 2007, *available at* http://www.clm.com/publication.cfm/ID/177.

183. *See* Lord Hoffmann, *supra* note 24; Eady, *supra* note 76, at 8–9.

184. H.R. REP. NO. 111-154, at 4, 5.

185. *Id.*

186. *Wimmer Testimony*, *supra* note 18.

187. Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

one that would punish "the unauthorized circulation of portraits of private persons" as well as the publication of details of "the private life, habits, acts, and relations of an individual" unless they bear on his or her fitness for public office.[188] Along with monetary damages, the authors recommended the availability of injunctive relief "in perhaps a very limited class of cases."[189] American law, however, has developed in a different direction.[190] The First Amendment protects the publication of material that would likely affront Warren's and Brandeis's sensibilities.[191] Indeed, in a leading privacy case, the Second Circuit acknowledged that it was authorizing the publication of material that Warren and Brandeis believed "all men alike are entitled to keep from public curiosity."[192] Contrast that with the evaluation of one commentator about today's privacy law in Britain: it "protects more than Warren and Brandeis ever contemplated."[193]

Expanding the SPEECH Act is not a perfect solution. Larger American media organizations have assets in Europe, so in many instances, privacy plaintiffs need not try to enforce judgments in the United States at all—they can do so overseas, free of the constraints of the First Amendment.[194] Nonetheless, adding "privacy" to the SPEECH Act would help reduce the chilling effect on American publishers and preempt a threat to First Amendment values.

"[P]rivacy is the new libel," *Private Eye* editor Hislop told the Parliamentary committee.[195] Before privacy tourism becomes the new libel tourism, Congress should extend the SPEECH Act to judgments for invasion of privacy.

188. *Id.* at 195, 216.

189. *Id.* at 219.

190. *See* Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 409 (1978).

191. *See, e.g.,* Ann-Margret v. High Society Magazine, 498 F. Supp. 401, 405 (S.D.N.Y. 1980).

192. Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir. 1940).

193. John Francis Curry, *Fame and Privacy: Mutually Exclusive? A Comparative Analysis*, 5 U. C. DUBLIN L. REV. 155, 171 (2005).

194. *Cf.* S. REP. NO. 111-224, at 10 (2010) (additional views of Sen. Kyl) (noting as a shortcoming of the SPEECH Act the possibility that British libel judgments would be enforced against Americans' European assets); *Libel Tourism*, *supra* note 2, at 57 (statement of Laura R. Handman).

195. *Press Standards, Privacy, and Libel Vol. 2*, *supra* note 7, at 191 (testimony of Ian Hislop). *See also* Sullivan, *supra* note 18, at 22 (stating that "[s]ome lawyers in the United Kingdom fear that privacy issues will become the next libel tourism").

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