

DEFAMATION: TORT OR CRIME? A COMPARISON OF COMMON LAW AND CIVIL JURISDICTIONS

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*“The truth is generally the best vindication against slander.” – Abraham Lincoln****

Since its origins in 130 A.D. under the Roman Law’s Praetorian Edicts, near the end of the Republic of Rome and beginning of the Roman Empire, the Law of Defamation has long been an interesting and controversial topic. Jurisdictions across the globe view the offense quite differently, some considering defamation to be an injurious crime made against one’s honor; while others simply consider it to be an actionable civil tort, remedied by damages; and some jurisdictions even consider it to be both. In this piece, the law of defamation is analyzed and compared in select common law and civil jurisdictions across North America, South America, and Europe, so as to give the reader a thorough understanding of the origins of law of defamation and how it interplays with our constitutional freedoms; and so as to provide law scholars and legal practitioners alike, with an up-to-date and informed opinion on the current law in this area. A discussion on defamation with regard to homosexuality vs. homophobia, with reference made to “upcoming cases to watch” in the U.S. Courts is also included, as is commentary on the religious law’s views on defamation, in order to ensure truly global coverage on this very interesting and current hot-topic of debate, whose infamous lawsuits are notoriously discussed regularly in our courtrooms, tabloids, newspapers, and the evening news, by today’s scandal-hungry society and feverishly entertainment-starved information seekers.

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*** Abraham Lincoln (1809-1865), sixteenth President of the United States, in his letter to U.S. Secretary of War, Edward Stanton, July 18, 1864 (approximately one year before Lincoln’s assassination on April 14, 1865).

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I. INTRODUCTION AND ORIGINS OF DEFAMATION LAW

The first accounts of defamation concerned injurious or false statements made in a public manner (*in Latin referred to as “convicium adversus bonos mores”*) dating back to 130 A.D., in the first codification of the *Praetorian Edict*,¹ which had declared that action could be brought for shouting at someone who had acted in a manner contrary to good morals. At this time, the offense was essentially limited to the public proclamation of otherwise false or injurious statements harmful to one’s honor or standing in the community. Defamation was defined as shouting falsities contrary to the morals of the city, or shouting something that might bring the exposed person into disrepute or contempt, thus giving rise to an injurious action (*actio injurarum*).² In these cases, the truth of the statements was not a justification for the public and insulting manner in which they were made. The accused, however, had the opportunity to justify his actions by openly stating that what he had said he considered necessary for the public’s safety.

¹ The *Praetor's Edict* in Roman Law was an annual declaration of principles made by the new *Praetor* (a title granted by the government of Ancient Rome to men acting in one of two official capacities: Either the commander of an army or an elected *magistratus* (magistrate) assigned various duties (as per the historical period). During the days of the early Roman Empire, and just after the end of the Republic, the *Praetor's Edict* was revised to become the *Edictum Perpetuum*. As later summarized by *Papinian* (Roman jurist circa 148-211), the law developed by the Praetors in their Edict became an instrument which could supplement, explain, and improve the *ius civile* (body of common laws that applied to Roman citizens). Thus, the *Praetor's Edict* developed into an important vehicle for the evolution of early Roman Empire civil law and formulary law relating to trial procedure. During the latter period of the Republic of Rome (before the Empire), the trial at civil law employed formulary procedure. In this process, the *Praetor* (described above) first determined the legal issue in a pending case. Then the *Praetor* decided the prescriptive formula which instructed what remedy would be appropriate, depending on the facts that were found. Then the *Praetor* would assign the case to a *iudex* (law judge) for trial. After the facts were determined at trial, the *iudex* would give his judgment, according to the formula proscribed by the Edict. Also see Johnson, Coleman-Norton, Bourne, *ANCIENT ROMAN STATUTES*, Austin, University of Texas, (1961).

² “*Digest Iustinian, Liber 47* (Based upon the Latin text of the Justinian Code, from Mommsen & Krueger’s Edition, Berlin, (1954), 47. 10. 15. 3-6), <http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Corpus/d-47.htm#10> .

A second aspect of the offense included defamatory statements made in private. In this case, the offense lay in the *content* of the imputation, not in the *manner* of its publication.³ The truth was therefore a sufficient defense.

Roman law aimed to provide sufficient scope for the discussion of a man's character while protecting him from needless insult, harm, and pain. The remedy for verbal defamation was long confined to civil action for a monetary penalty, which was estimated according to the significance of the case and the offender's wealth. A new remedy was introduced with the extension of criminal law, under which many kinds of defamation were punished with great severity during the period of the Roman Empire, as reported by *Horace*, a Roman lyric poet at the time of the first Emperor of the Roman Empire, Julius Caesar Augustus, circa 65 B.C. – 8 B.C. At this time, or shortly thereafter, the importance attached to the publication of defamatory books, or "*libri*," as they were known in Latin, or the "*libelli famosi*," which were libellous writings from which we derive our modern use of the English word "libel" today, increased. Under the later Emperors, the term "libel" or *libelli famosi* was applied to anonymous accusations, the dissemination of which was regarded as particularly dangerous and sanctioned with severe punishment, whether the matters contained in them were true or false.⁴

The Roman law jurists of this period entertained a lofty conception of the absolute rights to the unblemished personality of the free man and of the means to be utilized in the protection of those rights. The doctrine of strict liability as applied by the Romans held that any defamation, whether slander or libel, was to be severely punished and considered both a civil tort, remedied by an action for damages, or as a crime, strictly following the doctrine of "*animus injurandi*" (defamatory statements made, either in spoken word or in print, with the malicious intent to publicly injure or defame another's honor).⁵ After the fall of the Roman Empire, defamation law continued to develop and evolve within the systems of advanced jurisdictions such as those of England and Wales, and later in the United States as well, beginning in circa 600 A.D. The civil legal systems based on the Napoleonic Code, *such as France, Italy, Spain, and several countries in the Middle East* have also developed their own particular laws on defamation during that same time period, and all of these exemplary systems have served as a foundation (*along with religious law, local traditions, and customary beliefs*) for the modern defamation laws utilized today by many civil and common law jurisdictions across the globe.

³ Mommsen & Krueger *supra* note 2 at Book 9, Title 36.

⁴ Mommsen & Krueger *supra* note 2.

⁵ Melius de Villiers, *Malice in the English and Roman Law of Defamation*, 17 LQR (1901).

This paper examines defamation in a comparative sense by looking into the laws of defamation in select jurisdictions located on different continents. Most jurisdictions analyzed in this paper have chosen to either: 1) Utilize foundational Roman Law concepts, making defamation in their jurisdiction actionable as civil torts and/or as a malicious criminal offence; or 2) Deviate from the foundations provided by Roman Law and hold defamatory acts to be actionable only as civil torts, while arguing that this may be the best way to protect Constitutional rights, such as those found in the U.S. Constitution's First Amendment concerning freedom of speech and expression.⁶

The paper discusses the interplay in various jurisdictions of defamation and Constitutional rights such as freedom of speech and expression; it concludes with a look into the religious laws' viewpoints on this topic. Lastly, it discusses the latest direction of defamation law in the United States, with interesting new arguments being developed in the U.S. Courts that inquire as to whether it should be held as defamatory to call an individual a *homosexual* or label him or her *homophobic*.

II. OVERVIEW OF DEFAMATION

A. Overview and Explanation of Defamation

Today's law on defamation varies by jurisdiction as to whether it is held as a criminal offence or simply as an actionable civil tort. Defamation, also referred to in modern legal terminology as traducement, calumny, vilification, slander, or libel, is the communication of a statement that makes a claim (*actual malice required to be proven, in the case of the plaintiff being a public official*),⁷ expressly, stated, or implied to be factual, that may give an individual, business, product, group, government, or nation a negative image.⁸ The claim usually must be false, and that statement usually must be communicated to someone other than the person defamed (*the claimant*).⁹ Any person who destroys another's reputation may be referred to as a famacide, defamer, or slanderer. Contributing wrongdoers, in the case of more than one defamer, and whether they are joint, concurrent, or successive tortfeasors, are jointly and severally liable for the entire damage.¹⁰

⁶ A. Harum, *Remolding of Common Law Defamation*, ABA Journal, Vol. 49, No. 2 (1963); M. Newell, *The Law of Slander and Libel in Criminal and Civil Cases* Mason Harder Newell, (1914); D. Rolph, *Reputation, Celebrity and Defamation Law*, Ashgate Publishing Co. (2008).

⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁸ Roger LeRoy Miller, Gaylord A. Jentz, *Business Law Today: The Essentials*, Cengage Learning, 2007. 115 2007.

⁹ Linda L. Edwards, J. Stanley Edwards, Patricia Kirtley Wells, *Tort Law for Legal Assistants*, Cengage Learning, pp. 390, 2008.

¹⁰ *Gray v. Sutherland*, 124 Cal.App.2d 280, 268 P.2d 754 (1954).

In most common law jurisdictions, defamation has two sub-elements: “slander” refers to a malicious, false, and defamatory *spoken* statement or report, while “libel” refers to any other form of communication such as *written words* or images. Most jurisdictions allow legal actions, civil and/or criminal, to deter various kinds of defamation, and to retaliate against groundless criticism. Related to defamation is the public disclosure of private facts, which arises where one person reveals information that is not of public concern and the release of which would offend a reasonable person.¹¹ In contrast with libel, truth is not a defense for invasion of privacy, and any disclosure must be for a legitimate public concern.¹² False light laws on the other hand, are primarily intended to “protect a plaintiff’s mental or emotional well-being.”¹³ When published information is false or portrays an individual in a false manner, the tort of defamation might have occurred; even if that communication is not technically false, if it is still misleading, the tort of false light may have occurred.¹⁴

In most civil law jurisdictions, however, defamation is dealt with first as a crime, rather than a tort, or both a crime and tort, as explained below in the section on civil jurisdictions. In some common law jurisdictions as well, such as the United States and Canada, for example, defamation has been considered a criminal offence at the state level. The differences in the law of civil and common law jurisdictions will be discussed more in-depth below, but it is important to note that in the United States, a jurisdiction which is traditionally thought of as considering defamation a civil tort (*primarily to our protect First Amendment rights*), this misconception differs greatly from actuality at least on the state-level, where seventeen U.S. states and two U.S. territories have criminal defamation laws on their books.¹⁵ Between 1992 and August 2004, forty-one criminal defamation cases were brought to court in the United States and six defendants were ultimately convicted. From 1965 to 2004, sixteen

¹¹ Shulman v. Group W Productions Inc., 18 Cal.4th 200, 955 P.2d 469, 74 CAL. RPTR.2d 843 (1998).

¹² Diaz v. Oakland Tribune Inc., 139 Cal. App. 3d 118, 188 CAL. RPTR. 762 (1983).

¹³ Messenger v. Gruner + Jahr Printing and Publishing, 208 F.3d 122 (2d Cir. 2000).

¹⁴ Milkovich v. Lorain Journal Co., 474 U.S. 953 (1985).

¹⁵ U.S. States with criminal statutes and/or common law criminal rulings include: Colorado (Colorado Revised Statutes, § 18-13-105); Florida (Florida Statutes, § 836.01-836.11); Idaho (Idaho Code, § 18-4801-18-4809); Kansas (Kansas Statute Annotated, §21-4004); Louisiana (Louisiana R.S., 14:47); Michigan (Michigan Compiled Laws, § 750.370); Minnesota (Minnesota Statutes. § 609.765); Montana (Montana Code Annotated, § 13-35-234); New Hampshire (New Hampshire Revised Statute Annotated, § 644:11); New Mexico (New Mexico Statute Annotated, §30-11-1); North Carolina (North Carolina General Statutes, § 14-47); North Dakota (North Dakota Century Code, § 12.1-15-01; Oklahoma (Oklahoma Statutes, tit. 21 §§ 771-781); Utah (Utah Code Annotated, § 76-9-404); Virginia (Virginia Code Annotated, § 18.2-417); Washington (Washington Revised Code, 9.58.010 [Repealed in 2009^[8]]); Wisconsin (Wisconsin Statutes, § 942.01); Puerto Rico (Puerto Rico Laws, tit. 33, §§ 4101-4104); and Virgin Islands (Virgin Islands Code, Title 14, § 1172).

cases ended in final conviction, among which nine resulted in jail sentences (with an average sentence of 173 days). Other criminal cases resulted in fines (of on average 1,700 USD), probation (on average of 547 days), community service (on average 120 hours), and even the writing of a letter of apology.¹⁶

In order to prove that defamation has taken place, in the U.S., for example, a person must first prove that the statement made was malicious and false.¹⁷ Second, that person must also prove, using the objective *reasonable person* test, that the statement caused harm,¹⁸ and if concerning libel or written defamation, that a reasonable person would understand that the statement was directed towards the plaintiff.¹⁹ If the case concerns a slanderous comment, the plaintiff must prove that a reasonable person would form a negative opinion of the individual being defamed by hearing the slanderous spoken statements.²⁰ Lastly, a complainant must prove that the statement was made without adequate research into the truthfulness of the statement.²¹ (*N.B. These steps are for ordinary citizens, not public officials.*) In the case of a celebrity or public official attempting prove libel, an individual must prove the first three steps mentioned above, and then must also (in the United States) prove that the statement was made with the intent to do harm, under the *NY Times v. Sullivan* standard, or with reckless disregard for the truth.²²

With regard to any Statute of Limitations questions, as with any lawsuit, most jurisdictions have statute law that requires bringing a defamation lawsuit within a limited period of time. It is important to note that if the alleged libel occurs in the mass media such as a newspaper or the Internet, the statute of limitations begins to run at the *time of publication*, not when the plaintiff first learns of the communication.²³ Single publication of defamatory statements gives rise to one cause of action only in the United States,²⁴ and judgment acts as a complete bar to other actions.²⁵

Under United States law, defamation generally requires five key elements. The plaintiff must prove that the information was published; that the plaintiff was directly or indirectly identified; that the remarks were

¹⁶ OSCE – Libel and Insult Laws: A Matrix on Where We Stand and What We Would Like to Achieve. See OSCE reportage: <http://www.osce.org/fom/41958>.

¹⁷ *NY Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹⁹ *Schultz v. Reader's Digest Association*, 468 F. Supp. 551, 554 (E.D. Mich. 1979); see also *Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893 (W.D. Mich. 1980).

²⁰ *Clark v. American Broadcasting Companies Inc.*, 684 F.2d 1208 (6th Cir. 1982).

²¹ *Widener v. Pacific Gas & Electric Co.*, 75 Cal. App. 3d. 415, 434, 142 Cal. Rptr. 304 (1977).

²² *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977); *NY Times Co. v. Sullivan*, 376 U.S. 254 (1964); see also K. Sexton, *U.S. Political Systems*, (2010).

²³ *Arthur Alan Wolk v. Olson*, No. 09-cv-4001 (Dismissed, E.D. Pa. 2010).

²⁴ Uniform Single Publication Act, § 1101.

²⁵ Uniform Single Publication Act, § 1102.

defamatory towards the plaintiff's reputation; that the published information is false; and that the defendant is at fault.²⁶ On a side note, the Associated Press estimates that ninety-five percent of defamation cases do not arise from high-profile news stories, but rather from "run of the mill" local stories like news coverage of local criminal investigations or trials, or of business profiles.²⁷ Media liability insurance is available to cover potentially large monetary damage awards from defamation/libel suits.²⁸

B. Types of Defamation

The common law origins of defamation lie in the tort of "slander," which consists of harmful *statements* in a transitory form, especially in the form of malicious and false speech, giving rise to a common law right of action.²⁹ Libel, on the other hand, may be defined as defamation by *written* or printed words, pictures, or in any form other than by spoken words or gestures.³⁰ The law of libel originated in the sixteenth-seventeenth century in England. As literary and media publication grew in the United Kingdom, so did libel and the development of the tort of libel.³¹ *Defamation* is the general term that may be used today internationally for both, (*and is commonly used, as in this paper, for example*) where it is not necessary to distinguish between *slander* and *libel*. Libel and slander both require publication.³²

In essence, the fundamental distinction between libel and slander lies solely in the *form* in which defamatory matter is published. If the offending material is published in a transitory or fleeting form, by spoken words or sounds, sign language, and gestures, then it is considered to be *slander* or *slanderous*.³³ To be considered *libel* or *libelous*, the offending material must be published in written or printed form, as stated above.³⁴

Many nations have criminal penalties for malicious, injurious (offending one's honor), or reckless defamation, and there are different conditions for determining whether an offense has occurred in each

²⁶ *Bindrim v. Mitchell*, 92 Cal. App.3d 61, 155 Cal. Rptr. 29 (1979).

²⁷ NY Times, *The Media Business: Libel Threat is Increasing even for Small Publications*, (Feb. 3, 1992).

²⁸ M. Rothberg and R. Fenstermacher, *Online Publishing Risks Create Need for Libel Insurance*, ONLINE JOURNALISM REVIEW (2004) <http://www.ojr.org/ojr/law/1077150111.php>.

²⁹ *NY Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

³⁰ *Bindrim v. Mitchell*, 92 Cal. App.3d 61, 155 CAL. RPTR. 29 (1979).

³¹ Norman A. Crandell, *Torts, Libel and Slander*, 1 WM. & MARY L. REV. 438 (1958).

³² Deakin, S., Johnston, A. & Markesinis, B., *Markesinis and Deakin's Tort Law*, (5th Ed., 2003); see also *Cubby, Inc. v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Stratton Oakmont v. Prodigy Services Co.*, 63 U.S.L.W. 2765, 23 Media L. Rep. 1794, 1995 WL 323710 (N.Y. Sup. Ct. 1995); *reh'g denied*, 24 Media L. Rep. 1126 (N.Y. Sup. Ct. 1995).

³³ *Ny Times Co. v. Sullivan*, *supra* note 29.

³⁴ *Masson v. New Yorker Magazine*, 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991).

respective jurisdiction, as detailed below. *Article 19*, a free expression advocacy group, in an effort to expose restrictions on individual's rights to freedom of speech and expression, has published global maps charting the existence of criminal defamation law across the globe and countries that have special protections for political leaders or functionaries of the state.³⁵

A peculiarity to note here is that regional defamation statutes in some nations may differ from the norm that is applied nationally. For example, in the United States, there is usually no liability for defamation of the dead. There are five states, however, including Colorado, Idaho, Georgia, Louisiana, and Nevada that have criminal statutes regarding defamation of the dead.³⁶

As referenced above, a vital source which keeps updated information on defamation laws and related developments across the globe is the OSCE (*Organization for Security and Co-operation in Europe*). This organization keeps a detailed database on criminal and civil defamation provisions in fifty-five countries, including all European countries, all member countries of the Commonwealth of Independent States, and the United States and Canada.³⁷

C. Defenses

In many jurisdictions, adverse public statements about legal citizens presented as fact, must be proven false to be defamatory, slanderous or libelous.³⁸ There are certain circumstances in which questionable statements are permissible by law, even if a statement is perceived to be derogatory. The *truth* is often the best defense against prosecution for defamation.³⁹ Statements of opinion that cannot be proven true or false may necessitate the application of another type of defense. The use of *justification* as a defense is very risky, and defendants may be held as having aggravated the harm caused if they fail in their assertion of justification and truth.⁴⁰

The difference held between *fact* and *opinion* is an important aspect to note in the case of defamation law. Statements made as *facts* are

³⁵ Article 19, *Global Campaign for Free Expression*, see web page: <http://www.article19.org/>.

³⁶ *Rose et al. v. Daily Mirror, Inc.*, 2 N.Y.S. (2d) 315, (App. Div. 2d Dept. 1940); *Columbia Law Review*, Vol. 40, No. 7, (Nov., 1940); Yahoo Music News, *Michael Jackson fans want Anti-Defamation Law for Deceased*, (Mar. 7, 2011); Note, *Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statutes*, 9 *Fordham Intell. Prop. Media & Ent. L.J.* 1083 (1999).

³⁷ See the website of Organization for Security and Co-operation in Europe (OSCE) <http://www.osce.org/>; see also *Freedom from Fear*, Index on Censorship, Volume 38, Number 2, 2009.

³⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

³⁹ *Polygram Records Inc. v. Superior Court (Rege)*, 170 Cal. App. 3d 543, 216 Cal. Rptr. 252 (1985).

⁴⁰ *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977).

frequently actionable as defamation. Statements of *opinion* or pure opinion are not actionable.⁴¹ The United States Supreme Court has ruled that the First Amendment does not require recognition of an opinion privilege.⁴² To win damages in a defamation case, the plaintiff must first show that the statements were statements of fact or mixed statements of opinion and fact, “*and second, that these statements were false.*”⁴³ One of the major tests to distinguish whether a statement is fact or opinion is whether the statement can be proven true or false in a court of law.⁴⁴ Basically, if the statement can be proven to be either true or false, the case will be heard by a jury to determine which it is. If it cannot be proven true or false, the court may dismiss the defamation case without it ever reaching a jury for fact finding.⁴⁵

Under English common law, proving the *truth* of the allegation was originally a valid defense only in civil defamation cases.⁴⁶ Criminal defamation was construed as an injurious and deliberate offence to one’s honor, and to the public at large, based on the tendency of the defamatory statements to provoke a breach of peace rather than being a crime based upon the actual defamation *per se*.⁴⁷ In the United Kingdom, section VI of the Libel Act 1843 allowed the proven truth of the allegation to be used as a valid defense in criminal defamation cases only if the defendant also demonstrated that publication was for the “*public benefit.*”⁴⁸ Some U.S. statutes preserve historical common law exceptions to the defense of truth in defamation actions. These exceptions were for statements “*tending to blacken the memory of one who is dead*” or for those that “*expose the natural defects of one who is alive.*”⁴⁹ It is also necessary in these cases to show that there is a well-founded public interest in the specific information being known. This may be the case even for public figures. Public interest is generally not “*what the public is interested in,*” but rather, “*what is in the interest of the public.*”⁵⁰ The case of *Noonan v. Staples*⁵¹ is sometimes cited as precedent that truth is not always a defense to libel, but the case is

⁴¹ *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

⁴² *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

⁴³ *Hustler Magazine v. Falwell*, *supra* note 41.

⁴⁴ *NY Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

⁴⁵ *Polygram Records Inc. v. Superior Court (Rege)*, 170 Cal. App. 3d 543, 216 Cal. Rptr. 252 (1985); *NY Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁴⁶ *Reynolds v. Times Newspapers Ltd.*, 3 W.L.R. 1010, 1015–17 (H.L. 1999) (U.K.).

⁴⁷ *Derbyshire County Council v. Times Newspapers Ltd*, 1 All E.R. 1011, 1018 (H.L. 1993) (U.K.).

⁴⁸ H. C. Folkard, *The Law of Slander and Libel*, (London) Butterworth & Co., p. 480 (1908).

⁴⁹ See Colorado Revised Statute, s. 18-13-105.

⁵⁰ Find Law “*Law Dictionary*” (2006):

<http://dictionary.lp.findlaw.com/scripts/results.pl?co=dictionary.lp.findlaw.com&topic=61/610d76026e388dc5e6c88e6a8ddcef8d#public%20interest>; Also see Legal.org, “*Legal Terms*” (2004).

⁵¹ *Noonan v. Staples Inc.*, 556 F.3d 20 (1st Cir. 2009).

not universally held as a truly valid precedent or authority on that issue because *Staples* had failed to argue First Amendment protection for its statements.

Privilege may provide a complete bar and answer to a defamation suit, though conditions may have to be met before this protection is granted.⁵² There are two types of privilege in the common law tradition: 1) *Absolute privilege*, which has the effect that a statement cannot be sued as defamatory, even if it was made maliciously. A typical example is with relation to evidence given in court, (*N.B. This may give rise to different claims such as an action for malicious prosecution or perjury, and can also be applied for statements made in a session of the legislature, also known as 'Parliamentary privilege' in Commonwealth countries*); and 2) *Qualified privilege*, which may be available to journalists as a defense in circumstances where it is considered important that facts be known in the public interest.⁵³ An example of this defense would be public meetings, local government documents, and information relating to public bodies, such as the police and fire departments. Qualified privilege has the same effect as absolute privilege but does not protect statements that can be proven to have been made with malicious intent.⁵⁴

Statements made in *good faith* and with *reasonable belief* that they are true, are generally treated the same as true statements; however, the court may inquire into the reasonableness of the belief.⁵⁵ *Opinion* is a defense recognized in nearly every jurisdiction. If the allegedly defamatory assertion is an expression of *opinion* rather than a statement of *fact*, defamation claims usually cannot be brought, because opinions are inherently not able to be falsified.⁵⁶ However, some jurisdictions decline to recognize any legal distinction between fact and opinion. The United States Supreme Court, in particular, has ruled that the First Amendment does not require recognition of an opinion privilege.⁵⁷ *Fair comment* on a matter of public interest, and arguments made with an *honest belief* in their soundness on a matter of public interest (such as official acts) are defensible against a defamation claim.⁵⁸

If a “*reasonable person*” could honestly entertain such an opinion, the statement is protected.⁵⁹ *Consent* is an uncommon defense and makes

⁵² J.F. Handler, “*The Defense of Privilege in Defamation Suits against Government Executive Officials*,” *Harvard Law Review*, Vol. 74, No. 1, (Nov. 1960).

⁵³ *NY Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁵⁴ *Harold Straitwell v. National Steel Corporation*, 869 F.2d 248 (1989).

⁵⁵ *NY Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁵⁶ *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

⁵⁷ *Milkovich v. Lorain Journal Co.*, 474 U.S. 953 (1985).

⁵⁸ *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

⁵⁹ The “reasonable person” test and objective standard is taken from the English common law, and it is based on the famous case of *Sim v. Stretch*, [1936] 2 All E.R. 1237 (UKHL), in which Lord Atkin stated the following, with which his colleagues concurred: “*The conventional phrase*

the claim that the claimant consented to the dissemination of the statement.⁶⁰ *Innocent dissemination* is a defense available when a defendant had no “actual knowledge” of the defamatory statement or no reason to believe the statement was defamatory.⁶¹ Therefore, for example, a delivery service such as FEDEX or UPS may not be held liable for delivering a sealed defamatory letter.

The *Public Figure Doctrine*, also called the “*absence of malice rule*,” may be used as a defense; special rules apply in the case of statements made in the press concerning public figures, as mentioned above. *New York Times Co. v. Sullivan* established that for a public official (or other legitimate public figure) to win a libel case, the statement made must have been published with knowledge of its falseness or with reckless disregard to its truth, (*also known as actual malice*).⁶²

Internationally, protection against defamation is offered by application of Article 17 of the “United Nations International Covenant on Civil and Political Rights,” (which may also be used as a defense), and which states that: 1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation; and 2) Everyone has the right to the protection of the law against such interference or attacks.

II. COMMON LAW JURISDICTIONS

A. *The United States of America*

In the United States and U.S territories, defamation law is much less plaintiff-friendly than defamation law in the European Union and in the Commonwealth countries due to First Amendment rights relating to freedom of speech and expression.⁶³ A very important distinction to note, however, is that most European and Commonwealth jurisdictions primarily adhere to the theory that every publication of a defamation gives rise to a separate claim, as explained below, so that one instance of defamation on the Internet could be sued upon in any country in which it was read, while

exposing the plaintiff to hatred, ridicule or contempt is probably too narrow ... I do not intend to ask your Lordships to lay down a formal definition, but ... after collating the opinions of many authorities I propose in the present case the test: would the words tend to lower the plaintiff in estimation of right-thinking members of society generally?”

⁶⁰ A.C. Roline, *Defamation by Action May Speak as Loudly as Words*, Pub. Pers. Management, (1997).

⁶¹ In the UK, see *Sim v. Stretch*, [1936] 2 All E.R. 1237 (UKHL); In the U.S., see *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

⁶² *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *NY Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).

⁶³ *Huertas v. United States Dep't of Educ.*, (2009 U.S. Dist.) LEXIS 89903, 17-20 (D.N.J. Sept. 28, 2009).

American law only allows one claim for the primary publication.⁶⁴ In the U.S., a comprehensive explanation of what is and is not libel or slander is very difficult because the definition differs between different states. Some states codify slander and libel together in the same set of laws. Some states even have criminal libel laws (*as referenced above*), which are, for the most part, prosecuted infrequently. Washington State, for example, held its archaic criminal libel statute unconstitutional, applying state and federal constitutions to the question, since the law dated back to pre-statehood.⁶⁵ The origins of United States defamation law do indeed predate the American Revolution.

A very old and famous case from 1734 involving *John Peter Zenger*⁶⁶ was a landmark legal case in American jurisprudence. It determined that truth was a defense against charges of libel and it “laid the foundation for American press freedom.”⁶⁷ Though the First Amendment of the U.S. Constitution was designed to protect freedom of speech and freedom of the press, for most of U.S. history the Supreme Court neglected to use it to rule on libel cases. Libel laws were based upon the traditional common law of defamation that was inherited from the English legal system and mixed across the States.

The ground-breaking 1964 case *New York Times Co. v. Sullivan*⁶⁸ dramatically changed the nature of defamation law in the United States by establishing that public officials could win a suit for libel only if they could demonstrate a publisher’s “*knowledge that the information was false,*” and/or that it was published “*with reckless disregard of whether it was false or not.*” Supreme Court cases later barred strict liability for libel and forbid claims for “*statements so ridiculous, as to be patently false.*”⁶⁹ In *Gertz v. Welch*,⁷⁰ the Supreme Court held that a plaintiff could not win a defamation suit when the statements in question were “*expressions of opinion*” rather than fact, and the Court stated that, “*under the First Amendment, there is no such thing as a false idea.*” However, the Court rejected the notion of a First Amendment opinion privilege in *Milkovich v. Lorain Journal Co.*⁷¹ In *Gertz*, the Supreme Court also established a *mens rea* or culpability requirement for defamation and said that states may not impose strict

⁶⁴ Uniform Single Publications Act § 1461, (*A single publication gives rise to only one cause of action.*); Also see *Firth v. The State of New York*, Claim No. 97999, 184 Misc. 2d 105, 706 N.Y.S. 2d 835 (N.Y. Ct. of Claims, March 8, 2000), *aff’d.*, 731 N.Y.S. 2d 244 (N.Y. App. Div., 2001), *aff’d.*, N.Y. (2002).

⁶⁵ *Rickert v. Washington Public Disclosure Commission*, 168 P.3d 826, 831 (Wash. 2007).

⁶⁶ Zenger himself, published a verbatim account of the trial, known as, *A Brief Narrative of the Case and Trial of John Peter Zenger*, in the *New York Weekly Journal* (1736).

⁶⁷ S. Horton, Scott, *The Obstinate Dr. Heicklen*, *Harper’s Magazine* (Feb. 28, 2011).

⁶⁸ *NY Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).

⁶⁹ *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976).

⁷⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁷¹ *Milkovich v. Lorain Journal Co.*, 474 U.S. 953 (1985).

liability because that would run afoul of First Amendment rights. This holding differs significantly from most other common law jurisdictions, such as the U.K. for example, which still applies strict liability for defamation.⁷²

In *Hustler Magazine v. Falwell*,⁷³ the Supreme Court held that a parody advertisement claiming Jerry Falwell had engaged in an incestuous or questionable sexual act with his mother in an outhouse could not allow Falwell to win damages for emotional distress, even if it was false, because the statement was so obviously ridiculous that it was clearly not true. The Court went on to hold that it was an allegation “believed by nobody,” and that it brought no liability upon the author. The Court therefore decidedly overturned a lower court’s upholding of a jury decision that had awarded damages for emotional distress.

Recent cases have also addressed defamation law and the Internet. After the case of *Stratton Oakmont, Inc. v. Prodigy Services*⁷⁴ had applied the standard “*publisher/distributor*” test and found an online bulletin board liable for a comment posted by a third party, Congress specifically enacted 47 U.S.C. § 230 (1996), to reverse the *Prodigy* findings so as to provide for private blocking and screening of offensive and defamatory material. 47 U.S.C. § 230(c) declares that: “*no provider or user of an interactive computer shall be treated as a publisher or speaker of any information provided by another information content provider.*” The statute therefore provides internet forums with immunity for statements provided by third parties.

Later cases such as *Zeran v. AOL*⁷⁵ and *Blumenthal v. Drudge*⁷⁶ have also demonstrated that courts may be uneasy applying § 230 and that they may be bound to find providers such as MSN, Facebook, AOL, Yahoo, YouTube, Google, and the like immune from defamatory postings. This immunity applies even if the providers are notified of defamatory material and they neglect to remove it because provider liability upon notice would likely cause a flood of complaints. This would be a large burden on the court system as well, opening the “flood-gates” to numerous actions and could have a drastic effect on freedom of speech on the Internet as we know it. In *Barrett v. Rosenthal*,⁷⁷ however, the California Supreme Court ruled that 47 U.S.C. § 230(c) (1) does not permit web sites to be sued for libel written by other parties. Section 230 of the Communications

⁷² Miller v Jackson [1977] Q.B.966 ; Hulton v. Jones [1910] A.C.20; Cassidy v. Daily Mirror [1929] 2KB 331 at 341; Also see Swan Turton Solicitors LLP (UK), “Pressing Social Need and Strict Liability in Libel,” Entertainment Law Review, Issue 7, pp.199-200, (August 2001).

⁷³ Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

⁷⁴ Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 N.Y. Misc. Lexis 229 (N.Y. Sup. Ct. May 24, 1995).

⁷⁵ Zeran v. America Online, 129 F.3d 327 (4th Cir. 1997).

⁷⁶ Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998).

⁷⁷ Barrett v. Rosenthal, 146 P.3d 510 (Cal. 2006).

Decency Act of 1996⁷⁸ generally immunizes liability for defamation that occurs from statements published by third parties on internet forums. Liabilities for such statements, especially from those whose identity cannot be determined, are precluded.

As far as the availability of large awards in defamation suits in the U.S., a record libel verdict was rendered in 1997 against *Dow Jones* in favor of MMAR Group Inc. for \$222.7 million.⁷⁹ The record verdict rendered in favor of an individual was the award of \$35.5 million against Russian newspaper *Izvestia* in favor of entrepreneur Alex Konanykhin,⁸⁰ who also won a \$3 million judgment against *Kommersant*, another Russian newspaper.⁸¹ Punitive damages are discretionary however, but interestingly, wealth of defendants may also be taken into account when formulating awards against them in defamation cases.⁸²

The majority of states in the U.S. recognize that some categories of statements are considered to be defamatory “*per se*.” As such, people making a defamation claim for these types of statements do not need to prove that it was defamatory.⁸³ All states except Arizona, Arkansas, Missouri, and Tennessee recognize that some categories of false statements are so harmful that they are considered as defamatory *per se*. Statements are defamatory *per se* where they falsely impute to the plaintiff one or more of the following allegations: 1) Allegations or imputations “*injurious to another in their trade, business, or profession*,” 2) Allegations or imputations of “*loathsome disease*,” 3) Allegations or imputations of “*unchastity*” (usually only in the case of unmarried people and sometimes women); and 4) Allegations or imputations of “*criminal activity*” (sometimes only crimes of moral turpitude).⁸⁴ However, the Restatement (Second) of Torts view reflects a modern trend toward limiting the *per se* category of slander to those where the defamatory remark is apparent from the publication itself, without any reference to extrinsic facts.⁸⁵ Notably, the Restatement (Second) of Torts expressly leaves open the issue of whether an accusation of *homosexuality* falls into the *per se* category. This type of accusation will be discussed in the concluding section of this paper.

⁷⁸ Communications Decency Act of 1996, 47 U.S.C. § 230 (c) (1).

⁷⁹ Peterson, Iver in the *New York Times*, Firm Awarded \$222.7 Million In a Libel Suit vs. Dow Jones. <http://www.nytimes.com/1997/03/21/business/firm-awarded-222.7-million-in-a-libel-suit-vs-dow-jones.html>.

⁸⁰ Washington Post, *Court Awards \$35.5 Million To Russian In Libel Case*, (December 16, 1999).

⁸¹ Moscow Times, *U.S. Court Finds Kommersant Guilty of Libel*, (Jan. 25, 2000).

⁸² Sandoval v. Southern Cal. Enterprises Inc., 98 Cal.App.2d 240, 250, 219 P.2d 928.

⁸³ Hayes v. Smith, Col. Ct. Of App. 832 P.2d 1022 (1991); Also see Dancing with Lawyers (2010), <http://www.dancingwithlawyers.com/freeinfo/libel-slander-per-se.shtml>.

⁸⁴ Restatement (First) of Torts Section 569 (1938); NY Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964).

⁸⁵ See Restatement (Second) of Torts Sections 571-574 (1977); Gertz, *supra* (White, J., dissenting).

A primary advantage to claiming slander *per se* is that certain damages are presumed.⁸⁶ This presumption has been considered very desirable because injuries such as loss of reputation can be difficult to prove, especially since the recipients of the information may be reluctant to testify that the publication affected their relationship with the plaintiff. The words may also affect the recipients' view of the relationship in subtle ways of which the recipient is not necessarily aware.⁸⁷

B. *The United Kingdom*

Modern defamation laws for libel and slander, as implemented in many Commonwealth nations, as well as in the United States and in the Republic of Ireland, originally descended from English defamation law. Civil actions for defamation damages began as far back as the reign of Edward I (1272–1307). English law now allows actions for defamation to be brought in the High Court for “any published statements which are alleged to defame a named or identifiable individual or individuals in a manner which causes them loss in their trade or profession or causes a reasonable person to think worse of him, her, or them.”⁸⁸ A statement can include an implication. For example, a photograph of the Queen of England accompanying a headline reading “*Corrupt Royals*” could be held as an allegation that she was personally corrupt. Much like under U.S. law, once it is shown that a statement was published, that it has a defamatory meaning, and that it is harmful, that statement is presumed to be false unless the defendant is able to raise a valid defense to his act, a conviction can be made.⁸⁹

Notably however, the U.S. Congress has pressed the UK Parliament recently to reform its domestic libel law, (arguing from what this author believes is an exaggerated and typically overly-puritan U.S. viewpoint, that Britain's libel law is actually ‘dangerous’ to U.S. national security).⁹⁰ Both the UK's Ministry of Justice and its Parliamentary Committee on Media, Culture, and Sport are planning consultations on libel law reforms because the U.S. feverishly asserts that it takes steps to protect Americans from the English Courts. In their arguments, an American congressional committee has stated that “ridiculous lawsuits” are at times permitted in London, and in a hearing that there may be “*foreign*

⁸⁶ *Time v. Firestone*, 424 U.S. 448 (1976).

⁸⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁸⁸ Defamation Act 1952; Defamation Act 1996 s.1-7; Also see at common law, *McDonald's Corporation v. Steel & Morris*, [1997] EWHC QB 366.

⁸⁹ *Derbyshire C.C. v. Times Newspapers* [1993] A.C. 534; *Newstead v. London Express Newspapers* [1940] 1KB 377; *Morgan v. Odhams Press* [1971] 1WLR 1239.

⁹⁰ *The Guardian, U.S. Congress Presses Britain to Amend 'Harmful' Libel Law*, (Feb. 23, 2009), <http://europenews.dk/en/node/20135>.

individuals operating a scheme to intimidate authors and publishers (in the UK)...to promote suppression of information critical to American national security...” and that, “*Libel tourism threatens not only Americans' first amendment freedom of speech but also their ability to inform the general public about existential threats, namely the identity of terrorists and their financial supporters.*”⁹¹

U.S. Senators have gone on record in U.S. Senate Foreign Relations Committee hearings to further argue that “*England has become the favorite destination of libel tourists from around the world, especially wealthy tourists from countries whose own laws are downright hostile to free speech.*” The senators have already proposed a bill, supported by a coalition of American groups and the media, including the *New York Times* and *Washington Post*, which would allow U.S. judges to block libel judgments from the UK’s High Court deemed incompatible with the US constitution. Non-enforcement of a U.K. judgment that is not compatible with U.S. law may be acceptable, but it is this author’s own informed opinion that the U.S. Senators may be overstepping their bounds a bit in attempting to impose U.S. Constitutional law demands in the U.K.’s Courts and in the legislative branch of the U.K.’s sovereign Parliament.

As far as defamation on the internet, it has been held in the UK Courts as well that the Internet is a public enough forum for libel to take place.⁹² There is also statutory law in place which limits internet providers’ liability and that sets out defamation law in the U.K, both at the national level and the supra-national European Union level.⁹³ According to those Acts, slander is actionable *per se* without proof of special damage or actual damage for statements such as: words imputing a crime punishable with imprisonment, words imputing certain diseases, words disparaging a person in his office, calling or profession (*See section 2 of the U.K.’s Defamation Act 1952*); and for words imputing adultery or lack of chastity to a female (*See the U.K.’s Slander of Women Act 1891*).

The U.K.’s common law treatment of defamation somewhat reverses the traditional position of the burden of proof being placed on the defendant and holds that a defamatory statement is presumed false unless the defendant can prove its truth.⁹⁴ One could suggest that this amounts to presumption of the innocence of the plaintiff. In order to collect compensatory damages in the U.K., a public official or public figure must prove *actual malice* (knowing falsity or reckless disregard for the truth)⁹⁵ as held in the U.S Courts⁹⁶ and by the European Court of Human Rights.⁹⁷ A

⁹¹ See The Guardian *supra* and above, in footnote No. 93 of this paper.

⁹² Keith Smith v. Williams, Queen Bench Div. [2006] All ER (D) 297.

⁹³ Electronic Commerce (EC Directive) Regulations 2002; UK Defamation Act 1996.

⁹⁴ Murdoch Magazines (UK) Ltd. and Another, [1991] 1 W.L.R. 1184.

⁹⁵ Reynolds v. Times Newspapers Ltd., 3 W.L.R. 1010, 1023 (H.L. UK 1999).

⁹⁶ NY Times Co. V. Sullivan, 376 U. S. 254.

private individual must prove only negligence to collect compensatory damages. In order to collect punitive damages, all individuals must prove actual malice. As far as large awards go in the U.K. Courts, in 1989 a record £1.5 million (plus £500,000 costs) was awarded in a libel case against Count Nikolai Tolstoy-Miloslavsky who was accused him of war crimes. This award, which bankrupted Tolstoy, was overturned by the European Court of Human Rights in July 1995 as “*not necessary in a democratic society*” and a violation of Tolstoy’s right to freedom of expression under Article 10 of the European Convention on Human Rights.

This judgment significantly reduced the level of subsequent libel awards in the U.K. Courts, where the level of damages awarded for defamation cases have been subject to sustained criticism from judges and academics. Compared to awards for personal injury, it appears that under U.K. defamation laws the tarnishing of someone’s reputation results in awards in the hundreds of thousands of pounds and that defamation is considered greater than the loss of an arm or a leg, where awards in the U.K. Courts are merely in the tens of thousands of pounds. In the matter of *John v. MGN Ltd*,⁹⁸ the U.K.’s Court of Appeal laid down long awaited rules to constrain the jury’s discretion on large awards and requires that more comprehensive advice be given to juries before they are permitted to formulate unjustifiably large awards.

In one very famous U.K. libel case called the “*Mc Libel*” case,⁹⁹ McDonald’s Restaurants sued David Morris and Helen Steel for libel. The original case lasted seven years and was the longest-running court action in English libel history. It began in 1986, when London Greenpeace, an environmental campaigning group that involved Morris and Steel, distributed a pamphlet entitled, “*What’s wrong with McDonald’s: Everything they don’t want you to know.*” The pamphlet claimed that the McDonald’s corporation sold unhealthy food, exploited its work force, practiced unethical marketing of its products towards children, was cruel to animals, needlessly depleted resources and created pollution with its packaging, and was responsible for destroying the South American rain forests.

Although the first hearings were in McDonald’s favor, the widespread public opinion against them turned the case into a matter of embarrassment, and McDonald’s quickly announced that it had no plans to collect the £40,000 it was awarded and instead even offered to pay the defendants to drop the case. Steel and Morris in turn sued the UK government in the European Court of Human Rights, asserting that their rights to freedom of speech and a fair trial had been infringed upon... Their

⁹⁷ 316 Eur. Ct. H.R. (ser. A) 51 (1995).

⁹⁸ *John v. MGN Ltd* [1997] QB 586.

⁹⁹ *McDonald’s Corporation v. Steel & Morris*, [1997] EWHC QB 366.

most important claims were that English libel law was unfair to defendants in that it was, unfair to require two people of modest means to defend themselves against a large company without legal aid,; and that the damages were not justified. The court found partly in their favor, and ruled that the lack of legal aid made the trial unfair and was a breach of human rights as per the European Convention on Human Rights.¹⁰⁰ It also ruled that the excessive damages had denied the defendants' freedom of expression.¹⁰¹

English PEN and *Index on Censorship* have recently launched their report into English libel law entitled: "*Free Speech Is Not For Sale.*"¹⁰² The report was highly critical of English libel law and its "*chilling effect*" on freedom of expression. The report made ten recommendations on how English libel law could be improved, a sampling of which includes: 1) Reversing the burden of proof; 2) Capping damages at £10,000; 3) Introduction of a "*single publication rule*" as in the U.S.; and 4) Establishing libel tribunals to reduce costs.

Even the current UK Deputy Prime Minister, *Nick Clegg*, is committed to introducing legislation that he says would "*Turn English libel laws from an international laughing stock to an international blueprint.*"¹⁰³ Also, a new U.K. Draft Defamation Bill (CP3/11), was published on March 15, 2011, by the U.K.'s Ministry of Justice, with an annexed consultation paper containing provisions for reforming the law to "*strike the right balance*" between protection of freedom of speech and protection of reputation.

Defenses to defamation in the U.K. include many of the same defenses found in the United States such as justification; fair comment; absolute privilege; qualified privilege; right of privacy and innocent dissemination.¹⁰⁴ Since the passage of the Human Rights Act 1998, however, the law of defamation has been subject to pressure for reform. Two provisions of the European Convention on Human Rights provide for this pressure: Article 10 ECHR, which guarantees freedom of expression, and Article 8 ECHR, which guarantees a right to respect for privacy and family life. Thus the question posed here becomes whether the law of

¹⁰⁰ See the European Court of Human Rights decision in *Handyside v. UK* [1976] 1E.H.R.R. 737, for a general discussion on freedoms, necessity, national court's obligations under the Convention, and pressing social need.

¹⁰¹ *Id.*

¹⁰² The Libel Reform Campaign Petition (UK), *English Libel Law is Becoming a Global Disgrace*, (2010); See petition and reportage on website: <http://www.libelreform.org/>.

¹⁰³ The Guardian, (P. Wintour), *'Laughing stock' libel laws to be reformed, says Nick Clegg*, (Jan. 6, 2011); Also see ABA Law Journal, (L. Jaber), *Britain May Rewrite Controversial Defamation Laws*, (Feb 22, 2011).

¹⁰⁴ *Watt v. Longsdon* 1 K.B. 130; *Associated Newspaper Ltd v. Dingle* [1964] AC 371; *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010; *M. Charman v. Orion Publishing Group Ltd* [2007] EWCA Civ. 972.

defamation strikes the correct balance between allowing newspapers sufficient freedom to engage in their journalistic activity, for example, or whether private citizens' right to not suffer unwarranted intrusion. Note, however, that an independent tort protecting *privacy* has been rejected by the House of Lords in *Wainwright v Home Office*.¹⁰⁵

C. Canada

Canada generally follows English law on defamation issues, although the law on defamation in the province of Quebec has roots in both the English and the French tradition. At common law, defamation covers “any communication that tends to lower the esteem of the subject in the minds of ordinary members of the public.”¹⁰⁶ Intent is always presumed and it is not necessary to prove that the defendant intended to defame, as held in *Hill v. Church of Scientology of Toronto* (1995),¹⁰⁷ where the Supreme Court of Canada rejected the actual malice test adopted in the US, in *New York Times Co. v. Sullivan*.¹⁰⁸ Once a claim has been made, the defendant may avail himself to a defense of justification (the truth), fair comment, responsible communication, or privilege.¹⁰⁹ Publishers of defamatory comments may also use the defense of *innocent dissemination* where they had no knowledge of the nature of the statement, they were not negligent, and where it was not brought to their attention.¹¹⁰ Defamation in *Quebec* is governed by a standard of reasonableness as opposed to strict liability; a defendant who made a false statement would not be held liable if it was reasonable to believe that the statement was true.¹¹¹ *Blasphemous libel* in Canada is considered a crime and is punished with a maximum term of two years in prison, according to Article 296.1 of the Canadian Criminal Code (CCC). Defamatory libel, Article 298 CCC is also a crime that receives the same penalty, as proscribed under Article 301 CCC. If “libel known to be false” is made, then Article 300 CCC proscribes that the prison term increases to a maximum of five years. According to Article 298 CCC, defamatory libel “is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.” The criminal portion of the law in Canada has been rarely applied. In a recent and still undecided case, two men were charged with criminal libel for publicly accusing six prison

¹⁰⁵ *Wainwright v. Home Office* [2003] UKHL 53.

¹⁰⁶ *Murphy v. LaMarsh* [1970] 73 W.W.R. 114.

¹⁰⁷ *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130.

¹⁰⁸ R.A. Epstein, *Was New York Times v. Sullivan Wrong?* 53 *U. Chi. L. Rev.* 782 (1986).

¹⁰⁹ *Grant v. Norstar Corp.* [2009] SCC 61.

¹¹⁰ *Grant v. Norstar Corp.* [2009] SCC 61; *Lavigne v. Ontario Pub. Serv. Empl. Union*, [1991] 2 S.C.R. 211.

¹¹¹ *Société Radio-Canada c. Radio Sept-Îles Inc.*, [1994] R.J.Q. 1811.

guards of the racially motivated murder of a black inmate.¹¹² According to the OSCE's official report on defamation laws in 2005, fifty-seven persons in Canada were accused of defamation, of which twenty-three were convicted, nine sent to prison, nineteen to probation, and one made to pay a fine. The average period in prison was 270 days and the maximum was 1,460 days of imprisonment.¹¹³

IV. CIVIL JURISDICTIONS

A. Italy

In Italy there are several defamation related crimes, and they are mainly formulated as punishment for offending one's honor. The defamatory crime of injury (*Article 594 of the Italian Penal Code*) refers to offending an individual's honor and is punishable with up to six months in prison or up to €516 Euros in fine. If the offence refers to the attribution of a determined fact and is committed before many persons, penalties may then be doubled to up to one year in prison or €1,032 Euros in fine. In addition, the crime of defamation (*Article 595, of the Italian Penal Code*) refers to "any other situation involving offending one's reputation before many persons," and has a penalty of up to one year in prison or up to €1,032 Euros in fine; this may be doubled to up to two years in prison or to a fine of €2,065 Euros, but only if the offense consists of the "attribution of a determined fact."

When a defamatory offense occurs by the means of the press (published libel), by any other means of publicity, or in a public demonstration (slander/libel), the penalty may consist of imprisonment for a period of six months to three years, or may alternatively consist of a fine of at minimum €516 Euros.¹¹⁴ Lastly, an important fact to note here, with respect to Italian defamation laws, is that the Italian Penal Code establishes that defamatory or insult-related crimes committed with "abuse of power," with "abuse of a profession or art," or with the violation of a "duty inherent to that profession or art," may lead to the additional penalty of a temporary ban in the exercise of that profession or art in addition to the applicable sanctions, fines, and/or prison terms alluded to above.¹¹⁵

¹¹² R. Moles, *Canada Reports: Libel Case May Set Precedent*, Networked Knowledge, (2009).

¹¹³ Organization for Security and Co-operation in Europe, *Libel and Insult Laws: A Matrix on Where We Stand and What We Would Like to Achieve*, (2005), available at <http://www.osce.org/fom/41958> (last visited Nov. 23, 2011).

¹¹⁴ Libro Secondo Dei Delitti in Particolare, Titolo XII, Dei Delitti Contro la Persona, Art. 594 (*Injuria*) Cassazione Penale, sez. V., sentenza 16 settembre 2009, n. 35880 in Altalex Massimario; see *supra* at Art. 595 (*Diffamazione*) Cassazione penale, sez. V, sentenza 1 dicembre 2009, n. 46077 in Altalex Massimario.

¹¹⁵ Italian Penal Code (Codice Penale Italiano) Article 31. Also see the OSCE's *Report on Insult Laws of the European Union and North America* (2010).

B. Switzerland

In Switzerland, the crime of “*calumny*” or malicious and injurious defamation, the offending of one’s honor deliberately, is punished with a maximum term of three years in prison or with a sanction of at least 30 days prison and monetary fine, according to Article 174.2 of the Swiss Criminal Code (SCC). There is calumny when the offender knows the falsity of his or her allegations and intentionally looks to ruin the reputation of the victim (see Articles 174.1 and 174.2 SCC). Swiss Criminal Code s. 173, ss.1-5 provides definitions and codified law against defamation. Defamation under Swiss law is held to be committed when a third party falsely accuses a person, or creates a negative suspicion against a person of having committed dishonorable conduct or any other fact-specific prejudice.” Defamation is punishable by a penalty of 180 days prison or a fine, but not more than two years. N.B. Switzerland’s Penal code refers to “*day prison fines*,” because under Swiss Penal law, *mainly due to overcrowded prisons*, a first-time offender may pay a monetary fine for each day he is sentenced to in prison, instead of actually serving the days in prison. For example, if one was sentenced to 10 days prison, he may pay a fixed amount per day, which may even be fixed depending on his wealth, age, and occupation, for each of those ten days, to avoid serving in detention. But this is applicable only for minor offences, and sometimes in cases of assault without battery, only for first time offenders but not for crimes such as murder, theft, or other crimes of *mens rea*.

Section 173 of the SCC further provides that the defendant will not incur a penalty if he “*proves his allegations to be truthful*,” or if he had reasonable cause to “*hold them in good faith as being truthful*.” Section 173 SCC, ss. 3, states that the accused will not be admitted to such evidence and will be punished if his allegations were articulated or spread without regard to public interest or another other sufficient reason, and were made mainly for the purpose of speaking ill of others, particularly when they relate to “*privacy or family life*.” Section 173, ss. 4 states that if the author “*concedes the falsity*” of his allegations and retracts, the judge may waive or reduce the punishment of the offender from punishment. Section 173 SCC. ss. 5. states that if the defendant has not demonstrated the truth of his allegations or if they were untrue or if the accused has retracted, the judge will decide at trial or in a written statement, as to whether the allegations are true or not. Note that the judge, and not a jury, determines whether statements are true or not (*sometimes in high-profile matters, it may be an expert three judge panel*). There is no jury trial available for defamation matters in Switzerland.¹¹⁶ Section 175 SCC even states that if defamation occurs against a deceased party, those closest to

¹¹⁶ Swiss Federal Procedure Rules (Amended January 2011).

the deceased may file a criminal complaint seeking punishment of the defendant/defamer, which may include fines, sanctions, and/or prison.

C. Brazil

In Brazil, defamation is a crime prosecuted either as “*defamation*,” which may include three months to a year in prison plus a fine, as proscribed by Article 139 of the Brazilian Penal Code (BPC); or as “*calumny*,” which may include six months to two years in prison plus a fine, as proscribed by Article 138 of the BPC. It may also be prosecuted as “*injury*,” which may include one to six months in prison or a fine, as proscribed by Article 140 of the BPC, with aggravating penalties arriving when the crime is practiced in public. (See also Article 141, item III of the BPC).

Incitation to hate and violence is also foreseen in the Penal Code. (See “*Incitation to a Crime*” section of Article 286 of the BPC). Moreover, in situations like bullying or moral constraint, defamation acts are also covered by crimes of “*illegal constraint*” (See Article 146 of the BPC) and the crime of “*arbitrary exercise of discretion*” (See Article 345 of BPC), which is defined as breaking the law as a vigilante.¹¹⁷

Interestingly, criminal and civil defamation lawsuits against the Brazilian media have numbered in the thousands over the last five years, according to the Committee to Protect Journalists (CPJ) website.¹¹⁸ In a 2009 article by the CPJ on journalists being sentenced on defamation charges (See footnote reference No. 121 below), the CPJ asserts that businessmen, politicians, and public officials have filed multiple lawsuits against news outlets and journalists as a way to strain their financial resources and force them to halt their criticisms. The CPJ states:

Plaintiffs seek disproportionately high amounts of money for “moral and material damages, a practice that has become so common it's known as the “industry of compensation. . . . Lawsuits are filed in a politicized climate in which lower court judges routinely interpret Brazilian law in ways that restrict press freedom, and rights to freedom of speech and expression granted by the Constitution.”¹¹⁹

¹¹⁷ Código Penal do Brasil, Título I-VIII, Da Lei Penal, Decreto-Lei N° 2.848, De 7 de Dezembro (1940).

¹¹⁸ See articles on this topic found in the “Committee to Protect Journalists” website: <http://www.cpj.org/>.

¹¹⁹ Committee to Protect Journalists, *Brazilian journalist sentenced on defamation charges*, (July 10, 2009).

V. RELIGIOUS LAW VIEWPOINTS ON DEFAMATION

A. Jewish Law

Judaism's views on defamation may begin to be interpreted by referring to the writings found in the Jewish holy book the *Torah*. The *Torah* makes reference to *Lashon hara*, which in Hebrew means "evil tongue," and concerns the prohibition in Jewish Law (mainly in the *Halakha*, the definitive collective body of Jewish Law) of the telling of gossip. However, *Lashon hara* differs from defamation in that its focus is on the use of true speech for a wrongful purpose rather than on the falsehood and harm arising from defamation. By contrast, *Motzi Shem Ra*, ("spreading a bad name"), consists of using untrue remarks and is akin to slander or defamation. Speech is considered to be *Lashon hara* if it says something negative about a person or party that is not previously known to the public or is not intended to be correct or improve a negative situation.

Most importantly, *Lashon hara* is not true. Statements that fit within this description are considered to be *Lashon hara* in the *Halakha* regardless of the method of communication that is used. According to *Torah* scholars, *Lashon hara* is considered to be a serious sin committed by gossiping against another person. The main prohibition against *Lashon hara* is derived from the book of "Leviticus" 19:16: [1]:, "*Thou shalt not go up and down as a talebearer among thy people; neither shalt thou stand idly by the blood of thy neighbour: I am the Lord.*" In Sotah section 42a, the *Talmud* states that habitual speakers of *Lashon hara* are not tolerated in God's presence because they had committed the sin of speaking evil words and used an evil tongue against another. In the book of *Numbers* chapter 12, Miriam gossips with her brother Aaron and commits *Lashon hara* when she questions why Moses is qualified to lead the Jewish people. God hears her and strikes her down as punishment.

What must be considered as well under Jewish Law is that there are times when a person is obligated to speak out, even though the information might be disparaging. Specifically, if a person's intent in sharing the negative information is for a positive and constructive reason, the prohibition against *Lashon hara* does not apply, according to the *Torah*. While *Motzi shem ra*, or the "spouting of lies and spreading of disinformation," is always prohibited, if *Lashon hara* serves as a warning against the possibility of future harm, such communication is also permissible under Jewish law and according to the *Torah*.

B. Islamic Sharia Law

Under the rules of Islamic *Sharia Law*, which is mainly derived from Islam's holy book, the Quran, and from the *Hadiths*, *Fatwas*, *Sunna* and other important Islamic scriptures and decrees, freedom of speech with respect to criticism of *Mohammed* and *Islam* is strictly forbidden. Specific guidance on what may be considered to be defamation of individuals is dictated primarily in the *Hadiths*, *Sunna*, and *Quran*, and concerns the prohibitions on gossiping, telling harmful untruths or offending another's honor, or the use of an evil tongue as in Jewish Law. The protection of religion, however, appears paramount under *Sharia*.¹²⁰ Criticism of Islam or Mohammed is considered vile blasphemy and punishable by death via stoning or lynching. Any slander, gossip, and "backbiting of others", otherwise known as "*ghiba*" in the *Quran*, is forbidden as well, and also regarded as a sin, according to *Sharia*. Punishment for this offence is less severe, and mainly carried out via lashings - 100 lashings to be more precise - though, in rare instances, such an offence may be punishable by death.¹²¹

The European Court of Human Rights (ECtHR) recently determined in a "solemn hearing" that: "*Sharia Law is incompatible with the fundamental principles of democracy.*"¹²² The ECtHR further stated in the same hearing that if *Sharia* were implemented in a democratic state - even if coupled with some form of democratic legal or political system - it would: "*do away with the State's role as the guarantor of individual's rights and freedoms,*" and "*infringe upon the principle of non-discrimination between individuals, with regard to their enjoyment of public freedoms, which is one of the fundamental principles of democracy.*"

The way that defamation and freedom of expression interplay under the rules of *Sharia* appears to result in no actual right to recourse to an independent and non-religion-based court of law. For western societies, the mere thought of having constitutional freedoms or rights to recourse restricted in such a manner would be held to be unconstitutional; such idealism may be hard to digest for those who live in democratic societies

¹²⁰ C. Horrie & P. Chippindale, *What is Islam? A Comprehensive Introduction*, pg. 44, Virgin Books, (1991).

¹²¹ Oliver Leaman, *The Qur'an: An Encyclopaedia*, Rutledge Press, (2006).

¹²² See the report on the *Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year*, (22 Jan. 2004), http://www.echr.coe.int/NR/rdonlyres/29AC6DBD-C3F8-411C-9B97-B42BE466EE7A/0/2004__Wildhaber_Cancado_Trindade_BIL__opening_legal_year.pdf; Also see ECHR Press Release on *Refah Partisi, Erbakan, Kazan and Tekdal v. Turkey*, nos. 41340/98 & 41342-4/98, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=7&portal=hbkm&action=html&highlight=Refah%20%7C%20Partisi&sessionId=69309892&skin=hudoc-pr-en>.

such as the U.S. and Europe. Permitting the slightest possibility of restriction to fair and true commentary, simply because it may criticize a religion, may in essence undermine what democracy stands for in western societies, which is the right to freedom and equality under the rule of law. Such freedoms and rights should never be infringed upon, restricted, or oppressed.

On the other hand, several major and predominantly Muslim countries have criticized the Universal Declaration of Human Rights (UDHR), for its perceived failure to take into account the cultural and religious context of non-Western countries. Iran has claimed that the UDHR is simply a “*secular understanding of the Judeo-Christian tradition*,” which could not be implemented by Muslims without trespassing upon Islamic law. In 1990, the Organization of the Islamic Conference, a group representing all Muslim majority nations, adopted the “*Cairo Declaration on Human Rights in Islam*.” Notable absences from the Cairo Declaration include provisions for democratic principles, protection for religious freedom, freedom of association and freedom of the press, and equality in rights and equal protection under the law.

Article 24 of the Cairo Declaration states that “*All the rights and freedoms stipulated in this Declaration are subject to the Islamic Sharia*.” In *Sharia* systems, protection of the individual is defined in terms of “*mutual obligation*” rather than “*human rights*.” The concept of human rights, as applied in the Western or European framework, is viewed by Muslims governed by *Sharia Law* as unnecessary and potentially destructive to Islamic societies.¹²³ In 2009, the journal “*Free Inquiry*” summarized this criticism in an editorial: “*We are deeply concerned with the changes to the Universal Declaration of Human Rights by a coalition of Islamic states within the United Nations that wishes to prohibit any criticism of religion and would thus protect Islam's limited view of human rights. In view of the conditions inside the Islamic Republic of Iran, Egypt, Pakistan, Saudi Arabia, the Sudan, Syria, Bangladesh, Iraq, and Afghanistan, we should expect that at the top of their human rights agenda would be to rectify the legal inequality of women, the suppression of political dissent, the curtailment of free expression, the persecution of ethnic minorities and religious dissenters; in short, protecting their citizens from egregious human rights violations. Instead, they are worrying about protecting Islam.*”¹²⁴

Recently a matter concerning cartoons drawn by a man in Denmark and published by Danish and European newspapers drew a lot of attention because the cartoons depicted the Muslim prophet Mohammed. Depicting

¹²³ H. Patrick Glenn, *Legal Traditions of the World*, Oxford University Press, (2007).

¹²⁴ P. Kurtz, A. Dacey, and T. Flynn. *Defaming Human Rights*, *Free Inquiry*, Vol. 29, No. 2, (2009).

Mohammed is an act considered by Muslims as blasphemous and defamatory to their Prophet and is strictly prohibited by *Sharia Law*.¹²⁵ The violent reaction by some individuals after the cartoons were published may be considered by Western ideals as disproportionate in the societies in which the acts took place.

Sharia Law attributes legal rights and obligations differently among the sexes¹²⁶ and to different religious groups¹²⁷ in a manner that may be considered alarmingly discriminatory by western values. In practice, this may consist of what may be perceived by the Western societies and their democratic legal institutions to be “*curbs on the rights and freedoms of non-Muslims*” and restrictive to Muslims themselves, who are governed by the *Sharia* legal system.¹²⁸

C. Catholic Canon Law

With respect to *Catholicism* and its *Canon Law*, it is a sin to “*reveal previously unknown faults or sins of another person to a third person,*” and the act of making such defamatory statements is known as “*detraction*” under Roman Catholic Canonical Law.¹²⁹ This differs from the sin of calumny, which is explained in Canon Law as lying about faults or sins that a person doesn't really have. The exception to this rule comes into play when telling someone about the previously unknown faults of another can prevent greater harm, such as when a person is about to be chosen for a leadership position. As in the case of stealing, *detraction* is a sin which demands restitution, but performing restitution would appear

¹²⁵ BBC News, *Mohammed Cartoon Row Intensifies*, (Feb. 1, 2006) <http://news.bbc.co.uk/2/hi/4670370.stm> .

¹²⁶ See the “No to Political Islam Campaign” website, and their article called *Women’s Rights and the Sharia*, (Sept. 22, 2004), where they suggest that, “*According to the Sharia, despite declarations of the equality of the sexes before God, women are considered inferior to men, and have fewer rights and responsibilities.*” <http://www.ntpi.org/html/womensrights.html>; Also see M.S. McDougal, H.D. Lasswell, “*Human rights for women and world public order: The outlawing of sex-based discrimination,*” *Am. J. Int’l L.*, (1975); R.L. Hillock, “*Establishing the rights of women globally: Has the United Nations Convention on the Elimination of All Forms of Discrimination against Women made a difference?*” *Tulsa. J. Comp. & Int’l L.*, (2004).

¹²⁷ See P. Fargues, *Demographic Islamization: Non-Muslims in Muslim Countries*, John Hopkins University Press, *SAIS Review* 21.2 (2001), for a discussion on the “*Dhimmi*” status of non-Muslims under *Sharia Law*, http://muse.jhu.edu/journals/sais_review/v021/21.2fargues.html ; Also see G.C. Martin, *The Dhimmi Narrative: A Comparison between the Historical and the Actual in the Context of Christian-Muslim Relations in Modern Egypt*, for a discussion on the “*sorrows of dhimmitude*” and *dhimmi* status in general under *Sharia Law*, Naval Postgraduate School, Master’s Thesis (Dec. 2009); Also see in the French language, (*The Christians of the Orient, between Jihad and Dhimmitude*) by Ye’or, Bat., *Les Chretiens d’Orient Entre Jihad et Dhimmitude: VIIe-XXe siecle*, La Cerf, Paris (1991).

¹²⁸ Bernard Lewis, *The Jews of Islam*, Princeton University Press, pp. 62.

¹²⁹ J. Delany, *Detraction*, *The Catholic Encyclopaedia*, Vol. 4, New York, Robert Appleton Company (1908), and updated (9 Apr. 2011) <http://www.newadvent.org/cathen/04757a.htm> .

difficult in this regard, because once something has been communicated, it is quite difficult to make someone forget.

The *Bible* also directly addresses defamation and *slander* in particular, considering it to be a serious offence, which includes prohibitions against: *an abomination unto God*;¹³⁰ *whispering falsities and untruths, and backbiting*;¹³¹ *evil surmising and tale-bearing*;¹³² *babbling, tattling, and evil speaking*;¹³³ and lastly, *defaming, bearing false witness, and judging uncharitably*.¹³⁴

VI. CONCLUSION

The most common theme reported by this paper with respect to the laws on defamation across the globe is that when committing the civil tort or criminal offence, the slanderous or libelous statements require publication, some type of malicious or negative intention, and the effect of contributing to the negative image of the person being defamed. As noted above, some jurisdictions view defamation as a crime while others view it as a civil tort, and the jurisdictions vary as to whether or not multiple actions are pre-empted by statute. Defamation, whether written libel or slander made via spoken word, can result in large awards in some jurisdictions, with the common law jurisdictions apparently being the most readily available to accommodate in this respect.

It must be noted, however, that many jurisdictions are focusing their efforts on reforming their defamation laws, so that outrageous awards are no longer granted in favor of plaintiffs in defamation cases, especially

¹³⁰ Proverbs 6:16 “*These six things doth the LORD hate: yea, seven are an abomination unto him;*” Also see Proverbs 6:19 “*A false witness that speaketh lies, and he that soweth discord among brethren.*”

¹³¹ Romans 1:29 “*Being filled with all unrighteousness, fornication, wickedness, covetousness, maliciousness; full of envy, murder, debate, deceit, malignity; whisperers;*” Also see 2 Corinthians 12:20, “*For I fear, lest, when I come, I shall not find you such as I would, and that I shall be found unto you such as ye would not: lest there be debates, envyings, wraths, strifes, backbitings, whisperings, swellings, tumults.*”

¹³² 1 Timothy 6:4, “*He is proud, knowing nothing, but doting about questions and strifes of words, whereof cometh envy, strife, railings, evil surmising;*” and Also see Leviticus 19:16, “*Thou shalt not go up and down as a talebearer among thy people: neither shalt thou stand against the blood of thy neighbour: I am the LORD.*”

¹³³ Ecclesiastes 10:11, “*Surely the serpent will bite without enchantment; and a babbler is no better;*” and See also 1 Timothy 5:13, “*And withal they learn to be idle, wandering about from house to house; and not only idle, but tattlers also and busybodies, speaking things which they ought not;*” and also Psalms 41:5, “*Mine enemies speak evil of me, When shall he die, and his name perish?*”

¹³⁴ 1 Corinthians 4:13, “*Being defamed, we entreat: we are made as the filth of the world, and are the off-scouring of all things unto this day;*” and Also see Exodus 20:16, “*Thou shalt not bear false witness against thy neighbour;*” and Also see James 4:11-12, “*Speak no evil of one another, brethren. He that speaketh evil of his brother, and judgeth his brother, speaketh evil of the law, and judgeth the law: but if thou judge the law, thou art not a doer of the law, but a judge. There is one lawgiver, who is able to save and to destroy: who art thou that thou judgest another?*”

to those plaintiffs that are already millionaire companies or individuals. These plaintiffs are able to easily progress in the long and demanding procedural processes that relate to defamation cases and may wish to use the Courts as some form of egotistical retribution of sorts against more vulnerable and less wealthy defendants who may have been freely expressing their own opinions. In some cases, plaintiffs also appear to utilize defamation law as a means to seek opportunities for higher compensation. (*See the Brazilian jurisdiction above, where journalists call it the "industry of compensation."*)

Freedom of speech and expression are important rights guaranteed by both the U.S. Constitution and the United Nations and European Conventions, as referenced above. It appears that most jurisdictions are reluctant to interfere with those rights and at least make an effort to proclaim with words their resistance to restriction of those freedoms. Yet for many of us who fiercely support human rights, who know the intricacies of law, and who are aware of the many political shenanigans played around the law, we eagerly await the arrival of more than mere words by our politicians and judges for the continued protection of said freedoms in our civilized society. Instead, we await actions that demonstrate that we in the legal and political professions mean business when it comes down to giving people the right to express themselves without defaming or harming another, and definitely without religiously or politically motivated restraint by anyone in our respective societies, judiciaries and legislatures.

Lastly, there are very interesting arguments being developed in the U.S. Courts with regard to *homosexuality* and *homophobia* in this area of law, and an upcoming case in the Massachusetts Federal District Court to watch in this area (*See footnote No. 148*).

Various U.S. jurisdictions have reached different conclusions on whether statements that falsely accuse a person of being a *homosexual* or of engaging in *homosexual activity* would constitute slander and defamation *per se*.¹³⁵ The modern view on this issue is that statements regarding sexual preference do not constitute slander *per se*, let alone evidence of express malice.¹³⁶ The present state of the law in the United States leads us to a conclusion that *per se* classification is inappropriate for the homosexuality statements at issue, and that being called a *homosexual*, as further evidence

¹³⁵ Compare *Moricoli v. Schwartz*, 46 Ill.App.3d 481 (1977), on statements referring to a singer as a "fag" held to be slander *per quod*, and not slander *per se*, and *Boehm v. American Bankers Insurance Group*, 557 So.2d 91 (Fla.Dist.Ct.App.1990).

¹³⁶ Compare *Manale v. New Orleans*, 673 F.2d 122 (5th Cir.1982), on a Police role call statement referring to plaintiff as "ya little fruit" held to be slanderous *per se*; and See *Mazart v. State*, 109 Misc.2d 1092, 441 N.Y.S.2d 600 (1981), which was decided when certain homosexual activity was still a crime in New York, and where reference to plaintiffs as being "members of a gay community" was also considered slanderous *per se*.

by the very recent case of *Albright v. Morton*, in Massachusetts¹³⁷ is not defamation *per se*. In that case, District Judge Nancy Gertner dismissed a lawsuit filed by a former bodyguard and boyfriend of Madonna rejecting his claim that a photograph in a book and in two publications was defamatory because it misidentified him as a gay man.¹³⁸

Judge Gertner, relying in part on the Massachusetts Supreme Judicial Court's ruling legalizing gay marriage,¹³⁹ stated in the *Albright* judgment that “*being identified as gay is not defamatory*” and further held that “*a statement implying that an individual is a homosexual is hardly capable of a defamatory meaning, ...in fact, a finding that such a statement is defamatory requires this Court to legitimize the prejudice and bigotry that for too long have plagued the homosexual community.*”¹⁴⁰ On appeal, the District Court’s ruling in *Albright* was affirmed by the United States First Circuit Court of Appeals that also rejected the appellant’s request that a *false light invasion of privacy* claim should be recognized in the Commonwealth of Massachusetts,¹⁴¹ particularly given the state court’s repeated refusals.¹⁴²

There are also several other components which may assist us in arriving at the conclusion that accusations of homosexuality are not defamatory *per se*. It appears that there is no empirical evidence on record demonstrating that homosexuals are held in our society in poor esteem, though; it does appear that the community at large has views towards homosexuals that may be mixed, as for example, in the State of Colorado.¹⁴³ The fact that sexual activities between consenting adults of the same sex are no longer illegal in Colorado, as in many other states, tends to indicate that an accusation of homosexuality is not slanderous *per se*. If a person is falsely accused of belonging in a category of persons considered deserving of social approbation, i.e., thief, murderer, prostitute, etc., it is generally left to the courts’ determination as to whether it is considered to be defamation *per se*.¹⁴⁴

According to *Shelley v. Kraemer*, a court should not “*classify homosexuals with those miscreants who have engaged in actions that*

¹³⁷ *Albright v. Morton*, 321 F.Supp.2d 130, 132 (D.Mass.2004).

¹³⁸ Boston Globe, (S. Murphy), *Suit filed by ex-Madonna beau rejected: Gay-marriage law used by judge in dismissal*, (May 29, 2004), See link: http://www.copyright-laws.com/pgs/news_stories/globe_albright_1.html.

¹³⁹ *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

¹⁴⁰ *Albright v. Morton*, 321 F.Supp.2d 130, 132 (D.Mass.2004).

¹⁴¹ *Albright v. Morton*, 410 F.3d 69 (U.S. Ct. of App., 1st Cir. 2005).

¹⁴² See *ELM Med. Lab., Inc. v. RKO Gen., Inc.*, 403 Mass. 779, 532 N.E.2d 675, 680 (1989); *Jones v. Taibb*, 400 Mass. 786, 512 N.E.2d 260, 270 n. 12 (1987); *Fox Tree v. Harte-Hanks Communications, Inc.*, 398 Mass. 845, 501 N.E.2d 519, 522 (1986).

¹⁴³ See codified law in the *Denver Revised Municipal Code* 28-91, et seq. (1990); *Boulder Revised Code* 12-1-2, et seq. (1981); Colorado Executive Order in Regard to Human Rights (Colo. Dec. 10, 1990).

¹⁴⁴ *Inter-State Detective Bureau, Inc. v. Denver Post, Inc.*, 29 Colo. App. 313 (1971).

deserve the reprobation and scorn which is implicitly a part of the slander/libel per se classifications."¹⁴⁵ What will be interesting to see is what will be decided in a unique defamation case recently filed before the same Massachusetts District Court referenced above in the *Albright* matter.¹⁴⁶ The same District Court will be faced with the *converse* argument of whether falsely and deliberately labeling an individual as *homophobic* is defamatory *per se*, particularly when such statements were made by a defendant who is a member of a ruling family of a foreign *Sharia Law* state, a state and ruling regime that is also considered by the U.S. government to have an atrocious human rights record.¹⁴⁷

Homosexuality in that area of the world is generally considered taboo, and many of the oppressive ruling regimes of such nations are known to curtail the freedoms of and frequently persecute homosexuals on their soil. They have even been known to inject homosexuals with male hormones, in what they believe to be some sort of "cure" for homosexual behavior.¹⁴⁸ Some members of the ruling families of these nations have even being caught on videotape brutally torturing individuals that dare to contest them. They typically also attempt to justify themselves afterwards by using the very cowardly "blame the victim" routine as a defense; in a malicious attempt to further harm their victims, these individuals often even try to defame and discredit their victims after such savage and vicious acts of violence.¹⁴⁹ The defendant in said Massachusetts District Court defamation case (*see footnote No. 148 for reference*) allegedly even called the plaintiff a "Stupid American" at one juncture. That same defendant also appears to have deliberately sought worldwide publication of the harmful and false declarations made against the plaintiff by willfully making them to U.S. and international media outlets so as to purposely inflict the maximum amount of harm. Yet; while doing so, he quite possibly also availed himself of a well-balanced and indiscriminate U.S. jurisdiction, which has become quite noteworthy indeed for its decisions on the law of defamation. Will justice be served? The answer to that impending golden question remains to be seen.

¹⁴⁵ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹⁴⁶ Orsi v. Al-Nahyan, United States District Court, Eastern District of Massachusetts, filed March 16, 2011; Also see Boston Globe (Associated Press Newswire story), *Boston man sues UAE sheik for defamation*, (Mar. 17, 2011), http://articles.boston.com/2011-03-17/news/29350262_1_zayed-al-nahyan-bin-boston-man.

¹⁴⁷ U.S. Department of State, *Human Rights Report: United Arab Emirates, Diplomacy in Action*, (Feb. 25, 2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119129.htm>.

¹⁴⁸ The Guardian, (B. Whitaker), 'Gay Party' guests face hormone treatment, (Nov. 30, 2005), <http://www.guardian.co.uk/world/2005/nov/30/gayrights.brianwhitaker>.

¹⁴⁹ The Guardian, (P. Harris), *Torture-tape Gulf prince accused of 25 other attacks*, (May 9, 2010), <http://www.guardian.co.uk/world/2009/may/03/uae-sheikh-accusation-assualt-tape>.