NO PLACE IN THE LAW:

THE IGNOMINY OF CRIMINAL LIBEL IN AMERICAN JURISPRUDENCE

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Abstract

The application of the *Sullivan* standard to the crime of libel was a mistake. There is no common law affiliation with or legal justification for the existence of criminal libel in a democracy. Its existence is antithetical to the First Amendment's guarantees of equality of speech, as well as to the broader constitutional guarantees of equality of speaker. The crime has become almost completely indistinguishable from the tort of libel, both in form and function, as a result of its evolution in America – from the importance of truth as a defense to the audience's responsibility for its own reaction to the speech, violent or not. And the American experience demonstrates clearly and ignominiously that the abuse of prosecutorial discretion, and even the mere threat of prosecution, results in the suppression of constitutionally protected speech.

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The U.S. Supreme Court's decision in *New York Times v. Sullivan*[1] forty years ago for the first time in this nation's history provided constitutional protection to some falsehoods – that is, honest, inadvertent falsehoods about public officials which are not "knowing" or "reckless."[2] In so doing, the Court has come the closest to fulfilling the libertarian ideal of self-government and its prerequisite of an informed electorate – or at least Justice Oliver Wendell Holmes's characterization of it as a marketplace of ideas where "truth," or the best of available options, should always prevail.[3] And the Court acknowledged that "speech concerning public affairs is more than self-expression; it is the essence of self-government."[4] The Court subsequently applied the *Sullivan* rule to criticism of public officials under the First Amendment's petition clause,[5] and determined that they should be given the same protection from libelous criticism as

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[1] 376 U.S. 254 (1964).

[2] The Sullivan rule "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280.

[3] "The best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See* W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, JOURNALISM & MASS COMM. Q., Spring 1996, at 40. John Stuart Mill first applied Jeremy Bentham's social philosophy of utilitarianism to John Milton's conception of public deliberation when he wrote:

> The peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation – those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error…. Complete liberty of contradicting and disproving [an] opinion is the very condition which justifies us in assuming its truth for purposes of action….

ON LIBERTY 16, 18 (Elizabeth Rapaport ed., Hackett Pub. Co. 1978) (1859). *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (James Burns & Herbert Hart eds., Athlone Press 1970) (1789); JOHN MILTON, AREOPAGITICA – A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING (John W. Hales ed., Oxford University Press 1961) (1644).

[4] Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

[5] MacDonald v. Smith, 472 U.S. 479 (1985).

they were in *Sullivan*.[6] Even though the Court accepted the requirement that such plaintiffs must establish "express malice" to state an actionable claim,[7] it also required them to meet the *Sullivan* "actual malice" standard to collect damages.[8] These decisions reflect America's "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[9]

Yet the Court also failed the ideals of the First Amendment miserably forty years ago in *Garrison v. Louisiana*[10] when it applied the *Sullivan* rule to the crime of libel.[11] The reason for this may be found in the differences between civil libel and criminal or seditious libel.[12] Civil libel is a tort; as an alleged private wrong, the opposing parties are equal before the law. Criminal libel, on the other hand, is an alleged public wrong and the state is one of the opposing parties;[13] it is always the more dominant of the two. The prosecution of a criminal libel thus involves the misuse and abuse of power.[14] It could be blatant;[15] or it could be as subtle as a

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[6] Sullivan dealt with the First Amendment's free speech and press clauses. 376 U.S. at 254.
[7] 472 U.S. at 484. *See* White v. Nicholls, 3 How. 266, 291 (1845).
[8] *Id*. at 485; *see* Sullivan, 376 U.S. at 279-280.
[9] Sullivan, 376 U.S. at 270.
[10] 379 U.S. at 64.
[11] "Only those false statements made with the high degree of awareness of their probable falsity demanded by [the Sullivan rule] may be the subject of either civil or criminal sanctions." Garrison, 379 U.S. at 74.
[12] While sedition is an action whose tendency is to cause violence against the state, seditious libel is speech whose tendency is to cause violence against the state or its officials, or to bring them into disrepute. The argument developed in this research focuses on the latter, modern purpose of seditious libel – today subsumed in the crime of libel. The law of criminal libel today "consists of a curious meld of two dissimilar factual situations. One, known as seditious libel, is based on a criticism of government or public officials. The other involves an uncomplimentary statement about a nongovernmental individual that can best be described as name calling…." LOIS G. FORER, A CHILLING EFFECT: THE MOUNTING THREAT OF LIBEL AND INVASION OF PRIVACY ACTIONS TO THE FIRST AMENDMENT 51 (1987).
[13] For a discussion of the distinctions between crimes and torts, *see* JOHN C. KLOTTER, CRIMINAL LAW 16 (3d ed. 1990). For the purposes of this discussion, the most important distinctions are: who sues and on whose behalf a suit is filed.
[14] "Only someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation." Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting).
[15] Jim Fitts, for example, was arrested on charges of criminal libel Friday morning, May 20, 1988, after he published the allegedly offending remarks three days earlier. At the end of the business day, bond was set at $40,000. By the

prosecutor's choice of whether criminal charges should be brought and, if so, what they should be.[16] This is the "ignominious history of the law surrounding criminal libel."[17] The purpose of the crime is not to promote or provide "breathing space" for free expression.[18] Its purpose is to chill speech. It does not promote the equality of persons or of ideas. It has no place in a democratic society.

Consider the following recent example: David Carson and Edward Powers were each convicted of seven counts of misdemeanor criminal libel on July 17, 2002, for – among other things – accusing the mayor of Kansas City, Kansas, and her husband, a county judge, of not maintaining their legal residence in Wyandotte County, as required by law as a prerequisite to holding their respective political offices.[19] Carson and Powers were fined $3,500 each, of which all but $700 was suspended for each defendant, and sentenced to one year of unsupervised probation.[20] Yet each man could have been sentenced to pay a maximum fine of $17,500 and to serve a jail term of up to seven years.[21]

A cursory examination of the free-circulation, monthly tabloid, the *New Observer*, leaves no doubt that the newspaper's policy is – as the adage goes – "to afflict the comfortable."[22] In its

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time Fitts had raised the money, the court clerk had left for the weekend. Fitts remained jailed until the following Monday, without having been or ever subsequently being convicted of any crime whatsoever. *Politicians Have Columnist Jailed on Criminal Libel Charges*, EDITOR & PUBLISHER, June 18, 1988, at 19.

[16] This is known as prosecutorial discretion. The decision to prosecute Ian Lake, a 16-year-old juvenile, for criminal libel in Utah, for example, was made a month after his arrest on May 18, 2000, for posting offensive comments about school officials on his personal Internet Web site. Joe Baird, *Libel Case Against Teen To Proceed*, SALT LAKE TRIBUNE, Dec. 6, 2000, at C1.

[17] Tollett v. U.S., 485 F.2d 1087, 1094 (8th Cir. 1973).

[18] Sullivan, 376 U.S. at 272.

[19] *Newspaper Execs Convicted of Libel*, QUILL, Sept. 2002, at 7.

[20] Newspaper Editor, Publisher Get Fines and Probation for Criminal Libel (Dec. 4, 2002), Reporters Committee for Freedom of the Press, *at* http://www.rcfp.org/news/2002/1204kansas.html (last accessed Jan. 30, 2004). An appeal is pending.

[21] Each count carried "a maximum fine of $2,500 and a jail term of up to a year." *Jury Delivers Rare Criminal Libel Conviction*, NEWS MEDIA & THE LAW, Summer 2002, at 48.

[22] This adage is variously attributed to New York publisher Joseph Pulitzer and Chicago humorist Finley Peter Dunne. The Reader (January 1, 2004), *at* http://www.booksandbrainfood.com/thereader/index.shtml (last accessed Jan. 30, 2004); The Watchdog Misunderstood (2004), ¶ 1, Journalism.org, Project for Excellence in Journalism, *at* http://www.journalism.org/resources/tools/reporting/watchdog/misundestood.asp (last accessed Jan. 30, 2004).

November 2000 issue, it asked: "Is gossip that [the Kansas City mayor] lives in Johnson County true?"[23] After the publisher and editor's indictments on charges of criminal libel, the newspaper described the Wyandotte County district attorney and the mayor as "two vicious, self-interested politicians, for whom holding public office is more important than basic principles of democracy," and called the prosecutor the mayor's "protector," perpetually "blind" to increasing public corruption, and "frequently wrong but never in doubt."[24] Yet neither the mayor nor the prosecutor ever filed a claim for civil libel, and the *New Observer* claimed that if its accusations were "wrong or libelous, [the mayor] would have filed endless numbers of lawsuits over the last two years," noting that "no lawsuits have been filed."[25] Instead, Carson and Powers were accused, indicted and convicted of criminal libel, despite – or, perhaps, because of or without regard to – the fact that the Kansas legislature revised the state's criminal libel statute in 1995 to meet the heightened constitutional requirement of "actual malice" mandated in *Garrison*.[26] Remarking on the unique style of political debate in the area – which includes language "imbued with a heavy dose of rhetoric and hyperbole," "exclamations," and "inflammatory entreaties"[27] – the *New York Times* wrote: "Politics in Kansas City, Kan., is to standard Kansas politics what the XFL was to the National Football League – meaner and rowdier, and proud of it."[28]

Almost every time an event such as this occurs, journalists and legal commentators will

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[23] Quoted in Extra! Extra! Kansas City Newspaper Convicted of Criminal Defamation (Aug. 1, 2002), ¶ 1, Center for Individual Freedom, *at* http://www.cfif.org/htdocs/freedomline/current/in_our_opinion/criminal_defamation.html (last accessed Oct. 3, 2002).

[24] D.A. Nick Tomasic Stabs First Amendment in the Back, Files 10 Counts of Criminal Libel Charges Against New Observer Publisher, Editor, The New Observer (March 1, 2001), ¶¶ 13, 3, 1, *at* http://www.thenewobserver.com/observerreports/criminal%20liable.htm (last accessed Jan. 30, 2004).

[25] Id., ¶ 19.

[26] Kan. Stat. Ann. § 21-4004 (2000). Garrison, 379 U.S. at 74; Sullivan, 376 U.S. at 279-280.

[27] Dan Bischof, *Criminal Libel as Political Tactic*, NEWS MEDIA & THE LAW, Spring 2001, at 17.

[28] Felicity Barringer, *A Criminal Defamation Verdict Roils Politics in Kansas City, Kan.*, N.Y. TIMES, July 29, 2002, at C7. For one season during 1999-2000, the eXtreme Football League played "football the way it is supposed to be played," which included much more physical contact and other rules promoting the extreme blending of spectacle and sport. Official XFL.com (2000), *at* http://www.officialxfl.com/index.asp (last accessed March 5, 2004).

note that criminal libel is "obsolete in most states."[29] This research will contend that libel as a crime,[30] whether in Kansas or in any other state, is wholly unconstitutional and should be completely erased from America's legal lexicon by the U.S. Supreme Court. It is contrary to the rights guaranteed by the First Amendment to the U.S. Constitution,[31] it is inimical to the free expression of ideas in the United States,[32] and it is antithetical to any and every form of representative government for the following reasons: First, it is a historical "throwback to pre-Magna Carta England and to the common-law principles the monarchy used to justify keeping its heel on critics' necks" and, therefore, contrary to the principles of free expression enshrined in the First Amendment.[33] Second, its authoritarian philosophical and political foundations cannot be reconciled with the democratic, libertarian ideals on which the America was founded.[34] Third, it functionally serves the same purpose as civil libel, as American courts have now allowed truth to be a defense for the crime.[35] Fourth, its "breach of the peace" rationale has been discarded by American courts, making its purpose no different from that of civil libel.[36] Fifth, the American experience with criminal libel and its concomitant abuse of prosecutorial discretion is humiliating, embarrassing, shameful and reprehensible.[37]

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[29] *Newspaper Execs*, *supra* note 19, at 7.
[30] As this research focuses on the differences and similarities between the crime of libel and the tort of libel, it is not concerned with the distinction between libel and slander, and includes both in the term "libel." Generally, however, "written defamation is libel; spoken defamation is slander. Libel is a crime as well as a tort; slander of a private individual may be a tort, but is no crime." Van Vechten Veeder, *The History and Theory of the Law of Defamation (I)*, 3 COLUM. L. REV. 546, 571 (1903).
[31] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble for the redress of grievances." U.S. Const. amend. I.
[32] J. Philip Bahn, *Constitutionality of the Law of Criminal Libel*, 52 COLUM. L. REV. 521, 533 (1952).
[33] Timothy Smith, *Criminal Libel Case, a Legal Throwback, Divides Community*, WALL ST. J., June 29, 1988, 1, at 17. *See infra* text accompanying notes 79-129.
[34] *See infra* text accompanying notes 142-154.
[35] *See infra* text accompanying notes 163-194.
[36] *See infra* text accompanying notes 196-228.
[37] *See infra* text accompanying notes 265-402.

ORIGINS OF CRIMINAL LIBEL

If the purpose of civil libel is to restore one's reputation, through the payment of damages, the first function of criminal libel has always been social order and control.[38] More accurately, its purpose has historically been to protect power and privilege. Its philosophical and political foundations may be traced to the Middle Ages and beyond, where it originated as a rationale for government.[39]

The relationship of government with those who are governed may be described in one of two basic ways: either the governors are the people's superiors or they are the people's servants. It was, and still is, an issue of fealty: the allegiance to another, either to the state itself or to the people themselves. The philosophy under which criminal libel developed – authoritarian theory – assumes that the governors are the people's "betters," "and therefore must not be subjected to censure that would tend to diminish their authority…."[40] In order to maintain this circumstance, the governors – with the active assistance of Christian religious authorities – maintained that the nation-state "derived its power … through a process not generally capable of complete human analysis … divine guidance,"[41] also known as the divine right of kings.

Control of expression then could be justified to protect both the ruler's power and his exercise of it through the interpretation of divine commands.[42] For example, the *Bible* declares that God cannot lie or do wrong;[43] it affirms that God has ordained all governments and rulers.[44]

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[38] Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 923 (1963).
[39] This period, between the fall of the Roman Empire and the Renaissance (circa 476-1450 C.E.), was a time of extreme political, economic, and religious oppression and subjugation of those without power or privilege. Some would go so far as to argue that "the history of any civilization is a history of oppression…." WALTER M. BRASCH & DANA R. ULLOTH, THE PRESS AND THE STATE: SOCIOHISTORICAL AND CONTEMPORARY INTERPRETATIONS 3 (1986).
[40] ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 18-19 (1941).
[41] Fred S. Siebert, *The Authoritarian Theory of the Press*, in FRED S. SIEBERT, ET AL., FOUR THEORIES OF THE PRESS 11 (1956).
[42] Brasch & Ulloth, *supra* note 39, at 4.
[43] *Titus* 1:2; *Hebrews* 6:18.
[44] *Romans* 13:1-2.

Therefore, the ruler cannot lie or do wrong, because God made him sovereign.[45] As God is righteous and just,[46] so the monarch is "the fountainhead of justice and law."[47] Thus, to criticize the ruler or the actions of his ministers or to question the ruler's power or privileges "was to threaten the stability of the state."[48] What power "the church [had] in the spiritual world, a monarch [had] in temporal affairs."[49] Punishment for criticism of the government "was originally designed … to suppress sedition and, later, to prevent breaches of the peace provoked by the defendant's speech."[50] Because of this – and the monarch's inability to make mistakes – the truth of the matter made no difference whatsoever. If anything, it "exacerbated the situation," because of its threat to social order and stability.[51]

Criminal libel, which could conceivably include any expression, usually took one of four forms:[52] 1) libels tending to impact the administration of government – this could include words defaming the ruler, the government, or its officials (such as, seditious and treasonable words); words defaming the constitution and the laws generally; and words defaming the courts or their judges, or tending to obstruct the administration of justice generally, such as, contempt of court;[53] 2) libels tending to corrupt public morals and to injure society generally – this could

[45] In the words of King James I of England (1603-1625 C.E.), "as to dispute what God may do is blasphemy … so it is sedition in subjects to dispute what a King may do in the height of his power." James Stuart, *The State of Monarchy and the Divine Right of Kings*, Whitehall, March 21, 1609, BRITISH ORATIONS FROM ETHELBERT TO CHURCHILL 20-21 (1915).
[46] *Daniel* 9:14.
[47] By extension, the king's ministers and agents also can do no wrong. 2 JAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 299 (1883).
[48] Siebert, *Authoritarian Theory*, in Siebert et al., *supra* note 41, at 23.
[49] *Id*. at 17.
[50] ROBERT SACK, LIBEL, SLANDER AND RELATED PROBLEMS 130 (2d ed. 1980).
[51] *Id*.
[52] MARTIN L. NEWELL, THE LAW OF SLANDER AND LIBEL IN CIVIL AND CRIMINAL CASES 1126 (3d ed. by Mason H. Newell) (1914). Another commonly accepted division also sorts all libels into four categories: defamatory libel, obscene libel, blasphemous libel, and seditious libel. *See* J.R. Spencer, *Criminal Libel – A Skeleton in the Cupboard*, CRIM. L. REV. 383 (1977). On the other hand, William Blackstone categorized libels as blasphemous, immoral, treasonable, schismatic, seditious, and scandalous. 4 COMMENTARIES *151.
[53] W. BLAKE ODGERS, THE LAW OF LIBEL AND SLANDER 513-514 (5th ed. 1912).

include obscene libels,[54] blasphemy[55] and profanity;[56] 3) libels tending to harm the reputation of the living "and expose [them] to hatred, contempt, or ridicule"[57] – this could include group libel, fighting words, and specific instances of injury, such as, damage to a woman's reputation for being chaste;[58] and 4) libels tending to blacken the memory of the dead and to expose "his family and posterity … to contempt and disgrace."[59] As the historical purpose of criminal libel was to protect the public peace from disruption by violence, it was unnecessary for the state to show that the particular words in question had been communicated or published "to some third person other than the person defamed," as long as there was an "obvious tendency" to provoke anyone, including the subject of the words himself, and incite him to violence.[60] Because of this, all of these types of libel could be controlled by the ruler, either because his power comes from God or – according to Samuel Johnson's modern theory of authoritarianism – because "every society has a right to preserve public peace and order, and therefore has a good right to prohibit the propagation of opinions which have a dangerous tendency…."[61] Thus, in contemporary times, criminal libel is widely associated with all autocratic and tyrannical systems of government,

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[54] Obscene libels may be defined as "vicious and immoral words … uttered publicly in the hearing of many persons…." *Id*. at 506. *See* Colin Manchester, *A History of the Crime of Obscene Libel*, 12 J. LEGAL HIST. 36 (May 1991).

[55] Blasphemy may be defined as "any profane words vilifying or ridiculing God, Jesus Christ, the Holy Ghost, the Old or New Testament, or Christianity in general, with intent to shock and insult believers, or to pervert or mislead the ignorant and unwary." *Id*. at 477. To be criminal, the "words must be truly irreverent and designed to bring Things or Persons Divine into contempt." FRANK THAYER, LEGAL CONTROL OF THE PRESS 365 (4th ed. 1962).

[56] Profanity may be defined as "any words [uttered] in a public place and [to the] annoyance [of] the public … importing an imprecation of future Divine vengeance…." Newell, *supra* note 52, at 1148-1149. *See* Thayer, *supra* note 55, at 366.

[57] Newell, *supra* note 52, at 1153.

[58] *See* Lisa R. Pruitt, *'On the Chastity of Women All Property in the World Depends': Injury from Sexual Slander in the Nineteenth Century*, 78 INDIANA L. J. 965 (Fall 2003).

[59] Newell, *supra* note 52, at 1151. Though a person's reputation is supposed to die with him and may not be the basis for a civil suit, libel of the dead is a crime, because "all publications tending to defame the memory of deceased persons might have the tendency to excite some persons to breaches of the peace, whether they be relatives or friends of the deceased or others who may have a high regard for the deceased, though such regard rest only upon traditional or historical knowledge." State v. Haffer, 162 P. 45, 47 (Wash. 1916). *See* Thayer, *supra* note 55, at 327.

[60] Newell, *supra* note 52, at 1158.

[61] 2 JAMES BOSWELL, BOSWELL'S LIFE OF JOHNSON 249 (G.B. Hill, ed.; rev. & ed. by L.F. Powell) (1934). Johnson (1709-1784 C.E.) was an English lexicographer, poet, and man of letters.

which use the crime to preserve the existence of the nation-state.[62] For example, many modern "dictatorships [have] criminal [libel] statutes,"[63] which are "a threat to human rights."[64]

While the ignominious history of the law of criminal libel largely may be attributed to the excesses of the English Court of the Star Chamber,[65] certain characteristics of the crime may be found in much older legal codes. To preserve the public peace, the Babylonian Code of Hammurabi, for example, protected women from insult,[66] and set death as the appropriate punishment for one convicted of accusing another of a capital crime without proof.[67] In addition, the Jewish Mosaic law contained an express prohibition against false statements and reports – calumniations – though no specific penalty was attached to its violation.[68] However, penalties were set for a man's false attacks on his wife's reputation or chastity prior to their marriage.[69]

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[62] Under both the authoritarian and totalitarian systems of government, the people exist to serve the state. Yet totalitarian systems claim their right and power to govern comes from the people themselves, instead of any deity. Also, totalitarian systems generally do not allow for private ownership of property, while authoritarian systems do. Wilbur Schramm, *The Soviet Communist Theory of the Press*, in Siebert, et al., *supra* note 41, at 105. It is not uncommon for modern scholars to group the two systems under the general rubric of authoritarianism, which "views society as a hierarchical organization with a specific chain of command under the leadership of one ruler or group…." R.L. CORD, ET AL., POLITICAL SCIENCE: AN INTRODUCTION 119 (1974). *See* Warren Hoge, *Latin America Losing Hope in Democracy, Report Says*, N.Y. TIMES, April 22, 2004, at A3. The modern theory of authoritarianism has never been better explained than by Louis XIV, who ruled France 1643-1715 C.E., when he declared, *"L'état, c'est moi"* – I am the state. BARTLETT'S FAMILIAR QUOTATIONS (10th ed. 1919), *at* http://www.bartleby.com/100/772.15.html (last accessed Feb. 24, 2004). In such a system, the "ruler decides what shall be published because truth is essentially a monopoly of those in authority…. [D]issent [is] an annoying nuisance and often subversive…." WILLIAM A. HACHTEN, THE WORLD NEWS PRISM 62-63 (1981).

[63] Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press, quoted in, U.S. Ready To Jail Its Journalists, Index on Censorship (July 17, 2002), ¶ 11, *at* http://www.indexonline.org/news/20020719_unitedstates.shtml (last accessed Sept. 5, 2002).

[64] *Id*. at ¶ 3.

[65] Tollett, 485 F.2d at 1087.

[66] "If a man has caused the finger to be pointed against a votary, or a man's wife, and has not justified himself, that man they shall throw down before the judge and brand his forehead." THE OLDEST CODE OF LAWS IN THE WORLD: THE CODE OF LAWS PROMULGATED BY HAMMURABI, KING OF BABYLON B.C. 2285-2242 127 (C.H.W. Johns, trans., The Lawbook Exch. 2000). *See* George E. Stevens, *Criminal Libel After Garrison*, JOURNALISM Q., Autumn 1991, at 522.

[67] Newell, *supra* note 52, at 4. The code dates from about 2250 B.C.E.

[68] *Exodus* 20:16, 23:1. This is known as the Ninth Commandment. Historically, of course, the Jewish people were a unique group in that it was the only one which claimed to be "chosen," guided and governed by direct revelation from God. The Ten Commandments and subsequent laws date from about 1500 B.C.E.

[69] Penalties included corporal punishment, payment of a fine to the woman's family – "the highest fine imposed by the Mosaic law" and forfeiture of his right to divorce. Newell, *supra* note 52, at 3; *Deuteronomy* 22:13-19. It should be noted, however, that truth was considered a defense. Proof of the accusations would result in the woman being stoned to death. *Deuteronomy* 22:20-21.

The Greek laws of Solon contained the first prohibition against libeling the dead, "not on account of injury to the dead, but in respect to the quiet of families" and "the peace and honor of Athens."[70]

Laws against libel multiplied during the period of the Roman Republic, "their main object the preservation of the public peace…."[71] Their aim was not to restrict expression, for – as the historian Tacitus wrote – "deeds only were liable to accusation; words went unpunished."[72] This state of affairs generally continued beyond the end of the republic and throughout the lives of the first emperors.[73] However, following the deaths of Augustus and Tiberius – and their subsequent deification – later emperors became ever more closely identified with the state itself, in some cases claiming divinity during their own lifetimes, and criticism of them or their appointees became to be seen as a threat to national stability.[74] By the time Theodosius II collected the statutes of previous emperors into what is known as the Theodosian Code, at least four distinct criminal laws prohibiting libel existed,[75] authorized as early as the reign of

[70] Newell, *supra* note 52, at 5-6. Solon's laws date from about 600 B.C.E. They also contained the first codification of monetary damages, payable to the person whose reputation was injured.
[71] *Id*. at 6. The laws of the Roman Republic date from about 200 B.C.E.
[72] THE COMPLETE WORKS OF TACITUS 48 (trans. by Alfred J. Church & William J. Brodribb, Modern Library 1942) (c. 116 C.E.). The Emperor Augustus (27 B.C.E.-14 C.E.) "first … applied legal inquiry to libelous writings, provoked, as he had been, by the licentious freedom with which Cassius Severus had defamed men and women of distinction in his insulting satires." *Id*.
[73] On one occasion, when Aemilius Aelianus was accused of "vilifying Caesar," Emperor "Augustus pretended to lose his temper and told the counsel for the prosecution: 'I wish you could prove that charge! I'll show Aelianus that I have a nasty tongue, too, and vilify him even worse!' He then dropped the whole inquiry…." SUETONIUS, THE TWELVE CAESARS 80 (trans. by Robert Graves, Penguin Books 1957) (c. 117 C.E.). In a letter to his nephew (and future emperor) Tiberius, Augustus asked the young man not to "take it to heart if anyone speaks ill of me; let us be satisfied if we can make people stop short at unkind words." *Id*. Tiberius, who reigned as emperor from 14-37 C.E., remained "quite unperturbed by abuse, slander, or lampoons on himself and his family, and would often say that liberty to speak and think as one pleases is the test of a free country." *Id*. at 125. He once explained his position stating: "If So-and-so challenges me, I shall lay before [the Senate] a careful account of what I have said and done; if that does not satisfy him, I shall reciprocate his dislike of me." *Id*.
[74] Brasch & Ulloth, *supra* note 39, at 12.
[75] The *Quattuor Constitutiones Constantini de Famosis Libellis* provided that:

- First Constitution: "If at any time libels are found, let those concerning whose acts or names they make mention suffer no false accusations therefrom, but rather let the one who instigated the writer be found, and, when found, let him be compelled with all rigor to give proof concerning those things which he has thought fit to set forth; nor yet let him be released from punishment even if he shall show anything."

Constantine the Great.[76] These decrees later were introduced into the English Court of the Star Chamber by Edward Coke, "and declared by him to be the resolutions of the judges of that court, and to have descended to us from that period as the language and rule of the common law."[77]

DEVELOPMENT OF CRIMINAL LIBEL IN THE COMMON LAW

Though the English common law, upon which the American system of jurisprudence is largely based, cannot be traced directly back to "the ruins of the civil law and the Roman system,"[78] links clearly exist. The nuances of the modern law of criminal libel are the direct consequence of the unifying authority of Christianity throughout the Middle Ages,[79] the slow

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- Second Decree of Constantine: "Although copies of libels which have circulated in Africa are preserved in your office and in that of your deputy, nevertheless you will permit those whose names they contain to enjoy peace and freedom from fear, and you will only admonish them that they hasten to be free not only from crime but also from the appearance of it. For he who has the confidence to make an accusation ought to establish it and not conceal what he knows, since with merit about to fall into the act of public prescription, he will be praiseworthy."
- Third Decree in January: "As patience is to be shown to accusers if they desire to prosecute any one in court, so no credit must be given to libels; nor should they be brought to our knowledge, since he may cause such libels, of which no other appears, to be immediately destroyed by fire."
- Fourth Decree: "A defamatory writing which does not have the name of the accuser must not be examined at all, but must be wholly destroyed; for he who trusts in the motive of his accusation ought to call another's life into judgment rather by an outspoken charge than by an insidious and secret writing."

Newell, *supra* note 52, at 9-10. The phrase, "*famosis libellis*," "was almost exclusively given to that species of libel which affected the credit or tranquility" of the nation." *Id*. at 14.

[76] Emperor Theodosius (408-450 C.E.) completed the *Codex Theodosianus* in 438 C.E. Emperor Constantine ruled 312-337 C.E. Other criminal libel statutes included in Theodosius's collection required that defamatory writings be destroyed and not publicized, that anonymous defamatory remarks not be admitted into evidence by a court of law, and that one who circulates a defamatory writing be as guilty as its author. Fifth Decree, to the Africans; Sixth Decree, to the People; and Ninth Decree. *Id*. at 11-12. The purpose of these laws was, in essence, "to prevent secret and ambiguous accusation." *Id*. at 12. As in the Greek system, the injured individual could be awarded "damages according to the quality of the injury and [his] dignity …; and, unless the charge were of that kind which the State had an interest in publishing, the truth was no vindication." *Id*. at 17.

[77] *Id*. at 8. Coke's "mediaeval learning had such an air of finality about it that further recourse to mediaeval law was not so necessary, and it became more and more the tendency to take Coke's words on matters of … learning." THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 232 (4th ed. 1948).

[78] Newell, *supra* note 52, at 18.

[79] Christianity, it has been said, was "part of the common law of England." Quotation attributed to Sir Edward Coke (1552-1634 C.E.). *Id*. Stuart Banner calls it "part and parcel of the common law of England." *When Christianity Was Part of the Common Law*, 16 LAW & HIST. REV. 27, 30 (1998), quoting Rex v. Woolston, 64 Eng. Rep. 655, 656 (1729).

decline of the power of local lords and governments,[80] the evolution of a national monarchy with absolute power,[81] the nationalization of justice, the low literacy rate, early movement toward social equality and representative government, and the invention of moveable type.[82] Yet the difficulties in application were exacerbated by the problem of legal jurisdiction in England.[83]

Church courts – also known as, ecclesiastical courts – "were the first legal bodies to effectively prosecute libel,"[84] acting not only to protect the morals of the community but also for "the correction of the sinner [and] his soul's health."[85] The church, then, "being answerable for the cleanliness of men's lives," forbade defamation, as well as sexual immorality, blasphemy, perjury, obscenity and usury.[86] Malice – which would come to have a place in all common law

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[80] Until the twelfth century, law and justice were

> administered mainly by feudal and shire courts, courts of hundreds, etc…. The court and justice of the king was but one among many…. The monarchs wished, however, to increase their revenues and expand their power and prestige. Various devices were invented and fictions set up by means of which the jurisdiction of kingly courts was extended. The method was to allege that various offenses, formerly attended to by local courts, were infractions of the king's peace. The centralizing movement went on till the king's justice had a monopoly.

JOHN DEWEY, THE PUBLIC & ITS PROBLEMS 48 (1927).

[81] Throughout

> the fifteenth century, disorder and oppression by local magistrates constantly becomes more common; petitioners are continually complaining of the lawlessness of their great neighbors, and it is perfectly evident that the courts of common law are helpless in the face of this situation. Their procedure was too slow and too mild; juries and sometimes judges were intimidated by large forces of retainers who constituted the private armies of unruly subjects. With such grave matters, the [King's] Council alone was powerful enough

to deal with matters. Plucknett, *supra* note 77, at 172.

[82] *See* ELIZABETH L. EISENSTEIN, THE PRINTING PRESS AS AN AGENT OF CHANGE (1979).

[83] Veeder, *supra* note 30, at 555.

[84] At that time, "state justice … was very feeble – men were judged by their lords, by their fellow burghers, by their priests, but they were seldom judged by the state." John Kelly, *Criminal Libel and Free Speech*, 6 KANSAS L. REV. 295, 296 (1958). The efforts of early churches to persuade parishioners to take their differences to their pastors evolved into a "universal spiritual jurisdiction" with canons enforced by church councils. Veeder, *supra* note 30, at 550. The Bible, in fact, warns Christians against having disputes settled in secular courts:

> "Dare any of you, having a matter against another, go to law before the unjust, and not before the saints? Do ye not know that the saints shall judge the world? And if the world shall be judged by you, are ye unworthy to judge the smallest matters? Know ye not that we shall judge angels? How much more things that pertain to this life? … Is it so, that there is not among you one wise man who will be able to decide between his brethren, but brother goes to law with brother, and that before unbelievers? Actually, then, it is already a defeat for you, that you have lawsuits with one another. Why not rather be wronged? Why not rather be defrauded?"

I *Corinthians* 6:1-7 (King James).

[85] Veeder, *supra* note 30, at 550.

[86] *Id*. at 551. The "usual penance" for defamation "was an acknowledgment of the baselessness of the imputation, in

definitions of defamation – was understood to be part of the sin of defamation, because bad intent or malevolent motive was an essential element of all sin.[87]

Feudal courts – also known as, manorial, baronial or seigniorial courts – were also hearing criminal libel cases before the Norman conquest of England in 1066. Feudal lords and kings enforced the crime of defamation harshly as a means of social stability, in an attempt to substitute public justice for private revenge.[88] Alfred the Great, for example, "commanded that the forger of slander should have his tongue cut out, unless he redeemed it by the price of his head."[89] However, as a result of the Norman conquest came a rapid increase in royal power, accompanied by the establishment of the king's council as a royal court – in which "a single wrong might be redressed by a combination of civil and criminal remedies"[90] – and a steady decline of the feudal court system.[91]

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the vestry room in the presence of the clergyman and church wardens of the parish, and an apology to the person defamed." *Id*. Later, punishment was as extreme as excommunication. S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 380 (2d ed. 1981).

[87] Veeder, *The History and Theory of the Law of Defamation (II)*, 4 COLUM. L. REV. 33, 35-36 (1904).

[88] John Kelly refers to this as the substitution of "legal process for the drawn sword." *Supra* note 84, at 295. This was "a motivation for much of the original criminal law." *Id*. at 297. *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 704 (1986). As a result, "the vague authority of the law of God [was] gradually replaced by the alternative theory that libels are punishable because they disturb the state (if directed against magnates and magistrates), or because they provoke a breach of the peace (if directed against private individuals)." Plucknett, *supra* note 77, at 460.

[89] Newell, *supra* note 52, at 18. Alfred ruled 871-899 C.E. *See* Colin R. Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1053 (1962).

[90] A.K.R. KIRALFY, THE ENGLISH LEGAL SYSTEM 5 (1990). *See* GEORGE CRABB, A HISTORY OF ENGLISH LAW (1839).

[91] Though William the Conqueror (1066-1087 C.E.) did not question ecclesiastical jurisdiction – many of his judges were members of the clergy – he did forbid clergy who were also judges from hearing ecclesiastical matters in his royal courts, which began "the rivalry between the secular and spiritual jurisdictions." Veeder, *supra* note 30, at 551. Following the signing of the Magna Carta in 1215, by which King John (1199-1216 C.E.) agreed that his power was subject to the law and in which the beginnings of the English common law and representative government may be found – through its guarantee of rights and liberties to the king's barons – the feudal court system disappeared altogether and the king's royal courts, originally open only to a limited aristocracy, continued to gain power and prestige in their "aggressive" pursuit of justice. Kelly, *supra* note 84, at 297. Though "the most autocratic monarch of Western Europe would not have dreamed of denying the authority of the canon law" before the second millennium, successive kings acted to limit the church courts' power. Veeder, *supra* note 30, at 550. One of the first limits "was the requirement that if the sin was also an offense which the temporal courts could punish [or in which money was demanded as damages, as in modern civil law], the spiritual judges were not to meddle with it." *Id*. at 551. With this act, coupled with the creation of the Court of Common Pleas – designed to try cases brought by commoners against other commoners – the gradual separation of civil law from criminal law began.

Then in 1275, Edward I promulgated the first libel statute, *de Scandalis Magnatum*, which punished defamatory "news or tales" about the king "and great men of the realm" without any proof of special damage.[92] The statute would become "the doctrinal core of the law of criminal libel until the fifteenth century."[93] Richard II subsequently statutorily defined the "great men" as including, "Prelates, Dukes, Earls, Barons, and great men of the realm, and also of the Chancellor, Treasurer, Clerk of the Privy Seal, Steward of the King's House, Justices of the one bench or the other, and of other great officers of the realm."[94] The statutes, then, were "not only to punish such things as import a great scandal in themselves, or such for which an action lay at common law, but also such reports as were anywise contemptuous towards the persons of peers and the great men of the realm, and brought them into disgrace" with the common people.[95] They intended to preserve the people's allegiance to their ruler, by recognizing "the importance of the control of the communication of ideas in the maintenance of the control of the ruling group as well as in the policing of the populace to keep down private fights."[96] Their significance was in their anti-democratic tendencies; they separated nobles from all others in the eyes of the law:

> Protecting none but the great men of the realm who, on account of their noble birth or official dignity, could not or would not demean themselves either by personal encounter or by resort to any other jurisdiction than that of their

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[92] The Statute of Westminster I provided:

> "Whereasmuch as there have been aforetimes found in the country devisers of tales … whereby discord or occasion of discord hath arisen between the king and his people or great men of this realm … it is commanded that none be so hardy as to tell or publish any false news or tales whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm; he that doth so shall be taken and kept in prison until he hath brought him into the court which was the first author of the tale."

Id. at 553. Edward ruled 1272-1307 C.E. *See* John C. Lassiter, *Defamation of Peers: The Rise and Decline of the Action for Scandalum Magnatum, 1497-1773*, 22 AM. J. LEGAL HIST. 216 (July 1978).

[93] Kelly, *supra* note 84, at 298.

[94] Veeder, *supra* note 30, at 553, n. 3. Richard ruled 1377-1399 C.E.

[95] Newell, *supra* note 52, at 21.

[96] Kelly, *supra* note 84, at 298. Lois Forer writes that "libelous statements [were thought to stir] up the people and [endanger] the stability of government. Significantly, there was no evidence that the people were stirred up or that the stability of the government was endangered…." *Supra* note 12, at 54.

> sovereign, these statutes are hardly to be taken as a recognition by the royal authority of the right to reputation. They were in fact directed rather against sedition and turbulence than against ordinary defamation.[97]

The administration of criminal justice, it was said, did not "concern itself with trifling offenses…."[98] The "substantive effect was to allow 'magistrates' to recover for words which their lesser neighbors would have to swallow."[99] With the continued decline of ecclesiastical courts and the slow transformation of baronial courts into the king's courts of common law,[100] the only court in the mid-sixteenth century left with any power in the area of criminal libel was the king's council "sitting in the starred chamber."[101]

Though the English Court of the Star Chamber would eventually assume "jurisdiction of cases of ordinary or non-political defamation, which it decided in the way of criminal proceedings," it was originally "directed against political scandal,"[102] involving "the authority and connections of the nobles [who] were too powerful for the ordinary course of the law."[103] These individuals were far more concerned "with protecting their own interests, including their reputation," than they were with issues of equality and freedom of expression.[104] The public's growing "preference for the civil remedy, which enabled the frustrated victim to trade chivalrous satisfaction for damages, had substantially eroded the breach of the peace justification for

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[97] Veeder, *supra* note 30, at 554.
[98] Thayer, *supra* note 55, at 321.
[99] Milsom, *supra* note 86, at 388.
[100] The decline of the ecclesiastical courts was a result of "the increasing tyranny and corruption of the church," as well as of their "inquisitorial procedure." Kelly, *supra* note 84, at 298; Veeder, *supra* note 30, at 552. They survived for centuries before the church's jurisdiction was abolished during Victoria's reign (1837-1901 C.E.). The lengthy struggle "ended in the complete victory of the secular jurisdiction…." *Id.* at 557.
[101] *Id*. at 554. Prior to the reign of Elizabeth I (1558-1603 C.E.), the kings' courts of common law "practically gave no remedy for defamation." *Id*. at 555.
[102] *Id*. at 554-555.
[103] Newell, *supra* note 52, at 22.
[104] Robert Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEXAS L. REV. 984, 1017 (1956).

criminal libel laws."[105] Yet English nobles and peers were not completely satisfied. Their positions, they felt, required state criminal sanctions for libelous remarks. Thus, although the Star Chamber claimed "all its right and authority [to be grounded] in the common law,"[106] criminal libel owes its modern origins "to an innovation in [the] Star Chamber whereby elements of Roman law were employed as the basis for prosecuting the publishers of defamatory statements," because of their tendency "to cause breaches of the peace."[107] Whether the statement was true or not "was considered immaterial."[108] In fact, "that a disagreeable bit of printed matter was true made it all the more objectionable to the powerful lord about whom it was written," which gave rise to the maxim, "the greater the truth the greater the libel."[109]

Punishments included "imprisonment, pillory, fine, whipping, loss of ears, and brands in the face"[110] – including, "excision of the tongue" or the "loss … of the right hand for writings"[111] – as well as, "frequently mutilation."[112] It was not difficult to see, then, why the Star Chamber's reputation, especially in the United States, has always been "unsavory" and its methods viewed

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[105] Garrison, 379 U.S. at 69. The civil remedy for libel "was extremely popular … and except for a few political offenses, the civil action usurped the field of defamation." Kelly, *supra* note 84, at 299.
[106] Newell, *supra* note 52, at 23.
[107] Bahn, *supra* note 32, at 522. Ella Thomas notes that

> the English Star Chamber conceived a wholly new idea of this offense, by making it a crime to utter seditious words against the government or its officials, or to make defamatory statements against private persons which might lead to a breach of the peace. The law of seditious libel, which included any publication criticizing the legality or policy of any act of the government was ruthlessly applied….

THE LAW OF LIBEL AND SLANDER AND RELATED ACTIONS 2 (1973).
[108] Bahn, *supra* note 32, at 522.
[109] Leflar, *supra* note 104, at 1017.
[110] Newell, *supra* note 52, at 23.
[111] Plucknett, *supra* note 77, at 454, 457.
[112] Spencer, *supra* note 52, at 385. In one instance in which an individual, after being tortured, refused to reveal the author of an objectionable statement, Star Chamber justices ordered that he be

> drawn upon an hurdle to the place of execution; and there you shall be hanged by the neck, and being alive, shall be cut down, and your privy members shall be cut off, your entrails shall be taken out of your body, the same to be burnt before your eyes; your head to be cut off, your body to be divided into four quarters, and your head and quarters to be disposed of at the pleasure of the King's Majesty.

Wayne Terry, *Past Punishments: Life – and Death – Before the First Amendment*, QUILL, January 1982, 8, at 9. The Star Chamber's legal rationale for its actions was to draw "an analogy with poisoning: harm easily done in secret must be severely punished when brought to light…." Milsom, *supra* note 86, at 390.

as "odious."[113] It is also not therefore surprising that those tried in the Star Chamber were usually found guilty, and that the court's methods have not been sanctioned by the verdict of history.[114]

The court – an "arbitrary and high-handed tribunal which sat without a jury"[115] – took on added responsibilities with the invention of moveable type.[116] The church and ecclesiastical courts had historically suppressed ideas which they deemed to be heretical or blasphemous.[117] The monarchy viewed printed defamation with a renewed sense of alarm as a threat to "the public peace and security of the crown,"[118] based on its permanence and its ability to be duplicated quickly, and required all printed works to be either licensed or censored. The Star Chamber assumed jurisdiction over this new form of communication because the court was composed of leaders of both church and state, and because it "exercised practically unlimited authority."[119]

Its most famous policy statement establishing criminal libel as a common law crime –

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[113] Newell, *supra* note 52, at 23. Justice usually was not the result of a Star Chamber trial:

> In various ways the government contrived to stack the cards against the accused. The Attorney-General himself usually prosecuted. The prosecution was nearly always begun on the Attorney-General's *ex officio* information – a procedure which short-circuited the preliminary stages through which prosecutions ordinarily had to go, and so obviated the risk of an independently-minded jury refusing to find a true bill against the accused. And, latterly at any rate, the trial was further stage-managed in that a special jury was usually summoned to hear it – on the usually correct hypothesis that rich men have little sympathy with radicals. In the early days … the court was virtually an arm of the government….

Spencer, *supra* note 52, at 384. However, Martin Newell asks if there might "not have been some period of the history of the human race in which the superior learning of the high officers of church and state, and the collected authority and splendor of the nobles immediately attached to the court of a king, were a better safeguard for the public peace than the juries of a barbarous age, or their independence at a time when every peer was the sovereign of his vicinage?" *Supra* note 52, at 23.

[114] Irving Brant calls it "the most iniquitous tribunal in English history." *Seditious Libel: Myth and Reality*, 39 N.Y.U. L. REV. 1, 5 (1964).

[115] Forer, *supra* note 12, at 55.

[116] William Caxton set up the first printing press in England in 1476, which quickly "aroused the absolute monarchy to a keen sense of the danger of this new method of diffusion of ideas." Veeder, *supra* note 30, at 561.

[117] *See* Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 671-672 (1985).

[118] Kelly, *supra* note 84, at 300.

[119] Veeder, *supra* note 30, at 562. The court "disregarded forms; it was bound by no rules of evidence; it sat in vacation as well as in term time; it appointed and heard only its own counsel, thereby not being troubled with silly or ignorant barristers, or such as were idle and full of words." *Id*. at 563.

"the starting point of the modern law of criminal libel"[120] – may be found in its 1605 *de Libellis Famosis* decision.[121] As a result, the two primary elements of criminal libel were established as law: first, truth was not a defense; and, second, libel could be prohibited if it tended to cause a breach of the peace.[122] As a result, elements of the Roman civil law were introduced into the common law of criminal libel – though, arguably, they were misapplied by the court without regard to Roman limitations.[123] However, criminal libel's "newer and vaguer" common law foundations were not established by Edward Coke and the justices of the Star Chamber in 1605.[124] Twenty-two years later, in his *Institutes of the Laws of England*, Coke would report that he had discovered two libel prosecutions in 1336 and 1344 that demonstrated and established criminal libel's English common law origins.[125] Coke's evidence was accepted without question

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[120] The crime could be punished in either the king's courts or in the Star Chamber. Kelly, *supra* note 84, at 300.

[121] The ruling states:

> Every libel is made either against a private man, or against a magistrate or public person. If it be against a private man it deserves a severe punishment, for although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of the shedding of blood and great inconvenience; if it be against a magistrate, or other public person, it is a greater offense; for it concerns not only the breach of the peace, but also the scandal of Government; for what greater scandal of Government can there be than to have corrupt and wicked magistrates to be appointed and constituted by the King to govern his subjects under him.

5 Co. Rep. 125a-125b, 77 Eng. Rep. 250-251 (1605).

[122] If the libel concerned a public official, it was punished as seditious libel as it was deemed "a threat to the security of the state;" if it concerned a private individual, it was punished as criminal libel as it was a "risk [to] a breach of the peace." William Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 LAW Q. REV. 302, 305 (1924). The prevention of violence, as well as the promotion of social order, was the purpose of both, "for … two motives were at work: the general threat to good order inherent in insult, and the particular threat to authority inherent in sedition." Milsom, *supra* note 86, at 379.

[123] Veeder, *supra* note 87, at 44.

[124] Plucknett, *supra* note 77, at 461.

[125] The two cases were:

> Adam de Ravensworth was indicted in the King's Bench for the making of a Libel in writing, in the French tongue, against Richard of Snowshill, calling him therein, Roy de Raveners, etc. Whereupon he being arraigned, pleaded thereunto not guilty, and was found guilty, as by the Record appeareth. So as a Libeller, or a publisher of a Libel committeth a publick offence, and may be indicted therefore at the Common Law.
>
> John de Northampton an Attorney of the King's Bench, wrote a Letter to John Ferrers, one of the King's Council, that neither Sir William Scot, Chiefe Justice [of Common Pleas], nor his fellows the King's Justices, nor their Clerks, any great thing would do by the commandment of our Lord the King, nor of Queen Philip[pa], in that place, more than any other of the Realme; which said John being called, confessed the said Letter by him to be written with his own proper hand.

through the Tudor and Stuart reigns of the sixteenth and seventeenth centuries, and even after the Star Chamber was finally abolished in 1641. The English government continued its licensing system and gave the power to punish those violating the Star Chamber doctrine of criminal libel to the common law courts, which also provided a civil remedy for claims of defamation.[126]

Finally, based on Coke's evidence, William Blackstone in 1769 incorporated the common law of criminal libel into his own *Commentaries on the Laws of England*,[127] clothing it "in the flowing robes of State and Church, God and the King – a system of regulation and repression which he thought essential to the maintenance of an orthodox and orderly monarchic society."[128] Freedom of expression, Blackstone wrote, "is indeed essential to the nature of a free state; but this consists in laying no *previous* restraint upon publications, and not in freedom from censure for criminal matter when published."[129] This summarized the eighteenth century's position of free expression – which at the time was considered quite liberal – concisely: Licensing and prior restraints were improper but speakers could be held criminally liable for their expression.

Yet Coke was wrong; Blackstone was wrong. The Anglo-American legal origins of criminal libel are not to be found in the English common law. The two cases Coke cited were not

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THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 174 (repr., Garland Pub. Co. 1979) (1628).

[126] Kiralfy, *supra* note 90, at 52. Thus,

> the Star Chamber's law of libel was henceforth to be administered by the same court as had developed the common law of slander; inevitably the two bodies of law were bound to influence each other, and tended to become more coherently combined into something approaching a systematic law of defamation.

Plucknett, *supra* note 77, at 467.

[127] *Supra* note 52, at *151-*152.

[128] Brant, *supra* note 114, at 19. To make this more palatable, "Blackstone dropped the Star Chamber completely out of the picture, except for historical beginnings. He described the restraint of the press through prosecutions for criminal libel as if this were entirely an emanation from the common law." *Id*. It is thus easy to see why Blackstone as a legal scholar "has fallen into deep discredit" today. *Id*. at 14.

[129] Emphasis in original. Blackstone, *supra* note 52, at *151-*152. Yet the then widely accepted practice of licensing could not help but operate as a form of prior restraint on expression. As governmental licensing declined, it was replaced by seditious libel prosecutions. William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 98 (1984).

libel cases at all. One was treason, the other contempt of court.[130] Thus, the common law should not have been used to justify prosecution of anyone for the crime of libel. The common law of criminal libel – "the major obstacle to literal acceptance of the words of the First Amendment"[131] – is a sham.[132] Although common law courts assumed jurisdiction over criminal libel after the abolition of the Star Chamber, as a legal concept it was still "cut from … poisonous wood."[133] American jurisprudence for more than two-and-a-half centuries has thus been misled.

CRIMINAL LIBEL'S TRANSITION TO THE UNITED STATES

The question remaining and the "basic issue" of criminal libel in the United States is this: "To what extent does the First Amendment cut across and limit the law of criminal libel?"[134] Arguably, of course, "the Declaration of Independence … was the most monumental seditious libel in British history."[135] But how well did the English concept of criminal libel migrate to America? Irving Brant contends that

> nowhere in the world was the legal groundwork laid for complete recognition and permanent enforcement of freedom of speech, press, and religion until written constitutions came into existence in the United States…. To reach a conclusion that the First Amendment was intended to embody the *practices* of eighteenth century England, it is necessary to believe that the framers intended to sanction

[130] Brant, *supra* note 114, at 8. Brant's research and conclusions were cited with approval in *Garrison v. Louisiana*. 379 U.S. at 83 (Black, J., concurring).
[131] Brant, *supra* note 114, at 3.
[132] Irving Brant's "straightening of the record leaves *civil damage suits* for libel within the scope of the common law, a jurisdiction growing naturally out of its cognizance of similar private actions for slander. It makes *criminal libel* entirely the creation of the Star Chamber." Emphasis in original. *Id*. at 11.
[133] *Id*. at 12. The effect of this "mistake" on the development of American law "has been to put the full weight of eighteenth-century British jurisprudence behind a dogmatic remark by Coke about common-law jurisdiction as an alternative to trial in the Star Chamber – a remark that had no supporting evidence when he made it, and in support of which, twenty-two years later, he cited two ancient cases that evaporate completely upon examination." *Id*. at 19.
[134] Kelly, *supra* note 84, at 321.
[135] CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 83 (1969).

the state of affairs described by [the statement]: "To speak ill of the government [is] a crime."[136]

No such plausible argument can be made, especially given "the abandonment of … authoritarian principles in government, the rise of political parties, and the spread of democratic doctrines" throughout Europe[137] and "in the increasingly dissatisfied [American] colonies" of the eighteenth century.[138]

In addition, the civil remedy for libel – which "filled an important gap in the earlier law"[139] – continued its growth in popularity, for in America the civil remedy, coupled with "the immeasurable importance of political writing in an age of revolution," began redefining and limiting criminal libel to its "most important aspect" – seditious libel.[140] Criminal sanctions, like the ecclesiastical penalties of earlier centuries, "punished the defamer but did not make his victim whole."[141] The increasing use of the civil remedy, therefore, may also be seen as an expression of that most important egalitarian principle – the significance and equality of all persons in the eyes of the law.

A Philosophical and Political Shift

Equality was and still is the defining ideal of America. This concept represents a philosophical shift away from the authoritarian view that the governors are the peoples "betters" to one in which government generally is viewed as the people's servant. This trend viewed

[136] Emphasis in original. Brant, *supra* note 114, at 18. At that time in England, of course, "any publication which reflected upon the Government was criminal." Plucknett, *supra* note 77, at 470. However, Irving Brant argues that "if seditious libel has any genuine common-law affiliation, it is by illegitimate descent from constructive treason and heresy, both of which are totally repugnant to the Constitution of the United States." *Supra* note 114, at 5.
[137] Siebert, *Authoritarian Theory*, in Siebert et al., *supra* note 41, at 24.
[138] Kelly, *supra* note 84, at 305.
[139] *Id*. at 299.
[140] *Id*. at 305.
[141] *Id*. at 299.

seditious libel especially as "unnecessary and evil, because criticism of the rulers of the state was desirable as a method of keeping them responsive to the will of the public, their masters."[142] Factors which influenced this development during what has become known as the Age of Enlightenment, which postulated humans as rational beings, included a developing individualistic temperament, a growing literacy rate, the emergence of a social middle class, the economic and legal freedom to make contracts, and a belief in the value of free discussion and competition among ideas for acceptance[143] – a "marketplace of ideas," labeled thus by Justice Oliver Wendell Holmes in *Abrams v. United States*,[144] though first articulated by John Milton.[145] Although "the path of truth might lie through a morass of argument and dispute,"[146] popular sovereignty, the free exchange of ideas, and a self-righting marketplace would guarantee achievement of the "ultimate goal" of society – "the fulfillment of the individual."[147] Though

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[142] *Id*. at 303.

[143] The utilitarian jurisprudence of Jeremy Bentham, thus, "cast a long shadow" over American law. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 123 (1979).

[144] 250 U.S. at 630. *See* BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 383-386 (1993).

[145] In what has become to be understood as "the beginnings of [the] underlying theme of First Amendment theory" – DONALD GILLMOR & JEROME BARRON, MASS COMMUNICATIONS LAW: CASES AND COMMENT 3 (3d ed. 1979) – John Milton wrote:

> And though all the windes of doctrin[e] were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew truth put to the wors[e], in a free and open encounter?

Supra note 3, at 51-52. Similarly, John Locke wrote:

> The business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth, and of every particular man's goods and person. And so it ought to be. For the truth certainly would do well enough if she were once left to shift for herself. She seldom has received, and I fear never will receive, much assistance from the power of great men, to whom she is but rarely known, and more rarely welcome. She is not taught by laws, nor has she any need of force to procure her entrance into the minds of men. Errors indeed prevail by the assistance of foreign and borrowed succours. But if Truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her.

TREATISE OF CIVIL GOVERNMENT AND LETTER CONCERNING TOLERATION 205 (Charles L. Sherman ed., Appleton-Century-Crofts 1937) (1689). On the other hand, Steven H. Shiffrin and Jesse H. Choper question whether Milton envisioned his "free and open encounter" occurring in a commercial marketplace. THE FIRST AMENDMENT: CASES – COMMENTS – QUESTIONS 16 (2d ed. 1996).

[146] Siebert, *The Libertarian Theory of the Press*, in Siebert, et al., *supra* note 41, at 41.

[147] *Id*. at 40. Libertarians would

> let the public at large be subjected to a barrage of information and opinion, some of it possibly true, some of it possibly false, and some of it containing elements of both. Ultimately the public could be trusted to digest the whole, to discard that not in the public interest and to accept that

widely debated and critiqued,[148] this is still a central tenet of all libertarian/democratic societies and certainly "a central American theme."[149]

The libertarian theory, upon which the United States was founded, thus assumes that "the prime function of society is to advance the interests of its individual members," not of any ruling elite.[150] Because humans are rational beings, the purpose of government is thus to help every person achieve his or her fullest potential and "truth [is] a definite discoverable entity capable of demonstration to all thinking men."[151] Under the libertarian theory, then, "the free flow of ideas about matters of public importance [is necessary] for the attainment of truth and responsive government."[152] Therefore,

> let all with something to say be free to express themselves. The true and sound will survive; the false and unsound will be vanquished. Government should keep out of the battle and not weigh the odds in favor of one side or the other. And even though the false may gain a temporary victory, that which is true, by drawing to its defense additional forces, will through the self-righting process

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> which served the needs of the individual and of the society of which he is a part.

Id. at 51.

[148] *See*, *e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); Jerome Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 786 (2d ed. 1988). It is beyond the scope of this discussion whether this marketplace should more properly be analogized as a government-regulated "town meeting". *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24 (1960); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (Nov. 1965). On the other hand,

> the metaphor that there is a "marketplace of ideas" does … apply…. The metaphor is honored; Milton's *Aeropagitica* and John Stewart Mill's *On Liberty* defend freedom of speech on the ground that the truth will prevail, and many of the most important cases under the First Amendment recite this position. The Framers undoubtedly believed it. As a general matter it is true.

American Booksellers v. Hudnut, 771 F. 2d 323, 330 (7th Cir. 1985). *See supra* note 3.

[149] Aviam Soifer, *Freedom of Speech in the United States*, in PNINA LAHAV (ED.), PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY 80 (1985).

[150] Siebert, *Libertarian Theory*, in Siebert, et al., *supra* note 41, at 40.

[151] *Id*. at 41.

[152] Kelly, *supra* note 84, at 307.

ultimately survive.[153]

As a consequence, the libertarian theory created "an economic and social environment which made libel actions of all types unwanted and unneeded in the United States [and] of less significance [here] than in any other country under the civil or the common law."[154]

At least, that was the presumption. Yet the move "from authoritarian to libertarian principles … was not accomplished overnight,"[155] nor has it even now been fully attained. First, the imposition of the English common law of criminal libel upon the American colonies "bottled up popular criticism [and] made armed revolution the only course open to aggrieved Americans."[156] In his history of American jurisprudence, Charles Warren points out that "it is probable that no one thing contributed more to enflame the public mind against the common law than did the insistence of the American [colonial] courts on enforcing the harsh doctrines of the English law of criminal libel – that truth is no defense, and that the jury could pass only on the fact of publication…."[157] Second, even if citizens of the new country believed that censorship and the crime of libel had been eliminated by the American revolution, "[t]he judges of the young nation unanimously disagreed" and "took the view that the constitutional provisions were only declaratory of the English common law as set down" by Coke and Blackstone,[158] leaving "intact the common law of criminal libel which was felt to be a necessary limitation on the freedom of speech."[159] "Unchallenged by the legal profession,"[160] criminal libel thus became

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[153] Siebert, *Libertarian Theory*, in Siebert, et al., *supra* note 41, at 45. Inherent in this marketplace of expression is not only the speaker's freedom to speak but also the audience's implicit legal responsibility for its own reactions to that speech.
[154] Kelly, *supra* note 84, at 317.
[155] Siebert, *Libertarian Theory*, in Siebert, et al., *supra* note 41, at 47.
[156] Kelly, *supra* note 84, at 306. *See* Siebert, *Libertarian Theory*, in Siebert, et al., *supra* note 41, at 48.
[157] CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 236 (1911).
[158] Kelly, *supra* note 84, at 310-311. *See* Warren, *id*. at 237.
[159] Kelly, *supra* note 84, at 310. Charles Miller states:

> In American history the most important broad topic in legal history dealt with by the courts has been the extent to which the English common law was "received" as the law of the colonies and,

"kind of a national crime" in what was supposed to be a libertarian society.[161] This state of affairs lasted well into the twentieth century and "stands today as the major obstacle to literal acceptance of the words of the First Amendment."[162]

Truth as a Defense in Criminal Libel

Under "the harsh English criminal rule,"[163] truth was not allowed as a defense in criminal libel cases historically, because the purpose of the prosecution of the crime was to prevent violence – either against public officials and prosecuted as seditious libel, or against private persons and prosecuted as criminal libel.[164] As a result, it made no difference whether the matter was true or false, because the greater the truth the more likely violence would result.[165] English common law judges would allow "the question of actual publication to go to the jury" – to determine the fact of the matter – but treated the libelous character of the expression, its truthfulness, as "a question of 'law' for the judge…."[166] However, in American law "truth seems

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> later, of the states. Like many issues in legal history, the nineteenth-century argument over the reception of the common law was not a legal issue alone but was embroiled in politics. Like other legal receptions it was conditioned by cultural attitudes towards the home country of the system – in the American case the attitude toward England – but the issue was argued in terms of law…. Ultimately the country succumbed to [its] Anglo-Saxon heritage, but with the qualification that the law adopted would have to measure up to the "civil and political condition" of America.

Supra note 135, at 21-22, quoting Murray's Lesee v. Hoboken, 18 How. 272, 277 (1855). *See* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951).

[160] Brant, *supra* note 114, at 3.

[161] Chief Justice Thomas McKean of the Pennsylvania Supreme Court, quoted in Warren, *supra* note 157, at 238.

[162] Brant, *supra* note 114, at 3. In 1931, in *Near v. Minnesota*, Chief Justice Charles Evans Hughes stated:

> But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. The law of criminal libel rests upon that secure foundation.

Citations omitted. 283 U.S. 697, 715.

[163] Leflar, *supra* note 104, at 1017.

[164] Holdsworth, *supra* note 122, at 305.

[165] Leflar, *supra* note 104, at 1017; Warren, *supra* note 157, at 236; Sack, *supra* note 50, at 130.

[166] Kelly, *supra* note 84, at 299. Thus, in the early history of the American colonies "a royally appointed judge became the *ex post facto* arbiter of the extent of … freedom of speech." *Id*. at 302.

from the first to have been viewed as admissible."[167]

That divergence between English and American law was evident as early as 1735 when John Peter Zenger was acquitted of seditious libel by appealing to "principles of elementary justice" – in other words, by "pleading the truth" – based on the legal argument "that for any statement to be a libel, it had to be both false and injurious."[168] Zenger was indicted for his frequent published attacks on government ministers, especially, as they reflected on the royal governor of New York.[169] His newspaper's "manifesto on the freedom of the press" included the following statement about the governor: "For if such an overgrown criminal, or an impudent monster in iniquity, cannot immediately be come at by ordinary justice, let him yet receive the lash of satire, let the glaring truths of his ill administration, if possible, awaken his conscience, and if he has no conscience, rouse his fear, by showing him his deserts, sting him with shame, and render his actions odious to all honest minds."[170] Another time Zenger's newspaper suggested that the governor's actions threatened New Yorkers with slavery.[171] After eight months in prison, Zenger was acquitted when his attorney "argued politics rather than law"[172] and after the jury disregarded the court's instructions not to consider the truth or falsity of the statements.[173] Though it could be argued that the result was little more than an early instance of jury nullification,[174] the decision has generally been accepted as "the first chapter in the epic of

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[167] Bahn, supra note 32, at 523.
[168] WILLIAM L. PUTNAM, JOHN PETER ZENGER AND THE FUNDAMENTAL FREEDOM 104 (1997).
[169] STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND AMERICAN HISTORY 31-59 (1980); Frederic B. Farrar, *A Printer, a Lawyer and the Free Press*, EDITOR & PUBLISHER, Aug. 3, 1985, at 31.
[170] JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 11 (Stanley N. Katz ed., The Belknap Press of Harvard University Press 1972) (1736).
[171] *Id*. at 16; Newell, *supra* note 52, at 26.
[172] Alexander, *supra* note 170, at 24.
[173] Zenger's attorney argued that the jury had "the right beyond all dispute to determine both the law and the fact[s]." *Id*. at 78. *See* Newell, *supra* note 52, at 26-27; Kelly, *supra* note 84, at 306-307.
[174] Instances of this occur when a jury reaches a verdict without regard to the weight of the evidence or the requirements of the law, as "ultimately, the factfinder in a criminal trial has the raw power irrevocably to acquit a defendant for any reason whatsoever." JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 15 (1994). *See* Putnam, *supra* note 168, at 116.

American liberty," a precursor of the revolution "which was to make an ideal of 1735 an American reality," serving "repeatedly to remind Americans of the debt free men owe to free speech."[175] It also "helped snap the leading strings that bound the American Colonies to the mother country" and stood as "the morning star of that liberty which subsequently revolutionized America."[176]

The Zenger verdict was so influential that one argument in favor of enactment of the Sedition Act of 1798[177] – which punished any expression contemptuous of the president, the government, or Congress[178] – was that it allowed defendants to establish the truth of their accusations as a defense.[179] Though supposedly adopted in response to the threat of war with France, historians agree that the act was in reality nothing more than a thinly disguised attempt to limit press criticism of John Adams's presidency, "part of a campaign of intimidation."[180] Yet it is also further proof that the law of criminal libel survived the American Revolution and ratification of the First Amendment to the U.S. Constitution.[181]

That the statute "led to widespread contemporary abuses" would be impossible to

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[175] Alexander, *supra* note 170, at 1, 35. *See* Warren C. Price, *Reflections on the Trial of John Peter Zenger*, JOURNALISM Q., Spring 1955, at 161; James R. Wiggins, *The Zenger Case Today*, EDITOR & PUBLISHER, Aug. 3, 1985, at 33.
[176] VINCENT BURANELLI (ED.), THE TRIAL OF PETER ZENGER 61, 63 (1957).
[177] 1 Stat. at Large 596.
[178] Under the statute, to bring government and government officials "into disrepute tended to overthrow the state." Chafee, *supra* note 40, at 23.
[179] FRANK L. MOTT, AMERICAN JOURNALISM 148 (3d ed. 1962).
[180] *Id*. at 149. *See* JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1951). Criticism of Vice President Thomas Jefferson, for example, who was not a member of Adams's Federalist political party, was not prohibited. ALLAN NEVINS & HENRY S. COMMAGER, A SHORT HISTORY OF THE UNITED STATES 151 (1968); Max Frankel, *Democracy in Infancy*, N.Y. TIMES MAGAZINE, Jan. 23, 2000, at 17. John Kelly, however, contends that it "was hardly the pernicious legislation it is usually made out." *Supra* note 84, at 313.
[181] LEONARD LEVY, EMERGENCE OF A FREE PRESS 173-219 (1985). *See* D. Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154 (April 2001). Of course, "the Constitution of the United States, including the Bill of Rights, is above all else an anti-authoritarian document." Ruth Walden, A Government Action Approach to First Amendment Analysis, at 2, a paper presented to the Law Division at the annual convention of the Association for Education in Journalism and Mass Communication, Boston, Mass., Aug. 7-10, 1991.

deny.[182] An individual offering truth as a defense was made to "prove every charge he has made to be true; he must prove it to the marrow. If he asserts three things and proves but two, he fails in his defense, for he must prove the whole of his assertions to be true."[183] At least twenty-four persons were arrested, fifteen indicted, and ten convicted under the provisions of the act.[184] Though its constitutionality was never challenged in court, the public's "manifest opposition" to the act "was an important indication that freedom of speech and the press had a much broader popular connotation than [Blackstone's] mere prohibition of prior restraint."[185] The convictions were also proof that the mere inclusion of a clause allowing truth as a defense was inadequate to protect the free and open discussion of public affairs. After the act's expiration in 1801, all those convicted were pardoned by President Thomas Jefferson and their fines repaid by Congress.[186] The law's "ultimate failure … proved that Americans believed that they had an indestructible right of political criticism."[187] Its unconstitutionality was finally acknowledged by the Supreme Court in *New York Times v. Sullivan*:[188] "The attack on its validity has carried the day in the court of history."[189]

The use of truth as a defense in criminal libel was finally established as American law in *People v. Croswell*.[190] There, Federalist editor Harry Croswell had been convicted of criminal

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[182] Eric M. Freedman, *American Libel Law – 1825-1896: A Qualified Privilege for Public Affairs?* 30 CHITTY'S L. J. 113, 117, n. 10 (April 1982).
[183] U.S. v. Cooper, 25 Fed. Cas. 631, 642-643, No. 14,865 (C.C.D. Penn. 1800).
[184] BERNARD WEISBERGER, AMERICA AFIRE 200-224 (2000); Presser & Zainaldin, *supra* note 169, at 210-234.
[185] Kelly, *supra* note 84, at 313; *see supra* note 129.
[186] Putnam, *supra* note 168, at 124.
[187] Kelly, *supra* note 84, at 316.
[188] 376 U.S. at 254.
[189] *Id*. at 276. This conclusion, according Justice William Brennan, writing for a unanimous Court, reflects "a broad consensus that the act, because of the restraint imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *Id*. The statute "came to an ignominious end and by common consent has generally been treated as having been a wholly unjustifiable and much to be regretted violation of the First Amendment." *Id*. at 296 (Douglas, J., concurring). Yet after its expiration in 1801 state statutes making libel a crime began to proliferate.
[190] 3 Johns. Cas. 307 (N.Y. Sup. Ct. 1804). It has been called "the leading state case" in criminal libel law. Beauharnais v. Illinois, 343 U.S. 250, 295 (1952) (Jackson, J., dissenting). *See* Kyu H. Youm, *The Impact of People*

libel after being forbidden from using truth as his defense. Though a split New York appellate court upheld the conviction, the state legislature subsequently allowed truth, published "with good motives,"[191] to be used as a mitigating factor in such cases. The outcome was "the beginning of the end for the inadmissibility of truth."[192] This evolution culminated in 1964 with the Supreme Court's decision in *Garrison v. Louisiana*,[193] in which the Court not only acknowledged that truth may not be punished in criminal libel cases, but ruled that falsehood – published without "knowledge of its falsity or in reckless disregard of whether it was false or true" – is also protected by the First Amendment.[194] Yet that ruling was not enough, as "the mere threat of prosecution may operate as a gag" on all speech, without regard to whether it is true or false.[195]

Prevention of Violence as a Legal Rationale Underlying Criminal Libel

Despite the speed with which truth was adopted by American courts as a defense in actions for criminal libel in the eighteenth century, they "clung tenaciously" to its underlying legal justification of preventing breaches of the peace well into the twentieth century.[196] In part, this was as a result of their continued misplaced reliance on Blackstone;[197] more generally, this was a result of their common law "understanding" of historical precedent dating all the way back to the Babylonian empire.[198] This was also the essence of what distinguished the crime from the

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v. Croswell on Libel Law, 113 JOURNALISM MONOGRAPHS (June 1989).
[191] 3 Johns. Cas. at 353.
[192] Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 792, 792 (1964).
[193] 379 U.S. at 64.
[194] *Id*. at 74.
[195] Mott, *supra* note 179, at 149.
[196] HAROLD L. NELSON & DWIGHT L. TEETER, JR., LAW OF MASS COMMUNICATIONS 51 (5th ed. 1986).
[197] In criminal libel, "the tendency which all libels have to create animosities and to disturb the public peace, is the whole that the law considers." *Supra* note 52, at *150-*151.
[198] *See supra* text accompanying notes 66-129.

tort.[199] The historic purpose of criminal libel was the prevention of "tumult and disorder."[200] Though one who had been "falsely libeled might get satisfaction by proving that the statement was not true," the "only hope for satisfaction by one truly libeled was to cause harm to the defamer" by having him disciplined.[201] This interest in order and retribution – or justice – was taken so seriously that a criminal libel did not have to be communicated to a third party,[202] only directly to its intended recipient, as it might "move him to quick violence in reply."[203] Yet, as Zechariah Chafee points out, the "breach of the peace theory" is particularly susceptible to exploitation and abuse, especially in the case of unpopular expression: "It makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence."[204]

Increasing confidence in and reliance on the fledgling American court system in the nineteenth century, coupled with the growing preference for compensatory and punitive damages[205] – not available through criminal libel actions – meant a concomitant decreasing reliance on the prevention of violence as a rationale underlying the crime of libel. By the mid-twentieth century, "the prime test [was] whether the defamation tend[ed] to disturb the public peace or, in more recent decisions, whether it [was] unlawful simply because it injure[d] another."[206] Yet that trend did not stop the Supreme Court from relying upon the rationale in

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[199] Insofar as libel

> is merely an injury to the person, it comes within the category of private wrongs or torts and as such is cognizable by courts of civil law, but the bare fact that all libels are personal injuries, is a matter of indifference to the criminal law…. The criminal law ignores the private injury, leaving that to be remedied by a civil action, and exercises itself solely in the conservation of the public peace.

Frederick W. Brydon, *Criminal Libel*, 23 ALB. L. J. 46, 46 (1881).
[200] Plucknett, *supra* note 77, at 471.
[201] ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 490 (3d ed. 1982).
[202] *See*, *e.g.*, State v. Avery, 7 Conn. 266, 18 Am. Dec. 105 (1828); People v. Spielman, 149 N.E. 466 (Ill. 1925).
[203] Leflar, *supra* note 104, at 1012.
[204] *Supra* note 40, at 151.
[205] Garrison, 379 U.S. at 69. *See* Kelly *supra* note 84, at 299.
[206] WILLIAM F. SWINDLER, PROBLEMS OF LAW IN JOURNALISM 156 (1955).

situations involving seditious libel,[207] "fighting words,"[208] and group libel.[209]

In evaluating the application of seditious libel statutes[210] – such as the Espionage Act of 1917,[211] "the first federal seditious libel legislation since 1798"[212] – the Supreme Court required some form of the "clear and present danger" test to be used to determine the proper balance between individual freedom and the government's need to protect security.[213] However, the Supreme Court's decision in *New York Times v. Sullivan* "soundly rejected" the law of seditious libel[214] and "has resulted in the apparently permanent establishment of the anti-seditious-libel doctrine as authentic constitutional history."[215] As a result, the only remaining viable analysis – the modern test – for determining when state governments may restrict speech based on the prevention of violence rationale is the "imminent lawless action" test from *Brandenburg v. Ohio*, applying a state criminal syndicalism statute.[216]

Though the Supreme Court in *Beauharnais v. Illinois*[217] accepted both "the public right to tranquility" and "the private right to enjoy integrity of reputation" as the two legal theories upon which "the criminality of the defamation is predicated,"[218] the prevention of violence rationale

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[207] Schenck v. U.S., 249 U.S. 47 (1919).
[208] Words which "have a direct tendency to cause acts of violence" could be prohibited. The "test" was "what men of common intelligence would understand would be words likely to cause an average addressee to fight…." Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).
[209] Words which were "liable to cause violence and disorder" could be prohibited. Beauharnais, 343 U.S. at 254.
[210] The federal common law of seditious libel was expunged from American law by the Supreme Court in *U.S. v. Hudson and Goodwin*. 7 Cranch 32 (1812). However, "various state syndicalism acts and the federal act on espionage may be used to punished sedition, particularly in attempts to overthrow government or in time of war." Thayer, *supra* note 55, at 323. *See* Near, 283 U.S. at 716.
[211] 40 Stat. at Large 553.
[212] Miller, *supra* note 135, at 87-88.
[213] Schenck, 249 U.S. at 52. In *Abrams*, the test was defined as requiring "a clear and imminent danger." 250 U.S. at 627.
[214] Walden, supra note 181, at 36.
[215] Miller, *supra* note 135, at 92; Sullivan, 376 U.S., at 273-277.
[216] 395 U.S. 444, 447 (1969). *Brandenburg* was cited as holding seditious libel to be protected speech, "unless the danger is not only grave but also imminent." American Booksellers, 771 F. 2d at 329.
[217] 343 U.S. 250 (1952).
[218] *Id*. at 294.

behind criminal sanctions against "fighting words"[219] and group libel,[220] as well as libel of the dead,[221] appears to have been all but eviscerated by the Court's subsequent rulings in *Garrison v. Louisiana*[222] and *Ashton v. Kentucky*.[223] This was first

> clearly evidenced in the wide recognition of truth as either a partial or complete defense. The departure [was] also pointed up by the fact that most of the present [state] statutes declare the nub of criminal libel, like that of civil libel, to be the publication of matter tending to injure reputation….[224]

This change was based in part on the First Amendment's freedom of speech guarantee, which generally requires audiences to avoid communication they do not wish to receive, as the nation's founders

> knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil

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[219] *Supra* note 208.

[220] *Supra* note 209. Thomas Emerson argues that

> the major premise of *Beauharnais* – that libel laws are not within the coverage of the First Amendment – was overruled by *New York Times v. Sullivan* in 1964. A minor premise – that criminal laws are outside the First Amendment – was expressly repudiated a few months later in *Garrison v. Louisiana*. Hence little remains of the doctrinal structure of *Beauharnais*.

THE SYSTEM OF FREE EXPRESSION 396 (1970), referencing 343 U.S. at 250; 376 U.S. at 254; 379 U.S. at 64.

[221] Because by definition the dead have no reputation to be harmed, libel of the dead appears wholly invalid today without the prevention of violence as an underlying legal rationale. RODNEY A. SMOLLA, LAW OF DEFAMATION 4-118 (2d ed. 1999).

[222] The U.S. Supreme Court cited "changing mores and the virtual disappearance of criminal libel prosecutions" as evidence supporting its position. 379 U.S. at 69. According to the U.S. Court of Appeals for the Seventh Circuit (which includes Illinois, Indiana, and Wisconsin), the "foundations of *Beauharnais*" have been "so washed away" that it can "not be considered authoritative" today. American Booksellers, 771 F. 2d at 331, n. 3, citing Collin v. Smith, 578 F. 2d 1197, 1204-1205 (7th Cir. 1978).

[223] In this decision, the U.S. Supreme Court determined the common law of libel to be unconstitutional. 384 U.S. 195 (1966).

[224] "But the historical foundation of criminal libel accounts for continued differences between the criminal and civil actions." Bahn, *supra* note 32, at 525-526.

counsels is good ones.[225]

It was also based in part on the basic impossibility of measuring "the degree of self-restraint necessary for an individual to maintain orderly conduct when humiliated by a … libel to his character"[226] – not because the likelihood of violence is so high, but rather because it is so low.[227] Thus, "the dubious claim that violence will result from the publication of defamatory material, when contrasted with the real dangers of disorder which have failed as a ground of conviction in the Supreme Court, compels the conclusion that the breach of the peace rationale will not support the constitutionality of the law of criminal libel."[228] As a result, the only real distinction between civil and criminal libel is between those who seek to redress defamation through the awarding of compensatory damages to the one defamed and those who seek to redress defamation by punishing the defamer with a monetary fine or jail time – though the tort of libel can achieve this same end result through the awarding of punitive damages to the one defamed.

THE AMERICAN EXPERIENCE WITH CRIMINAL LIBEL

Though some could argue that "scant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel,"[229] the trends in this area are clear. During the twentieth century, America began the process of slowly freeing itself from the common law of

[225] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
[226] Thayer, *supra* note 55, at 321-322.
[227] As Zechariah Chafee explained: "Under modern law-abiding conditions, there is very small likelihood that anybody will be physically hurt…." 1 GOVERNMENT AND MASS COMMUNICATIONS: A REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS 57 (1947).
[228] Bahn, *supra* note 32, at 528, citing Terminiello v. Chicago, 337 U.S. 1 (1949), and Cantwell v. Connecticut, 310 U.S. 296 (1940).
[229] Gertz v. Robert Welch, Inc., 418 U.S. 323, 381 (1974) (White, J., dissenting). *See* Beauharnais, 343 U.S. at 254-255.

criminal libel, in all its forms.[230] Blasphemy did not survive the trip to America, as the First Amendment also guarantees freedom of religious belief, freedom from religious belief, and freedom from state-imposed religion.[231] Obscene and profane libels evolved into separate areas of the criminal law altogether – obscenity and indecency.[232] Seditious libel as a threat to the public tranquility – including group libel and libel of the dead – appears to survive only through application of the imminent lawlessness test;[233] as for defamation of public officials, it has been subsumed into the statutory crime of libel.[234] Modern scholars have described prosecutions for libel as rare[235] and "now generally discouraged,"[236] and criminal libel statutes as "mostly dormant,"[237] "not a real problem,"[238] "no longer … a serious risk,"[239] "obsolete legal action[s],"[240] which have "largely fallen into disuse,"[241] "relics of the past,"[242] "not yet

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[230] Miller, *supra* note 135, at 85.
[231] *See*, *e.g.*, Allegheny County v. ACLU, 492 U.S. 573 (1989); Larson v. Valente, 456 U.S. 228 (1982).
[232] Though obscenity has never been thought to be protected by the First Amendment, indecency is, at least to a degree. Roth v. U.S./Alberts v. California, 354 U.S. 476 (1957); Miller v. California, 413 U.S. 15 (1973). FCC v. Pacifica Foundation, 438 U.S. 726 (1978).
[233] *Supra* note 216.
[234] John D. Stevens, et al., *Criminal Libel as Seditious Libel, 1916-1965*, JOURNALISM Q., Spring 1966, at 110-113. If "the framers of the First Amendment sought to preserve the fruits of the … victory abolishing … censorship and to achieve a new victory abolishing sedition prosecutions," that has not been the historical result. Chafee, *supra* note 40, at 22. Donald Gillmor and Melanie Grant adopt an even more extreme position and contend that civil

> libel's complexity has created a vacuum in comprehension that has sustained sedition, but in a new form – the civil libel suit – in which an outraged public official … asks for astronomical sums of money to compensate for alleged damage done to reputation by negative media exposure. Where public officials are concerned, this is punishment for sedition in a civil guise.

Sedition Redux: The Abuse of Libel Law in U.S. Courts, at 2, a working paper of the Freedom Forum Media Studies Center, Columbia University, New York, N.Y., 1991.
[235] MAURICE R. CULLEN, JR., MASS MEDIA AND THE FIRST AMENDMENT 266 (1981); RONALD T. FARRAR, MASS COMMUNICATION: AN INTRODUCTION TO THE FIELD 375 (1988); RALPH L. HOLSINGER & JON P. DILTS, MEDIA LAW 114 (3d ed. 1994); W. WAT HOPKINS (ED.), COMMUNICATION AND THE LAW 98 (2004); KENT R. MIDDLETON, ET AL., THE LAW OF PUBLIC COMMUNICATION 77 (2003); WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 173 (2004); THOMAS L. TEDFORD & DALE A. HERBECK, FREEDOM OF SPEECH IN THE UNITED STATES 79 (4th ed. 2001); and DWIGHT L. TEETER, JR., & BILL LOVING, LAW OF MASS COMMUNICATIONS 83 (10th ed. 2001). Others describe them as "extremely rare." DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 240 (2005); JOHN D. ZELEZNY, COMMUNICATIONS LAW 116 (4th ed. 2004).
[236] DONALD M. GILLMOR, ET AL., FUNDAMENTALS OF MASS COMMUNICATION LAW 50 (1996).
[237] BARBARA DILL, THE JOURNALIST'S HANDBOOK ON LIBEL AND PRIVACY 214 (1986).
[238] DON R. PEMBER, MASS MEDIA LAW 233 (2001).
[239] T. BARTON CARTER, ET AL., THE FIRST AMENDMENT AND THE FOURTH ESTATE: THE LAW OF MASS MEDIA 125 (3d ed. 1985).
[240] Overbeck, *supra* note 235, at 172.
[241] T. BARTON CARTER, ET AL., MASS COMMUNICATION LAW IN A NUTSHELL 47 (5th ed. 2000).

buried,"[243] and "like the vampire legend [which] never quite seems to die out."[244] Yet more than a decade before the 1964 Supreme Court decision in *Garrison*,[245] scholars also described criminal libel statutes as latent[246] and as an "almost obsolete action,"[247] and prosecutions for the crime as rare[248] or unusual,[249] and as "so innocuous that chronicles of American journalism give them only passing reference."[250] In fact, one newspaper's in-house attorney is reported to have said fifty years ago that "he had not even bothered to know just what the law of criminal libel is."[251] Based on these qualitative assessments, it is unclear what effect, if any, the *Garrison* ruling[252] has had on prosecutions for the crime of libel. Because the crime "had already fallen into disuse" by 1964,[253] it has received even less scholarly attention since, especially with regard to the appropriateness of and alternatives to the *Garrison* ruling.[254]

The Quantitative Trend

Prosecutions for the crime of libel have been on the decline since the beginning of the twentieth century.[255] Studies by John Stevens, et al.,[256] and by Robert Leflar[257] confirm this

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[242] Pember, *supra* note 238, at 232.
[243] Teeter & Loving, *supra* note 235, at 83.
[244] *Id.* at 79.
[245] 379 U.S. at 64.
[246] Swindler, *supra* note 206, at 105.
[247] Bahn, *supra* note 32, at 533.
[248] Swindler, *supra* note 206, at 101.
[249] Kelly, *supra* note 84, at 317.
[250] Beauharnais, 343 U.S. at 298 (Jackson, J., dissenting).
[251] Kelly, *supra* note 84, at 318.
[252] 379 U.S. at 64.
[253] Carter, et al., *supra* note 239, at 125.
[254] 379 U.S. at 64. There is a dearth of legal scholarship on the issue, especially when compared to the plethora of legal research, commentary and analysis on the constitutional defense for civil libel developed in *Sullivan*. 376 U.S. at 254.
[255] The data do not support the claim that "criminal libel actions were few throughout most of the Nineteenth Century." Teeter & Loving, *supra* note 235, at 81.
[256] *Supra* note 234, at 111. The significance of their results is somewhat limited, as West's *Digest* system reports only appellate decisions, and not even necessarily all of them, exercising editorial discretion as to which to report. In an attempt to collect data which would be comparable, the study here employed the same research method.

trend. An extension of the reported data back to the earliest American criminal libel cases; a verification of the quantitative data reported by Stevens, et al., and by Leflar; and an updating of the two studies through 1996 is shown in Table 1.

Table 1

Reported Criminal Libel Appellate Cases, 1797 - 1996, from West's Digest Series[258]

1797 - 1806	1807 - 1816	1817 - 1826	1827 - 1836	1837 - 1846	1847 - 1856	1857 - 1866	1867 - 1876	1877 - 1886	1887 - 1896
7	7	8	11	14	14	1	15	60	99

1897 - 1906	1907 - 1916	1917 - 1926	1927 - 1936	1937 - 1946	1947 - 1956	1957 - 1966	1967 - 1976	1977 - 1986	1987 - 1996
98	93	52	50	20	19	19	19	10	5

No cases were reported from 1658 to 1796.[259] From 1997 to 2001, only two additional criminal libel cases have been reported in the West *Eleventh Decennial Digest* (Part I). None have been reported to date in the West *General Digest* (Tenth Series, 2001-2002).

Of the 595 reported cases examined here, 37.65 percent (224 of 595) clearly involved

[257] *Supra* note 104, at 985. The Leflar study counted criminal defamation case citations from 1920-1955, inclusive. The beginning date "was selected … not only because it gives a substantial 36-year period for study of the cases, but also because it roughly marks the beginning of a new national era in terms of social and economic attitudes that might have some bearing on the law and practice of defamation." *Id*., n. 1.

[258] This table is based upon a close examination of the hardcover West *Decennial Digest* system from 1658-2001 – including the *American Digest* (1658-1896), the *First Decennial Digest* (1897-1906), the *Second Decennial Digest* (1907-1916), the *Third Decennial Digest* (1916-1926), the *Fourth Decennial Digest* (1926-1936), the *Fifth Decennial Digest* (1936-1946), the *Sixth Decennial Digest* (1946-1956), the *Seventh Decennial Digest* (1956-1966), the *Eighth Decennial Digest* (1966-1976), the *Ninth Decennial Digest* (1976-1986), *Tenth Decennial Digest* (1986-1996), and *Eleventh Decennial Digest* Part I (1996-2001) – and West's *General Digest* (Tenth Series, 2001-2002). (In the Tenth Series, volume 25 was the last and most recent volume available for examination on May 5, 2004.) Duplicate citations were eliminated. Often, it was necessary to examine decisions in individual case reporters where the digests gave inadequate or incorrect information regarding the details of the case. Special gratitude is expressed to Robert Fricks, Cynthia Mitchell, Jason Edwards and Jack Morris for their assistance with this data.

[259] The *American Digest* covers the period 1658-1896. The earliest reported criminal libel prosecution in America was *U.S. v. Lyon*. 15 Fed. Cas. 1183, No. 8,646 (C.C.D. Vt. 1798).

public officials or public figures.[260] All of the remaining cases dealt with fears for the maintenance of the public peace – as the Leflar study also found[261] – including, group libels (attacks on religious, racial, or ethnic groups), false allegations and private disputes (including, criminal behavior or drunkenness, family quarrels, business or professional disagreements, and religious or labor arguments), and accusations of a woman's lack of chastity. For the period 1990 to 2002, Russell Hickey reports twenty-three "criminal libel prosecutions and threatened prosecutions," of which 52.17 percent (12 of 23) involved "political prosecutions."[262] And of the remaining eleven cases, at least eight appear to involve either public figures or issues of public controversy,[263] suggesting that the overwhelming majority of modern criminal libel cases – 86.96 percent (20 of 23 cases) – involve public issues of one sort or another. Yet, though the overall quantitative trend is clear, the effect of the 1964 *Garrison* ruling[264] on this trend is either unclear or nonexistent, depending how the data are interpreted.

Illustrative Incidents

Even though the trend in reported appellate decisions is declining, the use of criminal libel as a bludgeon against unpopular expression continues unchecked. Perhaps the case most paradigmatic of the American experience with criminal libel involved Jim Fitts, editor and

[260] This percentage is greater than the 20.95 percent (31 out of 148 cases, from 1916-1965) reported by Stevens, et al. *Supra* note 234, at 110. This percentage is slightly less than the 40 percent (44 out of 110 cases, from 1920-1955) reported by Leflar. *Supra* note 104, at 985. One explanation for the difference is that these two studies – conducted as they were before the Supreme Court's ruling in *Butts v. Curtis Publishing Co./Associated Press v. Walker* – did not count the number of criminal libel suits brought on behalf of public figures involved in issues of public interest. 388 U.S. 130 (1967). The two studies also examined different time periods. Between 1946 and 1960, according to the drafters of the Model Penal Code, "the law reports of this country record[ed] only eleven criminal libel cases, nearly all involving defamation of officials, sometimes as candidates for reelection." Model Penal Code § 250.7 comment at 44 (Tentative Draft No. 13, 1961).
[261] *Supra* note 104, at 985. The Stevens, et al., study only examined criminal libel cases involving public officials. *Supra* note 234, at 110.
[262] *A Compendium of U.S. Criminal Libel Prosecutions: 1990-2002*, LIBEL DEFENSE RESOURCE CENTER BULL., March 27, 2002, at 97.
[263] *Id*. at 105-106.
[264] 379 U.S. at 64.

publisher of *The Voice*, a weekly newspaper in Kingstree, S.C., who could not have known the consequences of his actions on Tuesday, May 17, 1988. That day, in a signed column with the headline, "My Vote Is Not for Sale," Fitts – without naming names – accused his community's legislative representatives of corruption and theft, figuratively if not literally.[265] As Fitts did not specify what he believe had been stolen, some contended that the statement was mere hyperbole.[266] The two Williamsburg County legislators up for re-election in the June 14 Democratic primary, state Senator Frank McGill and state Representative B.J. Gordon, however, believed their reputations had been damaged.

Yet rather than filing civil libel lawsuits, the two veteran legislators signed arrest warrants three days later charging Fitts with two counts of criminal libel.[267] Fitts was arrested at 11 a.m., Friday, May 20, and held in the Williamsburg County jail. At a 7 p.m. hearing that evening, a local magistrate set a surety bond for Fitts in the amount of $40,000 – which was "eight times the maximum fine provided for in the statute"[268] – instead of a "more common" personal recognizance bond.[269] The judge then refused to hear a motion that he reduce the bond. Once Fitts had raised the $4,000 necessary to be released – 10 percent of the amount in cash or

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[265] Fitts wrote on his newspaper's editorial page:

> Ask yourself: What have they done for the people they represent? Everything they have done was for themselves. They have created so much fear in the hearts of the people who don't support their corrupt dealings until the citizens will not [exercise] their right to stand for justice and speak the truth. They would have you believe that blacks are drowning on the economic stabilities of our county. I will say to you without fear of contradiction, if every black in Williamsburg County would start stealing today and steal for every day for the rest of their lives, they could not steal as much as those two have stolen during their time in power.

My Vote Is Not for Sale (editorial), VOICE, May 17, 1988, at 2.

[266] *Charges in Strange Libel Case Dismissed* (editorial), STATE, July 10, 1988, at 2B.

[267] The South Carolina criminal libel statute made it a crime for anyone "with malicious intent [to] originate, utter, circulate, or publish any false statement concerning another, the effect of which shall tend to injure such a person in his character or reputation" and provided that conviction be punished by a fine of up to $5,000 or imprisonment for not more than one year, or both. S.C. Code Ann. § 16-7-150 (1976). This was clearly an instance in which the "rules for criminal cases appear … to make it easier to secure criminal convictions than tort judgments in libel cases." Leflar, *supra* note 104, at 1016.

[268] Fitts v. Kolb, 779 F.Supp. 1502, 1505 (D. S.C. 1991).

[269] Holly Gatling, *Writer Jailed on Criminal Libel Charges*, STATE, May 21, 1988, at 1A.

property valued in the amount of the bond – he was told that "the clerk of the court was off duty for the weekend and would not be available to receive Fitts's bond money" until the coming Monday.[270]

Fitts remained in jail throughout the weekend, until his bond was changed to a $30,000 signature bond on Sunday, May 22, and he was released on his own recognizance after an emergency hearing before a circuit judge in Bishopville, approximately forty miles north in neighboring Lee County.[271] Yet as a condition of his release, Fitts was ordered not to write or talk about his arrest or his disagreements with the two legislators.

Both McGill and Gordon won their Democratic primary races with ease on June 14.[272] The following week, on June 23, the Williamsburg County grand jury convened to consider whether Fitts should stand trial for criminal libel. Gordon told South Carolina journalists that the state's criminal libel statute was valid: "If it's outdated, then the Ten Commandments are outdated."[273] On June 27, Fitts was indicted on two misdemeanor counts of criminal libel and ordered to stand trial.[274]

Then, in a surprise move on Friday, July 1, McGill and Gordon asked that the charges against Fitts be dropped.[275] Fitts attempted to force the prosecution to go forward, arguing that otherwise he would be subjected to double jeopardy, but was told by Third Circuit Solicitor

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[270] Will Moredock, *Columnist Spends Second Night in Jail*, STATE, May 22, 1988, at 1A.
[271] Holly Gatling & Richard Chesley, *Columnist Released from Jail*, STATE, May 23, 1988, at 1A. Representatives from "the Third Circuit solicitor's office [were] expected to oppose the motion, but did not show up." *Id.*
[272] Margaret O'Shea & Holly Gatling, *Grand Jury To Mull Editor's Criminal Libel Case*, STATE, June 22, 1988, at 1A.
[273] Margaret O'Shea & Maureen Shurr, *Editor Says He'd Like Day in Court*, STATE, June 24, 1988, at 1A.
[274] Margaret O'Shea & Maureen Shurr, *Editor Indicted in Libel: Fitts Happy To Have Day in Court To 'Tell My Story'*, STATE, June 28, 1988, at 1A.
[275] In an undated letter, Gordon wrote:

> I realize that vengeance is not mine but God's. God in his own time will rectify all situations. I, Rev. B.J. Gordon, Jr., feeling no malice in my heart for Mr. James Fitts, and finding that justice has prevailed by the grand jury's indictment, I hereby drop all charges against Mr. Fitts and forgive him of any malicious comments written or spoken against me.

Holly Gatling, *Charges of Libel Dropped*, STATE, July 2, 1988, at 1A; *Libel Charges Dropped Against Newspaper Editor*, WALL ST. J., July 5, 1988, at 26.

Wade Kolb, Jr., that a defendant who wishes to be tried does not have that right. Besides, the charges had achieved their objective, according to Wallace Connor, attorney for McGill and Gordon. The purpose behind them "was not so much as punish [Fitts as to serve as] a deterrent."[276] The desired effect had been achieved, though some thought it had made rural Williamsburg County "look medieval."[277]

Even though the South Carolina statute was subsequently declared unconstitutional,[278] the Fitts ordeal makes four important points about the American experience with criminal libel: First, either legislator could have filed a civil libel suit against Fitts had either believed he had been defamed.[279] Second, as it was a criminal case neither legislator risked any financial loss or costs.[280] Neither had to hire an attorney; neither had to pay any costs associated with the proceedings. The state acted to shield them,[281] without any determination that Fitts's accusations were true or false – clear evidence of the state's protecting its "best men."[282] Third, because not all criminal activity is prosecuted and because the state of South Carolina – through the actions of the prosecutor and the grand jury – moved to try Fitts for the crime of libel, there was a public

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[276] *Supra* note 33, at 17.
[277] Area resident John Crangle, quoted in Gatling, *supra* note 275, at 1A.
[278] Fitts, 779 F. Supp. at 1502.
[279] *See supra* text accompanying note 25.
[280] On the other hand,

> prosecution for criminal libel has significant social costs, including the high costs of investigating, arresting, and litigating criminal libel cases and the capricious manner in which such cases are prosecuted. As one court has noted, "one evil of a vague statute is that it creates the potential for arbitrary, uneven and selective enforcement. Nowhere is this more evident than in the area of criminal defamation…."

Jeffrey Hunt & David Reymann, *Criminal Libel Law in the U.S.*, LIBEL DEFENSE RESOURCE CENTER BULL., March 27, 2002, 79, at 86, quoting Gottschalk v. State, 575 P.2d 289, 294 (Alaska 1978). They also point out that a criminal prosecution may "provide an early and free litmus test for a potential civil plaintiff." *Id*. at 85.
[281] *See supra* text accompanying note 24. Criminal prosecution "is even more doubtful when it is used by prosecutors in behalf of famous and powerful persons [or persons warranting special community protection] who do not wish to bring a civil action themselves…." Carter, et al., *supra* note 239, at 125.
[282] NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETATIVE HISTORY OF THE LAW OF LIBEL (1986). *See* R.S.E. Pushkar, *Criminal Libel and Slander in the Military*, 9 A.F. J.A.G. L. REV. 40 (Nov.-Dec. 1967). It is also clear that the state will act to protect those of whom society expects (or, at least, historically expected) higher moral standards and behavior – women and teachers (the majority of whom, historically, were women). *See infra* text accompanying notes 287-360.

presumption, based on Americans' faith in the objectivity and fairness of the law, that at least some evidence pointed to his guilt.[283] Fourth, Fitts was penalized – through his weekend in jail and through the bond requirements – before he was ever tried or convicted of anything whatsoever, all of which worked together as punishment, warning, and prior restraint.[284] Actions, such as "fining men or sending them to jail for criticizing public officials, not only jeopardizes the free, open public discussion which our Constitution guarantees, but can wholly stifle it."[285]

Even though concerns about potential breaches of the peace have disappeared and "a serious body of law on the subject of free speech" developed after the first world war,[286] Jim Fitts's experience is the American experience.[287] As the country matured, and especially well before the end of the Civil war, as a review of the case law of criminal libel demonstrates, the threat of violence became less and less "imminent," "clear" or even likely.[288] In every instance, a civil libel claim would have been a fairer and less stigmatizing way to deal with the offending speech.

Theodore Lyman, to take an early example, was tried for the criminal libel of Daniel Webster in 1828, the gist of which "was, that whereas [President John Quincy] Adams had … charged that leading Federalists of Massachusetts had in 1808 had been guilty of treasonable designs to break up the Union, naming no one in particular, but libeling them all, Mr. Lyman had named Daniel Webster as a person to whom the libel of Mr. Adams applied, and thus made Adams's libel of all the leading Federalists of Massachusetts Mr. Lyman's own libel of Daniel Webster."[289] Though the prosecution ended in a mistrial because the jury was "not convinced

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[283] *See supra* text accompanying note 16.
[284] *Compare* Near v. Minnesota, 283 U.S. 697 (1931).
[285] Garrison, 379 U.S. at 80 (Black, J., concurring).
[286] Friedman, *supra* note 143, at 669.
[287] The cases cited by Leflar, and discussed in some detail, support this statement. *Supra* note 104, at 986-1011.
[288] Brandenburg, 395 U.S. at 447; Schenck, 249 U.S. at 52.
[289] JOSIAH H. BENTON, JR., A NOTABLE LIBEL CASE 11 (repr. Fred B. Rothman & Co. 1985) (1904).

that the charge was ever really made,"[290] Webster just as easily "could have brought a civil action against [Lyman] for damages," had he chosen to do so.[291] In a case that was also more about a public issue than about defamation, in 1830 abolitionist William Lloyd Garrison found himself convicted of criminal libel after his public condemnation of Maryland slave trading in which he identified the owner and captain of a particular ship and called them "highway robbers and murderers."[292] Consequently, he served seven weeks in jail when he was unable to pay the $50 fine. In this situation, the civil action option did not help Garrison, as he was subsequently also sued for civil libel and lost, to no one's surprise, as the verdict was more of a commentary on Maryland residents' attitude toward slavery than it was an attempt to restore the ship owner's reputation.[293] Similarly – though an incomplete list – accusations of pilferage made against a police constable,[294] for example, of bribery made against a Congressman,[295] of adultery made against a school teacher,[296] of the use of false weights made against livestock dealers,[297] of fiscal mismanagement made against a newspaper's managing editor,[298] of real estate fraud against a company and its president,[299] of prejudice and monopoly made against a news association

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[290] *Id*. at 103.

[291] *Id*. at 34. The trial was all the more unusual, as

> Webster and Lyman were former political associates, and had been personal friends and neighbors from the time Mr. Webster came to Boston. They were on intimate social terms, met usually several times a week, and had for years belonged to a dinner club that met every Saturday. It would have been a very simple matter for Mr. Webster to have asked Mr. Lyman for an explanation as to whether he intended to charge him with having been engaged in a plot to break up the Union in 1808.

Id. at 30. Clearly, the case "was in reality and personal and political suit by Webster against Lyman, and was so treated by the public and the press." *Id*. at 58.

[292] Amy Reynolds, *William Lloyd Garrison, Benjamin Lundy and Criminal Libel: The Abolitionists' Plea for Press Freedom*, 6 COMM. L. & POL'Y 577, 592 (2001).

[293] *Compare* Sullivan, 376 U.S. at 254 (where the public issue was civil rights).

[294] State v. Spear & Corbett, 13 R.I. 324 (1881).

[295] State v. Conable, 46 N.W. 759 (Iowa 1890).

[296] Vallery v. State, 60 N.W. 347 (Neb. 1894).

[297] State v. Shippman, 86 N.W. 431 (Minn. 1901).

[298] State v. Fosburgh, 143 N.W. 279 (S.D. 1913).

[299] Kennerly v. Hennessy, 66 So. 729 (Fla. 1914).

executive,[300] of prostitution made against a married woman,[301] of false oath-taking made against a Catholic fraternal organization,[302] of Ku Klux Klan membership made against members of a Catholic fraternal organization,[303] of impropriety made against a state attorney general during a murder investigation and prosecution,[304] of forgery against a candidate for city office,[305] of thievery made against a former mayor,[306] of pimping and adultery made against a woman and her son,[307] of bootlegging made against a police chief,[308] of poor business practices made against the owner of a beauty shop,[309] and of laziness, inefficiency and dishonesty made by an outspoken district attorney against judges before whom he prosecuted cases,[310] all appear to be issues which could more properly and more fairly have been dealt with through civil libel actions.

It should not have been surprising that the U.S. Supreme Court in *Garrison v. Louisiana*[311] would conclude that criminal libel, despite its differing history and purpose, does not "serve interests distinct from those secured by civil libel laws,"[312] especially after the Court remarked on the unconstitutionality of a federal criminal statute – the Sedition Act of 1798[313] – in the civil libel case of *New York Times v. Sullivan*,[314] even if it was *dicta*.[315] The crime of libel

[300] People v. Eastman, 152 N.Y.S. 314 (Ct. Gen. Sess. 1915).
[301] U.S. v. Davidson, 244 F. 523 (N.D. N.Y. 1917).
[302] Crane v. State, 166 P. 1110 (Okla. Crim. App. 1917).
[303] People v. Gordan, 63 Cal. App. 627 (1923).
[304] State v. Dedge, 125 A. 316 (N.J. 1924).
[305] Arnold ex rel. Florida v. Chase, 114 So. 856 (Fla. 1927).
[306] Commonwealth v. Enwright, 156 N.E. 65 (Mass. 1927).
[307] Wimberly v. State, 4 S.W. 2d 73 (Tex. Crim. App. 1927).
[308] State v. Gardner, 151 A. 349 (Conn. 1930).
[309] State v. Johnson, 231 S.W. 2d 625 (Mo. Ct. App. 1950).
[310] State v. Garrison, 154 So. 2d 400 (La. 1963).
[311] 379 U.S. at 64. *See* Eberhard P. Deutsch, *From Zenger to Garrison: A Tale of Two Centuries*, 38 N.Y. ST. B. J. 409 (Oct. 1966). *See also* Jane A. Finn, *Criminal Law – Criminal Libel – Constitutional Limitations on State Action – Garrison v. Louisiana*, 14 AM. U. L. REV. 220 (1965); Ronald A. Naquin, *Constitutional Law – Freedom of Speech – Defamation*, 39 TUL. L. REV. 355 (1965); *New York Times Rule Extended to Criminal Libel*, 40 WASH. L. REV. 898 (1965); Martin L. Zimmerman, *Constitutional Law – State Power To Impose Criminal Sanctions for Criticism of Public Officials Limited by Federal Constitution to False Statements Made with Actual Malice*, 16 SYRACUSE L. REV. 879 (1965).
[312] Garrison, 379 U.S. at 67.
[313] 1 Stat. at Large 596.
[314] 376 U.S. at 254.

is thus substantively no different than the tort, especially "where criticism of public officials is concerned."[316] *Garrison*, despite arguments to the contrary, did not thus involve "purely private defamation,"[317] which at that time would not have implicated the *Sullivan* rule.[318] The Court hinted that it might have accepted the kind of "narrowly drawn statute" proposed by a tentative draft of the Model Penal Code which would have criminalized so-called fighting words or group defamation, "especially likely to lead to public disorders,"[319] but concluded that the Louisiana statute was not of this type. Nor did it help that the Louisiana statute allowed a defense of truth to be negated "on a showing of malice in the sense of ill-will"[320] – in essence, a "good motives" and "justifiable ends" restriction of the defense[321] – as the Court noted that the public interest requires that freedom of speech be secured by restricting only "the knowing or reckless falsehood."[322] Despite the urging of two justices,[323] who recognized the broad prosecutorial power still available to protect public officials,[324] the foregoing leads to the conclusion that in 1964 the Court believed its 1952 *Beauharnais* ruling,[325] upholding a state group defamation statute, to be good law still.

Of the accusations made against public officials and public figures since 1964,[326] this

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[315] *Id*. at 276.
[316] Garrison, 379 U.S. at 67.
[317] *Id*. at 76.
[318] 376 U.S. at 279-280.
[319] Model Penal Code § 250.7, comment at 45 (Tentative Draft No. 13, 1961). *See* Chaplinsky, 315 U.S. 568; Beauharnais, 343 U.S. at 250.
[320] 379 U.S. at 71-72.
[321] *Id*. at 72-73.
[322] *Id*. at 73.
[323] *Id*. at 82 (Douglas, J., joined by Black, J., concurring).
[324] "I believe that the Court is mistaken if it thinks that requiring proof that statements be 'malicious' or 'defamatory' will really create any substantial hurdle to block public officials from punishing those who criticize the way they conduct their office." *Id*., at 79-80 (Black, J., joined by Douglas, J., concurring).
[325] 343 U.S. at 250.
[326] It must be noted that requiring actual malice to be proven for the conviction of those libeling public figures involved in issues of public interest is an assumption that could prove to be false. The requirement may be the rule in civil libel but is without a firm foundation in criminal libel. In civil libel, *Sullivan* has numerous progeny – Supreme Court decisions directly applying the rule. 376 U.S. at 64. *See*, *e.g.*, Rosenblatt v. Baer, 383 U.S. 75 (1966); Butts/Walker, 388 U.S. at 130; St. Amant v. Thompson, 390 U.S. 727 (1968); Greenbelt Co-op. Pub. Ass'n

broad prosecutorial power has been widely used. As with the pre-1964 cases discussed above, accusations of abuse of office made against a police chief,[327] of improper relationships made against a prominent businessman,[328] of professional misconduct made against a former Supreme Court justice,[329] of illegal drug dealing made against a county sheriff,[330] of unsuitability for elective office made against a presidential candidate,[331] of an unspecified nature made against a movie actress which tended to expose her to contempt,[332] of theft made against a state trooper,[333] and of illegal harassment made against a police chief,[334] also all appear to be issues more properly and more fairly – as well as, more easily – dealt with through civil libel actions (or through criminal charges of falsely reporting a crime, for example), if at all. Between 1990-2002, the most recent part of the post-*Garrison* period during which prosecutions for libel were supposed to have been have been "rare,"[335] Richard Hickey reported seventeen actual prosecutions[336] – not an insignificant number during a thirteen-year period – including charges of theft and unfitness for duty made against a police officer,[337] of fraud and child neglect made

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v. Bresler, 398 U.S. 6 (1970); Monitor-Patriot Co. v. Roy, 401 U.S. 265 (1971); Ocala Star-Banner v. Damron, 401 U.S. 295 (1971); Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Gertz, 418 U.S. at 323; Time, Inc. v. Firestone, 424 U.S. 448 (1976); Herbert v. Lando, 441 U.S. 153 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985); Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986); Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989); Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); Masson v. New Yorker Magazine, 501 U.S. 496 (1991). In criminal libel, *Garrison* has no progeny – no Supreme Court decisions directly applying the rule. 379 U.S. at 64. The Court has not addressed the applicability of civil libel's public figure rule in the area of criminal libel, even though lower courts have generally presumed its validity. *See infra* text accompanying notes 327-361.

[327] Commonwealth v. Ashton, 405 S.W. 2d 562 (Ky. 1965).

[328] Commonwealth v. Armao, 286 A. 2d 626 (Pa. 1972).

[329] U.S. v. Handler, 383 F. Supp. 1267 (D. Md. 1974).

[330] Weston v. State, 528 S.W. 2d 412 (Ark. 1975).

[331] State v. Anonymous (1976-8), 360 A. 2d 909 (Conn. Cir. no date).

[332] Eberle v. Municipal Court, 127 Cal. Rptr. 3d 594 (Cal. App. 1976).

[333] Gottschalk,, 575 P. 2d at 289.

[334] Debra Gersh, *Newspaper Letter Writer Charged with Criminal Libel*, EDITOR & PUBLISHER, March 24, 1990, at 22.

[335] Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?* 13 ALB. L.J. SCI. & TECH. 273, 320 (2003).

[336] *Supra* note 262, at 105-106.

[337] *Publishers Charged with Criminal Libel*, NEWS MEDIA & THE LAW, Spring 1990, at 22.

against an ex-girlfriend,[338] of misconduct made against a university vice president,[339] of criminal wrongdoing made against another,[340] of misbehavior made against police officers,[341] of brutality against an arresting officer,[342] of drunkenness and pedophilia made against a high school teacher,[343] of rape and battery made against a candidate for lieutenant governor,[344] of anti-Semitism made against county commissioners,[345] and of misconduct made against police officers.[346]

The most egregious recent example of all that is wrong with the crime of libel involved 16-year-old Ian Lake, a "pink-and-green haired teen,"[347] described as weird by classmates,[348] who reacted to the taunts and harassment of Milford High School students by creating an Internet Web site and posting "an obscenity-laced home page,"[349] which "peppered forty-nine people with various profanities."[350] On it, he referred to school principal Walter Schofield as "the town drunk" and to female classmates as "sluts,"[351] and speculated that school teachers and staff

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[338] State v. Ryan, 806 P. 2d 935 (Colo. 1991), *cert. den*., 502 U.S. 860.
[339] State v. Powell, 839 P. 2d 139 (N.M. Ct. App. 1992).
[340] State v. Helfrich, 922 P. 2d 1159 (Mont. 1996).
[341] State v. Cardenas-Hernandez, 579 N.W. 2d 678 (Wis. 1998); *Deputy Is Accused on Defamation on the Internet*, NEW ORLEANS TIMES-PICAYUNE, Aug. 27, 1999, at A4.
[342] Hamilton v. City of San Bernardino, 107 F. Supp. 2d 1239 (C.D. Calif. 2000).
[343] Jennifer Farrell, *Parody Web Site: Offensive or Illegal?* ST. PETERSBURG TIMES, Dec. 18, 2000, at 1.
[344] Ivey v. State, 821 So. 2d 937 (Ala. 2001); *Antiquated Libel Statute Declared Unconstitutional*, NEWS MEDIA & THE LAW, Summer 2001, at 14; *Top Court Overturns Lawyer's Conviction*, COLUMBUS LEDGER-ENQUIRER, July 7, 2001, at B4. The amicus brief submitted on behalf of the defendant by the Reporters Committee for Freedom of the Press is *available at*, http://www.rcfp.org/news/documents/iveyala.html (last accessed Sept. 20, 2001).
[345] State v. Shank, 795 So. 2d 1067 (Fla. Dist. Ct. App. 2001).
[346] Mangual v. Rotger-Sabat, 317 F. 3d 45 (1st Cir. 2003); *Puerto Rico: Libel Law Ruled Unconstitutional*, N.Y. TIMES, Jan. 23, 2003, at A19.
[347] Katharine Biele, *When Students Get Hostile, Teachers Go to Court*, CHRISTIAN SCI. MONITOR, Aug. 22, 2000, at 1.
[348] Jon Katz, Criminal Libel, Free Speech and the Net (June 5, 2001), ¶ 9, Slashdot, *at* http://slashdot.org/features/00/06/01/1526235.shtml (last accessed Sept. 5, 2002).
[349] Baird, *supra* note 16, at C1.
[350] Biele, *supra* note 347, at 1. Lake's father said "his son was fighting back against hostile peers. 'For him, it was just a tit-for-tat thing. Everything he has done up to this point was in retaliation for what other kids did, stuff that was just as vulgar and just as harmful.'" Katz, *supra* note 348, at ¶ 3.
[351] Baird, *supra* note 16, at C1. Jon Katz claims that "the anonymous Utah Web site was vulgar and offensive, but compared to may public flames, only tepid." *Supra* note 348, at ¶ 6. "Flaming" is harsh, caustic, online criticism, which is usually anonymous.

"engaged in drug use or homosexuality."[352] School officials suspected Lake immediately, because of his "frequent run-ins with the principal … and … an altercation during a football game,"[353] and Schofield notified police on May 16, 2000. Two days later, police seized Lake's computer, sent it to the state crime laboratory for analysis, and arrested the teenager, who subsequently spent seven days in juvenile detention.[354] Upon his release, his family sent him to live with relatives in California.

A month later, Lake was charged with one count of violating Utah's criminal libel statute and another of violating its criminal defamation statute.[355] After the juvenile court refused to dismiss the libel charge on December 19, the state court of appeals "initially declin[ed] to take the case," but reversed itself and sent the appeal to the state supreme court on May 15, 2001.[356] Eighteen months later, the Utah Supreme Court unanimously declared the state's criminal libel

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[352] Jennifer K. Nii, *Libel Charges Will Stand Against Milford Student*, DESERET NEWS, Dec. 6, 2000, at B4. The site "did not contain threats of violence or references to weapons." National Organization Joins Fight Against Utah's Criminal Libel Law (Aug. 10, 2001), at ¶ 3, Hard News Café, Utah State University Department of Journalism & Communication, *at* http://www.hardnewscafe.usu.edu/archive/august2001/0810_criminallibel.html (last accessed Oct. 1, 2002).

[353] Katz, *supra* note 348, at ¶ 9.

[354] Jon Katz argues this lengthy incarceration was the result of

> post-Columbine hysteria, in which anger, alienation and offensive speech online is increasingly equated with danger…. If a teenager calls one of his classmates a slut outside of school (but not online), it's hard to imagine he'd be arrested, driven out-of-state, or charged with criminal libel….
>
> Here, when troubled teenagers lash out at peers and teachers online, we don't sit down with teachers, counselors, parents and administrators. We don't call constitutional scholars, technologists and social scientists to ponder rational solutions to unprecedented techno-driven 21st century problems.
>
> We call 911 and turn a kid who has trouble fitting in into both a refugee and a criminal suspect.

Id. at ¶¶ 12, 22-23. In 1999, two disaffected teenagers at Columbine High School, near Littleton, Colo., shot and killed twelve students and a teacher, before killing themselves. *See* Biele, *supra* note 347, at 1.

[355] Utah Code. Ann. § 76-9-501 (1999); Utah Code Ann. § 76-9-507 (1999). After the juvenile court dismissed the slander charge, the count remaining alleged the criminal libel of the high school principal. *See* Motion To Dismiss Petition, State of Utah v. Ian Michael Lake (July 31, 2000), The American Civil Liberties Union Protecting Constitutional Freedoms in Utah, *at* http://www.acluutah.org/lakemotion.htm (last accessed Sept. 30, 2002).

[356] Joe Baird, *Libel Case Heading to High Court*, SALT LAKE TRIB., Aug. 4, 2001, at B1. *See* Brief for Appellant, State of Utah v. Ian Michael Lake (Aug. 2, 2001), The American Civil Liberties Union Protecting Constitutional Freedoms in Utah, *at* http://www.acluutah.org/lakeappeal.htm (last accessed Sept. 30, 2002); Joe Baird, *Libel Appeal Drawing National Attention*, SALT LAKE TRIB., Aug. 28, 2001, at B2.

statute unconstitutional,[357] after the Lakes spent more than $20,000 defending their son.[358] Thus was Ian Lake prosecuted and punished for his speech in much the same way as Jim Fitts was, without a conviction and at taxpayers' expense.[359] That several state court systems have declared the crime of libel antithetical to their state constitutions over the last forty years,[360] however, does not lessen the consequences and trauma associated with being arrested, charged, booked, jailed, indicted, tried, convicted and/or fined for speech which should never have been subject to criminal prosecution in the first place. Although Lake's prosecution was dropped after the state supreme court declared one of Utah's ten statutes dealing with criminal libel unconstitutional, online satire also resulted in a similar computer seizure and criminal libel charges in Colorado in January 2004,[361] proving once again the tenacity and resilience of the crime.[362]

Criminal Libel Statutes Today

As a consequence of the "trend toward uniformity in the state criminal laws"[363] and the efforts of the American Law Institute to modernize and reorganize the law – which began in

[357] *In re* I.M.L. v. State, 61 P. 3d 1038 (Utah 2002). The state supreme court's opinion is also *available at*, http://courtlink.utcourts.gov/opinions/supopin/iml.htm (last accessed March 17, 2004). *See* Christopher Smart, *Utah Court Kills 1876 Libel Statute*, SALT LAKE TRIB., Nov. 16, 2002, at A1; Alan Edwards, *Libel Case Out, Law 'Overbroad'*, DESERET NEWS, Nov. 16, 2002, at B1.

[358] A civil libel suit Schofield filed against the teenager in August 2000 was subsequently settled in the spring of 2001. Angie Welling, *Web Defamation Case Ending*, DESERET NEWS, Jan. 8, 2003, at B4.

[359] Lake's father "believes his son has the basis for a federal civil rights lawsuit for violation of his due process rights." *Id*.

[360] *See supra* text accompanying notes 326-357.

[361] Karen Abbott, *Student Squeals Over Seizure*, ROCKY MOUNTAIN NEWS, Jan. 9, 2004, at 18A; Howard Pankratz, *ACLU Targets State Libel Law After Student's Files Seized*, DENVER POST, Jan. 9, 2004, at A29; *Criminal Libel: Wipe It Off Books* (editorial), ROCKY MOUNTAIN NEWS, Jan. 10, 2004, at 14C; Jim Hughes, *Online Satire Wins Round in Court*, DENVER POST, Jan. 11, 2004, at A24; *Bad Taste Is Not a Crime* (editorial), DENVER POST, Jan. 13, 2004, at B8; Karen Abbott, *And This Little Piggy Isn't Libelous …*, ROCKY MOUNTAIN NEWS, Jan. 21, 2004, at 20A; Brittany Anas, *Poking Fun with 'The Howling Pig': Former UNC Student Runs Online Paper, Overcomes Professor's Libel Accusations*, DENVER POST, Feb. 8, 2004, at A29; Karen Abbott, *Salazar Drawn into Battle Over Libel Law: ACLU Challenges Its Constitutionality in Web Satire Case*, ROCKY MOUNTAIN NEWS, Feb. 20, 2004, at 7A.

[362] Criminal libel is thus similar to Hydra, the nine-headed serpent of Greek mythology which grew two heads for each one that was cut off. It was finally killed by Hercules with a firebrand.

[363] Klotter, *supra* note 13, at 6.

1952 and which resulted in the Model Penal Code, the official draft of which was completed in 1962[364] – most criminal law today is "statutory law rather than common law."[365] Most states have thus "abolished common law crimes."[366] This trend, at least with regard to the crime of libel, reached its zenith in 1966, when the Supreme Court declared the common law of criminal libel unconstitutional.[367]

However, the drafters of the Model Penal Code went even further than the Supreme Court did in 1964, when it required proof of actual malice to justify a conviction for criminal libel.[368] They did not even include a provision for a criminal libel section in their code, though they admitted that the question of the criminality of libel was "one of the hardest questions we confront in drafting a Model Penal Code."[369] The drafters finally concluded that libel should not be a crime, because

> penal sanctions cannot be justified merely by the fact that defamation is … damaging to a person in ways that entitle him to maintain a civil suit…. We reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security…. It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal

[364] The "Proposed Official Draft of the Model Penal Code [is] a carefully drafted code containing provisions relating to the general principles of criminal responsibility and definitions of specific offenses." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 22 (2d ed. 1995). As a growing number of states have adopted the code or portions of it, the results have been "stunning." Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L. J. 521, 538 (1988). The code "has become a standard part of the furniture of the criminal law. *Id*. at 521. In addition, more and more courts are turning "to the Model Code and its supporting commentaries for guidance in interpreting non-Code criminal statutes." Dressler, *supra* note 364, at 23. *See* MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE (2002).

[365] Klotter, *supra* note 13, at iv.

[366] Dressler, *supra* note 364, at 20.

[367] Ashton, 384 U.S. at 195.

[368] Garrison, 379 U.S. at 67.

[369] Model Penal Code § 250.7, comment at 44 (Tentative Draft No. 13, 1961). The drafters "diffidently advanced" – in the place of criminal libel – a new § 250.7, "Fomenting Group Hatred," but did not finally include it in the tentative model code promulgated in 1962. *Id*., at 41-42. Interestingly, "*Beauharnais v. Illinois* had almost no progeny…. Indeed, in revising its code of criminal law in 1961, Illinois did not re-enact the group libel statute despite its recent success." Nelson & Teeter, *supra* note 196, at 55, referencing 343 U.S. at 250.

control….[370]

In essence, prosecutions for the crime of libel are "inconsistent with the principles of imposing criminal liability in modern society."[371]

Yet twenty-three states, the District of Columbia,[372] and one territory still have statutes or constitutional provisions establishing, enabling or governing the prosecution of criminal libel:[373] Arkansas,[374] Colorado,[375] Florida,[376] Georgia,[377] Idaho,[378] Illinois,[379] Iowa,[380] Kansas,[381] Louisiana,[382] Michigan,[383] Minnesota,[384] Nevada,[385] New Hampshire,[386] New Mexico,[387] North

[370] Model Penal Code, *id*.
[371] Brenner, *supra* note 335, at 320-321.
[372] D.C. Code §§ 22-2301 through 22-2304 (1999).
[373] For a global perspective, *see* Jeremy Feigelson & Erik Bierbauer, *Criminal Defamation: International Reforms Advance Against a Global Danger*, LIBEL RESOURCE DEFENSE CENTER BULL., March 27, 2002, at 107; RUTH WALDEN, INSULT LAWS: AN INSULT TO PRESS FREEDOM (2000); Richard Winfield, *The Wasting Disease and a Cure: Freedom of the Press in Emerging Democracies*, COMMUNICATIONS LAWYER, Summer 2002, at 22; Elena Yanchukova, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 COLUM. J. TRANSNAT'L L. 861 (2003).
[374] Ark. Code Ann. §§ 5-15-101 through 5-15-109 (2001).
[375] Colo. Rev. Stat. § 18-13-105 (2000). The constitutionality of Colorado's statute was partially upheld in *People v. Ryan*. 806 P. 2d 935 (Colo. 1991), *cert. den*., 502 U.S. 860 (1991). The Colorado Supreme Court ruled that the statute was overbroad only to the extent that it criminalized libelous statements about public officials or public figures involving matters of public concern. Because truth is an absolute defense for criminal libel under Article II, § 10 of the Colorado Constitution, the statute is constitutional to the extent that it criminalizes libelous statements about private individuals.
[376] Fla. Stat. §§ 836.01 through 836.10 (2000). Fla. Stat. § 836.11 was declared unconstitutional in *State v. Shank*. 795 So. 2d 1067 (Fla. Dist. Ct. App. 2001).
[377] O.C.G.A. § 16-11-40 (2000). The statute's "breach of the peace" requirement was held to be unconstitutional by the state Supreme Court in *Williamson v. State*. 295 S.E. 2d 305 (Ga. 1982).
[378] Idaho Code §§ 18-4801 through 18-4809 (2000).
[379] 720 Ill. Comp. Stat. 300/1 (2001). 720 Ill. Comp. Stat. 5/1-6 (l) (2001) specifies the venue for such prosecutions but does not authorize such prosecutions.
[380] While no state criminal libel statute exists, Article I, § 7 of the Iowa Constitution provides that truth may be used as a defense in criminal prosecutions for libel.
[381] Kan. Stat. Ann. §§ 21-4004 through 21-4006 (2000). Kan. Stat. Ann. § 21-4004 was upheld in *Phelps v. Hamilton*. 59 F. 3d 1058 (10th Cir. 1995).
[382] La. Rev. Stat. § 14:47 (2001). The statute has been held partially unconstitutional, insofar as it restricts expression about public officials. State v. Defley, 395 S. 2d 759 (La. 1981).
[383] Mich. Comp. Laws §§ 491.1108, 750.97, 750.370, 750.389, 750.409 (2001).
[384] Minn. Stat. §§ 609.27(1)(4), 609.77, 609.765, 628.22, 631.06 (2000).
[385] Nev. Rev. Stat. §§ 200.510 through 200.560 (2001). Though the statutes have not been held unconstitutional, the U.S. District Court endorsed "an agreement" between the Nevada Press Association and the state Attorney General that the state's criminal libel statutes are "unconstitutional." Nevada Press Association v. del Papa, CV-S-98-00991-JBR (1998). *See* Hickey, *supra* note 262, at 101-102; LIBEL DEFENSE RESOURCE CENTER, 50-STATE SURVEY: MEDIA LIBEL LAW – 1998-1999 670 (1999).
[386] N.H. Rev. Stat. Ann. § 644:11 (2001). The statute was cited with approval in *Keeton v. Hustler Magazine*. 465 U.S. 770, 776 (1984).

Carolina,[388] North Dakota,[389] Ohio,[390] Oklahoma,[391] South Dakota,[392] Utah,[393] Virgin Islands,[394] Virginia,[395] Washington,[396] and Wisconsin.[397] Of these, nineteen jurisdictions specifically criminalize defamation of living persons;[398] ten criminalize defamation of the dead;[399] six penalize accusations of fornication or lack of chastity;[400] six criminalize defamation of financial institutions, insurance companies, or corporations;[401] one criminalizes the defamation of agricultural products;[402] and eight criminalize threats, name-calling, or "fighting words."[403] In the area of libel, then, it is clear that state legislatures have not followed the Model Penal Code's

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[387] N.M. Stat. Ann. § 30-11-1 (2001). The statute has been held to be partially unconstitutional, insofar as it applies to public statements involving matters of public concern. State v. Powell, 839 P. 2d 139 (N.M. Ct. App. 1992).
[388] N.C. Gen Stat § 14-47 (2000).
[389] N.D. Cent. Code § 12.1-15-01 (2001).
[390] Ohio Rev. Code Ann. §§ 2739.03, 2739.16, 2739.18, 2739.99 (Anderson 2001).
[391] 21 Okla. Stat. §§ 771 through 781 (2000).
[392] While no state criminal libel statute exists, Article VI, § 5 of the South Dakota Constitution provides that truth may be used as a defense in criminal prosecutions for libel.
[393] Utah Code Ann. §§ 76-9-404, 76-9-501 through 76-9-509 (2001). Utah Code Ann. § 76-9-502 has been held to be unconstitutional. *In re* I.M.L., 61 P.3d at 1038.
[394] 14 V.I. Code Ann. §§ 1177, 1183 (2001).
[395] Va. Code Ann. §§ 18.2-209, 18.2-416 through 18.2-418 (2001).
[396] Wash. Rev. Code Ann. §§ 9.58.010 through 9.58.020 (2001).
[397] Wis. Stat. § 942.01 (2000).
[398] These include: Arkansas, Colorado, the District of Columbia, Georgia, Idaho, Kansas, Louisiana, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Utah, Virginia, Washington, and Wisconsin. Ark. Code Ann. §§ 5-15-103 and 5-15-104 (2001); Colo. Rev. Stat. § 18-13-105 (2000); D.C. Code § 22-2302 (1999); O.C.G.A. § 16-11-40 (2000); Idaho Code § 18-4801 (2000); Kan. Stat. Ann. § 21-4004 (2000); La. Rev. Stat. § 14:47(1) (2001); Mich. Comp. Laws §§ 750.370 and 750.409 (2001); Minn. Stat. §§ 609.27(1)(4), 609.77, and 609.765 (2000); Nev. Rev. Stat. § 200.510 (2001); N.H. Rev. Stat. Ann. § 644:11 (2001); N.M. Stat. Ann. § 30-11-1 (2001); N.D. Cent. Code § 12.1-15-01 (2001); 21 Okla. Stat. § 771 (2000); Utah Code Ann. §§ 76-9-404 and 76-9-501 (2001); Va. Code Ann. §§ 18.2-209 and 18.2-417 (2001); Wash. Rev. Code Ann. § 9.58.010 (2001); Wis. Stat. § 942.01 (2000).
[399] These include: Colorado, Georgia, Idaho, Kansas, Louisiana, Nevada, North Dakota, Oklahoma, Utah, and Washington. Colo. Rev. Stat. § 18-13-105 (2000); O.C.G.A. § 16-11-40 (2000); Idaho Code § 18-4801 (2000); Kan. Stat. Ann. § 21-4004 (2000); La. Rev. Stat. § 14:47(2) (2001); Nev. Rev. Stat. § 200.510 (2001); N.D. Cent. Code § 12.1-15-01 (2001); 21 Okla. Stat. § 771 (2000); Utah Code Ann. § 76-9-501 (2001); Wash. Rev. Code Ann. § 9.58.010 (2001).
[400] These include: Arkansas, the District of Columbia, Florida, Michigan, Oklahoma, and Virginia. Ark. Code Ann. § 5-15-102 (2001); D.C. Code § 22-2304 (1999); Fla. Stat. § 836.04 (2000); Mich. Comp. Laws § 750.370 (2000); 21 Okla. § 779 (2000); Va. Code Ann. § 18.2-417 (2001).
[401] These include: Florida, Illinois, Kansas, Michigan, Virginia, and Washington. Fla. Stat. § 836.06 (2000); 720 Ill. Comp. Stat. 300/1 (2001); Kan. Stat. Ann. § 21-4005 (2000); Mich. Comp. Laws §§ 49.1108, 750.97, 750.389 (2001); Va. Code Ann. § 18.2-209 (2001); Wash. Rev. Code Ann. § 9.58.010 (2001).
[402] Colo. Rev. Stat. § 12-16-115 (2000).
[403] These include: Florida, Georgia, Idaho, Kansas, Nevada, Ohio, Oklahoma, and Virginia. Fla. Stat. § 836.05 (2000); O.C.G.A. § 16-11-39 (2000); Idaho Code § 18-4809 (2000); Kan. Stat. Ann. § 21-4006 (2000); Nev. Rev. Stat. § 200.560 (2001); Ohio Rev. Code Ann. § 2739.18 (Anderson 2001); 21 Okla. Stat. § 778 (2000); Va. Code Ann. § 18.2-416 (2001).

lead as they have in most other areas of the criminal law. In fact, the *Garrison* ruling[404] appears to have both undermined and eviscerated the American Law Institute's modernization efforts with regard to the crime of libel.

CONCLUSIONS

The crime of libel should have no place in American law. First, its common law basis is a "false foundation laid by Coke … beneath the equally false superstructure raised by Blackstone."[405] Second, it cannot ever be reconciled with the democratic, libertarian ideas on which America was founded, as criminal libel is the product of authoritarianism and is "the hallmark of all closed societies throughout the world."[406] Third, it is functionally identical to civil libel, because, "courts have never adequately worked out a distinction between the tort and the crime,"[407] now that truth may be used as a defense. Fourth, its purpose – the "protection of individual reputation is probably the only real justification of the modern law of criminal libel"[408] – is identical to that of civil libel, now that prevention of violence is no longer a legal justification for its existence.[409] Civil libel, with its possibility of monetary damages, both

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[404] 379 U.S. at 64.

[405] Brant, *supra* note 114, at 19.

[406] HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 15 (1965). The absence of

> libel as a crime is the true pragmatic test of freedom of speech. This I would argue is what freedom of speech is about. Any society in which seditious libel is a crime is, no matter what its other features, not a free society. A society can, for example, either treat obscenity as a crime or not treat it as a crime without thereby altering its basic nature as a society. It seems to me it cannot do so with seditious libel. Here the response to this crime defines the society.

Id. at 16. In fact, the crime of libel is now "widely regarded as a threat to human rights." U.S. Ready, *supra* note 63, at ¶ 3. To date, the United Nations, the Organization of American States, the Organization for Security and Cooperation in Europe, and Reporters Without Borders have all called for the decriminalization of defamation worldwide. Free Expression Chiefs Call for Action on Criminal Defamation (Nov. 29, 1999), *available at* http://www.article19.org/docimages/535.htm (last accessed Sept. 5, 2002); Maria Trombly, *European Journalists Discuss Libel Law*, QUILL, Jan./Feb. 2004, at 36.

[407] Kelly, *supra* note 84, at 318.

[408] Bahn, *supra* note 32, at 528.

[409] The only purposes remaining are improper ones:

> (1) to circumvent the [constitutional] restrictions placed on civil libel litigation … or (2) to punish an indigent who could not be reached by a civil judgment for damages. The first is clearly an

compensatory and punitive, is "the most satisfactory and popular method of dealing with defamations between individuals."[410] Finally, civil libel is also the fairest way of dealing with defamation. The impact of criminal law is "felt not only by those convicted," but also by those who are "merely prosecuted" or "threatened with prosecution," and by "countless others" who cannot "accurately judge the boundaries imposed on freedom or who [are] fearful to take the risk…."[411] The crime of libel "is often available as a device for punishing criticism of the men who direct the conduct of government. Indeed, examination of the cases reveals that in recent years there has been a tendency to use criminal libel to attain ends theoretically foreclosed by the absence of seditious libel."[412] Plus, the prospect of "its enforcement is always present,"[413] even

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> impermissible attempt to circumvent the First Amendment; the second, while not as obviously invalid as the first, raises quite serious problems of equal protection as well as the First Amendment ones.

Handler, 383 F. Supp. at 1278.

[410] Kelly *supra* note 84, at 299.

[411] Emerson, *supra* note 38, at 892. In civil libel, this is known as the "chilling effect." ERIC BARENDT, ET AL., LIBEL AND THE MEDIA: THE CHILLING EFFECT (1997); Forer, *supra* note 12; Michael Massing, *The Libel Chill: How Cold Is It Out There?* COLUM. JOURNALISM REV., May/June 1985, at 31.

[412] Bahn, *supra* note 32, at 530. This was what happened to Jim Fitts. He was set up. The issue was not one of reputation but of power and control. His accusers understood how the criminal justice system worked and used it to their advantage, without regard to whether they had actually been defamed or not. The warrants for his arrest were signed on a Friday morning; his bond hearing was held as the last item of business that evening. The magistrate judge owed his position, to which he had been elected in the state legislature, to the support of the two legislators who now claimed to have been defamed. The judge chose the harshest of the bond options available and refused to hear a motion that the bond be reduced. The clerk of the court went home for the weekend before Fitts could make arrangements to pay the bond. Fitts spent two nights in jail without ever having been convicted of any crime, indicted, or even arrested based upon "probable cause." His emergency release was conditional – he could not discuss what had happened to him. His indictment by the grand jury was based upon evidence developed and presented by the solicitor and his two assistants, one a cousin and the other a nephew of the two legislators. The charges were dropped just as it appeared public opinion was shifting in Fitts's favor, but after the legislators won their political party's re-nomination for office, which was tantamount to reelection because of the disparate strength of the Democratic and Republican parties in Williamsburg County at that time. Joe Drape, *Editor Uses Paper To Shake Up S.C. County*, ATLANTA J.-CONST., June 26, 1988, at 6A; Joe Drape, *South Carolina Editor Indicted in Libel Case*, ATLANTA J., June 28, 1988, at 4A. In discussing the 2001 Ian Lake case, Jon Katz notes the use of criminal libel

> makes offensive speech a crime. The whole point of the First Amendment is to protect offensive speech, even when it's obnoxious. When it becomes harmful, erroneous or defamatory, [civil] libel has always been the appropriate legal recourse…. But … the police aren't supposed to get involved….
>
> The outcome of this case and others like it is critical. Free speech isn't the right to speak for free. The right to free speech in the United States means the right to be free from punishment by the government in retaliation for most speech.

Supra note 348, at ¶¶ 14-15.

though laws proscribing the subversive criticism of government or its officials have disappeared.

Some who believe *Beauharnais v. Illinois*[414] was decided correctly might argue that without the crime of libel, "there is no satisfactory civil remedy for group libel"[415] or for libel of the dead. The verdict of history in both of these instances supports the conclusion that breach of the peace, disorderly conduct, or incitement to riot statutes – all based on the requirement that real, actual violence result – would be a more appropriate method of dealing with such situations. Others might argue that without the crime of libel, "the bankrupt libeler" and the "opulent defamer,"[416] as well as the person "mentally deranged and in need of restraint,"[417] would be able to harm reputations with impunity. But even if civil libel were not able to offer a practical remedy in these unlikely situations, the First Amendment – especially when the "vindictive … sordid private vendettas" that typify criminal libel today are considered[418] – would still stand for the proposition that speech is best corrected by speech and that more speech is better for society than less.[419]

It cannot be doubted that "the problem of maintaining a system of freedom of expression in a society is one of the most complex any society has to face."[420] Criminal libel is "a direct restriction on speech."[421] This research has shown that "arbitrary and discriminatory prosecutions

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[413] Kelly, *supra* note 84, at 318. In holding a Georgia statute prohibiting "opprobrious words or abusive language" to be unconstitutionally overbroad, the Supreme Court acknowledged that "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." Gooding v. Wilson, 405 U.S. 518, 521 (1972).
[414] 343 U.S. at 250.
[415] Kelly, *supra* note 84, at 330. *See A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (Jan. 1988); K. Lasson, *In Defense of Group Libel Laws, Or Why the First Amendment Should Not Protect Nazis*, 2 HUM. RTS. ANN. 289 (Spring 1985). *But see* Evan P. Schultz, *Group Rights, American Jews and the Failure of Group Libel Laws*, 1913-1952, 66 BROOK. L. REV. 71 (Spring 2000).
[416] Veeder, *supra* note 87, at 46.
[417] Spencer, *supra* note 52, at 390.
[418] *Id*. at 390-391.
[419] Whitney, 274 U.S. at 375.
[420] Emerson, *supra* note 38, at 889.
[421] Kelly, *supra* note 84, at 318.

are encouraged by such an unclear … rule."[422] As is now happening in high-profile civil libel cases with little chance of ultimate success, many file a criminal complaint, not because they believe they will eventually win or that the alleged libeler will ever be convicted, but for the publicity value of showing themselves as having been wronged.[423] They thus win by complaining. Yet because it is "more important that truth be heard than [a] society take no risk of violence,"[424] government must not have "untrammeled power" to sanction criminally that which is "part and parcel of the political process."[425] Experience teaches "that limitations imposed on discussion, as they operate in practice, tend readily and quickly to destroy the whole structure of free expression."[426]

As noted, it is true that "scant, if any, evidence exists that the First Amendment was intended to abolish" criminal libel.[427] But that is an argument for the vitality of criminal libel based upon silence, not one based upon evidence. Jurist Roscoe Pound, arguably "America's greatest legal scholar,"[428] believed "that the law consists, not in the actual rules enforced by decisions of the courts at any one time, but the principles from which those rules flow; that old principles are modified from time to time as changed conditions and new states of fact require."[429] Thus, while "conditions in 1791 must be considered … they do not arbitrarily fix the division between lawful and unlawful speech for all time."[430] In addition, the nation's "most eminent judges" of the twentieth century believed that "the First Amendment was intended to bar

[422] *Id*. at 320.
[423] RANDALL P. BEZANSON, ET AL., LIBEL AND THE PRESS 78 (1987).
[424] Kelly, *supra* note 84, at 326.
[425] Bahn, *supra* note 32, at 533.
[426] Emerson, *supra* note 38, at 893.
[427] Gertz, 418 U.S. at 381.
[428] Schwartz, *supra* note 144, at 467.
[429] Williams v. Miles, 94 N.W. 705, 708 (Neb. 1903).
[430] Chafee, *supra* note 40, at 14.

criminal defamation,"[431] despite more recent *dicta* to the contrary.[432]

Libertarian "governments recognize the duty of the state to protect the reputations of individuals."[433] Yet this duty may be wholly and completely fulfilled through the availability of the tort of libel to those harmed. While the facts surrounding the Fitts and Lake cases may be egregious,[434] they are not atypical,[435] nor are they uncommon.[436] Their outcome was predictable, for in the words of Thomas Emerson, the use of criminal libel statutes "can only result in suppressing unpopular expression."[437]

Thus, it must be concluded that the U.S. Supreme Court did not go far enough with its *Garrison* ruling.[438] The Court itself must erase the crime of libel from the American legal lexicon completely, for the American "legal system [is] an extremely complicated beast – a beast with fifty separate heads, bodies, and tails."[439] More than a half-century ago, "the possibility of abuse" was not deemed a good enough reason to deny Illinois the power to criminalize libel.[440] Forty years ago, the Court felt that "the fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a

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[431] Gottschalk, 575 P. 2d at 291. *See, e.g*., Abrams, 250 U.S. at 624 (Holmes, J., and Brandeis, J., dissenting); Garrison, 379 U.S. at 80 (Black, J., and Douglas, J., concurring); and Beauharnais, 343 U.S. at 287 (Jackson, J., dissenting).
[432] Keeton, 465 U.S. at 776.
[433] Siebert, *Libertarian Theory*, in Siebert et al., *supra* note 41, at 54.
[434] *See supra* text accompanying notes 265-284, 347-359.
[435] *See*, *e.g*., the case of "Happy" Howard Williamson. James Dodson, *The Trouble with Being Happy*, ATLANTA WEEKLY, April 18, 1982, at 10; Williamson v. State, 8 Media L. Rep. 2044 (Ga. 1982); Williamson, 295 S.E. 2d at 305.
[436] *See supra* text accompanying notes 265-359.
[437] *Supra* note 38, at 924.
[438] 379 U.S. at 64.
[439] LAWRENCE W. FRIEDMAN, LAW IN AMERICA 12 (2002). Actually,

> there are more than fifty systems within the territory controlled by the United States. The federal system can be counted as number fifty-one; and in addition, there is Puerto Rico…; there is Guam, and the Virgin Islands; and there are also the legal systems of many of the native peoples who live inside American borders.

Id.
[440] Beauharnais, 343 U.S. at 263.

criminal statute,[441] concluding that "presumably a person charged with violation of [the Alabama criminal libel] statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt."[442] The Court was wrong; the fear of prosecution is more inhibiting and subject to far greater abuse, as this research has shown. The Court's concomitant ruling in *Garrison* did place some "limits" on "an antiquated legal concept."[443] But the ruling was based on the assumption that law enforcement officials, knowing how difficult it would be to prove actual malice, would choose not to manipulate the judicial system in favor of any "best man" or woman.[444] Based on this faulty assumption, applying the Sullivan rule to the crime of libel provides inadequate protection for speech. Forty years have proven that the *Garrison* limits are not enough, at least not in this area of the law. Though the crime of libel today may indeed be "a largely unenforceable offense,"[445] that has not stopped those who would use its sledgehammer effect – or the threat of its use – to try to control speech, even in the face of eventual failure. Though not referring to the exact threat criminal libel poses today, Zechariah Chafee's words still ring true: "Surely, language which is immune from civil

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[441] Sullivan, 376 U.S. at 277.
[442] *Id*.
[443] 379 U.S. at 67; Jane Kirtley, *Overkill in Kansas*, AM. JOURNALISM REV., Sept. 2002, at 74.
[444] More than sixty years ago and just prior to his appointment to the Supreme Court, Robert Jackson – at the time U.S. attorney general – understood the dilemma:

> What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.
>
> If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone…. It is in this realm – in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense – that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, or being attached to the wrong political views….

The Federal Prosecutor, an address delivered at the second annual Conference of United States Attorneys, April 1, 1940, quoted in Morrison, 487 U.S. at 728 (Scalia, J., dissenting).
[445] Stevens, *supra* note 66, at 526.

defamation suits … ought to be equally immune from the sterner rigors of the penitentiary."[446] The jurists who drafted the Model Penal Code – including, chief reporter Herbert Weschler of the Columbia University School of Law, who also served as lead appellate counsel in *Sullivan*[447] – had it correct: libel as a crime, in any of its many forms, has no place in American law.[448]

Three factors are generally used to determine when conduct should be criminalized: 1) "the enforceability of the law;" 2) "the effects of the law;" and 3) "the existence of other means to protect society against the undesirable behavior."[449] Even though the crime of libel is obviously an enforceable offense, the other two factors argue overwhelmingly for its abolition as a crime: the effects of its enforcement on freedom of speech and the existence of the tort of civil libel to protect society against any abuse of that freedom. The Supreme Court must act. Until it does, criminal libel will continue to hang on the face of the First Amendment as spittle does from the mouth of a baby, who is not mature enough intellectually to know any better or mature enough physically to wipe it off. America's ideal of free expression in the twenty-first century merits the Court's total commitment.

[446] *Supra* note 40, at 95.
[447] 376 U.S. at 255. Eberhard P. Deutsch of New Orleans served as appellate counsel in *Garrison*. 379 U.S. at 64.
[448] Neither criminal libel nor the more narrow crime of group libel was included in the American Law Institute's final version of the Model Penal Code (1985). Section 250.7 of the final version is: "Obstructing Highways and Other Public Passages." *See supra* note 368.
[449] Klotter, *supra* note 13, at 5. "Too often, laws are enacted … without giving adequate consideration to the possible negative consequences. Nevertheless, criminal justice personnel are charged with enforcing these laws … until they are repealed or declared to be unconstitutional." *Id.*