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Libel Capital No More? Reforming British Defamation Law

by
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I. Introduction

London has repeatedly been called the libel capital of the world.[1] Three factors lie behind the characterization. First, British

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

defamation law substantively favors plaintiffs. By one estimate, plaintiffs win some 90 percent of defamation suits in Britain.[2] Second, British courts exercise expansive jurisdiction, leading to "libel tourism," the practice of filing suit in plaintiff-friendly Britain concerning statements made in other countries, even though the statements had minimal effect in Britain.[3] Third is the matter of cost. Defamation cases in Britain are by far the most expensive in Europe, with most of the costs borne by defendants.[4] In some instances, plaintiffs can file suits knowing that they will be liable for little or nothing in the way of expenses even if they lose.[5]

Although the British defamation regime has its defenders,[6] its critics have grown more numerous in recent years. The campaign for libel reform "came into play without warning," according to one

2. DREW SULLIVAN, LIBEL TOURISM: SILENCING THE PRESS THROUGH TRANSNATIONAL LEGAL THREATS—A REPORT TO THE CENTER FOR INTERNATIONAL MEDIA ASSISTANCE 19 (Jan. 6, 2010), *available at* http://cima.ned.org/sites/default/files/CIMA-Libel_Tourism-Report.pdf. Sullivan cites British media lawyer Mark Stephens as his source.

3. Libel tourism is the subject of a vast literature. Recent commentary includes 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 LAW 471 (2009); Travor C. Hartley, *"Libel Tourism" and Conflict of Laws*, 59 INT'L & COMP. L. Q. 25 (2010); A. R. Klein, *Does the World Still Need United States Tort Law? Or Did It Ever? Some Thoughts on Libel Tourism*, 38 PEPP. L. REV. 375 (2011); Yasmine Lahlou, *Libel Tourism: A Transatlantic Quandary*, 2 J. INT'L MEDIA & ENT. L. 199 (2009); Note, *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 (2010); Sarah Staveley-O'Carroll, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 N.Y.U. J. L. & LIBERTY 252 (2009); Tara Sturtevant, *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 (2010); Daniel C. Taylor, *Libel Tourism: Protecting Authors and Preserving Comity*, 99 GEO. L. J. 189 (2010).

4. *See* PROGRAMME IN COMPARATIVE MEDIA LAW AND POLICY, CENTRE FOR SOCIO-LEGAL STUDIES, UNIVERSITY OF OXFORD, A COMPARATIVE STUDY OF COSTS IN DEFAMATION PROCEEDINGS ACROSS EUROPE 244 (2008), *available at* http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamationreport.pdf.

5. *See* CULTURE, MEDIA, AND SPORT COMMITTEE, PRESS STANDARDS, PRIVACY, AND LIBEL: REPORT, 2009–10, H.C. 532, ¶ 286 (U.K.); *Media Law: Funding*, CARTER-RUCK, http://www.carter-ruck.com/Media%20Law/Funding.asp (last visited Jan. 23, 2012) (noting that financial arrangements available to some plaintiffs represent "a highly effective means by which to manage the costs risks of litigation)."

6. *E.g.,* Lord Hoffmann, *The Libel Tourism Myth*, DAME ANNE EBSWORTH MEMORIAL LECTURE (Feb. 6, 2010), http://www.indexoncensorship.org/2010/02/the-libel-tourism-myth/.

commentator.[7] In 2008, the United Nations Human Rights Committee urged changes to British libel law.[8] The same year, an Oxford study examined the high cost of British defamation cases.[9] In 2009, English PEN and the Index on Censorship issued a report saying that British libel law failed to achieve the proper balance; current law, the report said, "suggests that the reputation of the claimant is more important than the free speech of the defendant."[10] The same year, a committee of the U.S. House of Representatives held a hearing on libel tourism cases, especially those brought in Britain, as they affect Americans.[11] The year 2010 was particularly eventful. A U.S. Senate committee held a hearing on libel tourism.[12] The Center for International Media Assistance concluded that British defamation laws "currently pose a serious threat to media around the world."[13] The Ministry of Justice issued a report critical of British libel law[14] as well as a consultation and response on the costs of libel litigation[15] and a report on the costs of civil litigation generally.[16] The

7. Alex Novarese, *The Death of Libel—is the Defamation Bill the Beginning of the End for Libel Lawyers?,* LEGAL WEEK, May 12, 2011, http://www.legalweek.com/legal-week/feature/2070231/death-libel-defamation-beginning-libel-lawyers.

8. International Covenant on Civil and Political Rights, July 7-25, 2008, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant—United Kingdom of Great Britain and Northern Ireland* at 7–8 ¶ 25, U.N. Doc. CCPR/C/GBR/CO/6 (July 21, 2008), *available at* http://www.statewatch.org/news/2008/jul/uk-un-hr.pdf.

9. PROGRAMME IN COMPARATIVE MEDIA LAW AND POLICY, *supra* note 4.

10. ENGLISH PEN & INDEX ON CENSORSHIP, FREE SPEECH IS NOT FOR SALE: THE IMPACT OF ENGLISH LIBEL LAW ON FREEDOM OF EXPRESSION 5 (2009), *available at* http://libelreform.org/reports/LibelDoc_LowRes.pdf.

11. *See Libel Tourism: Hearing Before the Subcomm. on Commercial & Admin. L. of the House Comm. on the Judiciary*, 111th Cong. (2009).

12. *Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights? Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010).

13. SULLIVAN, *supra* note 2, at 7.

14. MINISTRY OF JUSTICE, REPORT OF THE LIBEL WORKING GROUP (2010), http://www.justice.gov.uk/publications/docs/libel-working-group-report.pdf.

15. MINISTRY OF JUSTICE, CONTROLLING COSTS IN DEFAMATION PROCEEDINGS: REDUCING CONDITIONAL FEE AGREEMENT SUCCESS FEES—RESPONSE TO CONSULTATION (2010) [hereinafter MINISTRY OF JUSTICE, REDUCING SUCCESS FEES—RESPONSE], http://www.justice.gov.uk/consultations/docs/response-conditional-fees-consultation.pdf; MINISTRY OF JUSTICE, CONTROLLING COSTS IN DEFAMATION PROCEEDINGS: REDUCING CONDITIONAL FEE AGREEMENT SUCCESS FEES—CONSULTATION PAPER (2010) [hereinafter MINISTRY OF JUSTICE, REDUCING SUCCESS FEES—CONSULTATION], http://www.justice.gov.uk/consultations/docs/costs-defamation-proceedings-consultation.pdf.

16. MINISTRY OF JUSTICE, PROPOSALS FOR REFORM OF CIVIL LITIGATION FUNDING AND COSTS IN ENGLAND AND WALES: IMPLEMENTATION OF LORD JUSTICE

House of Commons Culture, Media, and Sport Committee issued a report that called the American concerns about British defamation law "a humiliation for our system" and urged stricter controls on the costs of defamation cases.[17] And all three major political parties pledged at least to investigate libel reform if elected.[18]

In the view of some commentators, advocates of libel reform in Britain made a shrewd tactical decision: They emphasized a case involving a nonjournalist defendant.[19] In April 2008, during Chiropractic Awareness Week, science writer Simon Singh derided chiropractors in *The Guardian*.[20] He wrote: "The British Chiropractic Association claims that their members can help treat children with colic, sleeping and feeding problems, frequent ear infections, asthma and prolonged crying, even though there is not a jot of evidence. This organisation is the respectable face of the chiropractic profession and yet it happily promotes bogus treatments."[21] The organization sued Singh (but not *The Guardian*) for libel.[22] The trial judge ruled that the statements complained of were facts rather than opinions; indeed, the defendant accused the plaintiffs of "thoroughly disreputable conduct."[23] The court of appeal reversed the ruling, holding that the statement was an opinion; it added that Singh's opinion about chiropractics "may be mistaken, but to allow the party which has been denounced on the basis of it to compel its author to prove in court what he has asserted by way of argument is to invite the court to become an Orwellian ministry of truth."[24] The organization dropped the suit rather than seek a further appeal, but the victory cost Singh some £20,000.[25] The experience mobilized Singh and other scientists to push for change,[26] and journalists welcomed their aid. By stressing

JACKSON'S RECOMMENDATIONS (2010), http://www.justice.gov.uk/consultations/docs/jackson-consultation-paper.pdf.

17. Culture, Media, and Sport Committee, *supra* note 5, at 6.

18. Novarese, *supra* note 7.

19. *Id.*

20. Simon Singh, *Beware the Spinal Trap*, GUARDIAN (Apr. 19, 2008), http://www.guardian.co.uk/commentisfree/2008/apr/19/controversiesinscience-health.

21. *Id.*

22. British Chiropractic Assn. v. Singh, [2010] EWCA (Civ) 350, [10] (Eng.).

23. British Chiropractic Assn. v. Singh, [2009] EWHC (QB) 1101 [13–14] (Eng.).

24. British Chiropractic Assn. v. Singh, [2010] EWCA (Civ) 350 [23] (Eng.).

25. Sarah Boseley, *Simon Singh Libel Case Dropped*, GUARDIAN (Apr. 15, 2010), http://www.guardian.co.uk/science/2010/apr/15/simon-singh-libel-case-dropped?intcmp=239.

26. *E.g.,* Simon Singh, *How Our Libel Laws Censor Scientists*, NEW STATESMAN, Aug. 12, 2010, at 21; *Time for Libel-Law Reform*, 464 NATURE 1104 (Apr. 22, 2010);

the Singh case, advocates for libel reform were no longer mere "tabloid hacks," according to *Legal Week*; now they included respected scholars.[27]

Through the first half of 2011, it appeared that reform was finally underway. First, in August 2010, President Obama signed into law the SPEECH Act, which addresses the problem of libel tourism as it affects Americans.[28] Second, a January 2011 ruling of the European Court of Human Rights in Strasbourg is likely to reduce the costs facing unsuccessful defendants in some British defamation cases.[29] Third, and most significant, the British government released proposals for far-reaching reforms of defamation law in March 2011.[30] In a speech, Deputy Prime Minister and Liberal Democrat leader Nick Clegg declared, "Our aim is to turn English libel laws from an international laughing stock to an international blueprint."[31] A committee of Parliament sought public comment on the draft bill.[32] In the words of *Legal Week*, "The campaign for libel reform—by separating itself from tabloid interests in favour of more sympathetic academics—had proved incredibly successful."[33]

The prospects for comprehensive reform of libel law, however, took a nosedive in July 2011, as the long-simmering scandal over phone-hacking by Rupert Murdoch's *News of the World* exploded back into the news. The tabloid had hacked the voicemail of celebrities and other people in the news. In the most notorious example, the *News of the World* had listened to voicemail messages of

Cassandra Willyard, *Lawsuit Sparks Call for Libel Law Reform*, 15 NATURE MED. 723 (2009).

27. Novarese, *supra* note 7.

28. Securing the Protection of Our Enduring and Established Constitutional Heritage Act, Pub. L. No. 111-223 (H.R. 2765) (2010). The law, as will be discussed below, limits the enforcement of foreign judgments in American courts; thus, it could benefit non-Americans who have American assets too.

29. MGN v. United Kingdom, [2011] ECHR 66 (Eng.).

30. MINISTRY OF JUSTICE, DRAFT DEFAMATION BILL: CONSULTATION (2011), *available at* http://www.justice.gov.uk/consultations/docrs/draft-defamation-bill-consultation.pdf.

31. Nick Clegg, Speech on Restoring British Liberties (Jan. 7, 2011), http://www.libdems.org.uk/news_detail.aspx?title=Nick_Clegg:_Restoring_British_liberties&pPK=7781a555-f93b-4818-b08f-f6382841dc89.

32. Joint Select Committee, *Have Your Say on the Draft Defamation Bill*, PARLIAMENT, (Apr. 8, 2011), http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-defamation-bill1/news/call-for-evidence/. As this article was going to press, the committee issued its report. JOINT COMMITTEE ON THE DRAFT DEFAMATION BILL, *available at* http://www.guardian.co.uk/media/interactive/2011/oct/19/medialaw-newspapers.

33. Novarese, *supra* note 7.

Milly Dowler, who had been kidnapped in 2002.[34] When the voicemail box filled, the hacker allegedly deleted some messages to make room for more, an action that gave police and Dowler's family hope that she was alive; in truth, she had been murdered.[35] In July, Murdoch shut down the 168-year-old *News of the World*; accepted the resignation of his CEO, who was subsequently arrested; and withdrew his bid to take over the satellite broadcaster BSkyB, of which he already owned a minority share.[36]

To date, the British press has largely regulated itself through the voluntary Press Complaints Commission ("PCC"). The PCC has its origins in the 1990 report of the Calcutt Committee, appointed by the Thatcher government to determine how best to prevent invasions of privacy by the British press.[37] The committee recommended a PCC to establish and enforce standards of press behavior.[38] This commission would have eighteen months to demonstrate that it could function effectively.[39] "If it fails," the Calcutt Committee said, "we recommend that a statutory system for handling complaints should be introduced."[40]

Formed in 1991, the PCC is industry funded.[41] Seven of its seventeen members are editors.[42] It conducts investigations and has the authority to compel member news organizations to publish its adjudications, but any news organization can refuse to do so and withdraw from the PCC's jurisdiction; the entity has no legal powers.[43]

34. Steven Morris, *Police Say Body Is That of Milly Dowler*, GUARDIAN (Sept. 21, 2002), http://www.guardian.co.uk/uk/2002/sep/21/stevenmorris1.

35. Nick Davies & Amelia Hill, *Missing Milly Dowler's Voicemail Was Hacked by News of the World*, GUARDIAN (July 4, 2011), http://www.guardian.co.uk/uk/2011/jul/04/milly-dowler-voicemail-hacked-news-of-world.

36. *Phone Hacking: Timeline of the Scandal*, TELEGRAPH (Aug. 2, 2011), http://www.telegraph.co.uk/news/uknews/phone-hacking/8677065/Phone-hacking-timeline-of-a-scandal.html.

37. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, at 115; Press Complaints Commission, *History*, http://www.pcc.org.uk/about/history.html (last visited Jan. 23, 2012). *See generally* Adrian Bingham, *"Drinking in the Last Chance Saloon:" The British Press and the Crisis of Self-Regulation, 1989–95*, 13 MEDIA HIST. 79 (2007).

38. Press Complaints Commission, *supra* note 37.

39. *Id.*

40. *Id.*

41. Press Complaints Commission, *About the PCC*, http://www.pcc.org.uk/about/governance.html (last visited Jan. 23, 2012).

42. Press Complaints Commission, *Frequently Asked Questions*, http://www.pcc.org.uk/faqs.html (last visited Jan. 23, 2012).

43. Culture, Media, and Sport Committee, *supra* note 5, at 115–16; *Phone-Hacking Inquiry: Unanswered Questions*, GUARDIAN (July 29, 2011), http://www.guardian.co.uk/commentisfree/2011/jul/29/phone-hacking-inquiry-unanswered-questions.

In early 2011, in fact, the company that publishes *The Express*, *The Star*, *OK!*, and other periodicals withdrew from PCC funding and jurisdiction.[44] The PCC judges cases were based on adherence to the Editors' Code of Conduct, which has been developed and revised by the Editors' Code Committee, comprising journalists as well as the director and the chairman of the PCC; no outsiders are represented.[45] The PCC does not generally involve itself in issues that are or will be the subject of litigation; and where the injured party does not lodge a complaint with it, the commission rarely initiates its own investigation.[46] David Calcutt, who had headed the Calcutt Committee, assessed the PCC the year after its formation. He concluded that it fell far short of the independent body recommended by his earlier report, and he recommended statutory regulation. However, no action was taken.[47]

As the *News of the World* scandal broke, the Labour leader in Parliament, Ed Miliband, declared that the PCC is a "toothless poodle" that ought to be replaced by more stringent regulation.[48] The chair of the PCC, Baroness Buscombe, resigned in late July,[49] and the future of the PCC appears to be in doubt.[50] The Prime Minister's three-member Privacy Commission said in late July that "[n]ew regulatory arrangements must be able to demonstrate real independence from newspaper publishers; ensure an energetic sense of curiosity by the new regulator[;] and provide effective sanctions to be deployed where there is good cause."[51]

44. Press Complaints Commission, *PCC Statement on Northern & Shell's Withdrawal from Press Self-Regulatory System*, News Release, http://www.pcc.org.uk/news/index.html?article=Njg3NA== (last visited Jan. 23, 2012).

45. Press Complaints Commission, *Editors' Code of Practice* (Jan. 2011), http://www.pcc.org.uk/assets/111/Code_of_Practice_2011_A4.pdf; Culture, Media, and Sport Committee, *supra* note 5, at 115, 123.

46. Culture, Media, and Sport Committee, *supra* note 5, at 122, 125.

47. *See generally* David Calcutt, *Freedom of the Press: Freedom from the Press,* 9 DENNING L. J. 1 (1994).

48. Nicholas Watt, *Press Complaints Commission Is "Toothless Poodle,"* GUARDIAN (July 7, 2011), http://www.guardian.co.uk/media/2011/jul/07/press-complaints-commission-ed-miliband.

49. Mark Sweney, *PCC Confirms Baroness Buscombe Is to Step Down*, GUARDIAN (July 29, 2011), http://www.guardian.co.uk/media/2011/jul/29/pcc-baroness-buscombe-to-step-down.

50. *The Press Complaints Commission Is Another Victim of the Phone Hacking Scandal,* ECONOMIST, July 8, 2011, http://www.economist.com/blogs/leviathan/2011/07/rip-pcc.

51. THE PM PRIVACY COMMISSION REPORT, 18, *available at* http://www.bbc.co.uk/blogs/pm/PM_Privacy_Commission_Report.pdf.

After the Milly Dowler story broke, Prime Minister David Cameron called for an independent inquiry into "the culture, the practices and the ethics of the British press," with the goal of "clean[ing] up the press."[52] He said he especially wanted the group to "look at how our newspapers are regulated and make recommendations for the future," because "it's now clear to everyone that the way the press is regulated today is not working."[53] He added, "[a]s this scandal shows, while it's vital that a free press can tell truth to power, it is equally important that those in power can tell truth to the press,"[54] a remark that *Prospect* magazine found "Orwellian."[55] An appeal court judge, Lord Justice Leveson, will lead the inquiry into press practices, aided by (among others) several journalists, though none from a tabloid.[56]

Polls conducted in spring, before the worst of the story broke, found that two-thirds of respondents believed phone-hacking was common among British newspapers,[57] and two-thirds favored government regulation of the press.[58] A poll conducted in the second half of July, after the Milly Dowler revelation, found that more than half of Britons believe phone hacking and bribery are "just the tip of the iceberg of the corruption in British media."[59] Even some journalists seemed to get caught up in the frenzy of castigating the press following the phone-hacking revelations. Yasmin Alibhai-Brown of the *Independent* said on BBC radio that perhaps the government ought to license journalists.[60] When asked about licensing, the editor of *The Guardian*, Alan Rusbridger, said the

52. *David Cameron's Speech on Phone Hacking—The Full Text*, GUARDIAN, (July 8, 2011), http://www.guardian.co.uk/politics/2011/jul/08/david-cameron-speech-phone-hacking.

53. *Id.*

54. *Id.*

55. Brendan O'Neill, *What Price a Free Press?*, PROSPECT, (July 19, 2011), http://www.prospectmagazine.co.uk/2011/07/what-price-a-free-press/.

56. Patrick Wintour, *David Cameron Widens Inquiry on Media Regulation to Include the BBC*, GUARDIAN (July 20, 2011), http://www.guardian.co.uk/politics/2011/jul/20/cameron-media-regulation-leveson-inquiry-bbc.

57. Alec Mattinson, *Public Critical of News International's Handling of Phone Hacking Scandal*, PR WEEK, (Apr. 15, 2011), http://www.prweek.com/uk/news/1065989/Public-critical-News-Internationals-handling-phone-hacking-scandal/.

58. Alec Grice, *Voters Deeply Concerned About Phone Hacking, Survey Reveals,* INDEPENDENT (Feb. 1, 2011), http://www.independent.co.uk/news/uk/politics/voters-deeply-concerned-about-phone-hacking-survey-reveals-2200160.html.

59. *Poll: Murdoch Scandal Tip of Iceberg*, PRESS TV (July 30, 2011), http://www.presstv.ir/detail/191557.html.

60. O'Neil, *supra* note 55.

prospect made him "anxious," but that he would be "interested to hear other views."[61]

As the head of Index on Censorship acknowledged, "This is a tough time to be promoting freedom of expression."[62] Nonetheless, the various proposed changes to British defamation law merit review and evaluation. The *News of the World* scandal will probably delay libel reform, but it is unlikely to kill it outright. Current reform proposals will help set the agenda for future discussions of libel law.

This article begins by summarizing substantive provisions of the current law, the major criticisms and defenses of them, and the government's proposals for reform. Second, it examines issues related to the costs of litigating defamation cases in Britain, including the European Court of Human Rights ruling; these issues are not addressed by the government's proposed bill. Third, the article summarizes and evaluates the American SPEECH Act, the factors underlying it, and its likely impact. Fourth, the article considers the extent to which the completed and the proposed changes may ameliorate the perceived shortcomings of British defamation law, and discusses problems that are likely to endure. The conclusion notes that once the furor over the *News of the World* scandal dies down, reform of long-criticized defamation law in Britain may finally be at hand.

II. Substantive Issues in British Defamation Law

Although American defamation law is based on British common law, the two have diverged thanks largely to the American First Amendment, especially since *New York Times v. Sullivan* and the introduction of the "actual malice" standard.[63] The American approach to free expression has attracted much attention in Britain. One commentator calls it "the dominant topic of human rights litigation in this country."[64] Not all of the commentary has been

61. *Id.*

62. John Kampfner, *Britain's Media Must Start Policing Itself*, FIN. TIMES (July 5, 2011), http://www.ft.com/cms/s/0/0d6e425e-a737-11e0-b6d4-00144feabdc0.html#axzz1TtROWJtZ.

63. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Under the "actual malice" standard, a plaintiff who is a public official must show that the defendant either knew that the assertion was false, or acted in reckless disregard as to truth or falsity. *Id.* at 279–80. The Court later extended the actual-malice requirement to public figures. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967).

64. Stephen Sedley, *The First Amendment: A Case for Import Controls?*, *in* IMPORTING THE FIRST AMENDMENT: FREEDOM OF EXPRESSION IN AMERICAN, ENGLISH, AND EUROPEAN LAW 23, (Ian Loveland ed. 1998).

favorable, though. In a 2010 speech, Lord Hoffmann, who is an outspoken critic of efforts to change British defamation law, said Americans believe "that the whole world should share their view about how to strike the balance between freedom of expression and the defence of reputation."[65] One British media lawyer has called *Sullivan* "a defamer's charter."[66]

Responding to growing criticism of British law, the British government released a draft defamation bill in March 2011 and sought comments from the public.[67] In a foreword, Kenneth Clarke, the Lord Chancellor and Secretary of State for Justice, and Lord McNally, the Minister of State, wrote of "mounting concern over the past few years that our defamation laws are not striking the right balance, but rather are having a chilling effect on freedom of speech."[68]

This section considers the principal diagnosed shortcomings in substantive British defamation law, including jurisdiction, and the government's proposals for addressing some of them.[69] Issues related to litigation costs, including damage awards, Conditional Fee Arrangements, and After-the-Event insurance, will be considered in the next section.

A. Jurisdiction and Libel Tourism

The term *libel tourism*, according to the Ministry of Justice's Libel Working Group, "has been used to cover a number of different situations where cases have a tenuous link to the jurisdiction," but it "usually involves the situation where a person from outside England and Wales issues proceedings in a court of England and Wales in order to sue another person from outside England and Wales."[70]

65. Lord Hoffmann, *supra* note 6.

66. CULTURE, MEDIA, AND SPORT COMMITTEE, PRESS STANDARDS, PRIVACY, AND LIBEL: REPORT, 2009–10, H.C. 362-2, ¶ 43 (U.K.) (testimony of Rod Christie-Miller, Schillings Lawyers).

67. MINISTRY OF JUSTICE, *supra* note 30. The bill was based on the recent criticisms of British libel law, particularly the English PEN-Index on Censorship report, the Ministry of Justice's Libel Working Group report, and the report of the Culture, Media, and Sport Committee of the House of Commons. *Id.* at 6.

68. *Id.* at 3.

69. The article does not address, among others, the issue of privilege. Although the reform bill proposes to expand the absolute and qualified privileges slightly. *See* MINISTRY OF JUSTICE, *supra* note 30, at 23–27 (they have not been identified as major problems). *See, e.g.,* CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶¶ 143–145 (summarizing privileges but making no recommendations).

70. MINISTRY OF JUSTICE, *supra* note 14, ¶ 2.

Libel tourism occurs because British courts take an expansive view of jurisdiction. In many instances, courts decide libel cases even though neither the plaintiff nor the defendant lives in Britain and scarcely any copies of the alleged libel circulated in Britain.[71] British courts are equally open to accepting online libel cases even where the allegedly defamatory statement has only a tenuous connection to the jurisdiction. Whereas American courts may require that the statement be "targeted" at the jurisdiction before a court there should accept the case,[72] a British Court of Appeal said in 2004 that a defendant who publishes on the Internet "has 'targeted' every jurisdiction where his text may be downloaded."[73] By one account, at least fifty cases filed in Britain fall in the category of libel tourism.[74]

To be sure, British courts have declined some cases under *forum non conveniens* or other discretionary doctrines.[75] Under *forum non conveniens*, British courts will decline jurisdiction over a case whose natural forum is elsewhere unless "the plaintiff can establish that substantial justice cannot be done in the appropriate forum."[76] In one case, a British court dismissed a case as an abuse of process where the allegedly defamatory statements had received just five Internet hits in Britain.[77] (One commentator notes the implication: "The media defendant could only hope for poor readership in order to avoid jurisdiction in that foreign country."[78]) But "substantial justice" has proved difficult to demarcate in practice. In one instance, a British court retained jurisdiction over a case whose natural forum was India,

71. *See Libel Tourism: Hearing Before the Subcomm. on Commercial & Admin. L. of the House Comm. on the Judiciary*, 111th Cong. 134–35 (2009) (response to post-hearing questions from Bruce D. Brown); SULLIVAN, *supra* note 2, at 17. For an example in which a British court heard a case brought by one American against another American, see Lewis v. King, [2004] EWCA (Civ) 1329 (Eng.). Although the court in Jameel (Yousef) v. Dow Jones Co., [2005] EWCA (Civ) 75 (Eng.), said that a court should not hear a case unless a "real and substantial" tort has been committed in the jurisdiction, the court in Mardas v. New York Times Co., [2008] EWHC (QB) 3135 (Eng.), said that the circulation of "[a] few dozen" publications suffices to meet the "real and substantial" standard.

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

73. *Lewis*, [2004] EWCA (Civ). 1329, ¶ 34.

74. MINISTRY OF JUSTICE, *supra* note 14, at 52–63.

75. Anna C. Henning & Vivian S. Chu, *"Libel Tourism": Background and Legal Issues*, CONG. RESEARCH SERV. 3 (Mar. 5, 2010).

76. Connelly v. RTZ Corp. Plc, [1997] UKHL 30 ¶ 27 (U.K.). *See generally* ANDREW BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 149–64 ¶¶ 4.38–4.66 (2003).

77. Jameel v. Dow Jones & Co., [2005] EWCA (Civ) 75. (Eng.).

78. Sandra Davidson, *International Considerations in Libel Jurisdiction* 15, FORUM ON PUB. POL'Y, *available at* http://www.forumonpublicpolicy.com/archivespring08/davidson.pdf.

in part because Indian law would not permit the plaintiff to recover costs.[79] This reasoning would appear to preclude application of the *forum non conveniens* doctrine in all cases where the natural forum is the United States, Japan, or any other country that does not award costs to a successful plaintiff.[80]

Libel tourism has provoked criticism in Britain. English PEN and the Index on Censorship said that libel tourism has become an "international embarrassment."[81] The House of Commons committee said that libel tourism is harming "[t]he UK's reputation as a country which protects free speech and freedom of expression"[82] and deemed the American legislative responses (to be discussed below) "more than an embarrassment."[83]

Several reform proposals have been advanced. For print publications, English PEN and the Index on Censorship recommended allowing defamation suits to go forward only if a tenth of the total number of copies distributed were circulated in Britain.[84] As for online statements, they would permit British courts to take jurisdiction of defamation suits only if the defendant had advertised or promoted the article in Britain.[85] Media attorney Mark Stephens suggested that British courts decline jurisdiction unless at least 1,000 copies of a print publication have circulated in the country.[86] A group of American publishers proposed a threshold of 750 print copies and, like PEN and the Index on Censorship, recommended liability for online libel only where a foreign publisher has actively promoted the material in Britain.[87]

The Ministry of Justice's Libel Working Group developed an elaborate proposal, under which plaintiffs would either face additional hurdles before being permitted to serve a claim from outside Britain, or defendants would be given prior notice and

79. BELL, *supra* note 76, 157 ¶ 4.55 (*citing* The Vishva Ajay, [1989] 2 Lloyd's Rep. 558, 558–60).

80. *Id.*

81. ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 10, at 9.

82. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 195.

83. *Id.* ¶ 205.

84. ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 10, at 9.

85. *Id.* Sullivan suggests that until British jurisdictional law is changed, news organizations configure firewalls to prevent Britons from accessing articles. SULLIVAN, *supra* note 2, at 37.

86. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 211.

87. *Id.* ¶212.

permitted to challenge jurisdiction before the claim form was served.[88] It proposed a list of six non-exhaustive criteria for a court to consider:

> (1) The level of targeting of a publication at a readership in this jurisdiction compared with elsewhere;
> (2) The level of publication in this jurisdiction compared with elsewhere;
> (3) Whether the claimant has a reputation to protect specifically in England and Wales;
> (4) Whether a significant amount of damage is done in this jurisdiction compared with elsewhere;
> (5) The level of connection of the claimant to England and Wales (including domicile) compared with elsewhere;
> (6) The level of connection of the defendant to England and Wales (including domicile) compared with elsewhere.[89]

The Working Group also proposed that the burden ought to be on the party claiming British jurisdiction in a defamation case rather than on the party opposing it.[90]

Some British observers have denied that libel tourism represents a problem and disparaged efforts to address it. In 2010, Lord Hoffmann criticized the English PEN-Index on Censorship proposals. He said: "[T]here does not seem to me much logic in saying that, if you have significantly damaged someone's reputation in England, it should be a defence that you have published ten times as many copies of the libel somewhere else."[91] As for the notion that British courts ought to accept jurisdiction over online statements only if they were advertised or promoted in Britain, Lord Hoffmann said: "What does that mean? Taking out an advertisement in an English newspaper urging people to read a libellous article on the internet? The idea seems quite unreal."[92] He said he preferred the Court of Appeal's rationale: "if you publish an article on the internet, you are inviting the whole world to read it."[93]

88. MINISTRY OF JUSTICE, *supra* note 14, ¶¶ 19–37; MINISTRY OF JUSTICE, *supra* note 14, Annex D, at 64–65; MINISTRY OF JUSTICE, *supra* note 14, Annex E, at 68–72.

89. MINISTRY OF JUSTICE, *supra* note 30, ¶ 31.

90. *Id.* ¶ 32. The group noted, however, that it might be imprudent to deprive parties of substantive rights through procedural mechanisms. *Id.* ¶ 34.

91. Lord Hoffmann, *supra* note 6. The Ministry of Justice also noted that 10% might be considered arbitrary, and pointed out that although *The Economist* is based in Britain, only about 6.5% of visitors to its website come from the United Kingdom. MINISTRY OF JUSTICE, *supra* note 14, ¶ 30.

92. Lord Hoffmann, *supra* note 6.

93. *Id.*

The government proposal addresses jurisdiction against defendants not domiciled in the United Kingdom, another member state of the European Union, or a state that is a contracting party to the Lugano Convention.[94] For such defendants, a court will not have jurisdiction unless "of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement."[95] The government explained: "This approach is intended to ensure that, in cases where a statement has been published in this jurisdiction and also abroad, the court is required to consider the overall global picture . . . [in deciding] where it would be most appropriate for a claim to be heard."[96] A British court, however, might still accept jurisdiction over a case if the plaintiff could not receive a fair hearing elsewhere.[97] This statutory approach would replace the doctrine of *forum non conveniens* in the defamation context.[98] The government did not adopt the proposals that jurisdiction exists only if a minimum number or percentage of print copies reach Britain, or if online speech specifically targets Britain.

B. Truth Defense

The defendant in a British defamation action must prove truth (known as "justification"), whereas in the United States, the plaintiff must generally prove falsity.[99] Several groups addressed the issue of the truth defense. English PEN and the Index on Censorship argued that this "misplaced burden of proof" presumes the defendant is guilty, contrary to the norm in other realms of the law.[100] In their view, "this, above all, . . . gives libel its unique chilling effect on free speech."[101] They recommended reversing the burden of proof, at least in most cases, and requiring the plaintiff to prove falsity or

94. Bill to Amend the Law of Defamation, 2010–11, H.L. Bill [1] cl. 1 (Eng.). The Lugano Convention concerns the recognition and enforcement of judgments between the European Community and Ireland, Norway, Switzerland, and Denmark. *Id.* § 7(4).

95. *Id.* [1] cl. 2.

96. MINISTRY OF JUSTICE, *supra* note 30, at 34.

97. *Id.*

98. *Id.* at 35.

99. *Id.* at 14; CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 117; RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:9 (2d ed. 2010); ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 10, at 8. A defamation plaintiff must prove at the outset that the statement is defamatory, that it refers to him or her, and that it was published. *See* CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 117.

100. ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 10, at 5, 8.

101. *Id.* at 8.

unfairness.[102] 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)."[103] The House of Commons committee, however, concluded "on balance, that in the interests of natural justice, defendants should be required to prove the truth of their allegations."[104] The government proposed a statutory truth defense to replace the common-law justification defense but did not suggest reversing the burden of proof or requiring a plaintiff to make a preliminary showing of falsity.[105]

C. Harm to Reputation

Under current British law, a libel plaintiff need not prove harm to his or her reputation in order to be awarded damages; the law creates an "irrebuttable presumption . . . that the publication of a defamatory article causes damage to the reputation of the person defamed."[106] English PEN and the Index on Censorship proposed that plaintiffs be required to demonstrate damage to their reputations in order to recover damages.[107] Similar to the PEN-Index on Censorship proposal, the government proposed that a plaintiff make a preliminary showing that the allegedly defamatory statement "has caused or is likely to cause substantial harm to [his or her] reputation."[108] If a plaintiff failed to do so, the judge could dismiss the

102. *Id.* The groups did not explain why unfairness should be considered a ground for bringing a suit, and not just falsity. As for exceptions to the proposed rule, the groups said: "[T]here are cases where it may be impossible for a claimant to provide evidence of the falsity of an allegation and in these instances the defendant may be required to bring evidence supporting the truth of what they have written."

103. HUMAN RIGHTS COMMITTEE, *supra* note 8, at 8 ¶ 25.

104. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 135.

105. MINISTRY OF JUSTICE, *supra* note 30, at 14. The statutory defense would replace the common-law one, but case law would remain relevant in interpreting the statutory defense. *See Id.* at 14–15.

106. Mardas v. New York Times Co., [2008] EWHC (QB) 3135 [12] (Eng.). *See also* CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 118; Stephens, *supra* note 1, at 272. This rule is applicable to libel, but in slander, a plaintiff generally must prove damage to his or her reputation. *See* MINISTRY OF JUSTICE, *supra* note 30, at 8. Statutory exceptions to the slander rule include assertions that an individual suffers from leprosy, the plague, or a sexually transmitted disease, or that a woman is unchaste or adulterous; the government proposes eliminating these exceptions. MINISTRY OF JUSTICE, *supra* note 30, at 9. The First Amendment, by contrast, requires a plaintiff to come forth with evidence of "actual injury." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

107. ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 10, at 8.

108. Bill to Amend the Law of Defamation, 2010–11, H.L. Bill [1] (Eng.).

suit.[109] Such a requirement, in the government's view, "would provide extra certainty and help discourage trivial claims," albeit at the price of "some frontloading of costs" in libel litigation.[110]

III. Higher Standards for Public Officials and Public Figures

Unlike American courts, British courts weigh libel claims by the same standard regardless of whether the plaintiff is a public official, a public figure, or a private figure. Indeed, the Supreme Court Procedure Committee in 1991 expressly rejected a higher standard for public figures and stated that "it would be quite contrary to the tradition of our common law that citizens are not divided into different classes."[111] The United Nations committee criticized the approach, saying that Britain "should . . . consider the utility of a so-called 'public figure' exception, requiring proof by the plaintiff of actual malice in order to go forward on actions concerning reporting on public officials and prominent public figures."[112] In response, Lord Hoffmann called the UN committee's "suggestion . . . that failure to follow American practice may be a breach of this country's international obligation, . . . a remarkable proposition."[113] The government did not address the adoption of a higher standard of proof for public officials or public figures.

A. Responsible Publication Defense

Where a defendant cannot prove truth, the only other broadly applicable defense is one set forth in the 1999 House of Lords case *Reynolds v. Times Newspapers*.[114] It covers "responsible journalism," but only if the alleged libel concerns a matter in the public interest.[115]

109. MINISTRY OF JUSTICE, *supra* note 30, at 9. Dismissing the case would be in the judge's discretion and not mandatory; the government did not explain the reasoning behind this aspect.

110. MINISTRY OF JUSTICE, *supra* note 30, at 8.

111. Reynolds v. Times Newspapers Ltd., [1998] 3 All E.R. 961 (Ct. App.), [13] (Eng.).

112. Human Rights Committee, *supra* note 8, at 7–8 ¶ 25.

113. Lord Hoffmann, *supra* note 6.

114. Reynolds v. Times Newspapers, [1999] All E.R. (D) 1172 (Eng.). The attorney who represented Times Newspapers urged the court "to adopt something close to the *Sullivan* rule in the United States," but the court instead adopted a multifactor test. *See also* Lord Lester of Herne Hill, testimony to Joint Committee on the Draft Defamation Bill, (Apr. 27, 2011, at 11–12), http://www.parliament.uk/documents/joint-committees/Draft%20Defamation%20Bill/110427%20Defamation%20Transcript%20i%20-%20Lord%20Lester%20Corrected.pdf.

115. *See* Reynolds v. Times Newspapers, [2001] 2 A.C. (H.L.) (Eng.); Jameel v. Dow Jones & Co., [2005] EWCA (Civ) 75 ¶ 28 (Eng.); CONG. RESEARCH SERV., THE SPEECH ACT: THE FEDERAL RESPONSE TO "LIBEL TOURISM" 3–4 (Sept. 16, 2010),

Factors to consider in evaluating whether the journalism was responsible include the following, as set forth by Lord Nicholls of Birkenhead in *Reynolds*:

> (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
> (2) The nature of the information, and the extent to which the subject matter is a matter of public concern.
> (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
> (4) The steps taken to verify the information.
> (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect.
> (6) The urgency of the matter. News is often a perishable commodity.
> (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
> (8) Whether the article contained the gist of the plaintiff's side of the story.
> (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
> (10) The circumstances of the publication, including the timing.[116]

A subsequent House of Lords case indicates that the *Reynolds* factors are to be applied flexibly; a publisher need not satisfy each criterion.[117] Case law is divided as to whether this defense applies only to journalist defendants.[118]

available at http://www.fas.org/sgp/crs/misc/R41417.pdf; Stephens, *supra* note 1, at 273–74. The judge, not the jury, determines whether the subject matter of the publication was in the public interest. MINISTRY OF JUSTICE, *supra* note 30, at 38.

116. *Reynolds*, [2001] 2 A.C. (H.L.) (Lord Nicholls of Birkenhead).

117. Jameel v. Wall Street Journal [2006] UKHL 44 (appeal taken from Eng.).

118. *Compare* Kearns v. General Counsel of the Bar, [2003] EWCA (Civ) 331, ¶ 8 (Eng.) (stating that the defense is limited to the mass media), *with* Seaga v. Harper, [2008] UKPC 9 (Eng.) (stating that the defense applies generally).

The House of Commons committee called *Reynolds* "a defence of last resort, first because it will only be used by defendants who are unable to prove that their facts are correct, and second because it transfers scrutiny to the journalistic process."[119] English PEN and the Index on Censorship referred to the *Reynolds* defense as "probably the most significant development in libel law" during the preceding decade,[120] but they advocated clarifying that it extends beyond journalism.[121] Some international nongovernmental organizations ("NGOs") objected to the recommendation that authors get comments from the individual whom a publication criticizes, in part for fear that he or she may seek an injunction to stop publication.[122] Media attorney Mark Stephens noted that mounting a *Reynolds* defense can be expensive, costing from £100,000 to £200,000.[123] The House of Commons committee recommended consideration of making the *Reynolds* factors part of a statutory defense.[124] Stephens, among others, however, opposed the idea of codifying *Reynolds* in statutory form.[125]

The draft bill would place the gist of the *Reynolds* defense on statutory ground, as the House of Commons committee recommended and Stephens opposed. The government would also rename the defense from "responsible journalism" to "responsible publication on [a] matter of public interest."[126] Doing so would clarify that it applies to NGOs and others as well as to journalists, as English PEN and the Index on Censorship advocated. The defense would apply equally to assertions of fact, inference, and opinion.[127] The draft bill does not define what constitutes a matter of the public interest. The government explained:

119. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 157.

120. ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 10, at 5.

121. *Id.* at 9.

122. MINISTRY OF JUSTICE, *supra* note 14, ¶ 69; *id.*, Annex F, at 73.

123. Culture, Media, and Sport Committee, *supra* note 66, at 246 (testimony of Mark Stephens, Senior Member, Intellectual Property and Media, Finer Stephens Innocent LLP). *See also* MINISTRY OF JUSTICE, *supra* note 14, at 24 (stating that "[r]egional media editors often have limited budgets and therefore see *Reynolds* as a defence of last resort.").

124. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 162, 163.

125. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 66, at 246 (testimony of Mark Stephens, Senior Member, Intellectual Property and Media, Finer Stephens Innocent LLP). *See also* MINISTRY OF JUSTICE, *supra* note 14, ¶¶ 70–73. Instead of codifying *Reynolds*, the Ministry of Justice's Libel Working Group discussed the possibility of a statutory public-interest defense in addition to *Reynolds*. *Id.* ¶¶ 75–82.

126. MINISTRY OF JUSTICE, *supra* note 30, at 10.

127. MINISTRY OF JUSTICE, *supra* note 30, at 12.

> We believe that this is a concept which is well-established in the English common law and that in view of the very wide range of matters which are of public interest and the sensitivity of this to factual circumstances, attempting to define it in statute would be fraught with problems. Such problems include the risk of missing matters which are of public interest resulting in too narrow a defence and the risk of this proving a magnet for satellite litigation adding to costs in relation to libel proceedings.[128]

As for what distinguishes a responsible publication from an irresponsible one, a court would consider eight criteria adapted from *Reynolds,* holding the list to be illustrative rather than exhaustive:

> (a) the nature of the publication and its context;
> (b) the seriousness of any imputation about the claimant that is conveyed by the statement;
> (c) the extent to which the subject matter of the statement is of public interest;
> (d) the information the defendant had before publishing the statement and what the defendant knew about the reliability of that information;
> (e) whether the defendant sought the claimant's views on the statement before publishing it and whether the publication included an account of any views the claimant expressed;
> (f) whether the defendant took any other steps to verify the accuracy of the statement;
> (g) the timing of the publication and whether there was reason to think it was in the public interest for the statement to be published urgently;

128. *Id.* at 11. *See also Id.* at 73–74. The public-interest test in privacy cases evidently differs from the public-interest test in defamation cases. *See* Campbell v. MGN Ltd., [2002] EWCA Civ. 1373, ¶ 61 (Eng.) (stating that "[w]e do not believe that the same test of public interest applies to justify publication in these two very different torts"). The Editors' Code of Practice, enforced by the Press Complaints Commission, states that the public interest "includes, but is not confined to: i) Detecting or exposing crime or serious impropriety. ii) Protecting public health and safety. iii) Preventing the public from being misled by an action or statement of an individual or organisation." EDITORS' CODE OF PRACTICE, (Jan. 2011), http://www.pcc.org.uk/cop/practice.html. The Prime Minister's Privacy Commission, in its July 2011 report, found this definition of public interest "perfectly adequate." *The PM Privacy Commission Report*, (July 22, 2011), at 11, *available at* http://www.bbc.co.uk/blogs/pm/PM_Privacy_Commission_Report.pdf.

> (h) the tone of the statement (including whether it draws appropriate distinctions between suspicions, opinions, allegations and proven facts).[129]
>
> Though some had recommended it,[130] the government chose not to include, as a factor indicating responsibility, the defendant's adherence to professional standards, for fear that "such a provision would create a risk of satellite litigation over the meaning of the codes and the extent to which they had been complied with."[131]

B. Fair-Comment Defense

The British fair-comment defense is analogous to the opinion defense in American law, though it covers less ground. The fair-comment defense, according to the House of Commons committee, protects "[a] comment or expression of opinion, based upon (true) facts, made in good faith and without malice."[132] Commentators proffered fewer proposals for refining the fair-comment defense than for changing other areas of British defamation law. English PEN and the Index on Censorship recommended expanding the defense so as to allow "robust debate . . . to flourish" but did not set forth a specific proposal.[133] The House of Commons committee recommended renaming the defense "comment" or "honest comment"[134] and urged the government to consider the defense in its review of defamation law, though without advocating a particular reform.[135]

The government proposed a statutory defense of "honest opinion" to replace the common-law defense of fair comment.[136] The honest-opinion defense would incorporate elements of the common-law defense. Under the statutory defense, a defendant would have to show that the statement at issue was a statement of opinion; that the

129. Bill to Amend the Law of Defamation, 2010–11, H.L. Bill [2] cl. 2 (Eng.). On the illustrative rather than exhaustive nature of the criteria, see MINISTRY OF JUSTICE, *supra* note 30, at 74.

130. *E.g.,* Lord Lester of Herne Hill, testimony to Joint Committee on the Draft Defamation Bill, (Apr. 27, 2011), at 30, *available at* http://www.parliament.uk/documents/joint-committees/Draft%20Defamation%20Bill/110427%20Defamation%20Transcript%20i%20-%20Lord%20Lester%20Corrected.pdf.

131. MINISTRY OF JUSTICE, *supra* note 30, at 12.

132. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 137.

133. ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 10, at 9–10.

134. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 140.

135. *Id.* ¶ 142.

136. MINISTRY OF JUSTICE, *supra* note 30, at 17.

opinion concerned a matter of the public interest; and that an honest person could have held the opinion on the basis either of a fact that existed at the time of publication, or a privileged statement (such as a Parliamentary report) published before the defendant's statement at issue.[137] The government suggested some ambivalence over the public-interest test.[138] The government chose "a fact" in the third provision advisedly, "so that any relevant fact or facts will be enough and it will not be necessary for the defendant to prove the truth of every single allegation of fact set out in the statement complained of."[139] But the fact must have existed at the time of publication; a defendant's good-faith but erroneous belief would not be eligible for the defense.[140] In addition, the defense would be inapplicable if the plaintiff demonstrated that the defendant did not in fact hold the opinion that was published.[141] In this regard, the test is both objective (asking whether an "honest person" could have held the opinion based on a fact or a privileged statement) and subjective (asking whether the defendant actually did hold the opinion).[142]

C. Multiple-Publication Rule

Britain follows the multiple-publication rule, under which each access to an article can represent a new libel.[143] British common law holds that each publication of defamatory material gives rise to a new cause of action, which is subject to its own statute-of-limitations period. The rule originated in the 1849 case *Duke of Brunswick v. Harmer*, in which the Duke sued for libel after he purchased (through his servant) a copy of a seventeen-year-old newspaper that defamed him and then brought a libel action.[144] The rule can render the one-

137. Bill to Amend the Law of Defamation, 2010–11, H.L. Bill [4] (Eng.).

138. MINISTRY OF JUSTICE, *supra* note 30, at 20.

139. *Id.* at 20–21.

140. *Id.* at 21.

141. Bill to Amend the Law of Defamation, 2010–11, H.L. Bill [4] cl. 5 (Eng.). This provision does not apply where the defendant published a statement made by another person, unless the defendant knew or ought to have known that the other person did not hold the opinion. *Id.* [4] cl. 6.

142. MINISTRY OF JUSTICE, *supra* note 30, at 21–22.

143. *See* MINISTRY OF JUSTICE, *supra* note 14, at 81, ¶¶ 39–40; CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶¶ 218–222; CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 66, at 16 (testimony of Keith Mathieson, Reynolds Porter Chamberlain LLP); JOSHUA ROZENBERG, PRIVACY AND THE PRESS 204 (2004); SULLIVAN, *supra* note 2, at 18–19.

144. Duke of Brunswick v. Harmer, [1849] 14 Q.B. 185 (Eng.). The case is discussed in MINISTRY OF JUSTICE, *supra* note 14, ¶ 41; CULTURE, MEDIA, AND SPORT

year statute of limitations meaningless, especially for material in online archives, although 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.[145]

Several commentators advocated a single-publication doctrine, matching the approach taken by American law.[146] English PEN and the Index on Censorship recommended abolishing the *Duke of Brunswick* rule and adopting the single-publication rule.[147] A majority of the Ministry of Justice's Libel Working Group favored a single-publication rule for material republished by the original publisher.[148] The House of Commons committee recommended a single-publication rule with a one-year limitation period, which could be extended if the plaintiff could prove that he or she "could not reasonably have been aware of the existence of the publication."[149] Even after the expiration of the limitation period, under the committee's proposal, a plaintiff could seek a court order requiring the defendant to correct the defamatory statement.[150]

In its proposal, the government said, "We do not believe that the current position . . . is suitable for the modern internet age."[151] It recommended adopting the single-publication rule, but with two provisos. First, as the House of Commons committee suggested, a court would have the discretion to permit a plaintiff to bring a suit after passage of the limitation period.[152] Second, the rule would not apply if the original material was republished by another party, or if "the manner of publication was otherwise materially different from first publication."[153]

COMMITTEE, *supra* note 5, ¶ 216; ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 10, at 8; and SULLIVAN, *supra* note 2, at 18.

145. Times Newspapers v. United Kingdom, [2009] EMLR 14 (Eng.).

146. On the American rule, *see* Mitan v. Davis, 243 F. Supp. 2d 719, 721–22 (W.D. Ky. 2003); RESTATEMENT (SECOND) OF TORTS § 557A (1977).

147. ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 10, at 9.

148. MINISTRY OF JUSTICE, *supra* note 14, ¶¶ 53–54. The group divided on how to treat republication by a different publisher.

149. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 230.

150. *Id.* ¶ 230.

151. MINISTRY OF JUSTICE, *supra* note 30, at 30.

152. *Id.* at 30.

153. *Id.* at 31–32. The difference in text would have to be substantial; the single-publication rule would apply where the republished statement is "the same or substantially the same." The government opted to leave it to courts to determine the boundaries of "substantially the same." In addition, "manner of publication" might extend to circumstances where a narrowly published statement is made much more broadly or readily available, as when a website takes material that previously required several clicks

IV. Jury Trials

Currently, statutes provide for defamation cases to be heard by juries on the motion of any party, "unless the court considers that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury."[154] Parties to libel cases generally do not seek jury trials.[155] Jury trials are otherwise unavailable in most British civil proceedings.[156] Some members of the Libel Working Group criticized jury trials in defamation cases. According to the group's report, "[D]ifficulties had been experienced in juries considering issues relating to the *Reynolds* guidelines because of the range and complexity of the issues requiring determination as questions of fact."[157] In addition, jury trials can last longer and cost more than bench trials.[158] Other members of the group, however, argued that jury trials represent an important safeguard of individuals' reputations.[159]

The government concluded that the availability of jury trials impedes the resolution of disputes before trial.[160] Accordingly, the draft bill removes the presumption in favor of jury trials.[161] A judge could still order a jury trial where the interests of justice require it.[162] The draft bill does not set forth criteria for when jury trials may be

to access and posts it on the home page. One group proposed that the defamation bill insulate from liability (i) entities that make extant hard-copy publication archives available online, and (ii) online publishers that require subscriptions for new issues but make older issues available for free after a specified time. Libel Reform Campaign, Evidence Submitted to the Scrutiny Committee of the Draft Defamation Bill, (May 25, 2011,), *available at* http://www.libelreform.org/news/494-libel-reform-campaign-evidence-to-scrutiny-committee.

154. MINISTRY OF JUSTICE, *supra* note 30, at 36. On the division of labor between judge and jury in a defamation trial, see MINISTRY OF JUSTICE, *supra* note 14, Annex I, at 85.

155. Lord Lester of Herne Hill, testimony to Joint Committee on the Draft Defamation Bill, (Apr. 27, 2011), at 36, *available at* http://www.parliament.uk/documents/joint-committees/Draft%20Defamation%20Bill/110427%20Defamation%20Transcript%20i%20-%20Lord%20Lester%20Corrected.pdf.

156. MINISTRY OF JUSTICE, *supra* note 30, at 36. Jury trials are available only in civil cases over false imprisonment, malicious prosecution, and fraud. *Id.*

157. MINISTRY OF JUSTICE, *supra* note 14, ¶ 93.

158. *Id.* ¶ 92.

159. *Id.* The group also discussed and generally supported the idea of having defamation cases heard by specialist judges. *Id.* ¶¶ 114–115.

160. MINISTRY OF JUSTICE, *supra* note 30, at 4.

161. Bill to Amend the Law of Defamation, 2010–11, H.L. Bill [8] (Eng.).

162. MINISTRY OF JUSTICE, *supra* note 30, at 37.

appropriate; the government instead invited comment on whether the bill ought to do so.[163]

A. Corporate Plaintiffs

Currently, corporations can sue for defamation on the same basis as individuals.[164] English PEN and the Index on Censorship recommended that corporations and associations not be permitted to bring defamation suits unless they could prove malicious falsehood; they would exempt small companies from this restriction.[165] The government invited public input on restricting the ability of corporations to sue for defamation but did not advance any proposals.[166]

B. Forestalling or Abbreviating Trials

Libel trials can be long and costly, as will be discussed in further detail below. An extant Pre-Action Protocol encourages alternative-dispute resolution ("ADR"); a judge can consider whether the ADR procedure was exercised in determining costs.[167] A judge, however, cannot make ADR mandatory.[168] English PEN and the Index on Censorship advocated three steps to avoid or shorten trials in defamation cases. First, plaintiffs ought to have to submit to mediation and binding arbitration before bringing a suit.[169] Second, defendants ought to be able to resolve challenges by issuing declarations of falsity, which "would allow redress to injured parties and require minimum involvement of lawyers."[170] Third, special libel tribunals should determine the meaning of the statements at issue and

163. *Id.*at 37–38. Lord Lester, whose earlier bill provided much of the framework of the government's bill, said that "[w]e have found it very difficult to articulate any criteria because it is very hard to think of any sensible way of doing it." Lord Lester of Herne Hill, testimony to Joint Committee on the Draft Defamation Bill, (Apr. 27, 2011), at 37, *available at* http://www.parliament.uk/documents/joint-committees/Draft%20Defamation%20Bill/110427%20Defamation%20Transcript%20i%20-%20Lord%20Lester%20Corrected.pdf.

164. *See* CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶¶ 164–178.

165. ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 10, at 10. Although they do not define how small a company would have to be in order to sue for defamation, they note that Australia has introduced a law barring firms with more than ten employees from filing such suits.

166. MINISTRY OF JUSTICE, *supra* note 30, at 6, 40–56. On corporations' defamation suits, see CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶¶ 164–178.

167. MINISTRY OF JUSTICE, *supra* note 30, Annex H, at 84.

168. *Id.*

169. ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 10, at 9.

170. *Id. See also* MINISTRY OF JUSTICE, *supra* note 14, ¶ 112.

establish the fair-comment defense early in the litigation.[171] The Libel Working Group discussed these three proposals but did not reach a consensus.[172] The government solicited comments on improving mechanisms for summary judgments but advanced no proposals.[173]

C. Appellate Review of Defamation Judgments

British appellate courts defer substantially to trial courts in defamation cases, by contrast to the United States, where appellate courts closely examine facts as well as law and overturn nearly three-quarters of adverse defamation judgments.[174] Advocates of libel reform in Britain did not discuss appellate review of defamation judgments though, and the government's draft bill does not address the topic.

V. Cost Issues in British Defamation Law

According to the House of Commons committee, "[L]ibel cases are notoriously expensive."[175] Costs of libel litigation in Britain are by far the highest in Europe.[176] The draft bill does not directly address matters related to costs, though the foreword to the bill does note that "simplify[ing] and clarify[ing] the law and procedures" may reduce the length of litigation and the attendant costs.[177] The government intends to present proposals related to the funding of civil litigation at some future date.[178]

A. Damages

Defamation damages are not formally capped, though a £200,000 compensatory award from 2002 is generally considered to represent

171. ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 10, at 9. Similarly, the House of Commons committee recommended the use of preliminary hearings to determine whether a statement bears a defamatory meaning. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 129.

172. MINISTRY OF JUSTICE, *supra* note 14, at 36–37. The working group also discussed changing pleading requirements in defamation cases. *Id.* ¶¶ 101–107.

173. MINISTRY OF JUSTICE, *supra* note 30, at 6, 40–56.

174. *See* Bose Corp. v. Consumers Union, 466 U.S. 485, 514 (1984); *Libel Tourism: Hearing Before the Subcomm. on Commercial & Admin. L. of the House Comm. on the Judiciary*, 111th Cong. 19 (2009) (statement of Bruce D. Brown), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:47316.pdf.

175. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 236.

176. *See* PROGRAMME IN COMPARATIVE MEDIA LAW AND POLICY, *supra* note 4, at 187; CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 66, at 244 (testimony of Charmian Gooch, Director, Global Witness).

177. MINISTRY OF JUSTICE, *supra* note 30, at 3–4.

178. *Id.* at 3–4, 53.

the maximum amount recoverable.[179] English PEN and the Index on Censorship took issue with damages in British defamation suits. They wrote that "[t]he chief remedy . . . should be an apology, not financial reward." Accordingly, they recommended capping damages at £10,000 unless the plaintiff could prove material damage, such as lost earnings.[180] In response, Lord Hoffmann called this proposal "very silly," because damages are intended not merely to compensate the plaintiff, but also to "deter the media from irresponsible journalism."[181] His statement is somewhat misleading, as compensatory damages are not intended to punish the defendant; punitive damages, which are rarely awarded in British defamation cases, perform that function.[182] In Lord Hoffmann's view:

> [A] limit of £10,000 on damages will be wholly ineffectual. If a newspaper is willing to bid a quarter of a million pounds for the story of a footballer's mistress, they are unlikely to be deterred by the prospect of having to pay £10,000 if a story that sells papers turns out to be a libel.[183]

In a paper presented in 2010, Alastair Mullis of the University of East Anglia and Andrew Scott of the London School of Economics and Political Science proposed a two-track system for libel litigation.[184] Most cases would be handled through a streamlined and less costly process, which would seek above all to determine and publicize the truth. The principal remedy would be a correction, apology, declaration of falsity, or right of reply from the media organization.[185] Damages for psychological harm resulting from harm to one's reputation would be capped at £10,000.[186] No other damages

179. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 122. Since the mid-1990s, judges have instructed juries on the range of reasonable damage awards; previously, awards were substantially higher. *Id.* Out-of-court settlements do sometimes exceed that amount. *Id.* ¶ 123.

180. ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 10, at 8.

181. Lord Hoffmann, *supra* note 6.

182. *See* CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 124.

183. Lord Hoffmann, *supra* note 6.

184. Alastair Mullis & Andrew Scott, *Reframing Libel: Taking (All) Rights Seriously and Where It Leads*, paper presented at Symposium on Reframing Libel, City University of London, (Nov. 4, 2010), http://reframinglibel.com/2011/03/17/reframing-libel-taking-all-rights-seriously-and-where-it-leads/.

185. *Id.* at 24–25.

186. The European Court of Human Rights has construed Article 10 of the European Convention on Human Rights, which addresses privacy, to protect reputation as well. *Id.* at 8–9 & n.12.

would be available. The truth and opinion defenses would remain, but not the *Reynolds* defense, because the focus would be on judging accuracy rather than professionalism.[187] The second track, with greater damages and the *Reynolds* defense, would be available only for the most serious or damaging libels.[188]

B. "Success Fees" and After-the-Event Insurance

Major reasons for the high cost of defamation litigation in Britain are Conditional Fee Arrangements ("CFAs") and After-the-Event ("ATE") insurance. A plaintiff's lawyer who agrees to a CFA receives nothing if the client loses, but full reimbursement plus a "success fee" if the client prevails, paid by the other side—an arrangement unique in the United Kingdom, amongst the world.[189] CFAs were first envisioned by section 58 of the Courts and Legal Services Act 1990 and then implemented by the Conditional Fee Agreements Order 1995.[190] Under the Conditional Fee Agreements Order 1998, CFAs were available in all litigation other than criminal and family proceedings.[191] The Access to Justice Act 1999, which took effect in 2000, allowed winning plaintiffs to recover success fees.[192] Success fees were capped at 100 percent of base fees by the Conditional Fee Agreements Order 2000.[193] The hope was that success fees would encourage lawyers to accept weaker cases that they might not otherwise take, and thereby "create the opportunity for everyone, rich and poor alike, to go to court regardless of their financial position," a government representative said in 1998.[194] Although they were created to help less wealthy litigants find representation for court cases, CFAs have no means test; now, they are a favorite tool of well-off litigants such as the model Naomi

187. *Id.* at 21.

188. *Id.* at 25.

189. *See* CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 236; PROGRAMME IN COMPARATIVE MEDIA LAW AND POLICY, *supra* note 4, at 161; MINISTRY OF JUSTICE, *supra* note 16, at 25; Lord Justice Jackson, *Lord Justice Jackson's Response to Ministry of Justice Consultation Paper CP 13/10*, (Nov. 29, 2010), at 2, http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jackson-lj-civil-lit-response.pdf. Although CFAs and success fees are theoretically available to both sides in litigation, defendants rarely use them. MINISTRY OF JUSTICE, *supra* note 16, at 4; Culture, Media, and Sport Committee, *supra* note 5, ¶ 291.

190. MGN v. United Kingdom, app. no. 39401/04 (Eur. Ct. H. R. 2011), ¶ 90 (Eng.).

191. *Id.*

192. MINISTRY OF JUSTICE, *supra* note 16, at 11, 19.

193. *Id.* at 19.

194. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 251.

Campbell.[195] Due in part to success fees, the losing party's fees for lawyers can dwarf the damage award.[196] In one case, the *Mail on Sunday* paid a plaintiff more than £500,000 atop a damage award of just £5,000.[197] In the Campbell case, to be discussed below, the *Mirror* was ordered to pay £3,500 in damages and over £1 million in Campbell's legal fees, including success fees covering parts of the litigation.[198]

Along with success fees, the costs for unsuccessful defendants can be magnified by ATE insurance purchased by plaintiffs. If the plaintiff loses the case, the ATE insurance pays the defendant's legal costs that the plaintiff would otherwise be obligated to pay.[199] The insurance company generally charges no premium in those circumstances, but a plaintiff who wins can recover the cost of the ATE premium from the defendant, along with legal fees (including a success fee) and damages.[200] The premiums for ATE insurance can be costly—as much as £68,000 for £100,000 of coverage.[201] In this fashion, some plaintiffs can file defamation suits virtually for free, with the defendant liable for potentially hefty costs as well as damages.[202]

The costs of defamation litigation can pressure defendants into settling cases, even relatively weak ones. Reuters once got sued for saying that a particular tennis player had the worst record in the sport.[203] The player had a CFA. Reuters was eager to defend based

195. *Id.* ¶ 290; CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 66, at 14 (testimony of Marcus Partington, Chairman, Media Lawyers Association).

196. *Libel Tourism: Hearing Before the Subcomm. on Commercial & Admin. L. of the House Comm. on the Judiciary*, 111th Cong. 158–59 (2009) (response to post-hearing questions from Laura R. Handman), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:47316.pdf.

197. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 239. The total amount paid includes the VAT. *Id.*

198. MGN v. United Kingdom, app. no. 39401/04 (Eur. Ct. H. R. 2011), ¶ 56.

199. ATE insurance is not obligatory for a party with a CFA agreement. *See* MGN v. United Kingdom, app. no. 39401/04 (Eur. Ct. H. R. 2011), ¶ 95. But it is common. MINISTRY OF JUSTICE, *supra* note 16, at 30. Like CFAs, ATE insurance is available to both parties in litigation but generally is employed only by plaintiffs.

200. *See MGN*, ¶ 92; MINISTRY OF JUSTICE, *supra* note 16, at 30–31; CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 304; PROGRAMME IN COMPARATIVE MEDIA LAW AND POLICY, *supra* note 4, at 11 & n.18. The Access to Justice Act 1999 made ATE premiums, along with CFA success fees, recoverable from losing defendants. MINISTRY OF JUSTICE, *supra* note 16, at 30.

201. Culture, Media, and Sport Committee, *supra* note 5, ¶ 287.

202. *See* MINISTRY OF JUSTICE, *supra* note 16, at 25; CARTER-RUCK, *supra* note 5.

203. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 66, at 13 (testimony of Keith Mathieson, Reynolds Porter Chamberlain LLP).

on truth, attorney Keith Mathieson told the House of Commons committee, but felt obliged to settle.[204] In light of the plaintiff's CFA, losing this "comparatively unimportant libel case," he said, could have cost Reuters £1.2 million.[205]

In December 2009, Lord Justice Jackson considered CFAs and ATE insurance in a 557-page report on civil litigation costs.[206] He found that plaintiffs' costs increased starkly if they used CFAs and thus were not generally responsible for paying those costs. Plaintiffs' legal fees totaled as much as 203% of damage awards in cases using CFAs, whereas the fees came to around half of damage awards in non-CFA cases.[207] Lord Justice Jackson diagnosed four shortcomings in the CFA system. First, CFAs ought to have a means test rather than being available to all plaintiffs, regardless of wealth.[208] He wrote, "The present regime provides protection against adverse costs, but it is in no way targeted upon those claimants who need such protection."[209] Second, plaintiffs employing CFAs have no incentive to rein in litigation costs, because they will not be responsible for paying them.[210] Third, as in the Reuters case, "the costs consequences of the recoverability rules can be so extreme as to drive opposing parties to settle at an early stage, despite having good prospects of a successful defence."[211] Finally, the CFA regime may have the sole effect of helping litigants with especially strong cases get into court; attorneys may continue to decline weaker cases.[212] Lord Justice Jackson wrote, "[T]he CFA regime . . . presents the opportunity to cherry pick. If lawyers succumb to that temptation, they will greatly increase their own earnings and they will do so in a manner which is entirely lawful."[213] One firm prevails in some 98% of CFA cases it

204. *Id.* at 13

205. *Id.* at 13

206. MINISTRY OF JUSTICE, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT (2009).

207. *Id.* ¶ 2.20.

208. *Id.* ¶¶ 4.3–4.6.

209. RUPERT M. JACKSON, REVIEW OF CIVIL LITIGATION COSTS 326 (2010). MGN raised the same argument before the European Court. *See* MGN v. United Kingdom, app. no. 39401/04 (Eur. Ct. H. R. 2011), ¶ 167.

210. MINISTRY OF JUSTICE, *supra* note 206, at 110–11. *See* MINISTRY OF JUSTICE, *supra* note 16, at 20.

211. MINISTRY OF JUSTICE, *supra* note 206, at 111.

212. *Id.* at 111.

213. *Id.* *See also* CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 295 (referring to "the inevitability of cherry picking").

brings, according to Lord Justice Jackson.[214] Terming the recoverable success fees "the worst possible way to tackle the problem of funding litigation,"[215] he recommended that unsuccessful defendants no longer be required to pay success fees and ATE insurance premiums to prevailing plaintiffs.[216] To help prevailing plaintiffs pay their attorneys' success fees, he recommended increasing damage awards by 10%.[217] The Ministry of Justice issued a follow-up report that endorsed many of Lord Justice Jackson's diagnoses and prescriptions.[218]

Several other critics of the British libel system have viewed CFA success fees as a substantial hindrance. The UN Human Rights Committee urged Britain to reconsider success fees.[219] The Ministry of Justice proposed capping success fees at 10% as an interim measure, while the government considers Lord Justice Jackson's farther-reaching proposals.[220] The House of Commons Culture, Media, and Sport Committee recommended against means-testing CFAs—doing so "would be likely to result in access to justice being limited to the extremely poor and the super rich," the committee said[221]—but urged that losing defendants be liable only for 10% success fees (the plaintiff might agree to be liable for an additional success fee).[222] The committee also recommended that ATE

214. Lord Justice Jackson, *supra* note 189, at 3.

215. *Id.* at 5. He similarly judged recoverable ATE premiums "about the most inefficient and expensive form of one way costs shifting that it is possible to devise." *Id.* at 6 (footnote omitted).

216. *Id.* at 7.

217. *Id.* at 9.

218. MINISTRY OF JUSTICE, *supra* note 16, at 7, 15. The ministry did recommend allowing plaintiffs to recover a 10% success fee, calculated on the basis of the total damage award, rather than increasing damage awards themselves. *Id.* at 37. Lord Justice Jackson wrote that he "strongly oppose[d]" the change and believed that it would "undermin[e] the whole structure of my reforms." Lord Justice Jackson, *supra* note 189, at 8.

219. *See* HUMAN RIGHTS COMMITTEE, *supra* note 8, at 7–8 ¶ 25 (urging Britain to "consider . . . limiting the requirement that defendants reimburse a plaintiff's lawyers['] fees and costs regardless of scale, including Conditional Fee Agreements and so-called 'Success Fees,' especially insofar as these may have forced defendant publications to settle without airing valid defences.").

220. MINISTRY OF JUSTICE, *supra* note 16, at 5. The Ministry subsequently proposed the 10% cap to Parliament. *See* MINISTRY OF JUSTICE, REDUCING SUCCESS FEES—RESPONSE, *supra* note 15, at 17–18 (2010). The government, however, did not pursue the proposal further in the period leading to the April 2010 general election. *See* MGN v. United Kingdom, app. no. 39401/04 (Eur. Ct. H. R. 2011), ¶ 120.

221. CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 292.

222. *Id.* ¶ 307.

premiums be made nonrecoverable.[223] English PEN and the Index on Censorship advocated eliminating success fees, capping the legal fees that losing defendants must pay, and making ATE premiums nonrecoverable.[224]

C. Success Fees and the Naomi Campbell Case

A high-profile privacy case has cast doubt on the future of success fees in Britain. On February 1, 2001, the *Mirror*, a London tabloid, published the front page headline "Naomi: I am a drug addict."[225] The article said that Naomi Campbell was attending meetings of Narcotics Anonymous "in a courageous bid to beat her addiction to drink and drugs."[226] It featured surreptitiously taken photos of her outside the Narcotics Anonymous meeting place.[227] The *Mirror*'s initial coverage was sympathetic, but after Campbell threatened to sue for invasion of privacy (known as breach of confidence in Britain), the newspaper changed its tone and called the model "[p]athetic" and "whing[ing]."[228]

Campbell filed suit. She conceded that the newspaper was justified in publishing the facts of her drug problems, in part because of her past insistence that she did not use illegal drugs; however, she maintained that the *Mirror* had gone too far in publishing details of her treatment as well as photos of her outside the meeting place.[229] In 2002, after a five-day hearing, a judge on the Queen's Bench concluded that the *Mirror* had invaded her privacy and awarded her £3,500.[230] Later that year, the Court of Appeal reversed the judgment.[231] The court said: "We consider that the detail that was given, and indeed the photographs, were a legitimate, if not an

223. *Id.* ¶ 306.

224. ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 10, at 10. *See also* CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, ¶ 285 (recommending that the Ministry of Justice consider capping the maximum hourly rates that can be recovered from losing parties in defamation proceedings).

225. *MGN*, app. no. 39401/04 (Eur. Ct. H. R. 2011), ¶ 6.

226. *Id.* ¶ 7.

227. *Id.* ¶¶ 6, 10.

228. *Id.* ¶¶ 11–12.

229. Campbell v. MGN Ltd., [2002] EWCA (Civ) 1373, ¶¶ 9, 35–36.

230. Campbell v. Mirror Group Newspapers, [2002] EWHC (QB) 499 (Eng). Of the sum, £1,000 was aggravated damages awarded for the *Mirror*'s "trashing" of her after she had threatened to sue. *Id.* ¶ 164. The damages also covered what the judge deemed a violation of the Data Protection Act. *Id.* ¶¶ 71–125.

231. Campbell v. MGN Ltd., [2002] EWCA (Civ) 1373 (Eng.). The Court of Appeal likewise concluded that the *Mirror* had not violated the Data Protection Act. *Id.* ¶¶ 72–138.

essential, part of the journalistic package designed to demonstrate that Miss Campbell had been deceiving the public when she said that she did not take drugs."[232] In 2004, the House of Lords sided with the trial court.[233] By a vote of three to two, the Lords concluded that the *Mirror* had invaded Campbell's privacy by publishing the photos and the details of her treatment.[234]

Mirror Group Newspapers Ltd. was ordered to pay Campbell the nominal £3,500 in damages and a total of £1,086,295 in legal fees.[235] Although CFAs are rare in privacy cases, Campbell employed one in the appeal to the House of Lords, but not in earlier stages of the litigation.[236] Under the CFA agreement, her solicitors would be entitled to a success fee amounting to 95% of base costs, and her counsel would be entitled to a fee amounting to 100% of base costs.[237] The success fees came to £279,981.[238]

Mirror Group Newspapers appealed the success fees to the House of Lords.[239] The news organization argued that a liability for legal fees so disproportionate to the actual damages breached Article 10 of the European Convention on Human Rights, which provides, "Everyone has the right to freedom of expression."[240] The House of Lords unanimously dismissed the appeal, though some members voiced concern about disproportionate costs.[241] For the second appeal, MGN

232. *Id.* ¶ 62.

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

234. *Id.*

235. MGN v. United Kingdom, app. no. 39401/04 (Eur. Ct. H. R. 2011), ¶ 56. MGN was ordered to pay Campbell's ATE premium as well; the company did not challenge it. *See id.* ¶ 198.

236. *Id.* ¶ 56. *See* Tim Lowles, *The Consequences of MGN United v. The UK: Does the CFA Regime Really Need Reforming?*, INFORRM'S BLOG, (Jan. 20, 2011), http://inforrm.wordpress.com/2011/01/20/opinion-the-consequences-of-mgn-limited-v-the-uk-%E2%80%93-does-the-cfa-regime-really-need-reforming-tim-lowles/ (stating that "it is rare for privacy claims to be conducted on a CFA with their use being much more prevalent in personal injury or defamation claims.").

237. *MGN*, app. no. 39401/04 (Eur. Ct. H. R. 2011), ¶ 56.

238. *Id*.

239. Campbell v. MGN Ltd., [2005] UKHL 61 (Eng.). While the appeal was pending, Campbell's lawyers agreed to accept reduced fees, totaling £385,000, from MGN.

240. COUNCIL OF EUROP.. European Convention on Human Rights, Art. 10, http://www.hri.org/docs/ ECHR50.html.

241. *See Campbell,* ¶ 31. Lord Nicholls of Birkenhead:

> Faced with a free-spending claimant's solicitor and being at risk not only as to liability but also as to twice the claimant's costs, the defendant is faced with an arms race which makes it particularly unfair for the claimant afterwards to justify his conduct of the litigation on the ground that the defendant's own costs were equally high.

Id.

was ordered to pay Campbell £255,536, which included a solicitors' success fee of £85,096; her counsel did not employ a CFA for the appeal.[242] MGN then sought review by Judicial Taxing Officers of the costs for the second appeal—thus appealing the costs of its earlier appeal of costs.[243] The Judicial Taxing Officers, who have the power to adjust legal fees charged to losing parties, declined to disturb the percentage of the success fee award, though they did reduce the hourly rates charged by the counsel and solicitors.[244] The House of Lords refused to allow a further appeal.[245]

MGN then sought review by the European Court of Human Rights. In *MGN Ltd. v. United Kingdom*, the court reviewed the history of the *Campbell* litigation; the laws, orders, and case law concerning CFAs; and proposals for reforming the CFA regime and other elements that contribute to the expense of libel litigation.[246] The European Court reasoned that the United Kingdom was entitled to broad deference (called a margin of appreciation) on social and economic policies, including means of ensuring access to the courts; it would not interfere with a legislature's interpretation of the public interest in this realm "unless that judgment is manifestly without reasonable foundation."[247] But regulations affecting freedom of expression, at least when they potentially chill reporting on some matters, are entitled to less deference: "[T]he most careful scrutiny on the part of the Court is called for when measures taken by a national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern."[248] The court emphasized the many criticisms of the CFA regime that had been raised in Britain, though most of them came after the House of Lords decision on Campbell's success fees.[249] After reviewing Lord Justice

242. *MGN*, app. no. 39401/04 (Eur. Ct. H. R. 2011), ¶ 76.

243. *Id.* ¶¶ 77–79. On the power of courts and their designees to adjust CFA success fees and ATE insurance premiums, see MINISTRY OF JUSTICE, *supra* note 16, at 20.

244. *MGN*, ¶¶ 80, 96. Campbell's attorneys ultimately compromised with MGN and accepted a total of £500,000. *Id.* ¶ 218.

245. *Id.* ¶ 81.

246. *Id.* ¶¶ 1-220. The case is denominated *MGN v. United Kingdom* because claims in the European Court are brought against member states. Thus, MGN was suing the United Kingdom for infringing its Article 10 rights through enforcement of the CFA success fees. As the court summarized MGN's argument, "The requirement to pay the success fees of Ms. Campbell's lawyers was an interference with the applicant's freedom of expression." *Id.* ¶ 162.

247. *Id.* ¶ 200.

248. *Id.* ¶ 201.

249. *Id.* ¶ 203.

Jackson's critiques of the CFA system, the Court paused over the last of them, the likelihood that lawyers would cherry pick the strongest cases, where the odds of recovering success fees were highest. Cherry picking, the Court said, suggested that "the scheme has not achieved the espoused aim of ensuring access to justice of the broadest range of persons."[250] The Court went on to note that a member state's efforts to reform a practice do not necessarily mean that the practice violates the European Convention, but it added:

> However, the Court considers that the depth and nature of the flaws in the system, highlighted in convincing detail by the public consultation process, and accepted in important respects by the Ministry of Justice, are such that the Court can conclude that the impugned scheme exceeded even the broad margin of appreciation to be accorded to the State in respect of general measures pursuing social and economic interests.[251]

Accordingly, the success-fee requirement "was disproportionate having regard to the legitimate aims sought to be achieved."[252] In this respect, the United Kingdom violated Article 10 of the European Convention.[253]

D. The Uncertain State of Success Fees

The European Court did not say what level of success fees would be acceptable, only that fees of 95% and 100% were excessive.[254] The Court concluded that the government and MGN ought to be given the opportunity to reach a settlement before it released an order resolving the issue.[255] Accordingly, the legal standing of success fees remains unclear. Specifically, it is unknown what percentage of fees is consistent with Article 10 of the European Convention on Human Rights. Unless the British government changes the CFA procedure and the level or recoverability of success fees, future litigation before the European Court may be necessary to determine what is permissible.

250. *Id.* ¶ 215.
251. *Id.* ¶ 217.
252. *Id.* ¶ 219.
253. *Id.* ¶ 220.
254. *Id.* ¶¶ 218–219.
255. *Id.* ¶ 227.

VI. "Libel Tourism" and the SPEECH Act

British defamation law has had ramifications in the United States through libel tourism. Under the doctrine of comity, a defamation plaintiff who prevailed in a British court could—at least in theory—get an American court to enforce the judgment against the defendant's American assets, thereby evading the stringent First Amendment protections available to defendants in defamation cases brought in the United States.[256] American defendants would essentially be subject to British defamation law. Given the British courts' expansive approach to jurisdiction, this liability could extend even to defendants who never set foot in Britain and those whose publications reached only a tiny audience in Britain.

Though it was the subject of law review articles,[257] as well as hearings in the U.S. Senate and House of Representatives,[258] the problem of libel tourism was largely hypothetical. In the two cases where foreign litigants attempted to enforce British libel judgments in the United States, American courts refused to cooperate.[259] In one of the cases, the Maryland Court of Appeals concluded that enforcing such a judgment would conflict with American public policy and the First Amendment.[260] The Congressional Research Service was unable to point to any instance in which an American court had enforced a British libel judgment.[261]

Nonetheless, the possibility of such enforcement exerted a chilling effect on some American authors and publishers. In one instance, a litigant won a default libel judgment against an American author in a British court.[262] Although the plaintiff did not attempt to enforce the

256. On comity, 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 incorporate principles from *Hilton*. *See* CONG. RESEARCH SERV., *supra* note 75, at 7–8.

257. See sources cited in note 3, *supra.*

258. *Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights? Hearing Before the Sen. Judiciary Comm.,* 111th Cong. (2010); *Libel Tourism: Hearing Before the Subcomm. on Commercial & Admin. L. of the House Comm. on the Judiciary*, 111th Cong. (2009).

259. Matusevitch v. Telnikoff, 877 F. Supp. 1, 6 (D.D.C. 1995), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998); Telnikoff v. Matusevitch, 702 A.2d 230, 259 (Md. Ct. Apps. 1997); Bachchan v. India Abroad Publ'ns., 585 N.Y.S.2d 661, 664 (Sup. Ct. N.Y. Co. 1992); H.R. REP. NO. 111-54, at 4–5 (2009). *Cf.* Sarl Louis Feraud Int'l v. Viewfinder Inc., 489 F.3d 474 (2d Cir. 2007) (declining to enforce French judgment in a copyright case that impinged on First Amendment rights).

260. *Telnikoff*, 702 A.2d 230.

261. CONG. RESEARCH SERV., *supra* note 75, at 8.

262. Mahfouz v. Ehrenfeld, [2005] EWHC (QB) 1156 (Eng.).

judgment in the United States, the defendant worried that she might be vulnerable if she traveled to Britain or the European Union countries that enforce British judgments.[263] In addition, such judgments, even if not enforced, can adversely affect one's applications for jobs or loans as well as one's credibility.[264] In other instances, American publishers or authors backed down when threatened with libel lawsuits in Britain.[265] A media attorney, Laura R. Handman, told the House Judiciary Committee, "Virtually every demand letter we receive these days from a U.S. lawyer is accompanied by one from a British solicitor."[266]

On August 10, 2010, President Obama signed into law the SPEECH Act (Securing the Protection of our Enduring and Established Constitutional Heritage), which bars American courts from enforcing foreign defamation judgments that fail to comport with the protections of the First Amendment.[267] Specifically, American courts are instructed not to enforce judgments unless either:

> (A) the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom

263. *See Libel Tourism: Hearing Before the Subcomm. on Commercial & Admin. L. of the House Comm. on the Judiciary*, 111th Cong. 12 (2009) (statement of Rachel Ehrenfeld). The plaintiff'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: Hearing Before the Subcomm. on Commercial & Admin. L. of the House Comm. on the Judiciary*, 111th Cong. 32, 33 (2009) (statement of Bruce D. Brown). British judgments can be enforced across the European Union except for Denmark. *See Libel Tourism: Hearing Before the Subcomm. on Commercial & Admin. L. of the House Comm. on the Judiciary*, 111th Cong. 134–36 (2009) (response to post-hearing questions from Bruce D. Brown).

264. *See* S. REP. NO. 111-224, at 2 (2010); BELL, *supra* note 76, at 170 ¶ 4.8081 (2003); SULLIVAN, *supra* note 2, at 30.

265. *See Libel Tourism: Hearing Before the Subcomm. on Commercial & Admin. L. of the House Comm. on the Judiciary*, 111th Cong. 18–19, 22 (2009) (statement of Bruce D. Brown); Marc Perelman, *Israeli Art Critic Wins Legal Battles*, FORWARD (July 4, 2008), http://www.forward.com/articles/13662/.

266. H.R. REP. NO. 111-154, at 4 (2009) (testimony of Laura R. Handman), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr154.111.pdf.

267. Pub. L. No. 111-223 (H.R. 2765), Aug. 10, 2010. The burden is on the party seeking enforcement to establish consistency with First Amendment standards. *See* 28 U.S.C. § 4102(2) (West 2011). 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 process; or (ii) where the defendant provides an interactive computer service, unless the judgment is consistent with 47 U.S.C. § 230. *See* 28 U.S.C. §§ 4102(b), 4102(c) (West 2011).

> 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; or
>
> (B) 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.[268]

The burden lies on the party seeking enforcement of the foreign judgment.[269] The law also provides for the party opposing enforcement of a judgment to receive attorneys' fees, if successful.[270] In addition, the law provides for declaratory judgments as to the enforceability of a foreign judgment; here, the burden lies on the party bringing the action for a declaratory judgment.[271]

VII. Assessment

Americans must strive to avoid the parochial belief that foreign systems of free expression are inferior to the degree that they deviate from the protections afforded by the First Amendment, and its emphasis on free expression over reputation.[272] Nonetheless, even many Britons have found fault with the British system. The government's draft defamation bill seeks to give greater weight to free expression vis-à-vis reputation. As does the European Court of

268. 28 U.S.C. § 4102(a)(1) (West 2011). In addition, the court must conclude that the foreign court's exercise of personal jurisdiction comported with the requirements of the due process clause. 28 U.S.C. § 4102(b)(1) (West 2011).

269. 28 U.S.C. § 4102(a)(2) (West 2011). The jurisdictional inquiry and the interactive-computer provision also place the burden on the party seeking enforcement. 28 U.S.C. §§ 4102(b)(2), 4102(c)(2) (West 2011).

270. 28 U.S.C. § 4105 (West 2011).

271. 28 U.S.C. § 4104(a) (West 2011).

272. On the status of the United States as a global outlier when it comes to free speech, see Frederick Schauer, *The Exceptional First Amendment*, (Kennedy School of Government, Harvard University Working Paper No. RWP05-021, 2005) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=668543; Kyu Ho Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?*, 13 COMM. L. & POL'Y 415 (2008).

Human Rights ruling on CFA success fees, with their disproportionate impact on defendants. The SPEECH Act, of course, does not alter British law, but it appears to have helped shame the British government into taking action.[273] This section evaluates some of the government's most significant reform proposals.

The government's proposals are salutary in many respects. The requirement that plaintiffs demonstrate harm to their reputations, rather than having such harm irrebuttably presumed, will help prevent plaintiffs from recovering monetary damages (or settlements) where they have suffered no real harm. Elimination of the multiple-publication rule combined with a flexible approach to the one-year statute of limitations will give potential defendants some sense of repose with the passage of time, help ensure that evidence and witnesses' recollections are reasonably fresh, and encourage aggrieved potential plaintiffs to file claims as soon as practicable. As Oliver Wendell Holmes put it, "[I]f a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example."[274] Reducing the availability of jury trials will cut costs and bring defamation cases into line with most civil litigation in Britain, though it may trouble some Americans accustomed to jury trials in civil litigation.[275] The British government should set forth criteria for a judge to use in determining whether to order a jury trial. The decision to omit adherence to professional codes from the responsible-publication defense is welcome in light of subsequent developments. Whatever replaces the Press Complaints Commission may well draw up a professional code independently, rather than, relying on a code generated largely by journalists as it does now. Incorporating such an independent code into libel law would create a new and unpredictable form of press regulation.

In addition, for non-British defamation defendants, reining in the exercise of jurisdiction will make a substantial difference. (American individuals and corporations may still be liable for damages in British defamation suits if they have European assets).[276] Critics of libel tourism talked of establishing thresholds for jurisdiction, such as a minimum number of copies of a publication that must circulate in Britain. The government chose a wiser course of action in leaving

273. *See* CULTURE, MEDIA, AND SPORT COMMITTEE, *supra* note 5, at 6 (referring to American concerns about British defamation law as "a humiliation for our system.").

274. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

275. *See* U.S. CONST., amend. VII.

276. *See* S. REP. NO. 111-224, at 10 (2010) (additional views of Sen. Kyl).

courts to determine whether Britain represents "clearly the most appropriate place" for the litigation to go forward.[277] If judges continue to exercise jurisdiction over dubious cases, as sometimes occurs despite the analogous *forum non conveniens* doctrine, the government should revisit the issue, and perhaps add the criteria proposed by the Ministry of Justice's Libel Working Group to the law.[278]

For all their strengths, however, the government's proposals fall short in six areas. First, the government did not discuss requiring plaintiffs to prove the falsity of the challenged statement, rather than, as now, requiring defendants to prove truth. Requiring defendants to prove truth, rather than requiring plaintiffs to prove falsity, can lead to oppressive and even absurd results.[279] Second, contrary to the recommendation of the United Nations Human Rights Committee, the government failed to suggest a higher standard of proof, such as actual malice, for plaintiffs who are public officials or public figures. Given the culture of British tabloids, with their clangorous coverage of celebrities, perhaps the government was reluctant to raise the bar for public figures. Even so, a higher standard for public officials would protect the press's watchdog function in covering the government. Third, the proposed reform continues to embody a public-interest standard, most significantly through codification of the *Reynolds* defense as "responsible publication on [a] matter of the public interest."[280] Although the statute does set forth useful criteria as to what constitutes responsible behavior on the part of a journalist or other speaker, analogous to the negligence standard in American defamation law, the undefined public-interest standard is problematic. American courts have largely eschewed inquiries into what sort of speech directly advances the public interest.[281] As

277. Bill to Amend the Law of Defamation, 2010–11 H.L. Bill [7] cl. 2 (Eng.). The limitation would not apply to defendants domiciled in the United Kingdom, another member state of the European Union, or a state that is a contracting party to the Lugano Convention. *Id.* § 7(1).

278. *See* MINISTRY OF JUSTICE, *supra* note 30, ¶ 31.

279. In a case brought by David Irving, who sued over having been called a Holocaust denier and an unreliable historian, the defendant had to submit evidence of the existence of gas chambers at Auschwitz in order to show what Irving had mischaracterized or disregarded. *See generally* DEBORAH E. LIPSTADT, HISTORY ON TRIAL: MY DAY IN COURT WITH DAVID IRVING (2005).

280. MINISTRY OF JUSTICE, *supra* note 30, at 10. The issue arises concerning the honest-opinion defense too, which also embodies a public-interest element. *Id.* 20.

281. *See* Gertz v. Robert Welch Inc., 418 U.S. 323, 346 (1974) (noting the "difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not") (citation omitted). *But cf.*

commentators have noted, judges are likely to err and potentially constrict the sphere of public discourse.[282] Fourth, the honest-opinion defense should extend to an opinion based on a good-faith but erroneous understanding of the pertinent facts. The government's proposal covers only opinions based on accurately perceived facts, leaving those who honestly misconstrue the facts needlessly at risk. Fifth, appellate courts' independent review of libel cases, covering facts as well as law, provides an important safeguard in American courts. Britain should at least consider such an approach, which the government has not yet done. Finally, the government's bill fails to address the principal sources of high litigation costs in defamation cases, CFAs with success fees and ATE insurance premiums.[283] Under the European Court of Human Rights ruling in the Naomi Campbell case, success fees of 95% and 100% cannot continue, but the task of developing a replacement probably falls to the government, not to the Strasbourg court.[284] Valuable reform proposals have been advanced, particularly Lord Justice Jackson's comprehensive plan for making CFA success fees and ATE insurance premiums nonrecoverable. The government is preparing legislation based on the Jackson proposals, so criticism on this ground may be premature.

Some other complaints about the draft bill appear overstated. From one perspective, some critics have argued that codifying existing case law, as with the *Reynolds* defense, will simply lead to more litigation. A lawyer who represents plaintiffs told *Legal Week*, "The Defamation Bill will mean five to seven years of many litigants running up huge legal bills to work out what the various reforms mean in practice."[285] According to this argument, litigation will be necessary in order to establish whether Parliament intended merely

Bartnicki v. Vopper, 532 U.S. 514, 533 (2001) (distinguishing "the publication of truthful information of public concern" from "disclosures of trade secrets or domestic gossip or other information of purely private concern.").

282. C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment*, 21 SOCIAL PHIL. & POL'Y 215, 264 (2004); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 49 (1990).

283. In addition, the government failed to address the possibility of ADRs and other procedures for reaching early resolutions in defamation proceedings. For one such proposal, see Libel Reform Campaign, *supra* note 153.

284. MGN v. United Kingdom, [2011] ECHR 66 ¶¶ 218–219 (Eng.).

285. Alex Novarese, *A "Laughing Stock" Libel Law No More? The Defamation Bill*, LEGAL WK., May 12, 2011, http://www.legalweek.com/legal-week/feature/2070232/-laughing-stock-libel-law-defamation.

to codify case law, or whether it also intended to impose changes.[286] Lord Hoffmann, an outspoken opponent of libel reform, has said that "there is a case for leaving well enough alone."[287] But Parliamentary debates would probably clarify most instances of ambiguity. In another criticism, Jenny Afia and Phil Hartley of the Schillings Law Firm argue that the requirement of "substantial" harm to a plaintiff's reputation sets too high a threshold: because of the front-loaded costs of litigating the substantiality of harm, a worthy plaintiff may be unable to bring a suit against a media company.[288] But defamation law is intended to compensate plaintiffs for damaged reputations. Plaintiffs who cannot demonstrate that their reputations have been harmed should not be bringing suits.

From the other perspective, the Libel Reform Campaign, which is comprised of English PEN, the Index on Censorship, and Sense About Science, has argued that the government proposals do not go far enough. The Libel Reform Campaign continues to urge tight restrictions on the ability of corporations to sue for libel.[289] In particular, corporations should have to demonstrate malice or recklessness as well as actual or likely financial harm.[290] In the United States, the principal issue raised by corporations' libel suits has been determining whether plaintiffs qualify as public figures.[291] Given that Britain plans to continue to eschew the public-figure doctrine, the problem would not arise. The Libel Reform Campaign's concern about an imbalance of resources, with wealthy corporations suing middle-class individuals,[292] is best addressed through reducing the costs of libel suits. The Libel Reform Campaign also believes that the

286. *E.g.,* Jenny Afia & Phil Hartley, *Tipping the Balance*, NEW L. J., Mar. 18, 2011, at 376; Nigel Tait, *A Bitter Pill to Swallow*, LEGAL WK., May 12, 2011, http://www.legalweek.com/legal-week/feature/2070224/bitter-swallow-carter-ruck-tackles-defamation.

287. Afia & Hartley, *supra* note 286.

288. Jenny Afia & Phil Hartley, *Libel Reform: The Proposed Changes*, IN-HOUSE LAWYER (May 4, 2011), http://www.inhouselawyer.co.uk/index.php/media-entertainment-a-sport/9394-libel-reform-the-proposed-changes.

289. *Id.*

290. *Id.*

291. *See generally* Robert E. Drechsel & Deborah Moon, *Corporate Libel Plaintiffs and the News Media: An Analysis of the Public-Private Figure Distinction After* Gertz, 21 AM. BUS. L. J. 127 (1983); Lynn B. Oberlander, *Corporate Plaintiffs: Public or Private Figures?*, 16 COMM. LAW. 1 (1998); Norman Redlich, *The Publicly Held Corporation as Defamation Plaintiff*, 39 ST. LOUIS U. L. J. 1167 (1995); Dulele Straughan, Bill Chamberlin & Carol Reuss, *For Corporate Libel Plaintiffs: Life After* Gertz, 10 PUB. RELATIONS REV. 47 (1984).

292. Libel Reform Campaign, *supra* note 153.

"substantial harm" test—the requirement that a plaintiff show "substantial harm" to his or her reputation in order to proceed with a suit—sets too low a threshold, which will allow "trivial and vexatious claims" to be brought.[293] As an alternative it suggests "serious and substantial," albeit with a circular and unhelpful definition: "substantial in law merely means non-trivial or negligible, while serious means that it is serious enough to bring before a court."[294]

A. Conclusion

After years of complaints about British defamation law, the prospects for change suddenly brightened in 2010 and early 2011, and just as suddenly dimmed in mid-2011. To be sure, important steps have already been taken. The European Court of Human Rights has held that CFA success fees of 95% and 100% violate the European Convention on Human Rights; these success fees, along with ATE insurance premiums, have contributed significantly to the high costs of defamation cases in Britain. In addition, the United States has adopted the SPEECH Act, which bars American courts from enforcing some judgments in British defamation cases and thereby reduces the problem of libel tourism.

But the prospects for quick action on the British government's proposed reforms of libel law appear to be poor. A government eager to impose stricter regulations on the press, as is the case now, will not rush to give the press greater leeway in libel cases. The *News of the World*'s lawbreaking has left behind severe collateral damage.

In the long term, however, the British press will live down the scandal. When it does, the government's proposals will provide a valuable blueprint for reform—not thoroughgoing reform, with the issue of defamation costs as yet unaddressed, but important steps. For now, advocates of free expression can only wait for the climate to improve and, like many other Britons, seethe over the wrongdoing of Murdoch's minions.

293. *Id.*
294. *Id.*