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# The Defamation of Choice-of-Law in Cyberspace: Countering the View that the Restatement (Second) of Conflict of Laws is Inadequate to Navigate the Borderless Reaches of the Intangible Frontier

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# The Defamation of Choice-of-Law in Cyberspace: Countering the View that the Restatement (Second) of Conflict of Laws is Inadequate to Navigate the Borderless Reaches of the Intangible Frontier

Philip Adam Davis\*

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So she sat on, with closed eyes, and half believed herself in Wonderland, though she knew she had but to open them again and all would change to dull reality . . . .

—Lewis Carroll<sup>1</sup>

## I. INTRODUCTION: THE DEFAMATION OF THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS IN CYBERSPACE

The new information age has caused scholars to consider the adequacy of traditional jurisdictional regimes where interstate disputes arise in cyberspace. Personal jurisdiction has been one of the first of these regimes to undergo criticism and, for the most part, has come out relatively unscathed, despite its opponents' arguments that traditional notions of personal jurisdiction have no place in cyberspace.<sup>2</sup> While the assault on personal jurisdiction in cyberspace has lessened in recent years, in its wake has come yet another attack on conventional jurisdictional notions: a criticism of traditional choice-of-law regimes in cyber-disputes.

Much in the same vein as their assault on personal jurisdiction, many scholars argue that traditional choice-of-law doctrines are inadequate to determine which state law to apply in interstate cyber-disputes.<sup>3</sup> While these critics assert many arguments in support of their view that traditional

1. LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* 171 (The Heritage Reprints 2000) (1865).

2. Despite the continuous assault on usage of the minimum contacts and effects test analysis for determining personal jurisdiction when a dispute arises in cyberspace, courts tend to apply personal jurisdiction in cyberspace disputes the traditional way, rather choosing to better define concepts in cyberspace as opposed to redefining approaches to personal jurisdiction. See generally Allan R. Stein, *Symposium on Jurisdiction and the Internet: The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT'L LAW. 1167 (1998) [hereinafter *The Unexceptional Problem*].

3. John D. Faucher, *Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases*, 26 U.C. DAVIS L. REV. 1045, 1066 (1993) [hereinafter *Let the Chips Fall*].

choice-of-law approaches are inadequate for cyberspace,<sup>4</sup> the overwhelming criticism is that “old choice-of-law doctrines fail to provide any meaningful guidance in the virtual world because these doctrines depend on notions of physical location.”<sup>5</sup> Essentially, the argument is that “because there is no ‘there’ in the virtual world, [traditional choice-of-law] doctrines are virtually useless.”<sup>6</sup> In the same breath, many scholars are eager to propose offending alternative regimes to these perceived problems with choice of law in cyberspace,<sup>7</sup> most of which deal with choice of law by ignoring it.<sup>8</sup>

While many opponents criticize traditional choice-of-law regimes in cyber-disputes arising out of contracts, trademark infringement, and other areas of law, much of the criticism focuses on the law of defamation in cyberspace, or “cyber-defamation.”<sup>9</sup> The brunt of this scholarly attack on traditional choice-of-law regimes almost certainly falls on cyber-defamation actions. This is because of the unique aspect the law of defamation brings to cyberspace: publishing on the Internet is publishing instantaneously all over the world. Thus, in a multistate cyber-defamation action, a defendant could conceivably collect for damages in any state where the defamatory material was published.<sup>10</sup> As one scholar notes, “[t]he Internet allows anyone connected to it to disseminate information, statements, gossip, and so on, to millions of people with a few strokes on a computer keyboard. Thus millions of people now have their own electronic printing presses—capable of inexpensively communicating with millions of others worldwide.”<sup>11</sup> Clearly, the law of defamation represents the perfect lens through which to examine the adequacy of traditional choice-of-law regimes in cyberspace.

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4. See *infra* Part IV.

5. Christopher P. Beall, *The Scientological Defenestration of Choice-of-Law Doctrines for Publication Torts on the Internet*, 15 J. MARSHALL J. COMPUTER & INFO. L. 361, 362 (1997) [hereinafter *The Scientological Defenestration*].

6. *Id.*

7. *Id.* at 368.

8. See *infra* Part IV.

9. See *The Scientological Defenestration*, *supra* note 5, at 362.

10. “Under the single publication rule, a [defamed] plaintiff can recover for all harm suffered within or without the forum in a single action.” R. James George, Jr. & James A. Hemphill, *Defamation Liability and the Internet*, 507 PLI/PAT 691, 706 (1998).

11. R. Timothy Muth, *Old Doctrines on a New Frontier: Defamation and Jurisdiction in Cyberspace*, Sept. 1995, 68 WIS. LAW. 10, 11-12 (Sept. 1995) [hereinafter *Old Doctrines on a New Frontier*].

Despite the various choice-of-law doctrines available,<sup>12</sup> the focus of this Note is almost entirely on the Restatement (Second) of Conflict of Laws ("Restatement (Second)") for two reasons. First, the Restatement (Second) is an eclectic mix of dominant policies and principles taken from traditional choice-of-law doctrines.<sup>13</sup> Second, of those states turning away from the original Restatement of Conflicts of Laws, most are adopting the Restatement (Second).<sup>14</sup>

This Note examines the adequacy of the traditional choice-of-law rules, including the Restatement (Second), in interstate cyber-defamation disputes, and argues that there is nothing different or unique about cyberspace which warrants the modification or abandonment of traditional choice-of-law regimes for cyber-defamation disputes. A distinction must be made, however. This Note does not attempt to argue the adequacy of traditional choice-of-law approaches in and of themselves; the disparaging of traditional choice-of-law doctrines in the real world has been and continues to be a pastime among practitioners and scholars alike.<sup>15</sup> Further, this Note does not argue which choice-of-law approach would be most effective in dealing with cyber-defamation. The only goal of this Note is to demonstrate that traditional choice-of-law rules are not confounded by defamation disputes arising in cyberspace.

## II. BACKGROUND: THE LAW OF DEFAMATION AND THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS

Cyberspace is a breeding ground for defamation.<sup>16</sup> Several factors contribute to this. As one commentator suggests, "[T]he low cost of cyberspace communications makes wide-scale distribution of wrongful

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12. In addition to the Restatement (Second) doctrines, other traditional choice-of-law doctrines include *lex loci delicti*, *lex fori*, the center of gravity approach, Currie's interest analysis, the Neumeier rules, comparative impairment, and Leflar's choice-influencing considerations. For detailed analysis of each of these approaches, see generally GENE R. SHREVE, A CONFLICT-OF-LAWS ANTHOLOGY (1997).

13. The Restatement (Second) "is a treatment that takes full account of the enormous change in dominant judicial thought respecting conflicts problems that has taken place" over the years. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, at vii (1971) [hereinafter RESTATEMENT (SECOND)]. The Restatement (Second) acknowledges that the essence of "change has been the jettisoning of a multiplicity of rigid rules in favor of standards of greater flexibility, according sensitivity in judgment to important values that were formerly ignored." *Id.*

14. Hao-Nhien Q. Vu, *Choose or Lose: Choice-of-Law Issues in Cyberspace Cases Remain Unresolved*, L.A. DAILY J., May 22, 1997, at 7 [hereinafter *Choose or Lose*].

15. For a valuable critique of traditional choice-of-law approaches, see generally William L. Reynolds, *Symposium: The Silver Anniversary of the Second Conflicts Restatement: Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1371 (1997).

16. *Old Doctrines on a New Frontier*, *supra* note 11, at 12.

communications possible.”<sup>17</sup> Therefore, “the caution ordinarily exercised in face-to-face real space tends to recede in the world of anonymity and solitude that one finds in front of computer terminals. The temptation to engage in otherwise reckless behavior increases the probability of [cyber-defamation].”<sup>18</sup> Further, messages in cyberspace “transmit few social cues, so people communicating electronically tend to talk more freely than they would in person.”<sup>19</sup> Moreover, cyberspace provides numerous forms by which people can engage in cyber-defamation, whether via an e-mail message, a message posted to a newsgroup or bulletin board, or an available file via file transport protocol or database.<sup>20</sup> More than ever before, people are linked to one another across the country by engaging in various forms of communication. The more people communicate with one another, the greater the potential for defamation suits.

Due to the ease with which one can publish defamatory material via cyberspace, the potential for global publication of the material instantaneously<sup>21</sup>, and the varying defamation laws among states<sup>22</sup>, choice-of-law plays an even more crucial role in interstate defamation actions.

#### A. *The Law of Defamation*

In general, defamation refers to a “false written [or spoken] statement that exposes a person to public ridicule, hatred, or contempt, or injures [their] reputation.”<sup>23</sup> The basic elements of a defamation action commonly include: (1) a statement of fact was published by showing or saying it to a third party; (2) the statement was false at the time it was made; (3) the statement was defamatory; (4) the statement reasonably refers to the plaintiff; (5) the statement was made with the requisite degree of fault; and

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17. Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 83 (1996) [hereinafter *Conflicts on the Net*].

18. *Id.*

19. *Let the Chips Fall*, *supra* note 3, at 1047.

20. *Conflicts on the Net*, *supra* note 17, at 83-84.

21. Not all publications of defamatory material in cyberspace are instantaneously published all over the world. In order to recover in a given state for the publication of defamatory material in that state, one must be able to prove that another person, other than the defamer, read the material. Therefore, an e-mail sent from person A in state A to person B in state A defaming person C in state C is only “published” in state A. Of course, person B could always show the defamatory material to another individual, as well as post the message in cyberspace for everyone to read.

22. Kimberly Richards, Comment, *Defamation Via Modern Communication: Can Countries Preserve Their Traditional Policies?*, 3 TRANSNAT'L LAW. 613, 615 (1990) [hereinafter *Defamation Via Modern Communication*].

23. *Let the Chips Fall*, *supra* note 3, at 1052.

(6) the statement caused actual injury.<sup>24</sup>

Despite the common elements of defamation shared among states, many key variations in defamation law exist. For example, state defamation laws may vary on the requisite degree of fault required in defamation cases,<sup>25</sup> the requirement of falsity,<sup>26</sup> distinctions between fact and opinion, the defamatory nature of the statement, the requisite reference to the plaintiff,<sup>27</sup> the availability of defenses and privileges,<sup>28</sup> and special procedural rules.<sup>29</sup> These differences among state defamation laws “reflect deliberate state policy choices, stemming from a balance of free speech values against interests in compensating injured plaintiffs.”<sup>30</sup> Such state policy choices are what choice-of-law doctrines, like the Restatement (Second), serve to protect.

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24. James R. Pielemeier, *Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation*, 133 U. PA. L. REV. 381, 384 (1985) [hereinafter *Constitutional Limitations on Choice of Law*].

25. *Id.* at 384-85. The requisite degree of fault is considered to be the most significant defamation element differing among states “because it prescribes the basic standard of conduct that publishers must meet.” *Id.* at 384. *This requisite degree of fault turns on whether the plaintiff is classified as a public plaintiff or a private plaintiff.* The degree of fault that public plaintiffs must prove is the same in every state. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283-84 (1964). Public plaintiffs may recover damages only by proving that the publisher of the defamatory material had knowledge of the falsity or reckless disregard for the truth. *Id.* at 283. However, the requisite degree of fault varies between states where a private plaintiff is defamed because the Supreme Court has delegated power to the states to define their own fault standards in those cases. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). The only limitation on a state’s power to define its own standards for private plaintiffs is that a state may not impose liability without fault. *Id.* While some states have set the requisite degree of fault at simple negligence, some require actual malice, while others have variations of these standards. *Constitutional Limitations on Choice of Law*, *supra* note 24, at 384-85.

26. *Constitutional Limitations on Choice of Law*, *supra* note 24, at 385. For example, the burden of proving falsity varies from state to state. *Id.* Some states require the plaintiff to prove falsity, others place the burden on the defendant to prove the truth. *Id.*

27. *Id.* “Some jurisdictions have found words capable of a defamatory meaning that others have not.” *Id.* One state employs the “innocent construction rule” to determine the defamatory meaning of a statement. Under this rule, a publication is not defamatory if the words may reasonably be given an innocent interpretation. Other states simply leave it to the trier of fact to determine a statement’s defamatory meaning. *Id.*

28. *Constitutional Limitations on Choice of Law*, *supra* note 24, at 387. In some states, failure to demand a retraction can limit a plaintiff’s damages, while in other states, a retraction demand may have no effect on damages. *Id.* Also, the existence of privilege defenses, such as the privilege of neutral reportage that protects the accurate reporting of defamatory statements on a matter of public interest, vary depending on the state. *Id.*

29. *Id.* at 387-88. Some states favor summary judgment in defamation actions, while others are neutral or disfavor summary judgment. *Id.* Also, depending on the particular state, a plaintiff’s ability to force disclosure of the identity of a defamation defendant’s sources may be totally precluded or conditioned upon prerequisites. *Id.* at 388. In addition, the statutes of limitation for defamation actions vary by state. *Id.*

30. *Constitutional Limitations on Choice of Law*, *supra* note 24, at 384.

In a defamation action, a plaintiff may sue (i.e., personal jurisdiction is proper) in any state in which the plaintiff can prove that someone received the defamatory message.<sup>31</sup> “However, that forum’s law will not necessarily govern the suit. It is that forum’s choice of law rules that direct the court to the applicable law.”<sup>32</sup> As is evident, choice of law is a critical tool for the sophisticated attorney<sup>33</sup> in interstate defamation actions; it is one tool that could easily determine the ultimate outcome of the case.<sup>34</sup>

### B. *The Restatement (Second) of Conflict of Laws Approach for Defamation*

Whether the case ends up in the federal court system by way of diversity jurisdiction or in the state court system, a judge must always apply the forum state’s choice-of-law rules.<sup>35</sup> In addition, in order for a state law to be selected in a constitutionally permissible manner, a state must have a significant contact or contacts creating a state interest such that the choice of its law is neither arbitrary nor fundamentally unfair.<sup>36</sup>

Under the Restatement (Second),<sup>37</sup> the first step is to determine whether the alleged defamatory material was published in one state, or two or more states. Where alleged defamatory material is published in only one state, there is a presumption that the law to be applied is “the . . . law of the state where the publication occur[ed].”<sup>38</sup> This presumption can only be rebutted by demonstrating that “some other state has a more significant relationship . . . to the occurrence and the parties, in which event the . . . law of the other state will be applied.”<sup>39</sup> Thus, all relationships being equal, the law where the defamed party is domiciled controls by default. In multistate defamation actions, where the defamatory statement is contained

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31. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (finding sufficient contacts to support personal jurisdiction where defendant had sold less than one percent of its magazines). “The traditional doctrine in . . . defamation cases provides that such actions may be brought in any jurisdiction where the defamatory remarks were published.” *Old Doctrines on a New Frontier*, *supra* note 11, at 56.

32. *Conflicts on the Net*, *supra* note 17, at 88.

33. Regardless of the crucial nature that choice of law potentially plays in any given interstate defamation action, choice of law sometimes remains uncontested in court—often applied *sub silentio*. See *The Scientological Defenestration*, *supra* note 5, at 363.

34. See *Let the Chips Fall*, *supra* note 3, at 1052-53.

35. *Id.* at 1050.

36. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 326 (1981).

37. The Restatement (Second) deals with choice-of-law issues both when alleged defamatory material is published in one state only, or when such material is published in two or more states (multistate defamation). See generally RESTATEMENT (SECOND), *supra* note 13, §§ 149, 150.

38. *Id.* § 149.

39. *Id.*



“in any one edition of a book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture, or similar aggregate communication[.]”<sup>40</sup> there is a strong presumption that the state with the most significant relationship will be “the state where the person was domiciled at the time, if the matter complained of was published in that state.”<sup>41</sup> In multistate defamation actions involving corporations or other legal persons, “the state of most significant relationship will usually be the state where the corporation, or other legal person, had its principal place of business at the time, if the matter complained of was published in that state.”<sup>42</sup>

Again, in order to overcome all presumptions stated above, one must demonstrate that another state has a more significant relationship to the dispute.<sup>43</sup> Judges make this determination by applying the choice-of-law principles listed in section 6 of the Restatement (Second).<sup>44</sup> The seven factors relevant to the determination of the applicable law include: (1) the needs of the interstate and international system,<sup>45</sup> (2) the relevant policies of the forum,<sup>46</sup> (3) the relevant policies of the interested states,<sup>47</sup> (4) the

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40. The inclusion of the statement “or similar aggregate communication” in the list of communication media in section 150 of the Restatement (Second) demonstrates that the list is not intended to be exhaustive. In fact, such a statement tends to show that the American Law Institute understood that communications technology is a field that is ever-changing and therefore, saw fit to “leave the door open” for the inclusion of other mediums of communication, such as cyberspace. See RESTATEMENT (SECOND), *supra* note 13, § 150.

41. *Id.* § 150(2). “The state of a plaintiff’s domicile is generally the place where most of his reputational contacts are found; therefore, ‘the state of plaintiff’s domicile generally has the greatest concern in vindicating plaintiff’s good name . . . .’” *Wilson v. Slatalla*, 970 F. Supp. 405, 414 (E.D. Pa. 1997) (quoting *Fitzpatrick v. Milky Way Prods., Inc.*, 537 F. Supp. 165, 171 (E.D. Pa. 1982)). “Thus, domicile should provide a generally accurate starting point for determining which state’s law should apply.” Barry J. Waldman, *A Unified Approach to Cyber-Libel: Defamation on the Internet, a Suggested Approach*, 6 RICH. J.L. & TECH. 9, para. 26. (1999) available at <http://www.richmond.edu/jolt/v6i2/note1.html> [hereinafter *A Unified Approach to Cyber-Libel*].

42. RESTATEMENT (SECOND), *supra* note 13, § 150(3).

43. *Id.* § 150 cmt. e. For example, “[a] state, which is not the state of the plaintiff’s domicile, may be that of most significant relationship if it is the state where the defamatory communication caused plaintiff the greatest injury to his reputation.” *Id.* Such a situation may exist where the plaintiff is known better in a particular state than the state of his domicile, or the defamatory material was related to an activity of the plaintiff that is principally located in a state other than his domicile. *Id.*

44. *Id.* § 6(2).

45. The needs of the interstate system represent the needs of conflicts methods “to make the interstate and international systems work well.” *Id.* § 6 cmt. d.

46. Policy factors two and three can be combined to focus upon determining whether each state is interested based on “the purposes, policies, aims and objectives of each of the competing local law rules urged to govern” the controversy. *Id.* § 145 cmt. b. The Restatement (Second) makes no attempt to weigh the relative competing interests. See *id.* The Restatement (Second) simply seeks to identify them as another factor to determine the

protection of justified expectations,<sup>48</sup> (5) the basic policies underlying the particular field of law,<sup>49</sup> (6) certainty and uniformity of result,<sup>50</sup> and (7) ease in determining and applying the law.<sup>51</sup>

The Restatement (Second) also provides a list of relevant contacts to be taken into account when applying the factors listed in section 6, which include: “(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.”<sup>52</sup> As far as the law of defamation is concerned, “[t]he place of the plaintiff’s domicil, or on occasion his principal place of business, is the single most important contact for determining the state of the applicable law.”<sup>53</sup> These considerations serve to ensure that a court will not apply the law of a state with little interest in the case.<sup>54</sup>

Comments to the Restatement (Second) clearly establish that the section 6 and 150 lists are not meant to be exclusive.<sup>55</sup> “[A] court will on occasion give consideration to other factors in deciding a question of

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appropriate choice of law. Moreover, this recognition of the interest that a state may have in the outcome of a given controversy mirrors the recurrent choice-of-law values of justice, fairness, and the most socially acceptable result.

47. See *supra* note 46.

48. Factors four and six can be combined to focus upon “[the parties’] justified expectations and certainty and predictability of result.” See RESTATEMENT (SECOND), *supra* note 13, § 145 cmt. b. These considerations deal with the proposition that “it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state.” *Id.* § 6 cmt. g. This factor is also “of particular great importance in areas where the parties are likely to give advance thought to the legal consequences of their transactions.” *Id.* § 6 cmt. i. Although predictability and party expectations may not seem to be of significant relevance in the area of tort law (i.e., interstate automobile accidents), such values are of much greater importance in the area of defamation law. See *id.* § 145 cmt. b.

49. This factor recognizes “situations where the policies of the interested states are largely the same but where there are nevertheless minor differences between their relevant local law rules.” *Id.* § 6 cmt. h. The Restatement (Second) urges that in such situations, courts should endeavor to apply the law of the state that will best achieve those policy objectives underlying the particular field of law involved. *Id.*

50. See *supra* note 48.

51. Ease in the determination and application of the law to be applied simply recognizes that “[i]deally, choice-of-law rules should be simple and easy to apply.” See RESTATEMENT (SECOND), *supra* note 13, § 6 cmt. j.

52. *Id.* § 145(2). When determining which law is to be applied, the basic assumption that underlies the importance of contacts is that “[t]hose states which are most likely to be interested are those which have [§ 145] contacts with the occurrence and the parties.” *Id.* § 145 cmt. e.

53. *Id.* § 145 cmt. e.

54. *Defamation Via Modern Communication*, *supra* note 22, at 654.

55. RESTATEMENT (SECOND), *supra* note 13, § 6 cmt. c.

choice of law.”<sup>56</sup> Further, the factors listed in both lists are not arranged in any order of relative importance.<sup>57</sup> “Varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law.”<sup>58</sup>

In sum, the approach in the Restatement (Second) seeks to preserve state policies by requiring courts to apply the law of the state with the most significant relationship with the dispute.

### III. DEMYSTIFYING CYBERSPACE

As is the case with most breakthroughs in technology, people are eager to denigrate the efficiency of traditional legal rules, including choice of law.<sup>59</sup> Early in the 1990s, as the Internet spread throughout the world like a forest fire, people became enamored with it. Poetic sentimentalities in the face of a brave new era gave rise to phrases such as “surfing the Web,” “visiting a Web site,” “netizens,” “entering chat rooms,” and the “virtual world.” Indeed, the term “cyberspace” itself denotes some other “place” outside of traditional space and time; a place where anything and everything is possible at the touch of a button. In short, cyberspace established itself in the American psyche as a world of its own.<sup>60</sup>

In line with this clichéd ideology, some people assert themselves as “residents of Cyberspace, [resistant] to law emanating from outside of Cyberspace.”<sup>61</sup> One “netizen” of cyberspace went so far as to declare a “Declaration of Independence of Cyberspace,” which states, “Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.”<sup>62</sup> This self-styled “declaration” epitomizes netizen dogma.

Cyberspace is no longer a “new frontier,” but a fixed communication device that is commonplace and woven into the fabric of American society.

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56. *Id.*

57. *Id.*

58. *Id.* For example, the Restatement (Second) recognizes that “[s]ituations do arise . . . where the place of injury will not play an important role in the selection of the state of the applicable law . . . such as in the case of multistate defamation [where] injury has occurred in two or more states.” *Id.* § 145 cmt. e (internal citations omitted).

59. *The Scientological Defenestration*, *supra* note 5, at 362.

60. For a similar position, see *The Unexceptional Problem*, *supra* note 2, at 1172 (arguing that “[c]yberspace evokes a sense that the real activity is not occurring in physical space, but in some ethereal fifth dimension.”).

61. Aron Mefford, *Lex Informatica: Foundations of Law on the Internet*, 5 *IND. J. GLOBAL LEGAL STUD.* 211, 218 (1997) [hereinafter *Lex Informatica*].

62. *Id.* This “Declaration of the Independence of Cyberspace,” was written by John Perry Barlow and transmitted via the Internet on February 8, 1996. *Id.*

The fixation with cyberspace as another world is rapidly losing its poetic luster and becoming just another exhausted metaphor used for the amusement of the sci-fi generation. As one commentator eloquently stated, "As we master and understand [cyberspace], we demystify it."<sup>63</sup>

Cyberspace, contrary to netizen dogma, is not a "world." Cyberspace is another source of information, not a new state of being. A person does not sleep, eat, or play "there" anymore than they sleep, eat, or play in the pages of *Time* magazine. A person's reputation, whether defamed by a hard copy of *USA Today* or by the *USA Today* Web site, is still injured in the real world. It is conceivable, even though most likely unachievable, that—in the far distant future—humans might conceive of a way to physically place their bodies in the cyber-ether, thus truly becoming "netizens." In such a world, cyberspace could conceivably be their sovereign. Until that dream comes to fruition, however, the term "netizen" denotes no more than a person in real-space, under the law of real sovereign states, gazing into the dull reality of a real-space computer screen (most likely playing FreeCell or shopping on Ebay).

#### IV. COUNTERING THE ARGUMENTS AGAINST TRADITIONAL CHOICE-OF-LAW DOCTRINES IN CYBERSPACE

Thus far, criticisms of the traditional choice-of-law regimes for cyber-defamation can be classified into two groups, which may occasionally overlap. Within the first group rests those arguments based on a perceived premise that something is uniquely different about cyberspace.<sup>64</sup> Within the second group rests cloaked arguments that are asserted as "because of the uniqueness of Cyberspace," but ultimately are deep-rooted arguments routinely used to disparage traditional choice-of-law regimes, as well as other areas of law, in "real" space.<sup>65</sup>

These proposals for changing choice-of-law principles for cyber-defamation rely on the perceived notion that defamation in cyberspace is somehow different and, therefore, cyber-defamation needs different choice-of-law rules.<sup>66</sup> This perception is false. By demystifying cyberspace, it becomes all too clear that there is nothing about cyber-defamation that in any way challenges the adequacy of traditional choice-of-law regimes, including the Restatement (Second).<sup>67</sup>

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63. *The Unexceptional Problem*, *supra* note 2, at 1174 (in support of the traditional application of personal jurisdiction for cyber-disputes).

64. *See infra* Part IV.A.

65. *See infra* Part IV.B.

66. *The Scientological Defenestration*, *supra* note 5, at 363.

67. *The Unexceptional Problem*, *supra* note 2, at 1167.

### A. *Criticisms Based on a Lack of Boundaries in Cyberspace*

The most cited argument by far for why traditional choice-of-law rules are inadequate for cyber-defamation actions is the “boundless medium” argument.<sup>68</sup> “[M]ost traditional [choice-of-law] rules are based on the locations where activities take place[,]” including the Restatement (Second).<sup>69</sup> The argument is that these choice-of-law rules are inadequate for cyber-defamation actions because cyberspace is boundless; it defies national boundaries, and therefore, undermines the viability and validity of laws based on geographic borders.<sup>70</sup> These critics argue that cyberspace activities differ from real-space activities in that “they are free from any concept of locality or distance.”<sup>71</sup>

Critics argue that “like most post-Restatement authorities . . . the Restatement (Second) offers courts little substantive guidance concerning choice-of-law decisions.”<sup>72</sup> Regarding the Restatement (Second), critics argue that the geographical principles listed in section 145(2)<sup>73</sup> are confounded by cyberspace.<sup>74</sup> Critics wonder how these relevant contacts and principles are to be considered in cyberspace.<sup>75</sup> For example, how is “place of injury, place of conduct causing injury, principle place of business, and nationality” determined in cyberspace?<sup>76</sup> Some dismiss a user’s ambivalence to political border crossing in exchange for the claim that “[f]requently, users are unaware that they have even ‘crossed’ a political border in the course of their virtual travels.”<sup>77</sup> Some critics use “boundless medium” arguments to support the proposition that the choice-of-law principles in section 6 of the Restatement (Second) are vague and offer little direction because of cyberspace.<sup>78</sup>

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68. See *infra* notes 69-78. See also SYMEON C. SYMEONIDES ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, AND INTERNATIONAL 894 (1998); *Conflicts on the Net*, *supra* note 17, at 78; Heather McGregor, *Law on a Boundless Frontier: The Internet and International Law*, 88 KY. L.J. 967, 969 (2000) [hereinafter *The Internet and International Law*].

69. *Choose or Lose*, *supra* note 14, at 7.

70. *The Internet and International Law*, *supra* note 68, at 969 (citation omitted); see also *Lex Informatica*, *supra* note 61, at 236.

71. *Choose or Lose*, *supra* note 14, at 7.

72. *Let the Chips Fall*, *supra* note 3, at 1063.

73. See *supra* Part II.B.

74. *Conflicts on the Net*, *supra* note 17, at 94. See *Choose or Lose*, *supra* note 14, at 7.

75. *Conflicts on the Net*, *supra* note 17, at 94.

76. *Id.*; see also Craig Peyton Gaumer, *Conflicts, the Constitution, and the Internet*, 86 ILL. B.J. 502, 506 (1998) [hereinafter *Conflicts, the Constitution, and the Internet*] (asserting that in cyberspace, “[t]he only way to determine the principal ‘place’ of its business may be to review its records and ascertain in which state most of its customers are located.”).

77. *Conflicts on the Net*, *supra* note 17, at 82.

78. *Let the Chips Fall*, *supra* note 3, at 1064.

Critics fail to support their proposition that the boundless medium of cyberspace makes traditional choice-of-law doctrines inapposite. The way in which most arguments against traditional choice-of-law approaches are laid out is that an author creates a hypothetical cyber-defamation dispute, and then applies a choice-of-law doctrine. Ultimately, without ever explaining why cyberspace is somehow different or unique in their analysis, they conclude by holding that traditional choice-of-law regimes are inadequate or useless in cyberspace. Consider the following variation by John D. Faucher used to demonstrate the inadequacy of the Restatement (Second) for dealing with cyber-defamation disputes:<sup>79</sup>

A offers hundreds of bulletin boards from a mainframe computer in State A. A contracts with B, a movie critic from State B, to disseminate B's weekly movie review column. A publishes B's reviews over its Movie Line bulletin board. The Movie Line bulletin board has readers in all fifty states. In a review of a certain movie, B makes a false assertion. Specifically, B writes that C, the movie's star and a resident of the state of C, belongs to the Ku Klux Klan. After reading the review, African-American, Jewish, and Catholic computer users boycott the movie and its studio, Studio C. Studio C also resides in State C. C and Studio C sue B and A in federal court in the Western District of State C. They allege defamatory publication in State C, and seek compensatory and punitive damages. Defamation laws in State A, B, and C vastly differ.

In Faucher's Restatement (Second) analysis to this cyber-hypothetical, Faucher skips entirely the initial presumption that, unless another state has a more significant relationship to the dispute, the law of State C is to be applied in the dispute because the defamatory material was published in State C and the Plaintiffs' domicile and principal place of business are in State C. Instead, Faucher sets out to determine which state has the most significant relationship with the dispute, and asserts that it could just as easily be any one of the hypothetical states. Without difficulty, Faucher first breezes through the section 145 "physical" contacts list of the Restatement (Second), easily identifying that injury to reputation occurred in State C, conduct causing the injury took place in State B (the place from where the review was sent) and in State A (from where the review was disseminated), Plaintiffs are domiciled in State C, and Defendants are domiciled in States A and B. Based on the face of these contacts, Faucher argues that it is not immediately apparent which state has the "most significant contacts." Therefore, Faucher turns to the seven choice-of-law principles listed in section 6 of the Restatement (Second) in order to aid in the determination of which state has the most significant

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79. *Id.* at 1054-56 (hypothetical not verbatim).

relationship to the dispute. Without going through any section 6 analysis, however, Faucher states that “[t]hese criteria are vague and offer little direction.”<sup>80</sup> As a result of his cyber-hypothetical, Faucher summarizes by stating that “[b]ecause [the Restatement (Second)] process is long, difficult, and murky, the Restatement (Second) offers little help in [cyber-defamation] cases.”<sup>81</sup>

As is typical in most critics’ analyses, Faucher’s analysis of the Restatement (Second) as applied to his cyber-hypothetical identifies nothing unique about the medium of cyberspace that makes the Restatement (Second) any more “long, difficult, and murky” to apply when compared to defamation in real-space. Faucher simply runs through the Restatement (Second) analysis, and then at the end suggests that because it is cyberspace, it is somehow different, and therefore traditional choice-of-law regimes are inadequate for cyber-defamation disputes.

In the end, Faucher fails to address the crucial questions. How is Faucher’s analysis applied any differently in real-space? What does cyberspace uniquely offer that makes section 6 principles “vague and of little direction” when compared to the application of section 6 principles in the real world? These questions, and more, are left unanswered by the critics because cyberspace poses nothing unique to traditional choice-of-law regimes in the real world. Consider the following variation on Faucher’s cyber-hypothetical involving a defamation dispute in real-space:

A is the publisher of *America Today*, a nationally read newspaper located in State A. A contracts with B, a movie critic from State B, to disseminate B’s weekly movie review column. A publishes B’s reviews in the entertainment section of *America Today*, which has readers in all fifty states. In a review of a certain movie, B makes a false assertion. Specifically, B writes that C, the movie’s star and a resident of State C, belongs to the Ku Klux Klan. After reading the review, African-American, Jewish, and Catholic *America Today* readers boycott the movie and its studio, Studio C. Studio C also resides in State C. C and Studio C sue B and A in federal court in State C. They allege defamatory publication in State C, and seek compensatory and punitive damages. Defamation laws in State A, B, and C vastly differ.<sup>82</sup>

The only thing different from Faucher’s cyber-hypothetical and this real-space hypothetical is that in Faucher’s cyber-hypothetical the defamatory material was published in cyberspace on a computer bulletin

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80. *Id.* at 1064.

81. *Id.*

82. This hypothetical is based on the Faucher hypothetical. *Let the Chips Fall*, *supra* note 3, at 1054-56.

board available nationwide, whereas in this real-space hypothetical the defamatory material is published in real-space in a newspaper available nationwide. According to Faucher and other critics, traditional choice-of-law approaches, like the Restatement (Second), are inadequate choice-of-law approaches for cyber-defamation disputes; for choice-of-law purposes, however, there is absolutely no difference between Faucher's cyber-hypothetical and this real-space hypothetical.

An application of the Restatement (Second) to this hypothetical will present identical results as Faucher's cyber-hypothetical. Although Faucher did not provide the initial Restatement (Second) presumption in his cyber-hypothetical analysis, this critical presumption, if performed, remains the same in real-space. Specifically, unless another state has a more significant relationship to the dispute, the law of State C is to be applied in the dispute because the defamatory material was published in State C and Plaintiffs' domicile and principal place of business are in State C. Again, whether the defamatory review is published nationwide in cyberspace or real-space, the presumption in both hypotheticals remains unsurprisingly identical. Further, section 145 contacts equally remain identical and just as easily identifiable. Injury to reputation still occurs in State C. Conduct causing the injury still takes place in State B (the place from where the review was sent) and in State A (the place from where the review was disseminated). Plaintiffs are still domiciled in State C, and Defendants are still domiciled in States A and B. Incidentally, critics argue that section 145 contacts are confounded by boundless cyberspace,<sup>83</sup> yet Faucher, in his hypothetical used to prove inadequate traditional choice-of-law regimes for cyberspace, has no difficulty identifying these real-world physical contacts. Just as section 145 contacts remain identical in the real-space hypothetical, so too do such contacts remain just as easily identifiable.

Without going through any Restatement (Second) section 6 analysis, Faucher argues that section 6 principles are "vague and offer little direction" when applied in the context of his cyber-hypothetical.<sup>84</sup> Nevertheless, critics of the Restatement (Second) have always asserted that section 6 principles are somewhat difficult to apply, whether in real-space or cyberspace.<sup>85</sup> Policy analysis is a difficult business; that is why lawyering is a profession. Regardless, however "difficult, vague, or of little direction" these section 6 principles are in real-space, and are no more

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83. *Conflicts on the Net*, *supra* note 17, at 94; *see also Choose or Lose*, *supra* note 14, at 7.

84. *Let the Chips Fall*, *supra* note 3, at 1064.

85. For a critical evaluation of traditional choice-of-law approaches, *see generally Reynolds*, *supra* note 15.



“difficult, vague, or of little direction” in cyberspace.

In order to answer whether cyberspace offers something unique to choice-of-law doctrines for defamation, making section 6 principles “vague and of little direction” as Faucher suggests, it is imperative to analyze section 6 principles in cyberspace versus section 6 principles in real-space. The following focuses on a few relevant principles listed in section 6 of the Restatement (Second) in order to demonstrate that these principles are in no way confounded by cyberspace.

Principles (2) and (3) of section 6 combine to determine the interests of each state by gauging “the purposes, policies, aims and objectives of each of the competing local law rules urged to govern” the controversy.<sup>86</sup> The Restatement (Second) makes no attempt to weigh the relative competing interests.<sup>87</sup> It simply seeks to identify these interests as another factor to determine the appropriate choice of law. At a bare minimum, State C has a legitimate interest in protecting its citizens from fraudulent misrepresentation, but States A and B also have an interest in discouraging fraudulent conduct by persons operating from within its territory.<sup>88</sup> These competing interests are neither confounded nor altered by cyberspace. State C’s interest in protecting the reputation of its citizens is not changed simply because someone decides to defame State C’s citizen in cyberspace instead of real-space. Likewise, State A and B’s interest in discouraging fraudulent conduct by persons operating from within their borders is just as real, regardless of what medium those individuals use to effectuate such slanderous conduct.

Principles (4) and (6) of section 6 can be combined to determine the parties’ “justified expectations and certainty and predictability of result.”<sup>89</sup> These considerations deal with the proposition that “it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state.”<sup>90</sup> Specifically, these factors are “of great importance in areas where the parties are likely to give advance thought to the legal consequences of their transactions,” such as in the area of contract law.<sup>91</sup> Predictability and party expectations are not significantly relevant in the area of tort law because persons that cause injury usually act without giving

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86. See RESTATEMENT (SECOND), *supra* note 13, § 145 cmt. b.

87. *Id.*

88. See Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 5-6 (1996) [hereinafter *Jurisdiction in Cyberspace*] (identifying common interests held by states in interstate defamation actions).

89. RESTATEMENT (SECOND), *supra* note 13, § 145 cmt. b.

90. *Id.* § 6 cmt. g.

91. *Id.*

much thought (i.e., expectation) to the legal consequences of their actions.<sup>92</sup> Such principles may be of greater importance in the tort law area of defamation, however.

In addition, some commentators argue that the Restatement (Second) approach to cyber-defamation disputes, in its “case-by-case search for fairness . . . sacrifices certainty and simplicity.”<sup>93</sup> Regardless of its cyber-premise, this argument is merely a traditional real-space criticism of the Restatement (Second). Whether the Restatement (Second) does “sacrifice certainty and simplicity,” such a sacrifice is no greater because of cyberspace.

For example, newspapers, conscious of the legal consequences of their actions, will often structure their behavior around the availability of defenses and privileges to potential actions brought against them for defamation.<sup>94</sup> As sensitive as a newspaper may be to the potential of publishing defamatory material in an article, they also know the potential consequence when they do. That consequence is the inevitability that the state law of where the defamed party is domiciled will most likely govern the dispute.<sup>95</sup> Therefore, a newspaper publisher in no way can argue that it did not have any expectation that the law of the defamed party’s domicile could apply. Whether defamatory material is published on the newspaper’s Web site makes no difference to the newspaper’s expectation. The defamed party’s reputation is still injured in real-space, and real-space rules apply. Conversely, in those situations where someone publishes defamatory material without thought of the legal ramifications of his or her conduct, then justified expectations will play an insignificant role in the choice-of-law decision.<sup>96</sup> An individual’s reputation is injured regardless of whether someone carelessly defames that person in cyberspace, as opposed to real-space. Clearly, cyberspace offers nothing unique to these principles of expectation and predictability embodied in the Restatement (Second).

Finally, principle (7) recognizes that “[i]deally, choice-of-law rules should be simple and easy to apply.”<sup>97</sup> cyberspace does not make ascertaining the applicable law by traditional choice-of-law rules any more difficult. As discussed previously in both hypotheticals presented, the initial presumption of the Restatement (Second) remained exactly the same. Further, the identification of contacts listed in section 145 remained exactly

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92. *Id.* § 145 cmt. b.

93. *Conflicts on the Net*, *supra* note 17, at 94.

94. *Constitutional Limitations on Choice of Law*, *supra* note 24, at 387.

95. *See* RESTATEMENT (SECOND), *supra* note 13, § 150(2).

96. *Id.* § 145 cmt. b.

97. *Id.* § 6 cmt. j.

the same.<sup>98</sup> Also, the analysis of section 6 principles was not confounded by cyberspace.<sup>99</sup> However difficult critics may think the Restatement (Second) is to apply to defamation disputes in real-space, this perceived difficulty is in no way more or less difficult to apply in cyber-defamation disputes.

Indeed, much criticism of choice of law in cyber-defamation disputes has been geared toward the Restatement (Second).<sup>100</sup> Despite criticisms, cyberspace is not conducive to the paradigm that sovereignty is traditionally a function of territoriality.<sup>101</sup> Cyberspace in no way challenges the world to reconcile geographical real-space with a nongeographical cyberspace. And why should it? Albeit extremely exciting, cyberspace is simply another medium for the communication of information. Regardless of whether someone defames a party over a broadcast, by fax, in print, or in cyberspace, the defamed party's reputation is still injured in a sovereign state where that state has a real-space interest in protecting its citizens' reputation from injury.

### *B. Real-Space Traditional Choice-of-Law Criticisms Disguised*

The following represents those cloaked arguments that are asserted as "because of the uniqueness of cyberspace," but ultimately, are well-established arguments traditionally used to criticize traditional choice-of-law regimes, as well as other areas of law in real-space. While critics serve these arguments up as novel because of cyberspace, all of the following arguments exist not because of cyberspace, but because of a much broader dissatisfaction with traditional choice-of-law regimes as a whole. Regardless of the dissatisfaction that some may feel toward traditional choice-of-law approaches, that dissatisfaction is in no way amplified because of cyberspace.

One argument is that "[t]he physical acts of copying and distributing take time, during which [an individual] can obtain an injunction before suffering extensive damage."<sup>102</sup> However, in cyberspace the defamatory material can be distributed nationwide at a keystroke.<sup>103</sup> Thus, "[b]y the time the court hears the case, the damage has been done or the advantage has been exploited."<sup>104</sup> Although asserted to support the idea that traditional choice-of-law doctrines are inadequate for cyber-defamation disputes, the fact that humankind has created a medium of communication capable of speeding up the publishing process in no way is related to choice-of-law

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98. *Id.*

99. *Id.*

100. *Conflicts on the Net*, *supra* note 17, at 94.

101. *Id.* at 82.

102. *Lex Informatica*, *supra* note 61, at 220.

103. *Id.*

104. *Id.*

doctrine. Whether or not this argument presents a problem should be dealt with by the defamation law of states. Choice-of-law rules cut across various areas of state law (i.e., torts and contracts) without modifying them.

A similar argument presented to support the inadequacy of traditional choice-of-law rules for cyber-defamation is that under the single publication rule, a defamed plaintiff can recover for all harm to his or her reputation in or outside the forum state.<sup>105</sup> Thus, in any given cyber-defamation action, it is conceivable that such harm to reputation could occur nationwide.<sup>106</sup> Nationwide defamation actions are just as common in real-space, however, through nationwide newspaper circulations, as they may be in cyberspace. Again, the problem is not with choice-of-law doctrine. Whether or not the single publication rule should be re-examined as it relates to cyberspace may be a question for state legislatures to address in their defamation law. As for choice of law in cyberspace, the single publication rule offers nothing different than what it offers in real-space.

Another argument used to support the notion that choice of law is confounded by cyberspace stems from the fact that defamation law draws a distinction between "private persons who may be unavailable to access the media to respond to the defamation and public persons who have greater access to mass media."<sup>107</sup> The argument is that current law does not account for the fact that private individuals may now respond to defamatory statements via cyberspace by posting a message to any number of Internet newsgroups.<sup>108</sup> "In effect, the defamed person can very quickly and easily become the mass media himself by using the Internet."<sup>109</sup> Nevertheless, whether cyberspace provides private individuals with an opportunity to respond to defamatory statements they previously did not have bares no relation to choice-of-law doctrine. A state legislature or court may or may not wish to re-examine and/or possibly alter the requisite degree of fault that private plaintiffs must prove in cyber-defamation disputes. However, choice of law in cyber-defamation disputes is not affected by or concerned with this new opportunity afforded by cyberspace for private individuals to respond to defamatory statements.

Lastly, some critics argue that cyber-defamation is confounded by traditional choice-of-law approaches because the opportunity for forum shopping in cyber-disputes is intensified.<sup>110</sup> For example, in a defamation action, a plaintiff may bring suit in any state in which the plaintiff can

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105. *Defamation Liability and the Internet*, *supra* note 10, at 706.

106. *Id.*

107. *Lex Informatica*, *supra* note 61, at 219.

108. *Id.*

109. *Id.*

110. *Defamation Via Modern Communication*, *supra* note 22, at 614-15.

prove that someone received the defamatory message.<sup>111</sup> Thus, in any given multistate cyber-defamation action, a plaintiff may conceivably forum shop around fifty states for the most beneficial choice-of-law rules.<sup>112</sup> A plaintiff could initiate an action in a state with an insignificant interest in the dispute only to take advantage of that state's choice-of-law rules, thus controlling to a degree what substantive law governs the dispute.<sup>113</sup> Critics argue that "[t]his type of 'forum shopping' may not only adversely affect the defendant; it may also undermine the policies and laws of [states] which have substantially greater interest in the cause of action."<sup>114</sup>

It is somewhat ironic that states, in order to deal with the laws differing among them, created choice-of-law rules that *themselves* differ among states. Indeed, forum shopping is a problem. This Author is of the opinion that states should come to a consensus on one choice-of-law rule to not only decrease the opportunity for forum shopping that undermines the interests and policies of a given state, but also accord even greater comity among states. Regardless, forum shopping is no greater because of cyberspace. A nationwide cyber-defamation action poses no greater opportunity for forum shopping than a nationwide real-space defamation action. If *USA Today* contains defamatory material about an individual and it is read in all fifty states, the defamed party may forum shop in all fifty states for a beneficial choice-of-law approach. Likewise, if *USA Today* decides to publish the defamatory material on its Web site as opposed to its hard copy newspaper, and that material is read in all fifty states, the defamed party may still forum shop in all fifty states.

The only unique aspect of cyberspace is the heightened potential for a defamatory statement to have an effect nationwide. Once a defamatory cyber-statement does have an effect on a national level, however, that statement is no different than a real-space statement published in a nationally recognized magazine. Again, the problem of forum shopping exists with equal force in cyberspace and in real-space. Although now asserted as existing because of cyberspace, the forum shopping argument is nothing more than a classic criticism of the fact that traditional choice-of-law regimes differ among states. This argument is not novel because of cyberspace, but has always been a criticism grounded in real-space. This

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111. See *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984) (finding sufficient contacts to support personal jurisdiction where defendant sold less than one percent of its magazines). "The traditional doctrine in . . . defamation cases provides that such actions may be brought in any jurisdiction where the defamatory remarks were published." *Old Doctrines on a New Frontier*, *supra* note 11, at 56.

112. *Defamation Via Modern Communication*, *supra* note 22, at 614-15.

113. *Id.*

114. *Id.* at 616.

heightened potential for cyber-statements to gain national attention may call for states to rethink the potential severity of their defamation laws. Alternatively, this heightened potential may call for states to utilize the same choice-of-law approach for defamation. However, there is no reason to make new or modified choice-of-law rules for cyber-defamation disputes because, for choice-of-law purposes, such disputes in no way differ from real-space disputes.

### C. *Problems with Proposed Alternative Approaches*

In response to the perceived inadequacy of traditional choice-of-law regimes for cyber-defamation disputes, scholars propose various alternatives in the law. Among these numerous alternatives, the main proposals are: (1) creating a federal common law for the Internet that would effectively eliminate the choice-of-law process,<sup>115</sup> and (2) simply making cyberspace a sovereign of its own.<sup>116</sup> No courts apply these novel regimes.<sup>117</sup>

In the rush to be the first to establish new choice-of-law regimes for cyberspace, some scholars seem to have forgotten the reason behind choice-of-law regimes: to respect state sovereignty. Despite the overarching argument that cyberspace offers nothing novel for traditional choice-of-law regimes in cyber-defamations, an analysis of these cyberspace approaches will also reveal that they offer little as alternatives to traditional choice-of-law approaches.

Faucher argues that to bring order and predictability to cyber-defamation cases, judges should create a federal common law to govern cyber-defamation.<sup>118</sup> According to Faucher: "Such an approach would allow judges to fashion a defamation law that is relevant to electronic communication" as well as "avoid the conceptual difficulties of applying choice-of-law rules to torts that have little relation to a single geographical area."<sup>119</sup> Faucher states: "If the law is uniform across all states . . . choice-of-law problems disappear."<sup>120</sup> Faucher's federal common law approach changes the law of cyber-defamation itself, as opposed to modifying traditional choice-of-law regimes for cyberspace.<sup>121</sup> Assuming, *arguendo*, that the creation of a federal common law does not violate the *Erie* and

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115. See *Let the Chips Fall*, *supra* note 3, at 1051.

116. *The Internet and International Law*, *supra* note 68, at 982; see also *Conflicts on the Net*, *supra* note 17, at 108-10; *A Unified Approach to Cyber-Libel*, *supra* note 41, para. 20.

117. *The Scientological Defenestration*, *supra* note 5, at 368.

118. *Let the Chips Fall*, *supra* note 3, at 1067.

119. *Id.* at 1051 (internal footnote omitted).

120. *Id.* at 1068.

121. See *The Scientological Defenestration*, *supra* note 5, at 371-73.

*Klaxon* doctrines as Faucher suggests,<sup>122</sup> a federal common law for cyber-defamation would fundamentally violate the principles and policies of state sovereignty.

Faucher's solution to the perceived problem of choice of law in cyberspace is, essentially, to bypass the choice-of-law question entirely. Faucher argues that "the federal law would advance the forum's interest best because, under a federal common law, the forum is the United States rather than an individual state."<sup>123</sup> This argument is circular and loses sight of one crucial factor; the federal forum's minimal interest exists at the expense of a state's interest in a cyber-defamation action involving its citizens. The entire point of choice-of-law rules is ultimately to respect state sovereignty. A common law federal approach does not respect the sovereignty of any state's law. In fact, it would rob states of such sovereignty. Where choice-of-law rules exist to respect state sovereignty, a federal common law would exist to deny it. Faucher argues for an easy way out of perceived tough choice-of-law issues at the expense of everything choice of law exists to protect. Thus, Faucher's approach offends state sovereignty.

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122. According to *Erie*, federal courts in diversity must apply substantive state law rather than federal common law; in fact, *Erie* held that federal common law does not exist. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Despite *Erie*, Faucher relies on Georgene Vairo's assertion when stating that "federal courts have the authority to create federal law . . . when . . . the case involves a uniquely federal interest." *Let the Chips Fall*, *supra* note 3, at 1073 (citing Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 *FORDHAM L. REV.* 167, 203 (1985)). Faucher argues that cyberspace has enough of a unique federal interest to allow courts to create a common law by likening cyberspace to the federal government's regulation of interstate telephone service and aspects of some computer crimes. *See id.* at 1074. As one commentator notes, however: "This federal interest involves the technical capacity and security of the system. The federal interest does not involve the content of messages transmitted over the infrastructure." *The Scientological Defenestration*, *supra* note 5, at 371. Still, whether the federal government has such an interest, or whether such an interest may or may not be enough to justify the creation of federal common law for defamation, is outside the scope of this Note because whether such a power exists is irrelevant in determining whether traditional choice-of-law regimes are adequate for cyber-disputes.

Another roadblock that Faucher identifies in his quest for a federal common law is the *Klaxon* doctrine. In *Klaxon Co. v. Stentor Elec. Mfg. Co.*, the Supreme Court found that a federal court sitting in diversity must apply the state's choice-of-law rule and substantive law by finding that the *Erie* doctrine extended to both the choice-of-law rules and substantive law. 313 U.S. 487 (1941). Thus, another possible stop sign in the road to a federal common law for defamation is that "[c]reating a federal common law may constitute a choice-of-law rule, since the creation arises as a solution to a choice-of-law problem," thereby possibly violating the *Klaxon* doctrine. *Let the Chips Fall*, *supra* note 3, at 1074-75.

123. *Let the Chips Fall*, *supra* note 3, at 1076.

As well as offending state sovereignty, a federal common law for defamation seems difficult and unreasonable. As one commentator states: "When is the choice of law question for a particular cyber-dispute appropriately determined by this new model?"<sup>124</sup> "Simply 'touching and concerning' cyberspace, however, is not a sufficient reason to invoke an entirely new choice of law methodology."<sup>125</sup> For example, suppose *USA Today* publishes defamatory material in its newspaper distributed nationwide. Clearly, a defamation action arising out of these events would be governed by sovereign states, and the law applicable would be decided by traditional choice-of-law rules. Conversely, if *USA Today*, instead of publishing the material in its newspaper, publishes the defamatory material on its Web site, then, under Faucher's approach, this dispute would be covered by federal common law. However, what law governs—federal or state—when *USA Today* publishes the same defamatory material at the same time in both real-space (in a newspaper) and in cyberspace (on a Web site) as is predominantly the case? Does a plaintiff recover for Web site damages under federal law and newspaper damages under state law?

Regardless of these quandaries, it is entirely unreasonable that a state should lose its interest in protecting its citizens involved in a defamation dispute merely because a different medium was chosen to publish the defamatory material. There cannot reasonably be said to exist a federal interest in defamation via cyberspace that justifies stripping states of their principal interest, that of protecting their citizens. Indeed, a federal common law is not only difficult to apply, but also completely offensive to notions of state sovereignty. These are the primary interests choice-of-law rules exist to protect.

Alternatives proposing that cyberspace should be recognized as a sovereign within itself suffer from the same failing as Faucher's federal common law alternative. One such alternative similar to Faucher's approach is to make choice-of-law issues virtually irrelevant by having courts recognize a new law of cyberspace, called *lex cyberalty*.<sup>126</sup> The argument is that courts hearing cyber-disputes should look to *lex cyberalty* in order to determine the applicable "substantive standard of behavior."<sup>127</sup> Besides suffering from the same faults as Faucher's federal common law approach, it is unrealistic that this unwarranted approach would ever emerge because, for such a system to work, the states would have to relinquish their sovereign control over cyberspace.

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124. *Conflicts on the Net*, *supra* note 17, at 89.

125. *Id.* at 90.

126. *The Scientological Defenestration*, *supra* note 5, at 369.

127. *Id.*



Choice of law is a difficult subject area because of what is at stake not only in an interstate system, but also in a unique federal system. Choice-of-law rules serve to facilitate comity between the states. Comity between states is of extreme importance, but so too is comity between the federal system and the state system. Of equal importance in a federal system, however, are the states' rights to reign supreme over the areas of law rightfully reserved to them. It is imperative for the functioning of both the interstate and federal systems that jurisdictional doctrines do not lose sight of the vital principles embodied in state sovereignty.

## V. CONCLUSION

Despite the view of some, choice-of-law issues arising in cyberspace are only *sui generis* in substance, not form.<sup>128</sup> Instead of creating new regimes for cyber-defamation disputes, most courts apply traditional choice-of-law doctrines—usually *sub silentio*—and utilize old analogies to deal with the substance of cyberspace.<sup>129</sup> Stated another way: “Instead of following a virtual path for these Internet cases, most courts travel the well-worn path of traditional choice-of-law principles.”<sup>130</sup> As cyberspace becomes more grounded and less mystifying, it becomes much clearer that cyberspace does not offer any unique problems for choice of law in defamation disputes.

The desire to criticize traditional jurisdictional rules is misplaced. The effects of cyber-defamation remain the same in real-space, and traditional choice-of-law regimes are in no way confounded by cyberspace. Cyberspace is neither unique nor special for choice-of-law purposes, and as a result, there exists no reason to single out cyber-defamation as something

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128. *Old Doctrines on a New Frontier*, *supra* note 11, at 56.

129. *The Scientological Defenestration*, *supra* note 5, at 363, 374; *see also* *Reno v. ACLU*, 521 U.S. 844, 896-97 (1997) (finding Internet communications analogous to traditional forms of speech); *see generally* *EDIAS Software, Int'l v. BASIS Int'l, Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996). This case arose out of a cyber-defamation dispute. *Id.* Despite that fact, the court, without explicitly stating its methods, chose the applicable law based on where the plaintiff's domicile and principle place of business were located and where the defamatory material was published, mirroring the Restatement (Second). *Id.* at 420; *It's In The Cards, Inc. v. Fuschetto*, 535 N.W.2d 11 (Wis. Ct. App. 1995). This case involved another cyber-defamation dispute where the court determined the applicable law by applying the law of plaintiff's domicile and principle place of business, which was where the defamatory material was published. As in *EDIAS Software*, the choice-of-law approach in *It's In The Cards* falls in perfect alignment with the Restatement (Second). *Id.*; *Tamburo v. Calvin*, No. 94 C 5206, 1995 WL 121539 (N.D. Ill. Mar. 17, 1995). *Tamburo* also involved a cyber-defamation dispute where the court found no difficulty or need to apply new choice-of-law regimes.

129. *EDIAS Software*, 947 F. Supp. 413.

130. *The Scientological Defenestration*, *supra* note 5, at 363.

in need of reformulated choice-of-law rules. Nor is there a need to abandon traditional choice-of-law rules. Besides, proposed alternatives are difficult to apply, unreasonable, and serve only to strip states of their sovereignty over cyber-defamation disputes.

As for whether traditional choice-of-law regimes are confounded by cyber-disputes arising out of other areas of law, it would seem that the answer would be no. Just as cyber-defamation poses no difficulty for traditional choice-of-law regimes, cyber-contracts, for example, should also pose no difficulty. Similarly, other traditional choice-of-law methods<sup>131</sup> should fare just as well in cyberspace as the Restatement (Second) does. Nevertheless, as far as the application of the Restatement (Second) to cyber-defamation disputes is concerned, there is nothing different or unique about cyberspace warranting the modification and/or abandonment of traditional choice-of-law regimes for cyber-defamation disputes. In the end, the constant slandering of traditional choice-of-law regimes for cyber-defamation disputes must give way to the dull reality of real-space.

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131. See SHREVE, *supra* note 12.

