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Protecting Speech, Protecting Privacy: The Future Costs of U.K. Libel Claims

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I. INTRODUCTION

In January 2011, writers and publishers around the world—big and small, for- and not-for-profit—heaved a sigh of relief. The European Court of Human Rights (ECtHR) had held that the attorney's fees levied against the Mirror Group Newspapers (MGN) in a privacy suit[1] by fashion model Naomi Campbell before the Queen's Bench in the United Kingdom (U.K.) infringed the newspaper's right to free speech.[2]

At issue in the *Campbell* case before the ECtHR were the "success fees"[3] awarded to Naomi Campbell's lawyers for winning the case, in addition to payment of their contingency fees and the cost of the settlement.[4] The U.K. court had awarded Ms. Campbell £3500 in damages, and over £1m in attorneys' fees and costs;[5] a fee award the ECtHR held to be "disproportionate" to the damages levied.[6]

Given the U.K.'s position as the preeminent destination for forum-shopping libel claimants, this decision by the ECtHR was significant for publishers, journalists, bloggers, and non-governmental organizations (NGOs) both in the U.K., and around the world.

A. Political Reaction

Following the ECtHR's ruling, the British Parliament announced it would consider reforming its contingency fee structure as part of "wider government efforts to help businesses and public bodies fearful of

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1. Unlike in the United States, in the U.K. there is no "invasion of privacy" tort. Campbell v. MGN, [2004] UKHL 22, ¶ 11. Claims like that of Ms. Campbell, for publishing a story about her attending a Narcotics Anonymous meeting, are brought as claims for breach of confidence, as in *Campbell*, as well as defamation, as discussed here.
2. MGN Ltd. v. United Kingdom, 66 Eur. Ct. H.R., ¶ 219 (2011).
3. *Infra* Part III(A).
4. MGN, *supra* note 2, ¶ 198.
5. Campbell v. MGN, [2005] 1 W.L.R. 3394 (H.L.) (appeal taken from Eng.).
6. MGN, *supra* note 2, ¶ 219.

costly litigation."[7] Subsequently, the House of Commons and the House of Lords passed an act that would restrict both the conditional fee agreements[8] at the heart of the *Campbell* case, and after-the-event (ATE) insurance,[9] another contributor to the grotesque legal fees associated with U.K. privacy claims. Clause 46 of the Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO) altogether eliminates the use of ATE insurance in privacy claims,[10] while clause 44 drastically restricts (although falls short of eliminating) the use of success fees by limiting any such fees to a percentage of the damages award itself.[11]

B. Public Reaction

A group of dissenters, ranging from the Law Society[12] to Kate and Gerry McCann,[13] have publicly challenged LASPO, claiming that it limits access to the courts for lower income litigants engaged in privacy disputes.[14]

While these dissenters agree costs in libel and other privacy cases are often too high, they believe the solution proposed in LASPO will harm the most vulnerable. Dissenters argue that both claimants who lack the means to bring a claim, and respondents who, even if successful, would not have enough in damages available to cover their

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7. Josh Halliday, *European Court Deals Blow to No Win, No Fee Deals in Naomi Campbell Case*, THE GUARDIAN (Jan. 18, 2011), http://www.guardian.co.uk/media/2011/jan/18/european-court-of-human-rights-daily-mirror-naomi-campbell.

8. Legal Aid, Sentencing and Punishment of Offenders Act, 2012, c. 10, § 44 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/2012/10/pdfs/ukpga_20120010_en.pdf [hereinafter Legal Aid].

9. *Id.* § 46.

10. *Id.* § 46(1).

11. *Id.* § 44(2).

12. The Law Society of England and Wales is the organization dedicated to representing and advising British solicitors. *See* THE LAW SOCIETY, http://www.lawsociety.org.uk/home.law (last visited May 1, 2012). *See also*, *The End of the World As We Know It*, THE LAW SOCIETY, http://www.lawsociety.org/uk/advice/articles/the-end-of-the-world-as-we-know-it/ (last visited Apr. 9, 2013).

13. The McCann's have attracted the tabloid spotlight as a result of their five-year search for their daughter Madeleine who disappeared from their hotel room during a vacation to Portugal. They were thrust back into the spotlight in July of 2011 when it was revealed that they too had been victims of phone hacking by tabloid journalists. Richard Allen Greene, *Madeleine McCann's Mother Says She Felt Violated by Murdoch Paper*, CNN (Nov. 23, 2011), http://articles.cnn.com/2011-11-23/world/world_europe_uk-phone-hacking-scandal_1_milly-dowler-voice-mail-british-girl?_s=PM:EUROPE.

14. Owen Bowcott, *Kate and Gerry McCann Urge PM to Save 'No Win, No Fee' for Libel Cases*, THE GUARDIAN (Mar. 25, 2012), http://www.guardian.co.uk/law/2012/mar/26/mccanns-cameron-media-libel-legal-aid?intcmp=239. *See also* Gerry and Kate McCann, *Dear David Cameron: Full Text of the Open Letter on Legal Aid Bill*, THE GUARDIAN (Mar. 25, 2012), http://www.guardian.co.uk/law/2012/mar/26/mccann-open-letter-david-cameron.

defense costs, would be prevented from pursuing justice.[15] These potential victims include, for example, the middle class families whose personal tragedies made them the targets of News Corp's insidious phone hacking practices; as well as the bloggers, small papers, and NGOs, whose intervention in the *Campbell* Case[16] was so influential in the ECtHR's decision.

C. Thesis

This article focuses on the impact LASPO's revised fee structure will have in the context of libel claims in particular, and argues that speech would be better protected by additionally adopting California's Anti-SLAPP model. LASPO falls short of meeting the goal set by the ECtHR to create a fee structure that is "necessary in a democratic society,"[17] such that free speech, as guaranteed by Article 10 of the European Convention on Human Rights (ECHR), will remain safe. Rather, LASPO still allows the threat of a potentially crushing fee structure to chill speech across the U.K., and abroad. In contrast, California's Anti-SLAPP law, protects free speech by providing defendants an early opportunity to make a basic and preliminary showing that the defamation claim is bogus before committing to costly litigation; while also protecting privacy by allowing the plaintiff to retain the opportunity to prove that the claim was in fact well-founded, thus keeping the doors of justice open to her.

Part I lays out the policies behind balancing privacy rights and rights of free speech, both in the United States and in the U.K., as well as discusses the role of libel tourism in forcing an alignment of these goals.

Part II explains what is traditionally known as the "English Rule" of contingent fee agreements (CFAs), and how it has functioned to date, including the role of success fees and ATE insurance; as well as analyzes the costs and benefits of those provisions.

Part III similarly looks at the "American Rule" regarding fee-shifting, and specifically analyzes the benefits of Anti-SLAPP laws, which, on a state-by-state basis, are the closest the United States has come to consistently providing fee-shifting measures in defamation suits.

Part IV proposes potential solutions to achieve the sought-for balance between the right of expression and the right of privacy—

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15. *Id*.

16. James Goldson, Peter Noorlander & Mark Stephens, *Written Comments in the Case of MGN v. United Kingdom*, OPEN SOCIETY OF JUSTICE INITIATIVE (2009), *available at* http://www.opensocietyfoundations.org/sites/default/files/written-comments-20090313.pdf [hereinafter Intervenors' Comments].

17. *See* MGN, *supra* note 2, ¶ 198.

culminating in Part V with the conclusion that LASPO fails to achieve these goals, and California's Anti-SLAPP model would help better realize them.

II. DEFAMATION POLICY: A TRANS-ATLANTIC MATTER

A. Shared Policies

In a 2010 article in the Journal of International Media and Entertainment Law, James Windon neatly listed the five main goals of the U.S. libel system:

1) Discouraging plaintiffs from filing non-meritorious lawsuits;
2) Encouraging potential plaintiffs with small claims to file lawsuits;
3) Encouraging plaintiffs to settle litigation prior to trial;
4) Encouraging all reporting and public comment by media outlets that is less than actionable defamation; and
5) Discouraging all reporting that amounts to actionable defamation.[18]

These five goals create a checklist for whatever substantive or procedural law might be proposed in response to the *Campbell* case and reflect the balance that courts and scholars have expressed as the goals not just for U.S. defamation law, but also for U.K. defamation law.[19]

In fact, these goals accurately reflect the very balance performed by the ECtHR when weighing the rights enunciated in Articles 8 and 10 of the ECHR:

> Article 8:
> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
> (2) There shall be no interference by a public authority with the exercise of this right *except* such as is in accordance with the law and is necessary in a democratic society . . . *for the protection of the rights and freedoms of others*.[20]
> . . . .
> Article 10:
> (1) Everyone has the right to freedom of expression. . . .

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18. *See generally* James Windon, *Fee Shifting in Libel Litigation: How the American Approach to Costs Allocation Inhibits the Achievement of Libel Law's Substantive Goals*, 3 J. INT'L MEDIA & ENT. L. 175 (2010).

19. *See, e.g.*, *A Comparative Study of Costs in Defamation Proceedings Across Europe*, U. OF OXFORD PROGRAMME IN COMP. MEDIA L. & POL'Y CENTER FOR SOCIO-LEGAL STUD. 182–83 (Dec. 2008), *available at* http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamationreport.pdf. ("It cannot be legitimate or proportionate to widen access to justice to some at the expense of restricting or denying it to others." [hereinafter Oxford Comparative Study] (quoting ADRIAN ZUCKERMAN, CIVIL PROCEDURE: PRINCIPLES AND PRACTICE 1061 (2d ed. 2006)).

20. Council of Europe, European Convention on Human Rights art. 8, Nov. 4, 1950, C.E.T.S. No. 5 [hereinafter ECHR] (original formatting omitted) (emphasis added).

> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . *for the protection of the reputation or the rights of others*, *for preventing the disclosure of information received in confidence*.[21]

When the ECtHR determines whether or not an action potentially violates Article 10, here, in pursuit of upholding Article 8, it does so by considering three standards: (1) whether the potential violation was "in accordance with law" or "prescribed by law"; (2) whether or not the potential violation pursues any legitimate aims as laid out in Article 10(2); and, (3) whether or not the potential violation is "necessary in a democratic society."[22] The ECtHR spends the most time analyzing the third factor, defining "necessary" as "proportionate to the legitimate aim pursued."[23] Thus, the balancing conducted in the ECtHR most substantially occurs in determining whether or not the alleged limitation of expression is "proportionate" to a particular action to protect privacy.

B. Libel Tourism[24]

Beyond the shared judicial goals for defamation law, the fate of the U.S. and the U.K. approaches are inexorably bound together by virtue of the U.K.'s position as the preeminent destination for libel claimants.[25] Aided by Internet publication, U.K. courts have increasingly held that they have jurisdiction over defamation cases even where the source of the alleged libel action has limited publication in the U.K.[26] The U.K.'s standard for jurisdiction, as articulated in *Berezovsky v. Forbes*,[27] has three "distinctive features," the most important being the definition of publication as "where the words are heard or read."[28] As a result,

> U.K. courts have now repeatedly held that, even where the defendant's publication is distributed overwhelmingly in the U.S., so long as a few copies find their way into the U.K. or are

21. *Id.* art. 10 (original formatting omitted) (emphasis added).

22. PIETER VAN DIJK, ET AL., THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 334–35 (4th ed., 2006).

23. *Id.* at 340.

24. Given that the focus of this paper is on the impact of fee-shifting on defamation cases, and not libel tourism, the summary and analysis of the libel tourism issues will be limited. The matter is exhaustive and ongoing, as is current scholarship surrounding it.

25. Robert Balin et al., *Libel Tourism and the Duke's Manservant*, 3 EUR. HUM. RTS. L. REV. 303, 304 (2009); 3 MLRC BULLETIN 99, 99 (2009).

26. Balin, *supra* note 25, at 305.

27. *See* Shuddup, *Foreign Millionaires Like British Libel Laws. Publishers Don't*, THE ECONOMIST (Mar. 13, 2003), *available at* http://www.economist.com/node/1632864.

28. Berezovsky v. Michaels et al., [2000] 1 W.L.R. 1004 (H.L.) 1012 (U.K., opinion of Lord Steyn).

> downloaded by a few readers in England via the Internet, that is enough to constitute separate actionable publication in the U.K. and to subject the American defendant to the jurisdiction and venue of U.K. courts.[29]

To protect U.S. journalists, bloggers, publishers, and others from becoming liable under the U.K.'s claimant-friendly substantive defamation law,[30] in 2010, the United States passed the Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act.[31] The SPEECH Act requires that foreign defamation judgments shall not be enforced in the United States unless the plaintiff shows either that the foreign court provided at least as much free speech protection as would a U.S. court,[32] or the plaintiff shows that the U.S. defendant would have been found liable of defamation in a U.S. court.[33]

The protection provided by the SPEECH Act was necessary, and long overdue, but nonetheless incomplete in that it fails to protect U.S. citizens from the U.K.'s crippling fee structure. If a plaintiff with a U.K. judgment is able to meet the standards of a U.S. defamation claim, the result does not put the defendant in the same position she would have been in had the claim been brought in the United States. Rather, the English,[34] not the American,[35] fee-shifting rule would apply—requiring the defendant to pay the plaintiff's fees, including their success fee and ATE insurance fees, even though the defendant would not have access to ATE insurance. This loophole in the SPEECH Act makes U.S. publishers (of all sizes) vulnerable in the U.K., and chills both what they say and to whom they say it.

III. ENGLISH RULE AND THE CURRENT CFA SYSTEM

The "English Rule" for litigation damages, as compared to the "American Rule," has traditionally been understood in the United States to require "the losing party in civil litigation to pay the winning party's

29. Balin, *supra* note 25, at 305.

30. In the United States, a defamation plaintiff must prove that the defendant acted with some level of fault, more than mere negligence and actual malice in the case of public figures and officials. New York Times v. Sullivan, 376 U.S. 254, 279 (1964) and Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 47 (1988). Furthermore, in the United States, the defamatory statement is presumed to be true and the plaintiff bears the burden to prove it false. Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986). In the U.K., however, a defamation plaintiff proceeds under the presumption that the statement is false. Balin, *supra* note 25, at 304. The U.K. also differs in that the defendant, not the plaintiff, carries the burden to prove that the libelous statement was made with malice. *Id.* at 103–05.

31. 28 U.S.C. § 4101 [hereinafter SPEECH Act].

32. *Id.* § 4102(a)(1)(A).

33. *Id.* § 4102(a)(1)(B).

34. *Infra* Part III(A).

35. *Infra* Part IV.

attorney's fees."[36] In reality, in the U.K., the structure is far more complicated: the losing party looks forward to paying not only the winning party's fees, but also court costs, and the insurance fees that the winning party had to pay to cover themselves in the event of loss. Add to this the insurance fee the losing side had to pay simply to protect themselves in the event they did lose, and the price tag for litigation in the U.K. looks less like the "no win, no fee" structure so often lauded,[37] and more like bankruptcy—and in the case of defamation suits, chilling of free speech.

A. CFAs, Success Fees, and After-the-Event Insurance

As defined in the Courts and Legal Services Act of 1990, CFAs are designed to dictate the fee arrangement between a client and her attorney.[38] When limited to this arrangement, CFAs do in fact establish a "no win, no fee" structure between the two parties—in the event that the client loses the case, or accepts a deal less favorable than that accepted by the opposing party, the lawyer will receive no fee from the client.[39] The purpose behind this structure, according to the then Lord Chancellor who shepherded the legislation through the House of Lords in 1995, was to "extend access to justice" and "increase consumer choice."[40] The legislation recognized that most clients could not afford the hourly rates charged by even mediocre lawyers, and certainly not those charged by barristers, so the only way to ensure universal access to justice was to provide a combination of legal aid and a restructuring of the fee arrangements between clients and lawyers.

The trouble was that lawyers were taking all of the risk. They could only take on so many clients under this agreement because if they had a string of losses, then those were man-hours they could never bill and money they could never get back. Particularly given the U.K. courts' plaintiff-friendly approach to defamation cases, those clients already vulnerable to injustice (i.e., journalists and publishers), would be that much more vulnerable as they risked being systematically turned away by lawyers. Enter: success fees.

Success fees were designed as an insurance policy for lawyers, to ensure that even if lawyers lost one case (and therefore walked away empty-handed), they would make up for it by taking up to an additional 100% of their fees from the opposing party when they won the next case.[41] Unfortunately, if the client loses the case, she is bound by the

36. Windon, *supra* note 18, at 182.
37. Bowcott, *supra* note 14.
38. Courts and Legal Services Act, 1990, c. 41, § 58 (Eng.).
39. *See* Oxford Comparative Study, *supra* note 19, at 11.
40. Hollins v. Russell, [2003] 1 W.L.R. 2487 (H.L.) ¶ 4.
41. Oxford Comparative Study, *supra* note 19, at 11.

English Rule to cover her opponent's costs of litigation as well.[42] Of course, in the U.K., this is usually not just one but two representatives—both a solicitor and a barrister.

The final piece of the financial puzzle for litigating in U.K. courts is ATE insurance. Parties take out ATE insurance as protection to cover the winning party's costs in the event the case is unsuccessful.[43] As an Oxford study comparing the costs of defamation proceedings across Europe points out, the insurance is not mandatory.[44] If an opposing party does not take out insurance, however, likely because they do not have the means to do so, then a potentially prevailing party faces the possibility of losing no matter what—the defendant and her lawyers would have amassed considerable legal and court costs defending a suit, but without any possibility of recovery of those costs; making it more economical to pay off the plaintiff or retract even a truthful statement than to defend the suit.[45]

B. Costs of the Current Fee Structure

When considering the costs of the current fee structure, it is important to consider not only the pressure such a fee structure puts on "free speech" theoretically, but also to consider its specific applications and victims. Larger publishers, such as News Corp, the Telegraph Group, and the New York Times Media Group, are corporations who are less vulnerable to the theoretical implications of the costs entailed in the U.K.'s current fee structure. Therefore, it is easy to forget that there are real and practical free speech victims of CFAs and success fees.

1. Issues

The U.K. courts have enunciated three major issues raised by the effect the current fee system has on the press around the country: (i) the ransom factor; (ii) the chilling effect; and, (iii) the blackmailing effect.[46]

Justice Eady, in *Turcu v. NGN*, defined the first issue, the ransom factor, as the "significant temptation for media defendants to pay up something, to be rid of litigation for purely commercial reasons, and without regard to the true merits of any pleaded defence."[47] This effect was seen in stark relief in *King v. Telegraph*, where the claimant

42. Hollins, *supra* note 40, ¶ 27.

43. Oxford Comparative Study, *supra* note 19, at 11.

44. *Id.*

45. *See* King v. Telegraph Group, [2004] 1 W.L.R. 2282 (H.L.) ¶¶ 36–37.

46. See SELECT COMMITTEE ON CONSTITUTIONAL AFFAIRS, WRITTEN EVIDENCE SUBMITTED BY GUARDIAN NEWSPAPERS, 2005–06, H.C. § 6 (U.K.), *available at* http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/754/754we20.htm [hereinafter GUARDIAN EVIDENCE] for an outline of these three issues as raised by the courts.

47. Turcu v. News Group Newspapers, Ltd., [2005] EWHC 799 (QB) (Eng.).

brought a defamation suit against the Sunday Telegraph Newspaper for an article it ran claiming links between the claimant and Osama bin Laden. When Adam Musa King brought the claim, he did so through a CFA with his lawyers. He did not, however, take ATE insurance, forcing the newspaper to consider settling the matter, simply to hedge its bets against the potential cost associated with such a suit, despite the fact that they had a fairly sure shot at a "justification" defense.[48] As Lord Hoffmann pointed out in the *Campbell* case, the effect of such an increase of costs is to force the speaker (newspaper, NGO, etc.) to settle instead of to "take such a stand."[49]

The second issue, the chilling effect, was also well examined in *King*. While the ransom effect is an after-the-fact effect, causing the newspaper defendant to give up fighting a suit already in play, for fear of having to pay more later than it could afford; the chilling effect, according to Lord Justice Brooke, is a before-the-fact self-imposed restraint that the newspaper would inevitably enforce to avoid disproportionate and unfair potential suits.[50] The problem Lord Justice Brooke found was that potential costs to be levied against the defendant in the event they lose would fail to be "*reasonable* and *proportionate*" to those carried by the claimant.[51] This threat of disproportionate and unreasonable fees would have the effect of silencing those who might otherwise speak out on issues of public interest.

The final issue, the blackmailing effect, is an elaboration on the chilling and ransom effects.[52] Noted by Lord Hoffman in the *Campbell* case, the blackmailing effect could be the result of the kind of ransom to which a defendant could be held, as in *King*, or could be the result of the "arms race" between parties' solicitors to spend as much as the other, even if not necessary, to justify their cost position at the end of litigation.[53] The impact of these two possibilities is essentially a game of "cost"-chicken between the two parties—with the more vulnerable party (the small newspaper or the middle-class claimant) more likely to jump out of the way first.

48. King, *supra* note 45, ¶ 40.

49. Campbell, *supra* note 5, ¶ 34.

50. King, *supra* note 45, ¶ 99.

51. *Id.* ¶ 101 (emphasis added). *See, e.g.*, Jones v. Associated Newspapers, [2007] EWHC 1489 (QB) (Eng.); Tolstoy Miloslavsky v. United Kingdom, Eur. Ct. H.R. 25 ¶ 49 (1995) (holding that an award of damages must bear a reasonable proportionality to the reputational harm suffered, which did not include a £1.5m fee for publishing an article in the Winchester College newsletter alleging that the Warden was guilty of war crimes).

52. GUARDIAN EVIDENCE, *supra* note 46, § 6.3.

53. Campbell, *supra* note 5, ¶ 31. *See also* GUARDIAN EVIDENCE, *supra* note 46, ¶ 18 (essentially defining "blackmailing effect" as synonymous with "random effect").

2. Victims

Those whom the Lord Chancellor intended to protect turn out to be the very victims of this fee-shifting regime, despite the best intentions behind encouraging CFAs, success fees, and ATE insurance. As the intervenors in the *Campbell* case, and even those disputing the reforms proposed in LASPO, have pointed out, the high costs of defamation proceedings have a particular chilling effect on both smaller publishers and news organizations as well as NGOs.[54] "NGOs and small publishers—including bloggers—are extremely vulnerable to the threat of a costly libel or privacy actions in the UK. They simply do not have the means to defend themselves, and are easily forced to apologize and retract allegations even when they know them to be true."[55]

The first victims to examine are small publications around the U.K. As Lord Steyn pointed out in *In Re S*, when discussing the costs of litigation on the press, one is quick to think of "the press" as large media conglomerates with deep pockets that are likely to be able to afford such costs.[56] One rarely thinks of the small local papers, which are in fact both the lifeblood of the country, and the most vulnerable to defamation suits.[57] Citing The Newspaper Society, Lord Steyn pointed out that 85% of U.K. adults read a local paper, compared to 70% who read a national paper.[58] A solicitor who frequently represented small papers around the country provided anecdotal evidence to Parliament in November 2005, showing just how damaging the chilling effect can be on local papers.[59] This solicitor's conclusion was that the financial risk of litigation in defamation claims drives smaller publishers to either self-censor out of fear of suit; to retract even when the statement was true and of public interest; or, to go bankrupt.[60]

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54. Intervenors' Comments, *supra* note 16, ¶ 2.

55. *European Court Pulls Rug From Underneath Funding for Libel and Privacy Cases*, HUMAN RIGHTS WATCH (Jan. 18 2011), *available at* http://www.hrw.org/news/2011/01/18/european-court-pulls-rug-underneath-funding-libel-and-privacy-cases [hereinafter HRW, *European Court Pulls Rug*].

56. In Re S (a child), [2004] UKHL 47, [2005] 1 A.C. 593 (H.L.) (appeal taken from Eng.).

57. *Id.*

58. *Id.*

59. SELECT COMMITTEE ON CONSTITUTIONAL AFFAIRS, WRITTEN EVIDENCE SUBMITTED BY TONY JAFFA, PARTNER, FOOT ANSTEY SOLICITORS, 2005–06, H.C. 3 (U.K.).

60. *Id.* ¶ 18. One particular case Mr. Jaffa recalls is that of a small weekly paper, which published a Letter to the Editor criticizing the District Council. The Council threatened to sue, and even though the paper was protected by the Fair Comment defense, the editor recognized the steep financial battle he faced when he discovered that the council had retained a lawyer under a CFA. To avoid the potential financial burden, the editor decided to publicly apologize and pay a settlement. Such was the ransom effect of the CFA on this local paper. The chilling effect, Mr. Jaffa hypothesized, was that it would be a very long time before that local paper would ever again be willing to criticize the Council. *Id.* ¶¶ 15–17. Such self-censorship is at the heart of the free-speech battle over fee-shifting, particularly in the realm of the almost insupportable "search for truth" argument for free speech. Supporting free-speech because it allows journalists to find "the

The other victims to consider are NGOs. NGOs are not just publishers in their own right, providing their own analysis and news coverage of issues around the world almost exclusively on the internet.[61] They have also become important resources for news organizations whose own news gathering departments are shrinking.[62] Of particular concern to NGOs, much more so than to small publishers, is the impact of libel tourism on their exposure to crushing legal fees in U.K. defamation cases.[63] Whereas small, local publishers outside of the U.K. will have little cause for writing about potential claimants outside of their locale, U.S. based NGOs such as Human Rights Watch, frequently and necessarily expose themselves to potential international claimants with diverse interests who could establish jurisdiction in the U.K.[64]

C. Benefits of the Current Fee Structure

Despite the overwhelming pressure the current fee structure places on free speech, it is important to keep in mind the policy reasons behind its initial design and those it does protect. The purpose of the CFAs and success fees, as mentioned above, was to provide access to the courts, both for defendants and plaintiffs.[65] Unlike U.K. CFAs, U.S. contingency fees do not provide success fees as an incentive to take more clients on contingency. As a result, a U.S. defense attorney might

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truth" is a highly limiting doctrine for the liberty, as a whole; however, in the few cases where it is applicable, as here, it provides exponentially more weight to the freedom than any other argument. *See* WOJCIECH SADURSKI, FREEDOM OF SPEECH AND ITS LIMITS 8–16 (1999) (explaining the "search for truth" doctrine).

61. ANDREW CURRAH, WHAT'S HAPPENING TO OUR NEWS: AN INVESTIGATION IN THE LIKELY IMPACT OF THE DIGITAL REVOLUTION ON THE ECONOMICS OF NEWS PUBLISHING IN THE UK 106 (Oxford's Reuters Inst. for the Study of Journalism ed. 2009) (discussing the reliance of news organizations on PR firms furthering their clients' agenda, including charities and NGOs).

62. *Id.*; *see also* Intervenors' Comments, *supra* note 16, ¶ 6.

63. *See* HRW, *European Court Pulls Rug*, *supra* note 55; *see* Intervenors Comments, *supra* note 16, ¶ 9 for comments by Dinah PoKempner, the general counsel for Human Rights Watch, pointing out that libel tourism is "the greatest legal risk we run."

64. *See, e.g.*, Nguesso v. Global Witness, [2007] EWHC 1980 (QB) (Eng.) (where the NGO in fact won a defamation dispute brought in the U.K. by the son of the President of the Congo because of his business holdings there, for claims of corruption, but were never able to receive the damages due, let alone their success fee, even though they could have been out £100,000 had they lost); Intervenors' Comments, *supra* note 16, ¶ 10 (Human Rights Watch had to pay tens of thousands of dollars to settle a defamation claim by the subject of a report on Rwandan genocide, six years after its publication, because the U.K. government had partially relied on the report in denying the claimant naturalization); *id.* ¶¶ 14–15 (Index on Censorships abandoned a story about libel tourism when it was threatened with a defamation suit by a potential subject of the piece); Nicholas Always, *Costs and the Scourge of Conditional Fee Agreements*, PRESS GAZETTE (Mar. 1 2002), *available at* http://www.pressgazette.co.uk/story.asp?storycode=27856 (even though a straightforward Offer of Amends, including a cash settlement and a public apology for accidentally posting a photo of a family's house and mislabeling it as connected to a recently uncovered child prostitution ring, had been made, the claimant's solicitors still insisted that a 35% success fee was reasonable for the case—and the court agreed).

65. Hollins, *supra* note 40, ¶ 4.

infrequently accept a client on a contingency fee because there is no added incentive or protection for doing so.[66] This is not so in the U.K. U.K. success fees and ATEs make sure that the U.K. attorney gets paid, and then some, if she is successful in balancing out the risk of taking clients who might lose at other times.[67]

IV. AMERICAN RULE AND THE ANTI-SLAPP AMENDMENTS

Courts in U.S. litigation follow the American Rule for fee shifting, with notable exceptions.[68] The American Rule requires that courts "refus[e] to award damages to a victorious party unless otherwise provided for by statute."[69] The policy behind the American Rule is to ensure that the courts remain open to all, that individuals seek legal redress for perceived wrongs,[70] and that parties are not intimidated into settlement or abstinence by the threat of taking on the costs of the other party's case; all while discouraging frivolous lawsuits.[71] Furthermore, it has been suggested that fee-shifting, and its "guarantee" of payment, might encourage lawyers to perform unnecessary legal services and charge more for them—an extravagance the courts are keen to avoid.[72] Exceptions to this general rule are specifically carved out by federal[73] or state[74] statute, and are generally not left to the discretion of the courts.[75] This is in direct contrast with the "English Rule," which, as discussed above, has allowed fee shifting at the discretion of the courts for centuries.[76]

In the United States, although there is federal statutory law allowing for fee shifting in privacy claims against the government,[77] there is no federal statutory law providing for fee shifting in private defamation cases. In fact, at the state level, the most comprehensive protection a potential defendant has against frivolous defamation claims

66. *See infra* Part IV. *Cf.* Windon, *supra* note 18, at 182 (providing that there is a prevalence of attorneys working on contingency in the United States, and that as much as 86% percent of libel claimants are represented on a contingency basis).

67. Jones v. Associated Newspapers, [2007] EWHC 1489 (QB) (Eng.) at 31.

68. *See* Arcambel v. Wisman, 3 U.S. 306, 306 (1796).

69. Windon, *supra* note 18, at 181.

70. Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 183 (2008).

71. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 264 (1975).

72. Ciolli, *supra* note 70, at 182.

73. *See, e.g.*, 5 U.S.C. §§ 552 a(g)(2)(B) & (g)(3)(B) (providing for the shifting of fees to the government in the event of a successful claim against the government of a violation of the Privacy Act).

74. *See, e.g.*, WASH. REV. CODE § 4.24.510 (2010) (providing "reasonable attorney's fees" to the defendant in the event a SLAPP plaintiff is unable to establish, with convincing clarity, the required elements of their case).

75. Alyeska Pipeline Svc. Co. v. Wilderness Society, 421 U.S. 240, 266–70 (1975).

76. *Id.* at 247.

77. 5 U.S.C.A. §§ 552(a)(4)(E)(i) (West 2009).

is Anti-SLAPP statutes. Although a federal Anti-SLAPP provision was proposed in Congress in 2009, there is currently no federally enacted provision;[78] however, there is almost national coverage as the result of state statutory law.[79] In the majority of these statutes, there is a fee-shifting provision built in, as a means by which to ward off frivolous SLAPP suits, including defamation suits.[80]

A. Anti-SLAPP Legislation

Strategic Lawsuit Against Public Participation (SLAPP) claims are suits brought "in response to an individual's or a group's exercise of the right to speak out on a public issue."[81] The purpose behind the suit is not to win, or to achieve a financial objective, but to silence, or chill, the speech of the defendant.[82] This is not surprising, given that defamation claims are usually brought for non-economic reasons: either the plaintiff is a large organization trying to deter criticism by bringing serial suits, or an individual who is hurt and angry.[83] Although SLAPP suits can come in many flavors (e.g., malicious prosecution, invasion of privacy, intentional infliction of emotional distress), defamation claims are one of the most common causes of action.[84]

The issues raised by SLAPP claims are very similar to the issues raised by the current U.K. fee-shifting structure, and therefore make it an appropriate legislative comparison. As was found in the U.K., the

78. Citizens Participation Act of 2009, H.R. 4364, 111th Cong. (2009). *See also* United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999) (holding by the Ninth Circuit that it has federal jurisdiction to hear cases regarding California's anti-SLAPP state law); *cf.* Stuborn Ltd. Partnership v. Bernstein, 245 F.Supp.2d 312, 316 (D. Mass. 2003) (holding by the First Circuit that anti-SLAPP issues are strictly procedural and in conflict with federal law, therefore outside the jurisdiction of federal court).

79. Anti-SLAPP statutes have been passed in Washington, Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas, Oklahoma, Nebraska, Minnesota, Missouri, Arkansas, Louisiana, Illinois, Indiana, Tennessee, Georgia, Florida, Maine, Vermont, Rhode Island, New York, Massachusetts, Pennsylvania, Delaware, Washington, D.C., Maryland, and Hawaii. Public Participation Project: Fighting for Free Speech, STATE ANTI-SLAPP LAWS (2013), *available at* http://www.anti-slapp.org/your-states-free-speech-protection/#C [hereinafter Public Participation Project].

80. *See, e.g.*, CAL. CIV. PRO. CODE § 425.16(c)(1) (West 2009) (providing attorney's fees and costs for defendants, but only "reasonable" attorney's fees and costs for plaintiffs who can establish the viability of her case); N.Y. CIV. RIGHTS LAW § 70-a(a) (McKinney 2008) (providing attorney fees to SLAPP defendant if she can prove that the claim was "without substantial basis in fact and law").

81. Kathryn W. Tate, *California's Anti-Slapp Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 803–04 (2000).

82. Ciolli, *supra* note 70, at 192.

83. Randall P. Bezanson et al., *The Economics of Libel: An Empirical Assessment, in* THE COST OF LIBEL: ECON. AND POL'Y IMPLICATIONS 21, 22 (Everette E. Dennis & Eli M. Noam eds., 1989). *See also* David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207, 1208–09 (1995).

84. Tate, *supra* note 81, at 804–05.

principle concern of defamation SLAPP suits in particular is their chilling effect on speech.[85] Anti-SLAPP statutes were therefore designed specifically to prevent such an effect "through abuse of the judicial process."[86] Prior provisions to deal with SLAPP suits included substantive defenses, as well as summary judgments, and SLAPP-back suits.[87] The key failures of all of these solutions are two-fold: (1) that they still require a defendant to spend the time, energy, and money on defending the suit in court, no matter how bogus it is; and, (2) there is no way to make the defendant whole again once she proves the claim was baseless. States began enacting legislation that would provide protection for defendants against these bogus suits by limiting the amount of actual litigation required to disprove the claim (thereby reducing costs), as well as providing a fee-shifting provision to make the victims of these suits whole.[88]

B. Case Study: California's Anti-SLAPP Statute

In 1993, California's was one of the first Anti-SLAPP statutes enacted in the United States,[89] and is a model used around the country.[90] The key difference between the California statute and others, however, is its application beyond the right to petition, therefore broadening its application to personal, not necessarily governmental, matters.[91] This factor makes the California statute particularly relevant for consideration in contrast to the U.K. fee-shifting provisions in defamation cases. It is valuable to consider both the mechanics of the statute as well as the legislative policies behind it.

The statute itself includes the policy reasons behind its original enactment[92]—a move that proved to be important twenty years later when it became necessary to amend the legislation to remain in line with these considerations.[93] The statute is found in three parts: § 425.16

85. *See* Stephen M. Renas, et al., *An Empirical Analysis of the Chilling Effect: Are Newspapers Affected by Liability Standards in Defamation Actions?, in* THE COST OF LIBEL: ECON. AND POL'Y IMPLICATIONS 41 (Everette E. Dennis & Eli M. Noam eds., 1989) (explaining the chilling effect of defamation claims on editors and publishers, even in a post-*Sullivan* world); *See* Chris Dent & Andrew T. Kenyon, *Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers*, 9 MEDIA & ARTS L. REV. 89, 107–09 (2004) (providing substantial evidence to show that Australian coverage of government corruption is under-reported compared to the United States, where the defamation law is more "defendant" friendly due to the Constitutional privileges allowed in *Sullivan* and *Falwell*).

86. Tate, *supra* note 81, at 801 (citing CAL. CIV. PROC. CODE § 425.16 (West 2000)).

87. *Id.* at 805.

88. *Id*.

89. *See* Public Participation Project, *supra* note 79.

90. *See, e.g.*, N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2008).

91. Tate, *supra* note 81, at 812–14.

92. CAL. CIV. PROC. CODE § 425.16 (West 1994); *see also* Tate, *supra* note 81, at 806.

93. CAL. CIV. PROC. CODE § 425.17(a) (West 2012).

covers the protections provided and remedies for both SLAPPers and SLAPPees; § 425.17 provides the recently added limitations on § 425.16;[94] and, § 425.18 delineates provisions for SLAPP-back suits from those of malicious prosecutions.[95]

Section 425.16 begins by clarifying that the purpose of enacting the statute was to counteract the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[96] It then proceeds to outline the mechanics of the statute. First, when a claim is brought against someone exercising their right to free speech, under the U.S. or California constitutions, the statute provides for a special motion to strike based on the limited material already available to the court (i.e., pleadings, defenses, etc.), unless the plaintiff can show that she would likely prevail in the suit.[97] If the defendant prevails in the motion to strike, then the plaintiff must pay defendant's attorney fees and costs.[98] If the court holds that the motion to strike was frivolous, and finds for the plaintiff, then the defendant must pay the plaintiff's "reasonable" attorney's fees and costs—a qualification not provided regarding payment of defendant's fees and costs.[99]

In 2011, the California legislature introduced amendments in reaction to abuses of the statute that had resulted in the chilling of real grievances in the public interest.[100] Section 425.17 delineates when a § 425.16 motion to strike will not be available to a defendant.[101] The statute now excludes statements or actions made as representations to potential customers regarding goods or services.[102] The statute also requires a set of factors a defendant must meet to bring a motion to strike.[103] Pointedly, however, the statute excludes journalists, authors, artists, and any non-profits at least 50% dependent on government support, from those limitations of the amendment.[104]

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94. *Id.* (in response to the chilling effect of §425.16 on real grievance brought in the public interest).

95. Given that the focus of this paper is on defamation suits and not malicious prosecutions, it will not include an analysis of the further SLAPP-back provisions of CAL. CIV. PROC. CODE § 425.18.

96. CAL. CIV. PROC. CODE § 425.16(a) (West 1994).

97. *Id.* §§ 425.16(b)(1) & (b)(2).

98. *Id.* § 425.16(c)(1) (further providing that in limited circumstances, defendants cannot receive fees and costs, including if they are already receiving fees and costs pursuant to another section, or if the claim was brought by the state or other government official).

99. *Id.*

100. CAL. CIV. PROC. CODE § 425.17(a) (West 2012).

101. *Id.* § 425.17(b)(1).

102. *Id.* § 425.17(c).

103. *Id.* § 425.17(b).

104. *Id.* § 425.17(d).

V. POTENTIAL SOLUTIONS

Due to libel tourism, any solution to the chilling effect of the current CFA system in the U.K. will have considerable repercussions for libel suits in the United States. The SPEECH Act limits a plaintiff's ability to enforce U.K. libel decisions to those that would meet the burden of proof in the United States,[105] but if the decision is enforceable, U.S. defendants will be susceptible to whatever the cost burden would be as an extension of that judgment. Given the prevalence of Internet "publication" over all other kinds of dissemination of thought, this is a very real consideration. Thus, any solution must not only balance Articles 8 and 10 of the ECHR,[106] but also meet the goals of U.S. defamation law:[107] providing protection beyond the Constitutional privileges,[108] and other defenses provided by substantive common law.

A. The "English" Rule

For some American scholars, the "English" Rule is one proposed solution for the imbalance in the U.K.[109] The English Rule requires the losing party to cover the winning party's costs and fees, and, absent success fees, is arguably sufficient to provide both parties in a defamation claim access to justice.[110] Similarly, the ECtHR in *Campbell* seemed untroubled by CFAs and fee-shifting *per se*, and held only the success fees to be the cause of the "blackmailing," "chilling," and "ransom" effects highlighted by Lord Hoffman in his earlier opinion on the case.[111] But would fee shifting absent the success fees allow attorneys to provide the same level of representation to the same variety of clients? In other words, would attorneys still be able to provide CFAs to clients as frequently as they do now, and therefore keep the doors of justice open? Furthermore, as Professor Boies points out, there is no knowing how a judge and jury are going to rule; as confident as a party may be, such that the "protection" provided by the English Rule would be an incentive instead of a deterrent, a party could still find herself surprisingly liable for hers and her opponents' costs.[112]

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105. SPEECH Act, *supra* note 31, at § 4102(a)(1).

106. ECHR, *supra* note 20, arts. 8, 10.

107. Windon, *supra* note 18, at 177–78.

108. *See* New York Times v. Sullivan, 376 U.S. 254 (1964) and Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

109. *See* David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847, 851 (1986) ("Fee-shifting provides the dual benefits of making deserving plaintiffs whole and discouraging frivolous suits."). *See also* Boies, *supra* note 83, at 1212.

110. *Id*.

111. MGN, *supra* note 2, ¶ 209.

112. Boies, *supra* note 83, at 1213 (also providing a solution for the problem: only provide fee-shifting to the defendant, thus limiting the potential chilling of free speech, but failing to protect the bona fide plaintiff).

B. "Modified" Fee-Shifting

Another potential solution would be for "modified" fee shifting, as suggested by Professor Bradley Saxton.[113] He proposes that the losing party pay the winning party's fees, unless the winning party is only successful by virtue of a qualified privilege.[114] This approach would ensure that the defendant would still have to cover her own expenses were her statement in fact both false and defamatory, regardless of the status of the plaintiff, and therefore falls short of the ECtHR's goal of lifting the chilling effect of fee shifting.

C. Anti-SLAPP Legislation: California

A final potential solution could be to follow California's Anti-SLAPP model.[115] This model provides defendants an opportunity to show that a defamation claim is bogus (i.e., usually merely an effort to intimidate a writer or publisher from publishing the truth) before spending extortionate fees on litigation, and to be made whole again if successful. Meanwhile, the plaintiff retains the opportunity to prove that the claim was in fact well-founded, so as to keep the doors of justice open to her.

Despite its strengths, were the California Anti-SLAPP model introduced in the U.K., it could still fail to help victims of libel tourism. Although such a model is effective when the defense is simple (e.g., immunity for Internet intermediaries under § 230 of the Communications Decency Act), for more complex cases, a defendant would effectively have to try the case early—unprepared and even more vulnerable to liability. Furthermore, foreign libel defendants often default as they lack the means to travel to the U.K. and establish a defense.[116]

The very basic, preliminary showing provided for by Anti-SLAPP, however, is specifically designed to keep costs down, therefore making

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113. Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 100 (1995) (proposing a modified fee-shifting arrangement to protect against the chilling effect of potential suits regarding employer references).

114. *Id.*

115. CAL. CIV. PROC. CODE § 425.16 (West 1994). *See* Ciolli, *supra* note 70, 192–94 (suggesting such a model to remedy the chilling effects of § 230 of the Communications Decency Act of 1996).

116. *See, e.g.*, David Pallister, *US Author Mounts 'Libel Tourism' Challenge*, THE GUARDIAN (Nov. 15 2007), *available at* http://www.guardian.co.uk/world/2007/nov/15/books.usa (Rachel Ehrefeld defaulted on a defamation claim in U.K. court in 2006 by über-litigious Sheik Khalid bin Mahfouz for her book, *Funding Evil: How Terrorism is Financed – and How to Stop It*, where she alleged that Mahfouz financed terrorism. Ehrefeld took her case to the U.S. federal courts, and eventually prompted not just New York legislation to fight libel tourism, but also the SPEECH Act itself.).

it more likely than any other proposed solution to provide protection to victims of libel tourism.

VI. CONCLUSION

LASPO's revisions of CFAs in privacy suits fall short of the goals of the ECtHR and, by extension, the British Parliament. They fail to appeal to the majority of Britons increasingly aware of the vulnerability of their privacy thanks to the firestorm over media practices driven by the Levenson enquiry. The Levenson enquiry uncovered the depths of the unethical steps journalists and editors took over the last few years to get to the latest hot story, causing Parliament to declare Rupert Murdoch to be "not a fit person" to lead an international company.[117] Yet, LASPO also fails to effectively protect free speech rights.

LASPO limits success fees to a percentage of the damages awarded to the prevailing party, and eliminates ATE insurance for privacy claims.[118] In a country where lawyers' fees are twice those in the United States, due to the requirement of having a barrister and solicitor, doing away with ATE insurance is LASPO's first mistake. The insurance is a minimal contributor to the overall cost of suit and is one of the few safeguards against the chilling effects of potential bankruptcy.

Instead, Parliament should overhaul the fee shifting structure altogether, and in its place, follow California's Anti-SLAPP model. It would lift the chill caused by the current structure, while allowing plaintiffs the opportunity to establish the validity of their claim. Furthermore the fee shifting provided by such an approach should be accompanied by a requirement for ATE insurance. Together, these would be sufficient to incentivize attorneys to represent parties on both sides.

For such a structure to work, however, the issues of fact and law would have to be straightforward enough for the court to be able to make a ruling based on the limited information provided in the pleadings and defenses. Currently, respondents in U.K. defamation cases carry the burden of proving the truth of defamatory statements.[119] This creates a Sisyphean task for defendants, and is why U.K. courts are

117. Dan Sabbagh & Josh Halliday, *Rupert Murdoch Deemed 'Not a Fit Person' to Run International Company*, THE GUARDIAN (May 1, 2012), *available at* http://www.guardian.co.uk/media/2012/may/01/rupert-murdoch-not-fit-phone-hacking?INTCMP=SRCH.

118. Legal Aid, *supra* note 8, cls. 44, 46.

119. The changes affected by this year's Defamation Act have made great strides towards strengthening speech rights in the U.K., and by extension, around the world. The Act, however, failed to alter this key burden-shifting element. *See generally* Defamation Act, 2013, c. 26 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/2013/26/pdfs/ukpga_20130026_en.pdf.

the libel tourism capital of the world. Sadly, until the U.K. courts are prepared to adjust the burden of proof in defamation law, the necessary clarity will not be available, and such a fee structure will not be possible.