



# **Criminal Libel in the Land of the First Amendment**

**Special Report for the International Press Institute  
By A. Jay Wagner and Anthony L. Fargo**



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## Table of Contents

<b>I. Introduction</b>	...	4
<b>II. Origins in British Common Law</b>	...	6
<b>III. American Variations:</b>		
The John Peter Zenger Trial and Its Aftermath	...	8
<b>IV. The Long Road to Seditious Libel's Demise</b>	...	13
<b>V. Criminal Libel Today</b>	...	27
<b>VI. Conclusion</b>	...	34

**The International Press Institute (IPI)** is the world's oldest organisation dedicated to promoting the right to information. We are a global network of journalists and editors working to safeguard freedom of the press and to promote the free circulation of news and information as well as ethics and professionalism in the practice of journalism. Based in Vienna, IPI is a global organisation with members in more than 120 countries. It is a politically neutral body and holds consultative status at the United Nations and the Council of Europe.

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## I. Introduction

In 2003, University of Northern Colorado student Thomas Mink began publishing a blog titled “The Howling Pig.” It was his intent to poke fun at the school, the campus, and those affiliated through the Website. But he was cautious as well, stating early in the blog’s existence, “While we are currently aiming for a combination of satire and commentary, we will try to avoid publishing anything blatantly lawsuit-worthy.”<sup>1</sup>

Shortly thereafter, he posted a computer-altered image of well-known professor Junius Peake in K.I.S.S.-style makeup and a mustache, christening the photo “Junius Puke” and naming him the site’s mascot. Ever careful, Mink posted below the picture that Peake was “an outstanding member of the community as well as asset to the Monfort School of Business where he teaches about microstructure” and that Peake and Puke should not be confused.

Professor Peake failed to see the humor and alerted the Greeley, Colorado, police, who turned up at Mink’s residence with a search warrant and confiscated his computer and other accessories related to their investigation into a possible charge of felony criminal libel. U.S. District Court Judge Lewis Babcock quickly threw the case out, stating, “Even our colonialists of America engaged in this type of speech, with great lust and robustness.”<sup>2</sup>

The case would eventually cost Weld County nearly a half-million dollars in a settlement for violating Mink’s constitutional rights and would lead the Colorado Legislature to repeal the state’s century-old criminal libel statute.<sup>3</sup> The repeal bill’s sponsor, State Sen. Greg Brophy, said Colorado was looking to become the latest state to

curtail the law of criminal libel because it “tramples on the First Amendment rights of people.”<sup>4</sup>

It is cases like *Mink*'s that led American media rights scholar Leonard Levy to describe the U.S. crime of libel as “an accordion-like concept, expandable or contractible at the whim of judges.”<sup>5</sup> Since its early 17th century establishment in British common law, criminal libel has seen its pliability tested, having been brandished by mandarins as a shield against unflattering remarks, as a weapon to staunch insults and fighting, utilized as an avenue for controlling heresy and obscenity, and, most recently, as a damper on free speech. The ambiguity of the law has facilitated both its longevity and controversial status. Since its inception, public officials have capitalized on its malleability by adapting it to their contemporary needs, primarily to stem dissent. The myriad and capricious uses have also left legal scholars perplexed.

This report will trace the labyrinthine history of criminal libel in the United States, from its dubious origins in a British court to its peculiar contemporary status as a broad, perhaps redundant, and little-used law. A particular focus will be given to the division of libel law and its application along two differing tracks: the “best men” theory, in which libel charges are used to quell dissent and sustain power; and a public peace theory, in which criminal libel law is used to dispel agitation and argument among private citizens.

## II. Origins in British Common Law

King Henry VII founded the Court of the Star Chamber in the 15th century. From its inception, it was used as a forum for expediting a backlog of cases, both criminal and civil. The king decided which cases would be heard by his advisers and other common law judges. The Star Chamber was expected to quickly churn through its case log. Hearings were spartan, with no jury, no witnesses, and no right of appeal. Over time it evolved into the court for hearing cases against citizens wielding such power and influence that ordinary courts were incapable of convicting them. In the 16th century, monarchs began abusing the Star Chamber as an arena for handling private grievances, and it quickly became infamous for its arbitrariness, gaining a reputation as a method of circumventing due process.<sup>6</sup>

In 1606, the Star Chamber heard a case charging a British man with “*Libellis Famosis*” for publishing poems satirizing two Archbishops of Canterbury. Sir Edward Coke, a lawyer, Member of Parliament, and judge of great renown, prosecuted the defendant, and in his notes records what became the first known libel law in the Western canon. He states that the libeling of a private man “deserveth a severe punishment, for although the Libel be made against one, yet it inciteth all those of the same family, kindred, or society to revenge, and so may be the cause of *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience.” But Coke finds particular grievance with the libel of a public figure: “(I)t is a greater offence; for it concerneth not onely the breach of the peace, but also the scandal of government; for what greater scandal of government can there be than to have

corrupt or wicked Magistrates to be appointed and constituted by the King to govern his Subjects under him?”<sup>7</sup>

Thus a trajectory of criminal libel was set, with Coke noting the preferred position of the public official over the common man. Research has shown that since the law’s inception, there has been frequent application of criminal libel as adaptable to serve and suit the purpose of the “best men” of the prevailing society,<sup>8</sup> though not without negotiating the chasm between libel’s British common law past and the U.S. insistence on free speech at all costs.

Coke’s description of the law of libel later found its way into William Blackstone’s *Commentaries on the Laws of England*, published in the 1760s in an attempt to consolidate the common law of Great Britain in one place. Blackstone borrowed heavily from Coke but put more emphasis on protecting the peace than on protecting public officials from criticism. He focused on the illegality of “malicious defamations of any person ... made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed.”<sup>9</sup>

Blackstone’s interpretation of English common law was influential in both Great Britain and its colonies and territories. But in what would later become the United States, a widely publicized case in a colonial court helped change the role of truth as a defense to both criminal charges and civil actions.

### **III. American Variations: The John Peter Zenger Trial and Its Aftermath**

In 1733, newspaper publisher John Peter Zenger ran a string of articles critical of the New York Governor William Cosby, a recently-appointed British noble.<sup>10</sup> The governor took offense to the pseudonymously-published criticisms that Zenger's backers penned and charged Zenger with libel. During the trial, the prosecution attempted to demonstrate the harm of such public denigration by pleading the cause of public tranquility, announcing:

“(W)hen all order and government is endeavored to be trampled on, and reflections are cast upon persons of all degrees, must not these things end in sedition, if not timely prevented? If you, gentlemen, do not interpose, consider whether the ill consequences that may arise from any disturbances of the public peace may not in part lie at your door?”<sup>11</sup>

After Zenger's lawyers were disbarred for their insolence toward a judge sympathetic to the crown, illustrious American lawyer Andrew Hamilton took to defending him in the high-profile case. Hamilton acknowledged that Zenger had printed the insulting tracts, but argued that these publications were not a crime as they were facts. To not air such criticisms and allow such an unjust administration to continue unabated would have been more traitorous than libel, he said. The jury agreed, and after a brief deliberation Zenger was found not guilty on all charges and returned to publishing his newspaper.<sup>12</sup>

While, ultimately, the case's fame is due to the general free press implications, the establishment of truth as a defense for a libel allegation was monumental. Though the case didn't result in any statutory changes, Hamilton's successful argument defending the right to criticize government was strongly influential and set a standard for free speech



ideals in the United States. Truth as a defense allowed for government critique and informed officials and the public alike that libel was going to be held to a different standard in the colonies, whereas in Britain, truth only intensified the wrong of libel as it could not be refuted. As Levy said about the outcome in the United States, “The law of seditious libel simply no longer had any meaning.”<sup>13</sup> This was a major turning point as seditious libel, an arm of criminal libel specifically used to quash critiques of men in positions of power, was seemingly publicly stripped of its efficacy when the jury found in Zenger’s favor.

The *Zenger* Case is also noteworthy because of the shift in Cosby’s plea. He suggests the criticism of authority will result in civilian disorder, thus tying the protection of best men with public peace. In the past figures of power claimed that personal criticisms alone justified criminal libel, but Cosby’s insistence on possible chaos showed a populist concern unique to the United States’ fledgling principles.

After the United States gained its independence and adopted a new Constitution, the first Congress approved a series of amendments that were ratified by the states in 1791. The ten amendments ratified, known collectively as the Bill of Rights, included the First Amendment, which stated that “Congress shall make no law ... abridging the freedom of speech, or of the press. ...”<sup>14</sup> But did “the freedom of speech” mean freedom as Blackstone defined it, or something different?

The answer is not completely clear. The debates over the passage of the amendments in the First Congress, to the extent that they exist, indicate little debate over the decision to protect speech and press rights. More enlightening, perhaps, are state constitutions adopted in the late 18th and early 19th centuries. Many had specific

provisions in regard to libel that included allowing truth as a defense and allowing juries to determine both the facts and law of a case, in contrast to the British procedure of allowing juries only to determine whether a defendant had published the offending statements.<sup>15</sup>

### **The Sedition Act of 1798**

The Zenger trial might have unsettled the foundation for seditious libel, but the law would continue to be used by public officials when expedient to their causes. Only seven years after the First Amendment was ratified, President John Adams signed the Alien and Sedition Acts into effect. The Acts comprised four laws, two making it easier to deport non-citizens, one raising the bar for becoming a citizen, and one that outlawed disparaging the government.<sup>16</sup> The Acts were a response to a politically-tumultuous time and were extremely controversial.

A young United States had recently witnessed the effects of a populist uprising via the French Revolution and at home a rancorous divide was growing between the Democratic-Republicans and the Federalists. President Adams and other Federalists were intent on eliminating government criticism. The Sedition Act barred “scandalous and malicious writing or writings against the government of the United States ... with intent to defame the said government ... or to bring them into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.”<sup>17</sup> However, the Sedition Act also allowed defendants to plead truth as a defense and empowered juries to “determine the law and the fact,” in a break from British tradition and in line with the state constitutions.<sup>18</sup>

The leading Democratic-Republicans Thomas Jefferson and James Madison quickly reacted to the Alien and Sedition Acts by penning strongly-worded attacks that they persuaded the legislatures of Kentucky and Virginia to pass as resolutions. In the Kentucky and Virginia Resolutions they called for the Sedition Act's abolition, with Jefferson citing First Amendment protections and demanding recognition of "the freedom of religion, of speech, and of the press, insomuch that whatever violated either throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals."<sup>19</sup> Scholars today find Jefferson's furor and dissension – he was the sitting vice president – to be outlandish and likely treasonous. The Resolutions and their anti-Federalist brethren are seen as a seminally fractious moment in the country.<sup>20</sup>

Around this time Jefferson expressed his desire to do away with criminal libel law in favor of civil litigation. In a letter to Attorney General Levi Lincoln, he wrote, "While a full range is proper for actions by individuals, either private or public, for slanders affecting them, I would wish much to see the experiment tried of getting along without public prosecutions for libels."<sup>21</sup>

The 1800 election of Jefferson as president and an influx of Democratic-Republicans in Congress signaled the end of the Sedition Act of 1798. The law expired in 1801 with Jefferson pardoning anyone punished under the act and the House returning any fines collected. The Alien and Sedition Acts have been regarded as one of the great failures of U.S. policy. In a 1969 opinion, Supreme Court Justice William Douglas called it "one of our sorriest chapters; and I had thought we had done with them forever. ...

Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution.”<sup>22</sup>

#### **IV. The Long Road to Seditious Libel's Demise**

The debate over the Sedition Act of 1798 did not settle the debate over what the First Amendment meant and whether seditious libel remained a potential weapon for officials seeking to silence critics. The Supreme Court would not explicitly rule until 1925 that the First Amendment barred state governments as well as the federal government from infringing free expression rights.<sup>23</sup> One history of 19th century press law has noted that editors who faced state court criminal or civil libel actions or contempt citations for commenting on pending cases, known as “contempt by publication,” did not invoke the First Amendment as a defense. Instead, they argued that professional obligations to act as a “watchdog” over government justified their publications.<sup>24</sup>

Another obstacle for advocates of free expression was the “bad tendency” test. When the courts did take up issues related to free expression in the period between the Sedition Act's expiration in 1801 and World War I, the courts most commonly judged whether government suppression was appropriate by asking whether the speech in question had a tendency to lead to some potential evil that authorities had a right to prevent by suppressing the speech. According to historian David Rabban, “(F)ew prewar (World War I) cases analyzed free speech issues in any depth. The public commentary on ... free speech fights was generally more thoughtful than most judicial opinions of that period. In fact, the bad tendency was the predominant judicial approach in scores of prewar cases affecting speech.”<sup>25</sup>

A classic example of the use of the bad tendency test, as well as an example of judicial approval of contempt by publication actions, was Supreme Court Justice Oliver

Wendell Holmes's majority opinion in *Patterson v. Colorado*,<sup>26</sup> one of the rare free expression cases to make it to the Supreme Court prior to World War I.

Thomas Patterson was a U.S. senator and a newspaper publisher who printed a number of cartoons and opinion pieces critical of the Colorado Supreme Court. He was charged with contempt of court because the state attorney general believed the editorials were an attempt to influence pending state supreme court cases.

Justice Holmes's opinion for the Court in *Patterson* was noteworthy for rejecting Patterson's claim of truth as a defense and for upholding the bad tendency test. Justice Holmes compared contempt by publication to libel and determined that the objective of libel jurisprudence is not to protect public officials, but to maintain public order. He stated:

The main purpose of such constitutional provisions [protecting free speech] is 'to prevent all such previous restraints upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all.<sup>27</sup>

Justice Holmes explained that the truth did not offset the motives of the defendant, and in this case it was decided that Sen. Patterson's intent was to influence an on-going trial. Justice Holmes found Sen. Patterson's intentions "tend to obstruct the administration of justice" and "tending toward interference."<sup>28</sup> This endorsement of the bad tendency test would carry over into other government attempts to suppress unpopular speech.

## **Sedition Rises Again**

The eloquent Justice Holmes would continue to play a pivotal role in the development of U.S. free speech law, so much so that his writing on the subject has been considered foundational and is frequently cited today.<sup>29</sup> Somewhat surprisingly, given his opinion in *Patterson* that was a prime example of First Amendment “bad tendency” orthodoxy at the time, Justice Holmes would become a symbol of expanding protection for free speech when the word “sedition” found its way into American law again.

Shortly after the United States’ entry into World War I, President Woodrow Wilson signed into law the Espionage Act of 1917 as a method for quelling disloyalty during U.S. wartime activities. The Act outlawed support of rival countries, campaigning against the military and its recruiting, and activities interfering with wartime efforts. It would inhibit debate on public policy, limiting citizens’ expressions and right to criticize the war; however, the wide-ranging law did not obstruct press rights. A contentious debate in Congress removed a press censorship provision from the act by a single vote. The fear among members of Congress was that this would constitute prior restraint, and protection from prior restraint was the contemporary ideal for free speech. Though there were similar concerns with the restrictions on the public’s right to expression, the urgency of the wartime efforts trumped concerns about the temporary infringement of free speech rights.

In 1918, Congress passed an amendment to the Espionage Act that would come to be called the Sedition Act of 1918. President Wilson enacted the amendment in an effort to strengthen the original language, explicitly prohibiting criticisms of wartime decisions or anything that could be deemed an impediment to the U.S. war effort and strengthening

punishment for infractions. Section 3 states, “Whoever, when the United States is at war...shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States ... shall be punished.”<sup>30</sup>

The Espionage Act of 1917, with the inclusion of the Sedition Act, was responsible for more than 1,500 cases prosecuted and more than 1,000 people convicted.<sup>31</sup> In 1919, the Supreme Court would hear a trio of these cases, *Schenck v. United States*, *Abrams v. United States*, and *Debs v. United States*, which would prove to be landmark decisions in free expression.

In *Schenck*, Secretary of the Socialist Party of America Charles Schenck was accused of mailing literature with anti-draft messages such as, "Do not submit to intimidation," "Assert your rights," and "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain."<sup>32</sup> The Supreme Court unanimously upheld Schenck's Espionage Act conviction, with Justice Holmes writing the opinion. In what would prove to be a pivotal passage, Justice Holmes wrote:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the United States Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.<sup>33</sup>

The phrase “clear and present danger” in the Court’s opinion would later take on added significance, but for now it did not provide any greater protection to unpopular



speakers than the bad tendency test. This became clear one week later when the Court unanimously upheld the conviction of Eugene V. Debs, leader of the Socialist Party of America, for sedition because he opposed World War I and the military draft in his public speeches.<sup>34</sup>

In the summer break between terms of the Supreme Court in 1919, Justice Holmes read a law review article by Zechariah Chafee Jr. Chafee argued that the “clear and present danger” test, rather than being an extension of the bad tendency test, had the potential to be more speech-protective than the Court’s earlier jurisprudence.<sup>35</sup> Historians have noted that Justice Holmes met with Chafee that summer and also with other friends who tried to persuade him that the Supreme Court should take a more active stance in protecting freedom of expression and other civil liberties.<sup>36</sup>

Apparently it worked. In *Abrams*, the defendants, a group of Russian émigrés, had been throwing leaflets containing pro-Soviet messages from New York City towers.<sup>37</sup> The fliers pleaded with citizens to disregard U.S. government war propaganda and to allow the Russian Revolution to continue its course. The Court would come to a 7-2 decision against the pamphleteers, with Justices Holmes and Louis Brandeis dissenting.

The opinion from Justice John Hessin Clark reverted to bad tendency, declaring, “the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war ... and, the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war.”<sup>38</sup>

In the dissent, Justice Holmes showed a newfound appreciation for critique of government and the free exchange of ideas, stating:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. ... But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas.<sup>39</sup>

Justices Holmes and Brandeis would continue to write powerful opinions in defense of free expression and challenging the government's right to suppress it, but they were usually in the minority. For his part, Justice Brandeis is perhaps best remembered for his concurrence in 1927's *Whitney v. California*.<sup>40</sup> Justice Brandeis expressed faith in the power of reason and said the Framers of the Constitution shared that faith. The Framers knew that repression bred hatred and instability and that the remedy for "falsehood and fallacies" was "more speech, not enforced silence."<sup>41</sup>

Despite their strong and eloquent words, Justice Holmes and Brandeis did not directly change the course of First Amendment law during their years on the bench. When change came, it was signaled by a footnote in a case involving the regulation of milk products.

Historians have suggested that one reason for the Supreme Court's indifference to free expression cases in late 1800s and early 1900s was that the majority of justices believed that the Court's primary purpose was to protect economic and property rights. As Mark Graber has put it, the Court believed that if citizens were secure in their economic rights, they would then have the resources and leisure time necessary to engage in politics and participate in the marketplace of ideas.<sup>42</sup> One manifestation of this

philosophy was the Court's tendency to strike down federal and state laws aimed at regulating the economic marketplace on the theory that workers and employers should be free to trade labor for capital as they saw fit. In addition, conservative attitudes in favor of free markets and against "radical" speech hardened after the violent Carnegie Steel Works strike in Pennsylvania in 1892.<sup>43</sup>

The 1929 stock market crash and the subsequent Great Depression no doubt shook the faith of some justices in unregulated free markets. A more immediate threat came after President Franklin Roosevelt's re-election in 1936 and the strengthening of his Democratic Party's majority in Congress. President Roosevelt, tired of the Court repeatedly finding New Deal economic legislation unconstitutional, proposed that Congress pass a law increasing the size of the Supreme Court from nine to fifteen justices, essentially allowing him to appoint his own majority.<sup>44</sup> Whether out of a sincere change in philosophy or an attempt to protect its institutional integrity, the Court began to take a less strident tone toward legislation designed to aid the country's economic recovery.<sup>45</sup>

The Court had no intention of making itself irrelevant, and in 1938 it quietly announced a change in emphasis. In *United States v. Carolene Products Co.*,<sup>46</sup> the majority upheld a federal law regulating the content of milk products. The Court also announced that henceforth, it would uphold legislation affecting economic transactions unless it was shown that there was no "rational basis" for the legislation.<sup>47</sup> In a footnote, Justice Harlan Fiske Stone's opinion for the Court suggested that it might be necessary for the Court to apply more exacting scrutiny to laws that restrained citizens' ability to participate in the political process.<sup>48</sup> Such restraints, Justice Stone wrote, included

restraints on the “dissemination of information” and were suspect because they interfered with citizens’ ability to seek the defeat or repeal of unpopular or unwise legislation.<sup>49</sup>

It would be simplistic and inaccurate to suggest that a footnote in a case about milk magically transformed First Amendment jurisprudence on the Supreme Court. A few years later, the Court unanimously upheld a New Hampshire man’s conviction under a state law making it a crime to engage in speech that was likely to spur others to violence.<sup>50</sup> The Court noted that “fighting words” were, along with libel, obscenity, and false advertising, among the categories of speech that were not protected by the First Amendment.<sup>51</sup> And it would take until 1957 for the Court to find that the government could not imprison people merely for advocating Communism without proof that the advocacy was more than just talk.<sup>52</sup>

But there were also signs in the decade after the *Carolene Products* footnote that the bad tendency test was outliving its usefulness. In a series of cases in the 1940s, the Court effectively did away with contempt by publication.<sup>53</sup> As the Court noted in one of the cases, even distorted and inaccurate statements should not be enough to interfere with the administration of justice unless the attacks were aimed at a “judge of less than ordinary fortitude without friends or support.”<sup>54</sup>

The heightened interest in civil liberties, including free expression, during this period also likely contributed to a flowering of scholarly attention to freedom of speech, most notably in the work of Alexander Meiklejohn. In his 1948 book *Free Speech and its Relation to Self-Government*, he called for absolute free speech, a necessity corollary to and on par in import with voting itself. He stated:

What is essential is not that everyone shall speak, but that everything worth saying shall be said. To this end, for example, it may be arranged

that each of the known conflicting points of view shall have, and shall be limited to, an assigned share of the time available. But however it be arranged, the vital point, as stated negatively, is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. And this means that though citizens may, on other grounds, be barred from speaking, they may not be barred because their views are thought to be false or dangerous. No plan of action shall be outlawed because someone in control thinks it unwise, unfair, un-American. No speaker may be declared 'out of order' because we disagree with what he intends to say. And the reason for this equality of status in the field of ideas lies deep in the very foundations of the self-governing process. When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American.<sup>55</sup>

Meiklejohn's thoughts on free speech would be particularly influential in the Supreme Court's most important First Amendment case of the 20th Century, which would forever alter criminal as well as civil libel.

### ***Sullivan, Garrison, and Actual Malice***

While it would be tempting to draw a straight upward-sloping line from Justice Holmes's *Abrams* dissent through the contempt cases to *New York Times v. Sullivan* to denote a smooth expansion of the right to free expression, such a line would not be accurate. There would continue to be ambiguity on the path to *Sullivan*, perhaps nowhere more obvious in regard to criminal libel than the 1952 decision in *Beauharnais v. Illinois*.<sup>56</sup>

In *Beauharnais*, the defendant was campaigning against racial integration in Chicago using overtly racist messages, arguing that "rapes, robberies, knives, guns and marijuana" would be the result of the city's desegregation measures.<sup>57</sup> *Beauharnais* was convicted of criminal libel for publishing pamphlets attacking "citizens of any race, color, creed, or religion"<sup>58</sup> as such publications would lead to a breach of peace. The Supreme

Court upheld Illinois's decision, with Justice Felix Frankfurter finding that the libel of a group, or hate speech, was not constitutionally protected. Frankfurter determined, "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger.'"<sup>59</sup>

Although *Beauharnais* had the potential to enshrine criminal libel as outside of First Amendment consideration, it in fact turned out to be a fairly small bump in the road toward recognizing libel law as a threat to a robust public sphere.

An early sign of the declining support for criminal libel was apparent in 1962's Model Penal Code, an effort by the American Law Institute to suggest universal standards for U.S. criminal law. The Code said damningly and presciently on the status of criminal libel law:

It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. . . . It seems evident that personal calumny falls in neither of these classes in the USA, that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country.<sup>60</sup>

Only two years later, much of free speech precedent was turned on its head with the landmark speech case *New York Times v. Sullivan*.<sup>61</sup>

During the height of the civil rights movement, the *New York Times* ran a full-page ad that sought funding for the defense of civil rights leader the Rev. Martin Luther King, Jr. The ad suggested mistreatment of King at the hands of Montgomery, Alabama police and stated he had been arrested seven times, when he had only been arrested four times.<sup>62</sup> The ad also made other unverified claims, including mistreatment of protesting students at Alabama State College.

L.B. Sullivan, Montgomery's public safety commissioner, took umbrage to the claims, and though never explicitly named in the ad, sued the *New York Times* for libel. After the *Times* was found liable in an Alabama court for \$500,000, the Supreme Court ruled unanimously against Sullivan, finding that the First Amendment provided a safeguard for freedom of speech. More importantly, the court ruled that actual malice – knowledge that the defamatory statement was false or made with reckless disregard of whether it was false or not – was not apparent in the case.

Justice William Brennan covered a great deal of ground in his opinion for the unanimous Court. In addition to establishing the milestone definition of actual malice, he broadly defined the importance of free speech in the United States. “Debate on public issues should be uninhibited, robust, and wide-open, and it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . . First Amendment protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.”<sup>63</sup>

He then related the notion to the case at hand. “The rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First Amendment and Fourteenth Amendment in a libel action brought by a public official against critics of his official conduct.”<sup>64</sup>

Justice Brennan then imputed the necessity of government criticism. “Prosecution for libel on government has no place in the American system of jurisprudence, and this rule cannot be sidestepped by transmuted criticism of government, however impersonal

it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed.”<sup>65</sup>

*Sullivan* also conclusively put to rest the Sedition Act of 1798, with Justice Brennan attacking the law as “a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image,”<sup>66</sup> and adding that it “first crystallized a national awareness of the central meaning of the First Amendment.”<sup>67</sup>

Finally, *Sullivan* shifted the responsibility for proving libel to the plaintiff, with Justice Brennan stating, “The First Amendment does not recognize an exception for any test of truth, whether administered by judges, juries, or administrative officials, and especially not one that puts the burden of proving truth on the speaker.”<sup>68</sup>

The crux of the decision, though, was the foundation of the actual malice standard. While it had been adopted by a number of state courts, the Supreme Court ruling applied it federally and overhauled the groundwork for libel law. The burden of proof was firmly shifted to the plaintiff and required convincing evidence that the libeler intended to defame the libelee when the plaintiff was a public official.

Shortly after the *Sullivan* decision, the Supreme Court used similar logic in overturning a conviction for criminal libel. Jim Garrison, a district attorney for Orleans Parish, Louisiana, was charged with criminal defamation. Garrison made a number of disparaging remarks about local judges’ professional abilities at a press conference, accusing them of “inefficiency, laziness, and excessive vacations”<sup>69</sup> and hampering his capacity to perform his job. Garrison was convicted before ultimately having his case heard by the U.S. Supreme Court, where the previous decisions were overturned. The



Court struck down the Louisiana criminal defamation statute, finding that it did not allow for truth as a defense and lacked the actual malice standard.

In his concurrence, Justice Hugo Black said, “Recently in *New York Times Co. v. Sullivan*, a majority of the Court held that criticism of an official for official conduct was protected from state civil libel laws by the First and Fourteenth Amendments, unless there was proof of actual malice. We now hold that proof of actual malice is relevant to seditious libel – that seditious libel will lie for a knowingly false statement or one made with reckless disregard of the truth.”<sup>70</sup>

Justice Black also discussed the diminishing necessity of criminal libel legislation as a means of safeguarding public order. “Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that ‘. . . under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation.’”<sup>71</sup>

The *Garrison v. Louisiana* decision was a major step forward in criminal libel law as it applied the actual malice standard of tort law established in *Sullivan* to criminal law, limiting government power to control criticism.

*Ashton v. Kentucky*<sup>72</sup> would continue the tide of questioning the constitutionality of criminal libel. During a bitter coal miners’ strike in Hazard County, Kentucky, Steve Ashton circulated a number of pamphlets harshly accusing local authorities of collusion and other illegal and immoral behavior. He was convicted of the common law offense of criminal libel for “writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which done, is indictable.”<sup>73</sup>

As a result the Supreme Court struck down common law criminal libel, and in Justice Douglas's opinion the undefined nature of the law was cited. "The common-law crime of libel is unconstitutionally vague, and should not be enforced, in a jurisdiction in which no case has redefined the crime in understandable terms. Vague laws in any area suffer a constitutional infirmity, and when the First Amendment rights are involved, the United States Supreme Court looks even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer; such a law must be narrowly drawn to prevent the supposed evil."<sup>74</sup>

The trend toward broadening the rights of citizens to criticize the government and its officials also led to a change in the clear and present danger test in 1969. Clarence Brandenburg, a leader of an Ohio faction of the Klu Klux Klan, invited a local television reporter to cover one of its meetings. At the rally, speakers made hateful, racist tirades, with one calling for revenge upon those oppressing the Klu Klux Klan. The tape was discovered by local law enforcement and the calls for revenge were deemed worthy of indictment under Ohio's criminal syndicalism statute. Brandenburg was convicted in Ohio and his appeal would be heard by the Supreme Court, where it was unanimously reversed. In the *per curiam* opinion, the court found the mere vague advocacy of violence protected by First Amendment rights.<sup>75</sup> In *Brandenburg v. Ohio*, the Court established the imminent lawless action standard, meaning that government officials seeking to stop speech considered dangerous would now have to prove the danger was immediate, rather than the more vague "present." The heightened standard and increased protection of free speech held for criminal libel as well, allowing for a wider berth of government criticism.

## V. Criminal Libel Today

Since the free speech agitation of the 1960s, both criminal libel cases and statutes have dwindled steadily. Fifteen U.S. states and territories have criminal libel statutes at this writing.<sup>76</sup> Many of the statutes duplicate civil defamation – in Louisiana, Montana, New Hampshire, Oklahoma, and Wisconsin – by mentioning exposure “to public hatred, contempt or ridicule” as grounds for the offense.<sup>77</sup> Oklahoma shows particular concern for the reputation of the deceased, specifically using the antiquated phrase “blacken the memory of the dead.”<sup>78</sup> Michigan, Oklahoma, and Virginia explicitly prohibit questioning a woman’s chastity (though the fine is only \$25 in Oklahoma).<sup>79</sup> Florida, Illinois, and Michigan have provisions that forbid the libeling of banks and financial institutions (the only instance of criminal libel law in Illinois).<sup>80</sup> Florida, Idaho, Illinois, Michigan, New Hampshire, North Carolina, North Dakota, Virginia, and Wisconsin list the crime as a misdemeanor. Maximum fines in these states range from \$500 to \$5,000<sup>81</sup> and maximum jail terms run from six months to one year.<sup>82</sup>

Since *Sullivan*, 41 states and territories have either significantly diminished the strength or altogether repealed their criminal libel laws.<sup>83</sup> Eight have done so since the turn of the century, with Washington, D.C., overturning its law in 2001,<sup>84</sup> Arkansas in 2005,<sup>85</sup> Utah, as a result of *I.M.L v. State of Utah*, in 2007,<sup>86</sup> Washington state in 2009,<sup>87</sup> Kansas in 2011, Colorado in 2012, Georgia in 2015, and Minnesota in 2015 as a result of an appeals court ruling.

A recent study showed that the number of criminal libel cases prosecuted or threatened with prosecution as a result of media statements has shrunk to less than three per year, which included a recent uptick as states began to grapple with the intersection of

the Internet and libel law.<sup>88</sup> Of those criminal libel cases nearly a third involved Internet publication, and a full two-thirds of these cases were the result of a personal insult, or conducive to civil litigation.<sup>89</sup> The most frequent defendant of criminal libel cases were public officials and political candidates, who were targeted in 17 percent of the cases.<sup>90</sup> Journalism professions were involved in only 13 percent of all criminal libel cases.

However, another recent study shows that criminal libel is more frequently adjudicated than most media law scholars contend. In David Pritchard's thorough investigation of criminal libel law in the state of Wisconsin, he found 61 prosecutions of the law initiated in a 16-year period.<sup>91</sup> Because the vast majority of these cases never reached appellate courts or garnered media coverage, they rarely reached public attention. Of Pritchard's 61 cases, newspapers covered only 13, while only five reached an appellate court.

One reason for the paucity of scholars' attention may be the frivolous nature of a great number of the cases. Thirty-seven of the 61, or 61 percent, of the cases in the Wisconsin study were "purely private quarrels," with a significant number of these being instances of defamation by a former lover (four specifically involve the spread of HIV/AIDS rumors). Other cases included trivial revenge scenarios, rumor mongering, libeling of competing businesses, and retaliation against a manager or former boss.

Only thirteen of the cases involved public officials. A frequent result of the cases was the pleading down of the charge to either disorderly conduct or misappropriation (because of one party posting an online profile or personal information of another party soliciting non-traditional sex).

An inordinate number of the cases also came from rural areas of the state.

Pritchard found cultural differences as an explanation, stating, “rates of personal-injury litigation (libel lawsuits, for example) tend to be lower in rural areas than elsewhere, largely because small-town culture frowns upon attempts to transform injuries into claims for monetary damages.”<sup>92</sup> He also cited criminal libel as an attractive alternative for those with limited financial resources, as a lawyer for a civil case can be prohibitively costly and “criminal libel, in contrast, costs the victims nothing and allows them to vindicate themselves in a public forum.”<sup>93</sup>

Noteworthy criminal libel cases since the turn of the century have highlighted the inconsistent application and results of the law. In 2002, David Carson and Edward Powers Jr., both disbarred attorneys and the publishers of a Kansas City, Kan.-based newspaper, *The News Observer*, were charged with criminal libel for penning a story about public officials titled “Is gossip that Marinovich lives in Johnson County true?” The story explored whether the county mayor and district judge (wife and husband) were living outside of the county in violation of county policy. *The News Observer* was a sparsely-distributed monthly paper and Website that spent the majority of its column inches criticizing local public officials. Judge Tracy Klinginsmith convicted the duo of criminal libel, fining each \$3,500 and sentencing them to a year of unsupervised probation. Judge Klinginsmith acknowledged that the case was a “test” and the controversial decision would likely have to be affirmed by a higher court. Believing the decision was politically motivated, Carson appealed the case multiple times, only to be denied at each turn.<sup>94</sup>

Another Kansas case goes to show the strange shape to which criminal libel law can be stretched. Jarrod West, a resident of Valley Center, was upset with the city over improper drainage. In an effort to provoke repairs, Parker posted a yard sign directed at City Administrator Joel Pile stating, “Dear Valley Center, I did not buy Lake Front Property! Fix this problem. That’s what I pay taxes for. P.S. Joel This Means You!”<sup>95</sup> The city charged West with criminal defamation. The case was quickly dismissed by a local court, and shortly thereafter the ACLU filed a federal suit on Parker’s behalf, winning him \$8,000 in a settlement.<sup>96</sup>

In perhaps the highest profile criminal libel case since the turn of the century, *State of Utah v. I.M.L.*, high school student Ian Lake was charged with criminal libel after publishing a Website that questioned the morals of high school classmates and accused a school staff member of being the “town drunk,” among other pejoratives. The 16-year-old’s computer was seized and he was incarcerated in a juvenile detention center for seven days. The ACLU of Utah filed a motion to dismiss the case, claiming criminal libel is unconstitutional on its face. The judge denied the motion, but recognized that the case “raises serious and substantial questions about the facial validity of Utah’s criminal libel statute, that there is some merit for the position that the statute is unconstitutional...”<sup>97</sup>

The Utah State Supreme Court would unanimously rule that the criminal libel charge was unconstitutional, finding that the law didn’t meet the actual malice standard and reasoning “that such a rule was necessary to maintain the principle that debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>98</sup> The Utah Supreme Court’s nullification of criminal libel led to the

aforementioned repeal of the Utah criminal libel law in 2007. Though the legislation aimed at repealing criminal libel in Utah received much fanfare, it did not entirely do away with the state law, only severely narrowing its use.<sup>99</sup> In fact, an iteration of the law was applied in a 2012 case (as noted below). Much like the response to *Mink v. Colorado*, waking up a dormant criminal libel law for an unusual purpose resulted in state legislators attempting to remove it from the statute books.

In an attempt to frame the immediate climate of criminal libel, here is a sampling of notable cases since the turn of the year:

- A twenty-one-year-old Massachusetts woman was charged with criminal libel for accusing her boss at a coffee shop of spitting in police officers' food and drinks. A police investigation determined that the allegations were false and motivated by the firing of the woman's friend.<sup>100</sup> She received a fine and was ordered to write a letter of apology.<sup>101</sup>
- A former police chief in Utah was charged with criminal defamation for allegedly using the name of the current police chief to disparage Border Patrol agents (the accused repeatedly referred to the Border Patrol agents as security guards, a serious insult in the law enforcement community).<sup>102</sup> At the time of writing, there had been no resolution in the case.
- A Louisiana man convicted of criminal libel for criticizing a local public official was allowed to continue with his ACLU-backed suit claiming his First Amendment rights were violated when he was arrested in 2008 for the criticisms. In an unpublished email to the local newspaper, he

questioned the paper's lack of reporting on allegations of improper conduct by the public official.<sup>103</sup>

- A New Hampshire man was accused of criminal libel for misappropriating the name of a U.S. Marine when criticizing local officers and officials in letters to the local newspaper. At the time of writing, there had been no resolution in the case.<sup>104</sup>
- A Minnesota man was accused of creating an email account, posting an online profile, and arranging meetings with his ex-girlfriend at her residence.<sup>105</sup> The man had admitted to the charges, but the case was still pending at this writing.

The receding influence and use of criminal libel seems reasoned in light of recent criminal libel legislation. The charges enumerated above exhibit the petty nature of much contemporary criminal libel. Alternative charges are often the outcome of many of the original accusations. And though Pritchard's study shows that the law is applied with more frequency than typically noted in law journals, it also shows that this frequency is mitigated by the often trivial applications, and very rarely as a tool for stifling dissent or First Amendment rights.

Much of the recent adjudication is a response to Internet publication, an arena where legislation and case law are still fledgling. As the current cases are resolved and the firmament of Internet libel solidifies, the spike of criminal libel cases will likely revert to the norms of its hard copy cousin.

The law was originated as a method for providing order and tranquility, often via protection of the government, but as our democracy has matured, there is rarely any



legitimate purpose for quashing criticism. A civil libel law remains strong as a recourse for personal grievances, and most other applications of criminal libel fall under different contemporary charges, such as obscenity or disorderly conduct. It has, in short, become redundant and unnecessary.

## VI. Conclusion

Like the history of many U.S. rights, freedom of expression took a circuitous route to its position today as one of the United States' central values. Early in the nation's history, legislators and courts broke from the British common law tradition by declaring that truth could be a defense against a libel charge, but otherwise adhered to the view that government and its officials could punish critics freely. Justices Holmes and Brandeis laid a foundation for broader protection for free expression, and the "clear and present danger" test they championed later became the standard for judging government suppression of speech. In turn, the Court also began in the 1960s to view both civil and criminal libel laws as possible deterrents to the "uninhibited, robust, and wide open" exchange of views needed in a democracy. The Court erected a high barrier to lawsuits by public officials and extended the same reasoning to criminal libel. Today, while 16 states and territories still have criminal libel statutes, they are rarely used and, when they are, the triviality of the alleged offenses often leads to dismissals or calls for repealing the laws.

It has been a long path from the overt restrictions of the Alien and Sedition Acts to the free speech environment of today, but by slowly backing away from criminal libel, the United States inches closer to Alexander Meiklejohn's ideal: "A free government must be its own master. If We, the People are to be controlled, then We, the People must do the controlling."<sup>106</sup>

## NOTES

- <sup>1</sup> The Howling Pig, <http://webpace.webring.com/people/jt/thehowlingpig/> (last visited March 29, 2012).
- <sup>2</sup> *Jailed for Speech: Criminal Libel is an Old — and Bad – Idea*, First Amendment Center (Jan. 18, 2004), available at <http://www.firstamendmentcenter.org/jailed-for-speech-criminal-libel-is-an-old-%C2%97-and-bad-%C2%97-idea> (last visited April 9, 2012).
- <sup>3</sup> Brian Schraum, *Prompted by College Student’s Case, Colorado Repeals Criminal Libel Law*, STUDENT PRESS LAW CENTER, Apr. 16, 2012, available at [www.splc.org/wordpress/?p=3542](http://www.splc.org/wordpress/?p=3542) (last visited June 18, 2012).
- <sup>4</sup> Ivan Moreno, *Criminal Libel Repeal Considered in Colorado*, DENVER POST, Feb. 13, 2012, [http://www.denverpost.com/dontmiss/ci\\_19953738](http://www.denverpost.com/dontmiss/ci_19953738) (last visited March 29, 2012).
- <sup>5</sup> LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 8 (1985).
- <sup>6</sup> Thomas G. Barnes, *Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber*, 6 AM. J. LEGAL HIST. 221-249 (1962).
- <sup>7</sup> SIR EDWARD COKE, *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE*, Chapter 125A *The Case de Libellis Famosis* (2003).
- <sup>7</sup> *Id.*
- <sup>8</sup> NORMAN ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* 11 (1990).
- <sup>9</sup> WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 150 (1765).
- <sup>10</sup> RUTHERFURD LIVINGSTON, JOHN PETER ZENGER: HIS PRESS, HIS TRIAL AND A BIBLIOGRAPHY OF ZENGER IMPRINTS 12-17 (2007).
- <sup>11</sup> *Id.* at 39.
- <sup>12</sup> David Copeland, *The Zenger Trial*, Freedom Forum (2012), available at <http://www.freedomforum.org/publications/msj/courage.summer2000/y01.html> (last visited March 29, 2012).
- <sup>13</sup> Levy, *supra* note 5, at 67.
- <sup>14</sup> U.S. CONST. AMEND. 1.
- <sup>15</sup> *See, e.g.*, CONN. CONST. ART. I, § 7 (1818), in 1 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR THERETOFORE FORMING THE UNITED STATES OF AMERICA* 537 (Francis Newton Thorpe, ed., 1909) (hereafter Thorpe); DEL. CONST. ART. I, § 5 (1792), in 1 Thorpe at 569; ILL. CONST. ART. VIII, § 23 (1818), in 2 Thorpe at 983; IND. CONST. ART. I, § 10 (1816), in 2 Thorpe at 1058; MAINE CONST. ART. I, § 4 (1819), in 3 Thorpe at 1647; OHIO CONST. ART. VIII, § 6 (1802), in 5 Thorpe at 2910; TENN. CONST. ART. XII, § 19 (1796), in 6 Thorpe at 3423.
- <sup>16</sup> 1 STAT. 596-97 (1798).
- <sup>17</sup> *Id.*, § 2.
- <sup>18</sup> *Id.*, § 3.
- <sup>19</sup> Thomas Jefferson, *Kentucky Resolutions of 1798 and 1799*, reprinted in 4 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 532-39 (Jonathan Elliot, ed., 2d edition, 1888, reprint 1941).
- <sup>20</sup> RON CHERNOW, *ALEXANDER HAMILTON* 587 (2004); GARY WILLS, *JAMES MADISON* 49 (2002).
- <sup>21</sup> THOMAS JEFFERSON, *THE WORKS OF THOMAS JEFFERSON* (1799-1803).

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- <sup>22</sup> *Watts v. United States*, 394 U.S. 705 (1969).
- <sup>23</sup> *Gitlow v. New York*, 268 U.S. 652 (1925).
- <sup>24</sup> TIMOTHY W. GLEASON, *THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH-CENTURY AMERICA* (1990).
- <sup>25</sup> DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 131 (1997).
- <sup>26</sup> *Patterson v. Colorado*, 205 U.S. 454 (1907).
- <sup>27</sup> *Id.* at 462.
- <sup>28</sup> *Id.* at 463.
- <sup>29</sup> OLIVER WENDELL HOLMES, *THE FUNDAMENTAL HOLMES* 151 (Ronald K. L. Collins, ed., 2010).
- <sup>30</sup> 40 STAT. 553 (1918).
- <sup>31</sup> PAUL AVRICH, *SACCO AND VANZETTI: THE ANARCHIST BACKGROUND* 94 (1996).
- <sup>32</sup> *Schenck v. United States*, 249 U.S. 47 (1919).
- <sup>33</sup> *Id.* at 52.
- <sup>34</sup> *Debs v. United States*, 249 U.S. 211 (1919).
- <sup>35</sup> Zechariah Chafee Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919).
- <sup>36</sup> *See, e.g.*, LIVA BAKER, *THE JUSTICE FROM BEACON HILL* 527-546 (1991); RICHARD POLENBERG, *FIGHTING FAITHS* 218-228 (1987).
- <sup>37</sup> *Abrams v. United States*, 250 U.S. 616 (1919).
- <sup>38</sup> *Id.* at 624.
- <sup>39</sup> *Id.* at 630 (Holmes, J., dissenting).
- <sup>40</sup> 274 U.S. 357 (1927).
- <sup>41</sup> *Id.* at 377 (Brandeis, J., concurring).
- <sup>42</sup> MARK GRABER, *TRANSFORMING FREE SPEECH* 18-21 (1991).
- <sup>43</sup> ARNOLD PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* 75-76 (1960).
- <sup>44</sup> BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 317-318 (1998).
- <sup>45</sup> *Id.* at 362-363.
- <sup>46</sup> 304 U.S. 144 (1938).
- <sup>47</sup> *Id.* at 152.
- <sup>48</sup> *Id.* at 152-153 n4.
- <sup>49</sup> *Id.*
- <sup>50</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
- <sup>51</sup> *Id.* at 573.
- <sup>52</sup> *Yates v. United States*, 354 U.S. 298 (1957).
- <sup>53</sup> *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941).
- <sup>54</sup> *Pennekamp*, 328 U.S. at 349.
- <sup>55</sup> ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948).
- <sup>56</sup> 343 U.S. 250 (1952).
- <sup>57</sup> *Beauharnais v. Illinois*, 343 U.S. 250 (1952).
- <sup>58</sup> *Id.* at 250.
- <sup>59</sup> *Id.* at 250.
- <sup>60</sup> Model Penal Code, Tent. Draft No. 13, 1961, § 250.7, Comments, at 44.
- <sup>61</sup> 376 U.S. 254 (1964).

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<sup>62</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>63</sup> *Id.* at 271.

<sup>64</sup> *Id.* at 256.

<sup>65</sup> *Id.* at 292.

<sup>66</sup> *Id.* at 276.

<sup>67</sup> *Id.* at 273.

<sup>68</sup> *Id.* at 279.

<sup>69</sup> *Garrison v. Louisiana*, 379 U.S. 64 (1964).

<sup>70</sup> *Id.* at 81.

<sup>71</sup> *Id.* at 69 (quoting Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L. REV.* 877, 924 (1963)).

<sup>72</sup> 384 U.S. 195 (1966).

<sup>73</sup> *Ashton v. Kentucky*, 384 U.S. 195 (1966).

<sup>74</sup> *Id.* at 201.

<sup>75</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>76</sup> The states with current criminal libel statutes on the books or in the constitution include Florida (Fla. Stat. § 836.01, et seq.), Idaho (Idaho Code §18-4801, et. seq.), Illinois (720 Ill. Comp. Stat. 300/1 ) Louisiana (La. Rev. Stat. § 14:47), Michigan (Mich. Comp. Laws § 750.370 and Comp. Laws § 750.97.), Montana (Mont. Stat. § 45-8-212), New Hampshire (N.H. Rev. Stat. § 644:11), New Mexico (N.M. Stat. Ann. § 30-11-1), North Carolina (N.C. Gen. Stat. § 14-47), North Dakota (N.D. Cent. Code § 12.1-15-01), Oklahoma (Okla. Stat. tit. 21, § 771, et. seq), Utah Code § 76-9-404, the Virgin Islands (14 V.I. Code § 1171, et seq., and 14 V.I. Code § 1180, et seq.), Virginia (Va. Code § 18.2-417), and Wisconsin (Wis. Stat. § 942.01).

<sup>77</sup> *See, e.g.*, Kan. Stat. § 21-4004 (prior to repeal in 2011) “(a) Criminal defamation is communicating to a person orally, in writing, or by any other means, information, knowing the information to be false and with actual malice, tending to expose another living person to public hatred, contempt or ridicule; tending to deprive such person 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 surviving relatives and friends.”

<sup>78</sup> *See, e.g.* Oklahoma 21 Okla. Stat. § 771 , “Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious; publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends;” and Colorado Rev. Stat. § 18-13-105, “(1) A person who shall knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule, commits criminal libel.”

<sup>79</sup> *See* Mich. Comp. Law § 750.370; 21 Okla. Stat. § 779-80; VA Code Ann. § 18.2-417.

<sup>80</sup> *See* 720 Ill. Comp. Stat. 300/1 and Mich. Comp. Law § 750.97.

<sup>81</sup> In Idaho, no fine is to exceed \$5,000; Oklahoma, \$1,000; Louisiana, Montana, and the Virgin Islands, \$500.

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<sup>82</sup> In Idaho, Louisiana, and Montana the maximum imprisonment is six months; in Oklahoma, and the Virgin Islands, it is one year.

<sup>83</sup> See *Ivey v. State*, 821 So.2d 937 (Ala. 2001)); *Gottschalk v. State*, 575 P. 2d 289 (Alaska 1978); see also 1978 Alaska Laws 166, § 21 (repealing criminal libel statute); *Weston v. State*, 528 S.W. 2d 412 (Ark. 1975)); Arizona (repealed 1978); California (see *Eberle v. Municipal Court for Los Angeles Judicial District*, 55 Cal. App. 3d 423, 432, 127 Cal. Rptr. 594 (1976); see also 1986 Cal. Stat. 141, § 1 (repealing criminal libel statute), and 1991 Cal. Stat. 186, § 2 (repealing criminal slander statute)); Connecticut (see 1969 Ct. Laws 828, § 214 (eff. Oct. 1, 1971)); Delaware (See 11 Del. C. § 202); District of Columbia (see D.C. Law 4-164, §§ 602, 29 D.C. Reg. 3976 (1981)); Georgia (see *Williamson v. State*, 249 Ga. 851, 851, 295 S.E.2d 305, 306, 9 Media L. Rep. 1703 (1982), fully repealed from statute 2015); Guam (see Pub. L. 13-196 (eff. 1978)); Hawaii (see 1935 Haw. Terr. Rev. L. c.196 (repealed)); Kentucky (See Ky. Rev. Stat. § 500.020 (enacted by 1974 Ky. Laws 406, § 2 (eff. Jan. 1, 1975)); Illinois (see 1984 Ill. Laws 1047, § 1 (effective July 1, 1986)); Indiana (see 1976 Ind. Acts 148); Iowa (see 1976 Iowa Acts ch. 1245 , § 526 (eff. Jan. 1, 1978)); Kansas (see Kan. Stat. § 21-4004, repealed July 2011); Maine (See 1975 Me. Laws c. 499, § 11 (eff. May 1, 1976)); Maryland (common law offense for criminal libel repealed by 1997 Md. Laws 643 (codified in relevant part as amended at Md. Code Crim. Law § 9-507)); Minnesota (Minnesota Appeals Court decision 2015); Mississippi (*Boydston v. State*, 249 So.2d 411 (Miss. 1971)); Missouri (see 1969 Mo. Rev. Stat. §§ 559.410 (repealed)); Nebraska (see 1977 Neb. Laws, L.B. 38, § 328); Nevada (See 2001 Nev. Laws 15, § 1 (eff. April 10, 2001); )); New Jersey (common law offense unconstitutional under *Ashton v. Kentucky*); New Mexico (*New Mexico v. Powell*, 839 P. 2d 139, 20 Media L. Rep. 1841(N.M. App. 1992) (“When a criminal libel statute does not require proof of actual malice, the Constitution prohibits prosecution under the statute of public statements that involve matters of public concern”); New York (see 1965 N.Y. Laws 1030 (eff. Sept. 1, 1967)); Ohio (see 1972 Ohio Laws H 511 (eff. Jan. 1, 1974)); Oregon (see 1985 Or. Laws 366); Pennsylvania (*Commonwealth v. Armao*, 446 Pa. 325, 286 A.2d 626 (1972); statute subsequently repealed); Puerto Rico (*Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003); statute later repealed, see Law 149 of 2004); Rhode Island (common law offense unconstitutional under *Ashton v. Kentucky*); South Carolina (*Fitts v. Kolb*, 779 F. Supp. 1502, 20 Media L. Rep. 1033 (D.S.C. 1991)); South Dakota (see 1976 S.D. Laws 158, § 28-1); Tennessee (see 1989 Tenn. Laws 591, § 1); Utah (criminal libel statute declared unconstitutional in *I.M.L. v. State*, 61 P.3d 1038 (Utah 2002); Vermont (common law offense unconstitutional under *Ashton v. Kentucky*); West Virginia (common law offense unconstitutional under *Ashton v. Kentucky*); Wyoming (see 1945 Wyo. Cod. Stat. §9 1601 (repealed 1982)).

<sup>84</sup> D.C. Law 4-164, §§ 602, 29 D.C. Reg. 3976 (1981).

<sup>85</sup> *Weston v. State*, 528 S.W. 2d 412 (Ark. 1975); Ark. Code Ann. §41-240.

<sup>86</sup> Criminal libel statute declared unconstitutional in *I.M.L. v. State*, 61 P.3d 1038.

Though there is debate as to whether criminal libel statute remains in Utah.

<sup>87</sup> Wash. Rev. Code c 88 § 1 (2009).

<sup>88</sup> Eric Robinson, *Criminal Libel and the Internet*, MEDIA LAW RESOURCE CENTER (2007)

<sup>89</sup> *Id.* at 12.

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<sup>90</sup> *Id.* at 13.

<sup>91</sup> David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 COMM. L. & POL'Y 303-339 (2009).

<sup>92</sup> *Id.* at 335.

<sup>93</sup> *Id.* at 336.

<sup>94</sup> *Carson v. Kansas*, 276 Kan. 970 (2003); *Carson v. Kansas* 198 P. 3d 784 (2009).

<sup>95</sup> Roxhana Hegeman, *ACLU Sues Valley Center Over Yard Sign*, WICHITA EAGLE, Oct. 21, 2010, available at <http://www.kansas.com/2010/10/21/1551459/aclu-sues-valley-center-over-yard.html> (last visited March 29, 2012).

<sup>96</sup> Rhonda Holman, *Free Speech Is No Crime*, WICHITA EAGLE, Nov. 16, 2010, available at <http://www.kansas.com/2010/11/16/1590861/free-speech-is-no-crime.html> (last visited April 13, 2012).

<sup>97</sup> *State v. Ian Lake*, Citizen Media Law Project (October 19, 2008)

<http://www.citmedialaw.org/threats/state-utah-v-ian-lake> (last visited April 12, 2012).

<sup>98</sup> *I.M.L. v. State*, 61 P. 3d 1038 (Utah 2002).

<sup>99</sup> See Geoff Liesik, *Former Utah Police Chief Charged with Criminal Defamation*, DESERT NEWS, Jan. 31, 2012, available at

[http://www.deseretnews.com/article/705398479/Former-Utah-police-chief-charged-with-criminal-defamation.html?s\\_cid=rss-30](http://www.deseretnews.com/article/705398479/Former-Utah-police-chief-charged-with-criminal-defamation.html?s_cid=rss-30) (last visited April 9, 2012).

<sup>100</sup> Elizabeth Dinan, *Police: Prank About Spit in Cops' Coffee Was Crime, Meant to Cause Stir*, PORTSMOUTH HERALD, March 14, 2012, available at

<http://www.seacoastonline.com/articles/20120314-NEWS-120319822> (last visited April 9, 2012).

<sup>101</sup> Charles McMahon, *Woman Fined for Lying About Shop Workers Spitting in Cops' Coffee*, PORTSMOUTH HERALD, June 2, 2012, available at

<http://www.seacoastonline.com/articles/20120602-NEWS-206020330> (last visited June 16, 2012).

<sup>102</sup> Eugene Volokh, *Former Utah Police Chief Charged with Criminal Defamation*, THE VOLOKH CONSPIRACY (Feb. 2, 2012), available at

<http://www.volokh.com/2012/02/02/former-utah-police-chief-charged-with-criminal-defamation> (last visited April 12, 2012).

<sup>103</sup> *La. Man Arrested After Criticizing Police Chief Can Sue*, FIRST AMENDMENT CENTER, (March 20, 2012), available at <http://www.firstamendmentcenter.org/la-man-arrested-after-criticizing-police-chief-can-sue> (last visited April 9, 2012).

<sup>104</sup> *Portsmouth Man Faces Criminal Defamation Charges*, March 8, 2012, available at <http://www.wmur.com/Portsmouth-Man-Faces-Criminal-Defamation-Charges/-/9858568/11835048/-/mikhgoz/-/index.html> (last visited April 9, 2012).

<sup>105</sup> Betsy Sundquist, *Burnsville Man Charged with Defamation, Stalking*, BURNSVILLE PATCH, Jan. 6, 2012, available at <http://burnsville.patch.com/articles/burnsville-man-charged-with-defamation-stalking-after-placing-phony-craigslist-ad> (last visited April 9, 2012).

<sup>106</sup> Meiklejohn, *supra* note 56, at 12.