Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases

INTRODUCTION

Computer bulletin boards[1] have sprung up across the nation, linking computer users from coast to coast and around the world in a series of electronic conversations. Aficionados call them "electronic speakers' corners"[2] and harbingers of a coming global village.[3] A bulletin board user can turn on her computer in her basement to gain access through her modem and telephone. Once connected, users can carry on type-written conversations with each other. Bulletin boards usually disclose the name of a person leaving a message, but users rarely meet each other.[4]

Computer bulletin boards offer specific advantages over

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1 Computer bulletin boards allow users to converse with each other by sending messages to a central electronic address. *See* Jon Carroll, *My Other Car is a Modem*, S.F. CHRON., Aug. 21, 1991, at E12. Users can then read all messages sent to that address at their leisure. *Id.* This type of communication simulates the functions of a physical bulletin board at a supermarket or college. Jonathan Gilbert, Note, *Computer Bulletin Board Operator Liability for User Misuse*, 54 FORDHAM L. REV. 439, 439 n.1 (1985). For further descriptions of computer bulletin boards, see John T. Soma et al., *Legal Analysis of Electronic Bulletin Board Activities*, 7 W. NEW ENG. L. REV. 571, 572 n.2 (1985); *see also infra* note 4 (providing example of computer bulletin dialogue).

2 Michael Freitag, *As Computer Bulletin Boards Grow, If It's Out There, It's Posted Here*, N.Y. TIMES, Apr. 2, 1989, § 1, at 38. According to Freitag, bulletin board participants use bulletin boards to float and discuss ideas, in the same way that people discuss ideas at Speakers' Corner in London's Hyde Park. *Id.*

3 Bill Machrone, *The Interactive Reader*, PC MAG., Mar. 19, 1985, at 83 (stating "every hut in the global village soon will be able to tap into vast stores of organized data").

4 The following messages, culled from the "Books" conference on the Planet BMUG bulletin board in Berkeley, Cal., demonstrate computer bulletin board communication:

Wednesday, January 6, 1993 18:21:31

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From: Rhett V. Pascual

Do you think that the Bible can be construed as literature? How would it be classified? (Fiction, non-fiction, etc?)
[Signed] Rhett "Always posing dangerous questions" Pascual

Thursday, January 7, 1993 11:42:51
From: Scott Underwood

According to some biblical scholarship I have been reading lately (The Dead Sea Scrolls Deception by Baigent and ?, The Unauthorized Version by Robin Lane Fox, among others), the Bible stands as a flawed historical record, much of it written by people with a viewpoint to express, rather than a history to pass on. Of course, if you believe (as fundamentalists do) that the Bible is divinely inspired, the point is moot.

Thursday, January 7, 1993 22:20:04
From: jacqueline r. pringle

As far as lit[erature] goes, it's easier to study the old testament and look at the stories. (It's full of 'em). The new testament is more theology.

I enjoy Proverbs and the Psalms, that's about the only poetry I like. They aren't super historical, just good writing and some good advice.

Thursday, January 7, 1993 22:31:44
From: David C. Greenebaum

Can o' Worms here! Get yer Can o' Worms, guaranteed fresh!

Friday, January 8, 1993 18:13:29
From: Gilles L. Poitras

Can o' worms fo' sho'[.]

But seriously folks the Bible is such a complex collection of literary works that is it [sic] a rich source of research. Note that what we call the Bible came into existence over a large period of time and is really an anthology, in fact some of the books of the bible [sic] are collections in their own rights, as are many works or [sic] literature.

Now I'm not a biblical scholar but here's an exercise for you: What is the role of women and minorities (Samaritans etc.) in the Gospel of Luke? This was the assignment I had in a class years ago & students were very surprised when they read the text with that question in mind.

Friday, January 8, 1993 18:59:06
From: Rhett V. Pascual

I'm an immigrant and I really don't understand some American sayings. What does "can of worms" mean?
[Signed] - Rhett "Enlighten me please!!!" Pascual

Saturday, January 9, 1993 0:42:57
From: Ginny Wilken

I don't know the historical derivation of it, but the idea is that

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existing forms of communication.[5] First, phone lines and computers can carry vast amounts of data, allowing a bulletin board user to receive almost unlimited information without leaving her desk.[6] Second, because electronic messages travel between computers and appear on monitors, bulletin board messages use no paper.[7] Third, the messages transmit few social cues, so people communicating electronically tend to talk more freely than they would in person.[8]

Despite these advantages, electronic communication has yet to discover established legal limits.[9] For example, copyright laws do

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> when you open the can of worms, they all start slithering out and they're long and slippery and all tangled up, and you can't get ahold of them let alone put them back into the can. . . . I'm curious about the derivation now; sounds like maybe an old Southern or hillbilly notion. I'll look into it further.
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> [Signed] ginny "word jazz" wilken.

5 Freitag, *supra* note 2, at 38.

6 *See* Lee Sproull & Sara Kiesler, *Computers, Networks and Work,* SCI. AM., Sept. 1991, at 116. Services available to bulletin board users include an "enormous" genealogical data base in the Midwest and a medical answer line in rural West Virginia. Freitag, *supra* note 2, at 38.

7 *See generally* Martin Lasden, *Of Bytes and Bulletin Boards,* N.Y. TIMES, Aug. 4, 1985, § 6 (Magazine), at 34 (describing mechanics of computer communication and how community activist marshalled 175 attendees at city council meeting without using paper).

8 Sproull & Kiesler, *supra* note 6, at 116. The tendency to speak freely can lead to "flaming," the exchange of uncontrolled angry messages. Lasden, *supra* note 7, at 34. The lack of social cues makes it difficult on occasion to communicate irony or humor. Michael W. Miller, *A Story of the Type That Turns Heads in Computer Circles,* WALL ST. J., Sept. 15, 1992, A1. Computer users have invented the sideways smiley face [:-)] for the ends of electronic messages. *Id.* Miller relates the following interchange to demonstrate how people can flirt by computer:

> She: "In general I hate the smell of perfumes and deodorants, while the smell of certain people's fresh sweat turns me into a gooey gibbering mass of slithery lust."
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> He: "hmmmmm . . . i work out tuesday and thursday . . . :-)"

Id. at A11.

9 Anne W. Branscomb, *Common Law for the Electronic Frontier,* SCI. AM., Sept. 1991, at 154. Branscomb quotes an observer of computer communication: " 'Cyberspace,' says John P. Barlow, computer activist . . ., 'remains a frontier region, across which roam the few aboriginal technologists and cyberpunks who can tolerate the austerity of its savage computer interfaces, incompatible communications protocols, proprietary barricades, cultural and legal ambiguities, and general lack of useful maps or metaphors.' " *Id.* "Cyberspace" refers to electronic space. *Id.*

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not adequately regulate unauthorized software copying.[10] Further, at least one commentator charges that companies with large data banks, such as credit bureaus, infringe on privacy by continuously collecting consumer transaction information.[11] Although laws forbid unauthorized entry into electronic networks,[12] prosecutors often do not know how to work with these laws.[13] As computer use becomes even more widespread, and more information flows electronically, current laws will not adequately address emerging problems.[14]

One such problem involves interstate torts committed via computer bulletin boards. Computer bulletin boards can serve as the medium for defamation,[15] conversion,[16] or electronic tres-

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[10] *See* Paul S. Hoffman, *Who Has the Right to License Software?*, N.Y. ST. B.J., Mar./Apr. 1992, at 10 (outlining practical considerations of representing clients in software copyright suits); Sam Ricketson, *The Use of Copyright Works in Electronic Databases*, 63 LAW INST. J. 480 (1989) (noting that storing work in computer memory bank may or may not constitute "reproduction in a material form"); Anna Sharpe, *Unauthorised Importation of High-Tech Products - Some Recent Developments*, 63 LAW INST. J. 496 (1989) (recommending that Australia treat computer software no differently than other copyrighted work, despite ease and utility of copying and incorporating programs into computers and household appliances); Carl Sundholm, *Computer Copyright Infringement: Beyond the Limits of the Iterative Test*, 3 SANTA CLARA COMPUTER & HIGH TECH. L.J. 369 (1987) (arguing for new computer copyright test).

[11] Branscomb, *supra* note 9, at 156.

[12] 18 U.S.C. § 2701-10 (1988).

[13] Branscomb, *supra* note 9, at 157. Because law enforcement personnel often have little experience with computers, enforcement of computer laws ranges from the neglectful to the overzealous. Mitchel Kapor, *Civil Liberties in Cyberspace*, SCI. AM., Sept. 1991, at 158. In May 1990, the Secret Service seized 40 computer systems as part of an operation against computer crime. *Id.* More than a year later, the service had failed to serve indictments and had not returned the computers of some suspects. *Id.*

[14] Branscomb, *supra* note 9, at 154; Kapor, *supra* note 13, at 158. *See infra* notes 15-30 and accompanying text (discussing emerging problem of computer bulletin board defamation not covered by current laws).

[15] John Cooper, *Defamation by Satellite,* 132 SOLIC. J. 1021 (1988) (giving practical tips on how to handle defamation case where satellite or computer may have carried message). For proposals suggesting responses to interstate computer defamation, see Robert Beall, *Developing a Coherent Approach to the Regulation of Computer Bulletin Boards*, 7 COMPUTER/L.J. 499, 513-16 (1987), and Kimberly Richards, *Defamation Via Modern Communication: Can Countries Preserve Their Traditional Policies?*, 3 TRANSNAT'L LAW. 613 (1990).

[16] *See* Felicity Barringer, *Electronic Bulletin Boards Need Editing. No They Don't*, N.Y. TIMES, Mar. 11, 1990, § 4, at 4. Conversion usually occurs with

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pass.[17] In an ensuing computer tort action under state law, choice-of-law[18] questions will likely arise when the action spans several states.[19]

For example, if a libel occurs on a bulletin board covering many states, the plaintiff can sue in any state in which she can prove that someone received the defamatory message.[20] However, the forum state's law will not necessarily govern the suit.[21] Other

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credit card numbers. *Id.* Users publish valid numbers on bulletin boards, allowing readers to charge purchases to credit cards they do not own. *Id.*

17 *See* Chuck Sudetic, *Bulgarians Linked to Computer Virus,* N.Y. TIMES, Dec. 21, 1990, at 9. During the late 1980s, Bulgaria became a center for the transmission of damaging computer viruses. *Id.* Computer viruses are programs that replicate on computer systems. *Id.* Viruses damage computers by taking up storage area and instructing the computer to destroy memory. *Id.*

18 *See generally* WILLIS L.M. REESE ET AL., CASES AND MATERIALS ON CONFLICT OF LAWS 490 (9th ed. 1990) (discussing how choice-of-law questions arise). Choice of law becomes an issue when more than one law might govern an issue. *Id.* This generally occurs when the plaintiff and defendant come from, or the cause of action arises in, different states. *Id.*

19 Computer tort actions present legal difficulties beyond the one discussed in this Comment. For instance, because computer users may contribute pseudonymously to bulletin boards, a would-be plaintiff may be unable to identify a defendant. *See generally* Carroll, *supra* note 1 (describing anonymous conversations on bulletin boards). In addition, even if a plaintiff can identify the defendant, the defendant may be judgment-proof. *See generally* Lasden, *supra* note 7 (describing most-active bulletin board users as unethical teenagers). Some defendants, however, may have enough money to make a tort action worthwhile. *See, e.g.*, Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991) (involving defamation suit against corporate operator of computer bulletin board). Likely defendants include rich computer users or the system operators. *See generally* Beall, *supra* note 15, at 513-16 (discussing possible substantive solutions to computer bulletin board libel). System operators run the computers hosting bulletin boards, to which users send their messages and from which they receive answers. *Id.* Beall proposes holding system operators liable for messages sent by users. *Id.* However, in *Cubby*, the court summarily dismissed a computer defamation action against a system operator. 776 F. Supp. at 135. The *Cubby* court held that the defendant was a distributor rather than a publisher of the defamatory message. *Id.* at 141.

20 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295-99 (1980). A court must find "minimum contacts" between the defendant and the state in order to assert jurisdiction. *Id.* In Keeton v. Hustler Magazine, Inc. 465 U.S. 770 (1984), the Supreme Court found minimum contacts in New Hampshire when the defendant sold less than one percent of its magazines there. *Id.* at 781.

21 *See generally* RESTATEMENT OF THE CONFLICT OF LAWS § 384 (1934)

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states that appear to have a relation to the tort, and thus likely states to supply the law used, include the state of the bulletin board system's computer, the tortfeasor's state, and the plaintiff's state.[22] Existing choice-of-law theories are confusing and do not specifically address computer bulletin boards.[23] Because of these theoretical and legal defects in choice-of-law rules, judges and litigants may not know which state's law to apply.[24]

This Comment examines choice-of-law problems when federal judges decide computer bulletin board libel[25] cases that come before their courts under diversity jurisdiction. Currently, a federal judge must apply the forum state's choice-of-law rules[26] to determine which law to apply to a diversity case.[27] This practice often yields unsatisfactory results.[28] Some states' choice-of-law

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[hereafter FIRST RESTATEMENT] (recommending that courts apply *lex loci delicti*, or "law of the place of the wrong," in tort cases). The Restatement rule may require the forum state to apply another state's law. *Id.*

22 *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 310-11 (1981). Courts cannot use a state's laws unless they find "minimum contacts" between the action and the state. *Id.* Various elements of computer defamation take place in each of these states; hence, a court can say that each of these states has a relation to the tort. *See Allstate*, 449 U.S. at 310-11 (holding that minimum contacts between action and state must exist to use state's law). In a computer bulletin board case, the defamer may write a message in State A, which defames a plaintiff in State B, and send it to a computer bulletin board located in State C. *See generally* Edwards v. Associated Press, 512 F.2d 258 (5th Cir. 1975) (holding as proper Mississippi court's jurisdiction over news agency that defamed plaintiff in Mississippi, even though agency broadcast defamatory message by sending it electronically from Louisiana and did not re-broadcast in Mississippi). From the writing in State A, the message can travel to users throughout the computer network—states A through Z and beyond. *See generally supra* notes 1-4 (describing how computer communication works).

23 *See infra* notes 65-139 and accompanying text (discussing choice-of-law theories and their inapplicability to computer bulletin board libel).

24 *See generally* REESE ET AL., *supra* note 18, at 490 (discussing uncertainty of choice-of-law decisions).

25 Computer bulletin board libel refers to defamatory statements published over a computer bulletin board. For an example of a case involving bulletin board libel, see Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

26 Choice-of-law rules dictate which of several states' substantive rules a judge should apply. REESE ET AL., *supra* note 18, at 101.

27 *See infra* notes 208-10 and accompanying text (discussing doctrine which requires federal courts to apply state conflict of laws rules).

28 *See infra* notes 29-30 and accompanying text (discussing how conflict of laws rules can have less than satisfactory results).

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rules lack clarity or definition.[29] Other states' rules, although giving unequivocal direction, may require the judge to apply a manifestly unjust law.[30]

This Comment argues that federal courts should solve the choice-of-law problem by applying a federal common law to computer bulletin board defamation cases.[31] Such an approach would allow judges to fashion a defamation law that is relevant to electronic communication.[32] It would also avoid the conceptual difficulties of applying choice-of-law rules to torts that have little relation to a single geographical area.[33]

Part I of this Comment examines differences in defamation law among the several states.[34] Part II discusses various choice-of-law theories that might apply to electronic defamation cases.[35] Part III proposes a solution that avoids choice-of-law analysis in diver-

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[29] *See, e.g.*, Cousins v. Instrument Flyers, Inc., 376 N.E.2d 914 (N.Y. 1978). In *Cousins*, the New York Court of Appeals stated that "*lex loci delicti* (the law of the place of the wrong) remains the general rule in tort cases, to be displaced only in extraordinary circumstances." *Id.* at 915. However, the court used interest analysis instead of *lex loci delicti* to apply New York law to a question stemming from a Pennsylvania plane crash. *Id.* at 916. The court explained its deviation from the rule by pointing to the "fortuitous" place of the accident. *Id.* At least one commentator has criticized the *Cousins* reasoning. Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 16 (1984). A court can displace the *lex loci delicti* rule under less than "extraordinary" circumstances if it can do so whenever an accident occurs in a "fortuitous" place. *Id.* Today, federal courts in New York continue to apply interest analysis. *See, e.g.*, Rutherford v. Gray Line, Inc., 615 F.2d 944 (2d Cir. 1980); Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973), *cert. denied*, 414 U.S. 856 (1973). For an explanation of interest analysis, see *infra* notes 74-96 and accompanying text.

[30] *See, e.g.*, Alabama Great S. R.R. v. Carroll, 11 So. 803 (Ala. 1892) (applying Alabama's conflicts rule of *lex loci delicti* to nonsuit Alabama plaintiff employed in Alabama but injured in Mississippi); Boy Scouts of America v. Schultz, 480 N.E.2d 679 (N.Y. 1985) (applying jurisdiction-selecting rule and denying recovery to plaintiff molested by counselor).

[31] *See infra* notes 140-82 and accompanying text (presenting proposal).

[32] For instance, one court has held that an electronic bulletin board was not a publisher and therefore not liable for defamation damages. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 141 (S.D.N.Y. 1991). If limited to electronic media, this type of holding could become part of a federal common law of defamation.

[33] *See infra* notes 143-50 and accompanying text (discussing electronic torts and geography).

[34] *See infra* notes 38-62 and accompanying text.

[35] *See infra* notes 63-139 and accompanying text.

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sity cases involving electronic communication.[36] Part IV addresses criticisms to this proposal.[37]

I. Differences in Libel Law Among States

Libel refers to a false written statement that exposes a person to public ridicule, hatred, or contempt, or injures her reputation.[38] Such a false statement, whether written or spoken, constitutes defamation.[39] To prevail in a defamation action, the plaintiff must show that: (1) the defendant published the statement by showing or saying it to a third party, (2) the statement identified the plaintiff, (3) the statement put the plaintiff in a bad light, and (4) it was false at the time that it was made.[40]

Though law schools teach the same defamation law from Hawaii to Maine,[41] state laws vary widely.[42] In particular, state laws vary on standards of fault,[43] distinctions between fact and opinion,[44] application of rules of libel per se and per quod,[45]

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[36] *See infra* notes 140-82 and accompanying text.

[37] *See infra* notes 183-227 and accompanying text.

[38] W. Page Keeton et al., Prosser and Keeton on the Law of Torts 773 (5th ed. 1984).

[39] *See* Rodney A. Smolla, The Law of Defamation 1-9 (1992) (discussing difference between libel (usually a written statement) and slander (usually an oral statement) as types of defamatory communication).

[40] William L. Prosser et al., Cases and Materials on Torts 853-55 (8th ed. 1988).

[41] *Id.* at 852-71. At least one foreign observer treats American defamation law as monolithic. Hans Dölle, Der zivilrechtliche Persönlichkeits- und Ehrenschutz 257-94 (1960). Through almost 40 pages of discussing American defamation and privacy law, Dölle never mentions any differences in laws from one state to another. *Id.*

[42] Smolla, *supra* note 39, at 12-14; *see also* J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 Wayne L. Rev. 317, 333 (1967) (calling nuisance value of state defamation law differences "a genuine disaster").

[43] Smolla, *supra* note 39, at 2-84 to 2-86. Minnesota considers corporate plaintiffs "public figures" in defamation cases, and thus the corporate plaintiff must show actual malice, not just negligence, to recover. Jadwin v. Minneapolis Star, 367 N.W.2d 476, 492 (Minn. 1985). In Oregon, however, "[m]erely opening one's doors to the public, offering stock for public sale, advertising, etc., even if considered a thrusting of one's self into matters of public interest, is not sufficient to establish that a corporation is a public figure." Bank of Oregon v. Independent News, Inc., 693 P.2d 35, 42 (Or. 1985), *cert. denied*, 474 U.S. 826 (1986). Thus, corporations in Oregon may need only prove negligence to recover in defamation. *See id.*

[44] Smolla, *supra* note 39, at 6-22 to 6-40. According to Smolla, a

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availability of punitive damages,[46] and statutes of limitations.[47] Any of these laws could affect the outcome of a case involving a libel on a computer bulletin board.[48] Federal courts need uni-

majority of states allows the judge to decide whether to treat a given statement as fact or opinion. *Id.* at 6-40. A minority allows the jury to make the decision. *Id.* In analyzing opinion, which is protected by the First Amendment, versus fact, which is not protected, many courts follow the Restatement (Second) of Torts. *Id.* at 16-16.21 The Restatement (Second) states that a plaintiff can sue on a defamatory opinion only if the opinion implies the allegation of undisclosed defamatory facts. *See* RESTATEMENT (SECOND) OF TORTS § 566 (1965); SMOLLA, *supra* note 39, at 6-16.21. However, New Mexico, Louisiana, and Connecticut consider whether a statement can be verified to determine whether it is fact or opinion. *Id.* at 6-25 nn.133-35. Massachusetts and California look to the "totality of circumstances" and the statement's context in determining fact versus opinion. *Id.* at 6-27 (citing Cole v. Westinghouse Broadcasting Co., 435 N.E.2d 1021, 1025 (Mass. 1982), *cert. denied*, 459 U.S. 1037 (1982); Gregory v. McDonnell Douglas Corp., 552 P.2d 425, 428 (Cal. 1976)). Colorado and Florida follow a Ninth Circuit three-part test which looks to the "totality of circumstances." SMOLLA, *supra* note 39, at 6-28.

45 SMOLLA, *supra* note 39, at 7-1 to 7-18. "Libel per se" refers to a statement that is libelous on its own; "libel per quod" refers to a statement which only becomes libelous in conjunction with other information about the victim. *Id.* at 7-12. To recover damages in a case of libel per quod, a plaintiff must prove "special harm" (i.e., a pecuniary loss). *Id.* In a case of libel per se, however, the plaintiff need merely prove actual harm (for instance, by testifying to personal humiliation or anguish). *Id.* at 7-3 to 7-4. But only some jurisdictions (Arizona, Kansas, Montana, North Dakota, and Ohio) recognize the difference. *See, e.g.*, Peagler v. Phoenix Newspapers, Inc., 560 P.2d 1216, 1223 (Ariz. 1977); Karrigan v. Valentine, 339 P.2d 52 (Kan. 1959); Campbell v. Post Publishing Co., 20 P.2d 1063 (Mont. 1933); Ellsworth v. Martindale-Hubbell Law Directory, 268 N.W. 400 (N.D. 1936); Shifflet v. Thompson Newspapers, Inc., 431 N.E.2d 1014 (Ohio 1982). Other jurisdictions treat libel as a unified class. SMOLLA, *supra* note 39, at 7-11 to 7-12.

46 SMOLLA, *supra* note 39, at 9-21 n.98. Although the majority of states allows punitive damages in defamation cases, Massachusetts, Michigan, Oregon, and Washington prohibit punitive damages. *See, e.g.*, Stone v. Essex County Newspapers, 330 N.E.2d 161, 169 (Mass. 1975); Pettengill v. Booth Newspapers, Inc., 278 N.W.2d 682 (Mich. 1979); Wheeler v. Green, 593 P.2d 777, 788-89 (Or. 1979); Taskett v. King Broadcasting, 546 P.2d 81, 86 (Wash. 1976).

47 SMOLLA, *supra* note 39, at 12-20 to 12-21 n.116; *see also* Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) (upholding plaintiff's right to sue in New Hampshire because of its six-year statute of limitations, despite plaintiff's lack of contact with state).

48 *See generally* SMOLLA, *supra* note 39, at 12-14 (noting that state law "differences create powerful incentives for defendants to forum shop").

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form standards to reach consistent and just results in these cases.[49] They cannot do so using the current choice-of-law rules.[50]

Traditional choice-of-law theories do not work well because they often demand extensive analysis yet lead to an unjust result.[51] To demonstrate the inadequacy of current choice-of-law theories, this Comment presents the following hypothetical case:

> DataNow offers several hundred bulletin boards from a mainframe computer in the state of Analog.[52] DataNow contracts with Slander Siskert, a movie critic from the state of Backup, to disseminate Siskert's weekly movie review column.[53] DataNow publishes Siskert's reviews over its Movie Line bulletin board.[54]

Differing state laws can affect both the substance and the outcome of cases. For example, a plaintiff may face an almost insuperable hurdle if she brings suit in a jurisdiction that applies the libel per quod distinction. *Id.* at 7-12. If she brings suit in such a state, she must prove a pecuniary loss caused by the libel to recover. *Id.* The plaintiff may bring the case in a given state merely to enjoy its statute of limitations. *See Keeton*, 465 U.S. at 770 (allowing plaintiff to sue in New Hampshire because of its six-year statute of limitations on defamation). The plaintiff may file in a given state to enjoy the availability of punitive damages. *See* Burnett v. National Enquirer, Inc., 193 Cal. Rptr. 206 (Ct. App. 1983) (upholding California's punitive damage provisions). A corporate plaintiff may lose its case if the forum characterizes it as a public figure. *See, e.g.*, Dairy Stores, Inc. v. Sentinel Publishing Co., 465 A.2d 953 (N.J. 1983) (applying actual malice standard to all stories about quality or contents of products or services). If a court characterizes the plaintiff as a public figure, the defendant must prove the higher fault standard of actual malice to recover. *Id.*

49 *See* REESE ET AL., *supra* note 18, at 7 (discussing problems occurring without consistent standards).

50 *See infra* notes 63-139 and accompanying text (discussing unsuitability of conflict of laws rules to computer bulletin board libel).

51 *See infra* notes 52-139 and accompanying text (discussing hypothetical case and application of rules to it).

52 The facts of Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991), serve as a loose basis for this hypothetical. CompuServe, one of the nation's largest computer information sellers, operates more than 150 different bulletin boards. *See* 776 F. Supp. at 137.

53 In *Cubby*, CompuServe contracted with an independent company, Cameron Communications, to provide a bulletin board on journalism. *Id.* Cameron reprinted a newsletter, Rumorville, over the Journalism Forum bulletin board. *Id.* Statements in Rumorville led to the defamation action in *Cubby*. *Id.* at 138.

54 In *Cubby*, CompuServe disseminated the Rumorville newsletter over its Journalism Forum bulletin board. *Id.* at 137.

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> The Movie Line bulletin board has readers in all fifty states.[55] In a review of the movie *Totally Dumbfounded*, Siskert makes a false assertion. Specifically, Siskert writes that Ferdinand Kreisky, the movie's star and a resident of the state of Circuit, belongs to the Ku Klux Klan. After reading the review, African American, Jewish, and Catholic computer users boycott the movie and its studio, Polaris Pictures.[56] Polaris Pictures also resides in Circuit. Kreisky and Polaris sue Siskert and DataNow in federal court in the Western District of Circuit. They allege defamatory publication in Circuit, and seek compensatory and punitive damages.
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> Backup law, however, prohibits punitive damage awards in defamation cases.[57] Analog allows punitive damages if the plaintiff can show actual malice.[58] Circuit's legislature recently passed a unique damages statute. If a Circuit court finds a person liable for a computer tort in which damages exceed $1000, the court can confiscate her computer and award it to the plaintiff.[59]

Current choice-of-law theories limit a federal court to applying one of these three rules.[60] Before determining whether punitive damages apply, the court must determine which rule to apply.[61]

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55 CompuServe's Journalism Forum reached users in all 50 states. *See id.* at 137, 140.

56 *See generally* Lasden, *supra* note 7 (describing political activism coordinated over a computer bulletin board).

57 Four states—Massachusetts, Michigan, Oregon, and Washington—prohibit punitive damages. *See* cases cited *supra* note 46.

58 Forty-six U.S. jurisdictions allow punitive damages for defamation. *See* SMOLLA, *supra* note 39, at 9-21. "Actual malice" means reckless disregard of the truth or actual knowledge of falsity. *Id.* at 3-40.

59 U.S. courts may find this provision so extreme that it violates the Constitution. RESTATEMENT (SECOND) OF TORTS § 621(d) (1977) (stating that courts cannot assess punitive damages without showing actual malice); Michael D. Dortch, *The Constitution and Punitive Damages: Does Due Process Require the Definition of Degrees of Liability?*, 18 CAP. U. L. REV. 545, 565 (1989) (arguing that courts cannot apply punitive damages without showing higher liability than mere negligence). The legal establishment has reacted almost as extremely to other computer torts. For example, a U.S. District Court judge held Kevin Mitnick, a 25-year-old computer user charged with trespass, without bail before his trial. Kim Murphy, *Suspected Computer Hacker Is Denied Bail*, L.A. TIMES, Dec. 24, 1988, § 2, at 1. Jail officials insisted on placing all of Mr. Mitnick's telephone calls themselves. Steve Harvey, *Only in L.A.: People and Events*, L.A. TIMES, Jan. 28, 1989, § 2, at 2. According to Mitnick's lawyer, violent criminals receive more lenient treatment. *Computer Hacker Must Stay in Jail, Judge Rules*, CHI. TRIB., Jan. 4, 1989, at 8.

60 *See generally infra* notes 63-139 and accompanying text (discussing choice-of-law theories).

61 *See generally* REESE ET AL., *supra* note 18, at 436-38 (discussing choice of law's jurisdiction-selecting process).

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Under current practice, it would do so using the forum state's, Circuit's, choice-of-law rule.[62]

II. Possible Approaches to the Problem

States have a variety of choice-of-law rules they can select.[63] This Part examines five choice-of-law rules that a federal judge may have to use when applying a state's choice-of-law rule in computer bulletin board defamation cases. This Part will also address the different outcomes that may result under these different rules.[64]

A. First Restatement

The First Restatement of the Conflict of Laws provides the simplest choice-of-law rule.[65] In tort cases, the First Restatement follows the Roman law rule of *lex loci delicti*: the law of the place of the wrong applies.[66] Section 377 defines the place of wrong as "the state where the last event necessary to make an actor liable for an alleged tort takes place."[67] For libel, this means the state of publication,[68] where the statement actually harmed the plaintiff's reputation.

In a case involving a nationwide bulletin board, the "place of the wrong" could be any state receiving the defamatory message.[69] If publication took place in all fifty states, every state's

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[62] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (holding conflict of laws rules are "substantive" rather than "procedural," and thus binding on federal diversity courts), *cert. denied*, 316 U.S. 685 (1942); *see also infra* notes 208-10 and accompanying text (discussing application of *Klaxon* doctrine).

[63] *See generally* Reese et al., *supra* note 18, at 490 (describing choice-of-law theories); *see also infra* notes 63-139 (describing choice-of-law theories and applying them to hypothetical case).

[64] *See infra* notes 65-139 and accompanying text.

[65] *See* First Restatement, *supra* note 21, § 384. The First Restatement is the most widely accepted authority among the states. Herma H. Kay, *Theory Into Practice: Choice of Law in the Courts,* 34 Mercer L. Rev. 521, 586 n.399 (1983). In 1983, 21 states and the District of Columbia followed the First Restatement. *Id.* According to one commentator, the Restatement gives a series of "dogmatic" answers to choice-of-law questions. David F. Cavers, The Choice-of-Law Process 6 (1965) (quoting the Restatement's author, Joseph H. Beale).

[66] First Restatement, *supra* note 21, § 384.

[67] *Id.* § 377.

[68] *Id.* § 377 n.5.

[69] *See* Barnaby J. Feder, *Toward Defining Free Speech in the Computer Age*, N.Y.

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law could apply.[70] A judge using the First Restatement rule would end up no closer to a decision than before applying the choice-of-law rule. Therefore, the First Restatement rule in computer bulletin board libel cases could lead to a non-rule. More importantly, this rule could lead to injustice. A plaintiff would normally choose the substantive law by forum-shopping and secure this choice through skillful use of allegations at the pleading stage.[71] The hypothetical case discussed above presents an example.[72]

If Circuit follows the Restatement, the court has an easy analysis leading to a harsh result.[73] Kreisky and Polaris alleged publication only in Circuit. Therefore, the court must follow Circuit law on damages. Applying Circuit's law, the court will order DataNow to turn over its mainframe computer to the plaintiffs. In this case, the First Restatement gives a rigid rule which fails to consider the content of a state's law or its fairness if applied. This rule may not work well for any kind of tort, let alone computer bulletin board defamation.

B. *Interest Analysis*

Professor Brainerd Currie of the University of Chicago formulated the "governmental interest analysis"[74] approach as a reaction to the Restatement's rigid rules.[75] Currie's approach seeks to resolve choice-of-law questions by identifying the putative gov-

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TIMES, Nov. 3, 1991, § 4, at 5. Prodigy, a bulletin board run by IBM and Sears Roebuck, reaches 1.1 million subscribers throughout all 50 states. *Id.* Publication occurs whenever a third person receives the communication. SMOLLA, *supra* note 39, at 4-58. Therefore, a publication occurs every time a libelous message appears on a user's screen. *See id.*

[70] *See generally* FIRST RESTATEMENT, *supra* note 21, § 377 n.5 (stating that "place of the wrong" means place of publication in defamation cases).

[71] *See generally* Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) (applying New Hampshire law to nation-wide libel because plaintiff filed in New Hampshire and alleged publication only there).

[72] *See supra* notes 52-59 and accompanying text (presenting hypothetical case).

[73] *See supra* notes 65-72 (analyzing First Restatement rule).

[74] *See generally* BRAINERD CURRIE, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 183-84 (1963) (explaining theory of governmental interest analysis).

[75] Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 967 (1958).

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ernmental objectives or "policies expressed" in each law.[76] Having identified the policies, an interest analysis then identifies the circumstances in which each state would wish to see its law applied.[77]

If only one state has a policy interest in the application of its law, and all others have none, then a "false conflict"[78] exists. In this situation, the court simply applies the law of the state with the interest.[79] If no state has a policy interest in applying its own law, an "unprovided-for case"[80] exists, and the court applies forum law.[81] Similarly, the court should apply forum law in the event of

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[76] *Id.* at 964.

[77] *See* REESE ET AL., *supra* note 18, at 487 (discussing interest analysis). For instance, if an out-of-state plaintiff sought a punitive damage recovery, the forum state would have no interest in asserting its law granting punitive damages. *See infra* notes 80-81 and accompanying text (discussing unprovided-for cases).

[78] REESE ET AL., *supra* note 18, at 488. For an example of a false conflict, see Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963). In *Babcock*, the plaintiff rode as a guest in the defendant's automobile from Rochester, N.Y. to Ontario, Canada. *Id.* at 281. The defendant lost control of his car in Ontario and thereby injured the plaintiff. *Id.* Ontario had a "guest statute" which immunized drivers from liability stemming from injury to their passengers. *Id.* New York did not have a similar law. *Id.* The New York Court of Appeals found that only New York had an interest in applying its policy: ". . . Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law." *Id.* at 285. By contrast, New York's interest lay in requiring tortfeasors to compensate victims. *Id.* At least one commentator believes that the term "false conflicts" has a broader definition, which includes cases where the forums have unequal interests. Peter K. Westen, *False Conflicts*, 55 CAL. L. REV. 74 (1967).

[79] REESE ET AL., *supra* note 18, at 488.

[80] *See id.* at 496.

[81] Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 765 (1963). Currie thought that such "unprovided-for" cases would rarely arise because states would usually have interests. *Id.* However, he found the prospect so troubling that he created a hypothetical situation in which neither state would care about the result. Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 219 (1958). In his hypothetical case, a California resident injures an Arizona resident in Arizona. *Id.* Before the plaintiff can bring suit, the California resident dies. *Id.* California allows survival of tort actions presumably because it finds compensating plaintiffs more important than protecting estates from depletion by lawsuit. *Id.* Arizona, at the time, allowed tort actions to abate if the defendant died. *Id.* According to Currie, California would not care if an Arizona resident received compensation, and

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a "true conflict,"[82] wherein several states have an ostensible policy interest in the application of their law.[83] In sum, forum law applies unless only one other state has an interest in the application of its own law.

As with the Restatement rule, interest analysis can often lead to unjust results. A forum may have an unreasonable law which the court must apply. Again, the hypothetical presented above[84] gives an example of such an unjust law.

If Circuit follows interest analysis, the court must determine the policies behind the punitive damages laws in Backup, Analog, and Circuit.[85] The judge may determine that Backup forbids punitive damages in defamation to protect free speech.[86] Analog may allow punitive damages to give additional protection to its citizens from malicious defamation.[87] The Circuit legislature may allow confiscation because it hopes to deter people from committing computer-based torts against its citizens.

The court must then determine if each state has an interest in applying its policy.[88] Backup, whose law prohibits punitive damages, would have an interest, because its resident, Siskert, made the allegedly defamatory statement. Backup enacted its law to protect someone in his situation. Analog would have no interest in seeing its damages law apply to benefit plaintiffs in Circuit, because Analog enacted its law to protect Analog defendants. Circuit, whose law allows confiscation, would have an interest, because its citizens, Kreisky and Polaris, are victims of a computer tort. Circuit enacted its law to protect this class of plaintiff.

Because two states have an interest, there is a true conflict over

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Arizona would not care about the depletion of a California estate. *Id.* at 229.

[82] REESE ET AL., *supra* note 18, at 488.

[83] *Id.* at 487-88.

[84] *See supra* notes 52-59 and accompanying text (presenting hypothetical case).

[85] *See supra* notes 74-83 and accompanying text (discussing interest analysis).

[86] *See, e.g.,* Wheeler v. Green, 593 P.2d 777, 788-89 (Or. 1979) (deciding that Oregon's constitution holds defamation defendants responsible only for compensatory damages, not for punitive or deterrent damages).

[87] *See, e.g.,* Burnett v. National Enquirer, Inc., 193 Cal. Rptr. 206, 214-19 (Ct. App. 1983) (upholding California's punitive damage law in defamation cases as a way to punish and deter reprehensible acts).

[88] *See supra* notes 76-83 and accompanying text (describing states' policy interests).

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the question of punitive damages. Under interest analysis, forum law applies in the case of a true conflict.[89] The court will look to Circuit law to resolve the question of whether punitive damages apply. Thus, it will order DataNow to turn its mainframe computer over to the plaintiffs. Once again, this choice-of-law rule leads to an unjust result.

Interest analysis presents other problems in addition to injustice. Evaluating each state's interest can lead to unreliable results because courts must guess at underlying policies or intents.[90] In general, courts have found it difficult to follow Currie's rules.[91] Many courts have misunderstood the point of searching for the policies behind the respective laws.[92] In addition, legislators

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[89] *See supra* notes 82-83 and accompanying text (discussing true conflicts).

[90] *See generally* Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980). Brilmayer argues that scholars and judges can rarely find a legislator's intent in passing a statute because many states do not publish legislative histories. *Id.* at 399, 400 n.37. In addition, even if states publish legislative histories, the histories may not reflect the intent a court ultimately reads into the law. For example, in 1974 Congress passed a law overhauling the national railroad pension system. Railroad Retirement Act of 1974, 45 U.S.C.A. §§ 231-231v. Congress explicitly stated that it wished to preserve the vested earned benefits of all retirees. H.R. No. 93-1345, at 1 and 11 (1974). However, the law prevented some classes of retirees from collecting their vested benefits. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 172 (1980). In a case challenging the law's constitutionality, the U.S. Supreme Court determined that, despite Congress' stated objective, Congress intended to exclude some retirees. *Id.* at 176-77.

[91] Juenger, *supra* note 29, at 33-34. Juenger argues that two difficulties doom most attempts to follow Currie: (1) the futility of attempting to ascertain policies or determine a state's interests in a case, and (2) the "legal jingoism" of courts determined to apply their own states' laws when possible. *Id.*

[92] *See id.* at 47-48 (stating that judges are likely to compare conflicting policies and reflect on ones that make more sense, rather than just review them). For instance, the Second Circuit in Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973), *cert. denied*, 414 U.S. 856 (1973), attempted to follow the New York rule on conflicts which purported to follow Currie's interest analysis. The court found New York's policy against tort damage ceilings stronger than Massachusetts' policy of limiting wrongful-death damages. *Id.* at 441. Currie's original plan, however, had no provision for comparing the strength of policies expressed in law. CURRIE, *supra* note 74, at 181. The court focused its opinion on New York's "public policy" to justify applying New York law. 475 F.2d at 443. Currie, however, saw a big difference between "public policy" and "the state's interest in applying its policy." BRAINERD CURRIE, *Purchase-Money Mortgages and State Lines: A Study in Conflict-*

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often do not know what policy they wish to further in passing legislation.[93] Even if legislators know their own desires, the lawmaking paper trail may confuse courts in a search for legislative intent.[94] Overall, interest analysis has proven to be an unreliable school of thought in the conflict of laws.[95] This has led scholars to create other theories.[96]

C. Comparative Impairment

After courts began working with Currie's governmental interest analysis, Professor Baxter of Stanford University refined Currie's analysis into the "comparative impairment" test.[97] Under this test, the court applies the substantive rule of the state whose policy goals would suffer most if the court used another state's rule.[98]

The hypothetical case presented above[99] demonstrates how comparative impairment can lead to injustice. If Circuit follows Baxter's comparative impairment theory, the court will perform

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of-Laws Method, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 419-20 (1963). According to Currie, "local public policy" meant the forum's limitations on applying a foreign law, usually because the forum found the law noxious. *Id.* at 287-90. Currie theorized that courts should focus on a state's interest in applying its policy, without regard to that policy's content. REESE ET AL., *supra* note 18, at 487.

93 *See generally* "McNollgast," *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992) (arguing that legislation rarely embodies ideals of its supporters because supporters must gain support of moderates by including sometimes contradictory goals).

94 Even clear clues to a lawmaker's purpose do not exclude the possibility that other laws on the state's books embody a contrary purpose. *See* Jeffery Hill et al., *Constraining Administrative Decisions: A Critical Examination of the Structure and Process Hypothesis*, 7 J. L. ECON. & ORG. 373, 398 (1991) (arguing that observers cannot divine "intent" from most congressional delegations of legislative authority).

95 Juenger, *supra* note 29, at 48. "There surely must be something wrong with an approach that complicates even the simplest situation, such as a one-car accident on a rural highway." *Id.*

96 *See infra* notes 97-139 and accompanying text (discussing other choice-of-law theories).

97 *See generally* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963) (presenting theory of comparative impairment).

98 *Id.* at 18. The judge sacrifices "in the particular case, the external objective of the state whose internal objective will be least impaired . . . by subordination in cases like the one at hand." *Id.*

99 *See supra* notes 52-59 and accompanying text (presenting hypothetical case).

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the same interest analysis as above,[100] with one more step. After finding a true conflict, the court determines which state's policy it will less impair by applying the other state's law.[101]

Circuit's policy would suffer if the court applied Backup law because Circuit would not have protected two of its residents from computer torts. Backup's policy would suffer by application of Circuit law because the Backup resident would face a punishment Backup wishes to spare him. The judge might weigh these two impairments and choose to apply Circuit law because it implicates twice as many parties as Backup's law. On the other hand, the judge might apply Backup law because she finds policies protecting free speech more important than protecting parties from computer torts.

Courts have no objective methods to measure how much one law impairs another state's policy.[102] Under the comparative impairment test, courts have to guess about the policies underlying defamation rules and the relative weight they should give to those policies.[103] When faced with electronic defamation torts, courts face an additional difficulty. Legislatures and courts wrote libel laws for tangible media, like newspapers.[104] Courts applying comparative impairment need to determine how these laws apply to an electronic medium in order to determine which law to apply.[105] Thus, the theory appears ill-suited to electronic torts.

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100 *See supra* notes 74-83 and accompanying text (discussing interest analysis).

101 *See supra* notes 97-98 and accompanying text (describing comparative impairment theory).

102 *See* Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws,* 1989 U. ILL. L. REV. 105, 113 (suggesting that courts cannot measure impairment of policies).

103 *Id.*

104 *See generally* SMOLLA, *supra* note 39, at 1-9. Common-law courts created the distinction between libel and slander at a time when few people could read and the written word was "awesome." *Id.* Today, the laws must stretch to accommodate radio and television. *Id.* Smolla states that oral reading of written material constitutes libel, even if the third party does not know of the writing. *Id.*

105 *See supra* notes 97-98 and accompanying text (describing comparative impairment rule). Because of the volume of electronic messages and their ease of communication, courts have interpreted defamation rules in computer communication differently than for traditional media. *See generally* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991) (holding system operator of computer bulletin board does not qualify as publisher of defamatory message).

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D. *Restatement (Second) Most-Significant Relationship Test*

The Restatement (Second)[106] articulates another theory that is ill-suited to electronic torts.[107] Of the states that have abandoned the First Restatement, more have embraced the Restatement (Second) than any other choice-of-law theory.[108] Like most post-Restatement authorities, however, the Restatement (Second) offers courts little substantive guidance concerning choice-of-law decisions.[109] Section 145 requires the court to apply the local law of the state with the "most significant relationship" to the occurrence.[110] To determine which state has the most significant relationship, the court can look to the contacts listed in section 145(2): the place of injury, the place where the conduct causing the injury occurred, the place of domicile or residence of the parties, and the place where the parties' relationship is centered.[111]

If Circuit uses the Restatement (Second), the court will have to determine which state has the "most significant contacts" with the tort.[112] This could be any of the hypothetical states. The injury occurred in Circuit. The conduct causing the injury took place in Backup (from which Siskert sent his review) and Analog (from which DataNow disseminated the review). The parties reside in Backup, Analog, and Circuit.

Because it might not be immediately apparent which state has the "most significant contacts," the Restatement (Second) offers seven criteria to weigh the contacts: (1) the needs of the interstate and international system, (2) the relevant policies of the forum, (3) the relevant policies of the interested states, (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, (6) certainty and uniformity of result, and (7)

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106 RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereafter RESTATEMENT (SECOND)].

107 *See infra* notes 109-18 and accompanying text (discussing Restatement (Second)'s unsuitability to electronic torts).

108 Kay, *supra* note 65, at 586 n.399. Twenty-one states and the District of Columbia adhered to the First Restatement at the time of Kay's survey. *Id.* Of the remaining 29 states, 14 followed the Restatement (Second). *Id.*

109 *See infra* notes 112-18 and accompanying text (discussing difficulty of applying Restatement (Second)); Juenger, *supra* note 102, at 112 (discussing difficulty of applying Restatement (Second)).

110 RESTATEMENT (SECOND), *supra* note 106, § 145.

111 *Id.*

112 *See supra* notes 106-11; *infra* notes 113-18 and accompanying text (discussing Restatement (Second)).

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ease in determining and applying the law.[113] These criteria are vague and offer little direction.[114] For example, a judge will have difficulty determining which state's contacts weigh heaviest when considering the "protection of justified expectations."[115]

The judge, however, must decide which state's law to apply.[116] She might choose Analog law, because its policy of allowing punitive damages would partially fulfill Circuit's interest as well.[117] Analog would have the most important contacts based on the Restatement (Second)'s second and third criteria (relevant policies of the forum and of other interested states).[118] Because this process is long, difficult, and murky, the Restatement (Second) offers little help in computer bulletin board libel cases.

E. *Leflar's Choice-Influencing Considerations*

Professor Robert Leflar's choice-influencing considerations theory[119] offers even less guidance than the Restatement (Second).[120] Nevertheless, some courts express a preference for it.[121] According to Leflar, courts faced with a choice-of-law question

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113 RESTATEMENT (SECOND), *supra* note 106, §§ 6, 145.

114 Willis L.M. Reese, *The Law Governing Airplane Accidents,* 39 WASH. & LEE L. REV. 1303, 1304 (1982). A judge has wide discretion in choosing the state with the "most significant relationship," unless only one state could possibly fit. *See generally* René David, *The International Unification of Private Law,* 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 8 (1969) (discussing uncertainty of conflict of law rules using similar tests in Europe). David also notes that the "most-significant relationship" test "means nothing except, perhaps, that the answer is not ready at hand." *Id.*

115 RESTATEMENT (SECOND), *supra* note 106, § 6(2)(d).

116 *See supra* notes 60-62 and accompanying text (stating that judges must determine where to find law before applying it).

117 *See supra* notes 88-89 and accompanying text (discussing states' interests in applying their law).

118 RESTATEMENT (SECOND), *supra* note 106, § 6(2)(b), (c).

119 ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW 193-95 (3d ed. 1977).

120 *See supra* notes 112-18 and accompanying text (discussing difficulty of applying Restatement (Second)).

121 REESE ET AL., *supra* note 18, at 490. Courts in Minnesota, New Hampshire, and Wisconsin have followed Leflar's theory. *Id.*; *see, e.g.*, Milkovich v. Saari, 203 N.W. 2d 408, 413 (Minn. 1973); Clark v. Clark, 222 A.2d 205, 208 (N.H. 1966); Heath v. Zellmer, 151 N.W.2d 664, 672 (Wis. 1967). Other courts have combined his approach with other theories. *See, e.g.*, Williams v. Carr, 565 S.W.2d 400, 403-04 (Ark. 1978) (combining choice-influencing considerations with the "most significant relationship"); Peters v. Peters, 634 P.2d 586, 593 (Haw. 1985) (combining choice-influencing considerations with governmental interest analysis). The U.S.

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should consider five value factors in making their decision.[122] These factors are: (1) predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interest, and (5) application of the better rule of law.[123] Academics have practically limited their attention to the last factor, and at least one commentator has called Leflar's approach the "better-law" theory.[124]

If Circuit follows Leflar's theory, the court would consider which law best fulfills Leflar's five choice-influencing considerations.[125] Applying either Circuit's or Analog's punitive damages law would advance his first three considerations equally well.[126] That is, both laws may equally yield predictable results, maintain interstate order, and simplify the judge's task.[127]

Circuit's law would fulfill the fourth value, maintenance of the forum's interest, better than any other law.[128] Neither Analog's nor Backup's law would work so effectively to deter computer users from committing torts against Circuit residents. Though Analog's law allows punitive damages in some cases, it lacks the draconian provisions of Circuit's law. Backup's law, which forbids punitive damages, offers even less deterrence.

The court may decide that a rule allowing punitive damages, such as Analog's, is the "better law."[129] The judge might justify this decision by stating that only four other states forbid punitive damages in defamation,[130] and that tortious speech needs no pro-

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Supreme Court found a result of the "better-law" approach constitutionally sound in Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981).

122 LEFLAR, *supra* note 119, at 193-95, 259.

123 *Id.* at 193-95.

124 John E. Noyes, *The Better Law Approach to Choice of Law in Tort Law Cases: A Critique*, 57 CONN. B.J. 472, 481 (1983).

125 *See supra* notes 119-24; *infra* notes 126-39 and accompanying text (discussing Leflar's choice-influencing considerations).

126 *See generally* LEFLAR, *supra* note 119, at 193-95 (presenting and applying choice-influencing considerations).

127 *Id.*

128 *Id.*

129 *See infra* notes 130-32 and accompanying text (showing how Analog law might be best).

130 *See supra* note 46 (discussing punitive damages in defamation).

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tection.[131] Analog's law would therefore best fulfill the last consideration, the application of the better rule of law.[132]

At this point, a judge may decide to apply Analog law because it seems the better rule of law. Or she may decide to apply Circuit law because she finds the forum's interest so strong. Leflar's theory allows this discretion at the expense of the litigants' ability to foresee a result.[133]

Leflar suggests that judges have always followed these considerations, even when rigid rules ordered them to do otherwise.[134] His theory, however, works better as a description of judicial results than as a prescription for judicial action.[135] Indeed, Leflar originally formulated his choice-influencing considerations as a description.[136] Applying the "better rule of law" offers judges freedom but little guidance in deciding cases.[137] Litigators cannot predict decisions if judges merely consider factors in an unsystematic fashion.[138] Thus, Leflar's theories are better suited for historians than lawyers.[139]

III. PROPOSAL: A FEDERAL LAW OF ELECTRONIC DEFAMATION

None of the choice-of-law rules from the preceding Part effectively resolves the problems inherent in computer bulletin board defamation cases.[140] Without appropriate rules, the expanding world of electronic communications will remain chaotic.[141] To bring order and predictability to computer bulletin board defa-

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[131] *See, e.g.*, Burnett v. National Enquirer, Inc., 193 Cal. Rptr. 206, 214-19 (Ct. App. 1983) (upholding California's punitive damage law in defamation cases as method for punishing and detering reprehensible acts).

[132] *See generally* LEFLAR, *supra* note 119, at 193-95 (presenting and applying choice-influencing considerations).

[133] *See supra* notes 119-32; *infra* notes 134-39 and accompanying text (discussing Leflar's theory).

[134] REESE ET AL., *supra* note 18, at 490.

[135] Noyes, *supra* note 124, at 478.

[136] Robert A. Leflar, *The "New" Choice of Law*, 21 AM. U. L. REV. 457, 474 (1972).

[137] Noyes, *supra* note 124, at 480.

[138] *Id.* at 479.

[139] *Id.* at 478-86 (identifying Leflar's accomplishment as identification of judicial factors, but arguing against their use in practice).

[140] *See supra* notes 63-139 and accompanying text (discussing problems with conflict of laws theories).

[141] *See* Branscomb, *supra* note 9, at 154 (discussing chaotic nature of computer communications).

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mation, this Comment urges judges to create a federal common law to govern the tort.[142]

When a newspaper publisher prints an edition, or a radio station airs a news program, the message has some relation to the geographical territory in which the message is sent.[143] As a potential reader or listener gets farther from the location of the publication, she faces more difficulty in getting the message.[144] Once a user sends a defamatory message over a computer bulletin board, however, it resides in an electronic space rather than any geographical space.[145] A user can receive the message as easily in Sacramento as she can in Hoboken.[146] A libelous message over a computer bulletin board may damage a person's reputation as a computer user.[147] Hence, the damage itself will matter only to users of a particular electronic network.[148] These users might not share any geographic space, such as a state. They may only share a community linked by wires and electric pulses.[149] Therefore, traditional choice-of-law rules that attempt to tie the defamatory message to a single state will not work in computer bulletin board libel cases.[150]

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142 *See infra* notes 151-66 and accompanying text (presenting proposal).

143 *See generally* JOHN TEBBEL, THE MEDIA IN AMERICA 297 (1974) (quoting Rocky Mountain newspaper editor that dog fight in Denver is worth more newspaper space than war in Europe).

144 *See generally* 18 ENCYCLOPEDIA BRITANNICA 309-12 (1989) (stating that radio reception is generally more difficult as listener recedes from source); TEBBEL, *supra* note 143, at 297 (stating that newspapers generally serve local or regional interests); RAND MCNALLY NEW COSMOPOLITAN WORLD ATLAS (1975) (showing distances and physical obstacles between major cities).

145 *See generally* Branscomb, *supra* note 9, at 158 (differentiating between message's geographic and electronic locus).

146 *See* ROSABETH M. KANTER, THE STRATEGIC AND ORGANIZATIONAL IMPACT OF INFORMATION TECHNOLOGY 4 (1986) (background paper prepared for the Institute of Informational Studies). "Communication [by computer] is instantaneous and place-irrelevant, permitting transactions over any distance. Local advantages that remain concern primarily the moving of physical objects." *Id.*

147 *See generally* Lasden, *supra* note 7 (describing community of Neo-Nazi terrorists who communicated with each other solely by computer); Carroll, *supra* note 1 (describing how "overlapping communities" develop via bulletin boards); Freitag, *supra* note 2 (quoting computer users who believe they know each other without having spoken in person).

148 Freitag, *supra* note 2.

149 *See supra* note 147 and accompanying text.

150 Branscomb, *supra* note 9, at 158. Branscomb differentiates between a message's geographic locus and its electronic locus. *Id.* Versatility of

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If the law is uniform across all states, however, choice-of-law problems disappear.[151] When litigants in a bulletin board defamation case appear in a federal diversity court, that court can and should find that a single federal law applies.[152] Creating a federal law of computer bulletin board defamation would avoid problems of uncertainty and inconsistent results.[153] Because judges would spend less effort on abstruse conflicts analysis, they would reach just results more often.[154] Further, if judges limit their creation of federal defamation law to electronic media, they can fashion a law that better meets the needs of modern technology.[155]

Therefore, this Comment proposes that federal courts should create rules of federal common, or judge-made, law to computer bulletin board libel cases.[156] Rather than proposing substantive rules, this Comment proposes that judges create these substantive rules as they need them.[157] As cases arrive in court, judges would fashion coherent rules which they consider most just or reasonable.[158] These rules would address such issues as punitive

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computer uses, speed of communication, and extraterritoriality mark the electronic environment and pose challenges to its regulation by the legal system. *Id.* at 154.

[151] *See generally* REESE ET AL., *supra* note 18, at 6 (discussing how conflict of laws problems only arise when laws differ).

[152] *See infra* notes 153-82 and accompanying text (discussing benefits of a single federal law).

[153] *See generally* REESE ET AL., *supra* note 18, at 6 (discussing how conflict of laws problems often lead to inconsistent results).

[154] Juenger, *supra* note 102, at 123 (discussing how judges waste time with conflict of laws questions).

[155] For instance, in Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991) the court decided that the system operator of an electronic bulletin board was not a publisher and therefore not liable for defamation damages. *Id.* at 141. If limited to electronic media, this type of holding could become part of a federal common law of defamation.

[156] BLACK'S LAW DICTIONARY 276-77 (6th ed. 1990). "Common law" refers to the system of jurisprudence based on precedent rather than on statutory laws. *Id.* As used in this Comment, common law refers to judge-made law, rather than to the system of laws which the United States inherited from England. *See generally* Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 FORDHAM L. REV. 167, 203 (1985) (using same definition of common law).

[157] *See generally infra* notes 158-66 and accompanying text (proposing method for creating federal common law of computer bulletin board defamation).

[158] Juenger, *supra* note 102, at 126. Juenger suggests that courts can find the best law by referring to "a standard tort treatise" to determine current

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damages,[159] statute of limitations,[160] standards of fault,[161] differences between opinion and fact,[162] and definitions of "publication."[163] Because individual cases generally raise only a few

opinion. *Id.*; *see also infra* notes 201-15 and accompanying text (discussing federal common law in *Agent Orange* opinion). Common law consists of "broad and comprehensive principles based on justice, reason, and common sense." Miller v. Monsen, 37 N.W.2d 543, 547 (Minn. 1949). *See generally* RONALD DWORKIN, LAW'S EMPIRE 176-224 (1986) (arguing that bodies of law must have internal consistency to become legitimate).

159 A federal common law would need to have a single standard for applying punitive damages. *See generally* DWORKIN, *supra* note 158, at 176-224 (arguing that society cannot consider laws moral if applied inconsistently). United States jurisdictions have different laws regarding punitive damages in defamation. *See generally* SMOLLA, *supra* note 39, at 9-21 n.98. Although the majority of states allow punitive damages in defamation cases, Massachusetts, Michigan, Oregon, and Washington prohibit punitive damages. *See, e.g.*, Stone v. Essex County Newspapers, 330 N.E.2d 161, 169 (Mass. 1975); Pettengill v. Booth Newspapers, Inc., 278 N.W.2d 682 (Mich. 1979); Wheeler v. Green, 593 P.2d 777, 788-89 (Or. 1979); Taskett v. King Broadcasting, 546 P.2d 81, 86 (Wash. 1976). Other U.S. jurisdictions allow punitive damages. SMOLLA, *supra* note 39, at 9-21.

160 A federal common law would need to have a single statute of limitations. *See generally* DWORKIN, *supra* note 158, at 176-224. United States jurisdictions have adopted a variety of statutes of limitations in defamation actions. *See generally* SMOLLA, *supra* note 39, at 12-20 to 12-21; *see also* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 770 (1984) (upholding plaintiff's right to sue in New Hampshire because of its six-year statute of limitations, despite plaintiff's lack of contact with state).

161 A federal common law would need to have a single fault standard. *See generally* DWORKIN, *supra* note 158, at 176-224. Different states have different fault standards. *See generally* SMOLLA, *supra* note 39, at 2-84 to 2-86. Minnesota considers corporate plaintiffs "public figures" in defamation cases, and thus the plaintiff must show actual malice, not just negligence, to recover. Jadwin v. Minneapolis Star, 367 N.W.2d 476, 484 (Minn. 1985). In Oregon, however, "[m]erely opening one's doors to the public, offering stock for public sale, advertising, etc., even if considered a thrusting of one's self into matters of public interest, is not sufficient to establish that a corporation is a public figure." Bank of Oregon v. Independent News, Inc., 693 P.2d 35, 42 (Or. 1985).

162 A federal common law would need to have a single test to determine what constitutes fact and what constitutes opinion. *See generally* DWORKIN, *supra* note 158, at 176-224. United States jurisdictions currently employ a variety of tests to determine whether a message is fact or opinion. *See generally supra* note 44 (discussing tests of fact and opinion); SMOLLA, *supra* note 39, at 6-22 to 6-40. According to Smolla, a majority of states allows the judge to decide whether to treat a given statement as fact or opinion. *Id.* at 6-40. A minority allows the jury to make the decision. *Id.*

163 A federal common law would need a single test of publication. *See*

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specific defamation issues, judges would have the ability to consider each question in great detail.[164] This process would create a body of law with more practical rules than this Comment is able to provide.[165] Ultimately, creating a federal common law will substantially change the way federal courts handle computer bulletin board defamation cases.[166]

The hypothetical case of the DataNow bulletin board discussed earlier[167] can help to demonstrate how a court would create and apply federal common law. Rather than using a specific state's punitive damages law, the court would turn to the federal common law.[168] While choice-of-law rules tell a court which book provides the applicable rules, this proposal suggests that courts look to an as-yet empty book.[169] Judges would write this book and create the federal common law, just as they created England's common law.[170]

The federal judge in Circuit would therefore create a new fed-

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generally DWORKIN, *supra* note 158, at 176-224. States generally do not differ in their definition of "publication," but courts may define the term differently for computer-based torts. *See generally* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (holding system operators are not "publishers" of messages left on computer bulletin boards); Branscomb, *supra* note 9, at 154 (noting that ease with which users can move and copy electronic data challenges conventional notions of authorship and publication).

164 *See generally* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 142-43 (1985) (showing judicial development of antitrust's "rule of reason" from statute allowing no such rule).

165 *See* Miller v. Monsen, 37 N.W.2d 543, 547 (Minn. 1949) (stating that common law consists of "principles based on justice, reason, and common sense"); *see also* Wright, *supra* note 42, at 322 (stating "it is easier to make good law than successfully to predict how it will be made").

166 *See infra* notes 168-82 and accompanying text (discussing application of federal common law).

167 *See supra* notes 52-59 and accompanying text (presenting hypothetical case).

168 REESE ET AL., *supra* note 18, at 390 (discussing threshold questions in the choice of law); *see also* Wright, *supra* note 42, at 333 (arguing for rejection of choice-of-law rules in favor of federal common law).

169 *See generally* REESE ET AL., *supra* note 18, at 436-38 (presenting jurisdiction-selecting rules); Wright, *supra* note 42, at 333 (rejecting choice-of-law rules for federal common law, as yet not made).

170 Sir Frederick Pollock, *The King's Peace*, *in* THOMAS L. SHAFFER, READINGS ON THE COMMON LAW 3-9 (2d temp. ed. 1967) (describing rise of English common law, and how it came from judges).

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eral rule of punitive damages.[171] In doing so, she may consider other states' and nations' defamation laws,[172] treatises on defamation,[173] law review articles,[174] and arguments advanced by counsel.[175] In the case of punitive damages for defamation, she may hold that tortious speech does not need protection.[176] Further, she may hold monetary punitive damages appropriate in cases of actual malice,[177] but also find confiscatory punitive damages provisions like Circuit's to be inappropriate.[178] If she applies punitive damages, her decision will have precedential value, allowing future parties to predict the law.[179]

Rather than specifying which punitive damage laws federal judges should apply to computer bulletin board defamation cases, this Comment proposes that judges engage in a process of creat-

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171 *See generally* PETER W. LOW ET AL., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 301-02 (4th ed. 1989) (describing how court may create rule of federal common law: "Its job is to formulate the wisest solution to the problem before it").

172 *See, e.g.*, Greenspan v. Slate, 97 A.2d 390, 397-98 (N.J. 1953) (citing Austrian, French, and German civil codes as authority for finding parents liable for emergency treatment for their children); Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1362 (Ct. Cl. 1973) (stating that "[w]here Congress has left . . . a large void to be filled entirely by the courts, it is appropriate for us to consider what other jurisdictions have done"). For a description of American judicial responses to punitive damages, see *supra* note 46.

173 RESTATEMENT (SECOND) OF TORTS § 621(d) (1965) (stating that courts may allow punitive damages in cases of actual malice); SMOLLA, *supra* note 39, at 9-21 (arguing that "strong policy arguments can be . . . marshalled" against punitive damages, though current trend favors them).

174 *See generally* Jerome A. Barron, *Punitive Damages in Libel Cases - First Amendment Equalizer?*, 47 WASH. & LEE L. REV. 105 (1990) (arguing for punitive damages in defamation); P. Cameron DeVore & Marshall J. Nelson, *Punitive Damages in Libel Cases After* Browning-Ferris, 12 COMM-ENT 153 (1989) (arguing against allowing punitive damages in defamation).

175 *See generally* Miller v. Monsen, 37 N.W.2d 543, 547 (Minn. 1949) (stating that common sense adds to common law). If counsel can suggest a common-sense argument, that argument can add to the common law.

176 *See, e.g.*, Burnett v. National Enquirer, Inc., 193 Cal. Rptr. 206, 214-19 (Ct. App. 1983) (upholding California's punitive damage law in defamation cases as method for punishing and detering reprehensible acts).

177 SMOLLA, *supra* note 39, at 9-19. Actual malice refers to reckless disregard of the truth or actual knowledge of falsity. *Id.* at 3-40.

178 *See supra* note 59 and accompanying text (describing Circuit's confiscation statute).

179 Wright, *supra* note 42, at 323 (stating that legal decisions serve to establish precedent and organize law).

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ing substantive rules to create a body of federal common law.[180] Such a process will result in laws that reflect the considered wisdom and common sense of judges.[181] The process will also use society's judicial resources most economically, because judges will spend less time analyzing choice-of-law questions.[182]

IV. Analysis of the Proposal

Critics might level two objections to the proposal advanced in the preceding Part: (1) legal precedent forbids federal courts from creating a federal common law, and (2) the proposal, even if legal, might not advance justice. This Part rebuts these objections. First, this Part demonstrates that judges may develop a federal common law for computer bulletin board defamation cases without violating current legal doctrines.[183] Second, this Part explains how allowing judges to develop their own rules will enable them to render just decisions.[184]

A. *Violation of the* Erie *and* Klaxon *Doctrines*

On the surface, creating a body of federal common defamation law may appear to violate the doctrine of *Erie R.R. Co. v. Tompkins.*[185] According to *Erie*, federal courts in diversity must apply substantive state law rather than federal common law.[186] Indeed, *Erie* held that federal common law does not exist.[187]

Yet federal judges frequently create federal common law despite the *Erie* doctrine.[188] Their interpretations of federal statutes create precedents that become federal common law.[189] Case

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[180] *See supra* notes 140-79 and accompanying text (proposing federal common law of computer bulletin board libel).

[181] *See* Miller v. Monsen, 37 N.W.2d 543, 547 (Minn. 1949) (stating that common-law rules reflect wisdom and common sense).

[182] Wright, *supra* note 42, at 321-26 (arguing that diversity jurisdiction wastes judicial resources in comparison to federal common law).

[183] *See infra* notes 185-215 and accompanying text (analyzing *Erie* and *Klaxon* doctrines).

[184] *See infra* notes 221-27 and accompanying text (measuring proposal against Leflar's decision values).

[185] 304 U.S. 64 (1938).

[186] *Id.*

[187] *Id.* at 78.

[188] *See infra* notes 201-07 and accompanying text (discussing creation of federal common law).

[189] *See generally* Vairo, *supra* note 156, at 203 (defining federal common law to include interpretations of statutes).

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reporters and statute annotations bulge with examples of federal common law in antitrust law,[190] admiralty law,[191] securities law,[192] and other areas.[193] Federal courts, however, do not have the authority to make law in any area they please.[194] According to Professor Georgene Vairo of Fordham University, federal courts have the authority to create federal law only when: (1) a federal statute grants them authority, (2) a statute implies the authority, by mandating that the courts do justice, (3) the case involves a uniquely federal interest, or (4) the case involves clashing substantive state policies.[195]

Computer bulletin board libel satisfies Vairo's third condition, the uniquely federal interest.[196] This tort involves enough unique federal interests to allow federal courts to create a common law. The federal government has a unique and substantial interest in that it currently regulates interstate telephone service,[197] the medium over which the messages travel.[198] Federal law also regulates some aspects of computer crime.[199] Vice-President Al

[190] *See* 15 U.S.C.A. § 1, at 1-390 (West 1973). The Sherman Act has only two paragraphs of text, yet has spawned a rich legacy of cases that further develop the law. *See id.*

[191] *See* 46 U.S.C.A. § 688, at 21-650 (West 1975). Although the Jones Act consists of one long sentence, federal courts have interpreted it so often that the note cases run 630 pages. *See id.*

[192] *See* 15 U.S.C. § 78(j)(b)(5) (1988). The Securities and Exchange Commission's Rule 10b-5 is a "judicial oak which has grown from little more than a legislative acorn." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975).

[193] *See generally* 17 U.S.C.A. § 101-18 (West 1977) (giving judicial interpretation of copyright statutes); 26 U.S.C.A. § 61 (West 1988) (interpreting term "gross income" in Internal Revenue Code); 29 U.S.C.A. § 160 (West 1973) (citing case law that interprets power of National Labor Relations Board).

[194] *See generally* Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (holding that federal courts cannot create law in areas substantively governed by state law).

[195] Vairo, *supra* note 156, at 203. Vairo argues that federal regulatory statutes, the Commerce Clause, and the Equal Protection Clause give federal courts the basis to find sufficient federal interests to support application of federal law. *Id.*

[196] *See infra* notes 197-200 and accompanying text (discussing federal interest in regulating computer communication).

[197] *See* 47 U.S.C. §§ 1-805 (1988).

[198] *See supra* notes 1-6 and accompanying text (describing method of communicating via computer bulletin board).

[199] *See* 18 U.S.C. § 2701 (1988). The government has had limited success

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Gore has suggested that the federal government help create a nationwide information infrastructure.[200] A federal common law for computer misuse would make more sense than differing state laws, given the level of federal involvement in electronic media.

In addition, federal diversity courts have already moved toward creating a federal common law in large multi-state tort cases.[201] *In re Agent Orange Product Liability Litigation*,[202] a case with parties residing in "almost all states,"[203] shows this movement. In *Agent Orange*, Judge Weinstein used the "national consensus" of state laws to determine whether punitive damages should apply.[204]

The result in *Agent Orange* suggests that courts could create a federal common law for computer bulletin board libel even if *Erie* governs.[205] By creating his own choice-of-law rule, Judge Weinstein gained the freedom to find the substantive rule he thought best fit.[206] If other judges did the same, he suggested, courts would have available a federal common law of torts.[207]

Even though *Erie* does not prevent federal judges from creating a federal common law, another Supreme Court decision may temper their ability. In *Klaxon v. Stentor*,[208] the Court held that federal diversity courts must use state law, rather than federal common law, to decide choice-of-law questions.[209] The Supreme Court reached this decision by holding that *Erie* extended to choice of law as well as to substantive law.[210] Thus, federal courts could never create their own choice-of-law rules, because *Erie* mandates that they follow state conflicts laws.

Creating a federal common law may constitute a choice-of-law

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in patrolling this area of the law. Kapor, *supra* note 13, at 158. Kapor describes a raid on a computer game magazine publisher's office by Secret Service agents, who had no warrant and actually suspected the publisher of no crime. *Id.* at 158.

200 Al Gore, *Infrastructure for the Global Village*, SCI. AM., Sept. 1991, at 150.

201 *See infra* notes 202-07 and accompanying text.

202 580 F. Supp. 690 (E.D.N.Y. 1984).

203 *Id.* at 692.

204 *Id.* at 711-13.

205 *Id.* at 711 (describing possibility of federal common law arising because of choice-of-law rules).

206 *Id.*

207 *Id.* at 696.

208 Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (holding that choice-of-law rules are "substantive" rather than "procedural").

209 *Id.* at 496.

210 *Id.*

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rule, since the creation arises as a solution to a choice-of-law problem.[211] In light of *Agent Orange*, however, the *Klaxon* doctrine may not apply to computer bulletin board libel. In *Agent Orange*, a district court created its own choice-of-law rule by referring to a national consensus of law rather than any jurisdiction's law.[212] Yet the new rule violated neither *Erie* nor *Klaxon* because the action's contacts with the nation as a whole "dwarfed" those with individual states.[213] In the case of a libelous bulletin board message sent via telephone line to users all over the country, contacts with the entire country would similarly overshadow contacts with individual states.[214] Electronic messages and conversations respect no state borders; users converse with each other on the basis of a shared national culture and a nationally-integrated telephone system.[215] Thus, in computer bulletin board libel cases, federal courts could apply the solution proposed in this Comment and avoid a collision with *Klaxon*.

B. Satisfaction of Choice-Influencing Considerations

Federal courts not only have the power to create a federal common law for computer defamation, but doing so would result in just decisions. Leflar's choice-influencing considerations offer a useful standard with which to judge this proposal.[216] His values summarize the goals judges seek to fulfill when faced with choice-of-law questions.[217] Judges may disagree about the relative weight to assign to the different goals, such as maintaining order

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[211] *See generally supra* notes 19-30 (presenting problem of choice of law in computer bulletin board defamation cases).

[212] *Agent Orange*, 580 F. Supp. at 711.

[213] *Id.*

[214] *See infra* note 215 and accompanying text.

[215] *See* Lasden, *supra* note 7, at 34. The article describes an interview with a teenaged "hacker" who uses bulletin boards and claims to be one of the top software pirates in the country. *Id.* The teenager knew other hackers through bulletin boards in Ohio and New Jersey. *Id.* However, the hacker gave no clue of his home state in either the telephone interview or his bulletin board conversations. *Id.* Such a person communicates indiscriminately with people in any state. *See also supra* note 150 (discussing how distances within U.S. present no obstacle to electronic communication).

[216] *See* LEFLAR, *supra* note 119, at 193-95 (presenting description of how judges seek to decide cases).

[217] *See supra* notes 122-39 and accompanying text (discussing Leflar's value factors).

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against applying the better rule.[218] However, they would probably agree that they seek to decide cases in a way that maximizes Leflar's values: (1) predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interest, and (5) application of the better rule of law.[219] Even Leflar's critics recognize his descriptive accomplishment.[220]

Federalizing the law of electronic defamation would fulfill Leflar's values.[221] First, a single law would make the results of litigation more predictable, at least once courts build up this body.[222] Until they do, however, results will be no less predictable than they are today.[223] Second, the federal law would maintain interstate order, because no single state's law would ever apply at the expense of another's. Although a federal law might not advance the maintenance of international order, it would not harm the current situation either.[224] Third, the judicial task would become easier because one entire analysis, that of deciding which law applies, would disappear in most cases.[225] Fourth, the federal law would advance the forum's interest best because, under a federal common law, the forum is the United States rather than an individual state. Applying a federal law would advance the U.S. interest in regulating interstate communications.[226] Finally, the federal common law of computer bulletin board defamation would probably embody the best available rules. Judges would have fewer other questions to solve, and they would have the freedom to apply whatever rule they found most just.[227]

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218 DWORKIN, *supra* note 158, at 15-20 (1986).

219 *See* LEFLAR, *supra* note 119, at 474 (listing value factors).

220 Noyes, *supra* note 124, at 478.

221 *See infra* notes 222-27 and accompanying text (discussing how federal law fulfills Leflar's values).

222 *See supra* notes 151-55 and accompanying text. Courts would not have to analyze conflict of laws rules, often a daunting task. Litigants would always know which body of law would apply, though they may not know the rule. *See supra* notes 156-82 and accompanying text (presenting proposal).

223 *See supra* notes 151-55 and accompanying text.

224 REESE ET AL., *supra* note 18, at 21.

225 *Id.*

226 *See supra* notes 196-200 and accompanying text (discussing federal interest in regulating computer communications).

227 Juenger, *supra* note 102, at 106.

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Conclusion

Traditional conflicts theories do not provide an adequate framework for federal courts to adjudicate interstate computer bulletin board libel cases.[228] Traditional theories range from those so simple they offer no guidance[229] to those so complex they border on the "psychedelic."[230] The rule proposed in this Comment[231] would allow judges to spend their energy on substantive questions of law rather than wading through ineffective conflict theory.[232] Unifying the law of electronic defamation would avoid miscarriages of justice based on accidents of geography.[233] A federal common law would free judges from the jargon and conceptual difficulties[234] inherent in the conflict of laws. The federal law would also serve the needs of litigants: they would know that peculiar or outdated state laws would no longer deny them justice.[235] Litigants would know that courts would give substantive consideration to rules based on content.[236] Both defendants and plaintiffs, as well as courts themselves, would never

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228 *See supra* notes 135-39 and accompanying text (discussing unsuitability of Leflar's theory as prescription for judicial action).

229 *See supra* notes 65-70 and accompanying text (discussing First Restatement rule).

230 *See* Juenger, *supra* note 29, at 50 (describing interest analysis as theory of "psychedelic abandon").

231 *See supra* notes 156-82 and accompanying text (proposing federal common law of bulletin board defamation).

232 *See* William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953). Prosser called the discipline of conflict of laws a "dismal swamp" when discussing its difficulties. *Id.*; *see also infra* note 234 and accompanying text (discussing difficulties inherent in conflict-of-laws theories).

233 *See* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). The *Allstate* court held that Minnesota could use the better-law approach to justify applying its own law. *Id.* at 320. This allowed the plaintiff to "stack" three insurance policies, and thereby recover three times as much. *Id.* at 305-06. *Cf.* Boy Scouts of America v. Schultz, 480 N.E.2d 679 (N.Y. 1985) (applying jurisdiction-selecting rule, New York denied recovery to plaintiff molested by counselor).

234 Juenger, *supra* note 102, at 106.

235 *See, e.g.*, Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973) (involving $10,000 limit on recovery in wrongful death); Alabama Great S. R.R. v. Carroll, 11 So. 803 (Ala. 1892) (involving absence of workers' compensation statute); REESE ET AL., *supra* note 18, at 496-518 (discussing guest statutes).

236 *See* Juenger, *supra* note 102, at 126 (stating that court applying better rule of decision will look to rule's intrinsic quality).

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doubt which law applies. Such a step would move the legal system away from academic analysis and closer toward justice.

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