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Reforming the Crime of Libel

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REFORMING THE CRIME OF LIBEL

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I. INTRODUCTION

Criminal libel has a long and troubled history — longer and even more troubled than its counterpart in civil law. In its early guises, it was notable as an instrument of state repression alongside other variants of libel such as blasphemy and sedition and, in part, as a corrective to the end of press licensing. But its usage in the nineteenth and twentieth centuries became less state-oriented. Though its status as a crime inevitably brings with it an element of official sanction, criminal libel has latterly evolved as the weapon of most destruction in the arsenal of libel law. In this role, it has become a rarity but has survived attempts at eradication in England and Wales and even the United States. Its continuance is itself controversial, as well as its content and impact.

This paper will provide in Part II a brief description of the offense of criminal libel in England and Wales so that its distinctive features can be appreciated. Part III will detail some of the attempts at reform in that jurisdiction centered around the proposals of the Law Commission of England and Wales. There will follow in Part IV an assessment of the value of the offense, especially in light of claims to civil liberties, whether to reputation or to free speech. Is criminal libel worthy of preservation, either in England and Wales or further afield? The inquiry will be informed in Part V by some comparisons with the well-being of the offense in the United States.

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II. The Core of the Offense[1]

This part of the paper will outline the elements of criminal libel. It is necessary to examine the elements of actus reus and mens rea before listing some of its distinctive features, both in terms of differences from civil libel and the limited defenses for speakers.

A. Actus Reus

For many centuries in England and Wales, the publication of written defamation has amounted to a common law crime (as a misdemeanor) punishable on indictment with fine or imprisonment; however, oral defamation is not a crime, with some exceptions.[2] The publication of a libel known to be false became a separate statutory offense under the Libel Act 1843, section 4 and operates as an "aggravated offence"[3] attracting a heavier penalty on the basis of the significantly variant mens rea.[4]

The libel must vilify the subject-victim, which may be an individual, private or public corporation,[5] or unincorporated society or group.[6] The libel's effect must be the tendency to bring the person

1. *See generally* Law Commission, Working Paper No. 84, Criminal Libel (1982); Law Commission, Report No. 149, Criminal Law: Report on Criminal Libel (1985); Law Reform Commission of Ireland, Consultation Paper on the Crime of Libel, chs. 1, 2, 6 (1991); Law Reform Commission of Canada, Working Paper No. 35, Criminal Law: Defamatory Libel (1984); Peter F. Carter-Ruck & Harvey Starte, Carter-Ruck on Libel and Slander ch. 18 (Butterworth's Tolley 5th ed. 1997); Gatley on Libel and Slander ch. 22 (Patrick Milmo & W.V.H. Rogers eds., Sweet & Maxwell 10th ed. 2004). This paper does not cover procedural issues or group libels.

2. *See, e.g.,* Gatley on Libel and Slander, *supra* note 1, at para. 3.8.

3. In *Boaler v. The Queen*, (1888) 21 Q.B.D. 284, 285, 288, Field J. considered section 4 to create a new offense and Wills J. considered its relationship to common law to be akin to the distinct offenses of aggravated and common assault. *See also* Law Commission, Working Paper No. 84, *supra* note 1, at para. 3.30.

4. The Libel Act, 1843, c.96, s.4. *See* Gatley on Libel and Slander, *supra* note 1, at para. 22.3.

5. *See* Triplex Safety Glass Co. v. Lancegaye Safety Glass Ltd., [1939] 2 K.B. 395 (C.A.) (stating that corporations can both bring a claim for libel and be indicted for libel). *But see* Derbyshire County Council v. Times Newspapers Ltd., [1993] A.C. 534 (H.L.) (appeal taken from C.A.) (finding that local councils are not entitled to bring actions for defamation).

6. Libels upon groups is considered in Gatley on Libel and Slander, *supra* note 1, at ch. 22.18.

into hatred, contempt, and ridicule.[7] The meaning of this phrase was explored by the House of Lords (the supreme court for England and Wales) in *Gleaves v. Deakin*.[8] As implied by the word "vilify," the House of Lords confirmed that "a criminal libel must be serious libel," and not trivial, as judged by community standards.[9] This condition reflects the origins of the offense which can be traced to a decree of Alfred the Great in 880[10] and the statutory offense of *de Scandalum Magnatum* ("slander of the magnates," often translated as "the great men"), created as a cross-breed statutory offense between seditious and defamatory libel in 1275.[11] The rationale of the offense was to protect the reputations of persons in authority in respect of whom it might be said, "the greater the truth, the greater the libel."[12] Towards the start of the seventeenth century, the Court of Star Chamber[13] engineered a judge-made offense of defamation, the objective of which was to prevent public disorder through violent retaliation and duelling, and whereunder proof of truth was not a defense.[14] The Star Chamber's criminal libel jurisdiction and jurisprudence were, after the restoration of

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7. Thorley v. Lord Kerry, (1812) 4 Taunt 355, 364.

8. [1980] A.C. 477 (H.L.) (appeal taken from Q.B.D.).

9. *Id.* at 487, 495.

10. *See* Colin Rhys Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962) (describing the origins of the offense of libel).

11. De Scandalis Magnatum, 1275, 13 Edw. 1, c.34. *See* COMMITTEE ON DEFAMATION, REPORT OF THE COMMITTEE ON DEFAMATION para. 149 (1975); LAW COMMISSION, WORKING PAPER NO. 84, *supra* note 1, at para. 2.2; LAW REFORM COMMISSION OF IRELAND, *supra* note 1, ch. 1, para. 1; John Kelly, *Criminal Libel and Free Speech*, 6 U. KAN. L. REV. 295 (1958); John C. Lassiter, *Defamation of the Peers: The Rise and Decline of the Action for Scandalum Magnatum*, 22 AM. J. LEGAL HIST. 216 (1978); F.R. Scott, *Publishing False News*, 30 CAN. B. REV. 37 (1952); Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903). The statutory offense was abolished by the Statute Law Revision Act 1887.

12. It is thought that this statement was originally made by Lord Mansfield. Roy Robert Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43, 43 n.1 (1931); David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 735 n.38 (1942).

13. The criminal jurisdiction of the Court of Star Chamber began in 1488 and was abolished in 1641.

14. *See* De Libellis Famosis, 1606, 5 Co. Rep., 125a; LAW COMMISSION, WORKING PAPER NO. 84, *supra* note 1, at para. 2.5; LAW REFORM COMMISSION OF IRELAND, *supra* note 1, ch. 1, at para. 4.; J.R. Spencer, *Criminal Libel — A Skeleton in the Cupboard*, CRIM. L. REV. 383, 384 (1977).

the English monarchy in 1660, assumed by the common law-based Court of King's Bench, as later modified by statute.[15]

The House of Lords took the opportunity in *Gleaves* to remove some of the older political baggage from the actus reus, though one might argue that the result is net-widening and reflective of the fragmentation of power within society.[16] Thus, a prosecution for criminal libel need not engage the public interest beyond the norm for any public prosecution.[17] There is no automatic requirement that the victims be public figures. Nevertheless, the famous and prominent are still involved in a disportionate number of cases, which follows from the fact that the inference of seriousness can be readily made from the person's public position. Further, it need not be shown that the libel is likely to disturb the peace of the community or provoke a breach of the peace by an individual,[18] nor is it relevant whether civil remedies for libel should suffice for the person libeled.[19] Finally, for prosecutions under the Libel Act 1843, section 4, it must be shown that the libel is false, though this matter was (wrongly) presumed in *R. v. Wicks*.[20] In a case not under section 4, the libel is presumed to be false unless the defendant raises and proves justification (the truth of the statement).[21]

B. Mens Rea

The defendant must have intended to publish the materials which contain the libel, and, therefore, the careless misplacement of a criminally libelous aide-memoire intended for oneself will not result in liability. It is less certain whether the defendant must have specific knowledge of the libelous words which have been pub-

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15. For a discussion of the later modifications, see LAW REFORM COMMISSION OF IRELAND, *supra* note 1, ch. 1, at paras. 5–7, 17–20, 31–33. The most notable statutory reforms were the Libel Act, 1792, c.60 (allowing a jury trial of the issue of defamatory character and not merely publication), and the Libel Act, 1843, c.96, s.6 (providing for justification as a defense).

16. [1980] A.C. 477 (H.L.) (appeal taken from Q.B.D.).

17. *Id.* at 486.

18. *Id.* at 483, 486–87, 490, 495. This point had been largely settled in *R. v. Wicks*, [1936] 1 All E.R. 384, 386 (C.C.A.). *See also* J.R. Spencer, *Criminal Libel in Action — The Snuffing of Mr. Wicks*, 38 CAMBRIDGE L.J. 60 (1979).

19. *See* Gleaves v. Deakin, [1980] A.C. 477, 486 (H.L.) (appeal taken from Q.B.D.). *Cf.* Goldsmith v. Pressdram, [1977] Q.B. 83, 88.

20. [1936] 1 All E.R. 384 (C.C.A.). *See* Spencer, *supra* note 14, at 473.

21. *See* LAW REFORM COMMISSION OF IRELAND, *supra* note 1, ch. 6, at para. 170.

lished. However, some criminal law commentators, no doubt influenced by the general presumption in English criminal law in favor of mens rea,[22] tend to the view that "[t]he defendant must have intended to publish the words which are alleged to be libelous. It is not enough that he intentionally published a book or paper in which they were contained."[23] This view would excuse distributors and vendors of newspapers and so on who are (probably subject to having taken due care) unaware of the libels being purveyed.[24]

A keener debate surrounds whether there need be knowledge or belief as to the libelous quality of the words published. In particular, what is the significance of the term "maliciously," as reflected in the wording of the Libel Act 1843, section 5, and which is meant to be merely declaratory?[25] The implication has, at times, been that the relevant element is not just an intentional publication, but an intentional publication with a further malicious intent.[26] The modern view should require mens rea as to the libelous content to be positively and specifically established by the prosecution, though no English case has yet emerged to support this proposition.[27] Further, the prosecution must show that the publisher of a libel known to be false, contrary to the Libel Act 1843, section 4, had subjective knowledge of the falsity.[28]

C. Distinctive Features of Criminal Libel

The publications which are the subject of civil and criminal libel are largely the same. However, some communications can

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22. *See* Sweet v. Parsley [1970] A.C. 132 (H.L.) (appeal taken from Q.B.D.) ("[I]t is firmly established by a host of authorities that mens rea is an essential ingredient of every offence . . . .").

23. J.C. SMITH & BRIAN HOGAN, SMITH & HOGAN: CRIMINAL LAW 738 (Butterworths 10th ed. 2002) (citing R. v. Munslow, [1895] 1 Q.B. 758).

24. *See* Emmens v. Pottle, (1885) 16 Q.B.D. 354, 355 (C.A.); R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299 (Can.). For a discussion of the standard of negligence, see LAW REFORM COMMISSION OF IRELAND, *supra* note 1, ch. 6, at para. 173.

25. R. v. Munslow, (1895) 1 Q.B. 758, 761. For a very clear survey, see *Duffy v. Baehnk* (1993) S.A.S.C. 3828, *available at* http://austlii.edu.au.

26. *See* R. v. Evans, (1821) 171 Eng. Rep. 759; The King v. Paine, (1696) 87 Eng. Rep. 834.

27. *But see* Phelps v. Hamilton, 59 F.3d 1058 (10th. Cir. 1995); R. v. Lucas, [1998] 1 S.C.R. 439 (Can. S.C.); R. v. Stevens, [1995] 100 Man. R.2d 81 (Man. C.A.); R. v. Stevens, [1993] 7 W.W.R. 38 (Man. Prov. Ct.).

28. *See* R. v. Wicks [1936] 1 All E.R. 384 (C.C.A.).

amount exclusively to criminal libel while others, such as one form of defamation (slander) and other "non-serious" libels, are excused from criminal liability. As the rationale of these differences is often the erstwhile concern with the maintenance of social order, their survival in contemporary times may be questioned.[29] This applies with especial force to the first category of distinction, which comprises publication solely to the person defamed.[30] Since breach of the peace is no longer a constituent element of the actus reus, the main basis for the offense in this situation is wholly undermined; it might be better to view it as impliedly abolished rather than somehow surviving as an inexplicable anomaly.[31]

A second difference between civil and criminal libel is that it is a criminal offense to defame a deceased person. The better view would seem to be that an extension of the actus reus of the crime not be recognized in this sense, rather the publication could be defamatory of living members of the deceased's family, albeit by reason of the vilification of the dead relative's memory. According to Stephen J. in *R. v. Ensor*, "a mere vilifying of the deceased is not enough."[32] There have been only two recent cases on the issue, *Chiu Chut-Fong v. Law Chup*[33] and *Hilliard v. Penfield Enterprises Ltd.*[34] They certainly support the proposition that there must be some impact on the family member of the plaintiff.

If a publication is likely to bring a finite group into discredit, it may be criminal even though it could not be said to be defamatory of each identifiable individual in the group. There is no recent au-

29. COMMITTEE ON DEFAMATION, *supra* note 11, at para. 434.

30. R. v. Brooke, (1856) 7 Cox C.C. 251; R. v. Adams, (1888) 22 Q.B.D. 66.

31. For discussions which support the latter view, see LAW COMMISSION, WORKING PAPER NO. 84, *supra* note 1, at para. 3.8; LAW REFORM COMMISSION OF IRELAND, *supra* note 1, ch. 2, at para. 49.

32. (1887) 3 T.L.R. 366, 367. The trial judge later wrote that he should have stated that an actual intent to injure or to provoke or annoy the relatives was essential. *See* LEWIS FREDERICK STURGE, STEPHEN'S DIGEST OF THE CRIMINAL LAW 289 (9th ed. 1950). *See also* W.H. Binder, *Case Notes and Comments: Publicity Rights and Defamation of the Deceased: Resurrection or RIP?*, 12 J. ART & ENT. L. 297 (2002); Raymond Iryami, *Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statutes*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1083 (1999); G. Zellick, *Libelling the Dead*, 119 NEW L.J. 769 (1969).

33. [1973] H.K.L.R. 36, 50.

34. [1990] 1 I.R. 138. (Ir.)

thority in favor of this proposition.[35] Nevertheless, in *R. v. Gathercole*, Baron Alderson directed the jury to acquit if the libel was on the entire Roman Catholic community (implying that such a libel could not be covered by the offense of blasphemy, as not relating to the established Church of England), but that they could convict on one of the counts if it was a libel on the nearby nunnery at Scorton, North Yorkshire "generally and on the inmates named in particular."[36] Again, in *R. v. Williams*, in which harsh comments were made about the clergy of the diocese of Durham, the judge stated that anything published for the purpose of bringing any of the establishments of the state into hatred and contempt was a libel, and that the defendant could be found guilty if the publication was a libel in respect of the clergy generally or even just the clergy of Durham.[37] The jury found a verdict of guilty for libel of the clergy lving in and near the City of Durham.[38] Similarly, libels against the unnamed magisterial "bullies of the Dartford Bench" were actionable in *R. v. Masters*[39] and in the Canadian case of *R. v. Atkinson*, the court held that an unincorporated political party could be the victim of a criminal libel.[40]

A publication may be a criminal libel if it holds a person up to the hostility of the people amongst whom he lives, whatever their views, whether "right thinking" or not. For instance, in *R. v. Malatesta*, a libel against the anti-government credentials of an Italian anarchist was indictable in light of how it would be viewed by his equally anarchistic circle of friends.[41]

Some of the defenses available in civil law, justification and privilege, are much narrower in the criminal version. In particular, at common law, truth was not a defense to criminal libel,[42] but the Libel Act 1843, section 6, supplies a defense of truth if the defen-

35. See LAW COMMISSION, WORKING PAPER NO. 84, *supra* note 1, at para. 3.11, and ARCHBOLD: CRIMINAL PLEADING, EVIDENCE AND PRACTICE paras. 29–69 (James Richardson ed., 1994), which consider this position to be uncertain.

36. (1838) 168 Eng. Rep. 1140, 1145. *Cf.* Genest v. R. [1933] 71 Que. S.C. 385.

37. (1822) 106 Eng. Rep. 1308.

38. *Id.*

39. (1889) 6 T.L.R. 44.

40. [1979] 28 N.B.R.2d 452 (N.B. Prov. Ct.).

41. (1912) 7 Cr. App. R. 273.

42. *See* R. v. Newman, (1853) 118 Eng. Rep. 544; COMMITTEE ON DEFAMATION, *supra* note 11, at para. 435.

dant can prove that "it was for the public benefit that the matters charged should be published."[43] There is no English case authority on the requirement of "public benefit." However, *Kenny's Outlines of Criminal Law* argues that it alludes to publications which are "objectionable, whether on grounds of decency, or as being disclosures of state secrets, or as being painful and needless intrusion into the privacy of domestic life."[44] Section 6 demands objective proof by the defendant of "the truth of the matters"; it is not sufficient that the defendant genuinely (or even genuinely and reasonably) believes the libel to be true.[45]

Where an occasion is privileged at common law for the purposes of civil libel, it will also be privileged for the purposes of criminal libel.[46] But statutes extending privilege to fair and accurate reports of a wide range of matters have been inconsistent. Neither the Defamation Act of 1952 nor the Defamation Act of 1996 applies to criminal libel.[47] Therefore, the probable result is that in proceedings for criminal libel, absolute privilege for newspaper reports of criminal proceedings rests, and will continue to rest, on section 3 of the Law of Libel Amendment Act of 1888,[48] and that a statutory defense of qualified privilege is only available in the cases mentioned in section 4 of the 1888 Act.

III. Reform Proposals

The criminalization of speech is suspect in any context. Absent the threat of immediate harm, classical liberal theory contends that even foolish and erroneous speech must take its place in the marketplace of ideas where it will help to illuminate the truth. This part of the paper will, therefore, consider the arguments for the reform of the offense of criminal libel. Much of the debate has been based

43. The Libel Act, 1843, c.96, s.6. The requirement of public benefit is not present in the civil defense, though malice can defeat a claim of justification arising from a disclosure of a spent conviction. *See* Rehabilitation of Offenders Act 1974, § 8.

44. J.W. Cecil Turner, Kenny's Outlines of Criminal Law 234–35 (Cambridge Univ. Press 19th ed. 1966).

45. Waterhouse v. Gilmore (1988) 12 N.S.W.L.R. 270, 284. *But see* R. v. Gladstone Williams (1983) 78 Cr. App. R. 276. *See also* Spencer, *supra* note 14, at 469.

46. R. v. Rule, [1937] 2 K.B. 375. *See also* R. v. Munslow, [1895] 1 Q.B. 758, 761.

47. *See* Defamation Act, 1952, s.17(2); Defamation Act, 1996, s.20(2).

48. This has been treated as referring to criminal prosecutions. *See* R. v. Tibbits, [1902] 1 K.B. 77, 87; R. v. Parke, [1903] 2 K.B. 432, 438.

around reports issued by the Law Commission of England and Wales, which was established by the Law Commissions Act of 1965 to keep the law under review and to recommend reform.

A. The Contemporary Usage of Criminal Libel

It should be admitted at the outset that criminal libel has become a rarity in the English courts. There were just four prosecutions between 1948 and 1975; between 1970 and 1983, there were five committals for trial (plus twenty-two cautions); between 1984 and 1995, thirteen persons were found guilty or were cautioned; and between 1996 and 2001, just five persons were found guilty or were cautioned.[49]

Though not commonly invoked, one might contend that criminal libel performs some valuable functions.[50] It may send a signal as to the importance of rights to reputation and privacy: that the state has an interest in their protection and they are not to be left to the vagaries of civil litigation, which requires private initiative and finance. The situation may be that the wronged plaintiff cannot afford the time and cost of litigation, or that the defendant is totally without means and is, therefore, not worth pursuing. The advent of the internet makes the latter scenario much more probable. The drawbacks are that the offense is often archaic, obscure, and complex. It directly impinges on the right to free expression, and its role has been supplanted by more modern statutory offenses.

B. Law Commission Proposals[51]

The Law Commission concluded that two more limited statutory offenses should replace the existing common law offense of defamatory libel. The Commission first proposed a statutory version of criminal defamation, as set out in a draft "Criminal Defamation Bill."[52] The core offense in clause 1(1) would arise when a person "communicates to any person in England and Wales information which is, and which he knows to be, both false and seriously

49. LAW COMMISSION, REPORT NO. 149, *supra* note 1, at para. 2.3.

50. *See* LAW REFORM COMMISSION OF IRELAND, *supra* note 1, ch. 6, at para. 181.

51. *See generally* LAW COMMISSION, WORKING PAPER NO. 84, *supra* note 1; LAW COMMISSION, REPORT NO. 149, *supra* note 1.

52. LAW COMMISSION, REPORT NO. 149, *supra* note 1, at app. A.

defamatory of a third person."[53] The effect of this wording, which is amplified by clause 1(3), would be to extend the criminal law to slanders, but at the same time to withdraw its coverage from publications solely to the victim.[54] The offense would be committed by communication to persons within the jurisdiction, whatever the territorial origin of the message or territorial location of the author.[55] As for the meaning of "seriously defamatory," this would be defined by clause 1(2) as covering "information . . . likely seriously to damage [the victim's] reputation in the estimation of reasonable people generally."[56] It is further specified in clause 1(4) that the victim must be an individual, corporate body, or trade or employers' body which is alive or in existence at the time of the communication; it follows that defamations of the dead or unincorporated groups would not be crimes.[57] Having defined the elements of the offense, the draft bill proposed to adopt the civil law version of the defense of privileged communications (clause 2)[58] and to require the consent of the Attorney General (rather than a judge) to institute proceedings (clause 4).[59] In total, these proposals could remedy the most unpalatable features of the existing common law crime:[60] that truth per se is not a defense;[61] that the burden of proving public interest in its ventilation rests with the defendant;[62] that the broadening of the defenses to the civil action brought about originally by the Defamation Act of 1952 are inapplicable;[63] that the seriousness

53. The version of the offense set forth in LAW COMMISSION, WORKING PAPER NO. 84, *supra* note 1, at para. 8.2, includes publishing an untrue statement defamatory of any person, intending to defame the victim, and knowing or believing the statement to be untrue. This would not extend to libels of the dead or groups. *Id.* at paras. 8.17, 8.19.

54. LAW COMMISSION, REPORT NO. 149, *supra* note 1, at paras. 7.15, 7.19.

55. *Id.* at para. 7.32.

56. *Id.* at app. A.

57. *Id.* at paras. 7.24, 7.26, 7.27.

58. Since the offense is based on the communication of facts known to be false, the defenses of justification and fair comment become irrelevant. *Id.* at para. 7.63.

59. *Id.* at para. 7.68.

60. *Id.* at pt. IV.

61. There could be no liability in the first place for true statements and so no need for a defense of justification, though fair comment would also be abolished as a defense. *Id.* at paras. 7.10, 7.63.

62. *Id.* at para. 7.28.

63. There would be statutory definitions of privilege. *Id.* at paras. 7.64, 7.66.

element is wholly vague;[64] and that the requisite mens rea is obscure.[65]

C. Responses to the Criminal Defamation Bill

Though the proposals were largely endorsed by commentators, none of the foregoing proposals has been directly implemented.[66] Perhaps because of the neglect both in usage of the crime and in any determination to modernize it, the path of simple abolition seems to have become more enticing.[67] This outcome was subsequently endorsed by two further ad hoc official review bodies, the Calcutt Committee (which was principally reviewing the behavior of the press in relation to privacy values)[68] and the Supreme Court Procedure Committee on Practice and Procedure in Defamation (primarily examining civil libel).[69] There may be two alternatives which make criminal libel redundant.

One might suggest that civil libel should be viewed as a more suitable remedy since it is designed to directly restore the reputation of the victim by way of damages. By contrast, in criminal procedures, the victim is in a sense a bystander. Yet, according to the Faulks Committee, actions for civil libel cannot avail the impecunious, and so criminal libel might be a workable alternative.[70] In response, it may be said, in the first place, that there seems to be (as already shown) little willingness on the part of the police or Crown Prosecution Service to take up cases at public expense. Secondly, the logic of the arguments that criminal libel is needed either to take effective action against impecunious defendants, or to fill a gap in legal aid funding for victims is very suspect. The result

64. Seriousness is linked firmly to the degree of damage to reputation. *Id.* at para. 7.9.

65. The new offense would require proof by the prosecution of knowledge or belief as to the facts that the information was seriously defamatory and false. *Id.* at paras. 7.33, 7.61.

66. *See* G. Robertson, *The Law Commission on Criminal Libel,* PUB. L. 283 (1983); J.R. Spencer, *Criminal Libel: The Law Commission's Working Paper*, CRIM. L. REV. 524 (1983).

67. For a further discussion, including the Law Commission's view, see LAW COMMISSION, CRIMINAL LAW, *supra* note 1, at paras. 5.4, 5.7.

68. HOUSE OF COMMONS COMMITTEE ON PRIVACY AND RELATED MATTERS, REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS, para. 7.10 (1990).

69. SUPREME COURT PROCEDURE COMMITTEE ON PRACTICE AND PROCEDURE IN DEFAMATION, REPORT ON PRACTICE AND PROCEDURE IN DEFAMATION, para. IV 14 (1991).

70. COMMITTEE ON DEFAMATION, *supra* note 11, at para. 445.

would be either to "have one law for the rich, who can afford to pay damages, and another for the poor, who . . . should be sent to prison"[71] or "to introduce one evil as a result of another . . . it would be a dishonest way of dealing with the inadequately funded civil legal aid system."[72] In addition, alternative civil remedies are becoming more accessible as media complaints procedures (through the offices of the Broadcasting Standards Commission and the Press Complaints Commission) provide a workable alternative to civil libel.[73]

There is also a burgeoning catalogue of criminal law alternatives to criminal libel,[74] including the Malicious Communications Act 1988.[75] By section 1(1)(iii) of the Act, any person who sends to another person a letter or other article which conveys "information which is false and known or believed to be false by the sender" is guilty of an offense if it was committed for the purpose of causing "distress or anxiety" to the direct or intended indirect recipient.[76] Section 43 of the Criminal Justice and Police Act of 2001 updates section 1 of the Malicious Communications Act of 1988 by including reference to electronic communications.[77] Section 1(2) of the Malicious Communications Act includes an exception for threats made on reasonable grounds to enforce demands by what are believed to be proper means, such as by a letter before action.[78] Section 43 curtails this defense in that the belief must be objectively reasonable. The Act can effectively deal with the main vestige of mischief, namely private malicious attacks, which represent the more legitimate business of criminal libel compared to attacks on public officials. It may also represent a satisfactory approach, as it focuses on intentional distress to the recipient rather than the truth

71. Spencer, *supra* note 14, at 471.

72. LAW REFORM COMMISSION OF IRELAND, *supra* note 1, ch. 6, para. 181 n.33.

73. *See* RUSSELL L. WEAVER, ANDREW T. KENYON, DAVID F. PARTLETT & CLIVE P. WALKER, THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION, AND FREE SPEECH, chs. 4, 6 (2006).

74. *See* LAW COMMISSION, WORKING PAPER NO. 84, *supra* note 1, at pt. V.

75. *See id.*; LAW COMMISSION, REPORT NO. 147, POISON-PEN LETTERS (1984); Malicious Communications Act 1988, 1988, c.27, §1.

76. The penalty under the 1984 Act has been increased by the Criminal Justice and Public Order Act 1994, s.92, to 6 months imprisonment and a Level 5 fine.

77. Criminal Justice and Police Act 2001, § 43.

78. Malicious Communications Act 1988, c.27, §1(2).

of the contents of the letter.[79] The point of principle was recognized by the Law Commission itself, which depicted non-journalist criminal libels as being "more serious" and "more intractable."[80] Yet, it has been argued that the Law Commission proposals (and therefore the 1988 Act) do not adequately cater for the mischief of the "malicious complainant," who is distinct from the poison pen writer or constant harasser.[81] The main victims are persons in public or quasi-public office — police officers, judges, doctors, and even lecturers and teachers — in which an accessible and formalized procedure means that any complaint will prompt considerable worry for the target professional and expense and disruption for the organization. In these respects, the threat of criminal libel may be an effective deterrent, though it may conflict with demands for high standards of service, responsiveness, and integrity which effective and open complaints systems are meant to encourage.[82] The latest response to the continuing concerns surrounding the social ills of "poison pen letters," "character assassination," and harassment has been instituted by the Criminal Justice and Police Act 2001.[83] As well as updating the Malicious Communications Act 1988 in regard to harassment, section 42 of the Criminal Justice and Police Act allows for a police constable who is present at a residential scene to issue a direction when it is reasonably believed that the presence of one of the residents amounts to harassment or is likely to cause alarm or distress to another resident.[84] Contravention of a direction is a criminal offense.

Another relevant development is the Protection from Harassment Act 1997.[85] By section 1, a person must not pursue a course

79. LAW COMMISSION, REPORT NO. 147, *supra* note 75, at para. 2.5.

80. LAW COMMISSION, REPORT NO. 149, *supra* note 1, at para. 5.8.

81. *See, e.g.*, R v. Penkreth, (1982) 146 J.P. 56. *See also* J. Marston, *Malicious Correspondence: The Malicious Communications Act 1988*, 152 J.P. 663 (1988).

82. Spencer, *supra* note 14, at 472.

83. Civil libel is also utilized against complainants alleged to be malicious, especially those arising under the police complaints system. WEAVER ET AL., *supra* note 73, ch. 4.

84. Criminal Justice and Police Act 2001, § 42.

85. Protection from Harassment Act 1997. *See generally* HOME OFFICE, CONSULTATION PAPER, STALKING — THE SOLUTIONS (1996); TIM LAWSON-CRUTTENDEN & NEIL ADDISON, HARASSMENT LAW AND PRACTICE (1997); HOME OFFICE RESEARCH STUDY 203, AN EVALUATION OF THE USE AND EFFECTIVENESS OF THE PROTECTION OF HARASSMENT ACT 1997 (2003), *available at* http://www.homeoffice.gov.uk/rds/pdfs/hors203.pdf.

of conduct which "amounts to harassment of another" and which he knows or ought reasonably to know amounts to harassment; to pursue such a course of conduct is a summary offense under section 2.[86] Pursuant to section 7(4), "conduct" amounting to harassment under section 1 (or fear of violence under section 4, as described below) expressly includes speech. Section 7(3) states that a "course" of conduct is that which is repeated at least twice. Otherwise, the meaning of "harassment" is deliberately left as an undefined matter of fact. A person convicted under sections 2 or 4 may not only be punished, but may also be subject to a restraining order under section 5 (by which the criminal court orders the offender not to engage in further conduct amounting to harassment or causing fear of violence).[87] Breach of such an order is a further arrestable offense. It is clear that the 1997 Act can potentially deal with at least some of the workload of criminal libel. For example, in the Irish criminal libel case of *Fleming*, the defendant believed the victims, a married couple, had colluded with a finance institution which had repossessed his land.[88] The defendant wrote obscene graffiti about the couple in public places all around the country, inviting readers to telephone them to arrange for sexual intercourse; thousands of calls resulted.[89] The actions of such a defendant in the jurisdiction of England and Wales could now amount to a harassing course of conduct under section 2 of the 1997 Act, which could also trigger the future deterrence of a restraining order. Reference should next be made to contempts of court[90] and public order[91] offenses, which could cater for most circumstances far more proportionately than the blunderbuss of criminal libel. Wider powers to respond to antisocial behavior are also available under the Crime and Disorder Act 1998.[92]

86. Protection from Harassment Act 1997, §§ 1–2.

87. *Id.* §§ 5, 7.

88. LAW REFORM COMMISSION OF IRELAND, *supra* note 1, ch. 6, at para. 181.

89. *Id.*

90. *See* Contempt of Court Act, 1981, c.49.

91. *See, e.g.,* Public Order Act, 1986, c.64, §§ 4, 4A, 5.

92. Crime and Disorder Act, 1998, c.37, § 1. *See also* Police Reform Act, 2002, c.30, § 50 (granting a uniformed office the wide power to demand the name and address of anyone acting in an anti-social manner).

Judges have also played their part in reform by their novel interpretations of the criminal law of assault.[93] Responding to what is viewed as a "significant social problem" arising from the activities of "stalkers" and other forms of harassment of women, the courts have recognized the possibility of psychological as well as physical injury, and have allowed for more remote as well as immediate injury to be viewed as relevant forms of attack.[94] On the other hand, the judiciary, in the Privy Council decision in *Worme v. Commissioner of Police of Grenada*, have also indicated that their attitude towards criminal libel is not as dismissive as some might have foretold.[95] In that case, the editor and publisher of a newspaper in Grenada were charged with the crime of intentional libel concerning allegations of misspending money during a recent election in order to "bribe" people to vote for him.[96] The appellants argued unsuccessfully that the crime of libel was, in general, unnecessary and unjustified in a modern democracy, and that the particular offense under scrutiny breached the Grenadian constitution because it did not require the prosecution to establish that the defamatory matter was untrue.[97] The Privy Council held, on the latter point, that the statutory language had to be interpreted in accordance with the normal burden of proof in criminal trials and the constitutional presumption of innocence.[98] If a defendant raised a defense such as justification, and there was evidence to support it, then the prosecution had to prove both that the defamatory matter was untrue and that it was not published for the public benefit.[99] On the general point, the Privy Council emphasized not only the freedom to publish material discussing political matters and the affairs of public figures, but also the public interest in protecting the reputations of public figures

93. The relevant charges have been considered under the Offenses against the Person Act, 1861, c.100, §§ 18 (grievous bodily harm with intent), 20 (grievous bodily harm), 47 (assault occasioning actual bodily harm).

94. R. v. Ireland, [1998] A.C. 147, 152 (H.L.). *See also* Cecilia Wells, *Stalking: The Criminal Law Response,* CRIM. L. REV. 463 (1997); Jonathan Herring, *Assault By Telephone*, 56 CAMBRIDGE L.J. 11 (1997).

95. [2004] UKPC 8, [2004] 2 A.C. 430.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at paras. 25, 31.

from being falsely debased.[100] The existence of a civil remedy for damages no more renders the crime of intentional libel unnecessary than does the existence of the tort of conversion render the crime of theft unnecessary. The Privy Council felt further assured in its support for the crime of libel since the offense was maintained by such democratic societies as England, Australia, and Canada; so there was no reason Grenada should be left out in the cold.[101]

IV. Criminal Libel and the European Convention on Human Rights

In the absence of fundamental reform, can the crime of libel be reconciled with the demands of civil liberties? Within the jurisdiction of England and Wales, this question must first be approached within the context of the European Convention on Human Rights and Fundamental Freedoms of 1950 whereunder rights are balanced and qualified rather than absolute.

A. Background

While there has been some indirect movement on the agenda of the Law Commission, the fundamental issue remains unresolved — is criminal libel acceptable in principle and worthy of salvaging in the 21st century? The normative principles most commonly applied criminal libel come from a rights perspective. Therefore, this section of the paper will subject criminal libel to a "rights audit." In the case of the United Kingdom, civil rights are supplied through the Human Rights Act 1998, which relies wholly upon those rights specified in the European Convention on Human Rights and Fundamental Freedoms of 1950 ("Convention").[102] Of greatest relevance is the protection of free expression and its relationship with the potentially conflicting right to privacy. The right to privacy is protected in Article 8, which states:

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100. *Id.* at para. 42.

101. *Id.* at para. 43.

102. The legislative impacts of the Human Rights Act 1998 are themselves the subject of many commentaries. *See, e.g.*, Richard Clayton & Hugh Tomlinson, The Law of Human Rights (1st ed. 2000); Ben Emerson & Andrew Ashworth, Human Rights and Criminal Justice (1st ed. 2001); Human Rights Law and Practice (Lord Anthony Paul Lester & David Pannick eds., 1st ed. 1999); Clive Walker & Russell Weaver, *The United Kingdom Bill of Rights 1998*, 33 U. Mich. J.L. Reform 497 (2000).

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[103]

The Convention also protects the rights to freedom of expresion, with some restrictions that are necessary in a democratic society, in Article 10, which states:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . . .
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder of crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[104]

B. The Basis for the Right to Reputation in the Convention

Articles 8 and 10 may provide the two ways in which the right to personal reputation receives protection under the Convention. For example, in *Rotaru v. Romania*, the European Court of Human Rights stated that the collection of information about an applicant's political activities infringed on Article 8 in part because some of the information had "been declared false and is likely to injure the ap-

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103. Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, art. 8, Nov. 4, 1950, ETS No. 005.

104. *Id.* art. 10, §§ (1)–(2).

plicant's reputation."[105] In *Radio France v. France*, the European Court of Human Rights declared that "the right to reputation is included among the rights protected by Article 8 of the Convention insofar as it is an element of the right to respect for private life."[106] The case was not argued on the basis of Article 8, but under the logic of a later case, *Zollmann v. United Kingdom*, which combined the right to "honour and reputation" under Article 8 with the right to private life arising from an allegedly untrue statement made by a government Minister.[107] In domestic law, the Court of Appeal has expressed itself to be "content to assume that a person's right to protect his/her reputation is among the rights guaranteed by article 8."[108] One potential problem with this path to protection of reputation under Article 8 concerns the effect of the decision in *Von Hannover v. Germany* regarding the photographing of a famous person.[109] The strong statements in the judgment distinguishing "reporting facts — even controversial ones — capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual"[110] would presumably apply to the printed word just as it applies to photographs, as would the warning that it takes "certain special circumstances" to be legitimate and to reveal the private details of public figures.[111] This approach appears less robust than statements under Article 10 about the need to encourage speech regarding public affairs, and the special role of the press therein.

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105. App. No. 28341/95, para. 44 (Eur. Ct. H.R. May 4, 2000), *available at* http://echr.coe.int/echr.

106. App. No. 53984/00, para. 31 (Eur. Ct. H.R. Mar. 30, 2004), *available at* http://echr.coe.int/echr.

107. App. No. 62902/00, p. 16 (Eur. Ct. H.R. Nov. 17, 2003), *available at* http://echr.coe.int/echr. Though involving a defense of absolute privilege, the fact that the case was argued under Article 8 did not make a difference to the outcome, not least because the exceptions under Articles 8(2) and 10(2) are identical. But this commonality of exceptions may not always produce a commonality of outcomes, as illustrated by *W. v. Westminster City Council*, [2004] EWHC (QB) 2866, [2005] EWHC (QB) 102.

108. Greene v. Ass'n Newspapers Ltd., [2004] EWCA (Civ) 1462, [2005] 2 W.L.R. 281, 299.

109. App. No. 59320/00 (Eur. Ct. H.R. June 24, 2004), *available at* http://echr.coe.int/echr.

110. *Id.* at para. 63.

111. *Id.* at para. 64.

The "protection of reputation" is explicitly recognized as a ground for the curtailment of the freedom of expression under Article 10(2). It follows that there is no right to defame, and this has been emphasized, for example, in *Steel and Morris v. U.K. (no. 2)*, where it was made clear that even political speech must not overstep certain bounds, such as respect for the reputation of others.[112] As yet, there is no decision on English criminal libel, but in the cases of *Lingens v. Austria (no. 1)*,[113] *Lingens v. Austria (no. 2)*,[114] *Prager v. Austria*,[115] and *Thorgeirson v. Iceland*,[116] equivalent offenses were upheld as protecting the reputations of others. Further, in *Castells v. Spain*, an offense preserving the honor of the government was found to have legitimately protected reputations and prevented disorder.[117]

C. English Law and European Convention Jurisprudence

In *Gleaves v. Deakin*, the House of Lords suggested that the English version of criminal libel is "difficult to reconcile" with the provisions of the European Convention of Human Rights, and that, at a minimum, statutory reform would require the permission of the Attorney General for the commencement of a prosecution.[118] According to the Law Commission, the most unpalatable features of the existing crime are that truth per se is not a defense and that the burden of proving public interest in its ventilation rests with the defendant; that the broadening of the defenses to the civil action brought about originally by the Defamation Act 1952 are inapplicable; that the seriousness element is wholly vague; and that the requi-

112. App. No. 68416/01, para. 90 (Eur. Ct. H.R. Feb. 15, 2005), *available at* http://echr.coe.int/echr.

113. 26 D.R. 171 para. 10 (1981), *available at* http://echr.coe.int/echr, App. No. 8803/79.

114. Ser. A, vol. 103 para. 36 (Eur. Ct. H.R. July 8, 1986), *available at* http://echr.coe.int/echr, App. No. 9815/82.

115. Ser. A, vol. 313 para. 31 (Eur. Ct. H.R. Apr. 26, 1995), *available at* http://echr.coe.int/echr, App. No. 15974/90.

116. Ser. A, vol. 239 para. 59 (Eur. Ct. H.R. June 25, 1992), *available at* http://echr.coe.int/echr, App. No. 13778/88.

117. Ser. A, vol. 236 para. 39 (Eur. Ct. H.R. Apr. 23, 1992), *available at* http://echr.coe.int/echr, App. No. 11798/85.

118. [1980] A.C. 477, 484, 488, 493, 496, (H.L.) (appeal taken from Q.B.D.). The trial judge was likewise critical. *See Gleaves v. Deakin*, TIMES (London), Feb. 28, 1980.

site mens rea is also obscure.[119] The critique which follows will consider two core issues: does criminal libel give excessive protection for the right to reputation; conversely, is insufficient weight given to the right to free expression?

D. Problems of Excessive Protection for the Right to Reputation

The right to reputation is properly recognized in English law, but that recognition must be proportionate with respect for competing rights. Can it be said that reputation necessarily deserves protection by the criminal law in a democratic society?

One might argue that the invocation of the criminal law over and above the threat of civil remedies for the protection of reputations has a chilling effect on publication that is not justified by the importance of the interests protected.[120] Since *R. v. Wicks*, criminal libel has been largely divested of its public order aspects.[121] However, a strong counterargument in favor of criminal libel is that its use is commonplace elsewhere in Western Europe, and its wide-scale recognition seems to rule out its fundamental condemnation on the basis of the European Convention. Indeed, criminal libel is the normal method for protection of reputation in most civil law systems.[122]

A stark example of attitudes currently prevailing in the European judicial space is the case of *Sabou and Pircalab v. Romania*.[123] A journalist was convicted of criminal libel and sentenced to ten months' imprisonment and the suspension of his parental rights during his incarceration.[124] The conviction was triggered by an article examining the consequences of corruption admitted by officials.[125] There was an Article 10 violation owing to the disproportionality of the penalty, and a breach of Article 8 prima-

119. LAW COMMISSION, REPORT NO. 149, *supra* note 1, at pt. IV.

120. The chilling impact of civil libel should not be underestimated. *See* ERIC BARENDT, LAURENCE LUSTGARTEN, KENNETH NORRIE & HUGH STEPHENSON, LIBEL AND THE MEDIA: THE CHILLING EFFECT (Oxford Univ. Press 2d ed. 1997).

121. [1936] 1 All E.R. 384 (C.C.A.).

122. *See* LAW COMMISSION, WORKING PAPER NO. 84, *supra* note 1, at paras. 4.13, 4.14; CARTER-RUCK & STARTE, *supra* note 1, at chs. 29–33.

123. App. No. 46572/99 (Eur. Ct. H.R. Sept. 28, 2004), *available at* http://echr.coe.int/echr.

124. *Id.*

125. *Id.*

rily because the penal policy damaged the journalist's children's interests.[126] Subsequent sentences of such length have been struck down. In *Cumpãnã v. Romania*, the punishments for criminal libel, imprisonment for seven months and disqualification from journalism for one year (later removed by presidential pardon), were found to be in breach of Article 10 (especially because of the disqualification, though the convictions were viewed as proper due to the lack of factual basis for such grave allegations).[127] Further, in *Skala v. Poland*, a prisoner received a sentence of eight months' imprisonment for criminal insult arising from a letter he wrote to the president of a regional court to complain about one of the judges he had encountered; the letter included words such as "irresponsible," "clowns," "cretin," and "fool."[128] The sentence was viewed as disproportionate, but the offense of insult, which did not require publication beyond the victim, was not. In none of these cases has the European Court of Human Rights condemned the invocation of criminal libel per se.

E. Problems of Insufficient Weighting in Favor of Free Expression

Freedom of expression will provide a powerful restraint on the enforcement of rights to reputation because of the high value placed upon it by the European Court of Human Rights. According to the court in *Lingens v. Austria*, "freedom of expression, as secured in paragraph 1 of Article 10 . . . constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment."[129] If so, there are specific features of criminal libel which suggest that inadequate weight is given to the value of speech, including the lack of defense for statements which are truthful per se and that it is for the defendant rather than the prosecution to show that the publication of the truth, rather than its suppression, is in

126. *Id.*

127. App. No. 33348/96 (Eur. Ct. H.R. Dec. 17, 2004), *available at* http://echr.coe.int/echr.

128. App. No. 43425/98, para. 11 (Eur. Ct. H.R. May 27, 2003), *available at* http://echr.coe.int/echr.

129. Ser. A, vol. 103 para. 41 (Eur. Ct. H.R. July 8, 1986), *available at* http://echr.coe.int/echr, App. No. 9815/82.

the public interest — "this is to turn Article 10 of the Convention on its head."[130]

Freedom of expression is explicitly limited for the protection of individuals' reputations under Article 10(2). The balance between these interests has been considered in a number of European Court cases, but any restriction must be proportionate. In *Barfod v. Denmark*, the European Court made clear that the concept does not involve equality between competing interests, stating:

> [P]roportionality implies that the pursuit of the aims mentioned in Article 10 para. 2 . . . has to be weighed against the value of open discussion of topics of public concern. When striking a fair balance between these interests, the Court cannot overlook . . . the great importance of not discouraging members of the public, for fear of criminal or other sanctions, from voicing their opinions on issues of public concern.[131]

Some of the relevant factors which have affected the decisions have already been mentioned, and include the nature of the response — whether pre-publication censorship or post-publication sanctions are to be applied. In addition to these points, the relevant cases offer the guidelines that follow.[132]

Publications concerning important party political matters of public interest are more worthy of protection under Article 10 than speech about private lives.[133] There is arguably the highest level of protection for the speech of politicians themselves about political

130. Gleaves v. Deakin, [1980] A.C. 477, 483 (H.L.) (appeal taken from Q.B.D.).

131. Ser. A, vol. 149 para. 29 (Eur. Ct. H.R. Feb. 22, 1989), *available at* http://echr.coe.int/echr, App. No. 11508/85.

132. *See* Sandra Coliver, *Defamation Jurisprudence of the European Court of Human Rights*, 13 J. MEDIA L. & PRAC. 250 (1992); Ian Loveland, *A Sign of Things to Come? The ECHR and a "Public/Private" Divide in the Civil Law of Defamation*, 1 COMM. L. 193 (1996); Dirk Voorhoof, *Defamation and Libel Laws in Europe — The Framework of Article 10 of the European Convention of Human Rights (ECHR)*, 13 J. MEDIA L. & PRAC. 254 (1992).

133. *See* Lingens v. Austria, 26 D.R. 171 (1981), *available at* http://echr.coe.int/echr, App. No. 8803/79; Scharsach v. Austria, App. No. 39394/98 (Eur. Ct. H.R. Nov. 13, 2003), *available at* http://echr.coe.int/echr; Lopes Gomes da Silva v. Portugal, App. No. 37698/97 (Eur. Ct. H.R. Sept. 28, 2000), *available at* http://echr.coe.int/echr; Oberschlick v. Austria, Ser. A, vol. 204 (Eur. Ct. H.R. May 23, 1991), *available at* http://echr.coe.int/echr, App. No. 11662/85; Oberschlick v. Austria (no. 2), App. No. 20834/92 (Eur. Ct. H.R. July 1, 1997), *available at* http://echr.coe.int/echr; Schwabe v. Austria, Ser. A, vol. 242–B (Eur. Ct. H.R. Aug. 28, 1992), *available at* http://echr.coe.int/

or public matters. This facet of the impact of Article 10 emerged in *Castells v. Spain*.[134] Despite the concern about a defense of truth in *Castells*, in cases involving politicians or public officials, there is a line of authority which suggests that the truth of an allegation is not necessary for protection under Article 10.[135] In addition to speech about party political matters, the European Court has been almost as keen to encourage speech about other public affairs of wider interest, though perhaps at a less indulgent level than with party political speech.[136] Thus, the court has strictly reviewed any actions in libel arising out of allegations concerning public officials such as local government officials or police officers, though it has not expressly recognized any "public figure" doctrine.[137]

Just as the content of speech is important, so its vehicle may also prove to be relevant. In this regard, the court seems especially indulgent towards the press.[138] In *Jersild v. Denmark*, it was accepted that "[a]lthough formulated primarily with regard to the print media, these principles doubtless apply also to the audio-visual media," though the immediate and powerful effect of that medium must

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echr, App. No. 13704/88; Lingens v. Austria, Ser. A, vol. 103 (Eur. Ct. H.R. July 8, 1986), *available at* http://echr.coe.int/echr, App. No. 9815/82.

134. Ser. A, vol. 236 para. 39 (Eur. Ct. H.R. Apr. 23, 1992), *available at* http://echr.coe.int/echr, App. No. 11798/85.

135. *See* Tammer v. Estonia, App. No. 41205/98 (Eur. Ct. H.R. Feb. 6, 2001), *available at* http://echr.coe.int/echr; Schwabe v. Austria, Ser. A, vol. 242–B (Eur. Ct. H.R. Aug. 28, 1992), *available at* http://echr.coe.int/echr , App. No. 13704/88; Oberschlick v. Austria, Ser. A, vol. 204 (Eur. Ct. H.R. May 23, 1991), *available at* http://echr.coe.int/echr, App. No. 11662/85; Lingens v. Austria, Ser. A, vol. 103 (Eur. Ct. H.R. July 8, 1986), *available at* http://echr.coe.int/echr, App. No. 9815/82.

136. *See, e.g.*, Chauvy v. France, App. No. 64915/01 (Eur. Ct. H.R. June, 29, 2004), *available at* http://echr.coe.int/echr; Radio France v. France, App. No. 53984/00 (Eur. Ct. H.R. Mar. 30, 2004), *available at* http://echr.coe.int/echr.

137. *See* X. v. Germany, 3 D.R. 159 (1975), *available at* http://echr.coe.int/echr, App. No. 6988/75; Selistö v. Finland, App. No. 56767/00 (Eur. Ct. H.R. Nov. 16, 2004), *available at* http://echr.coe.int/echr; Vides Aizsardzîbas Klubs v. Latvia, App. No. 57829/00 (Eur. Ct. H.R. May 27, 2004), *available at* http://echr.coe.int/echr; Dalban v. Romania, App. No. 28114/95 (Eur. Ct. H.R. Sept. 28, 1999), *available at* http://echr.coe.int/echr; Thorgeirson v. Iceland, Ser. A, vol. 239 (Eur. Ct. H.R. June 25, 1992), *available at* http://echr.coe.int/echr, App. No. 13778/88.

138. *See* Castells v. Spain, Ser. A, vol. 236 para. 39 (Eur. Ct. H.R. Apr. 23, 1992), *available at* http://echr.coe.int/echr, App. No. 11798/85.

also be taken into account in considering both their potential and their dangers.[139]

The manner of expression does not, in principle, reduce the protections of the Convention. As stated in *Lingens v. Austria*, "freedom of expression, as secured in paragraph 1 of Article 10, . . . is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb."[140] However, it would seem from *Oberschlick v. Austria*, that the more inflammatory the message being commented upon, the harsher and stronger the terms of the response may be.[141] Value judgments, such as political rhetoric, must be distinguished from the need to establish facts.[142]

Turning to negative factors tending against protection under Article 10, where the alleged libel impinges on other important interests aside from personal reputation, there may be a reason for downgrading the value of the expression. One such possibility is where it can be shown that political or other utterances may lead to disorder or unrest. In such instances, countermeasures may be taken. The same applies to undermining confidence in the judiciary,[143] though lawyers have been allowed to point out the error of each other.[144]

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139. Ser. A, vol. 298 para. 31 (Eur. Ct. H.R. Sept. 23, 1994), *available at* http://echr.coe.int/echr, App. No. 15890/89.

140. Ser. A, vol. 103 para. 41 (Eur. Ct. H.R. July 8, 1986), *available at* http://echr.coe.int/echr, App. No. 9815/82. This echoes very closely dicta in *Handyside v. U.K.*, Ser. A, vol. 24 para. 49 (Eur. Ct. H.R. Dec. 7, 1996), *available at* http://echr.coe.int/echr, App. No. 5493/72; *Sunday Times v. U.K.*, Ser. A, vol. 217 para. 50 (Eur. Ct. H.R. Nov. 26, 1991), *available at* http://echr.coe.int/echr, App. No. 13166/87.

141. Ser. A, vol. 204 para. 58 (Eur. Ct. H.R. May 23, 1991), *available at* http://echr.coe.int/echr, App. No. 11662/85.

142. *See* Ukrainian Media Group v. Ukraine, App. No. 72713/01 (Eur. Ct. H.R. Mar. 29, 2005), *available at* http://echr.coe.int/echr.

143. Perna v. Italy, App. No.48898/99 (Eur. Ct. H.R. May 6, 2003), *available at* http://echr.coe.int/echr; Lešník v. Slovakia App. No. 35640/97 (Eur. Ct. H.R. Mar. 11, 2003), *available at* http://echr.coe.int/echr; Barfod v. Denmark, Ser. A, vol. 149 (Eur. Ct. H.R. Feb. 22, 1989), *available at* http://echr.coe.int/echr, App. No. 11508/85.

144. *See* Nikula v. Finland, App. No. 31611/96 (Eur. Ct. H.R. Mar. 21, 2002), *available at* http://echr.coe.int/echr; Schöpfer v. Switzerland, App. No. 25405/94 (Eur. Ct. H.R. May 20, 1998), *available at* http://echr.coe.int/echr; Steur v. Netherlands App. No. 39657/98 (Eur. Ct. H.R. Oct. 28, 2003), *available at* http://echr.coe.int/echr; Amihalachioaie v. Moldova, App. No. 60115/00 (Eur. Ct. H.R. Apr. 20, 2004), *available at* http://echr.coe.int/echr.

Where the court views a statement as not being seriously made, in particular, if it was published without proper research and investigation, or with an improper motive, then it will not wish to protect what it views as bad journalism. It is up to journalists to establish their facts in advance.[145]

V. Criminal Libel in Common Law Jurisdictions

It is evident from the foregoing survey that the European Court is relatively indulgent towards the concept of criminal libel and the English law version would not per se infringe its jurisprudence. A mixed picture also emerges from a survey of common law jurisdictions.

A. Outside the United States

While the law has remained static in England and Wales, comparable common law jurisdictions have undertaken reform, including abolition, but the picture overall is far from uniform. For example, criminal libel survives in the Republic of Ireland on much the same basis as in England and Wales,[146] though the Irish Law Reform Commission has advocated that the offense be retained in a more confined form.[147] The offense has been expressly retained by

145. Lingens v. Austria, 26 D.R. 171 para. 7 (1981), *available at* http://echr.coe.int/echr, App. No. 8803/79; Pedersen v. Denmark, App. No.49017/99 (Eur. Ct. H.R. Dec. 17, 2004), *available at* http://echr.coe.int/echr; Bergens Tidende v. Norway, App. No. 26132/95, para. 54 (Eur. Ct. H.R. May 2, 2000), *available at* http://echr.coe.int/echr; Oberschlick v. Austria, App. No. 20834/92 (Eur. Ct. H.R. July 1, 1997), *available at* http://echr.coe.int/echr; De Haes v. Belgium, App. No. 19983/92 (Eur. Ct. H.R. Feb. 24, 1997), *available at* http://echr.coe.int/echr; Prager v. Austria, Ser. A, vol. 313 para. 9 (Eur. Ct. H.R. Apr. 26, 1995), *available at* http://echr.coe.int/echr, App. No. 15974/90; Schwabe v. Austria, Ser. A, vol. 242–B, paras. 10, 34 (Eur. Ct. H.R. Aug. 28, 1992), *available at* http://echr.coe.int/echr, App. No. 13704/88.

146. There have been just two recent criminal libel cases in Ireland. *See Fleming*, Irish Times, Nov. 23, 1989; Hilliard v. Penfield Enterprises Ltd., [1990] 1 I.R. 138, H.C.

147. Law Reform Commission of Ireland, Report on Criminal Libel ch. 2 para 1. (1991), *available at* http://www.lawreform.ie/publications/reports.htm. See also Law Reform Commission of Ireland, *supra* note 1, ch. 6, at paras. 180–181, 187, which is more fully argued on this point. The Report of the Legal Advisory Group on Defamation continues to pursue the notion of a more confined offense with the folowing elements: (i) a person without lawful authority or reasonable cause; (ii) intentionally and with malice publishes a false statement in relation to a natural person; (iii) that statement was calculated to damage gravely and has damaged gravely the reputation of that person; and (iv) was calculated to cause and has caused serious harm to the mind of the

statute in India,[148] Malaysia,[149] Singapore,[150] and most states of Australia.[151] On the other hand, criminal defamation was abolished in 1992 in New Zealand[152] after two final, controversial cases.[153]

Criminal libel survives in Canada,[154] although the Canadian Law Reform Commission has called for its abolition.[155] It has also been under heavy judicial fire, prompted by the guarantee of freedom of expression in section 2(b) of the Charter of Rights of 1982. The attack in *Lucas v. Minister of Justice* resulted in the striking down of section 301 of the Federal Criminal Code of 1985, which reproduces much of the basic English common law offense.[156] Conversely, sections 298, 299, and 300 (which are equivalent to section

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person who was the subject of the statements. LEGAL ADVISORY GROUP ON DEFAMATION, REPORT OF THE LEGAL ADVISORY GROUP ON DEFAMATION (2003).

148. INDIA PEN. CODE, §§ 499, 502.

149. Sedition Act 1948, which can overlap with criminal libel. *See* Tengku Jaffar bin Tengku Ahmad v. Karpal Singh, [1993] 3 M.L.J. 156.

150. PEN. CODE, ch. 224, § 499. *See* Harbans Sigh Sidhu v. Public Prosecutor, 1973 S.L.R. LEXIS 10, HC.

151. Criminal Code Act, 1983, §§ 203–208 (1983) (N. Terr. Austl. Laws) (the possibility of a small fine conditional upon an early correction under the Defamation Act 1989, § 7 has now been repealed); Defamation Act, 1974, § 50 (1974) (N.S.W. Acts); Criminal Code Act 1958, § 9; Criminal Law Consolidation Act 1935, § 257 (as amended by the Statutes Amendment and Repeal (Public Offenses) Act 1992); Criminal Code Act 1924, §§ 196–225; Criminal Code 1913, § 350. Most reports have recommended retention and reform rather than repeal. *See* CRIMINAL LAW AND PENAL REFORM COMMITTEE, REPORT OF THE CRIMINAL LAW AND PENAL REFORM COMMITTEE (1977); AUSTRALIAN LAW REFORM COMMISSION, REPORT NO. 11, UNFAIR PUBLICATION: DEFAMATION AND PRIVACY, para. 203 (1979); AUSTRALIAN CAPITAL TERRITORY COMMUNITY LAW REFORM COMMITTEE, REPORT ON DEFAMATION (1991); LAW REFORM COMMISSION OF WESTERN AUSTRALIA, PROJECT NO. 8, REPORT ON DEFAMATION ch. 22 (1980). Repeal has occurred in just one case. *See* Law Reform (Abolition and Repeals) Act 1996, § 4.

152. The Crimes Act 1961, Pt. IX, §§ 211–216 was abolished by the Defamation Act 1992, § 56, sched. 3, as recommended by the COMMITTEE ON DEFAMATION, RECOMMENDATIONS ON THE LAW OF DEFAMATION, para. 459 (1977). As in England and Wales, the Harassment Act 1997 covers some of the same mischieves as criminal libel. *See* Beadle v. Allen, [2000] N.Z.F.L.R. 639 (H.C.); B. v. Reardon, [2000] D.C.R. 575 (D.C.).

153. Police v. McLachlan, [1989] 3 N.Z.L.R. 689 (H.C.); Police v. W. [1989] 3 N.Z.L.R. 696 (H.C.).

154. Criminal Code, §§ 297–317 (R.S. C–46, 1985 ed.). *See* LAW REFORM COMMISSION OF CANADA, *supra* note 1.

155. LAW REFORM COMMISSION OF CANADA, *supra* note 1, at 60.

156. [1995] 31 C.R.R.2d 92.

4 of the Libel Act 1843) escaped total condemnation in *R. v. Lucas*, the leading judgment of the Canadian Supreme Court.[157]

B. Inside the United States

Criminal libel has been largely, but not completely, curtailed in the United States.[158] The adoption by American secessionists of the mechanics of English repression was paradoxical, especially as its application in colonial times had been the source of much agitation.[159] Nevertheless, crimes against individual reputation[160] did resurface, primarily at the state level,[161] including limits on truth as a defense, which were generally reversed by state statutory versions

157. [1998] 1 S.C.R. 439. Lucas's attempt to overturn his conviction was dismissed in *Lucas v. Dueck*, [2002] 214 Sask. R. 213. *Compare* R. v. Stevens [1995] 28 C.R.R.2d 78 (declaring the constitutionality of s.300) *with* R. v. Gill [1996] 35 C.R.R.2d 369 (finding s.301 unconstitutional).

158. For the history of criminal libel in the United States, see Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEX. L. REV. 984 (1956); Note, *Constitutionality of the Law of Criminal Libel*, COLUM. L. REV. 521 (1952). *See also* Janet Boeth Jones, *Validity of Criminal Defamation Statutes*, 68 A.L.R.4th 1014 (1996). *But see* LAW COMMISSION, REPORT NO. 149, *supra* note 1, at para. 8.4.

159. Gregory C. Lisby, *No Place in Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL'Y 433, 455-56 (2004).

160. For a comparison of statutes relating to statements about the liquidity of financial institutes or the fitness of specific officials such as teachers or law enforcement personnel, see *Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. after* Sullivan *and* Garrison, MLRC BULLETIN 2003 NO. 1 (Media Law Resource Ctr., New York, N.Y.), Mar. 2003, at 27. More recently, successful attacks have also been made on offenses relating to the filing of false allegations against police officers, which have been depicted as a form of indirect criminal libel offenses. *See* Eakins v. Nevada, 219 F. Supp. 2d 1113 (D. Nev. 2002) (finding that NEV. REV. STAT. § 199.325, which criminalized the filing of false allegations against peace officers, violated the First Amendment); Hamilton v. San Bernadino, 107 F. Supp.2d 1239 (C.D. Cal. 2000) (holding CAL. PENAL CODE § 148.6 violative of the First and Fourteenth Amendments); Gritchen v. Collier, 73 F. Supp.2d 1148 (C.D. Cal. 1999) (finding CAL. CIV. CODE § 47.5 violative of the First and Fourteenth Amendments). *But see* People v. Atkinson, 58 P.3d 465 (Cal. 2002) (upholding CAL. PENAL CODE § 148.6), *rev'g* People v. Stanistreet, 113 Cal. Rptr. 2d 529 (Ct. App. 2001). There are also statutes which punish making knowingly false statements in election campaigns. *See* Representation of the People Act, 1983, c.2, § 106 (U.K.).

161. There have been some related statutes at the federal level, including the Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596; 18 U.S.C. § 1718 (1945) (making it an offense to post envelopes with extant libels), *invalidated by* Tollett v. United States, 485 F.2d 1087 (8th Cir. 1973), *repealed by* Crime Control Act of 1990, Pub. L. No. 101-647, § 1210(c), 104 Stat. 4832. Attempts to establish jurisdiction over a state crime of libel committed on federal territory was rejected in *United States v. Press Publishing Co.*, 219 U.S. 1 (1911).

as the nineteenth century wore on. Their use declined over a century and a half, as much for cultual as legal reasons.[162] Yet, it took until the 1966 case of *Ashton v. Kentucky* for an unequivocal condemnation of the inherent vagueness and breadth of the common law crime.[163] Amongst the problems are that the level of one's social reputation cannot be objectively determined and therefore there is no objective standard against which to judge criminal harm.

Those states which have retained criminal libel have adopted statutory versions of criminal libel, either in response to *Ashton* or beforehand.[164] Yet other problems of constitutionality remain.[165] In *Garrison v. Louisiana,*[166] the U.S. Supreme Court held that the crime must meet the First Amendment demands for respect of free speech, including an unqualified respect for truth as a defense and proof of "actual malice" in cases affecting public figures as in *New York Times Co. v. Sullivan*.[167]

Following the decisions in *Ashton* and *Garrison*, it is widely perceived that "there remains little constitutional vitality to criminal libel laws,"[168] especially as few statutes clearly articulate the re-

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162. *See* John Kelly, *Criminal Libel and Free Speech*, 6 U. KAN. L. REV. 295, 317 (1958).

163. *See* 384 U.S. 195 (1966). *See also Tollett,* 485 F.2d 1087; Fitts v. Kolb, 779 F. Supp. 1502 (D.S.C. 1991); Velasco v. Municipal Court, 147 Cal. App.3d 340 (Ct. App. 1983); Boydstun v. State, 249 So. 2d 411 (Miss. 1971).

164. But just eight states retained the common law version. *See* State v. Shank, 795 So. 2d 1067 (Fla. Dist. Ct. App. 2001); Gottschalk v. State 575 P.2d 289 (Alaska 1978); *Boydstun*, 249 So. 2d 411. *See also* MLRC BULLETIN, *supra* note 160, at 13.

165. In addition to the *Garrison* standard, it has been argued that *Gertz v. Robert Welch*, 418 U.S. 323 (1974), demands proof of negligence as to the falsity of the statement even in non-public issue cases. *See* DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE para. 4.5 (1993).

166. 379 U.S. 64 (1964). *See also* Moity v. Louisiana, 379 U.S. 201 (1964) (striking down the Louisiana statute which provided that truth was a defense only if made out with good motives).

167. 376 U.S. 254 (1964). *See* WEAVER ET AL., *supra* note 73.

168. *Tollett,* 485 F.2d at 1094. There have been many decisions striking down criminal libel laws. *See, e.g., Fitts*, 779 F. Supp. 1502; *Gottschalk*, 575 P.2d 289; State v. Defley, 395 So. 2d 759 (La. 1981); Eberle v. Municipal Court, 127 Cal. Rptr. 594 (Ct. App. 1976); Weston v. State, 528 S.W.2d 412 (Ark. 1975); Commonwealth v. Armao, 286 A.2d 626 (Pa. 1972); Commonwealth v. Mason, 322 A.2d 357 (Pa. 1972); State v. Snyder, 277 So. 2d 660 (La. 1972); State v. Brown, 206 A.2d 591 (N.J. 1965).

quired standards on truth and public figures.[169] Consequently, only those state statutes that require actual malice,[170] or have a strong dependence on the old rationale of public disturbance,[171] or are directed against extortion,[172] or protect purely private individuals have survived.[173] Yet the perception of a constitutionally inspired "death blow" to the offense of criminal libel,[174] even in public issue cases, is belied by the survival of the crime in twenty-five states and territories[175] despite the strong signal given by the Model Penal Code which, since 1962, has omitted the offense of criminal libel.[176]

One of the fuller and more recent affirmations of constitutionality occurred in *Phelps v. Hamilton*.[177] Fred Phelps, a preacher in the Westboro Baptist Church in Topeka, Kansas, conducted a vituperative and vicious campaign against homosexuals, including spe-

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169. The Media Law Resource Center suggests that a total of four states have such statutes: Kansas, New Hampshire, North Dakota, and Utah. *See* MLRC BULLETIN, *supra* note 160, at 16.

170. State v. Cox, 167 So. 2d 352 (La. 1964).

171. *See* Beauharnais v. Illinois, 343 U.S. 250 (1952); People v. Heinrich, 470 N.E. 2d 966 (Ill. 1984). *But see* Porter v. Kimzey, 309 F. Supp. 993 (N.D. Ga. 1970), *aff'd*, 401 U.S. 985 (1971) (stating that clarity is also required in defining the type of feared disturbance); Williamson v. State, 295 S.E.2d 305 (Ga. 1982).

172. *See* MLRC BULLETIN, *supra* note 160, at 30. There is also a federal statute, 8 U.S.C. § 875(d). *See also* United States v. Jackson, 986 F. Supp. 829 (S.D.N.Y. 1997), *aff'd on reh'g*, 196 F.3d 383 (2d Cir. 1999).

173. *But see* People v. Ryan, 806 P.2d 935, 942 (Colo. 1991) (Quinn, J., dissenting) (stating that there is still the problem of vagueness and the chilling effect from "the amorphous and uncertain zone of criminality created by [criminal libel]"). In addition, there must be protection for statements dealing with public concerns even if no public officials or figures are involved. *See* Commonwealth v. Armao, 286 A. 2d 626 (Pa. 1972); State v. Powell, 839 P.2d 139 (N.M. Ct. App. 1992); Shad L. Brown, *Criminal Libel Statute Held Unconstitutional as Applied to Public Statements Involving Public Concerns:* State v. Powell, 24 N.M. L. REV. 495 (1994). For a more recent attempt to strike down the criminal defamation offense in Colorado, see *Mink v. Salazar,* 344 F. Supp.2d 1231 (D. Colo. 2004).

174. ELDER, *supra* note 165.

175. Lisby, *supra* note 159, at 479. The figure of twenty-five is contestable because statutory versions do not exactly mirror the common law version. A total of seventeen is suggested by the Media Law Resource Center. *See* MLRC BULLETIN, *supra* note 160, at i.

176. MLRC BULLETIN, *supra* note 160, at 8.

177. Phelps v. Hamilton, 59 F.3d 1058 (10th Cir. 1995). Attempts to strike down the criminal defamation offenses in Kansas failed in *Thomas v. City of Baxter Springs*, 369 F. Supp.2d 1291 (D. Kan. 2005); How v. Baxter Springs, 369 F. Supp.2d 1300 (D. Kan. 2005).

cific allegations of child abuse, AIDS infection, and promiscuity against named individuals.[178] Charges were brought against him under a Kansas statute which penalized:

> [M]aliciously communicating to a person orally, in writing, or by any other means, false information tending to expose another living person to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social acceptance, or tending to degrade and vilify the memory of one who is dead and to scandalize or provoke his living relatives and friends.[179]

There are perhaps two features which saved this offense from censure. First, similar to the English Libel Act 1843, section 4, this law only applies to "false information." Further it provides that the truth of the information communicated shall be a defense. Secondly, in light of the fact that the statute had been redrafted post-*Sullivan* in 1969, and that a full mens rea was normally required under Kansas criminal law, the U.S. Court of Appeals interpreted the requirement that the communication be made "maliciously" as demanding proof of "actual malice" (in the sense that the defendant must intend not only to publish but also to defame)[180] in all cases, whether the defamation is against a public official or figure or not.[181] In the latter aspect, the Kansas statute was distinguished from previous challenges to criminal defamation contained in state statutes, which had almost always resulted in the striking down of the offense.[182] No doubt to be on the safe side, the Kansas statute was further amended in 1995. Now, instead of "maliciously," it states that the defendant must publish "knowing the information to

178. *Phelps*, 59 F.3d at 1062.

179. KAN. STAT. ANN. § 21-4004 (2005).

180. *Phelps*, 59 F.3d at 1073. This accords with arguments rehearsed earlier as to what might be a "modern" view of mens rea. However, there was evidence that Kansas in fact adopted the nineteenth century view that the defendant was guilty if the publication was without just cause of excuse and this convinced the lower District Court to strike down the statute. *See* Phelps v. Hamilton, 828 F. Supp. 831, 847 (D. Kan. 1993).

181. There is no constitutional requirement of actual malice for purely private defamation. *Phelps*, 59 F.3d at 1073. Because of their high profile campaign and because Hamilton, the District Attorney who prosecuted them, had stood for election on an anti-hate, anti-prejudice, and anti-"Fred" platform, Phelps and the other defendants had become public figures. *Id.* at 1070.

182. *Id.* at 1072. *See also* Fitts v. Kolb, 779 F. Supp. 1502, 1511 (D.S.C. 1991).

be false and with actual malice."[183] However, the issues of vagueness and overbreadth[184] have not been fully addressed, nor has there been any convincing explanation of the pressing need for speech content suppression such as is imposed by criminal libel. Indeed, it has been argued that the protection of reputations offers only "a weak and questionable basis for governmental intervention into the delicate area of regulating expression."[185]

In several other recent cases, the issue of constitutionality has passed by without comment. In *State v. Wolf*, the Wisconsin Court of Appeals upheld a conviction for defamation based on the distribution of signs, letters, and notes that stated, among other things, that the victim sold pornography at his stores.[186]

By contrast, the offense of criminal libel has been more often struck down. Examples during the the past decade include *State v. Helfrich* (on the grounds that the statute prohibited truthful criticism when not communicated for good motives and justifiable ends);[187] *Mangual v. Rotger-Sabat* (because the Puerto Rican statute on criminal libel had no requirement of absolute malice and did not recognize truth as an absolute defense);[188] *Ivey v. Alabama* (on the grounds that the statute did not require proof of actual malice);[189] and *IML v. Utah* (because the relevant offense had no requirement of absolute malice and did not recognize truth as an absolute defense).[190]

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183. KAN. STAT. ANN. § 21-4004 (2005).

184. For example, it may be noted that two of the seven impugned libels were against dead persons. *See Phelps*, 59 F.3d at 1062.

185. Tollett v. United States, 485 F. 2d 1087, 1096 (8th Cir. 1973).

186. 2000 WI App 161, ¶ 2 n.3, 238 Wis.2d 95, ¶ 2 n. 3, 617 N.W.2d 678, ¶ 2 n. 3. Another uncontested Wisconsin case is *State v. Dabbert*, in which the defendant was convicted of damaging the reputation of his former employer by posting her name with an ad seeking sex partners on a website entitled "Sex on the Side." *See* Lisa Sink & Linda Spice, *Man Charged with Defamation; Disgruntled Fired Employee Accused of Posting Ad with Ex-Boss' Name on Internet*, MILWAUKEE JOURNAL SENTINEL, June 7, 2000, at 1B; Lisa Sink, *Man Convicted of Posting Ex-Boss' Name on Sex Site; Defamation Case Believed to be County's First Such Internet Prosecution*, MILWAUKEE JOURNAL SENTINEL, Aug. 11, 2000, at 1B.

187. 922 P.2d 1159, 1163–64 (Mont. 1996).

188. 317 F.3d 45, 65–69 (1st Cir. 2003). *See also* Soto v. Rodriguez, 306 F. Supp.2d 120 (P.R. 2004).

189. 821 So. 2d 937, 946 (Ala. 2001).

190. 2002 UT 110, 61 P.3d 1038. But note that Justice Wilkins recommended reform rather than abolition as in this case the defendant probably did harbor actual malice. *Id.* at 1051. *See also* Edward L. Carter, *Outlaw Speech on the Internet: Examining the*

Criminal libel could be condemned on more sweeping constitutional grounds, which are more difficult to remedy by legislative wordplay, and it has been commented that the U.S. Supreme Court failed "miserably" in *Garrison* by simply applying *Sullivan* civil standards to the more draconian restraint of criminal libel.[191] First, it could be argued that its vague breadth allows arbitrary or overbroad enforcement, which is particularly dangerous in the field of speech. That criminal libel might easily revert to some of its ancient origins as the protector of "great men" has been a complaint of many commentators over many years.[192] There is also quantitative evidence from various state jurisdictions of its potential for undue attention to political speech. It has been computed that between 1797 and 1996, 595 criminal libels were dealt with by appeal courts, 38% of which concerned public officials.[193] More troubling is that the rate in recent years (52% in 1990-2002) is undiminished by the assault of *Garrison*.[194] The figure is actually rising because of the breadth and ease of Internet publications.[195]

Criminal libel triggers the further constitutional problem that the key terms such as hatred, contempt, or ridicule can be said to be impermissibly content-based. This was sustained in *State v. Shank*, in which the court stated that "[t]he statute criminalizes speech based solely on content, i.e., speech that criticizes or ridicules is targeted, while other 'nice' publications that praise or promote approval, admiration, or commendation are not penalized."[196]

VI. Conclusion

Despite the improvements which would undoubtedly be achieved by the implementation of the English Law Commission's

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Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions, 21 Santa Clara Computer & High Tech. L.J. 289 (2005).

191. Lisby, *supra* note 159, at 433.

192. Leflar, *supra* note 158.

193. Lisby, *supra* note 159, at 467.

194. *Id.* The Media Law Resource Center relates that there have been seventy-seven prosecutions since *Garrison* (1965 – 2002) and that fifty-three concern public officials and public issues. MLRC Bulletin, *supra* note 160, at 35.

195. Carter, *supra* note 190, at 289.

196. 795 So. 2d 1067, 1069 (Fla. Dist. Ct. App. 2001).

proposals, the path of simple abolition seems even more enticing for the following reasons.[197]

First, there is no convincing rationale for the offense, as the historic concerns about the standing of "great men" and the prevention of more violent resolutions, such as duelling, have largely disappeared. In reply, it might be accepted that the rationale for the offense has shifted over the years and that the protection of the criminal libel law (at least if reformed) could now be viewed as justifiable in terms of principle because of the serious misery inflicted on the victim's interests in privacy, autonomy, and proprietorial reputation;[198] the moral blameworthiness on the part of the perpetrator; the public interest in the performance of office-holders; and the drawbacks of civil remedies (especially costs).[199] Ultimately, the issue is whether behavior which is undoubtedly unpleasant, hurtful, and anti-social can be seen as sufficiently disturbing "the community's sense of security" either through the gravity of the harm done or the need for public condemnation and deterrence.[200] The answer must, of course, be based on history, culture, and politics rather than law, and especially the values placed respectively on speech, privacy, reputation, and liberty. As far as the United States is concerned, these considerations are unlikely to provide a compelling state interest in most cases, though European jurisdictions clearly take a different view as to the appropriate balance.

The use of the criminal law as a response to libel at any level involves a most serious threat to rights to free expression precisely because it invokes public condemnation, deterrence, and punishment. According to this argument, this use of the criminal law against wild expressions, even if prompted by a private party, is a dangerous instrument to make available in a modern liberal democracy. In particular, a major fear is that it will be used by the state for state purposes or by the rich and powerful. But speech

197. For the Law Commission's view, see LAW COMMISSION, REPORT NO. 149, *supra* note 1, at paras. 5.4, 5.7.

198. *See also* R v. Van Vuuren, 1961 (3) SA 305 (EC) at 308 (S. Afr.) ("[D]efence against injury should include both injury to the person and dignity, for injury to the latter may be even more serious than the former and less easily remedied.").

199. LAW COMMISSION, REPORT NO. 149, *supra* note 1, at para. 5.5.

200. MODEL PENAL CODE § 250.7 cmts. at 44 (Tentative Draft No. 13, 1961). The crime was dropped from the final version.

about the powerful is to be encouraged rather than threatened with punishment for "a medieval crime from which the aura of public interest has substantially departed with the passage of time."[201] Even false and ludicrous speech can assist a society's political and social debates by challenging orthodoxies and sharpening arguments and understandings. In any event, the designation of "truth" assumes an unerring and unconscionable degree of discernment and infallibility.[202] The response that times have changed and that criminal libel would now be utilised more by the common people rather than the great and the good is also contestable. It is interesting that the final two reported prosecutions for criminal defamation in New Zealand before its recent abolition were one by a humble local branch manager of a trading company[203] and the other by the mighty former Prime Minister, Sir Robert Muldoon.[204] According to the Privy Council in *Hector v. Attorney General of Antigua and Barbuda*, the crime of libel is

> a grave impediment to the freedom of the press if those who print, or a fortiori those who distribute, matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements on which the criticism was based.[205]

Next, there is no evidence of a pressing social need in any of the jurisdictions described hitherto. The statistics for the recent usage of criminal libel have already been given and suggest that there are very few instances where criminal libel need even be invoked. Furthermore, one would assume that the English Law Commission's much narrower proposed offense would produce even fewer cases and impose even less deterrence. Criminal libel has not emerged as indispensible in order to deal with any special subset of

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201. Leflar, *supra* note 158, at 1034. The author found that a substantial proportion of U.S. libel cases were "political." *Id.* at 985. The cases have included, for example, prosecutions for "expos[ing] the memory of George Washington to hatred, contempt, and obloquay." State v. Haffer, 162 P. 45, 45 (Wash. 1916). *But see* LAW COMMISSION, REPORT NO. 149, *supra* note 1, at para. 8.4.

202. JOHN STUART MILL, ON LIBERTY 64 (1956); Zundel v. R., [1992] 2 S.C.R. 731.

203. Police v. W. [1989] 3 N.Z.L.R. 696 (H.C.).

204. Police v. McLachlan [1989] 3 N.Z.L.R. 689 (H.C.)

205. [1990] 2 All ER 103, 106 (P.C.).

cases. Possible arguments along these lines might include cases brought against the indigent, especially those who can gain wide publicity by use of the internet at very little cost to themselves. However, the absence of business for the offense convinced the Calcutt Committee[206] and the Supreme Court Procedure Committee on Practice and Procedure in Defamation[207] that abolition was the sensible option. Abolition would not send a signal that attacks on reputation are condoned by society — the continuance of civil libel (as well as other related criminal offenses already described) would indicate otherwise.

Finally, there are adequate, albeit imperfect, alternative legal actions which provide redress for attacks on personal reputation or for harassment. The catalogue of civil, criminal, and quasi-criminal developments has been described previously. All can cater for most circumstances far more proportionately than criminal libel. The sensitivities of the contemporary era are better addressed by legislation dealing with malicious communications, the harassment of individuals, public disorder, and anti-social behavior rather than the more authoritarian contrivance of criminal libel. In this way, there is now a range of more proportionate offenses or quasi-criminal forms of intervention that can handle special cases such as defamers who are penniless (for example, scurrilous schoolboys with access to the internet) or those for whom civil libel may hold no fears (such as the opulent or mentally deranged).[208] Unfortunately, the smack of a state crime lurking in the background seems to be too tempting for many jurisdictions to forego entirely.

206. HOUSE OF COMMONS COMMITTEE ON PRIVACY AND RELATED MATTERS, *supra* note 68.

207. SUPREME COURT PROCEDURE COMMITTEE ON PRACTICE AND PROCEDURE IN DEFAMATION, *supra* note 69.

208. *See* Lisby, *supra* note 159, at 483.