ESSAY

The Small Steps of the SPEECH Act

BRUCE D. BROWN* & CLARISSA PINTADO†

INTRODUCTION

It had become the go-to punch line for English lawyers attending libel conferences in the United States. Speaking at a podium or debating on a panel, asked to explain a decade of growing defamation litigation in Britain against American authors and news organizations, they would shrug their shoulders and quip, with a nod to the late, great Johnny Cash, that London had indeed turned into a "town named Sue."

* Executive Director, Reporters Committee for Freedom of the Press; Lecturer, University of Virginia School of Law; Of Counsel, Baker Hostetler, Washington, DC. Mr. Brown testified in favor of legislation to combat libel tourism legislation before the Senate Judiciary Committee in 2010 and before the House Subcommittee on Commercial and Administrative Law in 2009.

† Clarissa Pintado is a Senior Research Associate with the Public International Law and Policy Group.

For many years, the joke was on us. Foreign libel plaintiffs had a considerable upper hand over American defendants in U.K. courts. By bringing suit in England, they could circumvent "actual malice" rules under *New York Times Co. v. Sullivan*[2] and other substantive First Amendment rights.[3] What is more, contrary to the standards in the United States, English courts were willing to assert personal jurisdiction over a defendant publisher who was not deliberately targeting a British audience.[4]

That jurisdictional practice had a particularly significant impact in the age of online publishing when posting news articles on a domestic website makes the material available instantaneously around the world. Lack of due process added to a lack of free speech protections and made for a lethal combination. Not only did English defamation law tilt the scales dramatically toward plaintiffs, it also encouraged individuals to bring suit in the United Kingdom even if they had tenuous ties to the forum and the defendant virtually none.[5]

This is the phenomenon of "libel tourism." While England was not the only problematic foreign jurisdiction, it was by far the most notorious — the "libel capital of the world" — with several high-profile cases that resulted in complete capitulation from publishers.[6] For American media companies, the threat of libel tourism had developed into a real concern. Media defendants were settling suits abroad as U.S. enforcement uncertainties loomed.[7]

On the one hand, exposure to foreign defamation law seemed fair if it came about in predictable circumstances in which a publisher aimed specific content at an overseas jurisdiction. While publishing on a website is not enough, if you make a market in a foreign country, it is not

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2. 376 U.S. 254 (1964).

3. *Compare* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (recognizing that private figure libel plaintiffs speaking on matters of public concern have the burden of proving falsity), *and* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984) (establishing independent appellate review of libel judgments), *with* Reynolds v. Times Newspapers Ltd., [2001] 2 A.C. 127 (H.L.) (appeal taken from Eng.) (creating the "Reynolds defense" for defendants to show the speech was in the public interest and that the journalist behaved responsibly and reasonably, and limiting the affirmative defense to authors within the journalism realm).

4. The leading authority in the United States on personal jurisdiction in Internet libel cases is *Young v. New Haven Advocate,* 315 F.3d 256 (4th Cir. 2002), which held that the posting of content by two Connecticut newspapers on their websites did not expose them to suit in Virginia, where the content was accessible to computer users, because the newspapers did not target audiences in the Commonwealth.

5. *See* Berezovsky v. Forbes, [2000] 1 W.L.R. 1004.

6. Eric Pfanner, *Britain Seeks to Curb 'Libel Tourism,'* N.Y. TIMES, May 9, 2012, http://www.nytimes.com/2012/05/10/business/media/britain-to-seek-curbs-to-libel-tourism.html?_r=0.

7. *See* Declan McCullagh, *Dow Jones Settles Net Defamation Suit*, CNET (Nov. 15, 2004, 4:46 PM), http://news.cnet.com/Dow-Jones-settles-Net-defamation-suit/2110-1030_3-5453453.html; Jonathan Krim, Internet Libel Fence Falls, WASHINGTON POST, Dec. 11, 2002, at A10.

unreasonable to expect that you might face foreign lawsuits applying foreign legal standards. More than *de minimis* hard copy circulation or substantial advertising revenues are signs of such a commercial presence.

On the other hand, libel tourism was something different; Americans were being sued overseas on the basis of content they published for a U.S. readership. Media companies were alarmed because libel tourism was exporting the much less speech-protective norms of foreign law to American shores. If authors and journalists who were writing for local or national readers could be intimidated by legal regimes wholly alien to the Constitution, it hardly is nativist to say that the First Amendment would be eviscerated at home.

The SPEECH Act was a measured and modest response to a significant problem that had created a tangible chilling effect on publishers in this country.[8] Enacted in 2010, the SPEECH Act held strong against its first challenge in federal court when the Fifth Circuit opted not to enforce a default defamation judgment from Canada against a Mississippi blogger.[9] In *Trout Point Lodge v. Handshoe*, the plaintiffs failed to prove the two prime elements of the SPEECH Act: that is, that Canadian defamation law is not as protective of free speech as U.S. law and that defendant would have been found liable in a Mississippi court.[10] Handshoe had posted content on his Gulf Coast online forum linking Trout Point to a corruption scandal in Jefferson Parish, Louisiana. In its claim, Trout Point did not make sufficient assertions regarding a key element that a plaintiff must show to comport with U.S. Constitutional standards: falsity.

Although *Trout Point Lodge* represents the utility of the SPEECH Act against international forum shopping, the legislation has its critics. The Professors David Anderson and Mark Rosen do not always agree with each other on what they believe is wrong with the SPEECH Act, but they are both critical of Congress's modest but important steps in this area. While this article will briefly respond to their criticisms, much credit is due to the professors for giving the legislation – and the issues behind it – some much-needed academic attention.

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[8] Securing the Protection of our Enduring and Established Constitutional Heritage Act, Pub. L. No. 111-223, 124 Stat. 2380 (2010) (codified at 28 U.S.C. §§ 4101–05).

[9] Trout Point Lodge, Ltd. v. Handshoe, 2013 U.S. App. LEXIS 18516, 2013 WL 4766530 (5th Cir. Miss. Sept. 5, 2013).

[10] *Id.*

I. THE FINE LINES OF INCLUSIVITY AND SOVEREIGNTY

A. Overinclusivity

As with most pieces of legislation, this bill was a series of compromises. Legislators were balancing several interests — U.S. values on protecting libel defendants, comity, and fairness to foreign states. Supporters considered a proposal to limit relief under the Act to true cases of libel "tourism" — where the foreign plaintiff lacked ties to the overseas forum in which he or she sued. But this idea was rejected because drafters thought that the bill should focus on how the foreign forum treated libel defendants and not distinguish between different types of foreign plaintiffs.

Critics of the SPEECH Act argue that it is overinclusive because it applies to a broad spectrum of defendants and types of judgments.[11] Professor Rosen suggests that the overbreadth of the phrase "United States person" is problematic because it may apply to foreign citizens and foreign corporations, but Professor Rosen does not acknowledge that First Amendment protections cover both.[12] A lawful permanent resident of the United States who travels to another country with the intention to return does not abandon his status upon leaving for a foreign state.[13] Journalists working under media (I) visas likewise would be afforded free speech protections while working in the United States.[14] To carve out a citizenship exception the Act would undo precedent protecting noncitizen speech. In addition, First Amendment protections apply to publishers and other businesses, and the SPEECH Act retains such protections.[15]

Drafters of the bill considered explicitly limiting the law's protections to cases in which an author could prove that she was not targeting an audience in the foreign state, but such a provision would be counter to our own constitutional jurisprudence. The jurisdictional test in the United States requires the plaintiff to show at least "certain minimum contacts" with the forum state, and in Internet cases, specific targeting of an

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11. Mark D. Rosen, *The SPEECH Act's Unfortunate Parochialism: Of Libel Tourism and Legitimate Pluralism*, 53 VA J. INT'L L. 99, 100–01 (2012).

12. *See* Arizona v. United States, 132 S. Ct. 2492, 2514 (2012) (noting that the Constitution protects the rights encompassed in the Bill of Right of *all* people within the United States).

13. *See*, *e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 772 (1950) (affirming that mere lawful presence carries certain fundamental rights, including the Fourteenth Amendment) (citing *Yick Wo. v. Hopkins*, 118 U.S. 356 (1886)).

14. *Eisentrager*, 339 U.S. at 772; *see also Visas for Members of the Foreign Media, Press, and Radio*, TRAVEL.STATE.GOV, http://travel.state.gov/visa/temp/types/types_1276.html (last visited Oct. 3, 2012) (explaining that the media (I) visa is issued to representatives of foreign media temporarily staying in the United States for business purposes related to their profession).

15. *See* 28 U.S.C. § 4101(6)(D); Citizens United v. FEC, 558 U.S. 310, 365 (2010) (holding that under the First Amendment political speech of corporations cannot be suppressed based on the corporation's identity).

audience in the forum state through a website.[16] To require a showing by a writer or publisher that it did not have minimum contacts or that it did not specifically target the foreign forum would shift the burden to the defendant speaker.

Thus the SPEECH Act leaves the door open to judgments from a foreign court in which the plaintiff can show that the writer or publisher targeted a foreign audience or had minimum contacts.[17] The Supreme Court has held that even sales of 10,000 to 15,000 copies of a nationally published magazine can establish jurisdiction in a libel action.[18] Thus, the SPEECH Act strikes a delicate balance between preserving the burden of proof on the plaintiff and permitting meritorious judgments to be enforced in the United States.

B. Underinclusivity

The SPEECH Act was a measured response to a concrete transnational issue, and legislators and drafters were willing to accept that the bill did not address all potential situations. Drafters of the bill conceded that it was not a comprehensive protection of all rights encompassed in the First Amendment and acknowledged that it falls short of protecting privacy rights of people within or outside of the United States and does not address hate speech. Critics of the bill point out the overinclusivity of the bill while at the same time emphasizing that the bill is underinclusive in the sense that it fails to prevent a foreign state's use of other deterrence measures, such as securing property of U.S. persons and companies overseas.[19] But critics deemphasize the multitude of other silencing tactics that can be invoked without undermining the U.S. Constitution.

As information and commercial markets continue to globalize, defamatory expression is not the only type of speech creating exposure for U.S. citizens and corporations around the globe. The SPEECH Act provides no clear protection to people within the United States who are offenders of hate speech laws abroad, for example.[20] In 2001, Yahoo! was sued by French parties who had obtained an order from a French court requiring the blocking of French citizens' access to Nazi material displayed on Yahoo!'s U.S. site.[21] The Ninth Circuit held that Yahoo!'s action for

16. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002).

17. 28 U.S.C. § 4102(a)(1)(B).

18. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 772, 781 (1984).

19. Rosen, *supra* note 11, at 119.

20. Jeremy Maltby, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 COLUM. L. REV. 1978, 2023–24 (1994).

21. Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006), *cert. denied*, 547 U.S. 1163 (2006).

declaratory judgment was subject to dismissal, noting that it is uncertain whether Yahoo! had the extraterritorial "First Amendment right to violate French criminal law and to facilitate the violation of French criminal law by others."[22] Similarly, the Swedish and German penal codes provide prison sentences for insults related to religion, ethnicity, and race.[23] These types of laws would likely not be covered by the SPEECH Act as it applies specifically to defamation — the definition of which would be unlikely to extend to proceedings brought under these provisions.[24]

The SPEECH Act was a defensive response to the impact of foreign free speech laws on U.S. authors. The Act was not designed to deflect other remedies available to foreign states. Prison sentences for libel are common throughout the world, and the Act was calibrated to avoid interfering with criminal processes.[25] Furthermore, foreign states can and do issue strict measures, including injunctions to publishers and distributers, banning of books, and censorship of webpages.[26] In Thailand, for example, the government chooses to censor websites that defame the king.[27] Foreign states can also seize control of assets held in their territories. Lastly, foreign nationals residing in the United States may still be subject to foreign laws under extradition agreements. German citizen Ernst Zündel was extradited in 2005 to Germany on fourteen counts of inciting racial hatred.[28] One of the charges involved slander to the memory

22. *Yahoo*!, 443 F.3d at 1221.

23. BROTTSBALKEN [BrB] [CRIMINAL CODE] 16:8 (Swed.); STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, REICHSGESETZBLATT [RGBL] §§ 130–31, 185 (Ger.).

24. 28 U.S.C. § 4102(a)(1)(A)–(B).

25. *See, e.g.*, *Rights Group: Morsy Files Record Number of Defamation Charges*, EGYPT INDEP. (Jan. 21, 2013, 2:30 PM), http://www.egyptindependent.com/news/rights-group-morsy-files-record-number-defamation-charges (noting that President of Egypt Mohamed Morsi has invoked defamation laws more than any president in the past 115 years, and reporters have been punished with prison sentences of about three to six years).

26. *See Indian State Bans Gandhi Book After Reviews Hint at Gay Relationship*, THE GUARDIAN (Mar. 30, 2012, 10:52 AM), http://www.guardian.co.uk/world/2011/mar/30/gujarat-bans-gandhi-book-gay-claims (describing that a state in India decided to ban Pulitzer-prize-winning Joseph Lelyveld's book after reviews said the book hinted that Mahatma Gandhi had a gay relationship, which still carries much social stigma in India); *The Nobel Prize in Literature 1967: Miguel Angel Asturias — Biographical*, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/literature/laureates/1967/asturias-bio.html (last visited May 22, 2013) (relaying that publication of the novel "El Señor Presidente," critical of Guatemalan leadership, took thirteen years to publish due to its "political implications").

27. *See* Gareth Finighan, *U.S. Citizen Jailed for More Than Two Years in Thailand for Posting Online Excerpts from Book Banned by King*, DAILY MAIL ONLINE (Dec. 8, 2011, 2:30 PM), http://www.dailymail.co.uk/news/article-2071468/Joe-Gordon-US-citizen-jailed-Thailand-posting-online-excerpts-book-banned-king.html (noting that the Thai government jailed an American for two years after he posted online, from his home in the United States, excerpts taken from a banned book that was critical of the king of Thailand).

28. Patrick Donahue, *Holocaust Denier Given Five-Year Prison Term by German Court*, NEW YORK SUN (Feb. 16, 2007), http://www.nysun.com/foreign/holocaust-denier-given-five-year-prison-term-by/48771/.

of the dead for publishing Holocaust-denying material online.[29] The Act left open the possibility of remedies to be included in future bilateral or international agreements. The SPEECH Act was not given a long arm to shield assets abroad, but it did allow for those sued to secure reasonable attorneys' fees for any proceedings in the United States.[30]

II. CONSTITUTIONAL PLURALISM: A MULTITUDE OF UNCERTAINTIES

A. The Speech Act Does Not Provide a Categorically Parochial Rule

Characterization of the SPEECH Act as "systematically and categorically parochial" is speculative in the sense that it surmises that U.S. courts will find all "un-American" foreign libel laws in complete discord with the U.S. Constitution.[31] The Act does not proscribe recognition of all foreign libel judgments, and it leaves ample room for application of free speech laws that provide "at least as much protection for freedom of speech and press in that case as would be provided by the first amendment . . . ."[32] For instance, a judgment under Germany's Criminal Code Section 187 may be enforced with regard to fines for intentional defamation.[33]

The SPEECH Act incorporates long-standing American free expression traditions and is not just a twenty-first century reaction to the world. The standard set by the Act reinforces both state common law comity principles and recognition statutes.[34] Most state common law and statutes share identical grounds for refusing to recognize foreign judgments. The Act permits an action "for a declaration that the foreign judgment is repugnant to the Constitution or laws of the United States" if the foreign judgment does not provide for the same amount of free speech protection.[35] This language reflects *Hilton v. Guyot*, a nineteenth century case that defined bases for recognition.[36] In *Hilton*, Justice Gray's opinion

29. *Id.*

30. 28 U.S.C. § 4105 (2012).

31. Rosen, *supra* note 11, at 121.

32. 28 U.S.C. § 4102(a)(1) (2012).

33. Strafgesetzbuches [StGB] [Penal Code], Nov. 13, 1998, Federal Law Gazette [Bundesgesetzblatt] I at 3322, § 187 (Ger.).

34. *See* Cedric C. Chao and Christine F. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147, 157–59 (2002) (describing the public policy exception to the comity principle and noting that the Maryland Court of Appeals had already found English libel law "repugnant to public policy").

35. 28 U.S.C. § 4104(a)(1) (2012).

36. 159 U.S. 113, 158 (1895) (holding that where there is a "fair trial abroad before a court of competent jurisdiction . . . and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of this case should not . . . be tried afresh . . . .").

discussed Justice Story's view on comity from his Commentaries on the Conflict of Laws, which stated, "[e]very nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded."[37] *Hilton* also described Chief Justice Taney's similar view in *Bank of Augusta v. Earle*, which reiterated that comity is a voluntary act of a state that is inappropriate when contrary to domestic policy and interests.[38] Although this case is not binding on any of the states, these principles have been incorporated into most state's statutory and common laws.[39] The Restatement (Third) of Foreign Relations Law also sets forth the common law rule on recognition and enforcement.[40]

The United States is not bound by international law to recognize foreign libel judgments. The United States has never ratified any international agreement regarding enforcement or recognition of foreign judgments, let alone defamation judgments. The Hague Choice of Court Convention applies to civil and commercial disputes, but only where an exclusive choice-of-court agreement already exists between the parties. While the United States signed the Convention in 2009, it has still not implemented the Convention due to ongoing controversy. The prospect of ratification of an international agreement on enforcement of all foreign court judgments remains far off.[41]

Courts in the United States are divided as to the criteria for determining a foreign law's repugnancy to public policy, but courts have generally refused to enforce foreign libel judgments after finding them to be repugnant.[42] If a plaintiff brings a case in a foreign state to deliberately avoid the home state's regulations, an injunction or money judgment will likely be considered to be repugnant, whereas a judgment simply seeking a remedy that does not exist in the forum state may be amenable.[43] State courts have applied similar comity principles to find that English libel

37. *Id.* at 165 (quoting JOSEPH STORY, CONFLICT OF LAWS § 28 (1834)).

38. *Id.* at 165–66 (citing Bank of Augusta v. Earle, 38 U.S. 519 (1839)).

39. EMILY C. BARBOUR, CONG. RESEARCH SERV., R41417 THE SPEECH ACT: THE FEDERAL RESPONSE TO "LIBEL TOURISM" 6 (2010).

40. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(1)(d) (1987) ("A court in the United States may not recognize a judgment of the court of a foreign state if: the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought.").

41. Stephen B. Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States* (Scholarship at Pa. L., Paper No. 101, 2006), *available at* http://papers.ssrn.com/abstract=921200.

42. *Id.* at *8; see also* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 931 n.73 (D.C. Cir. 1984).

43. *Laker Airways*, 731 F.2d at 931 n.73.

judgments were based on values antithetical to state public policy regarding free speech.[44]

In addition to its deep roots in U.S. common law, the SPEECH Act shares language with state recognition statutes. Prior to the SPEECH Act, most U.S. states had adopted the 1962 Uniform Foreign Money-Judgments Recognition Act (UFMJRA) in some form. The UFMJRA ensures that states will recognize and enforce foreign judgments just as they would do for sister states under the Full Faith and Credit clause of the Constitution.[45] The UMFJRA has a significant public policy exception as grounds to refuse recognition of a foreign judgment, however, allowing a state to refuse to enforce a judgment of another nation if the cause of action or claim for relief on which the judgment is based is repugnant to public policy or incompatible with the requirements of due process of law.[46]

Prior to the Act, several states had broadened the scope of the UFMJRA's application. For example, California,[47] Florida,[48] Illinois,[49] Maryland,[50] and New York[51] added an explicit exclusion of defamation judgments unless the foreign court provides an equal or greater amount of protection as federal and state law, but there was still a long way to go toward uniformity. Some states have adopted the 2005 Uniform Foreign-Country Money Judgments Recognition Act, which provides an even more inclusive public policy exception than its predecessor.[52] Moreover, prior to the SPEECH Act, several courts were already refusing to recognize foreign libel judgments on the grounds that they were repugnant to the U.S. Constitution and state laws.[53] One of the major benefits of having the SPEECH Act in place, however, is that it creates a uniform framework for resolving these questions in both federal and state courts.[54]

B. Rawlsian and Game Theory Approaches Present Challenges to Judicial

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44. *See, e.g.*, Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997) (finding English libel law contrary to Maryland public policy).

45. Unif. Foreign Money Judgments Recognition Act § 3 (1962), *available at* http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf.

46. *Id.* § 4.

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

48. FLA. STAT. ANN. § 55.605(2)(h) (West 2009).

49. Ch. 735 ILL. COMP. STAT. ANN. § 5/2-20(b)(5) (West 2008).

50. MD. CODE ANN., CTS. & JUD. PROC. § 10-704(c)(2) (West 2010).

51. N.Y. C.L.P.R. 5304(b)(8) (McKinney 2008).

52. *See* BARBOUR, *supra* note 39, at 7 (explaining that the 2005 version allows U.S. courts to reject foreign judgments if the judgment is repugnant to the U.S. Constitution, regardless of the cause of action).

53. *See, e.g.,* Telnikoff v. Matusevitch, 702 A.2d 230, 251 (Md. 1997).

54. *Id.*

Implementation and Turn Free Speech Into a Gamble

The suggested alternatives to the line drawing in the SPEECH Act — the Rawlsian approach and the game theory approach — provide little guidance to courts as to when a foreign judgment should be enforced. Under either approach, judges become foreign policy makers and turn the First Amendment into a playing card in the hands of the two states involved. Theoretically the ideas are sound enough, but applied to diverse court settings in the United States, the Rawlsian approach unravels.

The Rawlsian approach is multilateral, taking into account the interests of the two states involved: the forum state, where enforcement of the judgment is sought, and the foreign state, where the judgment was delivered.[55] While the Rawlsian approach to libel is plausible in theory, applying it in a courtroom setting would be unfeasible. First, the court would be required to determine which judgments to enforce, basing its decision solely on the content of the foreign state's laws; the second step in the analysis would require the court to categorize the country into a "liberal" or "non-liberal" box, based on subjective and vague criteria such as whether the people "have a certain moral character . . . cooperat[ing] on fair and reasonable terms with one another."[56] Thus a liberal state's judgment that could not have been entered under the U.S. Constitution, is put to a test that may aim to minimize costs for all involved, but results in placing artificial values on the fundamental right of free speech and taking a guess as to what the political costs will be.[57]

Likewise, the game theory approach turns free speech into just that — a game. This stance unilaterally aims to optimize the forum state's interests. Applying either approach, a judge should choose to enforce a judgment when it maintains or increases both states' "political stability."[58] The theories also present the risk of "playing favorites" by enforcing judgments with friendly states, which has its own political costs. Both options force judges to put a value on a fundamental right and to weigh it against the monetary costs and possible political ramifications, in essence to make a foreign policy decision that abandons the time-tested *Hilton* "repugnancy" analysis.

Placing a strategic foreign policy decision in the hands of judges leads to a risk that drafters of the SPEECH Act intended to avoid — the

55. *See* Rosen, *supra* note 11, at 114–15 ("a 'multilateralist' approach that takes account of the interests of both the forum country (where enforcement is sought) and the foreign country (from where the judgment issued)"). *See generally* Aysel Dogan, *The Law of Peoples and the Cosmopolitan Critique*, 27 REASON PAPERS 131 (2004).

56. Dogan, *supra* note 56, at 137.

57. *See* Rosen, *supra* note 11, at 116.

58. *Id.* at 115.

chilling of protected expression.[59] Drafters noted that the effect was so severe that the United Nations Human Rights Committee observed that some foreign libel laws "discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work."[60] An aim of minimizing costs will mean choosing the less costly path from the subjective viewpoint of a judge who will need to keep abreast of constantly changing foreign political dynamics. Upholding a foreign defamation judgment from a given state may have varying results in preserving diplomacy and political stability from year to year or even month to month. This uncertainty in what how will rule, with regard to judgments from different states and those from the same state, leads authors and publishers to pull back from publishing controversial stories to reduce exposure. While it may carry some weight that "[p]eace and stability are achieved by respecting constitutional differences," if the cost is silence, is it worth it?

III. A COMITY OF ERRORS: THE FIRST AMENDMENT AND ITS COMMON LAW PROGENY ARE ITERATIONS OF LONG-HELD U.S. VALUES AND PUBLIC POLICIES

Despite arguments that the SPEECH Act confuses violations of public policy with violations of the First Amendment, the wording of the Act acknowledges more than its critics let on. The Act makes a careful delineation, barring judgments that are "repugnant" to the constitution, not those that are "unconstitutional." The law makes clear that if the foreign law does not afford an equal amount of protection as the First Amendment or the party opposing enforcement would have not have been liable under the U.S. Constitution or state law or constitution, however, the overseas judgment is thereby declared repugnant.

To determine whether a law violates public policy, an analysis of the history and policy behind constitutional provisions is informative.[61] The Maryland Court of Appeals in *Telnikoff v. Matusevitch* provides a concise portrayal of historical events giving rise to varying attitudes and policies toward free speech in England and the United States.[62] The court concluded that "Maryland defamation law is totally different from English defamation law in virtually every significant respect. Moreover, the

59. Pub. L. No. 111-223, § 2(2)–(4), 124 Stat. 2380 (2010).

60. *Id.*

61. *See, e.g.*, Telnikoff v. Matusevitch, 702 A.2d 230, 239–40 (Md. 1997) (examining the "history, policies, and requirements of the First Amendment" to explain Maryland public policy).

62. *Id.* at 240–49.

differences are rooted in historic and fundamental public policy differences concerning freedom of the press and speech."[63]

The court in *Bachchan v. India Abroad Publications, Inc.* asks the same preliminary question as the *Telnikoff* court: is the law repugnant to the public policy of the United States?[64] The *Bachchan* court noted that it is highly unlikely that a judgment arising from an action that does not comport with constitutional standards could be enforced.[65] The *Bachchan* court distilled the fundamental differences between U.S. and English libel law and found that English libel law's burden on the defendant is "antithetical to the First Amendment's protection of true speech on matters of public concern . . . ." Accordingly, the judgment was unenforceable.[66] Some commentators have noted that *Bachchan* did not clearly articulate which foreign libel judgments would square with domestic public policy other than those that are perfectly aligned with *New York Times*[67] and its progeny.[68] While the decision makes it clear that judgments contrary to public policy embodied in the First Amendment are unenforceable, it offers just a glimpse of what those policies entail. [69]

The SPEECH Act is a natural extension of jurisprudence that provides greater certainty to journalists and publishers as to which judgments will be enforceable. It incorporates aspects of the repugnancy test while clarifying the analytical steps. The first step is a comparison of libel laws to determine repugnancy, which following binding authority includes shifting the burden to the plaintiff. Secondly, if the law is not necessarily repugnant, a direct application of the First Amendment to the facts of the case follows to determine repugnancy. The analysis is thus grounded in case law flowing from the Constitution, creating predictable outcomes. The SPEECH Act significantly reduces the chilling effect that ensues upon enforcement of laws contrary to the First Amendment protections across state borders. Prior to the Act there was no uniform approach across the United States to handle foreign libel judgments, and Congress was compelled to act to preserve the free speech rights embodied in the First Amendment.

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63. *Id.* at 248.

64. *See* Bachchan v. India Abroad Pubs., Inc., 585 N.Y.S.2d 661, 662 (Sup. Ct. N.Y. Cnty. 1992) ("[I]f . . . the public policy to which the foreign judgment is repugnant is embodied in the First Amendment to the United States Constitution or the free speech guaranty of the Constitution of this State, the refusal to recognize the judgment should be, and it is deemed to be, 'constitutionally mandatory.'").

65. *Id.*

66. *Id.* at 664 (quoting Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986)).

67. 376 U.S. 254 (1964).

68. Maltby, *supra* note 20, at 1982–83.

69. *Bachchan*, 585 N.Y.S.2d at 662; *see also* Leese v. Baltimore County, 497 A.2d 159, 172 (Md. Ct. Spec. App. 1985) ("We can conceive of no clearer 'mandate of public policy' than the rights spelled out in the United States constitution.").

IV. CHOICE OF LAW

The SPEECH Act was not the declaration of "war on the defamation laws of other countries" that Professor Anderson has portrayed.[70] It was a defensive maneuver to protect the free speech values embodied in the U.S. Constitution. Choice-of-law concepts as applied would only muddy the international waters, and an international baseline for freedom of speech protection is not on the horizon.

U.S. media companies would be justifiably skeptical of relying on foreign judges to apply our First Amendment jurisprudence. Anderson properly notes that First Amendment law is a complex "amalgam of rules, presumptions, preferences, procedures, and predilections."[71] The libel jurisprudence of lower federal and state courts continually requires the supervision of appellate courts. Under *Bose Corp. v. Consumers Union of the United States*,[72] federal appellate judges play a crucial role in independently reviewing jury verdicts for libel plaintiffs, over 70% of which are overturned on appeal, according to statistics since the 1970s.[73] Choice-of-law issues can be tricky at home, but First Amendment protections at least provide minimum protections.

While a global baseline for speech protections and a universal "single publication rule" are appealing ideas, the world is a long way from reaching agreement on these issues. Although the United Kingdom and New Zealand had taken meager measures toward libel reform prior to the enactment of the SPEECH Act, they were not enough to stop international forum shopping for cases that offended fundamental conceptions of free speech in the United States. A universal single publication rule might make sense among states in the United States, but this is a rule that is largely unique to U.S. jurisprudence. It again leaves choice of law to chance, and without the constitutional safety net.

CONCLUSION

Today, information is instantaneously dispersed around the globe, but this new communication landscape had left U.S. writers vulnerable to global forum shopping. Legislators passed the SPEECH Act to combat the very real problem of libel tourism that was stifling free speech on U.S. soil. This legislation is a counterweight to judgments resulting from foreign, plaintiff-friendly laws that U.S. state and federal courts have continuously refused to enforce as repugnant to state public policy and the

70. David A. Anderson, *Transnational Libel*, 53 VA. J. INT'L L. 71, 96 (2012).
71. *Id.* at 86.
72. 466 U.S. 485 (1984).
73. *See* Media L. Res. Ctr. Bull., Issue 1, 2007 Report on Trials and Damages (Feb. 2007).

U.S. Constitution. The Act nevertheless leaves ample room for foreign judgments to be enforced, even if they were entered under laws not as protective as those in the U.S. The compromises in the legislation preserved U.S. free speech values embodied in the bill of rights without trampling on the interests of foreign libel plaintiffs. In theory, other approaches — Rawlsian, game theory, and choice of law — have their appeal, but the application of these ideas presents unacceptable uncertainties for journalists and publishers in the United States.