



Spring 3-1-2010

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Recommended Citation

Doug Rendleman, *Collecting a Libel Tourist's Defamation Judgment?*, 67 Wash. & Lee L. Rev. 467 (2010).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol67/iss2/3>

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Collecting a Libel Tourist's Defamation Judgment?

Doug Rendleman*

Abstract

A libel plaintiff sued an American defendant in a foreign nation where he took advantage of plaintiff-favoring defamation law to obtain a hefty judgment. He brings this judgment to the defendant's state in the United States to collect from her bank account. The defendant's state's court could not have entered the plaintiff's judgment because of First-Amendment doctrines that stem from New York Times v. Sullivan.

How should the U.S. court respond to the "libel tourist" and his judgment? This succinct Article summarizes the tangled tale that emerges. Invoking the First Amendment under a public-policy exception to comity, U.S. courts have rejected foreign-nation defamation judgments. State legislation has buttressed these decisions. Bills have been introduced in Congress to repel these judgments at the water's edge. Against this tide, the following Article maintains that courts in the United States ought to take a more cautious and nuanced approach and recognize at least some overseas defamation judgments.

* Robert E.R. Huntley Professor of Law, Washington and Lee University School of Law. Thanks: for research support, to the Frances Lewis Law Center at Washington and Lee; for professional citation and form assistance, to Washington and Lee law students Mike Gardner, Rob Vrana, and Richard Bruno; for careful readings and sage advice at two stages, to Professor Joan Shaughnessy; for defamation and free-expression expertise, to Dean Rod Smolla, hoping that his contributions continue in the next chapter of his career as President Smolla. This Article benefitted from three presentations: the Frances Lewis Law Center Faculty Enclave, March 23, 2009; the Sixth Remedies Discussion Forum at the Faculty of Law, Aix en Provence, France, June 5–6, 2009; and a panel at the Southeastern Association of Law Schools Annual Meeting, First Amendment Workshop: Enforcement of Foreign Defamation Judgments, August 3, 2009. This Article was submitted to the Senate Judiciary Committee in connection with its February 23, 2010 hearing "Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights?" An identically titled but somewhat different version of this article is in press to be published in French and English in *Recognition and Enforcement of Judgements—Comparative and International Perspectives*, Presses Universitaires d'Aix-Marseille (Francois Lichere and Russell Weaver eds., forthcoming 2010).

Professor Helene Heronn, who teaches at Stonebridge University in Virginia, wrote a book exposing Saudi cleric Bin Badden as a promoter and financier of international terrorism. Heronn's book was published to widespread international acclaim. A less delighted Bin Badden became a "libel tourist," and sued Heronn for libel in the United Kingdom. Bin Badden based U.K. jurisdiction over Heronn on two "contacts": a copy of Heronn's book that Bin Badden's London lawyer bought from Amazon.com plus Internet reviews and advertisements accessible in the United Kingdom. Although she stands by the integrity of her research and conclusions, Heronn took her lawyer's advice to default Bin Badden's U.K. lawsuit because English libel law is loaded against the defendant. A U.K. default judgment for £10,000 was entered against Heronn. Bin Badden has filed his U.K. judgment for recognition and collection in Stonebridge, Virginia court, seeking to collect it from Heronn's home and her bank account.¹ Bin Badden's Virginia filing raises the procedure and conflicts of laws issues discussed below.

A plaintiff who files a defamation lawsuit against a U.S. defendant in a forum with plaintiff-favoring defamation doctrines, here Bin Badden in the United Kingdom, has been called a "libel tourist."² A libel tourist is a specialized forum shopper. Both libel tourist and forum shopper are opprobrious epithets an opponent may use to discredit her opponent's litigation tactics. However, a lawyer has a duty to his client to secure the most favorable result possible, which includes finding the most beneficial substantive law in the most hospitable forum.

A libel tourist is a forum shopper with two scarce attributes. First, a forum-shopping plaintiff usually prefers to sue his defendant in the United States because of its courts' discovery, jury trials, and generous damages. But a libel tourist is a forum shopper who shuns the United States.³ Second, a forum-

1. I based the problem on Rachel Ehrenfeld's well-known plight; however, the last sentence departs to focus on the legal issues of collection in this Article. For more information on Rachel Ehrenfeld's case, see Jennifer Howard, *American Scholar Fights British 'Libel Tourism' Judgment in the U.S.*, THE CHRONICLE OF HIGHER EDUCATION, Mar. 18, 2008, available at <http://chronicle.com/article/American-Scholar-Fights-Bri/40660/>. Less concerned about whether a plaintiff can collect a libel judgment than about its "declaratory judgment" effect are Barbra McDonald and David Partlett, *Recognition and Enforcement of Judgments—Comparative and International Perspectives*, Presses Universitaires d'Aix-Marseille (Francois Lichere and Russell Weaver eds., forthcoming 2010).

2. See, e.g., *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830, 834 n.5 (N.Y. 2007) (characterizing the defendant as a "libel tourist").

3. See Heather Maly, *Publish at Your Own Risk or Don't Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-guaranteed*, 14 J.L. & POL'Y 883, 905 (2006) ("The United Kingdom has notoriously plaintiff-friendly laws for defamation that attract 'libel tourists' who try to take advantage of the pro-plaintiff laws.").

shopping plaintiff's usual approach is to consider ultimate collection of his judgment when selecting a forum.⁴ But a libel tourist who sues an American defendant in the United Kingdom is picking a forum whose judgment probably will not be recognized and collected in the United States,⁵ as we will see below.

In addition to defending Bin Badden's collection action in Stonebridge court, Heronn has or had another tactical technique. Heronn could sue Bin Badden in Virginia, the United States, before he brings his U.K. judgment to Heronn's home court. A declaratory judgment allows a potential or actual defendant to become a plaintiff and take the offensive in another forum. Heronn could seek a U.S. declaratory judgment that Bin Badden's U.K. libel judgment would violate the U.S. Constitution and public policy.⁶ Based on the declaratory judgment, the court could grant Heronn an anti-suit injunction that forbids Bin Badden from pursuing his U.K. libel action or collecting his U.K. judgment in Virginia.

Herron's possible Virginia declaratory judgment and anti-suit injunction raise issues of obtaining jurisdiction over Bin Badden. United States in personam jurisdiction over Bin Badden based on his U.K. lawsuit against Heronn may fail because defendant's lack of contact with Virginia, the forum state.⁷ In Rachel Ehrenfeld's New York declaratory judgment action, the New York court held that her "libel-tourist" defendant was beyond the reach of the New York jurisdiction statute.⁸ The New York court distinguished the federal

4. See Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U.L. REV. 1, 55 (2004) ("[T]he ability to enforce a judgment and the potential for prejudgment relief may ultimately control the initial decisions of whether and where to sue.").

5. See *id.* (noting that "there is no constitutional provision requiring recognition of foreign judgments, nor any multilateral agreement to which the United States is a party" (citations omitted)).

6. See Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 858 (2004) (arguing from a Rawlsian approach that foreign judgments should not be enforced if they embody foreign law and values inconsistent with a liberal society); see also *infra* notes 16–21 (discussing Heronn's chances of obtaining a declaratory judgment).

7. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (requiring certain minimum contacts between a foreign defendant and a state before the state may assert jurisdiction over the defendant).

8. See *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830, 837 (N.Y. 2007) ("[T]he alleged effects of threatened enforcement of the English judgment may benefit defendant by chilling plaintiff's speech, but those effects do not arise from his invocation of the privileges and benefits of our State's laws. . . . As such, those effects do not form a proper basis for . . . jurisdiction.").

court's decision in *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*⁹ as based on the broader California statute.¹⁰

In that *Yahoo!* decision, California-based Yahoo! sued French plaintiffs in California federal court.¹¹ Yahoo! sought a declaratory judgment that U.S. recognition of a French court's order forbidding advertisement of Nazi paraphernalia on Yahoo!'s auction site would be improper.¹² Yahoo!'s lawsuit eventually was dismissed.¹³ The Court of Appeals's fractured eleven-judge en banc decision turned Yahoo! down without a firm majority opinion.¹⁴ A majority, eight judges, approved personal jurisdiction over the French litigants,¹⁵ which supports Heronn's U.S. jurisdiction over Bin Badden. However, the *Yahoo!* judgment was reversed and remanded for dismissal without prejudice.¹⁶ Six of the eleven judges favored dismissal: three for lack of personal jurisdiction; three for lack of ripeness.¹⁷

Jurisdiction in *Yahoo!* is based on an extravagant expansion of jurisdiction. The plaintiff charges that the defendant in another nation intentionally "aims" something harmful at plaintiff in the forum.¹⁸ In *Yahoo!*, the something was the French lawsuit.¹⁹ The "harmful" effect, a French court order that affected Yahoo!'s expression, is that "the impact or potential impact" of the French order may fall within the metaphor of a "chilling effect," something that discourages or may discourage Yahoo!'s expression in the

9. See *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1224 (9th Cir. 2006) (en banc) (holding, by a majority, that the district court properly exercised jurisdiction over Yahoo!, but concluding, by a plurality, that the suit was unripe and ought to be dismissed because Yahoo! had voluntarily complied with the French court's order).

10. See *Ehrenfeld*, 881 N.E.2d at 837–38 (noting that "[t]he California long-arm statute applicable there [was] 'coextensive with federal due process requirements,'" while the New York long-arm statute had been repeatedly recognized as granting more limited jurisdiction than simply all constitutionally-permissible cases (quoting *Yahoo!*, 433 F.3d at 1205)).

11. *Yahoo!*, 433 F.3d at 1204.

12. *Id.* at 1202–04.

13. *Id.* at 1224.

14. See *id.* (explaining the divisions of the court).

15. See *id.* ("An eight-judge majority of the en banc panel holds . . . that the district court properly exercised specific personal jurisdiction over defendants . . .").

16. *Id.*

17. *Id.*

18. See *id.* at 1207–10 (analyzing the suit under the *Calder* "effects test," requiring that an intentional act be aimed at the forum state, regardless of whether or not the act was wrongful (citing *Calder v. Jones*, 465 U.S. 783, 789–90 (1984))).

19. See *id.* (considering, as potential contacts with the forum state, a cease and desist letter sent to Yahoo!, process served on Yahoo!, and court orders from the French court sent to Yahoo!).

California forum.²⁰ The activities associated with suing a California Yahoo! in France, although certainly not a "wrong" in France, were enough for the fractured majority to confer California jurisdiction over the French plaintiffs.²¹

Jurisdiction becomes even more murky. After the court's decision under the New York jurisdiction statute rejecting Rachel Ehrenfeld's declaratory judgment, the New York legislature repudiated the decision by amending the New York statute specifically to allow New York jurisdiction over a "libel tourist" who is suing a New Yorker.²²

In addition, the Free Speech Protection Act (FSPA), which was introduced in Congress in 2008, and successor bills introduced in 2009, would extend U.S. jurisdiction over anyone who sued a U.S. person for defamation in a foreign country.²³

Heronn could maintain U.S. jurisdiction over Bin Badden under the New York statute or the proposed FSPA, but the question of whether the statutory reach exceeds constitutional due process's grasp remains open.

Although a majority in *Yahoo!* held that the California court had jurisdiction over the French defendants, I find the dissent more persuasive. The U.S. court should lack personal jurisdiction over the French litigants. Suing someone from the United States in a foreign nation on a cause of action valid in that nation should not submit the plaintiff to jurisdiction in the United States' courts.²⁴

20. *See id.* at 1211 ("Yahoo! contends that it has a legally protected interest, based on the First Amendment . . . [E]ven if the French court's orders are not enforced against Yahoo!, the very existence of those orders may be thought to cast a shadow on the legality of Yahoo!'s current policy.").

21. *See id.* ("[C]onsidering . . . the impact and potential impact of the French court's orders on Yahoo!, we hold that there is personal jurisdiction.").

22. *See* N.Y. C.P.L.R. § 302(d) (2009) ("The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York . . .").

23. *See* Free Speech Protection Act of 2009, S. 449, 111th Cong. § 3(b) (1st Session 2009) (allowing U.S. court jurisdiction over the foreign-nation defamation plaintiff if the foreign-nation plaintiff served a U.S. defendant with assets in the United States); Free Speech Protection Act of 2008, S. 2977, H.R. 5814, 110th Cong. (2008) (proposing to grant both a cause of action against and federal jurisdiction over any person who files a lawsuit against a "United States person" or seeks to execute a judgment against assets a U.S. person holds in the United States).

24. *See* *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1228–30 (9th Cir. 2006) (O'Scannlian, J., concurring) (arguing that the defendants had not carried on any activity in California, nor would they have reasonably anticipated being hailed into court there, and, therefore, they should not be subject to California jurisdiction); *id.* at 1232–33 (Tashima, J., concurring) (arguing that the majority erroneously "divorces the expressly-aimed conduct from the requirement that that conduct also be a contact with the forum state" because the California contacts come from acts of the French court, not acts of the

A more limited approach to jurisdiction is to favor legislation, but to extend U.S. jurisdiction only when a foreign-nation defamation plaintiff has a defamation judgment against a U.S. defendant—that is, to reject jurisdiction if the foreign-nation plaintiff merely has filed a defamation action against a U.S. defendant.²⁵

Heronn's lawyer has analyzed the jurisdictional difficulty of a declaratory judgment anti-suit injunction lawsuit and decided instead to take her stand on her home ground defending Bin Badden's collection. This leads us to examine the legal environment for a foreign-nation judgment creditor who seeks to collect from the judgment debtor's assets in the United States.²⁶

The U.S. Constitution's Full Faith and Credit Clause applies to judgment collection that involves two U.S. states.²⁷ Full faith and credit allows a plaintiff with a state judgment, now a judgment creditor, to collect his money judgment from the defendant-judgment debtor's assets in another U.S. state even though the judgment is based on substantive law that is contrary to the collection state's public policy.²⁸ For example, five states' "domestic" jurisprudence rejects common law punitive damages; but two of those states' courts,

defendants).

25. See Todd W. Moore, Note, *Untying Our Hands: The Case for Uniform Personal Jurisdiction over "Libel Tourists,"* 77 *FORDHAM L. REV.* 3207, 3243–44 (2009) ("[T]he provision advocated herein would be narrower [than the Free Speech Protection Act of 2008], allowing personal jurisdiction and a cause of action only if the foreign party had first obtained a judgment."); *Commercial and Administrative Law, "Libel Tourism": Hearing on H.R. 6146 and H.R. 5814 Before the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Linda J. Silberman, Professor, New York University School of Law) ("A person who brings a lawsuit in a foreign country and serves a defendant in the United States does not engage in the kind of 'purposeful conduct' directed to the United States that the Supreme Court has required to meet the constitutional standard . . . for asserting jurisdiction.").

26. For a helpful and succinct discussion of collecting an international judgment, see DOUG RENDLEMAN, *ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA* § 8.9 (2d ed. 1994) (providing an overview of enforcement of foreign judgments in Virginia); Teitz, *supra* note 4, at 55–59 (exploring enforcement of foreign judgments in the United States).

27. See U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."); RENDLEMAN, *supra* note 26, § 8.2 (explaining that the purpose of the Full Faith and Credit Clause is to have states treat judgments from "sister states" the same as they would their own).

28. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 (1971) ("A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim."); RENDLEMAN, *supra* note 26, § 8.6(B) ("That a sister state's judgment is based on substantive law that is contrary to the enforcing state's public policy is an insufficient reason to deny it full faith and credit."); WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, *THE FULL FAITH AND CREDIT CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 102 (2005) ("A state cannot refuse to enforce a judgment because it is based on a claim that the enforcing state finds repugnant to its own public policy.").

Louisiana's and Nebraska's, have accorded full faith and credit to punitive damages judgments from states that allow punitive damages.²⁹ If full faith and credit were to govern Bin Badden's Virginia collection action, he would be likely to prevail, reaching Heronn's home and bank account.

However, full faith and credit does not govern Bin Badden's judgment because it was entered in the United Kingdom. A different concept, "comity," applies when a judgment creditor with a judgment from a foreign nation's court, sues in the United States to collect that judgment.³⁰ Comity, a lesser standard than full faith and credit, lies between obligation and courtesy, and roughly amounts to the respect and dignified treatment that one sovereign owes to another's court judgment.³¹ A scholar referred to comity as "frequently cited

29. See *Ault v. Bradley*, 564 So. 2d 374, 379 (La. Ct. App. 1990) (finding that although Louisiana law might have applied to an action in Florida, because plaintiff did not demonstrate what that law was to the Florida court, the court was correct to presume that Louisiana law was the same as Florida law and the Florida judgment was valid in Louisiana); *Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975) ("It is a fundamental rule of law in this state that punitive, vindictive, or exemplary damages are not allowed. . . . [However, a] state may not refuse to enforce a judgment of a foreign state on the ground that it would result in a violation of the [state's] public policy . . ."); see also Michael Finch, *Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the Nation?*, 86 MINN. L. REV. 497, 554–55 (2002) (considering how "extension of full faith and credit to punitive judgments also transforms [that clause] into a means by which states can extend their regulatory authority beyond state borders"); Gary D. Spivey, Annotation, *Requirement of Full Faith and Credit to Foreign Judgments for Punitive Damages*, 44 A.L.R.3d 960, 960–63 (1972) (listing cases from several states in which the "unsuccessful contention of the defendants . . . [was] that a judgment for punitive damages is within the universally accepted rule of law that penal statutes will not be recognized . . . in jurisdictions other than those in which they are enacted").

30. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) ("'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation . . .").

31. See *id.* at 202 (concluding that if a fair trial has occurred in a foreign country and there is no "reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. b ("Judgments rendered in a foreign nation are not entitled to the protection of full faith and credit. In most respects, however, such judgments . . . will be accorded the same degree of recognition to which sister State judgments are entitled."); Louise Ellen Teitz, *The Story of Hilton: From Gloves to Globalization*, in CIVIL PROCEDURE STORIES 445, 469 (Kevin M. Clermont ed., 2008) (calling *Hilton* "the Supreme Court's only pronouncement on foreign judgments" and stating "[w]hile the recognition and enforcement of foreign judgments may have shifted post-*Erie* to state law, *Hilton*'s basic requirements for respecting a judgment have been incorporated into most state common and statutory law").

but rarely explained."³² A more thoroughgoing critic observed that comity is under-theorized and lacking principle.³³

Under the concept of comity, a court in the United States will recognize many foreign-nation judgments.³⁴ What pushes a foreign-nation judgment that is "different" over the comity line enough that it becomes "repugnant"?

Examples of foreign-nation judgments that a court in the United States would refuse comity to and not recognize, collect, or enforce include: a foreign-nation's money judgment for breach of a contract to buy heroin; a foreign-nation's judgment that confiscates an owner's property because of her religion or nationality; and, a foreign-nation injunction that forbids the defendant from publishing a book that has several "impious" cartoons that satirize the Prophet Muhammad.³⁵

Professor Rosen wrote that a court in the United States might reject a foreign-nation judgment that does not reflect values consistent with a "liberal or decent hierarchal societ[y]."³⁶ A 2008 Maryland decision, *Aleem v. Aleem*,³⁷ tests that point within the concept of "comity." Farah Aleem sought to divorce her husband Irfan Aleem, a Muslim national of Pakistan.³⁸ Before Farah filed in Maryland circuit court for an absolute divorce, Irfan went to the Pakistan Embassy in Washington, D.C., to perform *talaq*—the execution of a document that announces three times his intention to divorce his wife.³⁹ He then argued to the Maryland Circuit Court "that the performance by him of *talaq* under Islamic religious and secular Pakistan law, and the existence of a 'marriage contract,' deprived the Circuit Court for Montgomery County of jurisdiction to litigate the division of the parties' marital property situate in this country."⁴⁰

32. Teitz, *supra* note 4, at 55.

33. See Rosen, *supra* note 6, at 824 ("At many points . . . comity is undertheorized and accordingly incapable of providing principled guidance.").

34. See *Hilton*, 159 U.S. at 202 (limiting what judgments will be recognized by providing a list of characteristics that should be present in a foreign trial for that trial's judgment to be enforced in the U.S. under the doctrine of comity).

35. Cf. Rosen, *supra* note 6, at 847 (providing that some foreign judgments "categorically should not be enforced," such as judgments restricting free speech in the United States, judgments enforcing illegal contracts, or "judgments based on laws that reflect the problematic practices of outlaw states").

36. *Id.* at 858.

37. See *Aleem v. Aleem*, 947 A.2d 489, 502 (Md. 2008) (refusing to recognize in Maryland an Islamic religious law, which was secular law in Pakistan).

38. *Id.* at 490.

39. *Id.*

40. *Id.*

The Maryland Court of Appeals refused comity.⁴¹ The court concluded that

[t]he *talaq* divorce of countries applying Islamic law, unless substantially modified, is contrary to the public policy of this state and we decline to give *talaq*, as it is presented in this case, any comity. The Pakistani statutes providing that the property owned by the parties to a marriage follows title upon the dissolution of the marriage unless there are agreements otherwise conflicts with the laws of this State where, in the absence of valid agreements otherwise or in the absence of waiver, marital property is subject to fair and equitable division. Thus the Pakistani statutes are wholly in conflict with the public policy of this State as expressed in our statutes and we shall afford no comity to those Pakistani statutes. Additionally, a procedure that permits a man (and him only unless he agrees otherwise) to evade a divorce action begun in this State by rushing to the embassy of a country recognizing *talaq* and, without prior notice to the wife, perform 'I divorce thee . . .' three times and thus summarily terminate the marriage and deprive his wife of marital property, confers insufficient due process to his wife. Accordingly, for this additional reason the courts of Maryland shall not recognize the *talaq* divorce performed here.⁴²

Two commentators criticize the Maryland court's decision.⁴³ With due respect, the authors' learned remarks have not convinced me.

Is Bin Badden's U.K. libel judgment so far out of bounds that the Stonebridge court will treat it like the Maryland court treated *talaq*, as neither substantively nor procedurally acceptable?

Before going any farther, we observe the anomaly that, in contrast to the federal constitutional law of full faith and credit, state, not federal, law governs Bin Badden's collection of his foreign-nation judgment from Heronn in the United States.⁴⁴ The statutory and common law for collecting a foreign-nation

41. See *id.* at 502 (finding the difference in marital property rights between Pakistani law and Maryland law to be so substantial as to violate the public policy of Maryland and, therefore, to fall under the public policy exception to comity).

42. *Id.*

43. See David S. Rosettenstein, *Comity, Family Finances, Autonomy, and Transnational Legal Regimes*, 23 INT'L J.L. POL'Y & FAM. 192, 207 (2009) (arguing that an American court should strike a balance of "not passing judgment on the foreign practice, while dealing with the consequences of that practice"); Rajni K. Sekhri, Note, *Aleem v. Aleem: A Divorce from the Proper Comity Standard—Lowering the Bar that Courts Must Reach to Deny Recognizing Foreign Judgments*, 68 MD. L. REV. 662, 689 (2009) (arguing that the court erred because it did not actually demonstrate that Pakistani law was repugnant to Maryland public policy and concluding that the court's judgment thus lowered the bar for future Maryland cases and created an increased risk of results-oriented jurisprudence).

44. Teitz, *supra* note 31, at 469.

judgment in the United States is state common or statutory law.⁴⁵ Under the *Erie* doctrine, the federal court with diversity jurisdiction will apply state law to a judgment creditor's action to collect a foreign-nation judgment.⁴⁶

Over half of the states, including Virginia, have enacted the Uniform Foreign Money-Judgments Act (UFMJA).⁴⁷ Under the UFMJA, a collection state court, like the Virginia court, will refuse recognition and collection to a foreign-nation money judgment from a court that lacked jurisdiction.⁴⁸ And a UFMJA court may refuse recognition and collection if the foreign-nation judgment is based on substantive law that is "repugnant" to the collection state's public policy.⁴⁹ A UFMJA state court's finding that a judgment is "repugnant" to public policy is the equivalent to a refusal of comity.⁵⁰

Having state law govern U.S. relations with other nations is incongruous because collecting a foreign-nation court's judgment from a judgment debtor in the United States inevitably affects U.S. foreign policy, a subject the U.S. Constitution commits to the federal government.⁵¹ The consequences of state law in foreign-nation judgment collection are that, despite the uniform statute in more than half of the states, the law is balkanized and not well developed. A treaty with the United States' principal trading partners would secure uniformity, but that solution has proved insusceptible of fruition.⁵² A federal

45. See James P. George, *Enforcing Judgments Across State and National Boundaries: Inbound Foreign Judgments and Outbound Texas Judgments*, 50 S. TEX. L. REV. 399, 426 n.144 (2009) ("New York courts were the first to reject *Hilton*, heeding the *Hilton* four-justice dissent and . . . making a clear statement for state law controlling foreign country judgments between private parties.").

46. See *Erie R. Co. v. Thompkins*, 304 U.S. 64, 78 (1938) (invalidating the theory of a body of federal common law and declaring "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State"); George, *supra* note 45, at 440 (explaining that state law applies to foreign judgments through the *Erie* doctrine, but that, because of a 1908 Supreme Court ruling, the application of state law is occasionally subject to preemption by federal law).

47. See UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT (revised 1964), 13 U.L.A. 12-13 (Supp. 2009) (providing a table of jurisdictions which have adopted the act).

48. VA. CODE ANN. § 8.01-465.10(A)(2) (2009).

49. *Id.* § 8.01-465.10(B)(3).

50. See Sekhri, *supra* note 43, at 666 (arguing that the Maryland UFMJA is the codified equivalent of the doctrine of comity, including the public policy exception).

51. See U.S. CONST. art. II, § 2 (granting the President power to make treaties and appoint foreign ambassadors with the advice and consent of the Senate); Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*, 51 WM. & MARY L. REV. 87, 122 (discussing the foreign affairs power).

52. See Teitz, *supra* note 4, at 3-5 (discussing several attempts to harmonize international treatment of parallel proceedings, which have not succeeded, but have "heightened awareness of its connection with judgment enforcement").

statute would be uniform and would facilitate the development of stable and predictable doctrine. In 2005, an American Law Institute study proposed a federal statute to govern collection of a foreign-nation judgment in the United States.⁵³ Although Congress's enactment of the proposed statute into positive law is uncertain, I comment to Congress to consider it as a starting point to nationalize and stabilize this crucial but presently confused area of the law.

We return to forum public policy and its relationship to full faith and credit and to comity. The forum state's public policy enters conflicts of laws at several points. I will illustrate with a Virginian named Detter who owes a gambling debt to a New Jersey Casino.⁵⁴ Suppose that Casino sues Detter in Virginia on their gambling-debt contract and asks the Virginia court to apply the plaintiff-favoring New Jersey substantive law where the contract was formed and performed.⁵⁵ Under Virginia choice-of-law rules, the Virginia court likely will refuse to accept the New Jersey doctrine on the ground that the New Jersey substantive law that enforces a gambling contract is contrary to fundamental Virginia public policy.⁵⁶

But, if a better-advised Casino sues Detter in a New Jersey court and receives a New Jersey judgment on the gambling debt, a court in Virginia will accord the New Jersey judgment the full faith and credit that allows Casino to collect it from Detter's Virginia assets.⁵⁷

53. See generally AMERICAN LAW INSTITUTE, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006).

54. See RENDLEMAN, *supra* note 26, § 8.9 (providing enforcement of foreign judgment analysis for the same hypothetical).

55. *Id.*

56. See *Resorts Int'l Hotel, Inc. v. Agresta*, 569 F. Supp. 24, 26 (E.D. Va. 1983), *aff'd*, 725 F.2d 676 (4th Cir. 1984) ("In light of the General Assembly's express and unmistakable policy and the Virginia Supreme Court's interpretation thereof . . . there can be no other conclusion than that the enforcement of such a [gambling] contract would be against the express public policy and positive law of the Commonwealth."); *id.* ("[T]he Virginia court, citing . . . public policy, will refuse to choose the New Jersey substantive law which allows the plaintiff to proceed to judgment on a gambling debt."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971) ("No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum."); John Bernard Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647, 676-78 (1985) (recounting the facts of the New Jersey casino's suit and explaining "[the Virginia] court reasoned that a Virginia statute and a state supreme court decision constituted public policy sufficient to justify non-enforcement").

57. See *Coghill v. Boardwalk Regency Corp.*, 396 S.E.2d 838, 839-40 (Va. 1990) ("It is obvious that no judgment could have been obtained . . . in a Virginia court . . . [but] the New Jersey judgment is valid and enforceable under the laws of that state. The Full Faith and Credit Clause therefore requires us to accord it the same res judicata effect in Virginia."); Corr, *supra* note 56, at 677 n.148 (predicting this result).

Suppose, finally, that Casino is in a nation that recognizes and enforces a defendant's gambling debt. Casino sues Detter there and brings its foreign-nation judgment on Detter's gambling contract to Virginia for recognition and collection. Although the question is an open one, I would expect the Virginia court to refuse to let Casino collect on repugnance-comity-public policy grounds.⁵⁸ Does this prediction portend trouble in Virginia for Bin Badden? We will see.

If the U.S. court denies comity and refuses to recognize a judgment creditor's efforts to collect a foreign-nation money judgment, the judgment creditor may again become a plaintiff and sue the defendant in the United States asking the court at the choice of law stage to apply the foreign-nation's substantive law. If the Virginia court were to deny comity and reject Bin Badden's U.K. judgment because it violates forum public policy, and if Bin Badden were to become a plaintiff in a second libel lawsuit asking the Virginia court at the choice-of-law stage to choose to apply U.K. substantive libel law, he would probably be laughed out of court. The chance that the Virginia court, after rejecting the U.K. judgment on public policy grounds, would choose U.K. substantive law is minute.

With these distinctions about full faith and credit, comity, and public policy in mind, we return to Heronn's efforts in Virginia court to fend off Bin Badden's U.K. libel judgment.

U.S. and U.K. libel and attendant law differ in significant ways. *New York Times Co. v. Sullivan*⁵⁹ is U.S. First Amendment constitutional law for libel, uniform through the United States and reviewed by the U.S. Supreme Court. Under *Sullivan*, the plaintiff has the burden of proof of falsity.⁶⁰ In addition, a public-figure plaintiff, which we suppose famous author Heronn is, must prove defendant's actual malice—that defendant knew of falsity or was in reckless disregard of the truth.⁶¹ U.S. jurisdictions follow the single-

58. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(2)(d) (1987) ("A court in the United States need not recognize a judgment of . . . a foreign state if . . . the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought.").

59. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964) (finding, in a case of libel by a newspaper against an elected official in Alabama, that the lower courts had applied the wrong standard for showing libel and reversing the judgments below).

60. See *id.* at 283–84 (explaining that a state has a constitutional mandate to require a libel plaintiff to prove that the statement was false).

61. See *id.* at 279–80 ("The constitutional guarantees . . . [prohibit] 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'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

publication rule which means that, for libel, a publication's first appearance is once and for all; the defendant's defamation of plaintiff occurs then and there.⁶² Finally, under the American Rule for "costs," each party to a lawsuit pays its own lawyer.⁶³ In short, Bin Badden would have been unlikely to prevail in a U.S. defamation action against Heronn.

In contrast, U.K. libel law favors a plaintiff. A defendant's statement that injures a plaintiff's reputation is presumed false.⁶⁴ The defendant has no *Sullivan* public-figure defenses.⁶⁵ In the United Kingdom, defamation resembles a strict-liability tort.⁶⁶ Moreover, because the United Kingdom has no single-publication rule, each repetition repeats the libel.⁶⁷ Thus, a U.K. websurfer's Internet "hit" may lead to the broad jurisdiction rules that allowed Bin Badden to sue Heronn there.⁶⁸ Finally, the U.K. attorney-fee rule is double or quits, the loser pays the winner's attorney fee.⁶⁹ These differences are the

62. See RODNEY SMOLLA, LAW OF DEFAMATION §§ 4:93, 12:33 (providing that each separate publication of a libelous statement counts as a "single publication" and can only give rise to one cause of action in one jurisdiction by the plaintiff); see generally RESTATEMENT (SECOND) TORTS § 577A (1977); Lori A. Wood, *Cyber-Defamation and the Single Publication Rule*, 81 B.U. L. REV. 895 (2001).

63. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (explaining that the "American rule" is to prohibit the prevailing party from collecting attorney's fees, instead requiring each party to pay their own costs, and refusing to change this rule); DOUG RENDLEMAN, REMEDIES: CASES AND MATERIALS 160 (7th ed. 2006) ("In the United States, under the 'American Rule,' both winning and losing litigants bear their own expenses, including attorney fees.").

64. See SMOLLA, *supra* note 62, § 1:9 ("Modern British libel law has changed very little from its original common-law roots. British law continues to presume that defamatory statements are false, and to place the burden of proving truth on defendants . . .").

65. See *id.* ("[M]ost critically, British law recognizes no special protection for defamation actions arising from critiques of public figures or public officials, routinely imposing large damages awards in cases involving what American courts would characterize as core political discourse.").

66. See *id.* ("The British cause of action for defamation remains a strict liability tort in which publishers may be held liable even for statements that were honestly believed to be true, and published without negligence, again in sharp contradiction to American law.").

67. See *id.* § 4:93 (citing British cases for the proposition that the "original common-law position was to treat each individual copy of a defamatory statement as a separate publication giving rise to a distinct cause of action").

68. See *King v. Lewis*, [2005] E.M.L.R. 4, at 46 ("In the case of internet publications, given that each publication constituted a separate tort, a defendant who published on the web might at least in theory find himself vulnerable to multiple actions in different jurisdictions.").

69. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) ("[F]or centuries in England there has been statutory authorization to award costs, including attorneys' fees. Although the matter is in the discretion of the court, counsel fees are regularly allowed to the prevailing party.").

foundation for Heronn's U.S. lawyer's advice to her to default in the United Kingdom.

For perspective, let's detour to the United Kingdom. Suppose a badly advised Heronn were to deposit her copious royalties in a London bank. Bin Badden would be able to collect his £10,000 U.K. judgment from her bank account. Why not allow him to collect it from her assets in the United States?

Returning to Virginia to answer the foregoing question, because Heronn has no assets in the United Kingdom, Bin Badden has brought his U.K. libel judgment to Heronn's Virginia home to collect, filing it in Stonebridge circuit court.

Bin Badden's U.K. judgment is for libel and Heronn will maintain in defense that his collection in the United States would erode the First Amendment's protection of her free expression. Is there something elevated about a libel defendant's expression even if her speech was tortious and improper where "spoken" or "published"?

Good news for Heronn. Courts in the United States have declined comity to judgment creditors' domestic collection of U.K. libel judgments.⁷⁰ These decisions refer to U.K. libel doctrines as repugnant or contrary to their forums' public policy.⁷¹

The courts reason as follows: U.K. courts protect a libel defendant's freedom of speech significantly less than a U.S. court would under the U.S. Constitution's First Amendment.⁷² Thus, the courts maintain that the court in the United States should forbid a U.K. judgment creditor from collecting his "repugnant" libel judgment from the defendant's assets in the United States.⁷³

70. See *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 6 (D.D.C. 1995) (refusing to recognize a British libel judgment and calling it repugnant to Maryland and U.S. public policy because it would deprive the plaintiff of a right protected by both the First and Fourteenth Amendments); *Bachchan v. India Abroad Publ'ns, Inc.*, 585 N.Y.S.2d 661, 665 (N.Y. Sup. Ct. 1992) (refusing to enforce an English libel judgment on grounds that it does not recognize the defendant's First Amendment freedoms of speech and press and is, thus, repugnant to public policy).

71. See cases discussed *supra* note 70.

72. See *Matusevitch*, 877 F. Supp. at 4–5 (explaining the differences between British and American libel law and citing cases in which speech similar to that at issue was deemed constitutionally protected by U.S. courts); *Bachchan*, 585 N.Y.S.2d at 663–64 (explaining that the United States has abandoned the English common law rule of presuming a defamatory statement is false, instead opting for a First Amendment-informed requirement that the plaintiff prove falsity).

73. See *Matusevitch*, 877 F. Supp. at 4 ("In this case, libel standards that are contrary to U.S. libel standards would be repugnant to the public policies of the State of Maryland and the United States. Therefore . . . this court declines to recognize the foreign judgment."); *Bachchan*, 585 N.Y.S.2d at 665 ("The protection to free speech and the press embodied in [the First Amendment] would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the

These courts apparently will not accept another nation's judgment based on a plaintiff's libel cause of action unless the judgment could have been entered and affirmed by their state's courts. Because no other nation protects a libel defendant as much as the United States, these decisions effectively slam the United States' door on a U.K. libel plaintiff. Heronn will keep her bank account and home if the Stonebridge judge accepts these widely praised precedents.⁷⁴

"Tort reform" legislation is the latest major development. New York's statute, labeled the Libel Terrorism Protection Act, requires the foreign nation's libel law to be as defendant-favoring as U.S. law to create a judgment collectable in the Empire State.⁷⁵ Illinois's Solons have enacted a similar statute.⁷⁶ A proposed bill, passed by the U.S. House in the fall of 2008, and successor legislation, which also passed the House in 2009, would require a court in the United States to refuse recognition to a foreign-nation defamation judgment against a resident public figure unless the judgment was consistent with the First Amendment.⁷⁷

protections afforded the press by the U.S. Constitution.").

74. See *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474, 480 (2d Cir. 2007) (citing *Bachchan* for the proposition that the Constitution requires refusing comity to foreign judgments that are repugnant to the First Amendment); Monré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1237-40 (2007) (explaining that *Bachchan* and *Matusevitch* are two of the leading cases applying the "state action doctrine" in the context of a foreign judgment); Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 180 n.35 (2004) (stating that "commentators have generally praised" *Bachchan* and *Matusevitch* and providing citations to earlier favorable articles); Russell Weaver, *Recognition and Enforcement of Judgements—Comparative and International Perspectives*, Presses Universitaires d'Aix-Marseille (Francois Lichere and Russell Weaver eds., forthcoming 2010) (citing *Bachchan* and *Matusevitch* as raising "important questions regarding whether U.S. courts should enforce foreign free speech judgments").

75. See N.Y. C.P.L.R. § 302(d) (2009) (granting jurisdiction over any person who obtains a defamation judgment in a foreign proceeding against a New York resident "for the purposes of rendering declaratory relief with respect to that person's liability . . . and/or for the purpose of determining whether said judgment should be deemed non-recognizable"); N.Y. C.P.L.R. § 5304(b)(8) (2009) ("A foreign country [defamation] judgment need not be recognized . . . unless the court . . . determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press . . . as would be provided by both the United States and New York constitutions.").

76. See 735 ILL. COMP. STAT. 5/2-209(b-5); 5/12-621(a)(7) (2009) (mirroring the New York code provisions in large part, with the additional requirements that the publication at issue have been published in Illinois and the resident have assets in Illinois).

77. See H.R. 2765 111th Cong. (1st Session 2009) (governing all judgment creditors' collection of foreign-nation defamation judgments, even when the U.S. defendant appeared in the foreign court to contest jurisdiction or the merits and allowing a prevailing judgment debtor to recover attorney fees); H.R. 6146, 110th Cong. (2008), available at <http://www.thomas.gov/cgi-bin/query/z?c110:H.R.5814> ("[A] domestic court shall not

A more expansive federal bill with a less inflammatory name, the Free Speech Protection Act (FSPA) was the subject of a House of Representatives oversight hearing on February 12, 2009,⁷⁸ and a bill was the successor subject of a Senate Judiciary Committee hearing on February 23, 2010. The FSPA would create a federal cause of action.⁷⁹ Like the legislation in the previous paragraph, to be collectable in the United States, a foreign-nation court's libel judgment would have to be based on libel law that is consistent with the U.S. Constitution's First Amendment.⁸⁰ The FSPA bill goes further, for it also enables a defendant to sue in the United States for a declaratory judgment that a foreign-nation libel judgment is uncollectable in the United States. The court will buttress the declaratory judgment with an injunction that forbids the judgment creditor from collection in the United States.⁸¹

Additionally, in her suit for damages under the FSPA, a foreign-nation libel defendant would be able to recover (1) the amount of a foreign-nation libel judgment that has been collected, that is "clawback" damages, (2) her costs including her attorney fee, and (3) harm to her business reputation.⁸² The court may treble her damages if the foreign-nation plaintiff sued her intending to suppress her First Amendment rights.⁸³

recognize or enforce a foreign judgment for defamation that is based upon a publication concerning a public figure . . . unless the domestic court determines that the foreign judgment is consistent with the first amendment to the Constitution of the United States.").

78. See Free Speech Protection Act of 2009, S. 449, 111th Cong. (1st Session 2009); 155 CONG. REC. D150 (daily ed. Feb. 12, 2009) (explaining that the Committee on the Judiciary's "[s]ubcommittee on Commercial and Administrative Law held a hearing on Libel Tourism").

79. See S. 449, 111th Cong. § 3(a) (1st Session 2009); H.R. 1304, 111th Cong. § 3(a) (2009), available at <http://www.thomas.gov/cgi-bin/query/D?c111:1:/temp/~c111gpqRpW::> ("Any United States person against whom a lawsuit is brought in a foreign country for defamation . . . disseminated primarily in the United States may bring an action in a United States district court . . .").

80. S. 449, 111th Cong. § 3(a) (1st Session 2009); see H.R. 1304, 111th Cong. § 3(a) (2009) (providing a cause of action only if the "speech at issue in the foreign lawsuit does not constitute defamation under United States law"). The more recent Bill, S. 449, requires that the judgment debtor's allegedly defamatory subject matter have been "published, uttered, or otherwise primarily disseminated in the United States" and "does not constitute defamation under United States law." U.S. law apparently comprises the state common law of defamation plus the federal Constitution's First Amendment defenses.

81. S. 449, 111th Cong. § 2(c)(1) (1st Session 2009); see H.R. 1304, 111th Cong. § 3(c)(1) ("If the cause of action . . . is established, the district court shall order that any foreign judgment in the foreign lawsuit in question may not be enforced in the United States . . . and may order such other injunctive relief that the court considers appropriate to protect the right to free speech . . .").

82. S. 449, 111th Cong. § 2(c)(1) (1st Session 2009); H.R. 1304, 111th Cong. § 3(c)(2).

83. S. 449 111th Cong. § 2(d) (1st Session 2009); H.R. 1304, 111th Cong. § 3(d).

If enacted, the FSPA would give Heronn Virginia federal venue because she lives and owns property there, plus U.S. personal jurisdiction over Bin Badden because he sued her in a foreign nation for libel. This jurisdictional base is shaky and controversial; I argued above, citing judges in the minority in *Yahoo!*, that it may be inconsistent with U.S. Supreme Court due process decisions that require a defendant to have "minimum contacts" with a U.S. forum before he can be sued there.⁸⁴

The New York statute or the Illinois statute as well as the proposed FSPA would shield Heronn from Bin Badden's efforts to collect his judgment, if, that is, they were in effect in Stonebridge, Virginia. Heronn will defend under the Virginia UFMJA's procedural and substantive provisions.

The argument for collection starts with general principles and becomes more particular as it focuses on a defamation judgment. International collection promotes international commerce and free trade. It usually advances the important idea that a debtor should pay its just debts. When a court recognizes an international judgment, it promotes finality and reliance on judicial decisions. It also prevents expensive and unsettling parallel and duplicate litigation. Finally, it respects the foreign nation's law and governmental act.

The decentralized courts, applying state law, are making U.S. foreign policy.⁸⁵ Taking care of your own by requiring a foreign-nation judgment to be based on defamation law that favors defendants as much as domestic law can be perceived as parochialism, exceptionalism, or unilateralism. That will disturb the United Kingdom, an ally and trading partner, and erode its courts' alacrity to allow a U.S. plaintiff to collect commercial and other judgments there. For an example, in the United Kingdom, it is illegal to sell human sperm or eggs. Suppose a visiting British couple buys eggs from one of Professor Heronn's students in Virginia; and even though the resulting pregnancy is successful, they return home without paying her. The student sues them on her contract and obtains a Virginia judgment, which she takes to the United Kingdom to collect. Should she expect to collect it there even though their domestic law differs?

More to the point, is it really affording comity for a U.S. state court to cite repugnance to forum public policy as a reason to refuse to allow a judgment creditor to collect a foreign-nation judgment unless it is based on foreign nation substantive libel law that is identical, congruent with U.S. law?⁸⁶

84. *Supra* note 24 and accompanying text.

85. *See* Rosen, *supra* note 6, at 785–86 (arguing that decisions regarding whether to enforce foreign judgments have far-reaching political consequences and are best left to political branches of government rather than courts).

86. *See* Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws*:

As a matter of constitutional law, are we to suppose that the U.S. Constitution's First Amendment applies to conduct and litigation in a foreign nation? Professor Rosen maintains that the First Amendment protects only against the activities of the United States and its states.⁸⁷ He shows that the U.S. Constitution's protection of free expression does not extend to another nation's court decision based on that nation's internal law.⁸⁸ He suggests that foreign laws are more analogous to clauses in private contracts than to domestic state laws.⁸⁹ Nor would a U.S. state's recognition for collection of a foreign-nation judgment comprise the "state action" prerequisite for constitutional coverage.⁹⁰

As a matter of public policy then, do the courts in the United States need a higher repugnance-public policy-comity threshold? One court recognized a U.K. judgment that included plaintiff's attorney fee as part of "costs," a doctrine that is contrary to the American rule that each litigant pay its own lawyer.⁹¹ This illustrates the important point that a court in the United States will allow a judgment creditor to collect a foreign-nation judgment that is based on substantive law that is different from, but not different enough to violate public policy and be "repugnant" to, domestic law.⁹²

Redefining Governmental Interests in a Global Era, 153 U. PA. L. REV. 1819, 1870–72 (2005) (arguing that refusing to enforce "[u]nconstitutional" judgments under the public policy exception imposes the U.S. Constitution on situations that, arguably, do not implicate it at all); Rosen, *supra* note 74, at 229–30 (arguing that case law has all followed an "America-centric" analysis, disregarding foreign countries' and foreign plaintiffs' interests as well as the effect of non-enforcement on international law); Craig Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999, 1035–36 (1994) (arguing that *Bachchan* was misguided, misinterpreting either the First Amendment or the UFMJA).

87. See Rosen, *supra*, note 74, at 198 ("[T]he U.S. Constitution cannot be said to apply to foreign countries under any intelligible theory.").

88. See *id.* at 196–98 (arguing that there is no First Amendment violation if only the enforcement of a foreign judgment, rather than the substance of that judgment, is deemed to be a U.S. state's action).

89. See *id.* at 193–98 (arguing that state enforcement of a private contract is not state action, that foreign judgments are similar to private contracts in that they are not the state actions of a U.S. state, and that, therefore, enforcement of these judgments cannot be a violation of the Constitution).

90. See *id.* at 196–98 (arguing that where the legal right being sued upon was created by a private contract, neither a judgment in the case nor a state's failure to act to prohibit the contract is state action).

91. See *In re Jawad Mahmoud Hashim*, 213 F.3d 1169, 1171–72 (9th Cir. 2000) (finding the applicable requirements for comity to be satisfied and overturning a bankruptcy court's refusal to grant comity to an English judgment for costs and fees).

92. See *supra* note 31 (listing sources that explain that comity should be extended to foreign-nation judgments generally and only in rare circumstances will they be dishonored).

If, however, the Virginia judge subscribes to the existing decisions about foreign-nation libel judgments, Bin Badden's collection action in Stonebridge will fail. The Stonebridge judge also may find that the U.K. court lacked jurisdiction over Heronn because of her lack of contacts there and that, even if the U.K. court did have jurisdiction, all of its libel judgments are contrary to U.S. free-speech doctrines and cannot be recognized.

Helene Heronn is a sympathetic "victim" who presents a propitious occasion for a Virginia court to refuse collection. The Bin Badden-Heronn dispute has very little to do with the United Kingdom, and only the most tenuous contact there.⁹³ Even so, the U.K. courts are experienced in defamation and Heronn might have been better advised to defend vigorously there with an eye to a favorable decision on the facts and merits. Instead she defaulted and retreated to fortress America to repel Bin Badden's judgment. Nevertheless, with my approbation, she should preserve her Virginia home and bank account. But not simply because U.K. defamation doctrines protect a defendant less than the United States'.

The courts and legislatures that elect, in effect, to apply local, that is domestic, libel law to transnational judgment-collection appear to undervalue comity. A court in the United States should, under some circumstances, allow a foreign-nation libel judgment creditor to collect from the defendant's local assets. Suppose a U.K. libel plaintiff sues a U.K. defendant for calling the plaintiff a "thief," a libel within that nation and the United States. The lawsuit leads to a full blown U.K. trial and a money judgment for the plaintiff. The defendant transfers his assets to the United States to thwart the plaintiff, his judgment creditor. In a collection action against the judgment debtor's U.S. assets that he resettled to these shores, the court ought to extend comity and the U.K. judgment ought to be appropriate for collection.⁹⁴ For the same reasons, a categorical anti-defamation-

93. See Robert McFarland, *Please Do Not Publish this Article in England: A Jurisdictional Response to Libel Tourism*, MISS. L.J. (forthcoming 2010) ("[I]f Mahfouz [or Bin Badden] presented his judgment in a U.S. court, the court should deny enforcement . . . on the ground that the English tribunal's attempt to exercise jurisdiction in the case violates Ehrenfeld's [or Heronn's] right to due process."); *Commercial and Administrative Law, "Libel Tourism": Hearing on H.R. 6146 and H.R. 5814 Before the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Linda J. Silberman, Professor, New York University School of Law) ("When a foreign court exercises jurisdiction over a U.S. defendant in what might be regarded as an exorbitant assertion of jurisdiction . . . United States [law] relating to the recognition and enforcement of foreign judgments provide[s] that such a judgment should not be recognized or enforced.").

94. See *Commercial and Administrative Law, "Libel Tourism": Hearing on H.R. 6146 and H.R. 5814 Before the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Linda J. Silberman, Professor, New York University School of Law) (presenting a similar factual scenario and arguing that "[i]n a traditional conflict-of-laws analysis, the United States would

judgments statute, state or federal, that would protect a U.S. resident defendant from liability for the same defamation in the United Kingdom, is ill-advised.

A court in the United States should evaluate each foreign-nation judgment in a nuanced and discerning way. "[C]ourts," Professor Berman wrote, "should take seriously the conflicts values that would be effectuated by enforcing the foreign judgment, weigh the importance of such values against the relative importance of the local public policy or constitutional norm, and then consider the degree to which the parties have affiliated themselves with the forum."⁹⁵ In this increasingly transnational world of communication and commerce, including the Internet, the courts of the United States ought to develop doctrines for foreign-nations' judgments that more nearly resemble the full faith and credit decisions that countenance differences in substantive law.⁹⁶ Instead of a categorical negative decision, a court in the United States should view refusing recognition to a foreign-nation judgment, including one for defamation, as extraordinary.

Finally, I anticipate scholarly and media industry alacrity for the FSPA.⁹⁷ In contrast, as a reader might predict, I oppose the FSPA. It is based on the untenable and disrespectful notion that a plaintiff commits a tort by suing an American in another nation on a cause of action that is viable in that nation.

have 'no interest' in applying its standards . . . to these parties. Therefore, it seems inappropriate for U.S. standards to be invoked as a public policy defense in a recognition/enforcement context").

95. Berman, *supra* note 86, at 1872.

96. *Cf.* VA. CODE ANN. § 8.01-465.9 (2009) ("The foreign country money judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. c (1987) ("A foreign judgment is generally entitled to recognition by courts in the United States to the same extent as a judgment of a court of one State in the courts of another State."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 98 cmt. b, 117 cmt. c (1971) (conceding the public policy exception but concluding that foreign-nation judgments should often be enforced, or at least given conclusive effect in regard to issues decided, in order to further the public interest that there be an end to litigation). Eighty-five years ago, the Freeman treatise on Judgments observed a "tendency . . . to constantly narrow the differences between [sister-state] judgments [subject to full faith and credit] and those of wholly foreign states by raising the latter to [the] same plane of recognition." 3 A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 1482 (Edward W. Tuttle ed., 5th ed. 1925).

97. See Sarah Staveley-O'Carroll, Note, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment*, 4 N.Y.U. J.L. & LIBERTY (forthcoming 2009), available at <http://ssrn.com/abstract=1350994> (exploring New York's libel tourist statute and arguing for federal legislation that builds on New York's example). Needless to say, U.S. publishing and media interests who are potential libel defendants overseas and their lawyers favor shelter from overseas libel judgments. *Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights: Hearing Before the Senate Judiciary Committee*, 111th Cong. (2010) (statements of Mr. Kurt Wimmer and Mr. Bruce Brown), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4414> (on file with the Washington and Lee Law Review).

Filing a defamation lawsuit in a foreign nation is not tortious misconduct. Its panoptic rejection of all foreign-nation defamation judgments is both too blunt and too broad. The idea, moreover, that a foreign nation's substantive law is "repugnant" unless it is identical to ours is itself a repugnant one.⁹⁸ Courts and legislatures should reject the idea that a particular substantive category of foreign-nation judgments, those for libel, can never be collected in the United States.⁹⁹ The FSPA's remedies provisions for injunctions, damages, trebling, and clawback add insult to disrespect.¹⁰⁰ Congress ought to refuse to pass it.

Instead Congress might consider general federal legislation to create a uniform national approach by establishing either exclusive federal-court jurisdiction or concurrent federal-state court jurisdiction over foreign-nation judgments with final review by the U.S. Supreme Court.

In addition to the typical grounds to reject a foreign-nation judgment, such as lack of jurisdiction, partiality, and fraud, this legislation could include a uniform national definition of public policy, repugnance, and lack of comity that rejects incongruity and narrows the difference between full faith and credit and acceptance of foreign-nation judgments.

98. Michael Polelle, *Recognition and Enforcement of Judgements—Comparative and International Perspectives*, Presses Universitaires d'Aix-Marseille (Francois Lichere and Russell Weaver eds., forthcoming 2010) (arguing that "a mere variance between the law of a foreign country and American law" should not be a sufficient basis for denying comity and that legislation like that in New York and Illinois wrongfully removes all discretion in this area from the courts)

99. See RODNEY SMOLLA, *LAW OF DEFAMATION* § 23:14 (2009) (encouraging a nuanced approach recognizing some foreign-nation defamation judgments); McFarland, *supra* note 93 (maintaining that the United States should reject most libel tourism judgments because they deny defendants due process based on lack of personal jurisdiction, but that "if the foreign tribunal's jurisdiction is established, then the reviewing court should enforce the judgment in the shared interest of comity between nations"); Charles W. Mondora, Note, *The Public Policy Exception, "The Freedom of Speech or of the Press," and the Uniform Foreign-Country Judgments Recognition Act*, 36 *HOFSTRA L. REV.* 1139, 1151–52 (2008) (noting a movement "criticizing the categorical, constitutionally mandatory application of the public policy exception in the *Bachchan* line of cases"); Rosen, *supra* note 6, at 824 (arguing, under various types of analysis, that un-American judgments should not be refused enforcement categorically, but might, instead, be enforced in accordance with particular value judgments); *Commercial and Administrative Law, "Libel Tourism": Hearing on H.R.6146 and H.R. 5814 Before the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Linda J. Silberman, Professor, New York University School of Law) (asserting that U.S. courts should not "apply U.S. law principles without regard to context and invoke public policy too reflexively without sufficient regard for the competing interests on other countries").

100. See *Commercial and Administrative Law, "Libel Tourism": Hearing on H.R.6146 and H.R. 5814 Before the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Linda J. Silberman, Professor, New York University School of Law) ("These tools are much too aggressive an assertion of U.S. jurisdiction even in those situations where U.S. interests might be found to be compelling.").

