SHOULD ONLINE DEFAMATION BE CRIMINALIZED?

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I. INTRODUCTION

"People's reputations are sullied in a very new way, and it's very hard for them to recover from that."¹

As Part III of this article explains, the continuing evolution of the Internet fundamentally alters the assumptions that shaped our approach to criminal defamation.² Like most of our law, our approach to criminal defamation derives from historical English common law; as Part II explains, English courts "invented" four libel offenses in the sixteenth century as part of an effort to control the misuse of a then new technology, the printing press.

Colonists brought these offenses to America, where they ultimately languished, leading the drafters of the Model Penal Code to recommend that defamation not be criminalized.³ That recommendation, coupled with Supreme Court decisions applying the First Amendment to libel laws, caused criminal defamation to fall into disrepute and decline in this country.⁴

This article analyzes whether we should reconsider criminalizing defamation given the ever-increasing influence

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² Lisa Sink & Linda Spice, Man Charged with Defamation: Disgruntled Fired Employee Accused of Posting Ad with Ex-boss' Name on Internet, MILWAUKEE J. SENTINEL, June 7, 2000, at B1 (quoting state representative Marlin Schneider) (emphasis added).
³ See infra Part II.A for the definition of defamation.
⁴ See infra Part II.C.
⁵ See infra Part II.C, II.D.
of the Internet. Some contend that criminal defamation is the only realistic option we have for controlling certain types of online defamation. Those who take this view point out that the drafters of the Model Penal Code issued their recommendation in 1961, when publication was limited to print and instruments of the mainstream media (MSM). They note that these instruments were all controlled by corporate actors whose business acumen reduced the likelihood that defamatory material would be published and whose deep pockets made civil liability a viable option for the victim if this did, in fact, occur. Those who argue for expanding our use of criminal defamation point out that computer technology has, in effect, leveled the playing field; today, anyone with access to the Internet can publish whatever he or she likes, however inaccurate and/or scurrilous it may be.

Those who advocate resuscitating criminal defamation contend that cyberspace vastly expands the incidence and virulence of published defamatory speech. They also argue that since most of these online publishers are judgment-proof individuals, civil liability can neither make their victims whole nor deter those who may be inclined to follow their lead.

Criminalizing speech is generally distasteful to Americans because of our deep reverence for the First Amendment; we tend to believe an uninhibited marketplace of ideas is one of the best guarantees of freedom. Freedom, however, is not

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6 See infra Part IV; see infra Part II.A for the definition of publication and publish.

7 See infra Part IV; see, e.g., Barrick Gold Corp. v. Lopehandia, [2004] 71 O.R.3d 416 (Can).

8 See infra Parts III, IV.

9 See infra Parts III, IV.

10 See, e.g., McConnell v. FEC, 540 U.S. 93, 265 (2003) (Thomas, J., dissent-
inherently inconsistent with restrictions; every society necessarily outlaws behaviors that “harm” others and, in so doing, threaten the elemental fabric of social order.\textsuperscript{11} It is therefore conceptually appropriate to explore the possibility that our ever-increasing access to cyberspace may warrant rethinking how we use legal rules to deter harmful speech. We return to that issue in Part IV. First, we need to review how we have arrived at the current state of affairs, in which criminal liability is rarely imposed on those whose speech defames others.

II. CRIMINAL DEFAMATION IN ANGLO-AMERICAN LAW

“All four branches of libel sought to ensure that speech did not violate established norms of respect and propriety.”\textsuperscript{12}

This section defines essential terms and traces the evolution of criminal defamation law from its emergence in sixteenth century England to its current, rather neglected state in modern American law. The goal is to provide a doctrinal foundation for the analysis presented in Part IV.

A. Definitions

The first term we need to define is defamation. Historically, the justification for criminalizing defamation was to deter the publication of communications that were likely to cause a breach of the peace, specifically, a duel or some other form of self-help.\textsuperscript{13} As with all criminal prohibitions, therefore, the


\textsuperscript{13} See, e.g., Garrison v. Louisiana, 379 U.S. 64, 68 (1964). “Although the victim of a . . . defamatory publication might not have been unjustly damaged in reputation by the libel, the speaker was still punishable since the remedy was
goal was to deter speech that threatened the social order.\textsuperscript{14} The justifications for imposing civil liability have always focused more on injury to the individual. The *Restatement of Torts*, for example, defines a defamatory communication as one that “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”\textsuperscript{15}

This civil concern with individual harm influenced the evolution of criminal libel law in nineteenth and early twentieth century America, so that it, too, came to focus on the injury a communication inflicted upon “the person defamed, regardless of its effect upon the public.”\textsuperscript{16} As a result, while some modern criminal libel laws target only public harm,\textsuperscript{17} i.e., the potential for causing a breach of the peace, others target communications that “blacken the memory” of the deceased or “impeach the . . . integrity, virtue, or reputation or expose the natural defects of one who is alive and thereby . . . expose him to public hatred, contempt, or ridicule.”\textsuperscript{18}

\begin{footnotesize}
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\item See Brenner, *Toward A Criminal Law for Cyberspace*, supra note 11, at 6-46.\textsuperscript{15}
\item *Restatement (Second) of Torts* § 559 (1977).\textsuperscript{16}
\item 50 Am. Jur. 2d Libel and Slander § 523 (2005) (citing Garrison v. Louisiana, 379 U.S. 64 (1964); Ashton v. Kentucky, 405 S.W.2d 562 (Ky. 1966), rev’d on other grounds, 384 U.S. 135 (1966)). “Thus, under the rule prevailing in various jurisdictions, criminal liability may be incurred by the publication of a statement which tends to expose a living person to such matters as hatred, contempt, disgrace, ridicule, or loss of confidence.” Id. (citing Krasner v. Alabama, 26 So. 2d 519 (Ala. Ct. App. 1946), rev’d on other grounds, 26 So. 2d 526 (Ala. 1946); Allen v. Texas, 189 S.W.2d 753 (Tex. Crim. App. 1945)).\textsuperscript{17}
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Tort law divides defamation into libel and slander.²⁹ Libel consists of publishing defamatory material in written and/or printed form, while slander consists of publishing such material by spoken words or gestures.³⁰ A very few states separately criminalize libel and slander,³¹ but most follow traditional English common law and apply the generic term libel to any publication of defamatory material.³²

The last two terms we need to define are publication and publish. Black's Law Dictionary defines publication as communicating defamatory material "to someone other than the person defamed;"³³ Black's also includes this element in its definition of publish.³⁴ The requirement that the material have been communicated to someone other than the person being defamed derives from the justifications for imposing civil liability on libelers and slanderers; as tort law "protects only the interest in reputation. Therefore, unless the defamatory matter is communicated to a third person there has been no loss of reputation . . . ."³⁵ This requirement has not been a component of criminal defamation law, presumably because its concern was with preventing breaches of the peace instead of protecting reputation; the offense of criminal libel is therefore committed as long as the defamatory material has been pub-

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²⁹ See, e.g., 50 AM. JUR. 2d Libel and Slander § 1 (2005).
³⁰ See RESTATEMENT (SECOND) OF TORTS § 568 (1977). For the historical origins of this distinction, see, for example, RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977).
³¹ See, e.g., OKLA. STAT. ANN. tit. 21 § 781 (West 2002); UTAH CODE ANN. § 76-9-507 (2003); see also 53 C.J.S. Libel & Slander § 16 (2005) "While slander [was] not a crime at common law, it is a criminal offense under some . . . statutory provisions." Id. (footnote omitted) (citing New Jersey v. Klapprott, 22 A.2d 877 (N.J. 1941); California v. Faber, 77 P.2d 921 (Cal. App. Dep't Super. Ct. 1938); Branigan v. Wisconsin, 244 N.W. 767 (Wis. 1932)).
³² For the evolution of English criminal libel law, see infra Part II.B.
³³ BLACK'S LAW DICTIONARY 1264-65 (8th ed. 2004); see RESTATEMENT (SECOND) OF TORTS § 577 (1977).
³⁵ RESTATEMENT (SECOND) OF TORTS § 577 cmt. b (1977). At least one state has incorporated this requirement into its criminal defamation law, apparently in an effort to maintain consistency between civil and criminal defamation law. See, e.g., LA. REV. STAT. ANN. § 14:47 (1997).
lished to anyone other than its author or publisher.26

As noted earlier, civil law divides defamation into two categories based on the means used to communicate the defamatory material. Libel results when the material is communicated in written form, while slander consists of communicating it orally or by gesture. As was also noted earlier, criminal defamation law has generally resisted this categorization. Criminal defamation law has not, however, completely resisted a concern with how defamatory material is communicated. A few states, at least, amended their criminal defamation statutes to ensure that they encompass publication by electronic and other technological means.27

B. History

As Part I noted, societies must control certain behaviors to maintain the baseline of social order that is essential for the existence and functioning of any society.28 For most of our history, societies were concerned only with controlling physical behaviors; societies were not particularly concerned about controlling speech as long as it was oral, since face-to-face communication is limited in scale and it is relatively easy to correlate spoken words with a speaker.29

The rise of written language produced some concern about controlling speech because a speaker can use script to transcend the geographical limitations and attribute risks that are inherent in face-to-face oral communication.30 A dissident can transcribe a diatribe and send it to a geographically dispersed

26 See 50 AM. JUR. 2D Libel and Slander § 525 (2005); see, e.g., McCurdy v. Hughes, 248 N.W. 512, 517-518 (N.D. 1933); see also Gregory C. Lisby, No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence, 9 COMM. L. & POLY 433, 440 (2004); cf. MONT. CODE ANN. § 45-8-212(2) (2004).
28 See supra note 11 and accompanying text.
30 See id.
audience, each of whom reads it and passes it on.\textsuperscript{31} The use of script can also let the author conceal his identity and thereby frustrate official efforts to hold him accountable for what he has said.\textsuperscript{32} Generally, though, script did not create significant control issues for those who wished to see that speech stayed within what they considered acceptable bounds.\textsuperscript{33} Scale was still a problem; each copy of a diatribe had to be individually transcribed, which was a time-consuming process.\textsuperscript{34} And it was relatively easy to identify speakers given that (i) only a small proportion of the populace was literate and (ii) handwriting is distinctive.\textsuperscript{35}

This changed with the development of the first communication technology: the printing press. With a press, one can produce hundreds or thousands of copies of a diatribe quickly and anonymously. The copies can then be distributed over as wide a geographical area as physical transport allows, and they can be distributed simultaneously, rather than sequentially.\textsuperscript{36} It did not take governments long to realize that printing threatened their ability to control speech. The first printing press was brought to England in 1476; by 1538, a royal proclamation required that one obtain a license from the Privy Council before printing a book.\textsuperscript{37} This licensing system ended in 1694, and the common law courts became responsible for controlling speech, written and oral; they developed the concept of criminal libel and used it for this purpose.\textsuperscript{38}

Common law criminal libel actually encompassed four distinct offenses: seditious libel; blasphemy; obscenity; and defamation.\textsuperscript{39} Seditious libel consisted of publishing material that defamed the government and/or its officials; blasphemy

\textsuperscript{31} See id.
\textsuperscript{32} See id.
\textsuperscript{33} See id.
\textsuperscript{34} See id.
\textsuperscript{35} See id.
\textsuperscript{36} See id.
\textsuperscript{37} See id.
\textsuperscript{38} See id.
\textsuperscript{39} See id. at 288.
consisted of publishing material that “reviled” God or religion; obscenity consisted of publishing “offensive sexual content;” and defamation (which came to be known simply as criminal libel) consisted of publishing material that defamed a private citizen. The colonists who left England brought all four offenses with them to the New World, where they have had rather different histories.

English authorities took seditious libel very seriously, and their efforts to enforce it in the American colonies were a source of tension between the colonists and British authorities. Since the Revolution, seditious libel has cropped up on occasion in federal law, but it has never become a stable component of American law because its prohibitions are inconsistent with the free speech guarantees of the First Amendment. As to blasphemy, English authorities seem not to have been terribly concerned about publications that reviled God, but Puritan colonists certainly were. Other colonists, however, were not, and the adoption of the First Amendment guaranteed that blasphemy would not be a component of American criminal law. Obscenity was never a priority in English law; although the principle that publishing obscene material was a criminal act was established by 1727, English courts did not define obscenity until 1868. The Puritans and other English colonists consequently did not bring a fully-realized concept of the offense with them when they came to the New World; as a result, perhaps, prosecuting obscenity did not become a priority in America until the end of the nine-

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40 See id. at 290-316.
41 See id.
42 See id. at 290-92; see also David A. Anderson, The Origins of the Press Clause, 30 UCLA L. Rev. 455, 509-14 (1983).
43 See Brenner, Complicit Publication, supra note 29, at 304-05.
44 See id. at 290-316.
45 Blasphemy was a capital crime in the Massachusetts Bay Colony. See, e.g., Linda L. Ammons, What’s God Got to Do With It? Church and State Collaboration in the Subordination of Women and Domestic Violence, 51 Rutgers L. Rev. 1207, 1245-46 (1999).
46 See Brenner, Complicit Publication, supra note 29, at 305-07.
47 See id. at 307-08.
teenth century, when a group of “bluestockings” successfully lobbied for the criminalization of prurient material. By the end of the twentieth century, however, obscenity prosecutions were rare, their decline a product of evolving community standards.

Though all four of the English offenses technically constituted criminal libel, we are only concerned with the fourth offense, which was variously known as defamation or criminal libel. As noted earlier, English law recognized a distinction between seditious libel and criminal libel:

In 1605, . . . the Court of Star Chamber used the Roman doctrine of libellis famous to criminalize libel directed toward an individual. The Court’s rationale for criminalizing non-seditious defamation was that libels . . . may be penalized . . . because they tend to create breaches of the peace when the defamed . . . undertake to revenge themselves on the defamer. As one scholar explained, “. . . the great vogue of . . . dueling . . . seems to have given cause for great concern to the government.” After 1605, . . . when defamation involved a public official, it “was considered . . . a threat to the security of the state” and prosecuted as seditious libel; when it involved a private person, “it was considered to risk a breach of the peace” and . . . prosecuted as criminal libel.

English colonists brought this approach to individual criminal defamation to the New World, where defamation of public officials was eventually subsumed into criminal libel; seditious libel, insofar as it continued to exist, was reserved for attacks on the government.

Since the common law approached criminal libel as a threat to the social order (rather than as the infliction of harm

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48 See id. at 308-15.
51 See, e.g., Lisby, supra note 26, at 464.
on an individual), it was enforced more stringently than was its
civil counterpart: Truth was a defense in civil libel actions, but
not in prosecutions for criminal libel.\textsuperscript{52} The colonists brought
this distinction with them to this country, where it was influen-
tial well into the twentieth century.\textsuperscript{53}

C. Defamation in America

The conception of criminal libel English colonists brought
to this country has rarely been used. A quantitative study of
criminal libel prosecutions in the colonies and, later, in the
United States found no reported cases for the period 1658-
1796.\textsuperscript{54} The total number of reported cases for the seven
decades spanning 1797 to 1877 never exceeded fifteen per decade,
and tended to be in the single digits.\textsuperscript{55} The number of reported
cases increased to sixty in the 1877-1886 era and rose again,
into the nineties, where it stayed for the period 1887-1916.\textsuperscript{56}
The total number of reported criminal libel prosecutions then
began a decline, falling into the fifties for the period 1917-
1936.\textsuperscript{57} It continued its decline, hovering around twenty for
the four decades between 1937 and 1976.\textsuperscript{58} The next two de-
cades saw a further decline in reported criminal libel prosecu-

\textsuperscript{52} See supra note 14 and accompanying text; see, e.g., Marc A. Franklin, The
Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law,
16 STAN. L. REV. 789, 791-92 (1964). Indeed, a common law maxim held that
“the greater the truth, the greater the libel.” State v. Browne, 206 A.2d 591, 595
Speech, 6 U. KAN. L. REV. 295, 302 (1958)).

\textsuperscript{53} See, e.g., Edward L. Carter, Outlaw Speech on the Internet: Examining the
Link Between Unique Characteristics of Online Media and Criminal Libel Prosecu-

\textsuperscript{54} See Lisby, supra note 26, at 467.

\textsuperscript{55} See id. at 466. The precise numbers are as follows: 1797-1806 (seven); 1807-
1816 (seven); 1817-1826 (eight); 1827-1836 (eleven); 1837-1846 (fourteen); 1847-
1856 (fourteen); 1857-1866 (one); and 1867-1876 (fifteen). Id.

\textsuperscript{56} See id. The precise numbers are 1887-1896 (ninety-nine); 1897-1906 (ninety-
eight); and 1907-1916 (ninety-three). Id.

\textsuperscript{57} See id. The precise numbers are 1917-1926 (fifty-two) and 1927-1936 (fifty).

\textsuperscript{58} See id. The precise numbers are 1937-1946 (twenty); 1947-1956 (nineteen);
1957-1966 (nineteen); and 1967-1976 (nineteen). Id.
tions, falling to ten for 1977-1986 and five for 1987-1996.\textsuperscript{59} The authors of the study found only two reported criminal libel cases for the period between 1997 and 2002, when the study ended.\textsuperscript{60}

The drafters of the Model Penal Code cited this sparsity of libel prosecutions as a factor that militated against using penal sanctions to control "personal calumny."\textsuperscript{61} They said "[o]ne of the hardest questions" they confronted in drafting the Model Penal Code was deciding "whether to penalize anything like libel."\textsuperscript{62} The architects of the Code began their analysis of this issue by explaining that "penal sanctions cannot be justified merely by the fact that defamation is . . . damaging to a person in ways that entitle him to maintain a civil suit."\textsuperscript{63} After noting that "we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security," they considered whether libel falls into this category.\textsuperscript{64}

They explained that behavior exceptionally disturbs the community's sense of security for either of two reasons: One is that the

[H]arm done is very grave, as in rape or murder, so that even the remote possibility of being similarly victimized terrifies us. Or our alarm may, as in the case of petty theft or malicious mischief, derive from the higher likelihood that such lesser harms will be inflicted upon us by those who manifest disregard of other people's ownership.\textsuperscript{65}

The drafters of the Model Penal Code concluded that "personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this proba-

\textsuperscript{59} See id.
\textsuperscript{60} See id. at 467. Analysis of the cases showed that a significant percentage of them involved the alleged defamation of public officials. See id. The percentages vary from 37.65% for all of the reported cases to 52.17% for the period between 1990 and 2002. See id.
\textsuperscript{61} Model Penal Code § 250.7 cmt. at 44 (Tentative Draft No. 13, 1961).
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
bly accounts for the paucity of prosecutions and the near desuetude of... criminal libel legislation in this country. They therefore chose not to include a criminal libel provision in the final version of the Model Penal Code, which appeared in 1962.

The architects of the Code noted, though, that while “penal law need not address itself to... irritating or malicious gossip, or to the ordinary case of defamation compensable in a civil suit, it may very well have to take cognizance of certain aggravated situations.” In this aside, they explained that “[w]illful public defamation of an individual can be a traumatic experience which deserves to be taken as seriously as” threats, harassment and disorderly conduct, all of which were criminalized by the Code.

The Supreme Court quoted the drafters of the Model Penal Code approvingly in 1964, when it decided Garrison v. Louisiana. The case involved a criminal libel prosecution brought against Garrison, a Louisiana prosecutor who had criticized the criminal court judges in the Louisiana parish where he practiced. Garrison was tried and convicted of violating the state’s criminal libel statute, which made it a crime for anyone to maliciously publish material that “expose[d] any person to hatred, contempt, or ridicule, or... deprive[d] him of the benefit of public confidence or social intercourse.” He appealed, and the Supreme Court held that the Louisiana statute violated the First Amendment.

The Court began its analysis of the statute by citing its decision in New York Times Co. v. Sullivan, which involved a First Amendment challenge to a civil libel statute. An Alabama

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66 Id. They also cited First Amendment concerns. See id. at 45.
67 See id. at 45-46.
68 Id.
69 Id.
71 Id. at 65-66.
72 Id. at 65 n.1 (quoting La. REV. STAT. ANN. § 14:47 (1950)); see also supra Part II.A.
73 See Garrison, 379 U.S. at 77-78.
official had brought a civil libel suit against the *New York Times*, seeking damages for allegedly defamatory statements made in an advertisement published in the paper.\textsuperscript{75} The official won a judgment in the trial court that was then upheld by two Alabama appellate courts.\textsuperscript{76} The Supreme Court reversed because it found the Alabama law violated the First Amendment.\textsuperscript{77} More precisely, the Court found that a law allowing the imposition of civil damages upon those who criticized public officials would deter political speech protected by the First Amendment; it also found that Alabama's recognizing truth as a defense to the imposition of such liability was insufficient to control the chilling effect resulting from the possibility of liability like that imposed on the *New York Times*.\textsuperscript{78} The *Sullivan* Court held, therefore, that the First Amendment requires that a public official be precluded "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."\textsuperscript{79}

The *Garrison* Court held that the *Sullivan* rule applies to prosecutions for criminal libel when the statements at issue in the prosecution relate to the conduct of public affairs.\textsuperscript{80} It found "no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations."\textsuperscript{81}

\textsuperscript{75} *Id.* at 256-58.
\textsuperscript{76} *Id.* at 262-64.
\textsuperscript{77} *Id.* at 264.
\textsuperscript{78} See *id.* at 275-80.
\textsuperscript{79} *Id.* at 279-80.

\textsuperscript{80} See *Garrison v. Louisiana*, 379 U.S. 64, 71-74, 77-78 (1964). The *Garrison* Court left open the issue as to whether the *Sullivan* rule also applies "where purely private libels, totally unrelated to public affairs, are concerned." *Id.* at 72 n.8. The Court has so far never resolved this issue. See *Fla. Star v. B.J.P.*., 491 U.S. 524, 533 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975). It has, as one scholar noted, "not completely foreclosed defamation liability for all true speech, such as true but defamatory speech about private individuals and private subjects." Carol Rice Andrews, *Jones v. Clinton: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 BYU L. Rev. 1, 77 n.320 (2001).

\textsuperscript{81} *Garrison*, 379 U.S. at 67. The Court cited the commentary to the Model Pe-
The Garrison Court cited history for the proposition that the common law breach of the peace justification for criminalizing libel had no applicability in the twentieth century, and quoted the drafters of the Model Penal Code for the proposition that no other compelling considerations justify prosecutions for criminal defamation.

D. Assessment

The failure to include a criminal libel provision in the Model Penal Code, coupled with the Court's decisions in Sullivan and Garrison, seemed to indicate there was neither an empirical need nor a constitutional basis for criminalizing defamation. Some scholars therefore conclude that criminal libel has fallen into a state approaching extinction, but others disagree. The first group cites the relative paucity of state criminal libel statutes as proof that the crime is no longer taken seriously; the second group cites the persistence of such statutes as evidence that it is.

As far as this article is concerned, it really does not matter

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n. 82 See Garrison, 379 U.S. at 69; see also Ashton v. Kentucky, 384 U.S. 195, 199-200 (1966) (in holding that a common law criminal libel offense was void for vagueness, the Court noted that basing a crime on the premise that conduct is likely to create a breach of the peace "makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence") (quoting Zechariah Chafee, Free Speech in the United States 151 (1954)).

83 See Garrison, 379 U.S. at 69-70.

84 See, e.g., Tollett v. United States, 485 F.2d 1087, 1094 (8th Cir. 1973).


which group is correct. We are concerned not with what crimi-
nal libel is, but with whether it should become a tool societies
use to control certain types of online speech. The differentiating
factor in this analysis is our focus on cyberspace—on the virtu-
al publication of content that may, or may not, be sufficiently
objectionable to warrant the imposition of criminal liability.
The goal of the analysis is to assess the need for such a tool, to
evaluate the extent to which the significance of online publica-
tion is a differentiating factor that merits, indeed, requires, the
resuscitation and expansion of criminal libel.

To determine if criminal libel should become a tool societ-
ies use to control certain types of online speech, we must exam-
ine several issues. The first is whether online publication truly
inflicts new harms that exceptionally disturb our collective
sense of security. If we conclude it does not, our inquiry is at
an end; if, on the other hand, we conclude that online publica-
tion does inflict new harms, we must determine whether the
imposition of civil liability on those who are responsible for the
infliction of these harms is sufficient to control this type of
online speech. If we decide that the use of civil liability suffices
even in the online context, the analysis ends there; if we decide
it does not suffice in this context, then we will have to consider
whether, and how, criminal liability should be used to keep
online speech within socially acceptable bounds.

The next two sections examine these issues. Part III ex-
plains how cyberspace can be used to disseminate defamatory
material; it provides an empirical foundation for the analysis
presented in Part IV. Part IV evaluates the need for, and the
propriety of, using criminal defamation to control online
speech.

III. DEFAMATION IN CYBERSPACE

This section demonstrates how cyberspace can be used to
disseminate defamatory speech; it provides an empirical foun-
dation for the analysis in Part IV. Part III(A) refines the focus
of that analysis, while Part III(B) examines some representa-
tive cases in which cyberspace was used to distribute speech
that some, at least, found unacceptable for varying reasons.
A. Focus

Before we examine online publication of defamatory material, we need to (i) note a caveat and (ii) review the assumptions that are responsible for the current state of affairs in which criminal libel is, to say the least, disfavored by American law.

The caveat goes to the scope of this discussion: The Internet has made it possible for basically anyone to disseminate a wide variety of speech, some of which may disturb the person it concerns; speech can be disturbing for many reasons, only one of which is that it qualifies as defamatory.\textsuperscript{\textsuperscript{88}} This article, however, is exclusively concerned with speech that is defamatory, as defined above,\textsuperscript{\textsuperscript{89}} it therefore does not deal with online speech that is harassing, threatening or disturbing for other reasons.\textsuperscript{\textsuperscript{90}}

The assumptions that created the current state of affairs shape the focus of the analysis presented in Part IV. As explained above, criminal libel is disfavored in American law for two reasons: The drafters of the Model Penal Code concluded, forty-five years ago, that the harm defamation inflicts is generally not sufficient to warrant the imposition of criminal liability given the availability of civil redress; and the Supreme Court concluded, forty-two years ago, that the common law breach of the peace justification does not apply in the modern world and there was no other compelling justification for criminalizing defamation.\textsuperscript{\textsuperscript{91}}

Both entities based their conclusions on an empirical reality that was as yet unaffected by modern communication technology.\textsuperscript{\textsuperscript{92}} The drafters of the Model Penal Code and the Justices who decided the Sullivan and Garrison cases wrote in an era when publication in the generic sense—disseminating

\textsuperscript{88} For a definition of defamatory speech, see supra Part II.A.
\textsuperscript{89} See supra Part II.A.
\textsuperscript{90} For an analysis of other types of disturbing speech, see Brenner, Complicit Publication, supra note 29.
\textsuperscript{91} See supra Part II.C.
\textsuperscript{92} For more on this issue, see infra Part III.C.
content to a broad audience—was a bounded phenomenon.\textsuperscript{93} Forty years ago, the only venues for publication were the MSM: radio, television, cinema and print media (books, magazines, newspapers). This is significant for two reasons.

First of all, the drafters of the Model Penal Code and the Garrison and Sullivan Justices both relied on the premise that the imposition of civil liability would redress the injury to the victims of defamation.\textsuperscript{94} In so doing, they wrote on the slate they knew; that is, they assumed a world in which the responsibility for publication necessarily lay with a deep-pocket corporate entity.\textsuperscript{95} It was consequently reasonable for them to assume that if a victim of defamation established the elements of civil liability, she could recover damages from the party responsible for publishing the defamatory material.\textsuperscript{96} This, they assumed, would not only redress the injury to the victim, it would also create a financial disincentive that would discourage other corporate entities from publishing defamatory material and effectively control the dissemination of such material.\textsuperscript{97} The latter assumption—the disincentive assumption—is not articulated either in the Model Penal Code commentary or the major-

\textsuperscript{93} The circumscribed definition of publication given in Part II(A) is specific to defamation law. In law, as elsewhere, publication is more generally understood as being the act of distributing content to a wide audience—to the public. See, e.g., Black's Law Dictionary 1264 (8th ed. 2004) (defining publication as "[t]he offering or distribution of copies of a work to the public"); see also The Chambers Dictionary 1221 (9th ed. 2003) (defining publication as "the act of publishing or making public; a proclamation").

\textsuperscript{94} See supra note 81 and accompanying text. See also supra Part II.C.


\textsuperscript{96} This assumption that victims could obtain redress by bringing a civil suit is one of the factors the Supreme Court cited in rejecting the breach of the peace justification for criminal libel. See Garrison, 379 U.S. at 69; see also supra Part II.C.

\textsuperscript{97} Garrison, 379 U.S. at 69.
ity opinions in *Sullivan* or *Garrison*. It is inferentially derivable from both because the drafters of the Model Penal Code concluded that the "community's sense of security" could be maintained without criminalizing defamation, and the *Garrison* Court quoted this conclusion with approval.

The fact that the Model Penal Code commentary and the *Sullivan* and *Garrison* opinions were written in a world in which publication was controlled by MSM is significant for a second reason. MSM domination of the available venues for publication imported an element of control that limited the opportunities for, and the incidence of, defamation. It also tended to mitigate the virulence of the material that was published. Media control of the agencies of publication prevented excess and effectively kept defamation within socially acceptable bounds.

As many have noted, cyberspace has fundamentally altered the reality that gave us the Model Penal Code and the *Sullivan* and *Garrison* decisions. Before we assess the need to revisit the Code drafters' and the Court's rejection of criminal libel, we need to review precisely the extent to which the Internet has affected publication in general and defamatory publication in particular.

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98 See supra Part II.C.

99 See supra Part II.C.


101 See supra note 100 and accompanying text.

102 See, e.g., supra note 1 and accompanying text.
B. Online Publication of “Problematic” Speech

Our focus in this article is on the legal concept of defamatory speech. MSM control of publication tended to keep defamatory speech within certain predictable bounds until the end of the twentieth century,\textsuperscript{103} when cyberspace began to become a popular theater of human activity. One of the things cyberspace has done is to give anyone with access to the Internet the ability to become a publisher—an online publisher.\textsuperscript{104} This has vastly expanded the opportunities for the publication of what we will call “problematic” speech.

Defamation is a legal construct and, as such, bundles a fixed set of denotations and connotations;\textsuperscript{105} if we were to limit our review of online publication to defamatory content, we would overlook much of what many regard as problematic speech. Problematic speech is, for lack of a more precise definition, speech some (many) find unacceptable for varying reasons.

Cyberspace is so extensive and so fluid that it is impossible to describe all of the ways in which speech can be problematic. The sections below summarize some of the more egregiously problematic varieties of online speech. The categories are illustrative and, as such, are not immutable; the activity described in one may also inflict harm of the type at issue in another category. The purpose is merely to illustrate some of the ways in which online speech can be problematic.

1. Ridicule

“[T]hat’s the problem with the Internet. Things travel fast.”\textsuperscript{106}

\textsuperscript{103} See supra Part III.A.


\textsuperscript{105} See supra Part II.A.

\textsuperscript{106} Tu Thanh Ha, “Star Wars Kid” Cuts a Deal with His Tormentors, GLOBE & MAIL, Apr. 7, 2006, available at http://www.theglobeandmail.com/servlet/story/RTGAM.20060407.wxstarwars07?BNStory/National/home (quoting Jerome Laflamme) (emphasis added). Laflamme was involved in distributing the “Star Wars Kid” video. See id.; see also infra notes 110-13 and accompanying text.
Last summer, Kim Hyo-bi, a twenty-two year old student in South Korea, discovered her picture had been posted “on a photo-sharing website . . . with her face colored and distorted to make her look silly, titled alongside the original as ‘Before and After.’”\textsuperscript{107} After the photos were posted, she “was barraged with calls from friends who saw the page, and the humiliation and feeling of being violated caused her several sleepless nights.”\textsuperscript{108} She remains “keenly aware of any cameras around her” and reacts irritably when she knows she is being photographed.\textsuperscript{109}

A more notorious incident of ridicule involved Ghyslain Raza, a Canadian high-school student who videotaped himself pretending to be a Star Wars character wielding a light saber and then left the tape in the machine.\textsuperscript{110} His classmates found the tape and uploaded it to a file-sharing site; the tape, which was subsequently, and repeatedly, enhanced with music and special effects, was viewed millions of times and Raza became famous as the less than agile “Star Wars Kid.”\textsuperscript{111} According to Raza, the release of the tape made life “unbearable” for him at school because classmates mocked him; he left school, but was tormented by people’s recognizing him as the “Star Wars Kid.”\textsuperscript{112} Suffering from depression and other problems caused by the tape’s release, Raza eventually sued the students who put it online.\textsuperscript{113} Three years later, he settled with them; the details of the settlement, including whether it involved “monetary compensation,” were not revealed.\textsuperscript{114} It was never clear if

\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{111} See Ha, supra note 106.
\textsuperscript{112} Id. (quoting Ghyslain Raza, Star Wars Kid).
\textsuperscript{113} Id. It is not clear precisely what cause(s) of action Raza invoked in his suit.
\textsuperscript{114} Id.
the parents of the students he sued had insurance or other assets that could have been used to pay the damages Raza sought.\textsuperscript{115} Raza's tape is still available online,\textsuperscript{116} and there appears to be absolutely nothing he can do to remove it.

2. Invasion of Privacy

"It is one thing to be manipulated and used by a lover, it is another thing to be cruelly exposed to the world."\textsuperscript{117}

In May of 2004, Robert Steinbuch, a staff attorney for Ohio Senator Mike DeWine, met Jessica Cutler, a DeWine staffer, at a bar and "[t]hey apparently hit it off. A few hours later, Cutler and Steinbuch went to her apartment and enjoyed sexual activities."\textsuperscript{118} Their sexual encounters continued over the next twelve days, during which Cutler described the details (such as the fact that Steinbuch liked to spank and to be spanked) of their encounters in postings on her blog.\textsuperscript{119} The postings remained obscure until they were picked up by the popular blog Wonkette, "and the entire world quickly learned" the intimate details of the Cutler-Steinbuch affair.\textsuperscript{120} This put a dramatic end to the affair, and a year later Steinbuch sued Cutler, asserting that her "'cruel and malicious exposures' entitled him to substantial compensatory and punitive damages under two invasion of privacy liability theories (false light and disclosure of private facts)."\textsuperscript{121}

\textsuperscript{115} Id.
\textsuperscript{116} See, e.g., Star Wars Kid, http://www.jedimaster.net/.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id. (citing Complaint at 20, Steinbuch v. Cutler, 2006 WL 3060084 (D. D.C. Oct. 30, 2006) (No. 05-0970(PLF))). Steinbuch's claims for invasion of privacy were based on the Restatement of Torts (Second) § 652D (1977). Tort law recognizes a
cause of action for such invasions: One who publicizes "a matter concerning the private life of another" can be held civilly liable "if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." RESTATMENT (SECOND) OF TORTS § 652D (1977), see, e.g., Motion to Dismiss at 16-17, Steinbuch v. Cutler, 2006 WL 3060084 (D. D.C. Oct. 30, 2006) (No. 05-0970(PLF)).

The Model Penal Code includes a provision criminalizing certain invasions of privacy. See MODEL PENAL CODE § 250.12 (1962). The first section of the provision criminalizes eavesdropping or visual surveilling "in a private place." Id. at § 250.12(1). The eavesdropping or surveillance can be accomplished in person or by electronic means. See id. Ohio, South Carolina and Utah have codified versions of this provision. See OHIO REV. CODE ANN. § 2907.08 (2003 & Supp. 2005); S.C. CODE ANN. § 16-17-470 (2003); UTAH CODE ANN. § 76-9-402 (2003). The second section of the Model Penal Code provision makes it a misdemeanor to intercept and/or disclose the contents of a private message. See MODEL PENAL CODE § 250.12(2) (1962). Washington has codified this provision, while North Carolina adopted a version making it a crime to "violate the privacy" of telegrams. See N.C. GEN. STAT. § 14-371 (2005); WASH. REV. CODE ANN. §§ 9.73.010 & 9.73.020 (2003).


A very few states make "computer invasion of privacy" a crime, but these provisions are really computer crime statutes, in that they are concerned with preventing unauthorized intrusions into computer systems rather than violations of the personal privacy of an individual. See VA. CODE ANN. § 18.2-152.5 (2004 &
By the spring of 2006, Steinbuch’s suit had survived a motion to dismiss and was proceeding to discovery.\(^{122}\) Even if he prevails, it is unlikely Steinbuch can collect from Cutler, who has changed lawyers several times due to her apparent inability to pay legal fees.\(^{123}\) Even the judge questioned the wisdom of filing suit: “I don’t know why this guy thought it was smart to file a lawsuit and lay out all of his private intimate details in an appendix to the complaint.”\(^{124}\) Steinbuch is apparently determined to “set the record straight” about details such as “whether he is able to ejaculate with or without a condom or whether he likes to spank or be spanked.”\(^{125}\)

A similar but perhaps more compelling incident involved Virginia Congressman Edward Schrock who “abruptly dropped out of his race for a third term” after gay activist Michael Rogers claimed on a website that Schrock is gay.\(^{126}\) Rogers’ online “outing” of Schrock included posting an “audio file of Congressman Schrock seeking gay sex off of gay sex lines.”\(^{127}\)

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As this survey demonstrates, most of the state statutes that criminalize “invasions of privacy”—however defined—are voyeurism provisions. That is, they criminalize the act of “spying on” another, usually for the purpose of gaining “sexual pleasure.” See, e.g., BLACK’S LAW DICTIONARY 1167 (8th ed. 2004) (defining “Peeping Tom”); see also id. at 1609 (defining “voyeur”). The remaining statutes, like the Model Penal Code provision, derive from the common law crime of eavesdropping, which targeted the harm of violating the privacy of someone’s home. See WILLIAM BLACKSTONE, 4 COMMENTARIES *168; see also Note, The Right to Privacy in Nineteenth Century America, 94 HARV. L. REV. 1892, 1896 (1981).


\(^{124}\) Id. (quoting U.S. District Judge Paul Friedman).

\(^{125}\) Id.


\(^{127}\) Posting of Michael Rogers to BlogActive, Schrock Faces Accusations: Cancels Congressional Campaign, http://www.blogactive.com/2004/08/schrock-faces-accusations-cancels.html (Aug. 30, 2004). This article will assume, for the purposes of analysis only, that Rogers’ “outing” of Schrock was based on accurate information. This assumption will come into play later, when we consider the role, if any,
3. False Light

“It destroys our reputations.”128

A case from Wisconsin illustrates how someone can use cyberspace to cast another in a seriously “false light.”129 After his boss fired him, David Dabbert went to the “Sex on the Side” website, which “features ‘attached’ women who are seeking sexual encounters ‘on the side.’”130 Dabbert posted an advertisement on the site that purportedly came from his former boss, using her real name and email address.131 The ad “described her chest size and hair color and, in part, said: ‘I’m highly stressed out. . . . I’ve only been with my hubby. He’s gone at work 24 hours at a time . . . I want someone to make me their slut for the night.’”132 The woman received many responses to the advertisement, which left her frightened and embarrassed.133

In a similar case, “a family therapist posed as his former wife’s new husband and posted an ad on an Internet site for swingers, asking interested men to call the couple.”134 It gave “the ex-wife’s body measurements and home phone number and

privacy claims should play in our defamation analysis. See infra Part IV.A.


129 Tort law recognizes a cause of action for portraying another in a false light, i.e., for placing someone “before the public in a highly offensive and untrue manner.” BLACK’S LAW DICTIONARY 636 (8th ed. 2004) (defining false light); see RESTATEMENT (SECOND) OF TORTS § 652E (1977). There seems to have been no attempt to criminalize false light, at least not in this sense.


131 Sink & Space, Man Charged with Defamation, supra note 130.

132 Id. (citing criminal complaint against Dabbert).

133 Id.

134 Lisa Sink, Family Therapist Investigated in Internet Complaint; Phone Number of Former Wife, Her New Husband Posted in Swingers Ad, MILWAUKEE J. SENTINEL, Mar. 14, 2000, at 1B.
said: ‘Wife and I desire [three]some with a male. . . .’135 The advertisement “prompted a slew of calls to the woman and her new husband,” which, again, left them frightened and embarrassed.136

There are many other ways cyberspace can be used to cast someone in a false light. Educators have been notably vulnerable to this kind of activity. In 1998, Glenda Miskin, then a student at the University of North Dakota (UND), published an article entitled Kinky Torrid Romance by Randy Physics Professor on the UND News website, a privately-operated venture that exposes alleged wrongdoing at the University.137 In the article, Miskin accused Physics Professor John Wagner “of being a pedophile and [of] having odd sexual habits.”138 Outraged, Wagner sued Miskin for defamation and eventually won a judgment requiring her to pay him $3 million and apologize for the story.139 Aside from establishing that the jury disbelieved her allegations,140 the judgment was a purely Pyrrhic victory: Miskin could never pay such a sum; she declared, after the judgment issued, that she would not apologize; and her story was available online long after the jury returned its ver-

135 Id. The ad may have been prompted by a custody dispute between the former spouses. See id.

136 Id.


138 Carlson, Former Student’s Online Accusations, supra note 137; see also UND News, University of North Dakota, J. L. Wagner: Career Misogynist, http://www.undnews.com/university_of_north_dakota_j_l_wAGNER_CAREER_MISOGYNIST.htm (claiming that Wagner said “he ‘likes’ prepubescent children, their grandmothers, and great-grandmothers. He says that he does not do well with women his own age”).


140 See N.D. Century Code § 14-02-03 (defining libel as a “false . . . publication”); see also infra Part IV.
dict. Wagner paid his own attorney fees, recovering nothing from Miskin.

In a somewhat analogous case, Daniel Curzon-Brown, an openly homosexual professor at City College in San Francisco, sued Ryan Lathouwers, founder and webmaster of Teacher Review, a site that "post[ed] anonymous comments about . . . faculty members." Curzon-Brown sued for defamation after he was the subject of "postings that use[d] the word 'faggot' frequently, and allege[d] that he raped and molested students in exchange for better grades." One posting claimed he had sex with a student in the classroom; another accused him of killing a student. A year later, Curzon-Brown agreed to dismiss the suit and to pay the American Civil Liberties Union (ACLU) $10,000 in attorneys' fees; the ACLU represented Lathouwers, who could not afford private counsel. Had Curzon-Brown not agreed to dismiss, the ACLU would have moved for dismissal on the grounds that Lathouwers was statutorily immune from suit under the Communications Decency Act of 1996, and would have sought $100,000 in attorneys' fees.

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141 Bartlett, supra note 139; see also Robert Franklin, Internet Posting Results in $3 Million Verdict; A Professor Won a Suit Against a Student Who Made Accusations Against Him on a Web Site, STAR TRIB., Sept. 30, 2002, at 1B; Xiao Zhang, Jury Awards UND Professor $3 Million in Defamation Case; Nine-Member Panel Also Demands Former Student Retract Articles, Apologize, GRAND FORKS HERALD, Apr. 3, 2002, at B2.

142 See generally Tom Bryan, UND Prof Sues Web Site Creators; Names Student Editors, Service Providers of www.undfraud.com, GRAND FORKS HERALD, Nov. 27, 2000, at A1 (Wagner's complaint sought attorney's fees).


144 Id.

145 See Dean, supra note 128.


147 Schevitz, supra note 146; see also Carlson, Lawsuit Pits 2 Instructors, supra note 143.
The Communications Decency Act "overrides the traditional treatment of publishers . . . such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing . . . obscene or defamatory material written or prepared by others." \(^{148}\) Concerned about lawsuits inhibiting free speech online, Congress added section 230(c)(1) to title 47 of the U.S. Code. \(^{149}\) It states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." \(^{150}\) The effect of this provision is to immunize those who, like Lathouwers, post content that is provided by another, such as the individuals who submitted the postings about Curzon-Brown. \(^{151}\) At least one court has found that the immunity applies even though the operator of the site "exercises some editorial control over the anonymous postings." \(^{152}\)

Curzon-Brown’s experience illustrates the problems individuals can encounter in seeking civil redress from those who have contributed to the online distribution of defamatory material. If the author and publisher of the material are distinct, the aggrieved person may want to seek redress from either or both. The publisher is an obvious target, if only because he/she/it is readily identifiable. But as Curzon-Brown learned, the publisher of the material—the operator of the website on which it appeared—is immune from suit under the Communications Decency Act. \(^{153}\) The publisher may also be, like Lathouwers and Miskin, \(^{154}\) judgment-proof, i.e., "unable to


\(^{149}\) See Batzel, 333 F.3d at 1026-30.


\(^{151}\) See Batzel, 333 F.3d at 1030-31.


\(^{153}\) See Carlson, Lawsuit Fils 2 Instructors, supra note 143.

\(^{154}\) See Carlson, Former Student’s Online Accusations, supra note 137. As noted earlier, Miskin was both the author of the posting about Wagner and the publisher of the UND News website. See supra notes 137-42.
satisfy a judgment” for damages because he or she lacks assets and has a limited income.\textsuperscript{155} This leaves the author of the posted material, but difficulties arise here as well. For one thing, the author may be anonymous; if the publisher does not know who the author is, the aggrieved party will probably be unable to identify and pursue him or her.\textsuperscript{156} And even if the aggrieved party is able to identify the author of a defamatory posting, the author may be judgment-proof, like Miskin. We return to these issues in Part III(C).

4. Not-So-False Light

“If this guy Hoyt is not the one, God help us all for sullying the man’s name.”\textsuperscript{157}

The cases examined in Part III(B)(3) are categorized as false light cases because it is reasonably certain that the allegations at issue were, in fact, false. Sometimes, though, it is difficult to tell whether allegations are true or false; and individuals may object to the distribution of material concerning them even if it is not false, or is not entirely false.\textsuperscript{158} This section reviews a few, hopefully representative instances in which individuals have taken issue with the online dissemination of information and/or allegations about them that may, or may not, be false.

Our first example is the Foxy Felon case: In 2005, The Smoking Gun website posted its second collection of “foxy felon’ mug shots.”\textsuperscript{159} The collection consisted of mug shots of women


\textsuperscript{156} Cf. Course Reviews.com, Guidelines for Posting Reviews, http://www.coursereviews.com/help/guidelines (last visited Jan. 14, 2007) (stating that the website's policy requires posters to provide their “real email address” and receive a “verification key” before they can post messages).


\textsuperscript{158} Objections to the dissemination of not-false or not entirely false information are usually predicated on an invasion of privacy theory. See supra Part III.B.2; see also supra note 121.

\textsuperscript{159} See TheSmokingGun.com, Foxy Felons, http://www.thesmokinggun.com/ar-
who had been convicted of crimes, along with information about their crimes and the punishment they received. A year later, one of the women featured in the collection, Casey Hicks, threatened to sue The Smoking Gun if it did not excise her mug shot. The precise basis for the threatened litigation was not clear, but it seems to have included a defamation theory. This is interesting because Hicks did not—and presum-


The Smoking Gun packaged the mug shots and offense information of the Foxy Felons before posting it online. This at least somewhat differentiates what The Smoking Gun did from what an Ohio judge is doing. In June of 2006, Medina County Judge James Kimbler began “uploading his weekly sentencing hearings on the free video Web site YouTube.com.” Ohio Judge Broadcasts Sentencings on YouTube.com, COLUMBUS DISPATCH, June 21, 2006, available at http://www.columbusdispatch.com/news-story.php?story=194030. Judge Kimbler does not appear in the videos; only the defendant, the defendant’s attorney and what seems to be a bailiff appear in them. Id. While it is probably unlikely that any of the defendants will challenge what Judge Kimbler is doing, the practice might raise issues analogous to those under consideration in this article. The defendants could not, of course, claim that their privacy is being violated because the video records a public proceeding. Nor, since they have pled guilty to the charges against them, could they claim they are being cast in a false light. They might argue that this represents an impermissible incremental intrusion on their privacy: That is, while the sentencing itself is a public proceeding, sentencings are, traditionally, accessible to only a small, local audience. By uploading the video of a sentencing onto YouTube.com, Judge Kimbler is publishing it to a broader audience, which might well have negative effects that would not manifest themselves if the sentencing were available only to those who could attend in person.


See Letter from Terry D. Bork to Thomas Fitzharris, supra note 161 (noting that the picture was meant to “hold her up to public ridicule and humiliation”); supra note 18 and accompanying text. Bork’s letter also cited invasion of
ably could not—challenge the accuracy of what was posted.163
Her defamation claim, insofar as one exists, seems to go to the
issue of packaging, i.e., to the fact that The Smoking Gun took
information from the files of a public agency, assembled it with
other information obtained from the same source and then
posted all of the information online under a particular rubric,
“Foxy Felons.”
We are left to speculate about the nature of the injury
Hicks believes she suffered: Does she feel defamed because the
site characterized her as (i) “foxy” or (ii) a “felon?” Since she
was convicted of possessing a controlled substance, the latter
characterization seems factually unobjectionable; it is matter
neither of opinion nor speculation. Any conclusions we might
draw as to her reaction to the second characterization would be
rampant speculation, so we will move on to what, inferentially,
seems to be the real gist of Hicks’ defamation claim: Essential-
ly, she is complaining that The Smoking Gun took information
which was concededly public—in a very limited fashion—and
made it truly public by broadcasting it on the Internet. This
distinguishes her defamation theory from the invasion of priva-
cy cases we examined in Part III(B)(2). The site that “outed”
Congressman Edward Schrock revealed information that was
not in the public domain and, in so doing, arguably violated his
right to maintain control over his private life.164 Hicks’ mug
shot, conviction and sentence, on the other hand, were already
a matter of public record, although the record was, and pre-
sumably would have remained, obscure. Absent The Smoking
Gun’s posting the information online, one could have accessed
it only by traveling to or contacting the courthouse where the
information was securely filed away.
The notion that one is defamed, i.e., exposed “to public

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163 Bork’s letter suggests that the criminal history provided for Hicks was
incorrect. Letter from Terry D. Bork to Thomas Fitzharris, supra note 161.
164 See supra Part III.B.2; see also supra note 121.
hatred, contempt, or ridicule,” when otherwise public information is distributed online, surfaces in many of the not-so-
false light cases. Take the South Korean woman who refused requests to clean up after her dog when it defecated on the floor of the subway car in which they were riding. Outraged, another passenger used his cell phone to photograph her and the dog and then posted the photograph on a popular Korean website. “[W]ithin days, she had been identified and much of her personal information was exposed on the Internet.” Parody posters appeared online; people began to call the now-easily-recognizable woman the “dog-poop girl” and someone posted her photo on an online auction site with the caption, “I’m selling dog poop.” According to one source, the woman, who was a student, “quit her university because she had been “[h]umiliated in public and indelibly marked.”

In August of 2005, Thao Nguyen was riding on a New York subway train when another passenger, a man, began masturbating in front of her. Nguyen took a picture of him with her cell phone and posted it on websites along with a description of what had happened:

The New York Daily News published a front page article . . . about the incident and included the photo . . . The story . . . received wide attention from newspapers . . . [as well] as several weblogs. Several people called the Daily News claim-

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165 See supra note 18 and accompanying text.
167 Id.
168 Id.
ing that they believed the man to be Dan Hoyt. . . . [O]ther women came forward alleging that Hoyt was the same man who had exposed himself to them on prior occasions. 173

Hoyt eventually surrendered to police, pled guilty to one count of lewdness and was ordered to receive counseling. 174

The Hoyt episode prompted seven New York City residents to create “Holla Back NYC,” “a photoblog and grassroots initiative to . . . combat street harassment by posting photographs and narrative accounts of individuals’ encounters with offenders.” 175 Since “Holla Back NYC” is a blog, the site leaves the determination as to what constitutes street harassment to those who submit postings. 176 Some postings—photographic and otherwise—are ambiguous, while many are graphic. 177 Regardless of the accuracy with which the poster discerned an alleged harasser’s intent, the subject of the posting is lumped in with men who were foolish or reckless enough to expose themselves (in one way or another) to a camera or cell phone. 178

These examples all involve instances in which the behavior

173 Id.
174 Id.
that became the topic of web publication was itself unambiguous (though the import of some of the behaviors reported on the “Holla Back” site may be open to dispute). Our final example deals with a site that also reports particular behaviors, but in this instance the reports are clearly filtered through, and shaped by, the emotions and perceptions of the person submitting the report(s).

“Don’t Date Him Girl” is a website where women can share their “relationship experiences with women around the globe.” According to the site, “[b]y adding your ex to DontDateHimGirl.com, you empower others with the knowledge to make an informed decision in a potential new love interest!” Women who want to research a man can log on to the site and use a database to search for entries on that particular gentleman; some of the posts are, to say the least, highly critical of the men they focus on. As this is written, the site is only five months old but reportedly has over 500,000 registered users and gets 600,000 hits a day. Its Terms of Use section tells users they are “solely responsible” for the content they post, and that they should not post material that is “defamatory, inaccurate” or that violates another’s right to privacy.

Notwithstanding this warning, men featured on “Don’t Date Him Girl” complain that its anonymous postings include material that is inaccurate or “partially true but twisted.”

181 See DontDateHimGirl.com, http://dontdatehimgirl.com/search/cheater.asp?ddh_id=35881&return_url=index%2Easp%3F (last visited Jan. 25, 2007) (“This man is a liar and likes to play with ppl’s [sic] emotions and I am here to tell the world and I hope he doesn’t do this to you. Please read this email he sent me, and you can see for yourself how he plays with ppl’s [sic] minds”) (emphasis omitted).
Some of these complaints appear on an opposing website: Classaction-dontdatehimgirl.com offers “legal action information” about “Don’t Date Him Girl” and posts comments from men who feel they have been harmed by information posted on the site. In June of 2006, one man featured on “Don’t Date Him Girl” decided to fight back: Pittsburgh attorney Todd Hollis announced he was going to sue Tasha Joseph, operator of Don’t Date Him Girl, because his reputation is “being ruined by postings” on her site. According to Hollis, entries allegedly posted by women who have dated him “accused him of giving them a disease, dating two people at a time and being bisexual or gay.” He says he cannot pursue his accuser(s) directly because he cannot identify them; as noted earlier, “Don’t Date Him Girl” postings are anonymous. Joseph responded by pointing out that she is immune from suit under the Communications Decency Act of 1996 and by suggesting that Hollis post a rebuttal, which she permits men to do on her website.

Interestingly, between the time this article was written and the time the editorial process was completed, the tone of the “Don’t Date Him Girl” site mellowed considerably. We can only speculate as to why that is, but it seems reasonable to assume the change is due, at least in part, to the complaints about and litigation directed at the site.

com/ (last visited Jan. 14, 2007).
185 Id.; see, e.g., ClassAction-DontDateHimGirl.com, Howard M’s Story, http://www.classaction-dontdatehimgirl.com/howardmstory.php.
187 Id.
188 Id.
189 Id.; see supra notes 148-52 and accompanying text; see also DontDateHimGirl.com, Contact Us, http://www.dontdatehimgirl.com/contact_us/ (last visited Jan. 14, 2007) (explaining how to submit a rebuttal; however, the site does not remove profiles of the men in its database). See DontDatehimGirl.com, Search, http://www.dontdatehimgirl.com/search (last visited Jan. 14, 2007).
190 See, e.g., Thompson, supra note 182; DontDateHimGirl.com, http://dontdatehimgirl.com/faq/ (last visited Jan. 25, 2007).
C. Online Publication Is Different

"Print publishing acts as a filter, weblogs do not."\(^{191}\)

The drafters of the Model Penal Code made their decision not to criminalize defamation in a world in which there was only one model: real-world publication by the MSM (newspapers, magazines, books, radio, television and movies).\(^{192}\) That model's reliance on professional staff discourages the publication of defamatory material by filtering the content of what is published in two ways.\(^{193}\)

Most importantly, the real-world model filters the subject-matter of what is published. Because it is a commercial endeavor, MSM publication focuses on matters of general public interest, i.e., topics that are likely to attract a large segment of the available audience.\(^{194}\) One of the reasons the drafters of the

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\(^{192}\) See supra Part III.A. We will use the term "real-world" to denote activity—such as publication—that occurs solely in the "physical reality of everyday life which everyone experiences." Wikipedia, *Real World*, http://en.wikipedia.org/wiki/Real_world (last visited Jan. 14, 2007). The phrase "online publication" denotes the dissemination of information—text, sound, images, other data—by purely electronic means.


\(^{193}\) See supra notes 100-01 and accompanying text. MSM's default reliance on professional staff is attributable both to (i) MSM entities' conducting their respective operations as a business and (ii) the financial disincentives associated with the imposition of civil liability for the publication of problematic material. The first factor favors professionalism and the hierarchical organization that has historically proved advantageous in conducting commercial (and other) enterprises; utilization of professional staff and hierarchical organization are seen as effective ways to maximize an entity's competitiveness in the media marketplace. See generally Robert McChesney, supra note 5. The second factor promotes reliance on professional staff as a way to minimize financial losses attributable to successful and unsuccessful efforts to hold a media entity civilly liable for the publication of defamatory material. See supra notes 100-01 and accompanying text.

Model Penal Code gave for not criminalizing defamation was the often-trivial nature of the material at issue. They differentiated between "the ordinary case of defamation compensable in a civil suit" and gossip. This distinction had both a substantive and a methodological component; that is, it was based both on the nature of the material being disseminated and the method used to disseminate it.

The rationale for not criminalizing defamation was the product of three assumptions: (i) that if defamatory material were published, it would concern a public figure (whose activities would be deemed a matter of general public interest) and would be published by an MSM entity from which the victim could obtain civil redress; (ii) that the MSM would not publish defamatory material concerning non-public figures (because it would not be deemed a matter of general public interest); and (iii) that defamatory material not published by the MSM would be disseminated, if at all, parochially, by word of mouth (and limited print form). The distinction the draft-
ers of the Model Penal Code drew between gossip and actionable defamation was therefore based more on the method that is used to disseminate defamatory material than on its content. They realized that publication by the MSM—the only type of publication then possible—vastly expands the scale on which defamatory material is disseminated and thereby increases the harm it causes;201 to paraphrase Warren and Brandeis, what is whispered in the closet does far less damage than what is broadcast to the world.202

These assumptions that the drafters of the Model Penal Code made were valid when they decided not to criminalize defamation but, as is explained below, their validity has been eroded by the rise of online publication. Before we examine that issue, however, we need to resume our examination of how the traditional model of publication filters content.

The real-world model also applies a secondary filter: Once an item is selected for publication by an MSM entity, it undergoes a vetting that is intended to ensure the accuracy and fairness of the material to be published.203 This process is dictated both by professional ethics and by a desire to avoid being held civilly liable for defaming those featured in the publication.204 Although the drafters of the Model Penal Code did not

201 See, e.g., Ray v. Citizen-News Co., 57 P.2d 527, 528 (Cal. Ct. App. 1936). The terms harm and harms will be used to denote the very specific type of injury attributable to an activity that has been, or is sought to be, criminalized. See, e.g., WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.2(e) (2d ed. 2003).
203 See supra note 100; see also Wikipedia, Journalism Ethics and Standards, http://en.wikipedia.org/wiki/Journalism_ethics_and_standards (last visited Jan. 14, 2007). “Fairness” encompasses concerns such as minimizing intrusions into individuals’ privacy and respecting victims’ grief. See id. One ethical code, for example, notes that “private people have a greater right to control information about themselves than do public officials and others who seek power, influence or attention.” Society of Professional Journalists, Code of Ethics, supra note 100.
204 See, e.g., Wikipedia, Journalism Ethics and Standards, supra note 203.
cite this process as a factor supporting their decision not to criminalize defamation, it no doubt played a part in that decision, as the vetting process also limits the frequency with which defamatory material is published by MSM.

MSM entities have the incentives and ability to filter content because they are part of a closed, hierarchical, commercial system—a modern guild.\textsuperscript{205} MSM has historically been a closed, commercial system because of (i) the tremendous production costs involved in printing or broadcasting content and (ii) the need to control content so it is commercially viable and does not expose MSM entities to civil liability.\textsuperscript{206} MSM entities are hierarchically-organized because hierarchical organization is the most effective way to orchestrate personnel and other resources for the accomplishment of tasks in the real, physical world.\textsuperscript{207} All of this combines to create a finite operational context with shared understandings and standardized procedures.

As the incidents we examined in Part III(B) illustrate, online publication changes all of this. Cyberspace favors lateral, distributed organization rather than the hierarchical structures that prevail in the real-world; it also eliminates the financial and other barriers that make MSM a closed system.\textsuperscript{208} In cyberspace, publication is egalitarian and “[m]ass amateurization” is the norm.\textsuperscript{209} As one observer noted, while MSM creates audiences, online publishing creates communities, and communities do not filter content: “Writers submit their stories in advance, to be edited . . . before the public ever sees

\textsuperscript{205} See, e.g., Wikipedia, Guild, http://en.wikipedia.org/wiki/Guild#Modern_guilds; see also supra note 193.

\textsuperscript{206} See, e.g., Douglas Gomery, Media Ownership: Concepts & Principles, in MEDIA ECONOMICS: THEORY AND PRACTICE 45-46 (Alison Alexander, et. al. eds., 1998). The need to limit civil liability is of less importance in this regard than ensuring content is commercially viable.

\textsuperscript{207} See, e.g., Brian Nichiporuk & Carl H. Builder, Societal Implications, in IN ATHENA’S CAMP: PREPARING FOR CONFLICT IN THE INFORMATION AGE 295, 297-301 (John Arquilla & David Ronfeldt eds., 1997); see also supra note 193.


\textsuperscript{209} See id.
them. Participants in a community . . . say what they have to say, and the good is sorted from the mediocre after the fact.²¹⁰

The “amateur author/publisher” and “community” analogies accurately capture some aspects of online publication, but they miss others. Online publication does eliminate MSM’s reliance on professional staff; as we saw in Part III(B), anyone who is literate and who has access to the Internet can create content²¹¹ and publish it online,²¹² directly or by using an intermediary. The “amateur” analogy captures that aspect of online publishing, but it can also imply that online authorship resembles MSM publishing in that the author of content is identifiable. That is, as we saw in Part III(B), not always true: Online authors can identify themselves (the activist who “outed” Edward Schrock),²¹³ can remain anonymous (the person(s) responsible for the Curzon-Brown postings)²¹⁴ or can pretend to be someone else (David Dabbert).²¹⁵

The availability of all three alternatives—and particularly the last two—means that the online publishing model differs significantly from the real-world model upon which the drafters of the Model Penal Code relied. In the first alternative, we know who the author of the content is, but we may not know anything about that person; the less we know about the author of online content, the more difficult it is for us to assess the merits of what she says.²¹⁶ We (some of us, anyway) may

²¹¹ Our discussion of “publishing” content has tended to assume textual content, but it is not at all difficult to create and publish audio and/or visual content. See supra note 160.
²¹³ See supra Part III.B.2.
²¹⁴ See supra Part III.B.3.
²¹⁵ See supra Part III.B.2.
²¹⁶ We have become accustomed to MSM entities, and so tend to assume that the information they provide is credible. This tendency is so deeply ingrained we may not be aware of it, except, perhaps, when we encounter colloquial expressions such as “newspaper of record.” See, e.g., Wikipedia, Newspaper of Record, http://en.wikipedia.org/wiki/Newspaper_of_record (last visited Jan. 14, 2007); see also Wikipedia, The New York Times, http://en.wikipedia.org/wiki/New_York_Times
therefore credit content that is distorted or completely fabricated.217 This tendency is exacerbated when the author of the content remains anonymous or pretends to be someone else, someone with whom we believe we are communicating directly.218

Our relative or complete lack of knowledge as to the identity and bona fides of authors of online content differentiates it from content generated by real-world communities. Participants in a community not only know each other's identities, they also have (i) data that lets them assess the merits of what other community members say and (ii) shared experiential and emotional ties that keep their communications within certain, acceptable bounds. The first factor goes to the issue discussed above—our ability to assess the merits of what someone says. The second factor goes to a different issue: Community ties have historically acted to filter the content of communications in a fashion that is analogous to, but is less formal and probably less effective than, the standards and procedures used by MSM.219

This is where the “community” analogy for online publishing breaks down: While there are communities in cyberspace, and while these communities share ties that tend to maintain a level of civility in their mutual communications, this is not true of cyberspace itself. There are communities in cyberspace, but cyberspace itself is not a community; cyberspace is a frontier, a conceptual, unsettled, unstructured frontier.220 As we have

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(last visited Jan. 14, 2007).

217 See, e.g., Barrick Gold Corp., 71 O.R.3d at 314 (“Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations, by . . . its potential for being taken at face value”).

218 See supra Part III.B.3; see also Barrick Gold Corp., 71 O.R.3d at 31 (“the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed”).


seen, it is easy to remain anonymous in cyberspace or to operate under a pseudonym (which may be a borrowed identity). Many find this possibility intoxicating, and some exploit it to harm others by publishing problematic content (among other things). Indeed, it seems that our ability to conceal our identities online encourages uncivil, antisocial behavior in the same way and for the same reasons that our operation of motor vehicles produces “road rage.” What this means for online publication is that it is constrained neither by the formal standards that govern MSM publication nor by the informal standards that structure behavior in the real, physical world.

Finally, online publication differs from traditional publishing in yet another way, a way the drafters of the Model Penal Code could not have imagined. Cyberspace not only democratizes publishing; it accelerates it:

[O]ur visibility is reduced when we operate a vehicle; [and that] erodes our sense of social responsibility. The same is true—but to an even greater extent—of our participation in cyberspace. . . . [I]n the cyberworld we can achieve complete anonymity and thereby divest ourselves of the . . . real-world and the behavioral constraints it imposes. This certainly does not mean that everyone who ventures into cyberspace . . . embarks upon . . . antisocial . . . acts. . . . It is, however, clear that people are taking advantage of the liberation they feel online to engage in behaviors they would never have felt free to indulge in the real-world.” (quoting M. E. Kabay, Address at the Annual Conference of the European Institute for Computer Anti-virus Research, Anonymity and Pseudonymity in Cyberspace: Deindividuation, Incivility and Lawlessness Versus Freedom and Privacy, (Mar. 1998)) (footnotes omitted).
enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a . . . forum frequented by only a handful of people, any one of them can republish the message by . . . forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again. The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that “the truth rarely catches up with a lie.”

This aspect of online publishing goes not only to its aggravated ability to inflict harm, but also to the inefficacy of civil liability as both a remedial measure and a control mechanism.

The “Star Wars Kid” saga highlights its limitations as a remedial measure: The victim in that incident eventually sued the students who put his video online but they seem to have been, if not completely judgment-proof, unable to pay substantial damages. And damages would do little to remediate the harm Raza suffered; his video is still online, where it will no doubt remain for years. The adolescents he sued may have disavowed their part in putting it online, but there is nothing they can do to erase the video from the Internet, and there is nothing a court can do, either. As the above-quoted passage notes, once it is put online, content “travels” around the world, ultimately remaining beyond the reach of courts in any particular jurisdiction. As Raza learned, with online publishing it is remarkably difficult, if not impossible, to “put the cat back in the bag”—to undo what has been done.

His saga also highlights civil liability’s limitations as a

216 See infra Part IV.A.
217 See supra Part III.B.1.
control mechanism. Raza could, and did, sue the classmates who initially put his video online, which may deter them from doing something similar in the future. He cannot, however, sue everyone who copied, modified and/or distributed his video once it arrived online. Real-world defamation suits can target one or a few defendants because real-world publication involves a single, simultaneous release of content by an MSM entity; online publication involves a repetitive series of cascading events, each initiated by a different person or persons, so the defendant pool is likely to be large and may be additive, i.e., may continue to increase. Raza would have had to sue hundreds, if not thousands,\textsuperscript{230} of people in various countries, most, if not all, of whom would be judgment-proof.\textsuperscript{231} To obtain any re-redress,\textsuperscript{232} Raza would have had to fund this gargantuan litigation himself,\textsuperscript{233} which he could not do and which other victims of online defamation will no doubt find equally impossible. Online publishers understand these limitations, so the very-hypothetical prospect of civil liability does little, if anything, to control what they publish.

Online publication clearly differs from the real-world model of publication that was the implicit empirical foundation of the decision not to include a provision criminalizing defamation in the Model Penal Code. It differs in ways that undermine, if

\textsuperscript{230} According to some estimates, the video—in its various incarnations—has been seen by as many as 15 million people. See, e.g., Jerry Lawton, \textit{It's Daft Vader . . . But Star Wars Geek Has Last Laugh}, \textit{Daily Star} (UK), Aug. 27, 2003, at News.

\textsuperscript{231} And if it were undertaken, such an effort would also encounter the jurisdictional obstacles noted above. See supra note 228 and accompanying text.

\textsuperscript{232} A victim might, for example, seek an injunction requiring the removal of the defamatory content from the Internet rather than damages for its having been distributed. See generally Complaint, Steinbuch v. Cutler, 2006 WL 3060084 (D. D.C. Oct. 30, 2006) (No. 05-0970(PLF)).

\textsuperscript{233} Even if some/all of the defendants were not judgment-proof, most countries do not allow contingent-fee arrangements. See, e.g., Ilana T. Buschkin, Note, \textit{The Viability Of Class Action Lawsuits In A Globalized Economy—Permitting Foreign Claimants To Be Members Of Class Action Lawsuits In The U.S. Federal Courts}, 90 \textit{CORNELL L. REV.} 1563, 1596 (2005). Since most or all of them are likely to be judgment-proof, a U.S. attorney would not be likely to take a case such as this on that basis.
they do not invalidate, the rationale responsible for that decision. That, however, does not necessarily mean we should criminalize defamation; the decision to criminalize an activity involves a complicated calculus, a balancing of principles and pragmatism. We undertake that task in the section immediately below.

IV. CRIMINAL DEFAMATION?

"The . . . aim of the criminal law is . . . to prevent injury to the health, safety, morals and welfare of the public." 234

As noted above, in deciding whether to criminalize an activity we must evaluate principle and pragmatic considerations. The drafters of the Model Penal Code did this in deciding not to criminalize defamation.235 They considered the harm defamation then inflicted (principle) and the extent to which civil liability then sufficed as a control mechanism (pragmatism). In revisiting their decision, we are employing the same calculus, but in a different order. The section above addressed the pragmatic considerations, explaining how online publication erodes civil liability's effectiveness as a control mechanism; the pragmatic considerations that shaped the decision not to criminalize defamation are therefore far less compelling than when that decision was made. Part IV(A) examines the issue of harm, i.e., whether online publication exacerbates the nature and severity of the harm attributable to defamation so that this harm now warrants the imposition of criminal sanctions. Part IV(B) offers a note on enforcement.

A. Harm

"Libel . . . is notoriously difficult of exact definition." 236

234 LAFAYE, supra note 201, at § 1.2(e) (emphasis added).
235 See supra note 61.
The basic component—the basic operational unit—of criminal law is a "crime." A crime (also known as an "offense") is conduct law makes punishable because it inflicts what has been determined to be a socially-intolerable type of harm.237 There will therefore be a correlation between a crime and a specific harm. This correlation will be exclusive; that is, there will be one crime—and only one crime—for each proscribed harm.238

The drafters of the Model Penal Code recognized that real-world defamation inflicted harm, but did not think the harm warranted criminalization.239 After explaining that harms are criminalized either because they are "very grave" or because of the "higher likelihood" that they will be inflicted, the architects of the Code decided defamation fell into neither category.240 They inferentially, and correctly, concluded that it does not fall into the first category.241 As to the second category, they concluded that while the traumatic harm caused by "certain aggravated" types of defamation might qualify for criminalization, the likelihood of such situations occurring (given the MSM's then-domination of publication) was too slight to justify making defamation a crime.242 They also concluded, by implication, that the far more likely but less traumatic harm caused by routine defamation (gossip) did not justify criminalization; this conclusion seems to have been based on the very limited scale upon which this residual class of defamatory material could be disseminated in a pre-Internet era.243

Things have changed.244 The aggravated and routine varieties of defamation—along with some new variants—have migrated online where, it is clear, they will thrive and proliferate.

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237 See BLACK'S LAW DICTIONARY 399 (8th ed. 2004) (definition of "crime"). For more on this, see Brenner, Toward a Criminal Law for Cyberspace: Distributed Security, supra note 11.
238 See generally MODEL PENAL CODE § 1.07(1) (1962).
239 See supra Part II.C.
240 See supra Part II.C.
241 See supra Part II.C.
242 See supra Part II.C; see also Part III.C.
243 See supra Part II.C; see also Part III.C.
244 See supra Part III.
absent the introduction of control mechanisms more effective than conventional civil liability.\textsuperscript{246} Does this alteration in the empirical context the drafters of the Model Penal Code assumed, and relied on, justify rejecting their decision and embarking upon the criminalization of defamation?

It is difficult to answer that question. Online publication has not only made problematic speech—speech that may or may not qualify as defamation—\textsuperscript{246} more common, it has made it more complex. When the Model Penal Code was written, defamation was for the most part an established, predictable phenomenon that consisted of an MSM entity’s publishing text, photographs or, on occasion, video.\textsuperscript{247} The resulting harms were consequently stable: the published material “blackened” the victim’s reputation and/or held her up to public ridicule.\textsuperscript{248}

The section above explained how and why online publication changes the unitary nature of traditional, MSM publish-

\textsuperscript{246} See supra Part III.C. Online defamation will persist and perhaps increase in incidence and virulence for at least two reasons: One is that cyberspace lets us broadcast the gossip, vituperation and otherwise-malevolent communications that have always played some part in human society; the other reason is that cyberspace empowers our antisocial tendencies in the same way as, and for the same reasons as, our operation of motor vehicles. See supra Part III.C. Online defamation will only be further exacerbated as communication technologies increase in sophistication and in pervasiveness. See generally Susan W. Brenner, \textit{Law in an Era of Pervasive Technology}, 15 Widener L.J. 667 (2006).

It is at least theoretically possible that a modified version of conventional civil liability could be used to control online defamation along with, or instead of, criminal liability. How (and if) that could be done is quite outside the scope of this article, however.

\textsuperscript{246} See supra Part III.B.

\textsuperscript{247} An unscientific search of Westlaw for state civil and criminal defamation cases decided between 1946 and 1961 shows that nearly all of them arose from text and/or photographs published in newspapers or magazines; a few involved motion pictures.

\textsuperscript{248} See supra Part II.A. The Restatement and other, traditional formulations of defamation link reputational injury and being held up to ridicule. See Part II.A. The analysis presented below treats these as separate and distinct harms, on the premise that this more accurately reflects modern conceptualization of defamation as encompassing both reputational injury and emotional, or psychic injury. See Rodney A. Smolla, \textit{Law of Defamation} § 1:24 (2d ed. 2006). The impetus for dichotomizing what was once regarded as a unitary harm comes from modern publishing techniques, which can result in the dissemination of material that ridicules without impacting upon one’s reputation. See infra Part IV.A.1-2.
ing. While our experience with online publication is in its infancy, it is already apparent it introduces a substantial "wild card" element into the process. Anyone with access to the Internet can publish whatever he or she wishes in any of several formats: "real" or altered text, photographs, video and/or audio. The section above explained why this change in the nature of publishing requires that we reconsider the Model Penal Code drafters' decision not to criminalize defamation. To do that, we must assess the harms inflicted by the twenty-first century version of defamation. There would, after all, be no reason to employ penal sanctions in this context if the harms being inflicted are comparable to those with which the drafters of the Model Penal Code were familiar.

The first two sections below, therefore, undertake the rather daunting task of parsing the harms currently inflicted by the online publication of problematic speech. It is a daunting task because the pliancy of online media creates almost unbounded opportunities for producing and publishing problematic speech. Some of this speech will clearly inflict harms equivalent to or greater than those traditionally associated with defamation, but some will not; and some of it will be problematic, injurious speech the equivocality of which challenges our ability to classify it as harmful or not-harmful. Since it is impossible, here, to explore all of the harms that can be inflicted by online publication, the analysis presented in the first two sections is illustrative, not exhaustive. It focuses on a threshold issue: Does online publication inflict harms that justify the use of penal sanctions to control online defamation? Since we are exploring the fit between the harms traditionally associated with real-world defamation and the new harms attributed to online defamation, the sections use the traditional harms (reputational injury and ridicule) as baseline, or organizing,
principles. The third section then assesses the need to criminalize defamation in light of the preceding analyses.

1. Reputation

"Among the rights . . . the law undertakes to protect, that of reputation is one of the most prominent."

The harm defamation inflicts upon reputation is primarily relational. As one source notes, defamation law is concerned with "disruption of the 'relational interest' that an individual has in maintaining personal esteem in the eyes of others." This "relational interest" has three components: (i) existing relations with others; (ii) prospective relations with others; and (iii) an existing "public image" or the ability not to acquire a negative "public image."

While both are amorphous, reputational harm is the more concrete of the two types of harm traditionally associated with defamation. Unlike ridicule, which can be more nuanced, reputational injury tends to be less subject to disputation because the harm tends to be more immediately outrageous, more "in your face." The false light cases outlined above are a good example of this; in each instance, someone published material online that attributed socially-unacceptable traits, desires and/or behaviors to the victim(s). Depending on the particular case, the material was such that it would undermine the individual’s personal relations with others and could negatively

253 See supra note 248.
255 See, e.g., SMOLLA, supra note 248, at § 1:22. Dean Smolla suggests that reputational assaults also inflict economic and emotional harms, but it seems that these interests are, in most cases, encompassed by the harm to one’s relational interests. See id. at §§ 1.23-24.
256 Id. at § 1:22.
258 See infra Part IV.A.2.
259 See supra Part III.B.3.
impact professional relationships. To the extent that family, friends, colleagues or acquaintances credited the allegations against these individuals, each suffered a loss of reputational capital; the image—the “face” each presents to the world—was debased. And if educators can be deemed to have (or aspire to have) a public image, then the postings directed at Curzon-Brown and Wagner presumably inflicted similar damage on this aspect of their relational interests.

The harm inflicted in the false light cases is readily apparent because each involved the online publication of information that was clearly, demonstrably false. The truth or falsity of published material was traditionally irrelevant in imposing criminal liability for defamation; since the gravamen of the common law crime was distributing content that could cause a breach of the peace, accuracy was immaterial. But accuracy—or, more precisely, inaccuracy—is very material to calculating harm. While metrics have never been devised for defamatory harms, it is reasonable to infer that the publication of derogatory false information will have a significant deleterious impact on one’s reputation among those with whom the individual maintains and/or aspires to maintain relationships. Because the information is false, it inflicts reputational harms that would otherwise not have arisen; since, for example, David Dabbert’s former boss was not really interested in “sex on the side,” information to that effect would never have circulated in her community and tarnished her reputation but for his putting a false claim to that effect online.

The Dabbert case also shows how online publication can aggravate defamatory harms. First, assume the basic facts:

260 See supra Part III.B.3.
262 See id.
263 See supra Part II.A-B.
264 See supra Part III.B.3.
Dabbert's boss fires him, which makes him so angry he decides to "strike back" by accusing her of behavior her community will find extremely disreputable. Now assume this occurred forty years ago, before the Internet. How could Dabbert disseminate his accusations? Since no MSM entity would publish such unfounded allegations, he would have to rely on word of mouth, initiating a whispering campaign to spread the rumor that his former boss sought "sex on the side" (however one did that in a pre-Internet world). Those who heard the rumor from Dabbert would know it came from one with a grudge against the woman, and would assess it in that light; those who heard it indirectly and had no way of knowing who it came from would probably not be inclined to give much weight to an unattributed, implausible rumor about a (presumably) respected member of the community. This gossip scenario is what the drafters of the Model Penal Code had in mind when they decided not to criminalize defamation because of the very limited harm it inflicted.265

Now consider the twenty-first century version of the scenario: Instead of relying on an ad hoc whispering campaign that might ultimately be traced to him, Dabbert goes online, poses as his former boss (using her personal information to provide credibility) and posts a message saying "she" seeks "sex on the side." His revenge apparently lay in knowing she would receive responses to "her" inquiry that would frighten and embarrass her; he could have compounded the reputational injury to this woman if he had anonymously sent the posting to her boss, her minister, the principal of her children's school, etc. In either event, Dabbert inflicts a significantly greater level of reputational harm on his victim than in the gossip scenario because here it seems that this is no rumor; it seems this is truly something the victim herself has done. Online publication not only gives people like Dabbert the ability to broadcast defamatory material, it also lets them engage in imposture—using the victim's own persona to defame her.266

265 See supra Part II.C.
266 In some states, anyway, this aspect of Dabbert's conduct might constitute
The “Holla Back NYC” and “Don’t Date Him Girl” examples show how online publication can harm someone’s reputation in intermediate cases, i.e., when the truth of the material being disseminated is subject to dispute. The material posted on these sites comes from motivated individuals who offer their interpretations of their experiences (street encounters for “Holla Back,” dates for “Don’t Date Him Girl”) with anonymous or identified men. Since both sites encourage venting, the postings are almost exclusively negative; many of them are quite inflammatory (for different reasons). Both sites identify the subjects of the postings, though in varying ways and varying degrees: Those who post on “Don’t Date Him Girl” know the man they are warning others about and therefore include varying amounts of personal information about him; since those who post on “Holla Back” are reporting street encounters, they generally do not know names and so rely on photographs or physical details to identify the men they cite for misconduct.

While the truth or falsity of published information is irrelevant in imposing criminal liability for defamation, accuracy is, as noted earlier, of empirical significance in assessing harm. The allegations that appear on the “Holla Back” and “Don’t Date Him Girl” websites are not filtered or verified in any way; they come from individuals who are agitated as a result of an experience they have had with a man or men. Impostors like Dabbert could use these sites for malicious ends, but since we have addressed that scenario we will assume for the purposes of this analysis that the postings are at base legitimate, i.e., that they come from someone who really had an encounter (i) of the type at issue in the posting (ii) with the individual(s) identified in the posting. Given that assumption, then, do postings on sites like “Holla Back” and “Don’t Date Him Girl” inflict harms—the generic severity of which warrants the imposition of criminal liability for publishing defamatory material?

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\[260\] See supra Part III.B.4.

\[260\] See supra note 189.
Or do they merely represent the migration of gossip online?

Those are difficult questions. No one, presumably, would argue that being vilified on a website like this inflicts harm equivalent to that resulting from rape or murder.269 But what about the residual category the drafters of the Model Penal Code cited—an increased likelihood of lesser harms analogous to those resulting from “petty theft or malicious mischief”?270

The opportunity websites such as these provide for “outing” men who allegedly engaged in boorish (if not criminal) behavior dramatically increases the likelihood that what the men thought was private will become a public anecdote. If that occurs, it at least arguably produces two distinct but related harms: (i) a loss of control over one’s private activities; and (ii) having an idiosyncratic view of one’s private activities broadcast to the public. The potential for inflicting either or both harms might warrant the imposition of criminal liability for defamation, depending on (i) the likelihood that harm will be inflicted and (ii) the nature and severity of the resulting injury to the victim.

As to the first issue, we are concerned not with a quantitative assessment of the relative frequency with which individuals are likely to find their private lives becoming an anecdote on a website versus the frequency with which they are likely to become the victims of “petty theft or malicious mischief.” The drafters of the Model Penal Code cited these crimes as examples of lesser harm-inflicting behaviors, the incidence of which is not so remote that it is unnecessary and inadvisable to use criminal liability to control them.271 Writing in an era when publication was controlled by MSM entities, they assumed the publication of gossip or other calumnies was too remote to make this necessary and advisable. That assumption no longer holds.272 The sections below therefore consider whether the nature and severity of either/both of the harms identified above.

269 See supra Part II.C.
270 See supra Part II.C.
271 See supra Part II.C.
272 See supra Part III.C.
make it necessary and advisable to use criminal liability to discourage their infliction.

We begin our analysis with the second harm, because it is a purely defamatory harm. The first harm encompasses compromising someone's privacy as much as it does using allegedly private information to damage their reputation; since it implicates privacy concerns as well as defamation, we defer our consideration of this harm until we finish our examination of purely defamatory reputational harms.273

a. Reputational Harm

The second harm identified above can inflict reputational injury that is at least equivalent to the financial injury caused by petty theft and/or malicious mischief. To illustrate the nature and effect of this harm, we will consider two scenarios, one for each website.

i. “Holla Back”

John Doe, an associate in a New York City law firm, learns that a cell-phone photograph of him riding to work on a city bus has been posted on the “Holla Back” website along with the allegation that he was exposing himself to women on the bus. Doe learns this from a person (associate, paralegal, executive assistant) in his office, who says it has become a matter of common knowledge in the office. He begins to receive emails and calls from colleagues outside his office, from his family, from the woman he has been dating, from friends and so on. All of them have heard about the posting; most have seen it.

The posting will have a dramatic, negative effect on Doe’s professional and personal reputation; he has been publicly identified as a pervert, a criminal.274 This is true even though we are assuming that the allegation is false and that the photograph merely shows Doe seated on a city bus. If the allegation is false, this scenario is analogous to—though more egregious

273 See infra Part IV.A.1.b.
274 See N.Y. PENAL LAW § 245.01 (McKinney 2005).
than—the Dabbert scenario analyzed above. It is analogous in that by publishing a false accusation (along with Doe's photograph), his anonymous accuser has tainted a much, much wider audience than she could have reached with oral gossip. It is somewhat more egregious because the fact that the accusation is published on a site which “outs” behavior such as that being attributed to Doe and is accompanied by a photograph of Doe on a city bus inferentially enhances the presumptive credibility of what is in fact a falsehood.\footnote{The nature of the site Dabbert used presumably enhanced the credibility of his falsehood, as well; the inclusion of the photograph of Doe, however, markedly increases the likelihood that those who see this accusation will credit it, to some extent, because people will tend to infer guilt from the unambiguous evidence of Doe’s being on the bus.}

If the accusation is false, why would someone post it? We are assuming postings on this site are made in good faith, but we do not assume accuracy: Maybe the poster misunderstood something she saw; maybe she mistook Doe for someone else; maybe she is deranged. Who knows? When content is not filtered, errors will occur and harm will result.

What can Doe do to remediate the harm he has suffered? These sites seem loath to edit or remove postings,\footnote{See supra Part III.B.4.} so that is not a viable option. And as we saw earlier, civil liability offers Doe no recourse; the site is immune from suit and the poster is anonymous (and probably judgment-proof, as well).\footnote{See supra Part III.C.} It seems Doe has no recourse; he cannot publish a rebuttal, “unpublish” the accusation, or obtain vindication in a civil suit.

ii. “Don’t Date Him Girl”

Assume John Doe is, once again, an associate in a New York City law firm. Assume he dated an associate from another firm, Mary Smith, for six months before they broke up three months ago. Doe started dating Jane Brown, a professor who knows Mary Smith, two weeks ago; yesterday he received an email from Jane that contained the message, “This really opened my eyes. Don't call me again!” and a link to the “Don't
Date Him Girl” website.

Doe clicked on the link and was shocked to find that someone (whom he now believes to be Mary Smith) posted an “Alleged Cheater” profile on “Don’t Date Him Girl” using his name and photograph. The profile gives Doe’s age, height, weight, eye and hair color, and correct place of employment, and it then embarks on a lengthy diatribe which, among other things, accuses him of being “a degenerate lothario,” a “compulsive liar” and a “deadbeat” who “has a serious juvenile record.” The authoress of the post says Doe “cheated on” her with “MEN AND WOMEN,” including her friends. She accuses him of being a “Jekyll-Hyde” who “kept the ugly side of himself hidden” until the day he “abandoned” her for “my best friend.”

Doe is appalled. As far as he is concerned, the allegations are completely false; he calls Jane to tell her this, but she refuses to talk to him; she seems to believe what the profile says. Doe assumes Mary sent the profile to Jane but wonders how many other people have seen it. He calls and emails Mary, but she ignores him. He contacts “Don’t Date Him Girl” and learns that while they will not remove his profile, he can post a rebuttal. Doe is not sure he should do this, since he would have to admit that he dated Jane, a friend of Mary’s, and that he was charged with shoplifting when he was fourteen (the result, he says, of a “misunderstanding”). He could generally deny the profile’s other allegations, but is afraid this would only lend them credence (and maybe prompt the author to post a surrebuttal). He hopes people at his law firm do not learn about the profile, as that would be embarrassing.

Doe suffers some harm to his reputation in this scenario, but it differs in several ways from the harm inflicted in the “Holla Back” scenario. For one thing, here he knows (or thinks

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278 These allegations and those that follow are based on a “Don’t Date Him Girl” profile of a Virginia man. Don’tDateHimGirl.com, http://dontdatehimgirl.com/search/ (last visited Jan. 14, 2007).
279 Id. (“He’ll try to seduce your friends (he did mine and used me as a decoy to draw in other women).”).
280 See id.
he knows) who his accuser is; even if Mary Smith is not his accuser, the author of the posting must be a woman Doe dated at some point.\textsuperscript{281} This puts the accusations into a familiar context: bad feelings between former lovers. Everyone is familiar with that context and so will be inclined to take the allegations in the profile with a grain of salt; this minimizes the reputational harm they will inflict.

The allegations in the “Don't Date Him Girl” profile are also much less damaging than the accusation on the “Holla Back” site. While the “Holla Back” accusation imputed criminal behavior that is regarded as particularly opprobrious to Doe, the “Don't Date Him Girl” profile basically casts him as a cad (a deadbeat, lying lothario) with a “juvenile record.” This latter allegation is unlikely to have much impact because the profile notes he is an attorney; most of those who see it will probably realize that he would not be practicing law if he really had a “serious” juvenile record. The remaining, obscure allegations (being a “Jekyll-Hyde,” having an “ugly side” and cheating with MEN as well as with WOMEN) are also unlikely to carry much weight, if only because they are so vague and generalized.

Essentially, what we have here is the migration of gossip online. It differs somewhat from offline gossip in that it has been reduced to written form and published on a website that outs cads and cheaters; these circumstances mean the allegations will circulate more widely than if the author relied on oral transmission (rumor) and may acquire a certain cachet, a gloss of credibility, from being on a website (though there is an argument to the contrary).\textsuperscript{282} Overall, though, it seems this scenario actually inflicts less harm than real-world gossip because Doe can post a rebuttal, which will appear whenever anyone accesses his profile.

\textsuperscript{281} We are assuming the posting is legitimate, \textit{i.e.}, was posted by someone who dated Doe, and does not represent a Dabbert scenario. See supra notes 129-33.

\textsuperscript{282} The argument is that this site exists to let women “vent” about men they have dated, which suggests that the allegations it publishes are more likely to be the product of emotion than accurate reportage. It is a variant of the “grain of salt” caveat noted earlier.
iii. Reputational Harm: Assessment

As the analysis in the preceding sections should illustrate, assessing the nature and severity of the reputational harm inflicted by online publication is a very complicated task. As the analysis in the immediately preceding two sections may demonstrate, much will depend on the nature of the website on which the information is published; what might seem to be blatantly specious allegations ("trades sex for grades") could harm a teacher’s professional reputation if they were posted on a site like Teacher Review.283 Another important factor is the accuracy of what is posted; we have already noted how posting false allegations can harm someone.284 In the two sections immediately below we consider whether harm—more precisely, harm that is within the ambit of this analysis—results from the online publication of accurate information.

b. Privacy Harm

Although this is an article about defamation, we cannot ignore the issue of privacy. Privacy claims can arise in many contexts: The Foxy Felon postings; Cutler’s publicizing her trysts with Steinbuck; the (apparent) “outing” of Congressman Schrock; and postings on sites like “Don’t Date Him Girl” and “Holla Back” are all instances in which privacy was, or could have been, raised.285

People invoke privacy when an online publication involves the public dissemination of what they contend is private information.286 Privacy also becomes an issue when—and only when—the information disseminated is true; one cannot, after all, claim a privacy interest in fictive activity.

Violating someone’s privacy (actual privacy, as opposed to the aspirational privacy that usually surfaces in online publication cases)287 is a serious matter. So serious that the drafters

283 See supra Part III.B.3.
284 See supra Part IV.A.1.a.i.
285 See supra Part IV.A.1.
286 See supra Part IV.A.1.
287 See infra notes 292-94 and accompanying text.
of the Model Penal Code included a provision criminalizing invasion of privacy in the final draft of the Code; the provision targets real-world invasions of privacy, which are not implicated in this analysis. 288 Actually, invasions of privacy generally are not implicated in this analysis. 289

The privacy claims that surface in online publication cases are not invasion of privacy claims; they go, instead, to the act of publishing what the “victim” claims is—or should be—private information. We saw this in Part III(B), and again in Part IV(A)(1)(a). The Foxy Felon complained because official, public information about her criminal conviction was put online; Steinbuch, Schrock and the subjects of various postings on “Don’t Date Him Girl” and “Holla Back” complained because information about their private activities in public places was put online. 290 This is the issue we noted earlier, 291 and deferred for consideration until now.

The first problem with these complaints is that the information at issue was not private because it concerned an activity the complainant conducted in conjunction with or in the presence of another person or other persons. 292 Activities are

288 See supra note 121.

289 Traditional intrusions such as voyeurism, eavesdropping and compromising the privacy of the mail have long been criminalized. See supra note 121; see also 18 U.S.C § 1708 (2000) (listing the penalty for various criminal acts linked to stealing mail); H. Morley Swingle & Kevin M. Zoellner, Criminalizing Invasion of Privacy: Taking a Big Stick to Peeping Toms, 52 J. Mo. B. 345, 345-58 (1996) (discussing Missouri criminal penalties for invasion of privacy). The same is true for more egregious intrusions, such as breaking into repositories containing private data or documents. See, e.g., 18 U.S. Code § 1030(a) (2000) (criminalizing fraud in connection with activity related to computers); MODEL PENAL CODE § 221.1 (1962) (defining burglary).

290 See supra Part III.B.2, 4.

291 See supra Part IV.A.1.

292 See supra Part III.B. This circumstance will be a constant in most online defamation claims. Defamatory publication circulates accounts of (allegedly) “discreditable” events. Online (or offline) publications learn about these events from observers with first-hand information; it is these observers who are the “source” of the defamatory material being published. One is, by definition, “defamed” by another, not by oneself. If the victim voluntarily shared the information at issue with the source, then the information was not private and the only act the victim can complain of is the act of publishing the material. If the act of publishing the
not private when we conduct them with or among others,"293 when we share our thoughts, our acts, our selves with others we assume the risk they will divulge what they have learned.294 What you do in public—on a bus, on a street, in your lover’s apartment, on a website, etc.—is public. It cannot be deemed private simply because it is discreditable or embarrassing; arguments to that effect mix metaphors, confuse principles, and impossibly conflate privacy with defamation.

The other problem with these complaints goes not to the issue of privacy but to the issue of defamation. As was noted earlier, when victims of online publication invoke privacy, they are necessarily complaining about the dissemination of true information. The dissemination of true information can, of course, inflict reputational harm. Assume, for example, that the minister of a conservative Baptist church frequents strip clubs. Assume, further, that someone “outs” his predilection on a website, by posting digital photographs that show the minister at the strip club enjoying the performances. The online publication of this true information will inflict what may be devastating harm on his reputation.295 But there is no necessary equivalence between the infliction of reputational harm and defamation.

Since civil defamation law is predicated on the need to redress harm to an individual, it has never encompassed the dissemination of true information.296 As Blackstone observed,

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293 The Oxford English Dictionary, for example, defines “private” as “not to be shared or revealed.” CONCISE OXFORD ENGLISH DICTIONARY 1142 (11th ed. 2004). See also RESTATEMENT (SECOND) OF TORTS §§ 652A(2)(a), 652B (1977) (privacy as seclusion).
296 See supra Part II.C.
“if the fact be true, it is damnnum absque injuria; and where there is no injury, the law gives no remedy.” 297 Criminal defamation law, on the other hand, was historically predicated on the need to maintain social order by preventing breaches of the peace. 298 It therefore—at least originally—did not recognize truth as a defense, on the premise that “[t]he publication of matter which is true, may have quite as great a tendency to excite to breaches of the peace, as if false.” 299

The Garrison Court concluded that the common law breach of the peace justification for criminalizing defamation was not valid in the twentieth century, 300 a conclusion that presumably applies with equal force in the twenty-first century. The only remaining justification, therefore, for criminalizing defamation is the civil law premise: the publication of “untrue” information that defames someone and inflicts harm that the law must address. 301 Under the civil standard, publishing true information about someone may constitute a tortious invasion of privacy (or some other actionable transgression), 302 but it cannot constitute defamation. 303 The same rule should apply, for the same reasons, in the criminal context; we return to this issue in Part IV(A)(3).

297 WILLIAM BLACKSTONE, 3 COMMENTARIES *125.
298 See supra Part II.C.
299 State v. Burnham, 9 N.H. 34 (N.H. 1837); see also supra note 52 and accompanying text.
300 See supra note 82 and accompanying text.
301 See supra Parts II.A., IV.A.1; cf. infra Part IV.A.2 (discussing ancillary effects of defamation).
302 See supra note 121. Depending on the circumstances involved, the publication might constitute the intentional infliction of emotional distress, harassment or stalking. See, e.g., 18 PA. CONS. STAT. ANN. § 2709 (West 2000 & Supp. 2005); WASH. REV. CODE ANN. § 9.61.260 (West Supp. 2005); RESTATEMENT (SECOND) OF TORTS § 46 (1977). This brings us back to the issue noted earlier: the premise that online speech is problematic in various ways. See supra Part III.B; see also infra Part IV.A.3.
303 See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 558 & 561A (1977). As noted earlier, the Supreme Court has suggested—but not held—that publishing true information concerning purely private matters may be protected by the First Amendment. See supra note 80.
2. Ridicule

"exposed her to the ridicule . . . of all who heard such language"^{304}

We are using ridicule—a term often found in defamation statutes^{305}—as a residual category of harm. Although the publication of defamatory material primarily tends to harm the victim’s reputation,^{306} it can also have a secondary effect. Publishing defamatory material can harm our relationship with our self as well as our relationships with others; it can damage the self-esteem we derive from our internalized self-image.^{307}

We saw two clear examples of this type of harm earlier. One was the mortification Kim Hyo-bi experienced when someone put distorted photographs of her online.^{308} While people she knew saw them, the photographs would not cause Hyo-bi reputational harm because they in no way attributed negative acts or discredit able attributes to her. They made her look "silly,"^{309} a circumstance others would probably comment on, but which would not alter their assessment of, or relationship with, Hyo-bi.^{310} Logically, then, she suffered no harm; affectively, however, she was harmed because she was ridiculed,^{311} both by the photographs themselves and by the fact that someone had done this to her. (The limited information available

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^{305} See supra note 18 and accompanying text.

^{306} See supra Part IV.A.1.

^{307} See, e.g., R.A. STEFFENHAGEN & JEFF D. BURNS, THE SOCIAL DYNAMICS OF SELF-ESTEEM: THEORY TO THERAPY 28 (1987) (defining self-esteem as "the totality of the individual's constructs of self: self-concept (mental), self-image (physical), and social concept (cultural)"); see also id. at 19-30 (analyzing self-esteem).

^{308} See supra Part III.B.1.


^{310} No one would "believe" the distorted photographs: Acquaintances would know the pictures did not accurately depict Hyo-bi; and given the nature of the distortion involved, it seems reasonable to infer that anyone who saw them would realize this.

^{311} See, e.g., THE CHAMBERS DICTIONARY 1303 (9th ed. 2003) (defining "ridicule" as "to make fun of; to deride; to mock").
about this incident does not indicate that the publication of the photos caused Hyo-bi to suffer ridicule from others.)

The other ridicule case is the "Star Wars Kid" saga. As a reporter noted, Ghyslain Raza became "a worldwide object of ridicule when schoolmates put on the Internet a video of him clumsily pretending to be a Star Wars character."\(^{312}\) Unlike the morphed photographs of Hyo-bi, the video accurately depicted Raza voluntarily engaging in activity; here the ridicule derived not from a distortion of his image, but from the dissemination of a video many found amusing, given his earnest ineptitude as a Jedi Master.\(^{313}\) Raza was humiliated by their amusement because it made him see his performance (his self) as they saw it: as ridiculous. As with Hyo-bi, nothing in the video damaged Raza's reputation; his documented ineptitude with a light saber would not cause others to refuse to associate with him.\(^{314}\) Like Hyo-bi, therefore, Raza sustained the mere harm of ridicule (though the actual magnitude of the harm he sustained was much greater due to the wider, and more persistent, distribution of his video).

As these cases illustrate, ridicule produces psychic harm that is analogous to, but less severe than, the harm caused by intentionally inflicting emotional distress in violation of civil or criminal law.\(^{315}\) Until the last century, criminal law was only concerned with physical harms; but over the last several decades scholars and legislators have accepted the premise that psychic harms unaccompanied by physical injury can warrant

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\(^{312}\) Ha, supra note 106.

\(^{313}\) See, e.g., Star Wars Kid, supra note 116. Unlike Hyo-bi, Raza was the object of ridicule by others, particularly his classmates. See supra Part III.B.1.

\(^{314}\) Indeed, it generated some sympathy: At least 83,000 people signed a petition to have him given a role in the then-upcoming Star Wars movie. See Star Wars Fans Seek Film Role for Internet Kid, BBC News, Sept. 5, 2003, http://news.bbc.co.uk/cbbcnews/hi/tv_film/newsid_3083000/3083122.stm.

\(^{315}\) See, e.g., Mich. Comp. Laws Ann. § 750.411h(1)(b) (West 2004) (defining “emotional distress” under stalking law as “significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling”); see also Restatement (Second) of Torts § 46 cmt. j (1965) (discussing severe emotional distress). This type of harm was no doubt implicated in Steinbuch's suit against Cutler, see supra Part III.B.2.
the imposition of criminal liability. But not every psychic harm does warrant the imposition of such liability. As the authors of the Restatement of Torts explained, law cannot take cognizance of

[Insults, indignities, . . . petty oppressions, or other trivialities . . . [We] must . . . be hardened to a certain amount of rough language, and to occasional acts that are . . . unkind. There is no occasion for the law to intervene in every case where some one’s feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

Though the authors of the Restatement were explaining their decision not to impose civil liability for routine instances in which one person’s actions cause another to suffer emotional distress, their rationale applies with equal force to online ridicule, as is explained below.

3. Sum

“Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.”

Ridicule is not pleasant, but it does not have the ramifications associated with serious reputational harm. As we saw above, online resources can be used to disseminate material that will have a devastating effect on someone’s reputation and, consequently, on his or her life. We used postings on the “Holla Back” site to illustrate this, but that is one, rather modest example. In the preceding section, we used a hypothetical about a conservative Baptist minister who likes strip clubs to

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illustrate why privacy is not a harm within the compass of this analysis. Let us now use that hypothetical for a different purpose—to illustrate more devastating ways in which online publication can be used to damage, or even destroy, someone’s reputation.

Assume the following: John Doe is the minister of a conservative Baptist church in Ada, Oklahoma; he has never visited a strip club and, indeed, strongly believes strip clubs and other forms of “adult” entertainment are immoral and should be outlawed. His views reflect the tenets of his faith and are shared by the members of his congregation. Now assume that someone, for some reason, decides to “cause trouble” for Minister Doe. This person visits a strip club in Ada, takes digital photographs of men in the audience and uses software to morph the image of one of the men into that of Minister Doe. This person posts the morphed photographs on a website, with captions announcing that Doe attends strip clubs; the person emails the link to the website to members of Doe’s congregation and to other websites. The publication of these false images will inflict serious—perhaps irreparable—harm on Doe’s reputation. While the images are in a sense analogous to the false textual allegations leveled at Wagner, they will almost certainly be more devastating because they are more compelling; advances in technology notwithstanding, most people still believe “seeing is believing,” so they will tend to assume the photographs are true unless and until Minister Doe convinces them otherwise. This puts him in a very difficult position; unless and until he can prove a negative—prove it is not him in the photographs—an expanding audience will come to believe he is “the Baptist minister who likes strippers.” The online dissemination of the photographs will almost certainly result in his being removed from his position, at least while the matter is being investigated; and it could result in his ordination being suspended or even revoked, if he is unable to discredit the photographs.

This may seem an extreme example, but it is not. It merely takes the online publication of defamatory material to the next logical level—to graphical, instead of or in addition to, textual
defamation. It is—or will soon be—equally possible to use morphed video, posted on a site like YouTube,\textsuperscript{319} to publish false video “allegations” about someone. The availability of graphical defamation further exacerbates the harm associated with online publication and further differentiates it from the MSM publication the drafters of the Model Penal Code assumed.\textsuperscript{320}

The real significance of the Doe hypothetical, however, lies in what it reveals about the nature and consequences of the harm associated with reputational injury and with ridicule. In parsing the harms, it is useful to note that civil defamation law has not required proof of actual harm to establish a communication as defamatory.\textsuperscript{321} Since this approach is consistent with criminal law’s emphasis on controlling socially-undesirable behavior by sanctioning categories of behavior,\textsuperscript{322} we will utilize it in this analysis.

When the Model Penal Code drafters analyzed the need to criminalize defamation, they assumed the only unaddressed harm was what we are calling ridicule and what they called gossip (less than reputational harm). They made this assumption because, as we saw earlier, they also assumed that filtered-MSM publication would (i) prevent the publication of most defamatory material and (ii) ensure civil redress for reputational harm inflicted when the filters failed. The architects of the Model Penal Code equated MSM publication with the infliction of reputational harm on the reasonable assumption that the oral, face-to-face circulation of even scandalous


\textsuperscript{320} In addition to assuming the model of MSM-filtered publication examined earlier, the drafters would have implicitly equated “defamation” with the publication of textual material, given the then-very-limited sophistication of photographic and video technologies.

\textsuperscript{321} See RESTATEMENT (SECOND) OF TORTS § 559 cmt. d (1977) (“I[t is not necessary that the communication actually cause harm to . . . reputation. . . . Its character depends upon its general tendency to have such an effect.”); see also id. at cmt. e (discussing the standard used to prove defamation). The extent of the injury is relevant in calculating damages.

\textsuperscript{322} See Brenner, Toward A Criminal Law for Cyberspace: Distributed Security, supra note 11, at 6-46.
allegations is unlikely to inflict real reputational harm for the reasons noted earlier.\textsuperscript{323} In their minds, then, the residual category of defamation—ridicule (or gossip)—was not an appropriate focus of criminal liability because the harm it inflicted was too minor to justify the imposition of penal sanctions.

As we have seen, these assumptions have been seriously eroded, if not completely invalidated, by the development of computer technology and the ever-expanding influence of the Internet. The result—at this point in our experience with computer technology—is that we need to revise their decision not to criminalize defamation in part, but not in its entirety.

Even though it has moved online and beyond the reach of filters, the residual category of defamatory harm we are calling ridicule is still not (and probably never will be) an appropriate focus of criminal liability. It is simply too mundane and too subjective to become the predicate for criminal sanctions.

As to its mundanity, consider Ghyslain Raza: The humiliation he endured was but an amplified version of what he would have experienced if some of his classmates had happened to observe him playing Jedi Master; their account of what they saw would have made Raza an object of amusement (ridicule) as it rippled through the school and, perhaps, somewhat beyond. The oral account would not have spread around the world, as the video did; we will assume, for the purposes of analysis, that the expanded scale on which the ridicule circulated aggravated the psychic harm Raza suffered.\textsuperscript{324} But this is

\textsuperscript{323} As we saw in Part III(C), when defamatory allegations circulate orally in a community, the members of the community can assess the merits of the allegations critically, in light of the experiential information they have about the person to whom the allegations pertain. False allegations are therefore likely to be less damaging than when they are circulated by more formal, and therefore ostensibly more credible, means.

\textsuperscript{324} This assumption may be problematic. News stories about the “Star Wars Kid” emphasized the harm—the ridicule—Raza suffered at the hands of his classmates. See, e.g., Ha, supra note 106. While Raza was obviously aware that his performance had been viewed by millions of people around the world, he did not personally interact with those people and so was probably ignorant of and/or able to ignore their reactions. If this is true, then the fact that online ridicule circulates more widely than face-to-face ridicule may be irrelevant in assessing the actual harm it inflicts.
still simply a variation—a presumably enhanced variation—on the kind of experiences we have been dealing with as long as humans have lived in social groupings. Law cannot, as the drafters of the Restatement on Torts noted, eliminate the indignities and “petty oppressions” that are an inevitable, integral part of human society.\textsuperscript{325}

The subjectivity of ridicule goes to the severity of the harm it inflicts. If Jane posts a video on “YouTube” that shows her roommate Mary drunk and vomiting, does this make Mary an object of ridicule or is it a shared joke?\textsuperscript{326} The answer will depend on the subjective reaction of the ostensible victim; and how Mary reacts to the posting will be a function of many variables, including her personality and life experiences, her relationship with Jane, and other contextually idiosyncratic factors. As this example illustrates, criminalizing ridicule would require us to draw an inherently arbitrary line between joking and crime, between “blowing off steam” and crime, and between expressing an unflattering opinion and crime.\textsuperscript{327} Criminal law has recognized that the infliction of psychic harm can justify the imposition of criminal liability,\textsuperscript{328} and has therefore outlawed stalking and harassment.\textsuperscript{329} It has not, however, predicated the imposition of such liability on the infliction of self-diagnosed psychic injury; stalking and harassment statutes incorporate a “reasonable person” standard, so the imposition of liability is based not on the idiosyncrasies of the victim but on conduct that can objectively be deemed to inflict harm.\textsuperscript{330}

Courts have found that the inclusion of this objective standard prevents these psychic harm statutes from being void for vagueness.\textsuperscript{331} The inclusion of such a standard is possible be-
cause stalking and harassment are “conduct” crimes, rather than “result” crimes.\footnote{See, e.g., Eugene R. Milhizer, Justification and Excuse: What They Were, What They Are, and What They Ought To Be, 78 St. John's L. Rev. 725, 805 (2004) (“When a criminal statute’s purpose is to prevent a harmful result, the crime is said to be a result crime; when its intent is to prevent potentially harmful conduct, the crime is said to be a conduct crime.”).} Though both offenses derive from the need to deter the infliction of psychic harm, they do this by targeting continuing conduct that deviates from normal behavior and so can be described with a fair degree of objectivity.\footnote{See, e.g., 11 Del. Code Ann. tit. 11, § 1311(a) (2001); Idaho Code Ann. § 18-7906 (2004); Mich. Comp. Laws Ann. § 750.411h. Stalking and harassment are sometimes described as “course of conduct” or “continuing course of conduct” crimes. See, e.g., Rodriguez-Cayro v. State, 828 So.2d 1060, (Fla. Dist. Ct. App. 2002); Burnham v. State, 761 A.2d 890, 831 (Del. 2000).} We could not incorporate such an objective standard into a statute criminalizing ridicule because it would define a result crime, like assault; the goal would be to proscribe inflicting psychic harm—by a single act of publication—rather than a sequence of conduct inferentially likely to result in the infliction of such harm. Unlike assault, in which the proscribed result is bodily harm, the result proscribed by a ridicule crime would necessarily be capricious—the psychic harm a function of the varying sensibilities of specific individuals. Any attempt to criminalize the online (or offline) infliction of ridicule would undoubtedly be held unconstitutional: void for vagueness.

The drafters of the Model Penal Code were, and still are, correct: There is indeed a de minimis category of defamatory speech, the criminalization of which would be bad law and bad policy. Ridicule is ultimately too common, too unstable definitionally, and too trivial to become the predicate of criminal liability.

This is not true of defamatory speech that inflicts reputational harm. More precisely, it is not true of defamatory speech the online dissemination of which inflicts more than de minimis reputational harm (since one can argue that ridicule inflicts a type of reputational harm). As explained earlier, the
drafters of the Model Penal Code assumed, no doubt correctly, that civil liability sufficed to redress and discourage the infliction of reputational harm when publication was controlled by the MSM. As we also saw earlier, cyberspace invalidates the empirical premises on which that assumption was based; in cyberspace, publication becomes democratic and proletarian. It is neither accurate nor reasonable to assume that what is published will be filtered by professional staff or that one harmed by the publication of seriously defamatory material can obtain adequate civil redress from the publisher of the material.

The opportunities for the unfiltered publication of seriously defamatory material are therefore expanding while the disincentives for engaging in such publication are disappearing. To grasp the significance of these developments we need only consider the Doe hypothetical outlined above. The hypothesized harm Doe sustained is analogous to that produced by a physical assault. Here, it is not just Doe’s ego that has been injured; the publication of the defamatory photographs inflicted potentially devastating, perhaps ultimately irremediable harm on his “relational interests”—his reputation. To remediate that harm, Doe will have to find some way to rebut the false allegations the altered photographs make. Even if he comes forward, publicly, with credible evidence showing that he does not attend, has never attended, strip clubs, some will not believe him; they will believe what they “saw,” not what he says.

The Doe hypothetical illustrates one way, one of many, many ways, in which online publication can be used to inflict serious reputational harm. The drafters of the Model Penal Code recognized this harm, but chose not to criminalize its infliction for the reasons noted earlier, i.e., the unlikelihood of its being inflicted and the availability of civil redress when it was. The increasing likelihood of its infliction and the increasing unavailability of civil redress require that we revise that

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334 Cf. supra note 307 and accompanying text (explaining how defamation can cause injury to one’s self-image).

336 See supra notes 255-57 and accompanying text.
decision and use a narrowly-focused form of criminal liability to deter online publication that inflicts serious reputational injury.\textsuperscript{336}

We must therefore do what the drafters of the Model Penal Code did not: craft an offense that encompasses the infliction of the proscribed harm without sweeping too broadly. As we all know, substantive offenses consist of three definitional elements: (i) \textit{mens rea}; (ii) \textit{actus reus}; and (iii) harm.\textsuperscript{337}

The \textit{mens rea} for our postulated offense should be equivalent to that required for the other psychic harm offenses, stalking and harassment. Both require that the perpetrator have acted with the highest level of \textit{mens rea}, i.e., intentionally, purposefully or maliciously.\textsuperscript{338} These and other terms used to define aggravated \textit{mens rea} are reducible to the requirement that a perpetrator have acted with the purpose of inflicting the proscribed harm on the victim.\textsuperscript{339} The inclusion of such a stringent \textit{mens rea} requirement is an essential prophylactic measure when we are dealing with the infliction of psychic harm. Lesser mental states may suffice when the harm is tangible, as with homicide; but when it is psychic a heightened \textit{mens rea} requirement helps ensure that liability is imposed only upon those who acted malevolently.\textsuperscript{340} Such a require-

\textsuperscript{336} This is the approach that has been taken by at least some of the proposals to revise defamation law. See, e.g., UNIF. CORR. OR CLARIFICATION DEFAMATION ACT § 1 (1993); ANNEBERG LIBEL REFORM ACT § 2(b), reprinted in SMOLIA, supra note 248 at § 9:96.

\textsuperscript{337} See, e.g., LEFAVE, supra note 201, § 1.2.


\textsuperscript{339} \textit{Id.} See also MODEL PENAL CODE § 1.13(12) (1962) (defining intent as acting with purpose).

\textsuperscript{340} The difference between the two lies in an issue the drafters of the Model Penal Code cited: the relative likelihood harm will be inflicted. The infliction of physical harm upon persons, property and/or animals requires a degree of physical effort and results in a clearly-identifiable degradation of a physical state; both inferentially support the propositions that the harm was actually inflicted and was inflicted inappropriately. As we have seen, with psychic harm it is possible that neither of these propositions will be true; the conduct involved in the infliction of such a harm may be quite trivial compared to that required for physical harm, and the resulting harm may, at least in some instances, be open to inter-
ment also serves to limit the chilling effect an offense such as the one we are postulating can have upon speech; speech can provide the basis for the imposition of criminal liability, but to limit the chilling effect this can have, law requires that the speech be purposeful, i.e., be consciously intended to result in the infliction of a proscribed harm.\textsuperscript{341} Our postulated criminal defamation offense therefore requires that the perpetrator have published defamatory material online with the purpose of harming the victim’s reputation.

The \textit{actus reus} for our postulated offense is the act of publishing defamatory material online.\textsuperscript{342} That may seem straightforward, but it probably is not. One issue immediately becomes problematic: What does it mean to publish defamatory material online? Do I commit this offense if I post material that clearly inflicts serious reputational harm, with the purpose of inflicting such harm, in, say, a password-only accessible chatroom? Would that constitute publication? Or should publication consist only of disseminating material such as this in the truly public areas of cyberspace—areas such as publicly-accessible websites? Publication probably should be defined as encompassing both scenarios, if only because it is reasonable to assume that one bent on causing reputational harm to another would not post defamatory material in a limited-access area unless the poster had good reason to believe this mode of disseminating the material would achieve the desired result.\textsuperscript{343}

\footnote{See, e.g., Brenner, \textit{Complicit Publication}, supra note 29, at 324.}

\footnote{We are assuming the offense is limited to online publication because the MSM still controls the real-world venues of publication. The assumptions the drafters of the Model Penal Code made therefore still hold for real-world, MSM publication, so criminal liability should not be needed in this context.}

\footnote{This possibility illustrates yet another way in which MSM publication and online publication diverge: MSM media or mass media utilizes the blanket, indiscriminate publication of standard content; this mode of publication is a function of the one-to-many publication modalities (radio, television, print media) MSM utilizes. Online publication can be much more focused; it can, as in the scenario noted above, target particular interest groups, which can be even more devastating than the indiscriminate dissemination of content associated with MSM. With online publication, the distributor of defamatory material can target groups that...}
The third and most amorphous element is the harm. Crafting an offense such as the one we are postulating requires that we distinguish serious reputational harm from ridicule and do so with a level of objectivity sufficient to prevent the offense from being void for vagueness. How should we do this? We cannot rely upon the approach used in existing criminal defamation statutes because they either (i) conflate reputational harm with ridicule or (ii) criminalize publications that “provoke a breach of the peace.” The second approach is based upon an empirical rationale that no longer applies. And the first approach is analytically imprecise; it ignores the essential distinction we have drawn between mere ridicule and true reputational harm, presumably because these statutes merely incorporate the common law standard. The reference to ridicule in the common law standard is clearly surplusage, since real concern under common law libel was with injury to the victim’s reputation.

The best way to define the harm in our new version of criminal libel, therefore, is to retain this emphasis upon injury to reputation and strip out all references to collateral issues, such as ridicule. The offense therefore consists of purposely publishing material online that harms another’s reputation.

are likely to be particularly influenced by the material, which can enhance the magnitude of the harm inflicted.

344 See, e.g., Colo. Rev. Stat. Ann. § 18-13-105 (West 2005); see also supra Part II.A.

345 See, e.g., Ala. Code § 13A-11-160 (2005); see also supra Part II.A.

346 See supra note 300 and accompanying text.


348 See, e.g., State v. Hoskins, 62 N.W. 270, 271 (Minn. 1895); State v. Boogher, 3 Mo.App. 442 (Mo. Ct. App. 1877); see also Annenberg Libel Reform Act, supra note 336, at § 2 cmt. (“common law evolved many colorful pejoratives to define ‘defamatory,’” such as “hatred,” “contempt” and “ridicule”).

349 In the analytical scheme we have developed, ridicule constitutes a lesser-included, albeit un-criminalized, level of defamatory harm; harm to one’s ego, rather than harm to one’s reputation.

350 The proposed standard limits publication to online publication, because that is the focus of this article. It could, however, be expanded to include any type of
We then define reputation as one’s “relational interest.”

Some might argue for differentiating between harm to one’s personal reputation and to one’s professional reputation, presumably on the premise that the latter is likely to result in the infliction of greater financial harm. This distinction may well be reasonable in the context of civil defamation law, which must calculate damages once harm has been proven. Criminal law, however, is concerned with harm as a generic, categorical concept, rather than as a fiscal construct; this focus on categorical harm derives from criminal law’s central objective, which is the maintenance of social order.

There is another argument against attempting to differentiate personal and professional harms. It stems from the difficulty of parsing the two. Take the Doe (the minister alleged to have been in a strip club) hypothetical we began this section with, for example. The posting of the morphed photographs obviously, and intuitively, caused harm to Doe’s reputation, but how would we parse that harm? Given the nature of Doe’s profession, it is inferentially apparent that the publication of the photographs caused serious harm to his professional reputation, but would it not also damage his personal relationships? It is reasonable to assume that for Doe—as for most of us—there is no clear-cut, absolute point of demarcation between his personal and professional lives. Doe’s personal relationships are likely to intertwine—associationally, emotively, and conceptually—with his professional ethos, status, and activities. It would therefore be difficult to parse the respective quanta of professional and personal harm that he sustained.

There is yet another reason not to differentiate, in any formal sense, between the personal and professional harm inflicted by a particular online publication; to do so might imply a hierarchy of harm, one in which professional harm is more important, more significant than personal harm. While

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*See supra notes 256-57 and accompanying text; see also BLACK’S LAW DICTIONARY 1331 (8th ed. 2004) (defining “reputation” as “[t]he esteem in which a person is held by others”).
such a hierarchy might make sense in the civil arena, where the calculation of damages is involved, it would be inappropriate in criminal law, where the emphasis is on deterring categorical harms. To understand why that is true, assume a variation of the Doe hypothetical. In this version of the hypothetical, the victim is Jane Doe, an Indiana housewife. Jane has an undergraduate degree in education but has never worked in that field; she has chosen to work at home as a wife and mother. Jane and her husband lead a very conservative lifestyle; they are deeply religious, dress conservatively, drive a conservative car, and avoid sexually-explicit movies, music, television programs, and reading materials. Jane was, therefore, shocked and horrified when a friend sent Jane a link to a website which displayed morphed, nude photographs of Jane Doe engaging in a variety of sexually-explicit acts. Since she does not work outside the home, Jane presumably has no professional reputation which means she has merely sustained harm to her personal reputation. Can we, though, say that the harm she suffered was in some way inferior to that suffered by one whose professional reputation is the target of online defamatory material? Since the focus of the offense we are postulating is on the infliction of psychic harm, it seems that the precise nature of that harm should not matter as long as it impacted upon the victim’s relational interest.

We should follow the lead of stalking and harassment statutes and limit our postulated defamation offense to cases involving the infliction of serious reputational harm. This further narrows the availability of criminal liability by eliminating instances in which reputational harm was inflicted but the harm was relatively trivial. Stalking and harassment statutes, which also seek to deter the infliction of psychic harm, achieve this goal by limiting the offense to conduct that inflicts “severe” or “substantial” emotional distress rather than mere emotional distress. Our postulated defamation offense should there-

\footnote{The Jane Doe hypothetical is based on an actual event with which the author is familiar, having been contacted by the woman who was victimized by the online publication of false photographs.} \footnote{See, e.g., 11 Del. Code Ann. tit. 11, § 1311 (2001); Fla. Stat. Ann.
fore limit the imposition of criminal liability to cases in which the publication of the defamatory material inflicted serious or substantial reputational harm. As with the determination of whether emotional distress was severe or substantial in harassment or stalking cases, the determination of the severity of the reputational harm inflicted in a given case would ultimately be a matter for the jury to determine, using their native intelligence and everyday experience.\(^{354}\)

We need to note one other component of our postulated criminal defamation offense before turning our attention to its enforcement. The material alleged to be defamatory must be false,\(^{355}\) as we saw earlier, the publication of true material may very well inflict psychic harm, but it is not a "defamatory" psychic harm. It seems to represent a new type of harm, since, as was also explained earlier, it usually does not constitute invasion of privacy, at least not as that harm has so far been defined.\(^{356}\) The harm (if any) that people like Steinbuch suffer is not an invasion of privacy but a loss of control over information they prefer not to share with everyone.\(^{357}\) We might want to craft an offense that addresses this emerging harm since it cannot logically be brought within the concept of criminal defamation.

The material must not only be false, the person responsible


\(^{355}\) See supra Part IV.A.1.b.

\(^{356}\) See supra Part IV.A.1.b.

\(^{357}\) See, e.g., ADAM GREENFIELD, EVERYWARE: THE DAWNING AGE OF UBQUITOUS COMPUTING 126-28 (2006). Greenfield notes that "we've historically built our notions of reputation such that they rely on exformation—on certain kinds of information leaving the world, disappearing from accessibility." Id. at 128. It is this interest, this concept that sustains harm in scenarios such as the Steinbuch-Cutler saga.
for publishing it online must also have known it was false when he or she published it. This is consistent with our requiring that the perpetrator have acted with the purpose of inflict- ing reputational harm on the victim. The falsity of the material is an attendant circumstance essential to the commission of this offense; under the Model Penal Code, therefore, the perpetrator must have known that the material was false, believed it was false, or hoped it was false.\footnote{See Model Penal Code § 2.02(2)(a) (1962). This requirement ensures that the statute is constitutional under the Garrison holding. See supra Part II.C. This may not be important because the postulated offense is intended to be used primarily when private citizens are victimized. As was noted earlier, the Garrison holding does not apply to when the victim is a private citizen. See supra note 80.}

B. Enforcement

We have decided that a narrowly-focused defamation offense should be incorporated into the criminal law, in part because civil liability is not an effective means of controlling online defamation. Some may point out that efforts to impose criminal liability will encounter at least some of the same obstacles that impair civil liability’s efficacy in this context. The fact that a perpetrator is judgment-proof is not relevant when criminal liability is involved, but his or her ability to remain anonymous is. Another issue that can complicate enforcement—one that also arises in civil defamation suits—is the problem of jurisdiction, which becomes particularly difficult when online publication is involved.\footnote{See, e.g., Eric Barendt, Jurisdiction in Internet Libel Cases, 110 Penn St. L. Rev. 727 (2006).}

The legal analyses required to resolve these issues are both complex and quite outside the scope of this article. This section has a much more limited objective: to speculate about how a very old notion could be revived, modified, and used as an enforcement device when anonymity, and/or jurisdiction bar the use of more conventional measures.

Our speculation begins with the proposition that the defamation offense we postulated above differs somewhat from other offenses involving the infliction of harm. The infliction of
harm has historically been the prerogative of a human being. The human can use implements (gun, knife) to inflict the harm, but there has been a necessary correlation between human actor and the resulting infliction of harm. Guns do not shoot themselves and knives do not stab unaided. Humans can use certain implements to inflict harm remotely but there still tends to be a rough one-to-one correlation between human effort and resulting harm.

Online defamation is different. The human perpetrator of an act of online defamation publishes the defamatory material by posting it, somehow, online. Once posted, the material remains online unless and until it is removed, either by the perpetrator or by someone else. One of the issues that would arise in enforcing our postulated defamation offense would be the removal of the offending material; as long as it remains accessible online, the harm is still being inflicted and the crime is still being committed.

This does not mean that, if we decide to implement the defamation offense, we should not focus on apprehending, trying, convicting, and sanctioning the perpetrator. Here, as in other areas of criminal law, our ultimate goal is to exercise enough control over human behavior to maintain a baseline of social order; we do this by creating disincentives for individuals to engage in proscribed behaviors. And we create these disincentives by sanctioning at least a subset of the individuals who engage in these behaviors; we deprive them of their ability to re-offend by incarcerating them; and, in so doing, hope to discourage others from engaging in similar activity.

This approach has worked satisfactorily for other offenses and should work satisfactorily for our hypothesized defamation offense, as well (assuming we can identify and apprehend the necessary sub-set of perpetrators). The residual, perhaps unique problem is that even if all this functions perfectly, the offending material may still be online, harming the victim. (This will, no doubt, also be true if none of the enforcement

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360 See Brenner, Toward A Criminal Law for Cyberspace: Distributed Security, supra note 11, at 6-46.
methods function as they should because of jurisdictional obstacles, the perpetrator's persistent anonymity or other issues.)

One way to deal with this residual problem would be to require the perpetrator to remove the offending material. The statute defining the offense could impose such an obligation on convicted perpetrators, if necessary, and could provide for the imposition of special or enhanced sanctions when a perpetrator refused to comply. This assumes that the perpetrator (i) has been apprehended and (ii) is able to remove the offending material. Neither may be true: The authorities may be unable to apprehend the perpetrator because he or she remains cloaked in an impenetrable anonymity or because jurisdictional or other procedural obstacles (such as the lack of an extradition treaty) prevent the authorities from obtaining custody of an identified perpetrator. Even if the authorities obtain custody of a perpetrator, he or she may not be able to remove the offending material or may be able to feign an inability to do so with credibility sufficient to convince the authorities. In the first scenario, the perpetrator has intentionally or otherwise lost control over the site in question; in the second scenario, the perpetrator has structured the procedures by which he or she gains access in such a way that it seems he or she has lost control over the site in question.

All of this assumes that the perpetrator has been apprehended. Given the capacity one has to remain anonymous or pseudonymous online, it is likely that some (many) perpetrators will not be identified and apprehended.

Both scenarios present the very real possibility that the apprehension of the perpetrator cannot result in the removal of the offending material, which means that the commission of the crime—the infliction of harm upon the victim—continues unabated. This, unfortunately, is a possibility we may have to confront in other areas as well, as the ever-accelerating evolution of technology produces software, and hardware, that is capable of acting autonomously. Here, we are confronted with a very passive example of this automated, remote infliction of harm. While it is a primitive instance of automated harm, the continuing infliction of reputational harm by online defamatory
material requires us to consider how we will approach object-as-perpetrator or process-as-perpetrator, and, perhaps, gives us an opportunity to experiment with solutions we can implement if and when automated harms become more common and more sophisticated.

Assume, therefore, that the perpetrator in the Minister Doe hypothetical (a) cannot be identified and apprehended or (b) has been identified, apprehended and convicted but claims he cannot remove the offending photographs. Assume also that the site on which the offending photographs are posted disclaims any responsibility for removing them. Does this end the matter? Is this an acceptable resolution?

Arguably, at least, it is not. Even if the perpetrator has been apprehended, convicted, and is being sanctioned for posting the photographs, his crime is still being committed. Our model of law enforcement assumes that the commission of a crime does not survive the arrest, prosecution, and conviction of the perpetrator, either because (i) the commission of the crime was concluded long before those processes began or (ii) the apprehension of the perpetrator terminated the commission of the crime. The termination of crimes is an essential, assumed component of the model’s efficacy in controlling crime; aside from anything else, the termination of crimes establishes law enforcement’s ability to maintain social order. If the perpetrator’s conviction and sanctioning do not result in the termination of his crime, we have a disconnect which suggests that the process is somehow incomplete (and therefore unsatisfactory).

How can we resolve this residual problem—the persistence of reputational harm to the victim of online defamation? One possible solution is to approach the object-as-perpetrator or process-as-perpetrator as a target—an incremental target in this context—of criminal liability in its own right. If the offending material (object-as-perpetrator) is approached in this fashion, it creates the possibility of law enforcement’s taking direct action against that material, instead of its having to act indi-

\[361\] See id.
rectly, via the perpetrator (which, of course, may prove satisfactory in many or even most cases).

Conceptually, how could we establish the object-as-perpetrator? Except for corporate and other artificial, human-composite entities, our criminal law is concerned with individuals, not objects (or processes). We do have doctrines in place that allow for the forfeiture of objects that played a role in the commission of a crime. Some of these doctrines are based on the fiction that the object in question was itself guilty of a crime. Forfeiture, however, is based on the premise that the property is to be seized because it is tainted by its association with the commission of a crime and it has some value. We are dealing with a very different issue—with the fact that the object (or process) itself is (still) committing the crime; our goal, therefore, is not to seize the property because of its value, but to interrupt its continuing the commission of the crime.

How can we justify taking direct action against the object (or process) that continues the commission of the crime? There are ancient doctrines, such as the deodand, under which animals and objects were regarded as capable of committing crimes in the same way and to the same extent as human beings. These ancient doctrines, which seem very strange to us, imposed the same standards of criminal liability and the same criminal adjudicative procedures on animals and objects as upon human actors. These extinct doctrines were the product of cultural forces that are quite foreign to us and are therefore quite inapposite, in a literal sense, to the issues that confront us. However, they may suggest an instrumental approach we could utilize to deal with the scenario currently before us (online defamatory material’s continuing to inflict harm on the victim) and other emerging instances in which

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363 See id.
364 See id.
366 See id.
technology gives rise to automated crime.

We could develop a doctrine that allows for the imposition of a type of criminal liability upon online defamatory material that would justify law enforcement’s taking direct action to remove or otherwise terminate the material’s capacity for inflicting harm upon a victim. The imposition of the liability could supplement the liability imposed upon the human perpetrator who actually published the material online when the perpetrator has been identified and convicted, or it could serve as a substitute when the perpetrator cannot be identified or apprehended. As to the type of direct action it authorizes, this object/process liability could justify law enforcement actions when official demand that the operator of the website where the material is posted, the entity hosting the site, or some other responsible party see that the material is removed or face the prospect of being convicted as an accomplice to a crime in process. It might also—and this could be very controversial—justify law enforcement’s taking direct action to remove the material or alter it so that it could no longer communicate defamatory content.

V. CONCLUSION

The increasing incidence, virulence and creativity of problematic online speech—including defamatory online speech—are visible manifestations of how cyberspace and computer technology are changing our societies. Cyberspace and the technologies that support it are responsible for an emerging, fundamental shift in power. Power, such as the power to control publication, was historically concentrated in hierarchical commercial and governmental entities. As we have seen, cyberspace changes that; it erodes, and will no doubt ultimately disassemble, the MSM’s domination of publication.

This creates new opportunities for the infliction of psychic

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367 It would have to be strict liability since we, anyway, would not impute mens rea to objects or processes. Alternatively, the mens rea, and the actus reus, too, for that matter, might be derivative: based on the conduct and (inferred) intent of the person responsible for posting the material.
harms, a phenomenon with which the criminal law has had little experience and of which, until relatively recently, it took little cognizance, for reasons the drafters of the Model Penal Code noted. The infliction of psychic harms used to be limited to face-to-face encounters, which inevitably import identifiability and an attendant level of accountability; the result was that the harm inflicted was generally muted. The anonymity that we can enjoy online frees those who are so inclined to inflict greater levels of psychic harm on those they select as victims. This creates difficult challenges for criminal law, as we have seen in this article. On the one hand, criminal law cannot address every slight, every insult, every hurt feeling; on the other hand, psychic, intangible harms can be as devastating, if not more so, as more traditional, tangible harms.

Criminal law needs to develop a taxonomy of psychic harms. This article deals with one such harm: defamation. In so doing, it distinguishes the harm inflicted by defamation from privacy-related harms. What, though, is the precise relationship between defamation, privacy-based harms, stalking, harassment and other instances of psychic injury? How can we determine when a particular instance presents, say, an invasion of privacy versus an act of defamation? And is our current arsenal of offenses adequate to deal with the already-emerging varieties of psychic harms?

This article argues for incorporating a narrowly-focused, precisely-defined defamation offense into our criminal law. Should we also introduce a new privacy-based offense, one that deals with the dissemination of true information about someone? As explained earlier, the publication of this type of information does not (and should not) constitute invasion of privacy, but that does not necessarily mean it does not represent an invasion, a violation, of an interest we need to protect.

As the evolution of computer technology and its integration into our lives accelerates, it will become even more important to protect individuals from "information crimes." What is an "information crime?" Essentially, it is using information (or misinformation) to harm another person. Why should we be concerned about information crimes?
For most of our existence, we have interacted face-to-face. Face-to-face interaction lets us acquire the information we use to assess and interact with another person directly; we rely on our own observations and our own assessment of what we observe. We also, as explained earlier, rely on first-hand information that we obtain from others whom we know and trust. All of this is an active process; we gather, assess, retain, discard, and act on information about others. We have become very adept at using verbal and non-verbal data for this purpose.

We still adhere to this process and probably always will; however, this process is already being influenced by modern communication technologies. Employers, for example, “Google” prospective hires, and information that they acquire can affect the decision they make. As informational technology becomes ever more pervasive, we will rely more and more on this kind of “canned” information in our interactions with others. Before I meet with someone (or as I meet them) I will use a handheld device (or an implant) to do a quick check on them. Like the companies that currently rely on Google, I will assume the information I access is accurate, and so will rely upon it in my dealings with that person . . . just as some women already seem to be relying on entries posted on “Don’t Date Him Girl” to screen potential suitors.

In a world such as this, the accuracy of the ambient information available to a person takes on great significance. It is therefore appropriate, and may become absolutely necessary, to use some level of criminal liability to ensure that this information is free from maliciously introduced falsehoods and distortions. The online defamation offense postulated in this article is offered as a first, conceptual step in this direction.

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369 See, e.g., GREENFIELD, supra note 357, at 86.