THE FREE SPEECH PROTECTION ACT OF 2009: PROTECTION AGAINST SUPPRESSION

INTRODUCTION

In 2003, Dr. Rachel Ehrenfeld published a book in the United States titled *Funding Evil: How Terrorism is Financed—and How to Stop It*.[1] In the book, she alleged that a wealthy Saudi Arabian businessman named Khalid Salim Bin Mahfouz was funding al Qaeda and other terrorists.[2] The British publisher cancelled its deal with Ehrenfeld after receiving a threat of a lawsuit by an unnamed Saudi.[3] After the book was published in the United States, Mahfouz's lawyers asked Ehrenfeld to retract what she said, but she refused.[4] Mahfouz filed suit against Ehrenfeld in England for libel, asserting English courts had jurisdiction over her based on twenty-three copies of the book that had been purchased in England over the Internet and a chapter posted on an ABCNews.com website available in England.[5] Ehrenfeld chose not to appear to contest the suit on advice of English counsel, and received a judgment against her for $225,000.[6] Ehrenfeld accepted the default judgment because she believed it was better than dealing with the high cost of litigation and procedural barriers in England, and because of her disagreement in principle with being sued in a libel-friendly jurisdiction where she did not even make the speech at issue.[7]

Ehrenfeld instead filed a suit of her own in the U.S. District Court for the Southern District of New York, seeking a declaratory judgment that Mahfouz could not prevail based on the allegedly libelous statements at issue and that the English judgment was not enforceable in the United States or New York.[8] The district court held that it lacked personal jurisdiction over Mahfouz based on a New York long-arm statute.[9] In response to a certified question to the U.S. Court of Appeals for the Second Circuit, the Court of Appeals of New York ruled that

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1 RACHEL EHRENFELD, FUNDING EVIL: HOW TERRORISM IS FINANCED—AND HOW TO STOP IT (Expanded ed. 2005).

2 *Id.* at 22.

3 Sarah Lyall, *Are Saudis Using British Libel Law to Deter Critics?*, N.Y. TIMES, May 22, 2004, at B7.

4 Jeffrey Toobin, *Let's Go: Libel*, NEW YORKER, Aug. 8, 2005, at 36, *available at* http://www.newyorker.com/archive/2005/08/08/050808ta_talk_toobin.

5 *See* Ehrenfeld v. Mahfouz, 881 N.E.2d 830, 832 (N.Y. 2007).

6 Floyd Abrams, *Foreign Law and the First Amendment*, WALL ST. J., Apr. 30, 2008, at A15.

7 *Ehrenfeld*, 881 N.E.2d at 832–33.

8 *Id.* at 833.

9 *Id.*

Mahfouz had not transacted sufficient business in New York to be subject to jurisdiction under the statute.[10] Although the court limited itself to deciding personal jurisdiction, it described the issue as "libel touris[m]" and said the legislature could address the problem.[11]

The New York state legislature responded by passing the Libel Terrorism Protection Act,[12] which provided that a foreign judgment need not be recognized unless the New York court first determines that the foreign defamation law under which a suit is brought provides as much or more protection for freedom of speech and the press as is provided by the U.S. Constitution and New York Constitution.[13] The Act also modified New York's long-arm statute to allow personal jurisdiction in cases such as Ehrenfeld's.[14]

The U.S. House of Representatives passed a bill similar to the New York law in September 2008, H.R. 6146, providing that "a domestic court shall not recognize or enforce a foreign judgment for defamation that is based upon a publication concerning a *public figure or a matter of public concern* unless . . . the foreign judgment is consistent with the [F]irst [A]mendment."[15] Though this bill only affected cases involving a public figure *or* a matter of public concern, it extends to protect individuals such as Ehrenfeld, who write about matters of public concern like terror financing and public figures like Mahfouz.

In April 2008, another measure, the Free Speech Protection Act of 2008, was introduced in the House[16] and in May 2008 was introduced in the Senate.[17] The Free Speech Protection Act of 2008 would have expanded the protection created in New York's Libel Terrorism Protection Act and H.R. 6146 by providing a non-enforcement provision and a countersuit cause of action for U.S. citizens.[18] It then stated "findings" explaining why the cause of action is necessary.[19] The cause of action, in section 3(a), stated as follows:

> Any United States person against whom a lawsuit is brought in a foreign country for defamation on the basis of the content of any writing, utterance, or other speech by that person that has been

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[10] *Id.* at 831, 833 (citing N.Y. C.P.L.R. 302(a)(1) (McKinney Supp. 2010)).

[11] *Id.* at 833–34 & n.5.

[12] 2008 N.Y. Laws 66.

[13] *Id.* § 2 (amending N.Y. C.P.L.R. 5304 (McKinney Supp. 2010)).

[14] *Id.* § 3 (amending N.Y. C.P.L.R. 302 (McKinney Supp. 2010)).

[15] H.R. 6146, 110th Cong. § 2(a) (2008) (emphasis added).

[16] H.R. 5814, 110th Cong. (2008).

[17] S. 2977, 110th Cong. (2008).

[18] S. 2977; H.R. 5814. The stated purpose of the Act is "[t]o create a Federal cause of action to determine whether defamation exists under United States law in cases in which defamation actions have been brought in foreign courts against United States persons on the basis of publications or speech in the United States." S. 2977.

[19] *See* S. 2977 § 2.

> published, uttered, or otherwise disseminated in the United States may bring an action in a United States district court specified in subsection (f) against any person who, or entity which, brought the foreign suit if the writing, utterance, or other speech at issue in the foreign lawsuit does not constitute defamation under United States law.[20]

The Free Speech Protection Act of 2008 continued by discussing jurisdiction, remedies, damages, and other items.[21]

The Free Speech Protection Act of 2008 was reintroduced in both the House and the Senate last year as H.R. 1304[22] and S. 449,[23] both titled the Free Speech Protection Act of 2009, ("the Act") and is currently sitting in committee.[24] The current House version of the Act has been changed so that now the speech must be "disseminated *primarily* in the United States."[25] The current Senate version of the Act requires that the speech be "*primarily* disseminated in the United States," and that "the person or entity which brought the foreign lawsuit serves or causes to be served any documents in connection with such foreign lawsuit on a United States person."[26] These additional requirements result in a slightly narrower cause of action in both the current House and Senate versions of the Act, but one that is still a worthwhile attempt at dealing with forum shopping.

This Note recommends passage of the Free Speech Protection Act of 2009 because of the need for its proactive protection of free speech. Part I of this Note compares defamation law in the United States with that of other countries because application of the Act itself hinges on defamation law. Part II defines and examines the cause of action given in the Act. Part III examines types of cases affected by the cause of action and discusses why it is important in light of international

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[20] *Id.* § 3(a).

[21] *See id.* § 3(b)–(g) (2008); H.R. 5814 § 3(b)–(g) (2008). A complete examination of the Act is beyond the scope of this Note, which focuses on the cause of action. But some other parts of the Act, such as those governing personal jurisdiction and remedies, have to be discussed in order to have a complete picture. For example, personal jurisdiction may not exist when the plaintiff's actions are used as the basis to obtain jurisdiction over a defendant. As a commentator on New York's version of the Act noted, "Additionally, the provisos of the Act seem to provide personal jurisdiction based on the plaintiff's own actions rather than the defendant's independent activities, and, thereby, runs afoul of long standing Court of Appeals precedent." Kyle C. Bisceglie, Expert Commentary, Ehrenfeld v. Mahfouz, 9 N.Y.3d 501 (N.Y. 2007), *and the New York Libel Terrorism Protection Act,* 2008 EMERGING ISSUES 2485 (LEXIS). This Note urges passage based only on the merits of the underlying policy of the Act.

[22] H.R. 1304, 111th Cong. (2009).

[23] S. 449, 111th Cong. (2009).

[24] H.R. 1304 § 1; S. 449 § 1.

[25] H.R. 1304 § 3(a) (emphasis added).

[26] S. 449 § 3(a) (emphasis added).

differences in defamation law. Part IV examines non-defamation examples of chilling free speech and suggests modifications to this Act to help it deal with that problem.

I. U.S. DEFAMATION POLICY AND FOREIGN DEFAMATION POLICY

A. Defamation at Common Law

1. England

The common law of defamation existed long before the First Amendment. Throughout history, people have always been interested in protecting their good name and reputation.[27] In one early example, Alfred the Great accomplished this goal with the remedy of cutting out the defamer's tongue.[28] Early English defamation law descended from Roman law for the purpose of addressing wrongs done to a person's character, and the same purpose existed in Canon law applied before the year 1066.[29] But as post-Norman Conquest Canon law took jurisdiction over defamation, its "care over souls" approach caused the focus to move from remedying the harm done to reputation to "curing" the defamer by public penance.[30] During the fourteenth century, the English Star Chamber vigorously prosecuted criticism of the government as libel, and even truth was not a defense.[31] In the sixteenth century, slander was worked into the law but remained a tort very distinct from libel; part of the courts' reluctance to merge the two was due to their desire to continue to consider political libel as a more serious offense.[32]

By the end of the sixteenth century in England, defamation was in the jurisdiction of the common law courts.[33] In the late seventeenth century, a new form of libel law appeared in order to deal with noncriminal libel, and this was the civil libel law that continued to develop in the English common law.[34] The common law in England eventually developed into its current plaintiff-friendly status: the

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[27] *See* 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:1 (2d ed. 2009).

[28] Colin Rhys Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1052–53 (1962) (quoting 1 ENGLISH HISTORICAL DOCUMENTS 378 (Law No. 32) (Whitelock ed. 1955)).

[29] *Id.* at 1052, 1054.

[30] *Id.* at 1054–55, 1058 (citing Van Vechten Veeder, *The History of the Law of Defamation*, *in* 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 468 (Ass'n of Am. Law Sch. ed., Wildy & Sons Ltd. 1968)).

[31] *Id.* at 1060–62.

[32] *Id.* at 1070–71.

[33] 1 SMOLLA, *supra* note 27, § 1:3 (citing Lovell, *supra* note 28, at 1053).

[34] Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 569–70 (citing Frank Carr, *The English Law of Defamation*, 18 LAW Q. REV. 388, 393–94 (1902)). This article also gives an overview of early defamation history in England.

plaintiff must only show that the "defendant voluntarily communicated to someone [else] . . . a defamatory statement referring to the plaintiff."[35] This heavy protection for reputation is an obvious descendant of the goal of earlier defamation law to protect one's "good name."[36]

Today, defamation law in England generally is the same as it was at common law.[37] The policy of protecting individual reputation is still very present in a system in which a strict liability tort holds publishers liable for statements they honestly believed were true and did not publish negligently, even if the plaintiff is a public official or public figure who would be given less protection under U.S. law.[38] In *Telnikoff v. Matusevitch*, the court noted that "American and Maryland history reflects a public policy in favor of a much broader and more protective freedom of the press than ever provided for under English law," and went on to note that the British government has kept a tight rein on printed publications and the government criticism they would contain ever since the invention of the printing press.[39]

More recent British decisions do show a policy moving slightly in the direction of that of the United States.[40] In *Reynolds v. Times Newspapers Ltd.*, in which the plaintiff sued a newspaper for publishing material relating to his alleged dishonesty in his political career, Lord Nicholls considered, but ultimately rejected, a special category of qualified privilege for "political information," because it would not provide sufficient protection of reputation.[41] Even though rejecting a free speech approach, he showed a reluctance to infringe free speech in that,

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[35] Douglas W. Vick & Linda Macpherson, *Anglicizing Defamation Law in the European Union*, 36 VA. J. INT'L L. 933, 939 (1996) (citing Pullman v. Walter Hill & Co., [1891] 1 Q.B. 524, 527 (C.A.)).

[36] 1 SMOLLA, *supra* note 27, § 1:1.

[37] 1 SMOLLA, *supra* note 27, § 1:9; *see also* Raymond W. Beauchamp, Note, *England's Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 FORDHAM L. REV. 3073, 3087 (2006) (citing ERIC BARENDT ET AL., LIBEL AND THE MEDIA: THE CHILLING EFFECT 1 (1997) ("[D]efamation law in England . . . has not undergone the radical transformation that we have witnessed in the United States.")).

[38] 1 SMOLLA, *supra* note 27, § 1:9.

[39] 702 A.2d 230, 240 (Md. 1997).

[40] 1 SMOLLA, *supra* note 27, § 1:9.50 (citing Amber Melville-Brown, *The Impact of* Reynolds v. Times Newspapers, 18 COMM. LAW., Winter 2001, at 25); *see also* Marin Roger Scordato, *The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law*, 40 CONN. L. REV. 165 (2007) (commenting on a recent British case that essentially changed traditional British libel law, while also analyzing the results of the case holdings and comparing those results to defamation laws in the United States).

[41] [1999] UKHL 45, [2001] 2 A.C. 127 (appeal taken from Eng.) (U.K.).

"[t]o be justified, any curtailment of freedom of expression must be convincingly established by a *compelling* countervailing consideration."[42]

This deference to free speech is also seen in *Turkington v. Times Newspapers Ltd.* when, in dealing with a newspaper being sued by a law firm for publishing a report of a press conference at which comments critical of the law firm were made, the court recognized the need for more press freedom, noting that "the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."[43]

What *Reynolds* had promised, but not delivered, was fulfilled a few years later in the landmark decision of *Jameel v. Wall Street Journal Europe*,[44] which moved English defamation law even closer to that of the United States[45] after ruling on material published in a newspaper about multiple Saudi individuals and business interests with possible ties to terrorism.[46] In *Jameel*, the Lords ruled that when (1) there was a "public interest" in having the statement at issue in the "public domain," (2) the inclusion of the specific statement was justifiable (meaning it was necessary to the story), and (3) the gathering and publishing of the statement met the standards of "responsible journalism," then the statement is entitled to qualified privilege immunity, also called a "*Reynolds* privilege."[47]

Jameel has since opened the doors to a more publisher-friendly world in England. It has been applied in *Charman v. Orion Group Publishing Group Ltd.* to rule for a defendant who authored a book exposing corruption in a police force,[48] and in *Roberts v. Gable* to rule for a defendant magazine.[49] Yet the fact that the *Reynolds*, *McCartan*, and *Jameel* defendants were newspaper companies begs the question of how far the *Jameel* privilege rule will go in protecting other types of defamation defendants. Recently, speaking for the Court of Appeal of Jamaica, Lord Carswell said in *Seaga v. Harper*, that they saw "no valid reason why [the rule] should not extend to publications made by any person who publishes material of public interest in any medium, so long as [the publications meet the requirements laid out in *Jameel*]."[50]

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42 *Id.* (emphasis added).

43 [2000] UKHL 57, [2001] 2 A.C. 277 (appeal taken from N. Ir.) (U.K.).

44 [2006] UKHL 44, [2007] 1 A.C. 359 (appeal taken from Eng.) (U.K.).

45 Scordato, *supra* note 40, at 167.

46 *Jameel*, [2006] UKHL 44, [2007] 1 A.C. 359 (appeal taken from Eng.) (U.K.).

47 *Id.*

48 [2007] EWCA (Civ) 972, [2008] 1 All E.R. 750 (Eng.).

49 [2007] EWCA (Civ) 721, [2008] 2 W.L.R. 129 (Eng.).

50 [2008] UKPC 9, [2009] 1 A.C. 1 (appeal taken from Jam.) (U.K.).

These developments in English defamation law show a clear trend toward more protection for the defendants in libel suits, but the level of protection still does not approach that provided by the First Amendment in the United States. Apart from the few recent developments in *Jameel*, English law still requires the defendant to show that the allegedly defamatory statement was true.

2. Canada

Canada maintains the pro-plaintiff, "truth is a defense" common law approach that it inherited from England.[51] Canadian courts have followed those of England and Australia in remaining firmly on common law ground and have expressed their reluctance to move toward a U.S. approach.[52] One court considered (but rejected) adopting a more pro-free speech law like that of the United States because other jurisdictions like England and Australia had not adopted it, and the current policy of placing the burden of ascertaining the truth before publishing was the proper one.[53] But the court did adequately consider the "chilling effect" of the threat of libel suits, and cursorily dismissed it after a "review of jury verdicts in Canada reveal[ed] that there [was] no danger of numerous large awards threatening the viability of media organizations."[54]

Like England, Canada has moved *slightly* toward more press freedom in its increased qualified privilege protection.[55] One of these is the "fair comment" privilege, protecting "comments based on true facts made honestly without malice with reference to a matter of public interest."[56] But the comments cannot be "mixed up with statements of fact that the reader or listener is unable to distinguish between the reported facts and comment,"[57] a prohibition that clearly places Canadian law in the same pro-plaintiff territory as English law.

3. Australia

Just like Canada, former English colony Australia inherited England's pro-plaintiff common law of defamation.[58] The recently–

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[51] 1 SMOLLA, *supra* note 27, § 1:9.75 (citing 1 RAYMOND E. BROWN, THE LAW OF DEFAMATION IN CANADA § 1.5(1)(c) (2d ed. 1999)).

[52] *See, e.g.*, Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, ¶¶ 125–145 (Can.).

[53] *Id.* ¶ 140.

[54] *Id.* ¶ 143.

[55] 1 SMOLLA, *supra* note 27, § 1:9.75.

[56] Leenen v. Canadian Broad. Corp., [2000] 48 O.R.3d 656¶¶ 121, 123 (Can.).

[57] *Id.* ¶ 123.

[58] Nathan W. Garnett, Dow Jones & Co. v. Gutnick: *Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?*, 13 PAC. RIM L. & POL'Y J. 61, 70

decided case *Dow Jones, Inc. v. Gutnick* reaffirmed this idea when it applied the common law of defamation to suppress a news website originating in the United States.[59] This is especially apparent in one judge's comment during oral argument:

> [The American view of free speech that informs United States defamation law] is a very American viewpoint which is not shared by the rest of the world. The whole rest of the world does not share. [sic] It has to be very clear. The international covenant on civil and political rights does not share the American, as others see it, obsession with free speech.[60]

In spite of certain qualified privileges that have made headway in recent years, the protection for free speech in Australia is in line with the English law and is clearly not at the level of that provided in the United States.

4. United States

The importance of protecting reputation in English law was imported and stressed in early U.S. history, owing to the high deference lawyers in the Colonies gave to the English common law.[61] Even so, a wariness of government intervention in the affairs of the press led to a desire for more free speech and a prevalent attitude that the common law of defamation was "un-American."[62] Those who were worried about the press having runaway power could take comfort in two checks on the power of the press: (1) counterspeech and (2) defamation law.[63] One event that significantly informed early American jurisprudence on protection of freedom of speech was the *Zenger* trial in 1735.[64] John Zenger had published a newspaper in which politician William Cosby was attacked by opponents, and Cosby sued Zenger.[65] Since the reign of the Tudors, English law had held that truth was no defense to seditious libel; to the contrary, the greater the truth, the greater the libel, as truth was considered more of a threat to the king's power.[66] Despite this, Zenger's lawyer successfully convinced the court to allow the criminality

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(2004) (citing Matt Collins, *Defamation and the Internet After* Dow Jones & Co. v. Gutnick, 8 MEDIA & ARTS L. REV. 165, 167 (2003)).

[59] (2002) 210 C.L.R. 575, ¶¶ 190–202 (Austl.).

[60] Transcript of Oral Argument, *Dow Jones*, (2002) 210 C.L.R. 575, *available at* http://www.austlii.edu.au/au/other/hca/transcripts/2002/M3/2.html.

[61] *See* Paul T. Hayden, *Reconsidering the Litigator's Absolute Privilege to Defame*, 54 OHIO ST. L.J. 985, 1009–10 (1993) (quoting Veeder, *supra* note 34, at 546).

[62] 1 SMOLLA, *supra* note 27, § 1:4 (citing Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 17 (1983)).

[63] *Id.* § 1:27.

[64] *Id.* § 1:28 (citing THE TRIAL OF PETER ZENGER (Vincent Buranelli ed. 1957)).

[65] *Id.*

[66] *Id.*

of the publication to be determined by a jury of peers rather than a judge and successfully convinced the jurors that truth should be a defense, because they "should declare what they knew to be the truth" of the suffering under the Cosby government.[67] This reversal of clear precedent was a landmark verdict for the protection of free speech and influenced the adoption of the First Amendment.[68]

The adoption of the First Amendment and the explicit recognition of free speech that went along with it diverged in a small but distinct way from the English common law's protection of reputation[69] even though the First Amendment was not yet applied to defamation law.[70] Many still revered Blackstone's view of a more limited freedom of speech that ensured public and governmental order[71] by punishing "the disseminat[ion], or making public, of bad sentiments, destructive of the ends of society."[72]

After the American Revolution, defamation law developed independently in the states but generally remained a strict liability tort very similar to that which existed in England.[73] To make out a prima facie case, a plaintiff needed only to show that (1) defamatory speech, (2) had been published, (3) about the plaintiff.[74] The defendant then had to prove either (1) that the statement was substantially true, or (2) that it was privileged.[75] The common law's policy for punishing libel more seriously than slander was driven by the idea that libel damaged a person's reputation more seriously than slander, had a wider reach, and showed greater premeditation and deliberation on the part of the defendant.[76] Earlier in the common law, all libel was actionable without proof of actual harm, but eventually the law required special damages to be proved in a slander lawsuit *unless* one of four categories was implicated: "(1) imputation of a serious crime involving moral turpitude, (2) possession of a loathsome disease, (3) an attack on the plaintiff's

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67 *Id.*

68 *Id.*

69 *Id.*

70 *See* Respublica v. Oswald, 1 Dall. 319, 325 (Pa. 1788). In observing the "great crime" of libel, the Court asked, "Can it be presumed that the slanderous words, which, when spoken to a few individuals, would expose the speaker to punishment, become sacred, by the authority of the [C]onstitution, when delivered to the public through the more permanent and dissu[a]sive medium of the press?" *Id.*

71 *See id.*

72 WILLIAM BLACKSTONE, 2 COMMENTARIES *152.

73 1 SMOLLA, *supra* note 27, § 1:7.

74 *Id.* § 1:8 (citing RESTATEMENT (FIRST) OF TORTS § 558 (1938)).

75 *Id.* (citing RESTATEMENT (FIRST) OF TORTS §§ 582–98 (1938)).

76 *Id.* § 1:13.

competency in his business, trade, or profession, or (4) unchastity in a woman."[77]

Although certain privileges developed over the years to protect the speaker,[78] the common law of England controlled defamation law in the United States.[79] The First Amendment was not applied to defamation even as recently as 1942,[80] but that changed a few years later when the U.S. Supreme Court decided *New York Times Co. v. Sullivan*.[81]

B. U.S. Supreme Court Interpretations of the First Amendment Led U.S. Defamation Law to Depart Radically from That of Other Countries

In the United States, the First Amendment began playing a role in defamation law in *New York Times v. Sullivan* when a non-party took out an advertisement in the *New York Times* newspaper to draw attention to the plight of blacks in the South.[82] The advertisement included statements, some true and some false, that allegedly libeled Sullivan as one of three commissioners of Montgomery, Alabama, because the activities implicated police under his control.[83] The trial court, affirmed by the Alabama Supreme Court, ruled for Sullivan on the ground that the material was libelous *per se*, because it was published and it concerned him, with injury being implied and malice being presumed, and rejected the newspaper's argument that it was protected by the First Amendment.[84]

The U.S. Supreme Court reversed, holding that "the Constitution delimits a [s]tate's power to award damages for libel in actions brought by public officials against critics of their official conduct," because the First and Fourteenth Amendments require "safeguards for freedom of speech and of the press."[85] The Court stated that it was "compelled by neither precedent nor policy" to measure libel by the same constitutional limitations as other areas of expression, whether it came in the form of a paid or unpaid advertisement, and that now "actual malice" must be

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77 *Id.* § 1:15 (citations omitted).

78 *Id.* § 1:8 (citing RESTATEMENT (FIRST) OF TORTS §§ 582–98 (1938)).

79 *See* Hayden, *supra* note 61, at 1009–10 (citing LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 33–35 (2d ed. 1985)).

80 Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (citing ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 149 (1941)) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

81 376 U.S. 254 (1964).

82 *Id.* at 256–57.

83 *Id.* at 256–59.

84 *Id.* at 262–64 (citing N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 52 (Ala. 1962)).

85 *Id.* at 264, 283.

proved for a public official to recover for libel.[86] The Court found support for this new rule in the same rationale that was behind widespread rejection of the Sedition Act of 1798 (which criminalized libeling members of the federal government); namely, the idea that the United States, unlike England, was governed ultimately by the people and that the people therefore needed to examine and critique the government whose power they would approve.[87]

The Court noted that the free exchange of ideas and latitude for government criticism are essential for a democracy to function properly.[88] The problem with common law defamation was that it did not provide this:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.[89]

Without constitutionally protected defamation, "would-be critics of official conduct may be deterred from voicing their criticism" because, although they know it is true, it is too expensive to defend in court.[90] Moreover, this self-censorship affects not one individual but the entire public.[91] The Court used this policy, embodied in lines of free speech cases, rather than common law defamation cases, to implement a new law for alleged libel involving public officials.[92]

Just three years after *New York Times* the Court decided *Curtis Publishing Co. v. Butts*, in which the Court held that public figures—people who are "involved in issues in which the public has a justified and important interest"—may recover damages for defamation "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[93] The Court noted the "competing considerations" of the *New York Times* and common law defamation standards, but in cautioning against "blind application" of the *New York Times* standard, recognized that the policy of reporting on a public figure should be less favorable to the reporter than the policy of reporting on a public official.[94] Ultimately, the policy here is still on the side of the

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86 *Id.* at 265, 269, 279–80.

87 *See id.* at 273–76 (citing Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798)).

88 *Id.* at 269 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

89 *Id.* at 279.

90 *Id.*

91 *Id.*

92 *See id.* at 269–73.

93 388 U.S. 130, 134, 155 (1967).

94 *Id.* at 147–48 (internal quotation marks omitted).

press—it aims to allow the press freedom to purvey news and ideas about public figures without fear, so long as they do not demonstrate an "extreme departure" from responsibility.[95]

A few years later in *Gertz v. Robert Welch, Inc.*, the Court slowed the movement toward press freedom when it ruled that the *New York Times* test should not be applied to private individuals, but only to public officials and public figures.[96] Though the Court noted the need for "'breathing space'" to avoid self-censorship by the media,[97] it gave greater weight to "the strong and legitimate state interest in compensating private individuals for injury to reputation."[98] The Court set out a new rule that, as long as the states do not impose liability without fault, they may determine for themselves the standard of liability for defamation to a private individual.[99] In an attempt to balance the free speech policy of the First Amendment, the Court said that in regard to "an issue of public or general interest," the states also may "not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."[100] In his dissent, Justice Douglas noted the majority's struggle to find a balance between the common law of defamation and the First Amendment and suggested that the struggle be abandoned for the First Amendment to have the full effect that the Framers wanted.[101] Justice Brennan likewise believed that "free and robust debate" was not given adequate "'breathing space'" by the majority's rule.[102]

Later cases continued to nuance the first three in the *New York Times* line of reasoning. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* moved the law even more than *Gertz* to protect individual reputation by allowing presumed damages without showing actual malice in cases dealing with matters of private concern.[103] But the press received some relief in *Philadelphia Newspapers, Inc. v. Hepps*, in which the Court ruled that a private figure plaintiff must bear the burden of showing the defamatory speech was false when suing a media defendant for speech on a matter of public concern.[104] The Court decided this way even though its decision would "insulate from liability some speech that is false"[105]

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95 *See id.* at 149–55.

96 418 U.S. 323, 346 (1974).

97 *Id.* at 342 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

98 *Id.* at 348–49.

99 *Id.* at 347.

100 *Id.* at 346, 349.

101 *Id.* at 356 (Douglas, J., dissenting).

102 *Id.* at 361 (Brennan, J., dissenting) (quoting *Button*, 371 U.S. at 433).

103 472 U.S. 749, 761, 763 (1985) (plurality opinion).

104 475 U.S. 767, 776–77 (1986).

105 *Id.* at 778.

because of the policy of protecting some false speech just to protect "'speech that matters.'"[106] In *Hustler Magazine, Inc. v. Falwell*, the Court took one more step to protect even deliberately false speech in the form of a satirical cartoon, as the policy of free contribution to the public debate was important enough to justify it.[107] In *Milkovich v. Lorain Journal Co.*, the Court refused to explicitly grant additional protection to "opinion" as a constitutionally protected exception to defamation law because sufficient constitutional protection already existed, and "fact" and "opinion" are too closely intertwined to properly accord different legal status in defamation law.[108] The Court took note of its "recognition of the [First] Amendment's vital guarantee of free and uninhibited discussion of public issues" and sought to balance that with protecting reputation.[109]

Additionally, the Court has promoted rules that reduce the potential for self-censorship from threat of defamation actions.[110] The Court recognizes that some false speech is actually protected but has chosen to leave false speech to be corrected in the marketplace of ideas rather than promulgating rules that chill false speech at the expense of also chilling true speech.[111] The Court has reasoned that "[t]he First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."[112]

Even with this application of the First Amendment, defamation law still allows the restriction of speech when that would otherwise not be permissible.[113] Why is this so? One reason is that protecting relations between individuals prevents harm to the reputation and individual human personality that affects those relations.[114] Society has placed great value in "preventing and redressing attacks upon reputation."[115] The reason the law maintains that protection against defamation even in the face of the power of the First Amendment is due to the importance of

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[106] *Id.* (quoting *Gertz*, 418 U.S. at 341).

[107] 485 U.S. 46, 52–57 (1988).

[108] 497 U.S. 1, 18–21 (1990).

[109] *Id.* at 22–23.

[110] Deeann M. Taylor, Dun & Bradstreet, Hepps *and* Milkovich: *The Lingering Confusion in Defamation Law*, 1992/1993 ANN. SURV. AM. L. 153, 164.

[111] *Id.* at 165 (citing *Gertz*, 418 U.S. at 339–40; N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964)).

[112] Bose Corp. v. Consumers Union, 466 U.S. 485, 503–04 (1984). This idea was poignantly presented by the notion of willingly "'invit[ing] dispute'" as "'a function of free speech.'" Ashton v. Kentucky, 384 U.S. 195, 199 (1966) (quoting Terminiello v. Chicago, 337 U.S. 1, 3–4 (1949)).

[113] 1 SMOLLA, *supra* note 27, § 1:21.

[114] *Id.* § 1:22 (citing Leon Green, *Relational Interests*, 31 ILL. L. REV. 35, 36 (1936)).

[115] Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

minimizing disruption of the esteem that individuals enjoy in the eyes of fellow citizens.[116] One possible way to break down the types of harm to relational interests is (1) existing relations with third persons, (2) interference with future relations, (3) damage to public image, and (4) creating a negative public image when no previous public image existed.[117] Other rationales for redressing harm from defamation include economic harm, emotional injury, promotion of human dignity by preventing "undeserved" attacks, and deterrence of publishing false material.[118] Ultimately, because society has placed great value in "preventing and redressing attacks upon reputation,"[119] defamation law still allows for some restriction of speech even with this application of the First Amendment.[120]

Whether the terms "public official," "public figure," "public concern," and others will be given broader or narrower definitions in the future, the policy of current U.S. defamation law is clearly pro-defendant and pro-free speech.[121] Although some areas show a slight return to common law standards,[122] they are still a distance away from the law in England, Canada, Australia, and other common law countries. The United States stands alone in that its *New York Times* line of cases clearly prefers free speech and allows a law that willingly suffers false material to be published rather than to restrict the free exchange of ideas and free speech the Court has held to be guaranteed by the First Amendment.

II. CAUSE OF ACTION

The above comparison of defamation law exposes the differences between the law in the United States and several common law countries. This demonstration of differences is necessary because this fact is what gives "teeth" to the cause of action provided in section 3(a) of the Act.[123] Basically, the problem this Act addresses arises out of the differences in defamation law between the United States and other nations.

The cause of action is notable in that it creates a way to "retaliate" for being sued for defamation in a foreign jurisdiction. But the cause of action is not for defamation, because the person who is able to file suit under this Act is the one who was *sued for* defamation in a foreign

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[116] *See* 1 SMOLLA, *supra* note 27, § 1:22 (citing Kiesau v. Bantz, 686 N.W.2d, 164, 175 (Iowa 2004)).

[117] David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 765–66 (1984).

[118] 1 SMOLLA, *supra* note 27, § 1:23–:26.

[119] *Rosenblatt*, 383 U.S. at 86.

[120] 1 SMOLLA, *supra* note 27, § 1:21.

[121] *See* Taylor, *supra* note 110, at 164–65.

[122] *Id.* at 165.

[123] *See* H.R. 1304, 111th Cong. § 3(a) (2009); S. 449, 111th Cong. § 3(a) (2009).

country. It is similar to an abuse of process or malicious prosecution counterclaim. Still, this analogy can only stretch so far because the foreign defendant has not "abused" the foreign judicial system; rather, the foreign defendant has "abused" the U.S. judicial system. The U.S. citizen is able to file suit simply for being sued *if* the defamation at issue in the foreign lawsuit "does not constitute defamation under United States law."[124]

Although H.R. 1304 already provides a non-enforcement remedy, the retaliatory measure provided by this Act is also necessary. While this Act does not stop plaintiffs from suing in foreign jurisdictions, it allows for (1) *deterrence*, because foreigners will not want to sue when they know they will be sued in the United States, and (2) *retaliation*, because even if the foreigner wins overseas, the defendant may recover costs, and possibly more, in a suit in the United States.[125]

A. Deterrence

The Act will serve as a deterrent to libel lawsuits like *Ehrenfeld v. Mahfouz*[126] where the plaintiff "forum shops" before bringing a suit. As expressed in Part I, the current problem with defamation law differences is that most other common law countries are significantly more plaintiff friendly than the United States. In addition to "voiding" or "negating" the foreign suit through the nonenforcement provision, the Act provides

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[124] *Id.*

[125] This Note is not an overview of the entire Act, nor does it explore all the legal problems which may arise out of the language of the cause of action. *See supra* note 21.

In light of the *Ehrenfeld* lawsuit behind the origin of the Act, this language is presumably meant to target similar cases in which a publication *intentionally targeted* for distribution only in the United States ends up in a foreign country where a foreign plaintiff sues. But what if the intended distribution is 50% in the United States and 50% in some foreign country? 25% and 75%? 5% and 95%? These cases seem to be covered by the language of the Act, but it is not clear whether they are meant to be if the goal is to only protect individuals in Ehrenfeld's position.

Another problem might be the language "published, uttered, *or* otherwise disseminated." H.R. 1304 § 3(a) (emphasis added); S. 449 § 3(a) (emphasis added). The "or" would allow authors presumably to publish only in the United States and target foreign countries, even up to 100%. This is not what Rachel Ehrenfeld did, and the measure may be (1) a loophole or (2) an intentional overprotection and overreaction to *Ehrenfeld*.

Another issue this Note does not discuss is how the Act is affected by conflict of laws issues. For example, courts may refuse to enforce foreign judgments because they are repugnant to public policy in negating First Amendment protections. Matusevitch v. Telnikoff, 877 F. Supp 1, 2 (D.D.C. 1995). This remedy *was* the only hope for U.S. citizens. Now, the Act gives U.S. citizens a clear cause of action in an area which was before left up to the courts. An examination of the conflict of laws issues presented by the Act might lead to the conclusion that it must not be passed—or at least be modified before being passed—but that is not the point here. The protection that the Act gives to free speech is needed today in spite of the need that other provisions be slightly modified.

[126] 881 N.E.2d 830 (N.Y. 2007).

the threat of a retaliatory countersuit which will dull foreign plaintiffs' enthusiasm for bringing suits against U.S. citizens.

The Act already expressly provides that foreign judgments not meeting defamation under U.S. constitutional standards shall not be enforced.[127] But that is solely a defensive cause of action. In no way does it aid those who are under assault by those who are attempting to suppress their speech. Situations like Ehrenfeld's require a counter-weapon to deter those filing the lawsuits, or people like Ehrenfeld might not publish. Unlike the current situation—people like Ehrenfeld waiting to see if and when the foreign plaintiff will attempt to enforce the suit—there is a greater likelihood, under this Act, that the foreign plaintiff will never bring suit in the first place.[128] Currently, groundless lawsuits may be filed by foreign plaintiffs who are simply hoping for a good settlement offer. Frivolous lawsuits may be filed to intimidate, or for other reasons, because the risk to the filing party is pretty low. This Act would deter those types of suits. Even if H.R. 1304 or S. 449 is enacted, a defendant will still incur litigation costs and may have to deal with psychological trauma. This may be enough to cause them to self-censor. A counteraction cause of action is needed to provide more support for those willing to speak their minds and to do so without unnecessary worry.

The Act is intended to discourage forum shopping litigants and others with motives *besides* compensation for injury to reputation. Still, there might be some "collateral damage" in discouraging valid suits not under that description. Foreign citizens will be subjected to the Supreme Court's reading of the First Amendment by triggering a U.S. lawsuit. Even so, that is necessary collateral damage for the greater good of protecting free speech. A foreigner may have been defamed under the law of his or her own country and have no other motive to bring suit other than to be compensated for his or her injured reputation, but that foreigner may be deterred from bringing suit out of fear of being subjected to a U.S. lawsuit under this Act. But just as the Supreme Court has justified protecting some false speech in order to protect free speech in general, a threat to justifiable libel suits is necessary in order to deal with the unjustifiable ones.

This vigorous promotion of the First Amendment is not entirely novel. The First Amendment has been held to affect international jurisdictions in choice of law cases, as in *Desai v. Hersh* when the court said, "Moreover, so as not to chill speech inside the United States

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[127] H.R. 1304 § 3(c); S. 449 § 3(c).

[128] *See* N.Y. CITY BAR COMM. ON COMMC'NS & MEDIA LAW, REPORT IN SUPPORT OF S.6687/A.9652: THE LIBEL TERRORISM PROTECTION ACT 3, *available at* http://www.nycbar.org/pdf/report/LTPA.pdf. The commentary in this report refers to New York's law, but the Free Speech Protection Act of 2009 is almost identical to the New York law and accomplishes the same goals with the same cause of action.

relating to matters of public concern, it may be necessary that [F]irst [A]mendment protections spill over to more extensive extraterritorial re-publications of that speech, given the ease and likelihood of extraterritorial re-publication."[129]

Although the Act may "meddle" in the law of other countries—and foreign citizens may have to think twice now before filing suit—that concern is worth paying for the protection of free speech. Besides, to "meddle" is only one interpretation of this issue. Another interpretation, just as fair, is that the United States is simply doing its job in protecting its citizens. Even if this Act "meddles" with national sovereignty, any such "meddling" is not that different from the way forum shopping—such as that in *Ehrenfeld*—affects relations in the international community. Moreover, increased globalization and the international community's acceptance of forum shopping leave it with less of an argument that national sovereignty should bar legislation like this Act. Put another way, nations in effect concede any defense of national sovereignty by allowing forum shopping.

Another fact that should alleviate concern over "meddling" is the Act's requirement that the material be disseminated "primarily" in the United States.[130] This will limit lawsuits to only the most egregious attempts of forum shopping for the weapon of a libel judgment. A plaintiff would only be able to sue under this Act when a foreigner is trying to suppress speech primarily meant for the citizens of the United States. An author would not be able to use the current version of the Act as cover and protection to inject their views primarily into a foreign forum.

This Act responds to *Ehrenfeld* and its hot-button issue of terror financing, but it implicates other subject matter as well. Suppose a U.S. author publishes a book denying the Holocaust and attributes the claim to well-known foreign scholars. Although this damage to reputation would likely constitute defamation under the common law, it would probably be a matter of public concern dealing with public figures and, therefore, not qualify as defamation in the United States. If the scholars sued for defamation, they would be subject to suit in the United States. Thereby, the Act "meddles" with the sovereignty of foreign countries that want to make Holocaust denial a crime. Holocaust denial laws are already in place in some European countries and are being considered in others.[131] Though it is currently not illegal in England,[132] this Act will

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[129] 719 F. Supp. 670, 676–77 (N.D. Ill. 1989).

[130] H.R. 1304 § 3(a); S. 449 § 3(a).

[131] *Push for EU Holocaust Denial Ban*, BBC NEWS, Jan. 15, 2007, http://news.bbc.co.uk/2/hi/europe/6263103.stm.

[132] *See id.*

implicate any country with a similar defamation law. Despite the interference, this Act is needed because there is already self-censorship in British schools, regardless of the Holocaust denial laws.[133] Preventing similar self-censorship of U.S. authors is a primary goal of this Act.

B. Retaliation

The cause of action could be analogized to a countersuit in the form of (1) an abuse of process claim, (2) a malicious prosecution claim, (3) an action to recoup attorney's fees, or (4) an action under Federal Rule of Civil Procedure 11.[134] The media may use all of these actions to counter frivolous libel suits.[135] It may also use an action for infringement of constitutionally protected rights, which in these cases would be infringement of the First Amendment.[136]

Although none of these actions would apply here because these are international cases, not domestic ones in which a party may assert a counteraction due to both parties working within the same legal system, the ideas behind them shed light on the cause of action.

1. Abuse of Process

Abuse of process occurs when a party "uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed."[137] Abuse of process

> is not the wrongful *procurement* of legal process or the wrongful *initiation* of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any *purpose other than that which it was designed to accomplish*. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed . . . .[138]

Abuse of process is a counteraction available to a person who has been sued for a purpose not intended by the judicial system. Such action

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[133] Laura Clark, *Teachers Drop the Holocaust to Avoid Offending Muslims*, DAILY MAIL (London), Apr. 2, 2007, at 33, *available at* http://www.dailymail.co.uk/news/article-445979/Teachers-drop-Holocaust-avoid-offending-Muslims.html.

[134] *See* Seth Goodchild, Note, *Media Counteractions: Restoring the Balance to Modern Libel Law*, 75 GEO. L.J. 315, 336–50 (1986).

[135] *See id.* (discussing "[c]ounteractions available to the media").

[136] *See id.* at 350–56 (reviewing the media's ability to fight infringement of its First Amendment rights). This last claim is not analogous here, however, because the foreign defendant's behavior in his own country is not governed by the First Amendment.

[137] RESTATEMENT (SECOND) OF TORTS § 682 (1977).

[138] *Id.* § 682 cmt. a (emphasis added).

allows the defendant in an improper suit to become the plaintiff in an abuse of process suit against the original plaintiff.

A counteraction for abuse of process of defamation law is not entirely unprecedented. Courts have refused to dismiss counterclaims for abuse of process to libel claims.[139] In *Rewald v. Western Sun*, the defendants argued a libel suit was brought to intimidate them from publishing certain material, and the court refused to dismiss the abuse of process claim because it was well-pled.[140] When a plaintiff sued for libel in *Peisner v. Detroit Free Press*, the court found there could be an ulterior motive—in other words, a jury would be able to conclude that the only reason for the suit would be to intimidate the defendant newspaper into hiring someone to write a retraction.[141] The court ultimately dismissed the case on summary judgment because, even though that element was met, the second element of a "misuse" of the process was not met when the plaintiff properly initiated the libel suit.[142]

The "ulterior motive" element is what this Act targets. What the Act is really saying is that it is an abuse of process to sue for defamation when the publication is reporting on current events. Although some foreign defamation suits are brought with the proper motive of redressing harm to reputation, some, like that which confronted Ehrenfeld, are brought with the improper motive of stifling free speech. While an abuse of process claim would apply *within* one legal system, and therefore would not apply in this case, it still illustrates what this Act does. Just like the "ulterior motive" element of abuse of process claims, this Act targets the improper motive of a desire to suppress free speech. If the defamation suit referred to in this Act were brought in the United States, there could be an abuse of process counterclaim if it were shown that the original plaintiff clearly knew the defamation did not meet the standards of the law.

2. Malicious Prosecution

The legal remedy in this Act emulates the principles of a malicious prosecution claim. Malicious prosecution occurs when a plaintiff files a lawsuit with knowledge that it has no foundation and is defined as a suit "that is begun in malice and without probable cause to believe it can succeed, and that finally ends in failure."[143] It is distinguished from abuse of process in that malicious prosecution is the wrongful initiation

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[139] *See, e.g.,* Feder v. Woodward, 12 Media L. Rep. (BNA) 1071, 1071 (C.D. Cal. 1985).

[140] 11 Media L. Rep. (BNA) 2494, 2495 (D. Haw. 1985).

[141] 242 N.W.2d 775, 778 (Mich. Ct. App. 1976).

[142] *Id.*

[143] 52 AM. JUR. 2D, *Malicious Prosecution* § 1 (2000).

of process, while abuse of process, defined in Part II.B.1 above, occurs after the process has been initiated.

This cause of action is not commonly used in retaliation to a libel suit, but courts have upheld a malicious prosecution claim when a libel suit was instituted without sufficient probable cause.[144] Yet the requirement that the libel trial be closed before initiating a suit for malicious prosecution makes this claim much more difficult to use.[145]

Malicious prosecution is the type of claim that this Act gives U.S. citizens against foreigners who bring libel suits without foundation, similar to the quasi-judicial complaint brought against journalist Mark Steyn before the Ontario Human Rights Commission alleging that Steyn's article on Islam and the West violated the Ontario Human Rights Code.[146] Steyn's opponent admitted to filing a complaint with the Ontario Human Rights Commission in order "to demonstrate the gaping hole" in the law, even though "he knew the complaint would probably be dismissed."[147] The Act is necessary to protect against the suppression of speech caused by these claims without foundation.

3. Actions for Attorney's Fees and Rule 11 Actions

A defendant may sue for attorney's fees when the plaintiff has brought a suit in bad faith or wantonness.[148] One court affirmed an award of attorney's fees on the "thinness" of a case and the bad faith in which it was brought.[149] Under Federal Rule of Civil Procedure 11, federal courts may impose sanctions for frivolous litigation.[150]

Rule 11 actions would only work within the United States legal system, but serve as a useful analogy to what this Act does. An award of attorney's fees is actually provided for in section 3(c) of the Act,[151] and will serve the goal of punishing frivolous suits under this Act just like attorney's fees awards do within the United States legal system.

III. THE CAUSE OF ACTION IN LIGHT OF DEFAMATION LAW

The cause of action in section 3(a) of the Act clearly promotes U.S. defamation law by requiring its standards to be met in order to avoid a

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144 Kirk v. Marcum, 713 S.W.2d 481, 483 (Ky. Ct. App. 1986).

145 Goodchild, *supra* note 134, at 342.

146 Joseph Brean, *Rights Body Dismisses Maclean's Case*, NAT'L POST (Ontario), Apr. 9, 2008, *available at* http://www.nationalpost.com/news/story.html?id=433915 (internal quotation marks omitted).

147 *Id.*

148 Goodchild, *supra* note 134, at 344 (citing F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 129 (1974)).

149 Nemeroff v. Abelson, 704 F.2d 652, 659–60 (2d Cir. 1983).

150 Goodchild, *supra* note 134, at 349 (citing FED. R. CIV. P. 11).

151 H.R. 1304, 111th Cong. § 3(c)(2)(B) (2009); S. 449, 111th Cong. § 3(c)(2)(B) (2009).

countersuit, which, in turn, promotes a pro-free speech policy in defamation law. The common law of England, Canada, and Australia examined in Part I.A. is being subjected to the constitutionalized U.S. defamation law examined in Part I.B.

The contrast between the current state of U.S. defamation law and that of other common law countries[152] cannot be overstated, as the *New York Times* cases have brought the law onto ground that solidly supports the purposes of the Act. Before *New York Times*, people in Mahfouz's situation could sue easily and succeed if the people in Ehrenfeld's situation could not prove the truth of their claims. Proving the complex claims of financial ties to terrorism could turn out to be expensive and time consuming, thus deterring her from publishing. By not publishing, the public would be deprived of potentially valuable and necessary information of public concern. After *New York Times*, Mahfouz, who was likely a public figure,[153] not only would bear the burden of proving the claims were false, but also would have to prove that they were highly unreasonable.[154]

The potential effects that H.R. 1304 or S. 449 would have had on past cases are readily apparent. Cases like *Dow Jones & Co. v. Harrods Ltd.*,[155] *Bachchan v. India Abroad Publications Inc.*,[156] and *Telnikoff v. Matusevitch*,[157] involving U.S. parties seeking to bar foreign judgments from being enforced in the United States, would clearly be affected by H.R. 1304 or S. 449. But these cases involved libel suits in foreign jurisdictions that may never have been brought had the plaintiff been deterred by the threat of a suit under this Act.

This Act would provide deterrence in cases like *Ehrenfeld* by causing Mahfouz to be subject to a U.S. suit by Ehrenfeld and allowing Ehrenfeld to protect her right to free speech by effectively "requiring" foreign lawsuits to meet U.S. standards if the foreign plaintiff does not want to be sued in the United States.[158] But *Ehrenfeld* is an easy case; it was the reason this Act was ultimately introduced. What other cases would be different if the Act was passed?

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[152] *See supra* Part I.

[153] *See supra* note 93 and accompanying text.

[154] *See supra* notes 93–95 and accompanying text.

[155] 237 F. Supp. 2d 394 (S.D.N.Y. 2002).

[156] 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

[157] 702 A.2d 230 (Md. 1997).

[158] Although the foreign plaintiff has no options for avoiding suit in the United States besides not filing at all in the foreign country, that cost is necessary to protect American authors from having to self-censor. Foreign plaintiffs may have legitimate concerns about protecting reputation, and those may be dealt with by modifications to the Act. But that is not the scope of this Note; rather, the point here is that this type of measure is necessary to protect against the gravity of current free speech suppression.

It would depend on whether the speech or publication is about a public or private figure, as well as whether it is public or private speech. Public official cases like *New York Times* and public figure cases like *Butts* would clearly implicate this Act and would thus give a U.S. defendant a cause of action. A case involving a private figure in a matter of public concern where the private figure plaintiff has the burden of proving the speech was false in order to recover[159] would implicate the Act because the plaintiff would not have this burden in the English common law jurisdictions.

But cases involving speech about a private figure affecting matters of only private concern like *Dun & Bradstreet* might not implicate the Act because the Court in that case took an approach more similar to the common law. In these cases, the speech would "constitute defamation under United States law" as required by the Act,[160] and there would be no cause of action.

It is worth passing this Act to ensure that U.S. citizens keep their First Amendment protections in this age of increasing globalization. The Internet and other tools have increased the ease of communication, blurring lines of national sovereignty and causing jurisdictional problems. This Act does not force other nations to adopt First Amendment standards into their laws; it requires such protection only in the United States. The United States should exercise its sovereignty by promoting the policy of free and open speech for its citizens. If the United States, as the world's leading voice for free speech, fails to stand up against international forum shopping now, free speech and thought will take a big step toward extinction.

IV. THE EXPANSION OF PROTECTION OFFERED BY THIS ACT IS NEEDED DUE TO INCREASING WORLD-WIDE SUPPRESSION OF SPEECH

The unique cause of action in this Act is the type of measure necessary to combat (1) the chilling effect of the threat of litigation in many plaintiff friendly jurisdictions, (2) the filing of frivolous lawsuits as a way of "advancing the bar" of the law towards suppression, (3) using the claims of "defamation" and "the need to protect human rights" as ways to suppress speech, and (4) using protests and direct physical violence as a way to suppress speech. The Act already protects against the first two, but it should be modified to protect against the latter two, which may come in the form of a quasi-judicial proceeding or simply a law against criticizing an idea.

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[159] Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 768–69 (1986).

[160] H.R. 1304, 111th Cong. § 3(a) (2009); S. 449, 111th Cong. § 3(a)(1) (2009).

A. Quasi-Judicial Cases

Because the protection of speech is so important to free societies and an open marketplace of ideas, the power held by this Act to deter speech suppression should be extended to protect victims of foreign lawsuits or tribunals that may not be "defamation" actions in the formal sense but still involve restrictions on free speech under the guise of "defamation."

The Act should be expanded to deter situations like the attempted censorship of journalist Mark Steyn's writings in *Maclean's* magazine under the Canadian Human Rights Act.[161] After Steyn wrote about conflict between Islam and the West, several individuals filed charges against him before the Canadian, British Columbia, and Ontario Human Rights Commissions on the grounds that his publications violated their respective human rights codes.[162] Even though this speech was not directed at an individual, the Ontario Human Rights Commission still issued a ruling because the speech could possibly incite hatred of Muslims.[163] The word "defamation" was not used in Steyn's case, but the plaintiff attempted to censor Steyn because his writings were likely to injure the reputation of a particular group. Cases like Steyn's are not normal defamation cases. But because the restriction of press freedom at issue is one thing the Act is designed to protect, the Act should be enlarged to give U.S. citizens a cause of action for foreign quasi-legal prosecutions *similar* to defamation in their restriction of speech.

B. Criticism of Ideas

Defamation law has traditionally protected individual reputation, but it is being hijacked to serve the goal of suppression of ideas. Those seeking to suppress ideas they do not agree with might sometimes cry "defamation" absent any actual remedy, and might sometimes attempt to misuse the legitimate legal remedy of defamation. Although common law countries currently define defamation as protecting the individual and not the idea, the gap between the two is narrowing and is in danger of closing in on free speech. By passing this Act, the United States can at least protect its own citizens from the censorship of unfavorable ideas.

Recent years have seen an increase in the number of instances of human rights "courts" and organizations bowing to groups claiming that speech negative of Islam violates "human rights" and "defames" Islam. For example, the United Nations Resolution Combating Defamation of

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161 Brean, *supra* note 146.

162 *Id.*

163 *See* Press Release, Ontario Human Rights Comm'n, Commission Statement Concerning Issues Raised by Complaints Against Maclean's Magazine (Apr. 9, 2008), http://www.ohrc.on.ca/en/resources/news/statement.

Religions singles out for elimination speech that is critical of Islam.[164] Though the Resolution claims to protect all religions, Islam is the only one mentioned by name.[165] It is also of note that the resolution was introduced—and is still largely supported—by Muslim-majority countries.[166] The Resolution is a perfect example of protection of an idea, rather than individual rights. This Act defines defamation as "any action for defamation, libel, slander, or similar claim alleging that forms of speech are false or have caused damage to reputation."[167] If the U.N. Resolution, or a measure like it, is ever used as legal authority to bring a foreign defamation suit against a U.S. citizen, the U.S. citizen should be able to bring a counteraction in the United States.

The U.N. measure exposes the tactic of using defamation phraseology to repress speech critical of Islam, but this couching of suppression of ideas in acceptable legal terms and using judicial systems to further this insidious end is only part of a much broader wave that is swamping expression of thought critical of Islam. Numerous recent incidents indicate a pattern of repressing free speech in traditionally free, western countries, including the United States. The pattern is widespread, and the following examples are representative.

In 1989, the Iranian government called for the death of author Salman Rushdie after he wrote a book which supposedly committed apostasy against Islam.[168] Numerous riots and protests to the book followed around the world.[169] The fatwa against Rushdie was reaffirmed by Iran as recently as 2005,[170] and even recently demonstrators gathered in anger and Pakistani officials referred to Rushdie as a "big criminal"

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[164] Combating Defamation of Religions, Human Rights Council (HRC) Res. 7/19 (Mar. 27, 2008), *available at* http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_19.pdf.

[165] *See id.*

[166] *See id.* This is important because these countries do not see themselves as groups of people with the goal of simply living together in harmony—as Western countries do—but as entities to bring the authority of Islam to other countries around the world. *See* BERNARD LEWIS, THE CRISIS OF ISLAM 31–32 (Modern Library ed. 2003).

[167] H.R. 1304, 111th Cong. § 6(1) (2009); *see also* S. 449, 111th Cong. § 5(1) (2009). The Senate version of the Act expands this definition, defining defamation as "any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented a person or persons in a negative light, or have resulted in criticism or condemnation of a person or persons." S. 449 § 5(1).

[168] Philip Webster et al., *Ayatollah Revives the Death Fatwa on Salman Rushdie*, TIMES (London), Jan. 20, 2005, at 4, *available at* http://www.timesonline.co.uk/tol/news/uk/article414681.ece.

[169] Chris Hedges, *Rushdie Seeks to Mend His Rift with Islam*, N.Y. TIMES, Dec. 25, 1990, at 9.

[170] Webster et al., *supra* note 168.

after the United Kingdom knighted him.[171] After the more recent Danish Cartoon Controversy, the leader of the resistance group Hezbollah said, "If there had been a Muslim to carry out Imam Khomeini's fatwa against the renegade Salman Rushdie, this rabble who insult[ed] our Prophet Mohammed . . . would not have dared to do so."[172]

Theo van Gogh was a Dutch film maker who was murdered in November 2004 by a Moroccan immigrant acting on "religious conviction."[173] Van Gogh had produced a short film designed to call attention to the treatment of women in Islam, which caused an outcry from Muslim leaders who said it was "blasphemous" and "confrontational."[174] Van Gogh had previously received death threats and was shot two months after the film was released.[175] In trial testimony, his murderer, Mohammed Bouyeri, who appeared in court holding a copy of the Koran, said, "'the law compels me to chop off the head of anyone who insults Allah and the prophet.'"[176] Even though Bouyeri's motive is now public knowledge, the Dutch people are "struggling to understand *how* Bouyeri, who was born and raised in Amsterdam, turned to radical Islam."[177] Regardless, governments must heed these warning signs by not letting death threats roll back free speech. Instead, governments must maintain free speech laws while vigorously prosecuting law-breakers of all types, religious and non-religious, instead of trying to solve intolerance by tolerating it.

Ayaan Hirsi Ali is a Somali woman who immigrated to the Netherlands and later renounced Islam even though she was raised as a Muslim.[178] Ali produced the film *Submission*, which led to the assassination of director van Gogh,[179] after which a death threat note directed at Ali was found pinned to van Gogh's body.[180] Ali speaks

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171 *Day of Pakistan Rushdie Protests*, BBC NEWS, June 22, 2007, http://news.bbc.co.uk/2/hi/south_asia/6229506.stm (internal quotation marks omitted).

172 Sakher Abu El Oun, *Mohammed Cartoon Protests Escalate to Threats Against West*, MIDDLE EAST ONLINE, Feb. 2, 2006, http://www.middle-east-online.com/english/?id=15640 (internal quotation marks omitted).

173 *Life of Slain Dutch Film-Maker*, BBC NEWS, Nov. 2, 2004, http://news.bbc.co.uk/2/hi/entertainment/3975211.stm.

174 *Id.*

175 *Id.*

176 *Van Gogh Killer Jailed for Life*, BBC NEWS, July 26, 2005, http://news.bbc.co.uk/2/hi/europe/4716909.stm (internal quotation marks omitted).

177 *Id.* (emphasis added).

178 Gerald Traufetter, *"Everyone is Afraid to Criticize Islam,"* SALON.COM, Feb. 7, 2006, http://www.salon.com/news/feature/2006/02/07/hirsi_ali.

179 *Id.*

180 *Van Gogh Killer Jailed for Life*, *supra* note 176.

liberally, and often negatively, about the prophet Mohammed.[181] These statements, among many others such as "all humans are equal but not all cultures are equal,"[182] resulted in numerous death threats against her.[183] When Ali came to deliver a speech recently in Johnstown, Pennsylvania, a local imam unsuccessfully attempted to get the university to prevent her from speaking and said that her ideas warrant the death sentence under Islam.[184] Despite the risks people like Ali choose to undertake to speak freely, the United States must uphold its law from which Ali's free speech right emanates.

In 2005, the Danish newspaper *Jyllands-Posten* published cartoons of the prophet Mohammed that Muslims considered insulting.[185] The controversy spread, and while some newspapers reprinted the cartoons as a way to assert their freedom of expression,[186] crowds rioted at Danish and other embassies around the world.[187] Jordanian newspaper editors also decided to reprint the cartoons, but they were soon arrested after "Jordan's King Abdullah II said the publication of such images is a 'crime that [] cannot be justified under freedom of expression.'"[188] Many newspapers feared confrontation after the outcry, and capitulated to self-censorship by choosing not to publish the cartoons.[189]

Recently, in the United States, Random House decided not to publish the book *The Jewel of Medina* after concerns were raised that Muslims would be upset with it,[190] "saying it had been informed by credible sources that the book could incite violence."[191] Another publisher

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[181] *See* Helle Merete Brix & Lars Hedegaard, *Interview with Ayaan Hirsi Ali*, SAPPHO, Nov. 23, 2005, http://www.sappho.dk/Den%20loebende/hirsi_english.htm.

[182] Boris Kachka, *The Infidel Speaks*, N.Y. MAG., Feb. 4, 2007, *available at* http://nymag.com/arts/books/profiles/27304/.

[183] William Grimes, *No Rest for a Feminist Fighting Radical Islam*, N.Y. TIMES, Feb. 14, 2007, at E1.

[184] Robin Acton, *Johnstown Imam Ousted over "Death" Remarks*, PITTSBURGH TRIB. REV., May 10, 2007, *available at* http://www.pittsburghlive.com/x/pittsburghtrib/print_506958.html.

[185] *Embassies Torched in Cartoon Fury*, CNN.COM, Feb. 4, 2006, http://www.cnn.com/2006/WORLD/meast/02/04/syria.cartoon.

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *See* Flemming Rose, Op-ed., *Why I Published Those Cartoons*, WASH. POST, Feb. 19. 2006, at B1.

[190] Asra Q. Nomani, Op-ed., *You Still Can't Write About Mohammed*, WALL .ST. J., Aug. 6, 2008, at A15.

[191] *British Publisher to Bring Out Controversial Prophet Mohammed Novel*, AFP EUR. EDITION, Sept. 3, 2008, http://www.thefreelibrary.com/British+publisher+to+bring+out+controversial+Prophet+Mohammed+novel-a01611634417.

agreed to take on the book because of the importance of open access to varying books and ideas, even those that are controversial.[192]

In the United States in 2006, several imams were removed from a U.S. Airways flight after passengers and flight attendants suspected their behavior indicated a possible act of terrorism.[193] The imams filed a lawsuit against U.S. Airways and six un-named passengers who reported their behavior, though the passengers were dropped in an amended complaint.[194] Perhaps more telling of the desire to suppress speech is the imam's vehement opposition to the filing of an amicus brief by the Becket Fund,[195] a religious freedom organization that seeks to protect the religious freedom of individuals of *all* religions, including Islam.[196]

In England in June 2008, two individuals seeking to share their Christian beliefs in a Muslim neighborhood were met with hostility, and were told by none other than a police officer that they could not preach in a Muslim area or attempt to convert Muslims to Christianity, because that was a hate crime.[197]

More recently, a Muslim school in Minnesota sued the American Civil Liberties Union ("ACLU") for defamation, claiming that the ACLU's accusations that the school was promoting Islam hurt its ability to hire teachers.[198] The suit was dismissed.[199] Some would argue that this Act is not needed because the system will deal with matters like this—if the suit has no merit, it will be dismissed, and if it has merit, it will continue. But this argument overlooks the plaintiff who is grasping for any straw and abuses the process of defamation as discussed above.[200] This plaintiff knows there is no merit in the claim and is only seeking a public forum in which to shift public sentiment. Eventually, even though many suits will be dismissed, public opinion may shift, and

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[192] *Id.*

[193] Libby Sander, *Six Imams Removed from Flight for Behavior Deemed Suspicious*, N.Y. TIMES, Nov. 22, 2006, at A18.

[194] *See* Shqeirat v. U.S. Airways, Inc., 515 F. Supp. 2d 984, 990–91 (D. Minn. 2007).

[195] Plaintiffs' Memorandum of Law in Opposition to Becket Fund for Religious Freedom's Motion for Leave to File Brief *Amicus Curiae* in Support of Dismissal at 4–6, Shqeirat v. U.S. Airways Group, Inc., 645 F. Supp. 2d 765 (D. Minn. 2007) (No. 07-1513).

[196] The Becket Fund for Religious Liberty, About Us, http://www.becketfund.org/index.php/article/82.html (last visited Apr. 19, 2010).

[197] Steve Doughty & Andy Dolan, *You Can't Preach the Bible Here, This Is a Muslim Area*, DAILY MAIL (London), June 2, 2008, at 9, *available at* http://www.dailymail.co.uk/news/article-1023483/You-preach-Bible-Muslim-area-What-police-told-Christian-preachers.html.

[198] Sarah Lemagie, *Judge Throws Out Claim ACLU Defamed TiZA School*, STAR TRIB. (Minneapolis), Dec. 11, 2009, at B4, *available at* http://www.startribune.com/local/south/79023182.html.

[199] *Id.*

[200] *See supra* Part II.B.1.

the law may change to allow defamation suits to protect ideas, a dangerous end that the law never intended.

These events stand in stark contrast to U.S. history and the policy behind the First Amendment. Free speech in the United States has always been held to be of higher value—for example, prohibiting films that a censor claimed to be "sacrilegious" because they mock a religion has been held to violate the First Amendment,[201] as does requiring a license before sharing religious beliefs in a certain neighborhood.[202]

Unique circumstances of the current times call for certain measures. Terrorist groups' unprecedented complexity, ease of communication, and financial exploits call for suitable countermeasures—the foremost of which must be free and open reporting. Prohibiting "bad sentiments"[203] that cause *individual* harm may have been suitable for Blackstone's time, but changing times often require changes in the law, and certain inflammatory statements are necessary to successfully fight the complex terrorism practices of today.

The examples above, and many more like them, indicate a world-wide trend toward suppression of speech and ideas. Although not implicated by the current version of the Act, this Act is the type of measure needed to send a strong message to those repressing ideas, to protect against the spread of this type of suppression, and to provide legal protection for those victimized by it. These recent events make protection for those who desire to speak the truth even more crucial. The spread of "defamation" law must be carefully watched—and free speech must be protected.

CONCLUSION

The Free Speech Protection Act of 2009 should be passed because it is the type of measure needed to vigilantly guard the First Amendment right of U.S. citizens to speak freely. The Act takes a necessarily strong stance in protecting U.S. defamation law and in promoting its policy of reporting facts of public concern. This is an especially crucial goal during a time when certain elements are using defamation law to suppress speech. In light of this, legislators should broaden the Act to protect quasi-judicial foreign suppression of speech and should pass it, or a measure like it, to protect free speech.

Travis S. Weber[*]

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[201] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952).

[202] Cantwell v. Connecticut, 310 U.S. 296, 300–03, 307 (1940).

[203] BLACKSTONE, *supra* note 72, at *152.

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