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Defamation in the Digital Age: Some Comparative Law Observations on the Difficulty of Reconciling Free Speech and Reputation in the Emerging Global Village The Washington and Lee Law Alumni Association Student Notes Colloquium

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Defamation in the Digital Age: Some Comparative Law Observations on the Difficulty of Reconciling Free Speech and Reputation in the Emerging Global Village

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I. Introduction

Recent cases in the United States, Europe, and Australia have demonstrated quite clearly the choice of law problems associated with attempts to regulate the Internet. Simply put, the Internet makes a universe of

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information available with the click of a mouse.[1] Many legal scholars have written effusively about the transformative effect of the Internet on the marketplace of ideas.[2] Moreover, some have suggested that in order to realize fully the benefits of the Internet, it must be exempted from generally applicable local laws.[3]

For a variety of reasons, national governments are not likely to accept the notion that the Internet should be free from direct regulation. Internet activity bears upon too many important domestic interests for a nation to declare the Internet immune from local laws.[4] The sale or dissemination of child pornography, for example, creates a market for materials that a just government might wish to prevent.[5] Similarly, gambling operations on the web have

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1. *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 893–902 (2000) (noting the potential of the Internet to facilitate a very real "marketplace of ideas" open to all but also observing that "[t]his high theory contrasts rather markedly with the nature of actual discourse on the boards").

2. *See, e.g.*, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 5–6, 24–25 (1999) (arguing that the Internet presents unique regulatory problems); Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1744–45 (1995) (arguing that the Internet has unique characteristics that justify or require the creation of special regulatory rules); *cf.* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207–08, 210–14 (arguing that the Internet does not present any unique problems or characteristics that would preclude application of the existing legal order to the Internet); Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1201–02 (1998) (arguing that cyberspace regulation is feasible from the perspectives of jurisdiction and choice of law).

3. *See, e.g.*, James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 178 (1997) (suggesting that the benefits of the Internet can be realized only if government regulations do not suffocate it); Lidsky, *supra* note 1, at 932–44 (arguing that, in order to facilitate a robust marketplace of ideas and in light of readers' skepticism toward web content, generally applicable tort defamation rules should not apply to speech distributed via the Internet when the postings at issue relate to public figures or matters of public concern and arguably fall within the opinion privilege).

4. *See* Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 871–74 (2004) (arguing that important national interests justify legal regulation of the Internet when Internet activities have significant and foreseeable local effects).

5. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244–45 (2002) (invalidating a federal statute banning virtual child pornography because the statute acted to proscribe a substantial amount of lawful speech); Osborne v. Ohio, 495 U.S. 103, 108–11 (1990) (rejecting a First Amendment challenge to a state statute designed to protect the victims of child pornography). *But see* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001) (arguing that criminalization of child pornography, and the concomitant stigmatization of those presented in it, cause at least some of the harm to children associated with its production); Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 925–37, 961–69 (2001) (arguing that the Supreme Court has erred in adopting the view that erotic materials featuring children presumptively enjoy no First Amendment protection, in light of the reality that such materials sometimes possess significant artistic, literary, or scientific value).

serious local effects that a government might feel compelled to address.[6] Finally, goods and services offered on the Internet might transgress legitimate local laws. For example, the Internet sale of Nazi memorabilia, Oxycontin tablets, or some other regulated product might undermine entirely a nation's efforts to maintain and enforce its domestic laws within its own national territory.

Accordingly, despite the fact that the idea of the Internet as a "wild west"—a kind of frontier without borders, law givers, or law enforcers—has substantial academic support, nation states will undoubtedly insist on applying domestic law to Internet activity. The question then becomes: when local laws conflict, to what extent may a country insist on applying its own domestic law to Internet activity, even if the principal locus of the activity lies entirely outside the jurisdiction? Defamation law, particularly the law of libel, presents a good example of the problem.

II. The Problem Defined: Speech on the Internet Potentially Reaches a Global, Rather Than Merely Local, Audience

Cases like *Gutnick* v. *Dow Jones & Co.*[7] make clear that some national court systems, in at least some places, are not inclined to grant a blanket exemption to Internet activity in order to facilitate the international exchange of information and ideas. Defamation law, and particularly the law of libel, presents many difficult questions for regulation of the Internet; materials posted in one jurisdiction can be accessed with ease in another. Determining the place of publication and the appropriate choice of law applicable to an Internet posting constitute rather squirrelly questions.

Shawn A. Bone argues that with the emergence of the Internet, "the effect of a statement became more and more powerful" and has now reached the point that "communicators [have] the ability to send one line to the entire world instantaneously."[8] This fact leaves judges with two choices: either "divid[ing] the cyber-world into sovereign territory through the interest of a physical state"

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6. *See generally* Kurt Eggert, *Truth in Gaming: Toward Consumer Protection in the Gambling Industry*, 63 MD. L. REV. 217 (2004); Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569 (1999).

7. Gutnick v. Dow Jones & Co. (2002) 210 C.L.R. 575 (Austl.).

8. Shawn A. Bone, Note, *Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by* Gutnick *v.* Dow Jones & Co., 62 WASH. & LEE L. REV. 279, 290 (2005).

or "leav[ing] the cyber-world to regulate itself in the name of freedom of information."[9]

In my view, local courts will be strongly inclined to apply local law to Internet activity that arguably occurs within their jurisdiction. The High Court of Australia did so in *Gutnick*;[10] the French domestic courts did so in the *Yahoo!* case;[11] and Germany has acted to regulate Internet activity with substantial effects in its territory, even if the file server at issue is located abroad.[12] Bone acknowledges this state of affairs, observing that such "indirect regulation" has taken place with "varying degrees of success."[13]

The likely effect of multiple nations asserting jurisdiction over the same factual occurrences and applying local law is not particularly difficult to predict—chaos. Moreover, as Bone suggests, "a user of the Internet has no assurance that a given activity is legal on the Internet, even if it is legal when not done on the Internet."[14] He argues that decisions like *Gutnick* raise the specter of "liability without end" for persons or entities publishing potentially defamatory information on the Internet.[15]

The application of myriad local laws of defamation to Internet speech could have a significant "chilling effect" on speech, not only abroad, but also in the United States. "Because there is no way to isolate certain parts of the Internet through controlled access from sections of the world, there is no doubt that the media entity could be assured of limited liability [only] if it did not convert print media to Internet media."[16] Although media entities could engage

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9. *Id.*

10. *See Gutnick*, 210 C.L.R. at 642 (finding that the law of Victoria was appropriate in this case because the proceeding was founded on a local cause of action and that it was at least "arguable" that the substantive law applicable to the case was that of Victoria).

11. *See* Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (describing judicial proceedings in France in which a French domestic court applied to Yahoo!'s U.S.-based website French Criminal Code provisions that prohibit the sale or exhibition of Nazi artifacts or propaganda), *rev'd*, 379 F.3d 1120 (9th Cir. 2004), *reh'g granted*, No. 01-17424, 2005 U.S. App. LEXIS 2166 (9th Cir. Feb. 10, 2005) (en banc); *see also* Rosen, *supra* note 4, at 783, 790–91, 840, 868–78 (describing the *Yahoo!* case and arguing that U.S. domestic courts should have enforced the French judgment against *Yahoo!*).

12. *See* John F. McGuire, Note, *When Speech Is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 768–71 (1999) (describing Germany's efforts to police Internet activity by German residents in Germany regardless of the point of origin of the content).

13. Bone, *supra* note 8, at 293.

14. *Id.* at 298.

15. *See id.* at 306 ("The default choice of law rule adopted by the High Court [in *Gutnick*], that of the situs of the harm, leaves Dow Jones facing liability without end.").

16. *Id.* at 309. Of course, the ability to isolate the nonelectronic media, although significantly less difficult, is imperfect too; print materials often find their way quite far from home.

in efforts to limit access to their websites, such efforts are unlikely to be completely successful; accordingly, Bone's concerns about extended liability for defamation appear well stated.

Resolution of the problem requires one of two things: either (1) a voluntary decision by a local court to decline to apply its own law, notwithstanding the fact that a local citizen's reputation has been harmed by Internet speech; or (2) the creation of some sort of transnational system that would undertake protection of personal reputation on the Internet. Bone, arguing that the protection of trademarks and domain names through the World Intellectual Property Organization (WIPO) potentially provides a good model for the protection of reputation on the Internet, endorses the transnational approach.[17] Bone suggests that "[t]he WIPO arbitration forum has gone a long way towards uniform regulation of trademark infringement on the Internet."[18]

Of course, establishing an international forum for resolution of Internet defamation disputes "would require formal international agreement, most likely through a treaty or an accord."[19] And herein lies the problem with Bone's preferred solution to the problem. If we could achieve international agreement about the proper accommodation of reputation and free speech, a transnational solution involving a WIPO-like entity could work very well. The problem, however, is that a fundamental and deep-seated disagreement presently exists among nations—even nations committed to protecting and facilitating free speech—regarding the proper weighing of free speech versus protection of personal reputation, dignity, and personal honor.

III. The Primacy of Reputation, Dignity, and Personal Honor over the Freedom of Expression in Japan and Germany

Many industrial democracies, including, for example, Japan and Germany, place much greater importance on the protection of personal reputation, dignity,

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17. *See id.* at 318–21 (suggesting creation of an international treaty and an international entity, established pursuant to the treaty, that would undertake resolution of transnational libel disputes).

18. *Id.* at 321. *But cf.* Xuan-Thao N. Nguyen, *The Digital Trademark Right: A Troubling New Extraterritorial Reach of United States Law*, 81 N.C. L. REV. 483, 524–29, 535–44 (2003) (arguing that the Anticybersquatting Consumer Protection Act (ACPA) has largely preempted WIPO's system of protecting domain names and established the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit as the de facto international courts over domain name disputes because of ACPA's assertion of in rem jurisdiction of domain names registered by Network Solutions, Inc. in Herndon, Virginia).

19. Bone, *supra* note 8, at 322.

and honor than they do on protecting the freedom of speech.[20] Indeed, Professor Whitman has gone so far as to posit the existence of "honor" cultures that systematically attempt to secure personal honor from slights both large and small.[21] To be clear, these nations are committed to freedom of expression as a general matter and view free speech as essential to the project of deliberative democracy, including free and fair elections. Moreover, respect for the rule of law is a core legal and cultural value; the difference goes to the perceived importance of freedom of expression relative to other rights—including reputation, dignity, and personal honor—seen in these jurisdictions as possessing an equally "fundamental" character.

In other words, the baseline approach reflected in *New York Times Co.* v. *Sullivan*[22] has not garnered widespread acceptance in other nations; indeed, as I will explain in greater detail, Germany expressly has rejected many of the core assumptions that undergird the United States Supreme Court's decision in *Sullivan*. Before considering the examples provided by Japan and Germany, it would be helpful to first engage in a brief overview of United States First Amendment law regarding defamation. This will provide a clear sense of the degree to which freedom of speech enjoys primacy over the protection of personal reputation or honor in United States constitutional law.

A. A Brief Review of the Constitutionalization of United States Libel Law

Since the Supreme Court's *Sullivan* decision in 1964, freedom of speech routinely has displaced the common law of torts in serious and important ways. *Sullivan* prohibited a recovery for libel by a local Montgomery, Alabama public official (Commissioner Sullivan) on a showing of fault by the *New York Times* amounting to less than "malice" or "actual malice," which the plaintiff must

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20. *See* Ronald J. Krotoszynski, Jr., *The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression*, 1998 WIS. L. REV. 905, 955–57 [hereinafter Krotoszynski, *The Chrysanthemum, the Sword, and the First Amendment*] (discussing how the Supreme Court of Japan has drawn a boundary line in favor of protection of reputation over freedom of expression); Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1566–83 (2004) [hereinafter Krotoszynski, *A Comparative Perspective on the First Amendment*] (discussing a series of German Federal Constitutional Court opinions embracing dignity over freedom of speech as a preferred constitutional value).

21. *See* James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279 (2000) (comparing and contrasting rights of personal honor and dignity in Germany, France, and the United States).

22. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

prove with "convincing clarity."[23] The actual malice standard means that a media defendant must have published the false statement with either knowledge of its falsity or with reckless disregard for the truth or falsity of the statement.[24] In other words, mere negligence (or any showing of fault less than actual malice) is not a sufficient legal basis for imposing damages on a media defendant, at least when the plaintiff is a public officer.[25] Subsequent cases have expanded the *Sullivan* rule to encompass "public figures"—people who can command media attention to respond to negative stories in the press (for example, Jerry Falwell or Tom Cruise).[26]

In the 1970s, the Supreme Court further expanded the constitutionalization of libel law. For example, *Gertz v. Robert Welch, Inc.*[27] held that even with respect to a private figure, the press could not be subjected to presumed or punitive damages absent a showing of actual malice, provided that the story related to a "matter of public concern."[28] Moreover, *Gertz* held that an award of compensatory damages required a plaintiff to establish some sort of fault on the media defendant's part.[29]

This project of constitutionalizing libel law continued into the 1980s. In *Philadelphia Newspapers, Inc.* v. *Hepps*,[30] the Supreme Court held that states could not place the burden of proving truth on the media defendant, at least when a story related to a public official, public figure, or matter of public concern.[31] In other words, the common law rule to the contrary notwithstanding, the plaintiff affirmatively must establish the falsity of the statement at issue. Writing for the majority, Justice O'Connor explained that "[t]o ensure that true speech about matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot

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23. *Id.* at 279–80, 285–86.

24. *See id.* at 280–81 (describing the benefits to the public welfare of open discussion of the character and qualification of candidates for public office).

25. *See id.* at 281–82 (discussing the scope of the "actual malice" standard).

26. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 49–51 (1988) (explaining the theory of the public figure and finding Reverend Falwell to be a public figure for purposes of applying First Amendment limits to state tort law, including both defamation and intentional infliction of emotional distress); Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 163–69 (1979) (discussing requirements of attaining "public figure" status).

27. Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974).

28. *See id.* at 347–50 (1974) (discussing the importance of the plaintiff showing affirmative misconduct by the press before substantial damages are awarded in defamation suits involving matters of public concern).

29. *Id.* at 347.

30. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

31. *Id.* at 776–79.

stand when a plaintiff seeks damages against a media defendant for speech of public concern."[32] Thus, a private plaintiff suing a media defendant must show both fault and falsity if the story, or the precise statement at issue, relates to a matter of public concern.

The *Sullivan* line of cases leaves the pre-existing common law rules of defamation liability untouched only for private party plaintiffs suing a media defendant where the statements at issue do not implicate a matter of public concern.[33] This is so only because a majority of the Supreme Court does not believe that such speech implicates serious, or important, First Amendment values.[34] In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, Justice Powell explained that because of the "reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'"[35]

Before moving on to consider the radically different balance that Japan and Germany have struck between protecting free speech and protecting personal reputation, I should note that I have never been entirely persuaded that *Sullivan* and its progeny strike the appropriate balance here in the United States. At least arguably, the rules both under- and overprotect media defendants. For example, I see little reason to protect the media from being required to publish a correction of a false statement of fact that damages reputation on a showing of less than actual malice. The marketplace of ideas is not enhanced by the presence of an uncorrected falsehood, and media should be required to acknowledge false statements of fact. In this instance, *Sullivan* overprotects the press and underprotects public officials, public figures, and those involved in matters of public concern.

Accordingly, *Miami Herald Publishing Co.* v. *Tornillo*[36] should be limited to its facts.[37] The Supreme Court should sustain a state law or common law doctrine requiring publication of a forced correction upon proof of falsity by a

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32. *Id.* at 776–77.

33. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757–61 (1985) (describing why speech involving matters of private concern is not accorded the same First Amendment protection as speech concerning matters of public concern).

34. *Id.* at 759–60.

35. *Id.* at 761.

36. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

37. *See id.* at 258 (holding that the First Amendment precludes state law that requires a privately owned newspaper to publish a reply to an editorial adverse to a candidate for public office on theory that free speech and free press guarantees protect a newspaper's editorial control over the content of the newspaper).

preponderance of the evidence or, perhaps, by clear and convincing evidence when challenged on First Amendment grounds.

At the same time, however, the availability of punitive damages is a very real threat to the independence—indeed the very existence—of media entities. Unlimited punitive damage awards are a veritable sword of Damocles hanging over the media; if a plaintiff can meet the actual malice standard, then a jury may award unlimited, potentially bankrupting, punitive damages (subject only to the limits that the doctrine of substantive due process imposes).[38] Thus, if an alternative weekly newspaper gets a single story wrong, either intentionally (perhaps because of a rogue reporter) or inadvertently (perhaps from a single lapse in journalistic standards in a fashion suggesting "reckless" indifference to truth or falsity of the story), it faces annihilation. The punishment, frankly, seems disproportionate to the crime, especially when weighing the newspaper's future and past value as a purveyor of news and information against a single, albeit egregious, lapse of judgment.

I should take care to note that these ideas are not original to me; Justice White staked out this position in concurring and dissenting opinions.[39] Moreover, Professor David Anderson has written persuasively about the theoretical justifications for questioning, and perhaps revising, the *Sullivan* balance.[40] Finally, as I will explain in greater detail below, other nations simply

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38. *See* State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 416–19 (2003) (discussing the rationale behind placing due process limitations on punitive damage awards); BMW of N. Am. v. Gore, 517 U.S. 559, 562, 568–76 (1996) (stating that "grossly excessive" punitive damage awards are beyond the limits of due process).

39. *See, e.g.*, *Dun & Bradstreet, Inc.*, 472 U.S. 749, 771–72 (1985) (White, J., concurring) (arguing that actual malice standard should not apply "where [public official] sought no damages but only to clear his name"); Gertz v. Robert Welch, Inc., 418 U.S. 323, 388–95 (1974) (White, J., dissenting) (suggesting that limits on presumed and punitive damages would be sufficient to protect the press adequately and proposing action to clear name without damages under a less demanding standard than actual malice).

40. *See* David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 488–89 (1991) (arguing that the post-*Sullivan* landscape of libel law underprotects both the press and personal reputation). Anderson identifies as particular problems: (1) protracted litigation with hypercomplex rules and standards; (2) the potential of unlimited punitive damages against media defendants; (3) the profound chilling effect of both "the damage of losing a judgment" and "the prospect of having to pay the cost of defending" libel actions; (4) subjective and intrusive inquiries into media operations; (5) loss of concern and focus on the truth itself, and (6) creating an "ordeal" for media defendants in which "the blood is often the defendants'." *Id.* at 510–24. Anderson suggests possible reforms of libel law that would better protect both personal reputation and a free press, including clearer rules of liability, reconsideration of the actual malice standard, and controls on litigation costs, including declaratory judgment actions that seek to clear reputation without the imposition of substantial damages. *Id.* at 537–50; *see also* William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on the "Anderson Solution"*, 25 WM. & MARY

do not accept the premise that personal reputation, dignity, or honor should reflexively give way to create breathing room for free expression.

B. Japan: Tort Liability for Truthful Statements That Injure Reputation Absent Proof of Truth

Japan provides an instructive example of a nation committed to the freedom of expression that rejects the *Sullivan* metric. Japanese law provides for civil and criminal liability for truthful statements that damage or injure reputation.[41] The Supreme Court of Japan, however, has created a limited privilege to statutory liabilities for information related to public figures or matters of public concern where the defendant can establish a good faith mistake of fact.[42]

Consistent with this approach, the Supreme Court of Japan has affirmed a lower court's decision to issue an injunction against the distribution of a magazine featuring a highly unflattering portrait of a candidate for governor of Hokkaido.[43] The Supreme Court held that an injunction against publication or distribution of a periodical may issue "only when it is obvious that the contents of expression are not true or its objectives are not solely in the public interest, and, moreover, when the victim may suffer serious and irreparable damage."[44]

The story at issue in the case, entitled *An Authoritarian's Temptation*, described the candidate, Kozo Igarashi, as "skillful at lying, bluffing, and cheating," "a born liar," "an opportunist without scruples, doing anything for his own interest and his own success," and, more colorfully, as "a cockroach,"

L. REV. 793, 793–94 (1984) (arguing that *Sullivan* both overprotects and underprotects the press by making publishers vulnerable to "spectacular awards of damages when the proper modicum of scienter has been shown" while also "operat[ing] to defeat claims unfairly" when "people who lack the personal means of publicity to correct false and damaging statements that have hurt them, but who cannot satisfy the actual malice standard").

41. *See* Krotoszynski, *The Chrysanthemum, the Sword, and the First Amendment*, *supra* note 20, at 953–54 (noting that truthful statements that injure reputation are actionable in Japan, absent an affirmative defense provided by judicial glosses on the civil and criminal codes).

42. *See id.* at 953–64 (describing and critiquing the Japanese approach to protecting both free speech and personal reputation).

43. *See* Hoppo Journal Co. v. Japan, Judgment upon Case of Constitutionality of the Advance Judgment Against Publication of Magazine in Relation to Freedom of Expression, *Series of Prominent Judgments of the Supreme Court upon Questions of Constitutionality No. 22* (General Secretariat, Supreme Court of Japan, 1988) (decided June 11, 1986).

44. *Id.* at 6.

an "opportunist," a "magician with words and a street vendor quack," and "a mayor like the rump of the bitch."[45]

One must, of course, bear in mind that Igarashi was an active candidate for elected office; the piece also made direct political arguments regarding his merit as a candidate. The *Hoppo Journal* argued that Igarashi was "a useless and pernicious person to Hokkaido" and that "the Japan Socialist Party should change the candidate for governorship immediately if reform is earnestly sought."[46] Notwithstanding this context, the Supreme Court of Japan considered the insulting adjectives to constitute false statements of fact that properly engendered liability for libel and that justified a prior restraint against distribution of the *Hoppo Journal*.[47]

C. The Triumph of Dignity and Personal Honor over Freedom of Expression in Germany's Basic Law

German law goes beyond the Japanese approach and expressly limits the protection of free speech when necessary to protect "personal honor." Article 5(2) of the German Basic Law, which serves as Germany's Constitution, provides that free expression rights find "their limits in the provisions of the general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honor."[48] Moreover, the Federal Constitutional Court, the highest judicial authority on matters of constitutional law in Germany, has held that Article 5 rights are subordinate to rights secured by Article 1 and Article 2.[49]

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45. *Id.* at 7–8.

46. *Id.* at 8.

47. *Id.* at 9; *see also* Krotoszynski, *The Chrysanthemum, the Sword, and the First Amendment*, *supra* note 20, at 958–60 (discussing and critiquing the Supreme Court of Japan's resolution of this case).

48. GRUNDGESETZ [GG] [Constitution] art. 5(2) (F.R.G.) (emphasis added). For an overview of the Basic Law and its history, see DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 8–24 (1994).

49. *See* Tucholsky Case (Soldiers Are Murderers Case), BVerfGE 93, 266 (1995), *translated in* DECISIONS OF THE BUNDESVERFASSUNGSGERICHT—FEDERAL CONSTITUTIONAL COURT—FEDERAL REPUBLIC OF GERMANY (1998), at 659, 680 (holding that "freedom of opinion must always take second place where the statement affects another's human dignity"); *see also* Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 971 ("[H]uman dignity is the central value of the Basic Law.").

Article 1 provides that "[h]uman dignity is inviolable" and establishes that "[t]o respect and protect it is the duty of all state authority."[50] Article 2, in turn, provides that all persons enjoy the right to free development of their personalities.[51] Claims arising under both Article 1 and Article 2 take priority over free speech claims arising under Article 5.[52] Moreover, the state must provide a legal remedy for violations of Article 1 and Article 2, whether or not the government is directly responsible for the alleged abridgement.

Applying these general principles, the Federal Constitutional Court has enjoined distribution of a fictionalized account of a pro-Nazi actor, even though the subject of the account was deceased (*Mephisto*); a fictional interview, plainly labeled as such, with the then-Shah of Iran's wife (*Princess Soraya*); a factually accurate made-for-television docudrama about a gay robber (*Lebach*); and dehumanizing caricatures of an incumbent state elected official (*Strauss*).[53]

D. United States Free Speech Values Are Not Universal

In sum, Japan and Germany both value personal honor and reputation more highly than free speech, even in contexts where *Sullivan* and its progeny would apply with full force in the United States.[54] Accordingly, it seems unlikely that a common accommodation of free speech values could be reached that would be acceptable to the United States and also to Japan and Germany.[55] In fact, if one were to survey the globe, the United States approach, which protects demonstrably false speech in order to give a free press adequate breathing room, very much represents a minority approach. Unlike the protection of trademarks or domain names, an international consensus simply does not exist presently regarding the recognition, scope, and enforcement of the right to freedom of expression.

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50. GG art. 1(1).

51. *Id.* art. 2 ("Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.").

52. *See supra* notes 48–49 and accompanying text (discussing the hierarchy of constitutionally protected rights in Germany).

53. For a discussion of these cases and references to both official German reporter citations and English-language translations, see Krotoszynski, *A Comparative Perspective on the First Amendment*, *supra* note 20, at 1566–83.

54. *See supra* Part III.B–C (comparing the hierarchy of constitutional rights in Japan and Germany to that of the United States).

55. Bone seems to recognize that consensus might be difficult to achieve. *See* Bone, *supra* note 8, at 297 n.97 (noting that proposed solution "would not necessarily be effective for disputes like [*Yahoo!*]").

IV. Some Concluding Thoughts on Resolving Global Disagreements Regarding the Relative Importance of Free Speech and Personal Honor, Reputation, and Human Dignity

Although I am not hopeful about the prospects for reaching a common understanding regarding the relative importance of free speech, it might be possible to find ways of avoiding the conflict in the first place, perhaps by focusing on choice of law aspects of the problem. Even if agreement on the proper scope of free speech might be difficult, if not impossible, to obtain, perhaps agreement on choice of law principles could be reached.

For example, Europeans do not like the United States practice of applying domestic antitrust and securities law extraterritorially.[56] If the United States would agree to safe harbor provisions that would insulate foreign behavior from antitrust and securities regulations in the United States, other nations might agree to limit the application of their domestic law of defamation to United States media entities. Some general principles might include the question of intentional availment of a market. Simple efforts to discourage foreign nationals from accessing a given website and nontranslation of materials on a website from the host nation's most common language might be good starting points for developing such safe harbor provisions.[57]

The *Yahoo!* case, for example, does not feature sympathetic facts for the defendant. Yahoo! maintained a French language website, with dedicated and directed French language pop-ups that had links to the United States site that offered Nazi memorabilia—the sale of which violated French local law.[58] When Yahoo! plainly targets the French market and takes multiple affirmative steps to entice French customers to use its services, Yahoo!'s claim that it should not be subjected to French domestic law strikes me as remarkably unpersuasive.

By similar logic, if Dow Jones voluntarily maintains an active business presence in Australia and earns profits thereby, I am significantly less sympathetic about an Australian court holding Dow Jones bound by an Australian libel law for posting a story that one could reasonably foresee would

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56. *See* Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799, 1800–01 (1992) (describing foreign statutes designed to combat extraterritorial application of United States antitrust laws).

57. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 285–88 (1952) (holding that Congress may regulate acts undertaken entirely abroad if such acts have substantial domestic effects that are reasonably foreseeable).

58. Rosen, *supra* note 4, at 868–69.

be accessible and of interest to Australian nationals. A U.S. corporation, like Dow Jones, should not expect, as a matter of right, to conduct local operations in a foreign country, like Australia, free and clear of local laws.

Suppose, however, that the facts are somewhat different. Suppose that the website sponsor did not offer foreign language translation of the website's content; suppose that it featured an opening screen that instructed a user to "click here" if a "U.S. Citizen or Legal Resident" and "click here" if not, with those clicking "no" being directed not to access the website. Other rules might be devised that would serve to limit extraterritorial liability by establishing that a speaker affirmatively has avoided a particular national market. Thus, as a matter of comity, safe harbor rules might be developed to protect U.S.-based speech activities from foreign regulation, in hopes that the United States would recognize and respect safe harbor rules in other areas of the law, such as antitrust and securities regulation.[59]

Finally, websites operated without a commercial motive might be granted greater freedom and less constraint than those operated for profit. Two reasons would support such an approach. First, persons or organizations that lack a commercial motive might lack the financial resources necessary to use the most effective technology to block or impede access to a website. Businesses and corporations with a profit-motive for their speech are more likely to be both willing and able to take measures to mitigate potential extraterritorial liability. Second, because commercial speech activity is more robust than noncommercial speech, it would likely survive greater efforts at regulation, and the chilling effects of regulation would, therefore, be more attenuated.[60] The United States Supreme Court has endorsed this distinction between commercial and noncommercial speakers in cases involving regulation of cable channels[61] and the Internet.[62]

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59. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813, 817–28 (1993) (Scalia, J., concurring in part and dissenting in part) (describing the role of "international comity" in limiting the extraterritorial reach of statutes); *see also* Michael D. Ramsey, *Escaping "International Comity"*, 83 IOWA L. REV. 893 (1998) (discussing the vague contours of the concept of international comity and arguing for the adoption of more precise terminology).

60. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–66 (1980) (sustaining greater regulation of commercial speech than noncommercial speech on the theory that commercial speech is more robust and, accordingly, less susceptible to being squelched through government regulation).

61. *See* Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 753–66 (1996) (invalidating federal regulations that burdened noncommercial public, educational, and governmental cable channels, but not for-profit channels or leased-access cable channels, partially on theory that commercial motive would incent for-profit and leased-access channel speakers to incur costs of compliance with decency standards).

62. *See* Reno v. ACLU, 521 U.S. 844, 877 (1997) (invalidating the Communications

V. Conclusion

In sum, Bone has identified a real problem that will only continue to grow. Moreover, nations that regulate speech more aggressively than the United States will care little about the treatment of their nationals in the United States regarding similar questions because the United States simply does not regulate speech activity in the same way. The present system of reconciling inconsistent local speech regulations is something of a free-for-all, in which the mere presence of assets within a given jurisdiction creates a real risk of extraterritorial application of domestic defamation law. The development of safe harbor rules to limit the potential application of domestic laws to speech largely occurring abroad would represent an important first step in addressing the problem inherent in the current self-help regime.

Decency Act of 1996, in part because its open-ended prohibitions covered all nonprofit entities rather than simply commercial entities).