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Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by *Gutnick v. Dow Jones & Co.*

Shawn A. Bone

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Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by *Gutnick v. Dow Jones & Co.*[†]

Shawn A. Bone*

*Reputation, reputation, reputation! O, I have lost my reputation! I have
lost the immortal part of myself, and what remains is bestial. My
reputation, Iago, my reputation!*¹

*The purest treasure mortal times afford
Is spotless reputation: that away,
Men are but gilded loam or painted clay.*²

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* Candidate for J.D., Washington and Lee University School of Law, May 2005; B.S., Southwest Missouri State University, May 2002. I would like to thank all of the persons who helped with this Note, including my mother, Brenda Bone, who imbued me with respect for a person's good name. Special thanks go to the following: Professor Rick L. Kirgis, whose questions and comments served as the foundation for my solution to the *Gutnick* conundrum; Professor Brian C. Murchison, who taught me much about the purpose of defamation law; Dean David F. Partlett, who brought *Gutnick* to my attention; and the editors of this piece, who put up with my verbosity to no end. No list of thanks would be complete if I failed to mention Stephanie McKee, who put up with long hours, grouchy conversation, and stress attacks as this Note took shape, without ever once sullyng my reputation or reducing my status in her eyes. Thank you all; this Note is as much yours as it is mine.

1. WILLIAM SHAKESPEARE, THE TRAGEDY OF OTHELLO: THE MOOR OF VENICE, in THE COMPLETE WORKS OF WILLIAM SHAKESPEARE 935, act 2, sc. 3, lines 256–59 (William Aldis Wright ed., Garden City Publishing Co. 1936).

2. WILLIAM SHAKESPEARE, THE TRAGEDY OF KING RICHARD THE SECOND, in THE COMPLETE WORKS OF WILLIAM SHAKESPEARE, *supra* note 1, at 351, act 1, sc. 1, lines 180–84.

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I. Introduction

Shakespeare's Moor of Venice, Othello, exemplifies the lengths a person will resort to in clearing one's reputation.³ Duped by Iago, Othello believes himself to be a cuckold. With his wife supposedly in the arms of another man, Iago convinces Othello that if his peers hear of this affair, it will be the end of the good fortune that led to Othello's rise to high rank in the Venetian military.⁴ With the thought of a soured reputation eating at his sanity, Othello reacts with

3. See Shakespeare Resource Center, *Othello, The Moor of Venice*, at <http://www.bardweb.net/plays/18.html> (last updated July 5, 2004) (presenting a synopsis of *Othello*) (on file with the Washington and Lee Law Review). I commend the play to any readers not already familiar with it.

4. See *id.* (discussing the role of Iago in informing Othello of the alleged disloyalty of Othello's new wife).

rage.⁵ He orders the death of his wife's suitor and prepares himself to confront his wife about her infidelity.⁶ It is only after Othello kills his wife that he learns of Iago's manipulations and the false statements Iago made impugning Desdemona's honor.⁷ It is the consummate tragedy.

Transport Desdemona forward a few hundred years. Iago has not told Othello directly of Desdemona's alleged betrayal; instead, he is a reporter and has printed a denigrating story about the affair on the website of *The Venetian News*, which is read by people around the globe.⁸ Desdemona's reputation is her gateway to the world community; it goes before her to tell others of her honesty, trustworthiness, and ethos.⁹ It is the first thing that ingratiates Desdemona to her peers, and it is the last thing she wants to see tarnished.¹⁰ The article has falsely defamed her, and she has a right to see that reputational harm redressed in a court of law.¹¹ As Shakespeare recognized centuries ago, persons who have lost their reputation are left with little else, for one who has a bad reputation is worth little.¹²

Yet the remedy that Venice has a right to afford to Desdemona's reputation has traditionally been limited to the reputational harm suffered within its geographical boundaries.¹³ This was historically sound because the harm caused by a defamatory statement was generally confined to a single geographic zone, which had an interest in protecting its citizens from harm.¹⁴

5. See *id.* (noting the anger of Othello when he hears of the betrayal); see also *supra* note 1 and accompanying text (relating the value of personal reputation).

6. See Shakespeare Resource Center, *supra* note 3 (describing the lengths to which Othello and Iago resort in trying to stop the illicit affair and protect Othello's esteem).

7. See *id.* (stating the climax of the play, where Othello learns of Iago's betrayal after strangling his innocent wife).

8. See *id.* (indicating that Othello had been sent to Cyprus by the Duke of Venice). I ask the indulgence of the reader in calling this a newsworthy story, and assuming that to be the case, Iago the reporter has a strong journalistic desire to make it known to the public at large.

9. See BLACK'S LAW DICTIONARY 1307 (7th ed. 1999) (defining reputation as "[t]he esteem in which a person is held by others").

10. See *Grant v. Reader's Digest Ass'n*, 151 F.2d 733, 734 (2d Cir. 1945) ("A man may value his reputation even among those who do not embrace the prevailing moral standards . . .").

11. This is the principle justification for tort recovery for defamation. See *infra* Part II (describing the nature of defamation law and its elements).

12. See *supra* note 2 and accompanying text (noting the role of reputation in the stature of a person).

13. See *infra* Part II.B (analyzing the congruence of the publication rule and geographical harm limitation in defamation).

14. See *infra* Part II.C (examining the established method of choice of law in defamation). The focus of defamation has traditionally been the harm caused by the plaintiff and not the form of dissemination of information chosen by the defendant. See *infra* Part II.A (discussing the

As communications technology advanced, however, the reach of the harm to reputation outstripped the reach of the interest of a single state in offering full legal redress for that harm.¹⁵ With the advent of the Internet, Iago's words can now reach around the globe at the push of a button, leaving Desdemona with great harm and Venice with a question of whether it can, under choice of law principles, extend its own law from the physical world into the cyber-world to protect her.¹⁶ How does the physical world regulate defamatory communications on the Internet through choice of law concepts, when these communications defy the limits of the physical world?¹⁷

This Note offers a modest proposal as an answer to this important choice of law problem, attempting to chart both Desdemona and Iago a course in the treacherous waters of international Internet defamation. Part II outlines the elements of a cause of action in defamation¹⁸ and the requirement of publication, as well as traditional choice of law for a defamation action.¹⁹ Part

centrality of harm to an action for defamation).

15. See *infra* Part II.C (discussing the problems of increased technology in choice of law in defamation). This issue caused different jurisdictions to adopt one of two resolutions to the problem of interjurisdictional defamation, either allowing a single action for all harm caused or allowing the plaintiff to pursue multiple actions in multiple locations (recovering only the harm caused in each jurisdiction). See *infra* Part II.B (analyzing the single publication rule in defamation).

16. This question of interests has caused commentators to split into two general camps: those who advocate transposing traditional choice of law onto the Internet and those who advocate a new legal regime for the Internet. See *infra* Part III (explaining the geographic Internet approach to choice of law); *infra* Part V.A (rejecting the independent Internet approach to choice of law). Note that Iago has an interest in seeing a clear resolution to this choice of law problem as well so that he can calculate the costs of printing the article in light of the liability he might have for defamation. See *infra* Part IV.B (positing the problems with a choice of law system that totally ignores the interests of the publisher). It is always wise to remember the statement of the Supreme Court in *New York Times Co. v. Sullivan*: "Whatever is added to the field of libel is taken from the field of free debate." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)).

17. This question was posed more eloquently by Professor Henry Perritt when he queried: "Whose substantive legal rules apply to a defamatory message that is written by someone in Mexico, read by someone in Israel by means of an Internet server located in the United States, injuring the reputation of a Norwegian?" Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 3 (1996).

18. Defamation in this Note should be understood in historical terms and not as modified by constitutional interpretation in the American courts. Defamation in America has been changed by the Supreme Court via the protections given to citizens in the First Amendment. Most other countries do not have free speech protection like this, and the tort, where applicable, still maintains most of its common law characteristics. These have the most to do with the international choice of law issues addressed here.

19. See *infra* Part II (addressing the tort of defamation in the abstract and identifying publication as the essential element to the cause of action for traditional choice of law).

III addresses how these geography-oriented choice of law considerations for defamation have been challenged by the boundless Internet, even though courts have tried to apply them in due course.²⁰ Part IV explores how the Australian High Court, in *Gutnick v. Dow Jones & Co.*,²¹ used the traditional state-oriented approach to defamation choice of law to apply local law at the cost of ease of international communication.²² This Part also analyzes the logical errors committed by both the High Court and Dow Jones in resolving the thorny issue of choice of law for international defamatory Internet communication.²³ Finally, Part V posits a new approach to choice of law for international defamation on the Internet, using arbitration to establish the law of a single country to apply in an action for defamation, if the plaintiff opts not to take a binding determination of falsity with a concurrent duty on the defendant to retract the statement.²⁴ But first it is important to understand the purpose of the tort of defamation and its original elements.

II. Defamation, Publication, and the Situs of Harm

The tort of defamation is meant to remedy harms that cannot be quantified in terms of personal physical damage but that are more ethereal and social.²⁵

20. See *infra* Part III (exploring geographic choice of law for the Internet).

21. *Gutnick v. Dow Jones & Co.* (2002) 210 C.L.R. 575 (Austl.). For a more thorough description of the issues involved in the case and the questionable resolution adopted by the Australian High Court, see *infra* Part IV.

22. See *infra* Part IV.A (discussing the factual and procedural history of *Gutnick* and the decision handed down by the Australian High Court).

23. See *infra* Part IV.B (arguing that the approach used by the Australian High Court is too jurisdictionally oriented to be practical in Internet defamation suits); *infra* Part IV.C (noting that the alternative presented by Dow Jones is untenable in resolving the *Gutnick* conundrum).

24. See *infra* Part V (offering a new choice of law forum for international defamation, utilizing arbitration to either award the plaintiff a retraction of the false defamatory statement or determine the law governing a subsequent action for damages).

25. See WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON TORTS 771 (W. Page Keeton et al. eds., 5th ed. 1984) (discussing the purpose of defamation law). This Note will not attempt to give a thorough description of the tort of defamation in all of its legal glory. It is sufficient for this Note to simply outline the tort and note the interplay between its elements and traditional choice of law. Prosser and Keeton noted the eccentricities of defamation as follows:

It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer has ever had a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm.

"[D]efamation is an invasion of [a person's] interest in reputation and good name."²⁶ The tort's objective is to rectify the harm caused from statements made by one person to another about a third, so the content of the statement and the form of dissemination are central to the tort.²⁷ But there is no steadfast rule on what is or is not defamatory.²⁸ Instead, the tort has an ad hoc nature due to the competing concerns of freedom of expression and freedom from personal invasion and reputational insult.²⁹ There is a general consensus, however, on the form of the cause of action, and the need for a publication as the necessary link between insult and injury.³⁰ This Part first explores defamation in the

Id. at 771–72 (footnote omitted).

26. *Id.* at 771. To put it another way, "[d]efamation is . . . a communication that tends to . . . diminish the respect, good will, confidence or esteem in which [a person] is held, or to excite adverse or unpleasant feelings about [that person]." VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 838 (10th ed. 2000).

27. See ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS 63–64 (2d ed. 1994) (addressing the elements of a cause of action in defamation, be it based on libel or slander). The tort, beyond its remedial function, also tries to serve as a deterrent to persons who might cause reputational harm to another. See SCHWARTZ, KELLY & PARTLETT, *supra* note 26, at 833 (explaining that the origin of punishment for defamation grew out of the belief that it was a sin to harm another's good name).

28. See PROSSER & KEETON, *supra* note 25, at 773 ("[T]he courts have not been altogether in harmony in dealing with [defamation], so that very often a particular rule or holding is peculiar to a small number of jurisdictions."). Prosser and Keeton do offer this general guideline for defining what is defamatory:

A defamatory communication usually has been defined as one which tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided. . . . Defamation is . . . that which tends to injure "reputation" in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.

Id. Note that the tort can only be quantified with respect to the harm caused by the statement because of communication to another. "[Defamation] necessarily . . . involves the idea of disgrace . . ." *Id.*

29. See *id.* at 772–73 (outlining the common law debate between protection from reputational harm and freedom of expression). Prosser and Keeton, in their influential treatise on tort law, explain that one of the reasons that defamation is such a morass is its entwinement with notions of censorship and sedition. See *id.* at 772 (positing that the use of the Star Chamber in England to punish seditious libel led to a need to balance defamation with freedom of expression); see also SCHWARTZ, KELLY & PARTLETT, *supra* note 26, at 833–34 ("[F]urther development of the law of defamation was arrested when it encountered the rising tide of sentiment in favor of freedom of speech and the press . . ."). This need for freedom of thought and communication, especially where the statements are true, permeates the law of defamation, although Prosser and Keeton argue that recently the tort has been used with more effectiveness. See PROSSER & KEETON, *supra* note 25, at 773 (noting that the general trend, especially in newspaper libel cases, is for a lower threshold of liability).

30. See PROSSER & KEETON, *supra* note 25, at 797–802 (explaining the role of publication

abstract³¹ and then discusses publication of the defamatory statement as the heart of the tort.³² Finally, this Part describes how publication and choice of law principles³³ intersect to resolve the question of what law to apply in a multijurisdictional defamation suit.³⁴

A. The Tort in Isolation

Defamation law, which includes both libel and slander, was the original area of personal reputational protection courts recognized for individuals.³⁵ The tort solely addresses the standing of a person in society; it rarely deals with any personal affront caused by others and even then only in connection with damages.³⁶ Defamation is concerned with a reputational interest, "since it involves the opinion which others in the community may have, or tend to have, of the plaintiff."³⁷ The two traditional forms of action for defamation, libel and slander, roughly divide defamatory communication into the written and the spoken word.³⁸ But generally understood, a modern suit based on defamation requires four elements:

in defamation); *see also infra* Part II.B (describing the need for publication for actionable defamation).

31. *See infra* Part II.A (outlining the elements of defamation).

32. *See infra* Part II.B (addressing the need for communication both as an element to the tort and as the feature setting the state's interest in the conduct of the tortfeasor).

33. Choice of law is defined as "[t]he question of which jurisdiction's law should apply in a given case." BLACK'S LAW DICTIONARY 234 (7th ed. 1999). "Disputes involving what are typically thought of as 'choice of law' problems can arise in two settings: cases with facts connected to different jurisdictions, and cases involving enactments of different lawmakers within a single jurisdiction." DAVID P. CURRIE ET AL., CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 2 (6th ed. 2001). This Note is concerned with the former over the latter.

34. *See infra* Part II.C (reviewing the traditional concepts of choice of law in tort and how those apply to multijurisdictional defamation actions).

35. *See* PROSSER & KEETON, *supra* note 25, at 772 (discussing the growth of defamation protection in England and its concern with a person's community standing).

36. *See id.* at 771 (outlining the nature of liability in a defamation action); *id.* at 773 (arguing that the central concern in an action for defamation is not what is said but what effect that statement has on another).

37. *Id.* at 771 (footnote omitted).

38. *See id.* at 785–87 (noting the distinctions between libel and slander). This is a drastic oversimplification of the distinctions between libel and slander. Today, the delineation between the two has been blurred to a great extent, especially as technology has changed the way people communicate. *See id.* at 786–87 (describing the current state of the law in regards to what is considered libel and what is considered slander); *see also* Shor v. Billingsley, 158 N.Y.S.2d 476, 479–86 (N.Y. Sup. Ct. 1956) (extending libel to a spoken radio broadcast). This Note does

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher;³⁹ and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.⁴⁰

It is the issue of publication, the second element of the tort listed above, that is of greatest concern to choice of law in multijurisdictional defamation suits.

B. The Requirement of Publication

Because harm to reputation is the concern in defamation suits, courts require a plaintiff to prove that the defamatory statements were made to a third person.⁴¹ This requirement of publication can also be satisfied through

not delve into the fine distinctions in an action for libel versus one for slander because the key element in establishing choice of law—publication—is common to both forms. *See* PROSSER & KEETON, *supra* note 25, at 797 (relating the necessity for publication in any action for defamation).

39. This requirement of fault is associated with the *Sullivan* line of cases, but was not, and most likely still is not, an element at common law. *See* RESTATEMENT (SECOND) OF TORTS § 580A cmt. a (1977) (explaining that the fault requirement is constitutional in nature); *id.* § 580B cmt. b (noting that the common law had no fault requirement); *see also* MARC A. FRANKLIN ET AL., *MASS MEDIA LAW: CASES AND MATERIALS* 295 (6th ed. 2000) ("At common law a defamation plaintiff made out a prima facie case [of defamation] by showing that the defendant published a defamatory statement concerning the plaintiff."). This element of negligence can be ignored, except as noted in the conjunction with the requirement of publication. *See infra* Part II.B (relating the role of negligence in publishing defamation).

40. RESTATEMENT (SECOND) OF TORTS § 558 (1977). The idea of falsity is central to the tort of defamation. Truth has long been held to be an absolute defense to liability for allegedly defamatory statements, but at common law the burden was on the defendant to prove the truth of the story. *See* SCHWARTZ, KELLY & PARTLETT, *supra* note 26, at 844 ("At common law there has been general agreement that an action of defamation will lie only if the statement is both defamatory and false. . . . [T]ruth has been consistently treated as an affirmative defense . . .").

41. *See* PROSSER & KEETON, *supra* note 25, at 797–98 ("Where there is no communication to any one [sic] but the plaintiff . . . no tort action can be maintained upon the theory of defamation."); *see also* SACK & BARON, *supra* note 27, at 121 ("[A] person may write the most outrageous contrived accusations about another and either burn the document or send it to the person about whom they are written without incurring liability for defamation."). Publication is not limited to the connotative meaning given it by most people, that of printing a book or magazine, but extends to anything spoken, written, or comprehended by another person. *See id.* at 121–22 (observing that publication can happen in many different ways). There are limits to the doctrine of publication. "Courts have never imposed strict liability on the defendant for accidental and non-negligent publication of defamatory matter." PROSSER & KEETON, *supra*

republication of the original defamatory statement.⁴² The republisher would then be liable for the repetition of the information, and the original publisher would be liable for the harm caused by both the original publication and the subsequent publications, if they were reasonably foreseeable.⁴³ Most American jurisdictions, either by court decision or legislative action, have placed an important limit on the republication rule, commonly described as the single publication rule.⁴⁴ The Restatement (Second) of Torts Section 577A describes the rule as follows:

(3) Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.

(4) As to any single publication, (a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered in the one action; and (c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.⁴⁵

The single publication rule is temporal in nature, and only contemporaneous multiple publications will receive its protection.⁴⁶ "The test of whether the

note 25, at 803.

42. See SACK & BARON, *supra* note 27, at 125 (discussing republication as a form of publication). The traditional rule for republication was strict liability for any repetition if the original statement was defamatory. See *id.* (explaining that republication was treated the same as the original publication at common law). Courts have developed a number of exceptions to this traditional rule, but their precise application is beyond the scope of this Note. See *id.* (outlining the limitations to the republication rule).

43. See *id.* at 125–27 (examining the liability of a publisher and a republisher). Republication liability is premised on the theory that "[t]alebearers are as bad as talemakers." *Houston Chronicle Publ'g Co. v. Wegner*, 182 S.W. 45, 48 (Tex. Civ. App. 1915).

44. See SACK & BARON, *supra* note 27, at 363–65 (outlining the scope and limitations of the single publication rule); see also *Ogden v. Ass'n of the U.S. Army*, 177 F. Supp. 498, 502 (D.D.C. 1959) ("It is no longer the law that every sale . . . of the publication creates a new cause of action. . . . To permit a separate suit to be brought in regard to the sale . . . of every single copy of a modern publication would be inconceivable and intolerable."). The general rule in common law countries is that "each publication of a communication provides a separate cause of action." SACK & BARON, *supra* note 27, at 363; see also *Gutnick v. Dow Jones & Co.* (2002) 210 C.L.R. 575, 601–05 (Austl.) (declining to adopt the American single publication rule).

45. RESTATEMENT (SECOND) OF TORTS § 577A (1977). "The rule is justified by the necessity of protecting defendants and the courts from the numerous suits that might be brought for the same words if each person reached by such a large-scale communication could serve as the foundation for a new action." *Id.* § 577A cmt. c.

46. See SACK & BARON, *supra* note 27, at 364 (noting that new editions of previous works are generally not afforded broad protection under the single publication rule); see also *Backus v. Look, Inc.*, 39 F. Supp. 662, 663 (S.D.N.Y. 1941) (ruling that single reprints of an issue of a

article is a republication or a repetition should not depend on an interval of time, or a separate sale, but upon the answer to the question, was the act of the defendant [to publish] a conscious independent one."⁴⁷

C. Locating Defamation by the Situs of Harm

Because publication to a third person is the essential element for actionable defamation, it has long been the central consideration in defamation choice of law.⁴⁸ Traditional choice of law principles, embodied in the First Restatement of Conflict of Laws,⁴⁹ located the law governing a tort dispute by

newspaper sent to subscribers that lost their original copy did not constitute republication). This limitation is also thought to apply to later rebroadcasts of allegedly defamatory comments on radio or television but not to the reprinting of reports from news services like the Associated Press. See RESTATEMENT (SECOND) OF TORTS § 577A cmt. d (1977) (listing republications that the single publication rule should not extend to cover); SCHWARTZ, KELLY & PARTLETT, *supra* note 26, at 865 (discussing the republication rule); see also *Firth v. New York*, 775 N.E.2d 463, 466 (N.Y. 2002) (extending the republication rule to modifications of a website that are unrelated to the alleged defamatory material). "The . . . republication exception has no application at all to the addition of unrelated material on a Web site, for it is not reasonably inferable that the addition was made either with the intent or the result of communicating the earlier . . . defamatory information to a new audience." *Id.*

47. SACK & BARON, *supra* note 27, at 364–65 (quoting *Barres v. Holt, Rinehart & Winston*, 330 A.2d 38, 46 (N.J. Super. Ct. Law Div. 1974), *aff'd*, 359 A.2d 501 (N.J. Super. Ct. App. Div. 1976), *aff'd*, 378 A.2d 1148 (N.J. 1977)).

48. See James R. Pielemeier, *Choice of Law for Multistate Defamation—The State of Affairs as Internet Defamation Beckons*, 35 ARIZ. ST. L.J. 55, 58–60 (2003) (outlining the traditional choice of law rules for defamation as developed in the First Restatement of Conflict of Laws and its reliance on communication as the key event to locate a defamation suit). For a thorough critique of the development and implementation of the First Restatement of Conflict of Laws rules for defamation and other early approaches to defamation choice of law, see William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971–78 (1953). Professor Prosser was singularly unhappy about the state of choice of law in defamation at the time he wrote this famous article: "The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. . . . In connection with interstate publication, it offers peculiar and baffling difficulties." *Id.* at 971 (footnote omitted).

49. The First Restatement, as a compilation of the conflict of laws principles in the common law of the United States, was very influential, although it eventually gave way to other choice of law systems. See Pielemeier, *supra* note 48, at 60–66 (discussing the move away from the situs of harm rule). Common law jurisdictions, however, still look to the situs of harm to resolve choice of laws issues. See *infra* Part IV.A.2 (explaining the situs of harm rule adopted in *Gutnick*). This is in accord with the vested rights choice of law concept that took hold in Europe and spread to European colonies. See CURRIE ET AL., *supra* note 33, at 2–5 (outlining the historical foundation of choice of law). This idea of vested rights derives its force from the sovereign power of a state to govern its territory. "No state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law,

where the harm had occurred.⁵⁰ "In defamation cases, 'the place of the wrong' was the jurisdiction where the defamatory matter was heard or read by a third person, regardless of the place of broadcasting or writing."⁵¹ This was legally sound because it could be presumed that publication occurred in a place where the plaintiff had a reputation to be harmed.⁵² Therefore, it was the jurisdiction where both publication and harm occurred that was tasked with remedying the affront suffered.⁵³ This provided a twofold recovery to plaintiffs: (1) damages as measured by a jury of peers in the location that knew them the best, and (2) reputation vindication in a public forum within the local community.⁵⁴ In sum, this recovery returns plaintiffs to the standing they held in the community prior to the alleged defamation.⁵⁵ But that choice of law system did not always result in only one jurisdiction that met the requirements for applying its forum law to a defamation dispute.⁵⁶ Here is where the value of the single publication

but . . . rights . . . may . . . depend upon the law in force in some other state . . ." RESTATEMENT OF CONFLICT OF LAWS § 1 (1934).

50. See SACK & BARON, *supra* note 27, at 759 ("The place of the wrong was the place where the last occurrence necessary to create liability on the part of the actor took place."); see also Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904) ("The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found."); Ala. Great S. R.R. Co. v. Carroll, 11 So. 803, 807 (Ala. 1892) ("The negligent infliction of an injury here . . . creates a right of action here, which, being transitory, may be enforced in any other state or country the comity of which admits of it; but for an injury inflicted elsewhere . . . the aggrieved party must look to the local law . . .").

51. SACK & BARON, *supra* note 27, at 759 (quoting RESTATEMENT OF CONFLICT OF LAWS § 378 (1934)).

52. See RESTATEMENT OF CONFLICT OF LAWS § 377, cmt. 5, illus. 7 (1934) (outlining how the situs of harm rule worked for defamation). "A, broadcasting in state X, slanders B. B is well and favorably known in state Y and the broadcast is heard there by many people conversant with B's good repute. The place of wrong is Y." *Id.*

53. See Gutnick v. Dow Jones & Co. (2002) 210 C.L.R. 575, 633 (Austl.) (Kirby, J., concurring) (relating the situs of harm principle to vindication by a court of law).

54. See *id.* at 633–34 (Kirby, J., concurring) (explaining that the purpose of defamation law is to provide a plaintiff a redress for injury, in terms of both a tangible monetary recovery and an intangible restoration of reputation).

55. See *id.* at 633 (Kirby, J., concurring) ("[T]he purpose of the tort of defamation . . . is to provide vindication to redress the injury done to a person's reputation . . ."). Note that this principle, at least in terms of the specific tort of defamation, melds well with one of the central purposes of tort law, which is to place plaintiffs back in the same position as they were in prior to the harm suffered. See SCHWARTZ, KELLY & PARTLETT, *supra* note 26, at 1 ("[T]he major purposes of tort law [are]: . . . (4) to restore injured parties to their original condition, insofar as the law can do this, by compensating them for their injury.").

56. See RODNEY A. SMOLLA, LAW OF DEFAMATION, § 12.03[2][b] (1992) ("A literal application of the 'place of the wrong' rule leads to the bizarre result that a multistate

rule was best felt; because plaintiffs could only recover once for all of the harm caused by a defendant's defamatory statement, there was a single suit, generally located in the domicile of the plaintiff.⁵⁷

As technology changed the way communications were disseminated, however, the classic principles of defamation and choice of law in tort went from harmony to conflict.⁵⁸ Not only could a plaintiff's reputation be spread worldwide by the simple knowledge of someone's position, social status, or business, but also a defamatory statement could be broadcast across state and international boundaries.⁵⁹ The *lex loci delicti*—the place of the wrong—system was stretched to the breaking point for the plaintiff and defendant: The plaintiff was able to remedy only part of the damage suffered due to the geographical confines of a lawsuit, and the defendant was faced with expansive multijurisdictional liability unless a single publication state was selected as the choice of law.⁶⁰ As communications technology advanced, the effect of a statement became more and more widespread, until the Internet gave communicators the ability to send one line to the entire world instantaneously.⁶¹ The courts then faced a stark choice: either (1) divide the cyber-world into sovereign territory through the interest of a physical state, or (2) leave the cyber-world to regulate itself in the name of freedom of information.⁶²

publication of a defamatory statement gives rise to a separate tort in each state in which publication occurs, and is governed by the law of each such state."); Pielemeier, *supra* note 48, at 58–59 (noting the problem with the situs of harm rule in interstate defamation cases); *see also infra* Part IV.B (discussing the problem with scope of liability for the media in the aftermath of the *Gutnick* decision).

57. *See* SMOLLA, *supra* note 56, § 12.03[3][b] (analyzing the value of the single publication rule in traditional choice of law).

58. *See Gutnick*, 210 C.L.R. at 603 ("It was not until the middle of the twentieth century and the advent of widely disseminated mass media of [sic] communication . . . that choice of law problems were identified.").

59. *See* SMOLLA, *supra* note 56, § 4.13[4] (explaining that the situs of harm rule, like the republication rule, is illogical in light of modern communications technology).

60. *See supra* notes 56–57 and accompanying text (positing the problem with the *lex loci delicti* rule in interstate defamation disputes). *Lex loci delicti* means "[t]he law of the place where the tort was committed." BLACK'S LAW DICTIONARY 923 (7th ed. 1999).

61. *See* Pielemeier, *supra* note 48, at 111 (describing how a person can be defamed on the Internet).

62. *See id.* at 111–13 (relating the two competing theories of Internet libel choice of law); *see also infra* Part III (analyzing the geographic Internet approach); *infra* Part V.A (explaining the independent Internet approach).

III. *The Balkanization of the Internet in the Name of International Choice of Law*

The Internet knows nothing of jurisdictional boundaries.⁶³ "It is ubiquitous, borderless, global and ambient in its nature."⁶⁴ It defies isolationism; the information posted in cyberspace is available to all who desire it.⁶⁵ "These special features of the Internet present peculiar difficulties for the legal regulation of its content and, specifically, for the exclusion of access in defined jurisdictions."⁶⁶ Yet traditional choice of law, meant to respect physical sovereignty, is thought to apply to this borderless Internet.⁶⁷ The argument is that a nation has the duty to regulate activity within its borders, and although the activity on the Internet may only happen in cyberspace, it has harmful effects in the physical world that a state should not permit.⁶⁸ A state now has a zone of regulation within which it can act, and the Internet now has a sovereign border imposed upon it. This Part examines the growth of this "geographic"⁶⁹ Internet⁷⁰ and the international conflicts the theory has created while arguing that it is not the best approach to Internet conflict of laws in defamation.⁷¹

63. See *Gutnick v. Dow Jones & Co.* (2002) 210 C.L.R. 575, 625 (Austl.) (Kirby, J., concurring) ("[T]he Internet is global. As such, it knows no geographic boundaries.") As Justice Kirby noted: "[The Internet's] basic lack of locality suggests the need for a formulation of new legal rules to address the absence of congruence between cyberspace and the boundaries and laws of any given jurisdiction." *Id.* (Kirby, J., concurring).

64. *Id.* at 616 (Kirby, J., concurring). Justice Kirby noted that there were over 650 million people connected to the Internet. See *id.* (Kirby, J., concurring) (estimating the number of Internet users).

65. See *id.* at 617–18 (Kirby, J., concurring) (explaining the inability of the Internet to isolate users).

66. *Id.* at 618 (Kirby, J., concurring).

67. See *infra* Part III.A (noting the argument that traditional choice of law can be applied to the Internet); *infra* Part III.B (discussing the *Yahoo!* dispute as an application of traditional choice of law to the Internet); see also Part IV.A.2 (relating the Australian High Court's adoption of a geographical choice of law rule for the Internet).

68. See *infra* Part III.A (discussing the central tenant of the geographic Internet theory).

69. This Note uses the term "geographic Internet" to represent the theory that Internet legal disputes are amenable to resolution through the use of the law of a defined physical forum (a geographic choice of law), treating Internet transactions no different than transactions in the physical world. See *infra* Part III.A (discussing the geographic Internet theory). But see *infra* Part V.A (describing the alternative theory that the Internet cannot be regulated via traditional choice of law and should be free to develop its own community law).

70. See *infra* Part III.A (examining the argument advocating imposing geographical law on Internet activity).

71. See *infra* Part III.B (discussing the *Yahoo!* dispute as an example of the problems with the geographic Internet theory).

A. The Geography of the Internet

The situs of harm principle seeks a sovereign law to apply to a defamation dispute.⁷² The geographic Internet theory argues that these same sovereignty considerations should apply to Internet interaction, even though national boundaries do not exist there.⁷³ Activity on the Internet, it contends, can be tied to the physical location of the two (or more) persons interacting with one another on the Internet at a given time.⁷⁴ As a result, the activity of one of these parties can be regulated via the law of one of the geographic locations where the Internet users were located or the harm caused there occurred, in much the same way that a dispute in the physical world is governed.⁷⁵ "Territorial

72. See *supra* Part II.C (noting the role of the situs of harm principle in finding a law to govern a multistate defamation dispute); see also EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 10–11 (3d ed. 2000) (arguing that the original conception of conflict of laws was the scope of imperial power); Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 *IND. J. GLOBAL LEGAL STUD.* 475, 476 (1998) ("A nation possesses territorial sovereignty in the sense that it exercises the principal means of authority within a given territory.").

73. See Jack L. Goldsmith, *Against Cyberanarchy*, 65 *U. CHI. L. REV.* 1199, 1201 (1998) (arguing that Internet harm "do[es] not inherently warrant any more deference by national regulators, and [is] not significantly less resistant to the tools of conflict of laws, than other transnational transactions"). But see *infra* Part V.A (noting the rejection of national sovereignty over the Internet by some scholars).

74. See Goldsmith, *supra* note 72, at 476 (positing that the Internet can be located in the real world via its users). "The Internet is not, as many suggest, a separate place removed from our world. Like the telephone, the telegraph, and the smoke signal, the Internet is a medium through which people in real space in one jurisdiction communicate with people in real space in another jurisdiction." *Id.*; see also Cherie Dawson, Note, *Creating Borders on the Internet: Free Speech, the United States, and International Jurisdiction*, 44 *VA. J. INT'L LAW* 637, 639–40 (2004) (arguing that the geographic Internet approach used in *Gutnick* is proper for Internet conflict of laws).

75. See Goldsmith, *supra* note 73, at 1250 (concluding that physical choice of law rules can be used to regulate the Internet). Goldsmith viewed the issue as follows:

There is no general normative argument that supports the immunization of cyberspace activities from territorial regulation. And there is every reason to believe that nations can exercise territorial authority to achieve significant regulatory control over cyberspace transactions. Resolution of the choice-of-law problems presented by cyberspace transactions will be challenging, but no more challenging than similar problems raised in other transnational contexts.

Id. But see LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 188–209 (questioning whether a nation-state can actually have sovereign regulatory power over the Internet).

For an example of the geographic Internet theory in action, see *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996). There, a panel of the Sixth Circuit ruled that the community standard by which Internet obscenity is to be measured is the physical community where the person claiming an obscenity violation is located. See *id.* at 711–12 (refusing to adopt a cyberspace-wide community standard for obscenity). *Thomas* dealt with Internet pornography that had been

sovereignty supports national regulation of persons within the territory who use the Internet. . . . When a person abroad uses the Internet to produce harmful local effects, the local sovereign is justified in regulating these local effects."⁷⁶ Traditional choice of law, therefore, should not be abandoned merely because it might be hard to apply to Internet transactions.⁷⁷

The premise of the geographic Internet theory is jurisdictional power; the state has a duty to protect victims and punish wrongdoers within its territory, be it physical or cyber.⁷⁸ "[A] nation can regulate people and equipment in its territory to control the local effects of the extraterritorial activity. Such indirect regulation is how nations have, with varying degrees of success, regulated local harms caused by other communications media with offshore sources and no local presence."⁷⁹ As long as Internet activity can be tied to a physical place,

viewed by an Internet user in Tennessee. *See id.* at 704–06 (relating the facts of *Thomas*). The panel used the plaintiff's Tennessee community as the benchmark for obscenity, stating that it was a voluntary choice by the purveyor of the potentially obscene material not to prevent users from locales that have stricter obscenity conceptions from accessing the material. *See id.* at 711 ("If Defendants did not wish to subject themselves to liability in jurisdictions with less tolerant standards for determining obscenity, they could have refused to give passwords to members in those districts, thus precluding the risk of liability."). Although *Thomas* did not involve choice of law per se, this attempt to relate cyber-activity to geographical location is at the core of the geographic Internet theory.

76. Goldsmith, *supra* note 72, at 476–77.

77. *See* Goldsmith, *supra* note 73, at 1235 (explaining that Internet choice of law is no harder than current international choice of law). Goldsmith argued the similarities as follows:

The application of a single law to complex multijurisdictional conflicts will sometimes seem arbitrary and will invariably produce spillover effects. But as explained above, the arbitrariness of the chosen law, and the spillovers produced by application of this law, inhere in all conflict situations in which two or more nations, on the basis of territorial or domiciliary contacts, have a legitimate claim to apply their law. When in particular contexts the arbitrariness and spillovers become too severe, a uniform international solution remains possible. Short of such harmonization, the choice-of-law issues implicated by cyberspace transactions are no more complex than the issues raised by functionally identical multijurisdictional transactions that occur in real space all the time.

Id.

78. *See* Goldsmith, *supra* note 72, at 476–77 (positing the sovereign duty of the state to regulate the Internet).

79. Goldsmith, *supra* note 73, at 1222. Goldsmith noted that Internet activity "involve[s] people in real space in one territorial jurisdiction transacting with people in real space in another territorial jurisdiction in a way that sometimes causes real-world harms." *Id.* at 1200. It is this process of breaking down Internet activity into its component parts that is central to the geographic theory. It is also this process that causes its problems, especially as it intersects with defamation law. *See infra* Part III.B (positing the problems with the geographic theory in light of the *Yahoo!* case); *infra* Part IV (discussing choice of law for Internet defamation as established in *Gutnick* and the problems with that process for plaintiffs and defendants).

the state that governs that location has the power to govern the Internet there.⁸⁰ This state-oriented approach was put to the test in the *Yahoo!* dispute,⁸¹ to which this Note now turns.

B. International Conflict in Conflict of Laws—The Yahoo! Dispute

This geographic Internet theory was implicitly adopted by the French and American courts in resolving the *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*⁸² dispute.⁸³ The case centered on a French law prohibiting the

80. See Goldsmith, *supra* note 73, at 1239–40 (explaining the extent of state power over the Internet). Goldsmith concluded his state power argument as follows:

[C]yberspace is for these purposes no different than real space. Transactions in cyberspace involve real people in one territorial jurisdiction either (i) transacting with real people in other territorial jurisdictions or (ii) engaging in activity in one jurisdiction that causes real-world effects in another territorial jurisdiction. To this extent, activity in cyberspace is functionally identical to transnational activity mediated by other means, such as mail or telephone or smoke signal. . . . And the justification for and legitimacy of regulating local effects is no different. Under current conceptions of territorial sovereignty, a jurisdiction is allowed to regulate extraterritorial acts that cause harmful local effects unless and until it has consented to a higher law (for example, international law or constitutional law) that specifies otherwise.

Id. But see LESSIG, *supra* note 75, at 205 ("I have argued that we should understand the code in cyberspace to be its own sort of regulatory regime, and that this code can sometimes be in competition with the law's regulatory regime."). "While nations argue about what kind of regulation there should be, the code of cyberspace continues to develop with a certain kind of sovereign authority." *Id.* at 206. "The shift is away from the power of government to regulate, and toward the power of individuals to escape government regulation." *Id.* at 207.

81. See *infra* Part III.B (outlining the facts and decision in the *Yahoo!* case).

82. *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *rev'd*, 379 F.3d 1120 (9th Cir. 2004), *reh'g granted*, No. 01-17424, 2005 U.S. App. LEXIS 2166 (9th Cir. Feb. 10, 2005) (en banc). The Ninth Circuit reversed the *Yahoo!* decision based on lack of personal jurisdiction over the French parties to the declaratory judgment action. See *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 379 F.3d 1120, 1123–27 (9th Cir. 2004) (explaining the lack of personal jurisdiction), *reh'g granted*, No. 01-17424, 2005 U.S. App. LEXIS 2166 (9th Cir. Feb. 10, 2004) (en banc). In so doing, the court justified its decision as follows:

France is within its rights as a sovereign nation to enact hate speech laws against the distribution of Nazi propoganda in response to its terrible experience with Nazi forces during World War II. Similarly, LICRA and UEJF are within their rights to bring suit in France against Yahoo! for violation of French speech law. The only adverse consequence experienced by Yahoo! as a result of the acts with which we are concerned is that Yahoo! must wait for LICRA and UEJF to come to the United States to enforce the French judgment before it is able to raise its First Amendment claim. However, it was not wrongful for the French organizations to place Yahoo! in this position.

"exhibition of Nazi propaganda and artifacts for sale."⁸⁴ As part of Yahoo!'s Internet activities, it allowed users to auction items to other users worldwide by displaying the items and soliciting bids.⁸⁵ Included in those items were Nazi memorabilia, the display of which on its auction site, according to several French organizations suing in France, made Yahoo! liable under the pertinent French code provision.⁸⁶ The Tribunal de Grande Instance de Paris sided with the French organizations in the suit, holding Yahoo! liable for facilitating the display of offensive items⁸⁷ and requiring it "to take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes."⁸⁸ Yahoo! subsequently challenged the Tribunal's decision in the United States, seeking a declaratory judgment denying the enforceability of the French order.⁸⁹

Id. at 1126 (footnote omitted). The panel decision left open the question decided by the district court and at issue in this Note, namely the propriety of the application of the First Amendment to the Internet based on a geographic Internet theory.

83. Even though I address both the French and American facets of *Yahoo!*, the pertinent information has been taken from the decision by the U.S. District Court for the Northern District of California, which was later reversed by the Ninth Circuit Court of Appeals. Although the *Yahoo!* opinion I am discussing is no longer good law, the principles behind the opinion are still the prevalent justifications for the geographic Internet theory and exemplify the current legal approach to the Internet. As such, it is still a probative and thought-provoking example of the ills of the geographic Internet theory. On February 10, 2005, the U.S. Court of Appeals for the Ninth Circuit granted Yahoo! an en banc rehearing of the panel decision reversing the U.S. District Court for the Northern District of California. *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, No. 01-17424, 2005 U.S. App. LEXIS 2166 (9th Cir. Feb. 10, 2005). This decision leaves both the *Yahoo!* rationale and the use of the geographic Internet approach to overturn international restrictions on free speech in limbo.

84. *Yahoo!, Inc.*, 169 F. Supp. 2d at 1184.

85. *See id.* at 1183–84 (addressing the factual basis for Yahoo!'s liability under French law).

86. *See id.* at 1184–85 (stating the violations of the statute for which it was alleged Yahoo! was liable).

87. *See id.* (noting the ruling by the Tribunal).

88. *Id.* at 1185 (quoting High Court of Paris, Interim Court Order Nos. 00/05308 & 00/05309 (May 22, 2000) (translation attested accurate by Isabelle Camus, Feb. 16, 2001)). Yahoo! was required to comply by July 2000 but requested reconsideration based on the technological impossibility of meeting the order, which the French court rejected on November 20, 2000. *See id.* (outlining the procedural history of the *Yahoo!* case).

89. *See id.* at 1186 (noting the premise of the *Yahoo!* suit in America). Yahoo! based the declaratory judgment on freedom of speech, contending that "it lacks the technology to block French citizens from accessing the . . . materials which violate the French Order . . . [and] cannot comply with the French order without banning Nazi-related material from Yahoo.com altogether." *Id.* at 1185–86.

The U.S. District Court for the Northern District of California affirmed Yahoo!'s First Amendment right to post material on the Internet, ruling that the French order violated the public policy of the United States and was thus unenforceable.⁹⁰ The court noted that regulation by another nation of the activity of an American citizen within the United States would not be tolerated if that regulation violated American law.⁹¹ Recognizing the importance of that choice of law, the court expressed respect for the law of France: "The government and people of France have made a different judgment based upon their own experience. . . . [T]he Court intends no disrespect for that judgment or for the experience that has informed it."⁹² In making American law the presumptive law of the dispute, the court foreshadowed its ruling. After resolving lingering procedural issues,⁹³ the court reached the question of whether it should accord comity to the French order.⁹⁴ Although recognizing that the French order is "entitled to great deference as an articulation of French law,"⁹⁵ the court rejected the law's viewpoint discrimination as contrary to

90. See *id.* at 1194 (declaring that the French order is null and void as an infringement on the First Amendment rights of Yahoo!).

91. See *id.* at 1186–87 (establishing the foundation for the decision handed down by the court in the *Yahoo!* case). "What is at issue here is whether it is consistent with the Constitution . . . for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation." *Id.* at 1186. What is interesting is that the court, in relying on American law in the dispute, explicitly recognized the universality of the Internet. See *id.* at 1186 (discussing the problems caused by individual nations trying to regulate an information flow that is international in scope).

92. *Id.* at 1187. "A basic function of a sovereign state is to determine by law what forms of speech and conduct are acceptable within its borders." *Id.* at 1186. Even if the court expressed its respect for the decisions made by the French people, that statement is of little consolation to France because its law has been voided. The practical impact of this case is nullification of French law, at least in terms of Internet auctions.

93. See *id.* at 1187–92 (addressing the procedural foundation for a declaratory judgment). The court also rejected a claim by the French defendants that Yahoo! had brought the present action as a way of forum-shopping for more protective speech rights. See *id.* at 1191–92 (denying forum-shopping by Yahoo!). "[T]he purpose of the present action is to determine whether a United States court may enforce the French order without running afoul of the First Amendment. . . . [A] United States court is best situated to determine the application of the United States Constitution to the facts presented." *Id.*

94. See *id.* at 1192–93 (questioning whether the court must give comity to the French order). The court defined comity as follows: "No legal judgment has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. . . . United States courts generally recognize foreign judgments and decrees unless enforcement would be prejudicial or contrary to the country's interests." *Id.* at 1192.

95. *Id.*

freedom of speech.⁹⁶ "[T]he principle of comity is outweighed by the Court's obligation to uphold the First Amendment."⁹⁷

The *Yahoo!* dispute reveals that the luster of the geographic Internet solution has begun to wear off.⁹⁸ First, allowing a geographic entity to govern a portion of the Internet gives it the ability to impose its law on the whole of the Internet.⁹⁹ In *Yahoo!*, the court extended the protections of the First Amendment, as given to Yahoo! through editorial control, to the far reaches of the Internet.¹⁰⁰ Any nation that chooses to regulate speech as France did now will be denied that choice because American courts will not enforce such regulations against their own citizens.¹⁰¹ The First Amendment is now part of

96. *See id.* (rejecting the regulatory approach adopted by the French court). The court justified its conclusion as follows:

What makes this case uniquely challenging is that the Internet in effect allows one to speak in more than one place at the same time. Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders.

Id. The principles enunciated in *Yahoo!* will lead to a balancing test of foreign and domestic interests every time a foreign Internet-related decision against an American citizen is brought to a domestic court for enforcement.

97. *Id.* at 1193. Although this Note uses *Yahoo!* as an example of the problems caused by the geographic Internet approach, the resolution I offer in light of *Gutnick*, *see infra* Part V.C (offering an arbitration resolution to the *Gutnick* problem), would not necessarily be effective for disputes like this. The *Yahoo!* case offers a good starting point, however, to discuss the issues caused by states attempting to apply domestic law to Internet activity.

98. Remember that the idea of the geographic Internet approach is that a nation has a sovereign right to protect its citizens from harm. *See supra* Part III.A (noting the foundation of the geographic Internet approach). On that ground, the French law should have been respected by the American court.

99. *See* Goldsmith, *supra* note 72, at 487–91 (analyzing the problems caused by an individual nation regulating activity and its effect on other nations); *infra* Part V.A (presenting the independent Internet theory); *see also* LESSIG, *supra* note 75, at 192 (discussing the regulatory spillover argument presented by the antigeographic Internet theorists).

100. *See* Yochai Benkler, *Internet Regulation: A Case Study in the Problem of Unilateralism*, 11 EUROPEAN J. INT'L L. 171, 179 (2000) (arguing that the reach of any state's Internet regulatory power is the far ends of the Internet), available at <http://www.ejil.org/journal/Vol11/No1/110171.pdf> (on file with the Washington and Lee Law Review). "This quasi-Coasian reciprocity of effect of encoding values of one nation into the technology of communication shared by many displaces those of other nations, while a nation that refrains from such incorporation is exposed to communications that implement values of another." *Id.* at 174.

101. *See id.* at 184 (explaining the constraints that one state's regulation of Internet activity has on all other nations). "Both law and technology can act as means of embedding values of one nation as behavioural [sic] constraints in another. Moreover, the dynamic causal relationship between law and technology means that many more decisions about local are

the fabric of the Internet, at least for users that are already given the physical protection of the Constitution.¹⁰² Second, determining the law of the Internet by the law of a geographic location undermines the predictability of transactions¹⁰³ in cyberspace.¹⁰⁴ An action for enforcement of a right or protection afforded in one's physical location is now subject to the statutory or common law decisions and regulatory choices made by other nations.¹⁰⁵ As a result, a user of the Internet has no assurance that a given activity is legal on the Internet, even if it is legal when not done on the Internet.¹⁰⁶ The use of the Internet under the geographical approach is fraught with peril if the universe of territorial law can apply to a single act on the Internet.¹⁰⁷ The problems of this approach became more acute when it was applied to Internet defamation by the Australian High Court.¹⁰⁸

IV. Gutnick v. Dow Jones & Co.

With the advent of the geographic Internet approach, the two ends of the beast that is defamation were destined to collide.¹⁰⁹ On one end was the notion

translated, in a digitally networked globe, into behavioural [sic] constraints in other nations." *Id.* Taken to its logical extreme, this situation would leave France with little recourse other than to self-help measures, for instance political or diplomatic maneuvers. One has to wonder what sort of world would result as numerous nations take self-help positions as Internet conduct is constrained by extraterritorial judicial decisions.

102. See *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1192–93 (N.D. Cal. 2001) (explaining that American freedom of speech is of a higher value than French regulation), *rev'd*, 379 F.3d 1120 (9th Cir. 2004), *reh'g granted*, No. 01-17424, 2005 U.S. App. LEXIS 2166 (9th Cir. Feb. 10, 2005) (en banc).

103. I adopt the term "transaction" here to describe the interactions among Internet users in a broad sense and not in a commercial or business connotation.

104. See, e.g., *United States v. Thomas*, 74 F.3d 701, 710–12 (6th Cir. 1996) (ruling that Internet obscenity is to be measured by the community standard of where it is accessed). The defendants in *Thomas* are now subject to a standard of obscenity of a remote location, which could be stricter than the one for their own community.

105. See *Yahoo!, Inc.*, 169 F. Supp. 2d at 1186–87 (ruling that French law governing Internet activity is subject to American constitutional constraints).

106. See *Thomas*, 74 F.3d at 711 (noting that California obscenity standards might have protected the information posted by the defendants but that the information was able to be accessed "in jurisdictions with less tolerant standards for determining obscenity").

107. See Benkler, *supra* note 100, at 177 ("In effect, any state or international body can intervene at any point . . . , constraining the behaviour [sic] of individuals far outside its formal jurisdiction.").

108. See *infra* Part IV (describing the *Gutnick* case).

109. Compare *supra* Part II.B (discussing publication as central to harm in defamation), and *supra* Part II.C (noting that the situs of harm principle relies on harm to locate a tort

of harm—if a reputation is impugned, then a person should be entitled to a remedy wherever that remedy exists.¹¹⁰ On the other end was the link between publication and choice of law—apply the law of the place of publication to resolve liability.¹¹¹ The result of that collision was a High Court of Australia opinion that gave, in the words of one concurring justice, "a result contrary to intuition."¹¹² This Part first describes *Gutnick*¹¹³ and the legal resolution of the conflict of laws question in the case.¹¹⁴ It then analyzes the positions taken by the High Court,¹¹⁵ the arguments presented by Dow Jones in the case,¹¹⁶ and the

dispute), with *supra* Part III.A (explaining that the geographic Internet approach gives sovereign nations the right to regulate the Internet where it causes harm within their borders).

110. See PROSSER & KEETON, *supra* note 25, at 771–72 (discussing damages in a defamation action).

111. See *supra* Part II.C (noting the interplay between publication and choice of law).

112. *Gutnick v. Dow Jones & Co.* (2002) 210 C.L.R. 575, 642 (Austl.) (Kirby, J., concurring). The *Gutnick* decision is not the first to address the intersection of libel law and the media, although it is the first to deal with a United States media defendant. An Italian decision in 2000 found in favor of an Italian plaintiff on jurisdiction and choice of law based on the situs of harm principle against several Israeli media defendants. See Beverley Earle & Gerald A. Madek, *International Cyberspace: From Borderless to Balkanized???*, 31 GA. J. INT'L & COMP. L. 225, 252–53 (2003) (discussing the Italian court's decision in an Internet libel dispute). In contrast, a German court, considering a dispute over alleged hate speech posted on an Internet site by a user in Australia, refused to grant jurisdiction and to apply German law, stating that the place of uploading was where the suit should occur. See *id.* at 250–52 (noting that Germany has rejected the situs of harm principle in a recent Internet publication dispute).

113. *Gutnick*, 210 C.L.R. at 575. The choice of law element in *Gutnick* is intertwined with the question of whether the Australian court could exert jurisdiction over Dow Jones. See *id.* at 598–600 (explaining the intersection between jurisdiction and choice of law). One student recently analyzed the impact of the jurisdictional resolution and concluded that the position of the High Court is untenable and an international solution to the issue is warranted. See Nathan W. Garnett, Comment, *Dow Jones & Co. v. Gutnick: Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?*, 13 PAC. RIM L. & POL'Y J. 61, 88–90 (2004) (discussing the danger to free speech caused by Australia asserting jurisdiction in *Gutnick*). The question of jurisdiction in *Gutnick* is of far less concern than the choice of law regime instituted by the High Court, to which I offer the modest solution of an arbitration forum. See *infra* Part V.C (concluding that an international arbitration forum is necessary to solve the *Gutnick* conundrum); see also Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978) (analyzing the interplay of jurisdiction and choice of law). "To believe that a defendant's contacts with the forum state should be stronger . . . for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether." *Id.*

114. See *infra* Part IV.A (discussing the history of *Gutnick* and the decision handed down by the High Court).

115. See *infra* Part IV.B (examining the problems with the High Court's *Gutnick* decision).

116. See *infra* Part IV.C (arguing that Dow Jones proffered resolution to *Gutnick* was also faulty).

illogical result of each in light of the purpose of defamation law and the value of the Internet.

A. The Case

The *Gutnick* story began two years before the decision by the High Court of Australia.¹¹⁷ Gutnick was the subject of an exposé in *Barron's* magazine discussing stock manipulation by contributors to charitable organizations.¹¹⁸ *Barron's* claimed that Gutnick had participated in a plan to artificially inflate the price of stock in the United States; specifically, the magazine alleged that Gutnick left private investors with millions in losses after telling charities, to which he had given free stock to decrease that stock's availability on the open market, to sell out their holdings when this artificially limited supply caused prices to rise.¹¹⁹ In its submissions to the State of Victoria Supreme Court, Dow Jones characterized Gutnick as "a devious businessman who should be investigated by U.S. regulators; in any event American investors should beware of Gutnick-promoted shares in American depository receipts"¹²⁰ *Barron's* also alleged in the article that Gutnick was the largest customer of Nachum Goldberg, who had been jailed for tax evasion and money laundering.¹²¹ Gutnick argued that this purported link to Goldberg harmed his business and

117. See *Gutnick*, 210 C.L.R. at 594 (Austl.) (noting that the *Barron's* story at issue in the case was printed on October 30, 2000, having been placed online two days earlier). The High Court went on to discuss the features of the magazine's interactive website:

Those who pay an annual fee . . . may have access to the information to be found at WSJ.com. Those who have not paid a subscription may also have access if they register, giving a user name and a password. The information at WSJ.com includes *Barron's Online* in which the text and pictures published in the current printed edition of *Barron's* magazine are reproduced.

Id.

118. See *Gutnick v. Dow Jones & Co.* [2001] V.S.C. 305, ¶¶ 11–12 (Vict. Sup. Ct. Aug. 28, 2001) (discussing the contents of the *Barron's* article), available at <http://www.austlii.edu.au/au/cases/vic/VSC/2001/305.html> (on file with the Washington and Lee Law Review).

119. See *id.* (summarizing the article in *Barron's*). "[T]here is reason to suspect that U.S.-based religious charities have been used to manipulate the price of the stocks he has promoted in the U.S., arranging for the charities to make profits but leaving other investors to suffer losses." *Id.* ¶ 11.

120. *Id.*

121. See *id.* ¶ 3 (explaining how the article linked Gutnick with Goldberg and noting that, even though this was a very small part of the overall article, this was the basis for the defamation suit).

personal reputation.¹²² Specifically, this link between the men "imputed that Gutnick was masquerading as a reputable citizen when he was a tax evader who had laundered large amounts of money through Goldberg, and bought his silence."¹²³ Gutnick alleged that Dow Jones, as the parent company of *Barron's*, interjected this defamatory imputation into Victoria by placing the article online and caused him reputational harm there.¹²⁴ This suit was meant to remedy that damage.¹²⁵

1. *The Debate over Publication*

Dow Jones immediately challenged the power of the Supreme Court of Victoria to hear the case and apply Victorian law.¹²⁶ Dow Jones first claimed that the court had no power over Gutnick's claims because the online version of the article was published in New Jersey and not Victoria.¹²⁷ Dow Jones contended that the transformation of an article from print format to electronic format is similar to the traditional publication of an article.¹²⁸ Because Dow Jones's electronic conversion sites were located in New Jersey, New Jersey was the situs of publication for the article and jurisdiction for the suit was vested in the New Jersey courts, or at the very least application of American defamation law was appropriate.¹²⁹ Referencing the single publication rule in the American

122. *See id.* (discussing in brief the allegations of harm by Gutnick in the suit).

123. *Id.*

124. *See id.* ¶ 5 (establishing the basis for Gutnick's claim that the State of Victoria could hear the case).

125. *See id.* ¶ 3 ("[Gutnick] commenced his proceeding in the Supreme Court of Victoria by writ on 27th November 2000."). Gutnick only sued for those damages suffered in Victoria, "disclaiming any form of damages in any other place." *Id.* ¶ 130.

126. *See id.* ¶¶ 6–8 (explaining that upon notice of the suit to Dow Jones, the company filed to have the suit stayed for lack of jurisdiction).

127. *See id.* ¶ 6 (outlining Dow Jones's opposition to the suit continuing in the Supreme Court of Victoria). Dow Jones admitted that there were "several hundred subscribers" to its online content from Victoria, *id.* ¶ 2, and a total of 1700 in the whole of Australia, *see id.* ¶ 1 (describing the number of paid subscribers to *Barron's* website in Australia). Although the initial challenge made by Dow Jones was to jurisdiction, *see id.* ¶ 6 (stating the basis for the Dow Jones motion to dismiss), the High Court used the same submissions to determine choice of law. *See infra* Part IV.A.2 (describing the High Court's decision in *Gutnick*); *see also supra* Part II.C (explaining how publication helps to resolve choice of law in defamation).

128. *See Gutnick*, [2001] V.S.C. 305, ¶¶ 13–16 (noting that Dow Jones's argument would make the place of electronic format the location of publication of the article, aside from the physical printing presses); *id.* ¶ 72 ("The defendant's argument really is that liability for cyber-space defamation must be determined by the jurisdiction of the Website.").

129. *See id.* ¶ 21 (observing that Dow Jones's argument would make New Jersey the sole viable location for the lawsuit). The Supreme Court of Victoria noted that acceptance of this

courts, Dow Jones argued that the publication of electronic information can only occur at one point in time; although the information could be accessed multiple times by multiple people, the uploading of the information was done once.¹³⁰ If the Supreme Court of Victoria was to determine otherwise, Dow Jones argued, then it left publishers of information on the Internet subject to suit in any and every country where a given plaintiff could prove that persons had accessed the supposedly defamatory information.¹³¹

In contrast, Gutnick asserted that publication, in the sense of defamatory libel, occurs only when another individual comprehends the information.¹³² Although it might be true that the electronic information physically resides on Dow Jones's servers in New Jersey, Gutnick argued that this did not locate the lawsuit there.¹³³ While the electronic information was passively sitting in the server, it was conveying information to no one.¹³⁴ It took the act of Internet users downloading that electronic information onto their computers to convert it

argument would locate most suits like this in the United States because most of the web uploading is done there. *See id.* ¶ 73 (analyzing the end result of the situs of electronic publication argument).

130. *See id.* ¶ 73 (noting Dow Jones's contention that physical publication of an electronic article happens when that information is initially put on the Internet by the company in control of the article).

131. *See id.* ¶¶ 17–18 (outlining the argument presented by Dow Jones that without a bright-line rule, news organizations would be subject to suit in each country with defamation laws and someone with Internet access). The Supreme Court of Victoria described the impact of Dow Jones's position as follows:

The submission lacked nothing on the score of boldness, it being claimed that the Internet offered Australians the greatest hope of overcoming the tyranny of distance and that it would be contrary to the national interest for a State court in Australia . . . to assume to exercise jurisdiction over material placed on Websites overseas by foreign publishers, in circumstances where effective and appropriate redress is available in the place where the information is up-linked. . . . The suggestion that I had a national duty to decide that there was no jurisdiction in Australia even if I had a legal view to the contrary, and that it is my duty publicly to declare that Mr [sic] Gutnick's action against Dow Jones take place in New Jersey, might be thought by some to be remarkable for its ambition.

Id. ¶ 18.

132. *See id.* ¶ 21 ("The plaintiff's case is that it is only published when it is made intelligible or manifest to a third party by showing it or making it comprehensible."); *see also supra* Part II.B (describing publication).

133. *See Gutnick*, [2001] V.S.C. 305, ¶ 22 (dismissing the situs of publication argument proffered by Dow Jones). Gutnick argued the point through analogy: "[I]f one requests a book written in English and is given it wrapped up but written in a foreign language which one does not read or speak, it is absurd to contend that it is published to one by delivery . . ." *Id.*

134. *See id.* ¶ 14 (noting the need for active solicitation by a web searcher to convert Internet information into readable form).

to a readable format.¹³⁵ Therefore, where a plaintiff can prove that there are Internet users who performed this conversion process and made the article comprehensible, a court has jurisdiction over the defamatory materials and can apply its law based on the harm done, operating under the assumption that the users read the materials.¹³⁶ The Supreme Court of Victoria, based on Gutnick's arguments, retained jurisdiction over the suit.¹³⁷

2. *The High Court of Australia's Decision*

After a summary affirmance by the Court of Appeals of Victoria,¹³⁸ Dow Jones appealed to the High Court of Australia, asking it to overturn the decision by the Supreme Court of Victoria and to rule that Australia was not the proper forum for the dispute and should not apply its own law.¹³⁹ The High Court, however, unanimously upheld the lower court's determination.¹⁴⁰ "[I]dentifying the law which is to govern questions of substance, in an action for defamation where there is some foreign element, may have substantial

135. *See id.* ¶ 22 ("It is important to keep in mind that there is a difference between 'publishing' in a publishing sense and publication in the sense of actual communication, that is, that the document, in the case of a document, is in a form which is capable of being understood.").

136. *See id.* ¶ 32 (analyzing the end result of the plaintiff's argument).

137. *See id.* ¶¶ 130–31 (refusing to stay or dismiss Gutnick's libel suit and allowing it to go forward under Australian common law principles). The court determined that traditional notions of publication are proper to apply to the Internet, and jurisdiction and choice of law follow directly from that conclusion. *See id.* ¶¶ 59–60 (determining the law applicable to the Gutnick dispute). It described the theory of its decision as follows:

The point simply is that if you do publish a libel justiciable in another country with its own laws (not mere copies of the U.S. law as the defendant's submissions appear to favour [sic], perhaps because they are tilted in favour [sic] of the defendant), then you may be liable to pay damages for indulging that freedom.

Id. ¶ 75. The court was unimpressed by the arguments offered by the defendant that a decision finding jurisdiction in the State of Victoria would stifle the free flow of information. *See id.* ¶ 76 (dismissing the argument presented by Dow Jones's counsel that a decision in favor of plaintiff would prompt an Internet firewall around Australia). The obvious presumption of the court was that State of Victoria law would govern all subsequent issues. *See id.* ¶ 75 (noting that by publishing the article in Victoria, the defendant left itself open to the application of Victorian law to its conduct); *see also id.* ¶ 78 (noting that the plaintiff has confined the suit to damages suffered in Victoria). "[P]laintiffs can sue in the U.S.A. [for other damages caused by the article] and presumably are welcome to do so." *Id.*

138. *Gutnick v. Dow Jones & Co.* (2002) 210 C.L.R. 575, 596 (Austl.) (outlining the procedural history of *Gutnick*).

139. *See id.* (noting the appeal to the High Court).

140. *See id.* (dismissing the appeal).

consequences for the resolution of the proceeding."¹⁴¹ But the resolution of that choice of law issue did not mandate using the situs of uploading as the touchstone location, as argued by Dow Jones.¹⁴² "Activities that have effects beyond the jurisdiction in which they are done may properly be the concern of the legal systems in each place."¹⁴³ The High Court agreed that publication is the key element in locating a defamatory act and establishing jurisdiction over it.¹⁴⁴ Thus, in the High Court's mind it was clear that the publication of the information occurred in Australia when others were able to comprehend the information in readable form.¹⁴⁵

But establishing jurisdiction did not resolve the question of what law to apply. The High Court started with this premise: "[T]hose who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction."¹⁴⁶ It saw no need for Australia to adopt a single publication rule for the Internet.¹⁴⁷ Instead, it agreed that there can be multiple locations of

141. *Id.* at 599. The court went on to explain this proposition as follows:

It is necessary to begin by making the obvious point that the law of defamation seeks to strike a balance between, on the one hand, society's interest in freedom of speech and the free exchange of information and ideas . . . and, on the other hand, an individual's interest in maintaining his or her reputation in society free from unwanted slur or damage. The way in which those interests are balanced differs from society to society.

Id.

142. *See id.* at 599–600 (agreeing that there ought to be some assurance to Internet publishers of where a suit might be brought but dismissing the claim that the location would have to be where the document was uploaded). Instead of adopting the place of the location of the servers as the place of liability, the court attacked the premise of Dow Jones's argument for that location. *See id.* at 600 ("In considering where the tort of defamation occurs it is important to recognise [sic] the purposes served by the law regarding the conduct as tortious: purposes that are not confined to regulating publishers any more than they are confined to promoting free speech.").

143. *Id.* at 600.

144. *See id.* (expressing approval of the delineation between physical publication and defamatory publication adopted in the lower court decision). "It is the publication, not the composition of a libel, which is the actionable wrong." *Id.* (quoting *Lee v. Wilson* (1934) 51 C.L.R. 276, 287 (Austl.) (per Dixon, J.)).

145. *See id.* at 600–01 (agreeing that it is the damage to reputation after comprehension by a third party that locates the harm). The court noted, however, that resolution of the dispute over jurisdiction did not resolve what law to apply. *See id.* at 604–07 (analyzing the interplay between jurisdiction and choice of law in the present case).

146. *Id.* at 605.

147. *See id.* at 601–05 (rejecting the single publication rule present in most American jurisdictions); *see also id.* at 603 (noting the purpose of the single publication rule); *supra* Part II.B (discussing the single publication rule).

harm caused by a defamatory publication and that a plaintiff should be able to sue based on each instance of damage.¹⁴⁸ "It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed."¹⁴⁹ There was no need, therefore, to accept the bright-line rule offered by Dow Jones because traditional choice of law will work.¹⁵⁰ A court can presume that the publisher was aware of where harm from a defamatory statement would occur and was prepared for a potential suit there under that location's law.¹⁵¹

In a telling concurrence, Justice Michael Kirby went to great pains to examine the intersection of classic libel choice of law and the Internet. A self-described reformist,¹⁵² Justice Kirby grappled with the arguments put forward by Dow Jones: "When the new problem is as novel, complex and global as that presented by the Internet in this appeal, a greater sense of legal imagination may be required than is ordinarily called for."¹⁵³ Yet he was unwilling to adopt a unique rule with application only to the Internet.¹⁵⁴ Instead, he chose to use

148. See *Gutnick*, 210 C.L.R. at 604 (commenting that multiple suits for libel fit more squarely with the traditional common law purpose for defamation). The court accepted that a single action for defamation was best, even if under the common law it was not mandated. See *id.* ("[T]he common law favours [sic] the resolution of particular disputes between parties by the bringing of a single action rather than successive proceedings.").

149. *Id.* at 607.

150. See *id.* at 606 (refusing to adopt the rule that the location of an Internet libel suit should be where the information was uploaded). "However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have." *Id.* at 605. As a result, the situs of harm principle is as appropriate for the Internet as for any other form of communication. See *id.* (noting the similarity between the Internet and other mass communications devices).

151. See *id.* at 606 ("[I]t is defamation's concern with reputation, and the significance to be given to damage . . . that require rejection of Dow Jones's contention . . ."). The High Court rejected Dow Jones's position that this principle would force a publisher to take account of the defamation laws of every nation in the world. See *id.* at 609 (dismissing the worldwide liability argument). "[This] is seen to be unreal when it is recalled that in all except the most unusual of cases, identifying the person about whom material is to be published will readily identify the defamation law to which that person may resort." *Id.*

152. See *id.* at 619 (Kirby, J., concurring) (recognizing that where the established law and the Internet are in conflict, reform of the law is often necessary). "The genius of the common law derives from its capacity to adapt the principles of past decisions, by analogical reasoning, to the resolution of entirely new and unforeseen problems." *Id.* (Kirby, J., concurring).

153. *Id.* (Kirby, J., concurring).

154. See *id.* at 630 (Kirby, J., concurring) ("Where rules . . . are deeply entrenched in the common law and relate to the basic features of the cause of action propounded, their alteration risks taking the judge beyond the proper limits of the judicial function."). Justice Kirby was also uncomfortable with the idea that the Internet should have a law of its own: "The next phase in the global distribution of information cannot be predicted. A legal rule expressed in terms of

the standard conflict of laws test, determining the situs of harm to choose the applicable law governing the conduct of the defendant.¹⁵⁵

This formulation of the conflict of laws question led Justice Kirby to an easy legal resolution. "[T]he place of the wrong needs to be ascertained in a principled fashion, based on an analysis of the relevant legal issues in view of the rights, interests and legitimate expectations of the parties."¹⁵⁶ This meant that the publisher should be constructively aware that the place of residence of the defamed person would have an interest in a dispute (along with any other place of harm), based on reputational harm.¹⁵⁷ But Justice Kirby was left unsatisfied with the mechanical application of the common law choice of law rules.¹⁵⁸ He, more than any of the other Justices on the High Court, felt that the present legal solution may not strike the best balance possible between sovereignty and the Internet.¹⁵⁹ He closed with a haunting call for change, asking the international community to take a second look at defamation and the Internet.¹⁶⁰

the Internet might very soon be out of date." *Id.* at 631 (Kirby, J., concurring). Yet he recognized that it was the growth of new technologies that led to the adoption of new norms of private international law. *See id.* at 629 (Kirby, J., concurring) (noting that it is because of communication changes that private international law developed).

In contrast to Justice Kirby's hesitancy to formulate rules recognizing technological distinctions, the United States Supreme Court has adapted legal rules to practical technology. The delineation between print media, broadcast media, and cable media enunciated in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 400-01 (1969) (ruling that broadcast media can be more heavily regulated for content than print media due to the finite number of broadcast bands available), and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-39 (1994) (ruling that cable media is not the same technologically as broadcast media and cannot be as pervasively regulated for content), rests directly on the technological features of each media form. This technological "rule making" has been maintained by the American courts. *See, e.g.*, *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996) (applying the broadcast media rules to direct broadcast satellites).

155. *See Gutnick*, 210 C.L.R. at 638-39 (Kirby, J., concurring) (applying the situs of harm rule to Internet libel choice of law).

156. *Id.* at 639 (Kirby, J., concurring).

157. *See id.* (Kirby, J., concurring) (arguing that it is not a leap of logic to assume that the place of residence is where a reputation would exist, though not limiting the reputation to that location).

158. *See id.* at 642-43 (Kirby, J., concurring) (noting that his "result [is] contrary to intuition").

159. *See id.* (Kirby, J., concurring) ("[The Internet] is a medium that overwhelmingly benefits humanity, advancing as it does the human right of access to information and to free expression. But the human right to protection by law for the reputation and honour [sic] of individuals must also be defended to the extent that the law provides.").

160. *See id.* at 643 (Kirby, J., concurring) (arguing that the present common law system, although entrenched, does not respect the full value of the Internet). He closed his opinion as follows:

B. The Problem with the Gutnick Doctrine

The default choice of law rule adopted by the High Court, that of the situs of harm, leaves Dow Jones facing liability without end.¹⁶¹ It is not enough to say, as Justice Kirby did in his opinion, that "the spectre [sic] of 'global' liability should not be exaggerated."¹⁶² Plaintiffs who have suffered a great personal affront are likely to seek all of the vindication they can, wherever they can.¹⁶³ Even the United States Supreme Court has recognized that the law of

However, such results are still less than wholly satisfactory. They appear to warrant national legislative attention and to require international discussion in a forum as global as the Internet itself. In default of local legislation and international agreement, there are limits on the extent to which national courts can provide radical solutions that would oblige a major overhaul of longstanding legal doctrine in the field of defamation law. Where large changes to settled law are involved, in an area as sensitive as the law of defamation, it should cause no surprise when the courts decline the invitation to solve problems that others, in a much better position to devise solutions, have neglected to repair.

Id. (Kirby, J., concurring).

161. See *supra* Part II.C (discussing the notion of the expansive reach of reputational harm in defamation); see also *supra* notes 147–48 and accompanying text (describing the High Court's rejection of the single publication rule in favor of multiple defamation suits for widespread reputational harm).

162. *Gutnick*, 210 C.L.R. at 643 (Kirby, J., concurring); see also *id.* at 609 (explaining the High Court's dismissal of the unlimited liability argument proffered by Dow Jones). Justice Kirby justified this mitigation of the potential scope of liability as follows:

Apart from anything else, the costs and practicalities of bringing proceedings against a foreign publisher will usually be a sufficient impediment to discourage even the most intrepid of litigants. Further, in many cases of this kind, where the publisher is said to have no presence or assets in the jurisdiction, it may choose simply to ignore the proceedings. It may save its contest to the courts of its own jurisdiction until an attempt is later made to enforce there the judgment obtained in the foreign trial. It may do this especially if that judgment was secured by the application of laws, the enforcement of which would be regarded as unconstitutional or otherwise offensive to a different legal culture.

Id. at 643 (Kirby, J., concurring). There are two problems with Kirby's theory. First, as to the enforceability of a judgment, that argument is not unique; the same issue arises with the *Gutnick* decision itself. See *id.* at 628–29 (Kirby, J., concurring) (examining the enforceability of judgment issues in *Gutnick*); see also *supra* Part III.B (relating the *Yahoo!* dispute over enforceability). If there is no comity shown defamation judgments at all, then a plaintiff is left with no monetary vindication. If there is comity shown defamation judgments, there is no principled legal reason why it should be limited to a single judgment (a form of comity collateral estoppel). Second, as to the cost of multiple judgments, that would be true in the abstract, but Justice Kirby is ignoring the fact that a plaintiff will likely pursue subsequent judgments with the proceeds obtained from the first. In this day of million-dollar defamation recovery, cost becomes a null issue as long as subsequent actions are not time barred.

163. See Douglas McCollam, *Dateline Everywhere? How the Web May Make Us Vulnerable to Long-Distance Libel*, COLUM. JOURNALISM REV., May/June 2003, at 10–11

libel can be used by a plaintiff to thwart free and robust discussion of ideas in the press.¹⁶⁴ The Court has stated this reality as follows:

The half-million-dollar verdict [in this case] does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. . . . [T]his technique for harassing and punishing a free press—now that it has been shown to be possible . . . can be used . . . where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.¹⁶⁵

This problem of unlimited liability can be made even clearer with a hypothetical case. Suppose an Internet media website defamed Kofi Annan, the current Secretary-General of the United Nations.¹⁶⁶ Secretary-General Annan is an international figure with a reputation that most likely extends to every nation in the world.¹⁶⁷ Under the *Gutnick* doctrine, as long as the local reputation of Secretary-General Annan had suffered harm, he would be entitled to recovery

(discussing the scope of liability problems caused by the *Gutnick* rule). This would be especially true with jurisdictions that have similar defamation laws because one could presume that recovery in the other jurisdictions would be based on the same evidence adduced in the present case. It would also be true where some nations have tougher defamation laws than others where the plaintiff has suffered harm. A lawyer in that circumstance would be pressed to sue in any jurisdiction that had "easier" laws governing recovery.

164. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 294–95 (1964) (Black, J., concurring) (arguing that the monetary burden multiple libel suits can place on a media defendant could leave the press open to destruction).

165. *Id.* (Black, J., concurring). I concede that the principles enunciated in *Sullivan* are intimately tied to the freedom of speech, which are inapplicable to the *Gutnick* case. But that does not lessen the fact that a vindictive plaintiff, armed with time and money, can attempt to bankrupt a media defendant through a suit. In *Sullivan*, it was a group of plaintiffs that sued based on a single article, and the Supreme Court was concerned with the cumulative effect of recovery over all of the suits. See *id.* at 295 (Black, J., concurring) (noting that the *New York Times* faced millions of dollars in libel liability based on the eleven separate lawsuits filed regarding the advertisement at issue in the case). In *Gutnick*, it is the ability of the single plaintiff to sue wherever reputation can be proven and gain multiple recoveries against Dow Jones that leads to the specter of unlimited liability.

166. See United Nations Department of Public Information, *Biography of Kofi A. Annan*, at http://www.un.org/News/oss/sg/pages/sg_biography.html (last visited Oct. 26, 2004) (describing Kofi Annan's rise to Secretary-General of the United Nations) (on file with the Washington and Lee Law Review).

167. This is a logical assumption, considering the Secretary-General's duties as the head of the United Nations. See United Nations Department of Public Information, *The Role of the Secretary General*, at http://www.un.org/News/oss/sg/pages/sg_office.html (last visited Oct. 26, 2004) (explaining the role of the Secretary-General in world affairs) (on file with the Washington and Lee Law Review). "[T]he Secretary-General is a symbol of United Nations ideals and a spokesman for the interests of the world's peoples, in particular the poor and vulnerable among them." *Id.*

in each state or country based on the laws of that place.¹⁶⁸ A media defendant now faces an abyss of liability with little limitation.¹⁶⁹

Even more troubling is the practical effect that this decision will have on the Internet.¹⁷⁰ The burden of liability that the *Gutnick* decision places on an Internet media defendant will dry up the flow of information distributed via the Internet.¹⁷¹ A media entity prepared to place an article on the Internet will have to apprise itself of the gamut of international defamation law and make a calculated judgment whether or not to print based on a comparison of that law to the contents of the article.¹⁷² The effect of that will likely be one of two results: either (1) the media defendant will forego printing on the Internet because the potential liability is incalculable or (2) the media defendant will have to go through a screening process that would make printing on the Internet unwieldy and delay information flow.¹⁷³ Because there is no way to isolate certain parts of the Internet through controlled access from sections of the world,¹⁷⁴ there is no doubt that the media entity could only be assured of limited

168. This assumes that all nations, currently numbering over 150, *see* United Nations, *List of Member States*, at <http://www.un.org/Overview/unmember.html> (last modified Apr. 24, 2003) (noting the current membership of the United Nations) (on file with the Washington and Lee Law Review), have provisions protecting persons from defamation. Even if this is not true, Secretary-General Annan could pursue the media defendant in every jurisdiction that had libel protection, even into the individual states of the United States or other nations where protection for reputation has been handed to localities.

169. This would leave the media defendant, obviously, with little choice but to hold an article off of the Internet if it concludes that a statement within the article could be defamatory, regardless of the newsworthiness of the rest of the story. Note that in *Gutnick*, only one paragraph of the article was at issue, *see supra* Part IV.A (outlining the basis of the *Gutnick* case), creating a presumption that the rest of the article is newsworthy. In this day of instant news, forcing a media defendant to delay publication of important stories or to refuse to publish on the Internet altogether would negate the benefit of the Internet. *See Gutnick v. Dow Jones & Co.* (2002) 210 C.L.R. 575, 615–20 (Austl.) (Kirby, J., concurring) (describing the value of the Internet to society).

170. *See Gutnick*, 210 C.L.R. at 609 (discussing the "spectre [sic] . . . Dow Jones . . . conjure[d] up . . . of a publisher forced to consider every article it publishes on the World Wide Web against the defamation laws of every country from Afghanistan to Zimbabwe").

171. *See id.* at 627 (Kirby, J., concurring) (noting the chilling effect a situs of harm choice of law rule could have on Internet communication). "Depending on the publisher and the place of its assets, it might freeze publication or censor it or try to restrict access to it in certain countries so as to comply with the most restrictive defamation laws that could apply." *Id.* (Kirby, J., concurring).

172. *See id.* (Kirby, J., concurring) (explaining what process a media entity would have to go through before deciding to post information on the Internet).

173. *See id.* (Kirby, J., concurring) (positing the end result of unlimited liability for the posting of information on the Internet).

174. *See id.* at 617–18 (Kirby, J., concurring) (outlining Dow Jones's contention that preventing the access of certain geographical locations to information on the Internet is

liability if it did not convert print media to Internet media. Persons who create and maintain websites are already combing through the content of their websites because of the potential for excessive liability.¹⁷⁵ This self-censorship will cause a drastic speed bump in the fast lane that is information exchange on the Internet.

C. *The Problem with Dow Jones's Proposed Resolution*

In contrast to the situs of harm solution, Dow Jones offered the place of uploading as another geographical point at which to locate the law applicable to an Internet defamation suit.¹⁷⁶ It was an argument based on convenience and certainty; Dow Jones argued that it was illogical to force a publisher to account for the laws of all nations of the world when the publisher's activities could be easily identified with one nation or state.¹⁷⁷ Yet, as recognized by Justice Kirby

currently impossible). This pejorative statement, accepted by Justice Kirby, might not be as true today as when the suit was initially filed. See, e.g., NetGeo, *About Us*, at http://www.netgeo.com/about_netgeo.htm (last visited Oct. 26, 2004) (documenting the development of patent-pending software that allows business to isolate and block, in real time, Internet users associated with certain defined physical locations) (on file with the Washington and Lee Law Review).

175. See Andrew Nicholson, *The Expanding Web of Defamation: Gutnick v. Dow Jones*, 8 MURDOCH UNIV. ELEC. J. OF LAW 3, ¶ 28, at <http://www.murdoch.edu.au/elaw/issues/v8n4/nicholson84.html> (Dec. 2001) ("[C]are should be taken by both publishers and Internet site operators to consider the content of websites and other publications in light of [*Gutnick*].") (on file with the Washington and Lee Law Review).

176. See *Gutnick v. Dow Jones & Co.* (2002) 210 C.L.R. 575, 598 (Austl.) ("Dow Jones submitted that it was preferable that the publisher of material on the World Wide Web be able to govern its conduct according only to the law of the place where it maintained its web servers, unless that place was merely adventitious or opportunistic."). Chief Justice Gleeson questioned Dow Jones's proposed test as follows:

The rule propounded by Dow Jones may have a greater appearance of certainty than it would have in fact. "Adventitious" and "opportunistic" are words likely to produce considerable debate. Does a publisher's decision to have a server in a country where the costs of operation are low, or the benefits offered for setting up business are high, warrant either of these descriptions? Does a publisher's decision to have servers in two, widely separated, states or even countries warrant either description, or is it simply a prudent business decision to provide security and continuity of service? How is the user to know which server dealt with a particular request? Is the fact that one rather than the other server met the request "adventitious"?

Id. at 599. The questions posed by Chief Justice Gleeson are relevant to consideration of the specific test put forward by Dow Jones, but less applicable to the general approach adopted by Dow Jones.

177. See *id.* at 598–99 (noting Dow Jones's argument that it is technologically impossible for a publisher to limit access by a certain geographical region to Internet information and as a

in his concurrence, this contention is fraught with legal peril for the person being defamed.¹⁷⁸ "Publishers could easily locate the uploading of harmful data in a chosen place in an attempt to insulate themselves from defamation liability."¹⁷⁹ A doctrinal decision in line with Dow Jones's position would spark a global race to the bottom in defamation, with the reputation of the individual squashed in the name of certainty and predictability.

There is also a theoretical problem with Dow Jones's proposed solution, namely that it is counter to the purpose of defamation law. The underlying justification for tort recovery is to return the plaintiff to where he or she was before the harm occurred.¹⁸⁰ Modern defamation law achieves this result in two interrelated ways. First, it provides the plaintiff with a local forum where his or her reputation can be publicly vindicated by verdict. Second, it forces the

result a publisher would have to account for the plethora of national laws regarding defamation). Chief Justice Gleeson offered this critique of Dow Jones's position: "What is important is that publishers can act with confidence, not that they be able to act according to a single legal system, even if that system might, in some sense, be described as their 'home' legal system." *Id.* at 600.

178. *See id.* at 632 (Kirby, J., concurring) (analyzing the problems with the situs of publication argument presented by Dow Jones).

179. *Id.* (Kirby, J., concurring). "They might choose places with defamation laws favourable [sic] to publishing interests. . . . [T]he place of uploading of materials onto the Internet might bear little or no relationship to the place where the communication was composed, edited or had its major impact." *Id.*

In an analogous situation, the Montana Supreme Court expressed an aversion to a rule of defined geographic choice of law in products liability cases. *See Phillips v. Gen. Motors Corp.*, 995 P.2d 1002, 1011–12 (Mont. 2000) (adopting a flexible choice of law regime in tort for Montana). The Montana court rejected General Motors's argument that the place of design and manufacture should always govern the scope of liability in products liability cases. *See id.* (rejecting General Motors's proffered choice of law considerations). In rejecting that proposition, the court argued as follows:

The conclusion that the place of manufacture is a relatively unimportant factor in a product liability case is obvious when we consider a hypothetical case in which all of the relevant contacts are in the forum state except the location of the manufacturer. . . . Applying the law of the place of manufacture to that case simply because the product was manufactured out-of-state would allow a state with a high concentration of industry to capture all of the benefits of a high threshold of liability and a low level of compensation. Specifically, the manufacturing state could enjoy the benefits associated with liability laws which favored manufacturers in order to attract and retain manufacturing firms and encourage business within its borders while placing the costs of its legislative decision, in the form of less tort compensation, on the shoulders of nonresidents injured by its manufacturers' products. This seems inherently unfair.

Id. at 1012.

180. *See supra* note 27 (noting the compensation rationale for tort law).

defendant to pay damages for the harm caused.¹⁸¹ Forcing a plaintiff to sue a publisher in a remote forum achieves neither of these cathartic goals.¹⁸² A decision in favor of a plaintiff in a foreign jurisdiction, unassociated with the harm in the suit, will likely get no notice in the localities where the person was harmed.¹⁸³ Even if the damages could compensate for the silence of the verdict, those damages would not place the plaintiff where he or she was before the conduct because that plaintiff has not been publicly vindicated before his or her peers.¹⁸⁴ As a result, the nature of defamation as a cause of action is gone, replaced simply by a path to recovery.

At this juncture, it is helpful to view *Gutnick*¹⁸⁵ in light of the general

181. See *supra* Part II.A (discussing the role of reputation vindication in defamation recovery).

182. See *Gutnick v. Dow Jones & Co.* (2002) 210 C.L.R. 575, 633 (Austl.) (Kirby, J., concurring) (positing the incongruence between defamation recovery and forcing a plaintiff to sue in a remote location). Justice Kirby expressed this problem as follows:

[I]t would be small comfort to the person wronged to subject him or her to the law . . . of a place of uploading, when any decision so made would depend upon a law reflecting different values and applied in courts unable to afford vindication in the place where it matters most.

Id. (Kirby, J., concurring).

183. See *id.* (Kirby, J., concurring) (arguing that recovery under a foreign law would not provide local vindication in the public eye).

184. See *id.* at 600 (noting that it is the publication of defamation that is the wrong sought to be remedied). Damages can never fully replace the esteem that has been lost. See *supra* Part II.A (explaining the need for defamation law).

185. Issues of jurisdiction and choice of law in Internet defamation have arisen in other foreign courts. See *supra* note 112 (discussing other *Gutnick*-like cases). Ontario's Superior Court of Justice handed down a decision in a similar Internet defamation case establishing jurisdiction over a defendant in the case based in part on the principle of situs of harm. See *Bangoura v. Wash. Post*, No. 03-CV-247461CM1, ¶¶ 13–21 (Ont. Sup. Ct. of Justice Jan. 27, 2004), available at <http://www.canlii.org/on/cas/onsc/2004/2004onsc10181.html> (ruling that Ontario was the proper jurisdiction for a libel dispute based on Internet publication) (on file with the Washington and Lee Law Review). The plaintiff was allegedly defamed in an article placed on the website of *The Washington Post*, which was freely accessible to all. See *id.* ¶¶ 6–12 (noting the placement of the supposedly defamatory article). The Ontario Superior Court of Justice focused on the dissemination of the article by Internet as the grounds for establishing jurisdiction. See *id.* ¶¶ 16–21 (ruling that jurisdiction is proper based on the Internet distribution of the article). In the case, the Ontario court approved of the rationale adopted by the *Gutnick* court. See *id.* ¶ 19 (citing *Gutnick* with approval); see also *id.* ¶ 20 (rejecting the contention of the *Post* that comity should instruct the Ontario court to dismiss the action because a court in the United States will not enforce the judgment). As a result, the Ontario Superior Court of Justice will probably also conclude that Ontario law should apply to the case.

England has also adopted the *Gutnick* approach, but it has also made that approach even more treacherous to defendants. See *Lewis v. King* [2004] E.W.C.A. Civ. 1329, ¶¶ 28–31 (Eng. C.A. Oct. 19, 2004) (citing the High Court of Australia's opinion in *Gutnick* with approval), available at <http://www.courtservice.gov.uk/judgmentfiles/j2844/lewis-v-king.html> (on file with the Washington and Lee Law Review). In *Lewis*, the Supreme Court of Judicature Court of Appeal (Civil Division) of

England had before it an Internet defamation dispute regarding several postings made to boxing websites concerning the actions of Don King. *See id.* ¶¶ 3–10 (establishing the factual background for the *Lewis* dispute). In particular, one posting accused Mr. King of anti-Semitic comments, which Mr. King claimed defamed his reputation amongst the Jewish community in England. *See id.* ¶¶ 6–8 (discussing the statements at issue in *Lewis*). It is important to note that the statements all derived from litigation then-pending in New York court. *See id.* ¶¶ 6–7 (explaining that the *Lewis* dispute originally arose out of a case filed in New York court). In fact, the alleged defamatory statements central to the English case came (1) from a piece written by the New York attorney representing the defendants, and (2) from an interview given by that same attorney to a website based in California where the attorney had posted the complaint in the dispute days before. *See id.* ¶¶ 8–10 (outlining the origin of the statements before the English court in *Lewis*).

The English Court of Appeal was asked to decide the propriety of a denial of a *forum non conveniens* motion, which raised the issue of jurisdiction and choice of law for Internet defamation. *See id.* ¶ 2 (documenting the issue at dispute in the appeal). The Queen's Bench judge had denied the motion based, in part, on the notion that Mr. King was suing in England based solely on harm done to his reputation there. *See id.* ¶¶ 18–19 (relating the lower court's ruling on the *forum non conveniens* motion). According to the Court of Appeal, English courts presume a convenient forum in England if that is where a tort has been committed. *See id.* ¶ 24 (stating the English presumption of harm rule for convenient forum analysis). Because English law had previously determined that reputational harm occurs where a defamatory statement is downloaded, the presumption therefore is that England is a proper forum if the plaintiff can prove specific reputational harm there. *See id.* ¶ 2 (noting that the English courts have held that downloading is the equivalent of publication in disputes concerning Internet defamation). "[A] global publisher should not be too fastidious as to the part of the globe where he is made a libel defendant." *Id.* ¶ 30.

What is most important to note in the *Lewis* decision, though, is as much what the English Court of Appeals did not hold as what it did. The Queen's Bench Division court, in ruling on the *forum non conveniens* motion, had before it an argument that one of the reasons that the United States was the proper forum was because *Sullivan* would require dismissal of the case. *See id.* ¶¶ 40–41 (noting the juridical advantage argument proffered by the defendant in the *Lewis* dispute). In essence, the defendant contended that allowing the defamation suit in England would give the plaintiff the opportunity to pursue a cause of action that would not survive in another court. *See id.* ¶ 41 (documenting the position taken by the Queen's Bench judge who felt that the present action would fail in the United States). In fact, the Queen's Bench judge believed that the fact that *Sullivan* would ensure the doom of the plaintiff's action in America was a valid consideration in ruling on whether England was a convenient forum for the dispute. *See id.* (relating the opinion of the lower court that it should not force a transfer of this dispute to the United States simply because the case would likely fail there). The English Court of Appeal did not question this finding made by the Queen's Bench nor did it approve of the use of juridical advantage to establish a convenient forum for a case. *See id.* ¶¶ 42–43 (refusing to question the opinion of the lower court as to the propriety of allowing a suit to continue in England that would fail in the United States). Even though all of the factual events leading to the English action occurred in the United States, and even though the United States would not have entertained this dispute if the Internet was not involved, the English Court of Appeal was untroubled by the lower court's refusal to use that as a touchstone in deciding a convenient forum. Instead, simply because Mr. King alleged reputational harm in England and sought only remedy for that harm, the case was allowed to proceed. This judicial approval of international forum shopping in Internet defamation is staggering, raising a concern even beyond that of the *Gutnick* dispute. *Lewis* deepens the *Gutnick* conundrum by turning what might have been a defensive rule in Australia into an offensive rule for plaintiffs. A solution is vital. *See infra* Part V.C (positing a solution to *Gutnick* and *Lewis* that will protect defendants

purpose of law in society. Law is meant to be a regulating device, a system of rules via which people can coordinate their dealings with one another and society as a whole.¹⁸⁶ Much like the High Court of Australia recognized, the law, in an abstract way, is meant to represent a system of norms adopted by a society to govern interactions there.¹⁸⁷ But it is difficult to transpose a system of law, developed within a geographical limitation represented by national sovereignty, onto a mode of interaction that has no boundaries and defies that national sovereignty upon which thousands of years of legal doctrine are dependent.¹⁸⁸ It is time for traditional defamation choice of law to give way to something more in tune with the needs of the Internet.¹⁸⁹ Only then can the "result contrary to intuition"¹⁹⁰ imposed on the courts by the geographic Internet theory¹⁹¹ be forsaken.

V. A Modest Proposal

The conundrum of the *Gutnick* decision is clear from analyzing the positions presented by the High Court¹⁹² and Dow Jones,¹⁹³ coupled with the conflict caused by the *Yahoo!* dispute.¹⁹⁴ How does one principally choose a single geographic point of law in choice of law that will effectively govern the entirety of the Internet? What nation has the right to impose its law on all of the Internet's users, respecting both the desires of a libel plaintiff and a media defendant? This Note offers a modest proposal that seeks to answer the *Gutnick* conundrum and balance the need of the plaintiff for vindication with the need of the defendant for predictability in

from the offensive use of Internet defamation choice of law rules as they now exist).

186. See *Gutnick v. Dow Jones & Co.* (2002) 210 C.L.R. 575, 627 (Austl.) (Kirby, J., concurring) (explaining that defamation law, and by analogy entire legal systems, are meant to help govern individual conduct in society).

187. See *id.* at 633 (Kirby, J., concurring) (arguing implicitly that the type of defamation protection provided by a nation is related to how that nation views the need for reputational vindication and analyzing the role of societal values in defamation law).

188. See *id.* at 642-43 (Kirby, J., concurring) (expressing discomfort with the imposition of physical conflict of laws rules onto a cyber-world without any border and advocating international legal change).

189. See *infra* Part V.C (offering a resolution to the *Gutnick* conundrum).

190. *Gutnick*, 210 C.L.R. at 642 (Kirby, J., concurring).

191. See *supra* Part III.A (outlining the geographic Internet theory).

192. See *supra* Part IV.B (positing the flaws of the High Court's decision in *Gutnick*).

193. See *supra* Part IV.C (analyzing the problems with Dow Jones's alternative choice of law system).

194. See *supra* Part III.B (using the *Yahoo!* dispute to critique the geographic Internet theory of choice of law).

operation.¹⁹⁵ This Part outlines that solution, first by positing the true role of sovereignty in an Internet defamation suit,¹⁹⁶ then by drawing a parallel between the problem of Internet defamation and the problem of international intellectual property,¹⁹⁷ and finally by arguing that an international arbitration forum is the best solution for future *Gutnick* cases.¹⁹⁸

A. *The Internet and the End of Sovereignty over Personal Affronts?*

The geographic Internet theory posits that state sovereignty and power extend from the real world into the cyber-world.¹⁹⁹ Certain scholars, however, have rejected this approach to the Internet, arguing that the Internet is a whole new world of interaction requiring new rules to be adopted for it alone outside of classic state sovereign control.²⁰⁰ They argue that because the Internet cuts across all notions of sovereign borders, there is no justification for isolating a single sovereign law that

195. See *infra* Part V.C (explaining this Note's proposal). My present proposal only addresses media defendants because they are the most likely to be sued because they have the deep pockets worth reaching for a damages recovery. If suits against individuals for Internet defamation grow, then there is no reason why the arbitration forum I propose could not be enlarged to resolve those cases as well.

196. See *infra* Part V.A (positing the relevance of sovereignty when one judges the harm caused by a media defendant on the Internet).

197. See *infra* Part V.B (comparing the issue of remedy for Internet defamation to the WIPO).

198. See *infra* Part V.C (offering my resolution to the *Gutnick* problem through an international arbitration forum). In recommending a proposal to resolve this issue, I respect the words of Professor Goldsmith:

It would be silly to try to formulate a general theory of how such issues should be resolved. One lesson of this century's many failures in top-down choice-of-law theorizing is that choice-of-law rules are most effective when they are grounded in and sensitive to the concrete details of particular legal contexts. This does not mean that standards are better than rules in this context. It simply means that in designing choice-of-law rules or standards, it is better to begin at the micro rather than macro level, and to examine recurrent fact patterns and implicated interests in discrete legal contexts rather than devise a general context-transcendent theory of conflicts.

Goldsmith, *supra* note 73, at 1233.

199. See *supra* Part III.A (examining the geographic Internet theory); see also David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1368 (1996) ("Territorial borders, generally speaking, delineate areas within which different sets of legal rules apply.").

200. See Johnson & Post, *supra* note 199, at 1400–02 (concluding that traditional physical law should not be applied to the Internet). I will refer to this approach to choice of law on the Internet as the "independent" Internet approach. Note that this is not a choice of law approach in the traditional sense, but an argument for a whole new substantive law.

should apply to a given dispute.²⁰¹ There is no rational way to determine the sovereign entity that has the greatest justification for applying its law to a dispute because the locale of the persons sharing a cyber-relationship is irrelevant.²⁰² All sovereign entities have an equal interest in applying their own law to an Internet dispute because harmful interaction on the Internet happens everywhere simultaneously, invading all states equally.²⁰³ "[N]o physical jurisdiction has a more compelling claim than any other to subject these events exclusively to its laws."²⁰⁴ Instead, it is best to allow the Internet to develop its own "law" for transactions because only it has an overriding interest in regulating cyber-conduct.²⁰⁵ This makes the Internet a self-sustaining legal entity, based on mutual agreement by the users and an efficient choice of law for disputes in the physical world, because the users have adopted the Internet legal arrangement as their own.²⁰⁶

201. *See id.* at 1370–76 (arguing for the irrelevance of territorial sovereignty when dealing with the Internet since the Internet crosses all territorial borders). "All such Web-based activity . . . must be subject simultaneously to the laws of all territorial sovereigns." *Id.* at 1374.

202. *See id.* at 1375 ("There is no geographically localized set of constituents with a stronger and more legitimate claim to regulate [the Internet] than any other local group.").

203. *See id.* at 1370–78 (positing the anachronism of the sovereign power of a single nation over a part of the Internet). "The Net enables forms of interaction in which the shipment of tangible items across geographic boundaries is irrelevant and in which the location of the participants does not matter." *Id.* at 1378.

204. *Id.* at 1376. Johnson and Post justify that position as follows:

[E]vents on the Net occur everywhere but nowhere in particular, are engaged in by online personae who are both "real" (possessing reputations, able to perform services, and deploy intellectual assets) and "intangible" (not necessarily or traceably tied to any particular person in the physical sense), and concern "things" (messages, databases, standing relationships) that are not necessarily separated from one another by any physical boundaries

Id. As an example of their theory, Johnson and Post offer the following: "A Web site physically located in Brazil . . . has no more of an effect on individuals in Brazil than does a Web site physically located in Belgium or Belize that is accessible in Brazil." *Id.* at 1375.

205. *See id.* at 1378–81 (contending that the Internet is the only "state" that has an interest in regulating itself). Johnson and Post believe that we should "conceiv[e] of Cyberspace as a distinct 'place' for purposes of legal analysis by recognizing a legally significant border between Cyberspace and the 'real world.'" *Id.* at 1378. The ultimate result of that position is stated by them as follows:

If the sysops and users who collectively inhabit and control a particular area of the Net want to establish special rules to govern conduct there, and if that rule set does not fundamentally impinge upon the vital interests of others who never visit this new space, then the law of sovereigns in the physical world should defer to this new form of self-government.

Id. at 1393. They go on to argue that the real world should offer comity to the legal rules that are established in this way. *See id.* at 1391–95 (arguing for a system of comity for Internet law).

206. *See id.* at 1400–02 (discussing the Internet as a self-regulating legal forum).

The independent Internet approach has serious flaws. First, the current Internet has yet to formulate a system of community rules by which users should operate.²⁰⁷ Even assuming that a code of conduct could be created, there is no sovereign governing body able to impose a penalty upon someone who has violated these ethereal community standards.²⁰⁸ Allowing the Internet to impose conduct rules would give a plaintiff a right without a viable remedy, unless an ultranational Internet court is created for enforcement.²⁰⁹ In defamation law, it would be the same as saying to a harmed person, "Yes, we know you have suffered an affront, but all we can do is commiserate with you and agree about how bad it was."²¹⁰ That would be of little comfort to Gutnick as his business contacts fall away from him because

207. *See id.* at 1378–87 (noting the inability of the Internet, to this point, to develop its own conduct-regulating law). "Implied throughout this discussion is the recognition that these rules will be meaningful and enforceable only if Cyberspace citizens view whoever makes these decisions as a legitimate governing body." *Id.* at 1387. One would be correct in questioning how a system of community rules could actually be developed. The Internet is a broad-based forum for communication, and to gain the support of the users, the rules would have to strike a compromise between the varied interests of everyone using the Internet. That hypothetical agreement is at best a utopian concept for defamation, where some persons might have a "thin-shelled" reputation and others a "thick-shelled" reputation. One might also question what community this code actually covers. Does it reach to the far ends of the Internet and serve as an umbrella for all interaction, or does it simply represent the agreement of the users in a forum or those users interacting at a single point in time? Is the code a representation of the general community standards all persons using the Internet should strive to maintain at all times, or is it simply a reflection of the values of users at point *X*, which can be freely modified as users join or leave the world-wide discussion? These questions are relevant to defamation law because the harm occurs when reputation is hurt, but the measurement of that harm is subject to the consideration of the community at large. *See supra* Part II.A (discussing the original intent of defamation law).

208. *See Johnson & Post, supra* note 199, at 1387 ("In order for the domain name space to be administered by a legal authority that is not territorially based, new law-making institutions will have to develop."). "Experience suggests that the community of online users and service providers is up to the task of developing a self-governance system." *Id.* at 1388.

209. One would have to question the political viability of such a proposal, considering the international backlash to proposals to create other ultranational courts. *See, e.g., Philip Shishkin & Jess Bravin, EU Offers Deal on U.S. Immunity From Tribunal, WALL ST. J., Sept. 13, 2002, at A8* (explaining the United States's opposition to joining the International Criminal Court). *But see infra* Part V.B (explaining the reasons why WIPO was accepted by the international community). It would also be theoretically possible to establish a universal law of the Internet by accord that would be valid in any court of law, but the political likelihood of it is also very low. Johnson and Post contend that a system of comity could take the place of a separate enforcement mechanism. *See Johnson & Post, supra* note 199, at 1391–95 (contending that the physical world should give comity to Internet law).

210. *But see Johnson & Post, supra* note 199, at 1381–82 (arguing in favor of an Internet law of defamation).

of his alleged criminal activity.²¹¹ The community may have a standard of decorum, but without enforcement, it means nothing.²¹²

The second problem with the independent Internet approach is that it ignores the differences between contract law and tort law. The independent Internet theory works well with contract law because the two parties have the freedom to adopt any legal relationship they wish in their agreement.²¹³ A contract on the Internet is a personal interaction between two persons, and their digital agreement should be respected in a court of law with a lower level of state interference.²¹⁴ Tort law, in contrast, is meant to represent the duty a person owes to others in the community in everyday noncontractual settings.²¹⁵ The interest of the state is to protect citizens from the harm caused by persons who refuse to operate by these community standards or, in the case of defamation, use words to harm the reputation of others.²¹⁶ The victim has not entered into a voluntary relationship with the person who has libeled him or her; in fact, the victim may have no knowledge that the statement was made until the harm is done.²¹⁷ To truly respect a person's

211. See *supra* Part IV.A (stating the factual background of *Gutnick*).

212. Market forces could take the place of enforcement regimes in maintaining decorum. Under that system, persons would avoid associating with Internet users who put defamatory (as defined by the Internet community in the code) material on their websites, causing those users to stop posting unacceptable material. See Johnson & Post, *supra* note 199, at 1401 (discussing the market-regulating features users of the Internet have adopted to isolate unacceptable content). Unfortunately, the market is unsuited to deterring Internet defamation. The harm of defamation occurs when a person publishes the defamatory material to a third person. See *supra* Part II.B (discussing publication of defamatory material). Users, both new and old, are likely to stumble across a defamatory statement on the Internet, especially if they are searching for information concerning the individual who has been defamed. See *supra* Part IV.A (noting that Gutnick alleged that 1700 people could have viewed the defamatory statement by *Barron's* online by searching for the article).

213. See LESSIG, *supra* note 75, at 197 ("The terms of the contract are those agreed to in the text of the agreement, or implicit in the architecture that regulates dealings about the agreement."). This is not to say that certain jurisdictions do not have an interest in the terms of that transaction (for instance, certain contracts or terms of contracts that have been abolished or declared to be against public policy in a state), but parties to a contract are given wide latitude to structure their agreement and those expectations are generally given great weight in an action on the contract.

214. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) (allowing parties to choose the jurisdictional law applicable to disputes over the contract, with some limitations). This Note is not venturing to argue the scope of the power of a court to sit in judgment on the terms of an Internet contract, merely pointing out the difference between contract and tort and the divergent interests of the state in the two areas of law.

215. See SCHWARTZ, KELLY & PARTLETT, *supra* note 26, at 1 ("A tort is a civil wrong, other than a breach of contract, for which the law provides a remedy. This area of law imposes duties on persons to act in a manner that will not injure other persons.").

216. See *supra* Part II.A (describing the theory behind defamation law).

217. See, e.g., *supra* Part IV.A (noting the facts of *Gutnick*). Even if Gutnick knew of the

reputation, the sovereign state must play a role in punishing the wrongdoer and affording vindication.²¹⁸ It is the scope of that role that this Note will now attempt to define.

B. The WIPO Connection

Both the geographic Internet theory of choice of law and the independent Internet theory of choice of law are inadequate for Internet defamation.²¹⁹ The geographic approach leaves victim plaintiffs and media defendants in untenable positions.²²⁰ The independent Internet approach, on the other hand, does not provide a method of recovery that melds with the justification for defamation law under the common law.²²¹ Instead, the better approach to the *Gutnick* conundrum is to combine the principles of both into a new choice of law regime. This Note adopts that approach as the basis of a new forum for Internet defamation and choice of law.²²²

This intermediate approach borrows heavily from the experience of the international community in dealing with trademark protection on the Internet. As the Internet grew in importance for business, individuals began to register domain names that were the same or substantially similar to the trademarks prominent corporations held.²²³ Corporations immediately sought ways to protect their interest

article that was being prepared, he probably did not know of the part of the article alleging his relationship with Nachum Goldberg.

218. See LESSIG, *supra* note 75, at 188–209 (arguing in favor of a role for state sovereignty in Internet regulation and vindication of rights). "I have not argued against government. . . . Indeed, I have argued just the opposite. . . . But I am not a statist. . . . There is a proper space for collective life, and an important space for private life." *Id.* at 208.

219. See *supra* Part III.B (rejecting the geographic Internet approach to Internet choice of law); *supra* Part V.A (opposing the independent Internet approach); see also LESSIG, *supra* note 75, at 208 ("[I]t would be a disaster if cyberspace became a place where localities again completely controlled—if geography, that is, were simply mapped onto the space—just as it would be a disaster if no local (and hence no collective) control existed.").

220. See *supra* Part III.B (discussing the international problems associated with the geographic approach to Internet choice of law); *supra* Part IV.B (arguing that the High Court's resolution in *Gutnick* leaves a media defendant facing nearly unlimited liability for Internet defamation); *supra* Part IV.C (analyzing Dow Jones's proposed alternative geographic Internet choice of law theory and the problems it causes for plaintiffs).

221. See *supra* Part V.A (describing the failings of the independent Internet approach when viewed through the lens of defamation law).

222. See *infra* Part V.C (positing an international approach to choice of law in Internet defamation that melds the geographic and independent Internet theories into a two-stage process of arbitration).

223. See World Intellectual Property Organization Arbitration and Mediation Center, *Frequently Asked Questions: Internet Domain Names*, at <http://arbiter.wipo.int/center/faq/>

in those trademarks, either through the acquisition of the offending domain name or by the prevention of its use by others.²²⁴ As the tension over these business-related domain names increased, the world began to seek a way to resolve the dispute amicably through international standards.²²⁵ The result was the World Intellectual Property Organization (WIPO) domain name arbitration panel, the final arbiter for domain name issues.²²⁶ The WIPO procedures are "widely recognized as particularly appropriate for technology, entertainment and other disputes involving intellectual property."²²⁷ "WIPO's resolution service offers highly qualified neutral

domains.html (last visited Oct. 26, 2004) (discussing the development of cybersquatting) (on file with the Washington and Lee Law Review). The need for protection was described as follows:

Domain name disputes arise largely from the practice of cybersquatting, which involves the pre-emptive registration of trademarks by third parties as domain names. Cybersquatters exploit the first-come, first-served nature of the domain name registration system to register names of trademarks, famous people or businesses with which they have no connection. Since registration of domain names is relatively simple, cybersquatters can register numerous examples of such names as domain names. As the holders of these registrations, cybersquatters often then put the domain names up for auction, or offer them for sale directly to the company or person involved, at prices far beyond the cost of registration. Alternatively, they can keep the registration and use the name of the person or business associated with that domain name to attract business for their own sites.

Id.

224. *See id.* (relating the reaction to cybersquatting).

225. *See id.* (outlining the justification for the WIPO domain name dispute resolution process). The WIPO Arbitration and Mediation Center notes that it offers "[o]ne single procedure (as opposed to several court actions in different countries), which, in the case of arbitration, produces a result that is final and enforceable internationally." World Intellectual Property Organization Arbitration and Mediation Center, *Frequently Asked Questions*, at <http://arbiter.wipo.int/center/faq/index.html> (last visited Oct. 26, 2004) (on file with the Washington and Lee Law Review). As of October 26, 2004, the WIPO domain name arbitration forum had resolved 6466 general (or noncountry specific) domain name disputes. *See* World Intellectual Property Organization Arbitration and Mediation Center, *Geographical Distribution of Parties Cumulative: gTLDs*, at <http://arbiter.wipo.int/domains/statistics/cumulative/countries.html> (last visited Oct. 26, 2004) (listing the location of the parties who have participated in WIPO domain name arbitration) (on file with the Washington and Lee Law Review). These disputes have been resolved through the use of 377 arbitration panelists, located in fifty-two different countries. *See* World Intellectual Property Organization Arbitration and Mediation Center, *WIPO Domain Name Panelists*, at <http://arbiter.wipo.int/domains/panel/panelists.html> (last modified Oct. 26, 2004) (listing the arbiters available for domain name disputes) (on file with the Washington and Lee Law Review).

226. *See* World Intellectual Property Organization, *General Information*, at http://www.wipo.int/about-wipo/en/gib.htm#P6_18 (last modified June 2001) (outlining the development of WIPO domain name arbitration and the accord necessary for its enforcement) (on file with the Washington and Lee Law Review).

227. World Intellectual Property Organization Arbitration and Mediation Center, *WIPO Arbitration and Mediation Center*, at <http://arbiter.wipo.int/center/index.html> (last visited Oct.

panelists, thorough and expeditious administrative procedures, and overall impartiality and credibility.²²⁸

The WIPO arbitration panel was created to remedy a situation where the Internet, a multinational forum of communication, was allowing persons to infringe upon the rights of businesses protected under geographically centered trademark rights.²²⁹ Instead of leaving the issue to legal resolution in individual nation-states, the international community realized that a supranational solution was necessary,

26, 2004) (on file with the Washington and Lee Law Review). The Arbitration and Mediation Center outlines the WIPO arbitration advantages as follows:

- *A single procedure.* Through ADR, the parties can agree to resolve in a single procedure a dispute involving intellectual property that is protected in a number of different countries, thereby avoiding the expense and complexity of multi-jurisdictional litigation, and the risk of inconsistent results.
- *Party autonomy.* Because of its private nature, ADR affords parties the opportunity to exercise greater control over the way their dispute is resolved than would be the case in court litigation. In contrast to court litigation, the parties themselves may select the most appropriate decision-makers for their dispute. In addition, they may choose the applicable law, place and language of the proceedings. Increased party autonomy can also result in a faster process, as parties are free to devise the most efficient procedures for their dispute. This can result in material cost savings.
- *Neutrality.* ADR can be neutral to the law, language and institutional culture of the parties, thereby avoiding any home court advantage that one of the parties may enjoy in court-based litigation, where familiarity with the applicable law and local processes can offer significant strategic advantages.
- *Confidentiality.* ADR proceedings are private. Accordingly, the parties can agree to keep the proceedings and any results confidential. This allows them to focus on the merits of the dispute without concern about its public impact, and may be of special importance where commercial reputations and trade secrets are involved.
- *Finality of Awards.* Unlike court decisions, which can generally be contested through one or more rounds of litigation, arbitral awards are not normally subject to appeal.
- *Enforceability of Awards.* The United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, known as the New York Convention, generally provides for the recognition of arbitral awards on par with domestic court judgments without review on the merits. This greatly facilitates the enforcement of awards across borders.

World Intellectual Property Organization Arbitration and Mediation Center, *ADR Advantages*, at <http://arbitrator.wipo.int/center/advantages.html> (last visited Oct. 26, 2004) (on file with the Washington and Lee Law Review).

228. World Intellectual Property Organization Arbitration and Mediation Center, *supra* note 223.

229. See *supra* notes 223–24 and accompanying text (noting the need for the WIPO arbitration panel in domain name disputes). The recognition of trademarks has traditionally been the province of individual nations. See World Intellectual Property Organization, *supra* note 226 (recognizing the role of individual nations in the protection of intellectual property).

combining the rights of nations to protect their citizens from business harm with the need to have a universal, and not a balkanized, Internet.²³⁰ This same need is present in the *Gutnick* problem over choice of law in Internet defamation disputes. On one side of the debate is the value of a free Internet that promotes and facilitates information flow without self- or court-imposed restriction.²³¹ On the other side of the debate is the interest a nation has in protecting its residents from the reputational harm caused by Internet libel, both in cyberspace and in real space.²³² It is time for the international community to find the intermediate ground in Internet defamation disputes.²³³

C. *The Value of Conversation—A New Forum To Resolve the Gutnick Problem*

The WIPO arbitration forum has gone a long way towards uniform regulation of trademark infringement on the Internet.²³⁴ This Note posits that a similar approach can be used to create a uniform approach to international Internet defamation cases. Common law incremental change will not resolve the tension between the Internet and geographical choice of law.²³⁵ It is also apparent that an international consensus will not develop for a treaty-imposed single publication rule, in light of the current hesitancy of individual nations to adopt such a rule.²³⁶ Finally, it is not enough to say that the Internet should be treated as its own community; without a way to enforce community standards, reputational harm will go unpunished.²³⁷ Instead, what is needed is a uniform and substantial change—a

230. See *supra* note 225 and accompanying text (stating the justification for the WIPO domain name arbitration forum).

231. See *supra* Part IV.B (positing the value of the Internet as an information source).

232. See *supra* Part II (asserting the interest of the state in protecting personal reputation).

233. See *infra* Part V.C (recommending the formation of an arbitration forum as a first step in resolving choice of law in an Internet defamation action).

234. See *supra* Part V.B (describing the role of WIPO in intellectual property disputes).

235. See *supra* Part III (noting the tension between the Internet, a boundless communications forum, and choice of law, which attempts to center the resolution of a dispute in a single geographical place). This fact was recognized by Justice Kirby in his concurrence in *Gutnick*. See *supra* notes 158–60 and accompanying text (discussing Justice Kirby's reticence with the resolution adopted in *Gutnick*).

236. See *supra* Part IV.A.2 (noting the High Court's rejection of the single publication rule); see also DAVID PRICE & KORIEH DUODU, *DEFAMATION: LAW, PROCEDURE AND PRACTICE* 420–21 (3d ed. 2004) (noting that the decision reached in *Gutnick* is in accord with the law of defamation in Great Britain). Great Britain recently recodified its defamation law and refused again to adopt a statutory single publication rule. See PRICE & DUODU, *supra*, at 510–27 (listing the provisions of the English Defamation Act of 1996).

237. See *supra* Part V.A (dismissing the independent Internet theory as a viable choice of law regime).

change that embraces both the traditional concerns of defamation law and the unique features of a mode of communication that can reach the world at the touch of a button.

This Note contends that an international arbitration forum for defamation can achieve that goal. A forum like this would require formal international agreement, most likely through a treaty or an accord.²³⁸ There is an initial question as to why foreign nations would want to come together to sign an accord on the *Gutnick* conundrum. This Note argues that the political impetus for the treaty would arise out of a necessity to protect local media and the free flow of information on the Internet.²³⁹ Media entities in individual nations would place economic pressure on these nations to join the accord for liability protection.²⁴⁰ Also, because this is a collaborative effort to resolve an international issue, the nations would be assured that their substantive and procedural concerns with the treaty are addressed.²⁴¹

238. I advocate the use of a treaty under the circumstances so as to ensure proper consent to the arbitration panel, as was necessary with WIPO, *see supra* Part V.B (discussing the WIPO arbitration forum), although an international organization with jurisdiction over the Internet might have the authority to establish an arbitration procedure similar to the one I am proposing. In the United States, for instance, a treaty would have to be approved by the Senate, *see* U.S. CONST. Art. II, § 2, cl. 2 (establishing the treaty power of the President, requiring the "[a]dvice and [c]onsent" of the Senate), thereby establishing its status as part of the primary law of the land, *see* U.S. CONST. Art. VI, cl. 2 (placing duly adopted treaties on the same level as statutes and making them the "supreme [l]aw of the [l]and"). This process is necessary so that the treaty would be supreme to any other state or national Internet defamation laws. The same considerations in other nations counsel for a formal treaty or accord over an informal arrangement.

239. *See Gutnick v. Dow Jones & Co.* (2002) 210 C.L.R. 575, 643 (Austl.) (Kirby, J., concurring) (lamenting the approach taken in *Gutnick* and noting the need for an international consensus on the problem); *see also supra* Part IV.B (describing the liability issue for media defendants under *Gutnick*).

240. *See supra* Part IV.B (outlining the desire media defendants have for liability protection). This is a purely political and economic argument. If there is only partial international agreement to the accord, media entities would move their Internet operations to nations where the treaty was in force. This would not only impact the media operations and telecommunications sector of a nation's economy, but also their cyber-business as those corporations lose their media clients. Limited liability is often considered a valid reason to shift business operations. *See* Bernard Wysocki, Jr., *Malpractice Proposal Gives Insurers Fits*, WALL ST. J., Jan. 28, 2003, at A4 (discussing the tort reform movement in medical malpractice and doctors moving to states where there are liability limitations). It is doubtful that a nation would allow the exodus of business that nonparticipation might prompt.

241. *See Gutnick*, 210 C.L.R. at 627 (Kirby, J., concurring) (discussing the fact that defamation uniquely reflects the balance a nation makes between freedom of speech and reputation). It is that balance that a state would want to see preserved in the accord, along with any procedural concerns). Although I discounted earlier the interest a nation might see in a treaty like this from the plaintiff's point of view, if there is some agreement as to the comity a judgment pursuant to the treaty would be given in other nations, then there is an incentive to join to make sure that recovery is guaranteed.

Finally, the international community has come to an agreement on the value of the Internet in communications and dissemination of information, and any threat to that flow should be met with international action.²⁴²

In structure, the arbitration forum²⁴³ this Note proposes does not vary substantially from the one created in the WIPO accords.²⁴⁴ The International Internet Defamation Arbitration Forum (IIDAF) should consist of a panel of defamation law experts and practitioners tasked with two primary purposes in any given dispute that is brought before them.²⁴⁵ The first issue for the panel to decide will be the truth or falsity of the alleged defamatory statements posted on the Internet.²⁴⁶ If a determination of falsity is made, the plaintiff will have a choice of remedy. If the plaintiff opts to pursue a nontraditional retraction remedy, the panel will be given the power to make a binding determination of falsity against the media defendant and order it to retract the defamatory statements.²⁴⁷ If the plaintiff opts to pursue damages, however, the panel will make a binding determination of the law governing the dispute,²⁴⁸ leaving the plaintiff's ability to recover damages to the substantive provisions of that law.²⁴⁹ Each of these tasks will now be discussed in turn.

242. See *id.* at 615–20 (Kirby, J., concurring) (noting the value of the Internet to society); see also *supra* Part V.B (explaining the need for the WIPO panel in light of Internet commerce).

243. I have titled this forum the International Internet Defamation Arbitration Forum and will hereinafter refer to it by the acronym IIDAF. In developing this proposal, I have borrowed a number of provisions from the Annenberg Proposal, developed by the Libel Reform Project of the Annenberg Washington Program in Communications Policy Studies of Northwestern University. See Rodney A. Smolla, *The Annenberg Libel Reform Proposal*, in *REFORMING LIBEL LAW 229*, 230–50 (John Soloski & Randall P. Bezanson eds., 1992) (relating the provisions and commentary of the Annenberg Libel Reform Proposal). The Annenberg Proposal was developed by a group of distinguished scholars, and the proposal was the culmination of their discussion and debate. See *id.* at 229–30 (discussing the growth of the Annenberg Proposal). As such, I believe that it is the best representation of the general principles of defamation law, and I am selectively adopting its elements as the embodiment of a consensus on what defamation law is.

244. See *supra* Part V.B (describing the WIPO arbitration organization).

245. The makeup of the panel is flexible and should be addressed in the accord establishing the IIDAF.

246. See *infra* Part V.C.1 (discussing the truth and falsity role of the arbitration panel).

247. See *infra* Part V.C.2 (noting the remedies the arbitration panel will be empowered to grant).

248. This will simply be a choice of law determination, leaving plaintiffs with the choice of the jurisdiction in which they wish to sue.

249. See *infra* Part V.C.2 (positing the role of the IIDAF in the choice of law for a subsequent defamation suit for damages). This choice of law determination by the IIDAF should be established in the accord as the only law applicable to all of the harms suffered by the plaintiff in any jurisdiction, although the treaty should provide the plaintiff the opportunity to plead and prove the entire gamut of his or her damages from the statement worldwide. This

1. Truth or Falsity

The initial step for the tribunal will be to determine the truth or falsity²⁵⁰

determination of choice of law would also make the initial determinations of defamatory character and truth or falsity nonbinding because those questions would be subject to the substantive law of the jurisdiction.

250. Before addressing the elements of the truth or falsity determination to be made by the IIDAF, I want to make clear that this substantive determination is not meant to be a radical departure from established defamation law. Be it constitutional, statutory, or common law in form, defamation requires a false statement of fact against another. *See supra* Part II.A (outlining the core elements of an action for defamation). By empowering an ultranational entity to make a truth or falsity determination, I am not seeking to supplant the constitutional protections, implicit in the First Amendment, that have been recognized by the United States Supreme Court in its dealings with defamation law. *See generally* Ronald J. Krotoszynski, Jr., *Defamation in the Digital Age: Some Comparative Law Observations on the Difficulty of Reconciling Free Speech and Reputation in the Emerging Global Village*, 62 WASH. & LEE L. REV. 339, 344–48 (2005) (reviewing the Supreme Court's defamation jurisprudence); Christopher Wolf, *A Comment on Private Harms in the Cyber-World*, 62 WASH. & LEE L. REV. 355, 356–57 (2005) (commenting on the impact of *Sullivan* on defamation law). At no point should the accord seek to negate constitutional doctrine, but it should embrace that doctrine to the point that it is consistent with the classic determinations of truth and falsity required by defamation law. *See, e.g., infra* note 255 (discussing the opinion doctrine); *infra* note 258 (analyzing the need for a substantial truth doctrine). In fact, the remedy that the IIDAF can grant, *see infra* Part V.C.2 (limiting the IIDAF's binding remedy to retraction alone and recognizing that if a plaintiff wishes to pursue damages, he or she must do so in another forum), is meant to side-step any constitutional issues associated with a damages award. *See, e.g., Krotoszynski, supra*, at 346–47 (arguing for certain limitations on Supreme Court defamation doctrine that would allow for mandatory retraction remedies).

As a result, I differ with my commentators on the impact their fundamental premises have on my proposal. *See generally* Krotoszynski, *supra*; Wolf, *supra*. I do not believe that the IIDAF poses the challenge to the First Amendment protections so aptly described by their articles. *See generally* Krotoszynski, *supra*; Wolf, *supra*. Although I recognize that the rest of the world does not view freedom of speech through the same lens as Americans do, *see, e.g., Krotoszynski, supra*, at 343–52 (documenting the differing views on freedom of speech held by the United States, Japan, and Germany); Wolf, *supra*, at 355–64 (discussing the reaction of the international community to American free speech principles); *supra* Part III.B (noting the *Yahoo!* dispute); *supra* Part IV (describing *Gutnick*), I think a common agreement as to the core elements of a determination of truth or falsity can be reached, especially if the IIDAF can only award retraction for the plaintiff. *Supra* Part III.B (noting the *Yahoo!* dispute); *supra* Part IV (describing *Gutnick*); *see infra* Part V.C.2 (outlining the remedy available to plaintiffs using the IIDAF). *But cf.* Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 309 (1994) (arguing that a forced vindication remedy might violate editorial control under the First Amendment (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974))). If the plaintiff opts for money damages, the plaintiff and defendant are in the same position as they would be in a standard court of law. Each party would argue choice of law concerns to the IIDAF, *see infra* Part V.C.2 (examining the choice of law role of the IIDAF), much as they would to a regular court. Once a binding choice of law determination is made by the IIDAF, both parties are left to the law of that locale to resolve the dispute between them. *See infra* Part V.C.2 (describing the role of the choice of law determination made by the IIDAF). If that jurisdiction is the United

of the allegedly libelous statement.²⁵¹ This will require the IIDAF to make two

States, then defendants have the same First Amendment shield as they would have in a normal defamation dispute. If that jurisdiction is not the United States, then the defendants are subject to the whims of that jurisdiction's law. In fact, I would argue that my proposed process would afford defendants more First Amendment protection than at present. Under *Gutnick*, a plaintiff can avoid the potential application of the First Amendment by alleging tangible reputational harm in any jurisdiction where the harm has been caused by the access of the defamatory material via the Internet by persons in that jurisdiction. See *supra* Part IV.B (observing the harm caused by the *Gutnick* rationale). This allows plaintiffs to avoid the law of the United States entirely even if, under my proposed IIDAF regime, United States law is the proper law to resolve the dispute if money is sought. Far from posing a frontal challenge to the First Amendment as the commentators claim, see generally Krotoszynski, *supra*; Wolf, *supra*, the IIDAF helps to preserve the First Amendment in an ever-changing technological world without stepping on the toes of other nations through the use of a geographic Internet theory. See *supra* Part III (outlining and critiquing the geographic Internet theory).

Even if the IIDAF is constitutionally suspect under current doctrine, I believe that the Supreme Court might be willing to modify constitutional dogma to embrace an attempt to resolve some of the intractable problems of international defamation law. Even *Miami Herald Publishing Co. v. Tornillo*, it can be argued, did not go so far as to hold that right of retraction statutes for defamation violate editorial First Amendment freedom. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258–59 (1974) (Brennan, J., concurring). In fact, Justice Brennan, a strong believer in the power of the First Amendment, only joined the opinion in *Tornillo* on the understanding that the majority opinion "addresses only 'right-of-reply' statutes and implies no view on the constitutionality of 'retraction' statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction." *Id.* at 258 (Brennan, J., concurring) (citing Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730, 1739–47 (1967)). It was Justice Brennan too, dissenting in *Herbert v. Lando*, who argued that a determination of actual falsity could alter constitutional considerations in a defamation case. See *Herbert v. Lando*, 441 U.S. 153, 181, 197–98 (1979) (Brennan, J., dissenting in part) (arguing that the editorial privilege should be subject to abrogation where a plaintiff proves a prima facie case of defamatory falsehood). "If . . . a . . . plaintiff is able to establish . . . that the publication at issue constitutes defamatory falsehood, the claim of damaged reputation becomes specific and demonstrable, and the editorial privilege must yield." *Id.* at 197 (Brennan, J., dissenting in part) (footnotes omitted). Although Brennan's view did not carry the day in *Lando*, see *id.* at 180 (Brennan, J., dissenting in part) (noting that only Justices Stewart and Marshall joined in Justice Brennan's dissenting opinion), the Supreme Court could very well embrace Justice Brennan's more case-specific falsity approach when faced with the *Gutnick* conundrum and the IIDAF solution.

251. To ensure enforceability of the determination of the arbitration panel, resort to the IIDAF should be based on a voluntary agreement by the parties. One might question the efficacy of the panel based on this, however, because plaintiffs might forego the panel to pursue damages locally. I think there are practical reasons why the panel would work. First, the goal of the IIDAF would be to resolve defamation disputes quickly, efficiently, and at as low a cost as practically possible. As witnessed by *Gutnick*, defamation litigation can place an onerous time burden on the plaintiff. *Gutnick* is still making its way through the Australian courts, nearly four years after the alleged defamatory statement was made. See *supra* note 117 and accompanying text (noting that the article at issue in *Gutnick* was printed two years before the High Court's decision). The panel could also be empowered to award attorneys' fees to the "winning" party on the question of truth or falsity, encouraging plaintiffs to pursue this alternate avenue. A similar recommendation was made in the Annenberg Proposal. See Smolla, *supra*

decisions based on the record before it. First, is the statement defamatory? Second, is the statement objectively true or false? The determination of defamatory character seems deceptively easy, considering the trouble courts have had in determining what is and is not defamatory.²⁵² The IIDAF should require a person making an allegation of libel to prove by a preponderance of the evidence that the defamatory statement "tends to injure . . . reputation."²⁵³ The panel should judge the

note 243, at 235–36 (listing the Annenberg Proposal provisions for recovery of attorneys' fees).

Second, I think that a panel like this can serve as a catalyst for settlement. Defendants will be anxious to take the complaint to the panel to get a resolution on defamatory character and truth or falsity because those determinations normally come from a trier of fact at trial and not before. That desire would prompt defendants to negotiate with plaintiffs to take the suit to the IIDAF, possibly by offering settlement terms dependent on the resolution of the truth or falsity question before the panel. For instance, a defendant could agree contractually to give a plaintiff \$500,000 plus attorneys' fees and costs if the allegedly defamatory statement is found to be defamatory and false. A resolution on choice of law in a dispute also offers certainty for the parties in the subsequent damages litigation upon which they can base their likelihood of recovery. The choice of law determination by the IIDAF becomes the touchstone against which the parties can measure their hope for recovery and modify demands for settlement. Settlement becomes especially important to the plaintiff because there is a question of comity in enforcing judgments potentially contrary to the legal principles of other nations. See *supra* Part III.B (discussing the *Yahoo!* dispute).

252. See *supra* Part II.A (noting the problems courts have had in deciding whether a statement is defamatory or not).

253. Smolla, *supra* note 243, at 231. This definition of defamation was taken from that adopted by Smolla for the Annenberg Proposal and is in general accord with the definition used by Prosser and Keeton. See *supra* note 28 (quoting the definition of defamation adopted by Prosser and Keeton). It will require a plaintiff to plead and prove by a preponderance of the evidence all three of the classic elements of a defamatory statement: inducement, colloquium, and innuendo. See RESTATEMENT (SECOND) OF TORTS § 563 cmt. f (1977) (relating the common law pleading requirements for defamation). The Restatement describes the three elements as follows:

Under common law pleading, in framing a declaration for defamation, when the defamatory meaning of the communication or its applicability to the plaintiff depended upon extrinsic circumstances, the pleader averred their existence in a prefatory statement called the "inducement." In what was ordinarily called the "colloquium," he alleged that the publication was made of and concerning the plaintiff and of and concerning the extrinsic circumstances. The communication he set forth verbatim and in the "innuendo" explained the meaning of the words. The function of the innuendo was explanation; it could not change or enlarge the sense or meaning of the words. It could only explain or apply them in the light of the other averments in the declaration.

Id. Although at common law this pleading requirement only applied to defamatory statements that were not defamatory per se, see *id.* (noting that these elements only applied to allegations of defamation dependant on "extrinsic circumstances"), I believe that it is a better rule for each plaintiff to allege them as a procedural formality, which should not be hard to meet. Of course, in the context of proving defamatory character, the plaintiff will have to prove that the statement was made "of and concerning" the plaintiff. See *supra* notes 39–40 and accompanying text (noting the elements of an action for defamation).

character of the words based on their "capab[ility] of being reasonably understood as defamatory."²⁵⁴ But this definition of defamation should not reach statements that are purely opinion.²⁵⁵ "In all instances, of course, the implication must be a false and defamatory factual statement and not an expression of opinion."²⁵⁶

Assuming that the plaintiff proves by a preponderance of the evidence that the statement is in fact defamatory, the IIDAF panel will address a secondary question of whether the statement is true or false. The burden of proof should be on the plaintiff to prove falsity by a preponderance of the evidence.²⁵⁷ The defendant, in this analysis, should be protected by two

254. Smolla, *supra* note 243, at 231. The comments to the Annenberg Proposal, from which this mandate is taken, offer a few insights into the determination of defamatory character. They instruct the court to give the words "a reasonable construction in light of the context of the communication." *Id.* at 238. They also maintain that a suit based in defamation can "be maintained on the basis of allegedly false and defamatory implications alone, but . . . only when the implications alleged . . . may reasonably be drawn from the actual statements made." *Id.* at 239.

255. See *Ollman v. Evans*, 750 F.2d 970, 976 (D.C. Cir. 1984) (arguing that opinion is insulated from defamation liability "because there is no such thing as a 'false' opinion"); see also Smolla, *supra* note 243, at 239–40 (relating the commentary of the Annenberg Proposal concerning statements of opinion). The Annenberg Proposal lays out the analysis of fact or opinion as follows:

The first factor is the extent to which the statements are objectively verifiable or provable. If they cannot be objectively proved they are not statements of fact. The second factor emphasizes the general context of the communication: Statements made in a work of fiction, as part of satire or parody, or in the context of artistic, athletic, literary, academic, culinary, theatrical, religious, or political review or commentary should be presumptively construed as opinion. Letters to the editor, editorials, and editorial cartoons should be presumptively construed as opinion. Statements made in a straight news story should be presumptively construed as factual, unless qualifying language is employed to indicate otherwise. Mere colorful exaggeration, rhetorical hyperbole, verbal abuse, name calling, ridicule, or jest should be presumptively construed as opinion. In all instances, however, the emphasis must be on the overall context of the communication and on how the statements were reasonably understood in that context. The final factor emphasizes the nature of the language giving rise to the communication, including the extent to which qualifying, cautionary, or disclaiming language was employed.

Id.; see also *Ollman*, 750 F.2d at 979 (outlining a four-factor totality of the circumstances test for opinion).

256. Smolla, *supra* note 243, at 239.

257. Historically, it has been the defendant's burden to prove the truth of the statement. See *supra* note 40 (outlining the defense of truth); see also *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 770 (1986) ("[T]he common law[] presumption [is] that an individual's reputation is a good one. Statements defaming that person are therefore presumptively false, although a publisher who bears the burden of proving the truth of the statements has an absolute defense."). Shifting the burden to the plaintiff, however, "serves the compelling interest of providing breathing space for the free flow of information," which is at the core of the Internet. Smolla, *supra* note 243, at 244. "It [also] brings defamation into line with most other tort

mutually affirming concepts. The first is substantial truth, which shields the defendant from liability for technical inaccuracies in the article.²⁵⁸ The second is fair report, which shields the defendant from liability for the republication of defamatory statements contained in official reports from government sources.²⁵⁹ The determination of truth or falsity should base

actions in which the plaintiff normally has the initial burden of proving all elements of the prima facie case." *Id. But see Phila. Newspapers, Inc.*, 475 U.S. at 785–86 (Stevens, J., dissenting) (rejecting shifting the burden to plaintiffs to prove falsity because "a host of factors . . . may make it impossible for an honorable person to disprove malicious gossip about his past conduct, his relatives, his friends, or his business associates").

258. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516–18 (1991) (noting the common law defense of substantial truth). The Annenberg Proposal contains a similar protection and explains its importance as follows:

The substantial truth test codified in this section has long been an element of the common law. Minor inaccuracies in terminology or detail do not invalidate the substantial truth of a statement if its gist or sting is true. *The test is whether those aspects of the communication that are false are the same aspects that tend to injure the reputation.*

Smolla, *supra* note 243, at 244 (emphasis added); *see also* Rouch v. Enquirer & News of Battle Creek, 487 N.W.2d 205, 214–20 (Mich. 1992) (discussing that the plaintiff must prove that the defamatory statement is materially false).

259. *See, e.g., Medico v. Time, Inc.*, 643 F.2d 134, 137–40 (3d. Cir. 1981) (discussing the common law privilege of fair report). I would advocate that the accord adopt language similar to the Annenberg Proposal statute privilege, which is as follows:

Any cause of action for defamation maintained pursuant to this Act . . . shall be absolutely barred if the statements were made by:

- (1) Judges, attorneys, witnesses, jurors, or other participants in any judicial proceeding;
- (2) Legislators, attorneys, aides, witnesses, or other participants in any legislative proceeding; or
- (3) Executive and administrative officials, attorneys, witnesses, or other participants in any quasi-judicial or quasi-legislative executive or administrative proceeding.

Smolla, *supra* note 243, at 234. This is a practical defense based on the proof a defendant might have to proffer during the arbitration hearing concerning the truth of a defamatory statement. Because news agencies often rely on statements in official hearings in writing stories, the news agency should have the right to rely on the truth of those statements contained therein. It is illogical to require a news agency to have to delve into the factfinding behind the statements made by others at one of the proceedings covered by the statutory provision (assuming that the new agency could get access to the information in the first place). The defendant should prove by a preponderance of the evidence that it did rely on the statement in producing the article.

In developing the accord that would be the basis for the IIDAF, there might also have to be some consideration given to a provision for a neutral report defense. *See id.* at 233–34 (outlining a neutral report privilege for defendants under the Annenberg Proposal). The Annenberg Proposal notes it as follows:

No cause of action . . . may be maintained for the reporting of false and defamatory statements involving matters of public interest or concern made by persons or

itself on a reasonable construction of the statement, the message as a whole, and the information that the media defendant used to produce the article.²⁶⁰ A determination of nondefamatory character or truth would be a binding resolution of the suit in favor of the defendant, with *res judicata* effect in any subsequent action by the plaintiff. A determination of falsity, on the other hand, would leave the plaintiff with an important decision to make.

2. Remedy or Choice of Law

If a determination of falsity is made by the IIDAF, the plaintiff should have the option of allowing the panel to impose a binding remedy and ending the suit. But what remedy would the arbitration forum award?²⁶¹ That question

entities other than the defendant if the persons or entities who made the statements are identified and the statements are accurately reported.

Id. This defense goes much further in abrogating the common law liability for republication and would need more discussion before adoption. There would also have to be some consideration given to the protections to be afforded to anonymous sources and other protected persons who have given information to an article in which there is a defamatory statement. The contours of a solution to that question are far beyond the scope of this Note.

260. I believe that this determination, while intimately factual, might be able to be made on a paper record. If the panel deems witness testimony necessary, technology would allow that testimony to be done from remote locations through teleconference or by video cassette, limiting the need for actual live witness participation. This would make the panel a much more attractive forum in which to litigate.

261. Defamation law has been a common law tort action for centuries. As a result, it is less likely that nations with already established actions for defamation in their courts will voluntarily give up their substantive law powers to an international forum. If the international Internet arbitration forum veers too far towards being a final court of law with its own body of substantive defamation law, it is likely to be opposed by many nations on political grounds, much like the opposition the International Criminal Court has garnered from the United States, among other nations. *See supra* note 209 (noting the reaction to ultranational courts of law). The forum must also be careful not to tread on the separate national laws of defamation recovery in the member states to the treaty, which would be easy if it were tasked with awarding money damages. For example, the forum must be wary of infringing upon free speech principles in the United States because the enforcement of an initial damages award for a false statement would probably have to meet the requirements of present constitutional doctrine. Although a treaty has the same force and effect as statutes, *see* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . ; and all Treaties . . . , shall be the supreme Law of the Land . . ."), and the Supreme Court's decision in *Missouri v. Holland* established that a treaty can do things that a statute cannot under the Constitution, *see* *Missouri v. Holland*, 252 U.S. 416, 432–35 (1920) (ruling that a treaty, establishing an animal protection regime held unconstitutional when established by statute, is valid because it is not held to the strictures of the Commerce Clause), it is unlikely that the Supreme Court would allow infringement of fundamental rights by way of a treaty.

is best answered by a reflection on the purposes of defamation law.²⁶² The harm in libel is caused by the written word and its effect in the mind of the reader on the social standing of the plaintiff.²⁶³ If the statement, although defamatory, is true, the plaintiff's reputation has already been harmed by the actual event and the words simply relate that event to a wider readership.²⁶⁴ If the words are false, then, arguably, the best remedy is not to give the plaintiff damages, but to require that other words be used to reestablish the reputation of the plaintiff.²⁶⁵ This retraction would return the plaintiff's reputation to the position it occupied prior to the harm done, better fulfilling the initial purpose of tort law.²⁶⁶ It would also guarantee the plaintiff that the remedy would reach as far as the harm; a retraction on the Internet would be accessible by the same people worldwide that had access to the initial defamatory statements.²⁶⁷

This Note is not alone in arguing that vindication to reputation is the best approach to defamation.²⁶⁸ In discussing the development of a nonmonetary

262. See *supra* Part II (explaining the nature of protection for defamation).

263. See *supra* Part II.C (examining the notion of vindication in tort recovery).

264. See *supra* note 257 (discussing the defense of truth in defamation).

265. Opponents would argue that retraction would not be the best remedy for Internet defamation because there would be no guarantee that the persons who read the defamatory statement would read the retraction. See, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 46 (1971) (Brennan, J.) ("Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story."). Information on the Internet is so transitory that a website may change thousands of times in a single day. What is there to guarantee the plaintiff, who has been harmed by a false statement, that all of those persons who read the defamatory statements will also read the remedial statement by the author exonerating the plaintiff's character? Thus, the plaintiff should be given a damages award, if only to account for the harm to the reputation that cannot be remedied by a retraction alone. I think, however, that the premise of this argument is faulty. If there were readers so interested in *Barron's* article on Gutnick, see *supra* Part IV.A (describing the factual basis of *Gutnick*), that they specifically sought it out through the downloading process, it is likely that those same readers would seek out a retraction to that same article. Even assuming, *arguendo*, the truth of the premise of the opponents to retraction remedies, the IIDAF would have the power to "remand" the case for a damages award to the defined situs of harm, giving the plaintiff, who thinks that retraction will be ineffective, that monetary recompense sought in lieu of a statement of vindication. See *infra* notes 275–82 (outlining the IIDAF's role in determining choice of law for a damages action in a domestic court).

266. See *supra* note 55 and accompanying text (analyzing defamation in light of the purpose of tort law).

267. This would be especially true if the IIDAF was given the power to determine the time, place, and manner of the retraction. To enhance the power of this nondamages remedy, the plaintiff could also be afforded a right to reply to the defamatory statement under regulations and limitations determined by the IIDAF in an arbitration award order.

268. See, e.g., James H. Hulme & Steven M. Sprenger, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, in *REFORMING LIBEL LAW* 152, 160 (John Soloski & Randall P. Bezanson eds., 1992) (positing that a vindication action would be a better

resolution to defamation disputes, Pierre Leval concluded that "[p]ermitting such an action advances the remedial objectives of the libel law."²⁶⁹ "It . . . offers the plaintiff a far greater chance of successfully vindicating his reputation."²⁷⁰ Leval also noted that a vindication action offers the defendant a chance to save litigation costs and to limit out-of-control damage awards.²⁷¹ "Recognition of a no-money, no-fault suit would enhance the primary objective of the law of defamation: the restoration of a falsely damaged reputation."²⁷² According to the Annenberg Proposal, "the simplest, most efficient remedy for defamation is a prompt and reasonable retraction or reply."²⁷³ If a plaintiff merely wants "restoration of reputation or [deterrence of] further publication,"²⁷⁴ then the best remedy is the one provided by the IIDAF, where the plaintiff is declared the winner and the world will know it through the retraction.

If the plaintiff forgoes this IIDAF remedy, then he or she will be left to pursue damages in a domestic court.²⁷⁵ But it will be the province of the IIDAF to determine the law that will apply to the action for damages, a binding

alternative in defamation suits than the present action for damages); Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, in REFORMING LIBEL LAW, *supra*, at 211, 215–20 (arguing that a declaration of falsity, without an award of monetary damages, is a better approach to defamation).

269. Leval, *supra* note 268, at 215. Hulme and Sprenger reached a similar conclusion, arguing that "[p]ersonal identity is closely allied with reputation" and "[t]he law should recognize this reputational interest and forge new remedies to vindicate the reputations of those who are victims of defamatory falsehood . . ." Hulme & Sprenger, *supra* note 268, at 160.

270. Leval, *supra* note 268, at 216. Pierre Leval offered this analysis of the vindication action:

The finding of falsity should be seen not merely as one of the elements that plaintiffs must prove to make out their case but as part of the relief itself. We would be wrong to regard money as the sole—or even principal—objective of the libel action. At common law, because of the recognition that the correction of a false libel performed a valuable function, a plaintiff was permitted to sue for nominal damages. A plaintiff should be entitled to sue for the entry of a judgment embodying the verdict of falsity.

Id. (footnote omitted).

271. *See id.* at 216–20 (describing the advantages of a nondamages remedy in defamation).

272. *Id.* at 224.

273. Smolla, *supra* note 243, at 240.

274. Leval, *supra* note 268, at 216.

275. *See supra* note 261 (discussing why the IIDAF should not have the power to award a plaintiff damages in a defamation suit brought before it). This choice would negate the determination of defamatory character and falsity. Those substantive questions would have to be resolved according to the jurisdictional law chosen by the IIDAF because each would have its own statutory and common law requirements for both issues.

determination of choice of law.²⁷⁶ This choice of law will be made through a two part inquiry. First, the IIDAF will determine the place of domicile of the plaintiff at the time when the defamatory statement was published, and this home location's law will be the presumptive law for the action for damages.²⁷⁷ Then both the plaintiff and the defendant should be provided with the opportunity to prove by clear and convincing evidence that the reputation of the plaintiff was "centered"²⁷⁸ in a jurisdiction that was not the domicile of the plaintiff.²⁷⁹ This is meant to assure the parties that the law governing the

276. There is no international consensus on the limitation of suits for defamation to one action for all recoverable damages. Compare *supra* Part II.B (describing the American single publication rule in defamation limiting damage recovery to one suit) with *supra* Part IV.A.2 (discussing the High Court's rejection of the single publication rule in *Gutnick*). This will be a central issue in the development of the accord creating the IIDAF. It would be appropriate to have a provision making a damages recovery in a court of law in any jurisdiction the sole recovery available to the plaintiff for all damage caused by the Internet defamation. How a provision of this sort would be framed will be left to the negotiators creating the accord.

It is true that this is creating a single publication rule via the proverbial "back door," something that I have already argued that the international community would be loathe to adopt. See *supra* note 236 and accompanying text (positing that the common law countries will continue to refuse to adopt a single publication rule, even in light of the problems such refusal causes with Internet defamation). But without this necessary corollary to the accord, it leaves the question of Internet defamation subject to the same conundrum that this Note has attempted to solve. Hopefully, in something of a giving mood, the provisions for determination and recovery and the incentives to use the IIDAF, see *supra* note 251 (positing the advantages the IIDAF brings and the reasons why it would be an effective forum), would encourage an agreement in the international community on this provision.

277. I propose that the IIDAF adopt the provisions of the *Restatement (Second) of Conflict of Laws* for determining domicile. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 11–23 (1971) (establishing a series of inquiries to determine the domicile of a person). Section 11 of the Restatement defines domicile as follows:

- (1) Domicil [sic] is a place, usually a person's home, to which the rules of Conflict of Laws sometimes accord determinative significance because of the person's identification with that place.
- (2) Every person has a domicil [sic] at all times and, at least for the same purpose, no person has more than one domicil [sic] at a time.

Id. § 11. Section 12 further defines "home" as follows: "Home is the place where a person dwells and which is the center of his domestic, social and civil life." *Id.* § 12. Although the Restatement only summarizes the law of the United States as it concerns domicile, these provisions are adequate for the purposes of the IIDAF.

278. Centered, in this sense, would be a term of art. For example, if *Gutnick* was brought before the IIDAF, Dow Jones could attempt to prove, through the business and social contacts of *Gutnick*, that his reputation was centered in the United States and not Australia.

279. Because of the traditional presumption in defamation law that the reputation of the plaintiff is centered in the place of his or her home (in modern terms the place of domicile), see *supra* Part II.A (outlining the traditional common law conception of defamation), it is proper that any party wishing to relocate the place of reputation prove it by clear and convincing evidence. It would also be proper during this inquiry to allow a defendant the opportunity to

defamation dispute coincides with the purposes of defamation law, namely to provide the plaintiff with a recovery for the harm that has been done to him or her in the eyes of the community in which he or she associates.²⁸⁰ Once the IIDAF establishes the law that will apply to a damages action by the plaintiff, that choice will be *res judicata* in the dispute.²⁸¹ The IIDAF will then close the arbitration and leave the plaintiff to pursue the action elsewhere.²⁸²

The efficacy of arbitration to help resolve disputes over defamation has been explored prior to this Note, and it appears that the IIDAF can be a good first step for both parties.²⁸³ Evidence from the Libel Dispute Resolution Program (LDRP) indicated that arbitration is most effective "if the process is entered early."²⁸⁴ It is also important that "an alternative program have a range

depose and serve written interrogatories on the plaintiff to find out more about the plaintiff's allegations of harm and the location of the reputation of the plaintiff. This domicile and effects approach accords with other commentary on choice of law for Internet libel. See Barry J. Waldman, Note, *A Unified Approach to Cyber-Libel: Defamation on the Internet, a Suggested Approach*, 6 RICH. J.L. & TECH. 9, ¶¶ 25–29 (1999) (recommending that American courts adopt a two-fold analysis in Internet libel choice of law), at <http://law.richmond.edu/jolt/v6i2/notes.html> (on file with the Washington and Lee Law Review); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 (1971) (adopting a two-fold analysis for multistate defamation conflict of laws).

280. See *supra* Part II.A (noting the purpose of defamation as a tort action). This second-level inquiry also tries to ensure that the plaintiff is "afford[ed] vindication in the place where it matters most." *Gutnick v. Dow Jones & Co.* (2002) 210 C.L.R. 575, 633 (Austl.) (Kirby, J., concurring). Essentially, to determine the law of the place where the plaintiff's reputation is centered is to make sure that if the plaintiff recovers damages, those damages will put the plaintiff in the position that the plaintiff was before the defamation occurred. See *supra* Part II.C (relating the general principle of damage recovery in tort law and how defamation recovery fits that purpose).

281. This means that the parties will be subject to the ills and benefits of the law chosen.

282. See *supra* note 248 (noting that the choice of law determination will not necessarily limit the courts that have jurisdiction over the lawsuit). If a plaintiff or a defendant attempts to violate the binding provisions of the panel's award, the accord should provide the nonbreaching party the opportunity to either (1) bring an action for enforcement of the agreement, if the breaching party has not performed its part of the award; or (2) be able to interject the award in the lawsuit for purposes of *res judicata*, if the breaching party is attempting to circumvent the award.

283. See, e.g., Roselle L. Wissler et al., *Resolving Libel Disputes out of Court: The Libel Dispute Resolution Program*, in REFORMING LIBEL LAW, *supra* note 268, at 286, 294–310 (relating the results from the Libel Dispute Resolution Program sponsored by the American Arbitration Association and the Iowa Libel Research Project). The Libel Dispute Resolution Program was a domestic attempt to resolve American libel disputes out of court. See *id.* at 286–87 ("The LDRP is a voluntary alternative program . . . for resolving media libel disputes . . . outside the courts."); see also *supra* note 251 and accompanying text (positing the practical reasons why a plaintiff or a defendant would want to resort to the IIDAF in an international Internet defamation dispute).

284. Wissler et al., *supra* note 283, at 310.

of dispute resolution options in order to accommodate the varying interests of parties in different cases."²⁸⁵ In interviewing plaintiffs of libel suits for potential arbitration, the LDRP discovered that most plaintiffs "would have been satisfied if the media had immediately retracted or corrected the alleged libel,"²⁸⁶ and they "expressed dissatisfaction with their litigation experience."²⁸⁷ In discussing an alternative dispute resolution process for libel, the LDRP made a striking conclusion:

Many libel litigants, though not all, should find an alternative process to be an attractive option. Seventy percent of the interviewed libel plaintiffs said that if they could have obtained a quick, fair, and public finding on the dispute without going to court, they might have chosen this means rather than a lawsuit. The features of the process that plaintiffs listed as most attractive were having the outcome made public, avoiding suit, achieving a more just outcome, and reducing time and cost.²⁸⁸

Although the IIDAF may not offer each party everything he or she seeks, it appears from the evidence presented in this Note to be a legitimate attempt at a middle ground, protecting the "physical" reputation of the plaintiff while respecting the unique features that make media dissemination by the Internet vital to modern society.

VI. Conclusion

The necessity for clarity in choice of law for Internet defamation is apparent. The Internet is the first truly global method of communication, where one person can instantly tell the world vital or trivial information about anything.²⁸⁹ It defies boundaries; it defies isolation; it defies limitation.²⁹⁰ Whether these are features to be mourned or celebrated is beside the point.²⁹¹

285. *Id.*

286. *Id.* at 289.

287. *Id.* at 288. The plaintiffs also responded that their prevalent concern is "the underlying falsity of the alleged libel and restoring their reputation." *Id.* The use of litigation to remedy libel, according to LDRP evidence, exists because the plaintiff "lack[s] any other way of responding to the alleged libel." *Id.*

288. *Id.* The LDRP also discussed advantages for the media defendants, the most prevalent being "avoiding large damage awards and high litigation costs." *Id.* at 289.

289. *See supra* Part III (discussing the value of the Internet for communication).

290. *See supra* Part V.A (noting the argument for the independent Internet theory based on the borderless nature of the cyber-world).

291. I will leave the resolution of that question to the community at large.

Decisions like that in *Gutnick*,²⁹² which tie communication to harm to reputation in a single location, threaten persons who use the Internet for its intended purpose with potentially unlimited liability.²⁹³ On the other hand, individuals or businesses who argue as Dow Jones did that liability should be tied to uploading miss the point as well; that is merely an invite for a wholly unregulated forum as countries who desire Internet business forego liability for defamatory communication.²⁹⁴ Instead, there must be a happy medium.

This Note offers a first step towards a compromise between the geographic Internet and the independent Internet.²⁹⁵ Part II addressed the nature of defamation, especially the interplay between harm to the individual and publication of the information.²⁹⁶ It also noted how that notion of publication has been used to define the choice of law for an action in defamation.²⁹⁷ Part III explored the geographic Internet approach, noting its argument that traditional choice of law can easily be translated to the Internet and the problems that theory has caused.²⁹⁸ Part IV discussed the *Gutnick* decision as emblematic of the problems of using the geographic Internet approach for defamation, whether it results in the use of the law of the location of harm or the law of the location of uploading.²⁹⁹ Finally, Part V described the independent Internet theory, which argues that the Internet should be its own legal regime.³⁰⁰ This Note rejected that resolution of the *Gutnick* conundrum in favor of an arbitration panel that offered the advantages of each approach to

292. *Gutnick v. Dow Jones & Co.* (2002) 210 C.L.R. 575 (Austl.). For a more thorough description of the case, see *supra* Part IV.A.

293. See *supra* Part IV.B (analyzing the effect of the Australian High Court's decision on dissemination of information via the Internet).

294. See *supra* Part IV.C (outlining the potential race to the bottom for liability for defamation that could result from a rule of law that tied liability for defamation to the physical situs of uploading of information onto the Internet).

295. See *supra* Part III (noting the geographic Internet theory and its failings); *supra* Part V.A (describing the independent Internet theory and its inapplicability in defamation law).

296. See *supra* Part II.A (discussing defamation in abstract); *supra* Part II.B (stating the need for publication to establish harm).

297. See *supra* Part II.C (analyzing publication's role in traditional considerations of choice of law in defamation).

298. See *supra* Part III (noting the tension between jurisdictional rules for choice of law and the Internet's ability to instantaneously interject itself into every jurisdiction in the world).

299. See *supra* Part IV (relating the factual and procedural history of the *Gutnick* decision, its High Court resolution, and the problems associated with the final opinion and the counter-position taken by Dow Jones).

300. See *supra* Part V.A (discussing the independent Internet approach but noting that it would be illogical to apply in the case of defamation).

choice of law.³⁰¹ The IIDAF would first allow a plaintiff to force a retraction of a false article as the sole and binding remedy for a defamation cause of action.³⁰² If the plaintiff opted instead to pursue damages, the IIDAF would be tasked with the duty to determine the law to be applied in that action, with it seeking out the law of the place where the plaintiff's reputation is the greatest.³⁰³

The international community must step forward and come to an agreement on how the Internet is going to be regulated and what law shall be used. The geographic Internet theory is a failure for all parties, as the *Yahoo!* and *Gutnick* cases reveal.³⁰⁴ The independent Internet theory is still in its infancy, with no community agreement or enforcement mechanism on the horizon.³⁰⁵ But a plaintiff has a right to lament an affront to his or her reputation, as Desdemona did when Iago printed the story,³⁰⁶ even though Iago had a right to distribute timely and important news via the Internet.³⁰⁷ The IIDAF would protect both of those rights by balancing the independent Internet with the interest of the geographic state in providing protection from reputational harm, through a determination of falsity coupled with a required retraction or a determination of the law that should be used in a domestic case for damages.³⁰⁸ The IIDAF may simply be a modest proposal in this Note, but it is a start towards solving the conundrum *Gutnick* poses for international choice of law and towards giving both Desdemona and *The Venetian News* the predictability they need in a suit based on alleged Internet defamation.

301. See *supra* Part V.C (arguing for the establishment of the IIDAF to solve the *Gutnick* conundrum).

302. See *supra* Part V.C.1 (explaining the role of the IIDAF in deciding on the truth or falsity of a defamatory statement and providing the plaintiff with a retraction, if the plaintiff wishes that to be the only remedy). This is the independent Internet approach in action because the IIDAF, within the context of the founding accord, would be able to develop a case law independent of any other jurisdiction in the world for the limited truth and falsity role it plays in Internet defamation cases brought before it.

303. See *supra* Part V.C.2 (describing the choice of law duty of the IIDAF). This is the geographic Internet approach in action because the IIDAF would be deciding the geographic law to apply to a future damages dispute, taking into account the interest of the place where the plaintiff's reputation is greatest in seeing justice done.

304. See *supra* Part III.B (discussing *Yahoo!*); *supra* Part IV (discussing *Gutnick*).

305. See *supra* Part V.A (describing the problems with the independent Internet theory).

306. See *supra* Part I (posing a modern hypothetical derived from Shakespeare's *Othello*).

307. See *supra* Part I (discussing the allegations of infidelity printed by Iago and the harm caused to Desdemona).

308. See *supra* Part V.C (relating the advantages of the IIDAF proposed by this Note in light of the interests of each party in an Internet defamation dispute).

