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Abstract

This Comment argues that, although the New York Supreme Court reached the correct opinion in Bachchan v. India Abroad Publ., but the scope of the court's decision must be limited limited in its application with respect to future enforcement proceedings involving non-U.S. libel judgments. Part I examines the contrasting defamation standards in the United States and Great Britain, and details the concept of comity. Part II sets forth the factual and procedural history of the case and examines the opinion of the court. Part III analyzes the Bachchan decision and argues that, while the result was appropriate to the facts before the court, its application must be limited in future libel cases. This Comment concludes that future enforcement of non-U.S. libel judgments should be subject to a constitutional analysis on a case-by-case basis.

BACHCHAN v. INDIA ABROAD PUBLICATIONS INC.: THE CLASH BETWEEN PROTECTION OF FREE SPEECH IN THE UNITED STATES AND GREAT BRITAIN

INTRODUCTION

Unlike judgments rendered in any of the fifty states of the United States, which receive full faith and credit under the U.S. Constitution,[1] judgments rendered in non-U.S. tribunals receive no such automatic privilege.[2] The U.S. Congress has failed to enact clarifying legislation that would establish a consistent standard for U.S. courts asked to enforce extraterritorial judgments. As a result, the issue of recognizing non-U.S. judgments has fallen within the sphere of the common law.[3]

Courts in the United States traditionally recognize extraterritorial judgments.[4] The concept of comity, as established by the U.S. Supreme Court in *Hilton v. Guyot*,[5] encourages recognition of extraterritorial judgments.[6] Comity, however, does not guarantee enforcement of all non-U.S. judgments.[7]

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1. U.S. CONST. art. IV, § 1 (stating that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State").

2. *See* Hilton v. Guyot, 159 U.S. 113, 181-82 (1895) (distinguishing between judgments rendered in sister states and extraterritorial jurisdictions); *see also* Guinness PLC v. Ward, 955 F.2d 875 (4th Cir. 1992). In *Guinness*, the U.S. Court of Appeals for the Fourth Circuit acknowledged the limits placed on enforcement of non-U.S. judgments: "We note as a preliminary matter that '[t]he Full Faith and Credit Clause of Article IV § 1 of the Constitution of the United States does not apply to foreign judgments." *Id.* at 883 (quoting Andes v. Versant Corp., 878 F.2d 147 (4th Cir. 1989)). "The effect to be given foreign judgments has therefore historically been determined by more flexible principles of comity." *Id.*

3. *See Hilton*, 159 U.S. at 163. In his opinion, Justice Horace Gray stated that

> [t]he most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them.

Id.

4. *See id.* at 113 (establishing precedent for recognizing non-U.S. judgments); *see also* Holly Sprague, Note, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 CALIF. L. REV. 1447, 1447-52 (1986) (reviewing general principles of comity); *see generally* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (7th ed. 1872) (stating general principles of comity).

5. 159 U.S. at 163 (defining comity).

6. *Id.*

7. *See* Sprague, *supra* note 4, at 1450 (stating limits of comity); *see also* STORY,

Courts, jurists, and scholars have recognized several rationales for refusing to enforce non-U.S. judgments.[8] For example, U.S. courts may refuse to enforce extraterritorial judgments that violate public policy.[9]

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supra note 4, § 38(a) (stating limits of comity). Even the Court in *Hilton* acknowledged limits to recognizing extraterritorial judgments. *Hilton*, 159 U.S. at 228-29. To be enforced in the United States, the *Hilton* Court held, the non-U.S. judgment must be rendered by a competent court, which had personal and subject matter jurisdiction. *Id.* at 113. Defendant must have had an opportunity to defend against the charges. *Id.* The non-U.S. court must also adhere to a course of civilized jurisprudence. *Id.* Once these criteria are met, the *Hilton* Court held that the non-U.S. judgment is then prima facie evidence of truth. Under *Hilton*, the judgment is conclusive and must be enforced, unless defendant demonstrates special grounds for impeaching the judgment. *Id.* Grounds for non-recognition under *Hilton* include fraud, prejudice, and violation of public policy. *Id.* Additionally, Justice Gray suggested reciprocity as the final factor in enforcing a non-U.S. judgment. *Id.* at 190. The *Hilton* Court went as far as to assess the reciprocal relationship with other nation-states. *Id.* at 206-28.

8. *See* N.Y. Civ. Prac. L. & R. § 5304 (McKinney 1978). CPLR § 5304 lists mandatory and discretionary grounds for non-recognition of extraterritorial judgments. *Id.* Under CPLR § 5304(a), a New York court will refuse to enforce a non-U.S. judgment when the non-U.S. tribunal was not impartial, or the non-U.S. court lacked personal jurisdiction. *Id.* § 5304(a). Under CPLR § 5304(b), a New York court may refuse to enforce a non-U.S. judgment when the non-U.S. tribunal lacked subject matter jurisdiction, defendant did not receive sufficient notice, the judgment was obtained by fraud, the judgment was repugnant to public policy, the judgment conflicted with another judgment, the judgment conflicted with an agreement between the two parties, or the non-U.S. court was a seriously inconvenient forum. *Id.* § 5304(b); *see* Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253 (1991). Professor Brand suggests several rationales for not recognizing extraterritorial judgments. *Id.* at 269. U.S. courts are less likely to enforce a non-U.S. judgment if due process or jurisdictional issues arise from the non-U.S. judgment. *Id.* at 270-74. Additionally, a judgment against a U.S. citizen will not be enforced if the U.S. defendant did not have an opportunity to be heard. *Id.* at 274. Most courts list fraud as a defense to recognition. *Id.* U.S. courts will refuse to enforce a non-U.S. judgment if such enforcement results in a judgment that contradicts previous U.S. decisions. *Id.* at 276. Judgments contrary to the parties' agreement and the inconvenience of the forum are also defenses. *Id.* at 277. Professor Brand also acknowledges a vigorous public policy exception, noting that "United States courts have uniformly declared themselves not required to recognize or enforce a foreign judgment that contravenes state public policy." *Id.* at 275; *see generally* STORY, *supra* note 4, § 38(a).

9. *See* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972). In *Somportex*, the U.S. Court of Appeals for the Third Circuit further defined the public policy rationale established in *Hilton*. *Id.* at 440. Circuit Judge Aldisert enunciated the public policy rationale: "[c]omity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect." *Id.*; *see* Dunstan v. Higgins, 33 N.E. 729 (N.Y. 1893) (citing Lazier v. Westcott, 26 N.Y. 146 (1862)); *Lazier*, 26 N.Y. at 153 (paraphrasing Judge Story's treatise); Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979) (refusing to enforce non-U.S. law that violates good morals or is prejudi-

Despite the general principles of comity, which encourage recognition of extraterritorial judgments, one trial court in New York State suggests that U.S. courts may now be prepared to reject comity in the interest of preserving public policy.[10] In *Bachchan v. India Abroad Publications Inc.*, the Supreme Court of New York focused on whether New York courts must enforce non-U.S. libel judgments granted pursuant to standards antithetical to the protections of the U.S. Constitution.[11] The court refused to enforce a libel judgment awarded by the High Court of Justice in London, England.[12]

Bachchan represents the first reported case where a U.S. court has barred enforcement of an extraterritorial libel judgment on substantive grounds.[13] The Supreme Court of New York held that enforcement of the defamation judgment would threaten free speech protections offered by the First Amendment to the U.S. Constitution.[14] Faced with issues of comity,

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cial against Texas citizens); Wilcox v. Wilcox, 133 N.W.2d 408 (Wis. 1965) (acknowledging public policy exception). In *Wilcox*, the Supreme Court of Wisconsin acknowledged the public policy exception in rejecting the application of non-U.S. law: "We start with the premise that if the forum state is concerned it will not favor the application of a rule of law repugnant to its own policies." *Id.* at 416. *But see* Adamsen v. Adamsen, 195 A.2d 418 (Conn. 1963) (upholding Norwegian judgment as matter of comity); Loucks v. Standard Oil Co., 120 N.E. 198 (N.Y. 1918) (Cardozo, J.) (applying Massachusetts law in New York). In *Loucks*, the New York Court of Appeals found no violation of public policy by applying Massachusetts law in a tort recovery for wrongful death. *Id.* at 202. Defendant argued application of Massachusetts law violated the public policy of New York by affording certain rights under Massachusetts law not available under New York law. *Id.* at 201; *see* Brand, *supra* note 8, at 275 (acknowledging public policy exception); *see generally* STORY, *supra* note 4, § 38(a) (acknowledging public policy exception); Sprague, *supra* note 4, at 1450 (acknowledging public policy exception).

10. *See* Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992).

11. *Id.* at 662. The Supreme Court of New York is the trial court of general jurisdiction.

12. *Id.* The High Court of Justice, a superior court of record created by the Judicature Act of 1873, represents the first tier of civil appeal available to English litigants. TERENCE INGMAN, THE ENGLISH LEGAL PROCESS 12 (2d ed. 1987). Decisions from one of the three divisions of this court, the Queens Bench, the Chancery Division, and the Family Division, are appealable to the House of Lords, which is considered the highest court for domestic matters in the United Kingdom. *Id.* at 4; *see generally* R.J. WALKER, THE ENGLISH LEGAL SYSTEM 186-98 (1985) (describing England's judiciary system).

13. *Bachchan*, 585 N.Y.S.2d at 661. To date, no other U.S. court has refused to enforce an extraterritorial libel judgment on substantive grounds.

14. *Id.* at 662. In rendering her opinion, Justice Fingerhood held that "[i]t is doubtful whether this court has discretion to enforce the judgment if the action in

competing provisions of New York's Civil Practice Law and Rules ("CPLR"),[15] and precedent on both the federal and state level,[16] the court refused to recognize the English judgment without first subjecting it to a rigorous constitutional analysis.[17] Ultimately, the court refused to recognize the English judgment on public policy grounds, holding that the English decision violated the protections of free speech offered by the First Amendment of the U.S. Constitution.[18] In arriving at its decision, the court considered the due process and public policy provisions of article 53 of the CPLR.[19] Justice Shirley Fingerhood, in her opinion, further intimated that New York courts should refuse to enforce all English libel judgments because of the lesser protection afforded to free speech in the United Kingdom.[20]

This Comment argues that, although the New York

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which it was rendered failed to comport with the constitutional standards for adjudicating libel claims." *Id.*

The First Amendment of the U.S. Constitution guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

15. N.Y. Civ. Prac. L. & R. art. 53 (McKinney 1978). CPLR § 5302 provides general guidelines for New York courts reviewing non-U.S. judgments. *Id.* § 5302. CPLR § 5303 sets forth when enforcement of an extraterritorial judgment is required, while CPLR § 5304 offers grounds for non-recognition of extraterritorial judgments. *Id.* §§ 5303, 5304.

16. *See supra* note 9 (recognizing competing comity standards in United States).

17. *Bachchan*, 585 N.Y.S.2d at 662-63. Justice Fingerhood, relying on David Siegel's commentary to CPLR § 5304, found a constitutional analysis to be mandatory. *Id.*

18. *Id.* at 661.

19. *Id.* at 662.

20. *Id.* at 665. In denying plaintiff's motion for summary judgment in lieu of complaint, one of the procedures contemplated by CPLR § 5303 for enforcing an extraterritorial judgment, Justice Fingerhood stated that

> [i]t is true that England and the United States share many common law principles of law. Nevertheless, a significant difference between the two jurisdictions lies in England's lack of an equivalent to the First Amendment to the United States Constitution. The protection to free speech and the press embodied in that 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 protections afforded the press by the U.S. Constitution.

Id.

Plaintiff has not filed an appeal. Section 5513 of the CPLR requires plaintiffs to file an appeal within 30 days of the judgment. N.Y. Civ. Prac. L. & R. § 5513 (McKinney 1978). Thus, under CPLR § 5513, Plaintiff Ajitabh Bachchan is barred from appealing the judgment of the N.Y. Supreme Court.

Supreme Court reached the correct opinion regarding the facts before it, the scope of the court's decision must be limited in its application with respect to future enforcement proceedings involving non-U.S. libel judgments. Part I examines the contrasting defamation standards in the United States and Great Britain, and details the concept of comity. Part II sets forth the factual and procedural history of the case and examines the opinion of the court. Part III analyzes the *Bachchan* decision and argues that, while the result was appropriate to the facts before the court, its application must be limited in future libel cases. This Comment concludes that future enforcement of non-U.S. libel judgments should be subject to a constitutional analysis on a case-by-case basis.

I. *LEGAL QUESTIONS OF DEFAMATION AND COMITY*

In *Bachchan*, the Supreme Court of New York faced questions of competing defamation standards.[21] The U.S. standard offers constitutional protection to free speech.[22] Conversely, the English judicial system, devoid of a written constitution and a bill of rights,[23] adheres to a significantly less protective defamation standard.[24] In determining whether to enforce a decision on the basis of the English defamation standard, the New York Supreme Court examined the concept of comity.[25]

A. *Defamation in the United States*

The Supreme Court of the United States first established

21. *Bachchan*, 585 N.Y.S.2d at 663-64.

22. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (shifting libel standard from common law application to constitutional scrutiny).

23. *See* James Atlas, *Thatcher Puts a Lid on Censorship in Britain*, N.Y. TIMES, Mar. 5, 1989, § 6 (Magazine), at 36; *Call for Laws to Protect Free Expression*, Press Assoc. Ltd., April 11, 1991, *available in* LEXIS, Nexis Library, OMNI File; Michael Chilvers, *Judge Bars British Libel Judgment*, N.Y. TIMES, Apr. 17, 1992, at B16; Jeff Kaye, *Hyde Park Soapbox Oratory Falls Trippingly from the Tongue*, L.A. TIMES, July 10, 1990, at H2; Terence Shaw, *Think Tank Calls for Bill of Rights*, DAILY TEL., Dec. 10, 1990, at 20; *Rights Groups Finds British Government Hostile to Free Press*, Reuters, Oct. 27, 1991, *available in* LEXIS, Nexis Library, OMNI File.

24. *See generally* COLIN DUNCAN & BRIAN NEILL, DEFAMATION (1978); GATLEY ON LIBEL AND SLANDER (Sir Robert McEwen & Philip Lewis eds., 7th ed. 1974) [hereinafter GATLEY].

25. *Bachchan*, 585 N.Y.S.2d at 662 (determining application of CPLR § 5304, which essentially codifies comity in New York State).

the federal libel standard in *New York Times Co. v. Sullivan*.[26] Prior to the *Sullivan* decision, defamation was an amorphous tort found solely at common law.[27] In a libel action under the common law, defendant assumed the burden of proving truth.[28] In *Sullivan*, however, the U.S. Supreme Court elevated defamation to an action subject to First Amendment scrutiny, shifting the burden of proof to plaintiff.[29] As a result of *Sullivan*, certain libel claims fall within the scope of the First Amendment.[30] In subsequent cases, the U.S. Supreme Court further defined the libel parameters.[31] The New York Court of Appeals adopted a similar standard in *Chapadeau v. Utica Observer-Dispatch, Inc.*[32]

1. Public Officials and Public Figures: *New York Times Co. v. Sullivan* and *Curtis Publishing Co. v. Butts*

In *Sullivan*, an elected official from Alabama sued defendant, alleging that he had been libelled by an advertisement in defendant's newspaper.[33] The U.S. Supreme Court held that a

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26. 376 U.S. 254 (1964) (elevating libel to First Amendment protection).

27. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 151-52 (1967) (reviewing history of defamation in extending libel standard of *Sullivan* to include public figures); WILLIAM L. PROSSER ET AL., TORTS 853 (8th ed. 1988) [hereinafter PROSSER].

28. *See Sullivan*, 376 U.S. at 283-84 (rejecting Alabama law that presumed plaintiff's damages); *see generally* PROSSER, *supra* note 27, at 853 (acknowledging strict liability as original standard at common law). The tort of defamation encompasses both libel and slander. *Id.* at 881. Traditionally, written defamation falls under libel, while verbal defamation falls under slander. *Id.*

29. *Sullivan*, 376 U.S. at 283-84. In this landmark decision, Justice William J. Brennan for the majority found the Alabama law, which presumed plaintiff's damages, "inconsistent with the federal rule," which requires plaintiff to show malice. *Id.*

30. *See id.* at 268-69 (stating that "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions").

31. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (enunciating plaintiff's burden of proving falsity, regardless of plaintiff's position as either public or private figure); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (forming standard for private figure where published matter is of private concern); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (establishing libel standard for private figures where published matter is of public concern); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (extending *Sullivan* standard to include public figures).

32. *See* Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569 (N.Y. 1975) (basing New York libel standard on federal standard as established by U.S. Supreme Court in *Sullivan*).

33. *Sullivan*, 376 U.S. at 256. Plaintiff was elected the Commissioner of Public Affairs, one of three elected Commissioners in the City of Montgomery, Alabama. *Id.*

public official could not recover damages for defamation without proving by clear and convincing evidence that the defendant published the defamatory statement with actual malice.[34]

In establishing the new libel standard, the Court defined actual malice as knowledge that the defamatory statement was false, or that the statement was published with reckless disregard of whether it was false.[35] The Court's rationale rested on the proposition, as supported by prior case law, that the First Amendment secures the freedom of expression upon issues of public concern.[36] The First Amendment encourages rigorous debate on public issues, which may include vitriolic attacks directed at the government and its officials.[37] Therefore, the *Sullivan* Court established the federal rule, which bars public officials from recovering libel damages without first proving actual malice.[38] The Court implemented this heightened standard of

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In this position, plaintiff supervised the Police Department, Fire Department, Department of Cemetery, and Department of Scales in Montgomery. *Id.*

34. *Id.* at 279. Justice Brennan held that

> [t]he 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"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-81.

The Court implied that public officials are any persons who hold elected office:

> We are required in this case to determine for the first time 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.
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> Respondent . . . is one of the three elected Commissioners of the City of Montgomery, Alabama.

Id. at 256.

35. *Id.* at 279-81; *see supra* note 34 (defining actual malice).

36. *Sullivan*, 376 U.S. at 269; *see* Roth v. United States, 354 U.S. 476, 484 (1957) (stating goal of First Amendment is to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); Beauharnais v. Illinois, 343 U.S. 250 (1952) (articulating possible limits to Illinois criminal libel statute to encourage open dialogue about public officials conduct); Bridges v. California, 314 U.S. 252, 270 (1941) (stating First Amendment encourages society to speak freely and openly about public institutions).

37. *Sullivan*, 376 U.S. at 270; *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) (analyzing *Sullivan* standard for public officials). The *Gertz* Court distinguished private individuals from public officials, acknowledging the consequences of public life: "An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case." *Id.*

38. *Sullivan*, 376 U.S. at 279-80.

proof for statements about public officials to protect and encourage freedom of the press as embodied in the First Amendment.[39] Failure to offer this heightened level of protection would enervate the First Amendment's goal of encouraging public discourse.[40] Thus, under *Sullivan*, constitutional protection invokes a heightened threshold that must be met by a plaintiff in order to recover damages in a libel action.[41]

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39. *Id.* at 282. The primary concern of the Court in *Sullivan* was the protection of free speech available to the press:

> [T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. . . .
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> . . . .
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> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to a comparable "self-censorship." . . . Under [the Alabama law], would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The rule thus dampens the vigor and limits the variety of public debate.

Id. at 278-79.

40. *Id.* at 266. In the Court's opinion, Justice Brennan stated that failure to offer this heightened level of protection "would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' " *Id.* (quoting Associated Press v. United States, 326 U.S. 1, 20 (1944)).

Justice Brennan vehemently sought to encourage discourse by the press:

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

Id. at 269 (quoting Roth v. United States, 354 U.S. 476 (1957) and Stromberg v. California, 283 U.S. 359 (1931)) (citations omitted).

41. *Id.* at 285. Justice Brennan distinguished between speech protected by the First Amendment and speech that may be regulated:

> This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect."

Id. (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958) and Pennekamp v. Florida, 328 U.S. 331, 335 (1946)) (citations omitted).

In *Curtis Publishing Co. v. Butts*,[42] the U.S. Supreme Court extended the *Sullivan* standard to include public figures.[43] In *Curtis*, defendant published an article that accused plaintiff, the athletic director at the University of Georgia, of conspiring to "fix" a football game between the University of Georgia and the University of Alabama.[44] In extending the *Sullivan* standard to public figures, the *Curtis* Court considered plaintiff's societal position and ability to defend himself through the mass media.[45] Public figures, like public officials, play an influential role in society, and their position affords them easy access to mass media devices and other far-reaching forms of communication.[46] As in *Sullivan*, the Supreme Court applied this heightened standard in the interest of First Amendment protections to free speech.[47]

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42. 388 U.S. 130 (1967).

43. *Id.* at 155. In expanding the scope of the *Sullivan* standard to include public figures, Justice John M. Harlan held that

> [t]hese similarities and differences between libel actions involving persons who are public officials and libel actions involving those circumstanced . . . lead us to the conclusion that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard, but that the rigorous federal requirements of [*Sullivan*] are not the only appropriate accommodation of the conflicting interests at stake. We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

Id.

44. *Id.* at 135.

45. *Id.* at 154.

46. *Id.* at 164 (Warren, C.J., concurring); *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (analyzing *Sullivan* standard for public figures). The *Gertz* Court distinguished private individuals from public figures, acknowledging the consequences of public life:

> [T]hose classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.
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> . . . [P]ublic officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.

Id.

47. *Curtis*, 388 U.S. at 155.

2. Standards for Private Figures: *Gertz v. Robert Welch, Inc.*; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*; and *Philadelphia Newspapers, Inc. v. Hepps*

In *Gertz v. Robert Welch, Inc.*,[48] the U.S. Supreme Court faced different circumstances than the ones encountered in either *Sullivan* or *Curtis*. In *Gertz*, the Supreme Court addressed defamatory falsehoods regarding an individual who was neither a public official nor a public figure.[49] Plaintiff, a lawyer tangentially involved in the prosecution of a police officer, brought a libel action against defendant, a publisher, for an article in defendant's magazine that implicated plaintiff as a member of the communist party.[50] In his opinion for the majority, Justice Lewis Powell Jr. refused to extend either the *Sullivan* or the *Curtis* standard to plaintiff, a private individual, even though the media defendant argued that the matter was of public concern.[51] In rejecting the public figure application, the Supreme Court acknowledged a state interest in compensating injuries to private individuals, who, because of their societal position, have less effective opportunities than public figures to rebut defamatory falsehoods and are, therefore, more vulnerable to injury.[52] As in *Sullivan* and in *Curtis*, the *Gertz* standard requires the plaintiff to show that the media de-

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48. 418 U.S. 323 (1974).

49. *Id.* at 332.

50. *Id.* at 325-26. Defendant published *American Opinion*, a monthly periodical associated with the John Birch Society. *Id.* at 325.

51. *Id.* at 343-45.

52. *Id.* at 342-45. Justice Lewis Powell Jr., in his analysis of the applicability of *Sullivan* and *Curtis* to the case before the Court, held that

> [b]ecause private individuals characteristically have less effective opportunities for rebuttal than do public officials and public figures, they are more vulnerable to injury from defamation. Because they have not voluntarily exposed themselves to increased risk of injury from defamatory falsehoods, they are also more deserving of recovery. The state interest in compensating injury to the reputation of private individuals is therefore greater than for public officials and public figures.
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> . . . To extend the [*Sullivan*] standard to media defamation of private persons whenever an issue of general or public interest is involved would abridge to an unacceptable degree the legitimate state interest in compensating private individuals for injury to reputation and would occasion the additional difficulty of forcing courts to decide on an *ad hoc* basis which publications and broadcasts address issues of general or public interest and which do not.

Id. at 323-24.

fendant was at fault.[53] The Supreme Court, however, allowed the individual states to design for themselves the appropriate standard of liability for a publisher of defamatory statements injurious to private figures.[54]

The federal libel standard continued to evolve in subsequent Supreme Court cases. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[55] the Supreme Court considered an action by a private individual against a non-media defendant.[56] Plaintiff, a general contractor, brought a defamation action against defendant, a credit reporting agency.[57] Defendant sent a confidential report misrepresenting the solvency of plaintiff's business to five financial entities.[58]

The previous libel actions before the Supreme Court involved media defendants,[59] who argued that the statements in question were of public concern.[60] The alleged defamatory statements in *Dun & Bradstreet*, however, were purely of private concern.[61] In refusing to extend any of the heightened constitutional protections established in *Sullivan*, *Curtis*, and *Gertz*,[62]

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53. *Id.* at 345-46.

54. *Id.* at 347-48.

55. 472 U.S. 749 (1985).

56. *Id.* at 751.

57. *Id.*

58. *Id.*

59. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964) ("[Plaintiff] brought this civil libel action against . . . [defendant] the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper."); Curtis Publishing Co. v. Butts, 388 U.S. 130, 135 (1967) ("*Curtis Publishing Co. v. Butts*, stems from an article published in [defendant]'s Saturday Evening Post . . . ."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 325 (1974) ("[Defendant] publishes American Opinion, a monthly outlet for the views of the John Birch Society.").

60. *See Dun & Bradstreet*, 472 U.S. at 755-56. In analyzing the question before the Court, Justice Powell acknowledged the "public concern" defense enunciated in *Sullivan*, *Curtis*, and *Gertz*:

> *New York Times Co. v. Sullivan* . . . concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." . . . In later cases [*Curtis Publishing Co. v. Butts*], all involving public issues, the Court extended this same constitutional protection to libels of public figures. . . .
>
> In *Gertz*, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of [*Sullivan*].

Id.

61. *Id.* at 755-61.

62. *Id.* at 757-63.

the Supreme Court acknowledged tiers of free speech.[63] Speech of public concern enjoys the highest level of constitutional protection,[64] while matters of private concern are subject to a lesser standard.[65] In *Dun & Bradstreet*, the Supreme Court clearly distinguished the constitutional protections afforded to speech of public concern from those protecting speech of purely private concern.[66]

In *Philadelphia Newspapers, Inc. v. Hepps*,[67] the Supreme Court restated its holding in *Gertz*, which established the standard for a private individual seeking libel damages.[68] More significantly, *Hepps* reinforced the Supreme Court's abandonment of the common law rule, which burdened defendant with proving truth.[69] In the interest of protecting free speech, plaintiffs in libel actions, regardless of their position as public or private figures, bear the burden of proving falsity.[70]

The U.S. Supreme Court has articulated different tiers of free speech.[71] As enunciated in *Sullivan*, *Curtis*, and *Gertz*,

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63. *Id.* at 758. Justice Powell, in his majority opinion, noted that "[w]e have long recognized that not all speech is of equal First Amendment importance." *Id.*

64. *Id.* at 758-59. The Court emphasized the importance of unfettered speech in matters of public concern: "It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protections.' " *Id.* (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).

65. *Id.* at 759. The Court distinguished the First Amendment protection available to matters of strictly private concern:

> In contrast, speech on matters of purely private concern is of less First Amendment concern. . . . As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated [*Sullivan*] and *Gertz* are absent.

Id.

66. *Id.*

67. 475 U.S. 767 (1986).

68. *Id.* at 773-74.

69. *Id.* at 776.

70. *Id.* In her majority opinion, Justice Sandra Day O'Connor, after a careful analysis of the *Sullivan* and *Gertz* standards, adamantly refused to maintain the anachronistic common law rule even for private figure plaintiffs:

> In *Gertz*, as in [*Sullivan*], the common-law rule was superseded by a constitutional rule. We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.

Id.

71. *See supra* notes 63-66 and accompanying text (distinguishing between speech of public concern from speech of merely private concern).

speech of public concern receives a higher level of protection than speech of purely private concern.[72] In *Hepps*, however, the U.S. Supreme Court restated its proposition that both public and private figure plaintiffs assume the burden of proving falsity.[73]

3. The Libel Standard in New York

New York State has essentially complied with the federal standard for defamation.[74] In *Chapadeau v. Utica Observer-Dispatch, Inc.*,[75] the New York Court of Appeals, New York State's highest court, relied on *Sullivan* and its progeny in formulating the New York libel standard.[76] In *Chapadeau*, defendant published a story implicating plaintiff, a public school teacher, with two other men who had been arrested on drug charges.[77] New York's highest court held that plaintiff, a private figure, had to prove that defendant published the defamatory statement in a "grossly irresponsible" manner in order to recover damages.[78]

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72. *Compare* New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (establishing libel standard for public officials regarding matters of public concern) *and* Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (extending *Sullivan* standard to include public figures regarding matters of public concern) *and* Gertz v. Robert Welch, Inc., 418 U.S. 323, 324 (1974) (establishing libel standard for private figures where published matter is of public concern) *with* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (forming standard for private figure where published matter is of private concern).

73. *See supra* notes 67-70 and accompanying text (stating holding of *Hepps*, which reinforces plaintiff's burden of proving falsity).

74. *See* Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569 (N.Y. 1975) (basing New York libel standard on federal standard).

75. *Id.*

76. *Id.* at 570; *see* Kuan Sing Enter., Inc. v. T.W. Wang, Inc., 446 N.Y.S.2d 76, 77 (Sup. Ct.), *aff'd*, 444 N.E.2d 1008 (N.Y. 1982) (equating federal standard of proving actual malice with publishing in grossly irresponsible manner).

Other state jurisdictions essentially follow the federal libel standard established by the U.S. Supreme Court. *See* Moore v. Credit Info. Corp. of America, 673 F.2d 208, 210 (8th Cir. 1982) (enunciating Missouri libel standard equivalent to federal standard); Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 929 (C.D. Cal. 1982) (enunciating burden of plaintiff, as public figure, to prove actual malice to recover damages in California libel action); Pape v. Time, Inc., 294 F. Supp. 1087, 1088-89 (N.D. Ill.), *rev'd*, 419 F.2d 980 (7th Cir. 1969), *rev'd*, 401 U.S. 279 (1971) (defining malice in determining plaintiff's burden of proof to recover damages in Illinois libel action); Stone v. Essex County Newspapers, Inc., 311 N.E.2d 52, 56 (Mass. 1974) (stating plaintiff's burden of proving actual malice to recover in Massachusetts libel action).

77. *See Chapadeau*, 341 N.E.2d at 569-70.

78. *Id.* at 571. The *Chapadeau* court established the New York standard for defa-

In *Kuan Sing Enterprises, Inc. v. T.W. Wang, Inc.*,[79] the Supreme Court of New York clearly articulated the New York standard in rejecting plaintiff's libel claim.[80] Plaintiff, a private figure, failed to establish actual malice, which the court defined as publishing in a grossly irresponsible manner.[81]

B. *Defamation in England*

In stark contrast to the protections offered by the First Amendment to the U.S. Constitution is the English judicial system, which lacks a written constitution or civil rights protections substantially equivalent to those offered by the U.S. Bill of Rights.[82] Under English law, any published statement that injures the reputation of another person is defamatory.[83] In

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mation, clearly placing the burden of proof on plaintiff. *Id.* The court found that plaintiff bears the burden of proving that the "publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Id.*

79. 446 N.Y.S.2d 76, 77 (Sup. Ct.), *aff'd*, 444 N.E.2d 1008 (N.Y. 1982).

80. *Id.*; *see* Dattner v. Pokoik, 437 N.Y.S.2d 425 (Sup. Ct. 1981) (stating libel standard for private figures and public figures in New York).

81. *Kuan Sing*, 446 N.Y.S.2d at 77. Justice Cahn clearly stated New York's libel standard: "[t]o establish actionable defamation it must be shown that the facts are false and that their publication was generated by actual malice, i.e., with a purpose to inflict injury upon the party defamed, or *in a grossly irresponsible manner*." *Id.* (emphasis added).

Plaintiff owned and operated a Chinese Restaurant. *Id.* at 549. Defendant, a free lance writer, reviewed the plaintiff's restaurant for a Chinese language newspaper. *Id.*

82. *See generally* DUNCAN & NEILL, *supra* note 24; GATLEY, *supra* note 24.

83. *See* Knupffer v. London Express Newspaper, Ltd., [1944] App. Cas. 116, [1944] 1 All E.R. 495 (H.L.). In *Knupffer*, the House of Lords considered whether the defamatory words referred to plaintiff, the leader of an emigre group, individually, or to a larger group. *Id.* at 495. If the words refer directly to plaintiff, then plaintiff's reputation was injured and he could recover libel damages. *Id.* at 496. Lord Atkin summarized the English libel standard stating that "[t]he only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff." *Id.* at 497; *see* Ratcliffe v. Evans, [1892] 2 Q.B. 524 (Eng. C.A.). The court in *Ratcliffe* clearly stated the traditional English standard that "[e]very libel is of itself a wrong in regard of which the law, as we have seen, implies general damage." *Id.* at 529. The *Ratcliffe* court further enunciated the English rule explaining that

> [t]his case shews [sic], what sound judgment itself dictates, that in an action for falsehood producing damage to a man's trade, which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible. . . . In the case before us to-day, it is a falsehood openly dis-

contrast to defendants in the United States, defendants to an English defamation action bear the burden of proving truth.[84] Additionally, English law fails to distinguish between private figures and public ones. The Defamation Act of 1952,[85] which amends previously enacted legislation, serves only as a framework for the common law.[86] Essentially, the Defamation Act of 1952 clarifies issues that arose from the common law, such as the defense of justification, fair comment, and qualified privilege.[87]

1. Burden of Plaintiff

In an English libel action, plaintiff simply must establish three criteria.[88] Plaintiff must prove defendant published the alleged defamatory statement.[89] Next, plaintiff must show that the words complained of in fact refer to plaintiff.[90] Finally,

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seminated through the press—probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse with reference to such a subject-matter to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow, old rules; and, in addition to all this, would involve an absolute denial of justice and of redress for the very mischief which was intended to be committed.

Id. at 533-34.

84. *See* DUNCAN & NEILL, *supra* note 24, ¶¶ 5.01, 10.01-10.02. Plaintiff merely must establish that (i) the words complained of were published of him, (ii) that the words were defamatory of him, and (iii) that the words were published by the defendant. *Id.* ¶ 5.01. Defendant then bears the burden of proving truth, or justification. *Id.* ¶¶ 10.01-10.02.

85. Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 66.

86. *Id.*

87. *Id.* §§ 5-7.

88. *See* DUNCAN & NEILL, *supra* note 24, ¶ 5.01.

89. *See* Pullman v. Walter Hill & Co., [1891] 1 Q.B. 524 (Eng. C.A.). The Court of Appeal considered whether defendant's libelous letter was published or not. *Id.* at 525; *see* Rex v. Burdett, [1820] 4 B. & Ald. 95. In formulating the libel standard, the court in *Burdett* considered when a false statement became defamatory, stating that "[t]he public offence grows out of the [private] injury to the individuals. It arises out of the private injury to his name and reputation, which cannot be effected till the writing is published, or in other words, until its contents are communicated to the minds of others." *Id.* at 107.

90. *See* Knupffer v. London Express Newspaper, Ltd., [1944] App. Cas. 116, [1944] 1 All E.R. 495 (H.L.). To recover damages, plaintiff must show that the defamatory words refer to him as an individual. *Id.* Mere reference to the group with which plaintiff was affiliated with is insufficient to award damages. *Id.*; *see* 28 LORD HAILSHAM OF ST. MARYLEBONE, HALSBURY'S LAWS OF ENGLAND ¶ 39 (4th ed. 1979) [hereinafter HALSBURY'S LAWS OF ENGLAND] (stating plaintiff's need to show words complained of refer to plaintiff).

plaintiff must demonstrate that the words in question bear a defamatory meaning.[91] The court must determine if a reasonable person would understand the alleged words to be defamatory.[92] The fact that the person to whom the words were published believed them to be true is irrelevant in determining defendant's culpability.[93] Further benefiting plaintiff's position is a presumption of general damages in libel actions.[94]

2. Defenses Available to Defendant

The defenses available to defendant in an English libel action are justification, fair comment, absolute privilege, and

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91. *See* Rubber Improvement Ltd. v. Daily Telegraph Ltd., Rubber Improvement Ltd. v. Associated Newspapers, Ltd., [1964] App. Cas. 234, *sub. nom.* Lewis v. Daily Telegraph, Ltd., Lewis v. Associated Newspapers, Ltd., [1963] 2 All E.R. 151 (H.L.). The House of Lords considered the meaning the words would convey to an ordinary man. *Id.* at 235; *see* Capital and Counties Bank Ltd. v. George Henty & Sons, [1882] 7 App. Cas. 741 (H.L.). The House of Lords found the ordinary meaning of the words in question not to be defamatory. *Id.*

92. *See Capital and Counties Bank Ltd.*, [1882] 7 App. Cas. at 741. The House of Lords established a reasonableness standard in determining the meaning of a potentially libelous innuendo. *Id.* at 745; *see* Morgan v. Odhams Press Ltd., [1971] 1 W.L.R. 1239, [1971] 2 All E.R. 1156 (H.L.) (articulating test that reasonable man must understand alleged words to be defamatory); Hough v. London Express Newspaper, Ltd., [1940] 2 K.B. 507, [1940] 3 All E.R. 31 (Eng. C.A.). The Court of Appeal in *Hough* held innuendos subject to certain interpretation may be defamatory. *Id.* at 507.

> In an action for libel in respect of words which are not defamatory in their primary meaning, but are capable of being understood in a secondary and defamatory sense by persons having knowledge of certain facts, in order to support an innuendo that the words bear the secondary and defamatory meaning, it is sufficient for the plaintiff to allege and to prove that there are persons who know the special facts and so might understand the words in that secondary and defamatory sense, without proving that any person did in fact understand them in that sense.

Id.

93. *See Hough*, [1940] 2 K.B. at 509 (clarifying proposition that third party's belief that alleged words are true is irrelevant in determining defendant's culpability).

94. *See* Ratcliffe v. Evans, [1892] 2 Q.B. 524, 529 (Eng. C.A.). In determining whether plaintiff could recover for lost business as a result of defendant's defamatory statements, the Court of Appeal stated the established presumption of general damages for all libel actions: "Every libel is of itself a wrong in regard of which the law, as we have seen, implies general damage." *Id.*

General damages, as distinguished from special damages, are those that "necessarily result from the violation complained of," or are "damages that the law implies or presumes." DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 114-15 (1985) (citing Howard Supply Co. v. Wells, 176 F.2d 512, 515 (6th Cir. 1910)). Special damages, on the other hand, are those damages that proximately resulted from "the violation complained of" by plaintiff. *Id.* at 115.

qualified privilege.[95] In an English libel suit, defendant bears the burden of proving truth,[96] unlike in the United States where the plaintiff bears the burden of proving falsity.[97] If a defendant to an English libel suit proves truth, the publication is held to be justified and defendant escapes liability.[98] Under the defense of justification, defendant must prove that the defamatory statements are true or substantially true, and that the defamatory inferences of the words in question are true as well.[99] Additionally, defendant must specifically plead the defense of justification.[100] Failure to plead justification renders the defense inoperative once court proceedings begin.[101]

As an alternative defense, defendant may allege that the

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95. *See* DUNCAN & NEILL, *supra* note 24, chs. 12-14.

96. *See id.*

97. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986). In *Hepps*, the U.S. Supreme Court reaffirmed the established concept that plaintiff in a defamation actions bears the burden of proving falsity. *Id.*

98. *See* Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 66, § 5.

> In an action for libel . . . in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

Id. The Court of Appeal in Moore v. News of the World, [1972] 1 Q.B. 441 (Eng. C.A.), interpreted section 5 of the Defamation Act of 1952:

> [I]t means that a defendant is not to fail simply because he cannot prove every single thing in the libel to be true. If he proves the greater part of it to be true, then even though there is a smaller part not proved . . . defendant will win as long as the part not proved does not do the plaintiff much more harm.

Id. at 448.

99. *See* Broadway Approvals Ltd. v. Odhams Press, Ltd., [1965] 1 W.L.R. 805, 817, [1965] 2 All E.R. 523, 533 (Eng. C.A.). The Court of Appeal examined the defence of justification: "The comments, as well as the facts and the inferences from both fact and comment, in defamatory statements have to be proved to be true for the defence of justification to succeed. . . ." *Id.* at 535.

100. *See Moore*, [1972] 1 Q.B. at 441. The Court of Appeal rejected the defense of justification when such defense was not pleaded specifically:

> Now section 5 [of the Defamation Act 1952, which codifies the defense of justification] was not pleaded. It was not raised by counsel in the court below. Naturally enough the judge did not refer to it. As it was not raised below, I am of [the] opinion that it cannot be made any ground of complaint here. It seems to be that if a defendant seeks to rely on section 5, he ought to plead it. Even if he only relies on it in the alternative, he ought to plead it.

Id. at 448.

101. *Id.*

statements were an expression of opinion, and thus protected under the defense of fair comment.[102] To successfully defend under fair comment, defendant must show the following: the comment was of public interest; the comment was based on fact; the comment, although it may include inferences of fact, must be recognizable as a comment; and the comment must satisfy an objectivity test.[103] The objectivity test questions whether a reasonable person would express such an opinion on the proved facts.[104] Plaintiff's proof of malice, however, defeats the fair comment defense.[105]

English law affords persons in certain social, political, and public positions, such as ministers of the Crown, members of Parliament, members of the judiciary, advocates, witnesses, and juries, an absolute privilege when making certain statements.[106] The absolute privilege applies to statements made by persons on specific occasions, including statements made in the course of Parliamentary proceedings; statements protected by the Parliamentary Papers Act of 1840; statements made in the course of judicial or quasi-judicial proceedings; statements made by one officer of State to another in the course of duty; statements protected by the Parliamentary Commissioner Act of 1967; statements made in reports by the Monopolies Commission and the Director General of Fair Trading under the Competition Act of 1980.[107] If an occasion is subject to the absolute privilege, no action for defamation lies, even if the words concerning such occasion are published with malice.[108]

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102. *See* Campbell v. Spottiswoode, [1863] 3 B. & S. 769. In rejecting defendant's defense of privilege and fair comment, and thus finding for plaintiff, the court attempted to establish the limits of the fair comment defense: "If comment is beyond the limits of fair criticism it becomes libel. . . . The jury found that the comments were beyond the limits of fair criticism, I think they were: and it would be very hard if an action could not be maintained." *Id.* at 781.

103. *See* DUNCAN & NEILL, *supra* note 24, ¶ 12.02.

104. *See id.*

105. *See id.*

106. *See* HALSBURY'S LAWS OF ENGLAND, *supra* note 90, ¶¶ 96-98.

107. *See* DUNCAN & NEILL, *supra* note 24, ¶ 13.02; HALSBURY'S LAWS OF ENGLAND, *supra* note 90, ¶ 103 n.6

108. *See* Munster v. Lamb, [1883] 11 Q.B.D. 588 (Eng. C.A.). The Court of Appeal examined the defense of absolute privilege. *Id.* The court held that

> [a]ctions for libel and slander have always been subject to one principle: defamatory statements, although they may be actionable on ordinary occasions, nevertheless are not actionable . . . when they are made upon certain occasions. It is not that these statements are libel or slander subject to a

Other statements may be protected by a qualified privilege.[109] The defense of qualified privilege was founded on public policy grounds.[110] Unlike the absolute privilege, plaintiff's showing of malice thwarts the defense of qualified privilege.[111]

The principle of qualified privilege is broad and amorphous, applying to statements made in certain circumstances.[112] Statements made pursuant to a legal, social, or moral duty to a person who has a corresponding duty or interest to receive them are protected as qualified privilege.[113] Statements made for the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive them are also protected by the defense of qualified privilege.[114] In addition, statements made in the protection of a common interest to a person sharing the same interest are also privileged.[115] Furthermore, the defense of qualified privilege protects various judicial and parliamentary reports, such as fair and accurate reports of judicial proceedings,

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> defence, but the principle is that defamatory statements, if they are made on a privileged occasion, from the very moment when they are made, are not libel or slander of which the law takes notice.

Id. at 600.

109. *See* DUNCAN & NEILL, *supra* note 24, ¶ 14.01.

110. *See* Davies v. Snead, [1870] 5 Q.B. 608. The court applied the qualified privilege in the interest of public policy: "But I think . . . where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he bona fide and without malice does tell them it is a privileged communication." *Id.* at 611. *Halsbury's Laws of England* offers additional insight into the defense of qualified privilege:

> Defence of qualified privilege. On grounds of public policy the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person which is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege.

See HALSBURY'S LAWS OF ENGLAND, *supra* note 90, ¶ 108.

111. *See* Jenoure v. Delmege, [1890] App. Cas. 73 (Eng. P.C.); Hebditch v. MacIlwaine, [1894] 2 Q.B. 54 (Eng. C.A.).

112. *See* DUNCAN & NEILL, *supra* note 24, ¶¶ 14.01-14.04.

113. *Id.* ¶ 14.01. *Halsbury's Laws of England* offers additional insight to the qualified privilege: "It is not possible to set out all the occasions at common law which will be held to be privileged but, as a general rule, there must be a common and corresponding duty or interest between the person who makes the communication and the person who receives it." *See* HALSBURY'S LAWS OF ENGLAND, *supra* note 90, ¶ 108.

114. *See* DUNCAN & NEILL, *supra* note 24, ¶¶ 14.01-14.04.

115. *Id.*

whether or not such reports were published contemporaneously with the proceedings, and fair and accurate reports of Parliamentary proceedings and Parliamentary sketches.[116] Similarly, extracts from Parliamentary papers and public registers are also privileged.[117] Finally, certain reports published in newspapers are protected by virtue of the provisions of the Defamation Act of 1952.[118]

C. *Comity and Enforcement of Non-U.S. Judgments in the United States*

Traditionally, U.S. courts recognize the judgments of extraterritorial jurisdictions.[119] The extent to which a judicial decree of one nation will be enforced within the dominion of another depends on the "comity of nations," a concept first articulated in the United States by the U.S. Supreme Court in *Hilton v. Guyot*.[120] The influence of comity is more than a mere courtesy, but falls short of being a binding imperative.[121] In *Hilton*, the U.S. Supreme Court refused to enforce a French judgment.[122] The Court held that extraterritorial judgments

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116. *Id.*

117. *Id.*

118. *Id.* ¶ 14.01. Section 7 of the Defamation Act of 1952 simply codifies the qualified privilege for media publishers. Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 66, § 7.

119. *See* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). Justice Gray stated that

> "[c]omity," 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, 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.

Id.; *see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (defining parameters of *Hilton* in upholding act of state by government of Cuba); Lazier v. Westcott, 26 N.Y. 146 (1862) (fashioning comity standard in New York after *Hilton*); *see also* Sprague, *supra* note 4, at 1447-52 (reviewing general principles of comity); *see generally* STORY, *supra* note 4 (stating general principles of comity).

120. 159 U.S. at 163. The Court in *Hilton* defined the principle of comity:

> No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations."

Id.

121. *Id.* at 163-64.

122. *Id.* at 228.

serve merely as prima facie evidence in the subsequent U.S. enforcement action and may not be viewed as conclusive, particularly if the non-U.S. judgment violates U.S. public policy and if the extraterritorial jurisdiction fails to reciprocate by enforcing U.S. judgments.[123] In *Hilton*, the Court refused to hold the French judgment as conclusive evidence, and thus barred enforcement.[124] The Court reasoned that if the original judgment had been rendered in a U.S. court and if enforcement had been sought in France, the French judiciary would not have enforced the action.[125]

In *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*,[126] the U.S. Court of Appeals for the Third Circuit further defined comity.[127] In *Somportex*, plaintiff obtained a judgment against defendant in England and sought enforcement in the United States.[128] In the English action, defendant, a U.S. company, failed to respond to, or to appeal the Court's orders.[129] Faced with this litigation in England, defendant essentially did nothing.[130] Under these circumstances, the Third Circuit found the English decision was not repugnant to public policy, as the English court issued its order on procedural grounds similar to those in the United States.[131]

Article 53 of the CPLR, entitled "Recognition of Foreign Country Money Judgments,"[132] adopts as New York law the

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123. *Id.*

124. *Id.*

125. *Id.*

126. 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

127. *See id.* at 440 (interpreting U.S. Supreme Court's definition of comity). Circuit Judge Aldisert further defined comity:

> Comity is a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.

Id.

128. *Id.* at 439.

129. *Id.* at 438.

130. *Id.*

131. *Id.* at 442.

132. N.Y. Civ. Prac. L. & R. art. 53 (McKinney 1978).

Uniform Foreign Money-Judgments Recognition Act.[133] Section 5302 of the CPLR provides general guidelines for New York courts reviewing non-U.S. judgments.[134] CPLR section 5303 sets forth when a New York court must recognize an extraterritorial judgment.[135] Section 5304 of the CPLR limits recognition of non-U.S. judgments by delineating several ex-

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133. *See* Siegel, Practice Commentaries, CPLR § 5301, C5301:1; UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT §§ 1-4, 13 U.L.A. 261 (1962). The Uniform Foreign Money-Judgments Recognition Act codifies federal and state common law. *Id.*; *see also* Hilton v. Guyot, 159 U.S. 113 (1895) (establishing federal precedent for recognizing extraterritorial judgments); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (clarifying parameters of *Hilton*); Russian Socialist Federated Soviet Republic v. Cibrario, 139 N.E. 259 (N.Y. 1923) (defining comity clearly); Lazier v. Westcott, 26 N.Y. 146 (1862) (establishing New York standard for comity).

134. *See* N.Y. Civ. Prac. L. & R. art. 53 (McKinney 1978). CPLR § 5302 provides general guidelines available to New York courts reviewing extraterritorial judgments:

> This article applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.

Id. § 5302. CPLR § 5303 recognizes non-U.S. judgments:

> Except as provided in section 5304, a foreign country judgment meeting the requirements of section 5302 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. Such a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, crossclaim or affirmative defense.

Id. § 5303. CPLR § 5304 offers grounds for non-recognition of extraterritorial judgments:

> (a) No recognition. A foreign country judgment is not conclusive if:
> 1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
> 2. the foreign court did not have personal jurisdiction over the defendant.
> (b) Other grounds for non-recognition. A foreign country judgment need not be recognized if:
> 1. the foreign court did not have jurisdiction over the subject matter;
> 2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
> 3. the judgment was obtained by fraud;
> 4. the cause of action on which the judgment is based is repugnant to the public policy of this state;
> 5. the judgment conflicts with another final and conclusive judgment;
> 6. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
> 7. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

Id. § 5304.

135. *Id.* § 5303.

ceptions to the enforcement requirement of CPLR section 5303.[136] In particular, CPLR section 5304(b)(4) gives New York courts a discretionary tool to deny enforcement of non-U.S. judgments that are found to be repugnant to public policy.[137]

Courts applying New York law have addressed the public policy exception with conflicting results.[138] Some courts are more likely to ignore the public policy exception when enforcing an extraterritorial judgment rendered by a non-U.S. court in a common law jurisdiction.[139] In general, however, New York courts apply the public policy exception on a case-by-case basis, where the non-U.S. judgment egregiously violates an entrenched public policy.[140]

Two leading cases in New York, one federal and one state, demonstrate the complicated nature of the public policy exception when used to reject the enforcement of extraterritorial

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136. *Id.* § 5304.

137. *Id.* § 5304(b)(4) (stating that "[a] foreign country judgment need not be recognized if . . . the cause of action on which the judgment is based is repugnant to the public policy of this state").

138. *Compare* Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986) (denying enforcement of extraterritorial judgment where it "tends clearly to undermine the public interest . . . or security for individual rights of personal liberty") *and* Greschler v. Greschler, 414 N.E.2d 694, 698 (N.Y. 1980) (refusing to enforce non-U.S. judgment that "violates some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal") (citations omitted) *and* Barry E. (Anonymous) v. Ingraham, 371 N.E.2d 492, 496 (N.Y. 1977) (stating that "comity will not be accorded a foreign judgment if it violates a strong public policy of the State") (citations omitted) *and* Russian Socialist Federated Soviet Republic v. Cibrario, 139 N.E. 259, 260 (N.Y. 1923) (stating that "[t]his rule is always subject . . . to one consideration. There may be no yielding, if to yield is inconsistent with our public policy.") *and* Stein v. Siegel, 377 N.Y.S.2d 580, 582 (Sup. Ct. 1975) (stating that "[a]s a matter of comity, a foreign country judgment will not be recognized by our courts insofar as it contravenes the public policy of this state") *with* Clarkson Co. v. Shaheen, 544 F.2d 624, 629-30 (2d Cir. 1976) (applying public policy exception more narrowly where non-U.S. court rendering judgment lies in common law jurisdiction) *and* Ackerman v. Ackerman, 517 F. Supp. 614, 624 (S.D.N.Y. 1981) (applying public policy exception more narrowly where non-U.S. court rendering judgment lies in common law jurisdiction), *aff'd*, 676 F.2d 898 (2d Cir. 1982) *and* Loucks v. Standard Oil Co., 120 N.E. 198 (N.Y. 1918) (Cardozo, J.) (finding no violation of public policy in recognizing extraterritorial judgment).

139. *See supra* note 138 (regarding conflict between courts applying New York law).

140. *See supra* note 138 (regarding conflict between courts applying New York law).

judgments.[141] In *Ackermann v. Levine*,[142] the U.S. Court of Appeals for the Second Circuit limited the fees that a West German attorney could collect from his American client.[143] The Second Circuit refused to find the West German statutory scheme of fee calculation repugnant to New York policy.[144] Plaintiff, however, sought his fees without offering evidence of actual services rendered.[145] The Second Circuit held, however, that awarding "unconscionable" attorney fees would be repugnant to public policy.[146] Because the attorney's fees were unsupported by sufficient evidentiary documentation, the Second Circuit ultimately refused enforcement of the judgment.[147]

Similarly, the Supreme Court of New York in *Stein v. Siegel* rejected an Austrian decree as violative of public policy.[148] Plaintiffs were injured in an automobile accident in Austria and subsequently brought suit in Austria.[149] Eventually, plaintiffs dropped their Austrian suit by way of decree, which, under Austrian law, waived any future claims against defendant.[150] The New York Supreme Court held dismissal under the Austrian decree violated the public policy of New York.[151] There-

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141. *See Ackermann*, 788 F.2d at 830 (allowing German attorney to collect some fees while finding other fee requests violative of public policy); *Stein*, 377 N.Y.S.2d at 580 (finding Austrian decree repugnant to public policy).

142. 788 F.2d 830 (2d Cir. 1986).

143. *Id.*

144. *Id.* at 842-43.

145. *Id.* at 845.

146. *Id.* at 844. The Second Circuit held that awarding the fees without sufficient evidentiary support would violate New York public policy because

> [w]ithout these [evidentiary] predicates, there is a grave risk that American courts could become the means of enforcing unconscionable attorney fee awards, thereby endangering "public confidence" in the administration of the law and a "sense of security for individual rights . . . of private property." Further, to forsake this fundamental public policy would impose upon American citizens doing business abroad an undue risk in dealing with foreign counsel—a result that, ironically, could undermine the very processes of transnational legal relations that the doctrines of comity and res judicata seek to promote.

Id. (quoting Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972)). The court refused to award plaintiff those fees that were not adequately supported by sufficient evidence. *Id.* at 845.

147. *Id.*

148. 377 N.Y.S.2d 580 (Sup. Ct. 1975).

149. *Id.* at 582.

150. *Id.*

151. *Id.*

fore, plaintiffs were permitted to continue their action in New York.[152] Unfortunately, New York lacks a clear path of precedent revealing when a court will apply the public policy exception and when it will not.[153]

II. BACHCHAN v. INDIA ABROAD PUBLICATIONS INC.

In *Bachchan v. India Abroad Publications Inc.*, the Supreme Court of New York considered competing standards of free speech protection.[154] The *Bachchan* Court faced two choices: accept the English standard and enforce the judgment under the principles of comity, or protect defendant under the First Amendment and invoke the public policy exception, ignoring comity.[155]

A. *Procedural and Factual History*

Plaintiff Ajitabh Bachchan, an Indian national with a London residence,[156] initiated two libel actions in England's High Court of Justice.[157] The first action was brought against

152. *Id.* at 583.

153. *See* Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986) (allowing German attorney to collect some fees while finding other fee requests violative of public policy); Greschler v. Greschler, 414 N.E.2d 694, 698 (N.Y. 1980) (refusing to enforce non-U.S. judgment that "violates some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal") (citations omitted); Barry E. (Anonymous) v. Ingraham, 371 N.E.2d 492, 496 (N.Y. 1977) (stating that "comity will not be accorded a foreign judgment if it violates a strong public policy of the State") (citations omitted); *Stein*, 377 N.Y.S.2d at 582 (finding Austrian decree repugnant to public policy). *But see* Clarkson Co. v. Shaheen, 544 F.2d 624, 629-30 (2d Cir. 1976) (applying public policy exception more narrowly where non-U.S. court rendering judgment lies in common law jurisdiction); Ackerman v. Ackerman, 517 F. Supp. 614, 624 (S.D.N.Y. 1981) (applying public policy exception more narrowly where non-U.S. court rendering judgment lies in common law jurisdiction), *aff'd*, 676 F.2d 898 (2d Cir. 1982); Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918) (Cardozo, J.) (finding no violation of public policy in recognizing non-U.S. judgment).

154. 585 N.Y.S.2d 661 (Sup. Ct. 1992).

155. *Id.*; *see supra* notes 119-53, and accompanying text (articulating comity principles).

156. Plaintiff's Affidavit in Support of Motion for Summary Judgment in Lieu of Complaint at 1, Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992) (No. 28692/91).

157. *See* Bachchan v. India Abroad Publications Inc., No. 1990-B-1484 (High Court of Justice, Q.B. June 12, 1991); Bachchan v. Dagens Nyheter, No. 1990-B-1704 (High Court of Justice, Q.B. May 24, 1990).

Dagens Nyheter,[158] a revered Swedish newspaper with a national reputation equivalent to the one enjoyed by *The New York Times* in the United States.[159]

Mr. Bachchan brought a second libel action against defendant India Abroad Publications Inc.,[160] an operator of an international news service based in New York.[161] Also included as a defendant in this second action was Rahul Bedi, the U.K. correspondent for India Abroad Publications.[162] Plaintiff, a successful business man in India, and his brother Amitabh Bachchan, India's most famous film star, were close friends of Rajiv Gandhi, the former prime minister of India.[163]

Plaintiff charged India Abroad Publications and Mr. Bedi with promulgating an allegedly libelous article that linked plaintiff to an arms scandal in India.[164] Before writing the article, Mr. Bedi had consulted with a source at *Dagens Nyheter*,[165] who informed him of the newspaper's investigation into a bank account belonging to plaintiff.[166] According to the *Dagens Nyheter* report, Swiss authorities had frozen a bank account belonging to plaintiff.[167] Mr. Bedi based his article on this report

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158. *See* Bachchan v. Dagens Nyheter, No. 1990-B-1704 (High Court of Justice, Q.B. May 24, 1990).

159. *Id.* ¶ 33.

160. *See* Bachchan v. India Abroad Publications Inc., No. 1990-B-1484 (High Court of Justice, Q.B. June 12, 1991).

161. Memorandum of Law in Opposition to Plaintiff's Motion to Enforce a Foreign Judgment at 4, Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992) (No. 28692/91).

162. *Id.* at 11.

163. *See* Affidavit of Gopal Raju in Opposition to Plaintiff's Motion to Enforce a Foreign Judgment at 2, Bachchan v. India Abroad Publications Inc. (Sup. Ct. 1992) (No. 28692/91).

164. *See* Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661, 662 (Sup. Ct. 1992).

165. Affidavit of Gopal Raju in Opposition to Plaintiff's Motion to Enforce a Foreign Judgment ¶ 36, Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992) (No. 28692/91).

166. Affirmation in Support of Motion for Summary Judgment, Appendix C, Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992) (No. 28692/91).

167. *See* Bo G. Andersson, *Breakthrough for Indian Bofors investigators: Gandhi's friend received the money*, DAGENS NYHETER, Jan. 31, 1991. The *Dagens Nyheter* article stated the following:

> The Indian investigators are about to make a breakthrough in the Bofors affair. Businessman Ajitabh Bachchan, one of the closest friends of

carried by *Dagens Nyheter*.[168] Defendant's article alleged that plaintiff's Swiss bank account had received monies from a coded account belonging to Bofors, the Swedish arms company previously implicated in an arms scandal with the Indian government.[169] Plaintiff and his brother had been linked to this earlier Bofors scandal.[170]

After consulting with the *Dagens Nyheter* source, Mr. Bedi wrote his article and wired it from India Abroad Publications (U.K.) Limited, a London affiliate, to defendant in New York.[171] Defendant then wired the article to the National Press

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former Prime Minister Rajiv Gandhi, is the name behind one of the bank accounts which have been frozen in Switzerland.

Dagens Nyheter received this information from reliable sources with detailed access to the Indian bribery investigation.

. . . .

According to DN's sources, the Indian businessman Ajitabh Bachchan is personally behind the newly discovered account in Geneva. He and his brother, the film star Amitabh Bachchan, who enjoys immense popularity in India, have for many years been very close friends with India's former Prime Minister, Rajiv Gandhi.

. . . .

Neither of the brothers has officially had anything to do with Bofors and the howitzer order. The Swedish company thus had no valid reason to deposit money in Ajitabh Bachchan's account.

The fact that his name has now emerged is directly embarrassing to Rajiv Gandhi. He now finds himself right at the center of the this far-reaching corruption scandal.

Id.

168. Affidavit of Gopal Raju in Opposition to Plaintiff's Motion to Enforce a Foreign Judgment ¶ 36, Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992) (No. 28692/91).

See Rahul Bedi, *Ajitabh's account "Frozen,"* HINDUSTAN TIMES, Feb. 1, 1990; Rahul Bedi, *Switzerland "freezes Ajitabh's account,"* INDEPENDENT, Feb. 1, 1990. As Mr. Bedi's article was picked up off the NPA wire service, the same story appeared in the two Indian papers. The portion of Mr. Bedi's article in question stated as follows:

The Swiss authorities have frozen an account belonging to non-resident Indian businessman Ajitabh Bachchan, brother of film star Amitabh Bachchan, related to the Bofors kickback scandal, Sweden's leading newspaper has reported.

A report in the Dagens Nyheter, quoting reliable sources stated today that money was transferred to Mr. Bachchan's account from one of the five coded accounts in four different banks in Geneva and Zurich into which commissions on the gun deal were allegedly deposited.

Bedi, *Ajitabh's account "Frozen," supra*; Bedi, *Switzerland "freezes Ajitabh's account," supra*.

169. Bedi, *Ajitabh's account "Frozen," supra* note 168; Bedi, *Switzerland "freezes Ajitabh's account," supra* note 168.

170. Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992).

171. Affidavit of Gopal Raju in Opposition to Plaintiff's Motion to Enforce a

Agency of India ("NPA"),[172] as stipulated by an agreement between defendant and NPA.[173] *The Independent* and *The Hindustan Times*, two Indian newspapers with limited distribution in London,[174] picked up defendant's article from the NPA news service.[175]

Plaintiff brought separate libel actions against *Dagens Nyheter* and defendant in the High Court of Justice, London, England.[176] *Dagens Nyheter* settled with plaintiff, issuing a public apology[177] and paying substantial damages.[178] Defendant refused to issue an apology, but willingly published plaintiff's denial of any connection to the scandal and reported the settlement between plaintiff and *Dagens Nyheter*.[179] In the action against India Abroad Publications, the High Court of Justice found defendant's article libelous under English law and ordered defendant to pay plaintiff £40,000 in damages.[180]

B. *Decision of the N.Y. Supreme Court*

Plaintiff sought to enforce the English judgment against defendant in New York, as provided for in CPLR section 5303.[181] Section 5303 of the CPLR provides the mechanism for recognizing extraterritorial judgments.[182] Under CPLR section 5303, a plaintiff seeking enforcement of a non-U.S.

Foreign Judgment ¶ 36, Bachchan v. India Abroad Publications Inc. 585 N.Y.S.2d 661 (Sup. Ct. 1992) (No. 28692/91).

172. *Id.* ¶ 37.

173. *Id.* ¶ 16. Under Indian law, foreign news services are not permitted to distribute articles directly to news media in India, and must enter into a cooperating agreement with an Indian wire service, such as NPA. *Id.*

174. *Id.* ¶ 42.

175. *Id.* ¶ 38.

176. *See supra* note 157 (enunciating plaintiff's two libel actions brought in High Court of Justice).

177. *See* Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661, 661-62 (Sup. Ct. 1992)

178. *Id.* at 662.

179. Affidavit of Gopal Raju in Opposition to Plaintiff's Motion to Enforce a Foreign Judgment ¶¶ 46-47, Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992) (No. 28692/91).

180. Bachchan v. India Abroad Publications Inc., No. 1990-B-1484 (High Court of Justice, Q.B. June 12, 1991); *Bachchan*, 585 N.Y.S.2d at 662.

181. *Bachchan*, 585 N.Y.S.2d at 662.

182. N.Y. Civ. Prac. L. & R. § 5303 (McKinney 1978)

judgment may move for summary judgment in lieu of complaint.[183] The Supreme Court of New York, however, refused to recognize the judgment brought against defendant;[184] the court's rationale, though, was unclear. Two possible interpretations exist.

Under the first theory, Justice Fingerhood, in her opinion, relied on a public policy argument as a basis for rejecting plaintiff's motion for summary judgment.[185] Section 5304(b)(4) of the CPLR bars recognition of an extraterritorial judgment that violates the public policy of New York State.[186] In employing section 5304(b)(4) of the CPLR, the court relied on David Siegel's commentary to section 5304(b)(2).[187] CPLR section 5304(b)(2) supplies New York courts with a discretionary tool for rejecting extraterritorial judgments when a non-U.S. tribunal fails to give defendant fair notice of the proceedings.[188] In his commentary to section 5304(b)(2) of the CPLR, Professor Siegel argues that insufficient notice violates due process and therefore non-recognition is not merely discretionary, but constitutionally mandatory.[189] Thus, under this theory, the court assessed Professor Siegel's commentary to section 5304(b)(2) to mean that any extraterritorial judgment that violates a constitutional right, such as due process under section 5304(b)(2) or free expression under the public policy

183. *Id.*

184. *Bachchan*, 585 N.Y.S.2d at 665.

185. *Id.* at 662.

186. N.Y. Civ. Prac. L. & R. § 5304 (McKinney 1978). CPLR § 5304(b)(4) bars recognition of a extraterritorial judgment when "the cause of action on which the judgment is based is repugnant to the public policy of [the] state." *Id.*

187. *See Bachchan*, 585 N.Y.S.2d at 662.

188. N.Y. Civ. Prac. L. & R. § 5304(b)(2) (McKinney 1978) ("A foreign country judgment need not be recognized if . . . the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend.").

189. *See* Siegel, Practice Commentaries, § 5304, C5304:1. In his commentary to CPLR § 5304(b)(2), Professor Siegel states:

> The discretionary grounds are listed in subdivision (b). Several of them merit comment.
>
> A want of fair notice and time to defend in the foreign forum is made a ground for refusing recognition under paragraph 2. This goes to the roots of due process in the United States, and a want of reasonable notice and opportunity to defend may therefore make a refusal to recognize the judgment constitutionally mandatory rather than, as subdivision (b) of CPLR 5304 would have it, discretionary.

Id.

rationale of 5304(b)(4), must always be rejected.[190]

Alternatively, the court implicitly stated enforcement of this English judgment would violate defendant's procedural due process under CPLR section 5304(a)(1).[191] Section 5304(a)(1) denies recognition when a non-U.S. tribunal fails to provide defendant with due process procedures compatible with those available to litigants in the United States.[192] Under this second theory, the court interpreted David Siegel's commentary to section 5304(b)(2) to mean that insufficient notice is really a fundamental element of due process.[193] Thus, judgments by non-U.S. tribunals that fail to give adequate notice should be rejected not on a discretionary basis, but on mandatory grounds under the auspices of 5304(a)(1).[194] Ad-

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190. *Bachchan*, 585 N.Y.S.2d at 662. Justice Fingerhood applies the rationale behind David Siegel's commentary to the case before the court, stating

> For that reason, [Professor Siegel] suggests that a refusal to recognize a foreign country judgment for lack of fair notice may be constitutionally mandatory, rather than, as subdivision (b) would have it, discretionary. Similarly, if, as claimed by defendant, the public policy to which the foreign judgment is repugnant is embodied in the First Amendment to the United States Constitution or the free speech guaranty of the Constitution of this State, the refusal to recognize the judgment should be, and it is deemed to be, "constitutionally mandatory." Accordingly, the libel law applied by the High Court of Justice in London in granting judgment to plaintiff will be reviewed to ascertain whether its provisions meet the safeguards for the press which have been enunciated by the courts of this country.

Id. (quoting Siegel, Practice Commentaries § 5304, C5304:1).

191. *See Bachchan*, 585 N.Y.S.2d at 662. The court suggests that rejection of the English judgment is mandatory not discretionary: "It is doubtful whether this court has discretion to enforce the judgment." *Id.* Non-recognition of an extraterritorial judgment for public policy violations are discretionary under CPLR § 5304(b)(4). N.Y. Civ. Prac. L. & R. § 5304(b)(4) (McKinney). Non-recognition for procedural due process violations, however, is mandatory under CPLR § 5304(a)(1). *Id.* § 5304(a)(1).

192. N.Y. Civ. Prac. L. & R. § 5304(a)(1) (McKinney 1978) ("A foreign country judgment is not conclusive if . . . the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.").

193. *See Bachchan*, 585 N.Y.S.2d at 662. Justice Fingerhood, relying on David Siegel's commentary, found non-recognition of the English judgment mandatory:

> It is doubtful whether this court has discretion to enforce the judgment if the action in which it was rendered failed to comport with the constitutional standards for adjudicating libel claims. In his commentary on CPLR § 5304, David D. Siegel notes that one of the grounds for nonrecognition of foreign judgment in Section (b), a lack of fair notice in sufficient time to enable a defendant to defend, "goes to the roots of due process."

Id.

194. *See* Siegel, Practice Commentaries, CPLR § 5304, C5304:1.

hering to this interpretation, Justice Fingerhood's reliance on Professor Siegel's commentary would suggest that the court refused to enforce the English judgment on procedural due process grounds.

Relying on Professor Siegel's commentary, the court subjected the English judgment to a rigorous constitutional analysis.[195] Contrasting the two libel standards, the court found a relaxed English libel standard renowned for granting large judgments.[196] Relying on *Hepps*, where the U.S. Supreme Court restated the U.S. rule that plaintiff bears the burden of proving falsity,[197] the *Bachchan* court found the English requirement that the defendant bear the burden of proof to be repugnant to New York State's public policy.[198] This finding proved to be sufficient in denying recognition of the English judgment, obviating the need to subject plaintiff to a public figure analysis.[199] Justice Fingerhood, however, indicated that plaintiff, as a close friend to the Gandhi family and brother of an Indian movie star, would likely fall under the public figure criteria of *Gertz*, and thus would be required to prove actual malice to recover damages.[200]

III. BACHCHAN v. INDIA ABROAD PUBLICATIONS INC.: *AN ANALYSIS OF THE COURT'S DECISION*

In *Bachchan*, the Supreme Court of New York justly determined that the English judgment, which placed liability on defendant, was repugnant to the public policy of New York State.[201] The court invoked section 5304 of the CPLR in the interest of public policy.[202] Any other decision by the court would have threatened the integrity of the First Amendment. In arriving at this conclusion, the *Bachchan* court compared the English defamation standard with the U.S. standard.[203] Finding the English standard far below the constitutional require-

195. *Bachchan*, 585 N.Y.S.2d at 663-64.
196. *Id.*
197. *See supra* note 70 and accompanying text (articulating U.S. Supreme Court's holding in *Hepps*).
198. *Bachchan*, 585 N.Y.S.2d at 664.
199. *Id.* at 663.
200. *Id.* at 663-64.
201. *Id.* at 661.
202. *Id.* at 662.
203. *Id.* at 663.

ments mandated in the United States, the court correctly refused to recognize the English judgment on public policy grounds.

A. *Section 5304(b)(4) of the CPLR*

As a starting point in its analysis, the court in *Bachchan* balanced section 5304 of the CPLR, the non-recognition clause, against section 5303, the recognition clause.[204] The court correctly invoked the non-recognition clause, holding that section 5304(b)(4) of the CPLR requires non-recognition of this English judgment, which unequivocally violates the First Amendment.[205] Section 5304(b)(4) of the CPLR permits non-recognition of foreign judgments held to be repugnant to the public policy of the state.[206]

David Siegel's commentary to CPLR section 5304(b)(2)[207] argues that extraterritorial judgments that violate due process must be rejected on mandatory grounds although section 5304(b)(2) clearly falls within the discretionary section of article 53 of the CPLR.[208] Justice Fingerhood, in her opinion, relied on David Siegel's commentary in applying CPLR section 5304(b)(4).[209] The court interpreted the language of Professor Siegel's commentary[210] to mean any judgment that violates a constitutional right, such as due process under CPLR section 5304(b)(2) or free speech under the public policy exception of

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204. *See supra* note 134 (reciting relevant provisions of CPLR art. 53).

205. *See Bachchan*, 585 N.Y.S.2d at 662.

206. N.Y. Civ. Prac. L. & R. § 5304(b)(4) (McKinney 1978). CPLR § 5304(b)(4) states that "[a] foreign country judgment need not be recognized if . . . the cause of action on which the judgment is based is repugnant to the public policy of this state." *Id.*

207. *Id.* § 5304(b)(2). CPLR § 5304(b)(2) states that "[a] foreign country judgment need not be recognized if . . . the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend." *Id.*

208. *See supra* note 189 (restating text of David Siegel's commentary to CPLR § 5304(b)(2)).

209. *See supra* note 190 (citing court's reliance on Professor Siegel's commentary to CPLR § 5304(b)(2)).

210. *See* Siegel, Practice Commentaries, CPLR § 5304, C5304:1 (stating "a want of reasonable notice and opportunity to defend therefore make a refusal to recognize the judgment constitutionally mandatory rather than, as subdivision (b) of CPLR 5304 would have it, discretionary")

CPLR section 5304(b)(4), must be rejected.[211] As a result of this interpretation, the court subjected the English judgment to constitutional scrutiny.[212] Under this constitutional analysis, the English standard of defamation, which would not pass constitutional scrutiny in the United States, violates the public policy of New York State.

The court may have interpreted David Siegel's commentary in an alternative fashion.[213] Under this second interpretation, the court implicitly stated that the English judgment violated plaintiff's procedural due process under 5304(a)(1).[214] This interpretation, however, is clearly erroneous as the English libel standard, although repugnant to public policy, does not violate defendant's procedural due process. Libel involves substantive legal issues and is not an element of procedural due process. Such an interpretation would imperil the court's subsequent constitutional analysis. Thus, the public policy exception to article 53 of the CPLR is the court's only viable rationale for non-recognition of the English judgment.

Clearly, section 5304(b)(4) of the CPLR provides a court with a discretionary tool for invoking the public policy exception.[215] The court, however, suggests that any non-U.S. judgment that challenges a constitutional safeguard must not be enforced.[216] To arrive at this posture, the court extended Professor Siegel's commentary to CPLR section 5304(b)(2) to include CPLR section 5304(b)(4).[217] Section 5304(b)(2) of the

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211. *See supra* note 190 (citing court's rationale in extending Professor Siegel's commentary to CPLR § 5304(b)(4)).

212. *See supra* note 190 (citing court's rationale in extending Professor Siegel's commentary to CPLR § 5304(b)(4)).

213. *See supra* notes 191-94 and accompanying text (proposing alternative interpretation that court refused to enforce English judgment on grounds that it violated defendant's due process rights).

214. *See supra* notes 191-94 and accompanying text (proposing alternative interpretation that court refused to enforce English judgment on grounds that it violated defendant's due process rights).

215. *See* N.Y. Civ. Prac. L. & R. § 5304(b) (McKinney 1978). Subdivision (b) clearly begins with "[a] foreign country judgment *need* not be recognized if . . . ." *Id.* (emphasis added). In contrast, subdivision (a) begins "[a] foreign country judgment *is not* conclusive if . . . . " *Id.* § 5304(a) (emphasis added). Thus, subdivision (b) is discretionary as opposed to subdivision (a), which is mandatory. *Id.*

216. *See supra* notes 185-90 and accompanying text (citing court's interpretation of commentary to CPLR § 5304).

217. *See supra* notes 185-90 and accompanying text (citing court's interpretation of commentary to CPLR § 5304).

CPLR bars recognition when the non-U.S. court renders its judgment without sufficient notice to defendant.[218] In his commentary to CPLR section 5304(b)(2), Professor Siegel states that failure to give sufficient and fair notice threatens due process and thus non-recognition becomes constitutionally mandatory.[219] In *Bachchan*, the court stretched Professor Siegel's constitutional mandate argument to include any extraterritorial judgment involving a constitutional claim.[220]

By manipulating Professor Siegel's commentary, the court has essentially established three tiers of non-recognition for extraterritorial judgments. The first two tiers are found in CPLR section 5304(a), which provides for mandatory non-recognition for distinct procedural deficiencies,[221] and CPLR section 5304(b), which provides for discretionary non-recognition under specific instances.[222] The court's skewed interpretation of the relationship between CPLR section 5304(b)(4) and Professor Siegel's commentary to CPLR section 5304(b)(2) bifurcates the discretionary non-recognition clause, creating a third tier where non-recognition becomes mandatory for a violation of substantive constitutional law. This third tier is clearly beyond the language of either CPLR section 5304,[223] or section 4 of the Uniform Foreign Money-Judgments Recognition Act,[224] which the New York legislature essentially adopted as CPLR article 53.[225]

Such an overly broad application of section 5304, the non-recognition clause of the CPLR as adopted from the Uniform

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218. N.Y. Civ. Prac. L. & R. § 5304(b)(2) (McKinney 1978). CPLR § 5304(b)(2) allows for non-recognition "if the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend." *Id.*

219. *See* Siegel, Practice Commentaries, CPLR § 5304, C5304:1.

220. *See supra* notes 185-90 (following court's analysis of David Siegel commentary).

221. N.Y. Civ. Prac. L. & R. § 5304(a) (McKinney 1978); *see supra* note 134 (enunciating provisions of CPLR § 5304(a)).

222. N.Y. Civ. Prac. L. & R. § 5304(b) (McKinney 1978); *see supra* note 134 (enunciating provisions of CPLR § 5304(b)).

223. N.Y. Civ. Prac. L. & R. § 5304 (McKinney 1978).

224. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4, 13 U.L.A. 268 (1962).

225. *See supra* note 133 and accompanying text (reciting New York's adoption of Uniform Foreign Money-Judgments Recognition Act).

Foreign Money-Judgments Recognition Act,[226] may have the adverse effect of diluting the force of CPLR section 5304. At a bare minimum, a court has discretion to refuse recognition of a non-U.S. judgment that violates a constitutional right, and thus is found to violate public policy.[227] To claim, however, that all extraterritorial judgments with a constitutional impact mandates non-recognition goes beyond the explicit language of CPLR section 5304,[228] and the intent of section 4 of the Uniform Foreign Money-Judgments Recognition Act.[229] Implying such power dilutes the explicit language of CPLR's non-recognition clause.

In *Bachchan*, the court correctly invoked the public policy exception of CPLR section 5304(b)(4) in refusing to enforce the English judgment.[230] The court's broad enunciation, however, that every extraterritorial judgment with a possible constitutional impact necessitates non-recognition goes beyond the explicit language of the statute.[231] Application of CPLR's non-recognition clause must be limited. Clearly the language of section 5304(b) is both discretionary and broad; the court's interpretation of a mandatory element to section 5304(b) is erroneous and jeopardizes the legitimacy of the broad, discretionary powers vividly articulated by section 5304(b) of the CPLR.[232]

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226. *See supra* note 133 and accompanying text (reciting New York's adoption of Uniform Foreign Money-Judgments Recognition Act).

227. *See* N.Y. Civ. Prac. L. & R. § 5304(b)(4) (McKinney 1978).

228. *Id.* § 5304.

229. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4, 13 U.L.A. 268 (1962).

230. *See* Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661, 662 (Sup. Ct. 1992).

231. *See* N.Y. Civ. Prac. L. & R. § 5304(b) (McKinney 1978). CPLR § 5304(b) explicitly articulates discretionary language: "[a] foreign country judgment need not be recognized if . . . ." *Id.* Furthermore, CPLR § 5304(b)(4) offers a court broad powers: "[a] foreign country judgment need not be recognized if . . . the cause of action on which the judgment is based is repugnant to the public policy of this state." *Id.* § 5304(b)(4). Clearly the language is discretionary, and clearly it is broad; the court's interpretation of a mandatory element to CPLR § 5304(b) is erroneous and jeopardizes the legitimacy of the broad, discretionary powers vividly articulated by CPLR § 5304(b).

232. *See supra* note 231 and accompanying text (distinguishing between discretionary and mandatory language of CPLR § 5304).

B. *Constitutional Analysis*

The English defamation standard offers inadequate protection to free speech. The U.S. and English libel standards differ in three significant ways. The U.S. standard places the burden of proof on plaintiff,[233] while the English system burdens defendant with proving truth.[234] U.S. libel law, in contrast to English law, creates an even higher threshold of proof for public figures and officials.[235] Finally, the First Amendment of the U.S. Constitution broadly protects free speech,[236] while English law offers only legislative protection limited to defined categories of publication, such as absolute and qualified privilege.[237] Under the U.S. standard, plaintiff would not have been able to recover damages, as plaintiff failed to prove actual malice.[238]

1. Comparison Between U.S. and English Standards

As a result of the inadequate protection to free speech offered by the English libel standard, the Court in *Bachchan* correctly refused to enforce the English judgment. The Supreme Court of New York found the English decision repugnant to public policy because it stripped defendant of its basic First Amendment rights.[239] The U.S. libel standard evolved from Constitutional protections offered by the First Amendment.[240] The essence of this heightened standard encourages freedom of the press, thus protecting media-defendant publications.[241]

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233. *See supra* notes 67-70, 73 and accompanying text (restating U.S. standard that places burden of proof on plaintiff).

234. *See supra* note 84 and accompanying text (enunciating English standard that places burden of proof on defendant).

235. *See supra* notes 33-47 and accompanying text (creating higher federal standard for public officials and public figures).

236. U.S. CONST. amend. I (guaranteeing that "Congress shall make no law . . . abridging the freedom of speech, or of the press").

237. *See supra* notes 85-87 and accompanying text (articulating provisions of Defamation Act).

238. *See* Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661, 663 (Sup. Ct. 1992). Because plaintiff relied on the English standard, under which defendant must prove truth, plaintiff failed to prove malice. *Id.*

239. *Id.* at 665.

240. *See supra* notes 26-73 and accompanying text (defining federal libel standard).

241. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). In his impassioned opinion, Justice Brennan reinforced the importance of freedom of expression:

On the contrary, English law is geared to protect plaintiffs and thus weakens the power of the press to challenge societal and political issues.[242] The burden of proof in the United States falls on the plaintiff, who must show falsity.[243] In England, the defendant must bear the burden of proving truth.[244] The *Bachchan* court found such a contrast in standards to be repugnant to public policy.[245]

Additionally, the English system fails to acknowledge a heightened standard for public figures or for statements of public concern.[246] Even when plaintiff is held to be a private figure, and the statements made are of private concern, the U.S. standard offers greater protection than the English system.[247] In the United States, the burden of proof falls on the

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> The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."
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> . . . .
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> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Id. (quoting United States v. Assoc. Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)) (citations omitted). Justice Brennan closely linked the freedom of speech to an unfettered press that is encouraged to seek out the truth:

> Whether or not a newspaper can survive a succession of such judgments [libel suits], the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.
>
> . . . A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on the pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship."

Id. at 278-79.

242. *See supra* notes 88-94 and accompanying text (describing plaintiff's burden under English standard).

243. *See supra* note 70 and accompanying text (restating holding in *Hepps*, which confirms plaintiff's burden of proving falsity).

244. *See supra* note 96 and accompanying text (describing defendant's burden of proving truth under English standard).

245. Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661, 663 (Sup. Ct. 1992).

246. *Id.*

247. *See supra* notes 61-66 and accompanying text (enunciating protections available to private figures under U.S. standard).

plaintiff.[248] In the English system, the best protection available to a media defendant—a party subject to even greater protections than the ones offered a private individual under the U.S. standard—are few defenses that are difficult to establish.[249]

Furthermore, free speech in England survives solely by legislative decree and common law evolution.[250] Where U.S. courts must constitutionally defend free speech, English courts have no such strength and are thereby weakened by restrictive statutes calibrated to limit free expression. Thus, English courts must rely on anachronistic common law standards. As a result, much English legislation constricts free speech.[251]

2. Constitutional Application of the English Judgment

The court's refusal to enforce the English judgment in *Bachchan* was proper because of the constitutionally insufficient protections available to free speech under the English libel standard. Under the U.S. standard, a court would have denied plaintiff's original defamation action.[252] In this case, plaintiff would likely be found a public figure.[253] Plaintiff is a successful

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248. *See supra* notes 67-73 and accompanying text (articulating plaintiff's burden of proving truth under U.S. standard).

249. *See supra* notes 95-118 and accompanying text (detailing defenses available to defendant under English standard).

250. *See supra* notes 85-87 and accompanying text (articulating provisions of Defamation Act).

251. *E.g.*, Prevention of Terrorism Act (limiting speech with terrorist innuendos); Theatres Act, 1968 (applying libel laws to theater productions). The Prevention of Terrorism Act and the Television and Broadcasting Act have been imposed to restrict a BBC production that implicated a senior government official in a Protestant bombing in Northern Ireland. *See Britain Tells TV Company to Divulge Sources*, N.Y. TIMES, Aug. 3, 1992, at A6. Various religious groups rallied behind an amendment to the Blasphemy laws in order to ban Salman Rushdie's novel *Satanic Verses*. *See British Blasphemy Law Doesn't Apply to Islam*, WASH. TIMES, Apr. 10, 1990, at A2; Michael Prescott, *No Change in Blasphemy Law, Muslims Told*, Press Assoc. Ltd., July 4, 1989, *available in* LEXIS, Nexis Library, OMNI File. The Emergency Provision Act, originally installed to suppress the Irish Republic Army, has recently been applied in banning the Ulster Volunteer Force, a Protestant paramilitary group in Northern Ireland. *See* William E. Schmidt, *Britain Bans North Ireland's Largest Protestant Paramilitary Group*, N.Y. TIMES, Aug. 11, 1992, at A3.

252. *E.g.*, Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661, 664 (Sup. Ct. 1992).

253. *See id.* at 663 (linking plaintiff to Ghandi family and to Amitabh Bachchan, plaintiff's brother and India's top film star); *see also* Curtis Publishing Co. v. Butts 388 U.S. 130, 154-55 (1967) (finding plaintiffs as public figures because both "commanded sufficient continuing public interest and had sufficient access to the means of

business man who has garnered a reputation in India and in England.[254] His brother is the pre-eminent movie star in India and both are close friends to the Gandhi family.[255] Clearly, plaintiff meets the public figure criteria.[256] Under *Curtis*, a public figure plaintiff must prove actual malice, as defined by the Supreme Court in *Sullivan*, to recover damages in a defamation action.[257] The *Curtis* standard of actual malice for public figures drastically exceeds the English measure of simply showing that the words carry a defamatory meaning.[258]

Furthermore, the subject matter in *Bachchan* is of public concern.[259] The article involved a prominent Indian figure with personal ties to the government of India.[260] At a bare minimum, the facts in *Bachchan* fit under the *Gertz* criteria, which sets forth the standard for private figures, requiring constitutional scrutiny.[261] Under *Gertz*, plaintiff still retains the burden of proof while the individual states determine the precise measure of liability.[262] In New York, a private figure plaintiff must prove defendant published in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.[263] Plaintiff in *Bachchan* failed to meet the New York standard.[264] Even at its highest level, the English

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counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements").

254. *See* Bedi, *Ajitabh's account "Frozen," supra* note 168; Affidavit of Gopal Raju in Opposition to Plaintiff's Motion to Enforce a Foreign Judgment at 2, Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992) (No. 28692/91).

255. *See* Bedi, *Ajitabh's account "Frozen," supra* note 168; Affidavit of Gopal Raju in Opposition to Plaintiff's Motion to Enforce a Foreign Judgment at 2, Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992) (No. 28692/91).

256. *See supra* note 46 and accompanying text (enunciating perils of public life assumed by public figures).

257. *See supra* notes 42-47 and accompanying text (articulating *Curtis* standard).

258. *See supra* note 91 and accompanying text (stating English standard that merely requires plaintiff to show alleged words carry defamatory meaning).

259. *See* Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661, 664 (Sup. Ct. 1992).

260. *See supra* note 163 and accompanying text (establishing plaintiff as prominent Indian figure).

261. *See Bachchan*, 585 N.Y.S.2d at 663-64.

262. *See supra* notes 48-54 and accompanying text (establishing *Gertz* standard for private figures concerning matters of public interest).

263. *See supra* notes 74-81 and accompanying text (starting libel standard in New York).

264. *See Bachchan*, 585 N.Y.S.2d at 663. Because plaintiff relied on the English

standard fails to match the *Gertz* standard.

Non-U.S. judgments that violate the U.S Constitution should not be enforced in the United States. The court's decision places non-U.S. jurisdictions on notice that illusory protections of free speech will not be tolerated when enforcement is sought in the United States.[265] Furthermore, the court's refusal to recognize the English judgment is another reminder to the English judicial system, which lacks a bill of rights, and thus fails to offer human rights protections equivalent to those available in the United States. Various groups have lobbied English officials to enact a constitution and a bill of rights.[266] The *Bachchan* decision may help push this important process forward.

C. *Balance Between Constitutional Protection and Comity*

Refusal to enforce the English judgment may result in an international backlash, jeopardizing the international tradition of comity. An early foundation of comity rested in reciprocity.[267] As a result of the *Bachchan* decision, English courts may be less willing to enforce U.S. libel judgments in the future. The absence of reciprocity partially inspired the U.S. Supreme Court in *Hilton* to bar enforcement of a French judgment.[268] The Court of Appeals for the Third Circuit in *Somportex*, however, noted that reciprocity no longer serves as a theoretical element of comity.[269] Practically though, the categorical refusal by the court in *Bachchan* to enforce extraterritorial libel

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standard, under which defendant must prove truth, plaintiff failed to prove malice. *Id.*

265. *See* Brief of Amici Curiae at 3-4, Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992) (No. 28692/91). Many other libel actions involving U.S. media-defendants were pending when the Supreme Court of New York rendered its decision in *Bachchan*: separate suits were brought against Simon & Schuster and the *Wall Street Journal* in England, and an action in Trinidad engulfed McGraw-Hill. *Id.* The effect of *Bachchan* sends notice to non-U.S. jurisdictions.

266. *See* Chilvers, *supra* note 23; *Rights Groups Finds British Government Hostile to Free Press*, *supra* note 23; Shaw, *supra* note 23.

267. *See supra* note 125 and accompanying text (suggesting reciprocity as element of comity).

268. *See supra* note 125 and accompanying text (citing lack of reciprocity as reason for denying French judgment).

269. *See supra* note 127 (citing proposition in *Somportex* that does not include reciprocity as condition of comity).

judgments antithetical to the First Amendment of the U.S. Constitution may lead to an international backlash.

The threat to comity is a valid and salient criticism of the court's decision in *Bachchan*. Comity, however, is not an all-inclusive concept transcending constitutional rights.[270] Additionally, section 5304 of the CPLR provides for exceptions to recognition of extraterritorial judgments.[271] Inclusion of CPLR section 5304 within article 53 shows that the drafters of the CPLR contemplated exceptions to comity. Clearly U.S. courts cannot recognize every foreign judgment as such an ideology would dilute U.S. law and jeopardize constitutionally protected rights.

A balance between comity and First Amendment protections is needed in future enforcement actions for libel. The reasoning in *Bachchan* would compel New York courts to refuse to enforce most English libel judgments.[272] Such a sweeping decree irresponsibly ignores comity, an established legal concept that grows in importance as new technology links the world with greater intimacy. On the other hand, the English libel standard, as applied to the case before the court in *Bachchan*, violates public policy.[273] Encouraging litigants to file actions in less protective jurisdictions where libel judgments are more easily obtained and then to seek enforcement in the United States threatens the First Amendment. A case-by-case analysis of the non-U.S. libel standard and facts at issue are needed to strike the appropriate balance. Where an extraterritorial judgment has been rendered in a jurisdiction with a libel standard that violates the First Amendment, and the prevailing party seeks enforcement in the United States, the U.S. court should scrutinize the judgment with a constitutional lens in the interest of preserving the First Amendment's integrity.

Although the judgment of the court in *Bachchan* was just, courts must consider the ramifications of applying this decision to future libel cases. A balance must be struck between consti-

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270. *See supra* note 127 (defining comity and limiting its application).

271. *See supra* note 134 (reproducing CPLR § 5304, which codifies exceptions to comity).

272. *See supra* note 20 (citing court's rejection of all English libel judgments because of disparate treatment offered free speech in England).

273. Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992) (finding English judgment repugnant to public policy of New York State).

tutional issues and comity. The holding of *Bachchan* could be extended to all extraterritorial judgments, thus decimating comity and creating a contentious international legal forum. Conversely, following the comity argument, all foreign judgments could be enforced, thus threatening constitutionally protected rights. A court must use its discretion under Section 5304(b) of the CPLR when determining whether to enforce a non-U.S. libel judgment rendered by a court that relied on a standard antithetical to the First Amendment. U.S. courts should refuse to enforce extraterritorial libel judgments found to be repugnant to public policy. A court, however, should enforce a non-U.S. libel judgment, even in the face of a competing defamation standard, when a similar judgment would be delivered in the United States.

CONCLUSION

In future libel cases, courts must carefully balance the protection offered by the First Amendment with the concept of comity. Extraterritorial libel judgments should not be rejected per se, but rather, when constitutional issues arise, a court should submit the extraterritorial judgment to a rigorous constitutional analysis, following the New York Supreme Court in *Bachchan v. India Abroad Publishing Inc.* A balance is needed to ensure First Amendment protection without jeopardizing the concept of comity.

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