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OPINION

Foreign Law and the First Amendment

 By **FLOYD ABRAMS**
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Late in 1941, the U.S. Supreme Court issued an opinion which, for the first time in our history, starkly distinguished American protection of speech from that of England.

Two union members had been convicted of assaulting nonunion truck drivers. The day before they were to be sentenced, the Los Angeles Times published an editorial urging the trial judge not to grant probation, but to punish the transgressors severely: "This community," the editorial asserted, "needs the example of their assignment to the jute mill."



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Contempt of court proceedings were brought against the newspaper. California law at the time, like that of other states, was rooted in English law, under which such commentary, aimed at a judge during a trial, constituted contempt. Under English law, both then and today, such speech is punishable by massive fines or even imprisonment.

In reversing the ruling of the California courts holding the newspaper in contempt, the Supreme Court set this country on a different course. "No purpose in ratifying the Bill of Rights was clearer," Justice Hugo Black wrote, "than of securing for the people of the United States much greater freedom of . . .

expression . . . than the people of Great Britain had ever enjoyed."

Today, there are sharp distinctions between U.S. and English law. One difference is that under the First Amendment we provide far more protection for speech that is claimed to be libelous.


There is no need for democratic nations to agree upon such matters. The values of free speech and individual reputation are both significant, and it is not surprising that different nations would place different emphasis on each.

But a serious problem has surfaced. In recent years, English libel law has come to have a disturbing impact on the right of Americans to speak out.

England has become a choice venue for libel plaintiffs from around the world, including those who seek to intimidate critics whose works would be protected in the U.S. but might not in that country. That English libel law has increasingly been used to stifle speech about the subject of international terrorism raises the stakes still more.

The case against Rachel Ehrenfeld in England by Saudi banker Khalid Bin Mahfouz is illustrative. Her

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2003 book "Funding Evil: How Terrorism is Funded and How to Stop It" dealt at length with one of the most significant (and difficult and dangerous to research) topics – the funding of terrorism. The conduct of Mr. Bin Mahfouz as a possible funder of terrorism was one of the subjects discussed in the book, which was published in New York.

Twenty-three copies of the book were sold in England. On that slim basis, Mr. Bin Mahfouz sued there, claiming that his reputation had been gravely harmed.

Ms. Ehrenfeld (on the advice of English counsel) refused to appear before the English courts, and a judgment against her was entered in the amount of \$225,000. At any time, Mr. Bin Mahfouz could seek to enforce that judgment. Whether or not he does, the harm to Ms. Ehrenfeld's reputation remains real.

She sought a declaratory judgment in New York determining that the English judgment was not enforceable here, and that her work was protected under American law. But the New York Court of Appeals determined that her suit could not be heard under state law. Any change in that law, the court concluded, was up to the New York legislature.

To the surprise of those who denigrate the ability of the New York legislature to act decisively, both the Assembly and its Senate have unanimously passed a bill that would give Ms. Ehrenfeld and other citizens who are sued for libel abroad the right to obtain a declaration here that their works are protected under American law.

Gov. David Paterson has until the end of today to decide whether or not he will sign the bill. Meanwhile, the Ehrenfeld saga has led Rep. Peter King (R., N.Y.) to propose federal legislation which would provide similar relief.

The need for such legislation has become very real – all the more so since English libel law is increasingly being used to limit public debate about terrorism. Mr. Bin Mahfouz has personally commenced or threatened to commence at least 30 law suits in England. This tactic has served him well in obtaining libel judgments that would be unthinkable as well as unconstitutional here. The danger is that other American writers and publishers will shy away from this crucial subject, out of fear of being sued far from home.

This is a reasonable concern as a good deal of litigation related to reporting on terrorism has been threatened or started in England by individuals who have limited contact with that nation, but who find its libel law congenial.

England should be free to choose its own libel law. But so should we. It is not too much to ask that American law should protect our people when they speak in precisely the "uninhibited, robust and wide-open" manner that the First Amendment was drafted to protect.

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