WHY THE FREE SPEECH PROTECTION ACT OF 2009 SERVES AS A NECESSARY JUDICIAL RESTRAINT AGAINST FOREIGN LIBEL JUDGMENTS

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I. INTRODUCTION

Throughout the world the phrase "freedom of expression" has many different meanings. In some parts of the world, this is a guaranteed right in which each person rightfully enjoys the right to state one's opinion, as long as it is not injurious to others.[1] In other parts of the world, this is not

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1. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (The United States Supreme Court radically changed the U.S. libel laws wherein the Court held that public officials

considered as a right, much yet a privilege.[2] Freedom of expression is particularly highlighted in countries where democracy is the source of power and rule.[3] However, there are countries that believe in the protection of one's reputation more than protecting speech. For example, Singapore is called a "libel paradise."[4] In Singapore, settlement is usually the appropriate tool in libel cases because a defendant usually has no chance of success against a plaintiff suing for defamation.[5] Similarly, Australia protects reputation and privacy interests more than free speech.[6]

Because of the different libel laws in certain countries, there have been many lawsuits that have occurred overbroad (*i.e.*, outside the United States) against publishers. Hence, the infamous slogan of "libel tourism" was created. "Libel tourism" is "the use of libel judgments, procured in jurisdictions with claimant-friendly libel laws-and little or no connection to the author or purported libelous material to chill free speech in the United States."[7] In other words, it is the practice whereby defendants file defamation lawsuits overbroad (in plaintiff-friendly countries) against American publishers who have no connection to that foreign jurisdiction. The emergence of "libel tourism" is notoriously famous in the landmark case of *Ehrenfeld v. Bin Mahfouz.*[8] In 2003, American author, Rachel

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could prevail in a defamation suit if "actual malice" could be proven.). *See also* Chaplinsky v. State of New Hampshire, 315 U.S. 568, 573 (1942) (This case is a pertinent example of an opinion wherein "injurious speech" includes "fighting words" that are considered as personal, face-to-face insults that intend to provoke an immediate violent reaction by the average addressee or words which by their very utterance inflict injury.).

2. *See, e.g., Cuba, the World's Biggest Prison for Journalists*, CUBAVERDAD.NET, http://www.cubaverdad.net/freedom_of_speech.htm (last visited September 1, 2010) (discussing that many of Cuba's laws regarding freedom of expression or speech are repressive).

3. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 9 (Harper & Brothers) (1948) [hereinafter MEIKLEJOHN] (Alexander Meiklejohn was a prominent writer who argued that freedom of speech and democracy are interconnected. He stated in his book that "the man who rejects that agreement is not objecting to tyranny or despotism. He is objecting to political freedom. He is not a democrat.").

4. 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, 280 (2010) [hereinafter Sturtevant].

5. *Id.*

6. *Id.* (citing Michael Newcity, *The Sociology of Defamation in Australia and the United States*, 26 TEX. INT'L L.J. 1, 4 (1991)).

7. Ehrenfeld v. Bin Mahfouz, 9 N.Y.3d 501, 507 (N.Y. 2007). *See also* Sturtevant, *supra* note 4, at 269 (stating that libel tourism refers to "obtaining libel judgments in foreign countries where libel laws do not have the free speech protection" (citing Paul H. Aloe, *Unraveling Libel Terrorism*, 239 N.Y. L.J. 1, 4 (2008)).

8. *Ehrenfeld*, 9 N.Y.3d at 507.

Ehrenfeld, published her book entitled "Funding Evil: How Terrorism is Financed and How to Stop It."[9] In her book, she wrote that the plaintiff, Khalid Salim Bin Mahfouz, financed and provided monetary support to Al-Qaeda and other terrorist groups.[10]

Ms. Ehrenfeld had no connection whatsoever with the United Kingdom (U.K.). There were no published copies of her book in the U.K., except for twenty-three copies that were available via the internet and one chapter of the book that was accessible from the ABC.com web site.[11] As a result, this led Mr. Bin Mahfouz to file a libel lawsuit against Ms. Ehrenfeld in England. Mr. Bin Mahfouz's attorney sought to have Ms. Ehrenfeld:

1) Promise the court of England that she would stop repeating allegations against Mr. Bin Mahfouz;
2) Destroy all copies of her book;
3) Issue a letter of apology;
4) Make a charitable donation; and
5) Pay Mr. Bin Mahfouz's legal costs in exchange of no defamation action against her.[12]

Evidently, Ms. Ehrenfeld did not agree with what the plaintiff's attorney demanded of her. The reasons why Ms. Ehrenfeld did not seek to appear in the English courts were because:

1) Cost of the litigation;
2) British courts are claimant-friendly tribunals; and
3) Ms. Ehrenfeld lacked any connection with the British court's jurisdiction.[13]

Consequently, Ms. Ehrenfeld responded by filing a lawsuit against Mr. Bin Mahfouz in the United States District Court for the Southern District of New York, which was not reviewed by the court because New York lacked personal jurisdiction over Mr. Bin Mahfouz.[14] As a consequence of this case, Mr. Bin Mahfouz's defamation lawsuit against Ms. Ehrenfeld caused a deprivation of her First Amendment rights.

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9. *Id.* at 504.

10. *Id.*

11. *Id.*

12. *Id.* at 505.

13. *Ehrenfeld*, 9 N.Y.3d at 505–06.

14. *Id.* at 506, 508 (stating that under the New York statute, the defendant did not transact any business within the State of New York and did not invoke any privileges or protections of New York laws).

Because of the importance of the First Amendment, which is enshrined in the United States Constitution, this article will focus on the Free Speech Protection Act of 2009 as a safeguard in protecting Americans' right to free expression and protection from foreign libel judgments. The United States Constitution provides the right to free speech, but certain speech (*i.e.*, defamatory speech) is subject to restrictions. The United States Constitution also prohibits any law "abridging the freedom of speech, or of the press."[15]

Part I compares English libel law and American libel law. Particularly, the elements required to prove libel will be discussed according to the American and British libel laws. Part II focuses on the necessity of judicial restraints, especially the United States' use of judicial restraints in "libel tourism" through the use of several newly implemented statutes. Part III, the main crux, will discuss why the Free Speech Protection Act of 2009 should be passed into law as a necessary judicial restraint against foreign libel judgments. Specifically, the passage of this Act will be supported by the First Amendment's freedom of speech principles and the common law doctrine of *forum non conveniens*. Part IV contains the conclusion.

II. THE PARADOX BETWEEN BRITISH LIBEL LAW AND AMERICAN LIBEL LAW

Although much of the United States' laws are derived from British law, several laws are not in accord with those used by the British courts. The United States' laws on libel (*i.e.*, defamation) aim to protect speech more than the reputation or privacy of the person, as opposed to the British laws, which aim to protect the person's reputation and privacy more than the speech itself.[16]

Because of the importance of each country's respective laws regarding defamation, it is necessary to outline and compare the differences between British and American libel laws.[17] During the past years, foreign plaintiffs have applied U.K. libel laws to books that were written and published by American authors within the United States' boundaries.[18] However, these

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15. U.S. CONST. amend. I. *See also* Sturtevant, *supra* note 4, at 273 ("The constitution is not intended to protect intentional misrepresentation or malicious statements about others.").

16. *See infra* Parts II.A. and II.B.

17. *See* Kevin Mitchell, *Libel Tourism is no Vacation for Americans*, AVIATION DAILY, Oct. 13, 2009, at 5 [hereinafter Mitchell] (stating that United Kingdom defendants have to prove that allegations are true, while United States plaintiffs must prove allegations are false in a defamation suit).

18. Allan I. Mendelsohn, *Judicial Restraint in International Law*, THE FED. LAWYER, May 2010, at 53.

authors, whom have been victims of foreign defamation laws, did not have any publications overseas where they were sued by the foreign defendants. Nonetheless, because of today's technology, the books can be found in the U.K. through the internet.[19] As a result, the libel laws of the U.K. have been applied to American authors, instead of the more appropriate United States' defamation laws.

A. Elements Necessary to Prove Libel under American Law

1. *N.Y. Times Co. v. Sullivan*

In the United States, in order for a communication to be defamatory, the statement must "harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[20] In *N.Y. Times Co. v. Sullivan*, a Montgomery commissioner brought a civil libel suit against four petitioners and the New York Times Company for publishing in the New York Times newspaper a full-page advertisement that discussed the "negro students" engagement in non-violent demonstrations.[21] The advertisement allegedly accused the police for shooting their shotguns and using tear gas on the students in response to their demonstrations.[22] Even though the petitioner was not directly named in the advertisement, he argued that the paragraph stating "they have bombed his home almost killing his wife and child" accused the Montgomery police and him personally.[23] He contended that the word "police" referred to him as the Montgomery commissioner who supervised the police; thus, accusing him for the mishap in the school campus that involved the police.[24]

Under Alabama law, publications are considered "libelous per se" if the words tend to injure the person's reputation.[25] However, the United States Supreme Court held that a public official can recover damages for a defamatory statement relating to his official conduct only if the person can prove that the statement was made with "actual malice," that is "with knowledge that it was false or with reckless disregard of whether it was

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19. *Id. See also* Mitchell, *supra* note 17, at 5 ("The near perfect reach of the Internet has placed Americans, their free speech and their finances in harm's way.").

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

21. *Sullivan*, 376 U.S. at 256–57.

22. *Id.*

23. *Id.* at 257–58.

24. *Id.* at 258.

25. *Id.* at 267 (similar to British libel laws, see *infra* Part II.B).

false or not."[26] As a result, the United States Supreme Court held that there was insufficient evidence of the defendant acting with actual malice.[27] Even if the advertisement was incorrect or inaccurate in some ways, there was no proof of malice, so no libel.[28]

2. *Curtis Publ'g Co. v. Butts*

On a similar note, in *Curtis Publ'g Co. v. Butts*, the petitioner accused the respondent for allegedly conspiring to "fix" a football game between the University of Georgia and the University of Alabama.[29] The defamation claim came about because George Burnett had accidently overheard the respondent, an athletic director at the University of Georgia, give Georgia's plays to the University of Alabama coach.[30] Because the *Sullivan* case highlighted the importance of a public official who can recover for a defamatory falsehood, the Court in *Butts* explained the difference when one is a public figure.[31] A public figure who is not a public official can recover damages based on a defamatory statement when the substance of the statement creates a substantial danger to the person's reputation, "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[32]

3. *Gertz v. Robert Welch, Inc.*

Gertz v. Robert Welch, Inc. involved an attorney, the petitioner, who was retained to represent a family because one of the family members was shot by a police officer.[33] As a result of the litigation, the respondent, an author in "American Opinion" published an article which stated that the attorney was involved with the "Marxist League for International

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26. *Sullivan*, 376 U.S. at 279–80. *See generally* Gertz v. Robert Welch, Inc., 418 U.S. 323, 331–32 (1974) (The failure to investigate does not amount to a reckless disregard for the truth, but rather a reckless disregard requires a "high degree of awareness of . . . probable falsity." (citing St. Amant v. Thompson, 390 U.S. 727, 731 (1968))).

27. *Sullivan*, 376 U.S. at 285–86.

28. *Id. See also* RESTATEMENT (SECOND) OF TORTS § 613 (1977) (discussing the elements necessary in an action for defamation).

29. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 135–36 (1967).

30. *Id.*

31. *Id.* at 154–57.

32. *Id.* at 155. The public interest involved in the case included the materials that were being circulated regarding the 'fix' on the football game.

33. *Gertz*, 418 U.S. at 325.

Democracy."[34] Thereafter, the attorney claimed that the false statements injured his reputation as a lawyer and citizen.[35] Because the attorney was neither a public figure nor a public official, the Court ruled that he was a private figure who could recover compensatory damages for libel on a lesser showing than that required under the *Sullivan* analysis.[36]

Hence, a private figure is an average person who is not a public official or public figure. Because of the fact that the private person is not in the "spotlight" and is more vulnerable to injury than public officials and public figures, it is easier to recover damages in a libel lawsuit.[37] However, a private figure who does not prove knowledge of falsity or reckless disregard for the truth, can only recover compensation for actual injury, which is not limited to out-of-pocket loss.[38] Accordingly, a private figure can recover punitive damages or presumed damages if the plaintiff proves the defendant acted with actual malice, except when the defamatory statement does not involve a matter of public concern.[39]

The Court further explained two different categories of public figures. The first includes public figures that voluntarily expose themselves to the risk of injury from defamatory falsehoods.[40] Those public figures draw themselves into a particular public controversy and, thus, become a public figure for a limited range of issues.[41] The second category of public figures involves those individuals who achieve "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts" (*i.e.*, celebrities).[42]

Thus, the American defamation laws require a court to determine the plaintiff's status. If the plaintiff is a public official, then the plaintiff can recover for defamatory falsehoods relating to the plaintiff's official conduct only if the plaintiff can prove that the statement was made by the defendant with actual malice. If a plaintiff is a public figure, one must determine whether the person has pervasive fame/notoriety or whether the plaintiff is a public figure for a particular controversy and whether the defamatory statement was related to that controversy for which the plaintiff has made oneself a public figure. If the plaintiff is a private figure, the plaintiff has a

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34. *Id.*

35. *Id.*

36. *Id.* at 348–49.

37. *Id.* at 345–46.

38. *Gertz*, 418 U.S. at 349–50.

39. *Id.* at 346.

40. *Id.* at 351–52.

41. *Id.*

42. *Id.*

lesser burden of proof needed to obtain compensatory damages, but still has the burden of proving actual malice for punitive damages. The United States' defamation laws aim to put the burden of proof on the plaintiff for proving injury and damages.

B. Elements Necessary to Prove Libel under British Law

1. Is There a Protection to Freedom of Expression?

Like the protection afforded to Americans under the First Amendment's freedom of expression, much of the British law's right to freedom of expression stems from Article Ten of the Convention for the Protection of Human Rights and Fundamental Freedoms[43], alternatively known as the European Convention for the Protection of Human Rights (ECHR). While European countries are rightfully free to create their own laws on freedom of expression, many European countries are influenced by the ECHR.[44] Article Ten states that "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive the impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."[45] While a publisher has the freedom to express one's opinion, the privilege is not absolute because it can be restricted by legislation in order to protect the reputation or rights of others.[46]

The British libel laws are much like strict liability.[47] Unlike the United States' rules, under British law "publishers may be held liable even for statements that were honestly believed to be true, and published without

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43. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention].

44. *See* Heather Maly, *Publish at Your Own Risk or Don't Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-Guaranteed,* 14 J.L. & POL'Y 883, 887 (2003) [hereinafter *Forum Shopping*] (While the European Convention on Human Rights may be influential on European Countries, the European Convention on Human Rights decisions are only binding on the countries involved in a particular case. However, these decisions are highly influential on European Countries, particularly in the United Kingdom where "British Judges do pay heed to the freedom of expression principle as defined by the ECHR and interpreted by the Court.").

45. Convention, *supra* note 43, at art. 10.

46. Jameel v. Wall St. Journal Eur. S.P.R.L. [2006] UKHL 44, [2007] 1 A.C. 359, 374, ¶ 19 (appeal taken from Eng.).

47. *See* Sarah Staveley-O'Carroll, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment,* 4 N.Y.U. J. L. & LIBERTY 252, 257 (2009) [hereinafter *Libel Tourism Laws*] (citing RODNEY A. SMOLLA, LAW ON DEFAMATION § 1:9 (2d ed. 1999) [hereinafter SMOLLA]).

negligence."[48] The tort of libel under British law is considered to be "actionable per se."[49] All a plaintiff must prove is that the publication was a false statement that damaged his or her reputation without lawful justification.[50] There are no other special pleadings required from the plaintiff; mere proof of injury is sufficient to amount to libel.[51] However, a defendant may, as a legal defense, prove the substantial truth to every material fact.[52] While it may seem simple to prove the truth, it is not so easy because the defendant must prove truth to every material fact, which includes anything that "adds weight to the imputation."[53]

2. The Exception to Defamatory Publication

British courts have provided certain exceptions to the strict liability imposed on defendants. One of these exceptions includes the "qualified privilege" or the "responsible journalism" exclusion.[54] In *Jameel v. Wall St. Journal Europe*, the Wall Street Journal of Europe newspaper published an article after the atrocious events of September 11, 2001 in which certain companies, including the plaintiff's company, were connected to providing financial assistance to terrorist groups such as Al-Qaeda.[55] The House of Lords held that the privilege is successful; therefore, the publication is allowed if:

1) The publication is of public interest;
2) The inclusion of the defamatory statement was justifiable; and
3) If the publication and defamatory statement passes the public interest test, then it shifts the question to whether the

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48. SMOLLA, *supra* note 47, at §1:9.

49. *Jameel*, 1 A.C. at 372, ¶ 12.

50. *Id.*

51. *Id.*

52. *See* Sturtevant, *supra* note 4, at 275 (citing Raymond W. Beauchamp, *England's Chilling Forecast: The Case for Granting Declaratory Relief to Prevent Defamation Actions from Chilling American Speech*, 74 FORDHAM L. REV. 3073, 3078 (2006)).

53. *Id.*

54. *Libel Tourism Laws*, *supra* note 47, at 257.

55. *Jameel*, 1 A.C. at 369, ¶ 4.

> steps taken to gather and publish the information were reasonable and fair (*i.e.*, the "reasonable journalism" test).[56]

Finally, the burden of proving whether a statement is of public interest rests on the judge.[57] The House of Lords concluded that because the article was published at a time when people were extremely vigilant of the ongoing September 11, 2001 situation, the statements in the article were of public concern.[58] Particularly, the subject of the article "was to inform the public that the Saudis were cooperating with the U.S. Treasury in monitoring accounts. It was a serious contribution in measured tone to a subject of very considerable importance."[59]

III. THE NECESSITY OF JUDICIAL RESTRAINT

A. *What is a Judicial Restraint?*

Pursuant to *Black's Law*, judicial restraint is a "restraint imposed by a court, as by restraining order, injunction, or judgment."[60] In other words, it is the doctrine whereby a court refuses (for constitutional, statutory, or public policy reasons) to enforce a judgment of another state or country. In relation to the doctrine of judicial restraint, the doctrine of comity comes into play when a plaintiff tries to enforce a foreign defamatory judgment in a United States court against the defendant. Comity is "a practice among political entities involving mutual recognition of legislative, executive, and judicial acts."[61] Under the Full Faith and Credit Clause of the United States Constitution, the "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State."[62]

This essentially means that states must enforce or recognize sister state's records, acts, or judicial proceedings. However, because the constitutional provision does not include the right to enforce foreign judgments, records, or acts, the doctrine of comity is used. Comity is

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56. *Id.* at 381–83, ¶¶ 48, 51, 53 (stating that in order to prove element two, the public interest must be part of the story). *See also* Reynolds v. Times Newspapers Ltd., [2001] 2 A.C. 127, 159 (H.L.) (appeal taken from Eng.) (discussing an explanation on the qualified privilege).

57. *Jameel*, 1 A.C. at 382, ¶ 49 (noting that the court looks at the article as a whole and does not isolate the defamatory statement).

58. *Id.*

59. *Id.*

60. BLACK'S LAW DICTIONARY 705 (8th ed. 2005).

61. *Id.* at 223.

62. U.S. CONST. art. IV, § 1.

similar to the Full Faith and Credit Clause in the United States Constitution, but it is not governed by the United States Constitution or federal statutes.[63] "The doctrine of comity is one of deference and respect among tribunals of overlapping jurisdiction; in accordance with comity, the courts of one state or jurisdiction gives effect to the laws and judicial decisions of another, not as a matter of obligation but out of deference and respect."[64]

Hence, under the doctrine of comity, a state need not enforce a foreign act, record, or judicial proceeding if it is contrary to the public policy of the state.[65] These doctrines are essentially related to the use of judicial restraint through state statutes that bar enforcement of foreign defamation judgments because the state restrains the enforcement of the foreign suit. Fundamentally, the state is using the principle of comity by not enforcing the foreign judgments if they do not comport with the United States Constitution or the appropriate state constitution.

B. United States Court's Use of Judicial Restraints in "Libel Tourism"

1. New York Statute

As a result of the holding in *Ehrenfeld*, discussed previously, the New York legislature in 2008 passed a statute enforcing the concept of judicial restraint by restraining (*i.e.*, not recognizing) a foreign country's judgment if:

> The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.[66]

As stated earlier in *Ehrenfeld*, Ms. Ehrenfeld filed a declaratory judgment in the State of New York for the courts to not enforce the foreign, English libel default judgment against her in New York.[67] However, this

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63. *See* Greater Canton Ford Mercury, Inc. v. Ables, 948 So. 2d 417, 425 (Miss. 2007) (citing Laskosky v. Laskosky, 504 So. 2d 726, 729 (Miss. 1987)).

64. 16 AM. JUR. 2D *Conflict of Laws* §11 (2010) [hereinafter Conflict of Laws] (citing Matanuska Elec. Ass'n, Inc. v. Chugach Elec. Assn, Inc., 99 P.3d 553, 553 (Ala. 2004)).

65. *See* Conflict of Laws, *supra* note 64, at §11.

66. N.Y. C.P.L.R. 5304(b)(8) (McKinney 2009).

67. *Ehrenfeld*, 9 N.Y.3d at 506.

required the New York courts to establish personal jurisdiction over Mr. Bin Mahfouz, which the court clearly lacked.[68] Hence, the current statute that went into effect in 2008 simply overruled the *Ehrenfeld* decision by not recognizing foreign defamation judgments which are contrary to the freedom of speech and press doctrines embedded within the United States Constitution. This newly implemented statute is a pertinent example of judicial restraint against foreign libel judgments. The foreign judgment Mr. Bin Mahfouz obtained against Ms. Ehrenfeld did not provide at least as much protection for freedom of speech as that provided by the United States and New York Constitutions.

Under the United States Constitution, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[69] As held in *Sullivan*, a public figure or public official plaintiff must prove actual malice in order to obtain damages against a defendant who published an allegedly defamatory statement about the plaintiff.[70] Similarly, under the New York Constitution:

> Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.[71]

Hence, the judgment obtained in England against Ms. Ehrenfeld did not meet the "freedom of speech and press" standards embedded in the United States and New York Constitutions because the judgment abridged and restrained Ms. Ehrenfeld's right to have the public freely access her book. If there was such an abuse of the right to publish freely, Mr. Bin Mahfouz failed to prove actual malice as required under the American laws.

2. California Statute

Another similar statute to that of the New York statute and another example of judicial restraint against foreign defamation lawsuits is the California statute on the standards for recognition of foreign judgments. In

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68. *Id.*

69. U.S. CONST. amend. I.

70. *Sullivan*, 376 U.S. at 279–80.

71. N.Y. CONST. art. I, § 8.

2009, the California Code of Civil Procedure was amended to add subdivision (c)(9) of section 1716.[72] This new provision states that a foreign country's judgment is not recognized in California if "the judgment includes recovery for a claim of defamation unless the court determines that the defamation law applied by the foreign court provided at least as much protection for freedom of speech and the press as provided by both the United States and California Constitutions."[73] Consequently, if a person was sued overseas for an alleged defamatory work that was published in the United States and the plaintiff wanted to enforce the judgment in California, the plaintiff would have to win a judgment while meeting the standards for protection afforded by the United States and California Constitutions. Like the New York Constitution, the California Constitution provides that "every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."[74]

3. Florida Statute

The Florida statutes seeking non-recognition of foreign judgments is substantially similar to that of the New York and California statutes. In Florida, an out-of-country foreign judgment is not recognized if:

> The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court sitting in this state before which the matter is brought first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the United States Constitution and the State Constitution.[75]

The Florida Constitution provides that:

> Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter

72. CAL. CIV. PROC. CODE §1716(c)(9) (West 2010).

73. *Id.*

74. CAL. CONST. art. I, § 2(a).

75. FLA. STAT. § 55.605(2)(h) (2009).

> charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.[76]

Furthermore, not only does Florida not recognize any foreign defamation judgment that does not comply with the Florida and United States Constitutions, but the courts of Florida have personal jurisdiction over a person who sued a resident of Florida outside the United States[77] Hence, the New York, California, and Florida statutes all provide protections of freedom of speech and the press to publishers who publish books, articles, and other periodicals that are found to be defamatory by the defendant in a foreign tribunal. All statutes provide a necessary judicial restraint whereby courts are empowered by the United States Constitution and the individual state constitutions not to enforce or recognize foreign judgments that are contrary to the most fundamental liberties and rights that are given by the United States Constitution to its people. This liberty is extremely important because when a plaintiff can simply sue another individual for the defendant's unknown state of mind, without any malice or injury caused by the defendant, then what good is it to have and uphold First Amendment rights? The First Amendment makes the United States a country where one may freely enjoy the right to speak one's mind and not live in fear because of possible prosecution for stating an opinion contrary to the government's, community's, or individual's belief.

IV. WHY THE FREE SPEECH PROTECTION ACT OF 2009 SHOULD BE PASSED AS A NECESSARY JUDICIAL RESTRAINT

The Free Speech Protection Act of 2009 should be passed into law because the main purpose of this law is to secure the "free expression and publication by journalists, academics, commentators, experts, and others of the information they uncover and develop through research and study."[78] The reason for the proposed legislation is to secure the fundamental First Amendment rights that are denied to United States journalists by foreign courts and plaintiffs who sue these journalists abroad for speech that is

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76. FLA. CONST. art. I, § 4.

77. FLA. STAT. § 55.6055(1)(a) (2009). Florida also obtains personal jurisdiction over a person or entity that is amenable to the Florida jurisdiction, over a person who has assets in Florida, or over a person who may have to take action in Florida to comply with the foreign judgment. Also, note that this provision which upholds personal jurisdiction over the defendant who sued the plaintiff overseas is an excellent statute that would have been helpful in the *Ehrenfeld* decision adjudicated in New York.

78. H.R. 1304, 111th Cong. § 2(3) (2009).

primarily uttered within the United States' boundaries.[79] The results of passing this legislation into concrete law is imperative because most of the actions that foreign plaintiffs bring against United States journalists are simply to intimidate them and to suppress their freedom of expression through a libel cause of action, even if the protected speech did not occur extraterritorially.[80]

To bring a cause of action under the Free Speech Protection Act of 2009 in a United States district court, speech has to be:

> 1) Primarily uttered, published, or disseminated in the United States;
> 2) The speech cannot constitute defamation under the United States' laws; and
> 3) There has to be a suit by a foreign individual in a foreign court against the person who uttered, disseminated, or published the speech in the United States.[81]

Like the Florida statute, the federal district court retains personal jurisdiction over the person or entity that brings the foreign suit abroad and serves or causes to serve "any documents in connection with the foreign suit on a United States person with assets in the United States against which the claimant in the foreign lawsuit could execute if a judgment in the foreign lawsuit were awarded."[82] The remedy to be sought by passing the Free Speech Protection Act of 2009 is that if the cause of action is established and successful in a foreign tribunal, this foreign judgment will not be enforced in the United States.[83] Hence, under the doctrine of comity, the United States' courts would exercise their right to not enforce a foreign judgment that is in contravention to the United States Constitution and public policy (*i.e.*, in opposition to the right of freedom of expression and free speech). The use of comity (a form of judicial restraint) simply

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79. *See id.*

80. *See* Rachel Ehrenfeld, *Ending British Abridgement of Free Expression*, WASH. TIMES, Mar. 1, 2010, at B4, *available at* http://www.washingtontimes.com/news/2010/mar/01/ending-british-abridgement-of-free-expression/ (last visited July 25, 2010) ("The Free Speech Protection Act provides protection to all United States-based authors and publishers from libel judgments in any country that has lesser protection for free speech than the United States Constitution.").

81. H.R. 1304, § 3(a).

82. *Id.* § 3(b).

83. *Id.* § 3(c).

bolsters the United States' legal system by protecting the fundamental right of freedom of speech.[84]

"[D]ebate on public issues should be uninhibited, robust, and wide-open . . . and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[85] The First Amendment rights of freedom of speech and of the press are well known concepts in the United States because the freedom of speech essentially is the apple pie of United States law. If the United States courts would enforce foreign judgments that undercut a person's right to free speech and the press, what use would it be to tell United States journalists that they have the right to publish as they wish? It would simply be a paradox because the law grants the right to publish one's expression, yet one cannot publish because one can be sued abroad for libel. This is why the Free Speech Protection Act of 2009 needs to be passed into law; avoid this paradox. The founding fathers of the United States ensured the freedom of expression to the people by establishing a First Amendment right granted to all.[86] The Free Speech Protection Act of 2009 is intended not to chill the right to free speech. Not only do the defamation lawsuits abroad embarrass the publisher's professionalism and ethical standards, but it also exposes them to harassment and humiliation. "As a result, American publishers are increasingly unwilling to publish material that exposes the embarrassing, suspicious, or criminal dealings of wealthy people."[87]

In the United States, speech cannot be suppressed (especially if it is protected by the First Amendment) without showing that a restriction is justified.[88] Thus, through the use of the Free Speech Protection Act of 2009, the United States courts will not enforce foreign libel judgments that do not demonstrate why the restriction of the publisher's speech was restricted or punished without sufficient justification. Thus, the necessity of judicial restraint plays a key role in these cases because courts cannot enforce judgments that do not comport with the United States law and public policy. To suppress a publisher's speech is to suppress "the widest possible dissemination of information from diverse and antagonistic

84. *But see* Sturtevant, *supra* note 4, at 270 ("[N]otions of comity espoused by the United Nations, international treaties, and federal and state legislation, which blindly enforce libel judgments rendered abroad, or fail to review them, simply undercut our domestic legal system, libel law, and our Constitutional right to freedom of speech.").

85. *Sullivan*, 376 U.S. at 270.

86. Jon Golinger, *Shopping in the Marketplace of Ideas: Why Fashion Valley Mall Means Target and Trader*, 39 GOLDEN GATE U. L. REV. 261, 288 (2008) (citing The Honorable John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1312 (1993)). *See also* U.S. CONST. amend. I.

87. *Libel Tourism Laws*, *supra* note 47, at 269.

88. *Sullivan*, 376 U.S. at 280.

sources."[89] If United States publishers are sued abroad for publication disseminated at home, the publishers will fear to do their work; therefore, the general public will not have access to some of the most important information needed for informed judgments. While the United States grants the privilege to speak one's mind, the ability to do so does not always bring such good taste to all. Nonetheless, one's speech should not be suppressed simply because another does not agree with the speech uttered or written by someone else.[90] Clearly, the Free Speech Protection Act of 2009 has brought and may bring criticism by British courts; however, the exploitation of American publishers in plaintiff-friendly countries makes a great argument for enacting this pending legislation. While British law may "strike a balance between freedom of information . . . and the protection of the honour and reputation of individual citizens on the other hand,"[91] the United States' laws have the same purpose but the burden is on the plaintiff to prove actual malice, not on the defendant to prove truth.[92]

Another justification in passing the Free Speech Protection Act of 2009 as a necessary judicial restraint on foreign libel judgments is the doctrine of *forum non conveniens*. "The Common law doctrine of *forum non conveniens* exists at the state and federal level."[93] This common law doctrine is a "doctrine that allows a court to dismiss a case, although personal jurisdiction and venue are proper, when such a dismissal would serve the convenience of the parties and the ends of justice."[94] It is important to understand that because it is a common law doctrine created by the judiciary;[95] this is a distinction from the federal change-of-venue statute, which allows a district court to transfer "any civil action to any other district or division where it might have been brought."[96] The *forum non*

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89. *Id.* at 266 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

90. *See Sullivan*, 376 U.S. at 273 ("Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.").

91. Mardas v. N.Y. Times Co., [2008] EWHC (QB) 3135, ¶ 13.

92. *Sullivan*, 276 U.S. at 280.

93. MARC ROHR, CASES AND MATERIALS ON CIVIL PROCEDURE 255 (2009) [hereinafter ROHR].

94. Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non-Conveniences and the International Plaintiff*, 77 CORNELL L. REV. 650, 650 (1992) (stating that when a defendant invokes the doctrine of forum non conveniens, there is an understanding that the case will be filed in a more appropriate forum (citing Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1992))).

95. ROHR, *supra* note 93, at 255.

96. 28 U.S.C. § 1404(a) (2000).

conveniens doctrine allows a defendant to dismiss the case in a United States court to then have the plaintiff file the case in a foreign tribunal, while the federal change-of-venue statute allows a transfer of a case to any other district within the United States' jurisdiction. This doctrine of *forum non conveniens* is sometimes used by federal courts. According to 28 U.S.C. § 1404(a), there is no dismissal, but rather a transfer to a United States district court.[97] In *Piper Aircraft Co. v. Reyno*, the Court held that "the *forum non conveniens* determination is committed to the sound discretion of the trial court."[98]

In *Koster v. Lumbermens Mut. Casualty Co.*, which involved a plaintiff who sued in his home forum of New York, the Court stated that:

> Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantage of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems.[99]

Thus, what the *Koster* case concluded was that if a plaintiff sues in his or her forum, a court has to keep the case in that forum unless the defendant can "establish such oppressiveness and vexation . . . as to make all proportion to plaintiff's convenience . . . ."[100] Similarly, in *Gulf Oil Corp. v. Gilbert*, the court outlined several public and private interest factors that may be considered in determining whether to grant the defendant's right to *forum non conveniens*.[101] This private interest includes the private interest of the litigant.[102] The private interest of the litigant is taken into account by considering:

> The relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of

97. *Id.*

98. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981).

99. Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947).

100. *Id.*

101. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947).

102. *Id.* at 508.

> premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.[103]

In addition to the private interests, the courts consider public factors. Such public factors include the burden on the jury, alleviation of congested court dockets, and:

> The local interest in having the localized controversies decided at home, and the appropriateness in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.[104]

A presumption was created in the *Gilbert* case when the Court held that "unless the balance of these factors is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[105] In applying the *forum non conveniens* analysis to the Free Speech Protection Act of 2009, if a foreign plaintiff seeks to sue a United States publisher in a forum of the plaintiff's choice, this raises the question of *forum non conveniens* because:

1) United States courts have a greater interest in the defamation suit because the speech that is being punished was primarily uttered, published, or disseminated within the United States;
2) United States courts would be more familiar with the appropriate libel laws that are to be applied to a person who published within the United States;
3) There is a relative easier access of proof if defamation exists under appropriate United States courts rather than a British court because of the standard of proof required for a

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103. *Id.*

104. *Id.* at 509.

105. *Id.* at 508.

plaintiff to prove defamation against a United States publisher; and

4) The defendant-publisher can establish such oppressiveness and vexation as to make all proportions to the plaintiff's convenience.[106]

First, a foreign plaintiff has a greater private interest in litigating a defamation lawsuit abroad because the plaintiff has a higher chance of success if he or she chooses to sue abroad, such as in British courts, because of the plaintiff-friendly laws. Secondly, the public interests are in favor of litigating in the United States' courts because there is no public interest in American defendants who have published within the United States as opposed to overbroad, such as England, to travel abroad for a lawsuit. The only small factor that weighs in favor of the foreign tribunals is where a plaintiff lives, the jurisdiction in which he or she is suing in, and also where a few publications were disseminated. Lastly, a foreign plaintiff who seeks a defamation judgment against the American defendant creates an oppressive and vexatious lawsuit against the defendant because:

1) The defendant has no connection to the foreign tribunal;
2) The defendant has not published in the foreign country;
3) Foreign tribunals have no personal jurisdiction over the defendant;
4) Foreign courts' defamation laws do not comply with the United States' First Amendment freedom of speech and the press; and
5) The foreign courts' defamation laws do not comply with the appropriate state's constitutional rights on freedom of speech and the press.[107]

However, while some foreign tribunals might not possess such similar doctrines as the United States' *forum non conveniens*, foreign courts should consider the use of this doctrine because of the unfairness imposed on the defendant. Clearly, the doctrine need not be invoked by a foreign defendant in a United States court because the issue to be decided is appropriate in a United States forum, not a foreign forum. The United States Congress should consider Florida, New York, California, and other states' responses to the pandemonium of "libel tourism." Those states which have considered the desperate need to protect publishers who have published at home are truly protecting the ideals of the First Amendment.

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106. *See Gilbert*, 330 U.S. at 508–09.

107. *See, e.g.*, CAL. CIV. PROC. CODE § 1716(c)(9); FLA. STAT. § 55.605(2)(h); N.Y. C.P.L.R. 5304(b)(8); *Ehrenfeld*, 9 N.Y.3d at 507.

V. CONCLUSION

The passage of the Free Speech Protection Act of 2009 is extremely important. It is a statute that encompasses both the protection of freedom of speech and of the press. Our notion of liberty is incompatible with punishing someone for using their freedoms and publishing their thoughts and expressions. The Free Speech Protection Act of 2009 needs to be passed into law. This Act serves as a necessary judicial restraint against foreign libel judgments by not enforcing these distorted judgments that inhibit a publisher's right to free speech and free press and by protecting the right to publish authentic materials and information.