NOTE

THE PUBLIC POLICY EXCEPTION, "THE FREEDOM OF SPEECH, OR OF THE PRESS," AND THE UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

I. INTRODUCTION

The Uniform Foreign Money-Judgments Recognition Act ("1962 Act") was drafted by the National Conference of Commissioners on Uniform State Laws ("N.C.C.U.S.L.") in 1962.[1] The drafters hoped that states would codify the 1962 Act's rules, long applied by the majority of American courts, for recognition of foreign money-judgments in state courts.[2] The 1962 Act has since been enacted by twenty-eight states.[3]

In 2005, the N.C.C.U.S.L. drafted the Uniform Foreign-Country Money Judgments Recognition Act ("2005 Act").[4] The drafters hoped

1. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (approved by the N.C.C.U.S.L. in 1962), 13 U.L.A. pt. II, at 39 (2002) [hereinafter 1962 UNIF. ACT].

2. 1962 UNIF. ACT note, 13 U.L.A. pt. II, at 40 (2002) (Prefatory Note).

3. ALASKA STAT. §§ 09.30.100-.180 (2006); COLO. REV. STAT. §§ 13-62-101 to -109 (2007); CONN. GEN. STAT. ANN. §§ 50a-30 to -38 (West 2006); DEL. CODE ANN. tit. 10, §§ 4801-4808 (West 2006); D.C. CODE §§ 15-381 to -388 (2001 & Supp. 2007); FLA. STAT. ANN. §§ 55.601-.607 (2006); GA. CODE ANN. §§ 9-12-110 to -117 (1993); HAW. REV. STAT. §§ 658C-1 to -9 (Supp. 2007); 735 ILL. COMP. STAT. ANN. 5/12-618 to -626 (West 2003); IOWA CODE ANN. §§ 626B.1-626B.8 (West 1999 & Supp. 2008); ME. REV. STAT. ANN. tit. 14, §§ 8501-8509 (2003); MD. CODE ANN., CTS. & JUD. PROC. §§ 10-701 to -709 (LexisNexis 2006 & Supp. 2007); MASS. GEN. LAWS ANN. ch. 235, § 23A (West 2000 & Supp. 2008); MINN. STAT. ANN. § 548.35 (West 2000); MO. ANN. STAT. §§ 511.770-.787 (West Supp. 2008); MONT. CODE ANN. §§ 25-9-601 to -609 (2007); N.J. STAT. ANN. §§ 2A:49A-16 to -24 (West 2000); N.M. STAT. ANN. §§ 39-4B-1 to -9 (West 2003); N.Y. C.P.L.R. 5301-5309 (McKinney 1997); N.C. GEN. STAT. §§ 1C-1800 to -1808 (2007); N.D. CENT. CODE §§ 28-20.2-01 to -06 (2006); OHIO REV. CODE ANN. §§ 2329.90-.94 (West 2004); OKLA. STAT. ANN. tit. 12, §§ 710-718 (West 2000); OR. REV. STAT. ANN. §§ 24.200-.255 (West 2003 & Supp. 2007); 42 PA. CONS. STAT. ANN. §§ 22001-22009 (West Supp. 2007); TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001-.008 (Vernon 1997); VA. CODE ANN. §§ 8.01-465.6 to -465.13 (2007); WASH. REV. CODE ANN. §§ 6.40.010-.915 (West 1995).

4. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, 13 U.L.A. pt. II, at 5 (Supp. 2007) [hereinafter 2005 UNIF. ACT]. The official archive site for the National Conference of

that the 2005 Act would continue the basic policy and approach of the 1962 Act, while at the same time updating, clarifying, and correcting provisions of the 1962 Act.[5] The 2005 Act has since been enacted by four states, with more states likely to follow.[6]

This Note focuses upon the public policy exception to the recognition of foreign-country money judgments contained within both the 1962 and 2005 Acts, specifically, the changes made by the 2005 Act to this exception. The 1962 Act's public policy exception states the rule that a foreign judgment need not be recognized by a state court if "the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state."[7] The 2005 Act's public policy exception states the rule that a foreign judgment need not be recognized by a state court if "*the judgment* or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state *or of the United States*."[8]

The drafters of the 2005 Act sought to align the public policy exception with the vast majority of cases interpreting the 1962 Act's public policy exception.[9] Importantly, the Commentary to the 2005 Act

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Commissioners on Uniform State Laws may be found at http://www.law.upenn.edu/bll/archives/ulc/ulc.htm.

5. 2005 UNIF. ACT note, 13 U.L.A. pt. II, at 5 (Supp. 2007) (Prefatory Note) ("[The 1962] Act codified the most prevalent common law rules with regard to the recognition of money judgments rendered in other countries. . . . It delineates a minimum of foreign-country judgments that must be recognized by the courts of the adopting states, leaving those courts free to recognize other foreign-country money judgments not covered by the Act under principles of comity or otherwise."); *see also* National Conference of Commissioners on Uniform State Laws, Summary of the Uniform Foreign-Country Money Judgments Recognition Act, http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ufcmjra.asp (last visited May 26, 2008) [hereinafter Summary of 2005 Act] (providing a short summary of the primary differences between the 1962 and the 2005 Uniform Acts).

6. CAL. CIV. PROC. CODE §§ 1713-1724 (West Supp. 2008); IDAHO CODE ANN. §§ 10-1401 to -1410 (Supp. 2007); MICH. COMP. LAWS §§ 691.1131-.1143 (2008) (effective Mar. 7, 2008), *available at* http://legislature.mi.gov/doc.aspx?mcl-Act-20-of-2008; NEV. REV. STAT. ANN. §§ 17.700-.820 (West Supp. 2008). Most states enacting versions of the 2005 Act to replace previously enacted versions of the 1962 Act provide that "[t]he former [1962 Act] applies to all actions commenced before the effective date of [the 2005 Act] in which the issue of recognition of a foreign-country judgment is raised." *E.g.*, CAL. CIV. PROC. CODE § 1724(b) (West Supp. 2008). For an updated listing of states that have enacted the 2005 Act, see http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufcmjra.asp (last visited May 26, 2008).

7. 1962 UNIF. ACT § 4(b)(3), 13 U.L.A. pt. II, at 59 (2002).

8. 2005 UNIF. ACT § 4(c)(3), 13 U.L.A. pt. II, at 11 (Supp. 2007) (emphasis added).

9. 2005 UNIF. ACT § 4 cmt. 8, 13 U.L.A. pt. II, at 13 (Supp. 2007); *see* Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 480 (2d Cir. 2007); Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 432-33, 446 (S.D.N.Y. 2002); Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001); Telnikoff v. Matusevitch, 702 A.2d

cited *Bachchan v. India Abroad Publications, Inc.*[10] as the representative case for determining whether a judgment is repugnant to the public policy of the United States.[11] In *Bachchan*, a British libel judgment was denied recognition under the public policy exception of New York's Uniform Foreign Money-Judgment Recognition Act because the substantive law underlying the foreign money judgment violated the First Amendment.[12] In so doing, the court held that if the foreign libel judgment was repugnant to public policy because it violated constitutional standards embodied in the First Amendment to the United States Constitution or the free speech guaranty of the New York Constitution, the refusal to recognize the judgment was deemed to be "'*constitutionally mandatory*.'"[13]

The public policy exception to the recognition of foreign money judgments has been described as problematically under-theorized.[14] Indeed, prior scholars have deemed it unsafe to delve into the meaning of the exception.[15] Nevertheless, the following discussion will show that the 2005 Act's statutory reliance upon *Bachchan* is inappropriate because the history behind the public policy exception, and the modern ambivalence regarding its use, dictates that courts should not invoke the exception to provide categorical, constitutionally mandatory non-recognition of foreign money judgments. This argument is particularly important in light of the fact that a number of states will soon enact and

230, 249 (Md. 1997); Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661, 662 (Sup. Ct. 1992). The addition of judgment to the provision in the 2005 Act was intended to expand the exception to cases where either the cause of action or judgment itself was found to violate public policy. 2005 UNIF. ACT § 4 cmt. 8, 13 U.L.A. pt. II, at 13 (Supp. 2007).

10. 585 N.Y.S.2d 661 (Sup. Ct. 1992).

11. 2005 UNIF. ACT § 4 cmt. 8, 13 U.L.A. pt. II, at 13 (Supp. 2007).

12. 585 N.Y.S.2d at 665.

13. *Id.* at 662 (emphasis added).

14. Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 798 (2004).

15. *See* Horace Emerson Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth*, *in* 2 HARVARD STUDIES IN THE CONFLICT OF LAWS 288 (1938) (describing the public policy exception to Foreign Judgment Enforcement as "'a dangerous horse to ride,'" and warning that it is unsafe to attempt to delimit the exception's scope). Prior unsafe discussions of the exception include Karen E. Minehan, *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis?*, 18 LOY. L.A. INT'L & COMP. L.J. 795 (1996); Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956); Note, *The Public Policy Concept in the Conflict of Laws*, 33 COLUM. L. REV. 508 (1933); Jonathan H. Pittman, Note, *The Public Policy Exception to the Recognition of Foreign Judgments*, 22 VAND. J. TRANSNAT'L L. 969 (1989).

begin to interpret the 2005 Act and its expanded public policy exception.[16]

Part II of this Note will begin by discussing the recognition of foreign money judgments generally, before turning to the public policy exception, *Bachchan*, and the Second Circuit's recent reliance on *Bachchan* in *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*[17] Part III will then provide an overview of the recent ambivalent, scholarly reactions to *Bachchan*'s constitutionally mandatory language in order to show that the Commentary to the 2005 Act made an inappropriate choice in citing to *Bachchan* as the representative case for determining whether a foreign judgment is repugnant to the public policy of the United States. The public policy exception contained within the American Law Institute's ("ALI") recently proposed federal statute for the Recognition and Enforcement of Foreign Judgments[18] will be discussed, as will three scholarly reactions to the *Bachchan* line of cases: the State Action argument,[19] the Cosmopolitan argument,[20] and the Separate Considerations argument.[21]

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16. Indeed, the practical importance of the public policy exception will only increase as American free speech protections collide with foreign judgments arising out of online (Internet) activities. *See* THE A.L.I., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE 79-80 reporters' note 6(d) (Proposed Final Draft April 11, 2005) [hereinafter A.L.I. PROPOSED FINAL DRAFT]; Molly S. Van Houweling, *Enforcement of Foreign Judgments, The First Amendment, and Internet Speech: Notes for the Next* Yahoo! v. LICRA, 24 MICH. J. INT'L L. 697, 716 (2003) ("The Internet . . . raises the stakes for domestic enforcement of foreign judgments," as well as the "public policy safety valve.").

17. 489 F.3d 474 (2d Cir. 2007).

18. THE FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT, *in* A.L.I. PROPOSED FINAL DRAFT, *supra* note 16, at 7. For further discussion on the A.L.I. Act, see Thomas S. Leatherbury, *ALI Takes Position on Foreign Judgments (Including Those Against the Media)*, COMM. LAW., Summer 2005, at 25; Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239 (2004); Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635 (2000) (Professors Silberman and Lowenfeld were the co-Reporters for the A.L.I. Act). The A.L.I. Act has thus far failed to be enacted into federal legislation.

19. Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 186 (2004) (arguing that constitutional analysis within the public policy exception is inappropriate because there is no state action in the enforcement of Un-American Judgments). *But see* Montre D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1237 (2007) (discussing the *Bachchan* line of cases and arguing that the courts are correct to find that the state action doctrine precludes them from enforcing unconstitutional foreign judgments).

20. *See* Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1868 (2005) (arguing that courts interpreting the public policy exception should weigh the overall systemic interest in creating an interlocking system of international adjudication against the forum's public policy).

21. *See* Ayelet Ben-Ezer & Ariel L. Bendor, *Conceptualizing* Yahoo! v. L.C.R.A.*: Private Law, Constitutional Review, and International Conflict of Laws*, 25 CARDOZO L. REV. 2089, 2139-

Part IV will then examine the statutory history behind the 1962 and 2005 Acts, including the legislative history behind the 1962 Act's enactment in New York. The discussion will show that the public policy exception to the recognition of foreign money judgments, regardless of whether the public policy is that of the state or United States, should be interpreted narrowly and invoked only as a discretionary safety valve to protect against judgments that sufficiently violate fundamental notions of what is decent and just, so as to clearly show that recognition would seriously undermine "'that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel.'"[22] As such, this Note will argue that there is no statutory or historical basis for a constitutionally mandatory, categorical public policy exception to the recognition of foreign money judgments.[23]

In Part V, a statutory amendment to the 2005 Act will be proposed, with the belief that its inclusion in state versions of the 2005 Act can alleviate the problems inherent in *Bachchan* by separating the public policy exception from First Amendment analysis.[24] This part will then argue that the Second Circuit's analysis in *Viewfinder*[25] is entirely appropriate if utilized to interpret the proposed amendment, not the public policy exception. Finally, this Note will argue that courts interpreting the 2005 Act—as enacted by the N.C.C.U.S.L.—should incorporate constitutional principles into the public policy exception, rather than allow the public policy exception to be subsumed by constitutional analysis. The discussion will then apply this suggested approach to the facts of *Viewfinder*. In so doing, the analysis will also attempt to reconcile the belief that the First Amendment does not

40 (2004) (arguing that constitutional norms and public policy analysis are both relevant to the recognition of foreign judgments, but should not become coterminous).

22. 2005 UNIF. ACT § 4 cmt. 8, 13 U.L.A. pt. II, at 13 (Supp. 2007) (quoting Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980)); *see infra* Part IV.

23. *See* Berman, *supra* note 20, at 1872 ("[T]here is no basis for a categorical [public policy exception] preventing enforcement . . . ."); Rosen, *supra* note 19, at 172 ("Categorically refusing to enforce [foreign libel judgments under the exception] is tantamount to imposing U.S. constitutional norms on foreign countries."); Jeremy Maltby, Note, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 COLUM. L. REV. 1978, 2023 (1994) (arguing that courts should resist the reflex to summarily deny recognition to foreign libel judgments).

24. A similar amendment was introduced into both houses of the New York legislature in January 2008. *See infra* notes 201-03 and accompanying text.

25. 489 F.3d 474 (2d Cir. 2007).

directly preclude the recognition of foreign judgments[26] with the belief that public policy may be found by examining constitutional norms.[27]

II. THE U.S. RECOGNITION OF FOREIGN MONEY JUDGMENTS AND THE MOVEMENT TOWARDS A CONSTITUTIONALLY MANDATORY PUBLIC POLICY EXCEPTION

A. Comity, the U.S. Recognition of Foreign Judgments, and the Uniform Acts

Much has been written on the U.S. recognition of foreign judgments,[28] and many of these discussions begin with the doctrine of comity and the seminal Supreme Court case of *Hilton v. Guyot*.[29] This has been the case for two reasons: First, in discussing the public policy

26. *See* Telnikoff v. Matusevitch, 702 A.2d 230, 239, 249 (Md. 1997) (denying recognition to a foreign libel judgment on public policy grounds without deciding whether the First Amendment directly precluded recognition).

27. *See id.* at 239 ("[I]n ascertaining . . . public policy, it is appropriate to examine and rely upon the history, policies, and requirements of the First Amendment . . . . In determining non-constitutional principles of law, courts often rely upon the policies and requirements reflected in constitutional provisions."); Morris B. Chapman & Assocs., Ltd. v. Kitzman, 739 N.E.2d 1263, 1270 (Ill. 2000); Martino v. Cottman Transmission Sys., Inc., 554 N.W.2d 17, 20 (Mich. Ct. App. 1996); Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 688 (N.Y. 1985); *see also* KATHLEEN PATCHEL, STUDY REPORT ON POSSIBLE AMENDMENT OF THE UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT 32 n.164 (June 25, 2003), http://www.law.upenn.edu/bll/archives/ulc/ufmjra/apr2004studyreport.pdf ("In general, courts have recognized that the public policy of the forum state includes the public policy of the United States—that is, those policies reflected in the Constitution . . . .").

28. *See* Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 255 (1991) (discussing the recognition and enforcement of foreign judgments). For a historical overview of scholarly articles on the U.S. recognition of foreign judgments, see Saad Gul, *Old Rules for a New World? The Constitutional Underpinnings of U.S. Foreign Judgment Enforcement Doctrine*, 5 APPALACHIAN J.L. 67 (2006); Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601 (1968); Willis L. M. Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950); and Hessel E. Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law*, 33 MICH. L. REV. 1129 (1935).

29. 159 U.S. 113 (1895). The classic definition of comity comes from *Hilton v. Guyot*:

> '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 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.

Id. at 163-64. Not surprisingly, his definition has been described as overly ambiguous. *See* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 9-11 (1991).

exception courts often refer to and even rely on the doctrine of comity;[30] second, comity's importance in modern jurisprudence originated out of the Court's decision in *Hilton*.[31]

In *Hilton*, the Court formulated its test for foreign judgment recognition and enforcement:

> [W]here 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 between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, *or any other special reason why the comity of this nation should not allow it full effect*, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh . . . .[32]

Hilton's comity-based test viewed recognition of the full effect of a foreign judgment as an obligation if its test (plus reciprocity) was met.[33]

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30. *See, e.g.*, Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661, 662 (Sup. Ct. 1992) ("It is plaintiff's position that the public policy exception to the rule that foreign judgments are afforded comity is narrow . . . .").

31. 159 U.S. at 113.

32. *Id.* at 202-03 (emphasis added). Note that the "special reason" clause may be said to include judgments repugnant to the public policy of the forum.

33. The court subsequently held against the plaintiff because there was a "want of reciprocity," a requirement not included in its test. *See id.* at 228; Carodine, *supra* note 19, at 1167 n.24. Reciprocity in foreign judgment recognition is the recognition by country A of a country B judgment only if, and only to the extent that country B would recognize an identical country A judgment. *See* BLACK'S LAW DICTIONARY 1298 (8th ed. 2004) (defining reciprocity as it relates to intellectual property). The 1962 Act and the 2005 Act do not require reciprocity. For a discussion of both sides of the reciprocity debate, see J. Noelle Hicks, *Facilitating International Trade: The U.S. Needs Federal Legislation Governing the Enforcement of Foreign Judgments*, 28 BROOK. J. INT'L L. 155, 176 (2002) (arguing that if the U.S. requires reciprocity other countries will realize that they need to be more receptive to enforcing U.S. judgments); Miller, *supra* note 18, at 242 (arguing that a reciprocity requirement is neither wise nor warranted in U.S. foreign judgment recognition); Franklin O. Ballard, Comment, *Turnabout Is Fair Play: Why a Reciprocity Requirement Should Be Included in the American Law Institute's Proposed Federal Statute*, 28 HOUS. J. INT'L L. 199, 237-38 (2006) (arguing in favor of a reciprocity requirement); and Susan L. Stevens, Note, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115, 117 (2002) ("[T]he United States ought to enact a federal statute with a reciprocity requirement, in order to prevent foreign country neglect of U.S. judgments."). For a discussion of the recognition of U.S. judgments abroad, see ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE (Charles Platto & William G. Horton eds., 2d ed. 1993) (setting forth the laws and procedures for the enforcement of foreign judgments in more than 35 jurisdictions); Alessandro Barzaghi, *Recognition and Enforcement of United States Judgments in Italy*, 18 N.Y. INT'L L. REV. 61 (2005); Yves P. Piantino, *Recognition and Enforcement of Money*

Indeed, the widely recognized modern basis for the comity doctrine is that of obligation, requiring United States courts to defer to foreign sovereigns and the executive in the conduct of foreign relations.[34] The *Hilton* Court's deference to foreign tribunals and emphasis upon procedural protections mirrors Justice Cardozo's belief that "[w]e are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."[35]

The doctrine of comity remains significant in the modern context of foreign judgment recognition,[36] and *Hilton*'s test has remained a relevant, even canonical piece of foreign judgment jurisprudence. As such, part of *Hilton*'s test can be explicitly seen in the 1962 Act.[37]

The drafters of the 1962 Act hoped that states would codify its rules on recognition of foreign money judgments, thereby making it more likely that judgments rendered by U.S. courts would be recognized abroad.[38] To help achieve this goal the drafters emphasized that state courts were privileged to give foreign money judgments greater, not less, effect than the local forum was required to do by the provisions of the Act.[39]

The drafters of the 2005 Act hoped that the Act would continue the basic policies and approach of the 1962 Act, while at the same time updating, clarifying, and correcting provisions of the 1962 Act.[40] Accordingly, the drafters intended the 2005 Act to codify the most prevalent common law rules with regard to the recognition of money judgments rendered in other countries.[41] The 2005 Act thus delineated

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Judgments Between the United States and Switzerland: An Analysis of the Legal Requirements and Case Law, 17 N.Y.L. SCH. J. INT'L & COMP. L. 91 (1997); and Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175 (2005).

34. *See* Paul, *supra* note 29, at 12, 25-26.

35. Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918).

36. *See* Carodine, *supra* note 19, at 1233 ("It is important to remember that foreign judgment recognition in this country is based on principles of comity."); Mark L. Movsesian, *Judging International Judgments*, 48 VA. J. INT'L L. 65, 71 (2007) (noting that American courts make recognition and enforcement determinations based on a "comity theory"). *But see* Reese, *supra* note 28, at 784 ("Comity, a word of loose and uncertain meaning at best, has little significance in [foreign judgment recognition] other than as a statement of the conflict of laws rules of the forum.").

37. 1962 UNIF. ACT § 4 cmt., 13 U.L.A. pt. II, at 59 (2002) (citing *Hilton* directly); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. b (1987) (citing *Hilton*'s procedural requirements).

38. 1962 UNIF. ACT note, 13 U.L.A. pt. II, at 40 (2002) (Prefatory Note).

39. *Id.*

40. 2005 UNIF. ACT note, 13 U.L.A. pt. II, at 5 (Supp. 2007) (Prefatory Note); *see also* Summary of 2005 Act, *supra* note 5 (providing a short summary of the primary differences between the 1962 and the 2005 Uniform acts).

41. 2005 UNIF. ACT note, 13 U.L.A. pt. II, at 5 (Supp. 2007) (Prefatory Note).

the minimum standards for a foreign-country judgment to be recognized by the courts of the adopting states, leaving those courts free to expand recognition and enforcement to other foreign-country money judgments not covered by the Act under principles of comity or otherwise.[42]

One of the provisions that was updated and clarified in the 2005 Act was the public policy exception. The 2005 Act's public policy exception, contained in section 4 ("Standards for Recognition of Foreign-Country Judgment"), part (c)(3) reads: "A court of this state need not recognize a foreign-country judgment if: . . . *the judgment* or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state *or of the United States*."[43]

The 2005 Act, by including both "the judgment," and "or of the United States" in the language of the exception, thereby made two changes to the 1962 Act's public policy exception.[44] By adding "the judgment" to the exception, the drafters hoped to eliminate the tendency of some courts to narrowly hold that only public policy challenges based on foreign causes of action could be found repugnant under the Act.[45] In addition, the drafters also expanded the exception to provide for non-recognition of those foreign money judgments that were found to be repugnant to the public policy of the United States.[46] The drafters wanted to make it clear "that the relevant public policy is that of both the State in which recognition is sought and that of the United States."[47] The drafters cited *Bachchan*[48] as the representative case for determining

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42. *Id.* Recognition of a foreign money judgment by a state court under the 2005 Act precedes enforcement of that judgment. Specifically, if the court finds that the foreign money judgment is entitled to recognition under the Act, then the foreign judgment is enforceable to the same extent as a judgment rendered in "this state." 2005 UNIF. ACT § 7(2), 13 U.L.A. pt. II, at 16 (Supp. 2007); *see also* Guinness PLC v. Ward, 955 F.2d 875, 889 n.9 (4th Cir. 1992) (arguing that in the interest of comity, there may be instances where courts should recognize a foreign judgment, but not enforce it); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. b (1987) (distinguishing recognition from enforcement).

43. 2005 UNIF. ACT § 4(c)(3), 13 U.L.A. pt. II, at 11 (Supp. 2007) (emphasis added).

44. *Compare* 2005 UNIF. ACT § 4(c)(3), 13 U.L.A. pt. II, at 11 (Supp. 2007), *with* 1962 UNIF. ACT § 4(b)(3), 13 U.L.A. pt. II at 59 ("[T]he [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state . . . .").

45. 2005 UNIF. ACT § 4 cmt. 8, 13 U.L.A. pt. II, at 13 (Supp. 2007) ("Subsection 4(c)(3) rejects this narrow focus by providing that the forum court may deny recognition if either the cause of action or the judgment itself violates public policy."); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(2)(d) (1987) (providing that "the cause of action on which the judgment was based, or the judgment itself," may be subject to non-recognition under the exception).

46. *See* 2005 UNIF. ACT § 4 cmt. 8, 13 U.L.A. pt. II, at 13 (Supp. 2007) ("This is the position taken by the vast majority of cases interpreting the 1962 public policy provision.").

47. 2005 UNIF. ACT § 4 cmt. 8, 13 U.L.A. pt. II, at 13 (Supp. 2007).

48. 585 N.Y.S.2d 661 (Sup. Ct. 1992).

whether a judgment was repugnant to the public policy of the United States.[49]

B. Bachchan *and the Constitutionally Mandatory Public Policy Exception to Recognizing Foreign-Country Money Judgments*

In *Bachchan*, the plaintiff, an Indian national, filed a defamation suit in England against the New York operator of a news service that transmitted reports only to a news service in India.[50] The story at issue was written in London, wired by defendant to India, and reported in two newspapers that were subsequently distributed in the United Kingdom.[51] The English jury held for plaintiff and assessed forty thousand pounds in damages for the wire service story, plus attorneys' fees against the defendant, India Abroad, Inc.[52]

Plaintiff thereafter filed suit in New York under Section 5303 of the C.P.L.R.—the Uniform Foreign Country Money-Judgments Recognition Act.[53] The defendant responded by arguing that the judgment was repugnant to public policy and thereby not subject to recognition under Section 5304(b)(4) of the C.P.L.R.[54] According to the defendant, the foreign libel judgment was repugnant to public policy because it was imposed upon him without the safeguards for freedom of speech and the

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49. 2005 UNIF. ACT § 4 cmt. 8, 13 U.L.A. pt. II, at 13 (Supp. 2007) ("The language 'or of the United States' in subsection 4(c)(3) . . . makes it clear that the relevant public policy is that of both the State . . . and that of the United States. . . . *E.g.*, Bachchan . . . ."). Interestingly, a June 2004 memo by the Drafting Committee for the 2005 Uniform Act stated that despite the addition of United States policy, the standard for invoking the exception remained unchanged. Memorandum from the Drafting Comm. to Amend the Unif. Foreign Money-Judgments Recognition Act to the Unif. Law Comm'rs 8 (June 7, 2004), http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2004AnnMtgRpt.pdf. Public policy would be violated only "if the substance of the law is inimical to good morals, natural justice, or the general interest of the citizens of the state." *Id.* at 8. Shortly thereafter, the Reporter's Notes to a Draft Uniform Act, dated October 2004, cited to *Bachchan*'s constitutionally mandated invocation of the public policy exception as an example of a judgment repugnant to United States policy. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4, reporter's notes (Oct. 2004 Discussion Draft), http://www.law.upenn.edu/bll/archives/ulc/ufmjra/Oct2004MtgDraft.pdf. The reporter's notes and comments of subsequent draft uniform acts also cited *Bachchan*. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4, reporter's notes (Mar. 2005 Meeting Draft), http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005MarMtgDraft.pdf; UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4, cmt. 8 (July 2005 Draft), http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005annmtgdraft.pdf.

50. *Bachchan*, 585 N.Y.S.2d at 661.

51. *Id.* The story was also reported in an issue of defendant's New York newspaper. *Id.*

52. *Id.* at 662.

53. *See id.*; N.Y. C.P.L.R. 5303 (McKinney 1997).

54. *Bachchan*, 585 N.Y.S.2d at 662.

press required by the First Amendment of the U.S. Constitution and Article I, Section 8 of the New York State Constitution.[55]

The court held in favor of the defendant and denied recognition of the foreign judgment. In so doing, the court wrote,

> [I]f . . . the public policy to which the foreign judgment is repugnant is embodied in the First Amendment to the United States Constitution or the free speech guaranty of the Constitution of this State, the refusal to recognize the judgment should be, and it is deemed to be, "*constitutionally mandatory*."[56]

The court thus decided that it did not have discretion under the Act to recognize the judgment if the foreign judgment or cause of action failed to comport with U.S. Constitutional standards for adjudicating libel claims.[57] Because of the differences in English libel law as compared to U.S. libel law,[58] the court found that the foreign judgment must be unenforceable under the public policy exception because it violated the defendant's First Amendment rights to free speech and freedom of the press;[59] that is, the public policy exception was subject to "constitutionally mandatory" application in all cases seeking recognition of English libel law judgments where the substantive law underlying those judgments violated the First Amendment.

C. From Libel to Fair Use: Viewfinder

In the recent Second Circuit case, *Sarl Louis Feraud International v. Viewfinder, Inc.*,[60] the court relied heavily on *Bachchan* to effectively mirror the approach suggested by the drafters of the 2005 Act. In *Viewfinder*, the defendant was a website operator, incorporated in Delaware, with its principal place of business in New York.[61] Defendant's website contained photographs of current and past fashions, including photographs taken of fashion shows held by various

55. *Id.*

56. *Id.* (emphasis added).

57. *See id.* at 662-64.

58. For an abbreviated discussion on the differences between American and English libel law, see Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law?*, 16 HASTINGS COMM. & ENT. L.J. 235, 239-44 (1993-1994); Gregory T. Walters, Comment, Bachchan v. India Abroad Publications, Inc.*: The Clash Between Protection of Free Speech in the United States and Great Britain*, 16 FORDHAM INT'L L.J. 895, 930-32 (1992-1993).

59. *See Bachchan*, 585 N.Y.S.2d at 662-65.

60. 489 F.3d 474 (2d Cir. 2007).

61. *Id.* at 476.

designers.[62] The plaintiffs in the case were French designers, and photographs of plaintiffs' fashion shows were among those featured on the site.[63] Plaintiffs filed suit in France seeking money damages from Viewfinder, alleging the unauthorized use of their intellectual property[64] and unfair competition.[65] Viewfinder failed to respond and a default French judgment was entered against it, ordering Viewfinder to remove the offending photographs from the site and fining Viewfinder in the amount of 500,000 francs per plaintiff, with a 50,000 franc fine per day that Viewfinder failed to comply with the judgment.[66]

Plaintiffs then filed suit in the Southern District of New York seeking enforcement of the French money judgment under the New York Act.[67] The district court held that enforcing the French judgments would be repugnant to the public policy of New York because it would violate Viewfinder's First Amendment rights.[68] The Second Circuit granted plaintiff's appeal and subsequently vacated and remanded the case back to the district court for further proceedings specific to the public policy exception and copyright's fair use doctrine.[69]

In making its decision the Second Circuit wrote extensively on the proper application of the public policy exception within New York.[70] The court first determined that the judgment against Viewfinder was not repugnant to New York public policy due to the difference between U.S. and French copyright law; that is, dress designs are copyrightable in France, but not in the United States.[71] The court then moved on to

62. *Id.*

63. *Id.*

64. United States copyright law does not extend protection to clothes or dress designs. *Id.* at 480 n.3 (citing Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1002 (2d. Cir. 1995)). Under French copyright law, clothing designs are entitled to copyright protection. *Id.* at 479 (French citation omitted).

65. *Id.* at 477.

66. *Id.*

67. *Id.*; *see also* N.Y. C.P.L.R. 5301-5309 (McKinney 1997).

68. *See* Sarl Louis Feraud Int'l v. Viewfinder, Inc., 406 F. Supp. 2d 274, 285 (S.D.N.Y. 2005), *vacated*, 489 F.3d 474 (2d Cir. 2007).

69. Sarl Louis Feraud Int'l v.Viewfinder, Inc., 489 F.3d 474, 484 (2d Cir. 2007).

70. *Id.* at 479-80; *see infra* Part IV.C. In New York, the "public policy inquiry rarely results in refusal to enforce a judgment unless it is 'inherently vicious, wicked or immoral, and shocking to the prevailing moral sense.'" *Viewfinder*, 489 F.3d at 479 (quoting Sung Hwan Co. v. Rite Aid Corp., 850 N.E.2d 647, 650 (N.Y. 2006)); *see also* Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986) ("A judgment is unenforceable as against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.' The standard is high, and infrequently met.") (citation omitted).

71. *Viewfinder*, 489 F.3d at 480 n.3. The *Viewfinder* court deferred to the district court's holding that "copyright laws [were] not 'matters of strong moral principle' but rather represente[d] 'economic legislation'" subject to economic policy. *Id.*

discuss the relationship between the public policy exception and Viewfinder's First Amendment rights.

The court restated *Bachchan*'s holding that foreign judgments that impinge on First Amendment rights will be found to be "repugnant" to public policy.[72] The court then laid out a two step test for determining whether the foreign money judgment was repugnant to the public policy of New York: First, courts must identify the First Amendment protections deemed constitutionally mandatory for the speech at issue; second, courts must determine whether the substantive foreign laws underlying the foreign judgment provide comparable protections.[73]

The court then wrote that because the foreign judgment was based upon alleged copyright infringement, the proper prism to analyze the First Amendment claims was through copyright's fair use doctrine.[74] After summarizing the United States' fair use doctrine, the court indicated that if Viewfinder's use was found to be a fair use under United States copyright law, then the French foreign money judgments were to be held repugnant to the public policy of New York.[75] The court's analysis in *Viewfinder* therefore expanded the invocation of *Bachchan*'s categorical, "constitutionally mandatory" public policy exception to deny recognition to foreign judgments that impinged on the First Amendment rights protected by copyright's fair use doctrine.

III. THE SCHOLARLY REACTION

Despite the foreign judgment recognition jurisprudence outlined above,[76] there has been a recent movement by the academic community criticizing the categorical, constitutionally mandatory application of the

72. *Id.* at 480 (citing Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661, 662 (Sup. Ct. 1992); Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1189-90 (N.D. Cal. 2001)).

73. *Viewfinder*, 489 F.3d at 481-82. According to the Second Circuit, the district court should have first determined the level of First Amendment protection required by New York public policy, and second, it should have analyzed whether the French intellectual property regime underlying the foreign judgment provided comparable protections to Viewfinder's First Amendment rights. *Id.*

74. *Id.* at 482. "'We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine.'" *Id.* (quoting Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 74 (2d Cir. 1999)).

75. *See id.* at 483 ("If the publication of photographs of copyrighted material in the same manner as Viewfinder has done in this case would not be fair use under United States law, then the French intellectual property regime sanctioning the same conduct certainly would not be repugnant to public policy.").

76. *See supra* Part II.B-C.

public policy exception in the *Bachchan* line of cases.[77] This Part will discuss the academic ambivalence over the current state of the exception by examining the history behind the public policy exception contained within the ALI's recently proposed federal statute for foreign judgment recognition and enforcement, as well as three specific scholarly reactions to the *Bachchan* line of cases. The discussion will thereby show that the 2005 Act's citation to *Bachchan* as the representative case for determining whether a judgment is repugnant to U.S. public policy was a dubious, even inappropriate choice.

A. The Public Policy Exception to Foreign Judgment Recognition, Bachchan *and the ALI*

In 2005, the American Law Institute approved a proposed federal statute entitled the Foreign Judgments Recognition and Enforcement Act ("A.L.I. Act").[78] The A.L.I. Act was drafted with the belief that a federal statute could achieve nationwide uniformity in the American law of foreign judgment recognition.[79] The drafters of the A.L.I. Act also believed that federal legislation would stimulate agreements with foreign countries pertaining to reciprocal enforcement of each others' judgments, while providing clarity and incentives to foreign countries and their courts to recognize and enforce judgments emanating from the United States.[80]

The A.L.I. Act contained a public policy exception that read:

> A foreign judgment shall not be recognized or enforced in a court in the United States if the party resisting recognition or enforcement establishes that . . . the judgment or the claim on which the judgment is

77. *See* EUGENE F. SCOLES ET. AL, CONFLICT OF LAWS 1335 n.12 (4th ed. 2004); Berman, *supra* note 20, at 1872 ("[T]here is no basis for a categorical [public policy exception] preventing enforcement . . . ."); Rosen, *supra* note 19, at 172 ("Categorically refusing to enforce [foreign judgments under the exception] is tantamount to imposing U.S. constitutional norms on foreign countries."); Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999 (1994) (arguing that *Bachchan* made a collection of errors, including misconstruing the First Amendment); Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1305-06 (1998) (stating that the public policy exception should not be used to strike down every foreign judgment that shows any deviation from the accepted First Amendment protections for free speech); Maltby, *supra* note 23, at 2023 (arguing that courts should resist the reflex to summarily deny recognition to foreign libel judgments); Walters, *supra* note 58, at 899 (arguing that future enforcement of non-U.S. libel judgments should be subject to constitutional analysis on a case by case basis); *infra* Part III.B.

78. THE A.L.I., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006) [hereinafter A.L.I. PROPOSED STATUTE].

79. A.L.I. PROPOSED FINAL DRAFT, *supra* note 16, at 1.

80. *See id.* at 6.

> based is repugnant to the public policy of the United States, or to the public policy of a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law.[81]

The statutory history of the A.L.I. Act's public policy exception may be traced back through the Reports and Annual Proceedings of the A.L.I.[82] Initially the Reporters for the A.L.I. Act favored a narrow interpretation to the public policy exception, quoting Justice Cardozo's famous definition of public policy as a violation of "some deep-rooted tradition of the common weal."[83] By 2002, the discussion of the public policy exception had expanded beyond *Loucks* to include the First Amendment line of cases.[84] The A.L.I.'s discussion at the 2002 annual meeting thus centered upon whether it was appropriate to balance the public policy in favor of free speech against the public policy favoring enforcement.[85]

In 2003, Professor Linda Silberman, who along with Professor Andreas Lowenfeld acted as Reporters for the A.L.I. Act, posited that there may be no rationale for invoking the public policy exception as repugnant to United States' policy if the U.S. or a particular state does not have a sufficiently high interest in the judgment's recognition.[86] In further discussions in 2003 regarding the public policy exception, it was suggested that the A.L.I. explicitly uphold the *Bachchan* line of cases in the statute itself rather than "explicitly or implicitly trying to overrule those cases and cast doubt on those cases refusing to enforce on [First

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81. The FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT § 5(a)(vi), *in* A.L.I. PROPOSED STATUTE, *supra* note 78. Note that the public policy exception within the A.L.I. Act provides mandatory, rather than discretionary, grounds for non-recognition.

82. A.L.I. Proceedings 2005, *Discussion of Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*, 82 A.L.I. PROC. 94, 127-30 (2006) [hereinafter 2005 Proceedings]; A.L.I. Proceedings 2003, *Discussion of International Jurisdiction and Judgments Project*, 80 A.L.I. PROC. 109, 139-46 (2004) [hereinafter 2003 Proceedings]; A.L.I. Proceedings 2002, *Discussion of International Jurisdiction and Judgments Project*, 79 A.L.I. PROC. 328, 359, 365 (2003) [hereinafter 2002 Proceedings]; AM. LAW INST., INT'L JURISDICTION AND JUDGMENTS PROJECT: REPORT 26-28 (APRIL 14, 2000) [hereinafter A.L.I. INT'L JUDGMENTS REPORT].

83. A.L.I. INT'L JUDGMENTS REPORT, *supra* note 82, at 27 (quoting Loucks v. Standard Oil Co., 120 N.E. 198, 202 (1918) (Cardozo, J.)); *see infra* Part IV.C.

84. 2002 Proceedings, *supra* note 82, at 359.

85. *See id.* at 365. Professor Brand of the A.L.I. expressly rejected the notion of balancing and instead observed that, "I find it hard to believe that the public policy emanating from the Constitution will not always trump the public policy in favor of enforcement . . . ." *Id.*

86. 2003 Proceedings, *supra* note 82, at 142; *see also* Silberman & Lowenfeld, *supra* note 18, at 644.

Amendment grounds]."[87] In 2005, the A.L.I.'s discussion of the public policy safety valve[88] again focused upon the First Amendment line of cases, this time regarding how much weight they should be given in the A.L.I. Act's Commentary.[89]

The Commentary to the final A.L.I. Act emphasized that the threshold for invocation of the public policy exception was set at a very high level,[90] and the Reporters' Notes further stated that the scope of the public policy exception was meant to be extremely narrow.[91] In response to the First Amendment discussions, the Commentary to the A.L.I. Act acknowledged that recent American cases had invoked the exception to deny enforcement of foreign libel judgments.[92] Importantly however, the Reporters' Notes to the A.L.I. Act did not take a position on *Bachchan*'s constitutionally mandatory public policy exception, but instead chose to highlight the two main issues it believed arose out of the *Bachchan* line of decisions. First, whether there were some foreign judgments that would not pass muster under the First Amendment but that did not rise to the level of "'repugnan[ce] to the public policy of the United States.'"[93] Second, "whether a territorial connection or nexus with American interests other than the presence of assets in the United States should be necessary to trigger the public-policy exception in American courts."[94]

87. 2003 Proceedings, *supra* note 82, at 146 (quoting Professor Eric M. Freedman). In fact, Professor Freedman "would have amended the Reporters' Note to state specifically that a libel judgment obtained in violation of the First Amendment was in violation of fundamental United States public policy." Leatherbury, *supra* note 18, at 25.

88. 2005 Proceedings, *supra* note 82, at 128.

89. *Id.* at 134. In response to the suggestion that the First Amendment be explicitly referred to in the Comment as a vehicle for categorically invoking the public policy exception, Professor Silberman aptly responded, "[q]uite frankly, the circumstances and the facts as to when the First Amendment public policy applies is an issue of some debate, which we highlight in the Notes." *Id.*

90. *See* A.L.I. PROPOSED FINAL DRAFT § 5 cmt. h, *supra* note 16, at 63.

91. The Notes specifically referenced both Justice Cardozo's definition of public policy in *Loucks* and Professor Barbara Kulzer in describing the proper scope of the exception. *See* A.L.I. PROPOSED FINAL DRAFT § 5 reporter's note 6(a), *supra* note 16, at 72-74; *infra* Part IV.C.

92. *See* 2005 Proceedings, *supra* note 82, at 135.

93. A.L.I. PROPOSED FINAL DRAFT § 5 reporter's note 6(d), *supra* note 16, at 78; *see infra* Part V.B.

94. *See* A.L.I. PROPOSED FINAL DRAFT § 5 reporter's note 6(d), *supra* note 16, at 78; Silberman & Lowenfeld, *supra* note 18, at 644; *infra* Part V.B.

B. The Academic Response to Bachchan *and the First Amendment Cases: State Action, the Cosmopolitan Approach, and Separate Considerations*

The 2005 Act's reliance on *Bachchan* as the representative case for determining whether a judgment is repugnant to the public policy of the United States reflects both case law and the initial, generally positive, scholarly response to *Bachchan*'s "constitutionally mandatory" non-recognition under the public policy exception.[95] Recently however, there has been a backlash by the academic community against the *Bachchan* line of cases. This section will briefly discuss three of these arguments—the State Action argument, the Cosmopolitan argument, and the Separate Considerations argument—to highlight the academic ambivalence over the proper role of the public policy exception as it relates to the First Amendment.

1. The State Action Argument

The first argument against *Bachchan*'s categorical, constitutionally mandatory non-recognition under the public policy exception has its basis in State Action analysis.[96] Under this view the First Amendment does not preclude an American court from enforcing a foreign judgment, despite the fact that the substantive law underlying the judgment may impinge on rights protected by that amendment.[97] Instead, the substance of the judgment being recognized would not be attributed to the forum court for purposes of state action under *Shelley v. Kraemer*.[98] There would thus be no state action by the American court in recognizing the foreign judgment "because the underlying legal right was not created by

95. *See* Carodine, *supra* note 19, at 1237 (arguing that the First Amendment line of cases were correctly decided); Gregory J. Wrenn, *Cyberspace Is Real, National Borders Are Fiction: The Protection of Expressive Rights Online Through Recognition of National Borders in Cyberspace*, 38 STAN. J. INT'L L. 97, 106 (2002) ("The courts of the United States simply will not and cannot be party to the enforcement of [foreign judgments] outside of the permissible bounds of the First Amendment."); Youm, *supra* note 58, at 263-64 (describing *Bachchan*'s importance to American media); Eric P. Enson, Comment, *A Roadblock on the Detour Around the First Amendment: Is the Enforcement of English Libel Judgments in the United States Unconstitutional?*, 21 LOY. L.A. INT'L & COMP. L. REV. 159, 183-84 (1999) (arguing that under both the First Amendment, and the state action doctrine, the American enforcement of English libel judgments are unconstitutional); Jeff Sanders, Comment, *Extraterritorial Application of the First Amendment to Defamation Claims Against American Media*, 19 N.C. J. INT'L L. & COM. REG. 515, 534-40 (1994) (arguing that the *Bachchan* line of cases were correct to deny recognition to foreign judgments violating the First Amendment).

96. *See* Rosen, *supra* note 19, at 186-87.

97. *See id.* at 186.

98. *See id.* at 186-87; Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

an American polity."[99] Without this state action, recognition of foreign libel judgments by American courts would not even raise constitutional issues.[100] According to the State Action argument then, constitutional analysis within cases such as *Bachchan* is deemed wholly misplaced, and the judgments should be recognized accordingly.[101]

2. The Cosmopolitan Argument

A second argument against *Bachchan*'s categorical, constitutionally mandatory non-recognition under the public policy exception proposed that courts instead undertake a Cosmopolitan approach to the recognition of foreign judgments.[102] Under this approach, courts could not simply cite the First Amendment and refuse to recognize a foreign judgment without considering the conflict's values implicated in recognizing the decision.[103] Because of this added layer of analysis, there would be no basis for *Bachchan*'s categorical public policy exception preventing recognition.[104]

Under the Cosmopolitan approach, courts would have to seriously consider the conflicts values that are effectuated when foreign judgments are recognized, weigh the importance of such values against the forum's public policy, and "then consider the degree to which the parties have affiliated themselves with the forum."[105] Importantly, according to this argument "constitutional considerations could conceivably generate sufficient public policy reasons to refuse to enforce a [foreign] judgment."[106] However, before a recognition determination was made the court would have to weigh the constitutionally affected public policy "against the overall systemic interest in creating an interlocking system of international adjudication."[107] This balancing of interests would normally tip in favor of recognition.[108]

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99. Rosen, *supra* note 19, at 186.

100. *Id.* at 188.

101. *See id.*

102. Berman, *supra* note 20, at 1868. Berman's article applied what he called a "cosmopolitan vision" to the recognition of foreign judgments. *Id.*

103. *See id.* at 1879.

104. *See id.* at 1872.

105. *Id.*

106. *Id.*

107. *Id.* at 1868.

108. Under the Cosmopolitan approach, "judgment recognition implicates an entirely distinct set of concerns about the role of courts in a multistate world." *Id.* at 1869. Indeed, the judicial "parochialism" in the *Bachchan* line of cases was a "cause for concern" under this approach, not a cause to be championed. *See id.* at 1872.

3. The Separate Considerations Argument

According to yet another argument, *Bachchan*'s categorical, constitutionally mandatory non-recognition under the public policy exception improperly merged constitutional review and the public policy exception into one coterminous exception to recognizing foreign judgments.[109] Under this Separate Considerations argument, the authors believed that there were indeed facial similarities between courts examining constitutional norms and courts examining fundamental public policy considerations when deciding whether to recognize a foreign judgment.[110] However, despite this similarity, the authors believed that constitutional norms and public policy considerations were "separate categories, the distinction between which ought to be maintained."[111]

The authors also acknowledged that constitutional provisions could "influence and [even] give substance to fundamental public policies."[112] Yet, the authors importantly observed that there was a marked difference between the mandated application of constitutional norms, and the discretion often granted courts in discerning their forum's fundamental public policies.[113]

IV. THE NON-MANDATORY PUBLIC POLICY EXCEPTION UNDER THE UNIFORM ACTS

This Part will show that there is no statutory or historical basis for a categorical, constitutionally mandatory public policy exception to the recognition of foreign money judgments under the 1962 and 2005 Acts (and similar state versions of those Acts). This Part will begin by examining two prior Foreign Judgment Acts relied on by the drafters of the 1962 Act:[114] the [British] Foreign Judgments (Reciprocal Enforcement) Act, and The Foreign (Money) Judgments Act. The analysis will then trace the exception all the way back to articles written by the draftsmen of the 1962 Act, Willis L. M. Reese and Kurt H. Nadelmann.[115] Because the 1962 Act purported to codify state common

109. *See* Ben-Ezer & Bendor, *supra* note 21, at 2139-40.

110. *See id.* at 2140.

111. *Id.* This argument thus implicitly rejected *Bachchan*'s categorical public policy exception preventing recognition. *See id.* at 2139-40 (referencing *Bachchan* as an example of a court merging Constitutional and public policy analysis into a "coterminous" exception).

112. *Id.* at 2140.

113. *Id.*

114. 1962 UNIF. ACT note, 13 U.L.A. pt. II, at 41 (2002) (Prefatory Note).

115. *See* Reese, *supra* note 28; Kurt H. Nadelmann, *Non-Recognition of American Money Judgments Abroad and What to Do About It*, 42 IOWA L. REV. 236 (1957).

law rules, the history behind the 1962 Act's enactment in New York will be examined.[116] Finally, the intent behind the 2005 Act's public policy exception will be discussed.[117] This analysis will show that the public policy exception to the Uniform Acts (and thus state versions of those Acts) was meant to be interpreted narrowly. It was to be invoked only as a discretionary safety valve to protect against enforcement that would otherwise have sufficiently violated fundamental notions of what was decent and just, so as to clearly show that recognition would seriously "undermine 'that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel.'"[118]

A. Prior Acts Relied Upon by the Drafters

The Notes to the 1962 Act and the Commentary provide little guidance as to what exactly constituted a judgment repugnant to public policy.[119] However, the Prefatory Note to the 1962 Act provided that "codification efforts made elsewhere have been taken into consideration, in particular, the [British] Foreign Judgments (Reciprocal Enforcement) Act of 1933 and a Model Act produced in 1960 by the International Law Association."[120]

The [British] Foreign Judgments (Reciprocal Enforcement) Act ("British Act") contained a Public Policy exception to the enforcement of a foreign judgment. The section read:

> 4. – (1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment –
> (a) shall be set aside if the registering court is satisfied—

116. Under Article 53 of the C.P.L.R., New York enacted its own version of the 1962 Uniform Act. N.Y. C.P.L.R. 5301-5309 (McKinney 1997). Article 53 (and thus the 1962 Uniform Act itself) has subsequently been described as "principally a codification of pre-existing New York law." Dresdner Bank AG v. Haque, 161 F. Supp. 2d 259, 262 n.6 (S.D.N.Y. 2001) (citing Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313, 1318 n.6 (2d Cir. 1973)). In addition, New York is the home of two of the most influential cases regarding the exception: *Loucks* and *Bachchan*.

117. *See infra* Part IV.D.

118. *See* 2005 UNIF. ACT § 4 cmt. 8, 13 U.L.A. pt. II, at 13 (Supp. 2007) (quoting Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980)); Barbara Kulzer, *Recognition of Foreign Country Judgments in New York: The Uniform Foreign Money-Judgments Recognition Act*, 18 BUFF. L. REV. 1, 33 (1969); *infra* Part IV.

119. PATCHEL, *supra* note 27, at 31. The comment following section 4 of the 1962 Act did state that "a mere difference in the procedural system is not a sufficient basis for non-recognition" under the Act. 1962 UNIF. ACT § 4 cmt., 13 U.L.A. pt. II, at 59.

120. 1962 UNIF. ACT note, 13 U.L.A. pt. II, at 41.

. . .

(v) that the enforcement of the judgment would be *contrary to public policy* in the country of the registering court.[121]

Like the 1962 Act, the British Act was based upon rules set forth in the common law. Unlike the 1962 Act, the British Act's exception dictated that the courts shall set aside any foreign judgments found to be contrary to public policy; that is, there was no discretion.

By 1938, it was well-established that a foreign judgment would not be enforced if it was found to be contrary to local public policy.[122] In fact, under the common law of Britain, the scope of the exception was quite large.[123] Foreign money judgments which imposed penalties or involved taxes were not enforced because they were contrary to public policy.[124] The public policy exception was also invoked if the action on the original claim in the foreign country would have been illegal in the local forum, and if the "cause of action was [totally unknown] in the law of the [local] forum."[125]

Professor Horace Read, in an invaluable 1938 survey of the British common law, wrote that in order to properly invoke the exception the cause of action needed to be unknown to the law of the forum and contrary to an established policy of the forum.[126] Mere unfamiliarity with the law was not likely to be enough to apply the exception.[127] This narrowing interpretation would prove important to the public policy exception in the later 1962 Act.

In 1960, the Forty-Ninth Conference of the International Law Association enacted the Foreign (Money) Judgments Act ("I.L.A.

121. FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, 1933 § 4(1)(a)(v) *in* 2 HARVARD STUDIES IN THE CONFLICT OF LAWS app. B, at 319 (1938) (emphasis added). As the name of the Act suggests, one of the primary motivations behind the British Act was "to make provision for the enforcement in the United Kingdom of judgments given in foreign countries which accord reciprocal treatment to judgments given in the United Kingdom." *Id.* at 316 (introduction).

122. Read, *supra* note 15, at 288; *see also* Yntema, *supra* note 28, at 1159 (listing judgments found to be repugnant to public policy as one exception to a 1920 act governing foreign judgment recognition in the United Kingdom).

123. The modern public policy exception in Britain remains larger than its American counterpart. *See* SCOLES, *supra* note 77, at 1333.

124. Read, *supra* note 15, at 288-90. The 1962 Act addressed both of these precedents by excluding judgments for taxes, fines, or penalties from its definition of "foreign judgment." 1962 UNIF. ACT § 1(2), 13 U.L.A. pt. II, at 44. Judgments involving matrimonial or family matters were also excluded. *Id.*

125. Read, *supra* note 15, at 292-93.

126. *See id.* at 295.

127. *Id.*

Act").[128] The I.L.A. Act contained a public policy exception to recognition and enforcement that read, "A Foreign Judgment is recognised by the forum as conclusive and is enforceable . . . except where . . . (d) the foreign judgment is based upon a cause of action which is contrary to the *strong public policy* of the forum."[129] Again unlike the 1962 Act, the I.L.A. Act did not use discretionary language in codifying the court's application of the exception to foreign judgments.

The intent behind the public policy exception was discussed in great detail by the I.L.A. before its enactment. The exception was described as a necessary and "universally recognized defence, *a safety valve*, which appears in all the [Acts] already in force in this field . . . ."[130] However, the Committee for the Enforcement of Foreign Judgments debated the appropriateness of the phrase "contrary to the strong public policy."[131] It was suggested that the word "strong" be deleted from the clause as unnecessary.[132] One commentator even suggested the entire exception be deleted as overly vague and elastic.[133] Those arguments were countered by Professor Kurt H. Nadelmann's[134] explanation that, "we added the word 'strong' to 'public policy' in order to indicate that a serious violation of the public policy of the forum must be involved."[135] After the debate a vote was held by the committee and the phrase "strong public policy" remained in the final version of the Act.[136]

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128. Kurt H. Nadelmann, *Conflicts Drafts Adopted by the 49th Conference of the International Law Association*, *Hamburg, 1960*, 9 AM. J. COMP. L. 517, 517 (1960). Horace E. Read was the chairman of the International Law Association's Enforcement of Foreign Judgments committee in 1960, and Kurt H. Nadelmann, the draftsman of the 1962 Act, was his Vice-Chairman. INT'L LAW ASS'N, REPORT OF THE FORTY-NINTH CONFERENCE HELD AT HAMBURG, at L (1961) [hereinafter 1960 I.L.A. CONF.]. Both acted as draftsmen for the I.L.A. act. Nadelmann, *Conflicts*, *supra*, at 517.

129. THE FOREIGN MONEY JUDGMENTS ACT (1960) *in* 1960 I.L.A. CONF., *supra* note 128, at 316 (emphasis added). The Act was drafted without a reciprocity requirement and was meant to provide direction to national draftsmen, specifically the draftsmen working with the National Conference of Commissioners on the Uniform Foreign Money-Judgments Recognition Act. Nadelmann, *supra* note 128, at 517.

130. 1960 I.L.A. CONF., *supra* note 128, at 308 (emphasis added).

131. *Id.* at 296-308.

132. *Id.* at 296 ("I do not think it makes much difference whether or not the word 'strong' in Art. 4 sub. (d) is omitted.").

133. *Id.* at 297-98.

134. The draftsman of the 1962 Act.

135. 1960 I.L.A. CONF., *supra* note 128, at 306. This interpretation was in accord with the then present-day view of the exception. *See id.* at 307; Paulsen & Sovern, *supra* note 15, at 970.

136. 1960 I.L.A. CONF., *supra* note 128, at 311.

B. The N.C.C.U.S.L. and the 1962 Act's Draftsmen

The legislative history of the 1962 Act can be traced back through the Handbook of the Conference of Commissioners on Uniform State Laws.[137] The original suggestion to draft the 1962 Act was made in the 1957 Handbook, and Kurt H. Nadelmann's 1957 article in the *Iowa Law Review* is specifically referenced as the basis for this suggestion.[138] Nadelmann's article emphasized that, under the common law, American courts granted "conclusive effect to foreign judgments," with an allowed defense being "violation of the public policy of the forum."[139] Nadelmann did not further comment on the exception.

In 1958, the N.C.C.U.S.L. Handbook contained a "Report of Special Committee on Uniform Recognition of Foreign Judgments Act," stating that a Uniform Act was both desirable and practicable.[140] The committee's report cited to Willis L. M. Reese's 1950 article in the *Columbia Law Review* when discussing the principles behind giving conclusive effect to foreign judgments.[141] Reese's article discussed the public policy exception at various points. He wrote that foreign judgments were to be judged in accordance with state law, and thus the public policy exception should be specific to the state forum.[142] Reese also wrote, in what is perhaps the greatest insight into the drafter's intent, that:

> [T]he defense must . . . be available . . . . Thus, our courts should not be required to enforce a judgment based upon a cause of action which violated our fundamental notions of what is decent and just, or which offends our laws. . . . The rule must therefore be that our courts will in

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137. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT *in* 11 AM. J. COMP. L. 412 (1962) (see star footnote for legislative history of the 1962 Act). For further history on the 1962 Act, see NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND Proceedings OF THE ANNUAL CONFERENCE MEETING 142-43 (1957) [hereinafter 1957 N.C.C.U.S.L. HANDBOOK]; NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND Proceedings OF THE ANNUAL CONFERENCE MEETING 151-52 (1958) [hereinafter 1958 N.C.C.U.S.L. HANDBOOK]; NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND Proceedings OF THE ANNUAL CONFERENCE MEETING 82, 242-45 (1962) [hereinafter 1962 N.C.C.U.S.L. HANDBOOK].

138. 1957 N.C.C.U.S.L. HANDBOOK, *supra* note 137, at 142-43; *see* Nadelmann, *supra* note 115.

139. *See* Nadelmann, *supra* note 115, at 241.

140. 1958 N.C.C.U.S.L. HANDBOOK, *supra* note 137, at 151-52.

141. *Id.* at 151; *see* Reese, *supra* note 28. Reese was Nadelmann's co-draftsman for the 1962 Act.

142. *See* Reese, *supra* note 28, at 787.

> general enforce all foreign rights regardless of the [dissimilarity of the law] under which acquired. Correctly regarded, the [public policy exception] here discussed should be considered a safety valve . . . utilized only when necessary either to avoid offending our sense of morality or the integrity of our laws and institutions.[143]

The exception was therefore to be invoked as a safety valve when enforcement violated fundamental notions of what was decent and just. Reese's usage of "fundamental notions" and offenses to morality appear to provide ample room for courts to apply the exception. However, Reese closed his discussion of the exception by emphasizing that "only a real necessity to safeguard American citizens or institutions will be sufficient to override the compelling reasons behind [enforcement]."[144]

C. The 1962 Act's Enactment in New York

In 1970, New York enacted its own version of the 1962 Act within Article 53 of the Civil Practice Law and Rules ("C.P.L.R."), aptly titled the Uniform Foreign Country Money-Judgments Recognition Act ("New York Act").[145] The purpose behind enacting the New York Act was to procure much better reciprocal enforcement of New York judgments in foreign countries than they received at the time.[146] Indeed, in codifying the decisional law of the state, the New York Act was meant to provide statutory proof that New York liberally recognized foreign money judgments.[147] It was also emphasized that New York courts were free to exceed the terms of Article 53, by means of a savings clause,[148] to provide additional bases for the recognition of foreign money judgments under the Act.[149]

By the time New York enacted Article 53, it was "the settled law of this state that a foreign judgment [was] conclusive upon the merits."[150] However, this rule was not absolute, and by 1970 the public policy exception had long been part of the general rule of the state in regards to

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143. *Id.* at 797.

144. *Id.* at 798.

145. N.Y. C.P.L.R. 5301-5309 (McKinney 1997).

146. 1970 N.Y. Sess. Laws 2784 (McKinney).

147. *Id.*

148. N.Y. C.P.L.R. 5307 (McKinney 1997) ("This article does not prevent the *recognition* of a foreign country judgment in situations not covered by this article.") (emphasis added).

149. 1970 N.Y. Sess. Laws 2784 (McKinney).

150. Dunstan v. Higgins, 33 N.E. 729, 730 (N.Y. 1893); *see* Intercontinental Hotels Corp. (P.R.) v. Golden, 203 N.E.2d 210, 212 (N.Y. 1964); Johnston v. Compagnie Générale Transatlantique, 152 N.E. 121, 122 (N.Y. 1926); Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918); Lazier v. Westcott, 26 N.Y. 146, 151 (1862).

the recognition of foreign judgments.[151] Necessarily, the New York Act contained a public policy exception at Section 5304(b)(4) of the C.P.L.R. very similar to the exception contained in the 1962 Act. New York's exception read as follows: "(b) Other grounds for non-recognition. A foreign country judgment need not be recognized if: . . . 4. the cause of action on which the judgment is based is repugnant to the public policy of this state."[152]

New York's approach to the public policy exception traces back to 1862 and *Lazier v. Wescott*.[153] In *Lazier*, the Court of Appeals held that foreign judgments were to be given conclusiveness unless the judgment was "procured by fraud, or upon its face it was founded in mistake, or that it is irregular and bad by the local law."[154] Indeed, according to the *Lazier* court absolute conclusiveness was favored for foreign judgments except in the specific instances where non-recognition was necessary.[155] In *Loucks v. Standard Oil Co.*,[156] Justice Cardozo concretely framed the role the public policy exception would play for the next seventy years. In *Loucks*, Justice Cardozo famously wrote that the public policy exception provided courts the limited discretion to refuse to recognize a foreign judgment if to do otherwise "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[157]

After *Loucks*, New York courts invoked the exception to deny recognition and enforcement of foreign judgments upon "a clear showing that the enforcement . . . 'offend[s] our sense of justice or menace[s] the public welfare.'"[158] The exception was therefore to be invoked against judgments that were "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."[159] Making this determination meant reference to the laws of the forum, as well as

151. "A judgment recovered in a foreign country, when sued upon in the courts of this state, is conclusive . . . subject, however, to certain well-recognized exceptions, namely . . . [judgments] against the public policy of this state." Cowans v. Ticonderoga Pulp & Paper Co., 219 N.Y.S. 284, 286 (App. Div. 3d 1927).

152. N.Y. C.P.L.R. 5304(b)(4) (McKinney 1997). The only difference between the 1962 Act and the New York Act is that the clause "[claim for relief]" was omitted from the New York statute. *See* 1962 UNIF. ACT § 4(b)(3), 13 U.L.A. pt. II, at 59 (2002).

153. 26 N.Y. 146 (1862).

154. *Id.* at 153.

155. *Id.* at 152.

156. 120 N.E. 198 (N.Y. 1918).

157. *Id.* at 202.

158. Intercontinental Hotels Corp. (P.R.) v. Golden, 203 N.E.2d 210, 212 (N.Y. 1964) (citation omitted).

159. *Id.*

incorporating the prevailing social and moral attitudes of the community.[160] While a few lower courts invoked the exception,[161] the Court of Appeals has strictly construed the exception by consistently acknowledging its existence and then ruling that the exception did not apply.[162]

The Court of Appeals' approach to the public policy exception closely mirrored the prevailing view among scholars regarding the proper use of the exception. Professor Barbara Kulzer presented this view to New York's C.P.L.R. advisory committee in 1970 at a concurrent state Judicial Conference, at which the Judiciary was to decide whether it would propose adopting the 1962 Act.[163] According to Kulzer, though the public policy exception was universally allowed, the exception was narrow because the policy behind invoking the exception needed to be particularly violent to overcome the "'wider public policy in favor of recognition.'"[164]

Subsequently, in determining whether to enforce the foreign judgment it was up to the court's discretion to weigh the strength of local policy against the presumed justice of according recognition.[165] Importantly, Professor Kulzer emphasized that the exception was properly discretionary because of the "wider public policy in favor of recognition" and enforcement.[166] Courts were to deny recognition only if the policy violation was "particularly violent" and "closely related" to fundamental notions "of fairness and justice."[167]

D. The 2005 Act and the Intent Behind "Repugnant to the Public Policy of this State"

The 2005 Uniform Act, like its 1962 predecessor, also provides for discretionary non-recognition of foreign judgments when the judgment is found to be repugnant to the public policy of the state. However,

160. *Id.* at 212-13.

161. *See, e.g.*, *In re* Davis' Will, 219 N.Y.S.2d 533, 537 (Sur. Ct. 1961) (denying recognition to a foreign judgment as against public policy because it was "rendered after the defendant's death and without representation by his estate").

162. *Intercontinental Hotels Corp.,* 203 N.E.2d at 212; Rosenbaum v. Rosenbaum, 130 N.E.2d 902, 903-04 (N.Y. 1955); Martens v. Martens, 31 N.E.2d 489, 490 (N.Y. 1940); *Loucks*, 120 N.E. at 202.

163. Kulzer, *supra* note 118; *see also* 1970 N.Y. Sess. Laws 2784 (McKinney) (citing Kulzer); A.L.I. PROPOSED FINAL DRAFT § 5 reporter's note 6(a), *supra* note 16, at 72-73 (citing Kulzer).

164. Kulzer, *supra* note 118, at 32 (citation omitted).

165. *See id.*

166. *Id.*

167. *See id.* at 32-33.

unlike the 1962 Act, the drafters of the 2005 Act provided commentary within the Act regarding the proper test for determining whether a judgment was repugnant to the public policy of this state.

Like Kulzer, the drafters of the 2005 Act intended courts to invoke the exception against judgments repugnant to the public policy of the state only in the rarest of circumstances. Indeed, according to the commentary to the 2005 Act, courts should apply a stringent test for the public policy exception.[168] "Under [this] test, a difference in law, even a marked one," is not enough to invoke the exception.[169] Instead:

> Public policy is violated only if recognition or enforcement of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel."[170]

This test mirrors the surprisingly uniform and stringent tests adopted by courts across various states when addressing the public policy exception.[171]

The stringency of this test is consistent with the purpose behind both Uniform Acts. Both Acts hoped to establish uniform and clear standards under which state courts would enforce foreign-country judgments.[172] Through these uniform state enforcement standards, the drafters of the 2005 Act hoped that it would be more likely that money judgments rendered by U.S. courts would be recognized in foreign countries.[173] The drafters believed that the more uniform and predictable foreign judgment recognition became in the U.S., the less foreign courts would be inclined to deny recognition to U.S. judgments due to the doctrine of reciprocity.[174]

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168. 2005 UNIF. ACT § 4 cmt. 8, 13 U.L.A. pt. II, at 13 (Supp. 2007).

169. *Id.*

170. *Id.* (quoting Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980)).

171. PATCHEL, *supra* note 27, at 31; *see also* Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 479-80 (2d Cir. 2007) (New York); Turner Entm't Co. v. Degeto Film, 25 F.3d 1512, 1519 (11th Cir. 1994) (Georgia); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 443 (3d Cir. 1971) (Pennsylvania); Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001) (California); Matusevitch v. Telnikoff, 877 F. Supp. 1, 3 (D.D.C. 1995) (District of Columbia); *Hunt*, 492 F. Supp. at 900-01 (Texas).

172. *See* 1962 UNIF. ACT note, 13 U.L.A. pt. II, at 41 (2002) (Prefatory Note); 2005 UNIF. ACT note, 13 U.L.A. pt. II, at 5 (Supp. 2007) (Prefatory Note).

173. 2005 UNIF. ACT note, 13 U.L.A. pt. II, at 5 (Supp. 2007) (Prefatory Note).

174. *See id.*

Accordingly, because of this strong policy in favor of enforcement, the overwhelming majority of state courts almost always recognize foreign judgments, holding that the foreign judgment at issue is not repugnant to public policy.[175] The Restatement (Second) of Conflict of Laws, by comparing the recognition of foreign judgments to those of sister state judgments, also supports the tendency of courts to almost categorically deny defendants the "safety valve" of the exception.[176]

E. The Non-Mandatory Public Policy Exception Under the 2005 Act

The 2005 Act (and the 1962 Act), on its face, does not provide for a categorical, constitutionally mandatory public policy exception. Section 4 of the Act provides the Standards for Recognition of Foreign Judgments.[177] Section 4(b) contains the mandatory grounds for non-recognition of foreign judgments by American courts, including judgments that violate the requirements of due process, and judgments in which the foreign court lacked proper jurisdiction of the underlying case.[178] The section does not include the public policy exception.

Section 4(c) of the 2005 Act contains the non-mandatory or discretionary grounds for non-recognition of foreign judgments by American courts.[179] The public policy exception is codified in Section 4(c)(3) of the 2005 Act.[180] The discretionary nature of the 2005 Act's public policy exception differs from other Acts codifying the exception. As shown above, prior Foreign Judgments Acts provided mandatory non-recognition to foreign judgments found to be repugnant to public

175. *See* Movsesian, *supra* note 36, at 71; Rosen, *supra* note 19, at 176.

176. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt. c (1971); Rosen, *supra* note 19, at 176. By comparing recognition of a foreign judgment to the recognition of judgments between sister states, the Restatement's interpretation of the exception is so narrow as to be practically non-existent. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, at § 98 cmt. b (Supp. 1989); *see also* SCOLES, *supra* note 77, at 1335 ("In general, it appears to be the modern trend that the public policy defense will lie only in exceptional cases, similar to its narrow scope in the interstate setting.") (citation omitted).

177. 2005 UNIF. ACT § 4, 13 U.L.A. pt. II, at 11 (Supp. 2007).

178. *Id.* ("A court of this state *may not* recognize a foreign-country judgment if . . . .") (emphasis added); 2005 UNIF. ACT § 4 cmt. 3, 13 U.L.A. pt. II, at 12 (Supp. 2007) ("Subsection (b) states three mandatory grounds for denying recognition to a foreign-country judgment.").

179. 2005 UNIF. ACT § 4(c), 13 U.L.A. pt. II, at 11 (Supp. 2007) ("A court of this state *need not* recognize a foreign-country judgment if . . . .") (emphasis added); 2005 UNIF. ACT § 4 cmt. 3, 13 U.L.A. pt. II, at 12 (Supp. 2007) ("Subsection (c) states eight nonmandatory grounds for denying recognition.").

180. 2005 UNIF. ACT § 4(c), 13 U.L.A. pt. II, at 11 (Supp. 2007).

policy.[181] The A.L.I. Act also provided mandatory non-recognition to judgments violating public policy.[182]

Antithetical to the 2005 Act, courts following *Bachchan* deem themselves constitutionally mandated to categorically apply the exception to deny recognition to foreign judgments impinging on First Amendment rights.[183] This mandatory application of the public policy exception effectively transforms the discretionary nature of the exception into a Section 4(b) ground for non-recognition, where courts "*may not* recognize a foreign judgment" if the ground for non-recognition is met.[184] This transformation is inappropriate. The express language of the public policy exception is discretionary and courts interpreting versions of the 2005 Act should apply the statutes as written.[185]

Statutory language aside, the history behind the public policy exception shows that it was meant to be narrowly interpreted and invoked only as a discretionary safety valve.[186] This narrow interpretation, and the pro-recognition sentiment behind it, does not conflate with a categorical, mandatory public policy exception.

The 2005 Act emphasized that it contained only the minimum standards for a foreign-country judgment to be recognized by the courts of the adopting states.[187] Courts were free to expand recognition and enforcement to "other foreign-country [money] judgments not covered by the Act under principles of comity or otherwise."[188] The 1962 Act also delineated that state courts were privileged to give foreign money

181. *See supra* Part IV.A.

182. *See supra* note 81 and accompanying text.

183. *See* Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 480 (2d Cir. 2007) ("Foreign judgments that impinge on First Amendment rights *will* be found to be 'repugnant' to public policy.") (emphasis added)); Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661, 662 (Sup. Ct. 1992).

184. 2005 UNIF. ACT § 4(b), 13 U.L.A. pt. II, at 11 (Supp. 2007) ("A court of this state *may not* recognize a foreign-country judgment if . . . .") (emphasis added).

185. Section 482(2) of the Restatement (Third) of Foreign Relations Law contains a public policy exception nearly identical to that contained within the 2005 Act. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(2)(d) (1987) ("A court . . . *need not recognize* a [foreign judgment] if: . . . (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought.") (emphasis added). Additionally, Comment (a) of Section 482 states that "court[s] [are] not required to deny recognition" to judgments under Subsection (2). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. a (1987). The Restatement attributes its distinction between mandatory (subsection 1) and discretionary (subsection 2) grounds for recognition directly to Section 4 of the Uniform Act(s). *Id.*

186. *See supra* Part IV.

187. 2005 UNIF. ACT note, 13 U.L.A. pt. II, at 5 (Supp. 2007) (Prefatory Note).

188. *See id.*

judgments greater, not less, effect than the local forum was required to do by the provisions of the Act.[189] In New York, the legislature—in enacting its version of the 1962 Act—intended to provide statutory proof that New York liberally recognized foreign money judgments.[190] In fact, the legislative history made clear that New York courts were free to exceed the terms of Article 53 to provide additional bases for the recognition of foreign money judgments under the Act.[191] *Bachchan*'s expansion of the exception to provide mandatory non-recognition of foreign judgments, under the auspices of a non-mandatory public policy exception, is thus directly adverse to the policy favoring recognition underlying all three of these Acts.

A non-mandatory public policy exception is also consistent with modern notions of the comity doctrine. This is particularly important because American courts oftentimes make recognition determinations based on a comity theory.[192] Comity has been defined as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard 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."[193] The modern basis for the comity doctrine is that of "obligation, requiring U.S. courts to defer to foreign sovereigns and to the executive in the conduct of foreign relations."[194] American courts thereby almost always recognize foreign judgments.[195] The categorical, mandatory non-recognition of foreign judgments under the *Bachchan* line of cases is not consistent with this notion of comity, and would undoubtedly expand the use of the public policy exception by American courts to deny recognition to foreign judgments.

189. 1962 UNIF. ACT note, 13 U.L.A. pt. II, at 40 (2002) (Prefatory Note).

190. 1970 N.Y. Sess. Laws 2784 (McKinney).

191. *Id.*

192. Movsesian, *supra* note 36, at 71; *See, e.g.*, Turner Entm't Co. v. Degeto Film, 25 F.3d 1512, 1519-21 (11th Cir. 1994).

193. Hilton v. Guyot, 159 U.S. 113, 164 (1895).

194. Paul, *supra* note 29, at 12, 25-26.

195. *See* Movsesian, *supra* note 36, at 71; Rosen, *supra* note 19, at 176.

V. A PROPOSED AMENDMENT AND A SUGGESTED JUDICIAL APPROACH TO THE PUBLIC POLICY EXCEPTION

A. A Proposed Amendment to State Versions of the 2005 Act

Section 4 provides the exclusive grounds for non-recognition of foreign judgments under the 2005 Act.[196] Thus, for those who believe the First Amendment will always trump any policy in favor of enforcement,[197] this Note proposes that one solution to *Bachchan*'s problematic invocation of the public policy exception would be to create a mandatory ground for non-recognition, separate and apart from the public policy exception, within Section 4(b) of state versions of the 2005 Act. The proposed statutory amendment would provide for mandatory non-recognition if the "judgment or [cause of action] [claim for relief] on which the judgment is based is found to impinge upon the rights to freedom of speech and press embodied in the state or United States Constitutions."[198] The amendment would thus succeed in providing *Bachchan*'s mandatory, categorical protections,[199] by separating the public policy exception from First Amendment analysis.[200]

It is important to note that the creation of this amendment would not undermine the relevance of the public policy exception. Rather, it highlights the role the exception can play in foreign judgment recognition law; that is, the exception may be utilized as a tool to identify foreign judgments that warrant categorical, mandatory non-recognition. In the *Bachchan* line of cases, the exception acted first as a safety valve against judgments that impinge on rights protected by the First Amendment. And, in enacting the proposed amendment, a state's

196. *See* 2005 UNIF. ACT § 4(a), 13 U.L.A. pt II, at 11 (Supp. 2007); 2005 UNIF. ACT § 4 cmt. 3, 13 U.L.A. pt. II, at 12 (Supp. 2007) ("Subsection 4(a) places an affirmative duty on the forum court to recognize a foreign-country money judgment unless one of the grounds for nonrecognition stated in subsection (b) or (c) applies."); *see also* Guinness PLC v. Ward, 955 F.2d 875, 884-85 (4th Cir. 1992) (stating that the 1962 Act's Section 4 defenses—as enacted by Maryland—were the only means for denying recognition to foreign judgments).

197. *See* 2002 Proceedings, *supra* note 82, at 365 ("I find it hard to believe that the public policy emanating from the Constitution will not always trump the public policy in favor of enforcement . . . .") (quoting Professor Brand). *But see* Stern, *supra* note 77, at 1033 ("The First Amendment does not fundamentally and directly protect all manner of expression regardless of person, circumstance, and content.").

198. *Cf.* 2003 Proceedings, *supra* note 82, at 146 ("Are you suggesting we simply say judgments for defamation are not enforceable?") (quoting Professor Lowenfeld).

199. If this statutory amendment does not seem like an appropriate addition to the law of foreign judgment recognition, then, this author proffers, neither should *Bachchan*.

200. *See supra* Part III.B.3.

legislature would thereby acknowledge that the policies underlying the *Bachchan* line of cases are strong enough that codification, and thus categorical, mandatory non-recognition, is proper.

In January 2008, a bill was introduced in both houses of the New York legislature that would amend the New York Act to expressly deal with the recognition of foreign defamation judgments.[201] The bill, entitled the Libel Terrorism Protection Act,[202] would amend Section 5304(b) of the New York Act to provide that a foreign judgment need not be recognized if:

> [T]he cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York Constitutions.[203]

This Note suggests that any amendment providing for the non-recognition of judgments that violate "the freedom of speech and press as provided for by both the United States and [state] constitutions" should not limit its protections to judgments based only upon defamation. Instead, the amendment should provide for the non-recognition of *all* foreign judgments impinging on rights protected by the freedom of speech and press embodied in the state or United States Constitutions. Indeed, the *Viewfinder* decision itself, based upon the free speech protections provided by copyright's fair use doctrine, is proof that an amendment protecting only libel judgments is under-inclusive.

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201. Assemb. S06687-C, 2008 Assemb., Reg. Sess. (N.Y. 2008).

202. *Id.* The Libel Terrorism Protection Act was proposed to effectively overrule the New York Court of Appeals' decision in *Ehrenfeld v. Mahfouz*, 9 N.Y.3d 501, 506-07 (2007). *See* Memorandum, Sen. Dean Skelos, N.Y. State Senate Introducer's Memorandum in Support of S06687-C (2008). In *Ehrenfeld*, a New York plaintiff filed suit in New York, seeking a declaratory judgment that the foreign defamation judgment obtained against her in a British court would not be recognized in New York. *See Ehrenfeld*, 9 N.Y.3d at 506. The Court of Appeals dismissed the suit on personal jurisdiction grounds, holding that the English defendant did not fall under the reach of New York's long arm statute. *Id.* at 507. The bill, in addition to amending Section 5304 of the N.Y. C.P.L.R., also amends New York's personal jurisdiction statute to allow New York plaintiffs such as Ehrenfeld to obtain a declaration of non-recognition in New York courts. *See* Assemb. S06687-C, 2008 Assemb., Reg. Sess. (N.Y. 2008). For commentary on the Libel Terrorism Protection Act and the *Ehrenfeld* decision, see Thomas F. Gleason, *Who Should Fix the Libel Tourism Problem?*, N.Y. L.J., Mar. 17, 2008, at 3; Joel Stashenko, *Albany Bill Would Grant 'Libel Terrorism' Jurisdiction*, N.Y. L.J., Feb. 28, 2008, at 1, 7.

203. Assemb. S06687-C, 2008 Assemb., Reg. Sess. (N.Y. 2008).

Importantly, the Second Circuit's analysis in *Viewfinder* provides the proper judicial analysis for courts interpreting the suggested amendment to the Uniform Acts.[204] In *Viewfinder*, the court laid out a two-step test for determining whether foreign money judgments were repugnant to the public policy of New York.[205] First, courts must identify the First Amendment protections—in *Viewfinder*, the First Amendment protections contained within copyright's fair use doctrine—deemed constitutionally mandatory for the speech at issue; second, courts must determine whether the substantive foreign laws underlying the foreign judgment provide comparable protections.[206] The Second Circuit indicated that if Viewfinder's use was found to be a fair use under United States copyright law, then the French foreign money judgments at issue were to be held repugnant to the public policy of New York.[207]

This test, and indicated outcome, would be entirely appropriate if utilized to interpret the amendment proposed above.[208] Thus, courts interpreting the proposed amendment would first identify the First Amendment protections deemed constitutionally mandatory for the speech at issue, then determine whether the substantive foreign laws underlying the foreign judgment provided comparable protections.[209] If the judgment, or cause of action underlying the judgment, impinged on the rights to the freedom of speech and press embodied in the state or United States Constitutions then the foreign judgment would not be recognized.

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204. *See supra*, Part II.C. *Viewfinder* does not, however, provide for the proper judicial approach to courts invoking the public policy exception.

205. The *Viewfinder* court bases its test on the analysis undertaken in *Bachchan*. Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 481 (2d Cir. 2007). Because the Comment to the 2005 Act cites to *Bachchan*, *Viewfinder*'s test effectively determines whether a foreign judgment is repugnant to the public policy of the United States. *See* 2005 UNIF. ACT § 4 cmt. 8, 13 U.L.A. pt. II, at 13 (Supp. 2007).

206. *Viewfinder*, 489 F.3d at 481-82.

207. *See id.* at 483.

208. *See supra* notes 196-200 and accompanying text. The proposed statutory amendment would provide for mandatory non-recognition if the "judgment or [cause of action] [claim for relief] on which the judgment is based is found to impinge upon the rights to free speech in this state or the United States." 2005 UNIF. ACT § 4(c)(3), 13 U.L.A. pt. II, at 11 (Supp. 2007). This author proposes that *Viewfinder* be specifically referenced as the representative case for courts interpreting this amendment.

209. *Viewfinder*, 489 F.3d at 481-82.

B. A Suggested Approach to the Public Policy Exception

Viewfinder's test, while appropriate for the proposed amendment, does not provide the proper judicial approach for courts invoking the public policy exception under the 2005 Act. Instead, courts interpreting the 2005 Act should incorporate constitutional principles into the public policy exception, rather than allow the public policy exception to be subsumed by constitutional analysis. This Part will apply the suggested approach to the facts of *Viewfinder*. In so doing, this analysis will attempt to reconcile the belief that the First Amendment does not directly preclude the recognition of foreign judgments[210] with the belief that public policy may be found by examining constitutional norms.[211]

As stated above, the public policy exception should be interpreted narrowly. It should only be invoked only as a discretionary safety valve to protect against judgments that sufficiently violate fundamental notions of what is decent and just, so as to clearly show that recognition would seriously undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel."[212] Within this analysis, public policy may be found by examining constitutional norms,[213] and foreign judgments that impinge on rights protected by the First Amendment could sufficiently violate notions of what was decent and just.[214] However, in making this determination courts should act consistently with the strong policy favoring recognition underlying the 1962 and 2005 Acts.[215]

Viewfinder is a New York case involving plaintiffs seeking recognition of foreign judgments under New York's version of the 1962 Act. Accordingly, courts in New York should also require that the public

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210. *See generally* Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997) (denying recognition to a foreign libel judgment on public policy grounds without deciding whether the First Amendment directly precluded recognition).

211. *Id.* at 239 ("[I]n ascertaining . . . public policy, it is appropriate to examine and rely upon the history, policies, and requirements of the First Amendment . . . . In determining non-constitutional principles of law, courts often rely upon the policies and requirements reflected in constitutional provisions."); *see* Morris B. Chapman & Assoc., Ltd. v. Kitzman, 739 N.E.2d 1263, 1270 (Ill. 2000); Martino v. Cottman Transmission Sys., Inc., 554 N.W.2d 17, 20 (Mich. Ct. App. 1996); Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 688 (N.Y. 1985); PATCHEL, *supra* note 27, at 32.

212. *See supra* note 118 and accompanying text.

213. *See* Ben-Ezer & Bendor, *supra* note 21, at 2140; Berman, *supra* note 20, at 1872.

214. 2005 UNIF. ACT § 4 cmt. 8, 13 U.L.A. pt. II, at 13 (Supp. 2007) (quoting Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980)); *see supra* note 118 and accompanying text; *supra* Part IV.

215. *See supra* notes 187-91 and accompanying text.

policy violation be violent to the state or the United States.[216] Again, while First Amendment violations could rise to this level of public policy violation, the strong policy in favor of recognition underlying the New York Act dictates that foreign judgments must do more than impinge on First Amendment rights, per se, in order to invoke the exception. To reach this level of public policy violation, courts should also take into account the interests of the state and the United States at stake in the litigation[217] by examining the specific parties before them.[218] Questions that may be used to determine the relevant amount of interest include: whether a business is incorporated in the United States; whether either of the parties are United States citizens or legal United States residents; the financial interests at stake and whether the parties conduct a substantial amount of business within the country; whether the speech at issue targets a United States audience; and how much of the conduct giving rise to the litigation occurred within the country. This list is by no means exhaustive, but the greater the state or the United States interest at stake, the stronger the violation of public policy.

The above list mirrors many of the factors for determining "reasonableness" in regards to a (sovereign) State's limitations on jurisdiction to prescribe.[219] This jurisdiction entails the ability of that country to make its law applicable in a transnational context.[220] The public policy exception is used in the 1962, 2005, and New York Acts as a defense arising in private litigation, not public law.[221] However, the

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216. *See supra* Part IV.C.

217. *See* A.L.I. PROPOSED FINAL DRAFT § 5 reporter's note 6(d), *supra* note 16, at 78; Berman, *supra* note 20, at 1872; Silberman & Lowenfeld, *supra* note 18, at 644.

218. *See* Walters, *supra* note 58, at 899 (arguing that recognition determinations should be made on a case-by-case basis).

219. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2) (1987). Section 403(2) lists eight factors, including:

> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted . . . .

Id.

220. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, at Part IV (1987) (Introductory Note).

221. This Note deals specifically with determining when the public policy of the United States warrants that a foreign-country money judgment may be denied recognition through private

constitutionally mandatory, categorical denial of recognition to foreign judgments under the *Bachchan* line of cases does raise some of the same issues as a state exercising prescriptive jurisdiction.[222] This Note consequently proposes that courts interpreting the public policy exception in cases such as *Bachchan* should draw upon the factors listed above, and those listed for the principle of reasonableness in the Restatement, to help make their recognition determinations.[223]

In applying the suggested approach to *Viewfinder*, the court's analysis would still include a determination of whether the defendant's free speech rights were impinged upon by the foreign judgments.[224] The rights protected by the doctrine of fair use would be identified, and the court would determine whether the protections given to the substantive foreign laws underlying the foreign judgment provide comparable protections.[225] However, if the court determines that the foreign judgment impinges upon First Amendment rights by violating a defendant's right to fair use, non-recognition is *not* then deemed to be constitutionally mandatory. Instead, the court would proceed to determine the state or United States interests at stake in recognizing the judgment.[226] In *Viewfinder*, defendant is a website operator, incorporated in Delaware, with its principal place of business in New York.[227] Defendant's website content was presumably targeted towards a United States audience.[228] Thus, there appears to be sufficient United States

litigation. The principle of reasonableness under the Restatement determines when a sovereign state may apply its law to foreign actors.

222. Indeed, the Commentary to the Restatement states that "[s]ome United States courts have applied the principle of reasonableness as a requirement of comity . . . reflecting a sense of obligation among states." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. a (1987).

223. For an expanded discussion of international jurisdiction, free speech, and the Internet, see Cherie Dawson, Note, *Creating Borders on the Internet: Free Speech, the United States, and International Jurisdiction*, 44 VA. J. INT'L L. 637 (2004).

224. *See* Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 481 (2d Cir. 2007).

225. *See id.* at 481-82. Note that the rights protected by the First Amendment would merely be identified, not deemed constitutionally mandatory.

226. *See supra* notes 216-25 and accompanying text.

227. 489 F.3d at 476.

228. *See* Van Houweling, *supra* note 16, at 704-06 (arguing that both *Bachchan* and *Yahoo!* involved liability for speech to a foreign audience, yet neither opinion offered support for the controversial proposition that limiting speech directed abroad is an effect that comes within the ambit of the First Amendment). Van Houweling's argument focuses upon the extraterritorial application of the First Amendment. *See id.* at 705 n.34. Specifically, the belief that it is unclear whether "the First Amendment (and, hence, First Amendment-based public policy) protects speech directed to a foreign audience." *Id.* at 705. For a contrary view, see Sanders, *supra* note 95, at 552 ("It is acceptable for a court to extend First Amendment protection without a detailed explanation about why it is doing so because this is consistent with the general constitutional presumption that expression is protected.").

interests at stake to find that the foreign judgment, in impinging upon the rights protected by the First Amendment, sufficiently violates notions of what is decent and just, so as to clearly show that recognition would seriously undermine "'that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel.'"[229]

One case that most likely lacks the requisite nexus to United States interests is *Telnikoff v. Matusevitch*.[230] Indeed, at the commencement of the dispute, the plaintiff in *Telnikoff* was an English citizen working in Munich, Germany.[231] The defendant in the case was a journalist working in Europe and had not resided in the United States for over forty years.[232] The speech at issue was a letter written by the defendant that was published in London's *Daily Telegraph* in February 1984.[233]

Like much of public policy analysis, determining the interest at stake in recognizing a foreign judgment may seem an unsafe judicial task.[234] If done carefully however, courts will be able to use their discretion to invoke the public policy exception as the "safety valve," or last resort, to the recognition of foreign judgments it was intended to be,[235] rather than as a mandatory chute for all judgments that impinge upon rights protected by the First Amendment.[236]

VI. CONCLUSION

A number of factors are converging to increase the practical importance of how courts apply the public policy exception. First, the Internet continues to raise the stakes for the United States recognition of

229. 2005 UNIF. ACT § 4 cmt. 8, 13 U.L.A. pt. II, at 13 (Supp. 2007) (quoting Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980)); *see supra* note 118 and accompanying text; *see also supra* Part IV.

230. 702 A.2d 230 (Md. 1997); *see also* Berman, *supra* note 20, at 1872 (arguing that the libel judgment at issue in *Telnikoff* would not have been sufficiently repugnant to United States "public policy because neither party had any particular affiliation with the United States").

231. *Telnikoff* , 702 A.2d at 232.

232. *Id.*

233. *Id.* at 232-34.

234. *See* Read, *supra* note 15, at 288; Sanders, *supra* note 95, at 552 ("[W]hen a court limits the First Amendment, its obligation to explain itself is heightened.").

235. *See* Guinness PLC v. Ward, 955 F.2d 875, 886 (4th Cir. 1992); PATCHEL, *supra* note 27, at 34-35; Reese, *supra* note 28, at 797; *see also* Minehan, *supra* note 15, at 818 (arguing that the exception "serves as a 'safety valve' for unforeseeable changes in the law"); Zekoll, *supra* note 77, at 1305 ("Rather than treating public policy as an instrument of last resort, the court required, in essence, that the foreign court emulate every detail of American constitutional jurisprudence . . . .").

236. *See supra* Part II.B-C.

foreign judgments,[237] as American free speech protections collide with foreign judgments arising out of online activities.[238] Under state versions of the Uniform Acts, the public policy exception will play a central role in determining whether foreign judgments can survive the impact of the First Amendment. Second, the A.L.I.'s recent attempt at federal legislation regarding foreign judgment recognition has thus far failed, and congressional enactment of a national solution to foreign judgment recognition seems dubious at best.[239] Third, the academic response to the *Bachchan* line of cases has become increasingly ambivalent.[240] And finally, because of the recent passage of the 2005 Act, states will soon be enacting and interpreting updated versions of foreign judgment recognition acts.[241]

The N.C.C.U.S.L., in drafting the 2005 Act, has attempted to quell the debate over the exception. Under the 2005 Act's expanded public policy exception,[242] and the Commentary to the 2005 Act,[243] if a foreign judgment impinges upon rights protected by the First Amendment, then the refusal to recognize the judgment will be deemed "constitutionally mandatory."[244] The 2005 Act as a whole is a step forward for the American recognition of foreign judgments.[245] Indeed, four states have already enacted the 2005 Act.[246] Unfortunately however, the 2005 Act's express approval of *Bachchan*'s use of the public policy exception is a step in the wrong direction.

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237. *See* Van Houweling, *supra* note 16, at 716 ("The internet . . . raises the stakes for domestic enforcement of foreign judgments.").

238. *See* A.L.I. PROPOSED FINAL DRAFT § 5 reporter's note 6(d), *supra* note 16, at 79-80.

239. *See* Richard J. Graving, *The Carefully Crafted 2005 Uniform Foreign-Country Money Judgments Recognition Act Cures a Serious Constitutional Defect in Its 1962 Predecessor*, 16 MICH. ST. J. INT'L L. 289, 302 (2007) ("[C]ongressional enactment of a national solution [to foreign judgment recognition] is for now a dubious prospect.").

240. *See supra* Part III.

241. For an updated listing of states that have enacted the 2005 Act, see http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufcmjra.asp (last visited May 26, 2008).

242. A foreign judgment need not be recognized by a state court if "the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States." 2005 UNIF. ACT § 4(c)(3), 13 U.L.A. pt. II, at 11 (Supp. 2007).

243. *See* 2005 UNIF. ACT § 4 cmt. 8, 13 U.L.A. pt. II, at 13 (Supp. 2007).

244. *See, e.g.*, Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S. 661, 662 (Sup. Ct. 1992).

245. *See* Graving, *supra* note 239, at 302 (arguing that the 2005 Act is a "distinct improvement on its 1962 predecessor" and "deserves to be adopted in all U.S. jurisdictions").

246. CAL. CIV. PROC. CODE §§ 1713-1724 (West Supp. 2008); IDAHO CODE ANN. §§ 10-1401 to -1410 (Supp. 2007); MICH. COMP. LAWS §§ 691.1131-1143 (effective Mar. 7, 2008), *available at* http://legislature.mi.gov/doc.aspx?mcl-Act-20-of-2008; NEV. REV. STAT. ANN. §§ 17.700-.820 (West Supp. 2008).

This Note has shown that there is no statutory or historical basis under the 1962 and 2005 Acts for a categorical, constitutionally mandatory public policy exception to the recognition of foreign-country money judgments. If the mandates of the First Amendment must be protected absolutely, then that protection should be provided within state acts separate from the public policy exception.[247] Until that is possible, courts should apply the public policy exception as it was intended to be applied: a narrowly interpreted discretionary safety valve, invoked only to protect against judgments that sufficiently violate fundamental notions of what is decent and just, so as to clearly show that recognition would seriously undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel."[248] This analysis may prove the old adage true,[249] but it will also provide a safer, more settled law to the United States recognition of foreign judgments over time.

*Charles W. Mondora**

247. *See supra* Part V.A.

248. *See supra* note 118 and accompanying text; *supra* Part V.B.

249. *See* Read, *supra* note 15, at 288 (describing the public policy exception to foreign judgment recognition as "a dangerous horse to ride").

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