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COMMENTS

Arbitration for the “Afflicted” – the Viability of Arbitrating Defamation and Libel Claims Considering IPSO’s Pilot Program

EMMA ALTHEIDE*

I. INTRODUCTION

Filing suit for defamation or libel is signing up for an expensive and time-consuming endeavor. If it proceeds to trial, this type of litigation comes with high costs for both sides: potentially millions of dollars in legal fees, and years of court battles.¹ Average judgments against defendant publishers are high, often because uncapped punitive damages are available.² Plaintiffs may wait years to receive a judgment,³ only to spend a significant portion on attorneys’ fees.⁴ Given the inefficiency of the courts in handling defamation and libel claims, how might an alternative forum provide for a quicker process, with lower costs for both sides? How would such a forum affect the interests of the parties? Would the characteristics of arbitration alleviate some of the tensions between litigation and the law that allows people to protect their reputation? This Comment addresses the implications of resolving defamation and libel claims against the press through arbitration, and argues that it is critical for the press to consider utilizing arbitration for these claims, as more publishers face financial pressures and litigation poses a more serious threat than ever before. If the role of the press is to “comfort the afflicted and afflict the comfortable,”⁵ a viable forum for resolving disputes is critical to its continued existence and success.

* B.S. Iowa State University 2015, J.D. University of Missouri 2018. I would like to thank the Editorial Board of the *Journal of Dispute Resolution* and my advisor Professor Richard Reuben for the time and effort assisting with this Comment. I would also like to thank the late Barbara Mack for fostering my interest in journalism and the law, and for reminding her students to never stop learning.

1. Daxton R. Stewart, *The Promise Of Arbitration: Can It Succeed In Journalism As It Has In Other Businesses?*, 6 *APPALACHIAN J. L.* 135, 136-37 (2006).

2. *Id.* at 137.

3. *Id.* at 138.

4. David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 *ST. LOUIS U. L.J.* 1207, 1208 (1995).

5. This quote comes from the fictional character “Mr. Dooley,” created by journalist Finley Peter Dunne. The quote first appeared in a 1902 book, *OBSERVATIONS BY MR. DOOLEY*. FINLEY PETER DUNNE, *OBSERVATIONS BY MR. DOOLEY* 240 (1902). For a more extensive history of the quote, see David Shedden, *Today in Media History: Mr. Dooley: ‘The job of the newspaper is to comfort the afflicted and afflict the comfortable’*, POYNTER (Oct. 7, 2014), <https://www.poynter.org/2014/today-in-media-history-mr-doolley-the-job-of-the-newspaper-is-to-comfort-the-afflicted-and-afflict-the-comfortable/273081/> (quoting FINLEY PETER DUNNE, *OBSERVATIONS BY MR. DOOLEY* 240 (1902)); see also Stewart, *supra* note 1, at 161. Discussed later in this Comment, “afflict the comfortable” was one of the

Recognizing many of the issues associated with litigating defamation and libel claims, major press outlets in the United Kingdom agreed to take part in a pilot arbitration scheme launched in July 2016 by the Independent Press Standards Organisation (IPSO), a regulatory body charged with oversight of press in the U.K.⁶ IPSO was formed as a result of the Leveson Inquiry, an investigation into British media.⁷ The inquiry culminated in an extensive report, which advocated for an alternative option to litigation of defamation and libel claims, leading to the launch of IPSO's pilot arbitration program. Part II of this Comment discusses the events that gave rise to the Leveson Inquiry, and the objectives of the Leveson Report that the pilot arbitration program was designed to address. Part III will address the current media landscape in the United States, and discuss why press outlets are now poised to consider what options to traditional litigation could provide them with time and cost savings. Part IV of this Comment focuses on the interests of plaintiffs in defamation and libel cases, and how arbitration might serve or obstruct those interests, looking to IPSO's pilot program as a prospective framework. It is important to note that while arbitration issues often hinge on questions of contract law, this discussion is limited to the implications of voluntary agreements to arbitrate defamation and libel claims against the press.

II. THE LEVESON REPORT AND IPSO'S PILOT ARBITRATION PROGRAM

Published in November 2012, the Leveson Report comprises the findings of the Leveson Inquiry—an exhaustive review, headed by Lord Justice Leveson⁸, into the culture, practice, and ethics of the British press.⁹ The impetus for the inquiry was the revelation of phone-hacking tactics utilized by reporters and editors at News of the World, a now-defunct British publication.¹⁰ Police investigations over several years revealed that staff at News of the World had hacked into the phones of up to hundreds of people, notable victims including members of the British royal family,¹¹ and thirteen-year-old murder victim Milly Dowler.¹² Dozens of individuals ultimately acknowledged they had illegally acquired confidential information, and several top editors were criminally charged.¹³ In July 2011, Prime Minister

stated goals of news and gossip website Gawker. Farhad Manjoo, *Gawker's Gone. Long Live Gawker.*, N.Y. TIMES (Aug. 24, 2016), http://www.nytimes.com/2016/08/25/technology/gawkers-gone-long-live-gawker.html?smid=fb-nytimes&smtyp=cur&_r=1.

6. *About IPSO*, INDEP. PRESS STANDARDS ORG., <https://www.ipso.co.uk/about-ipso/> (last visited Nov. 19, 2016).

7. THE LEVESON INQUIRY, *About the Inquiry*, LEVESON INQUIRY: CULTURE, PRACTICE AND ETHICS OF THE PRESS, <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/about/> (last visited Nov. 19, 2016) [hereinafter *About the Inquiry*].

8. *Lord Justice Leveson promoted to third top judge*, BBC NEWS (Sept. 26, 2013), <http://www.bbc.com/news/uk-24286946>.

9. *About the Inquiry*, *supra* note 7.

10. *Id.*

11. Don Van Natta Jr., Jo Becker & Graham Bowley, *Tabloid Hack Attack on Royals and Beyond*, N.Y. TIMES (Sept. 1, 2010), http://www.nytimes.com/2010/09/05/magazine/05hacking-t.html?page-wanted=all&_r=0.

12. *Phone Hacking Trial explained*, BBC NEWS (June 25, 2014), <http://www.bbc.com/news/uk-24894403>.

13. Lisa O'Carroll, *Phone hacking: 10 years of resignations, cover-ups and convictions*, THE GUARDIAN (Dec. 11, 2015), <https://www.theguardian.com/media/2015/dec/11/phone-hacking-10-years-resignations-cover-ups-convictions>.

David Cameron named Lord Justice Leveson the head of a two-part inquiry,¹⁴ to first to look into the specific circumstances surrounding the News of the World scandal, and next investigate the general culture and practices of the British press.

The Leveson Inquiry culminated in a 2,000-page final report, published in November 2012. A central recommendation of the Leveson Report was the formation of an independent body to oversee the press, members of which would be “appointed in a genuinely open, transparent and independent way, without any influence from industry or Government.”¹⁵ From this proposal, IPSO was born.¹⁶ On July 26, 2016, IPSO took a major step toward realizing another of the Leveson Report’s major goals:¹⁷ an accessible alternative to litigation of claims against the press.¹⁸ The report took note of the barriers faced by those with limited means who wished to bring claims against powerful media companies,¹⁹ and emphasized the importance of access to justice.²⁰

The report concedes that alternative dispute resolution (ADR) methods must be voluntary,²¹ and ponders how to make these options “sufficiently attractive to the press so as to encourage them to be part of a regime that provides access to them, and equally attractive to those who wish to commence proceedings against the press.”²² One of the more controversial proposals²³ of the report was using cost awards to incentivize the use of ADR.²⁴ The report contemplates changing the conditional fee agreements available to those who pursue traditional litigation, thereby penalizing plaintiffs who refused to arbitrate their claims.²⁵ The report ultimately

14. *Lord Justice Leveson*, THE GUARDIAN (July 24, 2011), <https://www.theguardian.com/media/2011/jul/24/lord-justice-leveson-mediaguardian-100-2011>.

15. Ian Burrell, *Press Regulation: Judge for yourself – the Royal Charter in full*, THE INDEPENDENT (Oct. 29, 2013 10:06 GMT), <http://www.independent.co.uk/news/media/press-regulation-judge-for-yourself-the-royal-charter-in-full-8910572.html>.

16. *About IPSO*, *supra* note 6.

17. David Engel, *Complex, costly and confusing – will IPSO’s pilot arbitration program fly?*, PR WEEK (Aug. 23, 2016), <http://www.prweek.com/article/1406229/complex-costly-confusing-will-ipsos-arbitration-pilot-fly>.

18. *Arbitration*, INDEP. PRESS STANDARDS ORG., <https://www.ipso.co.uk/arbitration/> (last visited Mar. 15, 2017).

19. “Privacy claims and claims of the type that have been pursued against the NoTW [News of the World] are not necessarily straightforward and, in the absence of appropriate legal assistance, there is no question of an equality of arms between those who claim to have been victimised and the press. The wealthy will be able to pursue a remedy in court; there will be less incentive for lawyers to take up the cases of those who are not because the potential uplift in costs now payable out of the damages is likely to be comparatively modest.” THE RIGHT HONOURABLE LORD JUSTICE LEVESON, LEVESON REPORT 1505 (2012), http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780_iv.pdf.

20. *Id.* at 1512.

21. “Of course, no one can be forced to give up their right to go to court in pursuit, or for the protection, of their rights. However, that does not argue against the need for some arbitral system to be available.” *Id.* at 1768.

22. *Id.* at 1696.

23. “Leveson has himself commented that the proposal to penalise claimants who refuse to arbitrate is one of the most controversial parts of his recommendations.” Ned Beale, *Leveson’s media arbitration scheme*, THE GUARDIAN (Dec. 19, 2012, 5:46 EST), <https://www.theguardian.com/law/2012/dec/19/leveson-arbitration-media-claims>.

24. LEVESON, *supra* note 19, at 1698.

25. “Making it more difficult for complainants to use CFAs will put the balance of power firmly back with the newspapers when it comes to court action, making an alternative route to justice of critical importance for ordinary individuals.” *Id.*

recommends an arbitral process, emphasizing that it must be “fair, quick and inexpensive, inquisitorial and free for complainants to use.”²⁶

IPSO’s pilot arbitration scheme is billed as a “cost-effective process for resolving legal claims against the press.”²⁷ The scheme’s jurisdiction extends to defamation, privacy, and harassment claims, brought within twelve months of the alleged wrongdoing, against newspapers or magazines participating in the program.²⁸ Some of the most prominent media groups in the United Kingdom are among the participants, including publishers of Daily Mirror, Daily Telegraph, OK! Magazine, The Sun, and Daily Mail.²⁹ While these publications have agreed to take part in the pilot program, both parties must agree to arbitration for every individual claim.³⁰ The scheme utilizes a panel of arbitrators, all of whom are barristers approved by IPSO and found to have the “necessary experience and expertise in media law.”³¹ There are currently eight members on this panel, all with practice experience in media and privacy law, often on high-profile cases. Claimants under the pilot scheme are required to pay a £300 administrative fee, and an additional fee of £2,500 if the claim proceeds to a final ruling.³² Publishers are initially required to pay £3,800, in addition to their own legal costs, and the same £2,500 final ruling fee.³³ The rules leave the arbitrator the discretion to award fees and legal costs “based upon the conduct of the parties where this is fair and reasonable.”³⁴ According to IPSO, arbitrators will try to complete claims within 90 days of their appointment.³⁵

Given the lower costs and faster results,³⁶ it appears advantageous for claimants with limited means to utilize the pilot program. As discussed later in this Comment, many factors affect the actions of plaintiffs, particularly whether they are a private or public figure. The yearlong IPSO pilot program will end in July 2017, so analysis of its successes or failures will not be available for some time after the publication of this Comment. However, the establishment of such a program reflects the need for a more cost-efficient option for defamation and libel claims, and the potential for such an option to benefit both plaintiffs and defendants. This Comment will next address the current media landscape in the United States, and discuss why U.S. publishers should consider following in the footsteps of their British counterparts in order to reap the benefits of arbitration.

26. *Id.* at 1768.

27. *Arbitration*, *supra* note 18.

28. *What claims can I make?*, INDEP. PRESS STANDARDS ORG., <https://www.ipso.co.uk/arbitration/what-claims-can-i-make/> (last visited Mar. 10, 2017).

29. *Participating publications*, INDEP. PRESS STANDARDS ORG., <https://www.ipso.co.uk/arbitration/participating-publications/> (last visited Mar. 10, 2017).

30. *Arbitration FAQs*, INDEP. PRESS STANDARDS ORG., <https://www.ipso.co.uk/faqs/arbitration/> (last visited Mar. 10, 2017).

31. *Arbitration panel*, INDEP. PRESS STANDARDS ORG., <https://www.ipso.co.uk/arbitration/arbitrator-panel/> (last visited Mar. 10, 2017).

32. *Arbitration FAQs*, *supra* note 30.

33. *IPSO Pilot Arbitration Scheme Summary*, INDEP. PRESS STANDARDS ORG. (July 2016), <https://www.ipso.co.uk/media/1263/ipso-pilot-arbitration-scheme-summary-july-2016.pdf>.

34. *Id.*

35. *Arbitration FAQs*, *supra* note 30.

36. Jennifer A. Marler, *Arbitrating Employment Discrimination Claims: The Lower Courts Extend Gilmer v. Interstate/Johnson Lane Corp. To Include Individual Employment Contracts*, 74 WASH. U. L.Q. 443, 474 (1996); Stewart, *supra* note 1, at 138.

III. ARBITRATION AND THE INTERESTS OF THE PRESS

While the threat of litigation can make publishers vulnerable, the press has an interest in contesting claims, because quick settlements may only encourage further suits.³⁷ This section highlights the major interests of press outlets in defending claims, and discusses why arbitration offers benefits that alleviate the burdens of litigation.

A. *Concerns Over Strategic Lawsuits Against Public Participation (SLAPPs) in the U.S.*

The United States has recently seen rising concern about threats to press freedom, thanks in part to several high-profile suits against media companies, as well as the election of Donald J. Trump to the presidency.³⁸ One of these highly publicized suits was the invasion-of-privacy claim brought by Hulk Hogan, which shuttered Gawker, a popular news and gossip site.³⁹ After facing an initial jury award of \$140 million, Gawker sold itself to Univision in August 2016.⁴⁰ The parties eventually reached a \$31 million settlement, but Gawker lost its independence and its CEO, Nick Denton.⁴¹ Throughout the course of the Gawker litigation, it was revealed that Hulk Hogan's claim was being financed by Peter Thiel, Silicon Valley investor and subject of the 2007 Gawker headline "Peter Thiel is totally gay, people,"⁴² in an apparent act of vengeance against the publication for revealing his sexual orientation. News magazine Mother Jones similarly sunk millions of dollars into defending a defamation suit arising from a 2012 article⁴³ about Republican party donor Frank VanderSloot, who brought his claim after the site broke the story of Mitt Romney's "47 percent" remarks,⁴⁴ which some believe cost Romney the

37. "Professor David Anderson noted that the press may find itself in the position of being a 'repeat player' in libel litigation, 'committed to a policy of aggressively contesting all libel claims' to deter future libel plaintiffs." Stewart, *supra* note 1, at 158-59.

38. Matt Flegenheimer & Michael Barbaro, *Donald Trump is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html>.

39. Nick Denton, *How Things Work*, GAWKER (Aug. 22, 2016, 4:33 PM), <http://gawker.com/how-things-work-1785604699>.

40. Sydney Ember, *Gawker and Hulk Hogan Reach \$31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), <https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html>.

41. *Id.*

42. Owen Thomas, *Peter Thiel is totally gay, people*, GAWKER (Dec. 19, 2007, 7:05 PM), <http://gawker.com/335894/peter-thiel-is-totally-gay-people>.

43. The story that was the subject of VanderSloot's suit noted that his company, Melaleuca, gave \$1 million to Restore Our Future, a super-PAC supporting Mitt Romney. The story also discussed actions VanderSloot had taken in opposition to gay rights. Mother Jones acknowledged that it does not know whether the claim by VanderSloot is connected to the story on the "47 percent" remarks. Stephanie Mencimer, *Pyramid-Like Company Ponies Up \$1 Million for Mitt Romney*, MOTHER JONES (Feb. 6, 2016, 6:36 AM), <http://www.moherjones.com/politics/2012/02/mitt-romney-melaleuca-frank-vandersloot>.

44. During the 2012 presidential campaign, Republican candidate Mitt Romney was captured on video while speaking at a fundraising event. In his remarks, he stated, "there are 47 percent of the people who will vote for the president no matter what . . . there are 47 percent who are with him, who are dependent upon government, who believe that they are victims, who believe the government has a responsibility to care for them, who believe that they are entitled to health care, to food, to housing, to you-name-it. That that's an entitlement. And the government should give it to them. And they will vote for this president no matter what." Romney went on to state that the people he described paid no income taxes. Molly

2012 presidential election.⁴⁵ Mother Jones ultimately won a favorable verdict, but acknowledged that the suit “consumed a good part of the past two and a half years and has cost millions (yes, millions) in legal fees.”⁴⁶ Both cases are examples of what have been termed Strategic Lawsuits Against Public Participation, or SLAPPs,⁴⁷ which “function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense.”⁴⁸ Twenty-eight states have enacted anti-SLAPP legislation.⁴⁹ A federal anti-SLAPP bill, called the Speak Free Act, was introduced in Congress in 2015.⁵⁰ The legislation allows for a special motion to dismiss SLAPPs that arise from expression made in connection with an official proceeding or matter of public concern.⁵¹

To some, the Gawker and Mother Jones suits are anomalies, and not indicative of the most ubiquitous challenges facing publishers today. To others, however, the cases are cause for legitimate concern about press freedom.⁵² Because of the instantaneous nature of modern news, largely disseminated through social media, opportunities for defamation and libel claims abound.⁵³ Particularly in regard to entertainment news and celebrity coverage, many of the practices utilized by Gawker, including “reflexively criticizing people without giving them the benefit of the doubt, weaponizing internet outrage against ordinary people who didn’t merit it — have now become de rigueur online.”⁵⁴ In her work on the laws of image in the United States, University of Buffalo law professor Samantha Barbas suggests that as the opportunities for damaging one’s reputation have grown in the digital age, so has the public acceptance of bringing suit.⁵⁵ Her book, “Laws of Image: Privacy and Publicity in America,” traces the concept of image through the turn of the century and into the modern digital era, in which each person’s image is crafted and maintained through more and more platforms.⁵⁶ Barbas recognizes the increased

Moorhead, *Mitt Romney says 47 percent of Americans pay no income tax*, POLITIFACT (Sept. 18, 2012, 6:06 PM), <http://www.politifact.com/truth-o-meter/statements/2012/sep/18/mitt-romney/romney-says-47-percent-americans-pay-no-income-tax/>.

45. Monika Bauerlein & Clara Jeffery, *We Were Sued by a Billionaire Political Donor. We Won. Here’s What Happened.*, MOTHER JONES (Oct. 8, 2015, 3:51 PM), <http://www.motherjones.com/media/2015/10/mother-jones-vandersloot-melaleuca-lawsuit>.

46. *Id.*

47. *Anti-SLAPP laws*, REP. COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/anti-slapp-laws-0> (last visited Mar. 10, 2017).

48. Alice Glover & Marcus Jimison, *S.L.A.P.P. Suits: A First Amendment Issue And Beyond*, 21 N.C. CENT. L.J. 122, 122 (1995).

49. *State Anti-SLAPP Laws*, PUBLIC PARTICIPATION PROJECT, <http://www.anti-slapp.org/your-states-free-speech-protection/> (last visited Mar. 10, 2017).

50. H.R. 2304, 114th Cong. (2015).

51. *Id.*

52. Katie Rogers & John Herrman, *Thiel-Gawker Fight Raises Concerns About Press Freedom*, N.Y. TIMES (May 26, 2016), <http://www.nytimes.com/2016/05/27/business/media/thiel-gawker-fight-raises-concerns-about-press-freedom.html>.

53. See Shawn A. Bone, *Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by Gutnick v. Dow Jones & Co.*, 62 WASH & LEE L. REV. 279, 335 (2005).

54. Manjoo, *supra* note 5.

55. “We can see, nonetheless, a growing ‘claims consciousness’ around personal image. As the law expanded its authority over image-based harms and emotional harms, as privacy and libel litigation gained publicity and apparent social approval, there was a popular awareness that affronts to one’s public persona could be dealt with legally, if one chose—that legal recourse was one avenue, among many, that could be pursued, and perhaps should be pursued.” SAMANTHA BARBAS, *LAWS OF IMAGE: PRIVACY AND PUBLICITY IN AMERICA* 200 (2015).

56. *Id.* at 201.

authority of the law over personal image, and suggests that the effect of this has been to reinforce individuals’ sense of protectiveness over their own image.⁵⁷

Concern about press freedom swelled with the victory of President Donald Trump in the 2016 U.S. election.⁵⁸ Throughout his campaign, Trump expressed support for “opening up”⁵⁹ libel laws, and making it easier to sue publishers of content deemed “purposely negative and horrible and false.”⁶⁰ Over the years, Trump has shown a fondness for threatening media entities with legal action.⁶¹ He garnered particular publicity during his campaign after he threatened The New York Times with a libel suit based on the paper’s publication of an article⁶² featuring two women who alleged Trump had groped them.⁶³ Trump’s promises to open up libel laws have been called into question,⁶⁴ but his remarks were not without a chilling effect. In the weeks following Trump’s threat to sue The New York Times, the American Bar Association declined to publish a report compiled by its own committee of media lawyers on Trump’s litigation history, citing the risk of being sued.⁶⁵ One person who emerged as an ardent supporter of Trump’s campaign, donating a reported \$1.25 million in the final weeks before the election, was Peter Thiel.⁶⁶

In short, media outlets today are functioning in a climate where, each time they publish content, they put themselves at risk of suit.⁶⁷ Should they choose to defend a claim for defamation and libel—which is likely in their best interest⁶⁸—one judgment could potentially bankrupt them. In an economy where turning a profit is already increasingly difficult,⁶⁹ publishers would benefit from cutting costs wher-

57. *Id.* at 200.

58. Mirren Gidda & Zach Schonfeld, *Donald Trump’s Threat to Press Freedom: Why It Matters*, NEWSWEEK (Nov. 12, 2016, 11:02 AM), <http://www.newsweek.com/2016-election-donald-trump-press-freedom-first-amendment-520389>.

59. Hadas Gold, *Donald Trump: We’re going to ‘open up’ libel laws*, POLITICO (Feb. 26, 2016, 2:31 PM), <http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>.

60. *Id.*

61. Trevor Timm, *Trump’s many, many threats to sue the press since launching his campaign*, COLUMBIA JOURNALISM REV. (Oct. 3, 2016), http://www.cjr.org/first_person/donald_trump_law_suit_new_york_times.php.

62. Megan Twohey & Michael Barbaro, *Two Women Say Donald Trump Touched Them Inappropriately*, N.Y. TIMES (Oct. 12, 2016), <http://www.nytimes.com/2016/10/13/us/politics/donald-trump-women.html?action=click&contentCollection=Politics&module=RelatedCoverage®ion=Marginalia&pptype=article>.

63. Alan Rappeport, *Donald Trump Threatens to Sue The Times Over Article on Unwanted Advances*, N.Y. TIMES (Oct. 13, 2016), <http://www.nytimes.com/2016/10/14/us/politics/donald-trump-lawsuit-threat.html>.

64. Brian Naylor, *Trump’s Promise to “Open Up” Libel Laws Unlikely to Be Kept*, NPR (Mar. 26, 2016, 6:00 AM), <http://www.npr.org/2016/03/26/471846238/trumps-promise-to-open-up-libel-laws-unlikely-to-be-kept>.

65. Adam Liptak, *Lawyers’ group stifled report calling Trump a ‘libel bully’ over lawsuit fears*, BOSTON GLOBE (Oct. 25, 2016), http://www.bostonglobe.com/news/politics/2016/10/24/fearing-trump-bar-association-stifles-report-calling-him-libel-bully/anji4HveEWLas7oQIf3U9O/story.html?s_campaign=bostonglobe%3Asocialflow%3Afacebook.

66. David Streitfeld, *Peter Thiel’s Bet on Donald Trump Pays Off*, N.Y. TIMES (Nov. 10, 2016), <http://www.nytimes.com/2016/11/10/technology/peter-thiel-bet-donald-trump-wins-big.html>.

67. See Bone, *supra* note 53, at 335.

68. “Professor David Anderson noted that the press may find itself in the position of being a ‘repeat player’ in libel litigation, ‘committed to a policy of aggressively contesting all libel claims’ to deter future libel plaintiffs.” Stewart, *supra* note 1, at 158-59.

69. Amy Mitchell & Jesse Holcomb, *State of the News Media 2016*, PEW RES. CTR. (June 15, 2016), <http://www.journalism.org/2016/06/15/state-of-the-news-media-2016/>.

ever possible. It is important for the future of the press that they consider the benefits of arbitration, and follow the example of outlets in the U.K. in testing the viability of an arbitration scheme.

Plaintiffs behind SLAPPs—and any suits generally brought in an effort to garner publicity more than compensation—are unlikely, for many reasons, to be interested in an alternative to litigation. It is the cost, the time, and the spotlight of trial that they seek, and it is these that arbitration would temper. That is not to say arbitration is devoid of benefits for this class of plaintiffs, and the next section will discuss the potential benefits these plaintiffs may realize by arbitrating. Despite some plaintiffs' partiality to litigation, the trend of threats to press freedom illustrates why it may be important for media outlets to begin utilizing arbitration where the plaintiffs are amenable to it, to conserve time and expenses whenever possible. In this endeavor, U.S. press outlets can look to IPSO's pilot program, and their British counterparts, as "early adopters" of sorts.

B. Time and Cost Savings

Paul S. Voakes, journalism professor at the University of Indiana, conducted a survey to better understand the impact of defamation and libel suits on defendant journalists. Discussed later in this Comment, the Iowa Libel Research Project found significant evidence that libel plaintiffs felt they had won just by suing. The study by Voakes looked at the natural converse: did media defendants feel they had lost just by being sued? Voakes noted that this "would overstate the results, but it does seem clear that these journalists, almost all of them victorious in court, felt some degree of sting in the litigation they experienced."⁷⁰ In his interviews, Voakes spoke with journalists who attributed a chilling effect to the cost and time of possible litigation, more so than any moral or journalistic obligation.⁷¹

The most readily apparent advantage of a forum like arbitration for media defendants is lower cost, and less time before a final ruling.⁷² Press outlets can spend years defending defamation and libel claims in court, particularly in cases where an actual malice standard is applied.⁷³ Under the American Arbitration Association's rules, fees depend on the number of arbitrators used, and the relief sought.⁷⁴ In cases before a single arbitrator, the consumer filing fee is \$200, and the business filing fee is \$1,700.⁷⁵ Daily arbitrator fees are either \$1,500 or \$750, depending on whether the case is in-person, or a desk arbitration.⁷⁶

Beyond the lower upfront costs, other arbitration instruments may weigh in the press's favor, such as caps on damages. Under the pilot program implemented by

70. Paul S. Voakes, *Lessons Learned: A Lawsuit's Impact on Journalistic Behavior*, 4 COMM. L. & POL'Y 87, 106 (1999).

71. *Id.* at 104-105.

72. Marler, *supra* note 36, at 474.

73. Stewart, *supra* note 1, at 138.

74. AM. ARBITRATION ASS'N, CONSUMER ARBITRATION RULES 8 (2016), <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased>.

75. *Id.* at 33.

76. *Id.* See also Am. Arbitration Ass'n, *AAA Arbitration Glossary of Terms*, ALTERNATIVE DISP. RESOL., https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004198 (last visited Mar. 10, 2017) ("In a Desk Arbitration, the parties submit their arguments and evidence to the arbitrator in writing. The arbitrator then makes an award based only on the documents. No hearing is held.")

IPSO, an arbitrator may award a maximum of £50,000 in damages.⁷⁷ This amount is not insignificant, but it pales in comparison to the millions of dollars in judgments and attorneys' fees faced by Gawker and Mother Jones.⁷⁸

The other primary aspect of arbitration's efficiency is that it typically takes less time than litigation. "According to the National Arbitration Forum, a dispute resolution services provider that handles many commercial and consumer cases, the median time it takes to arbitrate such disputes is 104 days, compared to 650 to 720 days for litigation of similar cases in court."⁷⁹ The IPSO program aims to resolve claims within 90 days.⁸⁰

C. *Choice of Fact-Finder*

In determining what forum is likely to be most favorable toward them, media defendants must also consider who will serve as the fact-finder. Media companies would likely be eager to avoid juries, which have historically handed down large verdicts for libel plaintiffs (an average of \$2.9 million from 1980 to 2006).⁸¹ Under the rules of the American Arbitration Association, parties are able to select arbitrators with some expertise in the subject matter of the dispute.⁸² This could be valuable in the context of libel and defamation claims, in that media defendants could utilize arbitrators with an understanding of both First Amendment law and traditional newsroom practices, and not worry about a jury's understanding of the case.⁸³

As mentioned earlier in this discussion, IPSO's pilot program employs a panel of eight arbitrators, all barristers deemed to have the requisite experience and expertise in media law.⁸⁴ An article in *The Guardian* presented a twofold concern about this aspect of the scheme: whether the large number of media lawyers with ties to media organizations would impact the availability of neutral mediators, and whether an arbitration against the press could be effectively run with just one person at the helm.⁸⁵ The latter issue could be ameliorated by a suggestion in the very same article—providing arbitrators with additional clerks to handle procedural legwork, though this could result in additional administrative costs. Neutrality would likely be the larger issue, since people with expertise in media law very well may have experience working for the press, whether as a journalist, editor, or general counsel. Still, though, in a nation as large as the United States, the availability of neutral experts on media law is not likely to preclude the arbitration of libel and defamation claims.

D. *Limited Review*

A defendant media company is also likely to look favorably upon the limited review available in arbitration. Restrictions on review not only further curb the time

77. *Arbitration FAQs*, *supra* note 30.

78. Ember, *supra* note 40; Bauerlein & Jeffery, *supra* note 45.

79. Stewart, *supra* note 1, at 156.

80. *Arbitration FAQs*, *supra* note 30.

81. Stewart, *supra* note 1, at 157. *See also* Ember, *supra* note 40.

82. Stewart, *supra* note 1, at 157; *Arbitration FAQs*, *supra* note 30.

83. Stewart, *supra* note 1, at 157.

84. *Arbitration panel*, *supra* note 31.

85. Beale, *supra* note 23.

and cost of the entire process, but also lend assurance to the parties that the arbitrator's decision will be binding and final. Especially where, like in IPSO's program, arbitration is considered in the context of voluntary agreements, the parties would likely agree at the outset on the finality of the ruling. Under the Federal Arbitration Act, grounds for vacating an arbitrator's award are limited to fraud or corruption, or an arbitrator being guilty of misconduct or exceeding their powers.⁸⁶ Given that some of the vulnerability of publishers lies in the lengthy litigation process of defamation and libel claims, lesser opportunity for review would be advantageous for publishers.

In IPSO's pilot program, most claims are first directed to a preliminary ruling procedure, where the arbitrator rules on the core issues.⁸⁷ After this preliminary ruling, the arbitration is stayed and the parties have a 21-day period in which they may reach a settlement or the claimant may withdraw the claim.⁸⁸ At the parties' request, the arbitration may proceed to a final, binding ruling.⁸⁹

E. Potential Disadvantages

Though arbitration offers many benefits to publishers, there are potential downsides to consider. One is the wide range of available remedies. Arbitration of a defamation or libel claim may result in awards that would not be available in a traditional trial, such as printing a retraction, or even giving the opposing party the chance to tell their side of the story.⁹⁰ Press outlets are unlikely to relish any outside control over their content, and may prefer to take a monetary loss instead.

The most significant downside of arbitration for the media is the potential for changes in the application of First Amendment protections. The precedent of First Amendment law puts the press in a position of relative comfort with claims for defamation and libel. Under the Supreme Court's decision in *New York Times v. Sullivan*, a public official must prove actual malice—knowledge that the published information was false, or published with reckless disregard as to whether it was false—in order to succeed in a claim for defamation or libel.⁹¹ Public officials have struggled to bring successful claims since this high standard was established.⁹² In *Gertz v. Welch*, the Supreme Court held that different standards apply to public and private plaintiffs, and states may allow for private individuals to recover on any standard except no-fault liability.⁹³ This precedent does not necessarily bind arbitrators,⁹⁴ which could be of great concern for press outlets going to arbitration. However, in the context of voluntary agreements to arbitrate, parties would have the opportunity to agree on the relevant law to be applied. Additionally, a change

86. 9 U.S.C. § 10(a) (2012); Stewart, *supra* note 1, at 157.

87. *IPSO Pilot Arbitration Scheme Summary*, *supra* note 33.

88. *Id.*

89. *Id.*

90. Stewart, *supra* note 1, at 159.

91. *New York Times v. Sullivan*, 376 U.S. 254, 283 (1964).

92. Claire Steinman, *Defamation And False Rape Claims: Policies, Attitudes, And Suggested Reform In The United States And The United Kingdom*, 19 *CARDOZO J.L. & GENDER* 907, 911 (2013).

93. *Gertz v. Robert Welch*, 418 U.S. 323, 347 (1974).

94. Stewart, *supra* note 1, at 160.

in application of First Amendment protections may incentivize plaintiffs to pursue arbitration.⁹⁵

IV. ARBITRATION AND THE INTERESTS OF PLAINTIFFS

Other authors have explored the prospect of binding readers to arbitration through clauses in publications themselves,⁹⁶ but this Comment does not address the contract implications of such a proposal. Instead, this discussion is limited to voluntary agreements to arbitrate defamation and libel claims, and the reasons arbitration would ultimately benefit both sides. In libel and defamation law, current status quo favors the extremes—it is typically wealthy individuals who can bring suits, and publications with extensive resources that can survive them.⁹⁷ So why might someone with a claim for defamation or libel choose arbitration?⁹⁸ This section assesses the most common interests and objectives of libel plaintiffs, and argues that the benefits are likely to outweigh any perceived advantages of litigation.

A. *Libel Plaintiffs Seek More than Monetary Redress*

University of Iowa professors Randall Bezanson, Gilbert Cranberg and John Soloski, interested in the motivations of defamation and libel plaintiffs, began the Iowa Libel Research Project, to “better understand the dynamics of the libel dispute and the actions and motivations of the parties to it.”⁹⁹ They conducted an extensive study of libel claims against the media, interviewing 164 plaintiffs and defendants to libel suits, and assessing data on rates of suit, liability, and settlement. Their analysis of plaintiffs’ retrospective attitudes toward libel litigation is valuable when considering why plaintiffs may benefit from arbitrating these claims.

The researchers sought to understand why the plaintiffs brought suit when the odds of winning were low,¹⁰⁰ and the average awards modest.¹⁰¹ One of the major conclusions, based on their own research and earlier work by the Iowa Libel Research Project, was that plaintiffs’ primary incentives were nonmonetary.¹⁰² What plaintiffs wanted most—more than pecuniary relief—was to restore their reputation by correcting the factual record, and the research found that “this objective is accomplished in significant degree independent of the judicial result in the case.”¹⁰³

95. See Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 823 (1985).

96. See Stewart, *supra* note 1, at 141.

97. LEVESON, *supra* note 19, at 1500 (“Those of sufficient personal wealth can afford to fund legal advice and representation. Those who are not, cannot.”).

98. See generally Andrea Kupfer Schneider, *Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113 (2000) (assessing ADR options for a defamation claimant, and how his attorney might counsel him on each one).

99. Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789, 789-91 (1986).

100. “Most plaintiffs lost in court. Even for those who won, the terms of judicial victory were disappointing. Successful litigants obtained an average of \$ 80,000 in damage awards. Excluding two large awards, however, the average recovery was only \$20,600, a sizeable portion of which went to fees and costs.” *Id.* at 790-91.

101. *Id.* at 791.

102. *Id.*; see also Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226 (1985) [hereinafter Bezanson, *Libel Law*].

103. Bezanson, *Libel Law*, *supra* note 102, at 227.

In studying the life cycle of a libel suit, the researchers found that many plaintiffs first contacted the media outlet directly, then, unhappy with the response, hired counsel in order to bring suit.¹⁰⁴ The media defendants generally confirmed this view.¹⁰⁵ Focused more on setting the record straight than earning a windfall, plaintiffs saw the filing of the claim as a significant achievement in itself: “To them, the libel suit represents an official engagement of the judicial system on their behalf, and the act of suing represents a legitimization of their claims of falsehood.”¹⁰⁶

This view of engaging the justice system as a form of compensation in itself illustrates the role of honor perceived to be at stake in these suits.¹⁰⁷ In his discussion of honor and the law, William and Mary Law School professor Nathan Oman explores the historical practice of dueling, and its underlying moral purpose. While the actual practice of the duel is a clear anachronism, its objective of creating “a situation of acknowledged equality”¹⁰⁸ lives on—it is merely sought through other means today. Professor Samantha Barbas similarly compares the honor at stake in modern defamation and libel claims with the practice of dueling in the premodern South.¹⁰⁹ She proposes viewing the modern lawsuit as “an accompaniment to, or perhaps substitute for dueling and other acts of physical violence in defense of honor and reputation.”¹¹⁰ These comparisons illustrate why the underlying injuries in a suit for defamation or libel are best redressed by the act of formally addressing the dispute. In proposing an international arbitral forum for the resolution of defamation claims, Shawn Bone ponders what remedy should be available if a determination of falsity is made.¹¹¹ Looking at the underlying purposes of the law, Bone concludes the best remedy is not damages, but “to require that other words be used to restore the reputation of the plaintiff.”¹¹² If nonmonetary compensation is truly what best serves the interests of libel plaintiffs, it is apparent that the current litigation process is not an efficient means of achieving this.

Would arbitration serve the purpose of an official engagement of the justice system? While in a certain sense arbitration may be viewed as a less formal process than litigation,¹¹³ filing a claim through arbitration is by no means “unofficial.” Parties who agree to arbitrate a claim are thereby obligating themselves to participate in the adjudication process and adhere to the ultimate ruling. Arbitration is a widely used method of dispute resolution, and has grown in popularity with large businesses over the last several decades.¹¹⁴ Since the passing of the Federal Arbitration Act in 1925, “[arbitration’s] proponents have secured institutional acceptance of the process from business, bench and bar.”¹¹⁵ The very existence of IPSO’s program

104. Bezanson, *supra* note 99, at 791-92.

105. *Id.*

106. *Id.* at 791.

107. “The claims of honor are strongest in the case of intentional torts, particularly those that are aimed directly at a subject’s standing before others, such as the torts of libel or defamation.” Nathan B. Oman, *The Honor Of Private Law*, 80 *FORDHAM L. REV.* 31, 64 (2011).

108. *Id.* at 58.

109. BARBAS, *supra* note 55, at 76.

110. BARBAS, *supra* note 55, at 77.

111. Bone, *supra* note 53, at 331.

112. *Id.*

113. Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 *IND. L.J.* 425, 433 (1988).

114. See Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 *AM. REV. INT’L ARB.* 297, 300 (2014) [hereinafter Stipanowich, *Reflections*].

115. Stipanowich, *supra* note 113, at 425-26.

demonstrates that a developed nation, with a long and influential judicial history, recognizes arbitration as a legitimate, and often appropriate, means of resolving defamation and libel claims.

B. The Modern Litigation Process Presents Substantial Obstacles to Plaintiffs

As was discussed in the context of the IPSO program, the primary benefit of an alternative to litigation for plaintiffs is lower cost and faster results. Suits in the United States can drag on for years while attorneys' fees and court costs pile up, as the Gawker and Mother Jones cases illustrate.¹¹⁶ Here, again, the interests of private and public plaintiffs are likely to diverge. Public figures are cognizant of the hurdles of litigation at the outset, and they are unlikely to fear the economic repercussions of suing.¹¹⁷ According to the Iowa project, it was these public plaintiffs who saw litigation as the most effective solution available to them, given that cost was less of an issue, and a public statement denying the libel was seen as a less desirable remedy.¹¹⁸ In contrast, plaintiffs who have a lower legal standard to meet for a defamation claim¹¹⁹ were the least likely to see litigation as providing an attractive remedy. Those private plaintiffs were the ones most economically vulnerable, most unhappy with their counsel, and most likely to end up paying the bill. The study concluded that private plaintiffs were "directly and effectively discouraged by the rules and results of the legal system."¹²⁰

It is not merely the high cost, but the complexities of the judicial process that frustrate plaintiffs. Of the libel plaintiffs surveyed through the University of Iowa project, 34% expressed dissatisfaction with the end result of their suit, and 31% expressed extreme dissatisfaction.¹²¹ In studying specific comments from the plaintiffs, the study found this dissatisfaction was tied to frustration with the unresponsiveness of the judicial system to their claimed harm.¹²² The plaintiffs felt that "while the lawsuit itself serves their reputational objectives, the formal legal system often does not." Despite this significant dissatisfaction with the judicial system, "[a]bsent an alternative process, 95% of the plaintiffs stated that they would sue again. This proportion holds for plaintiffs who lost."¹²³ Just 10% of losing plaintiffs cited the punishment of media as an accomplishment of suing. This relatively low number could be attributable to the fact that these plaintiffs lost, and therefore did not achieve the full "punishment" they might have sought. But the researchers' results suggested another reason for this number: a shift from anger and frustration with the media, to anger with the justice system. Out of the plaintiffs who expressed dissatisfaction with their litigation experience, "67% direct it in whole or in part

116. Denton, *supra* note 39; Bauerlein & Jeffery, *supra* note 45.

117. "As a general proposition, a libel suit costs little if anything for plaintiffs classified as public officials or public figures under the Sullivan and Gertz cases . . . While very few plaintiffs win, and the incidence of judicial victory is smallest with public officials, the vast majority of plaintiffs who lost indicate that they would sue again, *knowing what happened*; indeed, virtually every public official we spoke with would sue again." Bezanson, *Libel Law*, *supra* note 102, at 228-29.

118. Bezanson, *supra* note 99, at 798-99.

119. *Gertz v. Robert Welch*, 418 U.S. 323, 342 (1974).

120. Bezanson, *supra* note 99, at 799.

121. *Id.* at 795.

122. *Id.*

123. *Id.* at 797.

toward the judicial system.”¹²⁴ According to the authors, “[t]his strongly suggests that a disjunction exists between the plaintiffs’ objectives—some of which are achieved despite the formal judicial outcome—and the rules and results of the judicial process. It also suggests that this disjunction is a source of great frustration among plaintiffs.”¹²⁵ If the “rules and results of the judicial process” are one of the primary affronts to libel plaintiffs, perhaps a system with different rules may yield more favorable results. Further, a survey conducted by David Boies found that, out of the total costs of defamation litigation spent by both plaintiff and defendant, between 3.5% and 8% of the total expenses ended up going to the plaintiff, with the rest covering legal fees and expenses.¹²⁶

C. *The Confidentiality of Arbitration May Further Plaintiffs’ Reputational Interest*

Plaintiffs with a claim for libel or defamation already feel they have suffered a significant harm in the public eye. While to some extent, plaintiffs wish to make a public reclamation of honor through a defamation suit, in doing so, they expose themselves to the risk of further humiliation and harm. The discovery process in traditional litigation can be lengthy and thorough, sometimes revealing sensitive information.¹²⁷ In light of this, the closed-doors nature of arbitration¹²⁸ may be attractive to plaintiffs who worry about what a contentious trial could uncover. In Hulk Hogan’s suit against Gawker, the trial focused on the distinction between Terry Bollea (Hogan’s real name) and his wrestling persona, whether or not his sex life was newsworthy, and his personal relationships with the other parties involved.¹²⁹ Laying out intimate, personal details in a courtroom does not very well serve the interest of most libel and defamation plaintiffs: shielding their reputation. In IPSO’s pilot scheme, communications between the parties, and all rulings but the final ruling, are treated as confidential unless parties agree otherwise in writing.¹³⁰

An additional reputational concern is the prospect of further publicity.¹³¹ Forty percent of plaintiffs in the University of Iowa study cited the stopping of further publicity as an accomplishment.¹³² It is hard to imagine this accomplishment changing in the context of arbitration. Plaintiffs’ grievances would be just as clear to the publisher, and the cessation of further publicity just as available a remedy as in litigation. In fact, publicity surrounding the suit itself might be reduced in arbitration, if proceedings were kept confidential. And, although the broader remedial powers of arbitrators may be a drawback for defendants,¹³³ plaintiffs could see this

124. *Id.* at 796.

125. *Id.*

126. Boies, *supra* note 4.

127. Katie M. Patton, *Unfolding Discovery Issues That Plague Sexual Harassment Suits*, 57 HASTINGS L.J. 991, 991 (2006).

128. Richard Reuben, *Secrecy and Transparency in Dispute Resolution: Confidentiality in Arbitration: Beyond the Myth*, 54 KAN. L. REV. 1255, 1256 (2006).

129. Ravi Somaiya, *When Is Hulk Hogan Not Hulk Hogan?*, N.Y. TIMES (Mar. 8, 2016), <http://www.nytimes.com/2016/03/09/business/media/when-is-hulk-hogan-not-hulk-hogan.html>.

130. INDEP. PRESS STANDARDS ORG., ARBITRATION PILOT SCHEME RULES 21 (2016), <https://www.ipso.co.uk/media/1263/ipso-pilot-arbitration-scheme-rules-may-2016.pdf>.

131. Bezanson, *supra* note 99, at 794.

132. *Id.* at 795.

133. Stewart, *supra* note 1, at 159.

as a way to receive something more meaningful than monetary compensation. Under the IPSO program, arbitrators may order the publisher not to re-publish the information at issue, remove the information from a website or online platform, deliver or destroy offending material, and even publish a summary of the arbitrator's final rulings.¹³⁴ However, IPSO arbitrators do not have the authority to grant pre-publication injunctions.¹³⁵

V. CONCLUSION

The modern litigation process for defamation and libel claims against the press does much to delay or prevent both parties from achieving their interests. The time and expense of litigation can both prevent plaintiffs with valid claims from ever bringing them, and threaten the very existence of the media entities that choose to defend themselves. The digital age allows for myriad opportunities for claims, and it is increasingly acceptable for plaintiffs to seek formal redress. Those who have been wronged often desire something other than money. They wish to have their voice heard, and their reputation restored. The characteristics of arbitration make it a better forum, in many cases, for resolving claims of defamation and libel against the press. Recognizing this, press outlets in the United Kingdom are in the process of testing an arbitral scheme that will lessen the barriers to justice faced by parties to these claims. In the United States, SLAPPs present legitimate threats to publications, and politicians can run successful campaigns on promises to punish the media. Arbitration offers a chance to resolve claims with time and cost savings on both sides, and a better chance for deserving plaintiffs to achieve meaningful recovery. Media outlets must be attentive to the outcomes of IPSO's pilot arbitration program, and view it as a prospective model for arbitrating defamation and libel claims here in the United States.

134. *What outcomes are available?*, INDEP. PRESS STANDARDS ORG., <https://www.ipso.co.uk/faqs/arbitration/#what-outcomes-are-available> (last visited Mar. 10, 2017).

135. *Id.*