

CRIMINAL DEFAMATION: STILL “AN INSTRUMENT OF DESTRUCTION” IN THE AGE OF FAKE NEWS

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I. INTRODUCTION

When Bangladeshi journalist Abdul Latif Morol, a correspondent for the Daily Probaha, used Facebook on August 1, 2017 to relay reports about the death of a goat, he was not expecting to be the target of a criminal defamation prosecution.¹ The previous day, Bangladesh’s Minister of State for Fisheries and Livestock Narayan Chandra Chanda donated the goat to a poor farmer in Dumuria during an event sponsored by the government’s local livestock department.² Following the event, news organizations published stories noting that the goat had died overnight. Morol took to Facebook to report the information, writing, “Goat given by state minister in the morning dies in the evening.”³

Soon after the post was published, fellow journalist Subrata Faujdar, a correspondent for the Daily Spandan, filed a criminal defamation complaint against Morol.⁴ Faujdar claimed that Morol’s post, which also contained a photo of the minister, was intended to demean the official.⁵ Faujdar was a supporter of the ruling party in Bangladesh and filed the complaint because

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¹ See *Bangladeshi journalist arrested for reporting death of goat*, COMM. TO PROTECT JOURNALISTS (Aug. 1, 2017), <https://cpj.org/2017/08/bangladeshi-journalist-arrested-for-reporting-deat.php>; *Bangladesh detains journalist over Facebook post on dead goat*, HINDUSTAN TIMES (Aug. 1, 2017), <http://www.hindustantimes.com/world-news/bangladesh-detains-journalist-over-facebook-post-on-dead-goat/story-ousJN1fAbldoTSBerbeP.html>; *Journalist arrested for sharing dead goat’s news on FB*, PROTHOM ALO (Aug. 1, 2017), <http://en.prothomalo.com/bangladesh/news/155161/Journalist-arrested-for-sharing-dead-goat%E2%80%99s-news>

² *Bangladeshi journalist arrested for reporting death of goat*, *supra* note 1.

³ *Bangladesh detains journalist over Facebook post on dead goat*, *supra* note 1.

⁴ *Journalist arrested for sharing dead goat’s news on FB*, *supra* note 1.

⁵ *Id.*

he “felt bad about the issue.”⁶ Specifically, Faujdar’s complaint alleged that the Facebook post had harmed the minister’s reputation in violation of Section 57 of Bangladesh’s Information & Communication Technology Act 2006, which criminalizes publishing material online deemed to contain false information, defamatory statements, and expression which tarnishes the image of the state or of an individual.⁷ The law also carries maximum penalties of 14 years in prison and fines equivalent to more than \$100,000 in U.S. dollars.⁸ Morol was arrested by Bangladesh police on August 1 before later being released on bail. As of December 2017, Morol was still facing the charges.⁹

A journalist facing a criminal punishment over a Facebook post about a dead goat seems absurd, but criminal defamation provisions used to punish such expression remain on the books in countries worldwide. In his concurring opinion in *Garrison v. Louisiana*,¹⁰ U.S. Supreme Court Justice William O. Douglas warned that criminal defamation actions brought by government officials constituted an “instrument[] of destruction” for free expression. Despite the assertions of many legal scholars, criminal defamation statutes continue to pose a significant threat to freedom of expression, in the United States and worldwide.

Although many regard such laws as anachronistic, criminal defamation prosecutions are a regular occurrence throughout the world. Social media, blogs, and other forms of digital expression have made it easy to criticize powerful individuals. Those criticized retaliate by filing criminal complaints, enabling law enforcement authorities to search homes, seize computers and mobile devices, and arrest bloggers and other individuals who often lack resources available to legacy media. In some parts of the world, journalists and editors are forced to defend themselves in court against government officials’ or private figures’ criminal defamation lawsuits, risking fines and potential imprisonment. Several prominent individuals have sought to wield criminal defamation as a punitive measure against critics rather than as a tool to merely protect their reputations. Even when criminal defamation charges or lawsuits are dropped or dismissed, the

⁶ *Id.*

⁷ Information & Communications Act (Act No. 39/2006) (Bangl.); *see also* ARTICLE 19, BANGLADESH: ANALYSIS OF INFORMATION COMMUNICATION TECHNOLOGY ACT 14-19 (2016), <https://www.article19.org/data/files/medialibrary/38365/Bangladesh-ICT-Law-Analysis.pdf>.

⁸ *Id.*; *Bangladeshi journalist arrested for reporting death of goat*, *supra* note 1.

⁹ Aliya Iftikhar, *Bangladesh’s defamation law is ‘avenue to misuse power,’ local journalists say*, COMM. TO PROTECT JOURNALISTS (Dec. 8, 2017), <https://cpj.org/blog/2017/12/bangladeshs-defamation-law-is-avenue-to-misuse-pow.php>.

¹⁰ 379 U.S. 64, 81-82 (1964) (Douglas, J., concurring).

targeted speakers are frequently chilled from engaging in future speech. Perhaps even more alarming, criminal defamation prosecutions are not limited to countries with regressive views toward open expression.

In recent years, numerous criminal defamation prosecutions have occurred in the United States and the world over. This paper documents selected examples of the charges, prosecutions, convictions, and punishments that result from some of the criminal defamation laws remaining in existence across the globe. We collected reports and updates published between 2015 and 2017 by several free press advocacy organizations, including the Committee to Protect Journalists (CPJ), the International Press Institute, Freedom House, Article 19, Reporters Without Borders, and the Organization for Security and Co-operation in Europe's Representative on Freedom of the Media.¹¹ Our analysis examined stories from news organizations in several countries, as well as court opinions and decisions. Using this compilation of information, we identified general trends and themes emerging from criminal defamation cases in the United States as well as internationally. The result is not an exhaustive accounting of all criminal defamation cases throughout the world. Rather, our aim is to provide illustrative examples to demonstrate that criminal defamation remains an "instrument of destruction."

This article begins with an examination of how criminal defamation laws are being used throughout the United States and internationally. First, we discuss the types of criminal defamation prosecutions found in the United States, which typically involve disputes between private individuals. We also examine examples of the types of reporting and criticisms that have prompted government officials and public figures outside the United States to seek criminal prosecution of journalists, news organizations, and others. Our analysis then turns to the penalties and adverse consequences journalists and other critics face when accused of committing criminal defamation in the United States and abroad. Finally, we discuss the continued threat that these criminal provisions pose for freedom of expression worldwide, particularly in the context of allegations of "fake news," and consider the steps necessary to combat this threat.

¹¹ COMM. TO PROTECT JOURNALISTS, CRITICS ARE NOT CRIMINALS: COMPARATIVE STUDY OF CRIMINAL DEFAMATION LAWS IN THE AMERICAS (2016); INT'L PRESS INST., OUT OF BALANCE: DEFAMATION LAW IN THE EUROPEAN UNION (2015); FREEDOM HOUSE, FREEDOM OF THE PRESS 2017 (2017); ORG. FOR SECURITY AND CO-OPERATION IN EUR., DEFAMATION AND INSULT LAWS IN THE OSCE REGION: A COMPARATIVE STUDY (2017).

II. CRIMINAL DEFAMATION CASES IN THE UNITED STATES

Many media law scholars have described criminal defamation law in the United States as “essentially dead”¹² and “virtually eradicated.”¹³ Legal thinkers who acknowledge that criminal defamation is not entirely moribund nevertheless suggest that criminal penalties for false, harmful statements “belong in our history texts, not in our law books”¹⁴ and have “no place in a democratic society.”¹⁵ Others contend that criminal defamation in the United States is a “minimal legal threat”¹⁶ and that prosecutions are “relatively rare.”¹⁷

This position is perhaps understandable if one relies solely on U.S. Supreme Court precedent. In 1964, the high court’s decision in *Garrison v. Louisiana* held that the Constitution forbade civil or criminal sanctions for truthful statements about public officials acting in their official capacities.¹⁸ Referencing their decision in *New York Times v. Sullivan*, decided earlier that same year, the Court determined that criminal sanctions could be imposed only when a person made statements with “actual malice”—i.e., knowledge of falsity or reckless disregard for the truth.¹⁹ That decision seemed to deal a death blow to criminal defamation in the United States.

However, criminal defamation has continued to live on in the United States. Although there are no federal criminal penalties for libelous speech, 17 states still have criminal defamation statutes on the books.²⁰ Researchers

¹² Salil K. Mehra, *Post a Message and Go to Jail: Criminalizing Internet Libel in Japan and the United States*, 78 U. COLO. L. REV. 767, 768 (2007).

¹³ Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 289, 292 (2005).

¹⁴ Gene Policinski, *Criminal Libel: A Bad Idea in a Free Society*, FIRST AMENDMENT CENTER (Feb. 17, 2012), <http://www.firstamendmentcenter.org/criminal-libel-a-bad-idea-in-a-free-society>.

¹⁵ Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL’Y 433, 435 (2004).

¹⁶ GENELLE BELMAS & WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 183 (2014).

¹⁷ ROBERT TRAGER ET AL., THE LAW OF JOURNALISM AND MASS COMMUNICATION 176-177 (3rd ed. 2012).

¹⁸ *Garrison v. Louisiana*, 379 U.S. 64 (1964).

¹⁹ *Id.* at 74.

²⁰ *See, e.g.*, ALA. CODE § 13A-11-160 (2017); FLA. STAT. §§ 836.01-836.12 (2017); IDAHO CODE §§ 18-4801 to 18-4809. (2017); KAN. STAT. ANN. § 21-6103 (2017); LA. STAT. ANN. § 14:47 (2017); MASS. GEN. LAWS ANN. 272 § 98C (West 2017); MICH. COMP. LAWS ANN. § 750.370 (West 2017); MINN. STAT. § 609.765 (2017); MISS. CODE ANN. § 97-3-55 (2017); MONT. CODE ANN. § 45-8-212 (2017); N.H. REV. STAT. ANN. § 644:11 (2017); N.C. GEN. STAT. § 14-47 (2017); N.D. CENT. CODE § 12.1-15-01 (2017); OKLA. STAT. tit. 21 §§ 771-781. (2017); UTAH CODE ANN. § 76-9-404 (West 2017); VA. CODE ANN. § 18.2-417 (West 2017); WIS. STAT. § 942.01 (2017).

examining state trial court records have observed that criminal prosecutions for defamation are more common than scholarly consensus would suggest.²¹ These criminal defamation prosecutions rarely involve matters of public concern, only occasionally are brought by public officials, and seldom involve “mainstream media.” However, they are by no means unheard of. Typically, public officials who do instigate criminal libel prosecutions are more likely to target outspoken individuals, many of whom operate blogs or act as citizen journalists, rather than the institutional press. Those public officials are able to utilize criminal complaints as a means to empower law enforcement officials to search homes and seize property, which, in turn, is a way to intimidate and silence critics.

Interestingly, Louisiana appears to be particularly active. For example, in 2016, a Louisiana sheriff executed a search warrant on a local police officer’s home in search of a blogger.²² The search, conducted by Terrebonne Parish Sheriff Jerry Larpenter’s office, sought to uncover the identity of the publisher of “ExposeDAT,” a blog reporting on the relationships and possible corruption between politicians and business officials in the parish. Specifically, the blog publicized financial dealings between the parish government and a local insurance agent. The agent’s office was hired to set up the parish government’s insurance coverage, which was done without a public bidding process and for which the sheriff’s office was billed monthly. The blog noted that the insurance agent, who served as the president of the local parish levee and conservation board, also employed the sheriff’s wife, and raised questions about whether her employment contributed to the agent’s new business arrangements.²³

The insurance agent filed a criminal defamation complaint against the blog in August 2016, which the sheriff’s office used as the basis to investigate.²⁴ After obtaining IP address records from AT&T, the sheriff’s

²¹ See David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 COMM. L. & POL’Y 303, 313 (2009) (finding that Wisconsin initiated 61 criminal prosecutions for criminal defamation between 1991 and 2007); Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking”*, 107 NW. U.L. REV. 731, 753 (2013) (finding at least 300 criminal defamation convictions in Virginia between 1993 and 2008). In Minnesota, the researchers for this paper found that prosecutors in Minnesota had filed criminal defamation charges 121 times between 2006 and 2014, resulting in 26 convictions.

²² WWL Staff, *Terrebonne Sheriff trying to use criminal statute to unmask online critic*, WWLTV (Aug. 3, 2016), <http://www.wvlv.com/news/local/lafourche-terrebonne/terrebonne-sheriff-trying-to-use-criminal-statute-to-unmask-online-critic/287169610>.

²³ *Id.*

²⁴ Naomi LaChance, *Sheriff’s Raid to Find Blogger Who Criticized Him was Unconstitutional, Court Rules*, THE INTERCEPT (Aug. 26, 2016), <https://theintercept.com/2016/08/26/sheriffs-raid-to-find-blogger-who-criticized-him-was-unconstitutional-court-rules>.

office searched police officer Wayne Anderson's home and seized several computers and smart phones.²⁵ The blog's author was subsequently revealed to be Anderson's wife, Jennifer Anderson.²⁶ After the search, the Andersons challenged the constitutionality of the warrant in state court. The Louisiana Court of Appeal for the First Circuit determined that the warrant was invalid.²⁷ The appellate court dismissed the warrant after finding that it lacked probable cause, noting that the insurance agent held a public position as president of the conservation board. Citing *Garrison v. Louisiana*,²⁸ the court determined that the "conduct complained of is not a criminally actionable offense" because Louisiana's criminal defamation law had been deemed unconstitutional "as it applies to public expression and publication concerning public officials, public figures and private individuals engaged in public affairs."²⁹ The Andersons also sued Larpenter in federal district court, alleging that Larpenter had violated their First and Fourth Amendment rights.³⁰ The district court denied a motion from Larpenter asserting qualified immunity from the charges,³¹ and he later reached an undisclosed settlement with the Andersons.³²

Louisiana officials in other parts of the state have also filed criminal defamation complaints against their critics. A council member in Livingston Parish filed an incident report in 2012 stating that a critic who posted under a pseudonym in the comments section of a local newspaper's Facebook page had written negative remarks about three council members. During its investigation related to the incident report, local sheriff's office detectives subpoenaed Facebook and the local Internet service provider, which provided records linking the pseudonymous accounts to the address

²⁵ David Hammer, *Houma PD reinstates officer raided over blog posts*, WWLTV (Aug. 14, 2016), <http://www.wwltv.com/news/local/lafourche-terrebonne/houma-pd-reinstates-officer-raided-over-blog-posts/297429131>.

²⁶ David Hammer, *Terrebonne, Dove dismissed from ExposeDAT suit, pay \$50k*, WWLTV (June 30, 2017), <http://www.wwltv.com/news/local/terrebonne-dove-dismissed-from-exposedat-suit-pay-50k/453424073>.

²⁷ *Terrebonne Parish Sheriff's Office v. Anderson*, No. 2016KW1093, 2016 WL 11184720, at *1 (La. Ct. App. Aug. 25, 2016); see also Eugene Volokh, *Louisiana sheriff (Jerry Larpenter) illegally uses criminal libel law to unmask a critic*, WASH. POST (Aug. 30, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/30/louisiana-sheriff-jerry-larpenter-illegally-uses-criminal-libel-law-to-unmask-a-critic>.

²⁸ 379 U.S. 64 (1964).

²⁹ *Terrebonne Parish Sheriff's Office*, 2016 WL 11184720, at *1.

³⁰ *Anderson v. Larpenter*, No. 16-13733, slip op. at 3 (E.D. La. July 19, 2017).

³¹ *Id.* at 1.

³² Katie Moore, *Terrebonne Sheriff reaches 'compromise' with blogger in 1st Amendment lawsuit over illegal search*, WWLTV (Sept. 7, 2017), <http://www.wwltv.com/news/local/investigations/katie-moore/terrebonne-sheriff-reaches-compromise-with-blogger-in-1st-amendment-lawsuit-over-illegal-search/472063049>.

of Royce McLin. The detectives executed a warrant on McLin's home and seized computers, one of which was later confirmed to be linked to the pseudonymous Facebook account. Later, the council members swore out criminal complaints alleging they were subjected to criminal defamation because of the comments. Three warrants were issued for McLin's arrest. McLin voluntarily surrendered to authorities after learning of the charges, but the district attorney's office dismissed the charges four months later.³³

McLin then sued the Livingston Parish sheriff's office and the council members, alleging that they had violated his First and Fourth Amendment rights. However, the U.S. Court of Appeals for the Fifth Circuit dismissed his lawsuit, holding that the defendants were entitled to qualified immunity,

In a separate instance, a judicial candidate was under investigation and accused of committing criminal defamation after running ads claiming that his incumbent opponent was a "coke-snorting, meth-buying, drunken judge."³⁴ The Montana Attorney General's Office ultimately declined to prosecute the candidate.³⁵

Perhaps due to the strength of the *Garrison* precedent, prosecutions involving public officials or public issues tend to be the exception rather than the norm in the United States. More often, criminal defamation prosecutions involve disputes between private individuals.³⁶ One study found that 37 of 61 criminal libel prosecutions initiated in Wisconsin between 1991 and 2007 involved solely private affairs. Eleven cases involved low-level government employees who did not have control over the direction of public policy, and the disputes were over private issues. The other thirteen cases involved criticisms of public officials. But nearly all of the cases did not involve disputes over what would generally be regarded as matters of public concern.³⁷ Similarly, thirteen criminal defamation prosecutions in Minnesota between 2011 and 2014 had little to do with matters of public interest - rather, many of the cases involved the disclosure of private information via online communication.³⁸

³³ McLin v. Ard, 866 F.3d 682, 686-87 (5th Cir. 2017).

³⁴ See Perry Backus, *Former Ravalli County judicial candidate asks federal court to stop defamation investigation*, RAVALLI REPUBLIC (May 13, 2017), http://ravallirepublic.com/news/local/article_a1b95e8f-c3bd-5fb3-a31c-06cfba83062e.html; see also Kevin Maki, *Attorney general's office won't prosecute attorney over campaign ads*, NBC MONTANA (Nov. 17, 2017), <http://www.nbcmontana.com/news/keci/attorney-generals-office-wont-prosecute-attorney-over-campaign-ads/658236509>.

³⁵ Maki, *supra* note 34.

³⁶ See Pritchard, *supra* note 21, at 317.

³⁷ *Id.* at 318.

³⁸ *Id.*

One example of a criminal defamation prosecution over a private dispute is *State of Minnesota v. Turner*, decided by the Minnesota Court of Appeals in 2015.³⁹ Prosecutors brought charges against Timothy Turner, alleging he violated the state's criminal defamation statute when he published multiple posts on online-classified advertising service Craigslist to exact revenge on a former lover.⁴⁰ Prosecutors alleged Turner wrote the posts, containing sexually explicit text, posing as his ex-girlfriend and her underage daughter.⁴¹ Several men subsequently sent messages soliciting sex and containing pornographic images to the woman and her daughter.⁴² Turner was later found guilty of committing criminal defamation. However, the Minnesota Court of Appeals overturned the conviction and declared Minnesota's criminal defamation law unconstitutional, holding the statute was overbroad because under its own terms truth could serve as a defense only if a statement was also "communicated with good motives and for justifiable ends."⁴³ The appellate court also declined to narrowly construe that statute, finding the standard requiring a true statement to be "only exempt if it is fair and made in good faith" was in direct conflict with the U.S. Supreme Court's decision in *Garrison*.⁴⁴

The appellate court's decision was not the final blow to criminal defamation in Minnesota. In 2016, rather than repeal the law, the Minnesota state legislature amended the criminal defamation statute to criminalize "false and defamatory" statements, removing only language that placed limitations on truth as a defense.⁴⁵ In early 2017, Robert Drews pleaded guilty to violating the amended criminal defamation statute after initially being charged with making threats of terrorism.⁴⁶ Drews had phoned an ex-girlfriend's new beau and threatened to use a bomb to kill the couple during an upcoming date at a casino.⁴⁷ Drews later pleaded guilty to criminal defamation, admitting that he sent text messages to the new boyfriend that included false information about the sexual history of Drews' ex-

³⁹ *State v. Turner*, 864 N.W.2d 204, 206 (Minn. Ct. App. 2015).

⁴⁰ MINN. STAT. § 609.765; see *Turner*, 864 N.W.2d at 206.

⁴¹ *Turner*, 864 N.W.2d at 206.

⁴² *Id.*

⁴³ *Id.* at 209.

⁴⁴ *Id.* at 211.

⁴⁵ 2016 Minn. Laws. ch. 126, § 8.

⁴⁶ MINN. STAT. § 609.713.

⁴⁷ Statement of Probable Cause, *State of Minnesota v. Robert Edward Drews*, No. 27CR1619904 (Minn. Dist. Ct., Hennepin County, 2017).

girlfriend.⁴⁸ The resulting punishment included a suspended jail sentence and a fine.⁴⁹

Although anti-SLAPP (strategic lawsuit against public participation) statutes might seem to provide a possible means to curtail criminal defamation actions in frivolous cases, the personal nature of the communications in these examples suggests that they are unlikely to be effective. Several states have enacted anti-SLAPP laws to curtail baseless lawsuits designed to intimidate speakers, including journalists and news media organizations, from participating in discussions on matters of public concern.⁵⁰ However, a California state court decision in 2010 held that the state's anti-SLAPP statute was inapplicable in a civil lawsuit based on a cyber bullying claim involving private parties.⁵¹ In that case, the family of a high school student, D.C., sued the family of another student, R.R., in 2005 after the latter posted threats and derogatory comments about the former's sexual orientation on a website promoting D.C.'s entertainment career.⁵² D.C. alleged in his lawsuit that R.R. had libeled him by falsely claiming D.C. was homosexual, intentionally inflicted emotional distress through outrageous statements, and had violated D.C.'s rights under the state's hate crimes laws prohibiting threats of violence motivated by perceived sexual orientation.⁵³

R.R. filed an anti-SLAPP motion under California state law, claiming that his message was protected speech because he had written his comments in a public forum on an issue of public interest.⁵⁴ The trial court denied R.R.'s motion, finding that his statements were not made in connection to a public issue, and the California Court of Appeal, Second District, affirmed the trial court's decision, finding that R.R. had failed to prove that his comments were matters of public interest or that D.C. was a public figure in this context.⁵⁵ "The public was not fascinated with D.C., nor was there widespread public interest in his personal life," the appellate court wrote. "Simply put, R.R.'s message did not concern a person in the public eye,

⁴⁸ Petition to Enter Plea of Guilty, *State of Minnesota v. Robert Edward Drews*, No. 27CR1619904 (Minn. Dist. Ct., Hennepin County, 2017).

⁴⁹ *State of Minnesota v. Robert Edward Drews*, No. 27CR1619904 (Minn. Dist. Ct., Hennepin County, 2017).

⁵⁰ *Anti-SLAPP statutes and commentary*, MEDIA L. RES. CTR., <http://www.medialaw.org/component/k2/item/3494> (last visited Sept. 2, 2019).

⁵¹ *D.C. v. R.R.*, 106 Cal. Rptr. 3d 399, 399 (Ct. App. 2010); *id.* at 409.

⁵² *Id.*

⁵³ *Id.* at 406.

⁵⁴ *Id.*

⁵⁵ *Id.* at 428-29.

conduct that could directly affect large numbers of people beyond the participants, or a topic of widespread public interest.”⁵⁶

Although anti-SLAPP statutes are typically invoked in civil litigation, the California case demonstrates the limits of such speech-protective laws in cases involving private matters. A majority of the criminal defamation cases in the United States do involve purely personal disputes, and the California appellate court decision suggests that defendants in such cases cannot turn to anti-SLAPP statutes as a tool to defend themselves. Moreover, anti-SLAPP laws in many states have come under intense criticism in recent years.⁵⁷ The highest courts in Minnesota and Washington struck down their respective state anti-SLAPP statutes, finding that the laws deprived claimants of the right to a trial by jury as guaranteed by their state constitutions and the Sixth Amendment to the U.S. Constitution.⁵⁸

Although the majority of American states have abandoned criminal punishments for false speech harming others' reputations, criminal defamation statutes remain alive and well in many parts of the United States. These criminal defamation cases most often involve disputes between private individuals, though notable exceptions involving public officials filing complaints against bloggers or individual critics do occur. But on the whole, public officials or figures seeking criminal defamation prosecutions to target traditional journalists or newspapers are rare, unlike many other parts of the world.

III. CRIMINAL DEFAMATION CASES OUTSIDE OF THE UNITED STATES

Outside the United States, public officials and figures appear more willing, or even eager, to seek criminal penalties against their critics, including those who would be considered traditional journalists. Many international criminal defamation cases stem from private prosecutions, which are barred or limited in most parts of the United States.⁵⁹ This ability

⁵⁶ *Id.*

⁵⁷ See Dillon White, *Updates to State Laws Create Challenges, New Benefits for News Organizations*, SILHA BULL. 23, (2015), <http://silha.umn.edu/assets/pdf/2015-summerfinal.pdf>; Scott Memmel, *Several State Courts and Legislatures Grapple with Anti-SLAPP Laws*, SILHA BULL. 53 (2017), <http://hdl.handle.net/11299/197789>; Scott Memmel, *Several State Courts and Legislatures Grapple with Anti-SLAPP Laws*, SILHA BULL. 53 (2017), <http://hdl.handle.net/11299/197789>.

⁵⁸ *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 638 (Minn. 2017); *Davis v. Cox*, 183 Wn.2d 269, 279 (Wash. 2015); see White, *supra* note 57 (for an analysis on how anti-SLAPP deprives claimants); Memmel, *supra* note 57.

⁵⁹ See, e.g., *Linda R.S. v. Richard D.*, 410 U.S. 614, 616-18 (1972); *Leeke v. Timmerman*, 454 U.S. 83, 87 (1981); *State ex rel. Wild v. Otis*, 257 N.W.2d 361, 363-65 (Minn. 1977); *State v. Harrington*, 534 S.W.2d 44, 49-51 (Mo. 1976); see also Matthew S. Nichols, *No One Can Serve*

to initiate private prosecutions appears to create wider variations in the types of criminal defamation cases that occur.

Through our examination of reports on international criminal defamation, we found that four major types of categories of international criminal defamation cases emerged. These categories include criticisms of powerful people perceived as insults, allegations of corruption, accusations of other questionable behavior, and accusations of sexual indiscretions. These categories are not exhaustive and can overlap, but many cases fall within this typology.

A. Criticisms Perceived as Insults

The most predominant category of criminal defamation cases involves situations in which a government official or other public figure with significant social influence perceives criticism as an insult. For example, an outspoken Canadian blogger in New Brunswick faced a criminal defamation investigation in 2012 over online posts criticizing local police officers.⁶⁰ Charles LeBlanc used his blog to criticize a Fredericton police officer that had given him a ticket for failing to wear a bicycle helmet, writing that the official was a “fascist cop” and “sexual pervert Québécois [constable].”⁶¹ The officer filed a criminal defamation complaint against LeBlanc, which resulted in Fredericton police officers searching LeBlanc’s apartment and seizing computer equipment.⁶² The New Brunswick Justice Department later decided not to bring charges against LeBlanc under Section 301 of Canada’s Criminal Code, which punishes “defamatory libel.”⁶³ Department officials noted that other Canadian provinces had previously found Section 301 unconstitutional because it did not require prosecutors to show that a defendant had known that an alleged libelous statement was false.⁶⁴

Two Masters: Arguments Against Private Prosecutors, 13 CAP. DEF. J. 279 (2001) (discussing problems private prosecutors face).

⁶⁰ *Controversial blogger charged with libel*, CBC NEWS (Jan. 20, 2012), <http://www.cbc.ca/news/canada/new-brunswick/controversial-blogger-charged-with-libel-1.1145586>; see also COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 22.

⁶¹ *‘The end of the road’: libel charge against Charles LeBlanc not approved*, CBC NEWS (May 9, 2017), <http://www.cbc.ca/news/canada/new-brunswick/charles-leblanc-libel-charge-dropped-1.4106455>.

⁶² *Controversial blogger charged with libel*, *supra* note 60.

⁶³ Canada Criminal Code, R.S.C. 1985, c. C-46 § 301.

⁶⁴ *Fredericton blogger libel charges won’t proceed*, CBC NEWS (May 4, 2012), <http://www.cbc.ca/news/canada/new-brunswick/fredericton-blogger-libel-charges-won-t-proceed-1.1153501>.

Because of their contentious history with LeBlanc, Fredericton police officials referred the matter to the Edmundston Police Force, which arrested LeBlanc in November 2016.⁶⁵ The officers told LeBlanc that the new investigation was based on Section 300 of the Canadian Criminal Code, which punishes anyone “who publishes libel that he knows is false.”⁶⁶ The justice department in New Brunswick again declined to bring charges against LeBlanc.⁶⁷ After this decision, Edmundston Police Chief Gilles Lee said that the criminal defamation investigations into LeBlanc’s blog postings were at “the end of the road.”⁶⁸

Additional examples from other countries include traditional journalists and other commentators facing criminal investigations, charges, or convictions for publishing criticism that government officials or public figures perceive as insults. In 2015, the European Court of Human Rights upheld a criminal defamation conviction of an Italian attorney who was upset about the outcome of a case and criticized a specific district court judge in a letter, alleging that the judge had willfully committed errors while presiding over the case.⁶⁹ The court found that the letter overstepped the bounds of permissible criticism because it suggested the judge had disregarded her ethical duties—potentially a criminal offense—without providing any proof that such claims were true.⁷⁰

By contrast, the following year, the European Court of Human Rights overturned the criminal defamation conviction of a Polish newspaper editor who published a satirical story calling a local government employee a “numbskull,” “poser,” and a “dim-witted official,” as well as describing the local mayor and spokesperson as “dull bosses” for their roles in a local farming project.⁷¹ The court determined that the conviction had interfered with the editor’s right to freedom of expression to comment on issues of legitimate public concern.⁷² In 2017, French journalists Elise Lucet and

⁶⁵ Alan White, *Charles LeBlanc investigated again for libel against Fredericton police*, CBC NEWS (Nov. 16, 2016), <http://www.cbc.ca/news/canada/new-brunswick/charles-leblanc-fredericton-police-libel-1.3853481>.

⁶⁶ Canada Criminal Code, R.S.C. 1985, c. C-46 § 300.

⁶⁷ *The end of the road*, *supra* note 61.

⁶⁸ *Id.*

⁶⁹ Peruzzi v. Italy, App. No. 39294/09 Eur. Ct. H.R. Rep. (2015), <http://hudoc.echr.coe.int/eng?i=001-155974>; *see also ECtHR: Are Criminal Defamation Laws protecting the Judiciary from legitimate criticism?*, ARTICLE 19 (July 14, 2015), <https://www.article19.org/resources/ecthr-are-criminal-defamation-laws-protecting-the-judiciary-from-legitimate-criticism>.

⁷⁰ *Id.*

⁷¹ Ziemiński v. Poland (No. 2), App. No. 1799/07 Eur. Ct. H.R. (2016), <http://hudoc.echr.coe.int/eng?i=001-164453>.

⁷² *Id.*

Laurent Richard faced a criminal defamation lawsuit filed in a French court by the Azerbaijani government after they described it as a “dictatorship.”⁷³ The court later dismissed the lawsuit, noting, “press law has been put in place to prevent political censorship.”⁷⁴

These examples are only a small sample of the variety of international criminal defamation cases involving criticism that public officials and figures perceive as insults.

B. Allegations of Corruption

International cases of criminal defamation also frequently involve accusations of official corruption, intimating that public officials or prominent figures have personally benefitted from malfeasance.⁷⁵ Once exposed, the public officials or figures typically seek a criminal defamation conviction against the journalists or news organizations that publicized the corrupt activity. One such case arose in Bulgaria in 2000. In the Bulgarian education system, after completing the seventh or eighth grade, students continue into either an ordinary or a specialized secondary school, depending on their scores on competitive examinations.⁷⁶ Under Ministry of Education regulations, children with certain medical conditions or special educational needs can be admitted to specialized secondary schools without an examination, and in May 2000, the Ministry of Education and Science appointed four officials to select such students for admission into these schools.⁷⁷ The following month, 14 parents wrote a letter to the Ministry, alleging that 157 students, mostly the children of medical doctors, paramedical staff, and teachers, had been admitted to specialized schools based on their medical conditions, despite the fact that many were “perfectly healthy.”⁷⁸ The parents also alleged that several children had been admitted in exchange for payments.⁷⁹

⁷³ *French Court Hears Case of Journalists Accused of Calling Azerbaijan ‘Dictatorship’*, RADIOFREEEUROPE/RADIOLIBERTY (Sept. 6, 2017), <https://www.rferl.org/a/azerbaijan-france-court-journalists-tried-for-saying-dictatorship/28717296.html>; *Journalists on trial in France after calling Azerbaijan a dictatorship*, COMM. TO PROTECT JOURNALISTS (Sept. 7, 2017), <https://cpj.org/2017/09/journalists-trial-france-azerbaijan.php>.

⁷⁴ *French Court Rejects Baku’s Defamation Case Against Journalists*, RADIOFREEEUROPE/RADIOLIBERTY (Nov. 7, 2017), <https://www.rferl.org/a/french-court-rejects-azerbaijan-journalist-case-censorship/28840783.html>.

⁷⁵ *Kasabova v. Bulgaria*, App. No. 22385/03 Eur. Ct. H.R. (2013), <http://hudoc.echr.coe.int/eng?i=001-104539>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

Katya Kasabova, a journalist for the newspaper *Compass*, wrote a story about the scandal titled “Corruption in Burgas education! Four experts and a doctor sacked over bribes?”⁸⁰ The story reported that the four officials “[would] be sacked for corruption.”⁸¹ It further stated that “40 boys and girls . . . got onto the [specialized secondary school] lists despite having no right to benefit from the privilege” and that the officials “pocketed at least 300 [United States] dollars” for every child they let through, totaling \$15,000.⁸²

In December 2000, the four officials filed a criminal complaint against Kasabova and the editor-in-chief of *Compass* in the Burgas District Court.⁸³ The officials argued that several statements in the three stories written by Kasabova constituted defamation under Article 147 of the Criminal Code of Bulgaria.⁸⁴ In May 2002, a Bulgarian court found Kasabova guilty of defaming the four officials.⁸⁵ The district court later ordered her to pay an administrative fine, damages, and the legal costs of the officials.⁸⁶ The court found that Kasabova had failed to provide adequate evidence that she had fully vetted the allegations against the officials, thus “failing to fulfill her journalistic duty.”⁸⁷ In 2011, the European Court of Human Rights overturned the judgment, finding that the financial penalties were disproportionate given that the total cost was more than 35 times Kasabova’s monthly salary.⁸⁸ However, the Court also found that the Bulgarian courts’ judgment that Kasabova had not fulfilled her journalistic duty was “reasonable.”⁸⁹

Several cases of journalists facing criminal defamation charges that stem from reporting on corruption have arisen in Central and South America. For example, the former director of a public college in Peru brought a criminal defamation complaint against *Nor Oriente* editor Alejandro Carrascal Carrasco after the newspaper published reports of

⁸⁰ *Id.*; see also ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 70.

⁸¹ *Kasabova*, App. No. 22385/03.

⁸² *Id.*

⁸³ *Id.*; see also Alexander Kashumov, *Publication of Unverified Data is Acceptable When There is No Timely Information on Wrongdoings*, ACCESS TO INFO. PROGRAMME (2012), http://www.aip-bg.org/en/publications/newsletter/Publication_of_Unverified_Data_is_Acceptable_When_There_is_No_Timely_Information_on_Wrongdoings; ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 70.

⁸⁴ НАКАЗАТЕЛЕН КОДЕКС [Criminal Code] [Crim. Code] art. 147 (Bulg.).

⁸⁵ ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 70.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*; *Kasabova*, App. No. 22385/03; see also Kashumov, *supra* note 83.

⁸⁹ *Id.*

corruption at the institution.⁹⁰ The editor was convicted and sentenced to a year in prison in 2010, but the Peruvian Supreme Court later overturned the conviction.⁹¹ In 2011, a Bolivian sports journalist was arrested for writing about alleged corruption related to the Bolivia's National Soccer Association president's management of the organization's funds.⁹² The journalist was convicted and ordered to pay a fine.⁹³ José Rubén Zamora Marroquín, editor of Guatemalan newspaper *elPeriódico*, faced a criminal defamation complaint filed by President Otto Pérez Molina in late 2013 after reporting on corruption within the president's administration.⁹⁴ A court barred the editor from leaving the country after the complaint was filed and was considering whether to freeze his assets.⁹⁵ However, the president later withdrew the complaint in early 2014 after consulting attorneys.⁹⁶ Molina resigned from the presidency and was arrested on charges of corruption in 2015.⁹⁷

C. Allegations of Malfeasance or Other Questionable Behavior

The third grouping of international criminal defamation cases involves public officials or figures engaging in malfeasance or other types of questionable behavior. These individuals attempt to retaliate against journalists and news organizations through criminal defamation charges. In these instances, the official's or public figure's malfeasance may not result in any specific personal benefit. However, the alleged behavior can directly affect the public if the individual has violated ethical or legal boundaries.

In late 2016, BBC's Southeast Asia correspondent Jonathan Head faced a criminal defamation prosecution brought by an attorney in Thailand over

⁹⁰ *Newspaper editor jailed for defamation in Peru*, COMM. TO PROTECT JOURNALISTS (Jan. 14, 2010), <https://cpj.org/2010/01/newspaper-editor-jailed-for-defamation-in-peru.php>.

⁹¹ *Peruvian Supreme Court frees editor jailed for defamation*, COMM. TO PROTECT JOURNALISTS (June 21, 2010), <https://cpj.org/2010/06/peruvian-supreme-court-frees-editor-jailed-for-def.php>.

⁹² *Id.*

⁹³ COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 81.

⁹⁴ *Guatemalan government targets elPeriódico editor*, COMM. TO PROTECT JOURNALISTS (Jan. 8, 2014), <https://cpj.org/2014/01/guatemalan-government-targets-elperiodico-editor.php>.

⁹⁵ *Id.*

⁹⁶ Alejandro Martínez, *Guatemala's president and vice president withdraw criminal complaints against newspaper editor*, JOURNALISM IN THE AMERICAS BLOG (Jan. 15, 2014), <https://knightcenter.utexas.edu/en/blog/00-14972-guatemala%E2%80%99s-president-and-vice-president-withdraw-criminal-complaints-against-newspape>.

⁹⁷ Azam Ahmed & Elisabeth Malkin, *Otto Pérez Molina of Guatemala is Jailed After Resigning the Presidency*, N.Y. TIMES (Sept. 3, 2015), <https://www.nytimes.com/2015/09/04/world/americas/otto-perez-molina-guatemalan-president-resigns-amid-scandal.html>.

his reporting on a criminal group's scheme to scam foreign retirees out of their properties.⁹⁸ The story included allegations that a retired British businessman's wife had forged his signature on documents that removed him as the head of a company that owned several Thai properties.⁹⁹ Head reported that attorney Pratuhan Thanarak had notarized the businessman's signature on the documents.¹⁰⁰ Head also reported that the attorney admitted on tape that the businessman was not present when the documents were signed.¹⁰¹ The businessman's wife was later convicted and jailed for her role in the fraud scheme.¹⁰²

Thanarak brought a private criminal defamation prosecution against Head, alleging that the report caused him to be "defamed, insulted or hated."¹⁰³ In addition to criminal defamation, Head faced a separate criminal charge under Thailand's Computer Crimes Act, which forbade uploading "false data" online.¹⁰⁴ Thai authorities also ordered Head to surrender his passport while the trial was proceeding, which could have taken up to two years.¹⁰⁵ But in August 2017, Thanarak dropped his criminal defamation suit against Head on the first scheduled day of the trial.¹⁰⁶

Journalists in other parts of the world have also faced criminal defamation prosecutions as a result of reports of government officials' and prominent figures' questionable behavior. In 2011, Montenegrin journalist Petar Komnenić was convicted of defaming government authorities after publishing a report alleging that officials had conducted illegal surveillance on judges.¹⁰⁷ He was ordered to pay a fine of 3,000 euros or serve four

⁹⁸ Lindsay Murdoch, *BBC to fight for correspondent Jonathan Head's freedom in Thailand*, SYDNEY MORNING HERALD (Feb. 26, 2017), <http://www.smh.com.au/world/bbc-to-fight-for-correspondent-jonathan-heads-freedom-in-thailand-20170223-gukbxd.html>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Agence France-Presse, *BBC journalist Jonathan Head on trial in Thailand over unusual defamation case*, GUARDIAN (Aug. 23, 2017), <https://www.theguardian.com/world/2017/aug/23/bbc-journalist-jonathan-head-on-trial-in-thailand-over-unusual-defamation-case>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *BBC correspondent Jonathan Head has criminal defamation suit dropped in Thailand*, GUARDIAN (Aug. 24, 2017), <https://www.theguardian.com/world/2017/aug/24/bbc-correspondent-jonathan-head-has-criminal-defamation-suit-dropped-in-thailand>.

¹⁰⁷ Aleksandar Vasovic & Matt Robinson, *Montenegrin journalist given prison term for libel*, REUTERS (Apr. 18, 2012), <https://www.reuters.com/article/us-montenegro-journalists/montenegrin-journalist-given-prison-term-for-libel-idUSBRE83H19E20120418>.

months in jail as a penalty for the conviction.¹⁰⁸ Komnenić's conviction was initially upheld on appeal in 2012 despite Montenegro's decriminalization of defamation a few months after his trial.¹⁰⁹ The Montenegrin parliament subsequently passed a law in 2013 that provided amnesty to people convicted of criminal defamation, and Komnenić was eventually pardoned.¹¹⁰

Ecuadorian President Rafael Correa filed a criminal defamation suit against newspaper *El Universo* over a column calling him a dictator.¹¹¹ *El Universo* columnist Emilio Palacio accused Correa of granting troops permission to fire on a hospital filled with patients during a police protest in September 2010.¹¹² A trial court convicted Palacio and the owners of *El Universo* of defaming Correa, sentencing them to three-year prison terms and assessing damages equivalent to \$42 million in U.S. dollars, and the penalties were upheld on appeal by the Ecuadorian Supreme Court of Justice in 2012.¹¹³ Shortly thereafter, Correa granted pardons to the *El Universo* owners and Palacio, citing the international condemnation of the convictions as the motivating force.¹¹⁴

D. Allegations of Sexual Indiscretions

The final broad category of cases includes instances in which journalists and news organizations face criminal defamation charges related to reports of sexual indiscretions of government officials or other public figures. In many instances, the indiscretions may simply be embarrassing to the prominent individual; in other cases, the alleged behavior could potentially constitute a violation of law. After allegations of sexual indiscretions are made public, the official or high-profile figure seeks criminal punishments against the reporter or news organizations. These types of cases are less prevalent than cases found in the other categories.

Canadian fashion designer Peter Nygard initiated a private criminal defamation prosecution against three Canadian Broadcasting Corporation

¹⁰⁸ *Id.*

¹⁰⁹ *Journalist sentenced to jail for libel in Montenegro*, COMM. TO PROTECT JOURNALISTS (April 30, 2012), <https://cpj.org/2012/04/journalist-sentenced-to-jail-for-libel-in-monteneg.php>.

¹¹⁰ *Freedom of the Press 2013: Montenegro*, FREEDOM HOUSE (2013), <https://freedomhouse.org/report/freedom-press/2013/Montenegro>.

¹¹¹ COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 95.

¹¹² See William Neuman, *President of Ecuador to Pardon Four in Libel Case*, N.Y. TIMES (Feb. 27, 2012), <http://www.nytimes.com/2012/02/28/world/americas/president-of-ecuador-to-pardon-four-in-libel-case.html>.

¹¹³ *Id.*

¹¹⁴ *Id.*

(CBC) journalists in 2011.¹¹⁵ Nygard filed the complaint after the CBC investigative news show “Fifth Estate” aired a critical documentary in 2010 reporting that the designer was abusive to staff working at his estate in the Bahamas.¹¹⁶ The documentary also reported that Nygard engaged in sexual conduct with an underage girl from the Dominican Republic at his Bahamian home in 2003.¹¹⁷ After the documentary aired, Nygard filed a criminal defamation suit against “Fifth Estate” host Bob McKeown and the program’s producers, Timothy Sawa and Morris Karp, alleging that the journalists had violated Sections 300 and 301 of the Canadian Criminal Code.¹¹⁸ In April 2017, the CBC journalists lost a years-long procedural battle in a Manitoba appellate court, which denied the journalists’ attempts to dismiss summonses to appear in district court to face the charges.¹¹⁹ The decision allowed Nygard’s prosecution targeting the CBC to move forward.¹²⁰

Peruvian journalist Paul Segundo Garay Ramírez also faced prosecution in 2011 over allegations that he made defamatory remarks about a local attorney during a radio broadcast.¹²¹ Prosecutor Agustín López Cruz brought a suit against Ramírez, claiming that the journalist was the unidentified voice on an undated radio clip where the speaker described the prosecutor as an “erotic dwarf” who sexually harassed young litigants.¹²² Ramírez denied that his voice was on the recording and claimed that the prosecutor brought the case as retribution for his reporting on corruption.¹²³ Neither Cruz nor Ramírez provided evidence to definitively prove their claims during the trial.¹²⁴ Ramírez was convicted and sentenced to three years in prison, and the Peruvian Supreme Court recommended the

¹¹⁵ COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 22.

¹¹⁶ Jamie Cameron, *Repeal Defamatory Libel*, CENTRE FOR FREE EXPRESSION (July 5, 2017), <https://www.cfe.ryerson.ca/blog/2017/07/repeal-defamatory-libel>.

¹¹⁷ *Id.*

¹¹⁸ Canada Criminal Code, R.S.C. 1985, c C-46 §§ 300-301.

¹¹⁹ Canadian Broadcasting Corp. v. Morrison, 2017 MBCA 36 (Can.); *see also* David Larkins, *Nygard scores win against CBC*, WINNIPEG SUN (April 8, 2017), <http://winnipeg.sun.com/2017/04/09/nygard-scores-win-against-cbc/wcm/fa749449-155a-46c4-bc9c-993f90c1aed3>.

¹²⁰ Larkins, *supra* note 119.

¹²¹ COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 104.

¹²² *Peru frees journalist jailed for defamation*, COMM. TO PROTECT JOURNALISTS (Oct. 31, 2011), <https://cpj.org/2011/10/peru-frees-journalist-jailed-for-defamation.php>.

¹²³ *Id.*

¹²⁴ Joel Simon, *Peru must take steps to decriminalize defamation*, COMM. TO PROTECT JOURNALISTS (Aug. 4, 2011), <https://cpj.org/2011/08/peruvian-government-must-take-steps-toward-decrimi.php>.

conviction be overturned after receiving a report from Peru's chief prosecutor highlighting deficiencies in the evidence used at trial.¹²⁵

Looking ahead, it is possible that the number of criminal libel prosecutions involving allegations of sexual misconduct could increase in the near future. In the United States, the "#MeToo movement" has prompted greater scrutiny and awareness of allegations of sexual harassment and assault. The #MeToo campaign, launched by activist Tarana Burke in 2006,¹²⁶ gained prominence in 2017 after widespread reports alleging high-profile film producer Harvey Weinstein of sexually harassing women in Hollywood circles for years, which resulted in his termination from the movie studio bearing his name.¹²⁷ Shortly thereafter, other powerful and prominent figures in film and media faced credible accusations of similar misbehavior, resulting in many losing their jobs.¹²⁸ At the same time, women, and some men, took to social media sites to share stories of sexual harassment and sexual assault they had faced to demonstrate how commonplace such misconduct can be.¹²⁹ In some situations, individuals who disclosed accounts of sexual harassment or assault included the names of the alleged perpetrators.

Unsurprisingly, civil defamation lawsuits followed.¹³⁰ In an October 2017 Facebook post, Melanie Kohler accused film director Brett Ratner of

¹²⁵ *Peru frees journalist jailed for defamation*, *supra* note 122.

¹²⁶ See ME TOO, <https://metoomvmt.org> (last visited May 25, 2020).

¹²⁷ Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

¹²⁸ See Kim Barker & Ellen Gabler, *Charlie Rose Made Crude Sexual Advances, Multiple Women Say*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/us/charlie-rose-women.html>; Sydney Ember, *Glenn Thrush, New York Times Reporter, Accused of Sexual Misconduct*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/business/media/glenn-thrush-sexual-misconduct.html>; John Koblin & Michael M. Grynbaum, *Mark Halperin, a Top Political Journalist, Faces Multiple Claims of Harassment*, N.Y. TIMES (Oct. 26, 2017), <https://www.nytimes.com/2017/10/26/business/media/halperin-sexual-harassment.html>; Kristine Phillips, *Netflix drops 'House of Cards' star Kevin Spacey after new allegations arise*, WASH. POST (Nov. 4, 2017), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/11/04/netflix-is-dropping-kevin-spacey-from-house-of-cards/>; Paul Farhi, *'Today' show host Matt Lauer fired after claims of 'inappropriate sexual behavior'*, WASH. POST (Nov. 29, 2017), https://www.washingtonpost.com/lifestyle/style/today-show-host-matt-lauer-fired-after-claims-of-inappropriate-sexual-behavior/2017/11/29/ee85bf42-d4fd-11e7-b62d-d9345ced896d_story.html; Abby Ohlheiser et al., *Garrison Keillor, founder of 'A Prairie Home Companion,' fired after allegations of improper behavior*, WASH. POST (Nov. 29, 2017).

¹²⁹ Anna Codrea-Rado, *#MeToo Floods Social Media With Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html>.

¹³⁰ See Joanne Sweeney, *Can you be sued for sharing your #MeToo story?*, SALON (Dec. 16, 2017), <https://www.salon.com/2017/12/16/can-you-be-sued-for-sharing-your-metoo-story/>.

rape, claiming that he “had preyed on me as a drunk girl [and] forced himself upon me.” Soon after, Ratner’s attorney threatened her with a defamation lawsuit, and Kohler removed the post.¹³¹ A week later, on November 1, the *Los Angeles Times* published a story recounting six additional allegations of sexual harassment by Ratner, including celebrities.¹³² Within hours, Ratner filed a lawsuit against Kohler in the District Court of Hawaii, even though she was not quoted in the *Los Angeles Times* article.¹³³ Kohler filed a motion in early January 2018 asking the district court to apply the anti-SLAPP law of California where Ratner lives and the alleged rape occurred, to dismiss Ratner’s suit.¹³⁴ However, Ratner later agreed to drop the lawsuit in October 2018 for an undisclosed reason.¹³⁵

Meanwhile in Kentucky, the owner of a prominent Louisville bar filed defamation lawsuits in state court in November 2017 against two women for alleging on social media that he had raped one of them, and drugged the other two weeks earlier.¹³⁶ One of the posts included a picture of the owner as well as “#metoo” in the caption.¹³⁷ In November 2018, one of the women accusing the bar owner of assault filed a countersuit, alleging the owner of improperly using his lawsuit and the court system to harass her.¹³⁸

Allan Cobb, a lawyer representing the woman, told the *Louisville Courier Journal* the lawsuit was also intended to discourage other possible victims from speaking out. “The circus (our client) has been through may

¹³¹ Amy Kaufman & Richard Winton, *She accused director Brett Ratner of rape in a Facebook post. Then he sued her for defamation*, L.A. TIMES (Nov. 2, 2017), <http://www.latimes.com/business/hollywood/la-fi-ct-brett-ratner-melanie-kohler-lawsuit-20171102-story.html>.

¹³² Amy Kaufman & Richard Winton, *Six women accuse filmmaker Brett Ratner of sexual harassment or misconduct*, L.A. TIMES (Nov. 1, 2017), <http://www.latimes.com/business/hollywood/la-fi-ct-brett-ratner-allegations-20171101-htmstory.html>.

¹³³ Kaufman & Winton, *supra* note 131.

¹³⁴ Christie D’Zurilla, *Woman sued by Brett Ratner asks court to dismiss defamation case*, L.A. TIMES (Jan. 3, 2018), <http://www.latimes.com/entertainment/la-et-entertainment-news-updates-2018-woman-sued-by-brett-ratner-asks-court-to-1515006314-htmstory.html>.

¹³⁵ Mike Fleming, Jr., *Brett Ratner & Accuser Find Common Ground; Defamation Suit Dismissed – Update*, DEADLINE (Oct. 2, 2018), <https://deadline.com/2018/10/brett-ratner-melanie-kohler-settlement-lawsuit-defamation-sexual-assault-allegation-1202474696>.

¹³⁶ Bailey Loosemore & Darcy Costello, *Haymarket Whiskey Bar reopens as owner files suit against woman who said he raped her*, COURIER J. (Dec. 6, 2017), <https://www.courier-journal.com/story/news/local/2017/11/29/haymarket-whiskey-bar-matthew-landan-defamation-lawsuit-rape-allegation/907567001>.

¹³⁷ *Id.*

¹³⁸ Bailey Loosemore, *Where the Haymarket Whiskey Bar lawsuit stands one year later*, COURIER J. (Nov. 28, 2018), <https://www.courier-journal.com/story/news/crime/2018/11/28/haymarket-whiskey-bar-metoo-rape-allegations-one-year-later/2136014002>.

be a deciding factor for these women,” Cobb told the *Courier Journal*. “It’s not something women want to come forward to and expose themselves to. It’s abuse of process, and we’re going to show, we believe, that he’s trying to silence a victim.”¹³⁹ The litigation remained ongoing as of early 2020.¹⁴⁰

These cases—admittedly, all civil proceedings—demonstrate that prominent figures in the United States have quickly turned to defamation litigation as a way to combat allegations of sexual harassment and silence critics. As movements such as #MeToo grow internationally, it is likely only a matter of time before government officials and public figures begin to exploit criminal defamation laws in an attempt to silence even legitimate accusations of sexual misconduct. Numerous examples in the United States and throughout the world show that if criminal defamation laws are available, people will use them as a way to stifle criticisms.

Although not an exhaustive list, the examples in these four categories illustrate the most common types of situations where public officials and prominent figures seek to utilize criminal defamation to pursue and punish their critics. These international cases demonstrate that powerful figures are willing to attack individuals such as journalists, bloggers and critics, as well as large news organizations. The cases also show that those in the public eye are willing to target critics who engage in commentary they perceive as insults, allegations of corruption, malfeasance, or sexual indiscretions. These types of cases present real threats to freedom of expression and the public’s “right to know.”

IV. CRIMINAL DEFAMATION PENALTIES WITHIN AND OUTSIDE THE UNITED STATES

Throughout the world, journalists and other individuals charged with criminal defamation typically face three possible punishments: monetary penalties, imprisonment, and being temporarily barred from journalistic practice. However, in the majority of instances, criminal defamation charges against journalists are either not formally levied or are dropped. Additionally, many defamation convictions are overturned on appeal, or a governmental authority grants a pardon. Nevertheless, the specter of punishment for criminal defamation remains a threat to the ability to practice robust journalism.

¹³⁹ *Id.*

¹⁴⁰ *Id.*; see also Bailey Loosemore, *Haymarket Whiskey Bar: Woman who says owner drugged her files countersuit*, *COURIER J.* (Dec. 26, 2017), <https://www.courier-journal.com/story/news/crime/2017/12/26/haymarket-lawsuit-matthew-landan-countersuit-drugged-drink/980693001>.

A. Financial Penalties

When journalists are punished for criminal defamation, they most often face financial penalties, which may take the form of a monetary fine, a mandated donation to a charity or other non-governmental organization, the freezing of the individual's bank account, or garnishment of a portion of their wages. One such case unfolded in Azerbaijan in November 2009, when Azerbaijan Interior Minister Ramil Usubov filed a criminal defamation lawsuit against Ayyub Karimov, editor-in-chief of the Azerbaijani newspaper *Femida 007*.¹⁴¹ Usubov claimed that a series of articles published in the newspaper were inaccurate and damaged his dignity and honor.¹⁴² Karimov had also criticized the Ministry of Internal Affairs in an interview with the opposition daily newspaper *Azadlig* (*Freedom*), contending that the Ministry had become a "nest" for criminals.¹⁴³ In a subsequent interview with Human Rights Watch, Karimov defended his interview:

In my commentary to Azadlig I didn't identify the names of any individual. It wasn't a personal insult against the minister. . . . I expressed my opinion after a group of criminals and kidnapers had been arrested in the Ministry [of Internal Affairs]. Present counter-arguments, and if I am proved wrong, then ask me to refute my words by publishing a retraction. But imprisonment is simply retaliation.¹⁴⁴

The charges against Karimov were brought under Article 147 of the Criminal Code of the Republic of Azerbaijan.¹⁴⁵ The Yasamal District Court sentenced Karimov to an 18-month suspended sentence, ordered that his salary be garnished by 15 percent for the duration of the sentence, and forced him to pay legal costs.¹⁴⁶ An appeals court upheld the sentence in October 2010.¹⁴⁷

Although these financial penalties might appear *de minimis*, they can be crippling to journalists in developing countries. If there is no financial assistance available, fines could potentially force journalists into poverty or

¹⁴¹ *Azerbaijani Journalist Convicted Of Libel*, RADIOFREEEUROPE/RADIO LIBERTY (Feb. 4, 2010), https://www.rferl.org/a/Azerbaijani_Journalist_Convicted_Of_Libel/1949038.html.

¹⁴² *Id.*

¹⁴³ *Beaten, Blacklisted, and Behind Bars: The Vanishing Space for Freedom of Expression in Azerbaijan*, HUMAN RIGHTS WATCH (Oct. 10, 2010), <https://www.hrw.org/sites/default/files/reports/azerbaijan1010W.pdf>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; see also AZƏRBAYCAN RESPUBLİKASININ CİNAYƏT MƏCƏLLƏSİ [Criminal Code] art. 147 (Azer.); ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 48.

¹⁴⁶ ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 51; *Azerbaijani Journalist Convicted of Libel*, *supra* note 141.

¹⁴⁷ *Id.*

even compel them to leave the field entirely. In 2012, the Regional Court in Plzeň and the Czech Constitutional Court confirmed the criminal defamation conviction of a journalist working for the tabloid newspaper *Blesk (Flash)*.¹⁴⁸ The case arose in 2008 when the journalist, who was not named in any of the news stories but was identified as a male, covered the murder of a woman and her small child in the town of Luh nad Svatavou, near the German border.¹⁴⁹ The alleged killer, the uncle of the murdered woman, had hanged himself in the woman's home.¹⁵⁰ The woman's body was found naked, and, coupled with other evidence, the journalist reported that she had had voluntary "wild sex" with the killer before she was murdered.¹⁵¹ The woman's husband then brought charges for criminal defamation, claiming that the reporter's insinuation that the alleged sexual encounter had been consensual was false, and that it was "unsubstantiated and was not confirmed by later police investigations," according to a local news story.¹⁵²

Although the journalist claimed he had made every effort to obtain accurate information, the District Court found that he had damaged the honor, human dignity, and reputation of the deceased and survivors under Article 84 of the Czech Criminal Code.¹⁵³ The court ordered him to pay a fine of 80,000 Czech crowns (~\$3,700), four times the journalist's monthly salary of 20,000 crowns.¹⁵⁴ Because of the potential financial hardship of the fine, the newspaper ultimately paid it on the journalist's behalf.¹⁵⁵

B. Imprisonment

Journalists also face imprisonment when convicted of criminal defamation charges, although this happens less frequently than the imposition of monetary penalties. Our examination found several instances in which journalists spent time in jail or prison or were

¹⁴⁸ Nález Ústavního soudu ze dne 18.10.2012 (ÚS) [Decision of the Constitutional Court of Oct. 18, 2012], sp.zn. II. ÚS 2042/12 (Czech); see also ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 83.

¹⁴⁹ ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 83; *Soud potvrdil novináři trest za zprávu o tragédii se třemi mrtvými* [The court upheld the journalists' punishment for a report on a tragedy with three dead], NOVINKY (Nov. 5, 2012) (Czech), <https://www.novinky.cz/krimi/283727-soud-potvrdil-novinari-trest-za-zpravu-o-tragedii-se-tremi-mrtvymi.html>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Soud potvrdil novináři trest za zprávu o tragédii se třemi mrtvými*, *supra* note 149.

¹⁵³ *Id.*; see also Trestní zákoník, Zákon č. 40/2009 Sb. (Czech).

¹⁵⁴ ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 83.

¹⁵⁵ *Id.*

ordered to carry out sentences of hard labor or other compulsory work. One such sentence was imposed in Belarus. In June 2002, Mikola Markevich, editor-in-chief of *Pahonia (The Emblem)*, a Grodno-based independent weekly newspaper, and Pavel Mazheiko, a journalist for the same newspaper, were convicted of defaming Belarus President Alexander Lukashenko under Article 367 of the Belarusian Criminal Code.¹⁵⁶ The charges were brought following an article published during the September 2001 presidential elections in which Markevich and Mazheiko called upon voters to oppose Lukashenko, alleging that he was involved in the “disappearances” of political leaders.¹⁵⁷ However, before the 11,000 issues of the paper containing the article could be disseminated, they were confiscated at the printing house.¹⁵⁸ Authorities shut down *Pahonia* in November 2001.¹⁵⁹

Both Markevich and Mazheiko received sentences of “restricted freedom,” with the editor-in-chief receiving two and a half years and the journalist receiving two years, and while the sentences were later reduced on appeal to one year each, the men were still required to engage in hard labor under police supervision.¹⁶⁰ Markevich was sentenced to spend the duration of his sentence in the town of Osipovichy, while Mazheiko was sentenced to serve his term in Zhlobin—both small, economically depressed towns located in the areas affected by the fallout from the 1986 Chernobyl nuclear disaster.¹⁶¹ In these towns, the journalists were required to work any hard labor job they could find before eventually being released in March 2003.¹⁶²

In an interview with *International League for Human Rights* editor Victor Cole, the journalists compared their sentences to that of political

¹⁵⁶ Victor Cole, *Convicted Journalists Leave Hometown To Serve Their Terms*, 5 BELARUS UPDATE (September 2002), <http://spring96.org/en/news/11548>; see also КОДЕКС РЕСПУБЛИКИ БЕЛАРУСЬ ОБ АДМИНИСТРАТИВНЫХ ПРАВОНАРУШЕНИЯХ [Criminal Code of the Republic of Belarus] [Crim. Code] art. 367 (Belr.).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ HUMAN RIGHTS WATCH, WORLD REPORT 2003: EVENTS OF 2002, 314 (2003), <http://pantheon.hrw.org/legacy/wr2k3/>.

¹⁶⁰ *Id.*; see also Cole, *supra* note 156; Mikola Markovic, Pavel Mazheiko, ENGLISH PEN (Feb. 14, 2003), <https://www.englishpen.org/campaigns/mikola-markovic-pavel-mazheiko>; *Belarus court jails journalists*, BBC (June 24, 2002), <http://news.bbc.co.uk/2/hi/europe/2063322.stm>.

¹⁶¹ Cole, *supra* note 156.

¹⁶² *Id.*; Mikola Markovic, Pavel Mazheiko, *supra* note 160.

prisoners during the reign of Soviet dictator Josef Stalin, who used internal exile as a means of punishing critics of his regime.¹⁶³ “The parallels with the Stalin era are obvious,” Markovic said. “My grandfather was repressed, and now the Belarusian authorities are using the same methods.”¹⁶⁴ Although this particular example involved a sentence of hard labor, our examination also uncovered cases in which other individuals convicted of criminal defamation served sentences ranging from one month to two and a half years in prison, including in Azerbaijan,¹⁶⁵ Bolivia,¹⁶⁶ Ecuador,¹⁶⁷ Slovenia,¹⁶⁸ and India,¹⁶⁹ among others.

C. Barred from the Practice of Journalism

Although comparatively rare, some journalists have been barred from practicing journalism for a designated period of time. In 2015, the Leninsky District Court in the Russian Federation found journalist and blogger Sergei Reznik (Сергей Резник) guilty of insulting the deputy prosecutor of the Rostov region, as well as the criminal police investigator and the deputy chief of the Centre for Extremism Prevention of the Russian Federation Ministry of Internal Affairs Main Directorate.¹⁷⁰ The court determined Reznik had used his blog on *LiveJournal* to criticize law

¹⁶³ Cole, *supra* note 156.

¹⁶⁴ *Id.*

¹⁶⁵ *Azerbaijan: Opposition Editor Sentenced to Prison*, HUMAN RIGHTS WATCH (April 25, 2007, 8:00 PM), <https://www.hrw.org/news/2007/04/25/azerbaijan-opposition-editor-sentenced-prison>; see also Daisey Sindelar, *Fatullayev: 'I'm Still Here – Alive, Working, and Telling the Truth'*, RADIOFREEEUROPE/RADIODLIBERTY (Oct. 3, 2011, 2:28 PM), https://www.rferl.org/a/fatullayev_says_im_still_here/24347732.html (discussing prison experience); see also ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 17, 52.

¹⁶⁶ COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 81; see also Scott Griffen, *Defamation Conviction in Bolivia Part of Wider Trend*, INT'L PRESS INST. (March 23, 2012), <https://ipi.media/defamation-conviction-in-bolivia-part-of-wider-trend>.

¹⁶⁷ *Ecuadorian Provincial Reporter Jailed on Defamation Charges*, COMM. TO PROTECT JOURNALISTS (May 2, 2011, 2:58 PM), <http://cpj.org/2011/05/ecuadoran-provincial-reporter-jailed-on-defamation.php>; see also COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 95-96.

¹⁶⁸ Jure Predanič, *Mitja Kunstelj bo moral zaradi bloganja v zapor* [*Mitja Kunstelj Will Have to go to Prison for Blogging*], DELO (May 13, 2013, 8:47 PM), <http://www.del.si/novice/kronika/mitja-kunstelj-bo-moral-zaradi-bloganja-v-zapor.html>; *Blogger Gets Six Months in Jail for Defamation*, REPORTERS WITHOUT BORDERS (May 16, 2013), <https://rsf.org/en/news/blogger-gets-six-months-jail-defamation>; See also ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 215.

¹⁶⁹ *Indian State Assembly Sentences Two Editors to Prison for Defamation*, COMM. TO PROTECT JOURNALISTS (June 23, 2017, 1:53 PM), <https://cpj.org/2017/06/indian-state-assembly-sentences-two-editors-to-pri.php>; see also *Karnataka Assembly Sentences Two Journalists to Jail for 'Defaming' Legislators*, WIRE (June 22, 2016), <https://thewire.in/150406/karnataka-assembly-sentences-two-journalists-to-jail-for-defaming-legislators>.

¹⁷⁰ ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 200.

enforcement officials, referring to them in derogatory terms such as “marmosets” and “crocodiles,” and describing one official as a “tractor driver,” “scoundrel,” “swindler,” and more.¹⁷¹ The court found such statements of the journalist to be insulting and in violation of Article 319 of the Russian Federation Criminal Code.¹⁷²

After conviction under Article 319, the court barred the journalist from working at any media agencies for one year and 10 months.¹⁷³ On the other charges, Reznik was sentenced to three years in a prison colony, to begin upon finishing an 18-month prison term for a separate offense in 2013.¹⁷⁴ Reznik’s lawyer, Tumas Misakyan, told the International Bar Association that the Russian criminal code’s section on criminal defamation was being abused and employed as a means of denying freedom of expression to those with legitimate criticisms to make.¹⁷⁵ He said, “You just cannot predict what you should and should not say . . . It is not possible to correlate the words with the [court] sentence you get because it is completely subjective implementation—and misuse—of the law.”¹⁷⁶

D. No Formalized Punishments

Although the journalists discussed above faced financial penalties, imprisonment, and being barred from practicing journalism, the majority of cases identified in our examination did not result in the imposition of judicially sanctioned punishment. In fact, many criminal defamation complaints are dismissed or dropped before a formal trial on the charges can take place, though journalists are still subject to searches, arrests, and imprisonment while the charges are still under consideration.

One such case arose in the United States in 2003 when Thomas Mink launched his online and print newsletter, *The Howling Pig*, while a student at the University of Northern Colorado.¹⁷⁷ Mink intended the newsletter to

¹⁷¹ Polly Botsford, *Word Crimes – Defamation and Freedom of Expression*, INT’L BAR ASS’N (Feb. 15, 2016), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=9e40e124-20bb-4533-a919-c7b5345f34c4>.

¹⁷² *Imprisoned Russian Journalist Sentenced to New Three-Year Jail Term*, COMM. TO PROTECT JOURNALISTS (Jan. 22, 2015, 5:44 PM), <https://cpj.org/2015/01/imprisoned-russian-journalist-sentenced-to-new-thr.php>; See also ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 200; UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 319 (Russ.).

¹⁷³ ORG. FOR SECURITY AND CO-OPERATION IN EUR., *supra* note 11, at 200.

¹⁷⁴ *Imprisoned Russian journalist sentenced to new three-year jail term*, *supra* note 172.

¹⁷⁵ Botsford, *supra* note 171.

¹⁷⁶ *Id.*

¹⁷⁷ *Mink v. Suthers*, 482 F.3d 1244, 1249-51 (10th Cir. 2007), *cert. denied*, 552 U.S. 1165 (2008); see also Patrick File, *Update: Colorado Prosecutor Violated Student Editor’s Rights with*

be “a regular bitch sheet that will speak truth to power, obscenities to clergy, and advice to all the stoners sitting around watching Scooby Doo,” as well as “a forum for the pissed off and disenfranchised in Northern Colorado, basically everybody.”¹⁷⁸ Mink wrote irreverent editor’s notes under the pseudonym “Junius Puke” alongside an altered photo of then-University of Northern Colorado economics professor Junius Peake, which depicted the professor in dark sunglasses and a Hitler-like mustache.¹⁷⁹

In November 2003, Peake contacted the police, claiming that he was criminally defamed by *The Howling Pig*’s use of his photograph, as well as by statements in the newsletter alleging that the professor “gambled in tech stocks” in the 1990s and wore sunglasses to avoid being recognized by his colleagues on Wall Street where “he managed to luck out and ride the tech bubble of the nineties like a \$20 whore and make a fortune,” among other statements.¹⁸⁰ Under Colorado’s criminal defamation statute in place at the time, it was a class 6 felony to knowingly publish any statement tending 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.”¹⁸¹

On December 12, 2003, police executed a search warrant on Mink’s residence and property, including his computer, as part of the investigation into Peake’s allegations.¹⁸² In early 2004, however, a federal district court ordered Mink’s possessions returned after the district attorney’s office announced it had decided not to prosecute him.¹⁸³ Mink later filed a lawsuit against the Colorado attorney general, the local district attorney, and a deputy district attorney, alleging that his Fourth Amendment rights had been violated by the search and that his First Amendment rights were violated by the “imminent threat” of a criminal defamation charge.¹⁸⁴

After several years of procedural skirmishes and appeals, the U.S. Court of Appeals for the Tenth Circuit concluded in 2010 that Mink had “plausibly alleged that [the defendants] violated [his] clearly established constitutional rights” under the Fourth Amendment.¹⁸⁵ In a later court

Criminal Libel Search Warrants, SILHA BULL., Summer 2011, at 37, <http://silha.umn.edu/assets/pdf/Summer2011Bulletinprimary.pdf>.

¹⁷⁸ File, *supra* note 177, at 37.

¹⁷⁹ *Id.*; *Mink*, 482 F.3d at 1249.

¹⁸⁰ *Mink v. Knox*, 613 F.3d 995, 1018 (10th Cir. 2010).

¹⁸¹ Colo. Rev. Stat. § 18-13-105 (repealed 2012).

¹⁸² *Suthers*, 482 F.3d at 1249.

¹⁸³ *Knox*, 613 F.3d at 999.

¹⁸⁴ *Id.*; *see also* File, *supra* note 177.

¹⁸⁵ *Knox*, 613 F.3d at 1011.

proceeding on June 3, 2011, Judge Lewis Babcock of the U.S. District Court for the District of Colorado agreed with the Tenth Circuit's ruling that there was no probable cause to issue a warrant related to a violation of Colorado's criminal defamation statute because "no reasonable reader" of *The Howling Pig* "would believe that the statements in that context were said by Professor Peake in the guise of Junius Puke, nor would any reasonable person believe that they were statements of fact as opposed to hyperbole or parody."¹⁸⁶ Mink eventually agreed to a \$425,000 settlement of his lawsuit against the deputy district attorney in December 2011.¹⁸⁷ But to achieve this, Mink had been forced to initiate a civil rights lawsuit regarding the search of his home, and spend several years in litigation in order to fight the possibility of a criminal defamation charge. The criminal defamation statute was subsequently repealed by the Colorado legislature in a bill signed by Governor John Hickenlooper on April 13, 2017.¹⁸⁸

Significantly, throughout the years of proceedings, the U.S. Court of Appeals for the Tenth Circuit had declined to rule on the facial unconstitutionality of Colorado's criminal defamation statute. In a 2007 decision, the appellate court held that Mink lacked standing to make a First Amendment challenge, and his claim that the statute was unconstitutional was moot because the district attorney declined to initiate a prosecution.¹⁸⁹ The appellate court wrote:

At the time the original complaint was filed . . . police had conducted a search of Mink's residence, seized his computer and papers, and were retaining them pending further investigation. Attempts by Mink's counsel to dissuade the district attorney from charging him had yet to bear fruit. Thus, Mink appeared to have a legitimate basis for alleging a credible fear of future prosecution when he brought the suit.

Nonetheless, we conclude Mink lacks standing under our case law. First, based on his review of controlling [U.S.] Supreme Court precedents, the district attorney disclaimed an intent to prosecute immediately after the lawsuit was filed. . . . No charges were ever filed against Mink and the district attorney publicly announced he would not prosecute well before his office filed an answer or motion to dismiss. Where a plaintiff only

¹⁸⁶ Mink v. Knox, No. 84-cv-08023-LTB-CBS, 2011 WL 2174401, at *5 (D. Colo. 2011).

¹⁸⁷ Chris Healy, *Eight Year Howling Pig Litigation Ends in \$425K Settlement*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Dec. 14, 2011), <https://www.rcfp.org/browse-media-law-resources/news/eight-year-howling-pig-litigation-ends-425k-settlement>.

¹⁸⁸ *Colorado Repeals Criminal Libel Law*, IFEX (April 20, 2012), https://www.ifex.org/united_states/2012/04/20/colorado_repeal.

¹⁸⁹ *Suthers*, 482 F.3d at 1249; see also Brief for the United States Court of Appeals as Amicus Curiae, *Suthers*, No. 04-1496 (482 F.3d 1244), [http://silha.umn.edu/assets/pdf/mink_v_buck\[1\].pdf](http://silha.umn.edu/assets/pdf/mink_v_buck[1].pdf).

seeks prospective relief, standing is defeated when there is evidence the government will not enforce the challenged statute against the plaintiff.

Second, it is significant Mink filed an amended complaint after the district attorney disclosed his intent not to prosecute. The sequence of events confirms Mink had no “injury in fact” for prospective relief when he filed his amended complaint. Any threat against Mink at the time was “hypothetical,” not “actual and imminent.”¹⁹⁰

The Tenth Circuit’s dismissal of the First Amendment claim implied that prosecutorial discretion mitigates the potential harms that enforcement of criminal defamation statutes can create, even in situations when a speaker’s property is searched and seized based on the exercise of constitutionally protected expression. However, even if it might be an effective deterrent in some instances, such discretion has limits.

In Kansas, the editor and the publisher of *The New Observer*, a free-circulation tabloid, were convicted of criminal defamation in 2002 after reporting that Kansas City, Kansas Mayor Carol Marinovich and her husband, a judge, did not live in the county where they held office, as required by law.¹⁹¹ During the case, the presiding judge refused to allow a local district attorney to prosecute because of the contentious history his office had with the defendants and as a result, the district attorney sought a private attorney, David Farris, from outside of the county to act as a special prosecutor.¹⁹² During his closing argument, Farris told the jury, “you can’t print a lie. That’s a crime in the state of Kansas and it’s a misdemeanor—some of us wish it was a felony.”¹⁹³ The jury convicted the editor and the publisher, who were each fined \$700 and placed on one year of unsupervised probation.¹⁹⁴ Significantly, the Kansas criminal defamation statute facially complied with *Garrison* because the Kansas state legislature had added an “actual malice” requirement in 1995.¹⁹⁵ This case demonstrates that relying on prosecutorial discretion alone is not sufficient to mitigate the threat that criminal defamation has on journalists’ and others’ free expression.¹⁹⁶

¹⁹⁰ *Suthers*, 482 F.3d at 1254-55.

¹⁹¹ *Kansas v. Carson*, No. 01-CR-301 (Kan. Dist. Ct. Wyandotte Co. July 17, 2002; *see also* Jane E. Kirtley, *Overkill in Kansas*, AM. JOURNALISM REV. (Sept. 2002), <http://ajrarchive.org/article.asp?id=2606>.

¹⁹² Kirtley, *supra* note 191.

¹⁹³ *Id.*

¹⁹⁴ John W. Dean, *A Case in Kansas Asks Whether Libel Should Ever be Prosecuted*, CNN (Dec. 9, 2002, 12:24 PM), <http://edition.cnn.com/2002/LAW/12/09/findlaw.analysis.dean.defamation>.

¹⁹⁵ *Id.*

¹⁹⁶ Lisby, *supra* note 15, at 435.

In many cases, journalists who are charged and convicted of criminal defamation are later exonerated. The types of sentences they initially faced vary, but on appeal, a court may overturn the conviction, or governmental authorities may pardon the journalist, such as in Panama,¹⁹⁷ Ecuador,¹⁹⁸ and Serbia.¹⁹⁹ One high-profile example in which a court overturned the conviction of journalists on charges of criminal defamation took place in Germany. In August 2010, German freelance journalists Thomas Datt and Arndt Ginzler were convicted of criminal defamation arising from two articles published in the daily newspaper *Die Zeit* and the newsmagazine *Der Spiegel* in 2008.²⁰⁰ The articles investigated alleged links between former high-ranking judicial officials, including judges and prosecutors, in the state of Saxony and a brothel. The scandal was known as the *Sachsensumpf* (Saxony Swamp).²⁰¹ In the article appearing in *Die Zeit*, titled “Voreiliger Freispruch” (“Early Release”), Datt and Ginzler criticized the police investigation into the scandal.²⁰²

The journalists based the story largely on interviews with former prostitutes from the brothel, one of whom had allegedly positively identified a judge to police in 2000, but the identification was never entered into evidence.²⁰³ Datt and Ginzler presented evidence supporting this claim, and also asked rhetorically whether the investigating officers had been under internal pressure to protect the judge.²⁰⁴ Although the two officers later said they were not offended by the article, the police commissioner nevertheless sought criminal defamation charges.²⁰⁵ In the article published

¹⁹⁷ *Freedom in the World*, FREEDOM HOUSE (2011), <https://freedomhouse.org/report/freedom-world/2011/panama>; see also COMM. TO PROTECT JOURNALISTS, *supra* note 11.

¹⁹⁸ *Despite Pardon, Correa Does Lasting Damage to Press*, COMM. TO PROTECT JOURNALISTS (Feb. 27, 2012); see also William Neuman, *President of Ecuador to Pardon Four in Libel Case*, N.Y. TIMES (Feb. 27, 2012), <http://www.nytimes.com/2012/02/28/world/americas/president-of-ecuador-to-pardon-four-in-libel-case.html>; COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 95.

¹⁹⁹ *Serbia: Seemo Welcomes Presidential Pardon in Serbia for Imprisoned Author of Reader's Comment*, SOUTH EAST EUR. MEDIA ORG. (Jul. 8, 2012), <http://seemo.org/news/seemo-welcomes-presidential-pardon-in-serbia-for-imprisoned-author-of-eeader%E2%80%99s-comment/453>; see also ORG. FOR SEC. AND COOP. IN EUR., *supra* note 11, at 206.

²⁰⁰ See ORG. FOR SEC. AND COOP. IN EUR., *supra* note 11, at 104; see also *On Trial For Criminal Defamation, German Freelance Journalists Faced “Existential Threat”*, INT'L PRESS INST. (Sept. 11, 2014), <http://ipi.media/on-trial-for-criminal-defamation-german-freelance-journalists-faced-existential-threat>.

²⁰¹ *Id.*

²⁰² Thomas Datt and Arndt Ginzler, *Voreiliger Freispruch*, ZEIT (last updated June 27, 2008, 3:18 PM), <http://www.zeit.de/online/2008/27/sachsensumpf-jasmin>.

²⁰³ ORG. FOR SEC. AND COOP. IN EUR., *supra* note 11, at 104.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

in *Der Spiegel*, titled “Dreckige Wäsche” (“Dirty Laundry”), the journalists further criticized the investigation and one of the judges tied to the scandal, who filed criminal defamation charges against the journalists.²⁰⁶

In August 2010, Datt and Ginzel were convicted of criminal defamation under Criminal Code Article 186.²⁰⁷ The lower court in Dresden sentenced the journalists to pay fines of €2,500 each, finding that the rhetorical question in the first article had “damage[ed] the honour” of the officers.²⁰⁸ However, in December 2012, the Dresden Regional Court overturned the ruling, finding that the question raised by the journalists was sufficiently grounded in fact.²⁰⁹ The Regional Court also rejected the charges brought in relation to the second article, finding that the story concerned a matter of public interest.²¹⁰ The court cited constitutional jurisprudence, which provides that “an honour-offending media report can also be allowed if it is later proven to be untrue even if already at the moment of publishing there remain doubts about the reliability of the material used.”²¹¹

Although the case in Germany was resolved within the country’s courts, in some cases, the EU Court of Human Rights has overturned convictions that had been upheld by appeals courts and/or Supreme Courts, such as in Finland,²¹² Hungary,²¹³ and Poland.²¹⁴

Throughout the world, journalists facing charges of criminal defamation are subject to consequences such as financial penalties, imprisonment, or being barred from practicing journalism. It is true that many of the cases found in our examination resulted in no formal charges, or the charges were dropped. In other cases, courts or government officials sometimes overturned convictions before journalists’ formal punishment was imposed. Nevertheless, the mere possibility of such consequences

²⁰⁶ *Id.*; see also *On Trial For Criminal Defamation, German Freelance Journalists Faced “Existential Threat”*, *supra* note 200; Thomas Datt and Arndt Ginzel, *Dreckige Wäsche, Dirty Laundry DER SPIEGEL* (Jan. 21, 2008), <http://www.spiegel.de/spiegel/print/d-55508009.html>.

²⁰⁷ ORG. FOR SEC. AND COOP. IN EUR., *supra* note 11, at 101; see also Strafgesetzbuch [StGB] [Crim. Code], § 186, <https://www.lewik.org/term/15005/german-criminal-code> (Ger.).

²⁰⁸ *Id.*; see also *On Trial For Criminal Defamation, German Freelance Journalists Faced “Existential Threat”*, *supra* note 200.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Ristamäki and Korvola v. Finland*, App. No. 66456/09 Eur. Ct. H.R. (2013); see also ORG. FOR SEC. AND COOP. IN EUR., *supra* note 11, at 92.

²¹³ *Uj v. Hungary*, App. No. 23954/10 Eur. Ct. H.R. (2011); see also ORG. FOR SEC. AND COOP. IN EUR., *supra* note 11, at 114.

²¹⁴ *Ziemiński v. Poland*, App. No. 1799/07 Eur. Ct. H.R. (2016).

threatens journalists and other advocates, potentially chilling their free speech and limiting press freedoms.

V. COMBATTING DEFAMATION LAW IN ITS MOST WEAPONIZED FORM

Criminal defamation law has been a persistent feature of societies for millennia, with roots in ancient Babylonia²¹⁵ and the Roman Empire.²¹⁶ In England, the Court of the Star Chamber adopted common law criminal defamation rules after the development of the printing press in the 15th century.²¹⁷ The rules were initially designed to protect the monarchy from criticism, but they were also applied to defamatory statements about private individuals in non-political contexts.²¹⁸ Common law criminal defamation laws were still in place in England during the 19th century, and were later enforced in the North American colonies.²¹⁹ Many justified the continued use of criminal defamation law as a way to avert breaches of the peace, such as duels or other vigilante acts, undertaken by those who felt their dignity or honor had been impugned.

The threat of widespread dueling may not be realistic today, but governments still claim legitimate concerns about maintaining a peaceful society as a pretext to censor or punish speech. The spread of “fake news” could potentially provide an additional pretext to do so.

For the purpose of this argument, fake news is defined as statements that are demonstrably false and disseminated with the deliberate intent to deceive. And, indeed, widespread and pervasive false information online has led to potentially dangerous offline situations. For example, a man was arrested in late 2016 after he carried an assault rifle and fired shots into a Washington, D.C. pizzeria after reading false allegations online that Hillary Clinton and associates used the restaurant to operate a child sex ring.²²⁰ In

²¹⁵ Gregory E. Stevens, *Criminal Libel After Garrison*, in *RETHINKING CRIM. LAW* (George P. Fletcher ed., 1991).

²¹⁶ Elena Yanchukova, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 *COLUM. J. TRANSNAT'L L.* 861, 863 (2003).

²¹⁷ Van Vechen Veeder, *The History and Theory of the Law of Defamation*, 3 *COLUM. L. REV.* 546, 547 (1903).

²¹⁸ Jane E. Kirtley, *Criminal Defamation: An “Instrument of Destruction”*, in *ORG. FOR SEC. AND CO-OPERATION IN EUROPE, ENDING THE CHILLING EFFECT: WORKING TO REPEAL CRIMINAL LIBEL AND INSULT LAWS* 89 (Ana Karlsreiter & Hanna Vuokko ed., 2004).

²¹⁹ The 1735 acquittal of John Peter Zenger was the most famous criminal libel prosecution in colonial America. See *The Trial of John Peter Zenger*, in *THREE TRIALS: ZENGER, WOODFALL & LAMBERT: 1765-94*, at 46 (Stephen Parks ed., 1974).

²²⁰ Faiz Siddiqui & Susan Svrluga, *N.C. man told police he Went to D.C. pizzeria with gun to investigate conspiracy theory*, *WASH. POST* (Dec. 5, 2016),

2017, social media users in Myanmar used false information and out-of-context photographs to describe the Rohingya people, who have been targeted by the Myanmar military for what U.S. officials described as “ethnic cleansing,”²²¹ as terrorists and to justify violence against them.²²² Governments could point to these examples as justification for retaining criminal defamation provisions on the books.

The examples of cases in the United States and around the world demonstrate that the threat of criminal defamation charges continues to be a significant deterrent to free speech. Rather than keeping the peace, criminal defamation could become the most potent form of “weaponized defamation” and could act as an “instrument of destruction” for free expression and the public’s right to know.²²³ Government officials and prominent figures can and will use it to target their critics. Particularly alarming is a trend of public officials seeking to delegitimize the institutional press’ role as a watchdog of the government by appropriating the term “fake news.” For example, rather than using the term in the context of intentional falsehoods meant to deceive, U.S. President Donald Trump has labeled reports he dislikes as “fake news,” both as a shield to defend himself against criticism and as a sword to strike at the legitimacy of reporting carried out by prominent news organizations.²²⁴ Evidence suggests Trump’s accusations that media organizations are purveyors of fake news have undermined trust in the press among large sections of American public.²²⁵

<https://www.washingtonpost.com/news/local/wp/2016/12/04/d-c-police-respond-to-report-of-a-man-with-a-gun-at-comet-ping-pong-restaurant>.

²²¹ Mark Landler, *Myanmar’s Crackdown on Rohingya Is Ethnic Cleansing, Tillerson Says*, N.Y. TIMES (Nov. 22, 2017), <https://www.nytimes.com/2017/11/22/us/politics/tillerson-myanmar-rohingya-ethnic-cleansing.html>.

²²² *In Myamar, Fake News Spread on Facebook Stokes Ethnic Violence*, PUBLIC RADIO INT’L (Nov. 1, 2017), <https://www.pri.org/stories/2017-11-01/myanmar-fake-news-spread-facebook-stokes-ethnic-violence>; Megan Specia & Paul Mozur, *A War of Words Puts Facebook at the Center of Myanmar’s Rohingya Crisis*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/world/asia/myanmar-government-facebook-rohingya.html>.

²²³ See *Garrison v. Louisiana*, 379 U.S. 64, 83 (1964) (Douglas, J., concurring).

²²⁴ Ronnell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567, 589 (2017); Steve Coll, *Donald Trump’s “Fake News” Tactics*, NEW YORKER (Dec. 11, 2017), <https://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics>; Jonathan Peters, *Trump Twitter spreadsheet tracks “a perpetual campaign against the press”*, COLUM. JOURNALISM REV. (Dec. 21, 2017), https://www.cjr.org/united_states_project/trump-twitter-spreadsheet-press-attacks.php.

²²⁵ See Poynter Inst. for Media Studies, *You’re Fake News!: The 2017 Poynter Media Trust Survey*, Poynter Journalism Ethics Summit, at 2 (2017), <https://poyntercdn.blob.core.windows.net/files/PoynterMediaTrustSurvey2017.pdf> (reporting the results of a survey finding that only 19 percent of Republicans express “a great deal” or “a fair amount” of trust and confidence in media reporting).

Outside the United States, other government officials have taken note of Trump's attempts to delegitimize critics and the press.²²⁶ Syrian President Bashar Assad declared an Amnesty International report about human rights violations at a Syrian prison as fake news in February 2017.²²⁷ During an October 2017 interview on BBC One's *The Andrew Marr Show*, Spanish Minister of Foreign Affairs Alfonso Dastis described pictures and reports of Spanish police officers responding aggressively at polling stations during the Catalonia independence referendum as "alternative facts" and fake news.²²⁸ In Myanmar, a state security minister said in December 2017 that the assertion of the mere existence of the Rohingya people was fake news.²²⁹ In April 2018, Malaysia adopted an "anti-fake news" law that created criminal punishments for anyone who shows, creates, or disseminates "news, information, data and reports [that] are wholly or partly false."²³⁰ The law was passed in advance of an upcoming national election that observers characterized as a referendum on Prime Minister Najib Razak, who had been accused of being involved in a multi-billion dollar corruption scandal involving government funds.²³¹ Prominent officials in Turkey,²³² Russia,²³³ Libya,²³⁴ and Poland,²³⁵ among others, have also used the phrase to criticize the press.²³⁶

²²⁶ See Steven Erlanger, *Fake News, Trump's Obsession, Is Now a Cudgel for Strongmen*, N.Y. TIMES (Dec. 12, 2017), 5:03 AM, <https://www.nytimes.com/2017/12/12/world/europe/trump-fake-news-dictators.html>; Jason Schwartz, *Trump's Fake News Mantra a Hit with Despots*, POLITICO (Dec. 8, 2017), <https://www.politico.com/story/2017/12/08/trump-fake-news-despots-287129>.

²²⁷ Zamira Rahim, *Syria's Assad Brushes Off Amnesty Report on Prison Executions as Fake News*, TIME (Feb. 10, 2017), http://time.com/4666806/assad_syria-amnesty-international.

²²⁸ *Spain FM: Many Police Violence Pictures Fake*, BBC (Oct. 22, 2017), <http://www.bbc.com/news/av/world-europe-41712725/spain-fm-many-police-violence-pictures-fake>; James Badcock, *Spanish minister: Police Violence Videos Against Catalonia Referendum Supporters are Fake News*, TELEGRAPH (Oct. 22, 2017), <http://www.telegraph.co.uk/news/2017/10/22/spanish-minister-says-videos-police-violence-fake-news>.

²²⁹ Hannah Beech, *No Such Thing as Rohingya: Myanmar Erases a History*, N.Y. TIMES (Dec. 2, 2017), <https://www.nytimes.com/2017/12/02/world/asia/myanmar-rohingya-denial-history.html>.

²³⁰ Henry Koh, *The Real News on Malaysia's Fake News Law*, ASIA TIMES (Apr. 17, 2018), <http://www.atimes.com/real-news-malaysias-fake-news-law/>.

²³¹ Hannah Beech, *As Malaysia Moves to Ban Fake News, Worries About Who Decides the Truth*, N.Y. TIMES (April 2, 2018), <https://www.nytimes.com/2018/04/02/world/asia/malaysia-fake-news-law.html>.

²³² Dorian Jones, *Turkish Opposition Claims Erdogan's Family Hid Money Offshore*, VOICE OF AMERICA (Nov. 28, 2017), <https://www.voanews.com/a/turkey-opposition-claims-receptayyip-erdogan-family-hid-money-offshore/4140478.html>.

²³³ Neil MacFarquhar, *With Big Red Stamp, Russia Singles Out What It Calls Fake News*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/world/europe/russia-fake-news-media-foreign-ministry-.html>.

Invocation of the term “fake news” to delegitimize the press, coupled with active use of criminal defamation laws worldwide, create an environment that could significantly undermine global press freedom. Civil society and other freedom of expression advocates must continue to push governments to repeal criminal defamation laws, despite official reluctance to do so.²³⁷ As of 2017, 42 of the 57 participating states in the Organization for Security and Co-operation in Europe (OSCE) still retain criminal defamation laws.²³⁸ Throughout the Americas, Jamaica is the only country that has fully repealed its criminal defamation laws.²³⁹ Since 2016, high courts in Zimbabwe and Kenya decriminalized defamation, but criminal defamation laws remain widespread in other countries in Africa.²⁴⁰ Press advocates’ continued pressure on governments to repeal criminal defamation laws is a necessary first step to combat the threat of powerful figures using fake news as a sword and shield against rigorous reporting.

Intergovernmental organizations, as well as international agreements, compacts, and treaties, should also be critical of criminal defamation laws. Existing international agreements have focused on enshrining protections for free expression,²⁴¹ but commitments by international bodies to

²³⁴ Patrick Wintour, *‘Fake News’: Libya seizes on Trump tweet to discredit CNN slavery report*, GUARDIAN (Nov. 28, 2017, 4:26 PM), <https://www.theguardian.com/world/2017/nov/28/libya-slave-trade-cnn-report-trump-fake-news>.

²³⁵ John Bowden, *Polish President Knocks Fake News over Wife’s Trump Handshake*, THE HILL (July 6, 2017), <http://thehill.com/homenews/news/340934-polish-president-knocks-fake-news-over-wifes-trump-handshake>.

²³⁶ See *Predators of Press Freedom use Fake News as a Censorship tool*, REPORTERS WITHOUT BORDERS (March 17, 2017), <https://rsf.org/en/news/predators-press-freedom-use-fake-news-censorship-tool>; Uri Friedman, *The Real-World Consequences of Fake News*, ATLANTIC (Dec. 23, 2017), <https://www.theatlantic.com/international/archive/2017/12/trump-world-fake-news/548888/>.

²³⁷ See, e.g., Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, United Nations Gen. Assembly, U.N. Docs., at 20 (May 16, 2011), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/132/01/PDF/G1113201.pdf?OpenElement>; WAN-IFRA, *Declaration of Table Mountain: Abolishing Insult Laws and Criminal Defamation in Africa and Setting a Free Press Higher on the Agenda*, WORLD ASS’N OF NEWSPAPERS & NEWS PUBLISHERS (Jun. 6, 2007), http://www.wan-ifra.org/sites/default/files/field_article_file/Declaration%20of%20Table%20Mountain%20Eng%20text.pdf; PEN Int’l, *Stifling Dissent, Impeding Accountability: Criminal Defamation Laws in Africa* (2017), <http://pensouthafrica.co.za/wp-content/uploads/2017/11/Stifling-Dissent-Impeding-Accountability-Criminal-Defamation-Laws-in-Africa.pdf>; Comm. to Protect Journalists, *supra* note 11; Int’l Press Inst., *supra* note 11.

²³⁸ ORG. FOR SEC. AND COOP. IN EUR., *supra* note 11, at 8.

²³⁹ COMM. TO PROTECT JOURNALISTS, *supra* note 11, at 11.

²⁴⁰ PEN Int’l, *supra* note 237.

²⁴¹ See, e.g., United Nations General Assembly, *The Universal Declaration of Human Rights*, Art. 19, U.N. Docs. (Dec. 10, 1948).

specifically target criminal defamation laws for removal are also necessary and can be effective. For example, the African Commission on Human and Peoples' Rights adopted a resolution in 2010 calling on countries to "repeal criminal defamation laws or insult laws which impede freedom of speech."²⁴² In 2013, the Pan-African Parliament adopted the "Midrand Declaration on Press Freedom in Africa" and committed to a campaign for greater press freedom in the continent.²⁴³ PEN Africa reported in 2017 that these efforts, along with a 2014 African Court of Human and Peoples' Rights (ACtHPR) decision finding criminal defamation sanctions interfere with journalists' freedom of expression, have resulted in progress toward the repeal of criminal defamation provisions in several African countries.²⁴⁴ Although PEN Africa contends that further progress is still necessary,²⁴⁵ these results suggest that international cooperation can play an important role in combatting criminal defamation worldwide.

Along with repealing of criminal defamation laws, countries should recognize that freedom of expression and the public's right to know can conflict with other legitimate values, such as individual dignity and reputation.²⁴⁶ As a result of this tension, criminal defamation laws could be used, not only to address genuinely damaging expression, but to target and suppress the opposition news media. Moreover, as the examples from the United States show, criminal defamation may also be used to settle scores arising from private disputes when individuals discover they have been the subject of false information disseminated to the public. If they may have no hope of recovering a monetary award in a civil proceeding, victims may turn to criminal complaints as a way to clear their names, at least in part to avoid the expenses related to civil litigation.²⁴⁷ Even if a plaintiff is successful in a civil suit, the defendant may have limited means to compensate for the reputational injuries the false statements caused.²⁴⁸ But as a criminal complainant, the same individual might have the satisfaction of knowing that criminal penalties were imposed. Although we did not

²⁴² ACHPR, 169: Resolution on Repealing Criminal Defamation Laws in Africa, African Commission on Human and Peoples' Rights (Nov. 24, 2010), <http://www.achpr.org/sessions/48th/resolutions/169>.

²⁴³ See PEN Int'l, *supra* note 237, at 2.

²⁴⁴ *Id.* at 10-11.

²⁴⁵ *Id.* at 11.

²⁴⁶ See, e.g., Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1321 (1992) ("It is a commonplace that robust free speech systems protect speech not because it is harmless, but despite the harm it may cause.").

²⁴⁷ Pritchard, *supra* note 21, at 335-36.

²⁴⁸ Daniel J. Solove, THE HARM TO REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 123-24 (2007).

examine international criminal defamation cases involving purely private disputes, we surmise that such cases are likely to happen with at least as much regularity as in the United States.

Governments should develop legal frameworks to replace criminal defamation penalties with affordable and accessible civil litigation options for ordinary individuals whose reputations have been tarnished through the dissemination of deliberately false and defamatory information. These frameworks also must include robust protections to ensure journalists and news organizations do not become easy targets for government officials and public figures seeking to silence criticism. The legal protections should clearly define the elements of defamation and the available defenses to defamation claims,²⁴⁹ allow truth as an absolute defense to defamation claims,²⁵⁰ require government officials and public figures to prove “actual malice” before recovering damages for defamation,²⁵¹ place limits on civil awards so that monetary damages are proportionate with harm, and ensure that legal costs are not disproportionately expensive so that wealthy and powerful individuals are the only ones with access to judicial systems.²⁵² Governments should also consider establishing legal environments that encourage media self-regulation processes that would allow victims to repair their reputations without filing lawsuits.²⁵³ These types of protections can help strike a fair balance between the right to free expression and personal reputation, while also ensuring that criminal penalties are not used merely to forestall legitimate debate.

VI. CONCLUSION

U.S. Supreme Court Justice Douglas’ observation that criminal defamation laws are “instruments of destruction”²⁵⁴ to free expression remains as true today as it was in 1964. The continued viability of these laws perpetuates an environment in which journalists, news organizations, and other advocates face not only possible civil liability, but harassment, imprisonment, or crippling fines, simply for reporting the news. Both in mature democracies and more repressive regimes, the threat of prosecution

²⁴⁹ PEN Int’l, *supra* note 237, at 58.

²⁵⁰ Org. for Sec. & Co-operation in Europe Parliament Assembly, *Minsk Declaration and Resolutions Adopted by the OSCE Parliamentary Assembly at the Twenty-Sixth Annual Session*, at 16(2017), <http://www.oscepa.org/documents/all-documents/annual-sessions/2017-minsk/declaration-25/3555-declaration-minsk-eng/file>.

²⁵¹ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

²⁵² INT’L PRESS INST., *supra* note 11, at 7.

²⁵³ *Id.*

²⁵⁴ *Garrison v. Louisiana*, 379 U.S. 64, 83 (1964) (Douglas, J. concurring).

for criminal defamation is a powerful way for government officials and prominent figures to target and silence their critics, and to stifle robust debate about issues of public importance.

In an environment where the powerful are increasingly labeling unflattering or inconvenient news reports as fake, confidence in legacy media has eroded. This benefits those in positions of authority. If the electorate can be convinced that the news media or other watchdogs are knowingly fabricating and disseminating false information for the purpose of misleading the public, it is easier for governments to argue that civil damages are insufficient to protect legitimate reputational and public interests, and that they must act to provide alternative criminal penalties.

In February 2016, while a candidate for President of the United States, Donald Trump promised he would “open up libel laws” to make it easier for public officials and public figures to sue the press.²⁵⁵ He repeated this threat (in the form of a question, in a Twitter post) as President in March 2017, when he was displeased with coverage by the “failing @nytimes.”²⁵⁶ It might seem improbable that Trump would actually seek to create a federal criminal libel law. But in a topsy-turvy world where partisan versions of “alternative facts” take on the veneer of truth²⁵⁷ and documented facts are labeled as “fake,” it is conceivable that anyone who “outrage[s] the sentiments of the dominant party,” as Douglas posited, could be “deemed a libeler” worthy of prosecution under criminal defamation law—the 21st Century equivalent of seditious libel.²⁵⁸ That is a tool any vindictive leader would be delighted to wield as a means of consolidating authority and suppressing dissent.

²⁵⁵ Hadas Gold, *Donald Trump: We're going to open up libel laws*, POLITICO (Feb. 26, 2016), <https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>; Callum Borchers, *Donald Trump vowed to open up libel laws to make suing the media easier. Can he do that?*, WASH. POST (Feb. 26, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/02/26/donald-trump-vows-to-open-up-libel-laws-to-make-suing-the-media-easier-heres-how-he-could-do-it/>; Casey Carmody, *Media Face Several Challenges During President Trump's First Months in Office*, SILHA BULL., Winter/Spring 2017 at 1, <https://drive.google.com/file/d/0B0mMM90VIGU9R05Xa0t6UEhfelk/view>.

²⁵⁶ Taylor Lorenz, *Trump threatens to change libel laws to go after NY Times*, THE HILL (March 30, 2017, 11:07 AM), <http://thehill.com/blogs/ballot-box/326486-trump-threatens-to-change-libel-laws-to-go-after-ny-times>; Adam Liptak, *Can Trump Change Libel Laws?*, N.Y. TIMES (March 30, 2017), <https://www.nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html>.

²⁵⁷ See, e.g., Assoc. Press, *Kellyanne Conway's alternative facts flub tops list of 2017's notable quotes*, N.Y. POST (Dec. 12, 2017), <https://nypost.com/2017/12/12/kellyanne-conways-alternative-facts-flub-tops-list-of-2017s-notable-quotes>.

²⁵⁸ *Garrison*, 379 U.S. at 82 (Douglas, J. concurring).

Yet those who fear criticism reveal fundamental weakness. Experience teaches us that, in the end, a government that is subject to robust debate is not diminished, but strengthened, as indeed are its people. “Fake news” may seem threatening to those in power, but the way to combat fake news is to encourage more speech, not less. Surely there is no better time for criminal defamation to meet the same fate as seditious libel: consigned to the ash heap of history.

