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ARTICLES

OUTLAW SPEECH ON THE INTERNET: EXAMINING THE LINK BETWEEN UNIQUE CHARACTERISTICS OF ONLINE MEDIA AND CRIMINAL LIBEL PROSECUTIONS

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ABSTRACT

Criminal libel prosecutions have been relatively rare since the United States Supreme Court expounded new constitutional standards for state criminal libel laws in *Garrison v. Louisiana*, in 1964. The rise of the Internet, however, in the mid-1990s coincided with a modest increase in the number of threatened and actual prosecutions for speech. About one-third of the recent criminal libel cases, including the notable prosecution of a Utah high school student, involved Internet speech. In examining the role played by the unique characteristics of the Internet in recent criminal libel cases, this article concludes that online speech justifies greater—if not absolute—protection from libel prosecution.

I. INTRODUCTION

Somewhere in America a 16-year-old male high school student with green and pink hair is angry because a more popular teen has publicly called his girlfriend a “slut.” In a crowded school hallway, the 16-year-old shouts that the other boy’s girlfriend is also a “slut.”

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The incident invariably unlocks the boy's pent-up frustrations with high school life. He directs his anger not only at classmates, but also at school administrators and teachers. Chafing under the iron-fisted rule of his school's principal, with whom he has had frequent run-ins and even physical altercations, the pink-and-green-haired boy yells loudly that the principal is a "drunk" and a "dickhead" who is having an affair with the school secretary. The boy then accuses a male teacher of homosexual conduct and calls a female staff member a "bitch."

What punishment could the 16-year-old expect for his behavior? Suspension perhaps, or maybe expulsion, but only if school authorities could show that the boy's words or actions "materially disrupt[ed] classwork or involve[d] substantial disorder or invasion of the rights of others" sufficient to overcome the boy's First Amendment right to speak.¹

Suppose, however, the 16-year-old boy had instead bitten his tongue in the school hallway but, quietly seething, hatched a plan to publish an off-campus newspaper to express his feelings. The boy used a home computer to craft various satirical articles about his classmates, teachers, and principal—repeating the same vulgar accusations mentioned above. The newspaper then was distributed generally throughout town, but not at school, although the 16-year old left an anonymous note in a school classroom that disclosed an off-campus location where copies of the publication could be obtained. What punishment could the boy now expect from school authorities? Because of the First Amendment, school officials under this scenario could not punish him at all:

We may not permit school administrators to seek approval of the community-at-large by punishing students for expression that took place off school property. Nor may courts endorse such punishment because the populace would approve. The First Amendment will not abide the additional chill on protected expression that would inevitably emanate from such a practice. Indeed, experience teaches that future communications would be inhibited regardless of the intentions of well meaning school officials.²

1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). The Court stated "that [n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506.

2. *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1051 (2d Cir. 1979) (reversing a school administrator's decision to suspend four junior high school students

In this scenario, suppose instead that the boy's off-campus newspaper were an *online* newspaper, created at the boy's home, whereby only a note left in a school classroom disclosed the World Wide Web address where the newspaper could be located. What punishment could the boy expect? School officials still can't punish him because he created the online publication after school and with the use of a home computer,³ but somehow the added dimension of the Internet in this scenario fuels the community to act and do strange things that would not necessarily have occurred in the previous situations.⁴ Here, even after the school's principal has filed a civil defamation lawsuit, he and the community still aren't satisfied that the boy has learned his lesson: they want more. Parents and school officials become involved and convince the local county prosecutor to seek a criminal remedy. They have the boy arrested, jailed, and prosecuted for criminal libel. In the end, the boy is run out of town and told never to return. Sound unlikely? Unlikely, yes, but that exact scenario nevertheless took place in a rural Utah community in 2000.

The case of 16-year-old Ian Lake,⁵ the boy with pink and green hair, demonstrates some of the dangers posed by remaining criminal libel laws. Although most states' criminal libel laws were legislatively repealed or judicially struck down in the latter part of the 20th century, criminal libel in the age of the Internet could rise again and become a powerful tool in the hands of government officials seeking to punish unpopular or minority speech. Such prosecutions would have the greatest impact on teenagers and the indigent, whose lack of financial assets would make them judgment proof in a civil defamation lawsuit. Although the number of Internet criminal libel cases thus far has been relatively small, the very real prospect of speakers—including journalists—facing criminal prosecution for mere alleged defamatory online words merits assessment of whether

for five days each for publishing an off-campus newspaper that included articles on masturbation, prostitution, sodomy, and castration).

3. Emily Wax, *Censored Students Post Their Exposés Online*, WASH. POST, Sept. 19, 2000, at B1 (taking note of "[s]everal court rulings [that] have declared that the Internet is outside the reach of school officials").

4. Katharine Biele, *When Students Get Hostile, Teachers Go to Court*, CHRISTIAN SCI. MONITOR, Aug. 22, 2000, at 1 ("The Web has added a new dimension to the issue of teacher defamation, taking what were once lunch-table conversations or clandestine notes, and making them available to everyone.").

5. *In re I.M.L.*, 2002 UT 110, 61 P.3d 1038 (Utah 2002).

the unique characteristics of the Internet justify different legal standards than those applicable to other media.⁶

This article examines Internet criminal libel cases to identify unique characteristics of the World Wide Web that may have led to more speech-restrictive legal treatment than would have been present with non-Internet speech. I conclude that the unique characteristics of the Internet as a medium of expression justify fewer, not more, speech restrictions than those present in other mass communication media. Characteristics of the Internet such as decentralization and anonymity do not provide reasons for law enforcement officials to prosecute or threaten to prosecute Internet libels more vigorously than non-Internet libels. Rather, characteristics such as low entry barriers, long shelf life and wide reach actually provide reasons for more vigorously protecting Internet speech than non-Internet speech.

II. CRIMINAL LIBEL IN AMERICA

Americans once considered criminal prosecution of libels necessary to prevent duels and other breaches of the peace.⁷ By the late 20th century, however, criminal libel had been virtually eradicated. Free speech advocates and news organizations argued that any harm stemming from libel was better addressed in civil and not criminal courts.⁸ Imprisoning speakers, they said, "is completely antithetic[al] to current law and the public conscience, which encourages a robust discussion on matters of public interest."⁹ The notion that a person in 21st century America could be jailed for speech¹⁰ seemed strange enough that one journalist compared it to

6. See *Reno v. ACLU*, 521 U.S. 844, 869 (1997) (noting that the Internet—because it did not suffer from medium scarcity and was not as invasive as radio or television—was entitled to greater speech freedom than broadcast media).

7. Brief of Amicus Curiae for The Reporters Committee for Freedom of the Press, *Ivey v. State*, 836 So. 2d 999 (Ala. Crim. App. 2001) (No. CR 99-2322), available at <http://www.rcfp.org/news/documents/iveyala.html#I> (last visited Nov. 22, 2004) [hereinafter Brief].

8. *Repeal Criminal Defamation*, SALT LAKE TRIB., Mar. 24, 2002, at AA1 ("Rectifying the harms caused by defamation is best achieved through a civil suit for damages by the individual maligned, not a criminal prosecution and incarceration at taxpayer expense.").

9. Brief, *supra* note 7.

10. The United States Supreme Court has identified several narrow categories of speech that can be subject to prohibition or punishment despite the First Amendment. For example, the Court has long maintained that speech advocating imminent lawless action is not protected. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). But cf. *Rice v. Paladin Enters., Inc.*, 128

“using an atomic bomb to kill a fly.”¹¹ Law enforcement authorities in some states have rejected this notion, however, as criminal libel prosecutions have been revived as a tool to punish purveyors of certain viewpoints expressed on the Internet.

A. *Early Criminal Libel Statutes*

The “ignominious history”¹² of criminal libel is “notoriously intertwined with the history of governmental attempts to suppress criticism.”¹³ Under the Babylonian Code of Hammurabi, the oldest known written legal code, a man could be punished for “point[ing] a finger at a priestess . . . unless he could justify it.”¹⁴ A millennium ago, Alfred the Great decreed that “[i]f anyone is guilty of public slander, and it is proved against him, it is to be compensated with no lighter penalty than the cutting off of his tongue.”¹⁵

In England, the royal courts in 1275 obtained jurisdiction over libel and slander, which were previously adjudicated in the ecclesiastical courts.¹⁶ Libel prosecutions served the function of “preserv[ing] order and peace in a feudal system of government by enforcing the obligation of the people to their traditional rulers.”¹⁷ Later, the English Star Chamber punished seditious libel without giving the accused either the benefit of a jury trial or the opportunity to prove the truth of his or her statements.¹⁸ The Star Chamber “punished libelers to preserve peace and to protect the kingdom.”¹⁹ Truth did not justify libelous statements; in fact, “the greater the truth,

F.3d 233, 243 (4th Cir. 1997) (“[S]peech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes.”). Additionally, the Supreme Court recently reiterated that “fighting words” and “true threats” are not protected speech. See *Virginia v. Black*, 538 U.S. 343, 359 (2003). Fighting words are those “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). True threats are “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Black*, 538 U.S. at 359.

11. Press Release, Society of Professional Journalists, Utah Attacks First Amendment Ideals by Pursuing Former Student, Says SPJ (Dec. 11, 2002) (on file with author).

12. *Tollett v. United States*, 485 F.2d 1087, 1094 (8th Cir. 1973).

13. *Fitts v. Kolb*, 779 F. Supp. 1502, 1506 (D.S.C. 1991).

14. *State v. Browne*, 206 A.2d 591, 594 (N.J. Super. Ct. App. Div. 1965).

15. *Fitts*, 779 F. Supp. at 1506 (internal quotations omitted).

16. *Id.*

17. *Browne*, 206 A.2d at 594.

18. *Fitts*, 779 F. Supp. at 1506.

19. *Browne*, 206 A.2d at 595.

the greater the libel.”²⁰ Recent scholarship on criminal libel has focused on the illegitimacy of tracing criminal libel’s origins to the English common law.²¹

American colonists were subjected to vigorous prosecution of criminal libels against the Crown.²² John Peter Zenger was infamously tried in New York in 1735 for a published—and truthful—attack on the colonial governor.²³ Although the royal judge denied Zenger’s defense of truth, Andrew Hamilton persuaded the jury to acquit Zenger nonetheless.²⁴ The Zenger trial influenced drafters of state constitutions²⁵ to include provisions making truth admissible as a defense to criminal libel.²⁶ Most state legislatures, nevertheless, adopted a formulation first suggested by Alexander Hamilton while defending a man accused of libeling Thomas Jefferson, and thus, in most states truth became a defense to libel only if the truth was published “with good motives and for justifiable ends.”²⁷ By 1952, twelve years before the United States Supreme Court expounded new constitutional standards for criminal libel laws,²⁸ twenty-seven states allowed truth as a defense to libel only if the truth was published for good motives and justifiable ends.²⁹ Meanwhile, eleven states made truth an absolute defense, seven states made truth merely admissible in defense, and three states had no provisions on the topic at all.³⁰

B. Criminal Libel Becomes Virtually Obsolete

The Supreme Court in 1964 established stringent new constitutional standards for criminal libel statutes and thus signaled

20. *Id.* (internal quotations omitted).

21. See Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL’Y 433, 451 (2004) (“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.”).

22. *Fitts*, 779 F. Supp. at 1507.

23. *Id.*

24. *Id.*

25. One of the primary aims of the various state constitutions and the federal constitution was to curb “the law of seditious libel, that branch of criminal libel law which had been used to control criticism of the government.” *Id.*

26. Note, *Constitutionality of the Law of Criminal Libel*, 52 COLUM. L. REV. 521, 524 (1952).

27. *Id.*

28. See *Garrison v. Louisiana*, 379 U.S. 64 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

29. See *Constitutionality of the Law of Criminal Libel*, *supra* note 26, at 525.

30. *Id.* at 525.

the societal disfavor toward such laws. First, the Court held in *New York Times Co. v. Sullivan*³¹ that public officials suing for civil defamation had to prove that the alleged defamatory “statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard for whether it was false or not.”³² Next, the Court held in *Garrison v. Louisiana*³³ that, when it came to speech about public officials or public affairs, “only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions.”³⁴ The *Garrison* Court accordingly invalidated as unconstitutional Louisiana’s criminal libel statute, which punished false statements made with mere common law malice, or ill will.³⁵

Following *Garrison*, antiquated criminal libel statutes in various states were either struck down by judges or repealed by legislators.³⁶ Almost universally, citing failure to require actual malice for false statements made about public affairs and failure to allow truth to serve as an absolute defense, courts struck down criminal libel statutes in Mississippi,³⁷ Pennsylvania,³⁸ Arkansas,³⁹ California,⁴⁰ Alaska,⁴¹ Georgia,⁴² South Carolina,⁴³ Colorado,⁴⁴ New Mexico,⁴⁵ Montana,⁴⁶ Alabama,⁴⁷ Utah,⁴⁸ and Puerto Rico.⁴⁹ The Supreme

31. 376 U.S. 254 (1964).

32. *Id.* at 279–80.

33. 379 U.S. 64 (1964).

34. *Id.* at 74.

35. *Id.* at 78.

36. Post-*Garrison*, only a few courts have upheld criminal libel statutes in the face of First Amendment challenges. Kansas’ criminal libel statute was upheld by a federal appellate panel that believed Kansas legislators, who enacted the law after *New York Times* and *Garrison*, must have meant to incorporate an actual malice standard. See *Phelps v. Hamilton*, 59 F.3d 1058, 1073 (10th Cir. 1995). Illinois’ criminal libel statute, which did not have an explicit actual malice standard, was upheld insofar as it applied to statements about a person who was neither a public figure nor a public official. See *Illinois v. Heinrich*, 470 N.E.2d 966, 972 (Ill. 1984).

37. *Boydston v. State*, 249 So. 2d 411 (Miss. 1971).

38. *Commonwealth v. Armao*, 286 A.2d 626 (Pa. 1972).

39. *Weston v. State*, 528 S.W.2d 412 (Ark. 1975).

40. *Eberle v. Mun. Court*, 127 Cal. Rptr. 594 (Cal. Ct. App. 1976).

41. *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978).

42. *Williamson v. State*, 295 S.E.2d 305 (Ga. 1982).

43. *Fitts v. Kolb*, 779 F. Supp. 1502, 1502 (D.S.C. 1991).

44. *People v. Ryan*, 806 P.2d 935 (Colo. 1991) (partial invalidation).

45. *State v. Powell*, 839 P.2d 139 (N.M. Ct. App. 1992).

46. *State v. Helfrich*, 922 P.2d 1159 (Mont. 1996).

47. *Ivey v. State*, 821 So. 2d 937, 946 (Ala. 2001).

48. *In re I.M.L.*, 2002 UT 110, 61 P.3d 1038, 1038 (Utah 2002).

Court reversed the conviction of a man charged under Kentucky's common-law criminal libel scheme, which was found to be vague and overbroad.⁵⁰ Likewise, two lower federal courts found a federal criminal law, which prohibited libelous statements on the outside of envelopes placed in the mail, unconstitutional as overbroad and vague.⁵¹ By 2004, only fourteen states⁵² had criminal libel laws that had not been adjudged unconstitutional in some way.

Thus, after *Garrison*, convictions for criminal libel became exceedingly rare. One study concluded that there were fifty-two threatened or actual criminal libel prosecutions in the United States between 1965 and 1996, making criminal libel cases on average a less than twice-annual occurrence in this country.⁵³ When criminal libel laws were invoked, many courts recognized that police,⁵⁴ prosecutors, and others in political power⁵⁵ selectively sought enforcement of criminal libel laws against political rivals,⁵⁶ those who challenged

49. *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003).

50. *Ashton v. Kentucky*, 384 U.S. 195 (1966).

51. *Tollett v. United States*, 485 F.2d 1087 (8th Cir. 1973); *United States v. Handler*, 383 F. Supp. 1267 (D. Md. 1974).

52. FLA. STAT. ANN. § 836.01 (West 2000); IDAHO CODE § 18-4801 (Michie 2002); KAN. STAT. ANN. § 21-4004 (2001); MICH. COMP. LAWS ANN. § 750.370 (West 2002); MINN. STAT. ANN. § 609.765 (West 2002); NEV. REV. STAT. ANN. § 200.510 (Michie 2001); N.H. REV. STAT. ANN. § 644:11 (2002); N.C. GEN. STAT. § 14-47 (2003); N.D. CENT. CODE § 12.1-15-01 (2001); OKLA. STAT. ANN. tit. 21, § 771 (West 1996); UTAH CODE ANN. § 76-9-404 (2003); VA. CODE ANN. § 18.2-417 (Michie 2002); WASH. REV. CODE ANN. § 9.58.010 (West 1998); WIS. STAT. ANN. § 942.01 (West 2001).

53. MEDIA LAW RESOURCE CENTER, CRIMINALIZING SPEECH ABOUT REPUTATION: THE LEGACY OF CRIMINAL LIBEL IN THE U.S. AFTER *SULLIVAN & GARRISON* 45-56 (2003) (on file with author).

54. See *Ashton*, 384 U.S. at 195 (reversing the conviction of a Kentucky labor activist who was charged with criminal libel for alleging that a local police chief and sheriff engaged in various illegal activities to benefit management in a miners' strike); *Gottschalk v. State*, 575 P.2d 289, 289-90 (Alaska 1978) (reversing the conviction of a man who was charged with criminal libel for accusing a state trooper of taking \$250 from the glove compartment of the man's truck).

55. See *Garrison v. Louisiana*, 379 U.S. 64, 64 (1964) (reversing the conviction of a Louisiana lawyer who was charged with criminal libel after he accused local judges of laziness, inefficiency, and a lenient attitude toward crime).

56. See *Ivey v. State*, 821 So. 2d 937, 939 (Ala. 2001) (reversing the criminal libel conviction of an Alabama lawyer who allegedly paid a woman to say that a state senator and candidate for Lieutenant Governor had assaulted the woman); *State v. Browne*, 206 A.2d 591, 592 (N.J. Super. Ct. App. Div. 1965) (invalidating a criminal libel charge against a mayoral candidate in New Jersey who accused his opponent, the incumbent, of "us[ing] his public office for private profit"). Additionally, the threat of a criminal libel prosecution has been invoked in various political battles outside the campaign context. For example, the Draper, Utah city manager accused the city's mayor of criminal libel in 1996 for writing a letter to the city's 13,000 residents accusing the city manager of being "arbitrary, high-handed and often

their authority,⁵⁷ and journalists⁵⁸ who dared to raise the possibility of government ineptness or corruption.⁵⁹ Scholars argued that the relative paucity of prosecutions for criminal libel, “which is committed many times each day,”⁶⁰ indicated that prosecutors applied criminal libel laws arbitrarily and abusively.⁶¹ Government officials displayed a tendency to wield criminal libel laws not only as swords to strike at political enemies, but also as muzzles to silence politically unpopular speech or minority viewpoints.⁶²

demeaning.” Jon Ure, *Draper Mayor Still at Odds with Council*, SALT LAKE TRIB., June 19, 1996, at B2.

57. See *Kansas Newspaper, Staffers Convicted of Criminal Libel*, available at <http://www.firstamendmentcenter.org/news.aspx?id=3659>

(last visited Oct. 26, 2004) (reporting that a Kansas newspaper editor and publisher were convicted of criminal libel in 2002 for publishing a story accusing two public officials of living in a county other than the one in which they served).

58. See *Fitts v. Kolb*, 779 F. Supp. 1502, 1502 (D.S.C. 1991) (finding, upon request for declaratory relief by a journalist who was arrested and charged with criminal libel for an article accusing two state senators of corruption, that South Carolina criminal libel law was unconstitutionally overbroad for failing to provide an actual malice standard and was void for vagueness); *Weston v. State*, 528 S.W.2d 412, 413 (Ark. 1975) (reversing the conviction of a weekly newspaper editor and publisher in Arkansas who accused the sheriff of playing a key role in the local illegal drug trade); *Commonwealth v. Armao*, 286 A.2d 626, 627–28 (Pa. 1972) (reversing the conviction of the managing editor of a weekly Italian-and-English-language newspaper for publishing an article that accused a man who had “considerable influence with members of . . . the Pennsylvania State Liquor Control Board” of being president of a club that was “well-known as a hangout for sex[ual] deviates”).

59. This application of criminal libel is particularly troubling, given that uncovering corruption in government is one of the primary First Amendment-protected functions of the press. See *Mangual v. Rotger-Sabat*, 317 F.3d 45, 64 (1st Cir. 2003) (stating that a newspaper’s accusations of corruption among government officials were “at the heart of the First Amendment protections of speech and the press”).

60. *Gottschalk v. State*, 575 P.2d 289, 294 (Alaska 1978). One scholar speculated that criminal libel “is ostensibly committed in this country a thousand times, and possibly ten or twenty thousand times, daily.” Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEX. L. REV. 984, 984 (1956).

61. In a study examining criminal libel prosecutions in the first half of the 20th century, one scholar discovered that

half the cases from 1920 on can be classified as basically political. . . . Commonest among the political cases were those in which prosecutions were filed against an unsuccessful political candidate or his supporters for statements made during a campaign, now ended, concerning his now successful opponent. Of the same sort were prosecutions of persons, who feeling aggrieved, made disagreeable statements about persons firmly entrenched in public office or power. One may suspect that in such cases the law was being used by the successful personage or his friends as a means of punishing their less potent enemies.

Leflar, *supra* note 60, at 985–86.

62. *Id.* at 1032 (“The successful prosecutions were, for the most part, for statements of a sort likely to have been unpopular at the time and place they were made.”).

C. States Use the Internet to Revive Criminal Libel

Although criminal libel statutes had fallen into near desuetude in the latter part of the 20th century, government officials in the 21st century are dusting off the remaining 19th century laws to target speech on the Internet.⁶³ For example, two journalists in Kansas were convicted of criminal libel in 2002 for postings on their newspaper's Web site alleging that the mayor of Kansas City, Kansas, lived in a neighboring county, a fact that would have made her ineligible for office.⁶⁴ In Georgetown, Colorado in 2002, the mayor-elect accused the incumbent mayor of posting criminally libelous statements on the incumbent's Web site just three days before the pair squared off in an election.⁶⁵ In Wisconsin, a man was convicted of criminal libel for posting an Internet advertisement soliciting sex partners in the name of his ex-boss.⁶⁶ Internet speech has drawn criminal libel charges and convictions in various other states as well.⁶⁷

The Media Law Resource Center reported seventy-seven cases of threatened and actual criminal libel prosecutions between 1964, the year of the Supreme Court's opinion in *Garrison*, and 2002.⁶⁸ Twenty-five of those cases—nearly one-third of the total—took place in 1997 or later, roughly the time period in which use of the Internet became widespread. Of the twenty-five cases since 1997, eight—approximately one-third—involved speech on the Internet. Without the Internet criminal libel cases, the number of reported cases since 1997 would have totaled seventeen, or fewer than three per year—

63. Ken Paulson, *Changing Rules of Rudeness*, TULSA WORLD, Dec. 8, 2002, at G3 ("There's an increasing temptation for school administrators to try to control the speech of students off school grounds, particularly when unpalatable viewpoints are posted on private Web sites. Sarcastic and cutting comments that were once shared over lunch in the cafeteria now get wider distribution via the Internet.").

64. James C. Goodale, *It Can't Happen Here—But It Did*, N.Y. L.J., Dec. 6, 2002, at 3 ("In the last several years . . . prosecutors have been bringing criminal libel charges for publication on the Internet. There have been five such cases in the last two years.").

65. Kit Miniclier, *Mayor-Elect Says Website Contains Libelous Items*, DENVER POST, Apr. 4, 2002, at B4 (reporting that the mayor-elect objected to Internet allegations that she had used cocaine, had assisted in a theft, and had been fired from a previous job).

66. Lisa Sink, *Man Convicted of Posting Ex-Boss' Name on Sex Site*, MILWAUKEE JOURNAL SENTINEL, Aug. 11, 2000, at B1.

67. See, e.g., *Woman Sentenced for Internet Message*, BATON ROUGE ADVOCATE, Sept. 22, 1999, at B3 (reporting that a Louisiana woman was sentenced to 10 days in jail for posting false information about a police officer on the Internet); Jennifer Farrell, *Parody Web Site: Offensive or Illegal?*, ST. PETERSBURG TIMES, Dec. 18, 2000, at A1 (reporting that county and state officials launched a criminal libel investigation related to a Website that parodied the sex lives of various faculty members at a Florida high school).

68. MEDIA LAW RESOURCE CENTER, *supra* note 53, at 42.

close to the average of less than two cases per year for the time period of 1964 to 1996. With the Internet criminal libel cases added, however, the average number of cases between 1997 and 2002 increased to *more than four* per year.⁶⁹

While various factors, including the relatively small number of cases involved, make it difficult to draw conclusions about a causal relationship between the Internet and threatened or actual criminal libel prosecutions, it remains important to examine the role played by unique characteristics of online media in the Internet criminal libel cases. Such an examination provides a basis for drawing conclusions about whether these unique characteristics justify different legal treatment for alleged criminal libels than would be present with non-Internet speech.⁷⁰

In the next part of this article, I will resume discussion of the Ian Lake case, the Utah case involving the ultimately unsuccessful prosecution of a high school student for Internet speech. Based on analysis of the Utah case and other Internet criminal libel cases, I conclude that the unique characteristics of the Internet as a medium of expression—primarily decentralization, anonymity, low entry barriers, wide reach, and long shelf life—justify increased rather than decreased legal protection of speech.

III. 'NO ONE HAS EVER SEEN HIM SOBER'

On May 5, 2000, Ian Michael Lake, a 16-year old high school junior at the time, used his home computer to create a site on the World Wide Web that would soon have the tiny town of Milford, Utah in an uproar.⁷¹ Lake's page⁷² was the teen's response to another Milford High School student's Web site that had labeled Lake's female friend "Slut of the Week" and had made various derogatory comments about her.⁷³ Lake's posting responded in kind by calling

69. *Id.* at 42–56.

70. See Eric M. Freedman, *A Lot More Comes Into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make it Particularly Urgent for the Supreme Court to Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 956 (1996) (chronicling the under-protection of speech on various new media and concluding that "permitting technological discrimination is inimical to freedom of expression").

71. Mark Havnes, *Ribald Web Site Gets Teen Exiled*, SALT LAKE TRIB., May 26, 2000, at B1.

72. The page was hosted by the ISP Lycos at <http://www.angelfire.com/ut/homemilford>. Memorandum in Support of Motion to Dismiss Petition, *In re I.M.L.*, No. 968716 (Utah 5th Dist. Juv. Ct. Aug. 1, 2000).

73. *Id.*

several female classmates “sluts,”⁷⁴ identifying a female faculty member as a “bitch,” and accusing a male faculty member of homosexual conduct.⁷⁵ Lake’s site also referred to Milford High School Principal Walter Schofield as the “town drunk”⁷⁶ and labeled others associated with the school as lazy or incompetent.⁷⁷

The type of language and insinuations used by Lake may well have been common among students at Milford High School in 2000, but school administrators—spurred by the angry reaction of an entire town—appeared to treat Lake’s speech differently than it would have been treated if Lake had simply scrawled it on a piece of paper and left copies in the school bathroom. Instead of facing just suspension for 10 days for behavior “disruptive to normal school proceedings,”⁷⁸ Lake faced the full force of the criminal law.

A. History of Criminal Libel in Utah

Utah’s criminal libel statute⁷⁹ remained virtually unchanged from 1876 until it was struck down as unconstitutional⁸⁰ in 2002. The 1876 Compiled Laws of the Territory of Utah punished criminal libel against “[e]very person who willfully, and with a malicious intent to injure another, publishes or procures to be published any libel.”⁸¹ At that time, criminal libel was defined as:

a malicious defamation, expressed either by printing or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt or ridicule.⁸²

At Utah’s constitutional convention in 1895, Salt Lake City newspaper editor and convention delegate, C.C. Goodwin, proposed that the Utah Constitution include a provision that would make truth

74. Joe Baird, *Trouble Fitting In*, SALT LAKE TRIB., May 28, 2000, at A1.

75. Amended Order Denying Motion to Dismiss Petition, *In re I.M.L.*, No. 968716 (Utah 5th Dist. Juv. Ct. Jan. 23, 2001).

76. *Id.*

77. Baird, *supra* note 74.

78. *Administrative Policies and Procedures, Sec. VIII, in BEAVER COUNTY SCHOOL DISTRICT POLICIES AND PROCEDURES* (April 6, 1999), available at http://www.beaver.k12.ut.us/boe_policies.html.

79. UTAH CODE ANN. §§ 76-9-501 to -503 (2003).

80. *In re I.M.L.*, 2002 UT 110, 61 P.3d 1038, 1038 (Utah 2002).

81. COMP. LAWS UTAH § 1955 (1876). Criminal libel in the Territory was punishable by a fine of up to \$1,000 and a term in the county jail of up to one year. *Id.*

82. *Id.* § 1954.

an absolute defense in both civil and criminal libel cases.⁸³ Goodwin's proposal was rejected, however, because other convention delegates believed that even some true statements should be punishable as criminal libel. Judge Charles S. Varian of Salt Lake City noted that most states' laws made truth only a qualified defense to libel "because the State in looking after its business does not permit the publication of even the truth, unless there be a good purpose and justifiable end connected with it."⁸⁴

Since at least 1876, Utah law prohibited truthful statements made with common-law malice, or ill will, that brought others into disrepute unless those statements were made "with good motives and for justifiable ends."⁸⁵ Before the 21st century, Utah's highest court had only two occasions to consider cases involving the criminal libel statute. Just eight months after the constitutional convention, the Supreme Court of the Territory of Utah upheld the criminal libel conviction of a man who accused the head of the Salt Lake Building & Loan Association of misadministration and called him a "gorilla-faced boss."⁸⁶ Five weeks later, the same court ordered a new trial for a newspaper editor convicted of criminal libel for printing an article charging that one of the delegates to the constitutional convention was "not a fit and proper person" for the job.⁸⁷ Even though it felt obligated to order the new trial because the trial judge had made improper statements that influenced the jury, the Supreme Court of the Territory of Utah at that time emphasized that public officials could be criticized only "upon proper occasion, from proper motives."⁸⁸

In 1973, nine years after *New York Times* and *Garrison*, the Utah Legislature created a new criminal offense, called "criminal defamation," that purported to require actual malice.⁸⁹ At the same

83. OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH 320 (1898).

84. *Id.*

85. COMP. LAWS UTAH § 1957 (1876).

86. *People v. Ritchie*, 12 UT 180, 42 P. 209 (Utah 1895).

87. *People v. Glassman*, 12 UT 238, 240, 42 P. 956, 957 (Utah 1895).

88. *Id.* at 244, 42 P. at 958.

89. UTAH CODE ANN. § 76-9-404 (2003) ("A person is guilty of criminal defamation if he knowingly communicates to any person orally or in writing any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt, or ridicule.").

time, the Legislature kept the century-old criminal libel statute⁹⁰ on the books without changing it to comport with the constitutional requirements of *New York Times* and *Garrison*. Neither the criminal libel statute nor the criminal defamation statute received much attention⁹¹ until 2000, when an unlikely teenager authored a Web page that spawned Utah's first-ever case of alleged criminal libel on the Internet.

B. Web Posting Enflames Community, Lands Teen in Jail

Ian Lake's Web posting, as evidenced by an excerpt of Lake's text quoted in a juvenile judge's order, could generally be described as crudeness of the type common in school hallways across America:⁹²

Town Drunk. Every town has a drunk and Milford is no exception (actually, [M]ilford has about 30). The who [sic] has been chosen as the town drunk for Milford is none other tha[n] Milford High Principal Uncle Walt. In all the years Walt has been in Milford no one has ever seen him sober. One time I though[t] Walt was sober but then he passed out and I knew he was tippin[g] back the jug again. Some might think that because Walt is principal he shouldn't be drinking. Well, to those people I say this[:] "F[—] YOU! THIS IS AMERICA AND WALT CAN DO WHAT HE WANTS!"

Milford High School. Principal Walt: Town Drunk. DICKHEAD; Secretary Wendy Sleeps with Walt; Counselor Erickson: Possible Homosexual leading a double life; Mr. Jensen: Possibly addicted to speed or some other narcotic; and Mrs. Jensen: BITCH.⁹³

Lake made no threats or references to violence. He later told police that he had used his home computer to do research for a school

90. UTAH CODE ANN. § 76-9-502 (2003) ("A person is guilty of criminal libel if he intentionally and with malicious intent to injure another publishes or procures to be published any libel.").

91. Utah newspapers reported only one criminal libel conviction after 1973; then-Salt Lake County Attorney Ted Cannon was convicted in 1987 and spent one month in jail for statements made about a news reporter. Hilary Groutage, *Is Web Diatribe Libel?: Milford Teen's Case is in a Gray Area of the Law*, SALT LAKE TRIB., May 27, 2000, at B1.

92. *The Washington Post* described Lake's Web pages as "an electronic version of bathroom wall graffiti." Wax, *supra* note 3. *The Christian Science Monitor*, meanwhile, called Lake's Internet postings "crude and unkind." Biele, *supra* note 4.

93. Amended Order Denying Motion to Dismiss Petition, *In re I.M.L.*, No. 968716 (Utah 5th Dist. Juv. Ct. Jan. 23, 2001).

paper on explosives, but his Web site did not discuss that research.⁹⁴ Lake's site included a "Quote of the Week" from the rock band "Rage Against the Machine," whose members sang on their CD, "The Battle of Los Angeles," that "all Hell can't stop us now."⁹⁵ Even though Lake created the site alone, he used the plural "we" on several occasions—a fact later invoked by police as evidence of a plot.⁹⁶ Lake's five-page Web site identified and criticized a total of forty-nine Milford High School students or employees. The site also praised a few of his friends.⁹⁷

Although Lake told no one about his Web site, which did not identify him as its creator, Lake did leave an unsigned note in the school's computer lab that contained the Internet address of his posting.⁹⁸ Within a week of the site's creation, the Beaver County Sheriff's Office had received "numerous complaints from concerned parents."⁹⁹ Some of Milford's 1,500 residents saw parallels in Lake's site with the Internet rantings of 1999 Columbine High School killers Eric Harris and Dylan Klebold;¹⁰⁰ a few parents even "refused to allow their children to attend school until the suspect [was] identified."¹⁰¹

Five days after Beaver County deputies received copies of Lake's postings from a Milford woman, Lake wore a "Rage Against the Machine" T-shirt to school and thereby brought suspicion on himself as the creator of the despised Web pages.¹⁰² The next day, Lake's Internet Service Provider ("ISP") responded to a Beaver County Sheriff's subpoena and identified Lake as the author of the Web site.¹⁰³ Later that evening on May 18, 2000, police arrested Lake at his home and seized his computer.¹⁰⁴

94. Memorandum in Opposition to Memorandum in Support of Motion to Dismiss, *In re* I.M.L., No. 968716 (Utah 5th Dist. Juv. Ct. Sept. 1, 2000).

95. Memorandum in Support of Motion to Dismiss Petition, *In re* I.M.L., No. 968716 (Utah 5th Dist. Juv. Ct. July 31, 2000).

96. *Id.*

97. Baird, *supra* note 74.

98. Amended Order Denying Motion to Dismiss Petition, *In re* I.M.L., No. 968716 (Utah 5th Dist. Juv. Ct. Jan. 23, 2001).

99. *Id.*

100. See Wax, *supra* note 3 (noting the tendency to equate "irreverent and sometimes off-color" content posted on the Internet by high school students with the Web pages of Harris and Klebold).

101. Memorandum in Support of Motion to Dismiss Petition, *In re* I.M.L., No. 968716 (Utah 5th Dist. Juv. Ct. Aug. 1, 2000).

102. *Id.*

103. Havnes, *supra* note 71.

104. *Id.*

After his arrest, Lake spent seven days in a juvenile detention facility in Cedar City, Utah, and, while his case was pending, was ordered by a juvenile judge to move from Milford and live instead with his grandparents in southern California.¹⁰⁵ Lake's father agreed with the judge that leaving town was the best thing for Lake, given the anonymous threats received by the Lakes.¹⁰⁶ Journalists around the globe portrayed Lake's forced exile as something straight from the English Star Chamber: "After seven nights in prison the hapless teen was run out of town and banished from the city limits."¹⁰⁷

Beaver County deputies recommended that County Attorney Leo Kanell file Class B misdemeanor charges of criminal libel¹⁰⁸ and criminal slander.¹⁰⁹ But the County Attorney's Office pursued only a single count of criminal libel. Prosecutors opted not to charge Lake with criminal defamation.¹¹⁰ Lake pleaded not guilty¹¹¹ and challenged the criminal libel law as unconstitutional for failure to incorporate the actual malice standard in *New York Times Co. v. Sullivan*¹¹² and *Garrison v. Louisiana*.¹¹³ The County Attorney countered by arguing that the Utah appellate courts had interpreted Utah's *civil* law of defamation to include an actual malice requirement, and the courts should likewise find that the *criminal* law of libel included an actual malice requirement.¹¹⁴

Fifth District Juvenile Judge Joseph E. Jackson determined that Utah's criminal libel statute implicitly incorporated the *New York Times* actual malice standard.¹¹⁵ Judge Jackson, however, recognized the potential for the statute to be declared unconstitutional by the Utah appellate courts and, therefore, he certified the question for interlocutory appeal.¹¹⁶ The Utah Supreme Court heard oral

105. *Id.*

106. *Id.*

107. Matt Kelly, *Kelly's I*, MIRROR (London), June 12, 2000, at 20.

108. UTAH CODE ANN. § 76-9-502 (2000).

109. *Id.* § 76-9-507.

110. *Id.* § 76-9-404.

111. *Milford Teen Pleads Not Guilty to Libel*, DESERET NEWS, June 21, 2000, at B3.

112. 376 U.S. 254 (1964).

113. 379 U.S. 64 (1964).

114. Memorandum in Opposition to Memorandum in Support of Motion to Dismiss, *In re I.M.L.*, No. 968716 (Utah 5th Dist. Juv. Ct. Sept. 1, 2000).

115. Amended Order Denying Motion to Dismiss Petition, *In re I.M.L.*, No. 968716 (Utah 5th Dist. Juv. Ct. Jan. 23, 2001).

116. *Id.*

arguments in March 2002 and issued its decision November 15, 2002.¹¹⁷

In its opinion, the Utah Supreme Court stated that “[q]uite obviously, the plain language of Utah’s [criminal libel] statute does not comport with the requirements laid down by the United States Supreme Court,” including a requirement of actual malice for statements about public officials and truth as an absolute defense.¹¹⁸ Next, the court held that the juvenile court erred by importing the actual malice standard from civil law into its interpretation of the criminal libel statute.¹¹⁹ Finally, the court rejected the state’s argument, presented for the first time on appeal, that the criminal defamation statute, which purports to include an actual malice requirement for statements about public officials, should be grafted onto the criminal libel statute to save it from unconstitutionality.¹²⁰ In striking down the criminal libel statute as overbroad,¹²¹ the court took pains to clarify that it was not passing judgment on whether “Utah’s criminal defamation statute passes constitutional muster.”¹²²

C. Criminal Libel Case Wouldn’t Die Even Though the Statute Did

In addition to the criminal charge, Lake faced a civil defamation lawsuit filed in August 2000 by Schofield, the former Milford High principal who left town soon after Lake did.¹²³ Eventually, Schofield and Lake settled the civil suit. The settlement reportedly included a written apology from Lake to Schofield.¹²⁴ As part of the agreement, Lake dropped a threatened civil-rights lawsuit against Schofield,¹²⁵ who allegedly “struck [Lake] during an altercation in 1999 and failed to provide adequate accommodations to address [Lake’s] epilepsy.”¹²⁶

117. *In re I.M.L.*, 2002 UT 110, 61 P.3d 1038, 1038 (Utah 2002).

118. *Id.* ¶¶ 18–19, at 1044.

119. *Id.* ¶ 21, at 1045.

120. *Id.* ¶¶ 24–27, at 1046–47.

121. *Id.* ¶ 30, at 1048.

122. *Id.* ¶ 24, at 1046 n.12.

123. Joe Baird & Thomas Burr, *Teen Seeking Dismissal of Libel Suit*, SALT LAKE TRIB., Nov. 29, 2000, at D1.

124. Jennifer Toomer-Cook, *Defamation Suit Being Settled*, DESERET NEWS, Mar. 19, 2001, at B1.

125. Joe Baird, *Civil Actions Near a Settlement in Teen’s Web Libel Incident*, SALT LAKE TRIB., Mar. 20, 2001, at B2.

126. Baird & Burr, *supra* note 123.

Nevertheless, even after the civil suits were settled and the criminal libel statute was declared unconstitutional, Lake's legal battles were not over. In April 2002, perhaps anticipating that the criminal libel statute would be struck down, Beaver County prosecutors filed four counts of criminal defamation against Lake.¹²⁷ Kanell, the Beaver County prosecutor, vowed to press forward with the prosecution under the 1973 criminal defamation statute, which he felt would withstand the constitutional challenge that the criminal libel statute did not.¹²⁸ Kanell, however, was defeated in his November 2002 re-election bid,¹²⁹ and his successor, Von Christiansen, had the criminal defamation charges dismissed.¹³⁰

Although his family spent tens of thousands of dollars on his legal defense, Lake said the criminal libel case actually did him some good because it "got [him] out of Milford and to California, where [he] graduated with honors from Palm Springs High School."¹³¹ By the time the case finally came to a close, Lake was 19-years old, working as Webmaster for a real-estate company in Desert Hot Springs, California, and applying for admission to the University of California at Riverside.¹³²

One of the most bizarre and groundbreaking cases in Utah history wrapped up with a series of interesting twists. Utah's largest newspaper assessed the case in a no-holds barred editorial: "What Ian Lake did would probably make John Adams wince. What Leo Kanell did would make Thomas Jefferson vomit."¹³³ Meanwhile, Lake's father filed a notice of intent to sue Milford and Beaver County officials for \$50,000 in legal fees and other costs incurred as a result of the prosecution of his son.¹³⁴

Kanell admitted that he had been ignorant of the parallel (and potentially constitutional) criminal defamation statute: "If I'd known this [defamation] law was on the books, I would have filed it sooner,"

127. Alan Edwards, *Libel Case Out: Law 'Overbroad,'* DESERET NEWS, Nov. 16, 2002, at B1.

128. Christopher Smart, *Utah Court Kills 1876 Libel Statute*, SALT LAKE TRIB., Nov. 16, 2002, at A1.

129. Edwards, *supra* note 127.

130. Mark Havnes, *Web Site Charges Dropped*, SALT LAKE TRIB., Jan. 8, 2003, at A1.

131. *Id.*

132. *Id.*

133. Editorial, *Free Speech Wins*, SALT LAKE TRIB., Jan. 10, 2003, at A8.

134. Mark Havnes, *Ex-Milford Student's Father to Sue*, SALT LAKE TRIB., Jan. 15, 2003, at B2.

he told one news reporter.¹³⁵ Kanell also admitted that his crusade to convict Ian Lake was a paternalistic effort to “help a young man who has problems.”¹³⁶ It became clear that many residents, police officers, and prosecutors in Beaver County viewed the entire case not as preventing a breach of the peace or even seeking redress for a private wrong, but rather, in the words of one letter-to-the-editor writer, “an issue of community retribution and mandatory atonement.”¹³⁷

Finally, Lake said he would create a new Web site that would tell all the details of his case and he planned to re-post the original caustic Web pages in an effort to rankle people in Milford, noting that “legally there’s nothing they can do about it.”¹³⁸

D. Role of Unique Characteristics of the Internet in Criminal Libel Cases

No one will ever know how Beaver County Attorney Leo Kanell and the patrons of Milford High School would have reacted if Lake’s comments had been made, not on the Internet, but rather, in the school bathroom or on a flier distributed at lunch. There is evidence, however, that what set Lake’s words apart from thousands of similar commentaries made by high school students daily was the medium through which the words were communicated.¹³⁹

In Ian Lake’s case, the Milford community appeared particularly agitated that Lake’s rantings appeared on the Internet. The perception of the Internet as a haven for lawbreakers,¹⁴⁰ coupled with the role of the Internet in the 1999 Columbine High School shootings, caused parents and others in Milford to read potential violence into Lake’s rather innocuous words about purported homosexual, drunken, and drug-addicted school officials. Lake himself was eminently surprised that Milford residents linked his Web site to Columbine or any other sort of violence.¹⁴¹ Thus, the question arises whether Lake was

135. Joe Baird, *New Battle Brewing Over Web Invective*, SALT LAKE TRIB., Dec. 11, 2002, at A1.

136. Havnes, *supra* note 130.

137. Jake Starkey, Letter to the Editor, *Student is Owed Apology*, DESERET NEWS, Nov. 20, 2002, at A8.

138. Havnes, *supra* note 134.

139. See MARSHALL McLuhan, UNDERSTANDING THE MEDIA: THE EXTENSIONS OF MAN 7 (The MIT Press 1964).

140. See *infra* notes 184–188 and accompanying text.

141. Lake’s incredulity was evident in the exchange he had with a Beaver County sheriff’s deputy the day Lake was arrested:

Ian: It wasn’t nothing to do with Columbine. I’m not even thinking about anything like that. I guarantee you that.

arrested and charged with criminal libel because of what he wrote or because of where he wrote it. Clearly, the "rumors" flying around among parents¹⁴² played a role in the criminalization of Lake, an admitted outsider whose dyed hair, outrageous outfits, and California roots did not go over well in the small southern Utah community.¹⁴³

Because the Milford community had gotten so worked up (deputy sheriffs engaged in a virtual manhunt for a would-be killer who didn't exist), the community appeared to decide to exact some punishment¹⁴⁴ of Lake beyond the remedies provided by the law of

....
 Ian: I mean I ain't nothing like that. That's why I couldn't figure out how it got anything like [this] because I was told . . . it's linked to Columbine And I'm like, "How?" You know[?]

....
 Ian: I don't see, I don't see how it's a big deal, how this is linked to Columbine in any way.

John: Well, maybe I can shed a little bit of light on it for you. You don't see how it's connected to Columbine in any way because you built these [Web pages]. You know what the intent was. You know why you did this. You know what you put in there.

Ian: Yeah but there's nothing in there that's like threatening anybody.

John: Well, but we got parents out there that are hearing rumors. And you know how rumors are in small towns.

Ian: Yep.

John: And you can say it on the street corner today and by tomorrow it will be 180 degrees backwards, and it will be ten times worse. And you know a big part of that I'm sure is what we have. But whatever the reason that's why this has become such a big production. Is [sic] because of the uh concern from the parents at the school, concern from the faculty of the school. Believe me this has had a deep impact. We had an officer up there at the school all day today. Just to be there. Just in case somebody decided to come in and start shooting the place up or blow the place up or

Ian: This seems to get out of hand so easily. I mean this wasn't nothing like that

....

Brief of Amici Curiae for The Reporters Committee for Freedom of the Press et al., Appendix 47-51, *In re I.M.L.*, 2002 UT 110, 61 P.3d 1038 (Utah 2002) (No. 20010159-SC).

142. The United States Supreme Court commented on the inappropriateness of tying prosecutions for criminal libel to the reactions of listeners:

[T]o make an offense of conduct which is "calculated to create disturbances of the peace" leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments *per se*. This kind of criminal libel "makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence."

Ashton v. Kentucky, 384 U.S. 195, 200 (1966) (quoting ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 151 (1954)).

143. See Baird, *supra* note 74.

144. See Starkey, *supra* note 137 and accompanying text.

civil defamation. Although Milford High School Principal Walter Schofield pursued a civil defamation lawsuit against Lake, a lawsuit against a likely judgment-proof teenager would not have satisfied the townspeople.¹⁴⁵ Thus, county prosecutors brought criminal charges, once again demonstrating that the only purpose of criminal libel is “(1) to circumvent the restrictions placed on civil libel litigation by *Sullivan* and by its progeny—a result which *Garrison* has foreclosed, or (2) to punish an indigent who could not be reached by a civil judgment for damages.”¹⁴⁶

Lake’s case is not the only one of its kind.¹⁴⁷ The Internet played a prominent role in at least six¹⁴⁸ other recent cases of threatened or actual prosecution for criminal libel. In 1999, a Louisiana woman was convicted of criminal libel and sentenced to spend 10 days in jail for posting false information about a police officer on the Internet.¹⁴⁹ In that case, 24-year old Amy Patton pleaded no contest to the defamation charge and was given a suspended jail sentence, but was

145. See August Gribbin, *Reputations Can Be Ruined on the Internet*, WASH. TIMES, Aug. 2, 2001, at A1 (quoting Harvard Law School Professor John Zittrain, who said that in the case of Internet defamation, “the authors are likely to be judgment-proof – unlike a large newspaper or publisher, they don’t have much money”). See also Biele, *supra* note 4 (noting that while parents may sometimes be held liable for the actions of their children, most states cap the parents’ liability at an average of \$2,500, unless parental negligence is shown).

146. *United States v. Handler*, 383 F. Supp. 1267, 1278 (D. Md. 1974).

147. It is important to note here that the substantive allegations against Lake were never tested in court. Even if the Utah criminal libel statute had included an actual malice standard—or if Lake had been prosecuted under the criminal defamation statute, which did require actual malice—Lake still could have defended himself by arguing that his speech was protected by the First Amendment as truth or fair comment. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Lake’s speech clearly did not rise to the level of “true threats” or speech likely to produce imminent lawless action because he advocated no harm or violence at all. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Virginia v. Black*, 538 U.S. 343, 359 (2003). The analysis of whether Lake’s words were “fighting words” involves a determination of whether they are words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). In the view of some scholars, the “fighting words” doctrine should have become a dead letter in contemporary society. GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 83 (1999) (quoting Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 536 (1980)) (stating that the fighting words doctrine is “nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression”).

148. The Media Law Resource Center data includes six recent Internet criminal libel cases in addition to the two Lake cases (one prosecution for criminal libel, which resulted in the Utah Supreme Court declaring the law unconstitutional, and one prosecution for criminal defamation, which was ultimately dropped). See MEDIA LAW RESOURCE CENTER, *supra* note 53, at 45–52.

149. *Id.*; *Woman Sentenced for Internet Message*, BATON ROUGE ADVOCATE, Sept. 22, 1999, at B3.

required to perform two days of community service.¹⁵⁰ The prosecutor, Assistant District Attorney Schyler Marvin, stated that "the anonymous nature of the Internet does not provide a person targeted by a message to sue or confront the writer."¹⁵¹ Notwithstanding that assertion, Patton's identity was uncovered via her ISP.¹⁵²

Also in 1999, 32-year old Tulsa, Oklahoma police officer, Gary E. Upton, was charged with one misdemeanor count of libel in connection with an Internet advertisement listing his neighbor as "[the owner of a] sex toy business and vendor in pornographic sites."¹⁵³ After the woman received numerous telephone calls from around the world, investigators tracked the ad to Upton via his ISP.¹⁵⁴ Upton entered into a plea agreement that would result in the removal of the conviction from his record after he performed forty hours of community service, paid \$1,000 in fines, and completed one year probation.¹⁵⁵

Prosecutors in Waukesha County, Wisconsin investigated three cases of alleged criminal libel during a short time span in 2000. One man was charged with defamation in connection with an Internet ad listing his female ex-boss's name and profile on a Web site called "Sex on the Side."¹⁵⁶ As a result of the listing, the boss received twenty calls. She obtained an injunction against her former employee and facilitated the government's criminal prosecution, which resulted in a no-contest plea, a sentence of 100 hours of community service, \$1,280 in restitution, and psychological counseling for the former employee.¹⁵⁷ Clearly, the Internet played a key role in the prosecution for what might otherwise have been considered tasteless, but harmless, foolishness. This sentiment was captured best by the

150. *Woman Pleads No Contest to Charge Stemming from Internet Posting*, ASSOCIATED PRESS NEWSWIREs, Sept. 21, 1999, available at Westlaw, ALLNEWSPLUS.

151. *Id.*

152. *Id.*

153. Brian Barber, *Tulsa Police Webmaster Charged with Criminal Libel*, TULSA WORLD, Mar. 23, 1999, at 7.

154. *Id.* The prosecutor, Assistant District Attorney Mark Collier, said he had never seen a criminal libel charge filed in Tulsa County. Collier told a newspaper reporter: "It's definitely rare. . . . When the charge was first suggested, I said I didn't think there was such a thing as criminal libel. But it exists." *Id.*

155. *Tulsa Police Officer Gets Deferred Sentence*, ASSOCIATED PRESS NEWSWIREs, May 22, 1999, available at Westlaw, ALLNEWSPLUS.

156. *Waukesha Man Charged with Defamation After Posting Comments on Web*, ASSOCIATED PRESS NEWSWIREs, June 7, 2000, available at Westlaw, ALLNEWSPLUS.

157. Sink, *supra* note 66.

female boss herself who stated, “[S]teps need to be taken to prevent ‘disturbed individuals (from) using the Internet to further their hate.’”¹⁵⁸ Her attorney equated the Internet posting to a common form of expression not generally considered a criminal offense: “‘We used to just write graffiti on the restroom stalls,’ said attorney Peter Plaushines. . . .”¹⁵⁹ Indeed, the sentiment expressed by both the female boss and her attorney describes the transformational power of the Internet with respect to words. What traditionally would have been considered a common and harmless form of expression, albeit tasteless, has become a not-so-harmless and possibly even criminal form of speech when penned on the Internet.

Wisconsin prosecutors charged another man with criminal libel for posting nude photographs of his estranged girlfriend on the Internet and soliciting sex partners in her name.¹⁶⁰ The man’s attorney planned to challenge the constitutionality of the statute,¹⁶¹ but the charge was ultimately dropped.¹⁶² Meanwhile, the same prosecutors investigated another case of alleged criminal libel in which “a family therapist allegedly posed as his former wife’s new husband and posted an ad on a swingers site.”¹⁶³

In 2002 in Colorado, the mayor-elect of a small town asked criminal prosecutors to investigate the former mayor, her political opponent, for allowing anonymously posted statements about the mayor-elect to remain on the former mayor’s Web site.¹⁶⁴ The anonymous post accused the mayor-elect of using illegal drugs, being fired from the city’s police department, and assisting in the theft of ammunition and drugs from an evidence locker.¹⁶⁵ After consulting with prosecutors, the mayor-elect withdrew her request that the former mayor be charged with criminal libel and the matter was dropped.¹⁶⁶

158. *Id.*

159. *Waukesha Man Charged with Defamation After Posting Comments on Web*, *supra* note 156.

160. *Id.*

161. *See Sink*, *supra* note 66.

162. MEDIA LAW RESOURCE CENTER, *supra* note 53, at 45–52.

163. *Waukesha Man Charged with Defamation After Posting Comments on Web*, *supra* note 156.

164. *Criminal Complaint Filed Against Georgetown’s Ex-Mayor*, ASSOCIATED PRESS NEWSWIRES, Apr. 4, 2002, available at Westlaw, ALLNEWSPLUS.

165. *Id.*

166. *Georgetown’s New Mayor Drops Libel Complaint Against Brooks*, ASSOCIATED PRESS NEWSWIRES, Apr. 10, 2002, available at Westlaw, ALLNEWSPLUS.

In Kansas, two journalists convicted in 2002 of seven misdemeanor counts of criminal libel for statements about a politician appealed their convictions to the Kansas Court of Appeals, which took the matter under advisement in June 2004.¹⁶⁷ That case also sparked an ultimately unsuccessful effort by some Kansas legislators to repeal the state's criminal defamation law.¹⁶⁸

IV. THE INTERNET DOES NOT JUSTIFY EXHUMING CRIMINAL LIBEL

For three hundred years in America, the advent of each successive new medium of mass communication has caused a re-examination of the availability and applicability of speech protections. The cycle began long before the United States Constitution was even adopted. The Massachusetts Legislature banned the first American newspaper, Benjamin Harris's *Publick Occurrences Both Foreign and Domestick*, after just one issue in 1690 because the publication did not have a government license.¹⁶⁹ Initially, the United States Supreme Court did not grant motion pictures any protection, based on freedom of speech or any other claimed right, against state prior restraint.¹⁷⁰ Broadcast media, radio, and television were subjected to stringent regulation, despite the First Amendment guarantees that by then had become entrenched for other forms of mediated speech.¹⁷¹ The level of speech protection to which cable television broadcasters were entitled also spawned multiple appellate court opinions.¹⁷²

167. Robert A. Cronkleton, *Libel Convictions Appealed*, KANSAS CITY STAR, June 17, 2004, at 3.

168. Emily Fredrix, *Senate Rejects Repeal of Criminal Defamation Law*, ASSOCIATED PRESS NEWSWIREs, Feb. 19, 2003, available at Westlaw, ALLNEWSPLUS.

169. Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 315 (2001). Later, Massachusetts legislators, angered at critical news coverage in the *New England Courant*, unilaterally forbade publisher James Franklin from printing anything unless he first received government approval. Unable to get relief from the legislature or the courts, James Franklin replaced himself as publisher with his 17-year old brother, Benjamin Franklin, and the *Courant* resumed publication. *Id.* at 316-17.

170. See *Mutual Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 244 (1915) ("It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion.").

171. See *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (noting that "special justifications for regulation of the broadcast media" in early cases included the scarcity of broadcast frequencies and the invasive nature of broadcasting).

172. See, e.g., *Cnty. Communications. Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981); *Preferred Communications. v. City of Los Angeles*, 13 F.3d 1327 (9th Cir. 1994) (per curiam).

Given its historical belief that "each medium of expression presents special First Amendment problems[,]"¹⁷³ the United States Supreme Court has adopted discrete speech doctrines for print media, motion pictures, broadcast media, and cable. Initially, new technologies must struggle to assert their entitlement to First Amendment protection. Professor Laurence Tribe lamented the fact that "the Constitution [has] to be reinvented with the birth of each new technology."¹⁷⁴ One scholar critiqued this "cycle of repression" by observing "censorship is the bastard child of technology" and by calling on government officials to allow the Internet to be "born free."¹⁷⁵

Certain characteristics make the Internet different from other forms of mediated communication, such as newspapers, motion pictures, broadcast television, radio, and cable television. Once the government has determined that the Internet is different than print newspapers, for example, I contend that the government must then engage in a two-step process before treating Internet speech differently than print speech: first, the government must determine that the unique characteristics of the Internet closely relate to the government's justification for regulating Internet speech;¹⁷⁶ second, the government must ensure that the means chosen to regulate speech on the Internet are narrowly tailored to serve the asserted governmental interest.¹⁷⁷ Absent a close relationship and narrow tailoring, the government may not restrict any more speech on the Internet than it could restrict in a print newspaper.¹⁷⁸

173. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

174. Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247, 266 (1994) (quoting Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, Keynote Address at the First Conference on Computers, Freedom & Privacy (Mar. 26, 1991)).

175. Corn-Revere, *supra* note 174, at 264, 341.

176. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (holding that, in the context of the takings clause of the Fifth Amendment, a local land-use permit could not be conditioned on a concession by the landowner that was unrelated to the government's justification for the land-use regulation); see also Corn-Revere, *supra* note 174, at 311 ("Justice Scalia wrote [in *Nollan*] that while the state could forbid 'shouting fire in a crowded theater,' it could not 'grant dispensations to those willing to contribute \$100 to the state treasury.' In other words, there must be an 'essential nexus' between the government's use of its authority and the problem to be solved.").

177. Corn-Revere, *supra* note 174, at 311-14.

178. This test is used widely by courts when government engages in content-based regulation of speech (i.e. regulation that targets speech for its message):

A content-based limitation on speech will be upheld only where the state demonstrates that the limitation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . This test involves three

In the context of criminal prosecution of speakers for alleged libels, the government's interests since the days of the English Star Chamber have been to prevent breaches of the peace and to prevent expression of criticism that could lead to revolution.¹⁷⁹ This article assumes that the government's interests in preventing breaches of the peace and in preventing criticism that could lead to revolution are significant.¹⁸⁰ Before the government can restrict speech on the Internet that would not be restricted in another medium, however, the government must first demonstrate that the test outlined above for medium-based regulation is satisfied. In applying the test, I examine the following unique characteristics of the Internet: decentralization, anonymity, a counter-cultural character, speed, low barriers to entry, long shelf life, and wide reach.

A. Decentralized Control and Anonymity

No one owns the Internet, and those who post and send things on the Internet do not have to identify themselves. Perhaps more than any other characteristic, the decentralized nature and anonymity of the Internet distinguish it from other communications media. As a distributed network, the Internet has no central control point, but rather "is comprised of an interconnected web of 'host' computers, each of which can be accessed from virtually any point on the network."¹⁸¹ It has been suggested that the Cold War warriors who created early versions of the new medium in the 1960s wanted to prevent total disruption of communication in the event of a conventional or nuclear attack.¹⁸² The diffuse nature of the Internet can lead to the belief that "anything goes," and that the Internet is a lawless haven for conspirators and terrorists.¹⁸³ While the Internet is

distinct inquiries: (1) whether the interests asserted by the state are compelling; (2) whether the limitation is necessary to further those interests; and (3) whether the limitation is narrowly drawn to achieve those interests.

Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library, 24 F. Supp. 2d 552, 564-65 (E.D. Va. 1998) (internal quotations and citations omitted).

179. See *supra* note 19 and accompanying text.

180. Corn-Revere, *supra* note 174, at 308 ("[P]resumption would disfavor regulation unless the government could demonstrate that its chosen means were narrowly drawn to serve a significant end.") (emphasis added).

181. Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, FCC OFFICE OF POLICY & PLANNING WORKING PAPER SERIES 29 (1997) (quoted in JERRY KANG, COMMUNICATIONS LAW AND POLICY 242 (2001)).

182. DAVID B. WHITTLE, CYBERSPACE: THE HUMAN DIMENSION 13 (1997).

183. See Kenneth J. Brown, *Assessing the Legitimacy of Governmental Regulation of Modern Speech Aimed at Social Reform: The Importance of Hindsight and Causation*, 10 WM. & MARY BILL RTS. J. 459 (2002) (advocating that government re-assess the imminent lawless

more interactive than virtually any other mass communication medium, the Internet can also be the most impersonal of all media.¹⁸⁴

The decentralization and anonymity of the Internet might cause some to believe that criminal libel should be regulated more stringently online than offline. Anonymity poses a problem for the traditional "marketplace of ideas" because the recipient, not knowing the author's identity, has a difficult time "evaluating the quality and significance of the writing."¹⁸⁵ In the Ian Lake incident, residents of Beaver County overreacted in part because they did not know who had created the Web pages in question, and they apparently feared that the caustic critic might also be a killer. Similarly, decentralization could be the basis for some officials' belief that Internet libels are materially different than non-Internet libels. Because there is no "single centralized point from which individual Web sites or services can be blocked from the Web[,]""¹⁸⁶ taking down an alleged libel—and pursuing its source—might prove forbidding. Also, the belief that "anything goes" on the Internet could lead Internet speakers to more freely engage in speech that threatens or incites lawless action, and that speech could be more widely and quickly received.¹⁸⁷

Decentralization and anonymity, however, are not closely enough related to the government's interests to justify medium-based regulation. Decentralization does not in practice prevent the government from serving its interests in preventing breaches of the peace and revolution. Internet Service Providers control at least their portion of the Internet. In the case of Lake, like other recent Internet criminal libel defendants, law enforcement authorities subpoenaed an ISP and received a response almost immediately.¹⁸⁸ If proven, the assertion that the Internet is a haven for anti-government types might be closely related to the government's interests in preventing breaches of the peace and revolution. However, a government regulatory regime aimed at controlling Internet speech in order to prevent

action test of *Brandenburg v. Ohio*, 395 U.S. 444 (1969) because the Internet permits speakers advocating criminal action to reach wide audiences instantaneously).

184. WHITTLE, *supra* note 182, at 49 (noting that a communications medium is impersonal when its messages "[o]riginate from a source without the individual awareness of the recipient").

185. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 n.5 (1995).

186. *ACLU v. Reno*, 929 F. Supp. 824, 838 (E.D. Pa. 1996), *aff'd by Reno v. ACLU*, 521 U.S. 844 (1997).

187. See Brown, *supra* note 183.

188. See *supra* note 103 and accompanying text.

physical conflict would almost certainly not be narrowly tailored. Because “the content on the Internet is as diverse as human thought[,]”¹⁸⁹ regulating the entire Internet in order to target anti-government types will also result in the regulation of legitimate, non-violent protest groups and social movement organizations.¹⁹⁰

Anonymity is not closely related to the government’s interest in prosecuting Internet criminal libels. Anonymity has long been a tradition of our nation’s system of free expression. Mark Twain and O. Henry are both pseudonyms for writers who preferred not to use their real names,¹⁹¹ and anonymous written communication has long been an integral part of self-governing societies.¹⁹² Fear of retaliation or ostracism, in Lake’s case, was a plausible reason not to attach his name to his comments.¹⁹³ In the United States, at least, “the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.”¹⁹⁴

B. Low Entry Barriers and Wide Reach

The Internet makes the equivalent of a printing press available to almost anyone for a fraction of the cost.¹⁹⁵ In doing so, the Internet makes reaching a large and widespread audience relatively easy to do. However, economic barriers are not the only things the Internet breaks down; the Internet also allows writers to avoid the editorial controls typically in place before publication.¹⁹⁶ Additionally, the Internet is unlike traditional print or broadcast media in that messages can have a long shelf life—an Internet message can circulate via e-

189. *Reno*, 521 U.S. at 870 (1997) (citation omitted).

190. See Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119, 125 (2001) (noting the presence on the Internet of organized groups focusing on homosexual rights, disability rights, environmentalism, and property rights, among others).

191. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341 n.4 (1995).

192. *Talley v. California*, 362 U.S. 60, 64 (1960).

193. *McIntyre*, 514 U.S. at 341–42 (“Despite readers’ curiosity and the public’s interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.”).

194. *Id.* at 342.

195. See Kreimer, *supra* note 190, at 124 (“Access to the Internet lowers the cost of producing and disseminating information and argument, and hence the capital required to enter public dialogue.”).

196. *Id.* at 126 (“The Web allows insurgent groups to make available a volume of information that could not conceivably have been carried by national media outlets.”).

mail or remain posted somewhere even long after the message's creator has tried to retract it.¹⁹⁷

Among all the characteristics of the Internet, however, the reduced barriers, wide reach, long shelf life, and instantaneous nature of the Internet are the least likely to justify medium-based regulation. A speaker who uses the Internet should not be penalized because his chosen medium is effective in that it reaches many people over a long period of time. If the wide reach and long shelf life of the Internet are relevant at all in a defamation action, they speak to damages and not injury. In a political system where "it is hazardous to discourage thought, hope, and imagination[,]” and where the preferred response to speech with which one disagrees is to express one's own point of view rather than trying to suppress someone else's,¹⁹⁸ the Internet not only lowers barriers and widens the reach of alleged libels, but also does the same for the responses of those who were allegedly libeled. Scholars have suggested that, in light of the Internet's facilitation of responses to alleged libels, civil defamation law should be recast to require "that the opportunity for reply be taken advantage of in lieu of monetary compensation."¹⁹⁹ Likewise, in the context of criminal libel, replies should replace prosecutions.²⁰⁰

V. CONCLUSION

Criminal libel is an anachronistic doctrine that was in decline before certain state prosecutors began reviving it in the context of Internet speech. Those states' attempts, however, to apply the law of criminal libel to the Internet—without prosecuting the thousands of criminal libels that occur daily in the non-Internet world—fail the test for medium-based regulation. States may not regulate speech on the Internet differently than they regulate non-Internet speech without

197. See Gribbin, *supra* note 145 (quoting a New York lawyer who said that Internet retractions are largely ineffective because "[i]f I send you something, and you delete and trash it, it's still on the Internet somewhere").

198. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating "the fitting remedy for evil counsels is good ones" and thereby demonstrating the commitment to encouraging those who disagree with certain speech to answer with their own speech rather than trying to suppress the original speech).

199. David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1382 (1996).

200. An additional reason for not punishing libel on the Internet as a crime is that the Internet breaks down geographic boundaries that provide legitimacy and notice for a state's criminal laws. See *id.* at 1369–70. For example, a resident of California who publishes an Internet message from California that is accessible in Utah would not expect his conduct to be regulated by Utah's criminal libel law. See *id.*

first showing that the unique characteristics of the Internet are closely related to the state's interest. In the case of criminal libel, the states seek to prevent breaches of the peace and to prevent criticism of the government. Those interests are not closely related to the characteristics—decentralization, anonymity, counter-cultural character, speed, low entry barriers, long shelf life, and wide reach—that make the Internet unique.