Confronting the Limits of the First Amendment: A Proactive Approach for Media Defendants Facing Liability Abroad

Michelle A. Wyant

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Confronting the Limits of the First Amendment: A Proactive Approach for Media Defendants Facing Liability Abroad

MICHELLE A. WYANT*

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I. INTRODUCTION

Despite each jurisdiction’s roots in the common law, American, English, and Australian defamation laws have diverged over time in the level of protection that they afford to the freedom of expression and to an individual’s reputation. This conflict is apparent in the context of the Internet and global publications. Because the American right to freedom of expression stems from a constitutional guarantee grounded in the First Amendment, it acts as a trump on the common law right to reputation. Consequently, American defamation law both prioritizes freedom of expression and favors defendants. In contrast, neither English nor Australian defamation law possesses a similar hierarchical priority of law. Unconstrained by a similar requirement, both systems prioritize the individual’s reputation and favor plaintiffs, as compared to the United States. These substantive differences provide plaintiffs with an incentive to forum-shop. Because each jurisdiction’s procedural laws provide plaintiffs with an avenue to do so, they have seized the opportunity. This action has brought this conflict to the forefront and threatened to undermine the speech protections on which American publishers have grown to rely.

This Article confronts the limits this issue imposes on the First Amendment in four parts. Part I described the potential for conflicting defamation laws and forum shopping to undermine the American media’s speech protections in the context of the Internet and global publications and outlines the Article’s overall method of analysis. Part II first orients these conflicting defamation laws with respect to their development from the common law. It then frames them in terms of the underlying structural and policy differences that have produced their substantive divergence. This frame provides the analytical perspective through which this Article examines the varying levels of protection
these substantive laws afford speech and the individual's reputation. Building from this frame, Part II then demonstrates the manner with which each jurisdiction's procedural laws facilitate their respective substantive goals. Lastly, Part II discusses these laws in terms of their extraterritorial application and views them from an aggrieved plaintiff's perspective to emphasize both his incentive to forum shop and the ease with which he may pursue that end. Thus, in the absence of any further action, the American media must either edit global publications to conform to foreign law or face potential liability in a foreign jurisdiction.

Part III offers a proactive approach by proposing that American media take action both through the courts and by modifying its internal practices to reduce, if not eliminate, its liability abroad. The American media should not rely on legal reform to harmonize conflicting laws. The difficulties associated with this approach stem from differences entrenched in the countries' respective legal traditions, and harmonization would require either drastic court measures or an intolerable degree of compromise. Part III proposes that the American media should, instead, rely on its own initiative and presents the two following courses of action. Through the courts, a defendant may (1) seek an anti-suit injunction, (2) assert forum non conveniens, or (3) contest the ultimate foreign judgment's enforceability. Modifying its internal practices, a member of the media could (1) utilize a website disclaimer or visitor agreement, (2) employ geo-location technology, or (3) acquire media liability insurance.

In conclusion, Part IV submits that the American media should recognize the limitations on the speech protections it enjoys in the United States and understand that once it publishes statements on a worldwide scale via the Internet or another global medium, foreign law readily applies. While the American media may be accustomed to the protections afforded by the First Amendment in the United States, foreign jurisdictions have evolved with their own traditions and cannot be expected to abandon them to preserve our own. By employing the means available to them, American publishers may both express themselves as they have on American soil and respect the degree to which that expression may be received beyond it.
II. THE CONFLICTING DEFAMATION LAWS: A PRODUCT OF THEIR DEVELOPMENT

This Article now examines the conflicting substantive and procedural laws governing defamation actions in America, England, and Australia through their evolution from the common law. Tracing their evolution demonstrates that the divergence stems from structural differences underlying each jurisdiction’s substantive laws. These difference have propelled each country’s ultimate policy choices. Further, each jurisdiction’s procedural laws operate as a means to give effect to their substantive policy goals. Viewing this conflict from an aggrieved plaintiff’s perspective, it is only logical to forum shop and take advantage of the most favorable laws available. Thus, American publishers must take heed each time they publish on either the Internet or another global medium.

A. The Substantive Law—An Evolution Driven by Underlying Structure & Policy

1. The Common Law

At common law, defamation encompasses both libel and slander. In certain cases the distinction may blur, libel typically prohibits defamatory statements that are either written or printed, while slander typically prohibits defamatory statements that are oral. In general, the elements underlying a defamation suit include (a) a false and defamatory statement of and concerning the plaintiff, (b) an unprivileged publication to and received by a third party, and (c) harm to the plaintiff.

2. Id.
4. Socha, supra note 1, at 475 (discussing the meaning of “a false and defamatory statement concerning the plaintiff” in the United States, noting that the majority of United States jurisdictions require that the statement be “of and concerning” the plaintiff, and explaining that statements which cannot reasonably be interpreted as statements of truth or fact are not actionable); Maly, supra note 3, at 899 (indicating that under British law, the plaintiff must “show that the work identified him or her” and that the statement will be judged by its ordinary meaning in the context in which it was used); Kenyon,
does not reach a third party, it cannot injure the plaintiff's reputation.  

Once the plaintiff demonstrates that the statement disparages his reputation, courts presume both its falsity and harm, and strict liability applies.

Under the common law, the defendant must either prove the truth of his assertion or assert a privilege in order to gain heightened protection for his speech. The fair comment privilege protects "honest expressions of opinion on matters of legitimate public interest based on true or privileged statements of fact" made without mal-intent so long as the privilege is not abused. The absolute privilege protects statements made in situations where the exchange of information carries such great importance that knowledge of the statement's falsity and the defendant's motive are irrelevant. Lastly, the qualified privilege protects statements made in good faith on any subject matter in which the person making the communication has an interest, or with reference to which he or she has a duty to perform, to another person having a corresponding interest or duty.

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supra note 3, at 653 (noting that identification requires only that recipients of the publication "would think the plaintiff is being referred to by the publication").

5. Socha, supra note 1, at 475 (noting that without publication to a third party, the statement cannot "be injurious to the plaintiff's reputation").

6. Id. at 476; Maly, supra note 3, at 898-99 (noting that allegedly defamatory statements are presumed false and actionable in England); Kenyon, supra note 4, at 653 (explaining that once an Australian plaintiff establishes that a published, defamatory statement identified the plaintiff, the statement's falsity need not be proved, and damages are presumed).


8. RESTATEMENT (FIRST) OF TORTS § 582 (1938).


10. 50 AM. JUR. 2D. Libel and Slander § 256. For example, the absolute privilege applies to statements made in the course of legal proceedings that are both relevant and material to redress or relief. Bochetto v. Gibson, 860 A.2d 67, 71 (Pa. 2004); Reynolds, 2 A.C. at 194 (recognizing that in some instances, "the need for uninhibited expression is of such a high order that the occasion attracts absolute privilege"); Theophanous, 182 C.L.R. at 108 (offering statements during Parliamentary proceedings as an example).

11. See 50 AM. JUR. 2D. Libel and Slander § 259 (outlining the scope of the American qualified privilege and privileged occasions); Reynolds, 2 A.C. at 194 (observing that the English qualified privilege attaches where a defamatory statement is made to a person with "a special interest in learning the honestly held views" even if the statement is untrue so long as the plaintiff cannot prove that the statement was actuated by malice); Theophanous, 182 C.L.R. at 133 (explaining that the Australian qualified privilege "depends on the absence of malice and on the . . . communication having an interest or duty in its making and on the recipient having a corresponding interest or duty in receiving it").
2. The American Law

Though American defamation law may be rooted in the common law tradition, the United States Constitution has colored its development. The result is a set of constitutional privileges that heighten speech protections over those accorded to the individual’s reputation. These constitutional privileges may be viewed as the constitutional component to American defamation law. In the United States, the right to freedom of expression stems from the United States Constitution’s First Amendment guarantee ensuring that “Congress shall make no law . . . abridging the freedom of speech or of the press.” The First Amendment’s protections preserve the “unfettered interchange of ideas” that empowers citizens to implement their desired political and social changes. This interchange facilitates a well-functioning democracy. It informs its citizenry through a forum for robust debate where truth is brought to the forefront because of the conflicting views that are tested in the marketplace of ideas. American defamation law protects freedom of expression over the individual’s reputation and is regarded as a necessary prerequisite to effective self-government.

Even though the First Amendment requires that freedom of expression be afforded more protection than an individual’s reputation, the two interests remain in flux. Thus, the individual’s right to his reputation and the states’ corollary interest in punishing those who damage that reputation also limit freedom of expression, and both are legitimate interests recognized by the courts. In determining whether the First Amendment’s guarantees extend to a certain type of speech, the court must weigh these.

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12. N.Y. Times v. Sullivan, 376 U.S. 254, 269 (1964) (stating that “libel can claim no talismanic immunity from constitutional limitations” and, therefore, “must be measured by standards that satisfy the First Amendment”).
13. Id.
15. Sullivan, 376 U.S. at 269 (observing that the free exchange of ideas is a necessary condition for the implementation of “political and social changes desired by the people”) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
17. Sullivan, 376 U.S. at 270 (stating “public discussion is a political duty”); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) (stating such discussion is necessary for the “the maintenance of our political system and open society”).
18. Sullivan, 376 U.S. at 272 (“Whatever is added to the field of libel is taken from the field of free debate.”).
19. Freedom of expression is not unconstrained; where one individual’s rights end, another’s begin.
competing interests and strike a balance that maintains their harmonious coexistence.\textsuperscript{21} 

\textit{New York Times v. Sullivan} and its progeny shaped the constitutional standards applied in defamation actions.\textsuperscript{22} In \textit{New York Times v. Sullivan}, the Supreme Court brought defamation law under the purview of the First Amendment on the theory that a state’s defamation laws may not override the free speech guarantees provided by the United States Constitution.\textsuperscript{23} With this hierarchy derived from the source of law in clear view, the Supreme Court established the “actual malice” standard for public officials to recover for libel.\textsuperscript{24} Under the actual malice standard, a plaintiff must prove that a defamatory statement regarding his official conduct was made with knowledge or reckless disregard for its truth or falsity in order to recover for libel.\textsuperscript{25} In \textit{Sullivan}, the New York Times published an ad containing false allegations regarding the number of times Martin Luther King was arrested and the course of police action taken on a college campus in response to civil rights activities held in Alabama.\textsuperscript{26} Rather than verify the information, the New York Times relied solely on the reputation of the individual placing the ad in its decision to publish it.\textsuperscript{27} Because the New York Times was at most negligent and the mere fact that the stories were on file did not establish the newspaper’s knowledge of their falsity, the Supreme Court reversed

\begin{itemize}
\item \textsuperscript{21} \textit{Sullivan}, 376 U.S. at 284-85 (quoting Speiser v. Randall, 357 U.S. 513, 515 (1958) for the proposition that questions involving the First Amendment and a State’s defamation law require that lines be properly drawn between “speech unconditionally guaranteed and speech which may legitimately be regulated”).
\item \textsuperscript{22} \textit{Id.} at 256 (observing that for the first time, the Supreme Court was called upon to determine “the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct”).
\item \textsuperscript{23} \textit{Id.} at 276 (reasoning that the Fourteenth Amendment extends the United States Constitution’s application to the states; therefore, a State’s defamation laws must be consistent with the First Amendment where the public has an interest in the speech at issue).
\item \textsuperscript{24} \textit{Id.} at 279-80 (“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ . . . ”). \textit{See also} Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) (defining public officials as “at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs”).
\item \textsuperscript{25} \textit{Sullivan}, 376 U.S. at 279-80.
\item \textsuperscript{26} \textit{Id.} at 256-59 (describing the content of the ad).
\item \textsuperscript{27} \textit{Id.} at 261.
\end{itemize}
the initial grant of recovery to the Alabama Police Commissioner for the inaccuracies.\textsuperscript{28}

The Court’s reasoning illuminated the First Amendment’s purpose and cast it in terms of a national commitment to the free and open debate required for a healthy, functioning democracy. The Court reasoned that the public must be able to criticize its government and public officials in order to self-govern and act as a check on the government.\textsuperscript{29} Though all views may not be widely held, minority views must be sounded as well, for self-government requires that each individual have a voice rather than solely the majority.\textsuperscript{30} Rather than force the media to conduct a cost-benefit analysis or censor those views which when disseminated result in the threat of suit,\textsuperscript{31} the Court protected freedom of expression in recognition of the role it plays in the public forum.\textsuperscript{32}

In \textit{Curtis Publishing Co. v. Butts}, the Supreme Court then extended the actual malice standard to public figures.\textsuperscript{33} In this case, the Supreme Court addressed two separate actions, but by examining them as a whole, constructed a framework of analysis for evaluating defamation suits commenced by public figures.\textsuperscript{34} In Case No. 37, a Georgia football coach named Butts sued Curtis Publishing Co. for its allegation that he had fixed a game by giving the opposing team his game plan.\textsuperscript{35} In Case No. 150, Walker sued the Associated Press for its allegations that he had instigated a charge against federal marshals enforcing a court order.\textsuperscript{36} From the Court’s analysis, one may define a “public figure” as any individual who is involved in a matter of public policy and thrusts themselves into the public sphere by speaking out on the forefront of an issue or acting as a figure of general prominence.\textsuperscript{37} Applying this framework, the Court determined that both Butts and Walker were public figures and that each must meet the actual malice standard to recover

\begin{itemize}
  \item \textsuperscript{28} \textit{Id.} at 288, 292.
  \item \textsuperscript{29} \textit{Id.} at 297 (stating that freedom ceases to exist if citizens may suffer as a result of criticizing the government).
  \item \textsuperscript{30} \textit{Id.} at 300 (recognizing that without adequate speech protection, minority groups would not be able to seek support for their causes through publication).
  \item \textsuperscript{31} \textit{Id.} at 294. In their concurring opinions, both Justice Black and Justice Goldberg recognized that high-value judgments would discourage publications containing unpopular views or criticism of public affairs. \textit{Id.} at 293, 297.
  \item \textsuperscript{32} \textit{Id.} at 270. Speech protections do “not turn upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered.’” \textit{Id.} at 271 (citing NAACP v. Button, 371 U.S. 415, 445 (1963)).
  \item \textsuperscript{34} \textit{Id.} at 134.
  \item \textsuperscript{35} \textit{Id.} at 135-36.
  \item \textsuperscript{36} \textit{Id.} at 140.
  \item \textsuperscript{37} \textit{Id.} at 154. \textit{But see} Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (holding that mere public interest is insufficient for the public figure status).
\end{itemize}
damages in a defamation action. The Court justified its extension of the actual malice standard by analogizing public figures to public officials with regard to their impact on public affairs and the public’s reciprocal interest in those affairs. Additionally, it considered their access to the media as a means to defend themselves in the public sphere.

While the Sullivan actual malice standard may apply in the public sphere, the First Amendment’s free speech protections carry less weight in the private sphere. When confronted with speech relating to private individuals, the Supreme Court distinguishes between matters of public and private concern. With regard to private individuals and matters of public concern, the Supreme Court has held that a negligence, rather than the Sullivan actual malice standard, applies. In Gertz v. Robert Welch, Inc., the Supreme Court justified the distinction between public and private parties with the observation that public parties have avenues of self-help made available to them through the media to which private parties often do not. Because public officials and figures have greater access to the media, they also have a greater capability to refute falsity in the public arena than do private parties. Lacking this capability, private parties are more vulnerable and require greater protection. Further, while public officials and figures assume the risk of defamatory statements

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38. *Butts*, 388 U.S. at 154. The Court observed that each “commanded a substantial amount of independent public interest at the time of the publications” and that while “Butts may have attained that status by position alone,” Walker engaged in “purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy.” *Id.* at 154-55.

39. *Id.* at 154 (stating that the public interest in the materials as well as the publisher’s interest in disseminating the material was “not less here than that involved in New York Times”).

40. *Id.* at 155 (noting that both Butts and Walker “had sufficient access to the means of counterargument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements” (citing Justice Brandeis’ concurring opinion in Whitney v. California, 274 U.S. 357, 377 (1927))).


42. *Id.* at 348-49 (ruling that where a private individual sues, the States may “impose liability . . . on a less demanding showing” but may not provide for presumed or punitive damages unless the Sullivan actual malice standard is met).

43. *Id.* at 344.

44. *Id.* This greater vulnerability increases the state’s interest in protecting private parties.
by voluntarily thrusting themselves into the public sphere, private parties involuntarily have defamatory statements thrust upon them.45

The Supreme Court weighed the First Amendment’s speech protections against the individual’s interest in his reputation and the state’s corollary interest in protecting that reputation. It found that the First Amendment does not trump these interests insofar as the actual malice standard should apply to private individuals.46 The Court found that the balance of these competing interests in the public arena was achieved through the actual malice standard but that in the private arena, the balance required a negligence standard.47

While false statements may have value in the public arena because tolerating them fosters public debate, such public debate does not occur with regard to private matters. As such, protecting the individual’s reputation in the private sphere does not compromise this constitutional value. In Gertz, the defendant published an article for a family whose son was killed by a policeman claiming that the police officer’s attorney was a communist.48 Though the plaintiff was a prominent attorney involved in a public affair, the Court found he did not rise to the public figure status and held that he could recover for the falsity of the statement under a negligence standard.49

In Philadelphia Newspapers, Inc. v. Hepps, the Court established the burden of proof.50 Regarding matters of public concern, the plaintiff bears the burden of proof to show the falsity of the statement.51 Recognizing the First Amendment’s free speech protections, the Court found that where the falsity is unclear, the interest in free speech outweighs an individual’s interest in his reputation.52 If the plaintiff can show negligence, the plaintiff must show actual injury in order to recover.53 If, however, the plaintiff can show actual malice, damages are presumed, and he may recover punitive damages.54 Where the defamatory statement relates to a private individual and a matter of private concern, the common law still applies.55 Strict liability and the presumption of harm are operative, and punitive damages are available.56

45. Id. at 345.
46. Id. at 348-49.
47. Id.
48. Id. at 326.
49. Id. at 351.
51. Id. at 775-76.
52. Id. at 776 (recognizing that burden of proof allocations “will determine liability for some speech”).
53. Id.
55. Id. at 775.
This progeny of cases reveals that the constitutional component to American defamation law subordinates the individual’s reputation, as well as the state’s interest in protecting it, to freedom of expression. Though this hierarchy may be colored depending on whether the speech implicates a public or private individual in a matter of either public or private concern, it is clear that the First Amendment has shaped the American jurisprudence in favor of free speech so long as the speech relates to a matter of public concern. The protection that American courts afford to free speech results in defendant friendly laws that allocate the burden of proof more heavily on plaintiffs, and in particular public figures, aggrieved by defamatory statements.

3. The English & Australian Law

i. Shared Features

Without this express constitutional component present in the development of either English or Australian defamation law, any heightened protection accorded to speech stems primarily from the traditional common law privileges. Though freedom of expression may be valued as an important part of the political process in both England and Australia,\(^{57}\) the law of defamation seeks to strike a balance between freedom of expression and the individual’s reputation; “[t]he way in which those interests are balanced differs from society to society.”\(^{58}\) Both English and Australian defamation laws strike the balance between freedom of expression and the individual’s reputation more closely than American defamation law. Additionally, they often do so in a manner that favors plaintiffs and privileges the individual’s reputation over freedom of expression.\(^{59}\) This is a product of the structural differences that inhere in each jurisdiction’s laws.

As a matter of policy, the presence of an express constitutional provision requires that the balance be struck in favor of freedom of expression in the United States, while the absence of such an express

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59. Id. at 650. As Justice Callinan observed, “Australian defamation law, and, for that matter, English defamation law also, and the policy underlying them are different from those in the United States. There is no doubt that the latter leans heavily, some might say far too heavily, in favour of defendants.” Id.
provision permits the balance to be struck more favorably towards the individual's reputation in both England and Australia. Whereas the First Amendment's speech guarantees require that American defamation law distinguish between public and private sphere, neither English nor Australian defamation laws possess this express constitutional requirement or make this distinction. Instead, English and Australian defamation laws treat plaintiffs equally. Such equal treatment results in laws that are more favorable to public officials and figures bringing suit in England and Australia than in the United States. These plaintiffs do not have to surmount the higher actual malice standard present in American law.

Also significant are two presumptions still present in both English and Australian law that are absent from American law as a result of Sullivan and its progeny—once a plaintiff establishes that the statement at issue disparages his reputation, English and Australian courts presume both the statement’s falsity and harm to the plaintiff. As result, the manner with which English and Australian courts allocate the burden of proof weighs heavily in favor of plaintiffs. While an American plaintiff in the public sphere must show both that the statement was false and, at the very least, actual injury to recover, a similarly situated plaintiff in either England or Australia does not. Rather, all English and Australian defendants must show the truth of their statements, a hurdle which significantly disadvantages their positions in court.

A notable English case illustrates the difficulty that plaintiffs encounter when attempting to meet this burden. In Irving v. Penguin Books, Professor Deborah Lipstadt published a book that accused David Irving of both distorting the supporting data for his Holocaust denial and reaching unreliable conclusions. In defending her case, Lipstadt bore the burden of proving that the Holocaust did, in fact, take place and was forced to summon expert witnesses to discredit the historian’s theories.

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62. This holds true for plaintiffs suing on statements regarding matters of public concern.
65. Id. at [2].
66. Id. at [7]. Despite witnesses that included a Third Reich military campaign expert, an execution procedure expert, and a professor on the subject, there still "remain[ed] good grounds for skepticism as to what had happened at Auschwitz." Id. at [36]. Such a
Without an express constitutional constraint requiring the contrary, both English and Australian defamation laws retain elements of the common law tradition that increase the ease with which plaintiffs may vindicate their reputations in court. Thus, English and Australian defamation laws have developed in a manner that protects the individual's reputation more so than American law does.

Absent the express constitutional component that is present in American defamation law, heightened speech protection in both England and Australia stems primarily from the traditional common law privileges and, more specifically, the qualified privilege. However, while both the English and Australian courts have begun to shape the qualified privilege into a vehicle for protecting speech relating to matters of public concern, this evolving protection still falls short of that afforded by the *Sullivan* actual malice standard.

**ii. The English Expansion**

In *Reynolds v. Times Newspaper*, the English House of Lords, "built on the traditional foundations of qualified privilege" and "carried the law forward in a way" that afforded "much greater weight . . . to the value of informed public debate of significant public issues." The traditional qualified privilege provides heightened protection for speech on a "privileged occasion," which requires a duty to communicate the information and an interest in receiving it. However, as noted by both Lord Hoffman and Baroness Hale of Richmond in *Jameel v. Wall Street Journal Europe Sprl.*, the "Reynolds privilege" may be "a 'different jurisprudential creature' from the law of privilege" and may "more appropriately be called the Reynolds public interest defense," when viewed as the following two-step inquiry.

As formulated by Lord Hoffman, the first prong examines whether the article's subject matter, including the defamatory statement, falls within the public interest. In making the determination, the judge should...
consider whether the publication as a whole "was privileged because of its value to the public." If so, the judge then determines whether "the inclusion of the defamatory material was justifiable" with allowances for editorial judgment because often this determination will depend on the article's presentation, and opinions may differ as to the details required to communicate its overall message. If the article, including the defamatory statement, satisfies the public interest test, the inquiry shifts to the second prong, which considers whether the defendant met the standards of responsible journalism. Responsible journalism requires "behaving fairly and responsibly in gathering and publishing the information." Though Lord Nicholls first formulated the standard in Reynolds to evaluate a newspaper publication, the defense is "available to anyone who publishes material of public interest in any medium" and "must be applied in a practical and flexible manner." As a guide, the judge may consider the non-inclusive list of factors first propounded by Lord Nicholls in Reynolds. These factors include the seriousness of the allegation; the nature of the information and the extent to which the subject matter is a matter of public concern; the source of the information; the steps taken to verify the information; the status of the information; the urgency of the matter; whether the comment was sought from the plaintiff; whether the article included the plaintiff's side of the story; the article's tone; and the circumstances of publication, including relevant time pressures.

Fashioned in this way, the Reynolds public interest defense diverges from the traditional qualified privilege in that it focuses on whether the published material was privileged rather than the occasion on which it was published. Lord Hoffman proposed that the Reynolds decision established that journalists have a general professional duty to impart information and that the public has an interest in receiving it as a matter of law. Thus, if the publication's subject matter satisfies the public interest test, the publication satisfies the traditional qualified privilege's

71. Id. (noting that this inquiry falls under the judge’s discretion).
72. Id. at 1295.
73. Id. at 1296.
74. Id. at 1297.
75. Id.
76. Id.
77. Id. Lord Hoffman clearly stated that these factors are "not tests which the publication has to pass." Id.
79. Jameel, 4 All E.R. at 1296.
duty-interest requirement. Viewed in this light, Lord Nicholls may have employed the term privilege when he first established the defense; however, “it is clearly not being used in the old sense.”

Though the Reynolds public interest defense may be viewed as a different jurisprudential creature, indeed, a more nuanced understanding reveals that, it is a flexible adaptation that extends the qualified privilege’s protection to “statements published to the world at large.” Because the journalist has a professional duty to disseminate information of public concern and the public has a corresponding duty in receiving it, neither Lord Bingham of Cornhill nor Lord Scott of Foscote found the defense rejected the qualified privilege’s duty-interest approach, even where formulated in terms of a general professional duty. Asking whether the publisher meets the standards of responsible journalism is an extension of this approach, for “there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify.” The expression responsible journalism is merely a phrase “usefully coined as a succinct summary—but only a summary—of the circumstances” under which a publisher may claim the privilege. Viewed in this light, the Reynolds defense may still be regarded as the Reynolds privilege because the traditional qualified privilege’s duty-interest test determines whether an article was published on a privileged occasion. Its focus remains on whether the occasion for publication was privileged rather than whether the published material was privileged.

Under either view, Reynolds significantly increased the protection extended to publications regarding matters of public concern. However, the new approach still falls short of protection afforded by the Sullivan actual malice standard, for it hinges on a case-by-case inquiry and allocates the burden of proof to defendants. Unlike the Sullivan actual malice standard, the Reynolds privilege or defense does not provide categorical protection to matters of public concern or political information. Ambiguity may be resolved in favor of publication, but determining

80. Id.
81. Id. at 1295.
82. Id. at 1318-19.
83. Id. at 1296.
84. Id. at 1315.
85. Id. at 1291.
86. Id. at 1319.
87. Id. at 1294.
whether a publication's subject matter is a matter of public interest and whether the publication itself satisfies the standard of responsible journalism is conducted on a case-by-case basis.\(^8\)

Each of these inquiries may yield unreliable protection for the following two reasons. First, whether a publication satisfies the public interest test is a discretionary matter.\(^9\) Second, the responsible journalism test may have been described as an *objective* inquiry; however, the factors involved in the determination and alternative sources of guidance such as the Code of Practice are just that—they are guides, *not binding*.\(^9\) This determination may not truly be objective until a body of illustrative case law fully develops. Thus, as compared to the categorical protection afforded by the *Sullivan* actual malice standard, the extent to which a publication will actually receive protection under the *Reynolds* defense or privilege remains to be seen.

Moreover, the defense or privilege's burden of proof favors plaintiffs rather than the defendants in need of its protection. Rather than require that the plaintiff surmount a formulation of the *Sullivan* actual malice standard, the defendant must prove that the *Reynolds* requirements are satisfied.\(^9\) In contrast to the influence that the United States Constitution may have had on the development of its defamation laws, Lord Nicholls emphasized that the English common law strictly protects reputation and explicitly rejected the *Sullivan* actual malice standard in *Reynolds*.\(^9\) Lord Nicholls found that the standard would leave individuals too vulnerable.\(^9\) It is not only "notoriously difficult to prove"\(^9\) but also encourages rash publications without thorough consideration for whether the public truly had an interest in receiving the information.\(^9\)

While the *Reynolds* defense or privilege may afford more protection to publications regarding matters of public concern, English defamation law balances the interests in freedom of expression and the individual's reputation in a manner that protects the individual's reputation more so

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89. *Id.* at 195.
90. *Jameel*, 4 All E.R. at 1296.
94. *Id.* at 201 (observing that unless the publisher withdrew his allegations, a "politician thus defamed would have no means of clearing his name, and the public would have no means of knowing where the truth lay"). While American courts have faith in a public official or figure's access to the media, English courts do not.
95. *Id.* Lord Nicholls envisioned a situation where a newspaper maintained the anonymity of its sources and deprived the plaintiff the "material necessary to prove, or even allege, that the newspaper acted recklessly." *Id.*
96. *Id.* (stating that "a newspaper, anxious to be first with a 'scoop,' would in practice be free to publish seriously defamatory misstatements of fact based on the slenderest of materials").
than the balance struck by American defamation law. To extend categorical speech protection or reallocate the burden of proof in a manner that impeded a plaintiff’s ability to vindicate his reputation would undermine this balance, and English law would not go that far.

Even though English defamation law itself may not possess an overarching constitutional component that is equivalent to the First Amendment’s speech guarantees, the European Convention on Human Rights does exert a degree of influence on the manner with which English courts construe defamation law. Article 10(1) of the European Convention on Human Rights provides “the right to freedom of expression.” The Human Rights Act of 1998 both directly incorporates the Convention right in the English common law and accords it with a “quasi-constitutional status.” When faced with a question involving a Convention right, English courts reconcile the common law with the Convention and, though they may be persuasive authority, consult relevant judgments rendered by the European Court of Human Rights.

For example, in Jameel, the House of Lords considered whether Article 10 of the European Convention on Human Rights requires that trading companies show special damage as an essential element for a libel action. They also consulted a relevant European Court of Human Rights decision. While the right to freedom of expression provided by Article 10(1) may seem promising for defendants, Article 10(2) expressly limits this right as “necessary in a democratic society” and “for the protection of the reputation or rights of others.” Thus, English defamation law does not contravene the Convention’s right to freedom of expression; rather, it falls within the scope of the right’s express limitation. As noted by Lord Hope of Craighead, the European Court of Human Rights has recognized that a right of action for libel serves as protection for freedom of expression.


100. Shany, supra note 98, at 360.

101. Jameel, 4 All E.R. at 1279.

102. Id.

reputational rights, and in his view, imposing special damages on trading companies would undermine this right. 104 Therefore, in Jameel, "[t]he argument that the change is necessary because the law is incompatible with art 10 of the European Convention for the Protection of Human Rights . . . [was] not sustainable." 105

Though the European Convention on Human Rights as incorporated into the English common law by the Human Rights Act of 1998 may guarantee freedom of expression, the interest in an individual's reputation is a recognized limit on this right. Considered in this light, the Convention does little to aid a defendant's cause, for the English defamation laws are consistent with, rather than contrary to, its provisions. Therefore, while the Convention may stand as an overarching provision that includes the right to freedom of expression, a defendant may only truly gain heightened speech protection through one of the traditional common law privileges or the evolving Reynolds defense or privilege.

iii. The Australian Expansion

Much like the English House of Lords, the High Court of Australia has also expanded protection for freedom of expression through the qualified privilege. However, unlike the English House of Lords, the High Court of Australia has recognized an implied constitutional protection for speech that relates to either government or political matters. 106 Stemming from the common law, the qualified privilege may be asserted where the duty to inform and interest in receiving the information exist. 107 Though the qualified privilege does not depend on the statement's subject matter, it may often attach where the defendant's

105. Id. at 1306.
106. See Nationwide News Pty. Ltd. v. Wills, (1992) 177 C.L.R. 1 (Austl.) (recognizing an implied protection for speech regarding government matters); Austl. Capital Television Pty. Ltd. v. The Commonwealth, (1992) 177 C.L.R. 106 (Austl.) (recognizing an implied protection for speech regarding political matters during elections); Theophanous v. Herald & Weekly Times Ltd. (1994) 182 C.L.R. 104, (Austl.) (recognizing an implied protection for political speech); Lange v. Austl. Broad. Corp., (1997) 189 C.L.R. 520 (Austl.) (explaining the basis for recognizing an implied constitutional protection). The High Court of Australia explained that the Constitution establishes this implied protection "by directing that the members of the House of Representatives and the Senate shall be 'directly chosen by the people' of the Commonwealth and the States, respectively." Id. at 559. The elections required for the Australian representative government "were intended to be free" and embody "true choice." Id. at 560. To exercise this freedom of choice, citizens must have "an opportunity to gain an appreciation of the available alternatives" through access to information. Id. (citing Capital Television, 177 C.L.R. at 187).
107. Theophanous, 182 C.L.R. at 133.
speech also falls under the implied constitutional protection. Like the speech protections in America and England, the Australian implied constitutional protection “ensure[s] the efficacious working of representative government” and restricts both legislative and executive power.

Pursuant to the Australian Constitution’s implied protection, the Australian High Court has recognized a constitutional defense for defamatory statements. In *Theophanous v. Herald & Weekly Times Ltd.*, the Australian High Court held that the defendant may assert the constitutional defense for statements made in the course of “political discussion” so long as the defendant did not publish the statement either knowing that it was false or recklessly without regard for its truth or falsity, and engaged in a publication process that was reasonable under the circumstances. The constitutional defense is extensive, for the Australian High Court’s interpretation of political discussion is quite expansive and “is not exhausted by political publications and addresses which are calculated to influence choices.” Unlike the traditional qualified privilege, it depends both on the statement’s subject matter and the defendant’s level of care in preparing the publication.

In *Lange v. Australian Broad. Corp.*, the High Court of Australia modified the qualified privilege and constitutional defense by condensing them into a single qualified privilege. Because “[t]he Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form ‘one system of jurisprudence,’” whether a publication falls under the protection of the constitutional defense or the common law’s qualified privilege “yields

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108. *Id.* at 140. In the context of political discussion, the qualified privilege will have “little, if any practical significance,” because while the qualified privilege may require that the recipient of the communication have an interest in the statement, “the public at large has an interest in the discussion of political matters such that each and every person has an interest, the kind contemplated by the common law.” *Id.*

109. *Id.* at 125.

110. *Id.*

111. *Id.* at 121, 137.

112. *Id.* at 124 (quoting ERIC BARENDT, FREEDOM OF SPEECH 152 (1985)). “Political discussion” may include “discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office” as well as “discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, e.g. trade union leaders, Aboriginal political leaders, political and economic commentators.” *Id.*


114. *Id.* at 564.
the same answer.”

Thus, an extended common law qualified privilege ensures that the law of defamation conforms to the implied speech protection contained in the Australian Constitution.

Under the Lange modification, a defendant may assert the qualified privilege for statements regarding government or political matters, for the public at large has an interest in these statements. Where the defendant has published a statement that may have reached “too wide an audience,” an audience that does not necessarily have an interest in the statement, the defendant must show that his conduct was reasonable under the circumstances. Reasonableness requires that the defendant had a reasonable basis to believe that the statement is true, did not believe that the statement was false and took the necessary steps to confirm the statement’s veracity. Further, unless a response is impractical or unnecessary under the circumstances, the defendant must have made efforts to acquire and publish the plaintiff’s response to the defendant’s publication. Lastly, a plaintiff may defeat the privilege upon a showing that the defendant published the statement with malice, that is “that it was actuated by . . . ill will or other improper motive.”

Though the High Court of Australia expanded its qualified privilege to protect speech relating to government and political matters, the value accorded to speech does not outweigh the value accorded to the individual’s reputation. The High Court of Australia justified its expansion, in part, based on its determination that individuals defamed by the publications it encompasses would be “adequately protected.” The publisher must show the reasonableness of his conduct and, even if the publisher satisfies his burden, the plaintiff may trump the defense by

115. Id. at 566. However, each has a “different significance.” Id. The High Court of Australia explained:

The answer to the common law question prima facie defines the existence and scope of the personal right of the person defamed against the person who published the defamatory matter; the answer to the constitutional law question defines the area of immunity which cannot be infringed by a law of the Commonwealth, a law of a State or a law of those Territories whose residents are entitled to exercise the federal franchise. That is because the requirement of freedom of communication operates as a restriction on legislative power. Statutory regimes cannot trespass upon the constitutionally required freedom.

116. Id. at 572.
117. Id. at 574.
118. Id.
119. Id. The plaintiff must show that the “publication [was] made not for the purpose of communicating government or political information or ideas, but for some improper purpose”; this improper purpose must be “actuated,” for the mere “existence of ill will or other improper motive will not itself defeat the privilege.” Id.
120. The privilege’s scope has since been interpreted narrowly. See Levy v. Victoria, (1997) 71 A.L.J.R. 837 (Austl.).
121. Lange, 189 C.L.R. at 574.
showing that the publication was actuated by malice. In light of the defendant's burden of proof in asserting the qualified privilege and the plaintiff's ability to, nevertheless, undermine its protection, Australian law still protects the rights of an individual in his reputation more so than those he possesses in free speech and to a greater extent than American defamation law. Though the High Court of Australia adopted a variation on the actual malice standard for matters of public concern, the plaintiff must only show that the publication was actuated by malice once the defendant has asserted the qualified privilege and proven that his publication was reasonable; whereas, a plaintiff in America must prove actual malice in every case.

An individual's right to free speech confronts another's right to his reputation where he is the subject of speech that a third party receives. Thus, defamation law and the courts enforcing it must make value judgments accordingly and determine where the balance between these two rights should be struck. In the United States, the First Amendment's constitutional guarantee shaped American defamation law in a manner that favors freedom of expression in recognition of the Constitution's precedence over the common law. In contrast, both English and Australian defamation law lack an additional constitutional component that has priority over the common law and mandates higher value be accorded to freedom of expression. Thus, each has developed in a manner that favors the individual's reputation.

As the American law favors speech over reputation, it also favors the defendants who author speech over aggrieved plaintiffs who challenge it. English and Australian law favors reputation over speech. As a result, the English and Australian law also favors aggrieved plaintiffs whose reputations are harmed by offending speech over the defendants who author it. It is thus not surprising that where a plaintiff has a choice of forum, he will choose to bring his suit in either England or Australia, as opposed to the United States, where the defendant's speech protections rooted in the First Amendment and set over the common law by Sullivan and its progeny may stand in his way.

122. Id.
B. The Procedural Law—A Mechanism to Further Substantive Goals

With these substantive differences regarding the protection afforded to freedom of expression, the forum for a defamation suit becomes increasingly important, if not determinative of the final outcome. While the substantive laws in each of these jurisdictions have created an incentive for plaintiffs to forum shop, the procedural laws have facilitated their efforts. Under the traditional common law approach, the place of publication supports jurisdiction and often determines the choice of law. However, the Internet amplifies the ease with which plaintiffs may shop amongst forums—articles uploaded on the Internet may be downloaded and read on a worldwide scale lending support for jurisdiction in a worldwide choice of forum. Such forum shopping among plaintiffs undermines the speech protections that inhere in the United States Constitution’s First Amendment guarantees. If a plaintiff brings his case in a foreign jurisdiction where the laws privilege an individual’s reputation over freedom of expression, choice of law principles generally permit him to take advantage of them. Because neither an international agreement nor convention addresses jurisdiction over Internet materials, each country must determine whether a writ may be served and jurisdiction may be exercised over defendants, according to its respective jurisdictional principles.

124. Shawn A. Bone, Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by Gutnick v. Dow Jones & Co., 62 WASH. & LEE L. REV. 279, 288-89 (2005). Bone explains further: Because publication to a third person is the essential element for actionable defamation, it has long been the central consideration in defamation choice of law. Traditional choice of law principles, embodied in the First Restatement of Conflict of Laws, located the law governing a tort dispute by where the harm had occurred. “In defamation cases, ‘the place of the wrong’ was the jurisdiction where the defamatory matter was heard or read by a third person, regardless of the place of broadcasting or writing.” This was legally sound because it could be presumed that publication occurred in a place where the plaintiff had a reputation to be harmed. Id.
125. John Di Bari, A Survey of the Internet Jurisdiction Universe, 18 N.Y. INT’L L. REV. 123, 166 (2005) (explaining that world leaders have been attempting to negotiate a treaty addressing the jurisdictional problems posed by the Internet yet have failed to reach agreement due to the difference in value each nation accords to freedom of expression and the individual’s reputation).
1. The American Approach

In the United States, whether a court may exercise jurisdiction over a foreign plaintiff, as opposed to the choice of law, is the key inquiry; for the principles relevant to the choice of law are such that the law of the forum applies where jurisdiction is proper. To determine whether jurisdiction will be conferred over a foreign defendant, the United States has traditionally adhered to the minimal contacts approach first established under International Shoe v. Washington.126 However, it has begun to adapt and develop its analysis to accommodate the global nature of information available on the Internet.127 Under the International Shoe minimal contacts approach, a court may exercise jurisdiction in accordance with due process over a non-resident if the defendant has “minimal contacts” with the forum state, so long as maintaining the suit does not “offend traditional notions of fair play and substantial justice.”128 Maintaining the suit in the forum state meets this standard if the defendant purposefully availed himself to the privileges of the forum state and could reasonably anticipate being subject to suit there.129

In the United States, jurisdictional issues regarding defamation using this approach in print publications were readily apparent. Applying the minimal contact analysis in Keeton v. Hustler Magazine, the Supreme Court held that “[t]here was no unfairness in calling [the national magazine] to answer for the contents of publication wherever a substantial number of copies are regularly sold and distributed.”130 The assertion of jurisdiction based on the number of copies sold can be translated into the rhetoric of the minimal contacts by viewing each copy sold as a contact with the state; therefore, a substantial number of contacts results in substantial contact with the state.

126. See Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (establishing the minimal contacts approach for jurisdiction as a means to accord jurisdiction over a non-resident with due process).
That very same year in *Calder v. Jones*, the Supreme Court similarly held that a Florida resident could bring a libel action against the National Enquirer in California because California was the state of the magazine's most substantial circulation; therefore, the magazine could readily anticipate suit there. Here, the explicit mention of the defendant's ability to anticipate suit in the forum state shows the importance of the defendant's knowledge regarding the effects of publication in the forum state. In the context of defamation, whether a defendant had minimal contacts and purposefully availed himself of the privileges of the forum depend on the defendant's intent regarding the publication, the harmful effects of the publication on the forum state, and the foreseeability of that harm on the part of the defendant.

Despite these considerations, however, the analysis still creates the potential for proper jurisdiction in multiple fora. If a nonresident commits an intentional act directed at the forum state—in the case of defamation, an intentional act may be demonstrated by substantial circulation with a harmful impact in the forum that the defendant could have foreseen—jurisdiction may arise. However, if the circulation reaches a number of forum states, jurisdiction may arise in each of them. When jurisdiction is proper in multiple fora, a question arises as to whether such jurisdiction still comports with traditional notions of fair play and substantial justice.

The United States' defamation laws provide a safeguard against liability from publication of a defamatory statement in multiple locations. The "single publication rule" does not allow multiple defamation suits to arise from a single defamatory statement published multiple times—American courts hold that the statement was published only once.1 Even though the courts operate under this legal fiction, the plaintiff can recover for all of the damage that he incurs as a result of multiple publications.2 For example, in *Keeton*, the plaintiff traveled across the country to find the state with the longest statute of limitations in order to maintain his claim, and though copies of the statement circulated

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131. *Restatement (Second) of Torts* § 577A (1977). Under subsection (3), "[a]ny one edition . . . or similar aggregate communication is a single publication." *Id.* The majority of American courts follow the single publication rule, as opposed to the multiple publication rule. *See* *Keeton* v. *Hustler Magazine*, 549 A.2d 1187, 1189 (N.H. 1988). The multiple publication rule provides plaintiffs with a separate claim for each publication of the defamatory material. *Id.*


(a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered in the one action; and (c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.

*Id.*
throughout the nation, the claim was consolidated to one action in which the plaintiff recovered for all of the publications.133

This rule advantages both the plaintiff and the defendant. First, the rule allows the plaintiff to consolidate his claims into one action to avoid bringing suit in each forum where the statement appears.134 Second, the rule prevents a potential for infinite liability on the part of the defendant due to the statement’s wide initial dissemination or subsequent dissemination in the future.135 The rule recognizes that a defendant’s defamatory statement is the product of a single act, even if it is published multiple times.

Though the United States’ defamation laws protect defendants against the potential for multiple suits in multiple fora, the jurisdictional laws have just begun to adapt to the challenges presented by the Internet.136 Without any geographic boundaries and the potential for many citizens of foreign states to view material published on the Internet, a defendant could have substantial contact with and have purposefully availed himself to many fora under the traditional minimum contact analysis. Therefore, courts have begun to adopt a sliding-scale approach based on the nature of the website and the defendant’s level of commercial activity over the site.137

First, where the defendant “clearly does business over the Internet” through his contractual undertakings with residents of the forum that “involve knowing and repeated transmission of computer files,” jurisdiction is most proper.138 Second, where the defendant operates an interactive website on which the user and operator may exchange information, jurisdiction may or may not be proper.139 To determine whether to exercise jurisdiction in these instances, the court must analyze the “level of interactivity and commercial nature of the exchange.”140 Lastly, passive websites where the information is merely posted to a site and made

133. Keeton, 549 A.2d at 1187.
134. Id. at 1189-90 (noting that the multiple publication rule burdened defendants with the “potential number and geographic dispersion” of defamation suits).
135. Id. (noting that “distribution over a long period of time” also posed a great burden for defendants under the multiple publication rule).
137. Id. at 1119.
138. Id. at 1124 (citing CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)).
139. Id. (citing Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996)).
140. Id.
available to readers of the forum do not serve as a proper basis for jurisdiction.\textsuperscript{141}

The judgment regarding passive websites is most important for those without any commercial purpose who use the Internet as a forum to disseminate their ideas, for under the United States' jurisdictional principles, they may be shielded from liability stemming from mere readership. The rationale behind this judgment involves the lack of objective intent on the part of the publisher to target and acquire an audience in a forum state.\textsuperscript{142} In \textit{Young v. New Haven Advocate}, the Fourth Circuit acknowledged the potential slippery slope that could result from conferring jurisdiction on a forum state based the availability of a defamatory statement through an Internet posting.\textsuperscript{143} The Fourth Circuit determined both that a defendant's manifested intent constrains a forum's ability to exercise jurisdiction over him and that posting to an Internet site was insufficient to demonstrate such intent.\textsuperscript{144} Further supporting this targeting approach, in \textit{Revell v. Lidov}, the Fifth Circuit held that an article published out-of-state on the Internet was not subject to the Texas state court's jurisdiction because though the article was "presumably directed at the entire world," the article's subject matter possessed no special connection to Texas and was, therefore, not specifically directed at the state.\textsuperscript{145}

This approach applies in the international context as well. For example, in \textit{Realuyo v. Villa Abrille}, the Southern District of New York declined jurisdiction over a Philippine news service with online publications because the news service had not "directed [its site] towards the potential New York audience."\textsuperscript{146} The Southern District of New York followed the Fourth Circuit's decision in \textit{Young} and refused to

\textsuperscript{141} \textit{Id.} (citing Benusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996), aff'd, 126 F.3d 25 (2d Cir. 1997)).

\textsuperscript{142} \textit{Young v. New Haven Advocate}, 315 F.3d 256, 263 (4th Cir. 2002) (simplifying the inquiry with regard to jurisdiction over Internet activity to whether the entity manifested an intent to direct their website content to the audience of that State).

\textsuperscript{143} \textit{Id.} (recognizing that exercising jurisdiction over a defendant based on his publication to the Internet alone would subject him to the jurisdiction of every state in which a citizen accessed the material).

\textsuperscript{144} \textit{Id.} The Fourth Circuit held that "[s]omething more than posting and accessibility is needed to indicate that the [defendant] purposefully (albeit electronically) directed [his] activity in a substantial way to the forum state." \textit{Id.} (quoting Va. Panavision Int'l. L.P. v. Toeppen, 141 F.3d 1316, 1321 (9th Cir. 1998)).

\textsuperscript{145} \textit{Revell v. Lidov}, 317 F.3d 467, 475 (5th Cir. 2002) (recognizing from \textit{Young} that the defendant must target a readership in the forum state). An Internet publication "directed at the entire world" is insufficient because "one cannot purposefully avail oneself of 'some forum someplace'; rather . . . due process requires that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court here." \textit{Id.} (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)).

exercise jurisdiction based on a passive Internet site, for to do so would subject defendants to suit in every possible forum with access to the site.\textsuperscript{147} This implication of such an exercise of jurisdiction "would violate the constitutional need to be mindful of traditional notions of fair play and substantial justice."\textsuperscript{148}

The considerations relevant to jurisdiction are consistent with those relevant to the choice of law, for most states apply the law of the jurisdiction with the "most significant relationship" to both the occurrence and the parties.\textsuperscript{149} In determining the law of the jurisdiction with the most significant relationship, courts generally consider (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile or residence of the parties, and (d) the place most central to the parties' relationship.\textsuperscript{150} Each of these considerations gives expression to a form of contact that the parties may have with the forum, which may be used to support jurisdiction. In the defamation context, the place of publication not only serves as a contact with the forum but is also both the place where the injury occurred and most central to the parties' relationship. The harm incurred by the plaintiff as a result of the publication may be the only basis for the parties' relationship. Where the publication takes place over the Internet, the targeting approach only further ensures that the defendant has a significant relationship with the forum.

2. The English & Australian Approach

Though neither England nor Australia take an approach to jurisdiction or choice of law similar to that employed in the United States, the place of publication is still the most relevant consideration. It acts as a strong foundation for jurisdiction and determines the law applied. In both England and Australia, a plaintiff may bring a foreign defendant under the purview of the court's jurisdiction with a writ of originating process.\textsuperscript{151} Though a plaintiff must typically seek leave of the court to

\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 145 (1971).
\textsuperscript{150} Id.
\textsuperscript{151} King v. Lewis, [2004] EWCA (Civ) 1329, (2005) E.M.L.R. 45, 47-48 (Eng.) (referencing the initial establishment of extraterritorial jurisdiction in this case by the service of a claim form, i.e. a writ of originating process, and discussing the requirements for potential grant of leave to serve a defendant outside the jurisdiction); Dow Jones & Co., Inc. v. Gutnick, (2002) 210 C.L.R. 575, 595 (Austl.).
do so in England, the writ may be obtained pursuant to an initial presumption locating the appropriate forum where the harm occurred, so long as the place of publication falls within the court’s jurisdiction. In Australia, such leave is not required. In either case, the defendant may challenge service of the writ and negate the court’s jurisdiction upon a showing that the forum is either not more appropriate in England or “clearly inappropriate” in Australia. However, as it will be shown in the forum non conveniens section, a defendant encounters difficulty with such an argument where the place of publication is concurrent with the court’s jurisdiction.

Where the plaintiff succeeds in establishing jurisdiction, the choice of law becomes the critical inquiry. This is because any advantage that he may have won through forum shopping could be lost in the event that the forum’s law does not apply. Because both English and Australian choice of law principles dictate that the law governing the lex loci delicti or place of harm be applied, the place of publication is determinative. Assuming the plaintiff has a reputation in the place of publication, the publication gives rise to the plaintiff’s injury the moment a third party reads it. Providing jurisdiction and determining the choice of law based on place of publication shows that both England and Australia place importance on protecting the individual’s reputation—these procedural principles not only provide the plaintiff with a cause of action in each jurisdiction where his reputation may incur harm, but also ensure that the more protective English and Australian laws are applied.

An equally important issue is the English and Australian rejection of the American single publication rule. Both England and Australia follow the “multiple publication rule,” which provides plaintiffs with a separate cause of action for each publication of a single defamatory statement. Because each publication constitutes a separate cause of

152. Lewis, E.M.L.R. at 45-49. Whether leave will be granted is a discretionary matter. Id.
153. Id. at 54.
154. Gutnick, 210 C.L.R. at 595.
155. Lewis, E.M.L.R. at 54 (discussing challenging the service of a writ through forum non conveniens and explaining that “the real question in these cases [is], which was the more appropriate forum”).
156. Gutnick, 210 C.L.R. at 596.
158. Bone, supra note 124, at 288-89.
action, it is quite possible for a defendant publishing in multiple jurisdictions to be subject to suit and the law of each of those jurisdictions or be required to defend multiple claims in a single jurisdiction if distribution has taken place over a long period of time.

Despite the potential burden that the multiple publication rule places on defendants, the English Court of Appeal maintained the rule in King v. Lewis. The decision was based on the publisher's deliberate choice to publish on the Internet and, stemming from that choice, the foreseeability of suit for each of those publications in each jurisdiction where they appear.161 Though courts in the United States recognize the Internet as a medium for which the law should be altered, the English Court of Appeal failed to find that change necessarily followed, for it is the "Internet publisher's very choice" to employ the "ubiquitous medium."162 The High Court of Australia's earlier rejection of the single publication rule in Dow Jones & Co. v. Gutnick greatly influenced the English Court of Appeal's decision.163 Though the multiple publication rule may subject a defendant to the laws of multiple jurisdictions and require him to mount a defense in each of those jurisdictions, Justice Kirby did not view "ask[ing] the publisher to be cognizant of the defamation laws of the place where the [plaintiff] resides and has a reputation ... to impose on the publisher an excessive burden."164 As noted by the English Court of Appeal and brought to the forefront by Justice Callinan in Gutnick, "[p]ublishers are not obliged to publish on the Internet"; it is a matter of choice.165 Should publishers choose to publish in a medium that may

161. Lewis, E.M.L.R. at 57 (acknowledging that under the multiple publication rule, a defendant may "at least in theory find himself vulnerable to multiple actions in multiple jurisdictions," but finding those who publish with global mediums "do so knowing that the information they make available is available"; therefore, "pointing to the breadth or depth of reach of particular forms of communication" is not grounds for abandoning the rule).

162. Id. at 57-58.

163. Id. (citing Dow Jones & Co., Inc. v. Gutnick, (2002) 210 C.L.R. 575 (Austl.) and re-iterating its reasons for rejecting the single publication rule and proposals for jurisdictional reform in the context of Internet defamation, including (a) the Internet and other forms of global media are indistinguishable, (b) when publishers choose to publish on the Internet, they knowingly target a large audience, (c) publishers should accept the possibility that they may be liable in jurisdictions where their publications are accessible, and (d) the "vindication of traditional principles relating to publication and jurisdiction in defamation cases").

164. Gutnick, 210 C.L.R. at 639.

165. Id. at 648.
result in an “uncontrollable” reach of jurisdiction, they must recognize that they must exercise a greater degree of care in doing so.166

The single publication rule recognizes the publication of a defamatory statement as the product of a single act of authoring. However, the multiple publication rule recognizes that this single act of authoring has the potential to harm the plaintiff’s reputation in each location of publication. The divergence in the two approaches stems from a difference in each jurisdiction’s focus—while the American laws focus on the speaker and his interest in freedom of expression, the English and Australian laws focus on the subject of speech and his interest in protecting his reputation wherever it may be harmed. To avoid chilling speech, the American defamation laws protect the speaker from infinite liability stemming from a single act by consolidating all claims into a single action. On the other hand, English and Australian laws provide for multiple claims by providing for a cause of action in each jurisdiction where the publication appears to avoid infinite harm to an individual’s reputation.

While English and Australian defamation laws hold fast to the multiple publication rule and relegate both jurisdiction and the choice of law to the place of publication, a potential solution for the place of Internet publication would be the place where the material was first uploaded, that is the location of web server. Such a modification would protect American publishers who upload articles on the Internet in the United States for their American audience.

However, the suggestion undercuts two key principles underlying the defamation laws in both jurisdictions. First, the suggestion undermines the policies driving the defamation laws in each jurisdiction—to provide an avenue for a plaintiff to vindicate his reputation and be compensated for the harm inflicted on it. Second, the suggestion departs from two foundational principles in England and Australia. The suggestion would serve as an adoption of the single publication rule for Internet publications, which as previously discussed, was rejected. All claims stemming from a defamatory statement published on the Internet would be consolidated and litigated in the forum where the publication was first uploaded. Such a rule for Internet publications would create an inconsistency between the rules applicable to defamatory statements published on the Internet and those published via other mediums. Yet, the underlying tort and harm to plaintiff’s reputation is the same in either case. In addition, and on a more fundamental level, the proper place of jurisdiction and choice of law are based on the location of the harm—in

166. Id.
this context, where the reputational injury has occurred, not the location of the statement’s first authorship.

The High Court of Australia swiftly rejected the modification. As noted by Justice Kirby, the location of the web server “might bear little or no relationship to the place where the communication . . . had its major impact.”167 If jurisdiction is exercised based on the location of the web server, the plaintiff may lose his cause of action. This was the case in Gutnick, for the article at issue was written in America and uploaded in America for an American readership; yet, the injury occurred in Australia. Moreover, as Justice Callinan observed, such a rule would create the potential for authors to insulate themselves from liability by simply “manipulat[ing] the uploading and location of the data,” such that the material is only uploaded to servers located where the laws are more defendant-friendly than those in England or Australia, for example the United States.168 Most web servers are located in the United States, and such a rule would result in the dominance of American defamation laws.169 The rule would financially advantage publishers in the United States and legally disadvantage citizens outside of the United States whose reputations have been harmed by the articles published there.170 Given the difficulties with this rule, the extent to which the Australian High Court criticized it, and the extent to which the English Court of Appeal relied on the Australian High Court in maintaining the multiple publication rule, it is highly unlikely that an English court would be amenable to this rule either.

Another solution would be to limit the place of publication to the location where the audience for which the defendant intended to publish is located or to formulate it in accordance with American jurisdictional principles and look at the place where the audience that the defendant intended to “target” with his publication is found. However, this suggestion is problematic as well. Constraining the place of publication to where the defendant’s target audience is located would render the determinations unpredictable. This is because ascertaining the defendant’s target audience would require inquiring into the defendant’s subjective intent at the time

167. Id. at 632.
168. Id.
169. Id. at 654 (observing that “[t]he consequence, if . . . accepted would be to confer upon one country, and one notably more benevolent to the commercial and other media than this one, an effective domain over the law of defamation”).
170. Id.
of publication. In the English Court of Appeal’s opinion, determinations of this nature would be “liable to manipulation and uncertainty.”

Because this rationale echoes the High Court of Australia’s rationale, it is doubtful that the High Court of Australia would accept a proposal based on the location of the web server either.

Even if the English Court of Appeal were open to this approach, it would be hard to argue that any audience was not a target audience. An author cannot choose to publish on the Internet without the intention of targeting a large audience; the Internet is a medium intended for mass publication. As noted by the English Court of Appeal, “those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.” That is the medium’s appeal; “[a] publisher, particularly one carrying on the business of publishing, does not act to put matter on the Internet in order for it to reach a small target.”

The publisher has “in truth . . . targeted every jurisdiction where his text may be downloaded.” Again, the English Court of Appeal’s rationale emphasizes the foreseeability of harm and liability in each jurisdiction where the defamatory statement appears.

Further, where a more narrowly tailored target audience could, indeed, be discerned, the approach still lacks the capacity to compensate the plaintiff fully for the reputational harm caused by a defendant’s defamatory statement. The location of the defendant’s targeted audience for the publication has little bearing on where the plaintiff’s reputation is actually harmed, and this injury is the injury that both English and Australian laws seek to remedy. The defendant may have targeted an American audience, yet the statements could have found an Australian audience. Under this approach, the plaintiff would only have a cause of action in America, even though the plaintiff’s reputation was actually harmed in Australia. This is a shortcoming of the American approach that runs counter to the policies motivating the English and Australian defamation laws which emphasize the individual’s reputation. With this in mind, it undermines the substance of the law to formulate English and Australian substantive law with a focus towards the plaintiff’s reputational harm and the procedural law with a focus that favors the defendant’s speech. Where a defendant may be held liable under the substantive law without regard to his intent to harm the plaintiff’s reputation, it makes

172. Id.
175. Id.
176. Id. at 59.
little sense to then save him from liability with a procedural loophole based on the intent that was irrelevant to the substantive judgment.

Though American courts have been open to reform in response to the Internet, neither English nor Australian courts have accepted arguments for reform based on the new medium. The divergence may be traced to the underlying jurisdictional and choice of law principles utilized by each of these courts. Whereas American courts focus on the foreign defendant’s contact with the forum state, English and Australian courts focus on the location of the harm. Because the defendant’s use of the Internet would have an impact on the type of contacts that he would have with the forum state, the new medium merits the adoption of a new American approach to accommodate its effects. However, a defendant’s use of the Internet does not affect the location of the ultimate harm resulting from his actions. Since the English and Australian approaches are based on a factor that has not changed as a result of the Internet, they do not require modification to accommodate it.

Because legal rules cannot anticipate technological advances, they should remain “technology-neutral.” The Internet has not impacted the rapid expansion of “the speed and quantity of information distribution throughout the world” in any way that distinguishes it from other technological advances that have done the same. An internationally distributed newspaper has no less of a global reach than the Internet, and other forms of communication such as radio and television permit “wide dissemination” as well. The Internet simply does not have a “uniquely broad reach.”

Much like the structural differences in the substantive law, the differences in American, English and Australian procedural approaches further the underlying policies driving each jurisdiction’s substantive laws through their focus and whom they favor. Because the American approach focuses on the defendant’s minimal contacts and whether he has directed his publication towards a target audience in the forum state, an audience state, it favors defendants. It furthers the protection afforded to free speech by limiting the extent to which a defendant may be required to defend it. Because the English and Australian approaches focus on

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178. Id.
179. Id.
181. Id.
the location of the harm and place of publication generally, they favor plaintiffs and further the protection afforded to plaintiffs’ reputations by maintaining the extent to which a plaintiff may vindicate it through a cause of action.

3. The Extraterritorial Application

Though the American, English and Australian approaches differ with regard to their underlying policies, their focus and whom they favor, each still creates the potential for an extraterritorial application. Because American courts focus on a defendant’s minimal contacts with the forum state and whether or not he has targeted that state, a defamatory statement that was written in Australia could have been targeted to a United States audience and could have created the potential for suit in America. Because English and Australian courts focus on the location of the statement’s harm, a defamatory statement that was written in America could harm an individual’s reputation in England or Australia and create the potential for suit in either jurisdiction. Since statements published on the Internet may simultaneously be targeted at an American audience yet harm an individual’s reputation in America, England or Australia, the publication creates the potential for suit in each jurisdiction.

However, there is a clear imbalance in the reach of each forum’s laws. If a statement published in America targets either an English or Australian audience yet harms an individual’s reputation in all three countries, a plaintiff will only have a cause of action in England or Australia. In either case, the substantive differences between procedural laws among each of these jurisdictions provide both an incentive and avenue for plaintiffs to engage in forum shopping. Because the law of the forum will most readily apply, a plaintiff’s procedural choices may govern the substantive outcome of the case and, more often than not, undermine an American defendant’s First Amendment protections. Given a choice of forum, the plaintiff would only rationally choose the forum with the laws most favorable to him. Thus, American publishers must be mindful of other jurisdiction’s laws and, keeping these laws in sight, edit their publications accordingly or face potential liability in a foreign jurisdiction. By publishing articles through the Internet or other global media, a publisher foregoes the speech protections that he would otherwise have in the United States.
III. THE PROACTIVE APPROACH: A MEDIA DEFENDANT’S COURSE OF ACTION

A. The Justification—Harmonization Hindered by Features in the Frame

Though legal reform harmonizing conflicting defamation laws may appear to be a very simple solution to a very complex problem, courts are hesitant to implement change on their own initiative. Additionally, consensus for an international agreement would be difficult to reach. As the High Court of Australia has stated, reforming the conflicting defamation laws involves both a “settled” and “sensitive” area of law; thus “it should cause no surprise when the courts decline the invitation to solve problems [the legislature], in a much better position to devise solutions, have neglected to repair.”

Further, any international agreement governing Internet and global publications would not likely serve the interest of every party with a stake in their dissemination. The conflicting substantive and procedural laws have emerged as a product of differences that inhere in both the structure and policies driving each jurisdiction’s laws. Reform by way of an international agreement, or the courts for that matter, would require that each respective party compromise the long-standing principles to which they now adhere, including the United States.

As the conflict between these defamation laws in the global scheme stems from differences embedded in their underlying legal frames, “there are limits on the extent to which national courts can provide radical solutions,” and “[n]o elegant utopian solution” by way of an international agreement is ever likely to emerge. Thus, legal reform is unlikely to come into fruition. Rather than reiterate the need for or proposing various methods to achieve harmonization among the defamation laws, this article accepts the difficulties associated with this approach as a product of their development. Further, it acknowledges the First Amendment’s limits abroad and takes a different approach—a proactive approach. American publishers cannot rely on external forces to provide

182. Gutnick, 210 C.L.R. at 643.
184. Gutnick, 210 C.L.R. at 643.
185. Rustad & Koenig, supra note 183, at 51.
them with a safe-harbor insulating them from potential liability abroad. American publishers must, instead, act on their own accord both through the courts and by modifying their internal practices if they hope to reduce or eliminate their liability abroad.

B. Through the Courts—For Defendants Possessing Domestic Assets Alone

Where an American defendant publishes via the Internet or another global medium, he creates the potential for a cause of action initiated abroad. To avoid being subject to suit, he may utilize the courts by (1) seeking an anti-suit injunction, (2) challenging jurisdiction through forum non conveniens, or (3) resisting enforcement. While the prospect of obtaining an order enjoining the foreign action or negating the foreign court’s jurisdiction is slim, a final judgment contravening that defendant’s First Amendment rights will not be enforced on American soil. As such, the defendant retains the First Amendment’s full protection so long as he does not possess any assets abroad against which the judgment may be enforced.

1. Anti-Suit Injunction

If an American defendant faces suit abroad, he may, petition an American court for an anti-suit injunction. Issuance of an anti-suit injunction preserves the defendant’s First Amendment protections and thwarts a plaintiff’s attempt at foreign forum shopping. However, such an issuance is problematic. The injunction would undermine the foreign jurisdiction’s reputational protections by allowing the defendant to shield himself with the First Amendment, even though he has published a defamatory statement abroad. Additionally, obtaining an anti-suit injunction in the United States requires that the defendant satisfy the “actual controversy” standard outlined by the Declaratory Judgment Act. He must demonstrate a “substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the [injunction’s] issuance.”

However, to do so, may present an insurmountable hurdle. For instance, in Dow Jones & Co. v. Harrods, Ltd., Dow Jones mistook an

186. Di Bari, supra note 125, at 149.
187. Id.
190. Id.
April Fool's Day joke by Harrods regarding whether the company would hold an initial public offering as a true statement and published a statement in both the Wall Street Journal's print version and website announcing the decision. Upon discovering the mistake, Dow Jones corrected it the following day, but the Wall Street Journal responded by publishing its own story regarding a potential public offering entitled, "The Enron of Britain." Infuriated by the link made between its company and Enron, Harrods began preparing to commence an action in the United Kingdom. It requested information regarding the Wall Street Journal's circulation and the number of hits its website had received since the statement was published.

Rather than provide the disclosure, Dow Jones sought an anti-suit injunction in the Southern District of New York to enjoin the libel suit that Harrods commenced in London's High Court of Justice. Dow Jones sought the injunction based on the following arguments: (a) the cost to defend itself in England would be an immense burden on the company, (b) without the single publication rule, the company could be held liable for the continued publication of the article, (c) that the suit, if commenced in the United States, would be dismissed either as an opinion whose falsity could not be proven or for lack of fault, and (d) even if the suit continued in England the judgment would be unenforceable in the United States. The Southern District of New York was not persuaded by any of these arguments and failed to find that Dow Jones had met the actual controversy standard.

192. Id. at 402.
193. Id.
194. Id.
195. Id. at 403.
196. Id.
197. Id. at 402.
198. Id. at 407. Dow Jones reasoned that because Harrods's claim would be non-actionable in American Courts, to enforce the judgment would contravene Dow Jones's First Amendment rights and, thus, be repugnant to the United States Constitution.
199. Id. The Court clearly stated, that "the Court is not persuaded that under the circumstances presented here Dow Jones has met its burden to sufficiently demonstrate the existence of an actual controversy." First, the controversy was not sufficiently real and immediate because the greater portion of Dow Jones's arguments were based on assumptions regarding the future that were not yet certain. It was not clear that the case would actually proceed to trial, that Harrods would win a judgment, or that Harrods would attempt to enforce the judgment in the United States. Id. at 408-09. Second, though Dow Jones's First Amendment rights were at issue in the suit, that did not necessarily mean that the judgment would threaten to curb or chill speech; therefore,
alternative, Dow Jones argued that the actual controversy standard should be relaxed, for the potential suit would undermine its First Amendment rights.\textsuperscript{200} Again, the Court was not persuaded and found that the allegations were not “sufficiently concrete, objective or specific” enough to find an actual controversy or justify the “extraordinary” relief that Dow Jones sought.\textsuperscript{201} The Southern District of New York was unable to find a basis for the authority to extend the First Amendment's protections to Internet publications that properly fell under a foreign court’s jurisdiction.\textsuperscript{202}

Though a foreign cause of action may undermine the First Amendment’s speech protections abroad, American courts are highly unlikely to undermine a foreign court’s ability to enforce its own laws.\textsuperscript{203} An American court may exercise extraterritorial jurisdiction over a defamatory statement published abroad via the Internet or some other global media,\textsuperscript{204} but it will hesitate to prevent a foreign court from exerting that very same authority, even if it adversely affects the domestic rights of publishers in the United States.\textsuperscript{205} An American publisher may only rely on the First Amendment’s protections to shield him from suit within the United States.\textsuperscript{206}

2. Forum Non Conveniens

Though the American defendant may not be able to enjoin the foreign suit, he may appear in the foreign court and challenge its jurisdiction by

\textsuperscript{200} Id. at 409-10. Third, the Court feared controverting principles of comity by preventing litigation abroad on the grounds that it offended our Constitution. \textit{Id.} at 411. Fourth, the Court distinguished cases where a foreign judgment was not enforced because there is a difference between enjoining a suit before it takes place and declining to enforce it after it has occurred. \textit{Id.} at 416. Lastly, though the Court could have exercised its discretion and issued the injunction despite these other considerations, it declined to do so. \textit{Id.} at 437-47.

\textsuperscript{201} Id. at 410.

\textsuperscript{202} Id. at 411.

\textsuperscript{203} \textit{See id.} (declining to issue an anti-suit injunction and prevent the commencement of a foreign defamation suit).

\textsuperscript{204} Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1119 (W.D. Pa. 1997); \textit{see also} Young v. New Haven Advocate, 315 F.3d 256, 263 (4th Cir. 2002). Based on the sliding scale approach to jurisdiction established by \textit{Zippo} as modified by \textit{Young}, an American court may conceivably exert extraterritorial jurisdiction over a publisher of an online defamatory statement so long as the statement is featured on an interactive website of a commercial nature and is targeted at an American audience. \textit{Id.}

\textsuperscript{205} \textit{See Harrods}, 237 F. Supp. 2d. at 407-11, 416, 437-47 (explaining that the issuance of an anti-suit injunction to prevent a foreign defamation suit would be improper based on the uncertainty of ex ante decision making and principles of comity).

\textsuperscript{206} Due to the practical difficulties associated with obtaining an anti-suit injunction because of the conflict presented by foreign defamation law and the First Amendment, a potential defendant cannot rely on this form of relief as a means to effectively extend the First Amendment’s protections abroad.
objecting to the writ through an assertion of forum non conveniens. However, the likelihood that an American defendant would succeed is slim, for once a foreign court has determined that the location of the harm, that is the place of publication, is within its territory, the foreign court becomes the natural forum. Moreover, it is discretionary whether an English court exercises jurisdiction over the defendant initially, or an English or Australian court maintains jurisdiction over an objection of forum non conveniens. Where the foreign court is the natural forum for the suit, the prospects of arguing it is an abuse of discretion to maintain jurisdiction rather than declare it an inappropriate forum fall to the wayside. For example, in Gutnick, the High Court of Australia declared that Australian courts will only decline to exercise jurisdiction on the basis of forum non conveniens where the defendant can show that jurisdiction is clearly inappropriate. In that case, because publication took place in Victoria, the plaintiff was a resident and conducted business in Victoria, and the plaintiff had a reputation to defend in Victoria, the Australian High Court could not find that the jurisdiction was either clearly inappropriate or that the trial court judge had abused his discretion by declining to set aside the writ on the basis of forum non conveniens. Rather, the trial court judge’s exercise of discretion was “plainly correct.”

As the High Court of Australia did in Gutnick, the English Court of Appeal in Lewis also emphasized that the trial judge’s initial jurisdiction inquiry is primarily a discretionary matter. The English Court of Appeal clearly stated that appeals based on forum non conveniens

208. Lewis, E.M.L.R. at 47-48, 54 (explaining that grant of leave to serve a writ on a non-resident defendant and obtain jurisdiction over him is a matter of discretion based on a finding that the English court is the more appropriate forum for suit).
209. Lewis, E.M.L.R. at 54 (discussing challenging the service of a writ through forum non conveniens, explaining that “the real question in these cases [is], which was the more appropriate forum,” and maintaining that such questions are a matter of discretion); Gutnick, 210 C.L.R. at 647 (stating “[a]s to the plea of forum non conveniens, we perceive no appellable error in the exercise of the [Australian] judge’s discretion” in denying the challenge to jurisdiction based on forum non conveniens).
210. Gutnick, 210 C.L.R. at 596.
211. Id. at 647.
212. Id.
213. See Lewis, E.M.L.R. at 54.
“should be rare and the appellate court should be slow to interfere.”\textsuperscript{214} In England, a defendant must show that the forum is not the “more appropriate forum” to negate jurisdiction on the basis of forum non conveniens.\textsuperscript{215} With these principles in view, the English Court of Appeal in \textit{Lewis} outlined four “strands in the learning” relevant to the circumstances regarding forum non conveniens arguments in the context of Internet libel.\textsuperscript{216} First, like the High Court of Australia, the English Court of Appeal found that the “natural or appropriate” forum is the location of the tort’s commission, and in this context, the place of publication, because “it is manifestly just and reasonable that a defendant should have to answer for his wrongdoing” where his actions took place.\textsuperscript{217} The English Court of Appeal found it difficult to accept the proposition that a court possessing jurisdiction over a tort would not also be an appropriate forum for the case.\textsuperscript{218}

Second, the English Court of Appeal considered the plaintiff’s connection with the forum.\textsuperscript{219} In the context of a defamation suit, evidence of publication in other forums may be a primary factor on the decision of whether jurisdiction is appropriate. Its weight will vary depending on the strength on the plaintiff’s connections to the forum—that is the stronger the plaintiff’s connection to the forum, the more likely that the claim will survive.\textsuperscript{220} Third, the English Court of Appeal considered the medium of publication.\textsuperscript{221} In the context of Internet publication, the judge’s discretion will be more “open-textured,” and the court’s consideration should “give effect to the publisher’s choice of a global medium.”\textsuperscript{222}

Though the English Court of Appeal indicated that each determination will depend on the circumstances surrounding the case, the court seemed to imply that where the defendant chooses to publish via global media, the court will give effect to that decision by bringing the statements published under its jurisdiction.\textsuperscript{223} Again, the English Court of Appeal reiterated that each of the first three considerations are “matters of practical reasoning, and not legal rules” that “will inform the judge who must decide where the balance of convenience lies.”\textsuperscript{224}

\begin{thebibliography}{9}
\bibitem{214} \textit{Id.} (quoting Spiliada Maritime Corp. v. Cansulex Ltd., [1987] A.C. 460, 465, 474-75 (Eng.)).
\bibitem{215} \textit{Id.}
\bibitem{216} \textit{Id.}
\bibitem{217} \textit{Id.} at 55
\bibitem{218} \textit{Id.}
\bibitem{219} \textit{Id.}
\bibitem{220} \textit{Id.}
\bibitem{221} \textit{Id.} at 58.
\bibitem{222} \textit{Id.}
\bibitem{223} \textit{Id.}
\bibitem{224} \textit{Id.} at 59.
\end{thebibliography}
Only the last factor is a question of law—whether the venue chosen by the plaintiff is the most objectively appropriate forum.\footnote{\textit{Id.} at 60.} Under this factor of the inquiry, the prospect that the plaintiff has chosen the forum to gain an advantage in litigation only comes into play if the judge has first found that the forum is, in fact, appropriate.\footnote{\textit{Id.}} Even at this point, the question is not whether the plaintiff is forum shopping, but rather whether or not “trial in England is required if substantial justice is to be done between the parties.”\footnote{\textit{Id.}} Because English defamation laws give priority to the individual’s reputation, it would be hard to argue that justice between the parties is more effectively served by either dismissing the case entirely or staying the proceeding to allow its continuance in the United States where the plaintiff would lose some of the protection that English law afforded him.

Because forum non conveniens is a discretionary matter, demonstrating that a forum is clearly inappropriate or not the more appropriate forum despite its jurisdiction over the location of the harm is difficult indeed. English and Australian defamation laws are protective of an individual’s reputation; thus, an American publisher cannot rely on arguments regarding forum non conveniens to evade the cause of action provided to remedy injury wherever it may occur. Additionally, the judge’s discretion comes into play. Further, the imbalance in the extraterritorial application of each forum’s laws only compounds the unlikelihood that an assertion of forum non conveniens would succeed. This is because if jurisdiction is not proper in America, an American defendant does not even have the option to assert forum non conveniens. The English and Australian courts would be the only appropriate forums.

\section*{3. Enforcement}

Where an American court declines to enjoin a foreign plaintiff from commencing a defamation action abroad and a foreign court declines to relinquish its jurisdiction over the action, an American defendant still has two domestic remedies. As a proactive measure, an American defendant may seek a declaratory judgment deeming the eventual foreign judgment unenforceable; as a reactive measure, an American defendant may argue that a foreign judgment is unenforceable once the foreign plaintiff seeks

\footnotesize{\textit{Id.} at 60.}

\footnotesize{\textit{Id.}}

\footnotesize{\textit{Id.}}
its enforcement. In either case, American courts will evaluate enforceability according to the "repugnancy" standard set out in the Restatement (Third) of the Foreign Relations Law of the United States.\textsuperscript{228} Under the repugnancy standard, American courts will decline to enforce a foreign judgment 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 and of the State where recognition is sought."

However, the ability of the courts to deem a foreign judgment unenforceable or decline to enforce it based on its repugnancy is not unqualified, for "[t]he courts are not free to refuse to enforce a foreign right" unless to do so "would violate some fundamental principle of justice, . . . some deep-rooted tradition of the common weal[th]."\textsuperscript{229} Both courses of action implicate principles of comity that require courts to balance both the relationship between the United States and foreign governments, as well as the rights held between the diverse parties to the action. The United States Supreme Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."\textsuperscript{230} Repugnancy is the exception, not the rule—a foreign judgment may be enforceable as a matter of comity but, nevertheless, not enforced on a finding that the judgment conflicts with public policy.\textsuperscript{231}

Notwithstanding this restriction based on comity, it seems clear that judgments contravening an American defendant's First Amendment rights satisfy the repugnancy standard. For the same reasons that American courts hesitate to grant an anti-suit injunction, American courts also hesitate to provide an American defendant with a declaratory judgment.\textsuperscript{232} However,
once a foreign plaintiff has a final judgment and seeks to enforce it on American soil, the courts will likely decline to enforce it.\textsuperscript{233}

For example, in \textit{Yahoo v. La Lingue Contra Le Racisme et L'Antisemitisme}, the Ninth Circuit recently addressed whether a declaratory judgment could be sought in the context of a French defamation action.\textsuperscript{234} In that case, an American auction held via the Internet featured Nazi memorabilia that could be accessed by and sold to French citizens even though French law strictly prohibited such items within French borders.\textsuperscript{235} A French citizen won a French order that required the American site to restrict access to its site or remove the memorabilia. When the order was not subsequently followed, the French court ordered fines for non-compliance.\textsuperscript{236} Yahoo! sought declaratory relief that the order was unenforceable within the United States. However, the Ninth Circuit declined to provide such relief finding that the action was premature due to uncertainty with respect to the application of the First Amendment on foreign soil.\textsuperscript{237} Remarking that "[t]he extent of First Amendment protection of speech accessible solely by those outside the United States is a difficult and, to some degree, unresolved issue," the Ninth Circuit could not find that complying with the French orders to restrict access to the memorabilia "\textit{in France}" necessarily offended either California public policy or the First Amendment.\textsuperscript{238}

Without a foreign plaintiff taking action to enforce a judgment rendered abroad against an American defendant, courts may hesitate to provide declaratory relief based on the uncertainty involved in providing prospective relief. Additionally, "[i]nconsistency with American law is not necessarily enough to prevent recognition and enforcement of a foreign judgment in the United States."\textsuperscript{239} The foreign judgment must be

\textsuperscript{234} \textit{See Yahoo!}, 433 F.3d 1199 at 1204.
\textsuperscript{235} \textit{Id.} at 1202.
\textsuperscript{236} \textit{Id.} at 1203.
\textsuperscript{237} \textit{Id.} at 1218. Other uncertainties also surrounded the Ninth Circuit's decision: (a) The French order was an interim decision that could be modified; (b) Yahoo! had "in large measure" begun to comply with the order, so the French court might not require "full and literal compliance"; and (c) the Ninth Circuit did not "know what effect, if any, compliance . . . would have on Yahoo!'s protected speech-related activities." \textit{Id.} at 1215-16.
\textsuperscript{238} \textit{Id.} at 1217.
\textsuperscript{239} \textit{Id.} at 1215.}
both inconsistent and repugnant. Rendering a prospective judgment based on uncertain factors may violate this principle. Further, as stated above, repugnancy is the exception rather than the rule. With this hierarchy in view, a court may be wise to take the prudential route and decline to render any decisions until faced with a plaintiff seeking to enforce the judgment. This takes the determination outside the realm of uncertainty and relocates it to the realm of actual controversy.

In contrast, when facing a final judgment that clearly contravenes the First Amendment’s speech protections, American courts will not hesitate to decline enforcement. The repugnancy of such judgments as to the public policy of the United States, or any State in which recognition is sought, is well-established. American courts have held that a foreign judgment meets the repugnancy standard on several grounds, including differences in the relevant standards of proof, substantive law, and traditions between the United States and foreign countries. In this context, an American defendant’s First Amendment rights take priority over principles of international comity that would give effect to the foreign plaintiff’s reputational rights. The Maryland Court of Appeals’ judgment in Telnikoff v. Matusevich lends support for this conclusion holding that differences between the protection afforded to freedom of expression as opposed to the individual’s reputation under English law were so significant that a foreign judgment could not be given effect, despite an English citizen’s argument that principles of international comity required the Court to enforce the judgment.

Because American courts firmly protect American publishers’ freedom of expression within our borders by declining to enforce foreign judgments, foreign defamation laws should not operate to the detriment of the speech protections provided by the First Amendment within the United States. Thus, Americans who possess assets located solely on

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240. *Id.* (reiterating that “[t]he foreign judgment must be, in addition, repugnant to public policy”).


243. *Bachchan,* 585 N.Y.S.2d 661 (declining to enforce an English defamation judgment based on the differences between the substantive law including the standard of proof and protection afforded to freedom of expression).

244. *Telnikoff,* 702 A.2d at 248.

245. *Abdullah,* 1994 WL 419847 at *7 (declining to enforce an English libel judgment based on its determination that an “establishment of a claim under the British law of defamation would be antithetical to the First Amendment”); *Telnikoff,* 702 A.2d 230; *Bachchan,* 585 N.Y.S.2d 661.
American soil need not fear the prospect of liability abroad for potentially defamatory statements published on the Internet. 246

C. Through Modifying Internal Practices—For Defendants Possessing Foreign Assets

Though American courts will protect publishers' First Amendment rights within their borders, there is still the issue of how to protect publishers from liability abroad. In the case of a publisher with assets located in many different jurisdictions, a judgment rendered against him for a defamatory statement that would otherwise be protected by the First Amendment may, nevertheless, be enforced. Out from under the American courts' protection, these publishers must modify their internal practices to reduce their seemingly limitless liability abroad. They may consider the following solutions: (1) employ a website disclaimer or visitor agreement, (2) reform their technology use to restrict access to their materials, or (3) purchase media liability insurance.

1. Website Disclaimers & Visitor Agreements

Those who publish on the Internet may attempt to employ either a website disclaimer or a visitor agreement in order to reduce their liability in the event that they are hauled into a foreign court based on a defamation action. Web publishers and operators typically deny responsibility for potentially defamatory statements in either a general disclaimer or visitor agreement by noting that the content supplied by users is not well monitored and may lack accuracy or even offend viewers. 247 Those utilizing visitor agreements will generally instruct users against posting defamatory or obscene material and reserve the right to remove material for any reason and at any time. 248 More extensive agreements may attempt to disclaim liability for damages entirely. 249 Though utilizing a website disclaimer or visitor agreement may, in theory, be good practice, the extent to which either tool will be enforced or reduce a publisher's

247. Johnathon D. Hart et al., 523 PLI/PAT 123, 169 (1998) (exploring the potential for web publishers to incorporate website disclaimers or visitor agreements as a means to avoid liability abroad).
248. Id.
249. Id.
liability is constrained by the relevant jurisdiction's contract law and, in particular, whether the provision will be deemed unconscionable by the standards of that jurisdiction.250

While the contract laws and standards of unconscionability may vary, a common factor in determining whether to enforce the disclaimers or agreements is generally whether or not they are "effectively brought to the attention of users."251 Bringing the disclaimer or visitor agreement to the user's attention generally takes one of the following three forms. First, publishers may require users to assent to the terms of the agreement by clicking on an icon indicating agreement, which would provide the publisher with grounds to argue that the user bound himself to the terms.252 However, this method is not fool-proof. A user may stumble onto material through another website's link and avoid the agreement all together.253 In the alternative, publishers may place a link in an obvious place on their own webpage that takes the user directly to the visitor agreement and pair the link with language stating that the user agrees to the terms by virtue of viewing the site.254 Lastly, publishers may place the link in an area that provides general information to users about the site.255 However, this is the weakest option. It may seem logical, but due to the less obvious placement of the terms, the agreement is less likely to be enforced.256

Although a disclaimer or a visitor agreement may appear to be a simple solution to a complex problem that could prevent a great deal of liability, the likelihood that one could construct a disclaimer or agreement that satisfies each jurisdiction's laws is highly unlikely. A better approach would be to have the author of the disclaimer or agreement acquire knowledge of each jurisdiction's laws regulating the content of the publication.257 Further, the extent of protection for the disclaimer or agreement will vary among different courts and be evaluated on an ad hoc basis taking into consideration the circumstances of each case.258 Even if the visitor agreement requires a user to assent to the agreement by clicking on the screen, a publisher may still encounter difficulty

250. Id. at 171.
251. Id.
252. Id.
253. Id.
254. Id.
255. Id.
256. Id.
258. Id.
trying to prove that the user, despite his *assent* to the terms, actually read them.\textsuperscript{259} The terms may be regarded as boiler-point language agreed to without any form of negotiation.\textsuperscript{260} The lack of negotiation between the publisher and website user compounded with a, more often than not, lack of sophistication on the part of the web-user\textsuperscript{261} makes these disclaimers and agreements particularly susceptible to challenge.

\textit{2. Geo-Location Technology}

Given the weaknesses that inhere in the use of a disclaimer or visitor agreement as a method for limiting liability, a better solution may be for publishers to employ geo-location technology in order to restrict access to their sites or, at a minimum, determine where they may be potentially liable and modify their publications accordingly.\textsuperscript{262} While a publisher may argue that access to online publications is both uncontrollable and unpredictable, the advancements in geo-location technologies may weaken this position. The technologies provide publishers with the means to monitor the location of those who access their sites and modify their sites accordingly to conform to a certain jurisdiction's laws.\textsuperscript{263}

Courts have begun to take notice of the potential for publishers to limit their liability and regulate the content of their sites through the use of geo-location technology. As such, they now factor this ability into their decisions.\textsuperscript{264} Geo-location technology provides publishers with a method for determining the physical location of their online publications as well as those who access them by linking a user's network address to their physical location.\textsuperscript{265} The physical location of the user may be used

\textsuperscript{259} Id. at 125.
\textsuperscript{260} Id.
\textsuperscript{261} Id. at 126.
\textsuperscript{262} Geo-location technology allows a publisher to determine the actual physical location of both his online publications and audience by way of the network addresses of those accessing the material through the Internet. Svantesson, \textit{supra} note 257, at 118; \textit{accord} Matthew Fagin, \textit{Regulating Speech Across Borders: Technology v. Values}, 9 MICH. TELECOMM. \& TECH. REV. 395, 412 (2003).
\textsuperscript{263} Yahoo! v. La Lingue Contra Le Racisme et L’Antisemitisme, 433 F.3d 1199, 1203 (9th Cir. 2006). Though Yahoo! contended that it had no means to restrict French access to the Nazi memorabilia, the French court obtained a report concluding almost 90\% of the website users could be identified through geo-location technology or requiring that users declare their nationality before accessing the site. \textit{Id}.
\textsuperscript{264} Id; \textit{accord} Svantesson, \textit{supra} note 257, at 118; \textit{accord} Fagin, \textit{supra} note 262, at 412.
\textsuperscript{265} Fagin, \textit{supra} note 262, at 412.
to filter whether or not a user will be granted access to the requested website. Where a user from an unintended jurisdiction attempts to access the material published on the website, the server may block his access or lead the user to a version of the site prepared for users from that location.

However, this technology is not entirely accurate. Accuracy, as reported by technology vendors, is determined by checking a sample of user locations as reported by the software against the locations provided by the customers; however, there is not a reliable method for verifying this information. Moreover, web-users have methods for circumventing the technology; these methods range from avoiding access to the HTTP servers to simply preserving their anonymity. With the potential for inaccuracy, some users that should not be granted access will gain it, while others that should be granted access will be denied it. Despite the potential for the technology's inaccuracy, it may still be regarded as reliable enough for publishers to both monitor and regulate access to their sites and for the courts to include it among their considerations when evaluating a case. As advancements continue to be made, publishers may be expected to comply with the local laws of each jurisdiction in which their publications appear, for not only will they have the means to control access to their materials, but also, liability would be uncontrovertibly foreseeable.

3. Media Liability Insurance

As a preventive measure, publishers may also purchase media liability insurance in anticipation of possible defamation actions commenced abroad. The risk of liability that the media undertakes in publishing online articles has been well recognized in the insurance field, and the insurance companies have responded to the demand for e-commerce insurance accordingly. The insurance industry is attuned to the fact that the media's First Amendment protections do not extend beyond our borders and that while a publication may be acceptable for American audiences, it may not be as well received abroad.

266. Svantesson, supra note 257, at 110.
267. Id.
268. Id. at 111.
269. Id. at 113.
270. Id. at 114 (referring to Roger Clarke's False Positives or False Negatives effect of inaccuracy).
271. Id.
However, because media liability insurance in the context of e-commerce is a new market, the policies are not uniform, nor is there a great deal of case law interpreting their terms.\footnote{273} Therefore, publishers must carefully review the terms. Though this may be a taxing process, given the level of complexity embodied in each policy,\footnote{274} it is possible to acquire the necessary coverage.\footnote{275} Often media liability policies include coverage for defamation actions, both libel and slander, as well as a commitment by the insurer to defend the policy holder.\footnote{276} Furthermore, in recognition of the high costs of such a policy, some insurance providers have constructed policies aimed specifically at businesses whose risk of liability stems only from their presence on the Internet.\footnote{277}

The question of whether or not a publisher should obtain insurance is no longer an issue. Rather, acquisition of insurance for media liability is now regarded as a duty of the corporate risk manager. A corporate risk manager has the duty to “be aware of the . . . risks [associated with Internet activity] and to actively manage their corporate risk exposure.”\footnote{278} These risks include those associated with the “[n]ew levels of cyber-exposure” as a result of defamation actions abroad.\footnote{279} Though a publisher may potentially reduce his liability abroad by constructing a disclaimer or visitor agreement for his website or by employing geo-location technology, neither course of action is foolproof and may still leave a publisher, despite his best efforts, open to liability. Thus, media publishers should take this risk into consideration and actively seek insurance in order to acquire the best protection possible.

IV. CONCLUSION

Though each evolved from a common tradition, differences rooted in both the structure and policies driving the American, English and Australian defamation laws have led to a divergence in the priority that each accords to freedom of expression and the individual’s reputation.
Where global publication comes into play, this divergence produces a readily apparent conflict—the countries’ respective substantive laws call for different results, yet their respective procedural laws provide an avenue for each to govern. American defamation law developed with a constitutional element grounded in the First Amendment that required priority be accorded to freedom of expression and entrenched this value in the law’s underlying structure. However, English and Australian law developed from the common law tradition alone and maintained much of the priority that it accorded to the individual’s reputation. Though both England and Australia are beginning to afford more protection to speech in matters of public concern through the traditional qualified privilege, neither has yet developed a substantial equivalent to the protection afforded by the First Amendment.

Each jurisdiction has assigned a different priority to the competing values through its substantive laws. This has created an incentive for plaintiffs to forum shop and influenced the procedural laws that allow plaintiffs to do so. The prospect of liability abroad for speech that would, otherwise, fall under the First Amendment’s protection in the United States has increased significantly with the advent of global publication and the Internet. This is because global publications provide courts around the world with the ability to exercise jurisdiction and apply their laws to defamation cases. In response, American courts have protected the defendant’s free speech rights procedurally. They limit both the fora and claims available to an aggrieved plaintiff through the minimal contacts approach and the single publication rule. In contrast, English and Australian courts have protected the plaintiff’s reputational rights procedurally by maintaining the fora and claims available to him. Their adherence to an approach which bases jurisdiction on the location of the harm and to the multiple publication rule provides the plaintiff a means to vindicate his reputation wherever and whenever it may be harmed. Based on the level of compromise that would be involved in bringing about legal reform, harmonization among the jurisdictions is unlikely to occur. Thus, American publishers must recognize the limitation on First Amendment’s protection abroad and confront their potential liability proactively both through the courts and by modifying their internal practices.

Once an American defendant is served with a writ of originating process from abroad, there is little action that he can do until a final judgment is rendered against him. While an American defendant may appear in the foreign jurisdiction and argue forum non conveniens, foreign courts are not likely to abstain from exercising jurisdiction, for doing so would likely strip the plaintiff of the protections their laws afford to his reputation. In the alternative, an American defendant may
petition an American court for either an anti-suit injunction enjoining the action or a declaratory judgment stating the judgment is unenforceable within the United States. Even though a foreign judgment would likely contravene the American defendant's First Amendment protection, American courts will, nevertheless, hesitate to grant either form of relief. Both courses of action implicate principles of comity that American courts will not violate where the uncertainty of granting prospective relief is concerned. However, once a plaintiff has a final judgment, an American defendant may contest its enforceability. American courts will protect the defendant's freedom of expression within our borders. They will decline to enforce judgments that contravene the First Amendment based on the repugnance of such judgments to American public policy. Thus, an American defendant can act through the courts to prevent foreign defamation laws from limiting the First Amendment's speech protections on American soil so long as he does not possess assets abroad.

However, the protections of the First Amendment stop there, for many publishers operate on a multinational level and possess assets abroad against which such judgments may be enforced. Therefore, American publishers must also modify their internal practices. They may (a) post a disclaimer or require a visitor agreement, (b) utilize geo-location technology to restrict access to the publication to certain locations, and (c) obtain media liability insurance. Though it is unclear whether a disclaimer or visitor agreement will be upheld and geo-location technology may at times be inaccurate, both possess the potential to reduce a publisher's risk of liability abroad. Moreover, with the availability of media liability insurance, publishers possess the means to protect themselves in the event that either of these methods fails. Those in the American media must understand that while Americans value free speech, the First Amendment protects speech only within our borders. Once statements cross our borders through a physical or online publication, they must conform to the standards applied in each jurisdiction where they appear. The American media cannot expect foreign jurisdictions to abandon their traditions in order to preserve our own. With avenues available to reduce liability, the American media may continue expressing itself as it has within our borders, but it must respect the extent to which that expression may be received abroad.