This article suggests a dynamic construct, classifying societies according to their dominant *method of resolving conflicts in the area of libel and "dangerous words" on a continuum from self-help to mediation, with criminal and civil law remedies between. It may have application in other areas as well.*

A DYNAMIC MEASURE OF FREE EXPRESSION

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There have been many attempts to compare the levels of free expression across nations. The most common approach has been to collect, weight, and correlate available data on media usage and economic and political variables. The resulting indices, even if the largely self-reported data were reliable, are unidimensional and do not allow change over time.

This article suggests a dynamic construct. It classifies a society according to its *dominant* method of resolving conflicts on key free-expression issues. It envisions a continuum from self-help at one end to mediation on the other, with criminal and civil law remedies between. "Mediation" includes all formal, but nonjudicial, means of resolving conflicts, such as arbitration and understandings. Of course, all modern societies employ a mixture of these solutions.

We will apply this heuristic construct to protection of reputation—libel and related "dangerous words." It provides a better measure than the wording of laws. "Dangerous words" can be and have been prosecuted under a bewildering variety of laws,

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AUTHOR'S NOTE: *John D. Stevens credits Jerry with urging him to "stretch his vision" beyond research findings to the construction of generalizations. This article, based largely on Stevens's earlier publications, is a "faltering, tentative step in that direction."*

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including such catch-alls as disturbing the peace, vagrancy, and contempt. What matters is the spirit of enforcement.

There have been two rationales for developing formal mechanisms to settle alleged libels. The first is preventing breaches of the peace; the second is national security. The first grew up in the area of private wrongs, the second in sedition. At times, the two rationales have been intertwined. Both rationales have virtually disappeared today.

CURBING LAWLESSNESS

Throughout recorded history, untold numbers of duels, feuds, and wars have been waged to protect reputations. The plays of Shakespeare run red with such defenses of personal or family honor. Many innocent bystanders were victimized in the process. At last, governments decided they could not tolerate such breaches of the peace and developed remedies under criminal law. Such criminal laws remain in force in most nations.

Slander of the king or government had long been punishable as a form of treason. When printing arrived in the fifteenth century, rulers sensed its power and defined written criticism as treasonable. Sedition laws were invented by fifteenth- and sixteenth-century monarchies, who pretended no toleration for dissent, either in temporal or spiritual realms. Early in the seventeenth century, offenses based on written criticism gradually came to be labeled seditious libel. Though enforced in England somewhat less savagely than overt acts of treason, their suppression became more general and systematic.

The right to criticize expanded along with popular participation in the political process. However, at the moment Americans were enacting their Constitution, the English law of seditious libel still prohibited any "unjustified" criticism of the government, its policies, or officials. And it was the government that decided what was "justified." Finally, in 1792, Fox's Libel Act provided that in seditious libel trials truth would be a defense and that the jury, rather than the judge, had the power to determine whether the

utterance was criminal. The First Amendment was drawn up and ratified against this backdrop by men fresh from a successful revolution against autocratic power, who were trying to establish a popular form of government. Historians still debate whether the Framers intended to abolish outright the English law of seditious libel, but certainly they had been careful to exclude expression from their constitutional definition of treason:

> Treason against the United States shall consist only in levying war against them, or, in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

PROTECTING RULERS

With the passage of the Alien and Sedition Acts in 1798, the incumbent Federalist administration attempted to take advantage of a brief spasm of fear about a possible war with France to destroy its Republican opposition. The Sedition Act provided prison terms of up to two years for writing, speaking, or publishing anything "false, scandalous and malicious" against the government of the United States, the president, or either house of Congress. (Vice President Jefferson, the only Republican office-holder in the federal government, was conspicuously unprotected.)

Although the law incorporated the two "libertarian" safeguards of Fox's Libel Law, both truth as a defense and the enlarged jury role proved useless to defendants. The first persons indicted were the editors of the major Republican newspapers. Everyone tried under the law was convicted. The law expired before its constitutionality could be ruled upon, but the episode left such a bad aftertaste that the federal government enacted no more peacetime sedition laws for a century and a quarter. The states, however, had many such laws and continued to use them for several more decades.

SEDITION IN THIS CENTURY

Under the Espionage Act of World War I, thousands of Americans were prosecuted, often for loose talk that questioned whether Liberty Bonds were a good investment or whether some of the atrocity stories were not exaggerated. Some were indicted even for questioning the constitutionality of the Espionage Act itself. Several received the maximum sentence of 20 years. The states were prosecuting "anti-war" remarks under their own laws. The total number of prosecutions during the 20 months in which America was at war never will be known. The Espionage Act, amended only slightly, went into effect again with the declaration of war in 1941, but during World War II, it was used only once. It was the spirit of enforcement that was different.

Beginning in 1920, states began to legislate in the realm of peacetime sedition. These criminal anarchy and criminal syndicalism laws were designed to prosecute militant left-wing groups. The Supreme Court upheld their constitutionality. The first such decision in *Gitlow* v. *New York* (268 U.S. 652, 1925) proved to be one of the most significant in First Amendment history. Although the Court upheld Gitlow's conviction under the New York sedition law, the real significance was that they reviewed it at all. From then on, the states were no more free than the federal government to abridge expression of individuals.

In 1940, the first federal peacetime sedition law since 1798 was enacted. The Smith Act provided penalties of up to 20 years for advocating overthrow of the government or for organizing or belonging to a group that advocated such activity. The Justice Department between 1948 and 1957 indicted 121 Communist Party leaders and editors in 15 actions. Much of the evidence consisted of printed tracts and party newspapers. The juries convicted in each long and costly trial. Courts of Appeal upheld all the convictions except for two they remanded. The Supreme Court's reversal in *Yates* v. *U.S.* (354 U.S. 198, 1957) ended the whole episode. The act languished in disuse and was eventually repealed.

CRIMINAL LIBEL

All sedition laws, of course, have been criminal statutes. Almost all states have enacted more general criminal libel laws, often anchored in the breach of peace rationale. Such prosecutions peaked in the last decades of the nineteenth century and have been declining ever since. They now average about one a year and involve breach of peace. Because the elements of proof are almost identical with those for civil libel, busy prosecutors usually urge turning to the civil law solution. Although the Supreme Court has never rejected outright the concept of criminal libel, it has made it clear that its social utility is slight.

Criminal libel has developed the suspicious odor of seditious libel in disguise, when brought on behalf of public officials. Is there any excuse for a criminal law of libel today? Perhaps. A public official may not want to sue under civil libel because he does not want the public to think he is seeking monetary gain. For example, a U.S. senator was the victim of a particularly vicious attack while running for reelection. Forged police reports were distributed in which he was accused of drunken driving and engaging in homosexual acts. The senator wanted to expose the forgeries and to do it quickly. Knowing a civil libel action would take many months, he persuaded the prosecutor to file criminal libel charges, which were dropped after the perpetrators publicly confessed.

Most autocratic nations still rely heavily on criminal libel, especially to punish critics or dissidents. Such laws are written so broadly that the government has little trouble applying them to anyone it chooses.

CIVIL LIBEL

With criminal libel dead, public officials or figures can expect little protection from civil libel. In fact, the logic of special protections for them has been turned on its head. Courts have

held consistently that they are to have a more difficult burden of proof in libel actions than ordinary citizens. The law assumes not only that such persons have voluntarily placed themselves in the public light but that they have easier access to the means of telling their stories. Although this burden seldom allows them to win, public officials and figures still file most of the libel actions.

Civil libel litigation unquestionably is the dominant solution today. If there are more libel suits being filed, the same is true in most tort areas. The United States has become a litigious society. But a litigious society is more "mature" than one in which aggrieved parties resort to horse whips or cudgels to settle their differences with editors. Modern civil libel law seeks to protect the individual's reputation. Let us here distinguish libel from its younger tort sister, privacy. Privacy attempts to protect one's self-esteem. Although libel is ancient and universal, privacy is recent and, at least as a separate tort, uniquely American. It was conceived in a law journal article by authors who melded logic from several existing areas of law to suggest the need for a separate tort called "privacy." No one has ever suggested a criminal law of privacy. Although nearly all American states now have some tort of privacy, the federal government does not. Nor do the British or most other nations.

As interpretations have pushed libel law in the direction of promoting the airing of more and more controversies, more libel suits are brought for alleged damage to business or professional reputation than for aspersions on moral reputation.

It is up to the libel plaintiff to show that his reputation has been damaged in the minds of "right-thinking" people. A prison inmate sued a publication that said he cooperated with law enforcement officials. The court rejected his argument that this lowered his reputation in the eyes of his fellow inmates. It is not defamatory to call a woman "a feminist" or a person "a patriot," although some persons find those terms objectionable.

Under the American legal tradition, each party pays his own legal costs, regardless of the outcome of the case. Those costs can be considerable. The system eliminates the "suits for honor" sometimes filed in English courts, wherein a person sues for a few

pence or a pound. If he wins, his honor is cleared and he cannot be accused of suing merely to line his own pockets.

TOWARD MEDIATION?

Clearly, neither the United States nor any other society has arrived at the final stage of defamation maturity, which we have labeled "mediation"; however, there is movement in that direction.

First, the mass media are more willing than they used to be to run corrections and even occasional apologies. This is especially true where there is an error of fact. Opinion is another matter, and courts in recent years have been expansive in interpreting statements that mix fact and opinion as the latter. State libel laws should be amended to encourage such self-help solutions, eliminating the cause for action if the correction is made promptly and in the right spirit. This is not always the case now. In some jurisdictions the published retraction can be used as evidence by the plaintiff to show that there was inadequate checking of facts in the first place.

Because the Supreme Court consistently has held that print media cannot be required by law to publish anything they do not want to, such agreements must be informal and voluntary. France and some other nations regularly order newspapers to carry statements written by plaintiffs, but such a requirement in the United States would run afoul of the First Amendment.

When a mediated agreement can be reached, it is much faster than the cumbersome libel action; and assuming that plaintiffs really want, as they claim, exoneration more than money, it serves all interests better, including media defendants. Economics is driving them to negotiate. A few large media corporations, such as Knight-Ridder, have always refused to settle for fear one payoff would spawn many more plaintiffs, seeking a similar deal. Few can afford this luxury today, and most libel suits are settled before they come to trial. Judges often serve as mediators in these out-of-court negotiations. Juries find against media defendants four times out of five, often assessing seven- and eight-figure

damages. Although appellate courts usually reverse or at least reduce the damages, the risk is great. So are the legal costs.

How strong is the trend toward such mediation? There are no statistics on cases that do not come to trial, but media attorneys report a great increase in settlements. This could be that fourth stage.

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