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## Cover Page Footnote

J.D. Candidate, 2007, Fordham University School of Law. I would like to thank Professor Benjamin Zipursky for his guidance on this Note. I would also like to thank my wife, Quiara, and my parents, Fay and Gary.

# NOTES

# ENGLAND'S CHILLING FORECAST: THE CASE FOR GRANTING DECLARATORY RELIEF TO PREVENT ENGLISH DEFAMATION ACTIONS FROM CHILLING AMERICAN SPEECH

*Raymond W. Beauchamp**

## INTRODUCTION

Dr. Rachel Ehrenfeld is an expert on the financing of terrorism.[1] In her book, *Funding Evil*, she reported allegations by her sources that the Saudi Arabian businessman Khalid Bin Mahfouz funds terrorism.[2] Bin Mahfouz sued Dr. Ehrenfeld in England for libel even though Dr. Ehrenfeld wrote and published her book in the United States.[3] Because twenty-three copies were purchased over the Internet in England and the first chapter of the book was available online, an English court allowed Bin Mahfouz to bring his suit there.[4]

Bin Mahfouz's behavior has been labeled "libel tourism"—choosing to sue in a forum with plaintiff-friendly libel laws.[5] Dr. Ehrenfeld did not defend this suit because, as an independent writer, she lacked the resources to defend an overseas action.[6] Furthermore, she felt English law did not offer her sufficient protection from Bin Mahfouz's defamation action.[7] The English judge found for the plaintiff in a default judgment[8] and awarded

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1. *See* Jeffrey Toobin, *Let's Go: Libel*, New Yorker, Aug. 8, 2005, at 36.

2. *See id.* Kahlid Bin Mahfouz is part of a trillion-dollar suit brought by families of the victims of the attacks on the World Trade Center on September 11, 2001. *See* Mark Hosenball & Michael Isikoff, *Libel Tourism: Anxious over Allegations of Terrorist Ties, Rich Saudis are Trying to Silence Their Critics in Court*, Newsweek, Oct. 22, 2003, http://msnbc.msn.com/id/3339584/.

3. *See* Bin Mahfouz v. Ehrenfeld, [2005] EWHC (QB) 1156 (Eng.).

4. *Id.* [22].

5. *See* Toobin, *supra* note 1; *see also infra* Part I.A.

6. Affidavit of Rachel Ehrenfeld ¶ 7, Ehrenfeld v. Bin Mahfouz, No. 04 Civ. 9641 (S.D.N.Y. June 9, 2005) [hereinafter Ehrenfeld Affidavit].

7. *See* Toobin, *supra* note 1; *see also infra* Part I.B.

8. *Bin Mahfouz*, [2005] EWHC 1156, [74]-[75]. Although it was a default judgment, the judge carefully reviewed the facts to demonstrate that the claimant did not rely on the

damages of 60,000 pounds as well as an injunction.[9] Had this case been brought in the United States, the First Amendment very likely would have protected Dr. Ehrenfeld.[10] However, because Bin Mahfouz chose the forum, and because England does not honor the United States Constitution, she could not shield herself with the First Amendment.

In the face of international defamation litigation, American defendants may have a source of relief in American courts. The Declaratory Judgment Act[11] provides a procedural mechanism for a potential defendant to institute proceedings in a federal district court.[12] It is typically used when one party is under threat of liability, but the party alleging a cause of action has not yet filed suit.[13] The Declaratory Judgment Act is not usually available to a defendant seeking a more advantageous set of laws—i.e., forum shopping.[14] But what about in the context of libel tourism? The central question of this Note is whether, and when, it is appropriate to provide declaratory relief to American defendants such as Dr. Ehrenfeld from defamation actions brought overseas.

Part I of this Note provides an overview of defamation law in the United States as compared with England. In particular, Part I contrasts American reform to its defamation law with the comparative stagnancy of English defamation law. In addition, Part I provides an overview of how declaratory relief operates under the Declaratory Judgment Act. Part II presents arguments for and against courts' considering declaratory relief from overseas defamation actions. This debate centers on the role of the First Amendment in determining whether to provide declaratory relief and how courts must modify their Declaratory Judgment Act analysis in light of the international scope of libel tourism cases. Part III argues that declaratory relief is appropriate under certain circumstances and provides a framework for use of the Declaratory Judgment Act in overseas defamation cases.

## I. BACKGROUND: "LIBEL TOURISM," DIVERGENT LAWS OF DEFAMATION, AND THE DECLARATORY JUDGMENT ACT

### A. *Libel Tourism*

Libel tourism is a growing trend: More frequently than ever those who are maligned in America seek jurisdictions without the protection afforded

advantage in England that the burden of proof would be on Dr. Ehrenfeld; rather, the court affirmatively determined that Ehrenfeld's statements were false. *Id.* [32]-[62].

9. *See id.* [74]-[75]; *see also* Ehrenfeld Affidavit, *supra* note 6, ¶¶ 8-9; Alyssa A. Lappen, *Libel Wars*, FrontPageMagazine.com, July 18, 2005, http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=18781.

10. *See infra* Part II.B.

11. 28 U.S.C. § 2201 (2000).

12. *See infra* Part I.C.

13. *See infra* notes 192-96 and accompanying text.

14. *See infra* notes 281-82 and accompanying text.

by the First Amendment.[15] With laws that favor plaintiffs steeped in history, England provides the perfect locale for the redemption of the defamed.[16] The following examples highlight why and how plaintiffs bring their defamation actions in England.

In a dispute between two media celebrities, Al Franken described Bill O'Reilly as a "lying liar" in his book.[17] Franken cited a variety of facts to support his view.[18] O'Reilly challenged at least one of Franken's facts—the allegation that O'Reilly had not grown up in Levittown, New York.[19] O'Reilly was certain he could prove Franken wrong (he had a copy of the title to his childhood home).[20] But because O'Reilly faced American laws that protect those who allegedly libel public figures,[21] he believed his case was doomed if he brought it in the United States.[22] Therefore he threatened to bring the action in England even after being told damages would be minimal.[23]

Another peculiar case involved Richard Perle, an expert on national security matters who has worked in several presidential administrations.[24] Seymore Hersh, a longtime reporter for *The New Yorker*, published a piece about Richard Perle that brought up questions regarding his war profiteering.[25] Mr. Perle called Hersh "the closest thing American journalism has to a terrorist,"[26] and threatened to sue in England to take advantage of its friendlier libel laws.[27] His threats proved empty.[28]

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15. *See* Hosenball & Isikoff, *supra* note 2 (describing the choice by plaintiffs to file defamation suits in England as "a growing phenomenon that lawyers have dubbed 'libel tourism'").

16. *See* David Hooper, Reputations Under Fire: Winners and Losers in the Libel Business 428 (2000) ("London has become known to many foreign 'forum-shoppers' as a Town named Sue—a place where you can launder your reputation on the basis of a few sales in the UK of some overseas publication.").

17. Jack Shafer, *Bill O'Reilly Libel Watch*, Slate, July 15, 2004, http://www.slate.com/id/2103910/.

18. *Id.*

19. *Id.*

20. *See id.* (noting that O'Reilly had posted the deed on his website).

21. *See infra* note 130 and accompanying text.

22. *See* Shafer, *supra* note 17 (quoting O'Reilly as asking on his news program, "[c]an I go over there and sue those people over there? Because I can't win here").

23. *Id.* After being told that his suit would be worth "a few thousand bucks," O'Reilly reportedly said, "[W]ell, it might be [worth it], just for the symbolic gesture." *Id.*

24. *See* Jack Shafer, *Richard Perle Libel Watch, Week 2*, Slate, Mar. 19, 2003, http://www.slate.com/id/2080384/ [hereinafter Shafer, *Perle Libel*]. At the time these events transpired, Richard Perle was a member of the Defense Policy Board, a group that advised the United States President on national security matters. He was also managing partner of Trireme Partners, a venture capital firm. The article by Mr. Hersh reported on potential conflicts of interest created by these dual roles. *See* Jack Shafer, *Put Up or Shut Up, Richard Perle*, Slate, Mar. 13, 2003, http://www.slate.com/id/2080100/ [hereinafter Shafer, *Put Up or Shut Up*].

25. *See* Shafer, *Put Up or Shut Up*, *supra* note 24.

26. *Late Edition with Wolf Blitzer* (CNN Broadcast Mar. 9, 2003) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0303/09/le.00.html).

27. *See* Shafer, *Put Up or Shut Up*, *supra* note 24.

While the previous examples did not lead to litigation, there have been more serious cases. Bin Mahfouz has not only litigated against Dr. Ehrenfeld, but others as well.[29] Indeed, he is one of a number of Saudis seeking to silence reports that they have funded terrorism.[30] Suits have been brought in England against the *Wall Street Journal* for reporting on Saudi oversight of certain bank accounts,[31] and against the investigator hired by the lawyers representing the families of the victims of the attacks on the World Trade Center.[32]

Suits like these have had a broad effect. Random House elected not to publish in England two books about geopolitics and the Middle East.[33] One of the authors tried to publish a chapter through a newspaper in England.[34] However, the paper pulled the story at the last moment;[35] according to its author, one of the book's subjects threatened suit if the article ran.[36] In this case, the publishers felt compelled not to publish in England; however in Dr. Ehrenfeld's case the British courts found her publication actionable even though it was ostensibly published in the United States. If English courts can create a fear of liability in America for American publications, the effect could be far broader.[37]

England is a primary destination of libel tourism, but it is by no means the only such destination.[38] Singapore has been called a "libel paradise," and New Zealand, Kyrgyzstan,[39] and Australia are also noted for being friendly to plaintiffs.[40] So many options for the libel tourist only heightens the problem, as well as the demand for an American solution.

The next section outlines the key differences between American and English defamation law that make England attractive to plaintiffs as an alternative to American courts.

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28. *See* Jack Shafer, *Perle's Before Sy*, Slate, June 25, 2004, http://www.slate.com/id/2102967/ (noting that the statute of limitations had run out).

29. *See* Toobin, *supra* note 1; Hosenball & Isikoff, *supra* note 2; Lappen, *supra* note 9; .

30. *See* Hosenball & Isikoff, *supra* note 2.

31. *See id.*

32. *See id.*

33. *See* Ron Chepesiuk, *Libel Tourism Chills Investigative Journalism*, Global Journalist, Second Quarter, 2004, at 14, *available at* http://www.globaljournalist.org/magazine/2004-2/libel-tourism.html (discussing Craig Unger, House of Bush, House of Saud: The Secret Relationship Between the World's Two Most Powerful Families (2004); Gerald Posner, While America Slept: The Failure to Prevent 9/11 (2004)).

34. Author Gerald Posner contracted with *The Mail on Sunday*, a British newspaper. *Id.*

35. *Id.*

36. *Id.*

37. *See* Ehrenfeld Affidavit, *supra* note 6, ¶ 25 (detailing her own "self-censorship" and reports of other writers who have also been impacted by libel tourism); *see also infra* notes 643-44 and accompanying text. For further information on the types of suits Bin Mahfouz has pursued, see Lappen, *supra* note 9.

38. *See* Shafer, *Perle Libel*, *supra* note 24.

39. *Id.*

40. *See* Nathan W. Garnett, Comment, Dow Jones & Co. v. Gutnick*: Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?*, 13 Pac. Rim L. & Pol'y J. 61, 69-70 (2004).

### B. *Divergent Laws of Defamation: The Laws of England and the United States Balance Reputation and Free Speech Differently*

Rights of action in defamation protect the interest of an individual in her reputation and recognize that there is value in one's reputation, value that can be damaged by words.[41] Conversely, courts also have recognized an interest, held by society, in a free flow of information.[42] These interests are in conflict with one another: As one interest receives greater legal protection, the other receives less.[43] In early defamation law, reputations received greater protection.[44] But in recent decades, courts around the world have recognized the importance of free speech, and accordingly, defamation law has been restricted to varying degrees.[45]

This section begins with a description of the basic elements of a traditional defamation claim both in England and in the United States prior to 1964, when the U.S. Supreme Court began to constitutionalize defamation law. It follows with a description of how common law privileges and immunities served to protect the interest in speech. The section concludes by demonstrating how, beginning in 1964, reform in the United States led to much greater legal protection for the interest in free speech than exists in England today.

#### 1. American and British Common Law: A Plaintiff's Paradise

##### a. *The Basics*

###### i. The Elements of a Defamation Claim

Prior to *New York Times Co. v. Sullivan*,[46] decided in 1964, the common law of each state controlled American defamation law.[47] As such, state courts had wide latitude to protect their citizens' reputations and generally imposed liability in a wide range of contexts.[48] To make a prima facie claim for defamation, the common law required a plaintiff only to show that the defendant published a defamatory statement, of and concerning the plaintiff, to a third party.[49] Under this standard, American defendants of

41. *See* Rodney A. Smolla, 1 Law of Defamation § 1.1 (2d ed. 1999).

42. *See* John W. Wade et al., Prosser, Wade and Schwartz's Cases and Materials on Torts 844 (9th ed. 1994).

43. *See id.*

44. *See* Smolla, *supra* note 41, §§ 1.6-1.8.

45. *See* Garnett, *supra* note 40, at 71-72.

46. 376 U.S. 254 (1964).

47. *See* Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment 103 (1991). After *New York Times*, all state defamation law was limited by the First Amendment. *See infra* Part I.B.2.a.

48. *See* Lewis, *supra* note 47, at 103.

49. *See* Smolla, *supra* note 41, § 1.8; *see, e.g.*, Lewis, *supra* note 47, at 28 (describing the elements in Alabama prior to *New York Times*: "a plaintiff ha[d] to show that (1) the

defamation actions were disadvantaged, at least by our current standards, in many of the ways currently present in English law.[50] The elements for an English defamation claim remain the same as those required under American state common law prior to 1964.[51]

ii. Burden of Proof

In America, at common law, the burden was on the defendant to prove truth,[52] and in England this aspect persists.[53] In England, defamatory statements[54] by their nature are presumed false.[55] A defendant may, as a defense, plead that his statements were true and thus justified.[56] However, to mount this defense, the defendant must prove the substantial truth of every material fact.[57] A material fact is defined as anything that "adds weight to the imputation."[58] Proving truth is no simple task. In *Grobbelaar v. New Group Newspapers Ltd.*,[59] a newspaper gave expansive coverage to allegations that a soccer player took bribes in exchange for throwing matches.[60] The paper based its story on video evidence of the player taking bribes.[61] The player was never criminally convicted,[62] but he pleaded

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defendant published (2) a defamatory statement (3) about the plaintiff"). The Restatement of Torts describes the elements as follows:

> To create liability for defamation there must be:
> (a) a false and defamatory statement concerning another;
> (b) an unprivileged publication to a third party;
> (c) fault amounting at least to negligence on the part of the publisher; and
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Restatement (Second) of Torts § 558 (1977). This Note will not discuss the fourth element, which relates to the difference between libel and slander. These differences are not relevant to this Note. For further information on libel contrasted with slander, see Sheldon W. Halpern, The Law of Defamation, Privacy, Publicity, and Moral Right 138-52 (4th ed. 2000). The first and third elements recognize the changes wrought by *New York Times* and its progeny. *See infra* Part I.B.2.a.

50. *See* Lewis, *supra* note 47, at 156-57; *see also* Smolla, *supra* note 41, § 1.7 ("Prior to [1964] . . . American law and English law were still essentially identical.").

51. *See* Mark Lunney & Ken Oliphant, Tort Law: Text and Materials 659-60 (2d ed. 2003). *But see* Maureen Mulholland, *Defamation*, *in* Clerk & Lindsell on Torts 22-14 (Anthony M. Dugdale ed., 18th ed. 2000) (explaining that a prima facie case by the plaintiff must include that the statement was false and was published maliciously even though the burden of proof for both of these "elements" falls on the defendant).

52. *See* Donald M. Gillmor, Power, Publicity and the Abuse of Libel Law 13-14 (1992).

53. *See* Lunney & Oliphant, *supra* note 51, at 681.

54. The test in England for what is defamatory is "'would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally'" or cause the subject of the statements to be "'shunned or avoided?'" Mulholland, *supra* note 51, at 22-19 (quoting Sim v. Stretch, [1936] 52 T.L.R. 669, 671 (H.L.) (Eng.); Youssopoff v. M.G.M. Pictures Ltd., [1934] 50 T.L.R. 581, 587 (C.A.) (Eng.)).

55. *See* Lunney & Oliphant, *supra* note 51, at 681.

56. *See id.*

57. *See* Mulholland, *supra* note 51, at 22-81.

58. *Id.* at 22-83.

59. [2002] UKHL 40, [2002] 1 W.L.R. 3024 (H.L.) (Eng.).

60. [2002] 1 W.L.R. at 3026.

61. *Id.* at 3030.

guilty to a disciplinary charge by the Football Association.[63] The newspaper asserted the justification defense, which failed.[64] The jury was convinced that the plaintiff took bribes, but they were not convinced that he threw matches.[65] Therefore, the defendant did not prove the truth of all of the material facts.[66]

### iii. Opinion

Traditional American common law did not give "opinion" wholesale protection.[67] Essentially, if the defendant could not prove that a statement was true, the question of whether the statement was defamatory was left to a jury.[68] This continues to be true in England. For example, in *Berkoff v. Burchill*, Steven Berkoff sued a movie reviewer who described him as "hideous" in one article and in another compared him unfavorably to the monster in the film, *Mary Shelley's Frankenstein*.[69] It was left for a jury to determine if this was defamatory.[70]

### iv. Fault

Traditional American common law followed English law by not requiring that the plaintiff prove fault on the part of the defendant.[71] A speaker's good faith belief in truth was inconsequential.[72] Indeed, in one

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62. *See* Lunney & Oliphant, *supra* note 51, at 682. After two hung juries the prosecution finally elected not to pursue the matter further. *See id.*

63. *See id.*

64. *Grobbelaar*, [2002] 1 W.L.R. at 3026.

65. *Id.*

66. *Id.* While the British court allowed the jury verdict to stand, the damages were reduced from 85,000 pounds to one pound. *Id.*

67. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 13 (1990) ("The common law generally did not place any additional restrictions on the type of statement that could be actionable. Indeed, defamatory communications were deemed actionable regardless of whether they were deemed to be statements of fact or opinion." (citing Restatement of Torts §§ 565-67 (1938))).

68. *See* Restatement (Second) of Torts § 566 cmt. a (1977) ("Under the law of defamation, an expression of opinion could be defamatory if the expression was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. The expression of opinion was also actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory. This position was maintained even though the truth or falsity of an opinion—as distinguished from a statement of fact—is not a matter that can be objectively determined and truth is a complete defense to a suit for defamation." (citations omitted)). The opinion issue is complex and beyond the scope of this Note. For example, common law did protect some hyperbolic statements as well as other statements not meant to be taken seriously. *See* Halpern, *supra* note 49, at 81-94.

69. Berkoff v. Burchill, (1996) 4 All E.R. (Comm.) 1008 (C.A.) (Eng.).

70. *Id.* at 1009.

71. *See* Lewis, *supra* note 47, at 157.

72. *Id.*; *see also Milkovich*, 497 U.S. at 12 ("As the common law developed in this country, apart from the issue of damages, one usually needed only allege an unprivileged

famous case that is still good law in England, a British Court found the publisher of a caricature liable for defamation even assuming, as the defendant argued, that the sketch referred to a fictitious character who coincidentally had the same name as the plaintiff.[73] It was enough that in using the name, the sketch clearly referred to the plaintiff.[74]

v. Damages

By not requiring proof of any particular loss, English law also remains lenient to plaintiffs in the area of damages.[75] If a defendant is found liable, a court will grant wide latitude to the jury.[76] Similarly, in the United States damages were generally presumed, meaning that a plaintiff need not prove injury. If the statement was defamatory, the fact that it injured the plaintiff was presumed by the statement.[77]

Current English law also provides two ways that a defendant's response to a defamation suit can lead to increased damages: First, if the defendant pleads a justification defense (that is, argues that his statements were true) and is unsuccessful, the jury may award aggravated damages; second, if the defendant does not apologize, the jury also may award aggravated damages.[78]

b. *Protecting the Interest in Speech Through Privileges*

Prior to 1964, American states were not exclusively interested in protecting reputation. Privileges and immunities existed to protect society's interest in freedom of expression.[79] For example, to ensure uninhibited speech in legal settings, many states immunized people making statements during judicial proceedings.[80] And to protect the press specifically, states often privileged fair and accurate reports of official or public proceedings.[81] Indeed, some states were more protective of the interest in speech than others. Kansas protected any speech directed at a candidate for office made in good faith—meaning that the speaker reasonably believed the facts stated were true.[82]

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publication of false and defamatory matter to state a cause of action for defamation." (citing Restatement of Torts § 558)).

73. E. Hulton & Co. v. Jones, [1910] A.C. 20 (H.L.) (Eng.).

74. *Id.*

75. *See* Ian Loveland, Political Libels: A Comparative Study 13-14 (2000).

76. *See id.* at 14.

77. *See* Smolla, *supra* note 41, § 1.8.

78. *See* Loveland, *supra* note 75, at 14.

79. *See* Halpern, *supra* note 49, at 178.

80. *See, e.g.*, Restatement (Second) of Torts § 585 (1977). The common law had (and continues to have) many immunities and privileges. For a more thorough discussion, see Halpern, *supra* note 49, at 178-207.

81. *See* Restatement (Second) of Torts § 611.

82. *See* Coleman v. MacLennan, 98 P. 211 (Kan. 1908) (finding that statements made by a newspaper about a public officer seeking reelection were made in good faith, and though they were false and defamatory, were therefore not actionable). This case was cited by the

British defamation law also protects free and open speech[83] through privileges, both absolute and qualified.[84] The qualified privilege is based on circumstance—the "privileged occasion." Such an occasion arises when statements are "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned."[85] The privilege is qualified because if the plaintiff can show[86] that the statements were made with malice,[87] the privilege will be defeated.[88]

Absolute privileges differ from qualified privileges in that they cannot be defeated by proof of malice.[89] English law maintains this privilege for "participants (be they judges, counsel, parties or witnesses) in judicial proceedings," for communications in the military or among civil servants, and for lawyers with their clients.[90] There is also a statutory absolute privilege for statements made in Parliament.[91]

Opinion is protected in England through the fair comment privilege.[92] This defense has been called "the most useful to the media."[93] It may only be raised when the statements are on a matter of public interest.[94] To make this defense, the defendant must prove that the comment was made on the basis of certain facts and must prove the truth of these facts.[95] Based on the facts that the defendant is able to prove, the jury must determine if the opinion "could honestly be expressed."[96] Like a qualified privilege, a plaintiff can still overcome this defense by showing that the statements

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*New York Times* Court as important precedent leading it to its decision. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280-82 (1964).

83. *See* Mulholland, *supra* note 51, at 22-08 ("The conflict between the values of freedom of speech on the one hand and the protection of a person's right to his reputation on the other has been addressed by the English courts . . . .").

84. *See* Loveland, *supra* note 75, at 8 ("[T]he absolute and qualified privilege defences accept that the common law has recognised that there are some types of information in respect of which it is better to run the risk that individuals be falsely defamed than that potentially true allegations be withheld.").

85. *Id.* (quoting Toogood v. Spyring, [1834] Eng. Rep. 1044 (H.L.)).

86. The plaintiff bears the burden of proof beyond a reasonable doubt. *See id.* at 10.

87. Malice can be shown in one of three ways: (1) The defendant was motivated by a "desire to inflict damage on the plaintiff"; (2) the plaintiff was not in fact motivated by the duty; or (3) the defendant knew that the information was false. *Id.* at 10-11.

88. *See id.* at 8.

89. *Id.* at 11.

90. *Id.*

91. *Id.* at 12.

92. *Id.*

93. Eric Barendt et al., Libel and the Media: The Chilling Effect 10 (1997).

94. *See* Loveland, *supra* note 75, at 13. The term public interest has been "afforded a wide meaning" covering nearly all government issues, criticism of the arts, and criticism of other objects put out for public consumption by the plaintiff. *Id.*

95. *See id.*

96. Barendt et al., *supra* note 93, at 12; *see also* Lunney & Oliphant, *supra* note 51, at 690 ("The test of fairness is 'would any honest man, however prejudiced he might be, or however exaggerated or obstinate his views, have written this criticism.' The defence thus protects the 'crank.'" (quoting Turner v. M.G.M. Pictures Ltd., [1950] 1 All E.R. 449, 461 (H.L.) (Eng.))).

were made with malice,[97] which in this context means either that the defendant knew the statements were false or that the "defendant acted predominantly out of spite to the plaintiff or to achieve some personal advantage."[98] While this privilege is particularly useful to the media, it is available to anyone.[99]

2. Reform in the United States Contrasted with Reform in England

a. *The United States*

i. *New York Times Co. v. Sullivan*

In *New York Times Co. v. Sullivan*, the Supreme Court reviewed the question of whether the Constitution limited a "[s]tate's power to award damages" in defamation actions.[100]

L. B. Sullivan, the plaintiff, was a commissioner for the city of Montgomery, Alabama, and had responsibility over the police and fire departments, among other duties.[101] He sued *The New York Times* for libel based on an advertisement that appeared in its paper.[102] The ad, headlined "Heed Their Rising Voices," described a "wave of terror" that civil rights activists faced in the South.[103] The ad alleged, among other things, that the Montgomery police had threatened student protestors at a college campus and that the Montgomery police had harassed Dr. Martin Luther King, Jr., by arresting him seven times.[104] Some of these allegations were false.[105] The Alabama jury found *The New York Times* liable and awarded damages of $500,000.[106] This was an enormous sum at the time.[107]

The result reflected the fact that Alabama law was very harsh to defendants of libel actions.[108] For one thing, *The New York Times* advertisement did not even directly name the plaintiff.[109] Additionally,

97. *See* Loveland, *supra* note 75, at 13.
98. Barendt et al., *supra* note 93, at 12.
99. *See* Lunney & Oliphant, *supra* note 51, at 686 ("[A]ny person is at liberty to comment upon a matter of public interest.").
100. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).
101. *Id.* For further discussion of *New York Times*, see Lewis, *supra* note 47 (describing in depth the history and meaning of the *New York Times* decision); Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. Chi. L. Rev. 782 (1986) (arguing that the Court's decision was not a principled one); Harry Kalven, *The* New York Times *Case: A Note on "the Central Meaning of the First Amendment,"* 1964 S. Ct. Rev. 191 (1965) (celebrating the Court's decision, despite the questions that remained).
102. *N.Y. Times*, 376 U.S. at 256.
103. *Id.* at 256-57.
104. *Id.* at 257-58.
105. *Id.* at 258-59.
106. *Id.* at 256.
107. *See* Lewis, *supra* note 47, at 35.
108. *Id.* at 103.
109. *N.Y. Times*, 376 U.S. at 258.

Alabama law followed the common law, requiring no proof by the plaintiff showing that *The New York Times* was at fault.[110] For truth to act as a shield, *The New York Times* bore the burden of proving the truth of all of the statements at issue.[111] Sullivan did not even try to show that he had suffered any economic or non-pecuniary damage.[112] Damages were presumed from the fact that the statements were defamatory.[113]

*New York Times* also demonstrated how defamation law could be used to threaten free speech.[114] The damages of $500,000 were enormous,[115] and other defamation suits against the newspaper were imminent.[116] The cases were not limited to the single *New York Times* advertisement either; for example, CBS was sued for a news piece about blacks trying to vote in Montgomery.[117]

The Supreme Court's decision in *New York Times* was an expansive decision, making the Court's first constitutional foray into defamation law a bold one.[118] The Court held that in order for a plaintiff who is a public official to succeed with a defamation claim against a defendant whose speech is directed at the plaintiff's official duties, the plaintiff must show with clear and convincing evidence that the speech was made with "actual malice," meaning that the defendant had knowledge that the speech was false or acted with reckless disregard as to the truth.[119]

The decision was bold in several respects. Although the Court could have simply required some fault, such as negligence, on the part of the defendant, it required constitutional malice, a much higher degree of fault.[120] Where it could have assigned the standard of proof as by the preponderance of the evidence, as is the common burden in civil claims, the Court elected to set the much higher standard of clear and convincing evidence.[121] And the Court reviewed the facts with something less than deference to the trial court's findings, signaling a heightened standard of review.[122]

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110. Lewis, *supra* note 47, at 157. However, Sullivan did argue that *The New York Times* was at fault because it had information in another department within the company that contradicted the ad's allegations. *N.Y. Times*, 376 U.S. at 260-61.

111. Lewis, *supra* note 47, at 35.

112. *N.Y. Times*, 376 U.S. at 260.

113. *Id.* at 262.

114. *See* Lewis, *supra* note 47, at 34-35.

115. This was the biggest libel judgment in Alabama history. *See id.* at 35.

116. Other people implicated under the aegis of "police" were preparing to file suit also. *Id.* at 103. Prior to the Supreme Court's review of *New York Times*, the Mayor of Birmingham also won an award for $500,000 based on the same statements. *See id.* at 35.

117. *Id.* at 36.

118. *Id.* at 140.

119. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

120. *See* Lewis, *supra* note 47, at 47.

121. *See id.* at 148.

122. *See id.* at 147-49. In a later case, the Supreme Court determined that the clearly erroneous standard does not apply to review of defamation cases, which instead call for "independent examination." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 498-515 (1984).

The Court's sweeping decision was based on several factors.[123] The Court believed that defamation law could inhibit speech to a similar degree as a statute criminalizing speech. Justice Brennan stated at the outset that

> [a]lthough this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which [*The New York Times*] claim[s] . . . impose[d] invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action [or] that it is common law . . . .[124]

The Court later went on to compare application of Alabama's defamation law to the Sedition Act of 1798.[125] The Sedition Act, the Court stated, had been "inconsistent with the First Amendment" because it allowed prosecution for certain forms of political speech.[126] The Court then added,

> What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.[127]

The real danger, the Court maintained, with a defamation law that punished speech without sufficient safeguards was that it could "chill" speech:

> Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.[128]

As such, the common law truth defense was not sufficiently protective of defendants.[129]

### ii. Expansion After *New York Times*

The Supreme Court continued to provide greater protection over speech after *New York Times*. The rule requiring actual malice when plaintiffs are public officials was extended to plaintiffs who are public figures.[130] While

123. It is also important to note that there were those on the Court who wanted to go much further, arguing that when the government is the object of criticism, the speaker should have complete immunity. *N.Y. Times*, 376 U.S. at 297-305 (Goldberg, J., dissenting); *see also* Lewis, *supra* note 47, at 179.

124. *N.Y. Times*, 376 U.S. at 265.

125. *Id.* at 273-78 (citing Sedition Act of 1798, 1 Stat. 596).

126. *Id.* at 276; *see also* Lewis, *supra* note 47, at 145 ("Justice Brennan did something quite extraordinary: He held unconstitutional an act of Congress that had expired one hundred and sixty-three years before.").

127. *N.Y. Times*, 376 U.S. at 277.

128. *Id.* at 279; *see also* Smolla, *supra* note 41, § 2.3 (arguing that this was the heart of the opinion's analysis).

129. *See* Smolla, *supra* note 41, § 2.3 (citing *N.Y. Times*, 376 U.S. at 279).

130. Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967). *Curtis* actually held that a slightly different standard applied when the defendant was a public figure. *Id.* at 155 (holding that in

the Court declined to apply its malice standard whenever speech was on a matter of public concern, it did hold that in such cases a state may not find liability without a showing of some degree of fault.[131] Generally, this is interpreted to mean that a finding of at least some degree of fault is always required regardless of the type of speech,[132] and many state laws reflect this position.[133]

The Supreme Court not only focused on fault but also identified constitutional restrictions on allocating the burden of proof. In *Philadelphia Newspapers, Inc. v. Hepps*, the Supreme Court struck down a state law that required the defendant to prove truth when the defendant was a member of the media and spoke on a matter of public concern.[134] In these cases, "the plaintiff [must] bear the burden of showing falsity."[135] The opinion noted that who has the burden of proof would only be relevant "when the fact finding process [is] unable to resolve conclusively whether the speech is true or false."[136]

In *Milkovich v. Lorain Journal Co.*, the Supreme Court declined the opportunity to protect all "opinion."[137] Instead, the Court held that opinion is only protected to the extent that (1) it must be provably false,[138] and (2) it must reasonably be interpreted as stating actual facts.[139]

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public figure cases, the plaintiff must prove on the part of the defendant "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers"). However, in subsequent decisions, the Court held that *Curtis* required applying the *New York Times* malice standard when the plaintiff was a public figure. *See* Harte-Hanks Commc'ns, Inc. v. Cannaughton, 491 U.S. 657, 666 (1989) ("Today, there is no question that public figure libel cases are controlled by the *New York Times* standard . . . .").

131. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (displacing *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), which stated in a plurality opinion that the actual malice standard should apply whenever speech is on a matter of public concern).

132. *See* Halpern, *supra* note 49, at 382-83.

133. *See id.* at 373-74 (noting that many states require more than simple negligence depending on the context); *see also* Restatement (Second) of Torts § 558 (1977) (stating that one element of all defamation claims is "fault amounting at least to negligence on the part of the publisher").

134. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986) ("To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.").

135. *Id.* at 776.

136. *Id.*

137. Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990) ("[W]e do not think . . . *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled 'opinion' . . . . Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact." (citation omitted)).

138. *Id.* at 19-20 (citing *Phila. Newspapers, Inc.*, 475 U.S. at 775) ("Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved.").

139. *Id.* at 20 ("[T]he *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual . . . provid[ing] assurance that public debate will not suffer for lack of

The Supreme Court also added rules for damages. If the plaintiff cannot prove malice as defined in *New York Times*, then the plaintiff cannot win presumed or punitive damages.[140] The Court later held that this rule does not apply when the plaintiff is a private figure and the speech at issue is not on a matter of public concern.[141]

### iii. Single Publication Rule

In defamation cases, complex problems arise in analyzing conflicts of laws.[142] Further complication arises because of the nature of defamation, where often the damage caused by a publication can extend well beyond one jurisdiction.[143] The single publication rule has replaced the traditional rule that each copy of a newspaper, for example, was separately actionable.[144] Instead, as described in the Restatement, only one action can be brought for most mass communications:

> (1) Except as stated in Subsections (2) and (3), each of several communications to a third person by the same defamer is a separate publication.
>
> (2) A single communication heard at the same time by two or more third persons is a single publication.
>
> (3) Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.
>
> (4) As to any single publication,
>
> (a) only one action for damages can be maintained;
>
> (b) all damages suffered in all jurisdictions can be recovered in the one action; and

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'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." (quoting Hustler Magazine v. Falwell, 485 U.S. 46, 50, 53-55 (1987)) (citations omitted)).

140. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) ("States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.").

141. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) ("In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'").

142. *See* Halpern, *supra* note 49, at 25-26.

143. *Id.* at 26-27. Typically, in multistate publications in the United States, a court will apply the law of the state with "the most significant relationship to the occurrence and the parties." Restatement (Second) of Conflict of Laws § 150(1) (1971). If a publication occurs in the jurisdiction where the plaintiff is domiciled, there is often a presumption that the law of that jurisdiction will control. *See id.* § 150(2). However, that will not always be the case and courts consider a variety of factors. *See id.* § 150 cmt. e. A detailed examination of choice of law in relation to multistate publications, particularly those on the Internet, is beyond the scope of this Note.

144. *See* Halpern, *supra* note 49, at 26-27.

> (c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.[145]

This is not a constitutional standard, but the Restatement is closely followed by most jurisdictions.[146]

### b. *English Defamation Reform*

As one commentator noted, defamation law in England has a "remarkable capacity for survival."[147] As such, it has not undergone the radical transformation that we have witnessed in the United States.[148] But, while England has not transformed its defamation law, there has been recent reform.

#### i. The Reasons for Reform

The English legal changes derive, at least in part, from the observation that English law does not adequately protect the press, and thus chills speech.[149] A recent study analyzed the effect England's libel laws have had on the media and the way it publishes.[150] Defamation cases have been on the rise in England,[151] with the defendants chiefly comprised of newspapers.[152] As a result of the constant threat of defamation actions, newspapers have complex legal procedures to ensure legality[153] and to respond to complaints.[154] In this structured environment, the study found that risky statements were often removed before publication[155]—especially those that were known to be true but for practical reasons would be difficult to prove.[156]

The authors of the study concluded that there was a pervasive chilling effect on the media.[157] There was a direct chilling effect that occurred

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145. Restatement (Second) of Torts § 577A (1977).

146. Halpern, *supra* note 49, at 26. ("With [the traditional] rule clearly unworkable in an age of mass communications, a strong and successful movement has resulted in the general adoption, by decision or statute, of the 'Single Publication Rule' . . . .").

147. John Murphy, Street on Torts 480 (11th ed. 2003).

148. *See* Barendt et al., *supra* note 93, at 1 (noting that even recent reforms in England "do not alter the main principles of the substantive law of libel").

149. *See* Lunney & Oliphant, *supra* note 51, at 728-29 ("[C]oncern has been expressed for a number of years that the English law of defamation is too harsh in its operation, with the result that it unduly interferes with the reporting of the news by the media, and acts as a shield which can be manipulated by the rich and powerful in order to deflect attention away . . . .").

150. Barendt et al., *supra* note 93.

151. *Id.* at 37. Eric Barendt et al. derive this conclusion of growth in libel cases by observing the number of libel cases brought to court during the prior five years. *Id.* at 39.

152. *Id.* at 40.

153. *Id.* at 48-54.

154. *Id.* at 54-60.

155. *Id.* at 67.

156. *Id.* at 69.

157. *Id.* at 191.

when statements were "changed in light of legal considerations" and was exemplified by the editors' mantra of "'if in doubt, strike it out.'"[158] There was also a structural chilling effect that was a "deeper, and subtler way in which libel inhibit[ed] media publication."[159] As an example, there were so-called "'no-go areas,'" topics that the media simply would not consider reporting on.[160] The study concluded "that the chilling effect . . . genuinely does exist and significantly restricts what the public is able to read and hear."[161] From this conclusion, the authors of the study identified three features of English law that were particularly problematic: first, that publishers face liability without evidence of fault;[162] second, that there is a presumption of falsity;[163] and third, that the jury is unchecked in assessing damages without proof of loss.[164]

### ii. Defamation Reform Act of 1996

The Defamation Reform Act of 1996[165] was a legislative attempt to better protect the rights of speakers in England.[166] The Act reduced the statute of limitations of any libel claim to one year.[167] More significantly, the Act bolstered certain defenses. The common law defense of "offer to make amends" was given greater heft by granting greater legal protection to a willing defendant who admits making defamatory statements and offers to pay damages.[168] The Act also included further protection for innocent dissemination,[169] thereby protecting those who were not the actual authors of the speech and did not know they were participating in its dissemination.[170] An example of this is the Internet provider on whose message boards a person posts defamatory matter.[171] Additionally, the Act added another qualified privilege.[172] This privilege protects fair and accurate reports of meetings open to the public,[173] such as parliamentary

158. *Id.*
159. *Id.* at 192.
160. *Id.*
161. *Id.* at 191.
162. *Id.* at 194-95.
163. *Id.* at 195-96.
164. *Id.* at 196-97.
165. Defamation Act, 1996, c. 31 (Eng.).
166. *See* Loveland, *supra* note 75, at 157-59.
167. Defamation Act, c. 31, § 5.
168. *Id.* §§ 2-4. If a defendant offers to admit fault and pay some damages, so long as he did not know the statements were false, he may plead an "offer to make amends" at trial as a mitigating factor. *Id.* If the plaintiff accepts the offer, a judge will determine damages instead of a jury. *Id.*
169. *Id.* § 1.
170. Murphy, *supra* note 147, at 506 ("[A] person has a defence if he shows that he was not the 'author, editor or publisher' of the matter complained of; that he took reasonable care in relation to its publication, and that he did not know (or have reason to believe) that what he did caused or contributed to the publication of defamatory matter.").
171. *See id.*
172. Defamation Act, c. 31, § 15.
173. *Id.*

hearings, court hearings, and public meetings held by private groups.[174] The privilege can be lost by a showing of malice,[175] or by a showing that the defendant did not publish a retraction upon being requested to by the plaintiff.[176] The Act did not provide broad *New York Times*-style protection.[177]

### iii. *Reynolds v. Times Newspapers*

Without a parliamentary solution, defendants in English cases have continued to seek greater protection through the courts. In one recent case, *Reynolds v. Times Newspapers*, an English court of appeals revisited the question of whether political speech should receive greater protection.[178] The plaintiff was the former Prime Minister of Ireland who had left his office on the heels of scandal.[179] The defendants were a newspaper and its reporter who had accused the former prime minister of dishonesty.[180] The issue before the court was whether there should be a new category of qualified privilege that would apply whenever the media reported on political issues.[181]

The court reviewed landmark decisions around the world, including *New York Times*, and concluded that there should be increased protection, but stopped far short of granting the breadth of protection given in the United States.[182] The court determined that the press's interests could be protected through existing qualified privilege.[183] The privilege would arise upon a finding that the media report was of a "public interest." To determine if there is a public interest, the court announced an elaborate set of factors that included the importance of the matter and the manner in which the statement was made.[184] While expanding the qualified privilege to include

174. *See* Lunney & Oliphant, *supra* note 51, at 704-05.

175. *Id.* at 705.

176. Defamation Act, c. 31, § 15(2).

177. *See* Loveland, *supra* note 75, at 159 (explaining that the Act did not provide an "actual malice" standard for those defendants who allegedly libel public officials or public figures).

178. Reynolds v. Times Newspapers Ltd., [2001] 2 A.C. 127 (H.C. 1999) (Eng.).

179. *Id.* at 135.

180. *Id.* at 141.

181. *Id.* at 135.

182. *See* Loveland, *supra* note 75, at 166 ("Once again, an English court has approached this question by assigning primary importance to the protection of reputation, thereby necessarily assigning a secondary, subsidiary role to the dissemination of political information.").

183. *Id.*

184. *Reynolds*, [2001] 2 A.C. at 205. The factors were:

> 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid . . . . 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation

statements by the press, the court also held that the standard of fault would be simple negligence, meaning that if the plaintiff could prove that the media acted unreasonably, the privilege would be lost.[185]

iv. The Multiple Publication Rule

English law also differs in another fundamental respect from American law in that there is no single-publication rule.[186] To the contrary, England has a multiple publication rule, meaning that "[e]very repetition of a defamatory statement is a new publication and creates a fresh cause of action in the person defamed."[187] This has been extended to include each time a person accesses a webpage.[188]

c. *Conclusion*

English and American law maintain different balances between an individual's interest in reputation and society's interest in freedom of expression.[189] Indeed, American courts have recognized these differences,[190] and because these differences can be an affront to American

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which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff . . . [a]n approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.

*Id.; see also* Andrew T. Kenyon, Lange *and* Reynolds *Qualified Privilege: Australian and English Defamation Law and Practice*, 28 Melb. U. L. Rev. 406, 410-11 (2004).

185. *See* Lunney & Oliphant, *supra* note 51, at 699.

186. *See id.* at 680.

187. *Id.* at 678.

188. *Id.* at 680 (citing Loutchansky v. Times Newspapers Ltd. (No. 2), [2001] EWCA (Civ) 1805, [2002] Q.B. 783 (Eng.); Godfrey v. Demon Internet Ltd., [2001] Q.B. 201 (Eng.)). This is a very important point for another reason: If the place of publication is England, an English court will, with exceptions, retain jurisdiction. *Id.* However, English judges do have discretion to refuse to take jurisdiction if there is another forum that is "clearly more appropriate." *See* Mathew Collins, The Law of Defamation and the Internet 349 (2d ed. 2005). A recent case exemplifies another exception to the basic jurisdictional rule. There, an English appeals court determined that it was an abuse of process for a plaintiff to bring an action in an English court on the basis of a web posting that was, in fact, only viewed by five people in England, three of whom were associated with the plaintiff. *See* Dow Jones & Co. v. Jameel, [2005] EWCA (Civ) 75, [2005] 2 W.L.R. 1614, [18], [70], [76] (Eng.).

189. *See* Smolla, *supra* note 41, § 1.9.

190. *See, e.g.*, Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661, 663 (Sup. Ct. 1992) ("Under English law, any published statement which adversely affects a person's reputation, or the respect in which that person is held, is *prima facie* defamatory. Plaintiffs' only burden is to establish that the words complained of refer to them, were published by the defendant, and bear a defamatory meaning. If, as in the present case, statements of fact are concerned, they are presumed to be false and the defendant must plead justification for the issue of truth to be brought before the jury. An unsuccessful defense of justification may result in the award of aggravated damages . . . . English law does not distinguish between private persons and those who are public figures or are involved in matters of public

public policy, U.S. courts have refused to enforce defamation judgments obtained in England.[191] These differences in defamation law are significant even after recent reform in England: The defendant still carries the burden of proof regarding truth; the court still will not consider the degree of fault by the publisher in determining liability; there is no separate treatment based on whether the plaintiff is a public official or public figure; there still need be no proof of damage; and mass communications are still actionable many times over.

So what can an American defendant do who is either sued or threatened with suit in England for a publication he believes occurred in the United States? The next section examines the Declaratory Judgment Act, a tool that sometimes allows a potential defendant to bring suit in a United States federal district court.

### C. *Seeking Declaratory Relief Under the Declaratory Judgment Act*

Generally, a United States district court may only act "when a litigant is entitled to coercive relief, such as a judgment for damages or an injunction."[192] The Declaratory Judgment Act ("DJA"), however, is a procedural device that allows a party to seek a federal court's declaration of "rights and other legal relations" between parties without seeking any coercive relief against the defendant.[193] For example, the DJA provides a remedy for the user of a technology, when there is an alleged patent holder threatening suit, who wishes to determine if he will incur damages or is free to use the technology.[194] The DJA can also be used by a person who is concerned she is violating a statute, has yet to be prosecuted, but would like to argue that the statute is unconstitutional before penalties accrue.[195] Although a plaintiff seeking a declaratory judgment may not necessarily

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concern. None are required to prove falsity of the libel or fault on the part of the defendant. No plaintiff is required to prove that a media defendant intentionally or negligently disregarded proper journalistic standards in order to prevail."); *see also* Matusevitch v. Telnikoff, 877 F. Supp. 1, 4-5 (D.D.C. 1995) (finding that English law does not require a jury to examine the context of speech to determine if it is protected opinion, and that in England a speaker is not accorded sufficient protection when the plaintiff is a public figure or speaks on a matter of public concern).

191. *See infra* note 292 and accompanying text.

192. Charles Alan Wright & Mary Kay Kane, Law of Federal Courts 716 (2002); *see also* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950) ("Prior to [The Declaratory Judgment Act ("DJA")], a federal court would entertain a suit on a contract only if the plaintiff asked for an immediately enforceable remedy like money damages or an injunction.").

193. 28 U.S.C. § 2201 (2000).

194. *See, e.g.*, Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83 (1993) (holding that the threat of patent infringement litigation provided the proper setting for declaratory relief).

195. *See, e.g.*, Steffel v. Thompson, 415 U.S. 452 (1974) (finding declaratory relief appropriate when threats of prosecution were made by the government, and the plaintiff challenged the constitutionality of the statute); *see also infra* notes 297-315 and accompanying text.

win damages or an injunction,[196] the plaintiff may gain an understanding of her legal rights.

This section first outlines the history of declaratory relief in the United States, then provides an overview of the analysis that a court must undertake in a case involving a request for declaratory relief, and concludes by examining cases where declaratory relief has been sought in the First Amendment and international contexts.

1. History and Purposes for Enactment of the Declaratory Judgment Act

Congress passed the DJA in 1934.[197] The enactment of the DJA ended a long debate among legal scholars about whether such a law should be passed and whether it would be constitutional.[198] The debate began with several law review articles, written by, among others,[199] Edwin M. Borchard,[200] who has come to be known as the father of the DJA.[201] He called for allowing declaratory relief in the United States.[202] He praised such a law as "designed to enable parties to ascertain and establish their legal relations, so as to conduct themselves accordingly, and thus to avoid the necessity of future litigation."[203]

At the time Borchard was writing, in 1918, there were neither federal nor state laws that gave courts the power to provide declaratory relief.[204] But soon thereafter, beginning in 1919, states began to enact laws allowing their courts to make declaratory judgments.[205] In *Nashville, Chattanooga & St. Louis Railway Co. v. Wallace*,[206] the Supreme Court reviewed for the first time a declaratory judgment issued in Tennessee.[207] The state of

196. While the DJA allows a dispute to be resolved without granting coercive relief, such a request may be made along with a request for declaratory relief. *See* Alan Wright et al., 10B Federal Practice and Procedure § 2751 (3d ed. 2003).

197. Act of June 14, 1934, 48 Stat. 955 (codified as amended at 28 U.S.C. § 2201 (2000)).

198. *See* Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. Rev. 529, 552-55 (1989).

199. Professor Edson Sunderland has also been credited as a "crusade[r]" for declaratory relief. Wright & Kane, *supra* note 192, § 100.

200. Doernberg & Mushlin, *supra* note 198, at 550 n.92 (citing Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform, Part I*, 28 Yale L.J. 1, 12-14 (1918); Edson R. Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment Act*, 16 Mich. L. Rev. 69 (1917)).

201. *See, e.g.*, U.S. Fid. & Guar. Co. v. Koch, 102 F.2d 288, 290 (3d Cir. 1939) ("Professor Borchard [is] the 'father' of the declaratory judgment in the United States.").

202. Edwin M. Borchard, *The Declaratory Judgment Act—A Needed Procedural Reform, Part II*, 28 Yale L.J. 105, 150 (1918).

203. *Id.* at 110.

204. *See* Russell B. Hill, *Should Anticipation Kill Application of the Declaratory Judgment Act?*, 26 T. Jefferson L. Rev. 239, 240 (2004). *But see* Doernberg & Mushlin, *supra* note 198, at 550 n.97 (noting that some states had statutes providing for declaratory relief prior to 1919 but only in the cases of wills and deeds).

205. *See* Hill, *supra* note 204, at 240.

206. 288 U.S. 249 (1933).

207. *Id.* at 259.

Tennessee argued that the Supreme Court did not have the power, under Article III of the United States Constitution, to review a declaratory judgment,[208] which became the threshold issue before the Court.[209] The Court held that federal courts could review such findings,[210] and, in so doing, rejected Tennessee's formalistic argument, concluding that "[i]n determining whether this litigation presents a case within the appellate jurisdiction of this Court, we are concerned, not with form, but with substance."[211] The Court also seemed to indicate that federal courts could be authorized to provide declaratory relief, by adding,

> [T]he Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 . . . .[212]

Shortly after this decision, Congress created in the federal courts, through the DJA, the power to issue declaratory judgments.[213] The Act reads, in part, as follows:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.[214]

The Supreme Court unanimously upheld the constitutionality of the Act in *Aetna Life Insurance Co. v. Haworth*.[215] In 1938, the DJA was provided for in the Federal Rules of Civil Procedure:

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208. *Id.* at 256. A previous Supreme Court case had seemed to create doubt as to whether federal courts could, under the United States Constitution, grant declaratory relief. *See* Hill, *supra* note 204, at 240 (discussing Willing v. Chi. Auditorium Ass'n, 277 U.S. 274, 289 (1928) ("To grant [declaratory] relief is beyond the power conferred upon the federal judiciary.")).

209. *Wallace*, 288 U.S. at 259 ("This preliminary question, which has been elaborately briefed and argued, must first be considered, for the judicial power with which this Court is invested by Art. 3, § 1 . . . only to 'cases' and 'controversies;' if no 'case' or 'controversy' is presented for decision, we are without power to review the decree of the court." (citation omitted)). Professor Borchard, along with Charles E. Clark, submitted a brief as amici curiae by leave of the Court. In it, they argued that the federal court should retain jurisdiction. *Id.* at 258.

210. *Id.* at 260.

211. *Id.* at 259.

212. *Id.* at 264.

213. 28 U.S.C. § 2201 (2000).

214. *Id.*

215. 300 U.S. 227, 240 (1937) ("Exercising this control . . . is not confined to traditional forms or traditional remedies . . . . The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.").

> The procedure for obtaining a declaratory judgment . . . shall be in accordance with these rules . . . . The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.[216]

There are many proposed purposes behind the DJA.[217] Professor Borchard succinctly explained that the DJA's "purpose is to afford security and relief against uncertainty and doubt."[218] Another commentator has said that the legislative purpose of the act was "to provide prospective defendants in the federal system with the procedural mechanism to obtain judicial resolution of present controversies that would otherwise linger at the discretion of potential plaintiffs."[219] One court explained this purpose as the avoidance of "the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure—or never."[220] Additionally, the DJA promotes efficiency: "[I]t helps avoid a multiplicity of actions by affording an adequate, expedient, and inexpensive means for declaring in one action the rights and obligations of litigants."[221]

Plaintiffs often seek declaratory relief in tandem with injunctive relief "because each involves a court determination regarding the propriety of a particular course of action."[222] In this scenario, a party would request a declaration that it has a certain right and on the basis of that right ask a court to enjoin the opposing party from continuing its actions.[223] While these two forms of relief are often sought together, their analyses are distinct.[224] Declaratory relief "involves a lesser showing than injunctive relief."[225]

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216. Fed. R. Civ. P. 57.

217. Martin H. Redish, *Declaratory Judgments*, *in* 12 Moore's Federal Practice: Declaratory Judgments § 57.04[3] (James Wm. Moore ed., 5th ed. 2003) ("[A]ctions for declaratory relief serve many purposes: Parties may avoid incurring damages by seeking a declaration of rights and obligations before performance of contract duties or violations of law; It promotes judicial efficiency by avoiding multiple proceedings; It enables parties to avoid harassment or threats of litigation; It provides a potentially effective alternative to injunctive relief . . . with a lesser showing than is required to obtain an injunction.").

218. Borchard, *supra* note 200, at 4.

219. Hill, *supra* note 204, at 239.

220. Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 237 (D.C.N.J. 1966). The "Damoclean threat" refers to the story of "Damocles, a courtier of Syracuse, . . . held to have been seated beneath a sword hung by a single thread." Hill, *supra* note 204, at 239.

221. Wright et al., *supra* note 196, § 2768; *see, e.g.*, Beacon Constr. Co. v. Matco Elec. Co., 521 F.2d 392, 397 (2d Cir. 1975) (noting that the DJA was intended to "afford a speedy and inexpensive method of adjudicating legal disputes without invoking the coercive remedies of the old procedure" (citation omitted)).

222. Redish, *supra* note 217, § 57.07.

223. *See, e.g.*, Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394 (S.D.N.Y. 2003) (plaintiff requesting a declaration of non-liability for defamation, and on that basis also requesting an injunction against the defendant from continuing its suit in England).

224. *See* Redish, *supra* note 217, § 57.07.

225. *Id.* For example, in a request for declaratory relief a party need not show that irreparable harm will follow if the court does not act. *Id.*

2. Mode of Analysis: "Actual Controversy" and "Discretion of the Court"

To determine if declaratory relief is appropriate, a court must first determine if it has subject matter jurisdiction, which in the context of the DJA includes both typical subject matter jurisdiction analysis as well as a determination of whether there is an actual controversy.[226] Once a court has determined that it has jurisdiction, it must decide whether it will elect to use its discretion and hear the case.[227]

a. *Jurisdiction*

The DJA has been found not to extend jurisdiction.[228] Therefore, a court must find subject matter jurisdiction through either federal question jurisdiction[229] or diversity jurisdiction.[230] While outside the purview of this Note, it is important to recognize that complications do arise when seeking declaratory relief with international parties.[231]

In DJA actions, for a court to have subject matter jurisdiction, there is the additional requirement that there be an "actual controversy."[232] This is not only required by the text of the DJA, but by the United States Constitution.[233] A district court faced with an action seeking declaratory

226. *Id.* § 57.09.

227. *Id.*

228. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950) ("Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction."); *see also* Wright et al., *supra* note 196, § 2754 ("[The DJA is] not jurisdictional. [It is] procedural only and merely grant[s] authority to the courts to use a new remedy in cases over which they otherwise have jurisdiction.").

229. *See* 28 U.S.C. § 1331 (2000).

230. *See* 28 U.S.C. § 1332 (2000).

231. In the context of the DJA, the amount in controversy for diversity jurisdiction is determined by the court, which asks whether a complaint written in a typical suit between the parties would request greater than $75,000 in damages. *See* Redish, *supra* note 217, § 57.21. Under U.S.C. § 1332(a)(2), which provides for jurisdiction in cases with foreign parties, there must be complete diversity, meaning that all of the plaintiffs must be citizens of the United States and all the defendants citizens of foreign countries, or visa versa. *See* 32A Am. Jur. 2d *Federal Courts* § 729 (2005). Because diversity jurisdiction is usually satisfied in international cases, there will not be an extended discussion of federal question jurisdiction. However, in the DJA context, federal question jurisdiction is complicated by the fact that it is a potential defendant who often initiates the action. In effect, the DJA could be a way for a party to get around the well-pleaded complaint rule and bring the action into federal court; however, the Supreme Court has held that "it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court." Pub. Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 248 (1952). As a result, a district court must predict what a well-pleaded complaint would have been if the potential plaintiff (now defendant) had filed his action. *See* Redish, *supra* note 217, § 57.21.

232. 28 U.S.C. § 2201(a) (2000). Courts often will consider whether there is an actual controversy even before considering if there is diversity or federal question jurisdiction. *See* Wright et al., *supra* note 196, § 2766; *see also* Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 406 (S.D.N.Y. 2003) ("As a threshold issue, DJA actions are justiciable only in cases in which an 'actual controversy' exists.").

233. *See* U.S. Const. art III, § 2; *see also* Redish, *supra* note 217, § 57.22[1].

relief must determine whether the issue is "an abstract, hypothetical or academic question" or "a real and substantial controversy."[234] As the Supreme Court has explained, "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication . . . [to be proper], 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field."[235]

The analysis of whether there is an "actual controversy" is not mechanical, and there is no exact formula for distinguishing between what is abstract and what is concrete.[236] The Supreme Court explained, in an oft-repeated formulation, "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[237] From the first case that reviewed the viability of the DJA, courts have struggled to find an appropriate test[238] and have used a variety of factors and phrases to determine if there is an actual controversy.[239]

The starting place in the analysis is whether the parties have adverse legal interests.[240] If so, a court will ask whether the circumstances of the case substantially affect those interests.[241] In one typical case, which resulted in the conclusion that there was a controversy, the Supreme Court found that

> [t]here is no doubt . . . that . . . respondents' suit was the "pursuance of an honest and actual antagonistic assertion of rights by one [party] against another," . . . [and] that "valuable legal rights . . . [would] be directly affected to a specific and substantial degree" by a decision . . . and that the Court of Appeals therefore had before it a real case and controversy . . . .[242]

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234. *Harrods*, 237 F. Supp. 2d at 406.

235. United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 89 (1947) (quoting United States v. Appalachian Elec. Power Co., 311 U.S. 377, 423 (1940) (citations omitted)).

236. *See* Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941) ("The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult . . . to fashion a precise test for determining in every case whether there is such a controversy.").

237. *Id.*

238. *See* Pub. Serv. Comm'n of Utah v. Wycoff, 344 U.S. 237, 242-44 (1952) (citing the many "familiar phrases" used in order to "define and delimit the measure of this new remedy" in *Aetna Life Inurance Co. v. Haworth*, 300 U.S. 227 (1934)).

239. *Md. Cas. Co.*, 312 U.S. at 273.

240. *See* Redish, *supra* note 217, § 57.22[2][b] (citing Golden v. Zwickler, 394 U.S. 103, 108-09 (1969)).

241. *See id.* (citing U. S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446 (1993)).

242. *Nat'l Bank of Or.*, 508 U.S. at 446 (quoting Muskrat v. United States, 219 U.S. 346, 359 (1911); Nashville, C. & St. L. R. Co. v. Wallace, 288 U.S. 249, 262 (1933)).

The controversy must also be immediate and real.[243] As one commentator has explained, "[D]eclaratory relief is appropriate when and only when one or both parties have pursued a course of conduct that will result in imminent and inevitable litigation unless the issue is resolved by declaratory relief."[244] For example, the apprehension of a suit—a common reason for filing an action for declaratory relief—can make a controversy sufficiently real.[245] The question becomes the reasonableness of that apprehension.[246]

Related to the above factors, but often treated separately, is the doctrine of ripeness. Ripeness is generally a matter of determining whether the timing of bringing the action is appropriate.[247] In *Public Service Commission of Utah v. Wycoff*, the Supreme Court explained that "[t]he disagreement must not be nebulous or contingent but must have taken a fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on its adversaries, and some useful purpose to be achieved in deciding them."[248] Thus, the ripeness inquiry is about more than just the immediacy of the controversy, but about whether the controversy can be settled now—whether this is the right time for the action to be brought.

Ripeness includes two concepts: the fitness of the action, and the hardship that would be felt were no declaratory relief provided.[249] Fitness relates to the concern over the certainty of the legal relations between the parties. If there are future events—or contingencies—that could unfold that would lead to a conclusion that there is no dispute, then it is less likely that a court will find that there is an actual controversy.[250] One court has explained, "A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required."[251] However, factual contingencies will not always prevent a

243. Armstrong World Indus., Inc. v. Adams, 961 F.2d 405, 412 (3d Cir. 1992) (finding that, where a plaintiff seeks declaratory relief, the issue must have "sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (internal quotations and citations omitted)).

244. Redish, *supra* note 217, § 57.22[2][c].

245. *Id.*

246. *Compare* Shell Oil Co. v. Amoco Corp., 970 F.2d 885, 887-88 (Fed. Cir. 1992) (finding no actual controversy because the defendant in the action had never actually threatened to sue the plaintiff who was seeking declaratory relief), *with* Orix Credit Alliance v. Wolfe, 212 F.3d 891, 897 (5th Cir. 2000) (finding an actual controversy where there was a threat by the defendant, notwithstanding the fact that the threat of litigation was contingent on other events occurring).

247. *See* Redish, *supra* note 217, § 57.22[3].

248. Pub. Serv. Comm'n of Utah v. Wycoff, 344 U.S. 237, 244 (1952).

249. Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967) ("The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.").

250. *See, e.g., id.*

251. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 833 F.2d 583, 587 (5th Cir. 1987).

declaratory judgment action from proceeding.[252] For example, in insurance cases where it is unknown if an injured potential plaintiff will sue, and if he does, whether he will win, these contingencies will not prevent the insurer from bringing an action seeking declaratory relief.[253]

Hardship is satisfied by showing that the plaintiff seeking declaratory relief will be harmed without immediate judicial intervention. As one court explained, "This question turns on whether the challenged action creates a direct and immediate dilemma for the parties, requiring them to choose between costly compliance and noncompliance at the risk of punishment."[254] To show the hardship that will result from a lack of judicial intervention, the plaintiff can demonstrate the positive results that will flow from a declaratory judgment: that the judgment will have a conclusive effect,[255] and that the judgment will be useful to the plaintiff's interests.[256]

In general, the plaintiff has the burden of demonstrating that the issue is justiciable.[257] However, the exact factors that determine whether there is an actual controversy can vary by court or jurisdiction.[258]

There are other possible bars to finding an actual controversy. Mootness, for example, may prevent an action from satisfying the actual controversy requirement.[259] The availability of another remedy, however, will not necessarily force a district court to deny declaratory relief.[260] Rule 57 of the Federal Rules of Civil Procedure indicates that "another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."[261] And the DJA allows for declaratory relief "whether or

252. Wright et al., *supra* note 196, § 2757 ("It is clear that in some instances a declaratory judgment is proper even though there are future contingencies that will determine whether a controversy ever actually becomes real.").

253. *Id.*

254. Redish, *supra* note 217, § 57.22[3][a].

255. *See, e.g.*, Step-Saver Data Sys., Inc. v. Wyse Tech., 912 F.2d 643, 648 (3d Cir. 1990) (denying declaratory relief for lack of ripeness in part because "any decree issued by the district court [would not] be sufficiently conclusive to define and clarify the legal rights or relations of the parties").

256. *See, e.g.*, Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 693 (1st Cir. 1994) ("The second part of the ripeness inquiry evoked by declaratory judgment actions is concerned with the hardship to the parties that would result from a refusal to consider granting relief. We believe that this part of the inquiry should focus on the judgment's usefulness. Rather than asking, negatively, whether denying relief would impose hardship, courts will do well to ask, in a more positive vein, whether granting relief would serve a useful purpose, or, put another way, whether the sought-after declaration would be of practical assistance in setting the underlying controversy to rest.").

257. Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 95 (1993).

258. *See* Redish, *supra* note 217, § 57.22[3][a].

259. An issue becomes moot "when the issues presented no longer are 'live' or the parties no longer have a legally cognizable interest in the outcome." Wright et al., *supra* note 196, § 2757. However, if one of several issues remains live, then there is still a "controversy." *Id.* Also, if there is a "substantial likelihood that an allegedly moot question will recur, the issue remains justiciable and a declaratory judgment may be rendered." *Id.*

260. *Id.* § 2758.

261. Fed. R. Civ. P. 57.

not further relief is or could be sought."[262] Similarly, the fact that an adverse party has brought an action in another court will not preclude declaratory relief from being granted.[263]

### b. *Discretion*

Once a district court determines that the case is justiciable, it must determine whether it should exercise its discretion and consider providing declaratory relief. Even though there is no clause in the DJA explicitly stating that it is discretionary, it was the intent of the drafters to make it so.[264] The Supreme Court put any doubt to rest in *Brillhart v. Excess Insurance Co. of America*, when it held that the district court, though it had the power to provide declaratory relief, "was under no compulsion to exercise that jurisdiction."[265] More recently the Court expounded further on this issue in *Wilton v. Seven Falls Co.*:

> By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants. Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close. In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.[266]

Just because it is in the discretion of the district court, however, does not mean it may deny relief based on a "whim or . . . disinclination."[267] Indeed a court must have a reason and must articulate that reason.[268] In general, commentators have asserted and courts have held that the relief should be applied liberally where there is a controversy,[269] but that courts need not find "extraordinary circumstances" in order to deny the relief.[270]

Professor Borchard developed two criteria that have often been cited by courts[271] to determine when to exercise discretion and provide declaratory relief:

> The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when

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262. 28 U.S.C. § 2201(a) (2000).
263. *See* Redish, *supra* note 217, § 57.42[2][b][i][B].
264. Edwin M. Borchard, Declaratory Judgments 313 (2d ed. 1941) ("[A]lthough discretion is not specifically mentioned, there was no intention to modify the established rules of law.").
265. Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 494 (1942).
266. Wilton v. Seven Falls Co., 515 U.S. 277, 288 (1995).
267. *See* Pub. Affairs Press, Inc. v. Rickover, 369 U.S. 111, 112 (1962).
268. *See id.*
269. *See, e.g.*, Borchard, *supra* note 264, at 294-96;
270. *See* Redish, *supra* note 217, § 57.41 (citing *Wilton*, 515 U.S. at 289).
271. *See* Wright et al., *supra* note 196, § 2759.

> it will terminate and afford relief from uncertainty, insecurity, and controversy giving rise to the proceeding.[272]

These two factors are often combined, focusing on the advantage—or "practicality"—of providing the requested relief.[273]

One factor that might militate against a court's exercising its discretion is the availability of other remedies.[274] While another remedy does not preclude a district court from acting, a finding that another remedy is superior may lead a court to decline to exercise its discretion.[275] A similar analysis follows if there is another suit involving the same parties in the same case, but in state court (a "pendent" state claim)—it will not preclude declaratory relief, but it might affect the court's decision on exercising its discretion.[276] In *Wilton*, the Supreme Court explained,

> [A] district court should examine "the scope of the pending state court proceeding and the nature of the defenses open there." This inquiry, in turn, entails consideration of "whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc." . . . [W]here another suit involving the same parties . . . is pending in state court, a district court might be indulging in "[g]ratuitous interference."[277]

Courts will generally look to determine if the other remedy or proceeding ongoing in state court is superior, giving deference when it is.[278] When the pendent state claim's forum is not superior, a federal court will look at a number of factors to determine if the court should provide the requested declaratory relief.[279] In cases where a court declines to exercise its discretion because there is a pendent state court claim, the preferable option is to stay the proceeding rather than dismiss it outright.[280]

Courts are also more likely to decline declaratory relief when there is evidence of forum shopping.[281] A court is not likely to grant its discretion if it believes that the plaintiff brought its action in federal court to get a

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272. Borchard, *supra* note 264, at 299.
273. *See Wilton*, 515 U.S. at 288.
274. *See* Wright et al., *supra* note 196, § 2758.
275. *See id.*
276. *See id.*
277. *Wilton*, 515 U.S. at 283 (quoting Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 495 (1942)) (citations omitted).
278. *See* Redish, *supra* note 217, § 57.42[2][b]; *see also* Cont'l Cas. Co. v. Coastal Sav. Bank, 977 F.2d 734 (2d Cir. 1992) (finding that the pending state action was different in terms of facts and parties, and therefore was not superior, thus not precluding declaratory relief by the federal court).
279. *See* Redish, *supra* note 217, § 57.42[2][b] (outlining several factors, including: the balance of conveniences; the existence of a compelling state court interest; whether all the parties can be brought in a state claim; and others).
280. *See Wilton*, 515 U.S. at 288 n.2.
281. *See* Redish, *supra* note 217, § 57.42[3].

more advantageous forum and in anticipation of an action filed by the opposing party.[282]

Some courts have formalized the discretion analysis into a five-part test.[283] The five factors have been described as follows:

> (1) [W]hether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; (2) whether a judgment would finalize the controversy and offer relief from uncertainty; . . . [3] whether the proposed remedy is being used merely for procedural fencing or a race to res judicata; [4] whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and [5] whether there is a better or more effective remedy.[284]

### c. *Comity*

A final consideration that is a part of the discretion analysis is that of comity. It is considered separately here because this issue takes on particular importance when considering DJA actions in the international context. The Supreme Court has defined comity as "a proper respect for state functions."[285] In its DJA discretion analysis a district court will typically analyze whether "principles of federalism, comity, judicial efficiency, and avoidance of federal-state conflict support federal jurisdiction."[286]

When declaratory relief is requested on the international stage, a different issue of comity arises.[287] International comity, or "comity of nations" has been defined simply as "friendly dealing[s] between nations at peace."[288]

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

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282. *Id.*

283. *See, e.g.*, *In re* Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999, 392 F. Supp. 2d 461, 473 (E.D.N.Y. 2005); *see also* Nucor Corp. v. Aceros y Maquilas de Occidente, S.A. de C.V., 28 F.3d 572, 579 (7th Cir. 1994).

284. *In re Air Crash*, 392 F. Supp. 2d at 473 (citing Dow Jones & Co. v. Harrods, Ltd., 346 F.3d 357, 359 (2d Cir. 2003)) (brackets in original). The Sixth and Seventh Circuits also have this five-part test. *See Nucor*, 28 F.3d at 579.

285. Younger v. Harris, 401 U.S. 37, 44 (1971) (defining the term "comity" in relation to a request for injunctive relief).

286. *See* Redish, *supra* note 217, § 57.42[4]; *see, e.g.*, U.S. Liab. Ins. Co. v. Wise, 887 F. Supp. 348, 352 (D. Mass. 1995) (choosing not to provide the requested relief because "considerations of federalism, efficiency and comity . . . outweigh[ed] the federal policy in favor of declaratory relief").

287. *See Dow Jones*, 237 F. Supp. 2d at 410-11 (noting that other cases allowed declaratory relief "in the context of domestic federal-state principles," but in the international arena "[t]he circumstances [were] quite distinct" because "[t]he constitutional strictures of the Full Faith and Credit Clause do not extend to international assertions of jurisdiction").

288. Hilton v. Guyot, 159 U.S. 113, 162 (1895).

> both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[289]

The "comity of nations" doctrine mandates that courts should heed the judgments of foreign jurisdictions as part of a larger effort to maintain friendly relations.[290] However, federal courts are not required by the Constitution to give extraterritorial effect to foreign judgments,[291] and foreign nations are not required to heed American court decisions. American courts may not give effect to a foreign judgment if it conflicts substantively with an important public policy.[292] Likewise, if a foreign tribunal suffers from one of a variety of defects in its legal procedure, American courts may not give its rulings extraterritorial effect.[293]

The DJA concludes, "[a]ny such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."[294] Therefore—with some limitations—principles of res judicata and collateral estoppel apply to declaratory judgments.[295] For domestic cases, this means that a state generally may not rehear cases that a federal court decides and in which it provides declaratory relief.[296] Foreign courts need not heed American declaratory judgments, however.

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289. *Id.* at 163-64.

290. *See* Sheldon R. Shapiro, Annotation, *Valid Judgment of Court of Foreign Country as Entitled to Extraterritorial Effect in Federal District Court*, 13 A.L.R. Fed. 208 (1972 & Supp. 2005) (listing cases where comity has been the reason for granting extraterritorial effect for foreign judgments).

291. *See Hilton*, 159 U.S. at 164 (explaining that while judgments of states are constitutionally entitled to full faith and credit, judgments of foreign countries are not).

292. *See, e.g.*, Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 931 (D.C. Cir. 1984) (explaining that courts are "not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests"). Particularly on point in this Note, courts have refused to enforce foreign defamation judgments on public policy grounds. *See* Matusevitch v. Telnikoff, 877 F. Supp 1, 4 (D.D.C. 1995) ("In light of the different [defamation laws], this court concludes that recognition and enforcement of the foreign judgment in this case would deprive the plaintiff of his constitutional rights."); Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661, 665 (Sup. Ct. 1992) ("The protection to free speech and the press embodied in that amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution."); *see also* supra note 190 and accompanying text.

293. *See Hilton*, 159 U.S. at 202-03 (finding that "where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice," the judgment should be given effect).

294. 28 U.S.C. § 2201(a) (2000).

295. *See* E.H. Schopler, Annotation, *Extent to Which Principles of Res Judicata Are Applicable to Judgments in Actions for Declaratory Relief*, 10 A.L.R.2d 782, 785 (1950 & Supp. 2005). One example of a limitation is that a plaintiff may seek further coercive relief after obtaining declaratory relief. *Id.* at 787.

296. *Id.* at 785.

### 3. The DJA in the First Amendment and International Contexts

This section examines federal courts' treatment of two issues that arise in the context of declaratory relief cases and that are the focus of this Note. First, this section examines the role of the First Amendment in courts' determinations of whether to provide declaratory relief. Second, this section explores several cases where plaintiffs have sought declaratory relief in the international context.

#### a. *Declaratory Judgments and the First Amendment*

Parties frequently seek declaratory relief because of the threat of liability—criminal or civil—under a statute that may be unconstitutional.[297] The central question is whether the statute violates, or threatens to violate, the plaintiff's constitutional rights at the time of the litigation.[298] The Supreme Court has stated that declaratory relief is appropriate when "a refusal on the part of the federal courts to intervene . . . may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity."[299] To determine if a claim is sufficiently immediate and real, "[t]he [Supreme] Court spread the justiciability question along a continuum ranging between 'a general threat by officials to enforce those laws which they are charged to administer' and a 'direct threat of punishment against a named [party] . . . for a completed act'" with those closer to the direct threat more likely to be an actual controversy.[300]

In *Steffel v. Thompson*, the Supreme Court considered a request for declaratory relief from a Georgia statute that was allegedly "being applied in violation of petitioner's First and Fourteenth Amendment rights."[301] Richard Steffel and a companion distributed anti-Vietnam war handbills in front of a supermarket.[302] The owner of the supermarket asked them to leave and, when they did not, called the police.[303] The police told the plaintiffs they would be arrested if they did not leave.[304] A few days later the pair returned and the same events transpired, except this time Steffel's companion did not leave and was arrested.[305] Steffel wanted to continue his protest, but he did not because of the threat of arrest.[306] The district court and the U.S. Court of Appeals for the Fifth Circuit denied his request

297. *See* Redish, *supra* note 217, § 57.22[8][a][i].
298. *See id.*
299. Steffel v. Thompson, 415 U.S. 452, 462 (1974).
300. Nat'l Student Ass'n v. Hershey, 412 F.2d 1103, 1111 (D.C. Cir. 1969) (quoting United Pub. Workers v. Mitchell, 330 U.S. 75, 88 (1947)).
301. *Steffel*, 415 U.S. at 454-55.
302. *Id.* at 455.
303. *Id.*
304. *Id.*
305. *Id.* at 455-56.
306. *Id.* at 456.

for declaratory relief based on a finding that there was no controversy.[307] The Supreme Court reversed, however, holding that "federal declaratory relief is not precluded when no state prosecution is pending [as long as] a federal plaintiff demonstrates a genuine threat of enforcement."[308]

*Steffel* is a typical example of how unconstitutional laws might be challenged through the use of the DJA[309] and accords with the actual controversy analysis discussed above.[310] The government threatened the plaintiff's constitutional rights and thus there were adverse legal interests.[311] Steffel's claim was ripe because there was no further factual development necessary to understand the issues,[312] and as such the questions were purely legal.[313] The harm he faced was, on the one hand, the threat of arrest if he continued the activity, or, on the other, the government's suppression of his speech if he chose to discontinue the activity.[314] The controversy was immediate and real because he had faced threats on more than one occasion that he would be arrested and had in fact seen his companion arrested.[315]

An open issue is whether—and the extent to which—accusations of a chilling effect bear on the actual controversy analysis.[316] In *Golden v. Zwickler*, the Supreme Court reviewed another handbills case.[317] There, Sanford Zwickler wanted to distribute anonymous handbills about a congressman,[318] but a statute prohibited anonymous handbills about candidates for office.[319] Mr. Zwickler sought a declaration that such a statute was unconstitutional.[320] The district court provided the requested relief.[321] However, by the time the case arrived at the Supreme Court, the congressman had become a judge and was not ever likely to run for office again.[322] The case was therefore moot since the handbills could not be distributed in opposition to his run for office.[323] The Supreme Court reversed the finding of the district court, which had held that the claim was justiciable because there was an actual controversy when the action was

307. *Id.* at 456-57.
308. *Id.* at 475. The Court also held that "[w]hen no state proceeding is pending and thus considerations of equity, comity, and federalism have little vitality, the propriety of granting federal declaratory relief may properly be considered." *Id.* at 462.
309. *See* Redish, *supra* note 217, § 57.22[8][a][i] n.52.
310. *See supra* Part I.B.2.a.
311. *See supra* notes 240-42 and accompanying text.
312. *See supra* note 250 and accompanying text.
313. *See supra* note 251 and accompanying text.
314. *See supra* notes 254-56 and accompanying text.
315. *See supra* notes 243-46 and accompanying text.
316. *See* Redish, *supra* note 217, § 57.22[8][a][i].
317. Golden v. Zwickler, 394 U.S. 103 (1969).
318. *Id.* at 105-06.
319. *Id.* at 104.
320. *Id.*
321. *Id.* at 107.
322. *Id.* at 106.
323. *Id.* at 107.

filed.[324] The Court held that "[t]he constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance."[325] The case was not live but moot,[326] and not specific because

> [i]t was not enough to say, as did the District Court, that nevertheless Zwickler has a "further and far broader right to a general adjudication of unconstitutionality . . . [in] [h]is own interest as well as that of others who would with like anonymity practise free speech in a political environment . . . ."[327]

*Golden* has been understood to mean that when the party seeking declaratory relief has no specific interest, "he ha[s] no standing to raise the interests of others;" put another way, a general chilling effect is not sufficient to find an actual controversy for the purposes of a declaratory judgment.[328]

In *Virginia v. American Booksellers Ass'n*, the Supreme Court examined a request for declaratory and injunctive relief from a statute that required bookshop owners to keep obscene material out of the reach of children.[329] While there was no specific threat to enforce the statute against the plaintiffs in the case,[330] the Supreme Court held that the case was justiciable because "plaintiffs [had] alleged an actual and well-founded fear that the law [would] be enforced against them. Further, the alleged danger of this statute [was], in large measure, one of self-censorship; a harm that [could] be realized even without an actual prosecution."[331] The Court noted that despite a general rule prohibiting litigants from asserting the rights of nonparties, an exception applies in cases where "'[l]itigants . . . challenge a statute . . . because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'"[332] This exception applied notwithstanding the "pre-enforcement nature of this suit."[333]

This decision thus recognized that a statute, if directed at a specific type of person—in this case bookshop owners—could by its very existence create a reasonable apprehension of prosecution, and therefore an actual controversy. Moreover, the Court recognized that even without enforcement, the statute potentially harmed the bookshop owners by "self-censorship" or a chilling effect. Finally, having established the fact that the statute affected this plaintiff, the Court took into consideration the general chilling effect the statute had on others not before the Court.

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324. *Id.* at 107-08.
325. *Id.* at 110.
326. *Id.*
327. *Id.* at 109-10 (quoting Zwickler v. Koota, 261 F. Supp. 985 (E.D.N.Y. 1966)).
328. Nat'l Student Ass'n v. Hershey, 412 F.2d 1103, 1113 n.29 (D.C. Cir. 1969).
329. Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 388-89 (1988).
330. *Id.* at 393.
331. *Id.*
332. *Id.* at 392-93 (quoting Sec'y of Md. v. J. H. Munson Co., 467 U.S. 947, 956-57 (1984)).
333. *Id.* at 393.

Other federal courts also have noted that an actual controversy is more likely to exist when a plaintiff's request for declaratory judgment is based on First Amendment grounds.[334] In *National Student Ass'n v. Hershey*, the D.C. Circuit Court considered this issue in depth.[335] A group of students sought declaratory relief from a directive issued by the selective service director.[336] The directive stated that protesters of the Vietnam war could lose their draft deferments and risk being immediately inducted into the armed forces.[337] None of the plaintiffs was specifically threatened;[338] however the court held that there was an actual controversy. In coming to this decision, the court stated,

> [I]t appears that suits alleging injury in the form of a chilling effect may be more readily justiciable than comparable suits not so affected with a First Amendment interest. Nonetheless, for a number of reasons we are not persuaded that every plaintiff who alleges a First Amendment chilling effect and shivers in court has thereby established a case or controversy.[339]

The court gave several reasons why it would not be persuaded to find a controversy in every such case: the fact that there was negative precedent on the subject;[340] the separation of powers problem—that such a position might lead to de facto court review of every statute;[341] and the concern that reviewing pre-enforcement challenges would not provide courts with the specific factual predicate that is typically their basis for determining cases.[342] The court concluded that there could be no bright-line rule, and the analysis must be done on a "case-by-case basis:"

> In determining whether a given chilling effect is sufficient [to satisfy the actual controversy requirement], it would seem relevant to consider *inter alia*: (1) the severity and scope of the alleged chilling effect on First Amendment freedoms, (2) the likelihood of other opportunities to vindicate such First Amendment rights as may be infringed with reasonable promptness, and (3) the nature of the issues which a full adjudication on the merits must resolve, and the need for factual referents

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334. *See* Pic-A-State Pa., Inc. v. Reno, 76 F.3d 1294, 1299 n.3 (3d Cir. 1996) (recognizing that other cases that implicated the First Amendment were not applicable to the case at bar, which did not implicate the First Amendment, and therefore denying justiciability); Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 409 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003) ("It is true that under some circumstances it is easier to satisfy the threshold of a justiciable controversy when the claim implicates First Amendment rights."); Kansans For Life, Inc. v. Gaede, 38 F. Supp. 2d 928, 933 (D. Kan. 1999) ("[I]n the context of a First Amendment facial challenge, '[r]easonable predictability of enforcement or threats of enforcement, without more, have sometimes been enough to ripen a claim . . . .'" (quoting Martin Tractor Co. v. Fed. Election Comm'n, 627 F.2d 375, 380 (D.C. Cir. 1980))).

335. Nat'l Student Ass'n v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969).

336. *Id.* at 1105.

337. *Id.*

338. *Id.*

339. *Id.* at 1113-14 (citations omitted).

340. *Id.* at 1114 (citing United Pub. Workers v. Mitchell, 330 U.S. 75 (1947)).

341. *Id.*

342. *Id.*

> in order properly to define and narrow the issues. These considerations become relevant . . . only if the plaintiffs plausibly allege that they are in fact vulnerable to the alleged chilling effect.[343]

The court analyzed the case and found that the students, none of whom had specifically been targeted under the statute, had presented an actual controversy because there was a chilling effect on First Amendment protected activity—i.e., political protest of the Vietnam War.[344] After its threshold finding that the actual controversy requirement was satisfied, the court found the directive unconstitutional.[345]

### b. *International Declaratory Judgments*

There have been several cases where plaintiffs have sought declaratory relief while suits against those plaintiffs were threatened or ongoing in foreign courts. While not common, these cases present unique issues such as: whether foreign courts will heed American declaratory judgments; how these judgments affect relations between foreign jurisdictions; how to consider issues of forum shopping when the other forum is foreign; and how to determine whether to defer to overseas litigation and whether this analysis should be the same as when the parallel proceeding is in a state court.

In *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, the District Court for the Southern District of New York considered a request for declaratory and injunctive relief from foreign litigation.[346] Farrell was a shipping company that entered into an agreement with the defendants to ship equipment from Italy to the United States.[347] The bill of lading included a forum selection clause indicating that U.S. law applied should there be a dispute.[348] U.S. law limited Farrell's liability to $500 per package, as did the bill of lading itself.[349] While in transit within the United States, the equipment suffered $800,000 worth of damage.[350] There followed a disagreement over whether Farrell's liability was indeed limited to $500.[351] Farrell, sensing litigation in its future, filed suit in a U.S. district court seeking a declaration that the forum selection clause was enforceable, with Farrell's liability therefore limited to $500,[352] as well as "an order enjoining defendants from filing or

343. *Id.* at 1115.
344. *Id.* at 1119 ("[W]e think the deferment policy works a pronounced chilling effect of legal or protected conduct.").
345. *Id.* at 1121-24.
346. Farrell Lines Inc. v. Columbus Cello-Poly Corp., 32 F. Supp. 2d 118 (S.D.N.Y. 1997), *aff'd*, 161 f.3d 115 (2d Cir 1998).
347. *Id.* at 122. The defendants included multiple companies and insurers. *Id.*
348. *Id.* at 123. The bill provided specifically that the Carriage of Goods by Sea Act of the United States of America applied. *Id.* at 122.
349. *Id.* at 123.
350. *Id.*
351. *Id.*
352. *Id.*

prosecuting suit relating to the damaged cargo in any other forum."[353] The defendants subsequently filed suit in Italy.[354]

The court found two sufficient controversies. First, there was a dispute over what law applied—American or Italian—the resolution of which would determine if there was a limit of $500 on Farrell's liability.[355] Second, there was the question of whether the forum selection clause was binding.[356] The defendants argued that under Italian law it was not, while the plaintiffs asserted that it was binding under American law.[357] The court explained that "for an actual controversy to exist, there need not be imminent danger of a suit in a United States court. Rather, there must be a controversy of sufficient immediacy that a ruling on the merits would substantially alleviate uncertainty surrounding the legal issues."[358]

Having resolved the threshold actual controversy issue, the court also exercised its discretion.[359] The court appeared focused on the fact that providing the requested relief would serve a useful purpose by "clarify[ing] plaintiff's liability" and would be conclusive by "end[ing] the uncertainty and insecurity giving rise to this proceeding."[360] While noting a general disinclination to provide declaratory relief when an action is brought in anticipation of an adverse party filing an action in another forum, the court said this was not improper here because the "plaintiff filed suit seeking resolution of a real controversy in the forum designated in the Bill of Lading."[361] The court also held that there was no forum shopping here because "the forum selection clause in the Bill of Lading requires suit in this district."[362] Finally, the fact that Italian law might provide an adequate alternative remedy was not dispositive.[363] The court did not at any point analyze the extent to which the foreign court might, or might not, recognize its declarations and injunction.

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353. *Id.* at 122.
354. *Id.* at 123.
355. *Id.* at 124.
356. *Id.*
357. *Id.*
358. *Id.* at 125.
359. *Id.* at 124. In its opinion, the court indicated that the circumstances required entertaining the suit for declaratory relief. *Id.* However, on appeal the Second Circuit held that a district court is never required to provide declaratory relief. It held that this mistake by the district court did not affect the outcome, however, because the district court also stated "'even if [it] had discretion to dismiss this declaratory judgment action, [it] would decline to do so.'" Farrell Lines Inc. v. Ceres Terminals Inc., 161 F.3d 115, 117 (2d Cir. 1998) (quoting *Farrell Lines,* 32 F. Supp. 2d at 124).
360. *Farrell Lines*, 32 F. Supp. 2d at 124.
361. *Id.* While this may seem conclusory, this was the sum of the court's examination on this point. *See In re* Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999, 392 F. Supp. 2d 461, 476 (E.D.N.Y. 2005) (discussing *Farrell*, and observing that "the district court did not employ an elaborate analysis or evaluate the case under each of the factors").
362. *Farrell Lines*, 32 F. Supp. 2d at 125.
363. *Id.*

In *Basic v. Fitzroy Engineering, Ltd.*,[364] a district court in Illinois determined that there was no actual controversy[365] and, even if there was, that it would not elect to provide the requested relief.[366] There, a dispute arose over the alleged failure of the plaintiff, John Basic, to meet his contractual duties requiring him to build an incinerator in New Zealand.[367] The dispute went to an arbitrator in the U.S. who awarded more than $1,000,000 in damages to Fitzroy.[368] Thereafter, Fitzroy brought another action in New Zealand.[369] Basic brought suit in a U.S. district court seeking several declarations—including issue and claim preclusion, and lack of personal jurisdiction—that would have theoretically barred the New Zealand claim from going forward.[370]

In finding that there was no actual controversy, the court characterized Basic's request as "an attempt to render null and void a possible future New Zealand judgment, a judgment which may never come to pass."[371] This kind of request was not appropriate for declaratory relief for several reasons: The New Zealand action was "at a relatively primitive stage" and therefore it was unknown whether Basic would be held liable;[372] because there was no ruling, it was impossible to tell on what grounds the New Zealand court would make its decision, meaning that the issues were not clear for the court;[373] there was no imminent harm Basic faced by the action—no risk of further accrual of damages;[374] and finally, there was no use in providing the relief because there was no indication that a New Zealand court would abide by the district court's rulings.[375] The court concluded that "[i]n essence, Basic seeks a court declaration based on contingencies . . . . The Constitution does not allow a federal district court to issue advisory opinions based on fears of future judgments and speculation."[376]

In its explanation of why it would not elect to exercise discretion notwithstanding the lack of an actual controversy, the court reiterated that a ruling would not be conclusive, nor would it be useful, because, again, a New Zealand court would be very unlikely to follow the district court's

364. 949 F. Supp 1333 (N.D. Ill. 1996).
365. *Id.* at 1337-38.
366. *Id.* at 1338.
367. *Id.* at 1335.
368. *Id.*
369. *Id.*
370. *Id.*
371. *Id.* at 1337 (internal quotation omitted).
372. *Id.*
373. *Id.* at 1338.
374. *Id.* ("[T]he purpose of the DJA would not be served . . . [That purpose is] to allow a party to avoid damage prior to an impending injury-causing event, not to allow a court to advise a party as to the 'legality of a proposed course of action.' Basic has not shown how the declarations requested of the court will help him avoid imminent harm.").
375. *Id.* ("[I]t is clear that the findings would be worthless.").
376. *Id.*

ruling.[377] The court also found that Basic, having filed his action after Fitzroy, was merely forum shopping.[378] Additionally, there was an alternative remedy that was adequate because, if the New Zealand judgment were indeed against American public policy, Basic could defend an enforcement action on those grounds.[379]

The court also discussed international comity. Citing one factor within the discretion analysis as "whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach on state jurisdiction,"[380] the court concluded that this "factor . . . appl[ies] to related foreign actions as well."[381] As such, the court was required to "defer to New Zealand's own court . . . [which] should have the opportunity to render a judgment . . . without an American federal court 'looking over its proverbial shoulder,' second-guessing each New Zealand court decision, and predicting possible foreign court judgments."[382]

Another district court in Florida, in a case involving disputed contractual rights in Bolivia between an American company and a Bolivian company,[383] elected to follow the reasoning of *Basic* and declined the opportunity to provide declaratory relief.[384] The case did not explicitly state whether there was an actual controversy, and most of its analysis involved the impact of foreign litigation on the discretion analysis.[385]

In *In re Air Crash Near Nantucket Island, Massachusetts, on Oct. 31, 1999*, a district court in New York tried to bring these decisions into accord.[386] Boeing, a manufacturer of airplanes, sold a plane built in the United States to EgyptAir.[387] The contracts were executed in the U.S.[388]

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377. *Id.* at 1341.

378. *Id.* at 1339-40.

379. *Id.* at 1341 ("Basic will have the opportunity to make [the argument that a New Zealand finding of liability is against public policy]. But that opportunity will take place on another day and in front of another judge.").

380. *Id.* at 1339 (quoting Nucor v. Aceros y Maquilas de Occidente, 28 F.3d 572, 579 (7th Cir. 1994).

381. *Id.* at 1340.

382. *Id.* at 1340-41.

383. Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997). Eastman Kodak, an American company, had a dispute with Kavlin, a Bolivian company, regarding an exclusive contract arrangement that Kavlin alleged Eastman Kodak entered into in Bolivia. *Id.* at 1080-82. The U.S. litigation involved a number of causes of action brought by Eastman Kodak, just one of which was a request for a declaration according to Bolivian law that there was no such agreement. *Id.* at 1079-80.

384. *Id.* at 1089-91 ("The Court finds the reasoning of the *Basic* opinion persuasive. Quite clearly, Kodak has sought a declaratory judgment in this Court in order to preempt the effect of a possible adverse judgment in Bolivia. Under such circumstances, a federal court should stay its hand.").

385. *See id.* at 1088-90; *see also* Dole Food Co. v. Gutierrez, No. 96-2219-CIV, 2004 U.S. Dist. LEXIS 28429 (N.D. Cal. July 13, 2004) (dismissing several requests for declaratory relief because there was no actual controversy, where the plaintiff requested declarations based on Nicaraguan law, and events that took place in Nicaragua).

386. *In re* Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999, 392 F. Supp. 2d 461, 472 (E.D.N.Y. 2005).

387. *Id.* at 464.

and included a clause that specified that the governing law was from the state of Washington.[389] The contracts also stipulated that Boeing would not be liable for damages "'whether or not arising from [its] negligence.'"[390] The plane later crashed off the shores of Nantucket Island, killing all of the passengers on board.[391] The insurers for EgyptAir filed suit against Boeing in Egypt.[392] Boeing subsequently filed suit in a New York district court, seeking a declaration that its contracts barred recovery by EgyptAir and its insurers.[393]

The court first found that there was an actual controversy.[394] Without a thorough analysis,[395] the court concluded that "[i]t is clear that there is a controversy" over the existence of liability "with respect to [the crash] in light of the Purchase Agreement . . . ; moreover, [the insurance company] has commenced a subrogation proceeding against Boeing notwithstanding the anti-subrogation provision" in the contract.[396]

In its discretion analysis, the court discussed *Basic*, *Eastman Kodak*, and *Farrell*.[397] To explain why the *Farrell* court exercised its discretion and the other cases did not, the court observed that

> in each case the forum that the court determined, in the exercise of its declaratory judgment discretion, to be the appropriate forum, was the forum where the underlying dispute had its principal origins and the primary controlling legal issues were to be governed by the substantive law of that forum.[398]

In *Basic* and *Eastman Kodak*, the essential aspects of the cases took place in the foreign forum,[399] while in *Farrell*, the contract in question was made and the damage occurred in the United States.[400] Accordingly, in *Farrell*, the court found that American law applied, while in *Basic* and *Kodak* it was unclear whose law applied. Because the predicate facts took place in the U.S. and U.S. law applied, a U.S. court was the natural place to resolve the dispute.[401] This determination differentiated many of the discretion factors:

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388. *Id.* There were separate contracts for the plane itself and the parts and servicing. *Id.*

389. *Id.*

390. *Id.* (quoting the contract). The contract provided certain warranties; the non-liability clause was in reference only to those aspects of the agreement not under warranty. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.* at 472.

395. *See id.* The court only quoted the Supreme Court's test in *Maryland Casualty Co. v. Pacific Coal & Oil Co. See supra* note 237 and accompanying text.

396. *In re Air Crash*, 392 F. Supp. 2d at 472.

397. *Id.* at 472-73. The court also compared *Dow Jones* to these cases. *See infra* notes 692-94 and accompanying text.

398. *In re Air Crash*, 392 F. Supp. 2d at 473.

399. *See id.* at 474.

400. *See id.* at 475-76. In *Farrell*, the controversy "stemmed from events and circumstances originating in the United States, and the resolution of their rights were to be governed by United States law." *Id.* at 476.

401. *Id.* at 477.

There was no forum shopping in *Farrell* since it was entirely natural to seek a U.S. court;[402] the fact that there was an alternative remedy was insignificant when the plaintiff seeks the preferred forum to bring its action;[403] and because the defendant sought the unnatural forum—an Italian court—comity did not counsel against exercising jurisdiction.[404]

The *In re Air Crash* court found that, like *Farrell*, a U.S. court was the appropriate forum because the contract "had all of its roots in the United States and was to be governed by United States law."[405] As such, Boeing could not be "accused of forum shopping; to the contrary, [the insurer] has candidly acknowledged that forum-shopping was . . . at the heart of its . . . action."[406] And because American law applied, "the Court's resolution of such law could hardly be viewed as increasing friction between the American and Egyptian legal systems or compromising principles of international comity."[407]

These four cases seem to indicate that declaratory relief is appropriate when, as determined by the law that should be applied and where the events that led to the dispute took place, the U.S. court is the preferred location to settle the dispute.

## II. COMPETING CONCEPTIONS OF DECLARATORY RELIEF IN INTERNATIONAL CASES AND THE ROLE OF THE FIRST AMENDMENT

The central question of this Note is whether, and when, it is appropriate to provide declaratory relief for defendants of defamation actions brought overseas. Part II discusses two cases that have encountered many of the issues relevant to answering this question: *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme* (*Yahoo! II*)[408] and *Dow Jones & Co. v. Harrods, Ltd.*[409] Part II.A discusses *Yahoo! II* and the arguments concerning whether to provide Yahoo! with declaratory relief from a French court order that purportedly violated Yahoo!'s First Amendment rights. Part II.B examines the debate over declaratory relief in *Dow Jones*, where Dow Jones faced a pending defamation suit in England and sought from a United States court a declaration of non-liability prior to an English judgment.

402. *Id.* at 476.
403. *Id.*
404. *Id.* at 477.
405. *Id.*
406. *Id.* at 478.
407. *Id.*
408. 433 F.3d 1199 (9th Cir. 2006). This Note refers to the circuit court's Yahoo! opinion as *Yahoo! II* and the district court's opinion as *Yahoo! I*. This is the opposite of the way that the Ninth Circuit differentiated the opinions, but for clarity this Note names the two cases chronologically.
409. 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003).

### A. Yahoo!: *Confusion over when a First Amendment Violation Can Justify Declaratory Relief from a Foreign Judgment*

#### 1. The Dispute

The *Yahoo! II* controversy centered on several Yahoo.com features that allowed all of its users, including those in France, to view Nazi propaganda and to buy and sell Nazi-related items.[410] La Ligue Contre Le Racisme et L'Antisemitisme ("LICRA"), a nonprofit group created to battle anti-Semitism,[411] filed suit in France against Yahoo!,[412] alleging the violation of a French law prohibiting the "exhibition of Nazi propaganda and artifacts for sale."[413] A French court entered an interim order against Yahoo! requiring that Yahoo! make such items unavailable to users in France, and providing for a penalty of over 100,000 euros for each day of noncompliance.[414]

Yahoo! argued that it would be impossible to fully comply with the order.[415] The French court commissioned experts to do a study on whether Yahoo! could restrict French users from accessing the content without restricting American users.[416] Although the reports were inconclusive,[417] the French court issued a second interim order "reaffirm[ing]" the first order.[418]

Still, for LICRA to collect damages, it had to bring Yahoo! back to the French court "to seek the imposition of a penalty."[419] LICRA did not bring the case back to the French court at any point, allegedly because it was

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410. *Yahoo! II*, 433 F.3d at 1202.

411. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme (*Yahoo! I*), 169 F. Supp. 2d 1181, 1183 (N.D. Cal. 2001), *rev'd en banc*, 433 F.3d 1199 (9th Cir. 1992).

412. *Id.* at 1184. La Ligue Contre Le Racisme et L'Antisemitisme ("LICRA") was later joined in its suit by another group, L'Union des Etudiantes Juifs de France. *See Yahoo! II*, 433 F.3d at 1202. In this Note, "LICRA" refers to all of the defendants in the U.S. *Yahoo!* cases.

413. *Yahoo! I*, 169 F. Supp. 2d at 1184.

414. *Id.* at 1184-85 ("[T]he French Court entered an order requiring Yahoo! to (1) eliminate French citizens' access to any material on the Yahoo.com auction site that offers for sale any Nazi objects, relics, insignia, emblems, and flags; (2) eliminate French citizens' access to web pages on Yahoo.com displaying text, extracts, or quotations from *Mein Kampf* and *Protocol of the Elders of Zion*; (3) post a warning to French citizens on Yahoo.fr that any search through Yahoo.com may lead to sites containing material prohibited by Section R645-1 of the French Criminal Code, and that such viewing of the prohibited material may result in legal action against the Internet user; (4) remove from all browser directories accessible in the French Republic index headings entitled 'negationists' and from all hypertext links the equation of 'negationists' under the heading 'Holocaust.' The order subjects Yahoo! to a penalty of 100,000 Euros for each day that it fails to comply with the order.").

415. *Yahoo! II*, 433 F.3d at 1203.

416. *Id.*

417. *Id.*

418. *Id.* There were minor variations to the second order, including a change to the authorized penalty from 100,000 euros to 100,000 francs per day of noncompliance. *See id.* at 1204.

419. *Id.* at 1204.

satisfied with Yahoo!'s "level of compliance."[420] However, LICRA "stopped short of making a binding contractual commitment that [it would] not enforce the orders, and [it took] no action to have the orders withdrawn."[421] Thus LICRA maintained its power over Yahoo! just in case in its view Yahoo! "revert[ed] to [its] old ways and violate[d] French law."[422]

Yahoo! did not appeal either of the interim orders in French courts.[423] Instead, Yahoo! filed suit in a U.S. federal district court "seeking a declaratory judgment that the interim orders of the French court are not recognizable or enforceable in the United States."[424]

The U.S. district court, in *Yahoo! I*, held that the issue was justiciable and that the French court's order conflicted with Yahoo!'s First Amendment rights.[425] In *Yahoo! II*, the Ninth Circuit reviewed the case en banc[426] and reversed the district court, ordering the dismissal of the case in a six to five vote. There was not a majority on the grounds for the dismissal, with some judges choosing to dismiss for lack of personal jurisdiction, and others dismissing because the case was not ripe.[427] This section will primarily examine the arguments surrounding the issue of ripeness.

### 2. Arguments for Ripeness

#### a. *The* Yahoo! I *Decision*

In *Yahoo! I*, a California district court described the issue before it as

> whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation. In a world in which ideas and information

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420. *Id.*

421. *Id.* at 1210.

422. *Id.* at 1204 (quoting LICRA's counsel at oral argument).

423. *See id.*

424. *Id.*

425. *Yahoo! I*, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001), *rev'd en banc*, 433 F.3d 1199 (9th Cir. 1992).

426. *See Yahoo! II*, 433 F.3d at 1201 (per curiam). The case was originally heard by a regular Ninth Circuit panel and dismissed on personal jurisdiction grounds. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 379 F.3d 1120 (9th Cir. 2004).

427. Out of eleven judges, six voted to dismiss the case. *Yahoo! II*, 433 F.3d at 1201 (per curiam). Three of those six did so on the grounds that there was no personal jurisdiction, and three determined that while there was personal jurisdiction, the case was not ripe. *Id.* Eight judges held that there was personal jurisdiction, which was the case's only majority decision on any issue. *Id.* On the ripeness of the claim, five of the judges thought the claim was ripe and three thought it was not. *Id.* One judge believed that declaratory relief was inappropriate on other grounds. *Id.* at 1225-28 (Ferguson, J., concurring in the judgment) (arguing that the case should have been dismissed on abstention grounds). The remaining two judges did not consider the ripeness issue because they believed the personal jurisdiction part of their opinion was dispositive. *Id.* at 1231 (O'Scannlain, J., concurring only in the judgment); *id.* at 1232 (Tashima, J., concurring in the judgment).

> transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, the implications of this question go far beyond the facts of this case.[428]

As is typical, the court determined first whether the case was justiciable—that is, if there was an actual controversy. LICRA proffered several arguments for why there was no controversy that centered on the lack of ripeness: First, Yahoo! could still appeal the decision in France and it was unknown how the appeal would result; second, the penalty imposed was only provisional and the court still had to determine the exact penalties, if any; third, Yahoo! might yet be found by the court to have substantially complied with the order and therefore could still face no penalties; and fourth, the defendants had signaled that Yahoo! had complied with the order to their satisfaction and were not planning to pursue Yahoo! for the judgment in the United States.[429]

Despite the fact that the arguments were "facially appealing and suggest[ed] a way for the Court to avoid deciding the sensitive and controversial issues presented," the district court rejected them for several reasons.[430] First, Yahoo! had not filed an appeal, so the fact that one was available was meaningless.[431] Second, because liability was retroactive (that is, each day following the second French order would be counted against Yahoo! in determining the penalty), regardless of whether Yahoo! knew the exact amount of damages, the threat of liability was specific and present.[432] Finally, as to the third and fourth points, there was no guarantee that Yahoo! had complied sufficiently or that the defendants would not seek enforcement in the United States.[433] Therefore, there was a ripe controversy for the purposes of the DJA.

The court also elected to exercise its discretion.[434] The central argument in opposition to discretion was that the court should not interfere with a foreign tribunal.[435] But the district court found that there was no such interference:

> Nothing in Yahoo!'s suit for declaratory relief in this Court appears to be an attempt to relitigate or disturb the French court's application of French law or its order with respect to Yahoo!'s conduct in France. Rather, the purpose of the present action is to determine whether a United States

428. *Yahoo! I*, 169 F. Supp. 2d at 1186.
429. *Id.* at 1188.
430. *Id.*
431. *Id.*
432. *Id.* at 1188-89.
433. *Id.* at 1190-91 (distinguishing *Salvation Army v. Department of Community Affairs of New Jersey*, 919 F.2d 183 (3d Cir. 1990), where formal waivers of liability from the government were held to preclude standing on the part of the plaintiff, because LICRA's waiver was not formal or guaranteed in any way).
434. *Id.* at 1191-92.
435. *Id.* at 1191.

court may enforce the French order without running afoul of the First Amendment.[436]

The court then examined comity among nations, observing that foreign judgments that violate the First Amendment should not be enforced.[437] The court proceeded to find that the French ruling did violate Yahoo!'s First Amendment rights because it impermissibly punished Yahoo!'s speech emanating from the United States through the Internet.[438]

### b. *The* Yahoo! II *Dissenters*

The five judges on the Ninth Circuit in *Yahoo! II* who believed the case was ripe for judicial review ("the dissenters")[439] agreed with much of the district court's analysis,[440] and they argued further that finding the case unripe would "establish[] a new and burdensome standard for vindicating First Amendment rights in the Internet context, threatening the Internet's vitality as a medium for robust, open debate."[441]

The dissenters began with an analysis of ripeness, arguing that the case was fit—thus meeting the first prong of the ripeness analysis—because the case presented a "purely legal issue."[442] The legal issue, according to the dissenters, was whether the French court's ruling was "vague, overbroad and threaten[ed] to chill protected speech" and thus violated Yahoo!'s First Amendment rights.[443] Framed as such, "Yahoo! [sought] nothing more than [a resolution of] its legal claim that the French court injunction by its very nature—in whole or in part—threaten[ed] Yahoo!'s protected speech."[444]

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436. *Id.* at 1191-92.

437. *Id.* at 1192-93 (citing Matusevitch v. Telnikoff, 877 F. Supp 1, 4 (D.D.C. 1995); Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992)).

438. *Id.* at 1193-94 ("If a hypothetical party were physically present in France engaging in expression that was illegal in France but legal in the United States, it is unlikely that a United States court would or could question the applicability of French law to that party's conduct. However, an entirely different case would be presented if the French court ordered the party not to engage in the same expression in the United States on the basis that French citizens (along with anyone else in the world with the means to do so) later could read, hear or see it. While the advent of the Internet effectively has removed the physical and temporal elements of this hypothetical, the legal analysis is the same.").

439. While these five judges technically comprised the dissent, on the ripeness issue there was no majority, and thus calling them the dissenters is not meant to imply that the majority's opinion on the ripeness issue is the rule of the case. *See Yahoo! II*, 433 F.3d 1199, 1233 n.1 (9th Cir. 2006) (Fisher, J., with whom Hawkins, Paez, Clifton, and Bea, J.J., join, concurring in part and dissenting in part) (explaining that the "majority opinion['s] . . . articulated rationale on ripeness . . . represents a three-judge plurality and does not command a majority of the en banc court").

440. *Id.* at 1234 (citing *Yahoo! I* several times with approval).

441. *Id.* at 1236.

442. *Id.* at 1238.

443. *Id.*

444. *Id.* at 1238-39.

The dissenters also argued that for the court to make its decision, it needed no further factual development.[445] Much of this discussion paralleled the district court's opinion,[446] but the dissenters also made an additional point: "Uncertainty about whether the sword of Damocles might fall is *precisely* the reason Yahoo! seeks a determination of its First Amendment rights . . . . [T]he uncertainties Yahoo! faces . . . provide a compelling basis for a federal court to hear Yahoo!'s First Amendment challenge."[447] The dissenters went on to quote the district court: "The fact that Yahoo! does not know whether its efforts to date have met the French Court's mandate is the *precise harm* against which the Declaratory Judgment Act is designed to protect."[448]

In the second prong of the ripeness analysis—hardship—the dissenters argued that Yahoo! faced great harm.[449] First, "Yahoo! face[d] actual abridgment of its current speech" because the French court order included fines if Yahoo! kept specific material available through its site (e.g., copies of *Mein Kampf*).[450] Second,

> the absence of a discernible line between the permitted and the unpermitted . . . makes the orders facially unconstitutional . . . because it would require Yahoo! to interpret the vague and overbroad injunction as to what content is prohibited and which users should be denied access, on pain of substantial penalty should it guess wrong.[451]

The dissenters also discussed the question of whether it was "technologically feasible for Yahoo! to monitor the postings and filter the millions of users accessing the website" so as to restrict access to only those users in France.[452] The dissenters seemed doubtful that such compliance was possible.[453] Furthermore, they argued that the cost of compliance "clearly suffices to make a case ripe for adjudication."[454]

Finally, for the dissenters, this was not a case about "extra-territorial application of the First Amendment; if anything, it [was] the extra-territorial application of French law to the United States" that was the issue.[455] In

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445. *Id.* at 1241.

446. For example, the dissenters point out that there was little reason to believe that the French court would reverse its interim orders, or that the French court would find that Yahoo! was in compliance; nor was there any way to know for sure whether LICRA would ever seek to enforce the judgment. *Id.* at 1241-42.

447. *Id.* at 1242.

448. *Id.* (quoting *Yahoo! I*, 169 F. Supp. 2d 1181, 1189 (N.D. Cal. 2001), *rev'd en banc*, 433 F.3d 1199 (9th Cir. 1992) (emphasis added by *Yahoo! II*)).

449. *Id.* at 1243.

450. *Id.*

451. *Id.* at 1244 (citing *Yahoo! I*, 169 F. Supp. 2d at 1193-94).

452. *Id.* at 1245.

453. *See id.* at 1245-47 (discussing the disagreement among experts hired during the French litigation to look into the technology, and calling into question some of the conclusions by the experts and the French court).

454. *Id.* at 1247.

455. *Id.* at 1234-35.

concluding, the dissenters explained why failing to provide Yahoo! declaratory relief was so worrisome:

> [I]t leaves in place a foreign country's vague and overbroad judgment . . . . This astonishing result is itself the strongest argument for finding Yahoo!'s claims ripe for adjudication. Are we to assume that U.S.-based Internet service providers are now the policing agencies for whatever content another country wants to keep from those within its territorial borders—such as, for example, controversial views on democracy, religion or the status of women? . . .
>
> We should not allow a foreign court order to be used as leverage to quash constitutionally protected speech by denying the United States-based target an adjudication of its constitutional rights in federal court . . . . [I]n doing so the majority creates a new and troubling precedent for U.S.-based Internet service providers who may be confronted with foreign court orders that require them to police the content accessible to Internet users from another country.[456]

### 3. The Argument for a Lack of Ripeness

The "majority"[457] held that while the case presented a controversy under Article III of the U.S. Constitution,[458] it required dismissal because of a lack of "prudential ripeness."[459] The issue, according to the majority, was "whether the two interim orders of the French court are enforceable in this country."[460] The standard to answer this question, the majority explained, is that foreign judgments are enforceable unless they are found to be "repugnant" to public policy.[461]

In determining the ripeness of this legal question—whether the French court orders were repugnant to public policy—the majority examined fitness and hardship.[462] For the majority, the case was not fit because it was uncertain about "whether, or in what form, a First Amendment question might be presented."[463] On the question of "whether" there would be a

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456. *Id.* at 1252-53.

457. The term "majority" is used for convenience only. The "majority's" portion of its opinion on ripeness was only a plurality opinion. *See supra* note 439 and accompanying text.

458. *Yahoo! II*, 433 F.3d at 1211 ("The existence of Article III subject matter jurisdiction is . . . a close question, but we agree with the district court that the effect of the French court's orders on Yahoo! is sufficient to create a case or controversy within the meaning of Article III.").

459. *Id.*

460. *Id.* at 1212.

461. *Id.* at 1212-15 (finding that the "repugnancy" standard that applies when the defendant is a party seeking nonenforcement of an overseas monetary judgment should also apply in the declaratory judgment context where the party seeking non-enforceability is the plaintiff and the enforcement question concerns an injunction rather than a monetary judgment).

462. *Id.* at 1211-12 (citing Abbot Labs. v. Gardner, 387 U.S. 136, 149 (1967)). For more information on the two-pronged ripeness analysis involving fitness and hardship, see *supra* notes 249-56 and accompanying text.

463. *Yahoo! II*, 433 F.3d at 1217.

First Amendment claim, the majority observed that the French order was an "interim" order, and therefore the French court could still reverse its initial decision.[464] Furthermore, there was no way to "know whether the French court would hold that Yahoo! is now violating its two interim orders."[465] Because Yahoo! made several modifications to its site after the order, the French court might yet find that Yahoo! had complied.[466] LICRA also claimed that Yahoo! had complied to its satisfaction,[467] meaning the case might not even be brought back to the French court—let alone ever brought to a United States court.

Because the order was not final it was also difficult to determine "in what form" the specific First Amendment question would be presented.[468] The French orders only "require[d], by their terms, . . . a limitation on access to anti-semitic materials *by users located in France*."[469] The unanswered questions as to what would constitute compliance with the French order, or if Yahoo! had, in fact, complied, left the court unsure where to even begin its analysis:

> If the French court were to hold that Yahoo!'s voluntary change of policy has already brought it into compliance with its interim orders "in large measure," no First Amendment question would be presented at all. Further, if the French court were to require additional compliance with respect to users in France, but that additional compliance would not require any restriction on access by users in the United States, Yahoo! would only be asserting a right to extraterritorial application of the First Amendment. Finally, if the French court were to require additional compliance with respect to users in France, and that additional compliance would have the necessary consequence of restricting access by users in the United States, Yahoo! would have both a domestic and an extraterritorial First Amendment argument. The legal analysis of these different questions is different, and the answers are likely to be different as well.[470]

The only cure for these uncertainties was a final decision by the French courts.[471]

In addition to the fitness problems, the majority argued that Yahoo! would not suffer great enough harm to justify granting declaratory relief.[472] Any fear of a Damoclean threat resulting from mounting monetary damages

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464. *Id.* at 1215 ("As indicated by the label 'interim,' the French court contemplated that it might enter later orders. We cannot know whether it might modify these 'interim' orders before any attempt is made to enforce them in the United States.").

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.* at 1217.

469. *Id.* at 1216.

470. *Id.* at 1217-18.

471. *Id.* at 1216 ("There is only one court that can authoritatively tell us whether Yahoo! has now complied . . . with the French court's interim orders. That is, of course, the French court.").

472. *Id.* at 1218-21.

was unfounded because "it [was] exceedingly unlikely that the sword [of Damocles would] ever fall."[473] This conclusion stemmed from two observations: First, LICRA had shown no indication it would pursue Yahoo! for monetary penalties;[474] and second, "even if the French court were to impose a monetary penalty against Yahoo!, it [was] exceedingly unlikely that any court in California—or indeed elsewhere in the United States—would enforce it."[475]

The three judges also downplayed the First Amendment harm to Yahoo!,[476] again pointing out that Yahoo! may have already complied, and indeed could comply further by simply restricting French access without restricting U.S. access.[477] Furthermore, the majority was unimpressed by Yahoo!'s inability or unwillingness to explain specifically how it was being chilled, i.e., what speech was not posted as a result of the French order.[478]

For the majority, then, the controversy was not ripe. It lacked fitness because there were contingencies that made the issues unclear. There was also no imminent harm, neither monetary nor First Amendment, that warranted judicial relief. Therefore, the majority held that the case should be dismissed.

### B. Dow Jones: *A Firm Refusal to Provide Declaratory Relief*

#### 1. The Dispute

In *Dow Jones & Co. v. Harrods, Ltd.*, a District Court for the Southern District of New York considered a request by Dow Jones for declaratory and injunctive relief from litigation brought in England by Harrods seeking damages for defamation.[479] It should be noted from the outset that *Dow Jones* differs from *Yahoo!* in at least two important respects: First, *Dow Jones* was a defamation case; second, and more importantly, the *Dow Jones* litigation in the United States took place prior to any judgment in England.

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473. *Id.* at 1218.

474. *Id.*

475. *Id.*

476. *Id.* at 1220 ("[T]he harm to First Amendment interests—if such harm exists at all—may be nowhere near as great as Yahoo! would have us believe.").

477. *Id.* at 1221 ("First Amendment harm may not exist at all, given the possibility that Yahoo! has now 'in large measure' complied with the French court's orders through its voluntary actions, unrelated to the orders.").

478. *Id.* at 1220 ("Yahoo refuses to point to anything that it is now not doing but would do if permitted by the orders."). This particular point caused a great deal of concern to the dissenters, who argued as follows: "To place such a requirement on an Internet provider—essentially forcing it to speculate as to the particular speech activity its millions of users 'might' engage in as senders or recipients—is to afford it no First Amendment protection at all." *Id.* at 1251 (Fisher, J., with whom Hawkins, Paez, Clifton, and Bea, J.J., join, concurring in part and dissenting in part).

479. Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003).

The *Dow Jones* dispute "began with an April Fool's joke."[480] In a press release, Harrods announced a plan to "float" Harrods and provided contact information, including a website, that would later explain the details.[481] It turned out, as the website made clear the next day, that the release was not serious: The website joked that Harrods planned to create a department store that was a boat, thus the pun on "float."[482] Dow Jones, however, took the press release seriously and published an article—before the website was available—on a supposed Harrods plan to issue a public stock offering.[483] After finding out the next day that the press release was a joke, Dow Jones published a correction.[484] Three days later, Dow Jones published an additional piece in which it compared Harrods to Enron[485] and accused the company of "messing around with the facts" as a promotional "gimmick" to draw people to its website.[486]

Now it was Harrods's turn to be inflamed by a less-than-serious piece.[487] It demanded an immediate retraction.[488] After Dow Jones refused, Harrods threatened a defamation lawsuit.[489] Dow Jones responded by filing its action for declaratory relief in a district court in New York.[490] Two days later, Harrods sued for defamation in an English court.[491] Harrods then filed a motion for summary judgment in the American district court that argued that the court could not, and should not, consider providing declaratory relief.[492] The district court granted Harrods's motion and dismissed the claim.[493] The Second Circuit affirmed.[494]

### 2. The Arguments Offered by Dow Jones

#### a. *Declarations Sought*

Dow Jones sought from the district court two declaratory judgments.[495] The first was a declaration that the defendant Harrods[496] could not meet its

480. *Id.* at 399.
481. *Id.* at 399-400.
482. *Id.* at 400.
483. *Id.*
484. *Id.*
485. *Id.* 400-01
486. *Id.* at 400 n.5.
487. *Id.* at 401.
488. *Id.*
489. *Id.* at 402.
490. *Id.*
491. *Id.* at 402-04.
492. *Id.*
493. *Id.* at 447.
494. Dow Jones & Co. v. Harrods, Ltd., 346 F.3d 357 (2d Cir. 2003).
495. *See* First Amended Complaint for Declaratory Judgment and Injunction, *Dow Jones & Co.*, 237 F. Supp. 2d 394 (No. 02 CV 3979), *available at* 2002 WL 32495909 [hereinafter Complaint].

burden of proving falsity regarding the "Enron of Britain" article it published.[497] Premised on the fact that this was speech on a matter of public concern, Dow Jones argued that the article was protected opinion under both prongs of *Milkovich*: It could not reasonably be understood as stating actual facts,[498] and there was nothing provably false in the article.[499]

Dow Jones also sought a declaration that Harrods could not meet its burden of proving fault.[500] Dow Jones argued that Harrods would have to prove some fault in relation to the falsity of the statement either because Harrods was a public figure (meaning the actual malice standard would apply)[501] or because the speech in question was on a matter of public concern (meaning there would have to be some showing of fault).[502] In either case, Harrods could not prove any fault.[503]

By operation of the single publication rule, these declarations would have the effect, Dow Jones argued, of rendering the statements at issue non-actionable anywhere.[504] Based on this effect of the judgment, Dow Jones also sought an injunction barring Harrods from litigating the issue anywhere in the world.[505]

### b. *Actual Controversy*

Dow Jones argued that its "action unquestionably present[ed] a live dispute."[506] It was ripe for review because the ongoing litigation created an immediate and substantial impact and the failure of the court to provide the requested relief would greatly harm it.[507] The impact and harm that Dow

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496. The defendants included both Harrods and Al Fayed, the chairman of Harrods. For the purposes of this Note, reference is limited to the two together as "Harrods" even though there were distinctions, relevant to the case but not to this Note, between the two defendants.

497. *See* Memorandum in Opposition to Motion to Dismiss at 6, *Dow Jones & Co.*, 237 F. Supp. 2d 394 (No. 02 Civ. 3979), *available at* 2002 WL 32496074 [hereinafter Memo in Opposition].

498. *Id.* ("[T]he First Amendment protects . . . types of speech that cannot reasonably [be] interpreted as stating actual facts." (internal quotation omitted)).

499. *Id.* ("[I]f a statement cannot be proved true or false, then a plaintiff cannot, as a matter of law, meet its burden of proof." (citing Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)).

500. Complaint, *supra* note 495, ¶¶ 57-65.

501. *Id.* ¶ 58.

502. *Id.* ¶ 63.

503. *Id.* ¶ 65.

504. *See* Memo in Opposition, *supra* note 497, at 13 ("Dow Jones asks this Court to declare preemptively that Harrods' cause of action can have no effect on our shores *or, under the single publication rule, anywhere else in the world.*").

505. *See* Complaint, *supra* note 495, ¶¶ 67-76. The injunction issue will not be examined in detail as it has its own, quite extensive, analysis. The injunction analysis is independent from, and more difficult to satisfy than, the DJA analysis. *See supra* notes 222-25 and accompanying text.

506. Memo in Opposition, *supra* note 497, at 13.

507. *See* Brief for Petitioner at 20-28, Dow Jones & Co. v. Harrods, Ltd., 346 F.3d 357 (2d Cir. 2003) (No. 02-9364), *available at* 2003 WL 23492405. These arguments are taken from the appeal by Dow Jones. The original memo of law did not detail its view that there was an actual controversy.

Jones alleged it would feel if the litigation continued included the following:

- the *threat* (and attendant chill) of being punished for speech, targeted to American readers, that unquestionably is protected under the First Amendment;
- the considerable *expense* of defending the London Action;
- the *diversion* of reporters and editors from gathering and reporting the news to defend the London Action;
- the *threat* (and attendant chill) of greatly increased potential liability in the London Action if ongoing internet distribution of the Article is not curtailed; and
- the *further chill* stemming from the uncertainty whether other articles similarly targeted to U.S. readers and also clearly protected under the First Amendment may subject Dow Jones to protracted litigation and liability under English law.[508]

According to Dow Jones, these interests were not "abstract or speculative" and were harmed by the very existence of the suit in England.[509] Dow Jones cited to the *Yahoo! II* district court case for the proposition that these harms were real and present even in spite of the fact that there was ongoing litigation overseas and that liability had not been exactly determined.[510]

Dow Jones also characterized the issues as legal not factual and therefore appropriate for declaratory relief.[511] According to Dow Jones, there was no factual dispute about the publication's content.[512] Nor was there a dispute about the fact that English law departed substantially from American law.[513] "The only 'facts' to be developed . . . [were] the *extent* to which the English law actually applied . . . [would] depart from U.S. constitutional requirements and the *extent* to which Dow Jones [would] be injured."[514] And since, "[i]t is irrelevant for the purposes of justiciability that the harm could . . . get even more serious," Dow Jones argued that the issue was justiciable.[515]

508. *Id.* at 25.
509. *Id.* at 20 (internal quotation omitted).
510. *Id.* at 23 ("In *Yahoo!* . . . the court recognized that the threat of punishment in a foreign forum for protected speech published simultaneously in the U.S. and abroad was a cognizable harm that created a justiciable 'case or controversy.'").
511. *Id.* at 27.
512. *Id.*
513. *Id.*
514. *Id.*
515. *Id.*

c. *Discretion*

Dow Jones further argued that the five discretionary factors supported a decision to provide declaratory relief.[516] First, the suit would be conclusive because the declaratory judgment coupled with an anti-suit injunction over Harrods would, without any involvement on the part of an English court, end all claims around the world.[517] Providing declaratory relief would also serve many purposes, preventing all the harms already noted above.[518]

Dow Jones added that it would be inappropriate to decline jurisdiction based on a finding that it was forum shopping.[519] Its DJA action was a method to prevent Harrods from harming its constitutional rights, which, as stated above, were being deprived by the simple existence of the suit in England.[520] If anything, Dow Jones argued, this was a case of "double 'forum shopping,'" where it sought American relief from Harrods, who only brought its litigation in England because of that nation's plaintiff-friendly laws.[521] Moreover, it would be inapt to extend the reticence of American courts in interfering with state court proceedings to this case, because "here, Dow Jones cannot vindicate its federal rights" as it could in a state proceeding.[522]

Finally, Dow Jones argued that there was no other adequate remedy.[523] It would not do to wait for a judgment and then defend a suit brought by Harrods in the United States seeking enforcement.[524] All of the harms it had listed would have occurred by that time.[525]

3. The *Dow Jones v. Harrods* Decision: The Case Against Providing Declaratory Relief

Dow Jones's arguments failed. The district court granted Harrods's motion for summary judgment on alternative grounds: There was no actual controversy and thus no subject matter jurisdiction,[526] and even if there were, the court would not have elected to exercise its discretion and provide the requested relief.[527]

516. *See* Memo in Opposition, *supra* note 497, at 17-19.
517. *See* Brief for Petitioner, *supra* note 507, at 54-56.
518. *Id.* at 55-56.
519. *Id.* at 56-57.
520. *Id.*
521. *Id.* at 57.
522. *Id.*
523. *Id.* at 58.
524. *Id.*
525. *Id.*
526. Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 408-09 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003).
527. *Id.* at 432.

a. *No Actual Controversy*

The court determined that there was no actual controversy on several bases: First, it found that the controversy was not sufficiently immediate and real;[528] second, the court argued that First Amendment challenges are not *per se* actual controversies and in this case the implication of the First Amendment did not change the analysis;[529] third, by examining principles of comity among nations, the court found that providing the requested relief would serve no useful purpose;[530] and fourth, the court distinguished cases to which Dow Jones analogized.[531] This section considers these arguments in turn.

i. Application of the Actual Controversy Standard: Controversy Not Immediate and Real

The first reason the court cited for the conclusion that there was no actual controversy was that there was not "enough immediacy and reality in Dow Jones' claim."[532] The court observed that "Dow Jones' complaint [was] grounded on a string of apprehensions and conjectures about future possibilities."[533] The court was troubled by unknowns such as whether the London action would survive motions to dismiss; whether Dow Jones would be held liable if the case went to trial; and if Dow Jones was found liable, whether Harrods would seek to enforce the judgment in the United States.[534] The court therefore concluded "that Dow Jones' claim of impending harm, and its fears of enforcement of an adverse judgment, are too abstract, remote and hypothetical to constitute an actual controversy qualifying for the declaratory relief it seeks."[535]

ii. The First Amendment and Actual Controversy

The court began its analysis of the First Amendment and actual controversy by stating that "[i]t is true that under some circumstances it is easier to satisfy the threshold of a justiciable controversy when the claim implicates First Amendment rights."[536] However, the court found that allegations of an effect on First Amendment rights do not necessarily lead

528. *Id.* at 407-09.
529. *Id.* at 409-10.
530. *Id.* at 410-13.
531. *Id.* at 413-18.
532. *Id.* at 408.
533. *Id.*
534. *Id.*
535. *Id.* at 408-09. The court, in its explanation of the actual controversy requirement, folded the ripeness issue into its discussion of immediacy and reality. It summed up the standard by explaining, "[t]he 'actual controversy' standard is conceptually linked to the doctrine of ripeness, requiring that the claim of threatened injury be of direct and immediate impact and the injury sufficiently likely to occur." *Id.* at 407.
536. *Id.* at 409.

to a conclusion that there is an actual controversy.[537] For this proposition, the court cited *Laird v. Tatum*, which held that a "'subjective chill' . . . [is] 'not an adequate substitute for a claim of specific present objective harm or threat of a specific future harm.'"[538] The court added that the party seeking relief must show a fear that its speech would be curbed or chilled.[539] The court concluded that even with the First Amendment issue, "Dow Jones' allegations of present or future harm are neither sufficiently concrete, objective or specific to support a finding of an actual controversy justifying the extraordinary relief Dow Jones seeks."[540]

iii. Principles of Comity Among Nations

The court next considered the fact that this was an international case and observed that whereas a state must give "final federal judgments . . . full faith and credit and conclusive effect[541] . . . , [t]he constitutional strictures of the Full Faith and Credit Clause do not extend" to other nations.[542] This was relevant because it was not clear what effect providing declaratory relief would have on the litigation in England.[543] While the court noted that Dow Jones was confident that England would dismiss Harrods's case in the event that Dow Jones won declaratory and injunctive relief in the United States, the court was less sure.[544] The decision discussed disagreement among the experts in English law hired to write briefs about the extent to which English courts might heed an American declaratory judgment.[545] The court reasoned,

> Even were this Court to grant the relief Dow Jones seeks, its judgment may not be entitled to recognition or enforcement in the United Kingdom [because] . . . British courts may find it contrary to English public policy, or to constitute an effort to prevent the administration of justice for an unjust end.[546]

The court also hesitated to extend too far into the international arena.[547] It characterized Dow Jones's request as implying that "the DJA would confer upon an American court a preemptive style of global jurisdiction branching worldwide and able to strike down offending litigation anywhere

537. *Id.* at 407, 409-10.
538. *Id.* at 407 (quoting Laird v. Tatum, 408 U.S. 1, 13-14 (1972)).
539. *Id.* at 409 (citing Younger v. Harris, 401 U.S. 37, 42 (1971) (finding that in DJA actions seeking to invalidate statutes, the plaintiff must show that it was threatened with enforcement)).
540. *Id.* at 410.
541. *Id.*
542. *Id.* at 411.
543. *Id.* at 411-12.
544. *Id.* at 412.
545. *Id.* at 412-13.
546. *Id.* at 413 (citation omitted).
547. *Id.* at 411 ("Intriguing as such universal power might appear to any judge, this Court must take a more modest view of the limits of its jurisdiction, and offers a more humble response to the invitation and temptation to overreach.").

on Earth."[548] The court concluded that "nothing in the United States Constitution, nor in the DJA or in customary practice of international law . . . comports with such a robust, Olympian perspective of federal judicial power."[549]

### iv. Distinguishing Other Cases that Provided Declaratory Relief on the International Stage

The Dow Jones court rejected *Yahoo! I* as applicable precedent on three bases.[550] First, in *Yahoo! I*, the issues were more concrete and real because there was a judgment for both damages and an order for Yahoo! to take action on its website.[551] Second, the order required immediate action within the United States.[552] Third, the declaratory relief that Yahoo! had requested was "limited to a determination that the French order would not be cognizable under the laws of the United States nor enforceable in this country."[553] In Yahoo!'s more limited request, the effectiveness of providing the requested relief was not dependent on the contingency that foreign courts may or may not recognize the judgment.[554] For these reasons, *Yahoo! I* was "not on point."[555]

Also not on point was *Farrell*.[556] This case had been more immediate and real because there was only one legal issue: whether a contractual forum selection clause applied.[557] According to the *Dow Jones* court, in *Farrell* "[t]he governing law there was predetermined by the parties."[558] Therefore, the "*Farrell* court . . . was not called upon to extend the reach of its authority extraterritorially—as this Court is urged to do—with the desired relief being motivated by substantive choice of law reasons."[559] The *Dow Jones* court also found the two cases incomparable in terms of complexity and scope;[560] the complexity and international scope of the relief sought by Dow Jones were factors that led to the finding that the requested relief was unlikely to be conclusive.[561] According to the *Dow Jones* court, in *Farrell*, the "court's judgment was fully dispositive."[562]

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548. *Id.*
549. *Id.*
550. At the time of the *Dow Jones* trial, *Yahoo! I* had not yet been reversed by *Yahoo! II*.
551. *Id.* at 413-14.
552. *Id.* at 414.
553. *Id.*
554. *Id.*
555. *Id.* at 413.
556. *Id.* at 414.
557. *Id.*
558. *Id.* at 415.
559. *Id.*
560. *Id.* ("Clearly, effectuating an agreement containing a forum selection provision to resolve a maritime dispute cannot be equated with the far more intricate and expansive relief Dow Jones seeks in this Court . . . .").
561. *See supra* notes 533-35 and accompanying text.
562. *Dow Jones*, 237 F. Supp. 2d at 415.

The court found *Basic* to be "closer on point."[563] According to the *Dow Jones* court, the opinion in *Basic* gave several reasons for finding no actual controversy that were also apt in *Dow Jones*: (1) declaring a foreign judgment unenforceable before there is a judgment would be "premature;"[564] (2) because there was no judgment, there was no way to know exactly what the foreign court held or the basis for these holdings, and therefore it was impossible to determine if the judgment was unenforceable;[565] (3) a declaratory judgment would not protect the plaintiff from any imminent harm;[566] and (4) providing the requested relief would be worthless because a foreign court need not—and probably would not—heed the ruling.[567]

b. *Discretion*

The *Dow Jones* court did not end its analysis as it could have with its decision that there was no actual controversy, instead holding that "even if [this Court] were presented with an actual controversy, [it] would not be inclined to exercise its discretion to render the declaratory judgment Dow Jones requests."[568] While recognizing that the DJA provided broad discretion, the Court intoned that the discretion analysis is governed by

> a case-by-case approach circumscribed by recognition that what the statute bestows upon [a district court] is discretion, not ambitions; that a free hand does not mean free rein, and that in practice, in giving expression to the confidence Congress reposed upon them, the courts' response should be measured and orderly.[569]

The court added that efficiency was vital to the analysis: "In enacting the DJA, Congress empowered the federal courts with a useful means to resolve disputes more expeditiously and economically."[570] The opinion followed with an analysis of five factors[571] that, since the decision, have been adopted by other courts in the Second Circuit.[572]

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563. *Id.* at 416.
564. *Id.*
565. *Id.*
566. *Id.*
567. *Id.* at 417.
568. *Id.* at 432.
569. *Id.* at 436.
570. *Id.* at 433.
571. *Id.* at 437-47.
572. *See In re* Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999, 392 F. Supp. 2d 461, 473 (E.D.N.Y. 2005) (indicating that "the Second Circuit gave its approbation to the district court's reliance on the . . . five factors" in *Dow Jones & Co. v. Harrods, Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003)). *But see* N. Am. Airlines, Inc. v. Int'l Bhd. of Teamsters Local 747, No. 04 Civ. 9949, 2005 U.S. Dist. LEXIS 4385, at *66 n.24 (S.D.N.Y. Mar. 20, 2005) (explaining that in the Second Circuit, courts are only required to analyze the first two discretion factors).

The first factor of the analysis was whether providing the relief would "resolve the controversy."[573] The court decided not only that the controversy would not be settled, but that it likely would be "[c]ompounded" if the court provided the requested relief.[574] The court predicted that there would be further "wrangling,"[575] in American courts through appeals and other litigation,[576] in British courts that might not take kindly to such an expansive American ruling,[577] and "possibly in other jurisdictions outside the United States."[578] Based on these probabilities, the court found that providing the relief would not settle the controversy.[579]

The opinion also concluded, "[f]or much the same reasons," that providing declaratory relief would not satisfy the second factor—that it serve a "useful purpose."[580] This conclusion resulted from the likelihood that a decision would not terminate the litigation,[581] and the court characterized Dow Jones's desire to terminate the London litigation as the primary purpose of its suit.[582]

The third factor also militated against Dow Jones because the court believed there was evidence of forum shopping.[583] Even though Dow Jones filed its action first,[584] the court found that it was a "preemptive procedural strike essentially intended to derail the London Action by compelling Harrods to withdraw it."[585] The court was careful to note that "this factor alone is not dispositive . . . especially in cases implicating substantial First Amendment issues."[586] However, here, the factor "weigh[ed] against the exercise of jurisdiction."[587]

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573. *Dow Jones*, 237 F. Supp. 2d at 437.

574. *Id.*

575. *Id.*

576. *Id.*

577. *Id.* The court compared the potential in *Dow Jones* to the experience of *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, where an American court took exception to an anti-suit injunction issued by a British court and retaliated with a decision not only nullifying the injunction but angrily noting that "[n]o recognition or acceptance of comity was made in [the British courts]." *Id.* at 437 n.168 (discussing Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984)).

578. *Id.* at 437.

579. *Id.* at 437-39.

580. *Id.* at 439.

581. *Id.*

582. *Id.* ("Dow Jones instituted this action with a view to settle its defamation dispute with Harrods not only in the United Kingdom but anywhere in the world. This Court is not persuaded that an order to this effect would have any value to that declared end. While such a judgment arguably may settle Dow Jones' rights and remove uncertainties concerning the enforceability of a damage award and future publication of the April 5 Article in the United States, it is unlikely to do much to dispose of Harrods' claims in London or elsewhere beyond this country [which is] . . . the real purpose[] intended.").

583. *Id.* at 440.

584. *See id.* ("That in this race to the courthouse Dow Jones managed to file its declaratory action first is immaterial.").

585. *Id.* at 439.

586. *Id.* at 440.

587. *Id.*

The fourth factor, whether there is a conflict with another jurisdiction, also weighed against Dow Jones.[588] The court began its analysis by quoting the United States Supreme Court in *Brillhart*, which advised against "'[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation.'"[589] It then held that this need to avoid gratuitous interference "appl[ies] with equal cogency in an international context."[590] With this as the backdrop, the court argued that it was uncertain how the British courts might rule in the case brought by Harrods.[591] As such, if an American court were to make a determination that would stop the litigation, the British system would effectively be deprived from making determinations as to its own law.[592] Therefore, such an American foray might cause "unnecessary tensions between the judicial power of the United States and that of the United Kingdom."[593]

The final of the five factors, the adequacy of an alternative remedy, also weighed against Dow Jones. This inquiry involved determining the forum best suited to handle the case,[594] which led in turn to yet another examination of international comity.[595] The court concluded that the British court was best suited to handle the case.[596] Doing so in an English court would not lead to the jurisdictional fight that might arise were injunctive relief provided from the United States.[597] Furthermore, there were rights that Dow Jones could exercise through the court system in England (albeit not perfectly),[598] such as the right to make arguments related to English law, the right to appeal, and the right to advocate for a change in the law.[599] The court added that even if Dow Jones were found liable it could use the American courts to prevent enforcement in the United States.[600] From the other perspective, the American action requested by Dow Jones would discontinue the English case before the parties were able to make their arguments.[601] The court therefore concluded, "[i]n sum, Dow Jones will have ample opportunity to exercise its right to its day in court,

588. *Id.*
589. *Id.* at 441 (quoting Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 495 (1942)).
590. *Id.*
591. *Id.* at 440-41.
592. *Id.*
593. *Id.* at 441.
594. *See id.* at 443 (The analysis includes "which forum is better and more efficiently equipped to serve the interests and convenience of the parties; whether defenses may be adequately addressed in the alternative forum; whether all of the issues and parties in dispute may be joined and the conflict comprehensively adjudicated.").
595. *Id.* at 443-47.
596. *Id.* at 445.
597. *Id.*
598. *See id.* ("[T]he Court's judgment is not blinded by any Panglosian faith in British justice; decidedly, the world we live in is not 'the best of all possible worlds.'").
599. *Id.*
600. *Id.* at 446 nn.214 & 215 (citing Restatement (Third) of Foreign Relations § 482(2)(d) (1987); Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661, 665 (Sup. Ct. 1992)).
601. *Id.* at 446-447.

the same right the outcome of this action would effectively deny to its opponent were Dow Jones' strategy to prevail here."[602]

### c. *The Purpose of the DJA*

The *Dow Jones* court also held that Dow Jones' request for declaratory relief was inappropriate because it did not fall within one of the purposes of the DJA. The opinion stated that the DJA was not intended to allow a potential defendant to obtain a ruling of non-liability in a tort case such as this: "[W]hat Dow Jones' resort to the DJA amounts to is an anticipatory interposition of a defense as affirmative armor to ward off damages from a potential tort action by preemptively procuring a federal declaration of non-liability."[603] The court did not conclude that the DJA never could be used to obtain anticipatory judgments, just that in this case it was inappropriate:

> The Court is mindful that there are circumstances in which anticipatory judgments of non-liability may be appropriate under the DJA, particularly in regards to claims asserting unaccrued or undefined rights or obligations arising under contractual relations such as insurance and intellectual property. However, where the purported use of the DJA seeks a declaration of non-liability to preemptively defeat actions grounded on tort claims involving rights already accrued by reason of alleged wrongful conduct, various courts have held that that application is not a warranted purpose of the DJA.[604]

The *Dow Jones* court cited *Cunningham Bros. v. Bail*[605] extensively for the above conclusions.[606] In that case, a contractor brought suit in a federal district court, asking for a declaration of non-liability involving an injury suffered by several construction workers.[607] The court held that providing a declaration of non-liability would be "a perversion of the Declaratory Judgment Act."[608] Such a ruling, the opinion argued, would allow what would typically be the defendant to choose the forum and the timing of the suit.[609] The DJA was not intended to allow a defendant to turn the tables in this way. For the *Dow Jones* court, *Cunningham Bros.* stood for the proposition that seeking a declaration of non-liability for completed torts was an inappropriate use of the DJA.[610]

In all, *Dow Jones* was a firm denunciation of the use of declaratory relief by a defendant seeking to stop a foreign tribunal from interfering with its

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602. *Id.* at 447.
603. *Id.* at 425-26.
604. *Id.* at 426 (citations omitted).
605. 407 F.2d 1165 (7th Cir. 1969).
606. *See Dow Jones*, 237 F. Supp. 2d at 426-27.
607. *Cunningham Bros.*, 407 F.2d at 1167.
608. *Id.*
609. *Id.* ("[W]e are of the opinion that to compel potential personal injury plaintiffs to litigate their claims at a time and in a forum chosen by the alleged tort-feasor would be a perversion of the Declaratory Judgment Act.").
610. *Dow Jones*, 237 F. Supp. 2d at 426 nn.126 & 128.

First Amendment Rights. At the outset of its opinion the *Dow Jones* court succinctly stated the issues: "whether the action . . . (1) raises an 'actual controversy'; (2) falls within the scope of cases for which the DJA was intended; and (3) presents circumstances sufficiently compelling to warrant exercise of the Court's discretion to grant or deny the relief requested."[611] In sum, the court found that the Dow Jones request failed on all three counts. But this was not a Supreme Court case, and—as Dr. Ehrenfeld's pending case suggests—did not end the debate. In Part III, this Note considers whether *Dow Jones* was correctly decided, and whether its reasoning forecloses all use of the DJA in international defamation cases.

## III. DECLARING AN END TO THE ENGLISH CHILL: A FRAMEWORK FOR HOW UNITED STATES FEDERAL COURTS CAN AND SHOULD PROVIDE DECLARATORY RELIEF FROM DEFAMATION ACTIONS BROUGHT OVERSEAS

This Note began by describing the fundamental difference between American and English defamation law: England lacks the strong protection of expression that the U.S. Supreme Court has held to be fundamental in the U.S. Constitution.[612] Because of this difference, plaintiffs seek out English courts—sometimes even bringing defamation actions based on statements mainly published in the United States.[613] The topic of the Note then shifted to an explanation of the Declaratory Judgment Act. This section described how the First Amendment affects the DJA analysis, and how the analysis changes when the case takes place on the international stage.[614] Part II examined the nexus of these two issues: Have federal courts provided declaratory relief to parties asserting a violation of their First Amendment rights by overseas litigation? In *Yahoo! I*, a district court in California provided declaratory relief to Yahoo!, which had been ordered by a French court to remove content from its American website or pay penalties.[615] The case was subsequently reversed, but with no clear rule of law on whether the case warranted declaratory relief.[616] In *Dow Jones*, a district court in New York definitively refused to consider declaratory relief for the Dow Jones company, which was under threat of liability in England for statements made almost exclusively in the U.S.[617] These two cases indicate uncertainty over how declaratory relief may be used to prevent alleged First Amendment violations by overseas legal action.

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611. *Id.* at 405-06.

612. *See supra* Part I.B.

613. *See supra* notes 1-5 and accompanying text; *supra* Part I.A.

614. *See supra* Part I.C.

615. *Yahoo! I*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *rev'd en banc*, 433 F.3d 1199 (9th Cir. 1992); *see also supra* notes 428-38 and accompanying text. While not a defamation case, because the case involved First Amendment rights being restricted by foreign law, the case included many of the same issues.

616. *See supra* notes 426-27 and accompanying text.

617. Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003); *see also supra* Part II.B.3.

This part separates the examination into two issues specifically relating to defamation. First, should U.S. federal courts consider granting declaratory relief for a party—such as Dr. Rachel Ehrenfeld, the writer introduced at the outset of this Note—whom a foreign court has found liable for defamation? If so, under what circumstances? Second, should U.S. federal courts grant declaratory relief for a party who has been sued overseas but is awaiting trial? Again, if the answer is yes, under what circumstances?

### A. *Seeking Declaratory Relief when There Is a Judgment*

Circumstances like Dr. Ehrenfeld's[618] merit declaratory relief. Her case is distinguishable from *Dow Jones* and aligns more closely with *Yahoo! I* and *Yahoo! II*.

The doubts expressed by the *Dow Jones* court concerning the ripeness of the controversy[619] are not relevant in Dr. Ehrenfeld's circumstances. In *Dow Jones*, there was not yet a ruling of liability, no judgment for damages, and no indication that Harrods would seek to enforce a judgment in the United States. These contingencies—the center of the *Dow Jones* court's argument for a lack of ripeness[620]—are concrete in Dr. Ehrenfeld's situation. She was found liable, and there was a judgment for damages.[621]

The plaintiff in the English case against Dr. Ehrenfeld, Bin Mahfouz, could argue that there is no real controversy because he has not yet sought to enforce the judgment. He might also assert that he agrees that the English judgment is not enforceable in the United States. However, the district court in *Yahoo! I* persuasively explained why this reasoning is not convincing.[622] It held that because LICRA had not formally given up its cause of action, and because damages could compound over time, there was no solace in nonbinding assurances by LICRA that it would not seek to enforce the judgment. Dr. Ehrenfeld faces the same dilemma: Bin Mahfouz has a judgment, does not appear to have formally disavowed seeking enforcement, and the damages could increase.[623] Therefore there is a controversy. If anything, Dr. Ehrenfeld's case is more concrete than Yahoo!'s, and would seem to resolve the ripeness concerns expressed by

618. *See supra* notes 1-10 and accompanying text.

619. *See supra* notes 532-35 and accompanying text.

620. *See Dow Jones*, 237 F. Supp. 2d at 408-09 ("Dow Jones' claim of impending harm, and its fears of enforcement of an adverse judgment, are too abstract, remote and hypothetical to constitute an actual controversy qualifying for the declaratory relief it seeks.").

621. *See supra* notes 8-9 and accompanying text.

622. *See Yahoo! I*, 169 F. Supp. 2d 1181, 1188 (N.D. Cal. 2001), *rev'd en banc*, 433 F.3d 1199 (9th Cir. 1992); *see also supra* notes 429-33 and accompanying text.

623. Damages could compound for several reasons: First, because the book may still be purchased through or viewed on the Internet, additional publications could lead to further causes of actions; second, if there are further suits, because Dr. Ehrenfeld has not removed the offending content, the English judge could issue aggravated damages; third, because Dr. Ehrenfeld presumably has not apologized, the English judge could issue aggravated damages. *See supra* notes 78, 186-88 and accompanying text.

the Ninth Circuit majority in *Yahoo! II*.[624] Dr. Ehrenfeld has a final judgment from the English court,[625] whereas in *Yahoo!*, there was only an interim order.[626]

The five discretionary factors also merit granting declaratory relief in Dr. Ehrenfeld's circumstances.[627] A declaratory judgment would serve a useful purpose because it would relieve Dr. Ehrenfeld of her doubt concerning the enforceability of the suit in the United States. One can imagine the strains such doubt might place on her: uncertainty about whether she could continue publication of her book; about whether she could publish more material like it (this is her livelihood!); and about whether this foreign judgment might affect her status in the United States, including aspects of her life such as her credit rating. A declaration on nonenforceability would relieve all of these doubts. Because this declaratory judgment would not require foreign compliance to be effective, it would be conclusive.

Nor could Dr. Ehrenfeld be accused of forum shopping[628] because she would seek a United States court only to receive a ruling on legal relations within the United States. Similarly, there would be no interference with a foreign tribunal because the requested relief would not affect the English decision. Comity does not mandate enforcing foreign judgments that contradict American public policy,[629] which is exactly what Dr. Ehrenfeld asserts. In *Dow Jones*, the court implied that a plaintiff situated like Yahoo! had been (that is, with an open foreign judgment) would present very different issues that might justify the use of the DJA.[630]

The last factor, whether there is an adequate alternative remedy,[631] is more complex. Bin Mahfouz could argue that Dr. Ehrenfeld can defend the enforcement action within the United States when it is brought. However, this is clearly not adequate when damages may increase with time, and when during the period that Bin Mahfouz waits, Dr. Ehrenfeld may be chilled from publishing important speech for fear of further liability. Indeed, the purpose of the DJA is to provide potential defendants with an early adjudication of their rights[632]—to remove the "Damoclean threat."[633] Thus, the fact that Dr. Ehrenfeld may have an adequate defense when and if Bin Mahfouz brings his action is far from determinative.

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624. *See supra* notes 457-78 and accompanying text.
625. *See supra* note 8 and accompanying text.
626. *See supra* notes 414-19 and accompanying text.
627. *See supra* notes 283-84 and accompanying text.
628. *See supra* notes 281-82 and accompanying text.
629. *See supra* notes 290-93 and accompanying text.
630. *See* Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 446 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003) ("Thus, should the London Action produce a judgment based on application of principles that would vitiate public policies of the United States, Dow Jones will then accrue a justiciably ripe occasion to challenge in a United States jurisdiction any effort to enforce the judgment on the substantive grounds it prematurely interposes here.").
631. *See supra* notes 274-80 and accompanying text.
632. *See supra* notes 218-21 and accompanying text.
633. Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 237. (D.N.J. 1966).

Consider Bin Mahfouz's motivation. He could argue on one hand that he does not necessarily intend to enforce the judgment within the United States. If that is the case, why, then, would he care if a U.S. district court determines that his judgment is not enforceable in the U.S.? On the other hand, he could argue that he does plan to seek enforcement. But in that case, one would have to wonder why he does not want to litigate the enforcement issue right away. The only way to explain Bin Mahfouz's motivation, it would seem, would be that he wants to continue the threat, to maintain the raised sword of Damocles, and thereby further chill Dr. Ehrenfeld's speech—as well as the speech of others who dare write and publish about his alleged financial ties to terrorism.[634]

Moving to the merits, the English judgment would likely be held unenforceable in the United States.[635] The English court did not consider U.S. constitutional protections.[636] This clearly conflicts with U.S. public policy.[637]

The rule that should follow from *Yahoo!* and the above analysis is that when a foreign judgment prima facie infringes on First Amendment rights[638] and further damages could accrue, a United States district court should find an actual controversy, hear the case, and reach the substantive analysis. If enforcing the foreign judgment would violate the plaintiff's First Amendment rights, then the court should provide a declaratory judgment of nonenforceability in the United States.

### B. *Seeking Declaratory Relief Prior to an Overseas Judgment*

The above solution is not adequate, however. It would be unfair, and indeed contradict the First Amendment, to force a defendant to wait for an English court to render judgment. Dow Jones articulated the immediate effects that foreign litigation can produce:[639] the cost of defending the litigation; the doubt as to whether a judgment would be enforceable in the United States; and perhaps most grave, a resulting chilling effect that is both specific (the statements under attack by the foreign defamation claim) and general (any other article that might offend).

The current laws in England have had a broad chilling effect on English media.[640] English law also has chilled American publishers from publishing in England what would be constitutionally protected work in the

634. This would be much like LICRA's assurances to Yahoo! that it would not seek to enforce the French court order. LICRA admitted that its motivation was to ensure that Yahoo! did not return to its "old ways." *See supra* notes 419-22 and accompanying text.

635. *See supra* notes 290-93 and accompanying text.

636. *See supra* notes 7-8 and accompanying text.

637. *See supra* Part I.C.

638. Because a court cannot know, without hearing a case (i.e., determining that it is justiciable), whether the circumstances really do violate the plaintiff's First Amendment rights, the court should only require the plaintiff to properly plead a violation of its First Amendment rights.

639. *See supra* notes 506-09 and accompanying text.

640. *See supra* notes 149-61 and accompanying text.

United States. If English courts, as well as other international tribunals, are allowed to find liability for publications emanating from within the United States, English law could chill all American publishers who publish on the Internet or make books available through online retailers.[641] The district court in *Yahoo! I* properly phrased the issue as

> whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation. In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, the implications of this question go far beyond the facts of this case.[642]

One commentator described the stakes:

> [Libel tourism] could have a considerable impact on the editorial decisions of Internet publishers. American publishers who rely on the actual malice standard of protection afforded by the First Amendment in making editorial decisions about news content must now decide whether the same material that is fully protected by the U.S. Constitution would be defamatory under other nations' laws. Unless content providers are aware of the laws of those countries in which a plaintiff could bring a claim, it would be nearly impossible to determine the standards of liability for defamation throughout the entire international community each time the content provider makes such an editorial decision.[643]

This section argues that courts should grant declaratory relief to American defendants involved in ongoing foreign defamation litigation if (1) damages could continue to accrue as litigation is ongoing, (2) the publication at issue predominantly took place in the United States, and (3) to hold the party liable for defamation would clearly violate the U.S. Constitution. This section reexamines *Dow Jones*[644] and explains why such cases can present actual controversies and, when they do, the circumstances under which courts should exercise their DJA discretion.

641. Dr. Ehrenfeld published her book in the United States. It reached the English market only through pages that were made available by an American website, and by sales on Amazon.com. *See supra* notes 3-4 and accompanying text.

642. *Yahoo! I*, 169 F. Supp. 2d 1181, 1186 (N.D. Cal. 2001), *rev'd en banc*, 433 F.3d 1199 (9th Cir. 1992).

643. Michael F. Sutton, Note, *Legislating the Tower of Babel: International Restrictions on Internet Content and the Marketplace of Ideas*, 56 Fed. Comm. L.J. 417, 422 (2004).

644. For a complete description of the facts in *Dow Jones*, see *supra* Part II.B.1.

### 1. Actual Controversy

#### a. *A Ripe Controversy*

The *Dow Jones* court should have found that there was an actual controversy. Dow Jones and Harrods were clearly legal adversaries[645] in a dispute over whether Dow Jones was liable for defamation. The result of the litigation affected the rights of the parties.[646] If foreign courts were to give effect to the American declaration, a decision would determine the totality of Dow Jones's liability. And even if foreign courts did not heed such a declaratory judgment, the case undoubtedly would determine whether a foreign judgment would be enforceable in the United States.

*Dow Jones* also satisfied both prongs of the ripeness inquiry.[647] First, the case was fit[648] because no further factual development was necessary for the court to understand the issues. The article that led to the dispute had long since been published. Therefore the court did not need any further events to transpire to determine if the words in the article were actionable. Second, by not receiving immediate relief, Dow Jones faced substantial, immediate, and ongoing hardship.[649] Based on English law, Dow Jones would have to remove the article from its website or risk additional damages.[650]

#### b. *The Likelihood that Foreign Courts Will Heed American Declaratory Judgments*

The *Dow Jones* court should not have attached great weight within its actual controversy analysis to its prediction that English courts would not give effect to its declaratory and injunctive relief.[651] The question of judicial power should focus on the nature of the controversy. It is true that in order to be justiciable there has to be some useful purpose to the declaration,[652] but the question at this stage in the analysis[653] should focus on the possibility that the declaration could serve a useful purpose. Under

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645. *See supra* notes 240-42 and accompanying text.

646. *See supra* note 241 and accompanying text.

647. *See supra* notes 247-56 and accompanying text (explaining that the ripeness inquiry includes two related concepts: fitness and hardship).

648. *See supra* notes 250-53 and accompanying text.

649. *See supra* notes 254-56 and accompanying text.

650. *See supra* note 78 and accompanying text.

651. *See* Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 413 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003) ("Even were this Court to grant the relief Dow Jones seeks, its judgment may not be entitled to recognition or enforcement in the United Kingdom [because] . . . British courts may find it contrary to English public policy, or to constitute an effort to prevent the administration of justice for an unjust end.").

652. *See supra* note 256 and accompanying text.

653. The problem with the *Dow Jones* court's analysis is not in its considering this issue, but in its considering the issue at this point in the analysis. As will become clear, the practical effect of providing declaratory relief is a central part of the discretion analysis.

American defamation law, declaring a particular publication non-actionable would bar all other defamation claims based on that article,[654] thus satisfying all of Dow Jones's purposes. It is perverse to base the power of U.S. courts to hear controversies on the likelihood that a foreign court will follow the U.S. decision; the constitutional power of a federal court would thus be dependent on the degree to which a foreign nation gave its determinations effect.

Even viewing this issue as the *Dow Jones* court did, a declaration that the article was constitutionally protected would still achieve a useful purpose by ensuring that any English judgment would be unenforceable in the U.S. This would provide Dow Jones with at least the assurance that it could continue to publish the article, as well as articles like it, without fear of being made to pay damages in the U.S.

### c. *The Case Law*

Contrary to the *Dow Jones* court's analysis, the case law supports a conclusion that there was an actual controversy. *Basic* was the only other international case in which the court explicitly found no actual controversy.[655] However, the facts in *Basic* relevant to the ripeness of the claim differed fundamentally from the *Dow Jones* facts.[656] First, in *Basic* the claim was not fit because the issues were unclear. It was unclear what the defendants sought from Basic in the foreign action. Therefore it was difficult to determine the basis for providing declaratory relief. The court needed further factual development.[657] This contrasts with *Dow Jones*, where the issue was crystal clear—whether or not one article was actionable in defamation.

Second, in *Basic* there was no threat of an accrual of damages while the overseas litigation was ongoing. Therefore the case was not ripe because even if no relief was provided, Basic faced no imminent hardship.[658] The *Basic* court found this factor vital because "the purpose of declaratory relief is to allow a party to avoid damage prior to an impending injury-causing

654. Through the single publication rule, if a mass publication is held non-actionable, all claims relating to that publication are barred. *See supra* notes 142-46 and accompanying text.

655. Basic v. Fitzroy Eng'g, Ltd., 949 F. Supp. 1333, 1337-38 (N.D. Ill. 1996); *see also supra* notes 373-78 and accompanying text.

656. For a description of the facts in *Basic*, see *supra* notes 367-70 and accompanying text.

657. *See Basic*, 949 F. Supp. at 1338.

658. *See id.* ("Basic has not shown how the declarations requested of the court will help him avoid imminent harm."). The *Dow Jones* court persuasively argued that the cost of litigation alone cannot account for a sufficient hardship to make a case ripe; such a determination would mean that all cases with ongoing parallel proceedings would be ripe. *See* Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 419 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003).

event."[659] In *Dow Jones* there was an injury-causing event: Either the article had to be removed or damages would continue to accrue.

In *Yahoo! I*[660] the argument that the case was not ripe appealed to the district court because it provided an easy opportunity to sidestep the difficult issues presented. But that court, as well as the dissenters in *Yahoo! II*, recognized that the argument should fail: The interim orders authorizing damages signified a sufficient threat to Yahoo!'s constitutionally protected activity. The court explained as follows:

> Uncertainty about whether the sword of Damocles might fall is *precisely* the reason Yahoo! seeks a determination of its First Amendment rights . . . . The uncertainties Yahoo! faces . . . provide a compelling basis for a federal court to hear Yahoo!'s First Amendment challenge . . . . "The fact that Yahoo! does not know whether its efforts to date have met the French Court's mandate is the *precise harm* against which the Declaratory Judgment Act is meant to protect."[661]

In Dow Jones's situation, this reasoning makes continued sense. A U.S. court should have the power to protect First Amendment rights attacked by overseas litigation. The danger of a chilling effect—inherent in defamation laws that do not adequately protect the interest in freedom of expression—can manifest long before there is a judgment for damages.[662]

### d. *The First Amendment*

The fact that *Dow Jones* and other cases like it implicate First Amendment rights strengthens the argument that there was an actual controversy.[663] Federal courts have observed that when a statute allegedly infringes on First Amendment rights, it is easier to demonstrate an actual controversy.[664] The *Dow Jones* court recognized this, but held that even with the First Amendment issue, the controversy was not ripe.[665] The *Dow Jones* court concluded that being forced to defend an action—to litigate—is not a harm that can justify declaratory relief even in the First Amendment context.[666] But the harm Dow Jones asserted was more than mere

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659. *Basic*, 949 F. Supp. at 1338.

660. 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *rev'd en banc*, 433 F.3d 1199 (9th Cir. 1992).

661. *Yahoo! II*, 433 F.3d at 1242 (quoting *Yahoo! I*, 169 F. Supp. 2d at 1189) (emphasis added by dissenters).

662. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) ("Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.")

663. *See supra* Part I.C.3.a. This is another reason that *Basic* is not on point: The plaintiff there did not assert a violation of a fundamental right protected in the Constitution. *See supra* note 370 and accompanying text.

664. *See supra* note 334 and accompanying text.

665. *See supra* notes 536-40 and accompanying text.

666. Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 419 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003).

litigation. Dow Jones faced the decision either to continue publication of the article and possibly face ever-growing liability, or to remove the article. As the Supreme Court has explained, the DJA is appropriate when "a refusal on the part of the federal courts to intervene . . . may place the hapless plaintiff between the Scylla of intentionally flouting [the] law and the Charybdis of forgoing what he believes to be constitutionally protected activity."[667] This is exactly the position in which Dow Jones was placed.

If a court establishes that a law directly affects the plaintiff's First Amendment rights, it also may consider whether there is a general chilling effect, a possibility that the law will chill speech of "'others not before the court.'"[668] The *Dow Jones* court, however, did not take into account the fact that by denying declaratory relief in this context, and in effect forcing Americans to litigate overseas, many publishers might reconsider publishing all kinds of material that the First Amendment supposedly protects. Clearly the general issue affects every American who publishes or sells books on the Internet.

In summary, when a party is sued or threatened with suit in a foreign country, and material published in the U.S. is the basis for the suit, and liability could continue to accrue, courts should find an actual controversy. It is perhaps telling that the Second Circuit, when it affirmed the holding of the *Dow Jones* court, did so solely on the basis that there was no abuse of discretion.[669] The circuit court did not discuss, and certainly did not endorse, the actual controversy analysis.[670]

### 2. The Purposes of the DJA

The finding by the *Dow Jones* court that the action was not within a purpose of the DJA was incorrect and inconsistent with the very cases it cited.[671] The court seemed to begin by considering the type of action from which Dow Jones asserted non-liability—a tort. As such, reasoning from *Cunningham Bros. v. Bail*,[672] it was inappropriate to provide declaratory relief. However, in *Cunningham Bros.*, the tort was a completed act: The defendants (i.e., would-be plaintiffs) were already injured and there was no open issue as to the potential liability of continuing conduct. This was the key to the analysis by the *Cunningham Bros.* court, which stated that "[t]he primary purpose of [the DJA] is 'to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had

667. Steffel v. Thompson, 415 U.S. 452, 462 (1974).

668. Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393 (1988) (quoting Sec'y of Md. v. J. H. Munson Co., 467 U.S. 947, 956-57 (1984)); *see also supra* notes 330-33 and accompanying text.

669. Dow Jones & Co. v. Harrods, Ltd., 346 F.3d 357 (2d Cir. 2003).

670. *See id.*

671. *See supra* Part II.B.3.c.

672. 407 F.2d 1165 (7th Cir. 1969). For a more complete explanation of this case, see *supra* notes 607-09 and accompanying text.

accrued.'"[673] The *Dow Jones* court, however, seemed to believe that actions seeking declarations of non-liability in torts were per se inappropriate under the DJA.

A recent district court case in New York tried to make sense of why courts typically refuse requests for declarations of non-liability in torts: "The reason for this rule is clear: declaratory relief is intended to operate prospectively. There is no basis for declaratory relief where only past acts are involved."[674] As of the date of the *Dow Jones* decision, the Dow Jones article at issue was still on the web, and damages potentially continued to accrue. In such a case, declaratory relief would operate prospectively.

In a sense, the *Dow Jones* court was formalistic—defamation is a tort, and therefore inappropriate for declaratory relief—in a way that the Supreme Court long ago determined should not govern the DJA analysis.[675] Instead, considering the nature of defamation, specifically in England, a proper conclusion is that because damages may accrue and the tort is ongoing (unless the writing at issue is removed from circulation, the material creates fresh causes of action), then regardless of how the case is categorized, it without a doubt falls within the purposes of the DJA.

### 3. Discretion

A district court still must determine whether or not to exercise its discretion.[676] By examining several cases, the *In re Air Crash* court attempted to discern a general rule as to when, in the international context, a district court should exercise its discretion and provide declaratory relief.[677] The court determined that the DJA was appropriate when the U.S. district in which the action was brought was the "forum where the underlying dispute had its principal origins and the primary controlling legal issues were to be governed by the substantive law of that forum."[678] This Note paraphrases the *In re Air Crash* inquiry into whether or not the district court is the "preferred forum." This is an effective framework because, as shall be demonstrated, its determination implicates all five factors a district court normally considers in its discretion analysis.[679]

In the examination of the first two discretion factors—useful purpose and conclusivity[680]—it is highly relevant whether or not the district court is the

673. *Cunningham Bros.*, 407 F.2d at 1167-68 (quoting E. Edelmann & Co. v. Triple-A Specialty Co., 88 F.2d 852, 854 (7th Cir. 1937)) (citations omitted).

674. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Int'l Wire Group, Inc., No. 02 Civ. 10338, 2003 WL 21277114, at *5 (S.D.N.Y. June 2, 2003) (citing Gianni Sport, Ltd. v. Metallica, No. 00 Civ. 0937, 2000 WL 1773511, at *4 (S.D.N.Y. Dec. 4, 2000)).

675. *See supra* notes 208-12 and accompanying text.

676. *See supra* Part I.C.2.b-c.

677. *See In re* Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999, 392 F. Supp. 2d 461, 472 (E.D.N.Y. 2005); *see also supra* notes 397-407 and accompanying text.

678. *In re Air Crash*, 392 F. Supp. 2d at 473.

679. For a description of the five factors typically considered in the discretion analysis, see *supra* note 284 and accompanying text .

680. *See supra* notes 271-73 and accompanying text.

preferred forum. If the district court is the preferred forum, it is likely that foreign courts would heed a U.S. declaratory judgment. On this point, the *In re Air Crash* court observed that there was no reason to believe that a foreign court would question an American ruling on American law, especially when the central events that led to the dispute all took place within the U.S.[681] Conversely, the *Basic* court foresaw foreign courts refusing to honor American rulings on foreign law in cases concerning events that took place in the foreign country.[682]

As the *In re Air Crash* court noted, forum shopping is a less important consideration if the plaintiff requests declaratory relief in the preferred forum.[683] Such a plaintiff might only be seeking to prevent the other party from forum shopping. Dow Jones referred to this as "double forum shopping."[684] The plaintiffs in *Basic* and *Eastman Kodak Co. v. Kavlin* did not seek to bring actions in the preferred forum, but to gain relief from the preferred forum. In *In re Air Crash*, *Farrell*, and, arguably, *Dow Jones*, the plaintiffs sought relief from an adverse party trying to avoid the preferred forum by bringing its action in a place with more advantageous laws. This point was similarly made by the *Yahoo! II* dissenters: "[T]he issue [is not] one of extraterritorial application of the First Amendment; if anything, it is the extraterritorial application of French law to the United States" that is the issue.[685]

A finding that a U.S. district court is the preferred forum also mitigates comity concerns for at least two reasons. First, as discussed above, foreign courts will likely take less umbrage with U.S. courts taking jurisdiction of cases that naturally fit in a U.S. forum.[686] Second, there would not be any interference in these cases because a declaration would not affect or purport to interpret the foreign court's laws. The declaration would impact and interpret U.S. legal rights.

In addition, DJA cases in the international context should receive a unique comity analysis. The *Dow Jones* court held that the constraint against gratuitous interference "appl[ies] with equal cogency in an

681. *In re Air Crash*, 392 F. Supp. 2d at 478 (reasoning that because no one offered any reason "why Egypt would not comply with this Court's interpretation and application of United States law, it is likely that the Court's declaratory judgment would resolve the Egyption . . . action, thereby finalizing the controversy and offering relief from uncertainty").

682. *See* Basic v. Fitzroy Eng'g, Ltd., 949 F. Supp. 1333, 1341 (N.D. Ill. 1996) ("[A]ny declaration made by this federal district court would not settle the controversy. Rather, the [foreign] action would continue without delay because any finding made by this court would have no persuasive or authoritative value to the [foreign] court.").

683. *In re Air Crash*, 392 F. Supp. 2d at 478 ("[S]ince it was entirely appropriate for Boeing to seek declaratory relief in a United States court, it cannot be accused of forum shopping.").

684. *See* Brief for Petitioner, *supra* note 507, at 57.

685. *Yahoo! II*, 433 F.3d 1199, 1234-35 (9th Cir. 2006) (Fisher, J., with whom Hawkins, Paez, Clifton, and Bea, J.J., join, concurring in part and dissenting in part).

686. Declaratory judgments are generally more commonplace in Europe. *See supra* Part II.B.1.

international context."[687] However, this conclusion simply does not adhere to the reasoning of the Supreme Court:

> [A] district court should examine "the scope of the pending state court proceeding and the nature of defenses open there." This inquiry, in turn, entails consideration of "whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc." . . . [W]here another suit involving the same parties . . . is pending in state court, a district court might be indulging in "gratuitous interference."[688]

In a state case, a defendant may exercise her constitutional and other federal rights. In an English case the defendant quite obviously cannot. Therefore, the "nature of the defenses" is different. In the context of defamation actions, the defenses available in England are not at all sufficient because they plainly do not meet U.S. constitutional standards.[689] For the same reasons, in England there is not an adequate alternative remedy because constitutional protections do not exist. Furthermore, just because a U.S. party can defend an enforcement action on public policy grounds, when and if it is brought, this is not an adequate alternative—not when damages could accrue.[690]

The question that remains is whether in a case like *Dow Jones* a U.S. district court is the preferred forum. In *In re Air Crash*, the court determined that *Dow Jones*, by deciding not to consider declaratory relief, fit into its framework because "its underpinnings [owed] . . . to events occurring in the foreign jurisdiction."[691] The court explained that the dispute in *Dow Jones* was "based upon a press release issued in England."[692] This observation, however, is incorrect. The dispute in *Dow Jones* was over an article written in the United States, published in the U.S. version of the Wall Street Journal only, and made available on the Internet.[693] While the *In re Air Crash* court's overall framework was a good one, unfortunately the facts of *Dow Jones* did not fit.

Consider the following hypothetical. Dr. Ehrenfeld, rather than having a judgment in England hanging over her head, has only been sued there. She files for declaratory relief, and thus is in a very similar situation to Dow Jones. In this scenario, there would be an actual controversy according to the analysis in Part III.B.1 above. The controversy would be whether she is liable for defamation or not. The central issue in the discretion analysis, it

687. Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 441 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003).

688. Wilton v. Seven Falls Co., 515 U.S. 277, 283 (1995) (quoting Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 495 (1942)).

689. *See supra* notes 84-99 and accompanying text.

690. *See supra* Part III.A.

691. *In re* Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999, 392 F. Supp. 2d 461, 474 (E.D.N.Y. 2005).

692. *Id.*

693. *See supra* notes 480-86 and accompanying text.

has been argued, is whether the U.S. district court is the preferred forum. The first part of this analysis is whether the events that led to the litigation principally took place in the U.S. To this, the answer appears to be a resounding "yes." Dr. Ehrenfeld published her book in the U.S. She expressly limited its publication to within the U.S. A U.S. news website made parts of the book available on the Internet. She sold many copies in the United States, and she only sold thirteen copies in England by way of the Internet. Thus, the events that led to litigation principally took place within the U.S.

The second question in determining the preferred forum is which law applies. This question is difficult because choice of law, complicated in and of itself, is even more so in defamation cases.[694] However, because such a large portion of the book's readership was in the U.S., and there are no facts that suggest England would be a better forum, the law of a U.S. jurisdiction would seem to apply to Dr. Ehrenfeld's publication.[695]

Since the principal events leading to the action took place in the United States, and U.S. law would be applicable, a U.S. district court appears to be the preferred forum. Therefore the discretionary factors would weigh in favor of providing Dr. Ehrenfeld declaratory relief even before Bin Mahfouz got a judgment. The same analysis should have applied in *Dow Jones*.

This Note therefore contends that the *Dow Jones* court should have, in its discretion, heard the case. But this is not to say that, in affirming, the Second Circuit made a mistake. The Supreme Court has recognized that there is a high degree of discretion given to district courts in DJA actions. It would be hard to argue that the *Dow Jones* decision was an abuse of this discretion.[696] This Note does not so argue. Rather, it provides a framework that future courts should consider in the analysis. But to get to this point—to the discretion analysis—a district court must find that a case includes an

694. *See supra* notes 142-43 and accompanying text.

695. The question for a U.S. court would likely be which jurisdiction has "the most significant relationship to the occurrence and the parties." Restatement (Second) of Conflict of Laws § 150(1) (1971); *see also supra* note 143 and accompanying text. This question is difficult and would depend on state laws for choice of law. Answering this question in depth is beyond the scope of this Note.

696. It could be argued that the district court's choice not to exercise its discretion to grant declaratory relief was a good one. The First Amendment rights held in the balance in *Dow Jones* were not great. The editorial that Dow Jones was being sued for was not political speech; it involved a petty dispute between two large companies. As it turned out, Dow Jones won at trial in England. *See* Sam Coates, *Al Fayed Loses April Fool Libel Case*, Times (UK), Feb. 18, 2004, at Home News 10. But this epilogue only strengthens the point that the *Dow Jones* court was too sweeping when it held that there was no actual controversy; the analysis would seem to apply to any request for declaratory relief from pending international litigation. As Dr. Ehrenfeld's case, and potentially others, percolate through the system, the *Dow Jones* decision will no doubt be given consideration. However, cases with facts like Dr. Ehrenfeld's clearly implicate much graver consequences by posing such questions as, are articles about Saudi millionaires impossible to put on the Internet without fear of liability in England? Other courts should not feel constrained by the actual controversy analysis by the *Dow Jones* court.

actual controversy. On this point, this Note argues that the *Dow Jones* court got it wrong. International defamation cases that include the threat of ever-increasing damages support a finding of an actual controversy. And therefore courts have the power—if not the daring—to provide declaratory relief.

## CONCLUSION

It is no longer possible to publish material solely in the United States. The Internet makes nearly all publications available all over the world. This will only increase as technology advances. As expression becomes simultaneously viewable worldwide, every country must examine how it can regulate expression and protect its dissemination. As an example of regulation, the United States must determine how it can stop child pornography put on websites maintained outside of its borders. Conversely, as this Note has examined, the United States must determine how it can protect commentary emanating from within the United States but viewable—and sometimes actionable—in foreign jurisdictions. Other countries must make the same decisions, and no doubt the United States should be careful not to interfere. The implications go far beyond the defamation issue that is the subject of this Note.

In *New York Times*, one of the Supreme Court's central innovations was an understanding that defamation law, by its legal contours and application, can have grave consequences for free and open speech, consequences not unlike those created by a statute criminalizing speech. The existence of untamed liability, like a statute, can not only impermissibly punish speech, but can chill it, preventing information in which the public has an interest from ever getting published. When plaintiffs bring actions overseas based on publications emanating from within the United States, there is a risk that foreign law will chill American speech.[697] While U.S. courts can only do so much, declaratory relief is a tool that has at least some use.[698] Declaratory relief should be granted for the American who has a judgment hanging over her head, as in the case of Dr. Ehrenfeld. Courts should also grant declaratory relief before such judgments have been ordered, when litigation and a foreign jurisdiction's laws threaten the First Amendment rights of Americans.

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697. It has been argued that by allowing countries to exercise jurisdiction on the basis of Internet publications, the controlling law for the Internet would be that of the country with the most plaintiff-friendly laws. *See* Garnett, *supra* note 40, at 75-76.

698. Other solutions have been offered. *See, e.g.*, *id.* at 86-88 (arguing for a change in Australian jurisdiction law as it relates to the Internet); Sutton, *supra* note 643, at 437-38 (arguing for international treaties making Internet liability uniform worldwide). By contrast, a central benefit of providing declaratory relief is that it does not require international cooperation; nor does it require any new legislation in the United States.