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A Roadblock on the Detour around the First Amendment: Is the Enforcement of English Libel Judgements in the United States Unconstitutional

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A ROADBLOCK ON THE DETOUR AROUND THE FIRST AMENDMENT: IS THE ENFORCEMENT OF ENGLISH LIBEL JUDGMENTS IN THE UNITED STATES UNCONSTITUTIONAL?

I. INTRODUCTION

The possibility of a libel suit has always threatened the American media. As American companies continue to canvas the globe,[1] however, the possibility of an unfavorable libel judgment looms even larger. Due to the fact that Americans dominate the dissemination of information,[2] an ever-increasing number of libel suits are being filed against the American media in England.[3] To make matters worse, the English justice system fails to provide the minimum level of protection for speech and press required by the First Amendment to the United States Constitution.[4]

Because these media defendants' assets are primarily located in the United States, many victorious libel plaintiffs seek to collect on the English judgments in United States courts.[5] Therefore, the question arises whether the United States should enforce English libel judgments in light of England's deficiencies in protecting the freedoms of speech and press.

A New York court was the first to attempt to answer this question in the 1992 case of *Bachchan v. India Abroad Publications, Inc.*[6] In *Bachchan*, a London correspondent for an American news service wrote a story concerning the bribing of Indian public officials.[7] The story fingered an Indian businessman, Ajitabh Bachchan, as the owner of a Swiss bank account, which the Indian government suspected was used to funnel illegal

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1. *See* Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law?*, 16 HASTINGS COMM. & ENT. L.J. 235, 236 (1994) [hereinafter *Suing American Media*].
2. *See id.*
3. *See id.* at 237.
4. *See* Gregory T. Walters, Bachchan v. India Abroad Publications, Inc.: *The Clash Between Protection of Free Speech in the United States and Great Britain*, 16 FORDHAM INT'L L.J. 895, 896–98 (1993).
5. *See id.* at 914–15.
6. 585 N.Y.S.2d 661 (1992).
7. *See id.*

payments to Indian politicians.[8] Bachchan sued the American news service in England's High Court of Justice.[9] After a trial, an English jury found the American corporation to be responsible for defaming Bachchan.[10] Due to the fact the Bachchan could not collect on the judgment in England, he requested that a New York trial court enforce the English libel judgment against the American news service in the United States.[11] The court feared that enforcement of the judgment would threaten the free speech protections[12] found in the First Amendment to the United States Constitution.[13] Ultimately, the court refused to recognize or enforce the libel judgment on the grounds that it would be adverse to the public policy of New York and the United States.[14]

The 1995 case of *Matusevich v. Telnikoff*[15] relied on *Bachchan* in refusing to enforce another English libel judgment in the United States.[16] In *Matusevich*, a Maryland federal court found that enforcement of a libel judgment from a country that did not incorporate American defamation standards was repugnant to the public policy of Maryland and the United States.[17]

In view of the growing number of individuals seeking enforcement of English libel judgments in the United States,[18] many arguments have been made as to why the American Judiciary should or should not enforce these judgments. However, the true focus should be on whether it is constitutionally permissible to enforce an English libel judgment in the United States. This Comment argues that under the First Amendment to the United States Constitution and some views of the "state action" doctrine, the American enforcement of English libel judgments is itself unconstitutional.

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8. *See id.*

9. *See* Robert L. Spellman, *"Spitting in the Queen's Soup": The Refusal of American Courts to Enforce Foreign Libel Judgments*, COMM. & LAW 63, 66 (1994).

10. *See Bachchan*, 585 N.Y.S.2d at 661.

11. *See id.*

12. *See id.*

13. *See* U.S. CONST. amend. I (providing that "Congress shall make no law . . . abridging the freedom of speech, or of the press.").

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

15. 877 F. Supp. 1 (D.D.C. 1995).

16. *See id.*

17. *See id.* at 2.

18. *See* Robin Pogrebin, *Libel Gripes Go Offshore; London a Town Named Sue*, N.Y. OBSERVER, Sept. 23, 1991, at 1.

Part II of this Comment explores the differences between English and American defamation standards. Part III discusses the process of enforcing a foreign judgment in the United States through the Full Faith and Credit Clause, comity, and the Uniform Foreign Money-Judgments Recognition Act. Part IV examines the American constitutional requirement of "state action" and focuses on its application to judicial acts. Part V applies the "state action" theory to the enforcement of English libel judgments in a United States court. Finally, Part VI concludes that if "state action" is found in the enforcement of English libel judgments, enforcement of such judgments violates the freedoms guaranteed by the First Amendment to the United States Constitution.

II. ENGLISH AND AMERICAN LIBEL LAW COMPARED

The vast differences between the defamation principles of England and the United States are the cause of this constitutional quandary. While both countries value freedom of speech and the press,[19] England does not value these freedoms on a level commensurate with the United States. In particular, England protects an individual's reputation over such freedoms through its plaintiff-friendly libel laws.[20] As a result of these laws, speech that would be protected under the constitutional principles of the United States could form the basis for a libel judgment in England.

A. The English Common Law Standards

Current English common law requires that three elements be satisfied before a libel judgment can be established. First, the defendant must have published the challenged statement. Second, the context of the statement must make the plaintiff identifiable to others. Third, the challenged statement must indeed be libelous.[21] In England, a libelous statement is one that a reasonable person would find to be destructive to the subject's reputation.[22]

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19. *See Suing American Media*, *supra* note 1, at 239.

20. See *id.* at 240.

21. *See* Michael Superstone, *Press Law in the United Kingdom*, *in* PRESS LAW IN MODERN DEMOCRACIES 34 (Lahav Pnina ed., Longman 1985).

22. *See* Spellman, *supra* note 9, at 68.

Under English common law, however, a plaintiff is not required to prove the falsity of a challenged statement, because that falsity is presumed by all English courts.[23] Additionally, a plaintiff need not show that he or she suffered an actual monetary injury.[24] The English common law presumes that the plaintiff suffers some form of monetary loss.[25]

Further, English common law does not require a plaintiff to prove the defendant had the intent to defame.[26] Very simply, the culpability of the defendant is not at issue. For this reason, libel in England is considered to be a strict liability tort.[27] Therefore, "the strict liability of the tort forces journalists to be guarantors of the truth of what they publish."[28]

Although truth is a complete defense to a charge of libel under English common law,[29] defendants rarely claim this defense for two reasons. First, because all defamatory statements are presumed false in England, the burden of proving truth falls upon the defendant. Second, if the libel defendant reaffirms in court that the charged statement is true, yet the sitting court finds otherwise, the judiciary has the authority to penalize the defendant by increasing a money judgment.[30]

B. The Constitutional Standard of the United States

From the time of America's founding to the mid-twentieth century, United States courts followed the English common law principles of defamation.[31] In adopting England's strict liability theory,[32] an early United States Supreme Court took the view that "[w]hatever a man publishes, he publishes at his peril."[33] Moreover, in 1942, the Supreme Court found no conflict between

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23. *See Suing American Media*, *supra* note 1, at 240.

24. *See* Jeff Sanders, *Extraterritorial Application of the First Amendment to Defamation Claims Against American Media*, 19 N.C. J. INT'L. L. & COM. REG. 515, 517 (1994).

25. *See id.* at 518.

26. *See Suing American Media*, *supra* note 1, at 241.

27. *See id.* at 240.

28. Spellman, *supra* note 9, at 67.

29. *See id.* at 68.

30. *See id.*

31. *See* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 156 (1991).

32. *See id.*

33. Peck v. Tribune Co., 214 U.S. 185, 189 (1909) (quoting Lord Mansfield in *The King v. Woodfall, Lofft*, 98 Eng. Rep. 914, 916 (1774)).

the English common law of libel and the First Amendment freedoms found in the United States Constitution because the First Amendment simply did not apply to libelous speech.[34]

The Supreme Court, however, retrenched twenty-two years later in the landmark libel case of *New York Times Company v. Sullivan*.[35] In *Sullivan*, a New York newspaper criticized the alleged discriminatory acts of Alabama politicians.[36] The Court held that, in the case of public officials, "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."[37]

As support for its break with the English common law, the *Sullivan* Court cited "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 . . . ."[38] The Court ultimately found that the application of strict liability to the tort of libel conflicted with the First Amendment, and necessitated elimination because a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to . . . 'self-censorship.'"[39]

By abolishing strict liability libel, the Supreme Court created a culpability requirement necessary to deem a statement libelous.[40] The Court stated that:

> [C]onstitutional guarantees require . . . 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.[41]

This culpability requirement has come to be known as the "actual malice" standard.[42]

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34. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
35. 315 U.S. 254 (1964).
36. *See id.* at 256.
37. *Id.* at 269.
38. *Id.* at 270.
39. *Id.* at 279.
40. *See id.* at 279–80.
41. *Id.*
42. *See id.*

The actual malice standard made two substantial changes to the common law of libel. First, it added a degree of culpability to the English common law by requiring a public plaintiff to show that the defendant intended to publish either a false statement or a statement with a reckless disregard for the truth. Second, the new standard shifted the burden of proof on the issue of falsity by requiring a public plaintiff to establish that a challenged statement is indeed false.[43]

Although these newly-created libel standards contrasted sharply with the English common law, the Supreme Court recognized that the new standards were not only constitutionally mandated, but also necessary in a democratic society. "By imposing heightened burdens on public officials who bring defamation claims against their critics, the law facilitates the government-monitoring function of the press."[44] Had the Court fashioned a stricter rule than that announced in *Sullivan*, freedom of speech would essentially be reduced to speech that was believed to be true to a legal certainty.[45] If this were the case, many governmental actions would go unquestioned by the press and the public.

In later years, the Supreme Court augmented the *Sullivan* ruling in its libel cases by extending some of *Sullivan's* requirements to private plaintiffs.[46] In *Gertz v. Robert Welch, Inc.*,[47] for example, the Supreme Court found that the First Amendment is violated when states apply strict liability to libel actions brought by private individuals.[48] The *Gertz* case "constitutionalized much of the law of defamation that relates to private plaintiffs, so that today each of the common-law rules (and any legislated variants) must be scrutinized under the First Amendment's guarantee of freedom . . . ."[49] The Court, however, allowed the states to choose any level of culpability below strict

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43. *See Suing American Media, supra* note 1, at 242–43.

44. Sanders, *supra* note 24, at 520.

45. *See id.*

46. *See* Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Curtis Publishing v. Associated Press, 388 U.S. 130 (1967).

47. 418 U.S. 323.

48. *See id.* at 347.

49. RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 1083–84 (Little, Brown, and Company, 6th ed. 1995).

liability.[50] Since the *Gertz* ruling, most states have chosen a negligence standard.[51]

The *Gertz* Court also addressed and dismantled England's presumed injury rule.[52] After *Gertz*, a plaintiff's injury from a defamatory statement could no longer be presumed.[53] The Court required the showing of an actual injury and that "all awards . . . be supported by competent evidence."[54]

Twenty-two years later, *Sullivan* was further extended in *Philadelphia Newspapers v. Hepps*.[55] Writing for the majority, Justice O'Connor stated that private plaintiffs, like public figures, must prove that a statement of public concern was actually false before a *prima facie* libel claim could be established.[56]

Thus, *Gertz* and *Hepps* implant two of *Sullivan's* requirements into libel suits involving private plaintiffs. First, *Gertz* requires some form of intent on the part of the publisher to disseminate a false statement before a statement of public concern is deemed libelous. Second, *Hepps* requires private plaintiffs to prove that statements of public concern are actually false before recovering damages.

In sum, there are vast differences between the English common law of libel and the constitutional law of the United States in the area libel and defamation.[57] Three striking

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50. *See id.*
51. *See* Spellman, *supra* note 9, at 70.
52. *See* Gertz, 418 U.S. at 349–50.
53. *See id.*
54. *Id.* at 350.
55. 475 U.S. 767.
56. *See id.* at 775.
57. A "real life" example of the differences between libel law in England and the United States occurred in the wake of Princess Diana's death. A cloud of controversy surrounded the publication of a book entitled THE ROYALS. The book highlighted many intimate details about England's Royal Family, such as Queen Elizabeth II's insatiable sex drive, Prince Philip's many extra-marital affairs, and Princess Diana's bad breath. Interestingly enough, the book was not published or sold in England, although it was published and sold in America. Due to England's plaintiff-friendly libel laws, the publication of the book in England would have exposed the publisher to a legal nightmare. It is likely that an English court would find the book's content defamatory, especially after Princess Diana's death. Moreover, because the English common law presumes that a defamatory statement is false, the publisher would have to prove the truth of each assertion in order to escape liability. In the United States, however, the Royal Family would have to prove that the book's assertions were indeed false, and published with knowledge of their falsity or a reckless disregard for the truth in order to succeed in a libel suit against the publisher. Obviously, the publisher was more comfortable with the American scenario. *See* Dana Kennedy, *Making Book*, ENT. WKLY., Sept. 26, 1997, at 8.

differences between the two systems exist: (i) the libel plaintiff in the United States must prove that the challenged statement was published with some knowledge of falsity, while the English common law employs a strict liability standard; (ii) the libel plaintiff in the United States must prove that the statement is indeed false, while the English common law presumes falsity; and (iii) the libel plaintiff in the United States must show actual damage from the challenged statement, while the English common law presumes that the libelous statement causes monetary damage.

Obvious in these differences is the reconciliation of an interest in protecting reputation with that of protecting freedoms of speech and press.[58] "The disagreement begins with how the balance should be struck. Roughly speaking, the common law has set its . . . presumption in favor of reputation, while the Supreme Court has set its in favor of freedom of speech"[59] and press. Because it is impossible to fully serve both interests, the common law of England and the constitutional law of the United States are fundamentally at odds with one another.

III. FULL FAITH AND CREDIT, COMITY, AND THE UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

The enforcement of a foreign judgment in a United States court is controlled by three main doctrines: (i) the Full Faith and Credit Clause; (ii) comity; and (iii) the Uniform Foreign Money-Judgments Recognition Act.

A. The Full Faith and Credit Clause

Once a plaintiff wins a money judgment in any state or federal court of the United States, that judgment may be enforced in any other state or federal court with relative ease.[60] The Full Faith and Credit Clause of the United States Constitution,[61] and the legislation implementing it,[62] guarantee that judgments handed

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58. *See* EPSTEIN, *supra* note 49, at 1084.

59. *Id.*

60. *See* Jeremy Maltby, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 COLUM. L. REV. 1978, 1983–84 (1994).

61. *See* U.S. CONST. art. IV, § 1 (stating that "[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state . . . .").

62. *See* 28 U.S.C. § 1738 (1988) (stating that "[a]cts, records, and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as

down in United States courts will be enforced in all other state and federal courts.[63] A state may only refuse to enforce a judgment in very limited circumstances.[64]

The Full Faith and Credit Clause, however, does not apply to foreign country judgments. Accordingly, foreign judgments lack the conclusive effect of judgments entered in the United States.[65] Therefore, other legal doctrines and theories are applicable to the enforcement of English libel judgments.

B. Comity

Although recognition of foreign judgments is not required by the United States Constitution, the Supreme Court has employed the notion of comity to give effect to such judgments.[66] The roots of comity are embedded in the landmark case of *Hilton v. Guyot*.[67] In *Hilton*, a French company attempted to enforce a French judgment against American citizens in a United States court.[68] The *Hilton* Court framed and defined the theory of comity for the first time:

> 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, 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.[69]

The *Hilton* Court's definition of comity created a guideline for the enforcement of foreign judgments. Moreover, it created three restrictions on the enforcement of such judgments: (i) procedural restrictions; (ii) reciprocity restrictions; and (iii) public

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they have by law in the courts of such state . . . from which they are taken.").

63. *See* Rachel B. Korsower, *Matusevitch v. Telnikoff: The First Amendment Travels Abroad, Preventing the Recognition and Enforcement of a British Libel Judgment*, 19 MD. J. INT'L L. & TRADE 225, 233–34 (1995).

64. *See* Maltby, *supra* note 60, at 1984 (A judgment's enforcement can be refused if the forum court did not have personal jurisdiction, there was inadequate notice, or the court did not have the requisite subject matter jurisdiction); *see also* Korsower, *supra* note 63, at 233.

65. *See* Maltby, *supra* note 60, at 1984.

66. *See* Korsower, *supra* note 63, at 235.

67. 159 U.S. 113 (1895).

68. *See id.* at 114.

69. *Id.* at 163–64.

policy restrictions.

1. Procedural Restrictions on Comity

As defined by the Court in *Hilton*, comity is an extremely malleable legal doctrine. However, the *Hilton* Court did place some procedural restrictions on this otherwise vague recognition theory:

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice . . . and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not . . . be tried afresh . . . .[70]

The *Hilton* Court thus recognized several procedural factors that can halt the enforcement of a foreign judgment in a United States court—"lack of jurisdiction, partiality, fraud, or lack of notice or due process."[71]

2. The Reciprocity Restriction on Comity

Ultimately, the *Hilton* Court refused to enforce the French judgment, not because of any of the above-mentioned procedural concerns, but due to a lack of reciprocity.[72] The Court noted that an individual's attempt to enforce a United States judgment in France would likely fail because the French judiciary would rehear the case without respecting the judgment of the American court.[73] Thus, the *Hilton* Court held that the notion of comity did not apply to French judgments because "international law is founded upon mutuality and reciprocity,"[74] which was lacking with France.

Ultimately, in addition to the procedural restrictions on comity, the *Hilton* ruling also required the forum nation to practice reciprocity, a deferential policy towards the enforcement of United States judgments.

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70. *Id.* at 202–03.
71. Maltby, *supra* note 60, at 1985.
72. *See Hilton*, 159 U.S. at 228.
73. *See id.*
74. *Id.*

3. Public Policy Restrictions on Comity

The procedural and reciprocity requirements were not the only comity issues considered in *Hilton*. The Court also considered the enforcing state's public policy as a further restriction on the enforcement of a foreign judgment.[75] *Hilton* establishes that when the enforcing state's public policy is offended by the forum court's ruling, the judgment cannot have conclusive effect. Therefore, the enforcement of a foreign judgment must also depend on "the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and her character . . . ."[76]

The public policy requirement was defined by then-New York Judge Cardozo in *Loucks v. Standard Oil*.[77] Judge Cardozo stated that it was a court's duty not to enforce a foreign judgment when enforcement would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common wealth."[78]

The public policy exception was employed in *Barry E. v. Ingraham*.[79] In *Barry E.*, the New York Court of Appeals refused to recognize an adoption judgment from Mexico. The court based its opinion on the belief that the Mexican court did not sufficiently investigate the welfare of the child, and that enforcing an adoption judgment without considering the child's best interest was against New York's public policy.[80] The court feared that the automatic enforcement of foreign adoption proceedings could lead to the "mercenary trading of children."[81]

The Supreme Court has never held that the federal standards of comity, created in *Hilton*, bind the states in their enforcement of foreign judgments.[82] Most states have nevertheless used the criteria announced in *Hilton* to create their own legislation

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75. *See id.* at 164–65.
76. *Id.*
77. 120 N.E. 198 (N.Y. 1918).
78. *Id.* at 202.
79. 371 N.E.2d 492 (N.Y. 1977).
80. *See id.* at 496.
81. *Id.*
82. The Supreme Court has never explicitly ruled that federal law governs the enforcement of foreign judgments, which has allowed states to legislate on their own. *See* R. Doak Bishop & Susan Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 INT'L LAW 425, 429 (1982).

regarding the enforcement of foreign judgments.[83] Other states have retained the *Hilton* requirements by enacting a form of the Uniform Foreign Money-Judgments Recognition Act (Recognition Act).[84]

C. The Uniform Foreign Money-Judgments Recognition Act

The Recognition Act,[85] which is basically a codification of the *Hilton* ruling,[86] has been voluntarily adopted by some states. Its purpose was to reconcile the states' diverse practices regarding the review of foreign judgments under their common law standards.[87] Uniformity was needed to guide other countries in determining whether their judgments would be enforced in the United States.[88] Although the United States was one of the more liberal countries on enforcement, each state seemed to interpret *Hilton* differently.[89] This divergence in foreign judgment review led to a lack of United States reciprocity, which put American judgments abroad in jeopardy.[90] The Recognition Act, thus, was intended to provide uniformity in enforcement so as to dissolve this reciprocity predicament.

The Recognition Act provides courts with the discretion to refuse the enforcement of a foreign judgment if the *Hilton* procedural restrictions are not met,[91] or if *Hilton*'s public policy restrictions are violated.[92] Therefore, even though states vary as to whether they have incorporated *Hilton* into their common law or enacted a version of the Recognition Act, the standards by which states consider the enforcement of foreign judgments are relatively similar.[93]

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83. A majority of states still use the *Hilton* requirements in creating foreign judgment recognition legislation. *See id.* at 430.

84. *See* Maltby, *supra* note 60, at 1986–87.

85. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 261 (1962).

86. *See* Maltby, *supra* note 60, at 1987.

87. *See* Korsower, *supra* note 63, at 237–38.

88. *See id.* at 237.

89. *See id.* at 237–38.

90. *See id.*

91. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a)(1)(3), 13 U.L.A. 261 (1962).

92. *See id.* § 4(b)(1)(6).

93. There is an exception. The reciprocity requirement, invoked in *Hilton,* has not gained wide acceptance by the states. In fact, only seven states have a standard that allows courts to deny recognition of a foreign judgment due to a lack of reciprocity from the forum nation. *See* Korsower, *supra* note 63, at 236.

Ultimately, however, a foreign judgment's fate depends on a state's interpretation of standards, such as partiality, fraud, and due process. Furthermore, a state court must entangle itself in the enforcement of a foreign judgment by deciding if it is inconsistent with the state's public policy. This entanglement raises the question of whether a state's conduct constitutes state action, making the Constitution and its Amendments applicable to the substance of the judgment.

IV. THE STATE ACTION DOCTRINE

A. Introduction to the State Action Doctrine

With the exception of the Thirteenth Amendment,[94] the United States Constitution and its Amendments only operate to restrain governmental action.[95] The Bill of Rights (the first ten Amendments to the Constitution) limits the actions of the federal government.[96] The Fourteenth Amendment expressly restrains the states from infringing upon the liberties created by the Bill of Rights.[97] However, the Bill of Rights and the Fourteenth Amendment do not restrain purely private action.[98] Thus, a suit alleging a constitutional violation must prove that some form of "state action" was involved in the violation.[99] In order for state action to be present, there must be a finding that the act or conduct challenged is an act by the state.[100] "For example, while a public school may not discriminate on the basis of race by virtue of the Equal Protection Clause, there is no such constitutional limitation on the activities of a purely private school. The reason is simple: a private school is not the state."[101]

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94. U.S. CONST. amend. XIII. The Thirteenth Amendment abolished slavery in both the public and private spheres.

95. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688 (2nd ed. 1988) [hereinafter CONSTITUTIONAL LAW].

96. *See* RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE 156 (1986) [hereinafter ROTUNDA].

97. *See id.* at 159.

98. *See id.* at 156.

99. *See* CONSTITUTIONAL LAW, *supra* note 95.

100. The phrase "state action", reflects the fact that most cases involving the doctrine concern the Fourteenth Amendment and the actions of a state. The phrase, however, also includes actions of the federal government. *See* ROTUNDA, *supra* note 96, at 151.

101. CHRIS N. MAY & ALAN IDES, 2 CONSTITUTIONAL LAW, EXAMPLES AND EXPLANATIONS 13 (Aspen Law & Business) (1998) [hereinafter MAY & IDES].

Often, the requirement of state action is easily met and is a non-issue, particularly when the state is an active participant in a constitutional violation.[102] For example, if a litigant challenges a state statute claiming that it violates his or her constitutional rights, the state is an obvious participant in the alleged violation because the state's legislature passed the challenged statute.[103]

The state action doctrine, however, becomes increasingly difficult to satisfy when it is unclear if the constitutional violator is the state. For example, in the case of the private school that racially discriminates, its constitutional insulation may be limited if the state is somehow involved in the school's operations.[104] In such a case, the private school may be viewed as the state through some of the Supreme Court's theories on state action. Therefore, the Constitution and its Amendments may be applicable to restrain the private school's actions.

The distinction between a private and a state actor is critical in determining if a plaintiff's constitutional rights have been violated. Thus, the Supreme Court has created standards to guide this inquiry and to define state action.

B. Defining State Action

The United States Supreme Court has identified a number of situations that satisfy the state action requirement. There are four main areas in which state action is found: (1) the private performance of a public function; (2) a joint activity between a state and a private party; (3) the state endorsement of private conduct; and (4) the judicial enforcement of private agreements.

1. Private Performance of a Public Function

State action has been deemed to exist when a traditionally exclusive public function is performed by a private individual.[105] In other words, "if a state permits a private party to exercise what is clearly a governmental power, then the activity of the private party will be treated as state action for the purposes of the

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102. *See id.* at 14.

103. *See* Brown v. Board of Education, 347 U.S. 483 (1954) (finding that a state statute mandating racial segregation in public schools automatically constituted state action because the state passed the law requiring such action).

104. *See* Adickes v. Kress & Co., 398 U.S. 144 (1970).

105. *See* Marsh v. Alabama, 326 U.S. 501 (1946).

Fourteenth Amendment."[106] In this sort of case, the individual's constitutional insulation will disappear.

2. Joint Activity Between a State and a Private Party

The Constitution's requisite state action has also been deemed to exist when there is a joint activity between the state and a private party.[107] If the state and a private individual act in concert to cause a constitutional injury, the individual's act is viewed as a state act.[108] Therefore, the private individual will be subject to the same restrictions under the Fourteenth Amendment that are applicable against the state.[109]

3. State Endorsement of Private Conduct

The third category of the state action doctrine places liability on a private party when that party engages in state-endorsed conduct.[110] When a state endorses or encourages a private activity that violates the Constitution, that private activity is then transformed, in the eyes of the judiciary, into a public activity. This transformation fulfills the state action requirement of the Fourteenth Amendment.

4. Judicial Enforcement of Private Agreements

The fourth category of state action, and the focal point of this paper, is the judicial enforcement of private agreements. Under certain circumstances, when a private party enforces an agreement, contract, or judgment against another private party through the judicial process, that enforcement will become state action and the Constitution and its Amendments will be applicable to the substance of the judgment.[111] This Comment asserts that under this view of the state action doctrine, the United States enforcement of an English libel judgment may create a situation in which the very enforcement of the judgment makes the First Amendment applicable to the substance of the judgment. If this assertion is true, the Constitution would act to bar a state judicial officer from infringing on a media defendant's First Amendment

106. *See* MAY & IDES, *supra* note 101, at 16.
107. *See* Adickes v. Kress & Co., 398 U.S. 144 (1970).
108. *See id.* at 152.
109. *See* MAY & IDES, *supra* note 101, at 22.
110. *See* Reitmen v. Mulkey, 387 U.S. 369 (1967).
111. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

freedoms. To substantiate this assertion, the United States Supreme Court's rulings in this state action arena must be explored further.

The leading case in this area is *Shelley v. Kraemer*.[112] In *Shelley*, the defendant, an African-American, purchased a piece of residential property that was encumbered by a restrictive covenant limiting the ownership of the property to people of the Caucasian race.[113] The plaintiff, a neighbor, sued the defendant to enjoin him from possessing the property. Subsequently, the Supreme Court of Missouri enforced the covenant and divested title from the defendant.[114]

On appeal, the United States Supreme Court recognized that the discriminatory covenant did not itself violate the Fourteenth Amendment since the agreement was between private parties.[115] The *Shelley* Court, however, concluded that the enforcement of the covenant by a Missouri judicial officer brought the power of the state into the transaction and that this state involvement was sufficient to establish the presence of state action.[116] The Supreme Court found that the "action of state courts and judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment."[117] In other words, judicial enforcement of the private agreement transformed the racial discrimination effected by that agreement into state action.

Logic suggests that the critical element in *Shelley* was the act of judicial enforcement, the involvement of the state judiciary. This logic, however, leads to a conclusion that any state court decision creates state action. Therefore, all private agreements and contracts would have to comply with the United States Constitution.[118] The Supreme Court, however, has rarely applied *Shelley* in this manner.[119] Thus, there is a critical element in the facts of *Shelley* that has not been evident in later cases.

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112. *Id.*
113. *See id.* at 5.
114. *See id.* at 6.
115. *See id.* at 13 (stating that the "[First] Amendment erects no shield against merely private conduct, however discriminatory or wrongful").
116. *See id.* at 19–20.
117. *Id.* at 14.
118. *See* MAY & IDES, *supra* note 101, at 20.
119. *See id.*

The state action theory, and *Shelley* in particular, is a very convoluted doctrine, causing legal scholars and Supreme Court Justices to disagree on what actually is the *Shelley* Court's rationale.

An example of this confusion exists in *Bell v. Maryland.*[120] In *Bell*, the Supreme Court was asked to decide whether state action was present when the Maryland judiciary convicted twelve African-American students of trespassing on private property.[121] The students were arrested and charged with trespass as a result of their sit-in demonstration in a privately owned restaurant that refused to serve non-Caucasians.[122] The case was ultimately remanded to the state court because of newly passed public accommodation laws.[123] However, some of the justices attacked the question of whether state action was present when a private individual used the state judiciary to enforce neutral trespass laws in a discriminatory manner and how *Bell* compared to *Shelley*.

a. The Douglas View of Shelley v. Kraemer

Justice Douglas, in *Bell v. Maryland*, answered the question of state action with simple logic and relied on *Shelley* to find the requisite state action in *Bell*. Douglas stated that the "court should put these restaurant cases in line with *Shelley v. Kraemer*, holding that what the Fourteenth Amendment requires in restrictive covenant cases it also requires from restaurants."[124]

It seems that Justice Douglas did not consider the critical element of *Shelley* to be so rare. Douglas believed that utilizing a neutral trespass law to enforce a discriminatory act was enough to satisfy the state action demands of the Fourteenth Amendment.[125] The trespass convictions in *Bell*, much like the enforcement of the restrictive covenant in *Shelley*, placed the stamp of state action on the discrimination, thereby making the constitutional restrictions against racial discrimination applicable.

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120. 378 U.S. 226 (1964).
121. *See id.* at 228.
122. *Id.*
123. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 405 (1997).
124. Bell v. Maryland, 378 U.S. at 259.
125. *See* CHEMERINSKY, *supra* note 123, at 405.

Although this interpretation of *Shelley* seems reasonable because of the state's necessary involvement, the Supreme Court has rarely taken such an encompassing view of *Shelley*.[126] Ordinarily, the mere involvement of the courts or the police to settle a private dispute does not alone create state action, there must be more.[127]

Notably, however, the Supreme Court has selectively applied the Douglas view of *Shelley* in some cases, while not applying it in others. In *Cohen v. Cowles Media Co.*,[128] for example, the plaintiff, a private party, gave the defendant, a Minnesota newspaper, scandalous court records concerning a candidate for Lieutenant Governor in exchange for a promise of confidentiality.[129] When the newspaper nevertheless exposed the plaintiff's name in breach of the confidentiality agreement, the plaintiff sued the paper on the theory of promissory estoppel.[130] The newspaper raised the defense that all its actions were shielded by the First Amendment's guarantee of freedom of press. The plaintiff, however, argued that the First Amendment was inapplicable because the case was merely a suit between private parties, there was no state action.[131]

In its state action discussion, the Court said, "[o]ur cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."[132] In an infrequent invocation of Justice Douglas' view of *Shelley*, the Court held that, "[t]hese legal obligations [promissory estoppel] would be enforced through the official power of the Minnesota courts. Under our cases, that is enough to constitute 'state action' for purposes of the Fourteenth Amendment."[133]

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126. *See id.* at 404.
127. *See id.*
128. 501 U.S. 663 (1991).
129. *See id.* at 665.
130. *See id.* at 666.
131. *See id.* at 668.
132. *Id.*
133. *Id.*

"As in *Shelley*, a court order restricting First Amendment freedoms would itself violate the asserted Constitutional right."[134] Therefore, the *Cohen* Court adopted the Douglas view by asserting, although not explicitly, that the sole requirement for state action is the mere involvement of the state judiciary.

b. Justice Black's View of Shelley v. Kraemer

Justice Black similarly attempted to define the critical element of *Shelley* in his *Bell* dissent. Justice Black lashed out at Douglas' view on *Shelly* by stating:

> It seems pretty clear that the reason judicial enforcement of the restrictive covenants in *Shelley* was deemed to be state action was not merely the fact that a state court had acted, but rather that it had acted 'to deny petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.'[135]

Justice Black focused on the effect of the judicial act as opposed to the judicial act itself. In *Shelley*, the grantor of the restricted property was willing to sell the property to an African-American.[136] In other words, the grantor chose not to discriminate against the buyer. According to Justice Black, the state court's enforcement of the covenant forced the grantor to discriminate on the basis of race by disallowing him to sell the property to a willing minority buyer. Justice Black points out that this was the critical element present in *Shelley*, and absent in *Bell*. The restaurant owner, in *Bell*, was discriminating on his own accord, whereas the land owner, in *Shelly*, was operating under the hand of the state.

While this is a reasonable view of *Shelley*, it is also a significantly narrow view. One can imagine very few situations, other than facts identical to *Shelley*, in which state action could be found under the Black view.

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134. MAY & IDES, *supra* note 101, at 21.
135. *Bell*, 378 U.S. at 330 (Black, J., dissenting).
136. *See Shelley*, 334 U.S. at 5.

c. *The Public Policy View of* Shelley v. Kraemer

A third and extremely plausible explanation for the Supreme Court's ruling in *Shelley* focuses both on the common law of restrictive covenants and Missouri's policy of enforcing these covenants. This may be referred to as the public policy view of *Shelley*.

At the time *Shelley* was decided, Missouri, like many other states, viewed covenants restraining the alienability of real estate as judicially unenforceable.[137] In simpler terms, Missouri presumed that any private agreement hindering the free sale of property was generally unenforceable. To enforce a restrictive covenant, a Missouri court must first find that the substance of the covenant is reasonable and that it is consistent with the public policy of the state.[138]

With this process in mind, the Missouri court that chose to enforce the *Shelley* restrictive covenant must have decided that it was consistent with Missouri's public policy to enforce a racially discriminatory covenant.[139] "[R]acially restrictive covenants were included by Missouri within the special subclass of restraints on alienability which the state's courts would *not* set aside as presumptively contrary to public policy."[140]

Viewing *Shelley* from the public policy view, the Missouri court, in its official representation of the state, endorsed racial discrimination by enforcing the private covenant. In this sense, the state placed itself in the shoes of the individuals drafting the covenant because both tacitly agreed that the covenant was consistent with Missouri's public policy. This agreement between the drafters of the covenant and the state court collapsed the two parties into one discriminating entity.

Thus, according to the public policy view of *Shelley*, neither the act of judicial enforcement nor the forcing of a person to discriminate created *Shelley*'s requisite state action. Alternatively, the Supreme Court found that the state court's decision that racial discrimination was consistent with public policy placed the stamp of state action on the private agreement, thereby making the Fourteenth Amendment applicable to that agreement.

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137. *See* RESTATEMENT OF PROPERTY § 406 (1944).
138. *See id.*
139. *See* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 263 (1985).
140. *Id.* (emphasis in original).

If this were the critical element in *Shelley*, the state action model created in that ruling would be applicable to any court decision that considers whether a private agreement, contract or judgment is consistent with public policy. At first glance, this view seems extremely expansive because a violation of public policy may be asserted during any contract enforcement hearing, a common form of litigation. It must be remembered, however, that a public policy violation is an affirmative defense in contract law.[141] Therefore, a person seeking to invalidate a contract on the basis of public policy must actually raise this issue with the court. Accordingly, the issue of public policy will not arise in every contract enforcement hearing, as it does in restrictive covenant cases. As a result, the public policy view of *Shelley* shrinks in effect.

d. The Non-Neutral View of Shelley v. Kraemer

A fourth view of *Shelley* similarly focuses on the substantive law of the enforcement of restrictive covenants as well as on the actions of the Missouri court. This may be referred to as the non-neutral view of *Shelley*.

As stated earlier, according to Missouri law a restrictive covenant can only be enforced if it is deemed to not be an unreasonable restriction on alienation.[142] Thus, in enforcing the *Shelley* covenant, the Missouri court must have decided that an agreement to only sell property to Caucasians still presented a reasonable opportunity for the owner to alienate his property.[143] On the other hand, if the restriction had prohibited the sale of property to Caucasians, the Missouri court would have had to strike the covenant down as an unreasonable restriction on alienability because the purchaser pool would have only consisted of African-Americans. This small purchaser pool would have excluded a vast majority of probable purchasers, Caucasians,

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141. An individual seeking to invalidate a contract on the basis of public policy must actually make this argument to the court because it is an affirmative defense to the enforcement of a contract. Therefore, the court places the burden of proof on the person seeking to invalidate the contract. In only very limited circumstances is public policy not an affirmative defense, meaning that the court must answer the question of public policy. *See* WILLIAM M. MCGOVERN, JR. & LARY LAWRENCE, CONTRACTS AND SALES: CASES AND PROBLEMS 308–09, 315–23 (1993).

142. *See* TRIBE, *supra* note 139, at 260.

143. This was probably true because Caucasians greatly outnumbered African-Americans, leaving a vast number of probable purchasers for the restricted property.

thereby leaving the property owner with little opportunity to alienate his property. Undoubtedly, the Missouri court would have found a Caucasian covenant to be an unreasonable restriction on the alienability of property while enforcing a similar African-American restriction.

Therefore, the non-neutral view of *Shelley* asserts that the Missouri state court actually participated in racial discrimination because it provided Caucasians with more opportunities to purchase land than it did for African-Americans. Consistent with this line of reasoning, the Supreme Court must have found that a state could not chose to rubber stamp restrictive covenants against African-Americans, while generally regarding alienability restraints against Caucasians as unenforceable.[144] Thus, the non-neutral view asserts that "[t]he real 'state action' in *Shelley* was Missouri's facially discriminatory body of common and statutory law—the quintessence of a racist state policy."[145]

V. ATTRIBUTING STATE ACTION TO THE ENFORCEMENT OF ENGLISH LIBEL JUDGMENTS IN AMERICA

The preceding section illustrates that it is not possible to determine, for certain, what aspect of judicial enforcement creates state action. It is possible, however, to apply the four varying views of *Shelley* and make an educated guess as to what types of judicial decrees will substantiate state action. This Comment asserts that under some of the aforementioned views of *Shelley*, the enforcement of an English libel judgment in the United States is a type of judicial decree that constitutes state action.

A. Application of the Douglas View to the Enforcement of English Libel Judgments in the United States

The Douglas view asserts that anytime the judiciary is involved in the enforcement of a covenant, contract, or judgment state action is created.[146] In order to find state action in the enforcement of an English libel judgment, this is the simplest and most generous view.

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144. *See* TRIBE, *supra* note 139, at 260.
145. *Id.*
146. *See supra* Part IV.B.4.a.

To most plaintiffs, a libel judgment is meaningless if it is not enforced.[147] When a plaintiff brings an English judgment to the United States, the plaintiff seeks assistance from the United States Judiciary because he or she could not sufficiently collect on the judgment in England.[148] Therefore, to effectuate the judgment, the United States Judiciary must intervene and employ its power to force payment. This process is very similar to the one in *Shelley*, where the restrictive covenant would have been ineffective unless the Missouri court intervened in the private agreement and enforced the covenant.

The parallel between *Shelley* and English libel judgments is bolstered when the *Cohen* case[149] is added into the equation. *Cohen* appeared to be a case in which the Supreme Court endorsed the Douglas view of *Shelley* within the context of the First Amendment.[150] Finding state action, the *Cohen* Court stated, "[o]ur cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."[151] It is clear that, in the foreign judgment arena, enforcement rules are state rules and the application of English libel laws restricts First Amendment freedoms. *Cohen* adds credence to the argument that the enforcement of these judgments creates state action, making the enforcement of a judgment attributable to the state and the Constitution applicable.

If the Douglas view is accepted, state action is present in the enforcement of an English libel judgment and the First Amendment is applicable to such judgments.

B. Application of the Black View to the Enforcement of English Libel Judgments in the United States

According to Justice Black's view of *Shelley*, state action was created because the Missouri court forced the grantor, a man willing to sell his property to an African-American, to discriminate on the basis of race.[152]

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147. Assuming that the main concern of the plaintiff is compensation for injuries suffered.

148. *See Suing American Media, supra* note 1, at 235–38.

149. *See* Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

150. *See supra* Part IV.B.4.a.

151. *Cohen*, 501 U.S. at 668.

152. *See supra* Part IV.B.4.b.

If this exclusive view of *Shelley* is accepted, the enforcement of an English libel judgment in a United States court would not create state action. In an enforcement case, the plaintiff is a willing participant in the infringement on the defendant's First Amendment freedoms, otherwise the plaintiff would not seek enforcement. Therefore, the state, in enforcing the judgment, does not compel anyone to violate a person's Constitutional liberties, as Missouri did in *Shelley*.

State action, therefore, under the Black view, is not present in the enforcement of English libel judgments, thereby making the First Amendment inapplicable because the state is not involved in the deprivation.[153]

C. Application of the Public Policy View to the Enforcement of English Libel Judgments in the United States

The public policy view of *Shelley* asserts that in upholding *Shelly*'s restrictive covenant, the Missouri court must have decided that racial discrimination was not inconsistent with the state's public policy. This policy decision placed the state in the shoes of the covenant's drafters, making the state a willing participant in the discrimination, thus creating state action.[154]

Under this view of *Shelley*, a creative argument can be made that the enforcement of an English libel judgment is strikingly similar to *Shelley*. As indicated in Section III of this Comment, under the Supreme Court's *Hilton* ruling[155] and the Recognition Act,[156] a court must decide that a foreign judgment is not contrary to the state's public policy before enforcing the judgment. If a state court enforces an English libel judgment, therein deciding that the substantive law used to create that judgment is not inconsistent with the state's public policy, the state places its stamp of approval on the judgment. This endorsement puts the state in the shoes of the tribunal that applied the substantive law and the state becomes involved in the deprivation of the defendant's First Amendment freedoms. As a result, state action is created.

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153. *See supra* Part IV.B.4.b. It is hard to imagine facts, other than those in *Shelley*, in which "state action" would be present under the Black view.

154. *See supra* Part IV.B.4.c.

155. *See* Hilton,159 U.S. 113 (1895).

156. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4 (b)(1)(6), 13 U.L.A. 261 (1962).

Under the public policy view of *Shelley*, the enforcement of an English libel judgment creates sufficient state action to make the United States Constitution applicable to the private quarrel.

D. Application of the Non-Neutral View to the Enforcement of English Libel Judgments in the United States

The non-neutral view of *Shelley* asserts that the Missouri State court was actually involved in the discrimination because it provided Caucasians with more opportunities to purchase land than it did African-Americans.[157]

Under this view, it is difficult to find state action without knowing the exact procedures and actions of the individual states in the enforcement of English libel judgments. If it can be shown that a state favors some defendants over others or a state enforces libel judgments regarding some types of speech while refusing to enforce libel judgments concerning other types of speech, then it may be possible to find state action under the non-neutral view. This finding, however, would probably lead to other constitutional violations[158] as opposed to a First Amendment violation.

Accordingly, state action may only be found in the enforcement of English libel judgments, under the non-neutral view of *Shelley* if certain facts are present.

VI. CONCLUSION

The Supreme Court's decision in *Shelley v. Kraemer* presents several plausible theories concerning the creation of state action. It is unclear which theory is actually correct. What is clear, however, is that if state action is found in the enforcement of an English libel judgment, perhaps under the Douglas or public policy view, the United States Constitution is violated.

The Supreme Court struck down the English libel principles years ago because of their infringement on First Amendment freedoms.[159] The First Amendment would once again be strangled if the same discarded principles were attributable to the action of a

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157. *See supra* Part IV.B.4.d.

158. If it could be shown that a state was favoring one defendant over another, then the Equal Protection Clause of the Fourteenth Amendment would probably be applicable rather than the First Amendment. This Comment, however, will not attempt to decipher the Supreme Court's Equal Protection analysis.

159. *See supra* Part II.B.

state, which is what the state action theory accomplishes. If state action is found in the enforcement of English libel judgments, the First Amendment demands that each and every state refuse to enforce these judgments.

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* J.D. Candidate, Loyola Law School, 1999; B.B.A. Economics, Baylor University, 1995. I dedicate this Comment to my parents, Carl and Barbara, without whom I would not have the opportunity to toil with obscure Supreme Court case law while the rest of the world toils with real-life. I would like to thank my brother and sisters, Chris, Jennifer and Samantha, for their constant support and encouragement. I also wish to thank Professor Christopher N. May (Loyola Law School) for his continual assistance in developing and preparing this Comment and primarily for his friendship and patience. Finally, I am also very grateful to the *Journal*'s editors and staff for their work in preparing this Comment for publication.