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**POST A MESSAGE AND GO TO JAIL:
CRIMINALIZING INTERNET LIBEL IN
JAPAN AND THE UNITED STATES**

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In the United States, criminal libel is all but dead. American law professors only write about it to denounce the continued existence of rarely enforced criminal libel statutes. In Japan, however, criminal libel laws have become vital tools in policing injurious speech on the Internet. Defamatory posts lead to police intervention and even arrest. Because the United States is considering regulation of online speech, potentially including criminal penalties, we can learn from the experience of Japan. From a positive perspective, this Article explains why Japan applies such laws to the Internet. From a normative perspective, the Article addresses why broadly extending existing criminal libel law onto the Internet is not a good choice for Japan. Finally, from a comparative law perspective, this Article discusses why a similar move would be an even worse choice for the United States than Japan.

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"A person lives for one generation; a good name lasts forever."

—Japanese proverb¹

"For what do we live, but to make sport for our neighbors, and laugh at them in our turn?"

—Jane Austen²

INTRODUCTION

It is perhaps an understatement of epic proportions to say that the Internet has sparked many changes. Among its less-celebrated transformations is the worldwide, instantaneous reach it provides to malicious gossip.³ In the United States, subjects of these slurs tend to fight fire with fire, launching counter accusations or even online hate campaigns; sometimes they even sue.⁴ Yet in Japan, things get even nastier: the cops get involved.

Criminal libel not only survives in Japan, it thrives. In the United States, criminal libel has been essentially dead since *New York Times v. Sullivan*⁵ and *Garrison v. Louisiana*⁶ in the mid-1960s. However, in Japan, hundreds of people are arrested under criminal libel laws every year,⁷ and these numbers have actually increased over the past decade.⁸ The police

1. *Hito wa ichidai, na wa matsudai*. DANIEL CRUMP BUCHANAN, JAPANESE PROVERBS AND SAYINGS 120 (1965).

2. JANE AUSTEN, *PRIDE AND PREJUDICE* 343–44 (Vivien Jones ed., Penguin Books 2003) (1813).

3. Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473, 473 (2004) (observing that "[p]eople write lots of nasty stuff about each other and publish it on the Internet").

4. *Id.* ("Sometimes the targets of these publications sue for defamation.").

5. 376 U.S. 254 (1964).

6. 379 U.S. 64 (1964).

7. See *infra* Table 1.

8. Japan's crackdown on libel has not been limited to criminal libel prosecutions; the famously non-litigious Japanese have brought civil lawsuits that break new ground in terms of remedies and damages. Recent years have seen the unprecedented enjoining of a website alleging fraud at one of Japan's largest insurers, record-breaking damages concerning a news story about "excessive womanizing" in Seattle by a Japanese baseball star, and an attention-grabbing injunction of a magazine story that a leading politician forced her daughter to divorce her Los Angeles-based husband and return to Japan. See *Kokhatsu saito no koukai o kinshi toukyouchisai* [Tokyo District Court Bans Public Display of Complaint Website], MAINICHI SHIMBUN, Apr. 24, 2001, at 25 (explaining that the website alleged claims of fraud by The Sumitomo Marine and Fire Insurance Company); *Kokuhatsu saito no sashitome karishobun toukyouchisai ga hatsuhandan* [Tokyo

get involved in such seemingly routine cases as online allegations that a particular company is “the worst” and that “the CEO is terrible”⁹ or that an Internet auction seller provides “counterfeit goods” of “poor quality.”¹⁰ The police have actually arrested Internet users who posted the name and phone number of an unwitting female victim on a “women seeking men” website¹¹ and posted allegations of a public official’s “bodily defects” and electoral misconduct on a local government message board.¹² Given Japan’s democratic institutions, fairly robust press, and widespread citizen access to mass communications, including the Internet, these arrests may seem shocking. While it is understandable to sympathize with the victims of

District Court makes the first decision granting a temporary injunction against a complaint website], SANKEI SHIMBUN, Apr. 25, 2001, at 30 (noting how “complaint” website cases had been increasing, so this first decision stopping such a site might have an impact); Hiroshi Matsubara, *Injunction Upheld Against Latest Issue of Shukan Bunshun*, JAPAN TIMES, Mar. 20, 2004, available at <http://search.japantimes.co.jp/print/news/nn03-2004/nn20040320a1.htm>; *Dokusen skuupu: Tanaka Makiko choujo wazuka ichinen de rikon—haha no mouhantai o oshikitte nyuuseki shita niizuma wa rosu kara hissoni kikoku* [Exclusive scoop: Makiko Tanaka’s eldest daughter divorces after only one year [of marriage]—Mom’s fierce opposition [to the marriage] gets its way, the new bride quietly returns home from Los Angeles], SHUUKAN BUNSHUN, Mar. 25, 2004, at 163 (the actual juicy details of a politician-mother’s interference in her daughter’s marriage).

9. NATIONAL POLICE AGENCY, HEISEI 14NEN JOHANKI NO SAIBAA HANZAI NO KENKYO OYOBI SOUDAN JURI JOKYOU NADO NI TSUITE [CONCERNING THE SITUATION OF CONSULTATIONS AND ARRESTS FOR CYBER CRIME IN THE FIRST HALF OF 2002] 5 (2002), http://www.npa.go.jp/cyber/statics/h14/kenkyo_2002_half.htm.

10. NATIONAL POLICE AGENCY, HEISEI 15NEN JOHANKI NO SAIBAA HANZAI NO KENKYO OYOBI SOUDAN JURI JOKYOU NADO NI TSUITE [CONCERNING THE SITUATION OF CONSULTATIONS AND ARRESTS FOR CYBER CRIME IN THE FIRST HALF OF 2003] 5 (2003), <http://www.npa.go.jp/cyber/statics/h15/html12.htm>.

11. NATIONAL POLICE AGENCY, HEISEI 17NEN JOHANKI NO SAIBAA HANZAI NO KENKYO OYOBI SOUDAN JURI JOKYOU NADO NI TSUITE [CONCERNING THE SITUATION OF CONSULTATIONS AND ARRESTS FOR CYBER CRIME IN THE FIRST HALF OF 2005] 5 (2005), http://www.npa.go.jp/cyber/statics/h17/h17_02.html. This kind of offense illustrates the Japanese intertwining within criminal libel of the American concept of libel as well as invasion of privacy. See Dan Rosen, *Private Lives and Public Eyes: Privacy in the United States and Japan*, 6 FLA. J. INT’L L. 141 (1990) (describing civil libel and the tort of invasion of privacy as intertwined in Japan but separate in the United States). Of course, invasion of privacy is a tort in the United States, not a crime—and acts that invade privacy can also be defamatory. See Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 292–93 (1983) (observing that although an 1890 article by Samuel Warren and Louis Brandeis calling for protection against truthful disclosure of personal affairs led most states to enact privacy laws, “plaintiffs rarely win” these cases).

12. NATIONAL POLICE AGENCY, *supra* note 10, at 3.

such online libels, so far the U.S. has not embraced criminal prosecution on their behalf, instead leaving civil litigation as their primary recourse. Indeed, American commentators often regard criminal libel as alien to a “modern liberal democracy”—the kind of thing “dictatorships” use to keep their societies from becoming too open to dangerous ideas.¹³

In Japan the pressure to maintain, and even increase the use of, criminal libel laws stems not from tyrannical suppression of individual speech, but rather from the need to respond to the free-for-all that is Japan’s online world. The Japanese came late to the Internet party, but have made up for lost time by quickly becoming more “wired” than the United States and other nations. A large part of Japan’s relationship with the Internet involves the creation of a kind of “other Japan,” where the famous rigid social norms of the physical world erode or even vanish. Thanks to the Internet, you do not have to be a celebrity to be libeled worldwide,¹⁴ and in a society where reputations and social norms play a powerful role,¹⁵ there is a bottom-up pressure for the criminalization of libel.¹⁶ The need for

13. See, e.g., Gregory Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL’Y 433, 433 (2004) (“There is no common law affiliation with or legal justification for the existence of criminal libel in a democracy.”); see Index on Censorship, U.S. Ready to Jail Its Journalists (July 17, 2002), <http://www.indexonline.org/en/news/articles/2002/3/us-ready-to-jail-its-journalists.shtml> (asserting that criminal defamation is “widely regarded as a threat to human rights” and quoting Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press, describing criminal defamation as being “typically associate[d] with . . . authoritarian governments”). This view of criminal libel is of course not limited to Americans. See Jairo E. Lanao, *Legal Challenges to Freedom of the Press*, 56 U. MIAMI L. REV. 347, 362 (2002) (“Elimination of criminal libel [statutes] has been a world cause embraced by numerous human rights organizations . . .”).

14. Those in legal academia who doubt this point need only check out www.RateMyProfessor.com. See John Sutherland, *Prof-Hunts*, THE GUARDIAN, Jan. 25, 2006, at <http://education.guardian.co.uk/higher/worldwide/story/0,,1693934,00.html> (last visited Feb. 14, 2007) (“[American f]ree access sites such as www.RateMyProfessor.com (which has 5m ratings and comments on 714,000 teachers) become trash buckets into which any kind of student pique or rage can be dumped—conceivably blighting careers . . .”).

15. See *infra* notes 109–13 and surrounding text.

16. See Itsuko Yamaguchi, *Beyond De Facto Freedom: Digital Transformation of Free Speech Theory in Japan*, 38 STAN. J. INT’L L. 109, 120 (2002) (describing the “persistent skepticism about speech regulation in Japan” due to World War II experience as a fascist police state, but stating that “after witnessing the unprecedented scale of speech on the Internet, the Japanese people have gradually realized the seriousness of the resultant harms and the need for remedial regulation”).

criminal libel prosecution goes hand-in-hand with a dependence on private ordering through reputation. Even though criminalization of online libel probably can never achieve the total elimination of offensive speech, it can help to enforce norms of behavior online as well as spread doubt about the value of online speech. Both results help reduce harm to personal reputations from Internet libel.

The Japanese experience is not of purely academic interest to Americans. Online speech, both political and otherwise, has come under fire in the United States in recent years. Legislators and bureaucrats have put forth proposals to regulate the speech of politically oriented “bloggers,”¹⁷ and enacted legislation that may make it a crime to use the Internet to communicate statements that “annoy” or “harass” others.¹⁸ Japan’s recent experience in applying criminal law to Internet speech is very relevant to these looming policy debates in the United States. This Article compares the American and Japanese situations and concludes that the use of an approach similar to Japan’s in the United States would risk public censorship for uncertain gain. The risks and costs of criminalizing libel in the United States are higher than doing so in Japan, given that the Japanese legal system is better situated to handle criminal libel¹⁹ and given the less political nature of Japanese police and prosecutors.²⁰ Furthermore, the benefits of criminalizing libel in the United States should be lower than doing so in Japan, since good reputations, while important, are less critical in the United States than in Japan.²¹ Not only would criminalizing online libel be a worse choice for the United States than it is for

17. See, e.g., Brian Faler, *FEC Hears Bloggers’ Bid to Share Media Exemption*, WASHINGTON POST, July 12, 2005, at A19 (describing hearings over whether the Federal Election Commission (FEC) should have the ability to regulate and punitively fine political speech contained in online journals called “weblogs” or “blogs”); Christopher P. Zubowicz, *The New Press Corps: Applying the Federal Election Campaign Act’s Press Exemption to Online Political Speech*, 9 VA J.L. & TECH. 6, 6 (2004), http://www.vjolt.net/vol10/issue3/v10i3_a6-Hansen-Young.pdf (arguing that the FEC should exempt political blogs from “online speech restrictions”). But see Victoria Shabo, “Money, Like Water . . .”: *Revisiting Equality in Campaign Finance Regulation After the 2004 “Summer of 527s,”* 84 N.C. L. REV. 221, 270–71 (2005) (questioning the wisdom of such exemptions not just for bloggers but also for mainstream media).

18. The predicted impact of such legislation, yet to be interpreted by any court, is a controversial matter. See *infra* notes 41–44 and surrounding text.

19. See *infra* Section II.A.

20. See *infra* notes 186–88 and surrounding text.

21. See *infra* notes 126–29 and surrounding text.

Japan, but it is also a poor choice for Japan itself. Indeed, despite its comparative advantage and significant transition costs, Japan is actually taking steps to bolster its civil remedy system for libel to provide an American-style alternative for victims.²²

Part I of this Article describes how the law of criminal libel came to be a dead-letter office of the law in the United States. Part II describes the criminal libel boom in Japan and provides some related contextual information about the intersection of the criminal justice system and the Internet in Japan and the deficiencies that make civil litigation a weak alternative. Part III discusses the risks of replicating the Japanese experiment in the United States, with a particular focus on the lower benefits and higher costs that criminalization of online speech would bring in the United States.

I. CRIMINAL LIBEL IN THE UNITED STATES

To paraphrase Ross Perot, criminal libel in the U.S. is like “the crazy aunt we keep in the basement.”²³ Law professors write about it to remind readers that the possibility of enforcement is still there and we should therefore be concerned. To this end, they describe criminal libel prosecutions as having been “virtually eradicated”—as if they are writing of smallpox or bubonic plague.²⁴ They ask rhetorical questions pained with indignation²⁵ and create odd metaphors involving babies and spittle, with the Supreme Court as an implied nanny.²⁶

22. See *infra* notes 130–44 and surrounding text.

23. See Frontline, *The Choice 2000: Issue Briefs*, <http://www.pbs.org/wgbh/pages/frontline/shows/choice2000/issues/> (last visited Feb. 12, 2007) (quoting Ross Perot’s take on the U.S. budget deficit).

24. See 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, 292 (2005) (“By the late 20th century, however, criminal libel had been virtually eradicated.”).

25. See David Kohler, *Forty Years After New York Times v. Sullivan: The Good the Bad and the Ugly*, 83 OR. L. REV. 1203, 1233 (2004) (asking, without directly answering, “[d]oes the occasional and selective use of criminal libel for political purposes have any place in an ordered society that values free expression as ours does?”).

26. Lisby, *supra* note 13, at 487 (concluding that “[t]he Supreme Court must act [to abolish criminal libel],” because “[u]ntil 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”).

Two common themes are repeated in analyses of American criminal libel law. First, contemporary criminal libel prosecutions are rare. A media advocacy group found that there have been all of seventy-seven criminal libel prosecutions *threatened* in the entire United States over the past forty-one years.²⁷ Other studies have produced similar figures.²⁸

Despite the small number of cases in a country with nearly 300 million people, the second common theme in articles about American criminal libel is alarm: commentators decry criminal libel as an abomination. The most benign view is that it is a legal relic, designed to keep the peace in an era when personal insult led to duels and other private violence. Indeed, the decline of dueling and similar private violence led the 1961 drafters of the Model Penal Code consciously to omit the crime of libel.²⁹ As a result, the vestigial remnants of criminal libel serve only as a potential threat to free expression and freedom of information. Thus, as common knowledge suggests, the existence of even a minimal number of criminal libel cases should provoke maximum outrage. Similarly, the minority of states that keep such statutes on their books find themselves derided as near-barbaric.³⁰

27. *Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S.* After Sullivan & Garrison, MEDIA LAW RESEARCH CENTER BULLETIN (Media Law Research Center, New York, N.Y.), Mar. 2003, at 42. The same report suggests that eight "actual or threatened" American prosecutions for libel from 1997 to 2002 involved the Internet—suggesting that the U.S. has recently averaged around one prosecution for online defamation annually. *Id.* at 42–56; see also Carter, *supra* note 24, at 298 ("Of the twenty-five cases since 1997, eight—approximately one-third—involved speech on the Internet.").

28. See Russell Hickey, *A Compendium of U.S. Criminal Libel Prosecutions: 1990-2002*, LIBEL DEFENSE RESOURCE CENTER BULLETIN (Media Law Research Center, New York, N.Y.), Mar. 27, 2002, at 95, 97 (reporting "23 criminal libel prosecutions or threatened prosecutions" from 1990 to 2002); Lisby, *supra* note 13, at 466–68 (counting 34 appellate criminal libel cases from 1967 to 1996).

29. See *Garrison v. Louisiana*, 379 U.S. 64, 69–70 (1964) (quoting MODEL PENAL CODE § 250.7 cmts. at 44 (Tentative Draft No. 13, 1961)):

It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country

30. Lisby, *supra* note 13, at 479 ("[P]rosecutions for the crime of libel are 'in-

This regrettable view of criminal libel finds its most famous expression in the Supreme Court's 1964 decision in *Garrison v. Louisiana*.³¹ In that case, the Supreme Court extended the logic of *New York Times v. Sullivan*³² from the civil sphere to the criminal libel context. In *Garrison*, the Court confronted the state law criminal libel prosecution of the New Orleans District Attorney for impugning the reputations of local judges.³³ As at common law, the statute in question allowed for prosecution of even *true* defamatory statements.³⁴ Such injurious true statements rose to the level of crimes if they were made in bad faith.³⁵ Specifically rejecting this formulation as unconstitutional in the context of criticism of a public official, the Court concluded that the "actual malice" standard of *Sullivan* should govern.³⁶ Accordingly, if the statement in question is true or at least not a knowing or reckless falsehood, the First

consistent with the principles of imposing criminal liability in modern society.' Yet 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.") (quoting Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH 273, 320-21 (2003)). Some of these state laws have been held unconstitutional. Carter, *supra* note 24, at 296 (stating that "[b]y 2004, only fourteen states had criminal libel laws that had not been adjudged unconstitutional in some way"). See FLA. STAT. ANN. § 836.01 (West 2006); IDAHO CODE ANN. § 18-4801 (2004); KAN. STAT. ANN. § 21-4004 (1995 & Supp. 2005); MICH. COMP. LAWS ANN. § 750.370 (West 2004); MINN. STAT. ANN. § 609.765 (West 2003); NEV. REV. STAT. ANN. § 200.510 (LexisNexis 2006); N.H. REV. STAT. ANN. § 644:11 (2006); N.C. GEN. STAT. ANN. § 14-47 (West 2005); N.D. CENT. CODE § 12.1-15-01 (2005); OKLA. STAT. ANN. tit. 21, § 771 (West 2002); UTAH CODE ANN. § 76-9-404 (2003); VA. CODE ANN. § 18.2-417 (2004); WASH. REV. CODE ANN. § 9.58.010 (West 2003 & Supp. 2007); WIS. STAT. ANN. § 942.01 (West 2005 & Supp. 2006).

31. 379 U.S. 64 (1964).

32. 376 U.S. 254 (1964).

33. 379 U.S. at 64-67.

34. *Id.* at 67-68 ("At common law, truth was no defense to criminal libel."). Under the Louisiana statute at issue in *Garrison*, the truth defense could be negated "on a showing of malice in the sense of ill-will." *Id.* at 71-72.

35. *Id.* at 72.

36. *Id.* at 72-75. The Court in *Sullivan* held that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." 376 U.S. 254 at 283. In particular, the Court concluded that such limits were impelled by "the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. Because it recognized that "erroneous statement is inevitable in free debate," the Court created the actual malice rule to provide "breathing space" for free expression. *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Amendment public interest in information trumps the private reputational interest at stake.³⁷

The impact of *Garrison* has been to “freeze” the criminal libel prosecutions that would otherwise “chill” free speech about public officials. But even criminal libel cases not concerning public officials have been rare in the United States, with as few as eleven such cases arising between 1990 and 2002.³⁸ Despite the scarcity of these prosecutions, there remains reason to be concerned that criminal libel cases could become more common in the future. First, *Garrison* left open certain avenues for criminal libel. The Supreme Court has not addressed the question of whether truth must be recognized as an absolute defense in a defamation action brought by a private person.³⁹ Indeed, some state courts have seized that opening to uphold state criminal libel statutes against constitutional challenge.⁴⁰ Additionally, there remains the possibility of prosecution for the dissemination of a reckless or knowing falsehood.⁴¹

Furthermore, as with so many other areas of the law, the Internet has forced a reexamination of libel law,⁴² including criminal libel.⁴³ The Internet drastically slashes the cost of widespread publication, making it easier to libel obscure pri-

37. *Garrison*, 379 U.S. 64 at 71–75.

38. See Hickey, *supra* note 28 (stating that there were 23 cases of actual or threatened criminal libel from 1990 to 2002, of which 12 involved public officials).

39. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that the publication of a rape victim’s name by a journalist did not violate First and Fourteenth Amendment protections because the identity of the victim was available in court records available to the public).

40. See, e.g., *People v. Ryan*, 806 P.2d 935 (Colo. 1991) (rejecting argument that statute is unconstitutional unless truth alone is an absolute defense in criminal libel prosecution for statement involving private individual); *People v. Heinrich*, 470 N.E.2d 966 (Ill. 1984) (same); see also *Fitts v. Kolb*, 779 F. Supp. 1502, 1513–15 (D.S.C. 1991) (refusing to hold criminal libel laws as per se unconstitutional, concluding that such statutes, properly drafted, do not violate the First Amendment).

41. See *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (“[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.”).

42. See, e.g., Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 865 (2000) (observing that “the power that the Internet gives irresponsible speakers to damage the reputations of their targets” and wondering about “the potential benefits that defamation law may bring to Internet discourse”).

43. See Carter, *supra* note 24, at 315–17 (concluding that despite the decentralized control, anonymity, low transaction costs and widespread dissemination characteristic of the Internet, online libel is still not pernicious enough to merit criminal libel prosecution).

vate individuals. As a result, the Internet changes the world that traditional libel law addresses. Previously, to have one's reputation damaged by allegations with wide reach, one had to be important enough and disliked enough to incentivize potential libelers to invest substantial capital (e.g., hiring a typesetter and firing up a printing press, buying radio or television time, etc.).

To stem the perceived tide of cheap and easy libel, legislators and bureaucrats have made efforts to extend criminal punishment and regulation by criminally punitive fines to Internet speech. Early in 2006, Congress made it a crime to use the Internet to communicate statements that "annoy" or "harass" others.⁴⁴ Interpretations of this statute vary. Some believe it should be read to merely extend existing harassment law to Internet telephony and offensive e-mails.⁴⁵ Others warn that the statute could criminalize web postings that harass or annoy the few even if they inform the many.⁴⁶ The statute contains a provision that says it should be read consistently with the First Amendment. However, this provision may not provide extensive First Amendment protection, since First Amendment law as defined by *Garrison* does not conflict with the statute's provisions. Rather, it allows for the prosecution of libel against private individuals, as well as the prosecution of knowing or reckless false libels against public officials.⁴⁷

44. See Declan McCullagh, *Create an E-annoyance, Go to Jail*, CNET NEWS.COM Jan. 9, 2006, http://news.com.com/create+an+e-annoyance%2C+go+to+jail/2010-1028_3-6022491.html ("President Bush signed into law a prohibition on posting annoying Web messages or sending annoying e-mail messages without disclosing your true identity."). The provision, section 113, of the Violence Against Women and Department of Justice Reauthorization Act (2005), is susceptible to the less inflammatory interpretation that it merely extends existing antistalking law to telephony using the Internet (Voice Over Internet Protocol) and e-mail. 47 U.S.C.A. § 223 (West 2001 & Supp. 2006). However, it is also possible to read this act, which has yet to be interpreted by a court, as punishing speech which informs many, but also annoys a few.

45. Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/posts/1136873535.shtml> (Jan. 10, 2006, 12:12) (Posting entitled, "A Skeptical Look at 'Create an E-Annoyance, Go to Jail'").

46. Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/posts/1136923654.shtml> (Jan. 10, 2006, 14:07) (Posting entitled, "Annoying Anonymous Speech Online").

47. See *Garrison v. Louisiana*, 379 U.S. 64, 75-76 (1964) (observing that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection" and stating that "[w]e do not think, however, that appellant's statement may be considered as one constituting only a purely private defamation").

In addition to this potential regulation of offensive speech against private individuals, the Federal Election Commission (FEC) has considered regulating the online political speech of politically oriented “bloggers.”⁴⁸ Given this group’s tendency to engage in no-holds barred criticism of incumbents and election candidates, such regulation raises serious concerns about government regulation of speech criticizing political officials.⁴⁹

Given the looming possibility of U.S. government revival of state punishment for libelous speech, it is beneficial to examine the experience of other nations to consider the wisdom and implications of this legislative move. While it is difficult to accomplish this from a comparative law perspective, there is at least one wealthy nation with widespread Internet penetration, a constitutional and legal system substantially influenced by American ideas, and vibrant use of criminal libel prosecutions: Japan.⁵⁰

II. CRIMINAL LIBEL IN JAPAN AND THE ONLINE WORLD

The facts of Japan’s prosecution of online defamation are fairly clear. Japan has both civil⁵¹ and criminal⁵² statutes pro-

48. See, e.g., Faler, *supra* note 17, at A19 (describing hearings over whether federal agency should have the ability to regulate and punitively fine political speech contained in online journals called “weblogs” or “blogs”).

49. *Id.*; Zubowicz, *supra* note 17, at 6 (arguing that the FEC should exempt political blogs from “online speech restrictions”). But see Shabo, *supra* note 17, at 270–71 (questioning the wisdom of such exemptions not just for bloggers but also for mainstream media).

50. For information about Japan’s high rate of Internet use and the frequency of its criminal libel prosecutions, see *infra* Part II. American influence on particular areas of Japanese law and the legal system is notable. See, e.g., Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 528 (1992) (describing Japan’s postwar constitution as adopting American ideas due to the Occupation, including Roosevelt’s Second Bill of Rights); Annie Murphy Paul, *Land of the Rising Lawyer: A Bold Solution to Japan’s Floundering Economy: 68 American-Style Law Schools*, LEGAL AFF., July/Aug. 2005, at 64 (describing Japan’s establishment of post-college, American style law schools); Mark D. West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States*, 150 U. PA. L. REV. 527, 528–29 (2001) (noting the use of the Illinois Business Corporation Act as a model for Japan’s *shouhou*, or commercial code); Intellectual Property High Court History, History, <http://www.ip.courts.go.jp/eng/aboutus/history.html> (last visited Feb. 15, 2007) (describing Japan’s establishment in 2004 of an intellectual property-specific appellate court, *la* the Federal Circuit).

51. See MINPŌ [Civil Code], arts. 709–10, 723.

“A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom.” *Id.* art. 709.

scribing defamation, which in and of itself is not surprising. Many Western nations and U.S. states maintain criminal libel statutes on their books.⁵³ What is surprising about Japan is that, unlike these Western counterparts, its criminal libel statutes are not vestigial.⁵⁴ As previously noted, studies suggest the United States has had less than eighty actual or threatened prosecutions for criminal libel in the last forty-one years, whereas Japan had almost 300 criminal libel arrests in the year 2003 alone.⁵⁵ This raises a simple two-part question: Why

"A person who is liable in compensation for in accordance with the provisions of the preceding Article shall make compensation therefor even in respect of a non-pecuniary damage, irrespective of whether such injury was to the person, liberty or reputation of another or to his property rights." *Id.* art. 710.

"If a person has injured the reputation of another the Court may, on the application of the latter, make an order requiring the former to take suitable measures for the restoration of the latter's reputation either in lieu of or together with compensation for damages." *Id.* art. 723.

52. See KEIHŌ [Criminal Code], art. 230 ("A person who injures the reputation of another by publicly alleging facts shall, regardless of whether such facts are true or false, be punished with penal servitude or imprisonment for not more than three years or a fine of not more than five hundred thousand yen."); *id.* art. 230-2 which sets forth:

When the act mentioned in paragraph 1 of the preceding Article is deemed to have been committed in allegation of the facts related to the public interest and with the object solely promoting the public benefit, it shall not be punished if, in inquiry into facts, the truth thereof is established

2. In applying the provisions of the preceding paragraph, facts concerning the criminal act of a person for whom a public action has not yet been instituted shall be deemed to be facts related to the public interest.

3. When the act mentioned in paragraph 1 of the preceding Article has been committed in allegation of the facts concerning a public officer or a candidate for elective public office, it shall not be punished if, in inquiry into the facts, the truth thereof is established.

53. See Anthony Letser, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 552-56 (1988) (describing European statutes and their tension with evolving standards of human rights in the EU); *supra* note 30 (listing American states that still have criminal libel statutes).

54. American criminal libel statutes have fallen into desuetude, although there have been a few recent Internet defamation prosecutions. See James C. Goodale, *It Can't Happen Here - But It Did*, 228 N.Y.L.J. 3 (2002) (describing use of Kansas criminal libel law to prosecute alleged online defamation of public official). European Court of Human Rights decisions have been interpreted as undermining, if not invalidating, member states' criminal libel statutes. See Letser, *supra* note 53, at 552-56 (describing ECHR cases overruling criminal libel decisions of the highest courts of the UK and Austria based on Article 10 of the European Convention on Human Rights).

55. See NATIONAL POLICE AGENCY, HEISEI 15NEN NO HANZAI (Crime in 2003) 108 (reporting 286 such arrests).

does Japan still actively prosecute libel, and why is it targeting Internet libel through these prosecutions? To understand how and why Japan can continue to pursue criminal libel charges, and even extend their reach to the Internet, one must understand the nature of the black letter law in Japan and the resources available for enforcement, the magnitude of the Internet challenge that Japan faces, and the weaknesses of the alternatives to criminal libel.

A. *Japan's Criminal Code and Supreme Court Have Wounded, but Not Killed Off Criminal Libel*

As in America, Japan's criminal libel law is a relic of a by-gone era. Indeed, the first part of the Japanese statute, dealing with the libel of private individuals, reads virtually just as it did when it was adopted in 1907, in the 40th year of the Meiji Emperor's reign.⁵⁶ However, like an antique samurai sword that can still behead modern victims, Japan's criminal libel laws still receive a fair degree of use. While Japanese criminal defamation cases are fairly rare in absolute terms, they are quite frequent in comparison with the number of similar cases in the United States, and their numbers are swiftly rising. As mentioned in the previous section, the United States, with 300 million people, has seen only seventy-seven *threatened* prosecutions in forty-one years. By contrast, Japan, a nation of 130 million people, had just under 500 known criminal cases of defamation in 2003. That number represented almost a five-fold increase over the number of criminal libel cases a decade earlier (see Table 1).⁵⁷ In 2003, nearly 300 people were arrested in connection with these cases, almost triple the number of similar arrests a decade ago.⁵⁸

56. The text of Article 230-1, *see supra* note 52, is substantially the same as it has been for a century. Compare Law No. 45 of 1907 (KEIHŌ [Criminal Code] art. 230) with Law No. 91 of 1995 (KEIHŌ [Criminal Code] art. 230) (raising the maximum possible fine from 8,000 yen to 500,000 yen, and changing the provision rejecting the truth defense to libel from "without asking about the truthfulness" (1907) of the facts asserted to "regardless of whether such facts are true" (1995)). After World War II, a new portion, Article 230-2, was added that made truth a defense in limited circumstances. See Yamaguchi, *supra* note 16, at 115 n.23; *see also supra* notes 61–64 and surrounding text (discussing this modern limited truth defense).

57. NATIONAL POLICE AGENCY, *supra* note 55.

58. *Id.*

Table 1: *Criminal Defamation Cases in Japan.*⁵⁹

Year	Known criminal defamation cases	Arrestees	Clearance rate ⁶⁰
1994	101	110	95.0%
1995	105	126	94.3%
1996	98	97	98.0%
1997	109	123	97.2%
1998	84	99	94.0%
1999	107	112	87.9%
2000	266	235	77.1%
2001	351	312	72.4%
2002	440	285	61.4%
2003	488	286	59.6%

One reason why prosecutors continue to bring criminal defamation cases in Japan may be that such cases are winnable. Though Japan's Criminal Code makes defamation an adequately serious crime to be punishable by fine or even imprisonment, truth is a limited defense.⁶¹ If the statement involves facts about public officials or the failure of officials to prosecute a crime, the fact that an injurious statement is *true* is a defense.⁶² It is worth noting that Japan's Supreme Court has read the statute's defense broadly.⁶³ However, truth is not a

59. *Id.*

60. The clearance rate represents the percentage of cases with an arrest, not the number of arrestees divided by the number of cases. The absolute number of cases with an arrest is reported in NATIONAL POLICE AGENCY, *supra* note 55, at 108.

61. See *supra* note 52 (text of statute including penal provision) and *infra* notes 62–63 (describing truth defense).

62. The Criminal Code *does* explicitly provide that truth will protect certain types of allegations in the public interest, specifically, facts concerning the non-prosecution of criminal acts and facts concerning public officers or candidates for public office. See KEIHŌ [Criminal Code] art. 230-2(2) ("In applying the provisions of the preceding paragraph, facts concerning the criminal act of a person for whom a public action has not yet been instituted shall be deemed to facts related to the public interest."); KEIHŌ [Criminal Code] art. 230-2(3) ("When the act mentioned in paragraph 1 of the preceding Article has been committed in allegation of the facts concerning a public officer or a candidate for elective public office, it shall not be punished if, in inquiry into the facts, the truth thereof is established.").

63. The Japan Supreme Court has suggested that the fact that a statement was made *under the belief* that it was true, with support by reliable evidence, *may* be a defense. See *Ex parte Kawachi*, 23 KEISHŪ 975 (Sup. Ct., June 25, 1969) (ap-

particularly strong defense; the Japanese rule falls short of the actual malice standard in *Garrison* and is permissive, not mandatory. Furthermore, the truth defense in Japan puts the burden of proof of intent on the defendant speaker.⁶⁴ By contrast, under *Garrison*, the prosecutor must prove actual malice on the part of the defendant.⁶⁵ Finally, while there is strong evidence that Japanese courts act with a high rate of consistency, Japan does not have U.S.-style stare decisis.⁶⁶ As a result, defendants may not feel the defense is entirely reliable.

The truth defense to criminal libel in Japan runs into another significant limitation: it is not a defense to libels against those not involved in the criminal justice system, those who do not hold public office, and those who are not otherwise entangled with a matter of public interest.⁶⁷ In the brave new world of the Internet, private individuals can now libel other private individuals quickly, cheaply and easily. As a result, Japan now faces myriad online libel criminal complaints that can proceed under the black letter law.

Japanese prosecutors may have reason to see criminal libel cases as more winnable than their American counterparts, but the most notable aspect of Japan's criminal push in this area involves the police, rather than prosecutors. Japan has made a conscious commitment to "maintain order" in the face of the

plying this rule to criminal case); *Tamura v. Yomiuri Shimbun*, 20 MINSHŪ 1118 (Sup. Ct., June 23, 1966) (applying this rule to civil case).

64. *Kawachi*, 23 KEISHŪ at 996 (stating that, "in the context of a defamation case, proof of truth of statement is the defendant's burden"). See also Yamaguchi, *supra* note 16, at 115 n.23 (describing the Japan Supreme Court's ruling that "there [i]s no crime of defamation if a defendant prove[s] he had 'considerable reason' to believe the facts he had alleged were true").

65. See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

[A] public official might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. . . . The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy.

Id.

66. See LAWRENCE WARD BEER, *FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS, AND SOCIETY* 137 (1984). A recent statistical analysis has found a high degree of consistency among many areas of judicial decisionmaking in Japan. See J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* 170 (2003) (concluding that at least some consistency is the product of "politically biased career incentives" for judges).

67. See *supra* note 52.

Internet.⁶⁸ Japan's police and prosecutors have dedicated resources and compiled annual reports covering a range of computer-related crimes, from unauthorized access to computer networks to Internet-related copyright infringement, and, of course, Internet-based criminal libel.⁶⁹ As the number of Japanese Internet users has increased, so too has the involvement of Japan's police in "consultations" about instances of defamation. These "consultations"—actually complaint filings that can lead to informal police action—can now even be made via the Internet.⁷⁰

By seeking out and publicizing information about consultations and the conduct that triggers them, Japanese police encourage victims of online defamation to come forward. The police advertise their ability to help victims deal with offensive posts.⁷¹ They also try to influence behavior by endorsing norms of conduct online.⁷² Examples of online defamation triggering police intervention include false negative evaluations of online vendors on auction websites, false descriptions of particular women as available for what is euphemistically called "com-

68. See Unauthorized Computer Access Law, Law No. 128 of 1999 (provisional translation), available at <http://www.npa.go.jp/cyber/english/legislation/ucalaw.html> ("The purpose of this Law is, by prohibiting acts of unauthorized computer access as well as by stipulating penal provisions for such acts . . . to prevent computer-related crimes that are committed through telecommunication lines and to maintain the telecommunications-related order . . .").

69. See *id.* See also NATIONAL POLICE AGENCY, HEISEI 12NEN NO SAIBAA HANZAI NO KENYO JOUKYOU NADO NI TSUITE [Concerning the Cybercrime Arrest Status and Related Matters in 2000] (2000), http://www.npa.go.jp/cyber/statics/h12/kenkyo_2000.htm; NATIONAL POLICE AGENCY, HEISEI 12NEN NO SAIBAA HANZAI NI KANSURU SOUDAN JURI JOUKYOU [The Status of Consultations Concerning Cybercrimes in 2000] (2000), http://www.npa.go.jp/cyber/statics/h12/soudan_juri.htm.

70. See National Police Agency, Todoufuken keisatsu honbu no saibaa hanzai soudan madoguchi nado ichiran [Catalog of Local Government Police Main Office Cybercrimes Online Consultation "Windows"], <http://www.npa.go.jp/cyber/soudan.htm> (last visited July 8, 2005).

71. See National Police Agency website, <http://www.npa.go.jp/cyber/existing/trouble1.html> (last visited July 1, 2005) (advising victims to first contact the site manager to get offending posts deleted, failing that, contact the ISP, and if the posts rise to level of libel, call the police).

72. See, e.g., National Police Agency website, Houritsu ihan kouji o shinai tame ni [To avoid breaking the law [online] . . .], <http://www.npa.go.jp/cyber/existing/ihan.html> (last visited Feb. 6, 2006) (warning that you should not libel people on anonymous message boards and that you should not heap abuse on people while masquerading under a friend's name).

pensated dating” (*enjo kousai*), and false posting of internal corporate disclosures to anonymous message boards.⁷³

The victims of such behavior certainly benefit from having their problems handled by police, even if all the police do is get the Internet Service Provider in question to take down the offensive website or message board postings. Additionally, in publicizing these interventions and setting forth their own guidelines, the police send the public a message about the nature of online speech and the boundaries of its acceptability. Through their own Internet-based intake forms, Japanese police suggest that online defamation is “serious” crime; one such website in Saga Prefecture even features the silhouette of a police officer kneeling, as if to fire his gun, just below an e-mail complaint click-on button (see Figure 1).⁷⁴

73. For typical examples of consultation about defamation, the NPA wrote that (1) “An internet auction counterparty put a false evaluation message about me on the Internet. Although I asked the manager of the internet auction site to delete the message, he did not respond”; and (2) “I have frequent telephone calls inquiring about a ‘dating service.’ I asked the person who called me and he said that my cellular phone number and message for customers of a paid dating service (*enjo kousai*) (compensated dating—essentially a form of escort service and/or prostitution) were on the BBS.” NATIONAL POLICE AGENCY, *supra* note 10. See also KOKKA KOUAN IINKAI [National Public Safety Committee], FUSEI AKUSESU KOUJI NO HASSEI JOKYOU OYOBI AKUSESU SEIGYO KINOU NI KAN SURU GIJUTSU NO KENYUU KAIHATSU NO JOKYOU [The Situation Relating to the Outbreak of Acts of Unauthorized Access and the Research and Development of Techniques for Controlling Access] [hereinafter UNAUTHORIZED ACCESS] <http://www.npa.go.jp/cyber/statics/h15/html16.htm> (last visited June 17, 2005) (describing arrest of 45-year old ex-employee in Nara, Japan case of unauthorized email use and online message board defamation).

74. See Saga Prefectural Police, Send Us Information about Internet Crime!, www.saganet.ne.jp/kenkei/osirase/internet/internet.html (last visited Jan. 26, 2006) (warning of crimes involving Internet message boards, including libel/defamation).

**Figure 1: "Send Us Information About Internet Crime!
(Saga Prefectural Police)"**



More generally, the National Police Agency advises on its website concerning consultations that “if you believe that [you are the victim of conduct] reaching the level of criminal libel, please consult your nearest police station or visit the consultation website of your local prefectural police department.”⁷⁵ The message is not only that online defamation is a crime, but also that the police care about and are involved in this kind of crime. Essentially, the police teach and enforce public moral standards.⁷⁶ Given that simply being a criminal defendant

75. Website of National Police Agency, Frequent Topics of [Police] Consultation, <http://www.cybersafety.go.jp/> (last visited Jan. 26, 2006) (addressing crimes involving personal information on the Internet).

76. That Japanese police act as agents of moral education is an established theme in sociological literature. See DAVID H. BAYLEY, *FORCES OF ORDER: POLICING MODERN JAPAN* 142 (University of California Press 1991) (1976) (observing that Japanese police often “deliver lectures on duty and morality” in addition to making arrests or giving out citations); JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 79 (1989) (stating that “Japanese police, prosecutors and courts rely heavily on guilt-induction and shaming as alternatives to punishment”); see also DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 186 (2002) (stating that “Japanese prosecutors—

carries powerful reputational costs in Japan, this may reduce the level of criminal defamation by triggering the existing system of social censure.⁷⁷ Of course, such concern depends on whether the potential violators believe they could be caught, which in Japan, as in the United States, remains something of an unanswered question.⁷⁸ Therefore, rather than scaring possible defamers through threats of criminal punishment, such police messages may just communicate the idea that “good” people do not engage in online defamation.

Of course, one might ask why Japan would commit its criminal law resources to something like criminal libel, as opposed to more “serious” crimes. One explanation is that because Japan’s police and prosecutors play a stronger role in more varied areas of law enforcement than their U.S. counterparts, one might expect them to be more active concerning Internet libel.⁷⁹ There are several reasons for this. First, Japan’s legal system appears to have more resources available for criminal law enforcement than America’s legal system. As Table 2 shows, Japan has a similar police officer-to-population ratio to the United States,⁸⁰ despite Japan’s significantly lower general crime rate.⁸¹ As a result, Japanese police have the

and probably detectives as well—rely more on moral instruction and normative appeals than do American interrogators”).

77. In Japan, much of the penalty of criminal arrest is damage to reputation and collateral harm—as opposed to direct fines or jail time—which creates a substantial chilling effect because these sanctions occur even before guilt or innocence is assessed. Interestingly, because arrest itself carries such a high social cost in Japan, police arrest less than 20% of suspected Penal Code violators—thought to be well below U.S. rates—in part to protect suspects from the stigma of arrest. See JOHNSON, *supra* note 76, at 13–14.

78. See *infra* note 121 (discussing barriers to ISP cooperation in Japan involving the identification of online libelers).

79. See, e.g., Salil K. Mehra, *Software as Crime: Japan, the United States and Contributory Copyright Infringement*, 79 TUL. L. REV. 265 (2004) (explaining why Japanese prosecutors outpaced their American counterparts in using criminal law resources to attack contributory copyright infringement using peer-to-peer software).

80. Japan has approximately 1.9 officers per 1,000 people (243,000 / 130 million), while the U.S. has approximately 2.3 officers per 1,000 people (687,010 / 300 million). See Table 2, *infra* Part II.A (figures on police officers).

81. Sociologists have proposed that the incidence of homicide is the best indicator of violent crime in a country due to the relatively lower rate of underreporting; Japan has slightly over 1/10 the homicide rate of the United States. See Satyanshu Mukherjee, *What is So Good About the Low Crime Rate in Japan?* 37 AUSTL. RATIONALIST 7, 11 (1995). Additionally, reported rates of robbery are a couple of orders of magnitude lower in Japan than in the United States. See JOHNSON, *supra* note 76, at 23 (“[I]n 1991, for each robbery in Japan, the United

availability to perform tasks that American police generally have no time to handle.⁸²

Table 2: Legal System Comparison

	United States	Japan
Population	300 million	127 million
Police	687,010 (including state & local)	242,677
Police per 1000 people	2.3	1.9
Lawyers	1,084,504	20,049
Prosecutors	31,915 (including federal state & local)	2,447
Prosecutors per 10,000 people	1.1	0.2
Prosecutors per 1000 lawyers	29.4	116.2
Judges	25,842 (including state & local) ⁸³	2,949 ⁸⁴

States recorded 182, and for each robbery in Tokyo, New York had 462.”).

82. For example, police in Japan seem to play a much greater role in lost object recovery than in the United States. See Mark D. West, *Losers: Recovering Lost Property in Japan and the United States*, 37 LAW & SOC’Y REV. 369, 378–83 (2003) (describing experiment in which cell phones and wallets were intentionally dropped in Tokyo and New York to see whether and how they would be returned to the owner, with the results that “88 phones and 16 wallets were given to the police in Tokyo even though the objects contained identifying information that would have allowed that finder to contact [the dropper] directly” while “[i]n New York, almost all returns were made by phone calls to the phone mailbox listed on the object even though a police station was located nearby”).

83. For an estimate of U.S. population as of July 1, 2005, see U.S. CENSUS BUREAU, ANNUAL POPULATION ESTIMATES 2000 TO 2006, <http://www.census.gov/popest/states/tables/NST-EST2006-01.xls>. For statistics on the number of federal, state and local police in the United States, see UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT STATISTICS (May 2003), <http://stats.bls.gov/oes/2003/may/oes333051.htm> (2003 figure for police and sheriff’s patrol officers) and <http://stats.bls.gov/oes/2003/may/oes333021.htm> (2003 figure for detectives and criminal investigators). For statistics on the number of lawyers in the United States, see AMERICAN BAR ASSOCIATION, NATIONAL LAWYER POPULATION BY STATE, (2004), <http://www.abanet.org/marketresearch/2004nbroflawyersbystate.pdf> (including figures for 50 states, DC and Puerto Rico for attorneys who are resident and active in those jurisdictions as of December 31, 2003). For statistics on the number of prosecutors in the United States, see UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PROSECUTORS IN STATE COURTS, 2001 (May 2002), <http://www.ojp.usdoj.gov/bjs/abstract/psc01.htm> (2001 figures for chief and assistant prosecutors of 2,383 and 24,228 respectively in state courts); UNITED STATES

The same picture emerges in an analysis of Japanese versus American prosecutorial capacity. Table 2 shows that, while there are many fewer public prosecutors in Japan than in the United States, public prosecutors make up a significantly higher share of professional lawyers in Japan than in the United States, with approximately 116 prosecutors per 1,000 lawyers, as compared to approximately twenty-nine per 1,000 in the United States.⁸⁵ Contested prosecutions in Japan are few,⁸⁶ and this fact together with “little crime” and “light

DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT (2002), http://www.usdoj.gov/usao/reading_room/reports/asr2002/02_stat_book.pdf (2002 figure for federal prosecutors of 5,304 total). For statistics on the number of judges in the United States, see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR (2003), <http://www.uscourts.gov/judbus2003/front/jdbusiness.pdf> (total figure of 1,192 federal judges including Supreme Court, Courts of Appeal, federal District Courts, and Bankruptcy Courts); UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, LEGAL OCCUPATIONS (May 2003), http://stats.bls.gov/oes/2003/may/oes_23Le.htm (state judges) and <http://stats.bls.gov/oes/2003/may/oes231023.htm> (local judges).

84. Sources: For Japan: (a) Police from NATIONAL POLICE AGENCY, POLICE BEAT (2003); (b) *bengoshi* (law-trained private litigators) from Japan Federation of Bar Associations, Outline of the Japan Federation of Bar Associations (April 2005 figure), <http://www.nichibenren.or.jp/en/about/index.html> (description of the Japanese Federation of Bar Associations, of which “all practicing attorneys . . . automatically become members” pursuant to Japan’s Practicing Attorneys Law); (c) Prosecutors from Kensatsucho [Public Prosecutors’ Office], Kensatsucho no soshiki kikou—kensatsucho no shokuin [Organizational Structure of the Public Prosecutors’ Office—Public Prosecutors’ Office Personnel] [hereinafter Public Prosecutors’ Office Personnel] (2005 figure), www.kensatsu.go.jp/soshiki_kikou/shokuin.htm (also reporting an additional 9,035 officials within the Procurators’ Office who were not prosecutors and were instead secretaries, administrators and so forth); (d) judges from Judicial Reform Council, The Japanese Judicial System (Jul. 1999), <http://www.kantei.go.jp/foreign/judiciary/0620system.html> (1999 figure which excludes some “judicial research officials” (*chōsakan*)).

85. Of course, as has been discussed broadly elsewhere, there are tens of thousands more Japanese with legal education than are qualified as *bengoshi* or legal personnel potentially capable of litigating. See J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 6–13 (1999) (indicating that the United States has perhaps 700,000–900,000 lawyers, whereas Japan has 16,000 litigators, although many more legally-trained non-litigators do exist); see also Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law*, 37 HARV. INT’L L. J. 3, 63 n.324 (1996) (discussing causality between litigation and the number of litigators as running both ways, in that a trend towards settling more disputes “legally” would create more demand for litigators). This means that there is somewhat more heft to Japan’s civil dispute resolution system than these figures may otherwise indicate.

86. Compare J. Mark Ramseyer & Eric B. Rasmusen, *Why is the Japanese*

caseloads” has been claimed to yield unharried prosecutors, especially as compared to the situation in the United States.⁸⁷ Additionally, many common crimes in Japan are resolved through uncontested prosecutions handled by office assistants (*jimukan*), of which there are about 9,000⁸⁸ (over and above the prosecutors and assistant prosecutors) in the procuracy nationwide.

Because of Japan’s commitment to addressing online crime, including libel, it is possible to find multi-year statistics on how much activity occurs involving online criminal libel. As Table 3 shows, the number of actual arrests is relatively small, compared to the large number of informal consultations that the police have undertaken on behalf of the victims of online defamation.

Conviction Rate So High?, 30 J. LEGAL STUD. 53, 57 (2001) (stating that “[t]he somewhat lower frequency of contested prosecutions in Japan probably reflects the greater predictability of trials there”), with David Johnson, *Plea Bargaining in Japan*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT 140 (Malcolm Feeley & Setsuo Miyazawa eds., 2002) (rejecting this position in favor of an answer based on a “different” kind of plea bargaining), and JOHNSON, *supra* note 76, at 237 (describing prosecutors’ use of a “conservative charging policy” to avoid indicting the innocent and minimize acquittals).

87. See JOHNSON, *supra* note 76, at 24–27. It is worth noting that Johnson was studying the Japanese “procuracy” (prosecutors collectively) at a time when Japan had roughly half the number of prosecutors it does now. Compare *id.* at 25 n.7, 94 (describing Japan as having 1130 prosecutors in 1994, but with proposals to greatly increase that number) with Public Prosecutors’ Office Personnel, *supra* note 84 (claiming 1548 prosecutors and 899 assistant prosecutors, for a total of 2447).

88. See Public Prosecutors’ Office Personnel, *supra* note 84.

Table 3: *Criminalization of Online Defamation in Japan*⁸⁹

	2000	2001	2002	2003
Arrests for Internet Defamation	30	42	27	46
Police Consultations for Internet Defamation	1884	2267	2566	2619
Internet users in Japan⁹⁰	47 million	56 million	69 million	77.3 million
% of Japan using the Internet⁹¹	37.1%	44.0%	54.5%	60.6%

It is worth noting, and perhaps not particularly surprising, that the number of arrests and consultations for criminal defamation have risen in line with the percentage of Japanese people using the Internet during the past several years.⁹²

The Internet's impact on criminal libel in Japan appears quite stark; as a greater percentage of Japanese people have begun using the Internet, the police have received more complaints of libel. But, perhaps because of the difficulties of finding Internet perpetrators, clearance rates for defamation—not just online defamation—have fallen in tandem with this increase in Internet use (see Figure 2).

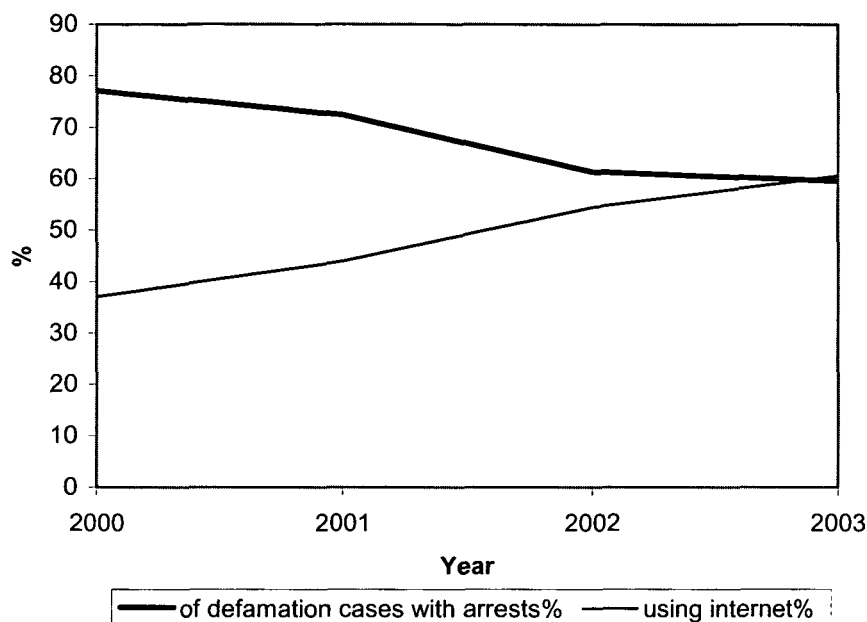
89. Source for Arrests and Consultations: NATIONAL POLICE AGENCY, NATIONAL POLICE AGENCY, HEISEI 15NENJYUU NO SAIBAA HANZAI NO KENKYO OYOBI SOUDAN JURI JOKYOU NADO NI TSUITE [CONCERNING THE SITUATION OF CONSULTATIONS AND ARRESTS FOR CYBERCRIME IN 2003], <http://www.npa.go.jp/cyber/statics/h15/html15.htm>.

90. See *Tokei Shiryou* (Statistical data [appendix]), *Haiteku hanzai ni tai suru rippou mondai* [The Legislative Problem of High-Tech Crime], 1257 JURISUTO 37 (2003).

91. See *id.* 2003 data is from news reporting of a Public Management Ministry report.

92. See *supra* Table 3.

Figure 2: *Defamation Cases, Internet Use, and Clearance Rates*



Of course, it is difficult to estimate the importance of this statistical increase in shaping behavior, since prosecutors cannot collect statistics on the number of acts of criminal defamation that go undetected (and therefore unpunished). Unlike the police, while prosecutors keep statistics on the number of criminal libel defendants and how few—145 in 2003—are prosecuted, they do not specify how many cases involve the Internet.⁹³ Despite these caveats, the contrast between Japanese and American criminal law and practice is instructive. The odds of any particular Japanese citizen being implicated in a criminal defamation case are small, but still appear much greater than those of an American.

93. For example, in 2003, a total of 145 defendants were prosecuted for criminal libel. See KENSATSU TOUKEI NENPOU [Annual Report of Statistics on Prosecution], 78–79 (2003).

B. Japan's Love-Hate Relationship with the Internet

"Welcome to the 2Channel group of online discussion forums, extensively covering topics from hacking to what's for dinner tonight."

—Slogan of Japan's biggest online forum, "2Channel"⁹⁴

"On the Internet, nobody knows you're a dog."

—Caption of famous New Yorker cartoon⁹⁵

Japan's decision to turn to criminal law to deal with online libel stems from a striking increase in the number of Japanese people who use the Internet. Additionally, the Internet has emerged as the location of a kind of hidden dark side of Japan. The unique way in which the Internet has become a widely-accessed "other" Japan has posed a challenge for the social system of reputation and private ordering that Japan has relied upon for centuries.

Japan is significantly ahead of the United States when it comes to citizen access to the Internet—Japan is more "wired" and is wired in a more centralized way. Of course, the United States had a significant head start on Japan in this regard. Indeed, the Internet was in large part a creation of the U.S. government.⁹⁶ However, by May 2003, a higher percentage of homes in Japan than in the United States had broadband Internet connections.⁹⁷ Thanks to government initiatives and private competition, today nearly all Japanese people have the option of obtaining Internet access superior to that of the average American.⁹⁸ Additionally, Japan has a substantial lead

94. See 2Channel Online Forum Gateway Page, <http://www.2ch.net/2ch.html> (last visited May 31, 2005).

95. Peter Steiner, Cartoon, *THE NEW YORKER*, Jul. 5, 1993, at 61.

96. See Anupam Chander, *The New, New Property*, 81 *TEX. L. REV.* 715, 756 (2003) ("[T]he United States government funded the creation of the Internet and the domain name system").

97. See Thomas Bleha, *Down to the Wire*, *FOREIGN AFF.*, May–June 2005, at 111, 112. The term "broadband" refers to a very fast Internet connection that makes use significantly more convenient.

98. See *id.* (stating that "nearly all Japanese have access to 'high-speed' broadband, with an average connection speed 16 times faster than in the United States").

over the United States in Internet access through mobile phones.⁹⁹

The fact that Japan is so very “wired” has begun to wreak social change. One of the basic motivations for getting online is to connect to other people; the basic phenomenon of an Internet message board is not unique to Japan. Many of the features of its largest discussion website, “2Channel,” would be familiar to anyone who has used such an Internet discussion forum. A visitor to the 2Channel main page finds a list of discussion topics, such as politics, law, or dinner recipes. Within these topics, numerous threads contain discussions about subtopics. However, 2Channel occupies such primacy in Japan’s consciousness that it does not have a functional U.S. equivalent. This is evidenced by comparing the use of the phrase “2Channel” among the Internet search engines most widely used in Japan. Because most Japanese people are not in the habit of typing Roman letters, they are considerably less likely than Americans to type an actual website address into the “URL box” of a web browser.¹⁰⁰ Instead, Japanese Internet users will typically type the Japanese name of the company or organization whose website they are looking for into a search engine such as Google.com, and then click on the listing of the website they want from the results.¹⁰¹ The Japanese affiliate of Nielsen/Netratings, a market research firm, observed in 2004 that, of Japan’s most important search engines, “2Channel” was the fifth most-used such keyword, just ahead of the common carrier “Japan Rail” and the former phone monopoly “NTT” (Nippon Telephone and Telegraph), and slightly behind the national TV broadcaster “NHK.”¹⁰² Among these popular websites, 2Channel occupies a unique space. Unlike corporations such as Japan Rail and NTT, or organizations such as NHK, 2Channel is a creature made by ordinary Internet users specifically for the Internet. 2Channel’s ancestor site was founded in 1999 by Hiroyuki Nishimura, then a 23-year old Japanese exchange

99. *See id.*

100. *See* Nielsen/Netratings, *Kensakugo kiiwaado “amazon, rakuten” no nyuuryokushasuu ga kono 1-nen de 2-bai ni zouka* [Keyword Searches for Amazon and Rakuten Double over Past Year], May 31, 2004, http://csp.netratings.co.jp/nnr/PDF/0531_2004newsrelease_J.pdf.

101. *See id.*

102. *See id.* Additionally, the site itself claims, in selling its advertising, that its “banner ads” are seen 2 million times per day. *See* 2Channel Website Guide, <http://info.2ch.net/guide/> (last visited July 29, 2005).

student living in the United States, and much of the site's maintenance is performed by volunteers.¹⁰³ The overwhelming bulk of its content consists of anonymous (Japanese-language) postings by its users.

This kind of anonymous connectedness has a dark side with regard to online defamation. Although good statistics are hard to come by, police reports and interviews with lawyers and victims' groups suggest that several categories of online defamation are common in Japan, including: slurs against or purported revelation of private information about women¹⁰⁴; defamation against corporations by employees or customers¹⁰⁵; and group libel against minority groups.¹⁰⁶

The degree of Japan's "wiredness" and the dominance and open-source nature of its biggest online discussion forum make online defamation a special problem in Japan. 2Channel enables users to say things online that they would not or could not say in the "real world," thus creating a kind of arbitrage of laws and social restrictions concerning speech. Moreover, consumers of this information are legion because Japan's traditional social norms serve to suppress information, creating a huge market demand for free speech. Mainstream mass media in Japan take a fairly restrained view when covering corporations and individuals, as compared to the media of the United Kingdom or the United States.¹⁰⁷ While there are less prestig-

103. See 2Channel, Frequently Asked Questions, <http://www.2ch.net/2ch.html> (last visited June 14, 2005) (describing how the site relies on a "huge number of volunteers" for the building of the site and its related features).

104. See *supra* note 73. This was also particularly emphasized as a significant category in an interview with attorney Takeshi Fukakusa of the Shirogane Saibaapaturoru (Cyberpatrol), a volunteer organization of lawyers that seeks to assist victims of cybercrimes on a pro bono basis. See Interview with Takeshi Fukakusa, Attorney, Shirogane Cyberpatrol, in Tokyo, Japan (June 20, 2006).

105. See Interview with Shunsuke Nomoto, Attorney, Nomoto Law Office, in Tokyo, Japan (June 28, 2006).

106. See Interview with representatives of the Int'l Movement Against Discrimination and Racism (IMADR), in Tokyo, Japan (July 7, 2006).

107. The mainstream Japanese media, particularly the major broadcasters and the big daily newspapers, are often described as "tame." See Hugh Cortazzi, *Is the Press Fulfilling Its Role?*, JAPAN TIMES, Feb. 3, 2003, <http://www.japantimes.co.jp/cgi-bin/geted.pl5?eo20030203hc.htm>. The system of controlled access to government reportage that is often portrayed as the source of this timidity has actually been cited as a trade barrier by Japan's European trading partners. See *No News from Japan*, THE ECONOMIST, Jan. 16, 2003 ("The European Union . . . has included Japanese media arrangements in its annual list of economic complaints, saying they are a 'restraint on the free trade in information.'").

ious news weeklies that specialize in gossip, those that exist are frequently the target of defamation lawsuits.¹⁰⁸

In addition to its confined media, Japan's form of labor-management relations also hampers the ability of the Japanese to share juicy gossip outside of the Internet. A worker who knows of government or corporate wrongdoing and discloses it might rightly fear retribution.¹⁰⁹ This fear of reprisal is particularly strong in Japan, where lateral career movement has traditionally been more difficult than in the United States.¹¹⁰ However, the ability to make such disclosures anonymously on the Internet removes (or lessens) the risk of career harm—a situation that has not gone unnoticed.¹¹¹ Online speech provides a powerful new outlet for whistleblowing, which was quite difficult in Japan until fairly recently.¹¹² Although Japan adopted a Whistleblower Protection Law in 2004, the law contains employer-friendly and government-friendly provisions that may still disincentivize potential informants.¹¹³ As a re-

108. See Cortazzi, *supra* note 107.

109. See Jirou Kokuryou, *Nettojou ni okeru shouhisha no soshika – sogou ni tai suru fubai undou no jirei kara* [The Organization of Consumers on Computer Networks—Lessons from the Sogo Department Store Boycott Case], <http://www.e.u-tokyo.ac.jp/itme/dp/dp73.pdf> (last visited May 5, 2005).

110. See Ronald J. Gilson & Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508, 527 (1999) (explaining that the lifetime employment system coexists together with a labor market with little lateral movement); Hideki Kanda & Curtis J. Milhaupt, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887, 898 (2003) (stating that in Japan's recent past "the lifetime employment system, in which rewards were directly tied to seniority and lateral career opportunities were limited, made it costly to leave the firm").

111. See Kokuryou, *supra* note 109 (noting that "it is easy to guess that there are a lot of things one might say openly if anonymous" and pointing especially to "the possibility of whistleblowing [*naibukokuhatsu*]" and observing that "information that is thought to be obtainable only to insiders frequently is disclosed on the Internet," suggesting that "the Internet has become a place of whistleblowing due to the strong anonymity it provides"). To be sure, this kind of disclosure was possible before the Internet, although telling a reporter something anonymously but credibly enough for her editors to print it can be almost prohibitively tricky.

112. See *id.*

113. See Leon Wolff, *New Whistleblower Protection Laws for Japan*, ZEITSCHRIFT FÜR JAPANISCHES RECHT, July 2004, at 209, 209 (stating that by promulgating its Whistleblower Protection Act, Law No. 122 of 2004, Japan "has joined a number of other countries which offer similar statutory protection," but that the Act contains limitations that will make it difficult for whistleblowers to enjoy its protections).

sult, 2Channel has become a place for whistleblowing and disseminating news that does not appear in the papers.¹¹⁴

Finally, in “real” world Japan, social norms embedded in the language itself involve sharp differences in politeness and formality based on relative status of the speaker and listener.¹¹⁵ Critical or harsh statements are softened or made more indirectly.¹¹⁶ Why most Japanese adhere to these speech norms is not entirely clear. One suggestion is that speakers follow speech norms to signal that they are the kind of “good” people who adhere to community standards and values.¹¹⁷ Whatever the reason, these norms continue to be widely followed. However, the perceived anonymity of 2Channel lets its online discussions leave all of Japan’s physical-world constraints, such as the speech norms, behind. Discussions on 2Channel can be blunt and even insulting,¹¹⁸ since anonymous posting and viewing of messages allows posters to speak their minds without fear of recrimination.¹¹⁹ This freedom has made 2Channel infamous as a place where those who would normally

114. See Kokuryou, *supra* note 109; *Kyouju o kiru 2chaneru* [2Channel Axes a Professor], 1112 HITOTSUBASHI SHIMBUN 3, <http://www.hitpress.jp/backnumber/1112/08.html> (asking Hitsotsubashi University sociology professor Tetsuo Katou about the role of 2Channel after the arrest of a Tokyo University professor based on information found on 2Channel, and receiving reply from Prof. Katou that anonymity on 2Channel had made a number of whistleblower cases possible).

115. See EDWIN O. REISCHAUER & MARIUS B. JANSEN, *THE JAPANESE TODAY* 381 (3d ed. 1999). Interestingly, the use of *keigo*, or honorific language, is associated with a “traditional” hierarchical social structure that is itself “becoming outmoded.” See PATRICIA WETZEL, *KEIGO IN MODERN JAPAN* 6 (2004). But see TESSA CARROLL, *LANGUAGE PLANNING AND LANGUAGE CHANGE IN JAPAN* 92 (2001) (describing how “the honorific language system has evolved . . . and continues to change,” and how it has actually become more used because “[u]pper- and middle-class norms of language usage are increasingly being imposed on or aspired to by all classes” as part of their working life in a highly industrialized society with many white-collar and service jobs).

116. See REISCHAUER, *supra* note 115, at 381. Such norms are not entirely universal, however. Some feminists in Japan reject social norms that would constrain their speech, and there has been some movement by corporate Japan to simplify these rules. See Norimitsu Onishi, *Japanese Get Word from on High: Drop the Formality*, N.Y. TIMES, Oct. 20, 2003, at A3 (describing some Japanese companies’ policies of reducing the use of honorific language, as well as some equality-minded parents’ opposition to teaching it to their children).

117. See CARROLL, *supra* note 115, at 92.

118. See Norimitsu Onishi, *Japanese Find a Forum to Vent Most-Secret Feelings*, N.Y. TIMES, May 9, 2004, at A3.

119. See Michael Rollins, *Japanese Get Real on 2 Channel*, JAPAN TIMES, Feb. 13, 2003, <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nc20030213mr.htm>.

use the honorifics and polite speech peculiar to the Japanese language instead tell each other to "Die, quickly!"¹²⁰

The perceived¹²¹ anonymity of 2Channel leads Japanese participants to communicate differently than they might in the physical world of Japan.¹²² Indeed, 2Channel's distinct style of

120. *Id.*

121. 2Channel is not completely anonymous, and the level of anonymity of 2Channel's participants in fact depends significantly on legal rules. Although 2Channel does not require individual registration with personal data in order to participate in its forums, beginning in January 2003, it started to log each user's Internet Protocol (IP) address, a series of numbers identifying the user's "location" on the Internet. See Michiko Nagai, *IP rogu hozon de 2channeru ga kawaru ka* [Will Internet Protocol Log Storage Change 2Channel?], CNET JAPAN, Feb. 25, 2003, <http://japan.cnet.com/interview/story/0,2000050154,20052427,00.htm> (interviewing founder of 2Channel concerning January 2003 commencement of logging and storing the IP address of every participant on the 2Channel forum); see also Nobuo Ikeda, *Tokumei no jiyu to sono kosuto* [The Cost of Anonymity], RIETI, Jul. 16, 2003, available at <http://www.rieti.go.jp/it/column/column030716.html> (last visited May 31, 2005) (describing how "it appears you are anonymous when you use an Internet forum, [but] in truth 2Channel logs your Internet Protocol address"). Since users generally connect to 2Channel via an account with an Internet Service Provider ("ISP")—which possesses data that can link IP addresses with real identities—cross-checking 2Channel's log with data available to the ISP makes it possible to ascertain the identity of a defamer on 2Channel. *Id.* ("[A]lthough an outsider cannot tell who [the user behind an IP address] is, the ISP logs this information at the time of access" to the Internet). Thus, in a defamation lawsuit, if a plaintiff could get both 2Channel and an ISP to cooperate, the identity of an "anonymous" defaming poster could be revealed. 2Channel makes clear in its online policy statement that it opposes defamation and invasion of privacy, promising that if the site's administrators are presented with a request from the police or a court, they will cooperate fully in helping to find the offending participant. See Yakusoku [Promise], <http://info.2ch.net/before.html> (last visited Mar. 7, 2007). However, there is a legal wrinkle in that 2Channel's cooperation alone, without that of the ISP, is useless. And although Japan has regulations setting forth the responsibilities and liability of ISPs, in practice an ISP does not face liability except in the unlikely case where it had actual or constructive knowledge that a user was seeking to defame another. See Provider Liability Law No. 137 of 2001, http://www.soumu.go.jp/joho_tsusin/top/pdf/jyoubun.pdf, (last visited June 14, 2005) (setting forth that ISPs not be liable for infringement of rights of a third party by one of its users unless it knew or had reason to know that the rights infringement was occurring); see also Report of the First Sub-Committee of the Copyright Council of the Ministry of Education, Sports, Science and Technology art. 5 (December 2000) http://www.mext.go.jp/b_menu/houdou/12/12_001246.htm (last visited May 31, 2005) (setting forth guidelines of third-party liability for ISPs, including defamation issues despite the name of the sub-committee; the existence of service providers' positive duties of surveillance; refusing to place on ISPs the "heavy burden" of inspecting or monitoring contents of participants in online forums for "defamation"); Ikeda, *supra*. Some ISPs have been reluctant to help defamation plaintiffs in this way, particularly given the possible opposition of their paying customers, including not only potential defendants, but anyone concerned for their privacy.

122. See Tony McNicol, *Cyber War Grips Asia*, JAPAN TIMES, June 14, 2005,

Japanese speech has become known as *Nichango*¹²³ (from *Ni Channeru go*—"Channel 2 speak"—which echoes the sound of the Japanese word for the Japanese language—*Nihongo*). And in this slang, there is even a term, *Nichanteki hyouka*, or the "Channel 2 view," for the way people on 2Channel see events in the real world, which in many cases differs from the view of those not online.¹²⁴ In fact, because of the perception that speakers are anonymous on 2Channel, some attribute more credibility to these online discussions—the view is that commentators are not holding their tongues, as they might in the physical world.¹²⁵

2Channel's brand of irreverent speech is particularly jarring because of the importance of reputation in Japan. Reputation is an important mechanism for private ordering, and there is a wealth of scholarship that shows the importance of private ordering in Japan.¹²⁶ Corporate law scholars have convincingly

available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?f120050614zg.htm> (last visited Feb. 12, 2007) (quoting expert that "Japanese society provides few chances to express frustrations or strong opinions in everyday life" and so some Japanese online use anonymous online forums to express rudeness and xenophobia). Despite the technical ability to determine identity, for all intents and purposes, users are in fact generally anonymous to each other. See *2channeru wa hontou ni tokumei na no?* [2Channel, Frequently Asked Questions], <http://www.2ch.net/2ch.html> (last visited July 14, 2005) (stating that "nowadays, 2channel logs everyone's IP address and host [server] information," but since "fellow users basically do not have this knowledge, there is no impediment to feeling anonymous").

123. See *Nichango to joshikouseigo no kaidokuhou* [How to Interpret 2Channel-Speak and High-School Girl Speak], 18 ASAHI SHIMBUN EXTRA REP. & ANALYSIS, Mar. 14, 2005, at 78.

124. See ZOKU 2 TEN [Continuing 2Channel Dictionary] 21 (2003).

125. *Id.* Of course, anonymity does not merely enable honest discussion, it also creates the real possibility of libel and false information.

126. This proposition is held by those who might disagree on the "chicken-and-egg" problem of whether "social capital" in Japan makes possible non-legal enforcement and "saves" Japan from having to rely on the heavy hand of the law, or whether non-legal enforcement is in fact a response to defective legal institutions. Compare FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 26–28 (1995) (describing Japan as a "high-trust society" where social institutions can function effectively without recourse to law), with Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 96 (2000) (finding correlation between "defective formal environments" and "private ordering" through organized crime, and arguing that organized crime can be undermined by "set[ting] state incentives so that entrepreneurialism is channeled into outlets that reinforce rather than erode legal and social norms"). See also Curtis Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083, 2098 (2001) (observing that, con-

portrayed reputation as critically important to Japanese corporations.¹²⁷ For families and individuals also, reputation proves to be essential.¹²⁸ No statistic can measure how much the Japanese people value reputations, particularly compared to Americans. The primacy of reputation in Japan reverberates in Japanese studies research¹²⁹ and comports with a solid body of Japanese legal scholarship.¹³⁰

Additionally, 2Channel's prominence is a concern because Japan lacks some of the competing sources of information and infotainment found in America. Observers have suggested that because Japan has a relative dearth of "talk radio" and other "direct talk" American-style media, 2Channel plays a greater role in Japan than an online forum could in America.¹³¹ In-

cerning non-legal rules such as lifetime employment in Japanese enterprises and norms against hostile takeovers, it is "highly plausible that in the immediate postwar environment, non-legal rules supplied a corporate governance framework at lower cost than the legal system."); Mark West, *Legal Rules and Social Norms in Japan's Secret World of Sumo*, 26 J. LEGAL STUD. 165, 200-01 (1997) (describing Japan's Sumo governing body as choosing between legal rules and social norms to mediate disputes thusly: "take the action that results in less aggregate cost for the [Sumo] Association without regard for a previously defined hierarchy of rules and norms").

127. See, e.g., J. Mark Ramseyer, *Takeovers in Japan: Opportunism, Ideology and Corporate Control*, 35 UCLA L. REV. 1, 17 (1987) (observing that "a firm that engages in a hostile acquisition in Japan puts the firm's reputation directly at stake" and such a firm "having chosen to violate one business norm, is unlikely to be deterred by communal sanctions from violating another"); Mark West, *Information, Institutions, and Extortion in Japan and the United States: Making Sense of Sokaiya Racketeers*, 93 NW. U. L. REV. 767, 790 (1999) (observing that due to a "thin-margin environment in which multiple competitors are often selling identical products may lead some Japanese department stores to value their reputation more highly than corresponding U.S. firms").

128. See, e.g., FRANK UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 80 (1987) (describing the common practice of checking the family register of a potential marriage partner or employee to verify an unchecked family heritage); Igarashi Futaba, *Forced to Confess*, 12 KYOTO J. 17 (1989) (observing that Japanese falsely accused of crimes report having been threatened by police interrogators with the ruin of their family's reputation by marking the family's entry in the national registration system with red paper); Dan Rosen, *supra* note 11, at 165 (stating that "[i]t is a cliché that losing face is a serious matter in Japan" but that "[l]ike most clichés, there is truth in this one").

129. See, e.g., REISCHAUER, *supra* note 115, at 142 (1989) ("[T]here can be no doubt that the Japanese on the whole think less in terms of abstract ethical principles than do Westerners and more in terms of concrete situations and complex human relations").

130. See *supra* note 126-29.

131. See Takeshi Kimura, *Saibaruwaarudo to riaruwaarudo no tatakai ga hajimaru* [The Fight Between the Cyberworld and the Real World Begins] (June 8, 2004), http://bizplus.nikkei.co.jp/colm/colCh.cfm?i=t_kimura61 (last visited May

deed, just as the controlled nature of the major newspapers in Japan can be used as an argument for the continued existence of infamous Japanese scandal sheets such as *Uwasa no Shinso* [*The Truth of the Rumor*], the controlled social context of Japan can be used as an argument for the existence of “anonymous discussion” on 2Channel.¹³² The analogy may explain the anomaly of relatively low general regard for, but high readership of, both 2Channel and the scandal sheets.¹³³ However, these scandal-mongering weekly newsmagazines are themselves endangered by the increased enforcement of libel laws.¹³⁴ As a result, 2Channel may become even more distinctive in Japan.

The end-run around Japan’s social norms and system of ordering through reputation created by Internet sites like 2Channel presents a serious challenge to the existing order. Japan’s leaders felt the need to respond. As discussed previ-

24, 2005) (“Americans can use things like radio talk shows and other terrestrial broadcasters with ‘straight talk’ . . . [in Japan] the electronic bulletin board called 2Channel is playing a role unimaginable in America.”).

132. *Id.* (Nihon Keizai Shimbun Company online journal commentator observing that “even if individually, one does not like the culture of 2Channel, I believe that 2Channel must be protected to safeguard the ‘freedom to communicate anonymously’ . . . [just as the scandal] magazine ‘The Truth of the Rumor’ may have had taste, but one can recognize its necessity in [Japanese] society”).

133. *Id.* (describing the “cyberworld” as having “low status” in the “real world of Japan,” but also of having over 77 million participants out of 130 million Japanese in 2003, and growing).

134. Partly as a reaction to this trend towards private information dissemination, Japan has recently been engaged in a debate over its Privacy Law—actually a package of five separate enactments—which was passed into law in April 2003 but phased into application over two years. One law in particular, *Kojin jouhou no hogo ni kan suru houritsu* [Act on the Protection of Personal Information], Law No. 57 of 2003, <http://www5.cao.go.jp/seikatsu/kojin/houritsu/index.html> (last visited May 27, 2005) translated in <http://www5.cao.go.jp/seikatsu/kojin/foreign/act.pdf>, is particularly relevant. The new law prohibits the dissemination of this data to a third party without the consent of the individual whose data is collected except in certain delineated cases. *Id.* arts. 15, 23. Of particular interest, the law explicitly exempts mainstream broadcasters, newspapers, and news agencies from its coverage, but does not mention Japan’s relatively more unbridled news magazines nor its freewheeling online world. *Id.* art. 50. Magazine publishers, who tread closer to the line of defamation than other media in Japan, view the new protections as potentially restricting their content. See Justin McCurry, *Probing “Privacy,”* NO. 1 SHIMBUN, <http://www.fccj.or.jp/modules/wfsection/article.php?articleid=557&category=2> (last visited May 27, 2005) (Japan) (stating that “for ‘protection of privacy,’ the weeklies read ‘media regulation’ and quoting a director at the weekly *Bungei Shunju* as stating that a judge who halted publication of an issue concerning the divorce of former Prime Minister Kakuei Tanaka’s granddaughter “wanted to teach us a lesson”).

ously, there have long been criminal libel statutes on the books; the country's leaders merely needed to find someone to enforce them against Internet users. That someone turned out to be the police.

C. Japan's Civil Defamation Law Supplies Weak Redress

American writers theorize that the state prosecutes criminal libel cases in response to two social demands. First, a dictatorship demands compliant media, so tyrannical governments use the police to suppress antigovernment speech.¹³⁵ Second, in traditional societies, including the pre-modern United States, criminal libel prosecutions responded to a demand for social order.¹³⁶ If libel led to a duel at dawn or a violent feud, criminal libel prosecution could prevent private warfare. However, Japan is not a dictatorship, and dueling and honor-related violence have not been serious problems for quite a while.¹³⁷ Absent these factual situations, Occam's Razor provides the likely answer to why criminal libel is still enforced: victims of criminal libel use criminal enforcement because it is their only viable option.

In general, the Japanese legal system tends to use criminal laws more and civil litigation less than the United States because of supply-side constraints. As is well-documented by the legal academy, Japan's legal profession remains small and expensive, despite recent attempts at change.¹³⁸ Moreover, the remedies that a private lawyer can obtain are often insufficient, particularly in the case of libel.

The most efficient means for a civil litigant to stop internet libel would probably be to enjoin the Internet Service Providers who host offensive speech, rather than chase down millions of

135. See *supra* notes 13, 36.

136. See *supra* notes 29–30.

137. Japan does occasionally have arrests under its 1889 anti-dueling law, but, as in the United States, these are newsworthy when they happen, and seem to involve teenage gangs rather than soberminded adults defending their supposed honor. See *Youths Arrested for Violating 116-Year-Old Dueling Law*, THE MAINICHI SHIMBUN, May 26, 2005, at 8 (Japan) (reporting the May 2005 arrests of two rival teenage fight clubs who had organized a kind of fighting tournament that led to serious injuries and also noting the March arrests of other youths under the same law).

138. See Paul, *supra* note 50 (discussing the opening of new law schools, with their first entering classes in 2004, as a step to increase the number of lawyers in Japan).

hard-to-find and possibly insolvent computer enthusiasts.¹³⁹ But, in the relatively short period of time in which large numbers of Japanese people have had the opportunity to defame each other on the Internet, Japan's courts have significantly undercut plaintiffs' ability to pursue claims against Internet forum hosts for contributory liability. A subsequent statute codified much of these courts' logic.¹⁴⁰ These cases and statutes create an easy safe harbor for forum hosts: pulling down defamatory posts when notified of their existence avoids contributory liability. However, unfortunately for those defamed, you cannot unring a bell; notice-and-takedown is obviously a poor remedy for libel's harm.

The most relevant judicial decisions have been fairly favorable to providers of websites that host defamation, making lawsuits against them a problematic way for victims to proceed. The first such case to reach Japan's appeals courts involved Niftyserve, an Internet service provider that grew out of its affiliation with the former U.S. online service CompuServe.¹⁴¹ A heated forum discussion on "Contemporary Ideas" grew into misogynistic insults directed by one forum participant against another. Despite knowing about the defamatory posts, the forum's manager decided to leave the posts up rather than delete them, apparently believing that continuing the discussion and trying to engage the parties in a more issue-oriented dialogue would address the problem. The Tokyo District Court held that this failure to take down defamatory posts was itself actionable neglect on the part of the forum manager.¹⁴² However, the Tokyo High Court reversed, taking an approach similar to that of the "business judgment rule"—refusing to substitute its own judgment with 20/20 hindsight for that of the forum operator.¹⁴³ The High Court reasoned that, although there could be

139. Cf. Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395, 396 (2003) (noting analogous argument concerning efficiency of enforcement "that third parties [such as ISPs] are often in a good position to discourage copyright infringement either by monitoring direct infringers or by redesigning their technologies to make infringement more difficult").

140. See *supra* and *infra* notes 141–50.

141. See ETSUO DOI, RECENT DEVELOPMENTS ON INTERNET RELATED LAWS AND REGULATIONS IN JAPAN 11–12 (2001), <http://www.nzls.org.nz/conference/pdf%20files/DoiF12.pdf> (last visited Feb. 15, 2007).

142. *Nifuteisaab jiken* [Niftyserve Case], 1610 HANREI JIHÔ 22 (Tokyo D. Ct., May 26, 1997).

143. *Nifuteisaab jiken* [Niftyserve Case], 1786 HANREI JIHÔ 80 (Tokyo High

cases where liability would attach to a forum manager's unreasonable failure to delete known defamatory statements, the Court could not conclude that the methods of the Niftyserve manager in question were necessarily unreasonable.¹⁴⁴

Together with the *Niftyserve* case, whose liability rule for Internet Service Providers was later codified in Japan's Provider Liability Law in 2001,¹⁴⁵ another case, known to Japanese lawyers as the "Animal Hospital Case," illustrates the relative weakness of civil defamation lawsuits in Japan.¹⁴⁶ The case stemmed from a series of libelous postings about a particular veterinary hospital, made to a thread entitled "Corrupt Animal Hospital" in a 2Channel message board named "[We] Love Pets."¹⁴⁷ The management of 2Channel refused to remove the offensive postings even after the plaintiff animal hospital complained.¹⁴⁸ Although the underlying facts of the case took place more than a year before the Provider Liability Law's effective date of May 2002, the court, in its June 2002 decision, applied the statute's logic to a case whose underlying events preceded it. The court felt that 2Channel's management had been unreasonable in its refusal to remove the offensive posts when requested and therefore that 2Channel could be held liable for knowingly infringing upon the "rights" of the veterinary hospital. As a result, 2Channel was ordered to pay 4 million yen (approximately \$40,000) in damages.¹⁴⁹ It is difficult to know what to make of this award. It is not a particularly large amount, but it was a strong enough sign to change the

Ct., Sept. 5, 2001).

144. *Id.* (stating that it "cannot recognize defendant's violation of its duty to take down [offending posts]" because the court could not conclude that his stance that continued discussion would take care of the problem was unreasonable).

145. See Provider Liability Law, *supra* note 121.

146. See *Doubutsu byouin tai 2channeru jiken*, 1810 HANREI JIHŌ 78 (Tokyo D. Ct., June 26, 2002). The duty of the management of 2Channel to remove the offending posts was upheld on appeal. *Doubutsu byouin tai 2channeru jiken*, 1816 HANREI JIHŌ 52 (Tokyo High Ct., Dec. 25, 2002); see also TSUKUDA KATSUHIKO, MEIYO KISON TO HOURITSU JITSUMU [DEFAMATION AND LEGAL PRACTICE] 88-91 (2005) (describing and analyzing electronic message board provider's liability for defamation under case law).

147. 1810 HANREI JIHŌ 78. Note that 2Channel is organized into subforums based on subject area, which in turn are broken down into often-lengthy discussions or "threads" based on a particular topic within the subject area. See *supra* part II.B.

148. *Id.*

149. *Id.*

behavior of 2Channel's management.¹⁵⁰ As a broader look at defamation in Japan suggests, such low damage awards tend to be the norm.

The civil defamation action in Japan has been called the "one million yen lawsuit."¹⁵¹ That number, which is equivalent to about \$10,000, is actually supposed to sound impressively large in Japanese. However, it is significantly less than the damages often seen in the United States, where civil libel verdicts can and do result in multimillion dollar judgments.¹⁵² Although official statistics do not break civil cases down by whether or not they involve defamation awards, studies by bar and judicial institutes in Japan bear out the conclusion that such damage awards are low.¹⁵³ According to one study, out of 370 judicial opinions involving defamation claims from 1982 to July 1999, only 197 opinions involved a damages award. Half of those awards were worth less than 500,000 yen (roughly \$5,000), with only 22% above 1,000,000 yen (\$10,000), and the highest at 10,000,000 yen (\$100,000) (see Table 4).¹⁵⁴

150. 2Channel's practical response to the verdict was to begin keeping a log of the IP addresses of posters, to help identify the Internet connections that libelous posters use. This allows 2Channel to produce this information to complainants, though, as discussed above, this information alone does not provide real-world names of users. See *supra* note 121.

151. JOURNAL OF THE LAW AND PRACTICE SURROUNDING DEFAMATION AND INJURY TO PRIVACY IN THE INFORMATION AGE, 62 (Bar Association of Shizuoka Prefecture ed., 2000) ("[H]owever, even though [Japanese lawyers] commonly call defamation lawsuits 'one million yen lawsuits,' compared to Europe and America, this has become a pittance.").

152. See E. GABRIEL PERLE, JOHN TAYLOR WILLIAMS & MARK A. FISCHER, PERLE & WILLIAMS ON PUBLISHING LAW § 5.13 (3d ed. 1999 & Supp. 2001) (observing that average defamation case awards exceed \$500,000); Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 13 (1989) ("[S]peakers found liable for defamation . . . often have faced judgments in the multimillion and multihundred thousand dollar range.").

153. See THE LAW AND PRACTICE SURROUNDING DEFAMATION, *supra* note 151, at 68.

154. *Id.* at 70.

Table 4: *Number of Judicial Opinions in Japan Awarding Damages in Connection with Defamation, by Amount of Award, from 1982 to 1999*¹⁵⁵

Amount of Award Recognized by Judicial Opinion (from 1982 to 1999)	Number of Judicial Opinions
Below 1 million yen (roughly \$10,000)	114
From 1 million to below 2 million yen (roughly \$20,000)	50
From 2 million to below 3 million yen (roughly \$30,000)	14
From 3 million to below 4 million yen (roughly \$40,000)	12
Above 4 million yen	7

Interestingly, among these 197 reported awards spanning amounts from less than 10,000 yen (about \$100) to more than 10,000,000 yen (about \$100,000), forty awards were for exactly 100,000 yen (about \$1,000). This price stickiness suggests that the term “one million yen lawsuit” may be puffery, but bolsters the notion that Japanese defamation awards tend to be both low and predictable.

The situation for private defamation plaintiffs in Japan is not hopeless, however, and damage awards have been rising. In October 2004, Japan’s Supreme Court confirmed the Tokyo District Court’s record-setting award of 19,800,000 yen (roughly \$200,000) in a case involving the liability of publisher Shinchosha for an article in which one of its magazines suggested that a medical corporation’s CEO had his wife killed in a traffic accident to get insurance money.¹⁵⁶ This represented a doubling of the previous record damages amount, awarded in another case before the same district court in March 2003, in which a magazine alleged strip-club patronage and “excess womanizing” by baseball player Kazuhiro Kiyohara during a trip to Seattle.¹⁵⁷ Such an award might make a significant na-

155. See THE LAW AND PRACTICE SURROUNDING DEFAMATION, *supra* note 151 at 69–70.

156. See Nihon Shimbun Kyokai [Japan Newspaper Association] NSK News-bulletin Online, Magazine Ordered to Pay Record 20 Million Yen for Libel (Nov. 2004), <http://www.pressnet.or.jp/newsb/0411b.html> (last visited on Feb. 20, 2007). Kiyohara v. Shogakukan, 1754 HANREI JIHŌ 93 (Toyko D. Ct., Mar. 27, 2001).

157. *Id.* See also Mark Schreiber, *Media Lick Their Legal Wounds*, JAPAN TIMES, Aug. 31, 2003, at 11, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?fd20030831tc.htm> (last visited Feb. 14, 2007) (stating that “in the past . . . courts had been stingy in awarding claims” but that “in March 2001, publisher Shogakukan was ordered to cough up what was then the most generous

tional impact, given the Tokyo District Court's prestige and influence within the Japanese judiciary.¹⁵⁸

Indeed, this may be the beginning of higher, yet still predictable, damage awards in Japanese civil defamation lawsuits. In particular, a 2001 report issued by Japan's Legal Training and Research Institute (LTRI) seemed to promote this trend.¹⁵⁹ The committee, which included judges from the prestigious Tokyo District and High Courts, created a table somewhat reminiscent of the U.S. Sentencing Guidelines to help make damage awards more predictable, by adding or subtracting points, based on features in the case (see Table 5).¹⁶⁰ The points then translate into the damages award.

settlement ever awarded—[10 million [yen]—to Yomiuri Giants infielder Kazuhiro Kiyohara” which led “others [to] converge[] on the courts, upping the size of claims, with some demanding hundreds of millions in damages”); *Kiyohara*, 1754 HANREI JIHŌ 93 (Tokyo D. Ct., Mar. 27, 2001) (awarding then-record 10 million yen, equivalent to approximately \$100,000 to professional baseball player).

158. See J. MARK RAMSEYER & ERIC B. RASMUSSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN 13 (2003) (stating that the Japanese judicial system uses a sorting and tracking mechanism for judges whereby “it distinguishes among the new recruits and posts those judges it believes most talented to the Tokyo District Court”).

159. See Heisei 13nendo songai baishou jitsumu kenkyuukai, Shihou kenshuujyo [2001 Compensation Practice Committee, Legal Training and Research Institute], *Songai baishou seikyuu soshou ni okeru songaigaku no santei* [Calculating Damages in Lawsuits Seeking Compensation], 1070-HANREI TAIMUZU 4 (2001).

160. See *id.* at 13.

Table 5: Calculation Criteria for Standardizing Compensation Awards in Defamation Cases¹⁶¹

	Calculation element	Aggravating factor	Mitigating factor
Circumstances concerning defamer	(1) Motive, purpose		
	Intentional	+10	
	Very Bad	+8	
	Bad	+6	
	Other	+3	
	(2) Contents of the defamatory statement		
	Inappropriate expression	+8	
	Appearance of photograph portrait	+10	
	Personal attack	+10	
	(3) Truth		
	Completely lacking	+10	
	Lacking	+8	
	(4) Inappropriateness		
	Presence of public benefit		-6
	Presence of intent to benefit public		-6
	(5) Range of the method of dissemination		
	TV or Internet	+10	
	National newspaper or sports newspaper	+9	
	Weekly publication	+8	
	Book	+7	
	(6) Profit from dissemination		
	Maximum	+10	
	Large	+8	
	Small	+4	

161. Japan's Legal Training and Research Institute (LTRI), *Songai baisho sei-kyuu soshou ni okeru baisho no santei* [Calculating Awards in Lawsuits Seeking Damage Compensation], 1070 HANREI TAIMUZU, 4 (May 17, 2001). One point equals Yen 100,000 (c. \$1,000)

	Calculation element	Aggravating factor	Mitigating factor
Circumstances concerning victim	(7) Social position		
	Age	? ['?' in original]	
	Occupation		
	Media celebrity, etc.	+10	
	Diet member, lawyer, etc.	+8	
	Other	+5	
	(8) Decline in social esteem		
	Big	+10	
	Medium	+7	
	Small	+5	
	(9) Harm to one's business, occupation		
	Big	+10	
	Medium	+7	
	Small	+5	
	(10) Harm over and above one's social relations (lethal damages to one's retirement)		
	Big	+10	
	Medium	+7	
	Small	+5	
	(11) Attitude of the defamer after dissemination		
	Good		-6
	Not Good	+3	

The LTRI had previously published a similar table for damages awards in motor vehicle accidents that was influential, which is not surprising given that the LTRI is the arm of the state charged with training judges, prosecutors, public defenders and trial attorneys.¹⁶² The defamation table is interesting, though one could quibble with some of its conclusions, such as defamation of a media celebrity deserving a greater award than defamation of a legislator or lawyer.¹⁶³ Perhaps most noteworthy is that the aforementioned one million yen benchmark for damages can be doubled—and the sticky 100,000 yen mark can be multiplied twenty-fold—merely by us-

162. Asaka Kanda, *Masumedia ni yoru joudou higai (2)* [Damage by Mass Media Reporting, Part 2], NIBEN FRONTIER 2002, available at http://www.niben.jp/07frontier/2002/no05/frontier2002_5_2.html (last visited Feb. 14, 2007) (attorney writing in Tokyo bar association's journal that the same Legal Training and Research Institute's similar research on criteria for damages in accident deaths had been widely accepted and recognized as a standard in such cases).

163. *Id.* (10 points, representing 1 million yen, for the fact that the victim is a media celebrity, but only 8 points, for 800,000 yen, if the victim is a lawyer or legislator). Indeed, the table seems to share features with both actuarial science and the film *Deathrace 2000*. *DEATHRACE 2000* (New World Pictures 1975); Wikipedia, http://en.wikipedia.org/wiki/Death_Race_2000 (last visited Feb. 14, 2007).

ing the Internet (10 points, yielding 1 million yen) to spread one's slur. This seems indicative of a future trend, not just towards larger and more predictable damage awards, but also towards tougher standards for Internet libel.¹⁶⁴

This new paradigm could have a dual result. Through deterrence, it could lead to less actionable defamation. However, it could also induce more defamation to shift toward anonymous Internet channels. There could thus be a kind of income effect, where defamers "buy" smaller amounts of actionable defamation because the price has risen (that is, they make fewer punishable defamatory statements), but also a simultaneous substitution effect, where defamers buy a greater amount of less actionable defamation (that is, they shift their defamatory statements onto media such as the Internet where punishment is less likely).

There are other ways of dealing with defamation than going to the police or bringing civil lawsuits. Such measures include directly addressing one's adversary, holding an opposing news conference, or, in the case of over-the-air broadcasting, requesting an investigation into the accuracy of the reporting through broadcasting regulations.¹⁶⁵ These types of methods, however, are more suited to public figures who have been defamed by the nightly TV news than to someone whose reputation has been injured by anonymous postings on the Internet. Additionally, Japan's Ministry of Justice (MOJ) offers an administrative process for dealing with cases of human rights violations that can apply to defamation. This process is flexible and can be initiated quickly and easily by a victim of defamation or other rights violation by consulting with a human rights protection officer at one's local MOJ office. However, this process is only successful if the accused desires to cooperate: the MOJ process attempts to foster reconciliation by completely voluntary steps such as "enlightening" a violator through recommendations or factfinding from discretionary investiga-

164. Indeed, the media seems to expect this result. See Hiroshi Matsubara, *Crackdown Has Publishers Running Scared*, JAPAN TIMES, Apr. 3, 2004, at 3, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040403f2.htm> (last visited Feb. 14, 2007) (observing that "former and serving judges have since published reports in legal journals saying the amount of damages must be raised").

165. See *Meiyokison, shinyokison no houritsu soudan*, 267-68 (2004) (discussing "[damage] redressing institutions besides lawsuits").

tions.¹⁶⁶ It is thus also completely useless where the defamer is unknown.

Justice for Japanese civil libel victims remains constrained by remedies and other practical difficulties imposed by the legal system. The lucrative remedies available to their U.S. counterparts are closed off to them, at least for the time being, but the future need not look exactly like the past. Changes are taking place that may increase citizen access to stronger libel remedies.¹⁶⁷ Until these plans come to fruition, however, the Japanese continue to rely on the police to deal with libel, online and otherwise.

III. LEGAL ENFORCEMENT AS A COMPLEMENT TO SOCIAL NORMS

Japanese victims of online libel have another choice, besides criminal libel prosecution or civil defamation litigation. They could do nothing and suffer the slings and arrows of nasty Netheads. Many have not made this choice. Their reason for rejecting the option to cry into their pillows contains a worthwhile lesson for Americans considering state punishment of online speech.

A. *Private Ordering Through Reputation as the Source of Criminal Libel Prosecution*

Japanese commentators perceive the Internet as driving an overall increase in defamatory statements and criminal libel prosecutions.¹⁶⁸ The ease of peer-to-peer (P2P) contact on the

166. *Id.* at 269.

167. The most significant difference in the two systems is the possibility for U.S. civil libel plaintiffs to receive punitive damages. See Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 643 n.250 (2005) (describing punitive damages as available in civil defamation action where the speech was false or made with reckless disregard for the truth); David Kohler, *Forty Years After New York Times v. Sullivan: The Good, the Bad, and the Ugly*, 83 OR. L. REV. 1203, 1231 (2004) (contending that “[p]unishing speakers for expression deemed libelous is a practice that is alive and well in the United States forty years after *Sullivan*” and that “[m]ost commonly this punishment takes the form of punitive damages” and that “[t]he average punitive damages award since 1980 [has] exceeded \$2 million”); see also Richard A. Epstein, *Monopoly Dominance or Level Playing Field? The New Antitrust Paradox*, 72 U. CHI. L. REV. 49, 65 (2005) (stating that “a defamation claim, with punitive damages no less, is routinely available” where one market competitor defames another).

168. See, e.g., Shigenori Matsui, *The ISP's Liability for Defamation on the Internet—Japan*, 3 (2002), http://www.ias.or.jp/old/research/res_houmodel/2002

Internet has changed not only the quantity of defamation, but also its *quality*. Whereas before, when defamation was largely a problem of politicians and celebrities injured by the mass media, ordinary people can now defame each other quite easily with little effort.¹⁶⁹ Indeed, Japan is increasingly faced with the problem of translating a defamation law regime created for newspapers and the reputation of public figures to the new context of Internet bulletin boards, small business people, dating singles and online battling keyboardists.

This leads to an important question: Why do the Japanese care so much what people say about them online? Or at least, why do they respond with what most Americans would perceive as the relatively extreme measures of suing or contacting the police? The Japanese are generally known as a “nonlitigious” people; a long debate has focused on explaining why.¹⁷⁰ This debate has involved an effort to develop a positive theory of Japanese litigation decision making and has also examined how the design of legal institutions shapes a citizenry’s behavior. A theory of why the Japanese resort to their legal system, civil or criminal, to deal with Internet defamation can explain why private ordering via reputation might need the backstop of the legal system.

One explanation for Japan’s “legal ordering” trend in online defamation is the notion that injury to reputation is a kind of “special” harm in a society with a high commitment to

1129/820Matsui.pdf (last visited Jun. 22, 2005) (observing that “[w]ith the increase of defamation on the Internet, the number of criminal prosecution[s] for defamation . . . also increased”).

169. *Id.* (observing that “[m]any Internet defamation cases are not concerned . . . with mass media or with celebrities” but “[i]t is rather an ordinary citizen that is suing and . . . an ordinary citizen that is sued”).

170. Assuming that “nonlitigious” means “few cases filed.” See Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW & SOC’Y REV. 651, 651 (1990) (stating that “[t]he Japanese are nonlitigious compared to the people in other industrialized countries” since “courts are used less often in Japan than in the United States”). However, if “nonlitigious” is supposed to refer to the lack of a personal taste for litigation, there is some debate about this point. Compare John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 378-89 (1978) (suggesting that low litigation rates in Japan stem from the availability of informal dispute resolution mechanisms and structural factors preventing courts from offering adequate relief) with J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 267 (1989) (Japanese do not litigate because variability in litigation outcome is outweighed by cost of litigation, driving parties to settlement).

private ordering. When social sanctions and reputation play a large role in governing a society, a transformative technology like the Internet may require state intervention to maintain the working system of social sanction.¹⁷¹ For example, if reputation plays a relatively large role when parties select partners to form contracts with, then defamation creates both a private and a public harm. First, the defamed party suffers in its ability to project itself as trustworthy and therefore might have a more difficult time conducting its business. Second, defamation of this kind may create a public harm by making reputation itself a less reliable form of social ordering. Once the Internet makes unverifiable anonymous gossip so widely available, the magnitude of both the private and public harms can ratchet up with the number of online users. Police involvement in online defamation therefore may actually be an attempt to maintain social norms.¹⁷² Indeed, this goes beyond direct consultation and arrest, as the police have actually sought to proactively advance guidance for proper online behavior. Not only do they suggest trying to maintain one's privacy online,¹⁷³ but they also provide guidance to victims on how to report defamation¹⁷⁴ and have begun to gather complaints online.¹⁷⁵

Another explanation for the "legal ordering" trend is the motivation of parties in online defamation cases. Why do they not simply respond in kind to attacks, or at least try to defend themselves? It could be that asymmetries between the victim and the attacker mean a direct response would actually harm the victim's reputation in other ways. For example, in the first

171. JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 183 (1991) ("The social stigma of the disclosure of wrongdoing can function as an equally effective and far more efficient substitute for state coercion.").

172. This pattern has been observed in other contexts, such as management-employee relationships. See Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of—Stability?* 43 *UCLA L. REV.* 635, 690 (1996) ("[A] major pattern of judicial decisions in Japan: decisions that emphasize protection of the weak by maintaining existing relationships and the existing order.").

173. See National Police Agency, <http://www.cybersafety.go.jp/> (last visited July 1, 2005) (advising Internet users to keep their personal data and pictures off their publicly available websites and off Internet message boards).

174. See National Police Agency, <http://www.npa.go.jp/cyber/existing/trouble1.html> (last visited July 1, 2005) (advising victims offended by online postings to "please make copies of the offending entry's contents, prepare a detailed explanation of why the entry gives offense, and consult the police").

175. See *supra* note 65 and accompanying text.

case in which a Japanese court issued an injunction requiring the takedown of a website, an individual had alleged that Sumitomo Marine and Fire Insurance Company had swindled him.¹⁷⁶ A large, reputable company's response to defamation by lobbying online countercharges might actually hurt the company by legitimizing the defamer's claim in the eyes of third parties.¹⁷⁷ Even where there is not such an asymmetry, to the extent that explicit, direct attacks signal a rejection of general norms, to respond to defamers in kind may result in costs associated with the injured person's rejection of these norms.

It is impossible to say for sure whether the costs, in terms of police resources and chilled expression, are worth whatever benefits they provide for Japan's system of private ordering through reputation. Failing to do anything might lead to the Internet having the credibility of graffiti—little believed for actual factual assertion, but sometimes possessing a kind of truth of opinion. However, because of its prior commitment to protecting reputations, Japan has been unable or unwilling to make the choice to do nothing. Americans enamored with private ordering should heed this warning of the kind of state action that private ordering can lead to.

B. Police and Prosecutors Are Blunt Instruments in Dealing with Speech

Police and prosecutorial activity in online defamation cases may create its own problems. Police can act quickly, but they can also make mistakes; arrest itself carries significant reputational harm in Japanese society.¹⁷⁸ While the prosecutors al-

176. *Kokuhatsu saito no koukai o kinshi toukyouchisai* [Tokyo District Court Bans Public Display of Complaint Website], MAINICHI SHIMBUN, Apr. 24, 2001, at 25 (explaining that the website alleged claims of fraud by The Sumitomo Marine and Fire Insurance Company); *Kokuhatsu saito no sashitome karishobun toukyouchisai ga hatsuhandan* [Tokyo District Court makes the first decision granting a temporary injunction against a complaint website], SANKEI SHIMBUN, Apr. 25, 2001, at 30 (noting how "complaint" website cases had been increasing, so this first decision stopping such a site might have an impact).

177. Interview with *bengoshi* Arimi Yamada, Att'y, Sumitomo Marine and Fire Ins. Co., in Philadelphia, Pa. (May 24, 2005) (explaining these motives and that there was no written opinion accompanying the order); Interview with *bengoshi* Shunsuke Nomoto, Att'y, Sumitomo Marine and Fire Ins. Co., in Tokyo, Japan (June 28, 2006).

178. One commentator has suggested that most Japanese view arrestees as guilty. See Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal*

most always obtain convictions against defendants brought to court, relatively few actually go to a contested trial, with many defendants confessing.¹⁷⁹ This creates sparse guidance for potential online defamers. There is also risk that vigorous criminal prosecution of defamation could lead down a slippery slope to criminal prosecution by the state of politically dissenting speech, a traditional concern of civil libertarians.¹⁸⁰ Indeed, this has already come to pass; individuals have been arrested for insulting public officials online.¹⁸¹

Criminal justice need not be the only way for Japan to deal with online defamation. Japan is undergoing a series of legal reforms that will result in more lawyers, more public participation in the legal system, and more judicial capacity.¹⁸² In short, if Japan must deal with online defamation judicially, civil litigation may become a significantly more attractive option. Interestingly, this could have two different effects on victims of online defamation. They might find it easier to bring civil cases and therefore more suits may be filed, an effect that could be accelerated as damage awards in defamation cases are made larger and more predictable.¹⁸³ At the same time, the role of reputation and private ordering might weaken with the growth of the legal system. To be sure, the speed and magnitudes of these effects might differ greatly. But the Internet's impact could actually reinforce the growing attractiveness of civil litigation and simultaneously weaken the value of reputation-based private ordering.

Justice, 80 CAL. L. REV. 317, 344 n.170 (1992) ("Upon a suspect's arrest the Japanese media will normally drop the appellation *san* from after that person's name. In addition, photographs of arrested suspects are typically oval-shaped, to distinguish them from photographs of 'normal' people.").

179. See *supra* note 72.

180. See Jairo E. Lanao, *Legal Challenges to Freedom of the Press in the Americas*, 56 U. MIAMI L. REV. 347, 362 (2002) ("Elimination of criminal libel [statutes] has been a world cause embraced by numerous human rights organizations.").

181. See *supra* note 12 and accompanying text (describing arrest of individual for allegation of body part oddity of public official).

182. See, e.g., Paul, *supra* note 50, at 64 (describing reforms aimed at criminal and civil procedure and at expanding legal education); Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic Historical and International Psychological Perspectives*, 37 VAND. J. TRANSNAT'L L. 935, 947 (2004) (describing proposed lay judge system in Japan that will increase citizen participation in trials).

183. See *Calculating Damages in Lawsuits Seeking Compensation*, *supra* note 159, at 4 (advocating higher, standardized damages in defamation lawsuits).

The possibility of building up civil litigation, rather than risking civil liberties by supercharging Internet policing, provides a real alternative to Japan, one made more promising with Japan's changing legal system. However good a choice civil litigation is for Japan, it is even better for the United States. The United States has more abundant civil litigators, and U.S. police are not actively seeking to enforce libel suits.¹⁸⁴ American institutions, by their structure and history, already configure themselves to handle civil libel litigation rather than criminal enforcement. Additionally, the Napster wars in the U.S. have paved the way for American plaintiffs to obtain the identities of web posters from ISPs with relative ease, compared to their Japanese counterparts.¹⁸⁵

There is also a serious political reason to think that, however bad a choice criminal libel is for Japan, it could be far worse for the United States. Any criminal justice system may be poorly situated to deal with this problem, whether in Japan or the United States. But police chiefs and prosecutors are not elected positions in Japan, whereas they sometimes are in the United States. Thus, the risk that a criminal libel regime would involve the suppression of politically-charged speech is greater in the United States than in Japan.

Another saving grace for Japan is that prosecutors have, traditionally, been given leeway to take a broad view and have not faced negative repercussions for failing to prosecute nonviolent, less serious crime.¹⁸⁶ As a result, if prosecutors were to conclude that a criminal libel prosecution would be harmful to society at large, in Japan it would accord more with the norms and politics of criminal prosecution to decline to charge the defendant.¹⁸⁷ The apolitical nature of prosecutors' offices in Japan, along with a high degree of career job security, enables

184. See *supra* Part I and Table 2.

185. See 17 U.S.C. § 512(h) (2000) (providing that federal courts may grant a copyright owner a subpoena ordering a service provider to reveal the identity of an allegedly infringing subscriber); *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs.*, 351 F.3d 1229, 1233 (D.C. Cir. 2003) (holding that whether subpoenas may issue depends on whether the provider "hosts" the infringing content on its own servers).

186. See DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 201 (2002) (describing a "second system of criminal justice" for offenses of low seriousness—particularly with respect to violence—and "offenders of high correctability").

187. *Id.* at 31 (stating that "Japanese prosecutors confront little of the fear, fury, and wishful thinking that drive criminal policy in the United States").

prosecutors to be somewhat insulated from the broader public whom they serve—which can be a good thing for unpopular speakers.¹⁸⁸ By contrast, many heads of prosecutors' offices and police departments in the United States are elected—creating a built-in risk of political motivations for libel prosecution.

The dangers of state regulation of speech may hold a lesson for private ordering, generally. The standard comparison concerning how to organize affairs and handle disputes places public ordering, on the one hand, in a position of employing “coercive power of the state, to which all actors are subject,” and puts private ordering, on the other hand, in a position of relying on “reputation mechanisms.”¹⁸⁹ But social norms that do not track private interests may be inherently unstable.¹⁹⁰ And that instability can be heightened where technological change—like anonymous online posting—provides opportunities to flout social norms in favor of one's private interest.

CONCLUSION

There are several possible responses to Internet defamation. To the extent that a society devotes itself to private ordering through reputation and observing social norms, civil litigation and fighting back with one's own verbal assaults may not represent attractive options, and those charged with maintaining public order may have to get involved. The irony is that private ordering, so attractive to those concerned about the overexpansion of law as a public institution, might actually require public enforcement to survive technologies that can undercut it. The double irony is that America is considering criminal regulation of online speech while Japan is considering

188. *Id.* at 30 (“Since Japanese prosecutors are not elected and are largely impervious to public opinion, they are insulated from the punitive attitudes of the public whom they represent.”). However, there are institutions that at least attempt to bridge the gap between the Japanese public and their unelected prosecutors. See Mark D. West, Note, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684 (1992).

189. Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2340 (2004).

190. J. Mark Ramseyer, *Learning to Love Japan: Social Norms and Market Incentives*, 31 SAN DIEGO L. REV. 263, 265 (1994) (“[T]he more self-interested strategies give members of a community an incentive to deviate from communal norms, the more precarious those norms will be.”).

the benefits of American-style civil libel remedies. We should learn from Japan's mistake, just as the Japanese appear to be: criminalizing online libel can be a slippery slope to state regulation of political speech—a cure far worse than the disease.