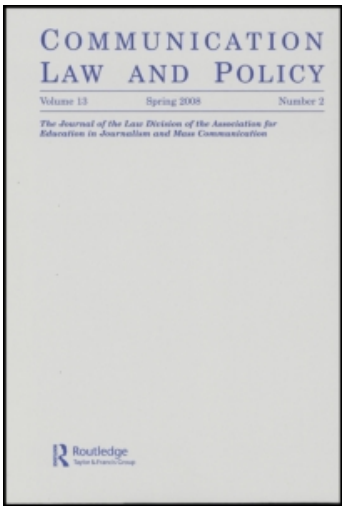

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David Pritchard [a]
[a] Department of Journalism and Mass Communication, University of Wisconsin-Milwaukee,

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RETHINKING CRIMINAL LIBEL: AN EMPIRICAL STUDY

DAVID PRITCHARD*

The prevailing view of criminal libel among communication law scholars in the United States is that there are very few prosecutions, that most of the prosecutions are about politics or public issues, and that none of the prosecutions are necessary because victims of defamation can sue for civil libel. The results of an empirical study of all Wisconsin criminal libel cases from 1991 through 2007, however, suggest that criminal libel is prosecuted far more often than realized, that most criminal libel prosecutions have nothing to do with political or public issues, and that the First Amendment is an effective shield on the rare occasions when a criminal libel prosecution is politically motivated. This article concludes that criminal libel can be a legitimate way for the law to deal with expressive deviance that harms the reputations of private figures in cases that have nothing to do with public issues.

Criminal libel[1] is the black sheep of communication law[2] — so much so that some recent communication law textbooks do not even mention it.[3] Authors who do refer to criminal libel frequently disparage it as

*Professor, Department of Journalism and Mass Communication, University of Wisconsin-Milwaukee. The author thanks Andrew Pease for research assistance and the Greater Milwaukee Foundation's Journal Foundation/Walter Jay and Clara Charlotte Damm Fund for financial support.

[1]This article uses the term "criminal libel," though some statutes and scholars use the term "criminal defamation." The two terms are considered synonymous for purposes of this article.

[2]The term "black sheep" refers to "the least reputable member of a group; a disgrace." CHRISTINE AMMER, THE AMERICAN HERITAGE DICTIONARY OF IDIOMS 64 (1997).

[3]*See, e.g.*, RANDY BOBBITT, EXPLORING COMMUNICATION LAW: A SOCRATIC APPROACH (2008); ROBERT TRAGER, JOSEPH RUSSOMANNO & SUSAN DENTE ROSS, THE LAW OF JOURNALISM & MASS COMMUNICATION (2007).

"ancient,"[4] "archaic,"[5] "antiquated,"[6] "obsolete,"[7] "outdated,"[8] and "undemocratic."[9] Prosecutions are thought to be extremely rare,[10] a state of affairs that provides solace to free-speech advocates who believe that the principal use of criminal libel is to punish political dissent.[11] The presumed link between criminal libel and suppression of political speech leads to frequent claims that criminal libel prosecutions violate the First Amendment.[12] Constitutional concerns aside, it is often asserted that

[4]Wendy Tannenbaum, *Critics Question Constitutionality of Criminal Libel Laws*, 27 NEWS MEDIA & THE L. 37, 38 (Winter 2003) ("the use of an ancient law to punish mere insults").

[5]Bonnie Bressers, *The Dangers of Criminalizing Speech*, 91 QUILL, Mar. 2003, at 8 (Criminal defamation statutes are "often clearly archaic."); *Criminal Libel Developments: 2007 Update*, MEDIA L. RESOURCE CENTER BULL., Dec. 2007 at 123 ("These statutes are a mix of archaic laws and others that have been revised to require actual malice."); Editorial, *Nasty? Yes. Criminal? No.,* L.A. TIMES, Dec. 11, 2008, at A24 ("Archaic laws in several states also allow libel to be prosecuted as a criminal offense.").

[6]Jane Kirtley, *Overkill in Kansas,* 24 AM. JOURNALISM REV. 74, 74 (Sept. 2002) ("Criminal libel is an antiquated legal concept.").

[7]WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 160 (2001) ("The reason we can touch criminal libel so lightly in a text such as this is that it has become an obsolete legal action.").

[8]Tannenbaum, *supra* note 4, at 38 ("Media advocates and legal experts have criticized laws that punish people for speech, calling the statutes outdated and undemocratic.").

[9]*Id.*

[10]*See, e.g.*, KENT R. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATION 97 (7th ed. 2009) ("There might not have been a successful prosecution in the last thirty-five years."); 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS §3.2, 3-4 n.11 (3d ed. 2008) ("Criminal libel lives on in American law, but barely."); PAUL SIEGEL, COMMUNICATION LAW IN AMERICA 98 (2d ed. 2008) ("Seventeen states still have criminal libel laws on the books, though they are rarely used."); THOMAS L. TEDFORD & DALE A. HERBECK, FREEDOM OF SPEECH IN THE UNITED STATES 81 (5th ed. 2005) ("Not all states have criminal libel laws, and nowadays those that do rarely invoke them."); Salil K. Mehra, *Post a Message and Go to Jail: Criminalizing Internet Libel in Japan and the United States*, 78 U. COLO. L. REV. 767, 768 (2007) (Criminal libel is "a dead-letter office in the law in the United States."); Clive Walker, *International and Comparative Perspectives on Defamation, Free Speech, and Privacy: Reforming the Crime of Libel*, 50 N.Y.L. SCH. L. REV. 169, 195 (2005) ("Criminal libel has been largely, but not completely, curtailed in the United States.").

[11]*See*, *e.g.*, DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 234 (2009/2010 ed.) ("Most criminal libel prosecutions are generated for political reasons."); Dan Dischof, *A Renaissance in Speech Crime Prosecutions,* NEWS MEDIA & THE L., Spring 2001, at 14 ("Many times, the targets of prosecutors' charges are their political opponents.").

[12]*See*, *e.g.*, Gregory J. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL'Y 433, 487 (2004) ("The Supreme Court must act. Until it does, criminal libel will continue to hang on the face of the First Amendment as spittle does from the mouth of a baby, who is not mature enough intellectually to know any better or mature enough physically to wipe it off."); Editorial, EDITOR & PUBLISHER, Dec. 9, 2002, at 10 ("Criminal-libel statutes no longer protect offended honor — they dishonor our nation's bedrock principles of free speech and free press."); Stacey Laskin, *Absence of Malice? Criminal Libel Statutes Still Threaten Free Speech*, NEWS MEDIA & THE L., Spring 2008, at 28; Ken Paulson, *Jailed for Speech: Criminal Libel is an Old — and Bad — Idea*, Jan. 18, 2004,

criminal libel serves no legitimate purpose because people who have been defamed can file civil lawsuits alleging libel.[13]

In a nutshell, that is the scholarly consensus about criminal libel in the United States: very few prosecutions, most of them about politics or public issues, all of them of dubious constitutionality, and none of them necessary because victims of defamation can sue for civil libel.

This article questions the validity of the scholarly consensus. It reports the results of a page-by-page review of trial-court files from sixty-one criminal libel prosecutions in Wisconsin from 1991 through 2007. The study documents a reality of criminal libel that is stunningly different from the prevailing view. Among other things, the Wisconsin data show:

- Criminal libel is prosecuted far more often than communication law textbooks assert.
- Most criminal libel prosecutions have nothing to do with political or public issues.
- On the rare occasions when criminal libel is used in an attempt to punish dissent, First Amendment arguments by defendants tend to be successful.
- Most criminal libel cases never reach an appellate court or attract coverage from major newspapers, which means that they are invisible to scholars who rely on computer databases of appellate court decisions and news coverage.

Overall, the Wisconsin data suggest that criminal libel can be, and often is, a legitimate way for the law to deal with expressive deviance that harms the reputations of private figures in cases that have nothing to do with public issues. This is especially true when a defamed person cannot afford to hire a lawyer to file a lawsuit for civil libel or when a potential defendant is so poor that a plaintiff's lawyer working on a contingent-fee basis would decline to take the case because the lawyer would see no realistic hope of collecting any damages a court might award.

http://www.firstamendmentcenter.org/commentary.aspx?id=12468 ("There's no justification for keeping these laws on the books. A free society doesn't threaten citizens with jail for exercising their freedom of speech.").

[13] *See*, *e.g.*, PEMBER & CALVERT, *supra* note 11, at 235 ("Authorities in most states are unwilling to take on someone else's troubles and prosecute for criminal libel so long as a civil remedy is available."); Editorial, *supra* note 5, at A24 ("But libel online, like all libel, is best redressed by replenishing the plaintiff's purse, not by turning the defendant into a criminal."); Kirtley, *supra* note 6, at 74 ("Civil lawsuits offer an adequate remedy for those whose reputations are genuinely harmed."); Laskin, *supra* note 12, at 28 ("Civil lawsuits fill the needs of libel victims and society as a whole. . . ."); Paulson, *supra* note 12 ("If someone writes an article that is defamatory, a plaintiff can sue and recover monetary damages. The system works.").

The first section of the article provides background on the constitutional status of Wisconsin's criminal libel statute. The second explains the empirical study's method of collecting data, contrasts it with methods used by previous studies, and discusses the extent to which Wisconsin is similar to other states that have criminal libel statutes. The third section contains summary results with respect to the frequency of criminal libel prosecutions, the general nature of disputes that led to prosecutions, and certain characteristics of defendants. The fourth presents details about individual cases to demonstrate the variety of fact situations that gave rise to criminal libel prosecutions, and the fifth discusses the implications of the study.

CRIMINAL LIBEL AND THE FIRST AMENDMENT

The Supreme Court of the United States ruled on three criminal libel cases between 1952 and 1966,[14] and has not revisited the issue since. Although the first of those cases, *Beauharnais v. Illinois*, is often thought of as a group-libel case,[15] the Illinois Supreme Court construed the law in question as a criminal libel statute, a decision that the federal Supreme Court accepted.[16] By a 5-4 majority, the Court upheld the Illinois statute. Although the dissenting justices did not agree with how the Illinois courts had applied the statute, none of them questioned the constitutional legitimacy of criminal libel.[17]

Twelve years later, in *Garrison v. Louisiana*, the Supreme Court limited states' authority to prosecute false, defamatory statements about the official conduct of public officials. The Court, consistent with its decision with respect to civil libel earlier in the same year,[18] ruled that such statements were constitutionally privileged unless they were made with actual malice — knowledge that the statements were false or reckless disregard for their truth or falsity.[19] Truth was established as an absolute defense "where the criticism is of public officials and their conduct of public business."[20]

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[14]Ashton v. Kentucky, 384 U.S. 195 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964); Beauharnais v. Illinois, 343 U.S. 250 (1952).

[15]*See*, *e.g.*, MIDDLETON & LEE, *supra* note 10, at 96; DWIGHT L. TEETER JR., DON R. LE DUC & BILL LOVING, LAW OF MASS COMMUNICATIONS: FREEDOM AND CONTROL OF PRINT AND BROADCAST MEDIA 75–76 (9th ed. 1998).

[16]*Beauharnais*, 343 U.S. at 253-54.

[17]*Id*. at 267 (Black, J., dissenting); *id*. at 277 (Reed, J., dissenting); *id*. at 287 (Jackson, J., dissenting).

[18]New York Times v. Sullivan, 376 U.S. 254 (1964).

[19]*Garrison*, 379 U.S. at 74–75.

[20]*Id*. at 72–73. Despite the Court's seemingly unambiguous holding that truth was an absolute defense only in cases involving public officials and "public business," some

The third criminal libel case decided by the Supreme Court dealt with the question of whether Kentucky's common-law offense of criminal libel was unconstitutionally vague.[21] The Court ruled that the trial judge, by defining the offense of criminal libel as expression calculated to disturb the peace, had created a standard that was unconstitutionally vague because it predicated the defendant's guilt on "calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments per se."[22] The Court's ruling in the Kentucky case did not modify the constitutional privilege established two years earlier in *Garrison*. These three decisions, and especially the *Garrison* ruling, provide the context for any discussion about the constitutionality of a state's criminal libel statute.

Wisconsin, the focus of this study, has had a criminal libel statute since it became a state in 1848. The current criminal libel statute is titled "Defamation" and reads in full:

1. Whoever with intent to defame communicates any defamatory matter to a 3rd person without the consent of the person defamed is guilty of a Class A misdemeanor.[23]
2. Defamatory matter is anything which exposes the other to hatred, contempt, ridicule, degradation or disgrace in society or injury in the other's business or occupation.
3. This section does not apply if the defamatory matter was true and was communicated with good motives and for justifiable ends[24] or if the communication was otherwise privileged.
4. No person shall be convicted on the basis of an oral communication of defamatory matter except upon the testimony of 2 other persons

observers have interpreted the Court's holding to mean that truth is also an absolute defense in criminal libel prosecutions generally. *See*, *e.g.*, Lisby, *supra* note 12, at 460 ("This evolution culminated in 1964 with the Supreme Court's decision in *Garrison v. Louisiana*, in which the Court . . . acknowledged that truth may not be punished in criminal libel cases."); Kirtley, *supra* note 6, at 74 ("The First Amendment requires that truth must be a defense to any criminal libel charge, even if the statements were made with ill will or bad motives."); Laskin, *supra* note 12, at 27 ("*Garrison* said state criminal libel statutes are unconstitutional if they allow for prosecution of truthful statements.").

[21]Ashton v. Kentucky, 384 U.S. 195 (1966).

[22]*Id*. at 200.

[23]The maximum penalty for Class A misdemeanors in Wisconsin is a fine not to exceed $10,000 or imprisonment not to exceed nine months, or both. WIS. STAT. §939.51(3)(a) (2007).

[24]The "good motives and justifiable ends" limitation on the truth defense comes from the Wisconsin Constitution, which was adopted in 1848. WIS. CONST. art. I, §3. The limitation is found in many state constitutions and criminal libel statutes. *See Garrison*, 379 U.S. at 71.

> that they heard and understood the oral statement as defamatory or upon a plea of guilty or no contest.[25]

The Wisconsin Supreme Court has decided nine appeals involving criminal libel over the years,[26] but no state or federal appellate court has directly addressed the Wisconsin statute's constitutionality since the U.S. Supreme Court applied the constitutional privilege protecting false statements about public officials to criminal libel in 1964.[27] The constitutional privilege is not explicitly mentioned in the Wisconsin statute, a fact that raises the question of whether the statute can be interpreted as incorporating the privilege. No legal commentary has focused on the issue,[28] but the answer to the question is found in the wording of the statute itself.

Section 3 of the Wisconsin criminal libel statute explicitly prohibits prosecution "if the defamatory matter was true and was communicated with good motives and for justifiable ends or *if the communication was otherwise privileged*."[29] In other words, the statute incorporates all commonly recognized privileges, certainly including the constitutional privilege established in *New York Times v. Sullivan* and extended to criminal libel in *Garrison v. Louisiana* (that defamatory comments about the official conduct of public officials may not be punished unless they are false and made with actual malice). Other constitutional privileges, such as those that protect false statements about public figures[30]

[25]WIS. STAT. §§942.01(1) – 942.01(4) (2007).

[26]Wisconsin Supreme Court cases that have considered criminal libel are State v. Cardenas-Hernandez, 579 N.W.2d 678 (Wis. 1998); State v. Herman, 262 N.W. 718 (Wis. 1935); Branigan v. State, 244 N.W. 478 (Wis. 1932); State v. Mueller, 243 N.W. 478 (Wis. 1932); Malone v. State, 212 N.W. 879 (Wis. 1927); Hyde v. State, 150 N.W. 965 (Wis. 1915); State *ex rel.* Sullivan v. Dist. Court of Milwaukee County, 130 N.W. 58 (Wis. 1911); Barnum v. State, 66 N.W. 617 (Wis. 1896); Hauser v. State, 33 Wis. 678 (1873). Wisconsin Court of Appeals cases that have involved criminal libel are State v. Wolf, 617 N.W.2d 678 (Wis. Ct. App. 2000); State v. Gilles, 496 N.W.2d 133 (Wis. Ct. App. 1992); State v. Stebner, 506 N.W.2d 170 (Wis. Ct. App. 1993).

[27]Garrison v. Louisiana, 379 U.S. 64 (1964).

[28]One law review article since 1990 has focused on Wisconsin libel law. It disposed of the state's criminal libel statute in a single sentence. Sarah A. Maguire, *A Misplaced Focus: Libel Law and Wisconsin's Distinction Between Media and Non-Media Defendants*, 2004 WIS. L. REV. 191 (2004). A 1996 book about communication law in Wisconsin devoted two sentences to criminal libel, one of which erroneously stated that "it has not been an active area of the law in recent years." GARY COLL, MASS COMMUNICATION LAW IN WISCONSIN 17 (1996). Other summaries of laws that apply to Wisconsin communicators do not mention criminal libel. *See*, *e.g.*, STATE BAR OF WISCONSIN, WISCONSIN NEWS REPORTERS' LEGAL HANDBOOK (5th ed. 2005); Jennifer L. Peterson, *The Shifting Legal Landscape of Blogging*, 79 WIS. LAW. 8 (Mar. 2006).

[29]WIS. STAT. §942.01(3) (2007) (emphasis added).

[30]*See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

and expressions of pure opinion,[31] also would apply to criminal libel in Wisconsin, as would the full range of statutory and common-law privileges that Wisconsin recognizes.[32] Although Wisconsin appellate courts have not had the opportunity to construe the state's criminal libel statute as incorporating the constitutional privileges, appellate courts have done so with the criminal libel statutes of other states,[33] and there is little doubt that Wisconsin would follow suit, given the "otherwise privileged" language of the statute.[34]

If the foregoing analysis is valid, then truth is not an absolute defense to criminal libel in Wisconsin. Truthful defamatory statements about the private activities of a private person may be punished unless the statements are made "with good motives and for justifiable ends."[35] The Wisconsin Court of Appeals affirmed this position in a post-*Garrison* decision in 1993.[36] The ruling was consistent with what the Wisconsin Supreme Court has said with respect to civil libel: "Purely private defamations are not entitled to constitutional protection."[37]

METHODOLOGY

The scholarly consensus referred to at the beginning of this article is based principally on studies that relied on surveys of appellate court

[31]*See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974). A useful standard for distinguishing pure opinions from those opinions that imply defamatory facts can be found in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984).

[32]*See* State v. Cardenas-Hernandez, 579 N.W.2d 678 (Wis. 1998) (The absolute civil privilege for defamatory statements made in judicial proceedings prohibits a criminal libel prosecution, even when the statements constitute perjury as well as defamation.); State v. Gilles, 496 N.W.2d 133, 135–37 (Wis. Ct. App. 1992) (The common-law defense of conditional privilege recognized in the civil law applies to criminal libel).

[33]*See*, *e.g.*, Phelps v. Hamilton, 59 F.3d 1058 (10th Cir. 1995); People v. Ryan, 806 P.2d 935 (Colo. 1991); Pegg v. State, 659 P.2d 370 (Okla. Crim. App. 1983).

[34]WIS. STAT. §942.01(3) (2007).

[35]*Id*.

[36]State v. Stebner, 506 N.W.2d 170, 171 (Wis. Ct. App. 1993) ("Defendant argues that true statements are not defamatory. That is only partly correct. To constitute a defense, there must be more than a communication of truthful matter. 'This section does not apply if the defamatory matter was true *and* was communicated with good motives *and* for justifiable ends *or* if the communication was otherwise privileged.' It is impossible to infer good motives, justifiable ends or privilege from the complaint" (emphasis in original).).

[37]Denny v. Mertz, 318 N.W.2d 141, 153 (Wis. 1982). *See also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 ("It is speech on matters of public concern that is at the heart of the First Amendment's protection."). For an overview of state law on this point, *see* Ruth Walden & Derigan Silver, *Deciphering* Dun & Bradstreet*: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases?,* 14 COMM. L. & POL'Y 1–39 (2009).

decisions and on Internet databases of news coverage.[38] Among the studies is one that identified seventy-seven actual or threatened criminal libel prosecutions in the thirty-eight years after the 1964 *Garrison* ruling, or roughly two per year throughout the entire United States.[39] Two studies of criminal libel activity during the 1990s and early years of the twenty-first century also conveyed the impression that criminal libel cases are rare. Specifically, a 2002 Libel Defense Resource Center (LDRC) study located twenty-three actual or threatened criminal libel prosecutions in the United States from 1990 through 2001, or about two a year.[40] A University of Kansas School of Law study identified thirty-one actual criminal libel prosecutions in the United States during the ten-year period from 1993 through 2002, or about three a year.[41] Although none of these studies explained in detail the methods it used to locate criminal libel prosecutions, the LDRC study was typical, saying that it was based on "a review of case law and news reports."[42] The studies reinforced the prevailing wisdom that prosecutions for criminal libel are rare, with no more than two or three prosecutions per year throughout the United States.[43] According to the LDRC and Kansas studies, no individual state or territory averaged even one criminal libel case per year in the 1990s and first years of the current century.

These studies' assertions about the frequency and content of criminal libel prosecutions were based upon two unstated assumptions: (a) that most criminal libel cases attract the attention of news organizations whose content is available *via* readily accessible databases, and (b) that

[38]*See supra* notes 4–13 and accompanying text.

[39] *Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. After* Sullivan & Garrison, 2003 MEDIA L. RESOURCE CENTER BULL., No.1 (Mar. 2003).

[40]Russell Hickey, *A Compendium of U.S. Criminal Libel Prosecutions: 1990–2002*, 2002 LIBEL DEF. RESOURCE CENTER BULL., No. 2 (Mar. 2002).

[41]Katrina Hull, *Criminal Defamation* 19-20 (U. Kan. Sch. of L. Pub. Pol'y Clinic, Fall 2003), *available at* http://web.ku.edu/~rlevy/PPC_F04/Materials/Criminal_Defamation.pdf.

[42]Hickey, *supra* note 40, at 97.

[43]At the end of 2008, the following fifteen states and one territory had criminal libel statutes that had not been invalidated by an authoritative decision of an appellate court: Colorado, COLO. REV. STAT. §18-13-105 (2007); Florida, FLA. STAT. §§836.01–836.10 (2008); Idaho, IDAHO CODE §§18-4801–18-4808 (2008); Kansas, KAN. STAT. ANN. §§21–4004 -21-4006 (2006); Louisiana, LA. REV. STAT. ANN. §§14:47–14:50 (2008); Michigan, MICH. COMP. LAWS §750.370 (2008); Minnesota, MINN. STAT. §§609.765, 628.22, 631.06 (2007); Montana, MONT. CODE ANN. §45-8-212 (2007); New Hampshire, N.H. REV. STAT. ANN. 644:11 (2008); North Carolina, N.C. GEN. STAT. §§14–47, 15–168 (2008); North Dakota, N.D. CENT. CODE §12.1-15-01 (2008); Oklahoma, 21 OKL. ST. §§771–774, 776; Utah, UTAH CODE ANN. §76-9-404 (2008); Virgin Islands, 14 V.I. CODE §§1171–1178 (2008); Virginia, VA. CODE ANN. §18.2-417 (2008); Wisconsin, WIS. STAT. §942.01 (2007). Comments about these jurisdictions' criminal libel statutes and how courts have interpreted them can be found in MEDIA LIBEL LAW 2008-09: LDRC 50-STATE SURVEY (2008).

a relatively high proportion of criminal libel prosecutions reach appellate courts.[44] To the extent that these assumptions are false, studies relying on them risk not only understating the true level of prosecutions for criminal libel but also making erroneous statements about the content of criminal libel prosecutions. This is so because cases that have litigants with enough resources to pursue appeals and/or cases that attract the attention of news organizations are not representative of trial-court cases generally. Many scholars have discussed the hazards of drawing conclusions about trial-court activity on the basis of knowledge about appellate-court activity[45] and news coverage.[46] In the specific context of libel, several scholars have questioned the value of the appellate-court focus of traditional legal research methods as a means of learning about how defamation-related disputes arise and are processed.[47] As one scholar noted: "Since most suits never advance to the

[44]Studies of criminal libel prosecutions in years before the 1990s focused almost exclusively on appellate court activity. *See* Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEXAS L. REV. 984 (1956); Lisby, *supra* note 12; George E. Stevens, *Criminal Law After Garrison*, 68 JOURNALISM Q. 522 (1991); John D. Stevens, Robert L. Bailey, Judith F. Krueger & John M. Mollwitz, *Criminal Libel as Seditious Libel, 1916–1965*, 43 JOURNALISM Q. 110 (1966).

[45]*See*, *e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 125 (2002) ("Judicial decisions represent only the very tip of the mass of grievances."); David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U.L. REV. 681, 683 (2007) ("For many observers of the American legal system, law is what judges write in appellate opinions. These observers are mistaken. But the gravitational pull of an appellate-centered view of the legal world is strong. Opinions from such tribunals continue to dominate the training of new lawyers and are widely disseminated by the mainstream media."); Kay L. Levine, *The Law is Not the Case: Incorporating Empirical Methods into the Culture of Case Analysis*, 17 U. FLA. J.L. & PUB. POL'Y 283, 285 (2006) ("We should be aware that constructing legal arguments in the context of one case, or teaching students how to do so, is distinct from making claims about what the law in a particular area really is, in all of its many forms and messy realities."); Ahmed E. Taha, *Data and Selection Bias: A Case Study*, 75 UMKC L. REV. 171, 171 (2006) ("When studies use as data only those cases that result in a published judicial opinion, they are vulnerable to a publication bias that can lead to erroneous conclusions.").

[46]Just as appellate court activity is an unsound basis for making valid conclusions about activity in trial courts, so too are news media reports, which typically provide a very unrepresentative view of trial court activity. *See*, *e.g.*, David Pritchard & Karen D. Hughes, *Patterns of Deviance in Crime News*, 47 J. COMM. 49 (Summer 1997).

[47]*See*, *e.g.*, RANDALL P. BEZANSON, GILBERT CRANBERG & JOHN SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 235–47 (1987); Timothy W. Gleason, *The Libel Climate of the Late Nineteenth Century: A Survey of Libel Litigation, 1884–1899*, 70 JOURNALISM Q. 893 (1993); David Pritchard, *A New Paradigm for Legal Research in Mass Communication*, 8 COMM. & THE L. 51 (Aug. 1986). For surveys of alternatives to the tradition legal-research paradigm with respect to communication law generally, *see* JEREMY COHEN & TIMOTHY GLEASON, SOCIAL RESEARCH IN COMMUNICATION AND THE LAW (1990); COMMUNICATION AND LAW: MULTIDISCIPLINARY APPROACHES TO RESEARCH (Amy Reynolds & Brooke Barnett eds. 2006).

appellate level, existing histories reach a relatively low number of cases and reveal little about libel litigation at the trial and pretrial level."[48]

Comparing Methods

In Wisconsin it is possible to test the assumption that most criminal libel cases reach an appellate court. In the late 1980s, Wisconsin's Office of State Courts began to create a digital archive of civil and criminal actions in state trial courts. Only a few counties took part in the program in its early years, but by the mid-1990s all but one of the state's seventy-two counties were participating. Any Internet user can search the archive to see whether a given individual or company has been involved in a case,[49] but public access is limited to searches by names of parties to individual cases. For the present study, the Office of State Courts was asked whether it could produce a report of all prosecutions for violations of Wisconsin's criminal libel statute through the end of 2007. The answer was affirmative, and approximately two weeks after payment of a modest search fee, the Office of State Courts produced a spreadsheet containing information about each defendant charged with criminal libel since 1991. The spreadsheet contained the full name of each of the sixty-one defendants, the county in which each charge was filed, and the case number for each prosecution. This information enabled the researchers to locate criminal libel case files in county courthouses throughout Wisconsin, and thus to be able to review police reports, criminal complaints, trial-court rulings, and other documents in the case files for all criminal libel prosecutions from 1991 through 2007. This method not only located far more cases than one based on the assumptions that criminal libel cases will attract media coverage and/or reach an appellate court, but it also provided a depth

[48]Gleason, *supra* note 47, at 893. *See also* Diane L. Borden, *Patterns of Harm: An Analysis of Gender and Defamation,* 2 COMM. L. & POL'Y 105, 123 (1997) (noting the "obvious appellate-level bias and resulting sampling distortion" of the West case-reporting system). A handful of scholars doing research in areas of communication law other than libel also express awareness of the limitations of focusing only on appellate cases. *See*, *e.g*, Cathy Packer, *Don't Even Ask! A Two-Level Analysis of Government Lawsuits Against Citizen and Media Access Requestors*, 13 COMM. L. & POL'Y 29, 30 n.9 (2008) ("Cases that are settled before trial and cases that go to trial but are not appealed usually do not result in published opinions, and therefore most of them are not included in this study."); Cathy Packer & Johanna Cleary, *Rediscovering the Public Interest: An Analysis of the Common Law Governing Post-Employment Non-Compete Contracts for Media Employees*, 24 CARDOZO ARTS & ENT. L. J. 1073, 1083 n.52 (2007) ("Most trial court decisions were not included in this study because they are generally not reported. One can safely assume, therefore, that these fifty-one [appellate] cases represent a relatively small proportion of the conflicts.").

[49]*See* http://wcca.wicourts.gov/index.xsl.

Table 1
Criminal Libel Prosecutions in Wisconsin, 1991–2007

Year	Prosecutions initiated	Number covered by newspapers	Number reaching appellate courts
1991	3	0	1
1992	3	2	1
1993	2	0	0
1993	2	0	0
1995	3	1	1
1996	4	1	0
1997	0	0	0
1998	4	2	2
1999	5	2	0
2000	6	1	0
2001	9	0	0
2002	3	0	0
2003	4	1	0
2004	6	0	0
2005	3	1	0
2006	2	1	0
2007	2	1	0
Total	61	13	5

of understanding of the cases that media reports and appellate court rulings could not match.

Table 1 documents the number of prosecutions each year in Wisconsin during the period under study, as well as the number that were the subject of at least one story in a newspaper whose content is archived in either LexisNexis Academic[50] or Wisconsin Newsstand,[51] both of which provide full-text content of the daily newspapers published in Wisconsin's two largest cities (Milwaukee and Madison) as well as selected content from a few other Wisconsin media organizations. Table 1 also shows the number of cases that reached an appellate court. At least one newspaper devoted at least one story to four cases that reached an appellate court and nine cases that did not. Major newspapers ignored the fifth criminal libel case that reached an appellate court. In all, fourteen of the sixty-one cases (23%) were mentioned in major newspapers, reached an appellate court, or both. That means that more than three-fourths of the cases (77%) would have been invisible to scholars relying on computerized databases of news coverage and court decisions.

[50]*See* http://www.lexisnexis.com/us/lnacademic/.
[51]*See* http://www.uwm.edu/Libraries/guides/wisconsin.htm.

Another way to demonstrate the usefulness of the present study's empirical approach is to compare the actual number of Wisconsin criminal libel prosecutions to the number of cases located by the LDRC and Kansas studies. The LDRC study identified five criminal libel cases in Wisconsin from 1990 through 2001. Two of them ended with guilty pleas that were reported on by the largest newspaper in Wisconsin; the other three were cases that reached appellate courts. The Office of State Courts database documented forty-four criminal libel prosecutions during that period, which means that the LDRC study missed thirty-nine of forty-four cases, or 89%. The Kansas study, which focused on the ten-year period from 1993 through 2002, identified the same five cases that the LDRC study found, missing 87% of the thirty-nine criminal libel prosecutions in Wisconsin during those years. In other words, in the 1990s and first years of the twenty-first century there were approximately eight times more criminal libel prosecutions in Wisconsin than previous studies of those years indicated.

Applicability to Other States

In contrast to the LDRC and Kansas studies, the study reported in this article is based on data from a comprehensive set of cases — but cases from only one state. The study's focus on a single state raises the question of the extent to which knowledge about criminal libel prosecutions in Wisconsin may provide insights about patterns of prosecution in other states. Because no collection of trial-court data about criminal libel cases from other states could be found, there is no empirical answer to such a question. Instead, the answer to the question depends on the level of similarity of the jurisdiction under study to other jurisdictions where similar legal processes may be occurring. One well-known researcher of local judicial systems asserted that it is enough to show that the jurisdiction under study "is not so atypical as to be unique."[52] Wisconsin exceeds the "not-so-atypical" standard in at least two ways.

First, Wisconsin is a very representative state. A 2006 analysis of U.S. Census data went so far as to declare Wisconsin to be the most representative of the American states. The analysis compared state-by-state averages on twelve variables, including neighborhood characteristics,

[52]MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT xxxii (1992) ("Can what we learn here be generalized to other cities as well? . . . This is not really the right question. No single city can be regarded as 'typical.' The correct test is not to show that New Haven is typical of all American cities or typical of middle-sized cities, but rather to show that it is *not* so atypical as to be unique.").

race and ethnicity, and income and education.[53] Second, Wisconsin resembles many states with criminal libel statutes in that it has a "moralistic" political culture, as do nine other states that have criminal libel statutes (Colorado, Idaho, Kansas, Michigan, Minnesota, Montana, New Hampshire, North Dakota, Utah). Overall, ten of the seventeen states (59%) with "moralistic" political cultures — including three of the four states that border Wisconsin — have criminal libel statutes, while only five of the thirty-three states (15%) with "individualistic" or "traditionalistic" political cultures have criminal libel statutes (Florida, Louisiana, North Carolina, Oklahoma, Virginia).[54]

PATTERNS OF PROSECUTION

As noted earlier, the scholarly consensus holds that convictions for criminal libel are exceedingly rare. The 2009 edition of a popular communication law textbook, for example, said that there might not have been a successful prosecution for criminal libel in the past thirty-five years.[55] This article's study, in contrast, found twenty-three criminal libel convictions in Wisconsin alone between 1991 and 2007. The convictions included three defendants who were found guilty by juries, three who pleaded guilty to criminal libel in return for more serious charges being dropped, and seventeen who pleaded either guilty or no contest to initial charges of criminal libel. Table 2 shows the outcomes of the criminal libel prosecutions in Wisconsin from 1991 through 2007.

Ten of the convicted defendants were sentenced to periods of incarceration. The shortest jail sentence was five days. The longest was nine months.

The study showed criminal libel to be largely a small-town crime, at least in Wisconsin. There were no criminal libel cases in the state's most populous county in the seventeen years under study. The state's eight largest counties, which contained about 50% of the state's population in 2000,[56] generated less than 17% of the criminal libel prosecutions (ten of sixty-one). More than half of the criminal libel cases were filed in counties with populations of fewer than 60,000.

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[53]Mark Preston, *The Most "Representative" State: Wisconsin*, July 27, 2006, *available at* http://www.cnn.com/2006/POLITICS/07/27/mg.thu/index.html.

[54]The political culture categorizations are from Daniel Elazar's widely cited work. DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 103–26 (3d ed. 1984).

[55]MIDDLETON & LEE, *supra* note 10, at 97.

[56]U.S. Census Bureau, Wisconsin — County Population, Housing Units, Area, and Density (2000).

Table 2
Outcomes of Criminal Libel Cases in Wisconsin, 1991–2007

Charges dropped (16)	
All charges dismissed before trial	14
Criminal libel charge dismissed during trial	2
Pleas to original charge (19)	
Guilty or no contest to original criminal libel charge	17
Not guilty by mental disease to criminal libel charge	2
Pleas bargains (21)	
Criminal libel plea bargained to lesser charge, guilty plea	10
First offender agreement, charge reduced or dismissed	7
Guilty plea after felony charge reduced to criminal libel	3
Guilty plea to felony after criminal libel charge dropped	1
Trial verdicts (4)	
Trial, defendant found guilty of criminal libel	3
Trial, defendant found not guilty of criminal libel	1
Other (1)	
Conviction overturned by Wisconsin Supreme Court	1
Total	61

The sixty-one defendants ranged in age from 16 to 75 years old, with an average age of 34. Ten of the defendants were teenagers; nine were 50 years old or older. Forty-three of the defendants (70%) were men. Although there was no way to obtain precise information about defendants' income or social class, information in the case files indicated that a majority of defendants were either students, unemployed, incarcerated, or working in low-paying jobs.[57] No defendants appeared to be wealthy. More than two-thirds of the alleged defamations (forty-two of sixty-one, or 69%) dealt with sex in one way or another. Women were the targets of the defamation in 38% of the cases, while men were the targets in 56% of the cases. The defamation in the handful of remaining cases was aimed at both women and men. Ten of the defendants (16%) were charged with more than one count of criminal libel.

The Internet appeared to be the major factor in an increase in the annual number of criminal libel prosecutions over the seventeen years under study. There were twenty-one prosecutions in Wisconsin in the first eight years under study (1991–98, inclusive), or 2.62 per year. None of the pre-1999 cases involved the Internet or e-mail in any way. In the

[57]Jobs considered low-income included part-time employment at a fast-food restaurant, part-time employment at Target, employment as a receptionist in a small-town optometrist's office, working as a substitute school bus driver, and being a clerical employee in a rural sheriff's department. About a dozen of the defendants had significant criminal histories at the time they were charged with criminal libel.

Table 3
Dominant Themes of Criminal Libel Cases in Wisconsin, 1991–2007

Purely private quarrels	37 (61%
Politics, criticism of public officials, discussion of public issues	13 (21%)
Criticism of non-public official government employees, no public issue	11 (18%)
Total cases	61 (100%)

nine years from 1999 through 2007, however, almost half of the cases (eighteen of forty, or 45%) were Internet-related in one way or another. Without the Internet-related cases, the average number of prosecutions annually in the 1999–2007 would have been 2.44, about the same as the average for 1991–98. When the Internet-related cases were included, however, the average number of criminal libel prosecutions in Wisconsin each year for 1999–2007 increased to 4.44.[58]

The widely held belief that most prosecutions for criminal libel are politically motivated is based on studies of unrepresentative sets of cases, those that reached an appellate court and/or attracted the attention of the news media. This article's review of criminal libel prosecutions in Wisconsin since the early 1990s, in contrast, revealed that only about one-fifth of the prosecutions involved political campaigns, criticism of public officials or discussion of public issues. The vast majority of criminal libel prosecutions had nothing to do with politics or public issues. Table 3 outlines the dominant themes of the Wisconsin cases.

Table 3 shows that about three-fifths of the cases (thirty-seven of sixty-one, or 61%) were related to private quarrels involving individuals who were not public officials or government employees. Many of these cases resulted from acts of communicative revenge against former romantic partners who had ended a relationship with a defendant or against former bosses who had fired defendants. Roughly another

[58]Some scholars who accept the prevailing wisdom that prosecutions for criminal libel are rare nonetheless correctly assert that there has been an increase in the number of criminal libel prosecutions since the use of the Internet became widespread. The authors of a communication law textbook published in 2007, while accepting the notion that there had been no convictions for criminal libel from 1974 until the early twenty-first century, wrote that there had been "a flurry of cases during the last five years." T. BARTON CARTER, JULIET LUSHBOUGH DEE & HARVEY L. ZUCKMAN, MASS COMMUNICATION LAW 47 (6th ed. 2007). The author of a textbook chapter published in 2008 specifically noted criminal libel cases involving on-line defamation. He wrote: "These statutes are rarely used today, but they have been applied to Internet publishers recently." Kyu Ho Youm, *Defamation*, in COMMUNICATION AND THE LAW 91, 94 (W. Wat Hopkins ed., 2009). *See also* Susan W. Brenner, *Prosecution Responses to Internet Victimization: Should Online Defamation Be Criminalized?,* 76 MISS. L.J. 705 (2007); Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 289 (2005).

one-fifth of the cases (eleven of sixty-one, or 18%) stemmed from defamatory falsehoods about government employees whose jobs were not significant enough to place them in the category of public officials.[59] None of the defamatory comments in these cases dealt with public issues. In short, 79% of the criminal libel cases were unrelated to politics, public officials, or public issues. Only about one-fifth of the cases (thirteen of sixty-one, or 21%) involved criticism of public officials or discussion of public issues. This is not to say that 21% of the prosecutions were politically motivated, however. Many of the cases of criticism of public officials did not focus on public issues. This finding is consistent with that of a 1956 study which found that "even the cases that arose out of political contests were usually more private than public."[60]

PRIVATE QUARRELS AND ISSUES

In the cases reviewed, criminal libel was most often prosecuted when one participant in a purely private quarrel violated the boundaries of socially acceptable disputing behavior. Many of the defamatory communications were disseminated at the point where a romantic or employment relationship had been damaged beyond repair.

Relationship-Related Revenge

People who terminated romantic relationships were common targets of the kind of defamation that can lead to prosecution for criminal libel. In March 1993, for example, a teaching assistant at the University of Wisconsin-Eau Claire ended her relationship with her boyfriend. In May, he distributed a letter to all of the faculty members in her department saying that she was sleeping with one of her students. The accusation was false; the man was charged with criminal libel. He told police he wrote and circulated the letter because he was angry at the

[59]The definition of "public official" from *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) was used ("[T]he 'public official' designation applies, at the very least, to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."). The definition was interpreted as broadly as possible to ensure that the number of cases that resulted from criticism of public officials or discussion of public issues was not understated. The study's "public official" cases included those in which the people who were allegedly defamed were a village president, a candidate for village president, a member of a county board, a director of the municipal emergency medical services department in a small city, a county attorney, a county clerk of court, a small-town postmaster who was also his community's zoning administrator, a small-town police chief, two county judges, a district attorney, an assistant principal of a high school, and a school official whose title was not specified in the court file.

[60]Leflar, *supra* note 44, at 985.

woman for breaking up with him. The defendant pleaded guilty to two counts of criminal libel and was put on two years probation.[61] Three years later, at a different University of Wisconsin campus, a student broke up with her boyfriend. In response, he distributed several copies of a videotape showing her nude. He told police he did it because he was angry at her. The initial charge of criminal libel was dropped in return for the defendant's agreement to plead guilty to disorderly conduct.[62] The justice system was not so lenient with a 17-year-old who videotaped himself and his 16-year-old girlfriend having sex. The girl was unaware that the act was being taped. The boy showed the videotape to at least eight of his friends. When the girl's parents heard about the video, they called police. Initial charges of sexual assault and bail jumping (because the incident violated the 17-year-old's probation from a previous case) were dropped in return for his agreement to plead guilty to criminal libel. He was placed on three years probation.[63] A variation on the same theme was evident in the case of a 41-year-old man who put a photo of his naked ex-girlfriend on six T-shirts. He distributed them at a small-town corn roast. The woman heard about the T-shirts and called police. The man was charged with several crimes, including two counts of criminal libel and a felony count of illegally exhibiting a representation of nudity.[64] In return for more serious charges being dismissed, the defendant agreed to plead guilty to the two misdemeanor counts of criminal libel. He was sentenced to four months in jail.[65]

Three of the relationship-related revenge cases involved false statements that someone was HIV-positive or had AIDS. In March 1992, a couple of months after her boyfriend had broken up with her, a 24-year-old woman told five female acquaintances that the former boyfriend was HIV-positive. It was a lie, and the woman was charged with criminal libel and eight counts of violating an injunction against harassing the former boyfriend. The criminal libel charge and five of the harassment counts were dropped in return for the woman's agreement to plead guilty to three counts of harassment. She was put on two years probation.[66] A

[61]State v. Brusen, No. 1993CM1033 (Circuit Court, Eau Claire County, 1993).

[62]State v. Krohn, No. 1996CM180 (Circuit Court, Grant County, 1996).

[63]State v. Mathison, No. 1992CF546 (Circuit Court, La Crosse County, 1992). *See also* Associated Press, *Judge Calls Teen 'Sick' in Sex-video Case*, MADISON CAP. TIMES, May 29, 1992, at 1A; Associated Press, *Judge Berates Youth Over Sex Videotape*, WIS. ST. J., May 30, 1992, at 2D.

[64]WIS. STAT. §942.09(2)(c) (2001).

[65]State v. Jacob, No. 2003CF551 (Circuit Court, La Crosse County, 2003). Although the defendant did not contest the charge, it is worth noting that the truth of the naked images would have been a valid defense only if the images had been "communicated with good motives and for justifiable ends." WIS. STAT. §942.01(3) (2007).

[66]State v. Maloney, No. 1992CM978 (Circuit Court, Waukesha County, 1992).

decade later, a man whose girlfriend had broken up with him went to the fast-food restaurant where she worked. While he was standing his line waiting to place his order, he began telling everyone within listening range that the woman — who was on duty at the restaurant during the incident — had AIDS. She didn't, and the man was charged with criminal libel. He pleaded guilty, and was sentenced to sixty days in jail.[67] A slightly more complicated case unfolded in September 2001, when a 23-year-old woman whose boyfriend had been seeing another woman sent a letter to several acquaintances claiming that the other woman was HIV-positive. It was not true, and police were contacted. The defendant admitted sending the letter. Her statement to police said: "After Corey [the boyfriend] admitted to spending the night with Nicole [the other woman], I knew I had to do something to save Corey and my relationship. That is when I decided to write a letter about Nicole being HIV-positive." The defendant did not explain why she thought telling people that her two-timing boyfriend had been exposed to HIV would rekindle their romance. The criminal libel charge against the woman was dismissed in return for her agreement to plead guilty to disorderly conduct.[68]

By the late 1990s, use of the Internet had become widespread, and the new medium became a vehicle for the spread of revenge-related defamation. An Internet-related criminal libel charge in a suburb of Wisconsin's biggest city attracted the attention of news organizations, both for the presumed novelty of the legal action[69] and for the nature of the facts, which the prosecutor called "a love triangle gone bad."[70] A 58-year-old man had rummaged through the purse of his 26-year-old former girlfriend, finding nude pictures of her and her new boyfriend. He posted the pictures on *alt.sex.bondage*, an Internet newsgroup site. The post included the couple's contact information and a message saying that they wished to engage in sadomasochistic activity. The defendant challenged the resulting criminal libel charge on First Amendment grounds; the prosecutor expressed concern that an appellate court might find the statute to be unconstitutional.[71] The result was that the charge was dismissed in return for the defendant's agreement to plead guilty to

[67]State v. Patraw, No. 2002CM318 (Circuit Court, La Crosse County, 2002).

[68]State v. Pomeroy, No. 2001CM462 (Circuit Court, Marinette County, 2001).

[69]The chair of the Criminal Law Section of the Wisconsin Bar Association was quoted as saying that the charge was "quite unique." He added: "I can't recall ever seeing a criminal defamation case in Wisconsin." Mike Johnson & Lisa Sink, *Pictures Bring Defamation Charge*, MILWAUKEE J. SENTINEL, Sept. 17, 1999, at 1A.

[70]Lisa Sink & Jeanette Hurt, *Posting Nude Photos of Ex-girlfriend Brings Fine*, MILWAUKEE J. SENTINEL, May 22, 2001, at 1B.

[71]*Id*.

disorderly conduct.[72] Wisconsin's largest newspaper depicted the case as "highly uncommon."[73] Oddly, the same newspaper ignored a similar case a little more than a year later from the same suburban county. This case involved a woman who refused to continue to see a man she had been dating. He put a post on an Internet sex site saying that she was eager for various kinds of kinky sexual activity. She began to get unwanted phone calls and e-mails proposing such activity. He was charged with criminal libel. Like the previous year's defendant from the same county, he challenged the statute on First Amendment grounds. The prosecutor responded as he had the previous year, dismissing the criminal libel charge in return for the defendant's agreement to plead guilty to disorderly conduct.[74]

First Amendment challenges to criminal libel prosecutions were the exception rather than the rule, however.[75] A man from northern Wisconsin created a fake page on MySpace.com, a social networking site popular among teenagers and young adults, about his former girlfriend (who was also the mother of his child). He was angry because she had taken legal action against him to get child support. He placed nude photos of her on the MySpace page, which he named "Juneslut." The woman began getting unwanted e-mails proposing sex, so she called the police. Her ex-boyfriend was charged with felony misappropriation of identity[76] in addition to criminal libel and other misdemeanors. The misdemeanor charges were dropped in return for the defendant's agreement to plead guilty to the misappropriation charge. He was sentenced to twenty days in jail and placed on three years probation.[77]

Individuals sometimes did strange things to lift the spirits of the people whose hearts they had broken. In May 2007, according to a criminal complaint, a woman "willingly participated in a live webcam show that involved her getting naked and masturbating into the camera and exposing her nude body to the camera. She said she and Robert had broken up about that time but she did it because she felt sorry for him."[78] Not surprisingly, Robert saved the webcam show on his computer and sent images from the show to acquaintances. When the woman learned that her friends on MySpace had received nude pictures of her, she text-messaged Robert to find out why he had shared the images with others.

[72]State v. Karnstein, No. 1999CM2222 (Circuit Court, Waukesha County, 1999).

[73]Johnson & Sink, *supra* note 69, at 1A.

[74]State v. Frank, No. 2001CM38 (Circuit Court, Waukesha County, 2001).

[75]Only nine of the sixty-one criminal libel defendants in our study (15%) made a First Amendment argument. *See infra* notes 145–150 and accompanying text.

[76]WIS. STAT. §943.201(2)(c) (2005).

[77]State v. Bauer, No. 2006CF959 (Circuit Court, Eau Claire County, 2006).

[78]State v. Spiro, No. 2007CM910 (Circuit Court, La Crosse County, 2007).

His response: "You are a slut, you deserve it. And the reason I did it was because you hurt me and I wanted to hurt you too."[79] Robert was charged with criminal libel and unlawful use of a computer.[80] The case was diverted to a first-offender deferred-prosecution program, with no formal finding of guilt.

Getting Back at the Boss

Several of the criminal libel cases in Wisconsin had their roots in strained relationships between employees and their bosses — often bosses who had fired employees. In 2000, a 37-year-old man was fired by his female boss for stealing merchandise from the company's warehouse. The man decided to exact revenge by making a post in his former boss' name to an Internet site called *sexontheside.com*. Among other things, the post said the woman, a married mother of two children, wanted someone "to make me there [sic] slut for the night." The man pleaded guilty to one count of criminal libel, and was sentenced to fifteen days in jail, 100 hours of community service, and two years of probation. He also was ordered to pay $1,350 in costs and restitution.[81] In a similar case a few years later, a man who had been fired from his job at a coffee shop in northern Wisconsin decided to take revenge on his ex-boss by creating and posting a fake ad on Yahoo! Personals. The ad purported to be from the ex-boss. It said that he was gay, that he was looking for men to date, and that he didn't believe in God. The ex-employee was charged with criminal libel, a misdemeanor, and with misappropriation of identity, a felony. The felony charge was dismissed in return for the defendant's agreement to plead no contest to criminal libel. He was fined $1,000 and ordered to pay $500 restitution.[82]

One of the most sensational criminal libel cases involved an employee who did not like his boss. The boss was a public official (the municipal emergency services director in a small city in southern Wisconsin). The employee resented his boss' shining image in the community. He knew his boss' e-mail password, and surreptitiously read the boss' personal e-mail. He found a series of e-mails strongly implying a sexual affair between the boss, who was married, and a woman other than his wife. The employee sent the e-mails to the boss' wife and to several acquaintances

[79]*Id*.

[80]WIS. STAT. §947.0125(1)(d) (2005).

[81]State v. Dabbert, No. 2000CM1563 (Circuit Court, Waukesha County, 2000). *See also* Lisa Sink, *Man Convicted of Posting Ex-boss' Name on Sex Site*, MILWAUKEE J. SENTINEL, Aug. 11, 2000, at 15B; Lisa Sink & Linda Spice, *Man Charged With Defamation*, MILWAUKEE J. SENTINEL, June 7, 2000, at 15B.

[82]State v. Kunze, No. 2004CF23 (Circuit Court, Forest County, 2004).

of the boss. The day after the e-mails were sent, the boss shot and killed himself in his garage.[83] The employee was charged with one count of criminal libel, one count of misappropriating another's identity for the purpose of harming his or her reputation,[84] two counts of obstructing an officer by lying to police,[85] and two counts of computer crime.[86] The illicit sex and suicide aspects of the case led to considerable media coverage.[87] The criminal libel charge in the case was dismissed because the defamation involved truthful accusations against a public official, which are protected by the First Amendment.[88] The defendant also sought dismissal of the charge of misappropriating the dead man's identity for the purpose of harming his reputation, claiming that the statute interfered with his constitutional right to disseminate truthful criticism about a public official. The trial court agreed with the defendant and dismissed the charge,[89] but the court of appeals unanimously overruled the trial court and reinstated the charge.[90] The defendant appealed the court of appeals reinstatement of the charge to the Wisconsin Supreme Court, which in July 2008 agreed to hear the appeal during its 2008–09 term.[91]

Unneighborly Behavior

Communicative revenge related to either romantic or employment relationships accounted for roughly one-half of the criminal libel cases that stemmed from purely private quarrels. The other half of the cases in the private-quarrel category depicted a grab-bag of deviance that required a broad label. The phrase "unneighborly behavior" was chosen

[83]State v. Baron, No. 2006CF496 (Circuit Court, Jefferson County, 2006).

[84]WIS. STAT. §943.201(2)(c) (2005).

[85]WIS. STAT. §946.41(1) (2005).

[86]WIS. STAT. §§943.70(2)(a)3; 943.70(2)(a)6 (2005).

[87]*See, e.g.,* Associated Press, *DA: Gossip Led to Suicide*, MADISON CAP. TIMES, Sept. 28, 2006, at A3; Associated Press, *Suicide Linked to Hacker Gossip*, WIS. ST. J., Sept. 29, 2006, at B3; Jacqueline Seibel, *Man Charged With Defamation After Boss' Suicide; Ex-Jefferson Staffer Routed Private E-mails, Officials Say*, MILWAUKEE J. SENTINEL, Sept. 28, 2006, at B1.

[88]*See* Jacqueline Seibel, *Charge Dropped in Affair E-mails; Defamation Statute Unconstitutional, District Attorney Says*, MILWAUKEE J. SENTINEL, Mar. 7, 2007, at B3.

[89]*See* Jacqueline Seibel, *State Appeals ID Theft Ruling; Case Involves E-mails About Affair*, MILWAUKEE J. SENTINEL, Sept. 10, 2007, at B5.

[90]State v. Baron, 754 N.W.2d 175 (Wis. Ct. App. 2008). *See also* Ryan J. Foley, *Worker Can Face Identity Theft Charges; Man's Boss Committed Suicide After E-mails*, WIS. ST. J., May 30, 2008, at B5; Marie Rohde, *ID Theft Charge Should Stand, Court Rules; Former EMT Sent E-mails Implying Boss Had an Affair*, MILWAUKEE J. SENTINEL, May 30, 2008, at B3.

[91]State v. Baron, 758 N.W.2d 90 (Wis. 2008).

to describe this dreary collection of mean-spirited acts in small towns.[92] Some of the behavior that led to these prosecutions may have been motivated by revenge, though nothing in the court files clearly indicated such a motive. In any case, the behavior depicted in the case files is hardly uplifting. A few examples will suffice to evoke the nature of these conflicts.

In 1992, police discovered that the owner of a photo-developing store in a city in western Wisconsin for years had been secretly making copies of photos that his customers brought in to be developed. The photos depicted people semi-nude, nude or engaged in sexual activity. The store owner periodically showed the collection of pictures to his friends, store employees and even the mailman. He was charged with criminal libel.[93] The trial court dismissed the charge, ruling that the criminal complaint failed to demonstrate that a photograph was a form of communication or that the photos were defamatory.[94] The state appealed the dismissal of the charge to the Wisconsin Court of Appeals, which ruled that photographs are forms of communication and that pictures of persons who are nude and/or engaged in sexual activity can have a defamatory effect.[95] The charge was reinstated and the case was returned to the trial court, which in 1994 dismissed the charge once and for all, ruling that the affidavit in support of the search warrant was insufficient to show that the items seized were related to any violation of the law.

In 1996, a small-town dispute found its way into chatter on citizens' band radio. A 33-year-old woman repeatedly made derogatory comments on the CB about another woman, saying that she was a whore who enjoyed being gang-banged. Not surprisingly, the object of these sentiments took offense. She recorded the comments and took the tape to police. When confronted with the evidence, the 33-year-old admitted making the comments. The criminal libel charge against her was dismissed in return for her agreement to plead guilty to disorderly conduct.[96]

In August 1998, police in a small town in northern Wisconsin got a call from a man who said that one of his neighbors was telling children that

[92]Robert Leflar's 1956 study used the heading "Gossip, female unchastity, and general nastiness" to describe a similar grouping of cases. Leflar, *supra* note 44, at 1009.

[93]State v. Stebner, No. 1992CM457 (Circuit Court, La Crosse County, 1992).

[94]*Keeping Customers' Sexual Photos Ruled Not Defamatory*, WIS. ST. J., Apr. 27, 1992, at 3D.

[95]State v. Stebner, 506 N.W.2d 170 (Wis. Ct. App. 1993), *rev. denied*, 508 N.W. 2d 422 (Wis. 1993).

[96]State v. Diderrich, No. 1996CM1292 (Circuit Court, La Crosse County, 1996). *See also Woman Faces Charges Over CB Radio Chatter*, WIS. ST. J., Sept. 20, 1996, at B3; *CB Radio User Accused of Defaming Others*, MILWAUKEE J. SENTINEL, Sept. 21, 1996, at B5.

he was a "bad person, a sex offender, a pervert, and a fag." The neighbor, a 53-year-old man, acknowledged making such comments; he told police that he thought they were justified. Police had previously advised him to stop harassing his neighbor. The 53-year-old was charged with criminal libel, contributing to the delinquency of a child,[97] and disorderly conduct. He agreed to plead guilty to disorderly conduct in return for the dismissal of the other charges. He was fined $330.[98] The same year in another small town, a 49-year-old woman who was getting divorced from her husband sent him a letter accusing another woman he had been seeing of stealing $24,000 in cash he kept hidden behind a toilet. She also sent an e-mail to the other woman's father, asking: "Does your daughter still have my husband's money?" The police were contacted. They soon discovered that the estranged wife had stolen the money herself. She was charged with several crimes, including two counts of criminal libel, all of which were later dismissed[99] as the couple's divorce proceedings dragged on for years.[100]

Teenagers were not immune to the lure of unneighborly behavior. A 17-year-old high school girl circulated an e-mail describing a fellow student as "nasty white trash" and a "teacher fucker." The e-mail urged its recipients to "let all your friends know about this slut." After school administrators determined who was circulating the e-mail, they called the police. The girl was charged with criminal libel. In a plea agreement in which she acknowledged circulating the e-mail, the charge was reduced to disorderly conduct. The girl pleaded guilty and was ordered to pay $367 in fines and costs.[101]

A final example of unneighborly behavior involved people who worked at competing gas station/convenience stores in a rural community. The Citgo station was advertising a "brat fry"[102] with banners posted around the community. Several of the banners were stolen, and one was defaced with the words "Cheryl Renel's Get Sick Quick Grease Fry." Renel worked at the Citgo station. Police questioned the owner of the local Amoco station, who admitted putting up the offending sign. He was charged with theft, criminal damage to property, and criminal libel. He pleaded no contest to all three charges. The judge placed him on a year's probation and ordered him to pay $315 in fines and costs.[103]

[97]WIS. STAT. §948.40(1) (1997).

[98]State v. Bassette, No. 1998CM923 (Circuit Court, Chippewa County, 1998).

[99]State v. Deeny, No. 1999CF98 (Circuit Court, Monroe County, 1999).

[100]Deeny v. Deeny, No. 1996FA198 (Circuit Court, Monroe County, 1996).

[101]State v. Coppelman, No. 2004CM1589 (Circuit Court, Kenosha County, 2004).

[102]A "brat" (the word rhymes with "hot") is a bratwurst, a German-style sausage popular throughout Wisconsin.

[103]State v. Warner, No. 2000CM469 (Circuit Court, Shawano County, 2000).

Delusion-Driven Defamation

Three defendants in the study had emotional problems that caused them to make outrageous and clearly false accusations against people in their communities. The defendants apparently believed that the accusations were true. A woman in a small town in northern Wisconsin wrote a series of "bizarre and threatening" letters to a doctor whose patient she had been. The letters accused the doctor and his colleagues in the local clinic of having used dirty tools in treating her, of having left latex in her uterus, of having placed "filthy bones" into her uterus, and of having put "monsters" into her body.[104] The 29-year-old woman was charged with criminal libel. She pleaded no contest and was found not guilty by reason of a mental disease or defect. She was committed to up to nine months of treatment in a state mental hospital.[105]

The other case of this kind had two defendants, a married couple from a small community in northwestern Wisconsin. For several months in late 1997 and early 1998, the two circulated accusations that a local grocery-store owner was promoting child pornography by selling greeting cards depicting partially nude children. The cards were of a type commonly found in stores throughout the United States. The couple posted cardboard signs around the community accusing the grocery-store owner of child pornography. They also placed typewritten notes containing the accusation in more than 100 hymn books at the grocery-store owner's church, and tucked notes inside greeting cards in various local businesses. The motives for the campaign were not entirely clear, though the woman told police that she did not think that anyone should publicly display photographs of children. After the initial contact with police, the couple agreed to stop circulating their accusations, but soon the messages began to reappear. The man and woman were both charged with criminal libel. They pleaded not guilty to the charges, and read the Bible during their four-hour bench trial.[106] They were found guilty, and sentenced to two years of probation and 240 hours of community service each.[107] Their appeals in the state and federal courts were unsuccessful.[108]

[104]State v. Stariha, No. 1995CM209 (Circuit Court, Washburn County, 1995).

[105]*Id*.

[106]*Couple Convicted of Defaming Grocer by Spreading Claim That He Sold Porn*, MILWAUKEE J. SENTINEL, Oct. 24, 1999, at 2.

[107]State v. L. Wolf, No. 1998CM428 (Circuit Court, Chippewa County, 1998); State v. B. Wolf, No. 1998CM429 (Circuit Court, Chippewa County, 1998).

[108]Larry J. Wolf and Belinda C. Wolf v. Timothy F. Scobie *et al.*, 28 Fed. Appx. 545 (7th Cir. 2002); State v. Larry J. and Belinda C. Wolf, 617 N.W.2d 678 (Wis. Ct. App. 2000).

CRITICISM OF PUBLIC OFFICIALS

As noted earlier, only about one-fifth of criminal libel prosecutions (thirteen of sixty-one) since the early 1990s in Wisconsin had roots in criticism of public officials or discussion of public issues, contradicting the widespread belief that most criminal libel prosecutions stem from political disagreements or discussion of public issues. That said, several cases did deal with politics or public issues. Four of the thirteen cases involved crude parodies about political candidates.

Three of these four parody-related prosecutions resulted from a single prank. On April Fools' Day in 2001, three men distributed about 200 fliers that made wild accusations against a candidate for president of the village where they all lived. The fliers said that the candidate had served on death row, had been fired from a job at a public school for molesting children, and had been involved in lynchings as a member of the Ku Klux Klan. In addition, the fliers depicted the candidate's head atop a nude male body. The nude body had been taken from a gay Web site; one of the defendants had used a digital editing program to insert the candidate's head on top of the body. All of the defamatory assertions were false; the three perpetrators were charged with both criminal defamation and disorderly conduct.[109]

Each defendant chose a different legal strategy. One pleaded guilty to criminal libel and disorderly conduct; he was sentenced to forty-five days in jail and two years probation, with a fine and costs of $765.[110] A second defendant negotiated, pleading guilty to criminal libel in return for no jail time and the dismissal of the disorderly conduct charge. He was sentenced to twenty-four hours of community service work and $1,345 in fines and costs.[111] The third defendant pleaded not guilty and demanded a jury trial on both counts. His trial was notable for the fact that his lawyer presented a defense based on the First Amendment, asserting that the flier was a satiric parody not intended to be taken seriously, and thus constituted protected speech.[112] The jury appeared to have been sympathetic to this argument, because it acquitted the defendant of criminal libel (but found him guilty of disorderly conduct). He was ordered to pay a total of $1,289 in fines and costs.[113] Despite the

[109]State v. Gocek, No. 2001CM321 (Circuit Court, Walworth County, 2001); State v. Kuss, No. 2001CM323 (Circuit Court, Walworth County, 2001); State v. Mann, No. 2001CM322 (Circuit Court, Walworth County, 2001).

[110]State v. Mann, No. 2001CM322 (Circuit Court, Walworth County, 2001).

[111]State v. Gocek, No. 2001CM321 (Circuit Court, Walworth County, 2001).

[112]State v. Kuss, No. 2001CM323 (Circuit Court, Walworth County, 2001) (citing Hustler v. Falwell, 485 U.S. 46 (1988)).

[113]*Id*.

jury trial and the First Amendment defense, none of Wisconsin's major newspapers reported on the case.

The other case involving an anonymous parody and a political candidate was from Madison, the state capital. The two main characters in this drama were political rivals Patrick DePula and Don Eggert. DePula had been a member of the Dane County Board. When he ran for re-election in 2002, Eggert defeated him. In 2004, Eggert won a second term on the board. Two days after the election DePula, who had learned *via* Internet searches that Eggert had made posts in the 1990s to *alt.sex.bestiality*, wrote an e-mail to the county executive and others, making it appear that the e-mail came from Eggert. The e-mail proclaimed Eggert's "affinity for animals of all types," and asked the county executive for an appointment to the county zoo commission. The e-mail asked several questions about the prerogatives of zoo commission members, including, "As a Zoo Commission member, do I get to spend any time alone with the animals?" and "Can I sleep over with the more cuddly ones?"[114] DePula was charged with identity theft for the purposes of harming the reputation of the person whose identity was appropriated, a felony.[115] He mounted a First Amendment defense, saying that his message was a parody similar to the political satire featured on "The Daily Show" with Jon Stewart,[116] but the trial judge rejected the constitutional argument.[117] DePula lacked the resources to pursue an appeal of the judge's ruling on the First Amendment defense.[118] He agreed to plead guilty to criminal libel, a misdemeanor. He was fined $1,000 and ordered to do 250 hours of community service.

All four of these cases — those of the three men who produced the crude flier about the candidate for village president, and that of DePula — took place in the context of local elections, but none of the defamatory messages focused on local political issues. Instead, the defendants, intending to be anonymous, pulled images and information from the

[114]State v. DePula, No. 2005CF129 (Circuit Court, Dane County, 2005).

[115]WIS. STAT. §943.201(2)(c) (2003).

[116]In DePula's own words:

> I have never disseminated any information that I believe to be untrue. Though my actions might be described as juvenile, in poor taste, or just plain stupid, I truly believe that the posts made to various sex sites, including alt.sex.bestiality, were made by Supervisor Don Eggert. Though some may find it distasteful to disseminate such material, I believe it to be truthful and well within my constitutional rights to speak about it, make fun of it, criticize or parody it.

Patrick DePula, statement at sentencing, July 16, 2004, *available at* http://www.channel3000.com/print/3533183/detail.html.

[117]*See* Steven Elbow, *DePula Pleads Guilty to E-mail Defamation*, MADISON CAP. TIMES, Nov. 15, 2005, at C1.

[118]*See* Ed Treleven, *DePula Pleads to Defamation in E-mail Case*, WIS. ST. J., Nov. 15, 2005, at B1.

Internet and used them to concoct parodies that alleged sexual and other forms of deviance. All four of these cases led to convictions, three for criminal libel and one for disorderly conduct.

Several of the remaining nine prosecutions involving criticism of public officials had their roots in small-town politics, and in at least some instances the prosecutions were clear attempts by people in power to stifle criticism. In such prosecutions the charges usually were dismissed after the defendant made a First Amendment argument. In a 2003 case, the village president of a community of about 1,000 people asked the police chief to investigate a letter to the editor in a local weekly newspaper. The letter was critical of the village president's performance in office.[119] A charge of criminal libel was filed against the 68-year-old author of the letter. The defendant represented himself, filing a handwritten motion for dismissal of the charge on First Amendment grounds. The court granted the request in January 2004.[120] Five months later the local powers-that-be adopted a new strategy, filing two charges of giving false information for publication[121] against the author of the letter. Those charges also were dismissed on First Amendment grounds.[122] Another case involving a critic of small-town authority had a similar outcome. A 67-year-old man in a small city in northern Wisconsin published a pamphlet alleging corrupt behavior on the part of two Lincoln County officials and criticizing the publisher of the local newspaper. The Lincoln County district attorney charged the man with three counts of criminal libel and three counts of giving false information for publication.[123] The defendant made a First Amendment argument and all of the charges were dismissed, at least in part because there was a history of conflict between the defendant and the district attorney. The defendant had filed countless civil actions against public officials over the years.[124] The district attorney had physically assaulted the defendant at the courthouse and was eventually removed from office for that confrontation as well as for another involving a referee at a high-school basketball game.[125]

One case of alleged libel of law enforcement or judicial personnel involved allegations of non-sexual police misconduct in a small town.

[119] *See* Robert J. Schmitt, Letter to the Editor, *Olson Doesn't Substantiate Claims*, DUNN COUNTY NEWS, Jan. 5, 2003 (photocopy of newspaper clipping without page number in court file of State v. Schmitt, No. 2003CM108 (Circuit Court, Dunn County, 2003)).

[120] State v. Schmitt, No. 2003CM108 (Circuit Court, Dunn County, 2003).

[121] WIS. STAT. §942.03 (2003).

[122] State v. Schmitt, No. 2004CM290 (Circuit Court, Dunn County, 2004).

[123] State v. Rady, No. 1995CM109 (Circuit Court, Lincoln County, 1995).

[124] *See* Robert Imrie, *District Attorney's Temper at Issue in Removal Hearing*, WIS. ST. J., June 22, 1996, at B3.

[125] In the Matter of Disciplinary Proceedings Against James F. Blask, 573 N.W.2d 835 (Wis. 1998).

In 2000, a 50-year-old man accused police officers of promoting gang activity at a local elementary school. He also said he had seen police officers smoking marijuana in a restaurant. Police unsuccessfully sought a restraining order against the man; the request was denied on First Amendment grounds.[126] The man then was charged with four counts of criminal libel. He insisted on a jury trial. At the end of the second day of the trial, the defense attorney moved for a mistrial on First Amendment grounds. The judge granted the request.[127] The dismissal of the charges meant that the truth or falsity of the claims was never determined.

Another case had to do with long-standing rumors that a number of prominent citizens in a rural county were involved in dealing illegal drugs. In 2000, the rumors were spread *via* the Internet and e-mails to local newspapers and radio stations. A judge wrote an article for the local weekly paper and appeared on the county seat's radio station to deny the rumors.[128] Almost four years later the rumors resurfaced when a petition was circulated on bulletin boards and *via* e-mail at the local community college, where the judge taught a course in American government. The petition was written and signed by a 31-year-old student who had a lengthy criminal record that included convictions on drug charges. The petition said, in part: "Many of the younger students and those from out of the area may not have heard the 'allegations' concerning Judge Leineweber and District Attorney Andrew Sharp. . . . Many locals, including myself, believe the judge and DA are involved with cocaine, as well as other forms of corruption."[129]

When police contacted the man whose name was on the petition, he acknowledged writing and posting it and said that he had evidence to support the accusations. His motive was not clear, but revenge was a distinct possibility because the district attorney had prosecuted him and the judge had sentenced him in previous cases for negligent operation of a motor vehicle,[130] criminal trespass and criminal damage to property,[131] and possession of THC.[132] The targets of the defamatory comments were the local judge and prosecutor, so a special prosecutor from another county filed the criminal libel charges against the defendant, and a judge from another county presided over the case. In

[126]*See* Associated Press, *No Restraining Order for Man Critical of Cops*, WIS. ST. J., Feb. 6, 2000, at 7B.

[127]State v. Groskreutz, No. 2000CM153 (Circuit Court, Waupaca County, 2000).

[128]Joseph Koelsch, *False Rumors About Prominent Richland County People Probed: Those Being Targeted are Public Officials and Business Leaders*, WIS. ST. J., Sept. 16, 2000, at B3.

[129]State v. McQuillan, No. 2004CM96 (Circuit Court, Richland County, 2004).

[130]State v. McQuillan, No. 2000CF27 (Circuit Court, Richland County, 2000).

[131]State v. McQuillan, No. 2001CM164 (Circuit Court, Richland County, 2001).

[132]State v. McQuillan, No. 2002CM301 (Circuit Court, Richland County, 2002).

November 2004, the defendant, who in the meantime had been convicted of felony drug charges in another county and had been sentenced to a year in jail, pleaded no contest to one charge of criminal libel. Given his incarceration on more serious charges, his sentence for criminal libel was relatively light. He was ordered to perform eighty hours of community service and to write letters of apology to the judge and the district attorney.

Finally, two cases placed in the "public official" category were about as far removed from discussion of public affairs as possible. Both involved high-school students spreading lies about school officials. In 1998, a 17-year-old girl told police that an assistant principal had fondled her breast. Police concluded that the girl's story was a lie, and she was charged with obstructing an officer[133] and criminal libel. She pleaded no contest to criminal libel and was sentenced to a year's probation and forty hours of community service.[134] In 2003, a 17-year-old boy created and distributed an illustrated article describing a school official as having been caught masturbating in a bathroom at the local high school. The story was not true, and the boy was charged with criminal libel. The charge was dismissed pursuant to a deferred prosecution agreement that required the defendant to apologize and to do seventy-five hours of community service.[135]

NON-PUBLIC-OFFICIAL GOVERNMENT EMPLOYEES

Almost one-fifth of the cases in this study resulted from criticisms of government employees who were not public officials. None of the criticisms focused on issues of public concern that were being discussed in a community. Rather, most of them simply seemed to be malicious lies. Several of these criminal libel prosecutions stemmed from accusations of misconduct against police or other people involved in law enforcement or corrections. None of the accusations appeared to be true.

In two of the cases, defendants made false accusations that police officers sexually assaulted them after they had been arrested. One such case happened in 1996, when a 21-year-old Illinois woman was stopped for drunk driving just north of the Illinois state line. The driver flunked field sobriety tests and was placed into a squad car to be taken to jail. Upon arrival at the jail, the woman stated that the deputies had raped her. They had done nothing of the kind, and she was charged with criminal libel. She pleaded no contest and was sentenced to ninety days in

[133]WIS. STAT. §946.41(1) (1997).
[134]State v. Oleson, No. 1998CM234 (Circuit Court, Racine County, 1998).
[135]State v. Heuer, No. 2003CM778 (Circuit Court, La Crosse County, 2003).

jail.[136] The other case of this type involved a 39-year-old man whom police arrested for domestic abuse on charges he had assaulted his former girlfriend. After the suspect was handcuffed a police officer began a pat-down search. The suspect said to him, "Don't touch my nuts." The officer wrote in his report: "Due to this statement as well as the drug paraphernalia seen in the apartment and knife, I did a thorough pat down search." The suspect told several people, including a hospital receptionist and a doctor, that the police officer had sexually assaulted him. The ensuing criminal libel charges were dropped as part of a plea bargain in which the defendant pleaded guilty to battery.[137]

Two cases involved untrue allegations by men that women mandated by a court to treat or supervise them had engaged in sexual activity with them. One case involved a 17-year-old who was on probation. He told people his female probation agent had engaged in consensual sex with him. If the story had been true, the act would have constituted serious misconduct by the probation agent. However, the teen later admitted that he had lied. He pleaded guilty to a charge of criminal libel and was sentenced to two years of probation.[138] The other case came about when a 33-year-old man with five drunk-driving convictions told social services personnel that he didn't want to see a female alcohol/drug abuse counselor as part of his court-ordered treatment because she had previously coerced him into a sexual relationship. He later acknowledged to police that he had lied: There had been no coercion and no sexual relationship. He pleaded no contest to a charge of criminal libel and was sentenced to twenty days in jail, two years of probation, and additional alcohol/drug abuse treatment.[139]

A final case involving allegations of sexual misconduct against law enforcement personnel stemmed from material that appeared on a social networking Internet site popular among teenagers and young adults. An 18-year-old high school student placed a fake profile of a police officer assigned to his school on MySpace. The profile said that the officer enjoyed child pornography and hitting on underage girls, among other things. The teenager admitted that he had created the profile and fabricated the statements. The criminal libel charge was dismissed in return for the youth's agreement to plead guilty to disorderly conduct and to pay a fine of $150.[140]

[136]State v. Redfern, No. 1996CM1262 (Circuit Court, Kenosha County, 1996).
[137]State v. Podeweltz, No. 2004CM313 (Circuit Court, Lincoln County, 2004).
[138]State v. Davis, No. 2000CM352 (Circuit Court, Lincoln County, 2000).
[139]State v. Oium, No. 2005CM1076 (Circuit Court, Monroe County, 2005).
[140]State v. Bachert, No. 2007CM1559 (Circuit Court, Waukesha County, 2007). *See also* Mike Johnson, *Man Charged With Defamation: He's Accused of Posting Fake Web Material About New Berlin Officer*, MILWAUKEE J. SENTINEL, June 20, 2007, at B3.

Although most cases involving criticism of government employees involved false reports of inappropriate sexual activity, a few did not. For example, in 2000 an anonymous phone call alerted officials in a rural school district that one of the district's full-time school bus drivers was selling drugs to students. Police were contacted and, indeed, found marijuana plainly visible in the bus driver's car parked on school grounds. They pursued their investigation and soon learned that the anonymous phone call had come from one of the district's substitute bus drivers. He confessed not only to making the phone call, but to planting the marijuana in the full-time employee's car. The motive for the substitute driver's crime? He wanted to become a full-time school bus driver, but none of the full-time drivers planned to leave their jobs. He thought if he could cause a full-time driver to be fired, he would be hired to fill the vacancy. The substitute driver pleaded no contest to criminal libel and was sentenced to eight days in jail and forty hours of community service.[141]

DISCUSSION

The research presented in this article suggests that criminal libel is both more important and less important than previously believed. Criminal libel is more important because it is prosecuted far more often than scholars, including the authors of major communication law textbooks, have realized. If patterns of prosecution in other states with criminal libel statutes are similar to those in Wisconsin, the number of criminal libel cases may be many times greater than prior studies of criminal have indicated. What is more, a fairly high proportion of the criminal cases result in convictions.[142] This finding suggests that authors of communication law textbooks may wish to consider revising, and perhaps expanding, their discussions of criminal libel in future editions.[143]

While criminal libel is more important in a quantitative sense than previously realized, it also seems to be less important as a threat to political expression than many scholars have asserted. Very few prosecutions in Wisconsin represented attempts to stifle political dissent. People who claim that most criminal libel prosecutions are politically motivated appear to be victims of research methods which fail to locate cases that do not reach an appellate court or attract the attention

[141]State v. Hass, No. 2000CM334 (Circuit Court, Trempealeau County, 2000).

[142]*See supra* notes 55–58 and accompanying text.

[143]Communication law textbooks published before the *Garrison* decision in 1964 often devoted a considerable amount of space to criminal libel. *See*, *e.g.*, FRANK THAYER, LEGAL CONTROL OF THE PRESS 319–31 (4th ed. 1962) (covering "Libel as a Crime" and "Special Characteristics in Criminal Libel").

of major newspapers. In Wisconsin, about four-fifths of the cases from 1991 through 2007 dealt with purely private disputes and issues. Only about one-fifth of the cases dealt with criticism of public officials or false statements during political campaigns, and very few of those could be construed as efforts by people in power to punish political opponents. To be sure, in a couple of cases criminal libel charges were filed against critics of small-town government in obvious attempts to silence them, but the defendants' First Amendment arguments quickly got the charges dismissed.[144]

Criminal Libel and the First Amendment

Defendants made First Amendment arguments in only nine of the sixty-one cases in this study, or 15%. The low frequency of First Amendment arguments reflects the rarity of political content in the defamatory communications that led to the criminal libel charges. That said, evoking the First Amendment was a useful tactic for six defendants who had criticized public officials. In three cases, it led to the dismissal of criminal libel charges before trial,[145] while in a fourth it led to a successful motion to dismiss charges after a trial had begun.[146] In addition, a First Amendment argument by a defendant who opted for a jury trial was almost certainly a factor in his acquittal on the charge of criminal libel,[147] while in another case a First Amendment argument helped a defendant plea bargain a felony identity theft case down to criminal libel, a misdemeanor.[148]

First Amendment arguments also were used by three defendants whose alleged defamations had nothing to do with politics or public issues. Two men who had put posts on Internet sex sites saying that women who had terminated relationships with them were eager for raunchy sex used the First Amendment to plea bargain charges of criminal libel down to citations for disorderly conduct, a far less serious offense. Both cases came from the same county, and the prosecutor

[144]*See supra* notes 119–27 and accompanying text.

[145]State v. Baron, No. 2006CF496 (Circuit Court, Jefferson County, 2006); State v. Schmitt, No. 2003CM108 (Circuit Court, Dunn County, 2003); State v. Rady, No. 1995CM109 (Circuit Court, Lincoln County, 1995). *See also supra* notes 83–91 and accompanying text, *supra* note 120 and accompanying text, and *supra* note 123 and accompanying text.

[146]State v. Groskreutz, No. 2000CM153 (Circuit Court, Waupaca County, 2000). *See also supra* note 127 and accompanying text.

[147]State v. Kuss, No. 2001CM323 (Circuit Court, Walworth County, 2001). *See also supra* notes 112–113 and accompanying text.

[148]State v. DePula, No. 2005CF129 (Circuit Court, Dane County, 2005). *See also supra* notes 114–118 and accompanying text.

was willing to make the plea bargains because he doubted that the Wisconsin criminal libel statute was constitutional.[149] The only case between 1991 and 2007 in which a First Amendment defense was not at least partially successful was the case of the photo-store owner who had been making personal copies of nude pictures his customers brought in for developing. He argued that he could not be charged with criminal libel on the basis of truthful communications (that is, photographs that accurately depicted their subjects). The Wisconsin Court of Appeals rejected that argument.[150]

Socio-Economic Aspects of Criminal Libel

The scholarly consensus holds that prosecutors are unwilling to file criminal libel charges because people who claim to have been defamed can take matters into their own hands by filing lawsuits for civil libel. Although some prosecutors may take that stance, the fact remains that sixty-one people were charged with criminal libel in Wisconsin during the years under study. No contemporaneous statements from prosecutors are available to explain they filed criminal libel charges rather than counseling complainants to seek civil remedies, but the facts that most cases in the study came from rural areas and that most parties to the disputes were people of limited means enable some informed speculation about the reasons the disputes ended up in criminal, rather than civil, court.

First of all, rates of personal-injury litigation (libel lawsuits, for example) tend to be lower in rural areas than elsewhere, largely because small-town culture frowns upon attempts to transform injuries into claims for monetary damages.[151] A study of such litigation in a rural Midwestern county, for example, noted: "Money was viewed as something one acquired through long hours of hard work, not by exhibiting one's misfortunes to a judge or jury or other third party."[152] Defining defamation as a crime to be punished by a fine or a term in jail rather than as an opportunity for people to gain unearned damages by portraying themselves as victims makes sense in such a culture.

Second, even if cultural factors did not militate against civil libel lawsuits, many of the defamation victims would have had no effective access to civil justice because they would have had a very difficult time

[149]*See supra* notes 69–74 and accompanying text.

[150]State v. Stebner, 506 N.W.2d 170 (Wis. Ct. App. 1993), *rev. denied,* 508 N.W. 2d 422 (Wis. 1993).

[151]*See* David Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551 (1984).

[152]*Id*. at 559.

finding lawyers to handle their lawsuits. More than 80% of plaintiffs' attorneys in libel cases work on a contingent fee basis,[153] meaning that their fee are determined largely by the amount of damages actually paid. Lawyers make economic calculations about whether the likely damages in a case would provide adequate compensation for the time and expense they would invest in the case.[154] When a potential defendant is unemployed or has a low-paying job, as was true in most of the study's cases,[155] a plaintiff's chances of actually collecting a significant amount of money are slim and a lawyer working on a contingent fee basis is not likely to be interested in the case. A potential plaintiff could pay a lawyer on an hourly basis, but lawyers are expensive and, in general, our study's victims of defamation seemed no wealthier than the defamers themselves.

Civil libel actions are usually brought "by the wealthy and the powerful."[156] Private figures with fewer resources have far less access to civil justice.[157] For them, criminal libel may be the only realistic way the law can punish defamatory communications that harm their reputations. One prosecutor noted that civil libel actions are expensive to pursue, generally take years before a final outcome is reached, and may result in a judgment that is impossible to collect because the defendant lacks resources. A criminal libel action, in contrast, "costs the victims nothing and allows them to vindicate themselves in a public forum relatively quickly," he wrote.[158]

Criminal Libel and the Internet

Many situations that spawned criminal libel cases in this study — malicious gossip, bitter lies about someone who severed a romantic or employment relationship, false accusations against police and other public employees — are familiar staples of American life. Such cases are

[153]BEZANSON ET AL., *supra* note 47, at 69.

[154]HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004).

[155]*See also* DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 124 (2007) ("Most people posting online have little money to pay.").

[156]Diane L. Borden, *Reputational Assault: A Critical and Historical Analysis of Gender and the Law of Defamation*, 75 JOURNALISM Q. 98, 99 (1999).

[157]For an argument that civil libel law is biased against non-wealthy plaintiffs, s*ee* Carolyn Stewart Dyer, *Listening to Women's Stories: Or Media Law as if Women Mattered*, *in* WOMEN IN MASS COMMUNICATION 317 (Pamela J. Creedon ed., 2d ed. 1993); Robert Martin, *Libel and Class*, 9 CAN. J. COMM 1 (1983). *See also generally* Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339 (2008).

[158]Jay B. Burnham, *Consider Victim's View*, USA TODAY, Nov. 1, 2005, at 13A.

not unlike criminal libel cases of previous decades and centuries.[159] As Robert A. Leflar noted more than fifty years ago, "Defamations are the stock in trade of loose talk, both oral and written, and few indeed are the loose talkers who go through a week without making a statement which if legally tested would satisfy the law's definition of defamatory crime."[160]

Although the topics of defamatory communications may not have changed much over the years, the means of communication have changed dramatically. Almost half of the criminal libel cases in Wisconsin since 1999 involved the Internet. At times it is difficult for Wisconsin's nineteenth century criminal libel statute to adapt to twenty-first century realities. Nothing illustrates the difficulties of adaptation better than the apparent trend of teenage girls willingly sending their boyfriends digital images of themselves either nude or engaged in solitary sexual activity, and then being surprised when the boyfriends share the images with others.[161] Several recent criminal libel cases in Wisconsin have emerged from precisely such situations.[162] At first glance, it is difficult to see any defamation in such scenarios. Presumably the young women who originally sent the nude pictures believed that they were flattering depictions. When a soon-to-be-ex-boyfriend forwards the images to people other than the recipient the girlfriend intended, however, it is not difficult to imagine how the young woman may feel ridiculed, degraded, and/or disgraced — words that evoke the definition of defamation in the criminal libel statute ("anything which exposes the other to hatred, contempt, ridicule, degradation or disgrace in society").[163]

[159] *See*, *e.g.*, State v. Herman, 262 N.W. 718 (Wis. 1935); Branigan v. State, 244 N.W. 478 (Wis. 1932); State v. Mueller, 243 N.W. 478 (Wis. 1932); Malone v. State, 212 N.W. 879 (Wis. 1927); Hyde v. State, 150 N.W. 965 (Wis. 1915); State *ex rel.* Sullivan v. District Court of Milwaukee County, 130 N.W. 58 (Wis. 1911); Barnum v. State, 66 N.W. 617 (Wis. 1896); Hauser v. State, 33 Wis. 678 (1873).

[160] Leflar, *supra* note 44, at 984.

[161] A survey in 2008 found that about 20% of teenagers had sent nude cellphone pictures of themselves or posted such pictures online. Stephanie Clifford, *Teaching Teenagers About Harassment*, N.Y. TIMES, Jan. 27, 2009, at B1. *See also* Sharon Jayson, *In Tech Flirting, Decorum Optional; Racy Pics, Messages Flying Among Young*, USA TODAY, Dec. 10, 2008, at 1A; Stephanie Reitz, *New Teen Trend: Nude Photos; Cell Phones and the Internet Take Teen Mischief to a New Level*, WIS. ST. J., June 5, 2008, at C6.

[162] *See* State v. Spiro, No. 2007CM910 (Circuit Court, La Crosse County, 2007), and at least three prosecutions initiated in 2008: State v. Schultz, No. 2008CM322 (Circuit Court, St. Croix County, 2008) (A teenage girl sent nude pictures of herself to her 17-year-old boyfriend *via* cell phone.); State v. Meyer, No. 2008CM321 (Circuit Court, St. Croix County, 2008) (A teenage girl sent nude pictures of herself to her 17-year-old boyfriend *via* cell phone.); State v. Phillips, No. 2008CF309 (Circuit Court, La Crosse County, 2008) (A 16-year-old girl e-mailed nude pictures of herself to 17-year-old defendant, who put them on his MySpace page.).

[163] WIS. STAT. §942.01 (2007).

People may have voluntarily shared nude images of themselves before the advent of the Internet, but in the pre-digital era it was difficult to make flawless reproductions of the images, much less send them with ease to large numbers of people. In the twenty-first century, an e-mailed picture can be perfectly reproduced and sent to countless people with a few clicks of a mouse. The traditional understanding of the boundary between public and private communication is blurred, if not outright shattered. The Internet transforms the nature of gossip in much the same way. It is one thing for two people to exchange gossip in face-to-face conversation; it is quite another to pass on unsubstantiated gossip *via* e-mail or social networking sites. There is no permanent record of the face-to-face defamation, which likely remains more or less hidden from the object of the gossip. With on-line gossip, in contrast, a permanent, and often a publicly retrievable, record of the conversation exists. One scholar noted that "[i]nformation that was once scattered, forgettable, and localized is becoming permanent and searchable."[164] He added: "Placing information on the Internet is not just an extension of water cooler gossip; it is a profoundly different kind of exposure, one that transforms gossip into a widespread and permanent stain on people's reputations."[165]

CONCLUSION

One important conclusion of this article is methodological: Scholars in any area of law should be very cautious about making statements about what happens in trial courts unless they have data from trial courts. If a research question has to do with appellate courts, then databases such as Lexis or Westlaw can be incredibly useful tools. If a question has to do with trial courts, however, computer databases may be of very limited use. It is a slower and more cumbersome process to gain access to systematic information about trial courts, but scholars who wish to understand the nature of cases that are prosecuted have little alternative to doing just that.

A second conclusion is that, contrary to the scholarly consensus outlined at the beginning of this article, very few criminal libel prosecutions in Wisconsin were politically motivated. In the rare cases when a politically motivated prosecution was initiated, the First Amendment was a reliable tool for the defense. Every defendant in a politically motivated case who used a First Amendment argument was at least partially successful; most such arguments resulted in criminal libel charges being

[164]SOLOVE, *supra* note 155, at 4.
[165]*Id*. at 181.

dismissed. The evidence in this study documents the power of the First Amendment when prosecutors pursue politically motivated cases.

A third conclusion is that criminal libel is a legitimate legal tool to use when the reputations of private figures have been harmed by defamatory comments that have nothing to do with public issues. Criminal libel can be especially useful for people of limited means, those who would have difficulty finding lawyers to pursue civil lawsuits for libel. Criminal libel may also be useful in curbing defamatory gossip on the Internet, which one professor recently described as a "Wild West" with "no ethics, no rule of law."[166] Experience with other attempts at stopping Internet-based violations of law suggests that we should not be overly optimistic about the deterrent effect of criminal libel prosecutions,[167] but at the very least they do have the potential to make the Internet less of a "Wild West."

This article has documented several dozen criminal libel prosecutions (including many convictions) that occurred in Wisconsin without any news coverage, without reaching appellate courts, and without any hue and cry from free-speech advocates. It is surmised that criminal libel prosecution activity is similar in other states with valid criminal libel statutes, but the question must remain open in the absence of solid evidence. Given that Wisconsin is representative of American states generally and that it shares a political culture with the majority of other states that have criminal libel statutes, it would be surprising if patterns of criminal libel prosecution in other states were radically different from Wisconsin, but nothing short of additional research can definitively put the issue to rest.

[166]Don Wycliff, *The GOP's Beef With the Media*, CHICAGO TRIB., Sept. 5, 2008, 1–31.

[167]The entertainment industry's well-publicized lawsuits against people who illegally share copyrighted music and movies have not had an appreciable deterrent effect on such activity. *See* Emanuela Carbonara, Francesco Parisi & Georg von Wangenheim, *Legal Innovation and the Compliance Paradox*, 9 MINN. J.L. SCI. & TECH. 837 (2008).