GEOFFREY ROBERTSON: It is indeed a privilege to offer some thoughts on the ways of protecting the First Amendment here in Virginia where the First Amendment first originated in Madison’s report to the Virginia Assembly calling for some constitutional protection against the resurgence of British libel laws, in particular the law of criminal libel.

Thanks to Madison’s genius the media in the United States has enjoyed a freedom that has been the envy of your counterparts elsewhere, albeit a freedom perhaps threatened today by subpoenaing journalists to divulge their sources, a freedom certainly threatened around the world by the imposition of more repressive legal regimes claiming jurisdiction to punish and mulct the US media for civil and criminal libel, for contempt, for copyright, for breach of confidence.

These perils are certainly to media insurers, although let’s put them in perspective. They are not the kind of perils that are faced by many of the journalists we serve. Last year, 63 journalists were killed, 1,300 media workers were attacked, were injured around the world and over 100 ended up in jail. The struggle to erect Madison’s vision of press freedom is a fight to tell inconvenient truths.

It’s not merely a battle to protect the profits of the US media, it’s a fight for the right of citizens throughout the world to read and see information and opinion that their
governments and increasingly multi-national corporations and international public figures don’t want them to read or see.

Ironically, it’s sometimes always also a freedom to tell them what they don’t want to know. As George Orwell said in his introduction to Animal Farm, “If liberty means anything at all, it means the right to tell people what they do not want to hear.” An introduction, of course, that went unpublished because his left wing publisher, Gollancz, didn’t want to insult Stalin.

Well, as globalization proceeds apace there are very few newscasters and broadcasters that are not disseminated across national borders. They’re uploaded on the Net. They become actionable in 191 countries; 190 of those countries lacking a First Amendment.

Modern media lawyers must not only be experts on the domestic law of libel and contempt and privacy, they must be familiar with the rules in other countries, with international treaties and doctrines for resolving conflicts between laws.

We are all familiar enough with examples. The New York Times most recently forced, or advised at least, to cut its coverage of evidence about the plot to blow planes up mid-Atlantic for fear that they might prejudice some far off trial at the Old Bailey. Forbes Magazine, the top court in Britain dividing 3-2, on whether a plaintiff could sue for a minor nugatory circulation in Britain. The plaintiff being a Russian oligarch, Boris Berezovsky, and the story set entirely in Russia.

Baron’s, a magazine that doesn’t circulate at all in the small Australian state of Victoria dragged there to defend an article about a Victorian businessman’s shenanigans on the New York Stock Exchange because it was downloaded by a few of his friends from a Melbourne synagogue.
Yahoo, condemned by Amnesty for divulging details of subscriber dissidents as the quid pro quo for operating in China. Journalist for the Straits Times arrested recently for spying in China. Far East Economic Review, based in Hong Kong, has just received the double whammy, sued not only by Li Kwan Yu but also by his son the Prime Minister. And so it goes on, often irrationally, very often comically but sometimes with malice and cruelty.

Jan Johannes and I had the experience, not so long ago, of going to Zimbabwe to observe the trial of the Guardian regular correspondent for twenty years from that country the American, Andy Meldrum. He was charged with an imprisonable offence, one of Mugabe’s new laws of publishing false news about him.

Of course the Guardian isn’t circulated at all in Zimbabwe, partly for that reason but Andy’s story went up on the London Web site of the newspaper and there is a secret police detachment that spends its time around the clock Googling the world for critical stories about Mr. Mugabe.

The trial was somewhat comical, as the prosecutor tried to show the judge how this was published in Zimbabwe. We all had to adjourn to the business center of the local Sheraton Hotel where he desperately tried to Google it on the Guardian web site and couldn’t find it. That was because we had advised that it be taken off.

So Andy was acquitted. Censorship perhaps, but in the interest of saving a journalist from prison, perhaps justified. Andy was acquitted by a judge whose car was then firebombed by Mugabe’s thugs. His local lawyer, Beatrice Mtetwa was beaten up and Andy himself was deported and he now reports Zimbabwe from the comparative safety of Johannesburg.
So these global perils, how are they to be confronted in a world without a First Amendment? One way perhaps is by building upon the qualified free speech guarantee in human rights treaties, most notably Article 10 of the European Convention on Human Rights which now applies with a court to enforce it to 40 European countries. Paralleling Article 19 of the International Convention on Civil and Political Rights, which at last count 154 countries have ratified, even China, although not, of course, Singapore.

These guarantees although they are subject to qualifications, they are not like the First Amendment in the sense they don’t have the block on laws restricting media freedom, they are always balanced with the right to reputation or national security and so forth. But it is nonetheless possible to introduce in the courts and commissions that are charged with considering breaches of the Article 19 or Article 10 right, some of the First Amendment jurisprudence.

Academics have become interested recently in what they call “diffusion of law,” how one legal system will adopt attractive principles from other legal systems, sometimes for political or geo-political reasons, sometimes because of a migration of principles caused by a shared history, sometimes because of a landmark judgment or even the power of a judicial aphorism.

“Sunlight is the best disinfectant,” gets quoted a lot in Europe these days at a time when it’s not much bandied about in Washington I’ve noticed. New York Times v. Sullivan is a rather good example. I gave a talk here in 1984 on the twentieth anniversary and I did a check of all the free speech cases in Britain since 1964 and there was not one mention, not one, of New York Times v. Sullivan.
Well today, and in the subsequent 20 years, particularly since the adoption of Article 10, there is no press freedom case that gets argued in appellate courts without a reference to that great case. It has been instrumental, I think, in having the Reynolds defense, a public interest defense incorporated into British common law and in abolishing the right of political parties and public corporations to sue for libel.

So diffusion of law, diffusion of First Amendment principles is going on and can only be encouraged. But in order to understand and in order to encourage other countries to import them, it is important to look at briefly the history of the First Amendment. I know some Americans think that history begins in 1776, but in fact that’s to detract from the struggle against the English libel laws in which the American colonists played a very proud and central part, as Madison knew, as Tom Paine certainly knew.

What lodged in their minds was the struggle against the sedition laws that was conducted in the 1630’s and 1640’s when John Winthrop took some 30,000 Puritans across the pond to settle New England. They were refugees from persecution and that persecution by Charles the First was very much a persecution, as a result of their claimed right to free speech.

They wanted the freedom to speak from the pulpit even though they weren’t ordained by bishops. They wanted the freedom to have their preachers safe from the Star Chamber; the Star Chamber, the kangaroo court of Charles the First that imposed torture on those that spoke freely. They were taken out, they had their ears cut off, they had their noses slit and on their heads were branded the words “SL”, SL standing for “seditious libeler.” And of course they came back. They came back to fight the Civil War, the entire first graduating class of Harvard College joined Cromwell in that fight.
Civil liberties in Britain is dated back to Magna Carta. Well, of course, in 1215 there was no printing press to license, so Magna Carta says nothing about free speech. In fact, then there was a law of scandalatum magnatum, discomforting the powerful by gossip. The greater the truth, the greater the libel. And licensing begins in 1559.

But the fight against the sedition laws, produced of course when the Presbyterians tried to bring back licensing – the Puritans get a bad press largely because they are confused with the really dour Presbyterians – but their attempt to bring back licensing in the 1640's led Milton to make his famous cry for press freedom in the Areopagitica. “The attempt to subdue doctrine by licensing is like the exploit of the gallant man who thought to keep the crows out of his garden by shutting his gate.” That was Milton’s argument for a free marketplace of ideas.

It was Milton who first lodged in the Puritan consciousness the argument that was later adopted in New York Times v. Sullivan, the argument that in a free marketplace of ideas, truth will ultimately triumph over falsity but that false statements are necessary for that triumph to happen, they need protection if made non-recklessly.

So that period, I think, is crucial to understanding the basis upon which Madison, in his report to the Virginia Assembly, put forward the case for protection of the press. Of course it was put in place at a time when the American Revolution had been partly inspired by men like John Wilkes, the mayor of London who was led the criticism of George the Third and was a great supporter of the American Revolution.

It was Wilkes, it is often forgotten, who began and inspired the chant, that became the chant of the mob outside the Old Bailey, “Freedom of the press.” It was John Wilkes and freedom of the press, the first popular cries for press freedom after Wilkes’ printers and his publishers were arrested and subject to general warrants and unlawful searches.
And it’s most important, at a time when the Europeans have gone somewhat Euro crazy with the idea of privacy and trying to trump Article 10 with Article 8 privacy rights, to remember that privacy, the right to be left alone originated in Wilkes’ stand over the raids on him, on his publication, “The North Briton,” for attacks on George the Third.

He was the great figure who not only established freedom of printers, but of course went to prison, went to prison and got elected again and again and again, three times, while he was in prison because he was the first in Britain to introduce the importance of the freedom of the press. He went to prison for his essay on women which was read solemnly by his enemy Lord Sandwich to the House of Lords, “Life can little more supply than just a few good fucks and then we die.” First time a four letter word was heard in the House of Lords. The peers cried “Go on. Go on,” as he read this blasphemous poem. And Wilkes of course charged with blasphemous libel and criminal libel that saw John Wilkes go to prison.

And he, too, was in Madison’s mind in his report to the Virginia Assembly that led to the adoption of the First Amendment. It was there in Tom Payne’s mind as well, when he wrote “Common Sense.” So the freedom of the press, the chant of the mob incorporated into American law. And of course it was Voltaire’s similar arguments for press freedom that enthused the French Revolution and, as Simon Schama writes, it was the “incontinent freedom” that the press had in France that was such a factor in the French Revolution.

And it’s interesting that subsequently, while free speech found its home in the First Amendment, that in Europe both in England and in Europe, for quite different reasons, free speech was denied. Pitt, the Prime Minister thought that their Jacobinism
feared the French Revolution and so he insisted on wide-ranging prosecutions for the work of Tom Payne for so much political polemic under the four classes of libel. Seditious libel, blasphemous libel, criminal libel and obscene libel, were all developed as part of Pitt’s drive to imprison printers.

Napoleon, who conquered Europe, became again determined to stamp out criticism of officials but he did so by passing insult laws. He abolished juries and passed the insult laws that now unfortunately, deface press freedom in so much of Latin America where they were imported by the Spanish and throughout Europe.

They’re called Desacato laws in Latin America, they find their way into the 1881 version of the old Code Napoleon and they have left in Europe a very unhappy inheritance where the idea that those who criticize officials, be they policemen or politicians, must be punished by criminal law. And to its discredit the European Court of Human Rights has not outlawed them under Article 10. That’s a battle that we are still fighting. They have stopped imprisonment. No journalist now is imprisoned for insult law crimes but they are widely fined and the idea of criminal conviction has not yet been rooted out as a result of Napoleon’s inheritance.

But in Britain at least, we had trial by jury and a very complacent gentleman called Albert Dicey said at the beginning of the twentieth century “Well, we don’t have freedom of speech but we do have the right to jury trial which ensures freedom of speech.” Of course it doesn’t, and as you look at the fact that every blasphemy case resulted in a conviction, every sedition case resulted in a conviction so that was the idea of resting it upon juries was undoubtedly extremely complacent.

But it did, of course, and it’s the 100th anniversary of John Betjeman so I think it’s fair to report what he said of freedom of expression in England. He said, “Think of
what our nation stands for; books from Boots and country lanes, free speech, free
passes, class distinction, democracy and proper drains."

That was free speech in England and what sadly happened was that the civil libel
laws which had been introduced originally to discourage the upper classes from ending
their quarrels with a duel in which a lot of heirs of estates were prematurely cut off, they
encouraged them to sue each other in civil libel and so the old libel precedents were
very much of the nineteenth century. They unblotted their escutcheons by suing for
libel. The language is very much of the gentlemen’s club.

A libel is something that lowers you in the estimation of right-thinking chaps.
Most of the early cases were to do with allegations of cheating at cards or shooting
foxes. It’s a terrible thing for a gentleman to be accused of shooting a fox. A gentleman
hunts them down with dogs. But in this period, as libel law was developing from the old
forms of pleading, two unfortunate and really devastating for free speech presumptions
came into play and are still in play. First of all, the presumption that anything that
lowers a chap in others estimation is presumed to be false, the presumption of falsity.

That, it seems to me, is still the greatest clamp on free speech because it means
that the media defendant has to prove, and if it’s a serious allegation, prove not quite
beyond reasonable doubt but certainly to a very high standard, the case and of course
where sources go to water and where – the classic example I suppose is Jeffrey Archer.
They had photographs of him paying 2,000 pounds – $5,000 – to a prostitute, but they
couldn’t justify, they couldn’t prove that he’d slept with her and so over a million dollars
was awarded to him some fifteen years before he was jailed for perjury. But that is the
kind of miscarriage and there are so many in British libel history.
Miscarriage – Liberace got a fortune when he sued for the suggestion that he was effeminate. American publishers pull things, statements that they can quite easily make here. There was a famous case with Time magazine when I first started at the libel bar. Time magazine wouldn’t publish in Britain, Daniel Moynihan’s aphorism about Henry Kissinger. “Henry doesn’t lie because it’s in his interest. He lies because it’s in his nature.” Solemnly edited out – and so much else. William Shawcross’ book on Cambodia had to have 22 cuts, and there were many other examples. I think U.S. Penthouse was sued by someone who was in prison for fifteen years for referring to him as a murderer and he won damages because he could show that he was only in prison for manslaughter. He was a manslaughterer, not a murderer.

The other presumption that has been very unhelpful to the press is the presumption of damage. Every criticism, which is what a libel boils down to in English courts, is presumed to have done terrible damage even when it hasn’t – when it hasn’t made the slightest difference to someone’s reputation. There is that presumption of damage.

And until recently there was no public interest defense. It was thanks to Article 10 and to the influence of Sullivan that we finally got what is termed “Reynolds privilege,” which is a kind of privilege to say important things so long as the media conform to ten checklists for responsible journalism laid down by House of Lords judges who have got no idea what it is like to work in a newsroom.

So Reynolds privilege, while it’s a start, has not been as helpful as it might be for media defenses. So there you have the problem and it is a severe problem. Its severity was highlighted a few years ago when Idi Amin was in power. There is a new film about him —just opened. He was installed in Uganda by the British and was thought to be a pretty safe bet and the first sign of him going utterly crazy was when he sacked his
foreign minister, Princess Elizabeth of Toro, and gave a press conference in which he announced that she had been caught having oral sex at a toilet in Orly airport.

And this of course was the first sign of his craziness. It was widely reported in every British newspaper. Princess Elizabeth having been sacked and not having been in a toilet in Orly airport, then came to Britain and won enormous damages from British newspaper for publishing that obviously public interest story.

And so that was the position in Britain without Sullivan and without a public interest defense. Newsworthy stories of utmost importance could not be published and now can in certain cases, thanks to Reynolds, thanks to the effect and the impact and the diffusion of New York Times v. Sullivan.

Contempt of court has become, and you’ve got a session on it shortly, is another aspect of the British colonial history because it was the rule against scandalizing the court, that I think caught up with Murray Hiebert when he wrote an utterly true story about a Malaysian judge. It was actually invented by the Privy Council, which was the court for all the British colonies at the end of the nineteenth century, because they became worried about the natives getting restless and criticizing the judges. And they said, “Well, it’s all right in countries that are sort of civilized and white for the judges to be criticized, but in other far flung colonies with colored populations, they couldn’t be trusted.” And so scandalizing the court was necessary.

Very sadly in some of those ex-colonies which for racist reasons this law was invented have adopted and run with it. The editor of the Wall Street Journal published a statement by Peter Cowan to the effect that a recent libel judgment against them in favor of Li Kwan Yu was deeply regrettable, he was charged with scandalizing the court and convicted.
There have been some amelioration of contempt of court thanks to Article 10, the right to criticize the courts – particularly in the case over Thalidomide. But contempt still does provide a real problem for American newspapers in particular reporting terrorism plots that arise from and are fomented in Britain. It’s terribly important to know whether the plot to blow up planes over the Atlantic really has evidence or whether it’s like other plots that the same people have thought or promoted and said to exist and which turn out to be nugatory or turn out to have no evidence.

Yet, not only is there this rule against prejudicing a trial, but there is also the fact that when the trial does take place, to avoid prejudice much of these trials take place in secret. The media are not allowed to report them until the end. And oddly enough, not only the press is complaining about these trials at the Old Bailey, incredibly important in producing evidence of terrorism which don’t get reported except at the end, which means they are not really properly reported at all.

And not only is the press deprived of important copy, but the police are very angry about this – the police commissioner made a recent statement saying that it’s intolerable that these trial are held in secret because the police cannot persuade the Muslim community in Britain that they are actually acting on evidence unless that evidence, when it’s unveiled, can be reported. So there is a prospect that the press and the media will actually make some common cause in that respect.

I think it’s an important matter that has to be faced. Obviously, one solution is sequestering juries. Another is to have trial before three judges rather than trial by jury. These arguments are important at the moment. The British press are in two minds. They rather like jury trial. It’s a shibboleth. They have a stubborn attraction for it.
But it may be that the answer with those charged with terrorism is that they would get a fairer trial and the media would be free to report if anti-terrorist courts were composed of three judges rather than juries. That's a matter that we have to consider.

Well, what does human rights and the human rights treaties have to offer? We have now signed up 154 nations to the International Covenant on Civil and Political Rights, which is a kind of a universal declaration of human rights writ large.

It's important to understand where human rights came from. They don't come actually from the Declaration of Independence and the French Declaration of the Rights of Man. They were based on the concept of natural rights and if you read Jefferson these are our inalienable rights somehow coming from God. Well, in Europe we don't believe in God, and Jeremy Bentham was the first to say that this idea of natural rights is really nonsense – “nonsense on stilts.” Karl Marx then weighed in by attacking natural rights as bourgeois rights, particularly freedom of the press, which he described as freedom of the press proprietors. The idea of human rights didn't emerge until just before the Second World War. It was quite interesting how it did because in until 1939, when Hitler was extinguishing human rights throughout Europe, no European intellectual no League of Nations Court or debate canvassed the idea of human rights.

The first idea of universal human rights came from the little group of writers led by H.G. Wells. There was H.G. Wells, there was J.B. Priestly, there was A.A. Milne, who would motor up from Pooh Corner to add his twopence to the draft of this first universal declaration of human rights. And it was produced in 1939 as a Penguin special, H.G. Wells “The Rights of Man.”

The idea that freedom of speech was one of the fundamental rights that should be guaranteed was translated into 30 languages. The Foreign Office was so excited by
it that it actually translated it into German and dropped it on the advancing German army as it swept across France, but they didn’t stop to read it.

The person who did stop to read it was Franklin Roosevelt, who was a great friend of H.G. Wells and he conspired a great speech in January 1st, 1942. What are we fighting for? Human Rights. What are human rights? The four freedoms: freedom of speech was the first, freedom of speech in worship, freedom from want and from fear.

And Wells’ work was then sent to Eleanor Roosevelt who ran the committee that produced the universal declaration and that universal declaration was the basis of Article 19 of the universal declaration, was the model for Article 10 of the European Convention and the model for Article 19 of the International Convention on Civil and Political Rights.

We have, in Europe, I think, backslid in some respects. Largely from history, the result of the Holocaust is that you will never get a European court of human rights thinking it an invasion of free speech to jail people for hate speech. It’s been very backward in relation to allowing nations to punish obscenity or blasphemy, but it has been, as I say, significant in first of all in contempt of court.

The case of Goodwin against the United Kingdom in 1996 specifically rejected the American position in Branzburg v. Hayes and showed that from a free speech guarantee you can spell out the freedom of the journalist to protect his or her source, because if the source can't be protected, stories and news will dry up and the public will be less well-informed.

Goodwin has now been adopted at an international level in the case of Jonathan Randall and the Washington Post that was heard in the international appeals court in The Hague. The right of war correspondents to protect their sources and not to be compelled to give evidence was upheld.
So in some respects it would be nice to think that the journalists in America might benefit from the far more rigorous protection that is given by the human rights treaties in Europe to the right to protect sources. I see that the Senate has recently frozen debate on the idea of a bill to protect journalistic sources in this respect if in few others. The European human rights position is perhaps more advanced than the protection to freedom of expression that is given by the First Amendment.

So in protecting the First Amendment, there are claims to actually widen it with some assistance. There is of course remaining, the problem certainly with British libel law of the burden of proof and the inept public interest defense. British libel law is the only law that is not enforced, or judgments under it are not enforced in American courts. Bachchan v. India Abroad, and other cases, have held that British libel law is antipathetic to the First Amendment.

Hopefully, if the Reynolds defense is developed, the first objection to British libel law, namely that it lacks a public interest defense, will be overborne. It however, remains the case that the burden of proof on the defendant is the other reason and will remain the other reason why European law is antipathetic to the First Amendment and that, it seems to me, is the most important problem and this is the area in which Sullivan and indeed Gertz can be of most help in persuading European courts that, in fact, the burden of proof must shift.

The other problem, of course, that we’re having is privacy. As the European Court holds that it is a breach of Article 8 to photograph Princess Caroline in the street. Naomi Campbell won a judgment when having claimed that she was entirely drug free, a newspaper published a photograph of her emerging from a drug clinic. The medical confidentiality was said to trump the media’s right to see her announce in a public street
that she was a hypocrite. She goes to trial in New York today for throwing a telephone at her maid, so I will adopt the British principle of not making any critical comments about her while she is facing trial, but certainly the result of that case does give us concern that at least some newsworthy and public interest may be gagged by privacy orders under the guise of breach of confidence.

Well, and of course we are seeing in the European court an unhappy development. The idea that Article 8 privacy can be balanced with Article 10 and that where stories of public interest relate to public figures they may have a privacy right to have them injuncted. Well, that I think, is to forget that Article 8 is limited to the right to protect home and family – it originated in John Wilkes’ great case, Entick and Carrington, which protected him against a general search by governments in search for evidence. It is to take Article 8 entirely out of its historical origin to use it to trump the claim of newsworthy publication.

As we move forward, how can finally Article 10 be protected and promoted in the rest of the world? Journalists cannot be given a physical shield when they delve into areas which are likely to cause reprisals. One remembers and pays tribute to men like Daniel Pearl and Paul Klebnikov, both of them assassinated by those about whom they were investigating. But there is an important development in international law which largely because, I have to say, of the Bush administration’s reluctance to regard international law as a great thing for every other country but America. And they’ve been reluctant to, in fact they’ve attempted to undermine until recently, the work towards an international criminal court.

But there are defects in the Geneva Convention protection of journalists. There is an urgent need to make amongst the war crimes that are listed definitively in the
Rome statute. It is not a war crime to assassinate a journalist and I think that the first thing that should be done is to make the attempts on journalists, which as I’ve said are now so common, make them a war crime punishable by the international criminal court.

Hopefully, as America’s attitude to the ICC is changing thanks to Darfur, we may get a greater involvement and then a proper protection of journalists. There is another serious gap which a number of British journalists almost came a cropper in the early days in Afghanistan when they dressed up in burkhas. They were arrested for spying, and through a historical anomaly, the people who are not protected by the Geneva Conventions are spies and mercenaries. And in China, the Straits Times journalist was alleged to be both.

So you can torture and execute summarily journalists who are caught without a press card pretending to be citizens and that is a serious gap in the protection of journalists which should be plugged.

The Geneva Convention, of course, was a product of its time. I had to look at it and read it to apply it recently to the prison in Sierra Leone where Charles Taylor came in and I was quite interested to see that the greatest right that a prisoner could have in 1949 in the Geneva Conventions is, would you believe, the right to smoke. That was seen as vital in those days. And much of the Convention does hinge upon concepts of 1949.

I was amused to see a White House spokesman not long ago, referring to the fact that of course the prisons in Guantanamo couldn’t be treated in accordance with the Geneva Conventions because that required them to be given a musical instrument and sure as hell the American taxpayer wasn’t going to pay for a musical instrument.
That overlooked the fact that, of course, that comes from the importance of orchestras in the concentration camps and the Jewish ghettos and that’s why it’s there. It also overlooked the fact that the Taliban tended to execute those who played musical instruments.

So the Geneva conventions are products of their time and even though they were reformed in 1977, they still do not provide the protection for journalists that they should. Article 47, which allows journalists to be maltreated if they are caught in plain clothing must be repealed. Of course, it doesn’t help in this sense when journalists, as it were, Geraldo-like, grab guns and fight for their side.

The British Ministry of Defense struck a campaign medal recently for soldiers in Iraq and invited journalists to apply, and shamefully I think 64 correspondents in search for a campaign medal applied. Journalists in return for the proper protection in international law should be prepared to be independent.

The second thing to be done is, of course, to apply – attempt to apply the principles in Goodwin’s case and the valuable jurisprudence in European and international law to First Amendment battles bring fought by journalists here who are trying to protect their sources against subpoenas to testify before a Grand Jury.

It would be valuable if Branzburg is ever to be re-litigated to persuade the Supreme Court to take cognizance of the jurisprudence that has developed in Europe under Article 10 and internationally, that explains why it is part of freedom of expression for journalists to protect their source.

The next thing that I’d like to see the international media do, is to keep the pressure on at the European Court so as to encourage them to abolish insult laws and criminal libel laws. Madison’s vision is still not complete in that respect, and most
notably throughout South America and throughout Europe, having journalists
condemned as criminals is something that you can help to end.

Finally, and I think perhaps most difficult conceptually but most important, is to
develop a conflict of law theory that will protect, sensibly, those American publications
that are being hauled into court in up to 190 countries of the world. It seems to me that
the correct answer to the conundrum of conflict of laws; what do you do when a plaintiff
with a reputation in Victoria is libeled by a magazine that is circulated only in New York
– that’s the Gutnick case – but there are all sorts of other cases that are coming through
now where a newspaper or broadcasting organization which largely serves the area in
which it is established and which it is domiciled, by whose laws it is developed and by
where it is insured – those media being dragged into courts with a completely different
system of law.

The answer seems to me to say if they are to be sued, they should be sued in
their place of domicile unless they have acted so as to promote or promulgate
themselves in the place of the forum. Whenever you suggest this, there’s always some
plaintiff’s lawyer who will erect the specter of a libel-free zone. A sort of “press goes
wild island” in which there’s no defamation law and you can get away with anything. But
I think that can be taken care of in a proper conflict rule.

I don’t think that we will get this rule for many more years. It is too much to ask
national courts to yield jurisdiction where there is a plaintiff who has been traduced in
some article that’s been downloaded from another country by the members of his
synagogue or whatever. They will insist upon trying it but then, I think for the time
being, I’d be happy for a treaty on the subject to require, where this occurs, where a
publisher domiciled in another country is dragged into court by a plaintiff domiciled in a
different country, to at least require that the courts of the plaintiff’s country, if they are to take jurisdiction, apply the law of the defendant’s domicile.

That would require countries in which American newspapers and broadcasters are sued to apply the First Amendment. I don’t think there would be any better way of introducing foreign courts to the freedom of speech guarantee of the First Amendment than to make them apply the First Amendment in their own courts. Thank you very much.