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The Strong Medicine of Overbreadth as Applied to Criminal Libel

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THE STRONG MEDICINE OF OVERBREADTH AS APPLIED TO CRIMINAL LIBEL

INTRODUCTION

In 2000, Allan Parmelee, an inmate at the King County Jail in the state of Washington, filed two grievances for two separate clashes with guards.[1] In one altercation, he called a guard an "asshole" and a "piss-ant."[2] In the next, he called a guard a "shithead."[3] For each grievance, King County charged Parmelee with violating the prison rule prohibiting defiance, insolence, and abuse.[4] After administrative hearings, the County convicted Parmelee of both infractions. In denying his appeal, the County admonished him "not to use degrading language—respect those in authority."[5] For each infraction, the County punished Parmelee with ten days of segregation and ten days of lost good time.[6] Parmelee then brought suit, alleging that the infraction violated his First Amendment rights.[7] The Washington Court of Appeals affirmed the administrative decisions, finding that the First Amendment did not protect Parmelee's right to make disparaging comments about prison employees.[8]

Five years later, Parmelee was back in Washington State's custody.[9] This time, the charges pertained to a letter Parmelee sent to the head of Washington's Department of Corrections alleging that the superintendent of Clallam Bay Corrections Center was "anti male[,] a

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1 *In re* Parmelee, 63 P.3d 800, 802–03 (Wash. Ct. App. 2000).
2 *Id.* at 802.
3 *Id.* at 803.
4 *Id.* at 802–03.
5 *Id.* at 803–04.
6 *Id.*
7 *Id.*
8 *Id.* at 807–08.
9 Parmelee v. O'Neel, 186 P.3d 1094, 1097 (Wash. Ct. App. 2008).

lesbian," and thus unfit to run the prison.[10] Prison officials intercepted the letter and charged Parmelee with violating the prison rule against committing "any act that is a misdemeanor under local, state, or federal law that is not otherwise included in [the prison] rules."[11] The "not otherwise included" misdemeanor was criminal libel.[12] Prison officials found Parmelee guilty of this infraction at an administrative hearing, punishing him with ten days of disciplinary isolation and ten days without privileges.[13]

Parmelee subsequently filed suit, alleging that the infraction violated his First Amendment rights.[14] This time, however, the Washington Court of Appeals sustained his suit, finding Washington's criminal libel law facially unconstitutional under the First Amendment.[15] Intuitively, it would seem bizarre that Parmelee could be punished for calling a prison employee an "asshole," but not for calling one a "lesbian." Under the First Amendment doctrine of overbreadth, however, one who engages in unprotected speech may challenge a law that purports to punish protected speech along with unprotected speech.[16] As such, Parmelee was able to successfully challenge his second infraction, even though the state had previously been able to punish him for similar behavior. Because the state proceeded under the criminal libel statute and not the prison rules, the First Amendment overbreadth doctrine rendered his second punishment unconstitutional. This outcome is justified by the theory that overbroad laws have a chilling effect on speech. Thus, for the good of society as a whole, an individual convicted under an overbroad law has standing to challenge it, even if he could legally be punished for his speech under a more narrow law.[17]

The outcome in *Parmelee* was not the only one possible. It is true that within the past twenty years, many courts have taken the same course as *Parmelee* and have thrown out entire criminal libel statutes on overbreadth grounds.[18] However, others have partially invalidated or imposed narrowing constructions on such laws, invalidating them only insofar as they violate the First Amendment.[19] This approach

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[10] *Id.*

[11] *Id.* (quoting former WASH. ADMIN. CODE § 137-28-260(1)(517) (2005)).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 1099–1106.

[16] Dombrowski v. Pfister, 380 U.S. 479, 487 (1965).

[17] *Id.*

[18] *See, e.g.*, Mangual v. Rotger-Sabat, 317 F.3d 45 (1st Cir. 2003); I.M.L. v. State, 61 P.3d 1038 (Utah 2002); Fitts v. Kolb, 779 F.Supp. 1502 (D.S.C. 1991).

[19] *See, e.g.*, Phelps v. Hamilton, 59 F.3d 1058, 1073 (10th Cir. 1995); State v. Powell, 839 P.2d 139 (N.M. Ct. App. 1992); People v. Ryan, 806 P.2d 935 (Colo. 1991), *cert. denied*, 502

might have allowed Washington to uphold Parmelee's second punishment for unprotected speech, while narrowing the criminal libel statute to protect the public from any chilling effect.

The current judicial split on which path to take results largely from tension in Supreme Court jurisprudence surrounding the overbreadth doctrine. On the one hand, the Court has "'recognized that the overbreadth doctrine is "strong medicine" and [has] employed it with hesitation, and then "only as a last resort."'"[20] When it is necessary to apply the overbreadth doctrine, the Court has advised that the judiciary should (where possible) partially invalidate or impose a limiting construction on the law instead of striking it down completely.[21] Even so, the Court has held that judges should not usurp legislative authority by imposing constructions that preserve unconstitutional laws by effectively rewriting them.[22]

Many states still provide criminal penalties for libel under old statutes that have never been updated to comply with the Supreme Court's First Amendment doctrine.[23] And challenges to these laws are likely to arise under the overbreadth doctrine, since modern criminal libel prosecutions are often brought over completely false, unprotected libelous speech, where overbreadth is the defendant's only means of escaping punishment.[24] Consequently, the question of how courts should treat overbreadth challenges against criminal libel statutes is an important issue in modern constitutional law. Furthermore, the courts that have heard overbreadth challenges to criminal libel laws have largely not engaged each other on the issue of whether to strike down or preserve such laws. This Comment examines the legal history of criminal libel and the Supreme Court's precedent on the subject, and proposes that, on balance, applying limiting constructions and partial invalidations to overbroad criminal libel statutes is the proper course under the First Amendment.

Part I of this Comment provides a brief history of criminal libel, and examines its modern significance. Part II will examine the

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U.S. 860 (1991).

[20] Los Angeles Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32, 39 (1999) (quoting New York v. Ferber, 458 U.S. 747, 769 (1982) (citing Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973))).

[21] Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.").

[22] Heckler v. Matthews, 465 U.S. 728, 741 (1984) ("The canon favoring constructions of statutes to avoid constitutional questions does not, however, license a court to usurp the policymaking and legislative functions of duly elected representatives." (citing Yu Cong Eng v. Trinidad, 271 U.S. 500, 518 (1926))).

[23] *See infra* notes 46–47 and accompanying text.

[24] *See, e.g., infra* Parts III.A, B.

tension between the Court's precedent dealing with overbroad speech-restricting statutes. Part III will compare cases within the last twenty years where courts invalidated overbroad criminal libel statutes with cases where courts elected to impose limiting constructions on such statutes instead.[25] It will further argue that Supreme Court doctrine makes legislative intent the most important question when considering whether to strike down state criminal libel statutes and that, absent special circumstances, legislative intent will most likely cut against striking down a criminal libel statute in its entirety.

I. CRIMINAL LIBEL PAST AND PRESENT

In order to determine the proper way to treat criminal libel statutes, it is first important to know the origins of criminal libel, as well as its modern relevance. By examining the historical justification for criminal libel laws, one can determine whether such laws still serve the purpose they once did. By analyzing the way that states have applied criminal libel laws over the past two decades, one can estimate the value of criminal libel statutes to modern society.

A. The History of Criminal Libel

Criminal libel laws punish malicious statements "designed to expose a person to hatred, contempt, or ridicule."[26] Though criminal libel's origins can be traced as far back as ancient Babylonia,[27] its instance in America is most directly traceable to English common law.[28] The common law regarded libel as a crime due to its origins in the authoritarian feudal system, which depended on the absolute authority of the ruling class.[29] Because disparaging comments about members of the ruling class tended to erode their authority, the law punished libel as a harm to society.[30] Truth was no defense, because true statements could have the same detrimental effect as false

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[25] This Comment will confine its review of cases to the past twenty years because it is concerned with the modern relevance and future treatment of criminal libel laws. Furthermore, earlier cases were decided prior to a number of important Supreme Court cases that expand the Court's guidance on the questions at hand.

[26] BLACK'S LAW DICTIONARY (8th ed. 2004).

[27] Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL'Y 433, 441 (2004) (noting how Hammurabi's Code "protected women from insult, and set death as the appropriate punishment for one who accused another of a capital crime without proof").

[28] *Id.* at 443–52 (exploring how criminal libel became part of common law, and thus entered into American jurisprudence).

[29] *Id.* at 438–43.

[30] *Id.* at 438.

statements.[31] If anything, truth was an aggravating factor, because true statements could damage the ruling class much more than false statements.[32] At common law, it was axiomatic that, "'the greater the truth, the greater the libel.'"[33]

Criminal libel persisted throughout early American history, both by the adoption of English common law and in statutes such as the Sedition Act of 1798.[34] Though the authoritarian rationales underlying criminal libel were less relevant in America's egalitarian system, courts "'clung tenaciously' to its underlying legal justification of preventing breaches of the peace well into the twentieth century."[35]

Starting in the early nineteenth century, criminal libel began to erode in America. By the early 1800s, American law had begun to accept truth as a defense to criminal libel prosecution.[36] By the 1830s (if not well before), "the civil remedy [for libel] had virtually pre-empted the field of defamation" in criminal libel prosecution, with the exception of seditious libel.[37] In the early 1900s, the Supreme Court limited criminal libel by requiring that, to punish speech, the government must show a "clear and present danger" of the harm the government seeks to prevent.[38] In the context of libel, this meant that the state had to prove that a statement posed a clear and present danger of exposing the victim to shame or ridicule, as opposed to merely showing it had a tendency to do so.[39]

In 1964, with *Garrison v. Louisana*,[40] the Supreme Court all but eliminated the historical version of criminal libel by applying the *New York Times v. Sullivan*[41] standard to criminal libel prosecutions. Under this standard, the government may not punish libel regarding public figures unless it was published with "actual malice."[42] Actual malice is a mens rea defined as knowing falsehood or reckless disregard for the truth.[43] *Garrison* further provided that truth must

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[31] *Id.* at 439.

[32] *Id.* at 448.

[33] *Id.* (quoting Robert Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEX. L. REV. 984, 1017 (1956)).

[34] *Id.* at 456–58.

[35] *Id.* at 460.

[36] *Id.* at 459–60 (citing 3 Johns. Cas. 337, 353 (N.Y. Sup. Ct. 1804)).

[37] Garrison v. Louisiana, 379 U.S. 64, 68–69 (1964).

[38] Schenck v. United States, 249 U.S. 47, 52 (1919).

[39] Lisby, *supra* note 27, at 461–62.

[40] 379 U.S. 64.

[41] 376 U.S. 254 (1964).

[42] *Id.* at 279–80.

[43] *Id.* Though the *Sullivan* Court applied the actual malice standard to public officials only, *id.*, the Court subsequently extended this standard to protect statements about all public figures. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967).

always stand as a defense to criminal libel.[44] These requirements constitute the test for the constitutionality of criminal libel laws to this day. Therefore, a criminal libel statute today must a) provide truth as a defense, and b) except from prosecution statements made about public figures without actual malice. A statute that fails to meet these requirements sweeps protected speech in with unprotected libel, making it unconstitutionally overbroad under the First Amendment.[45]

B. Criminal Libel Today

Though libel is no longer a crime in most states, at least twenty states continue to leave open the possibility of criminal penalties for libel.[46] Four states and the Virgin Islands territory[47] retain criminal libel laws that do not comply with *Garrison* (because they fail to require actual malice with regard to public figures, and/or do not provide truth as a defense) and have not been limited by court decisions. Though criminal libel prosecutions are by no means common, reported cases within the last twenty years indicate that criminal libel still serves largely as a tool to shield state officials and employees from criticism and insults, making them instruments with limited social utility.

For instance, in *Parmelee v. O'Neel*,[48] discussed above, prison officials used Washington's criminal libel law to punish an inmate for calling a prison superintendant a lesbian.[49] Though the inmate's speech would have been punishable under prison regulations,[50] the

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[44] *Garrison*, 379 U.S. at 72–73.

[45] *See* Thornhill v. State of Alabama, 310 U.S. 88, 97–98 (1940) (discussing the burden on the State to prove its penal statute did not impermissibly cover protected speech).

[46] *See* Lisby, *supra* note 27, at 479–81. Lisby claims that "twenty-three states, the District of Columbia, and one territory still have statutes or constitutional provisions establishing, enabling or governing the prosecution of criminal libel." *Id.* at 480. But the Washington Court of Appeals invalidated Washington's criminal libel statute after Lisby published his article. Parmelee v. O'Neel, 186 P.3d 1094, 1107 (Wash. Ct. App. 2008). Furthermore, some of the statutes Lisby cites arguably do not punish libel, such as the District of Columbia's proscription on aggressive panhandling, D.C. CODE §§ 22-2301 to -2304 (2006).

[47] *See* IDAHO CODE ANN. §§ 18-4801 to -4809 (2004) (punishing true statements made without good motives and justifiable ends); N.C. GEN. STAT. § 14-47 (2007) (punishing false statements in newspapers about public figures made without actual malice); OHIO REV. CODE ANN. §§ 2739.13, .16 (West 2006) (punishing publishers who fail to correct printed false statements even when made about public figures without actual malice); OKLA. STAT. tit. 21, §§ 771–81 (2002) (punishing true statements made without good motives and justifiable ends, punishing truthful but unfair reports of official proceedings, punishing statements accusing officials of crime when made without actual malice, and punishing false imputation of unchastity to females, including public figures, made without actual malice); V.I. CODE ANN. tit. 14, §§ 1174–83 (1996) (punishing true statements made without good motives and justifiable ends, punishing true but unfair reports of official proceedings).

[48] 186 P.3d 1094 (Wash. Ct. App. 2008).

[49] *Id.* at 1097.

[50] *Id.* at 1105.

case nevertheless represents a criminal libel statute being used to punish an insult to a state official.

Mink v. Suthers[51] provides another recent example where a state used criminal libel to silence a private citizen's insults towards a state employee. There, state prosecutors used Colorado's criminal libel law against Mink, the publisher of the online journal *The Howling Pig*.[52] In the journal, Mink had posted a parody of a state university professor, which sported a Hitler-style mustache and made arguments "'diametrically opposed'" to the real professor's views.[53] After the professor complained to state officials, police obtained a search warrant under the criminal libel law, searched Mink's home, and seized his computer.[54] Although the state did not file charges,[55] the case is still an example of a state using criminal libel prosecution to protect a state employee.

Mangual v. Rotger-Sabat[56] is yet another case of a government actor using criminal libel laws to protect the reputations of public officials. There, a newspaper in Puerto Rico published an article claiming that a narcotics agent was having an affair with a drug dealer.[57] The article claimed that this affair was the reason for the inordinate number of drug case dismissals in local courts.[58] After the narcotics agent filed a complaint, the local district attorney charged the article's author with criminal libel, again showing a criminal libel prosecution being used to protect a state employee from criticism.[59]

Finally, *I.M.L. v. State*[60] shows another government actor attempting to use criminal libel laws to stifle insults towards government employees. There, I.M.L, a high school student, had published a web site that mocked both students and faculty at his school.[61] The site claimed that the school principal was the town drunk, insinuated that one faculty member was a homosexual, and accused another of being a narcotics addict.[62] When police arrested I.M.L. for criminal libel, he claimed that he made the page in response to similar sites created by other students.[63]

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[51] 482 F.3d 1244 (10th Cir. 2007).
[52] *Id.* at 1248–49.
[53] *Id.* at 1249 (quoting Appellant's App. at 80–81).
[54] *Id.* at 1248.
[55] *Id.* at 1250.
[56] 317 F.3d 45 (1st Cir. 2003).
[57] *Id.* at 52–53.
[58] *Id.* at 53.
[59] *Id.*
[60] 61 P.3d 1038 (Utah 2002).
[61] *Id.* at 1040.
[62] *Id.*
[63] *Id.*

These and other cases[64] demonstrate that, within the last twenty years, criminal libel has been a tool to protect government officials and employees from insulting and critical speech. This has changed little, if at all, since 1964 when the *Garrison* court found that criminal libel had little modern relevance except as a tool to punish sedition or criticism of the government.[65]

This is not to say, of course, that criminal libel has no social value whatsoever. When an offender is too poor to satisfy a libel judgment, civil penalties may prove all but useless against him—in such situations, criminal sanctions may be the best way to deter individuals from publishing injurious statements about others. On the other hand, it is difficult to envision local prosecutors, often operating with limited budgets, providing anything more than sporadic enforcement of criminal libel penalties. Therefore, when considering the subject of how courts should treat criminal libel laws, one must take into account the fact that criminal libel has questionable social utility, but is not entirely without merit.

II. SUPREME COURT OVERBREADTH DOCTRINE

A law is unconstitutionally overbroad when it prohibits protected speech as well as unprotected speech.[66] Overbroad laws violate the First Amendment by causing an impermissible chilling effect on speech, harming society as a whole.[67] Because of this chilling effect, it is not appropriate to allow an overbroad statute to stand until the government applies the statute unconstitutionally, since in the meantime many people may be deterred from engaging in protected speech.[68] As such, the Court has declared that a defendant may challenge overbroad restrictions on speech even when his own speech was not constitutionally protected.[69] This stands in contrast to

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[64] *See* Phelps v. Hamilton, 59 F.3d 1058 (10th Cir. 1995) (preacher charged with criminal libel after accusing various state employees of being, inter alia, homosexuals and child molesters); Fitts v. Kolb, 779 F. Supp. 1502 (D.S.C. 1991) (journalists charged with criminal libel after one accused state legislators of corruption, and the other accused a state high school principle of domestic violence); State v. Powell, 839 P.2d 139 (N.M. Ct. App. 1992) (state university teacher charged with criminal libel after accusing university vice president of academic fraud); I.M.L. v. State, 61 P.3d 1038 (Utah 2002) (high school student charged with criminal libel after calling school principal the town drunk, claiming a faculty member to be homosexual, and claiming another faculty member to be a narcotics addict). *But see* People v. Ryan, 806 P.2d 935 (Colo. 1991) (upholding criminal libel charge for disparaging remarks about a private person where the defendant circulated a flyer accusing his ex-girlfriend of being, to summarize a long list of accusations, a very unsavory character).

[65] Garrison v. Louisiana, 379 U.S. 64, 67–70 (1964).

[66] Thornhill v. State of Alabama, 310 U.S. 88, 97–98 (1940).

[67] *Garrison*, 379 U.S. at 67–70.

[68] Dombrowski v. Pfister, 380 U.S. 479, 486–87 (1965).

[69] *Id.*

ordinary cases, where one may not challenge a statute by asserting that it violates the rights of third parties.[70] As such, without the overbreadth doctrine, someone who libeled another with actual malice (such as Allan Parmelee[71]) would lack standing to challenge a criminal libel law based on its overbreadth.

However, because the overbreadth doctrine allows litigants to exceed the ordinary bounds of standing, the Court has limited its application. The Court requires that, in order to strike down a statute as overbroad, its overbreadth must be "both real and substantial."[72] In order to find a statute unconstitutionally overbroad, it is not enough that one could merely imagine a situation where a law could restrict protected speech, but rather the law must be significantly likely to punish a significant amount of protected speech.[73] Additionally, the Court mandates that statutes should not be struck down for overbreadth lightly; overbreadth is "'strong medicine'" and should only be employed as a last resort.[74] Even when courts consider a facial challenge under the overbreadth doctrine, the Court directs them to preserve an overbroad statute (if at all possible) so as not to unnecessarily interfere with state regulatory programs.[75]

These precedents leave courts with the quandary of balancing the social value of protecting free speech with the Court's admonishments to invoke overbreadth as sparingly as possible. The contradictory nature of these rules is striking—courts should take extraordinary measures to protect free speech from overbroad laws, and at the same time courts should take extraordinary measures to preserve those same statutes, insofar as a limiting construction is possible. On balance, the only practical interpretation of these conflicting precedents is that courts should take the middle path—they ought to invoke overbreadth where appropriate, but they should proceed carefully to ensure that they are not overusing it and trenching on the power of the legislature by invalidating laws too readily.

As argued above, however, criminal libel laws are not highly valuable to society.[76] And victims of libel have recourse to civil

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[70] Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973).

[71] *See supra* notes 1–17 and accompanying text.

[72] Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

[73] Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984).

[74] Bigelow v. Virginia, 421 U.S. 809, 817 (1975) (quoting *Broadrick*, 413 U.S. at 613).

[75] Los Angeles Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32, 39 (1999) (quoting New York v. Ferber, 458 U.S. 747, 769 (1982) (citing *Broadrick*, 413 U.S. at 613)).

[76] *See supra*, Part I; *see also* Lisby, *supra* note 27, at 481 (arguing that criminal libel has no place in American law because it serves no compelling purpose and duplicates the civil law

actions that, unlike criminal libel prosecutions, may award damages to the victim. Given the availability of alternative remedies, common sense suggests that protecting free speech from overbroad criminal libel laws is generally more valuable to society than preserving said laws. This social calculus, however, stands in opposition to the Court's admonition that total invalidation should be "'a last resort.'"[77]

Because legislatures have primary lawmaking authority, courts should not adopt such a strained construction of a statute that they reach the point of subverting its purpose or judicially rewriting it.[78] However, because legislatures typically intend to pass constitutional laws, partially invalidating a statute to remove unconstitutional provisions would actually comply with, rather than frustrate, a legislature's intent. This intent to preserve valid statutory provisions despite the problems in other provisions is most clearly shown when legislators include a severability clause in a statute.[79] This shows that the legislature intends for courts to invalidate the parts of the law deemed unconstitutional while upholding the remainder, rather than striking down the entire law.[80] The Court has made legislative intent the primary concern in deciding whether to partially invalidate a law—"'"'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'"'"[81] This holding provides two guideposts for determining whether to partly or fully invalidate a law: a) whether the legislature intended the unconstitutional provisions to be severable, and b) whether the law can still achieve its purposes with the unconstitutional provisions severed.

III. OVERBREADTH CHALLENGES TO CRIMINAL LIBEL WITHIN THE PAST TWENTY YEARS

As introduced above,[82] when faced with First Amendment challenges to criminal libel laws, some courts have totally invalidated such laws, while others have elected to partially invalidate them or to

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of libel). *See generally* Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEX. L. REV. 984 (1956) (arguing that criminal libel is not useful to modern society).

[77] *Bigelow*, 421 U.S. at 817 (quoting *Broadrick*, 413 U.S. at 613).

[78] Heckler v. Matthews, 465 U.S. 728, 741–42 (1984) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964) (quoting Scales v. United States, 367 U.S. 203, 211 (1961))).

[79] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501–06 (1985).

[80] *Id.* at 506.

[81] *Id.* at 506–07 n.15 (quoting Buckley v. Valeo, 424 U.S. 1, 108–09 (1976) (quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932))).

[82] *Supra* Intro.

impose limiting constructions to preserve their constitutionality. Having introduced the background and Supreme Court jurisprudence on the matter, this Comment will next undertake to study a number of these cases through the lens of Supreme Court precedent, with an eye towards determining which cases are most convincing, those prescribing total invalidation or only partial.

A. Total Invalidation Cases

The most recent case striking down a criminal libel statute was *Parmelee v. O'Neel*.[83] The case dealt with Washington's criminal libel laws.[84] The first of the two statutes at issue forbade a person to "expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse."[85] The next section provided the defenses to criminal libel: the statement is justified if it "charges the commission of a crime, is a true and fair statement, and was published with good motives and for justifiable ends."[86] It further provides that the statement is excused if it was "honestly made in belief of its truth and fairness and [based] upon reasonable grounds for such belief, and consists of fair comments upon the conduct of any person [engaged in] public affairs, made after a fair and impartial investigation."[87] The court found that these statutes would punish false statements about public figures made without actual malice as well as true statements made without good motive.[88] Because this violated the requirements set out in *Garrison*, the statutes were unconstitutionally overbroad.[89] The *Parmelee* court did not discuss the Supreme Court precedents urging courts to apply limiting constructions to salvage overbroad laws, but simply cited other courts' total invalidations of overbroad criminal libel laws to support its decision to do the same.[90]

Similarly, in *Mangual v. Rotger-Sabat*,[91] the First Circuit Court of Appeals struck down Puerto Rico's criminal libel scheme as unconstitutional.[92] This scheme was very similar to Washington's—it

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[83] 186 P.3d 1094 (Wash. Ct. App. 2008). For the facts of this case, see *supra* Intro.

[84] WASH. REV. CODE §§ 9.58.010, .020 (2003).

[85] WASH. REV. CODE § 9.58.010(1).

[86] WASH. REV. CODE § 9.58.020.

[87] *Id.*

[88] *Parmelee*, 186 P.3d at 1102.

[89] *Id.* at 1098–1101.

[90] *Id.* at 1101–02.

[91] 317 F.3d 45 (1st Cir. 2003). For the facts of this case, see *supra* text accompanying notes 56–59.

[92] *Mangual*, 317 F.3d at 69.

punished libelous statements,[93] provided that truth was a defense only when the statements were made with "good intention and justifiable ends,"[94] and provided that reports of official proceedings were only privileged from prosecution if they were true and fair.[95] Reaching the same result as in *Parmelee*, the court struck down Puerto Rico's criminal libel scheme as unconstitutional because it punished protected speech, namely false statements about public figures made without actual malice, and because it punished true statements made without good motive.[96] Like the Washington court of appeals, the *Mangual* court did not attempt to reconcile the statutory scheme's overbreadth with the Supreme Court's instructions to preserve overbroad statutes where possible.

I.M.L. v. State[97] considered the constitutionality of Utah's criminal libel scheme.[98] The statutes at issue punished statements "'tending to defame or darken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural defects of one who is alive and thereby expose him to public hatred, contempt, or ridicule.'"[99] The scheme only punished such statements when made maliciously (that is, with ill will, as opposed to the "actual malice" *Sullivan* standard) and provided that malice would be presumed when the speaker could not show a justifiable motive for his statements.[100] Under the Utah Constitution, truth would serve as a defense to criminal libel, but only when the true statements were made with good motives and justifiable ends.[101] Just as in *Parmelee* and *Mangual*, the court found the statutory scheme overbroad because it punished false statements about public figures made without actual malice and true statements made without good motive.[102]

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[93] P.R. LAWS ANN. tit. 33, § 4101 (2001) (defining a libelous statement as one which "publicly dishonors, discredits, or imputes any person of a crime or impugns the honesty, integrity, virtue, or good name or reputation of any natural or juridical person, or defames the memory of a deceased person").

[94] P.R. LAWS ANN. tit. 33, § 4102.

[95] P.R. LAWS ANN. tit. 33, § 4103. The court noted that the original Spanish text of this section could be read as "impartial and exact" rather than "true and fair," but concluded that the statute would not survive constitutional scrutiny under either translation. *Mangual*, 317 F.3d at 68.

[96] *Mangual*, 317 F.3d at 66–67. While the court did not use the term "overbroad," the case was effectively decided on overbreadth grounds because a criminal libel law that does not follow *Garrison* punishes protected speech along with unprotected speech.

[97] 61 P.3d 1038 (Utah 2002). For the facts of this case, see *supra* text accompanying notes 60–63. Two of the statutes at issue were repealed in 2007. *See* UTAH CODE ANN. §§ 76-9-501 to -502 (2008).

[98] *I.M.L.*, 61 P.3d at 1040.

[99] *Id.* at 1043–44 (quoting UTAH CODE ANN. § 76-9-501).

[100] *Id.* (citing UTAH CODE ANN. §§ 76-9-501, -502, -503).

[101] *Id.* at 1045 (citing UTAH CONST. art. 1, § 15).

[102] *Id.* at 1048.

Unlike *Parmelee* and *Mangual*, however, the *I.M.L.* court provided a substantial discussion of the principle that courts ought to uphold overbroad statutes where possible.[103] The court noted that the judiciary should, "whenever possible, construe a statute so as to save it from constitutional infirmities."[104] But the court also indicated that it was bound by canons of statutory construction.[105] The court held that any limiting construction must be based on the text of the law and that courts do not have the power to add substantive terms or rewrite an unconstitutional statute.[106] The court found that adding an actual malice requirement, which could save Utah's criminal libel scheme, would not comport with the text or accepted canons of construction.[107] The issue was further complicated by the fact that Utah's legislature passed the criminal libel statutes in 1973, almost a decade after *Garrison*.[108] The State urged that because the legislature is presumed to be aware of the existing law when it passes a new law, the court should construe the new law in light of the legislature's intent to pass constitutional laws.[109] The court dismissed this argument, however, as the legislature had passed a constitutionally questionable slander law in conjunction with the criminal libel statutes—based on this enactment, the court decided that it could not presume that the Utah legislature was aware of *Garrison* when it passed the criminal libel statutes.[110]

Of the three cases cited, *I.M.L.* was the only one to address the concerns inherent in deciding whether to totally or partially invalidate a statute. Furthermore, *I.M.L.* is consistent with the Court's holding that legislative intent is of primary importance when making this decision.[111] By explicitly finding that the legislature did not intend to create a severable statutory scheme, the *I.M.L.* court demonstrated why partial invalidation was not appropriate in that case. But in failing to address the issue, both *Parmelee* and *Mangual* are left with little persuasive force on this question.

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[103] *Id.* at 1046–47. The court discussed Utah precedent to this effect, but the basic principles cited are practically equivalent to those announced by the Supreme Court. *See supra* Part II.

[104] *I.M.L.*, 61 P.3d at 1046 (quoting State v. Morrison, 2001 UT 73, ¶ 12, 31 P.3d 547 (Utah 2001)).

[105] *Id.*

[106] *Id.*

[107] *Id.* at 1046–48.

[108] *Id.* at 1047.

[109] *Id.*

[110] *Id.* at 1047–48.

[111] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506–07 n.15 (1985).

B. Partial Invalidation and Limiting Construction Cases

In *Phelps v. Hamilton*,[112] the Tenth Circuit provided a comprehensive analysis of whether Kansas's criminal libel statute should be struck down or limited by a narrowing construction. At the outset, the court noted that "federal courts do not have the power to narrow a state law by disregarding plain language in the statute just to preserve it from constitutional attack."[113] The *Phelps* court found, however, that it had the authority to interpret an *ambiguous* statute "according to traditional rules of statutory construction, and then to judge the constitutionality of such statutes as so construed."[114] The court found that, in making such an interpretation, it was permitted to follow interpretations of analogous statutes.[115] Furthermore, it recognized that statutes should be "'interpreted to avoid constitutional difficulties.'"[116] The court also recognized that the Kansas Supreme Court requires Kansas courts to uphold statutes against constitutional attack if there is any reasonable way to do so.[117]

Applying this law to the facts in *Phelps*, the Tenth Circuit interpreted Kansas's criminal libel law to preserve it against unconstitutional attack.[118] Though Kansas's criminal libel law properly provided truth as an absolute defense to libel, it did not specify any state of mind as an element of the offense (in other words, the statute failed to specify whether the offense required actual malice).[119] Another Kansas statute, however, provided that, except where otherwise specified, intent must be an element of all criminal offenses.[120] Following this statute, the court found that intent to make a false statement was an element of criminal libel in Kansas.[121] This ruling provided even more protection than the *Sullivan* standard, because the "actual malice" standard incorporates both recklessness and knowledge, while the *Phelps* court found that only knowledge

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[112] 59 F.3d 1058 (10th Cir. 1995). For a brief statement of the facts of this case, see *supra* note 64.

[113] *Phelps*, 59 F.3d at 1070 (citing Wilson v. Stocker, 819 F.2d 943, 948 (10th Cir. 1987) (citing Grayned v. City of Rockford, 408 U.S. 104, 110 (1972))); *see also* Gooding v. Wilson, 405 U.S. 518, 520 (1972) (looking only to state court decisions for statutory construction because the Supreme Court "lack[s] jurisdiction authoritatively to construe state legislation" (quoting United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971))).

[114] *Phelps*, 59 F.3d at 1070.

[115] *Id.* (citing Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)).

[116] *Id.* (quoting Frisby v. Schultz, 487 U.S. 474, 483 (1988)).

[117] *Id.* at 1071.

[118] *Id.* at 1073.

[119] *Id.* at 1062 (citing KAN. STAT. ANN. § 21-4004 (1988)). The statute has since been amended to require actual malice. KAN. STAT. ANN. § 21-4004 (1995).

[120] *Phelps*, 59 F.3d at 1072–73 (citing KAN. STAT. ANN. § 21-3201 (1988)).

[121] *Id.*

would suffice. Also, while the criminal statute at issue had not been previously construed by the courts, Kansas courts had construed the law of civil defamation to require actual malice, further suggesting that the court's decision to uphold the statute based on a limiting construction was proper.[122]

The New Mexico Court of Appeals took a different approach in *State v. Powell*.[123] Rather than interpreting the statute at issue in such a way as to render it constitutional, the court simply invalidated part of the statute.[124] The court recognized New Mexico precedent requiring courts to interpret statutes so as to preserve them against constitutional attack, but found that because the statute could not be fairly read to require actual malice, no such preserving construction was possible.[125] And unlike in *Phelps*, the statute was not ambiguous, making it impossible to read the constitutionally required actual malice standard into the statute.[126] Rather than invalidating the entire statute, however, the New Mexico court simply found the statute unconstitutional "as applied to a charge of libel predicated on public statements that involve matters of public concern."[127]

People v. Ryan[128] also partially invalidated a criminal libel statute.[129] There, the Colorado Supreme Court determined that the state's criminal libel statute unconstitutionally punished statements about public figures made without actual malice.[130] In reaching this decision, the court paid careful attention to United States Supreme Court precedent on overbreadth.[131] The *Ryan* court held that, according to Supreme Court precedent, total invalidation is rare when partial invalidation can preserve a statute against a constitutional attack for overbreadth.[132] The court also noted that the Supreme Court gives great respect to the state courts' "'ability to narrow [overbroad] statutes so as to limit the statute's scope to unprotected conduct.'"[133] Based on these holdings, the *Ryan* court found that the best course of

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[122] *Id.* at 1072.

[123] 839 P.2d 139 (N.M. Ct. App. 1992). For a brief statement of the facts of this case, see *supra* note 64.

[124] *Powell*, 839 P.2d at 147.

[125] *Id.* at 145–47.

[126] *Id.*

[127] *Id.* at 147.

[128] 806 P.2d 935 (Colo. 1991), *cert. denied*, 502 U.S. 860 (1991). For a brief statement of the facts of this case, see *supra* note 64.

[129] *Ryan*, 806 P.2d at 940–41.

[130] *Id.*

[131] *Id.* at 939–40.

[132] *Id.* (citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985)).

[133] *Id.* at 940 (quoting Osborne v. Ohio, 495 U.S. 103, 120 (1990)).

action was to save Colorado's criminal libel statute by invalidating it only so far as it purported to punish protected speech.[134]

Each of the above partial invalidation cases are carefully reasoned, and each of them pay homage to the principle of judicial deference to the legislature that the Supreme Court has strongly endorsed. Even though the majority of the cases were decided based on state precedent, all of the partial invalidation cases are generally in harmony with the Court's suggestion that overbroad statutes should be preserved unless it is clear that the legislature did not intend them to be severable.

C. The Comparative Merits

As set out above, the Court has held that the question of whether to totally or partially invalidate a statute depends firstly on the legislature's intent.[135] And as we see in *Phelps*, *Powell*, and *Ryan*, deference to the legislature and the assumption that the legislature intends to pass constitutional laws lead most often to the end result of partially, rather than completely, invalidating overbroad criminal libel statutes.

Furthermore, the one persuasive total invalidation case in recent years, *I.M.L. v. State*, also aligns with the Court's emphasis on legislative intent.[136] In that case, the facts were simply aligned against a finding that the legislature intended to pass a valid law. Not only was the law enacted after *Garrison* without any attempt to comply with its holding, it was also enacted alongside a companion law that could similarly be found unconstitutional.[137] While the Utah court recognized that legislatures are presumed to intend that their enactments comply with the Constitution, these circumstances rebutted any presumption that the legislature intended the law to comply with Supreme Court precedent.[138]

In the absence of the sort of circumstances present in *I.M.L.*, however, the presumption that state enactments are constitutional[139] ought to take precedence. In *Parmelee* and *Mangual*, for instance, the courts did not give serious consideration to whether the legislature intended the laws to be severable, or whether severability might have

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[134] *Id.* at 940–41.

[135] *Supra* notes 78–81 and accompanying text.

[136] I.M.L. v. State, 61 P.3d 1038, 1046–47 (Utah 2002).

[137] *Id.* at 1047–48.

[138] *Id.*

[139] *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2675 (2008) (Alito, J., dissenting) ("Laws enacted by the state legislatures are presumptively constitutional . . . ." (citing Gregg v. Georgia, 428 U.S. 153, 175 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).

preserved the statutes at issue.[140] Of course, this would have been a legal fiction if applied in *Parmelee*, because Washington's criminal libel law was passed long before *Garrison*.[141] Even so, it is a legal fiction that would respect the legislature's expressed wish to retain criminal libel laws. Even though criminal libel is not a socially vital criminal law, a legislature's decision to retain criminal libel laws should not, according to the Court, be treated as a nullity.

CONCLUSION

While criminal libel laws do not serve a vital purpose in modern society, the fact remains that libel is unprotected by the First Amendment as long as the limitations of *Garrison v. Louisiana* are observed. Courts in states whose criminal libel statutes have not been tested post-*Garrison* will need to confront the issue of whether to narrow, partially invalidate, or totally invalidate such laws when they are challenged as overbroad. While it may be tempting to toss out archaic and overbroad libel penalties in favor of civil remedies, courts should pay due regard to the Supreme Court's holdings on overbreadth. Though the Court advises other courts not to tread on legislative authority by effectively rewriting statues,[142] the Court considers partial invalidation of overbroad laws as respecting, rather than infringing, state legislative authority.[143] After all, doing the utmost to uphold the core, constitutionally permissible proscriptions of a criminal law shows greater deference to the legislature than voiding an entire statute. In the absence of special circumstances that make upholding a statute impossible, courts should attempt to impose narrowing constructions or partial invalidations to preserve criminal libel laws against facial attack.

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[140] *See* Mangual v. Rotger-Sabat, 317 F.3d 45, 66–67 (1st Cir. 2003); Parmelee v. O'Neel, 186 P.3d 1094, 1099–1103 (Wash. Ct. App. 2008).

[141] *See* WASH. REV. CODE §§ 9.58.010, .020 (2003) (indicating that the criminal libel scheme was last amended in 1935). "In fact, the *Garrison* Court cited Washington's criminal libel law as an example of the type of statute that failed constitutional scrutiny." *Parmelee*, 186 P.3d at 1101 (citing Garrison v. Louisiana, 379 U.S. 64, 70 n.7 (1964)).

[142] *See* Heckler v. Matthews, 465 U.S. 728, 741 (1984).

[143] *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

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