

CRIMINAL DEFAMATION AND PUBLIC INSULT LAWS IN THE REPUBLIC OF POLAND: THE CURTAILING OF FREEDOM OF EXPRESSION

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The Polish government and judiciary continue to enforce the criminal defamation and public insult laws enumerated in the Polish Penal Code, thereby significantly infringing upon an individual's constitutional right to freedom of expression. With respect to striking a fair balance between freedom of expression and an individual's right to a protected reputation, criminal sanctions for defamation and public insult employ a chilling effect upon freedom of expression and spawn self-censorship concerning open public discourse. While countries across the European continent continue to maintain criminal penalties for defamation and insult, Poland diverges from this trend because the Polish legal system regularly enforces these laws, especially when the case involves public officials with political power. Meanwhile, the European Court of Human Rights has yet to formally reject criminal sanctions for defamation, thereby allowing Member States to curtail freedom of expression. This Note examines prospective legal proposals to amend the current defamation system in Poland. Then, this Note argues that civil judgments are equally effective in remedying a plaintiff's damages in a defamation action because they do not detrimentally impact and stigmatize a defendant's personal and professional reputation.

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I. INTRODUCTION

In May 2011, officers from Poland's Internal Security Agency raided Robert Frycz's residence after obtaining a search warrant from a local prosecutor's office.¹ Officers confiscated Frycz's laptop and shut down his website² that featured computer games such as "Komor Killer," which showcased former Polish President Bronislaw Komorowski being shot by virtual vegetables.³ From the outset, Frycz argued that the website was meant to be satirical.⁴ He was found guilty and convicted of insulting the Polish Head of State, and his sentence included both a restriction of liberty, which prohibited Frycz from changing his permanent address without the court's permission,⁵ and a court order to complete 600 hours of community service.⁶

In general, criminal defamation law is a fiercely contested freedom of expression issue in Poland and across the European continent because even the mere threat of criminal liability places a significant "constraint on public debate and the freedom of the press."⁷ A genuine constitutional

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¹ *Man Convicted of Insulting Polish President*, THE WARSAW VOICE (Sept. 17, 2012), <http://www.warsawvoice.pl/WVpage/pages/articlePrint.php/22223/news>.

2. *Id.*

3. *Court Finds Man Guilty of Insulting Polish President on 'Satirical' Web Site*, RADIO POL. (Sept. 15, 2012, 8:30 AM), <http://www.thenews.pl/1/9/Artykul/112235,Court-finds-man-guilty-of-insulting-Polish-president-on-satirical-web-site>.

4. *Man Convicted of Insulting Polish President*, *supra* note 1.

5. *Court Finds Man Guilty of Insulting Polish President on 'Satirical' Web Site*, *supra* note 3.

6. *Man Convicted of Insulting Polish President*, *supra* note 1. The Organisation for Security and Co-operation in Europe criticized Poland for Frycz's sentence and stated that criminal sanctions for insulting heads of state are outdated in modern democracies. See *Blogger Charged with Insulting Polish President*, RADIO POL. (Jan. 16, 2013, 3:00 PM), <http://www.thenews.pl/1/9/Artykul/124311,Blogger-charged-with-insulting-Polish-president>.

7. *Polish Rights Ombudsman Criticises Criminal Defamation Despite Campaign, Notorious Art. 212 Remains in Force*, INT'L PRESS INST. (July 16, 2015),

guarantee concerning free expression is a relatively new legal phenomenon in the Republic of Poland because government-sponsored censorship was not abolished until April 1990, which coincided with the former Soviet satellite state's communist-inspired government crumbling in favor of a Western-style democracy.⁸ Under the former regime, criminal provisions for defamation and insult were utilized as governmental devices to stifle individual speech and "justify repression of the democratic opposition" that existed within Communist Poland.⁹

This Note will explore criminal defamation laws and its subset of public insult laws in the Republic of Poland and provide legal proposals for the country to implement in place of the current criminal law provisions.¹⁰ This Note will first articulate the succinct history of communism and totalitarianism in Poland and then briefly discuss the country's accession into the European Union and Council of Europe following the collapse of communism.¹¹ Next, this Note will examine Polish national courts' overall compliance with Article 10 of the European Convention on Human Rights, to which Poland is a contracting party.¹² Then, this Note will introduce legal proposals to alter existing defamation law in Poland; these proposals range from judicial refusal to enforce these criminal laws in favor of civil litigation, legislative amendments to the Polish Penal Code to decriminalize defamation actions, and adoption of either the American or British approaches to defamation law.¹³ Subsequently, each proposal will be carefully

<http://legaldb.freemedia.at/2015/07/16/polish-rights-ombudsman-criticises-criminal-defamation/> [hereinafter *Polish Rights Ombudsman Criticises Criminal Defamation*].

8. Wojciech Sadurski, *Freedom of the Press in Postcommunist Poland*, 10 EAST EUR. POL. & SOCIETIES 439, 439 (1996).

9. *Id.* at 442.

10. *See infra* Parts II.B., IV.

11. *See infra* Parts II.A., II.C.

12. *See infra* Part III. Under the European Convention on Human Rights, a contracting party is afforded national sovereignty; however, to be a contracting party to the Convention, "acceptance of the jurisdiction of the [European] Court [of Human Rights] became compulsory" to ensure that any alleged Convention violations would be heard before the Court. Frank Emmert & Chandler Piché Carney, *The European Union Charter of Fundamental Rights vs. The Council of Europe Convention on Human Rights and Fundamental Freedoms - A Comparison*, 40 FORDHAM INT'L L.J. 1047, 1056–57 (2017).

13. *See infra* Part IV.

evaluated, and the best alternative will be selected, while being cognizant of the contemporary Polish legal and historical landscape.¹⁴

II. BACKGROUND

A. Brief Polish History: Post-World War I to Present

Throughout the twentieth century and the onset of the twenty-first century, Poland—a Central European nation nestled among the Western and Eastern European hegemonies—endured an unparalleled geopolitical experience in comparison to the country’s western and eastern neighbors.¹⁵ Following centuries of battling for a national identity because of the competing hegemonic powers to the east, west, and south,¹⁶ Poland did not reemerge onto the international scene until 1918 when it became an independent sovereign subsequent to the Allied Powers defeating the Central Powers in World War I.¹⁷ However, Polish independence came to an abrupt halt when Adolf Hitler’s German army invaded the country on September 1, 1939, sparking the beginning of World War II.¹⁸ Following the demise of Nazi Germany in World War II, post-war Poland—known as the Polish People’s Republic—failed to achieve independence and was under the dominion of an authoritarian and communist-inspired “illegitimate puppet government,” which operated at the behest of the Soviet Union from 1945–1989.¹⁹ While under the dominion of the Soviet Union, freedom of expression was severely restricted, as the criminal codes throughout the Soviet bloc

14. *See infra* Parts V., VI.

15. *See generally* BRIAN PORTER-SZÜCS, *POLAND IN THE MODERN WORLD: BEYOND MARTYRDOM* 1–4 (2014).

16. *See generally* Piotr S. Wandycz, *The Lands of Partitioned Poland, 1795–1918*, in 7 *A HISTORY OF EAST CENTRAL EUROPE* 1, 10–11 (Peter F. Sugar & Donald W. Treadgold eds., 1996) (discussing the three late eighteenth century partitions of Poland by the Russians, Prussians, and Austrians, thereby eliminating an independent Poland off the European map).

17. PORTER-SZÜCS, *supra* note 15, at 71.

18. *Id.* at 144.

19. *Id.* at 186–87.

carried severe criminal penalties for defamation and insult.²⁰ During the Communist era, criminal defamation and insult laws were routinely enforced, and an individual convicted of defaming Soviet authorities often received a seven-year prison sentence.²¹ Vladimir Lenin believed freedom of expression was a threat to the government, assuming that the bourgeoisie would use modes of communication—such as the press—to undermine and overthrow the government.²²

The Polish legal and political landscape underwent the process of democratization in 1989 with the fall of the Berlin Wall and Central and Eastern European Communism,²³ at which point a non-communist democratic government was elected by the people and instituted in Poland.²⁴ By 1997, eight years after the fall of Communism, the Polish government adopted a new constitution for the newly independent Republic.²⁵ However, Communism did not completely fall as “the specter of totalitarianism continues” to loom²⁶ since Poland is one of nine European Union Member States that continues to enforce insult as a criminal offense with the potential for imprisonment against individuals, particularly journalists and other members of the media.²⁷

After the collapse of the Soviet Union, countries around the world expected the former Soviet bloc countries to follow the lead of either the United States—which limits defamation judgments to civil liability—or Western Europe—which is relatively lax on enforcing criminal

20. See Elena Yanchukova, LL.M. Comment, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 COLUM. J. TRANSNAT'L L. 861, 883 (2003).

21. *Id.*

22. *Id.* at 870.

23. See Daniel H. Cole, *From Renaissance Poland to Poland's Renaissance, The Struggle for Constitutionalism in Poland*, 97 MICH. L. REV. 2062, 2092 (1999).

24. See PORTER-SZÜCS, *supra* note 15, at 321.

25. See Cole, *supra* note 23, at 2092.

26. Yanchukova, *supra* note 20, at 870; see also Cole, *supra* note 23, at 2065 (commenting that “[m]uch of the developmental path of societies is conditioned by their past”).

27. SCOTT GRIFFEN, OUT OF BALANCE: DEFAMATION LAW IN THE EUROPEAN UNION: A COMPARATIVE OVERVIEW FOR JOURNALISTS, CIVIL SOCIETY AND POLICYMAKERS 15 (Jan. 2015), <http://legaldb.freemedia.at/wp-content/uploads/2015/05/IPI-OutofBalance-Final-Jan2015.pdf>. Only five of these Member States have repealed their criminal defamation laws, and only Romania has completely eliminated defamation-related provisions from its criminal code. *Id.* at 10.

defamation and insult laws by deferring to a vigorous belief in freedom of expression.²⁸ Nonetheless, Poland chose to follow neither the American nor Western European approach with respect to defamation law, and various Western outlets have taken note of it, including the United States' Department of State.²⁹ In Poland's 2014 and 2015 Human Rights Report, the Department of State indicated that "[c]riminal defamation laws restricted freedom of speech and press by discouraging speech, publications, and material on the internet critical of public officials."³⁰ The 2015 Human Rights Report indicated that in 2014, 2 individuals were convicted of insulting "constitutional organs of the government," and 20 individuals were convicted of defamation, which resulted in the defendants paying fines.³¹ Although the maximum penalty was not imposed in any of these instances, the Helsinki Human Rights Foundation warned that "the risk of facing criminal charges may discourage [people] from addressing sensitive subjects."³² When issuing Poland's Human Rights Report, the United States Department of State was alarmed at Poland's enforcement of, and subsequent prosecution of individuals under the, criminal defamation and public insult laws, which in turn unduly curb freedom of expression.³³ The likely rationale for the Department of State's trepidation with respect to Polish defamation law predictably stems from the American judiciary's broad interpretation of the First Amendment of the American Constitution, which guarantees freedom of expression.³⁴

28. See Yanchukova, *supra* note 20, at 883–84.

29. See generally U.S. Dep't of State, Bureau of Democracy, H.R., and Lab., Poland 2015 Human Rights Report (2015), <https://pl.usembassy.gov/wp-content/uploads/sites/23/2016/04/hrr2015.pdf> [hereinafter Poland 2015 Human Rights Report].

30. U.S. Dep't of State, Bureau of Democracy, H.R., and Lab., Poland 2014 Human Rights Report 1 (2014), <http://www.state.gov/documents/organization/236776.pdf>; see also Poland 2015 Human Rights Report, *supra* note 29, at 1.

31. Poland 2015 Human Rights Report, *supra* note 29, at 11. Of the twenty individuals convicted, three individuals were members of the mass media and seventeen individuals were not members of the media. *Id.*

32. *Id.* at 10–11.

33. See *id.* at 1.

34. See generally *What Does Free Speech Mean?*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does> (last visited Feb. 14, 2017) (providing examples of

Scholars communicate the idea that international observers should not be surprised that countries of the former Soviet bloc have not created and enforced carbon copies of constitutions or laws that are followed in the United States and Western Europe.³⁵ However, Central and Eastern European nations have looked to their influential Western European neighbors and their constitutional models in order to amalgamate with “the family of Europe.”³⁶ Nevertheless, Poland continues to impose criminal liability for disseminating disparaging remarks against the Polish nation itself or its public officials—even in a “post-communist era for the kind of [free and uncensored] speech”³⁷ that is inherently guaranteed and protected under the Polish Constitution.³⁸

B. Criminal Liability for Defamation and Public Insult

The Polish Constitution of 1997 enumerates similar individual rights and liberties that Western democracies have successfully implemented and judicially interpreted.³⁹ Specifically, the Polish Constitution contains several provisions that assure an individual’s freedom of expression,

American case law on freedom of expression and the various modes of constitutionally protected speech); *see generally* U.S. CONST. amend. I (stating that “Congress shall make no law . . . abridging the freedom of speech, or of the press”).

35. Symposium, *Constitutional “Refolution” in the Ex-Communist World: The Rule of Law*, 12 AM. U. J. INT’L L. & POL’Y 45, 54 (1997) [hereinafter *Constitutional “Refolution” in the Ex-Communist World: The Rule of Law*].

36. *Id.* at 55–56. For example, some correlations can be deduced between Poland’s 1997 Constitution and France’s 1957 Constitution. *Compare* KONSTITUCJA RZECZYPOSPOLITEJ POLSKIEJ [THE CONSTITUTION OF THE REPUBLIC OF POLAND] Apr. 2, 1997, art. 2 (Pol.) [hereinafter THE CONSTITUTION OF THE REPUBLIC OF POLAND], with 1958 CONST. art. 1 (Fr.) (stating generally that both nations shall be democratic states that honor the rule of law and respect the rights of all citizens).

37. *Constitutional “Refolution” in the Ex-Communist World: The Rule of Law*, *supra* note 35, at 56.

38. *See* THE CONSTITUTION OF THE REPUBLIC OF POLAND, art. 54, §§ 1–2 (guaranteeing one’s constitutional right to freedom of expression and abolishing preventive governmental censorship in the Polish state).

39. *Compare id.* art. 32 (Pol.) (stating that “[a]ll persons shall be equal before the law”), with U.S. CONST. amend. XIV, § 1 (stating that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).

including Article 14 and Article 54.⁴⁰ However, given these constitutional provisions and their respective guaranteed rights, Article 212 of the Polish Penal Code states:

Whoever imputes to another person, a group of persons, an institution or organisational unit not having the status of a legal person, such conduct, or characteristics that may discredit them in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type to activity shall be subject to a fine, *the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year*. If the perpetrator commits the act specified in § 1 through the mass media shall be subject to a fine, *the penalty of restriction of liberty or the penalty of deprivation of liberty for up to [two] years*.⁴¹

Additionally, Article 216 of the Polish Penal Code dictates:

Whoever insults another person in his presence, or [even in his absence], or with the intention that the insult shall reach such a person, shall be subject to a fine or *the penalty of restriction of liberty*. Whoever insults another person using the mass media, shall be subject to a fine, *the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year*.⁴²

Specifically, Section 2 of Article 135 of the Polish Penal Code criminalizes publicly insulting the Polish president and subjects those convicted to a maximum penalty of imprisonment of three years.⁴³ Moreover, Polish prosecutors lack discretion when individual expression “offends the dignity of [the] president” and are compelled to pursue

40. See THE CONSTITUTION OF THE REPUBLIC OF POLAND, arts. 14, 54 (Article 14 states, “The Republic of Poland shall ensure freedom of the press and other means of social communication,” and Article 54 states, “Preventive censorship of the means of social communication and the licensing of the press shall be prohibited”).

41. KODEKS KARNY [KK] [THE PENAL CODE] art. 212, §§ 1–2 (Pol.), <http://www.legislationline.org/documents/section/criminal-codes/country/10> (emphasis added) (outlining criminal liability for defamation).

42. *Id.* art. 216, §§ 1–2 (emphasis added) (outlining criminal liability for public insult).

43. *Id.* art. 135, § 2.

criminal charges even if the president is not personally offended.⁴⁴ Although similar criminal defamation provisions are present in other European nations' criminal codes,⁴⁵ the Polish provision is distinguishable because insults against the president still potentially result in a criminal prosecution and conviction.⁴⁶ Another major distinction from other European countries is that the Polish Constitution provides the president with extensive political powers.⁴⁷ In contrast, other European countries that apply similar criminal provisions for defamation do so to protect members of their royal families,⁴⁸ who merely act as head of state figureheads and do not exert significant political power or influence.⁴⁹

Generally, defamation laws are implemented "to protect the reputations of individuals against injury."⁵⁰ In furtherance of this general

44. Helena O'Rourke-Potocki, *Polish Jokes Are No Laughing Matter*, POLITICO (Jan. 29, 2016, 1:19 PM), <https://www.politico.eu/article/poland-humor-satire-duda-tusk-zabawny-kuc/>. In some instances, the president will intervene and urge prosecutors to discontinue investigating the criminal charges against the defendant. See Joanna Gill, *Beyond a Joke: Seven Countries Where It's a Criminal Offense to Insult a Head of State*, EURONEWS, <http://www.euronews.com/2016/04/15/beyond-a-joke-7-countries-where-is-it-a-criminal-offence-to-insult-a-head-of> (last updated Apr. 15, 2016).

45. *Czech Lawmakers Seek to Make Defaming the President a Crime*, REUTERS (Nov. 15, 2016, 11:47 AM), <http://www.reuters.com/article/us-czech-law-defamation-idUSKBN13A27S>.

46. See *Poland Should Abolish Criminal Defamation, Says OSCE Media Freedom Representative Following Conviction of Editor*, ORG. FOR SEC. & CO-OPERATION IN EUR. (Sept. 17, 2012), <http://www.osce.org/fom/93797>.

47. See THE CONSTITUTION OF THE REPUBLIC OF POLAND, art. 126, § 1 ("The President of the Republic of Poland shall be the supreme representative of the Republic of Poland and the guarantor of the continuity of State authority."); see also *id.* arts. 133–34, 136–44 (vesting additional political powers with the Polish president).

48. See CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 490(3) (Spain) ("Whoever commits slander or defamation against the King . . . , the Queen . . . the Regent or any member of the Regency, or the Heir to the Throne, . . . shall be punished with a sentence of imprisonment of six months to two years.").

49. See Caitlin Dewey & Max Fisher, *Meet the World's Other 25 Royal Families*, WASH. POST (July 22, 2013), https://www.washingtonpost.com/news/worldviews/wp/2013/07/22/meet-the-worlds-other-25-royal-families/?utm_term=.e54d62cd3491.

50. *Decriminalisation of Defamation*, COUNCIL OF EUR., <http://www.coe.int/en/web/freedom-expression/defamation> (last visited Oct. 20, 2016); see also *Defamation*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining defamation as the "[m]alicious or groundless harm to the reputation or good name of another by the

definition, the Polish Constitutional Court previously upheld the country's public insult law⁵¹ concerning insults against the president because of the solemn character of the presidency, which mandates that the president of the Republic should "be treated with respect and veneration."⁵² The Polish Constitutional Court asserted that "[s]howing disdain by means of offensive and humiliating utterances . . . do[es] not fall into the categories of truth and falsehood . . . [and] may not be regarded as an element of acceptance criticism of the President of the Republic of Poland."⁵³ Furthermore, the Court held that freedom of expression is to be protected with respect to the content, not the form, if the communication is offensive or humiliating.⁵⁴ The Court indicated that such criticism was not "an acceptable standard in a democratic state," and if citizens wish to participate in the public debate, they must

making of a false statement to a third person . . . and [a] false written or oral statement that damages another's reputation").

51. See Constitutional Tribunal Advisory Opinion, *Article 135(2) of the Act of 6 June 1997 – the Penal Code (Journal of Laws - Dz. U. No. 88, item 553, as amended) is Consistent with Article 54(1) in Conjunction with Article 31(3) of the Constitution of the Republic of Poland, as well as with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Done at Rome on 4 November 1950 (Journal of Laws -Dz. U. of 1993 No. 61, item 284, as amended)*, TRYBUNAŁ KONSTYTUCYJNY (July 6, 2011), ¶¶ 3.2–3.4, 4.3, http://trybunal.gov.pl/fileadmin/content/omowienia/P_12_09_en.pdf [hereinafter Constitutional Tribunal Advisory Opinion] (affirming "[t]he freedom to express opinions . . . is not absolute in character and may be subject to restrictions" and penalizing public insult of the President of the Republic of Poland "does not hinder possible criticism . . . and the course of the public debate"). Unlike the United States federal system—which prohibits federal courts from entertaining and issuing advisory opinions—the Polish Constitution authorizes the Constitutional Court to hear and issue advisory opinions on the constitutionality of legislative acts. See THE CONSTITUTION OF THE REPUBLIC OF POLAND, art. 193 ("Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.").

52. Press Release, Trybunał Konstytucyjny, Criminal Liability for the Public Insult of the President of the Republic of Poland (May 2013), <http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/2596-odpowiedzialnosc-karna-za-publiczne-zniewazenie-prezydenta-rzeczypospolitej-polskiej/> [hereinafter Press Release, Criminal Liability for the Public Insult of the President].

53. *Id.*

54. *Id.*

communicate their viewpoints “in a civilised and polite manner.”⁵⁵ In response to this ruling, the Council of Europe⁵⁶ indicated “the mere fact [of criminal] sanctions” for defamation and the subsidiary offense of public insult “have substantial undesirable effects on freedom of expression and information.”⁵⁷ In 2012, the imprisonment clause enumerated in Article 212 of the Polish Penal Code regarding criminal defamation was brought before the Polish Constitutional Court; however, the Court reaffirmed that criminal defamation—like public insult—was consistent with freedom of expression under the Polish Constitution and cited the earlier 2006 ruling to reject the advocate’s argument, which averred against a defendant’s imprisonment for merely exercising his constitutional right to freedom of expression.⁵⁸

Broadly speaking, defamation laws that criminally penalize slander (oral defamation) and libel (written defamation) are implemented “to protect the reputation of a person from harm caused by the dissemination of false information” by a third party.⁵⁹ Criminal defamation has its philosophical and political foundations tracing back to the Middle Ages, when these laws were intended to maintain social order and control along with protecting power and privilege.⁶⁰ Although defamation laws are widely known to protect public figures and institutions, they also exist to

55. *Id.*; see also THE CONSTITUTION OF THE REPUBLIC OF POLAND, art. 31, § 3 (“Any limitation upon the exercise of constitutional freedoms and rights may be imposed . . . when necessary in a democratic state for the protection of its security or public order, . . . or the freedom and rights of other persons.”). However, a recently enacted Polish law states that individuals who imply that the Republic of Poland was responsible for carrying out the atrocities of the Holocaust during World War II could potentially be subject to three years imprisonment because such assertions would be an obvious “falsification of Polish history.” Todor Gardos, *Poland’s Twisted Holocaust Law*, HUM. RTS. WATCH (Feb. 10, 2018, 12:00 AM), <https://www.hrw.org/news/2018/02/10/polands-twisted-holocaust-law>.

56. The Council of Europe should not be confused with the European Union or the European Union’s European Council; the Council of Europe is a separate supranational organization that “advocates freedom of expression and of the media” in addition to channeling human rights across its Member States and abroad. *Values: Human Rights, Democracy, Rule of Law*, COUNCIL OF EUR., <http://www.coe.int/en/web/about-us/values> (last visited Nov. 10, 2016).

57. *Decriminalisation of Defamation*, *supra* note 50.

58. *Polish Rights Ombudsman Criticises Criminal Defamation*, *supra* note 7.

59. Yanchukova, *supra* note 20, at 863.

60. Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL’Y 433, 438 (2004).

protect private individuals and their respective reputations.⁶¹ However, the European Court of Human Rights has held that “[t]he limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician.”⁶² Additionally, insult laws are implemented solely to protect the honor and dignity of members of the government, public officials, and national symbols from ill-mannered oral and written expression from the public and media.⁶³ In fact, defamation and insult laws are distinguishable in that defamation focuses on a “false assertion of fact” whereas insult emphasizes “penaliz[ing] the truth.”⁶⁴

C. Polish Membership in the European Union and the Council of Europe

Given the statutory restrictions in the Polish Penal Code and the potential for criminal sanctions for defamation and public insult, it is noteworthy that Poland has joined multiple global and regional supranational organizations following the country’s severance with authoritarian communism and its movement toward democracy.⁶⁵ Poland’s accession into the European Union occurred on May 1, 2004,⁶⁶

61. See Yanchukova, *supra* note 20, at 863.

62. Castells v. Spain, App. No. 11798/85, 14 Eur. H.R. Rep. 445, 477 (1992). Other jurisdictions have similarly held that “[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals . . . and the state interest in protecting [private individuals] is correspondingly greater.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

63. See Yanchukova, *supra* note 20, at 863.

64. *Id.* at 863–64.

65. See *U.S. Relations with Poland*, U.S. DEP’T OF ST. (Oct. 3, 2016), <https://www.state.gov/r/pa/ei/bgn/2875.htm> (stating that Poland is a current Member State of the United Nations, North Atlantic Treaty Organization, Euro-Atlantic Partnership Council, Organization for Security and Cooperation in Europe, Organization for Economic Cooperation and Development, International Monetary Fund, World Bank, and World Trade Organization). Regionally, Poland is a Member State of the Visegrad Group, which consists of Poland, Hungary, Slovakia, and the Czech Republic. See *generally* VISEGRAD GR., <http://www.visegradgroup.eu/> (last visited Jan. 29, 2017).

66. *Poland: Overview*, EUR. UNION, https://europa.eu/european-union/about-eu/countries/member-countries/poland_en#poland-in-the-eu (last updated Feb. 11, 2018). Other countries to join the European Union with Poland in 2004 included Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia, and Slovenia.

and by becoming a European Union Member State, Poland agreed to bind itself to various treaties that the European Union expects Member States to implement and regularly enforce within their borders.⁶⁷ However, Poland has opted-out of the Charter of Fundamental Rights of the European Union,⁶⁸ which states, “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”⁶⁹ Specifically, the Polish opt-out clause of Article 1 prevents “the Court of Justice of the European Union, or any court or tribunal of Poland . . . to find that the laws, regulations or administrative provisions, practices or action of Poland . . . are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.”⁷⁰ Shockingly, although regional organizations report countries across the European continent are trending toward abolishing criminal liability for defamation actions, only five European Union Member States have actually repealed the laws as an offense against *private individuals*.⁷¹ Although Italy appears to be the only European Union Member State to routinely imprison journalists for libel, recent research also confirms Polish courts have ordered prison sentences or suspended prison sentences for journalists and bloggers who were convicted of defamation.⁷² In particular, the Polish media continues to be “hindered by criminal defamation laws” and press censorship because

Member Countries of the EU, EUR. UNION, https://europa.eu/european-union/about-eu/countries_en (last updated Feb. 11, 2018). All of these countries (excluding Cyprus and Malta) were under the direct control of the Soviet Union following World War II. *Id.*

67. *EU Treaties*, EUR. UNION, https://europa.eu/european-union/law/treaties_en (last updated Feb. 11, 2018).

68. Consolidated Version of the Treaty on the Functioning of the European Union art. 1, May 9, 2008, 2008 O.J. (C 340) 1 [hereinafter TFEU].

69. Charter of Fundamental Rights of the European Union art. 11(1), Dec. 18, 2000, 2000 O.J. (C 364) 11 [hereinafter Charter of Rights]. The Charter of Rights became legally binding on all European Union Member States (excluding Poland and the United Kingdom) in December 2009 with the ratification of the Treaty of Lisbon.

70. TFEU art. 1.

71. GRIFFEN, *supra* note 27, at 10 (emphasis added). Of these five countries, only Romania has completely eliminated defamation-related provisions from its criminal code. *Id.*

72. *Id.* at 11.

even the threat of criminal sanctions from these laws remains “one of the most significant potential threats to freedom of speech.”⁷³

Prior to joining the European Union, Poland became the twenty-fifth Member State of the Council of Europe in November 1991,⁷⁴ and although the Council of Europe and the European Union “share the same fundamental values – human rights, democracy and the rule of law,” they are distinctly separate supranational entities with “different, yet complementary, roles.”⁷⁵ The European Court of Human Rights is the governing judicial body of the Council of Europe; the Court is located in Strasbourg, France, thereby dubbing the Court’s decisions as “‘Strasbourg’ case-law.”⁷⁶ The European Court of Human Rights’s longstanding and influential decisions on freedom of expression have captivated international courts on other continents, such as the Inter-American Court of Human Rights, and the European Court’s persuasive jurisprudence has been used to resolve similar issues in front of these international courts.⁷⁷ Unlike the Charter of Fundamental Rights of the European Union, which is not legally binding on Poland,⁷⁸ the European Convention on Human Rights (the Convention) is binding on the Polish government and national courts solely because the country is a sitting Member State of the Council of Europe.⁷⁹ Thus, the European Court of

73. Iwona Lepka, *Freedom of Expression in Post-Communist Poland*, 37 J. SOCIALIST THEORY 619, 631 (2009).

74. *Poland*, COUNCIL OF EUR., <http://www.coe.int/en/web/portal/poland> (last visited Nov. 13, 2016).

75. *The Council of Europe and the European Union: Different Roles, Shared Values*, COUNCIL OF EUR., <http://www.coe.int/en/web/portal/european-union> (last visited Nov. 13, 2016). Additionally, the Council of Europe has 47 Member States, whereas the European Union consists of 28 Member States. *Id.*

76. FREEDOM OF EXPRESSION IN EUROPE: CASE-LAW CONCERNING ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 7 n.2 (Mario Oetheimer ed., 2007).

77. See Eduardo Andrés Bertoni, *The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards*, 3 EUR. HUM. RTS. L. REV. 332, 349–50 (2009).

78. See TFEU protocol 30.

79. See European Convention on Human Rights art. 1, Nov. 4, 1950, E.T.S. 5 [hereinafter *The Convention*] (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”); see also *Poland and the European Court of Human Rights*, PERMANENT REPRESENTATION OF THE REPUBLIC OF POL. TO THE COUNCIL OF EUR., http://www.strasbourg.gmsz.gov.pl/en/poland_in_the_council_of_europe/poland_and_the_european_court_of_human_rights/ (last visited Feb. 21, 2017) (stating that Poland

Human Rights is granted jurisdiction over legal actions concerning possible Convention violations; citizens of Council of Europe Member States then initiate these legal proceedings against their respective countries via Article 19 of the Convention.⁸⁰

Article 10 of the Convention guarantees freedom of expression and states, “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”⁸¹ However, Article 10(2) of the Convention alludes to the idea that these freedoms are not limitless and “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others, . . . or for maintaining the authority and impartiality of the judiciary.”⁸² Despite the right to freedom of expression enumerated in the Convention, approximately 1,000 individuals are found guilty in Polish courts annually for defamation and insult.⁸³ There were 6,654 cases reported to the police in 2005; 9,838 cases in 2010; 11,174 cases in 2011; and 6,466 cases in 2012—approximately 10% to

signed onto the Convention on January 19, 1993, acceded to the Convention’s protocols, and permitted Polish citizens to lodge applications with the European Court of Human Rights when citizens contended their human rights and fundamental freedoms were abridged by Poland and its agents).

80. The Convention, *supra* note 79, art. 19 (“To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, . . . [and] [i]t shall function on a permanent basis.”); *see also* Handyside v. United Kingdom, App. No. 5493/72, 1 Eur. H.R. Rep. 737, 754 (1976) (reaffirming that the Court “is responsible for ensuring the observance of those States’ engagements . . . [and] is empowered to give the final ruling on whether a ‘restriction’ or ‘penalty’ is reconcilable with freedom of expression as protected by Article 10”).

81. The Convention, *supra* note 79, art. 10(1). Note that the Article 10 provision in the Convention is nearly identical to the Article 11 provision within the European Union’s Charter of Rights. *See* Charter of Rights art. 11(1).

82. The Convention, *supra* note 79, art. 10(2).

83. Zoltán J. Tóth, *The Regulation of Defamation and Insult in Europe*, in *COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION* 507, 509 (András Koltay ed., 2015). Verbal and physical insults committed against public officials are included in this statistic. *Id.*

20% of those defendants were subject to a criminal sentence upon conclusion of judicial proceedings.⁸⁴

III. POLAND AND ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. Protecting Reputation Versus the Chilling Effect on Public Debate

Article 10 of the Convention guarantees that individuals are unquestionably entitled to freedom of expression; however, the second section of Article 10 places formal restrictions on that right, particularly with respect to protecting and preserving an individual's reputation from unsubstantiated public ridicule.⁸⁵ One of the leading European Court of Human Rights cases deliberating this issue is *Lingens v. Austria*.⁸⁶ In that case, via a television interview, the President of the Jewish Documentation Centre accused Friedrich Peter, President of the Austrian Liberal Party, of serving in Nazi Germany's SS infantry brigade, which "massacred civilians behind the German lines in Russia" during World War II.⁸⁷ Lingens published two articles in an Austrian magazine stating that Peter was "unacceptable as a politician in Austria" because of his past involvement with the infantry, which was never actually denied.⁸⁸ Lingens published a second article criticizing retiring Chancellor Bruno Kreisky for an "accommodating attitude towards former Nazis who had recently taken part in Austrian politics" and supporting Peter.⁸⁹ Lingens's article also criticized Austrian political parties for allowing former Nazis

84. *Id.* at 509 n.98. Overall, Polish courts convicted 738 individuals in 2005, 1,064 in 2010, 1,270 in 2011, and 1,413 in 2012. *Id.*

85. *See* The Convention, *supra* note 79, art. 10(1)–(2); *see also* Stijn Smet, *Freedom of Expression and the Right to Reputation: Human Rights in Conflict*, 26 AM. U. INT'L L. REV. 183, 192 (2010).

86. *See generally* *Lingens v. Austria*, App. No. 9815/82, 8 Eur. H.R. Rep. 407, 421 (1986) (holding unanimously that there was a violation of Article 10 of the Convention).

87. *Id.* at 408.

88. *Id.* at 409.

89. *Id.* Lingens also stated, "In truth [retiring Chancellor] Kreisky's behaviour cannot be criticised on rational grounds but only on irrational grounds: it is immoral, undignified." *Id.* at 410.

to be their leaders.⁹⁰ In response, then-Chancellor Kreisky brought private prosecutions against Lingens under the applicable criminal defamation provision in the Austrian Criminal Code.⁹¹

Upon review of the case, the European Court of Human Rights reversed the Austrian Court of Appeal's decision convicting Lingens and held Lingens's Article 10 rights were violated.⁹² In the Court's holding, it stated that freedom of expression is an essential foundation and the hallmark of a democratic society.⁹³ Additionally, the Court indicated that Article 10(2) "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb [and] [s]uch are the demands of that pluralism, tolerance and broadmindedness."⁹⁴ Politicians, unlike private individuals, "lay[] [themselves] open to close scrutiny" with respect to their official actions, and they must "display a greater degree of tolerance" when criticized by the media and the public.⁹⁵ Article 10 does indeed protect the reputation of others, including politicians acting in their public and private capacities, but such reputational protection must "be weighed in relation to the interests of open discussion of political issues."⁹⁶ Essentially, there must be a pressing social need if there is to be governmental interference, and the

90. *Id.* at 411.

91. *Id.*; see also Dean Chapman, *Suppressing Dissent: The Pivotal Role of the Prosecutor in Criminal Defamation Proceedings in Countries Subject to the European Court of Human Rights*, 14 COLUM. J. EUR. L. 598 (2008) (commenting that "[b]y virtue of their positions, public figures—politicians, judges, police officers, even prosecutors themselves—are very well placed to invoke criminal defamation laws for their own protection"). In the United States, criminal prosecutions are brought publicly by the state under the theory of prosecutorial discretion. See, e.g., *Wayte v. United States*, 470 U.S. 598, 608 (1985). However, in many European jurisdictions, a victim of a crime may seek a private prosecution if the public prosecutor initially decides to drop charges against the defendant. See *Challenging the Decision Not to Prosecute*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS., <http://fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/victims-support-services/prosecution> (last visited Jan. 1, 2018).

92. *Lingens*, 8 Eur. H.R. Rep. at 414, 421 (affirming the Vienna Regional Court's judgment).

93. *Id.* at 418.

94. *Id.*

95. *Id.* at 419.

96. *Id.* The European Court of Human Rights also deemed the press as the "purveyor of information and public watchdog" over public discussion and debate. *Id.* at 420.

interference must be proportionate for there to be a justified breach of an individual's Article 10 right to freedom of expression.⁹⁷

Article 10 of the Convention mandates that Member States must strike a fair balance between protecting “a good reputation, the right of access to justice, and the right to freedom of expression.”⁹⁸ The European Court of Human Rights grants leniency and awards additional protection for defendants when defamatory statements are “uttered in an ironic or satirical manner.”⁹⁹ Freedom of expression is violated when an ironic or satirical statement has “a minor impact on the reputation of the plaintiff, given the *clearly humorous tone* of the statement.”¹⁰⁰ A recent July 2016 case originating from Poland reinforces the European Court of Human Rights' protection of ironic and satirical comments, while also exemplifying Polish courts' continued enforcement of criminal defamation and insult laws to protect the reputations of Polish government officials.¹⁰¹ In that case, the defendant Ziemiński published an article that contained “the copious use of words such as ‘numbskull,’ ‘dull boss,’ ‘dim-witted official,’ ‘poser’ and ‘populist,’” which led the plaintiffs—several public officials—to file a criminal complaint against Ziemiński for “lower[ing] them in public opinion and undermin[ing] the public confidence necessary for the discharge of their duties.”¹⁰² Instead of charging Ziemiński with criminal defamation under Article 212 of the Polish Criminal Code, the trial court convicted him under Article 216 for criminal insult through the mass media.¹⁰³

97. See Gavin Millar, *Whither the Spirit of Lingens?*, 3 EUR. HUM. RTS. L. REV. 277, 288 (2009). Under this standard, “a healthy, modern democracy” requires “a robust, questioning media” without unnecessary governmental interference. *Id.*

98. Lord Lester, *Free Speech Today*, 33 POLISH Y.B. INT'L L. 129, 135 (2013). It is common ground that a criminal defendant's conviction and punishment for defamation “constitute[] an interference . . . with her right to freedom of expression.” *Lewandowska-Malec v. Poland*, App. No. 39660/07, Eur. Ct. H.R. ¶ 54 (2012).

99. *Smet*, *supra* note 85, at 211.

100. *Id.* at 212 (emphasis added).

101. See *Ziemiński v. Poland* (No. 2), App. No. 1799/07, Eur. Ct. H.R. ¶¶ 16, 45 (2016) (The Polish trial court held the media was not legally entitled “to criticise the actions of public officials . . . in a manipulative way to wage private wars.” However, the European Court of Human Rights indicated Ziemiński's use of satire was within “the limits of admissible exaggeration.”).

102. *Id.* ¶ 9.

103. *Id.* ¶ 12. The Polish trial court indicated that the defendant's actions constituted harm toward the plaintiffs' honor and dignity, which led to the decision to

Upon hearing Ziemiński's appeal and following numerous unsuccessful appeals at the Polish court system level, the European Court of Human Rights held there was a violation of Article 10 because "the interference with [Ziemiński's] right to freedom of expression was disproportionate to the aim pursued, and was thus not 'necessary in a democratic society.'"¹⁰⁴ The Court noted that journalists are permitted within the scope of freedom of expression to use sarcasm and irony, even though freedom of expression is to be balanced against the right to private life.¹⁰⁵ Therefore, the Court concluded, "a degree of exaggeration or even provocation is permitted," which essentially permits journalists to a "degree of immoderation" in their publications.¹⁰⁶ Moreover, the Court stated, "[S]atire is a form of artistic expression and social commentary which, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate."¹⁰⁷ Additionally, near the conclusion of the Court's holding, the Court skirted around the idea of condemning criminal defamation and insult laws that are implemented and enforced by Council of Europe Member States by stating:

While the *use of criminal-law sanctions in defamation cases is not in itself disproportionate . . .* the nature and severity of the penalties imposed are factors to be taken into account, because they must not be such as to dissuade the press or others who engage in public debate from taking part in the discussion of matters of legitimate public concern.¹⁰⁸

Judges Wojtyczek and Kūris wrote a joint dissent in *Ziemiński* providing a captivating assessment when compared to the Opinion of the Court.¹⁰⁹ The dissent states that international courts such as the European

convict under the criminal insult provision instead of criminal defamation. *Id.* ¶ 16. Fortunately, the trial court did not impose a prison sentence for Ziemiński, as prison was considered a disproportionate penalty, and instead imposed a fine of 10,000 zlotys. *Id.* ¶ 18.

104. *Id.* ¶¶ 37, 47.

105. *Id.* ¶¶ 39, 44.

106. *Id.* ¶ 44.

107. *Id.* ¶ 45.

108. *Id.* ¶ 46 (emphasis added).

109. *See generally id.* (Wojtyczek & Kūris, JJ., dissenting).

Court of Human Rights must be cautious “in deciding to dismiss . . . findings by domestic courts [because] . . . certain words or phrases are authoritatively held to be beyond the limits of acceptability in a particular society.”¹¹⁰ Furthermore, the dissent emphasized that the Polish courts considered the insulting nature of the expressions used by Ziemiński, and an international court does not have the capacity or competencies to question either the legal determinations or the linguistic and cultural expertise of the Polish courts.¹¹¹ However, observers following the case noted that the judges failed to cite to adequate authority in making their propositions because none of the cited cases in the dissent concerned defamation or insult convictions.¹¹² In response to the assertions made by the dissenting judges, legal scholars noted that “[t]he beauty of the Strasbourg Court” is that the judges can step back from potentially partial decisions made by the national courts and deliberate “in a clear-headed fashion, keeping in mind the healthy, modern democracy as the ideal.”¹¹³

Furthermore, a central concern for the European Court of Human Rights when determining whether there has been an Article 10 violation is to ensure that the national court decision did not produce a chilling effect with respect to legitimate public interest and debate.¹¹⁴ When delineating a criminal defamation or insult analysis, the Court applies a “most careful scrutiny” test for potential sanctions.¹¹⁵ A chilling effect arises when a private individual or journalist acting within the scope of his employment engages in “self-censorship,” meaning there is a fear on

110. *Id.* ¶ 3.

111. *Id.*

112. See Ronan Ó Fathaigh, *Polish Mayor’s Private Prosecution of Local Journalist for Insult Violated Article 10: Ziemiński v. Poland (No. 2)*, STRASBOURG OBSERVERS (Aug. 12, 2016), <https://strasbourgobservers.com/2016/08/12/polish-mayors-private-prosecution-of-local-journalist-for-insult-violated-article-10-zieminski-v-poland-no-2/> (discussing that the cases cited by the dissenting judges concerned civil rather than criminal defamation, a conviction for publishing secret information, an injunction against reporting a person’s arrest, and an arrest for disobeying a police order).

113. Millar, *supra* note 97, at 288.

114. TARLACH MCGONAGLE, *FREEDOM OF EXPRESSION AND DEFAMATION: A STUDY OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS* 24 (Onur Andreotti ed., 2016).

115. See *id.* at 57. The synonymous term typically used in American jurisprudence is “strict scrutiny.” See generally Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285 (2015).

the part of an individual of disproportionate sanctions, or an individual fears prosecution under overbroad laws.¹¹⁶ Essentially, a chilling effect “works to the detriment of society as a whole”¹¹⁷ because it exerts a deterrent effect on the public, particularly on journalists who will be reluctant to report on matters of public interest due to the threat of a criminal prosecution and potential conviction, which may adversely impact their right to practice journalism.¹¹⁸ Critics of criminal defamation and insult laws specify that “[t]he very fact of a criminal conviction, even where the penalties imposed for it are light, can be very detrimental as it imposes a *criminal record on the person concerned*, which in turn can have far-reaching personal and/or professional consequences.”¹¹⁹

B. Imprisonment and Suspended Sentences Remain Possible Legal Consequences in Poland: *Malisiewicz-Gąsior v. Poland*

The threat of imprisonment following a defamation or insult conviction and the impending chilling effect¹²⁰ on private individuals and the media remain relevant in the Republic of Poland, as evidenced by *Malisiewicz-Gąsior v. Poland*.¹²¹ The European Commission of Human Rights brought this case to the European Court of Human Rights after Malisiewicz-Gąsior was convicted of defaming Andrzej Kern, the

116. *Id.* at 24. This is not meant to be an exhaustive list for when a chilling effect arises, but rather provide some examples for when it does arise.

117. *Id.*

118. See Yanchukova, *supra* note 20, at 868. Yanchukova also notes that sometimes it is better for courts to “tolerate some excesses in expression, even where they may cause some harm, than to limit publication in the public interest,” even though national courts in emerging democracies (e.g., Central and Eastern Europe) do not decide in this manner. *Id.* (quoting Toby Mendel, *The Right of the Public to Know and Freedom of Entertainment: Information Seen from the Consumer’s Angle*, ARTICLE 19 (Sept. 23, 1999), <https://www.article19.org/data/files/pdfs/publications/freedom-of-information-foi-vs.-privacy.pdf>).

119. MCGONAGLE, *supra* note 114, at 56 (emphasis added).

120. See *supra* Part III.A.

121. See generally *Malisiewicz-Gąsior v. Poland*, App. No. 43797/98, 45 Eur. Ct. H.R. 563, 571, 579 (2006); see also Chapman, *supra* note 91, at 598–99 (stating criminal defamation laws “are ripe for abuse by political officials” in that they improperly avail themselves of the “laws to insulate themselves from unfriendly commentary”).

Deputy Speaker of the Sejm of the Republic of Poland.¹²² In this 2006 case, the defendant Malisiewicz-Gąsior was convicted of defamation because she published two articles in a newspaper and made allegations against Kern, a well-known political figure, who had allegedly abused his power while working in the Sejm.¹²³ Kern initially requested criminal proceedings after alleging that the defendant and her husband kidnapped his teenage daughter who had a history of previously absconding from the Kern family home.¹²⁴ Malisiewicz-Gąsior's critical statements about Kern were broadcasted via radio and television stations while Malisiewicz-Gąsior campaigned as a candidate in the Polish parliamentary elections in 1993 against the grave injustices she suffered in "a western-style democracy [that] had just set in."¹²⁵

The Polish national courts focused on the idea that Malisiewicz-Gąsior's statements were defamatory because "they debased the victim in the public opinion and exposed [Kern] to loss of the trust necessary to perform the functions of Deputy Speaker of the Sejm of the Republic of Poland and other public functions."¹²⁶ Additionally, the Polish national courts ruled that Malisiewicz-Gąsior's statements were false, and she did not "defend[] a socially justified interest" in achieving her private goals, which was to win a seat in the Polish Senate.¹²⁷ Therefore, the Polish courts ruled on the basis of protecting the Sejm member's overall official and personal reputation in light of the public eye and sentenced

122. *Malisiewicz-Gąsior*, 45 Eur. Ct. H.R. at 570. The Polish Sejm is the American comparable to the House of Representatives in Congress; the Sejm is the lower house, and the Senate is the upper house of the national legislature. See THE CONSTITUTION OF THE REPUBLIC OF POLAND, art. 95, § 1.

123. *Malisiewicz-Gąsior*, 45 Eur. Ct. H.R. at 577. According to Malisiewicz-Gąsior, Kern, the well-known politician, allegedly abused his power as a high-ranking member of the Sejm because Malisiewicz-Gąsior was "arrested groundlessly and [purposely] imprisoned" in a psychiatric cell, her home was searched for drugs, her telephone calls were tapped, and her car was damaged—each of these contributing to "constant mental pressure." *Id.* at 568–69. In believing Kern overstepped the acceptable limits granted to him with respect to his position in the Sejm, Malisiewicz-Gąsior surmised that "such behaviour had been possible only in the Stalinist era." *Id.* at 569.

124. *Id.* at 566.

125. *Id.* at 569, 577.

126. *Id.* at 577.

127. *Id.*

Malisiewicz-Gąsior to a one-year prison term suspended for three years along with ordering her to issue a public apology.¹²⁸

When the case was appealed to the European Court of Human Rights, the Court emphasized the importance of promoting free political debate, which is consistently affirmed as the core concept of a free democratic society.¹²⁹ The Court noted that Malisiewicz-Gąsior's comments about Kern were a result of her own personal experiences gained during the criminal proceedings initiated against her at the request of the politician.¹³⁰ Therefore, the Court held the defendant's statements about Kern "were not a gratuitous personal attack" but rather part of an overall political debate in light of the surrounding circumstances of the case.¹³¹ Even if some of Malisiewicz-Gąsior's statements about Kern contained harsh assertions, the Court reiterated the well-established concept that well-known politicians must expect and tolerate higher levels of "acceptable criticism" as opposed to private individuals.¹³²

128. *Id.* at 571. This was the sentence rendered by the Polish appellate court; the trial court initially sentenced the defendant to eighteen months in prison suspended for five years. *Id.* The Polish appellate court also ordered the defendant to pay various fines for the costs of the appellate proceedings and a fee to the State Treasury. *Id.*

129. *See id.* at 578; *see also* *Oberschlick v. Austria* (No. 2), App. No. 20834/92, 25 Eur. H.R. Rep. 357, 366 (1997) (holding "[i]nsults, denigrations and offensive language could not enjoy general, unlimited protection under the Convention" because they do not provide a positive contribution to society's political development, and they "poison the [political] climate by prompting a desire for retaliation").

130. *Malisiewicz-Gąsior*, 45 Eur. Ct. H.R. at 578. Intergovernmental organizations and international human rights bodies have noted that criminal defamation laws "involve the exercise of state power and the use of state resources," which in turn renders these laws a potential legal tool "to silence opponents and critics." SCOTT GRIFFEN, DEFAMATION AND INSULT LAWS IN THE OSCE REGION: A COMPARATIVE STUDY 7 (Barbara Trionfi ed., 2017), <http://www.osce.org/fom/303181?download=true>.

131. *Malisiewicz-Gąsior*, 45 Eur. Ct. H.R. at 578; *see also* *Lewandowska-Malec v. Poland* (No. 2), App. No. 39660/07, Eur. Ct. H.R. ¶¶ 61, 64–65 (2012) (holding that the criminal defendant's "impugned assertion [against a political figure] was underpinned by a sufficient factual basis" and "part of a political debate" when taken in "the overall context in which the applicant made her statement").

132. *Malisiewicz-Gąsior*, 45 Eur. Ct. H.R. at 578; *see also* *Lingens v. Austria*, App. No. 9815/82, 8 Eur. H.R. Rep. 407, 419 (1986) (affirming the acceptable level of criticism politicians must be expected to tolerate as opposed to private individuals). The Court also noted the crucial importance of free political debate in the context of democratic elections, thereby establishing that Malisiewicz-Gąsior's statements had "a socially justified interest" in that Kern should have expected to tolerate a greater degree of public criticism. *Malisiewicz-Gąsior*, 45 Eur. Ct. H.R. at 578–79.

The European Court of Human Rights also discussed the severity and proportionality of the punishment rendered against Malisiewicz-Gașior at the national court level.¹³³ The Court held that although the Polish Government indicated that Malisiewicz-Gașior “did not suffer any prejudice” because the prison sentence was not enforced, “what matter[ed] here [was] not that her sentence was not enforced *but that she was convicted at all*.”¹³⁴ In the spirit of the Court’s previous landmark holding in *Cumpănă v. Romania*—where the Court expressly held that sentencing upon a criminal conviction was a matter left to the national courts’ discretion¹³⁵—it concluded that the Polish Government’s decision to not enforce the prison sentence “[did] not expunge her conviction and [did] not quash [Malisiewicz-Gașior]’s criminal record.”¹³⁶ In the context of a heated political debate, the Court held there was “no justification for the imposition of a prison sentence” because a conviction based on Malisiewicz-Gașior’s allegations of abuse of power by an elected official while she campaigned for political office herself would create a chilling effect on freedom of expression.¹³⁷ Even suspended prison sentences for defamation convictions, which convey the notion that a defendant will not serve prison time if he does not commit another defamation offense within a specific time frame, will have an inevitable chilling effect with respect to public discourse.¹³⁸ Thus, the mere threat of an enforceable

133. See *Malisiewicz-Gașior*, 45 Eur. Ct. H.R. at 579.

134. *Id.* (emphasis added); see also *Lopes Gomes Da Silva v. Portugal*, App. No. 37698/97, 34 Eur. Ct. H.R. 1376, 1386 (2000) (finding that there was a violation of Article 10 of the Convention, and “[t]he journalist’s conviction [even if it was a minor penalty] was not therefore a measure that was reasonably proportionate to the legitimate aim pursued bearing in mind the interest of the democratic society in ensuring and protecting the freedom of the press”).

135. *Cumpănă v. Romania*, App. No. 33348/96, 41 Eur. Ct. H.R. 200, 225 (2004). In this landmark case involving criminal defamation, the Court ruled that sentencing is a matter of the national courts, but prison sentences must “be compatible with journalists’ freedom of expression” that is guaranteed by Article 10; the Court allows this fundamental right to be seriously impaired under exceptional circumstances, such as “hate speech or incitement to violence.” *Id.*

136. *Malisiewicz-Gașior*, 45 Eur. Ct. H.R. at 579.

137. *Id.*; see also *supra* Part III.A.

138. See MCGONAGLE, *supra* note 114, at 59; see generally *Marchenko v. Ukraine*, App. No. 4063/04, 51 Eur. Ct. H.R. 864, 873 (2009) (holding there was a violation of Article 10 of the Convention because Marchenko’s “lengthy suspended prison sentence” amounted to a substantial interference with his freedom of expression).

prison sentence against Malisiewicz-Gąsior at the Polish national court level, according to the European Court of Human Rights, “overstepped the narrow margin of appreciation afforded to [M]ember States” and “failed to strike a fair balance between” protecting a politician’s rights and reputation and Malisiewicz-Gąsior’s freedom of expression that is “necessary in a democratic society.”¹³⁹

IV. PROPOSED LEGAL MECHANISMS TO IMPROVE POLISH COMPLIANCE WITH ARTICLE 10

Because criminal defamation and insult laws in Poland tend to produce a chilling effect that potentially foster self-censorship¹⁴⁰ among journalists, the country’s defamation laws should be reconsidered in order to strike the proper balance between an individual’s freedom of expression (per Article 10 of the Convention), the media’s ability to report on matters of public interest freely without undue governmental interference, and protecting an individual’s reputation.¹⁴¹ This section examines the various legal proposals already utilized in foreign jurisdictions: (1) judicial refusal to enforce criminal liability for defamation and insult;¹⁴² (2) decriminalizing defamation via legislative action;¹⁴³ and (3) the similar but divergent civil remedies employed in the United States and United Kingdom.¹⁴⁴ After an examination of these jurisdictions’ respective approaches to defamation law, the following section will evaluate which system would be the most effective if implemented in Poland.¹⁴⁵

139. *Malisiewicz-Gąsior*, 45 Eur. Ct. H.R. at 579.

140. Self-censorship occurs “when journalists purposely avoid newsworthy stories as they anticipate negative reactions from their superiors, based on built-in penalties and rewards for doing what is expected.” Herdis Thorgeirsdottir, *Self-Censorship Among Journalists: A (Moral) Wrong or a Violation of ECHR Law?*, 4 EUR. HUM. RTS. L. REV. 383, 384 (2004).

141. GRIFFEN, *supra* note 27, at 6.

142. *See infra* Part IV.A.

143. *See infra* Part IV.B.

144. *See infra* Part IV.C.

145. *See infra* Part V.

A. Judicial Refusal to Enforce Criminal Liability for Defamation and Public Insult

Generally, defamation law throughout continental Europe¹⁴⁶ is treated as a criminal matter rather than a civil matter.¹⁴⁷ Some European countries, such as Germany and France, have criminal defamation and insult provisions officially recorded within their respective criminal codes; however, these countries do not regularly enforce these laws and narrowly construe them in favor of the criminal defendant.¹⁴⁸ The German Criminal Code divides criminal defamation into three categories—insult, slander, and malicious defamation.¹⁴⁹ This criminal code expressly bars insulting the German Republic, the flag, the colors of the Republic, public order, and foreign heads of state¹⁵⁰ and defaming the German president, government, constitutional court, and legislature.¹⁵¹ The penalties in Germany, similar to the penalties in Poland for identical crimes,¹⁵² carry potential prison sentences¹⁵³ as a result of individuals freely expressing their thoughts and opinions.¹⁵⁴ However, these provisions within the German criminal code are thought to be of minimal

146. The United Kingdom detracts from continental Europe in this sense because criminal proceedings are bypassed in favor of civil litigation; the plaintiff, in seeking civil redress (i.e., damages), files a civil complaint, in which the plaintiff claims the defendant defamed him. *See infra* Part IV.C.ii.

147. Yanchukova, *supra* note 20, at 871. Only five European Union Member States (Cyprus, Estonia, Ireland, Romania, and the United Kingdom) repealed criminal defamation as an offense against private individuals. GRIFFEN, *supra* note 27, at 10. All other Member States, including Poland, have some form of criminal penalty for defamation. *See id.*

148. Yanchukova, *supra* note 20, at 873.

149. *See id.*

150. *See Germany Will Abolish Law Against Insulting Foreign Heads of State*, CBS NEWS (Jan. 25, 2017, 12:03 PM), <http://www.cbsnews.com/news/germany-will-abolish-law-against-insulting-foreign-heads-of-state/> (reporting that Germany recently abolished an “outdated and unnecessary” law that permitted the prosecution of a person who insulted a foreign head of state).

151. *See* STRAFGESETZBUCH [StGB] [PENAL CODE], §§ 90–90(b), *translation at* http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.pdf (Ger.).

152. *See* KODEKS KARNY [KK] [THE PENAL CODE] art. 212, §§ 1–2 (Pol.) (criminal defamation); KODEKS KARNY [KK] [THE PENAL CODE] art. 216, §§ 1–2 (Pol.) (public insult).

153. *See* STRAFGESETZBUCH, §§ 90–90(b).

154. *See* GRIFFEN, *supra* note 27, at 6.

importance because Germany's Federal Constitutional Court has held in favor of freedom of expression and severely weakened an individual's ability to initiate a defamation or insult case that carry criminal implications.¹⁵⁵ Today, there are limited "classic insults"—such as calling someone an old Nazi,¹⁵⁶ a pig, or a fascist—that result in a plaintiff and defendant appearing before a German court.¹⁵⁷

Countries such as Denmark, Norway, the Netherlands, and Sweden follow Germany's lead and rarely invoke their respective criminal defamation and insult laws against the press.¹⁵⁸ The Danish Criminal Code states that a person who uses "insults, abusive language or other offensive words or gestures [against individuals], while they are executing their [public] office or function or on occasion of such office or function, shall be liable to a fine or to imprisonment for [a] term not exceeding six months."¹⁵⁹ In light of this facially harsh criminal provision, there are no recent court cases that have convicted journalists for these offenses.¹⁶⁰

Denmark's neighbor, Norway, also rarely enforces criminal charges for defamation against individuals or the media despite the existence of criminal laws within its criminal code.¹⁶¹ Recently, Norway implemented amendments to its criminal code, and as of October 2016, defamation has been removed as a criminal offense and now limits a plaintiff to recover damages via civil litigation.¹⁶² Likewise, the Netherlands rarely charges

155. Yanchukova, *supra* note 20, at 873.

156. Germany's Basic Law contains provisions protecting freedom of expression, but the nation's horrific past with Nazism has resulted in statutory restrictions on communications insinuating criminal agitation and representations of violence and racial hatred insofar that the restrictions honor free expression but are also designed to "combat the resurgence of Nazism." See David E. Weiss, *Striking a Difficult Balance: Combatting the Threat of Neo-Nazism in Germany While Preserving Individual Liberties*, 27 VAND. J. TRANSNAT'L L. 899, 917, 919, 924–26 (1994).

157. Erik Kirschbaum, *In Germany, It Can be a Crime to Insult Someone in Public*, L.A. TIMES (Sept. 6, 2016, 6:35 AM), <http://www.latimes.com/world/europe/la-fig-germany-insult-law-snap-story.html>. There must also be at least one witness or "some record" to indicate that the disparaging remarks were made by the defendant. *Id.*

158. See Yanchukova, *supra* note 20, at 874.

159. STRAFFELOVEN [PENAL CODE], § 121 (Den.).

160. Yanchukova, *supra* note 20, at 874.

161. *Id.*

162. Norway, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/2016/norway> (last visited Jan. 7, 2017).

journalists with criminal defamation, and “Sweden has completely repealed its criminal laws prohibiting insult of government officials and national symbols.”¹⁶³ Lastly, it is noteworthy that Freedom House lists these aforementioned countries, Norway in particular, as “the world’s most open media environments”¹⁶⁴ and allocates these countries high scores with respect to press freedoms.¹⁶⁵

B. Amend the Polish Penal Code to Decriminalize Defamation and Public Insult

Another alternative to criminal defamation and insult laws is to abolish criminal liability and limit a plaintiff to civil litigation in a defamation action because monetary damages are a “proportionate response for [any] illegitimate harm done to reputation.”¹⁶⁶ Unlike criminal sanctions, which encompass imprisonment, fines, probation, or the threat thereof and a stigma that is “burdensome and sometimes destructive” for the individual, civil remedies involve a court order allowing the plaintiff to return to the *status quo ante*.¹⁶⁷ Thus, in addition to negating a criminal conviction from the defendant’s record, civil recourse seeks “to make the injured party whole” again by compensating the plaintiff for damage caused.¹⁶⁸ For example, Ireland has statutorily abrogated criminal defamation offenses under the enactment of the country’s 2009 Defamation Act and implemented a legal regime that imposes civil liability on defendants in defamation cases.¹⁶⁹

163. Yanchukova, *supra* note 20, at 874–75.

164. Norway, *supra* note 162.

165. See *Freedom of the Press: 2016*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/freedom-press-2016> (last visited Jan. 7, 2017). Applicants also infrequently lodge complaints against these countries to the European Court of Human Rights, with Norway receiving five complaints, Sweden receiving two complaints, and the Netherlands receiving seven complaints. *Violations by Article and Respondent State 1959–2015*, EUR. CT. HUM. RTS., http://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf (last visited Feb. 27, 2017).

166. GRIFFEN, *supra* note 27, at 7.

167. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1809 (1992).

168. *Id.*

169. See *Ireland*, INT’L PRESS INST., <http://legaldb.freemedia.at/legal-database/ireland/> (last visited Jan. 7, 2017).

Under Part 5 of the 2009 Irish Defamation Act, the national legislature abolished criminal liability for “[t]he common law offences of defamatory libel, seditious libel and obscene libel”¹⁷⁰ Part 2 of the Irish Defamation Act maintains the same elements as criminal defamation, except the primary distinction is the civil redress as opposed to criminal sanctions rendered against the defendant.¹⁷¹ The statute states that “defamation consists of the publication, by any means, of a defamatory statement” with respect to one or more people, and the plaintiff alleging defamation could reasonably understand the defamatory statement refers to him.¹⁷² In repealing criminal liability for defamation, Ireland introduced a defense to a defamation allegation for distinguishing between allegations of fact and opinion.¹⁷³ To establish this defense, the following must be proven: (1) “the extent to which the statement is capable of being proved”; (2) the statement under the circumstances could have been “reasonably understood” to be an opinion rather than an allegation of fact; and (3) the statement was used to the extent that a disclaimer was accompanied by “cautionary words.”¹⁷⁴

Section 31 of the 2009 Irish Defamation Act provides for civil redress in a successful defamation case via general damages and special damages,¹⁷⁵ and Section 32 permits under judicial discretion the option of punitive damages “payable by the defendant to the plaintiff” if punitive damages are appropriate to fully compensate the plaintiff for reputational injury.¹⁷⁶ In applying this statute, the Irish High Court recently awarded well-known businessman Denis O’Brien €150,000 in a defamation

170. Defamation Act 2009 (Act No. 31/2009) § 35 (Ir.), <http://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/pdf>. Part 2 of the statute also indicates that the torts of libel and slander shall be collectively referred to as the “tort of defamation.” *Id.* § 6(1)(b).

171. *See id.* § 6(2)–(5).

172. *Id.* § 6(2)–(3).

173. *See id.* § 21.

174. *Id.* § 21(a)–(c). Additionally, the statute extended the defenses for truth, absolute privilege, qualified privilege, honest opinion, offer to make amends, apology, consent to publish, fair and reasonable publication on a matter of public interest, and innocent publication. *Id.* §§ 16–18, 20, 22, 24–27.

175. *Id.* § 31(3), (7).

176. *Id.* § 32(2).

lawsuit against the *Daily Mail*, a newspaper outlet.¹⁷⁷ A jury concluded the published article implied that O'Brien was assisting in relief following the devastating earthquake in Haiti out of hypocritical self-interest and that his relief effort was an "ingenious feint."¹⁷⁸

In Ireland, the country's prime minister or other high-ranking public officials may also file defamation lawsuits against third parties if his reputation is harmed by a publication that was directed toward him.¹⁷⁹ However, proving damage to reputation is potentially challenging to uphold in court because publishers are likely to defend themselves by pleading the common law defense of "fair comment,"¹⁸⁰ which denotes "the subject matter of the comment is of such interest to the public that he should be free to make it without paying for the harm he does by defaming the plaintiff."¹⁸¹ For example, publishing a cartoon illustrating the prime minister as a pig is facially defamatory and "subjects the Prime Minister to ridicule and contempt," but a publisher could plead the fair comment defense and indicate that the cartoon is meant to be satirical.¹⁸² Overall, the Irish approach to defamation cases appears to be a workable and effective legal mechanism, which is demonstrated by the fact that only one citizen lodged a complaint against Ireland with the European

177. See Tim Healy, *Denis O'Brien Wins €150,000 in Daily Mail Defamation Case*, INDEP. (Feb. 14, 2013, 8:55 PM), <http://www.independent.ie/irish-news/courts/denis-obrien-wins-150000-in-daily-mail-defamation-case-29070377.html#sthash.j0BEpp6m.dpuf>. Following the jury verdict, O'Brien commented that he felt "vindicated" with the judgment because "everybody should have a right to their good name." *Id.*

178. *Id.* Notably, the Irish High Court did not award O'Brien "aggravated damages," or punitive damages. *See id.*

179. GERT BRÜGGEMEIER, AURELIA COLOMBI CIACCHI & PATRICK O'CALLAGHAN, *PERSONALITY RIGHTS IN EUROPEAN TORT LAW* 264 (2010).

180. *Id.*

181. Note, *Fair Comment*, 62 HARV. L. REV. 1207, 1207 (1949).

182. BRÜGGEMEIER, CIACCHI & O'CALLAGHAN, *supra* note 179, at 264; but see Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 862 (1997) Professor Eberle discusses the *Strauss* caricature and political satire case in Germany, where Strauss—a Bavarian public official—was depicted as a "sexually active pig." *Id.* The Constitutional Court found this satire to exceed "the bounds of propriety" because "[t]he crude depiction could only be viewed as a sharp, scurrilous attack on Strauss." *Id.* By depicting Strauss as an animal engaging in a sexual act, the Court held Strauss's dignity had been intruded upon and violated. *Id.* In contrast to Ireland, Germany, in exceptional cases, prioritizes "human dignity and personality rights" over an individual's "speaker rights." *Id.*

Court of Human Rights from 1959–2015 with respect to violating an individual’s freedom of expression.¹⁸³

C. The American and British Approaches to Defamation

i. *The American Approach*

American First Amendment jurisprudence with respect to freedom of expression is based on the “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.”¹⁸⁴ In general, defamation in the United States is redressed under tort liability, which is under the umbrella of civil liability and thereby constitutes a public wrong.¹⁸⁵ When considering the potential for criminal penalties for defamation, an American federal appeals court once held “there remains little constitutional vitality to criminal libel laws” and that “[w]e would serve little purpose by discussing the ignominious history of the law surrounding criminal libel.”¹⁸⁶

183. *Violations by Article and Respondent State 1959–2015*, *supra* note 165.

184. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In the United States, pursuant to federal and state constitutional guarantees prescribing free expression, state law governs defamation actions, resulting in 50 similar—but independent—defamation regimes. *See, e.g.*, DEL. CODE ANN. tit. 10, § 3919 (West 2018); N.J. STAT. ANN. § 17B:30-7 (West 2018); 42 PA. CONS. STAT. § 8344 (West 2018). Some jurisdictions in the United States have statutes or constitutional provisions that govern the prosecution of criminal libel, even though the state courts rarely enforce the laws. *See, e.g.*, ARK. CONST. art. II, § 6; MICH. COMP. LAWS § 750.370 (West 2018); N.C. GEN. STAT. § 15-168 (West 2018).

185. Lisby, *supra* note 60, at 435; *see also* VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE, AND SCHWARTZ’S TORTS: CASES AND MATERIALS 879–80 (13th ed. 2015) (discussing a brief history of defamation law through the common law and defamation’s inclusion in tort law). Historically, criminal defamation and public insult has previously surfaced onto the American legal landscape following the colonial experience and independence from Great Britain. Lisby, *supra* note 60, at 458. The Sedition Act of 1798, which Congress enacted in early American history, punished expression that was “contemptuous of the president, the government or Congress.” *Id.*

186. *Tollett v. United States*, 485 F.2d 1087, 1094 (8th Cir. 1973). Moreover, some American jurisdictions have “never adopted general criminal libel legislation” and instead have opted to empower claimants by allowing them to avail themselves in the

Although there is “[s]cant, if any evidence . . . that the First Amendment was intended to abolish” criminal liability for defamation allegations,¹⁸⁷ the United States Supreme Court’s landmark holding in *New York Times Co. v. Sullivan* controls the overarching defamation jurisprudence in all American courts.¹⁸⁸ The applicable standard set forth in *New York Times Co.* requires that in order to recover civil damages for defamation, public officials must prove that false statements made against them were communicated with “actual malice” or “reckless disregard”¹⁸⁹ on the part of the alleged defamer.¹⁹⁰ This high threshold of actual malice is required to prove defamation because “[i]t is of the utmost consequence that [citizens openly] discuss the character and qualifications” of public officials and figures, and injury to their reputation “yield[s] to the public welfare, although at times such injury may be great.”¹⁹¹ Citizens should be awarded “breathing space”¹⁹² in the arena of free public debate with respect to elected officials and “[w]hatever is added to the field of libel is taken from the field of free debate.”¹⁹³ An individual’s constitutional right to freedom of expression

civil arena when an alleged defamatory publication “may be a crime as well as an actionable civil wrong.” *State v. Browne*, 206 A.2d 591, 596–97 (N.J. Super. Ct. App. Div. 1965).

187. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 381 (1974) (White, J., dissenting).

188. *See New York Times Co.*, 376 U.S. at 283 (holding that the United States Constitution “delimits” the amount a public official may recover in a libel action for criticisms directed at their “official conduct”).

189. “Actual malice” is defined as knowledge that the statement was false, and “reckless disregard” implies that the speaker of the statement was reckless in determining the truthfulness or falsity of the statement. *Id.* at 298 (Goldberg, J., concurring). The Court declared, “Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight.” *Id.* at 267 (majority opinion).

190. *Id.* at 279–80; *see also Gertz*, 418 U.S. at 344 (implementing different legal standards that divide public officials and public figures from private individuals in defamation cases because of private individuals’ level of vulnerability to reputational injury and access to counteracting false statements made by third parties).

191. *New York Times Co.*, 376 U.S. at 281 (quoting *Coleman v. MacLennan*, 98 P. 281, 286 (Kan. 1908)).

192. *Id.* at 272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

193. *Id.* (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)). The Supreme Court stated that injuring an official’s reputation does not inevitably permit restricting an individual’s freedom of speech, and repression is only justified when there is “a clear and present danger of the obstruction of justice.” *Id.* at 272–73.

will not be repressed merely because “effective criticism” of a public official “diminishes [his] official reputation[.]”¹⁹⁴ Moreover, defamatory statements require that the plaintiff prove that the statements were made “of and concerning” him; otherwise, the plaintiff’s claim for defamation will fail.¹⁹⁵ Furthermore, arguably in dictum, the United States Supreme Court reasoned that civil liability should govern defamation cases because “no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.”¹⁹⁶

Likewise, American jurisprudence goes beyond its European counterparts with respect to protecting one’s reputation, particularly a public figure, when counterbalancing an individual’s freedom of expression.¹⁹⁷ To succeed in a defamation case based on harming a public figure’s reputation in the United States, the standard to satisfy is high, as set forth in *Hustler Magazine, Inc. v. Falwell*.¹⁹⁸ In this defamation case, the Supreme Court held that a public figure is barred from recovering damages regarding publications that potentially harm his reputation, but were “not reasonably believable.”¹⁹⁹ In accord with the First

194. *Id.* at 273.

195. *Id.* at 288.

196. *Id.* at 291 (quoting *City of Chicago v. Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923)). “The present proposition would sidestep this obstacle by transmuted criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed.” *Id.*

197. See Tóth, *supra* note 83, at 487 (recognizing that “Member States of the European Union and Switzerland—where acts against honour and human dignity are looked upon rather harshly—are given special consideration”). Case law deriving from the United States Supreme Court has undeniably had an impact on the European Court of Human Rights’s freedom of speech and press jurisprudence. See Thorgeirsdottir, *supra* note 140, at 393–94.

198. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (holding public figures and public officials are barred from recovering damages via intentional infliction of emotional distress “by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice,’ [or] knowledge that the statement was false or with reckless disregard as to whether or not it was true”).

199. *Id.* at 57 (quoting *Falwell v. Flynt*, 797 F.2d 1270, 1278 (4th Cir. 1986)). Notably, the Court also held that a public figure cannot recover for intentional infliction of emotional distress (IIED) for a defaming publication unless he or she makes a showing that the false statement was made with “actual malice,” which indicates that the

Amendment, the *Falwell* standard constitutionally protects “slashing and one-sided” caricatures that may not be “reasoned or evenhanded” even when the “exploitation of unfortunate physical traits or politically embarrassing events” is meant to “injure [the plaintiff’s] feelings” and consequently adversely impact the plaintiff’s reputation.²⁰⁰

ii. The British Approach

British defamation law follows a similar approach to American defamation law because cases involving defamation are well settled under civil law as opposed to criminal law.²⁰¹ The common law offenses of seditious libel, defamatory libel, and obscene libel in England, Wales, and Northern Ireland were abolished following the enactment of the Coroners and Justice Act in 2009.²⁰² Prior to abolishing defamation as a crime in 2009, the criminal statutes were essentially unused and not enforced by British courts.²⁰³ However, the United Kingdom, more specifically its capital city of London, was previously known as “the libel capital of the world” because British defamation law “substantively favor[ed] [and continues to favor] plaintiffs.”²⁰⁴ In the past, British courts also tended to exercise expansive jurisdiction over defendants, including defendants in other countries.²⁰⁵ Legal costs were borne by defendants, meaning plaintiffs could file suit in some instances merely because they

defendant had knowledge that the statement was false. *Id.* at 56. Thus, a jury may only award damages for an IIED claim if the defendant’s conduct was “outrageous.” *Id.* at 57.

200. *Id.* at 54; see also Cohen Peart, *Cartoons of the Day: First Presidential Debate Between Hillary Clinton and Donald Trump*, DENV. POST (Sept. 28, 2016, 1:18 PM), <http://www.denverpost.com/2016/09/28/cartoons-of-the-day-first-presidential-debate-between-clinton-and-trump/> (depicting caricatures of presidential candidates Donald Trump and Hillary Clinton that are constitutionally protected under the *Falwell* standard).

201. See generally Defamation Act 2013, c. 26, § 12(1) (Eng.) (utilizing the term “claimant,” which denotes a civil action).

202. Coroners and Justice Act 2009, c. 25, § 73 (Eng.). Under the common law, defamation crimes were designed to deter insulting or abusive speech, while protecting and maintaining public order. See Lord Lester, *supra* note 98, at 131.

203. Tóth, *supra* note 83, at 488.

204. Stephen Bates, *Libel Capital No More? Reforming British Defamation Law*, 34 HASTINGS COMM. & ENT. L.J. 233, 233–34 (2012).

205. *Id.* at 234.

would not expend vast financial resources even if they did not succeed in court.²⁰⁶

Under British law, plaintiffs in a civil defamation lawsuit do not need to prove reputational harm in order to recover damages because the law establishes an “irrebuttable presumption . . . that the publication of a defamatory article causes damage to the reputation of the person defamed.”²⁰⁷ Also, unlike jurisdictions such as the United States and those across continental Europe, British courts utilize a uniform standard for public officials, public figures, and private individuals.²⁰⁸ Due to the prior extensive application of British defamation law and the so-called “libel tourism,” the American Congress enacted legislation that barred English libel judgments from having legal effect and therefore prevented the judgments from being enforced against defendants residing in the United States.²⁰⁹

Until statutory reform in 2013,²¹⁰ British defamation law balanced freedom of expression and protection of reputation with respect to media dissemination under the standard set forth in *Reynolds v. Times Newspapers Limited and Others*.²¹¹ In that case, Reynolds was the Prime Minister of Ireland until a political crisis commenced in 1994.²¹² As a result of the crisis, Reynolds resigned from his position, and reasons for

206. *Id.* Estimates have shown that roughly 90 percent of plaintiffs in British defamation cases are successful in their lawsuits. *Id.* The British courts’ expansive jurisdiction over defendants was termed “libel tourism” because it incentivized plaintiffs to file suit against defendants even if the defendants’ statements had “minimal effect in Britain.” *Id.*

207. *Id.* at 247 (quoting *Mardas v. New York Times Co.* [2008] EWHC (QB) 3135 [12] (Eng.)). Relating back to an earlier discussion, the *Mardas* Court extended jurisdiction to the defendant even though there was a wider circulation of the publication in the United States and France, and the United Kingdom claimed to only have a “smaller local publication.” *Mardas v. New York Times Co.* [2008] EWHC (QB) 3135 [39] (Eng.).

208. Bates, *supra* note 204, at 248.

209. Lord Lester, *supra* note 98, at 136; *see generally* Securing the Protection of our Enduring & Established Constitutional Heritage Act (SPEECH Act), 28 U.S.C. §§ 4101–4105 (2010) (barring both federal and state courts from enforcing defamation judgments rendered by foreign jurisdictions that champion “libel tourism”).

210. *See* Defamation Act 2013, c. 26, § 4(6) (Eng.) (abolishing the *Reynolds* defense).

211. *See Reynolds v. Times Newspapers Ltd.* [1999] UKHL 45 (appeal taken from Eng.).

212. *Id.*

his resignation “were of public significance and interest in the United Kingdom” because of Reynolds’s association with Northern Ireland’s peace process.²¹³ Following his resignation, the *Sunday Times* published an article in its British mainland edition entitled “Goodbye [G]ombeen [M]an.”²¹⁴ However, on the same day, the Irish edition of the *Sunday Times* published an article entitled “House of Cards” about the fall of the prior government.²¹⁵ The Irish edition contained obvious differences when compared to the British mainland edition, and Reynolds alleged that the British mainland article was defamatory because it articulated that Reynolds “had deliberately and dishonestly misled” the Irish House of Representatives.²¹⁶ The House of Lords held that although the media was required to act in good faith and report factually, it was not required to guarantee factual accuracy.²¹⁷ The information with the article was “undoubtedly of public concern” in the United Kingdom, and “[i]t goes without saying that a journalist is entitled and bound to reach his own conclusions and to express them honestly and fearlessly.”²¹⁸

Moreover, the *Reynolds* defense was statutorily abolished in 2013 following the United Kingdom’s defamation law reform.²¹⁹ Similarly, under the 2013 Defamation Act, defendants are permitted to show that the alleged defamatory statement was made “on a matter of public interest” along with the defendant reasonably believing the statement was made in the public interest.²²⁰ This defamation law reform also

213. *Id.*

214. *Id.* The article also featured a subtitle entitled “Why a fib too far proved fatal for the political career of Ireland’s peacemaker and Mr. Fixit.” *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* However, the House of Lords affirmed the ruling rendered by the Court of Appeal because the serious allegations made by the *Sunday Times* “were not information the public had a right to know,” and a public interest privilege was no applicable. *Id.* The *Reynolds* defense was later reaffirmed. *See generally* *Jameel v. Wall St. Journal Europe* [2006] UKHL 44 [29] (appeal taken from Eng.).

219. *See* Defamation Act 2013, c. 26, § 4(6) (Eng.).

220. *Id.* § 4(1)(a)–(b). The 2013 Defamation Act’s public interest and reasonable belief defense replaces the *Reynolds* defense, which took a wide array of circumstances into account. *See Reynolds*, [1999] UKHL 45 (outlining Lord Nicholls’s non-exhaustive list of circumstances that must be taken into account, including the allegation’s seriousness, the article’s tone, the steps taken to verify information, the extent to which

limited the phenomenon of libel tourism by severely curbing British jurisdiction over defamation defendants.²²¹

V. EVALUATING THE PROPOSALS

A. Judicial Refusal to Enforce Criminal Liability for Defamation and Public Insult

The seemingly obvious alternative option for Poland with respect to amending its criminal defamation and insult laws is to mimic its continental European counterparts and decline to enforce criminal liability for defamation actions.²²² The German Federal Constitutional Court ruled that insults against state symbols must typically be tolerated regardless of the harshness of the insults²²³ because of the importance of one's constitutional right to freedom of speech.²²⁴ Nonetheless, some exceptions to this general rule continue to theoretically apply if an individual insults a police officer or calls another individual an "old Nazi."²²⁵ Thus, the nation's highest court must generally rule in favor of freedom of speech over the specific underlying national criminal code provisions by choosing not to habitually enforce them.²²⁶ In contrast, the Polish Constitutional Court has recently defended the enforcement of both criminal defamation²²⁷ and public insult laws, holding that the laws are consistent with the Polish Constitution.²²⁸ In 2011, the Polish

the subject matter is of public concern, and the seriousness of the allegation made by the media).

221. See Defamation Act 2013 §§ 9–10 (Eng.).

222. See Yanchukova, *supra* note 20, at 871.

223. In considering the significance of the German flag, the German Federal Constitutional Court has ruled that "[t]he flag serves as an important integration device . . . [and] its disparagement can thus impair the necessary authority of the state. From this, . . . state symbols only enjoy constitutional protection in so far as they represent what fundamentally characterizes the Federal Republic." Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 7, 1990, 81 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 278 (Ger.).

224. See Yanchukova, *supra* note 20, at 873.

225. Kirschbaum, *supra* note 157.

226. See Yanchukova, *supra* note 20, at 873.

227. See *Polish Rights Ombudsman Criticises Criminal Defamation*, *supra* note 7.

228. See Press Release, Criminal Liability for the Public Insult of the President, *supra* note 52.

Constitutional Court upheld the country's public insult laws, specifically insults against the president, in light of Section 1 of Article 54 of the Polish Constitution, which allows the freedom to express opinions and acquire and disseminate information.²²⁹ The Polish Constitutional Court denoted the president's various functions and duties as "the guarantor of the continuity of State authority" and any insult directed toward the president of the Republic would undoubtedly disturb public order, while potentially weakening the president's position internationally and among world leaders.²³⁰ The Polish High Court noted that the provision facially interferes with an individual's freedom of expression enumerated in Section 1 of Article 54 of the Polish Constitution, but insults may not be defended as preventing a criticism because they lack legitimacy within the context of public debate and are not protected under the Polish Constitution or even Article 10 of the European Convention on Human Rights.²³¹

Similarly, the Polish Constitutional Court in 2006 held that the country's criminal defamation laws were consistent with the Polish Constitution and freedom of expression.²³² In reviewing relevant domestic law, the European Court of Human Rights stated that the Polish Constitutional Court held that protecting rights and freedoms such as "dignity, good name and privacy might prevail over" protecting an individual's freedom of expression.²³³ Additionally, the Polish Constitutional Court found that protecting personal reputational rights could not presumably provide the equally effective relief that is found in

229. Constitutional Tribunal Advisory Opinion, *supra* note 51, ¶¶ 3, 3.4. The Court rendered a decision on the provision's constitutionality even after the public prosecutor discontinued investigating a case involving a public insult made against then-President of Poland, Lech Kaczyński, when the case was still on appeal. *Id.* ¶ 1.1.

230. *Id.* ¶ 4.1. The Court pointed to these reasons as "legitimate aims" as set forth in Article 10(2) of the European Convention on Human Rights. *Id.* ¶ 5.

231. *See id.* ¶ 4.3. The Polish Constitutional Court went further to assert that "the penalisation of a public insult to the President of the Republic of Poland does not hinder possible criticism of the activity of the said authority and the course of public debate." *Id.* The Court furthered its assertion by indicating, "[i]n a democratic state[,] ... debate may held in civilised and well-mannered way, without any detriment to the rights and freedoms of persons and citizens as well as to the proper functioning of public institutions." *Id.*

232. *See* Gąsior v. Poland, App. No. 34472/07, Eur. Ct. H.R. ¶ 22 (2012).

233. *Id.*

criminal law.²³⁴ Therefore, according to the Polish Constitutional Court, protecting an individual's reputation by the use of criminal law did not violate the freedoms enumerated within the Polish Constitution.²³⁵

Polish courts are unlikely to follow the current legal standards applied in countries such as Germany, Denmark, Norway, the Netherlands, or Sweden by not habitually enforcing criminal liability for defamation or public insult.²³⁶ The German Federal Constitutional Court previously weakened the enforceability of criminal liability for defamation,²³⁷ whereas the Polish High Court has consistently upheld criminal liability for analogous laws even when it concurrently reaffirmed the idea that the purpose of freedom of expression is “to provide the individual with a possibility of self-fulfilment in the personal realm” while securing individual development in a democratic state.²³⁸ This legal proposal is not an effective approach to reforming Polish defamation law because Polish courts are either reluctant to refuse enforcement of criminal defamation laws or, more ordinarily, continue to apply criminal liability to those found guilty.²³⁹ For example, in 2013, under Section 2 of Article 212 of the Polish Penal Code with respect to defamation against the media, Polish courts criminally convicted 11 individuals and 2 convictions resulted in suspended prison sentences.²⁴⁰ Also in 2013, for insulting a public official under Section 1 of Article 226 of the Polish Penal Code, there were 3,666 criminal convictions, with 220 resulting in unconditional prison sentences and 1,261 suspended prison sentences.²⁴¹

Thus, it does not appear that Polish courts are demonstrating a pattern of following their European counterparts by refusing to enforce criminal defamation laws but are instead choosing to protect individuals'—typically governmental officials—personal reputations at the expense of

234. *Id.*

235. *See id.*

236. *See* Yanchukova, *supra* note 20, at 873–74.

237. *See id.* at 873.

238. Constitutional Tribunal Advisory Opinion, *supra* note 51, ¶ 3.

239. *See Poland*, INT'L PRESS INST., <http://legaldb.freemedia.at/legal-database/poland/?target=criminal-defamation> (last visited Jan. 12, 2017).

240. *Id.*

241. *Id.* In 2013, however, there were no convictions for insulting the President of Poland under Article 135, Section 2, but there was one unconditional prison sentence following a conviction for an insult of a constitutional authority under Article 226, Section 3, of the Polish Penal Code. *Id.*

freedom of expression.²⁴² Without some enforcement mechanism²⁴³ preventing national courts from applying criminal liability for defamation and insult, Poland will continue the overall trend that exists in Europe by maintaining its current defamation and insult laws.²⁴⁴ In addition, the United States Supreme Court once observed that overruling prior established and even controversial precedent “overtax[es] the country’s belief in the Court’s good faith” and such a decision would allude to the idea that the Court erroneously decided the prior case, thereby negatively impacting and undermining the Court’s legitimacy.²⁴⁵

B. Amend the Polish Penal Code to Decriminalize Defamation and Public Insult

The ideal legal mechanism to supplant criminal liability in Poland for defamation actions is to follow the Irish example by amending the current Polish Penal Code.²⁴⁶ Contemporary Irish law only authorizes civil redress for any injury incurred from a defamatory publication and awards the appropriate monetary damages to place the plaintiff in the position he or she was in prior to the initiated litigation.²⁴⁷ By imposing only civil penalties and abolishing criminal liability in defamation actions in Poland, the potential for self-censorship and the chilling effect

242. Constitutional Tribunal Advisory Opinion, *supra* note 51, ¶ 5 (upholding the constitutionality of public insult and affirming its consistency with Article 10 of the Convention).

243. The Sejm and Senate would have to amend the penal code and abolish criminal liability for defamation actions pursuant to the legislative powers granted to them in the Polish Constitution. *See* THE CONSTITUTION OF THE REPUBLIC OF POLAND, art. 95, § 1 (Pol.).

244. *See* GRIFFEN, *supra* note 27, at 10 (“Despite an overall trend toward the abolition of criminal defamation laws, to say such laws are alive and well in the European Union would be putting it mildly.”).

245. *Planned Parenthood v. Casey*, 505 U.S. 833, 866 (1992). The United States Supreme Court contended that “[t]here is a limit to the amount of error that can plausibly be imputed to prior Courts . . . [and] [t]he legitimacy of the Court would fade with the frequency of its vacillation.” *Id.*

246. *See generally* Defamation Act 2009 (Act No. 31/2009) § 35 (Ir.), <http://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/pdf> (abolishing criminal liability for defamation proceedings).

247. *See id.* § 31(4)(a)–(k) (allowing the defendant to recover on the basis of the facts and circumstances surrounding the case).

on public debate and matters of public interest will likely decline along with the “substantial undesirable effects on freedom of expression and information” that are associated with criminal sanctions.²⁴⁸ Additionally, the elimination of criminal penalties in favor of civil relief would eradicate the possibility of a defendant amassing a criminal record, which has the potential to be detrimental to a defendant’s personal and professional reputation and ambitions.²⁴⁹

Furthermore, implementing an Irish defamation scheme in Poland would reduce self-censorship because Irish defamation law is designed to make the plaintiff satisfy a high statutory threshold in ascertaining harm to his reputation.²⁵⁰ Instead of placing the right of reputation ahead of freedom of expression, Poland would adopt a defamation regime that allows for a freer flow of information and heightened public debate on legitimate matters of public interest.²⁵¹ This system of civil recourse would further the goals and objectives of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, which both accentuate the right to freedom of expression through “hold[ing] opinions and . . . receiv[ing] and impart[ing] information” without governmental interference “regardless of frontiers.”²⁵²

Critics advocate the idea that civil penalties may continue to place a chilling effect on defendants and the freedom of expression.²⁵³ With the

248. *Decriminalisation of Defamation*, *supra* note 50; *see also* MCGONAGLE, *supra* note 114, at 24.

249. *See* MCGONAGLE, *supra* note 114, at 56.

250. *See* BRÜGGEMEIER, CIACCHI & O’CALLAGHAN, *supra* note 179, at 264.

251. *Compare id.* (showing that even if the Irish Prime Minister in a defamation action can prove an “ordinary reasonable reader [would] understand [a] cartoon to imply . . . [he] had acted in some inappropriate manner,” the publisher will likely be relieved from paying damages because the publisher can plead the fair comment defense), *with Man Convicted of Insulting Polish President*, *supra* note 1, and *Blogger Charged with Insulting Polish President*, *supra* note 6 (providing two Polish examples that indicate ridiculing the President of Poland and other high ranking officials result in criminal penalties, even if the material was meant to be “satirical”).

252. The Convention, *supra* note 79, art. 10(1); *see also* Charter of Rights art. 11(1).

253. *See* David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207, 1212 (1995). For example, the International Press Institute warned that “civil lawsuits launched by public figures or that claim disproportionate damage awards remain significant areas of concern,” especially following Poland’s ruling Law and Justice (PiS) party’s libel suit against a leading Polish

availability of defamation lawsuits, a chilling effect is generated merely because of the substantial cost that is associated with defending lawsuits.²⁵⁴ Furthermore, a chilling effect comes in the form of the *threat* of a potential lawsuit that may impose an unrecoverable cost if not won in court.²⁵⁵ Nonetheless, civil damages may only be awarded on a case-by-case basis, particularly with respect to “the nature and gravity of any allegation in the defamatory statement concerned.”²⁵⁶ Although the costs of civil defamation might still engender some form of self-censorship due to a chilling effect, these potential side effects substantially outweigh the self-censorship that results from a criminal conviction for defamation.²⁵⁷ While one may argue that criminal sanctions for defamation protect public order and the rights and reputation of the individual harmed, these claims can be satisfied equally under available civil remedies.²⁵⁸ Freedom of expression is hindered when journalists are threatened with criminal penalties simply because an individual’s reputational interests are harmed.²⁵⁹ Criminal convictions, as opposed to civil judgments, impose a social stigma on the individual convicted of a

newspaper, which published an opinion piece “that criticised Polish President Andrzej Duda’s pardon of a former anti-corruption official convicted of abuse of power.” *Polish Governing Party Files Libel Suit Over Critical Commentary*, INT’L PRESS. INST. (Feb. 5, 2016), https://www.ifex.org/poland/2016/02/05/libel_suit/. The article condemned President Duda’s pardon as an “anarchic gesture” that reflected a “mafia state,” in which the ruling party was determined to “exert pressure and even intimidate the judiciary.” *Id.*

254. See Boies, *supra* note 253, at 1212; see also Shane Phelan, *Libel Laws Face Review as ‘Awards in Ireland Are Wholly Out of Kilter’*, INDEPENDENT.IE (Nov. 2, 2016, 2:30 AM), <http://www.independent.ie/irish-news/politics/libel-laws-face-review-as-awards-in-ireland-are-wholly-out-of-kilter-35181234.html> (emphasizing the extreme and sometimes excessive costs associated with a defamation lawsuit).

255. See Boies, *supra* note 253, at 1210 (emphasis added).

256. Defamation Act 2009 (Act No. 31/2009) § 31(4)(a) (Ir.), <http://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/pdf>. Other factors considered include the extent of circulation of the defamatory statement, the importance of the plaintiff’s reputation “in the eyes” of those who observed the defamatory statement, and “evidence given concerning the reputation of the plaintiff.” *Id.* § 31(4)(c), (f), (h).

257. See Yanchukova, *supra* note 20, at 893.

258. See *id.*

259. See *id.*; see also Richard N. Winfield, *The Wasting Disease and a Cure: Freedom of the Press in Emerging Democracies*, 20 COMM. L. 22, 24 (2002) (asserting that defamation should be “exclusively a civil remedy to reconcile two competing values: an individual person’s right to reputation and the right of a free press to publish”).

particular crime.²⁶⁰ The defendant in a criminal defamation prosecution acquires a criminal record, while the plaintiff receives nothing in return other than mere satisfaction—all at the expense of the defendant’s freedom of expression.²⁶¹ Conversely, in a civil action for defamation, the plaintiff has a valid monetary remedy and is restored to the *status quo ante* “to the extent that money can do so.”²⁶²

C. The American and British Approaches to Defamation

i. *The American Approach*

While the American judiciary’s First Amendment jurisprudence has implemented a “progressive ‘constitutionalization of defamation’” in the aftermath of the United States Supreme Court’s seminal holding in *New York Times Co. v. Sullivan*, it is plausible to argue that Poland can effectively institute an American-style approach to defamation law.²⁶³ This proposal is achievable even though Europeans have different viewpoints regarding the metes and bounds of speech freedoms than Americans.²⁶⁴ Polish legislators, however, would likely be required to go beyond the overall scope of Article 10 of the Convention because unlike the First Amendment to the United States Constitution, freedom of expression is a limited right and can be restricted under some circumstances as provided in the Convention, most notably with respect to safeguarding an individual’s reputation from undue harm.²⁶⁵

260. See W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 139 (2011); see also *In re Winship*, 397 U.S. 358, 363 (1970) (emphasizing the public stigma that is inflicted upon a criminal defendant following a conviction).

261. See generally Ball, *supra* note 260, at 124 (“If a law has a civil label, labels are all that matters; after a law is labeled criminal, labels no longer matter.”).

262. Ellen S. Pryor, *Rehabilitating Tort Compensation*, 91 GEO. L.J. 659, 660 (2003).

263. Régis Bismuth, *Standards of Conduct for Journalists Under Europe’s First Amendment*, 8 FIRST AMEND. L. REV. 283, 283–84 (2010).

264. *Constitutional “Refolution” in the Ex-Communist World: The Rule of Law*, *supra* note 35, at 56. Americans are so infused with their First Amendment freedoms that they have “more expansive ideas” regarding free speech than Western and Eastern Europeans. *Id.*

265. See Bismuth, *supra* note 263, at 286–87, 293.

Historically speaking, American First Amendment jurisprudence has not always been as liberal as it was in the United States Supreme Court's landmark holding in *New York Times Co. v. Sullivan*.²⁶⁶ Following the colonial experience, the Fifth United States Congress enacted the Sedition Act of 1798 for the fledgling American democracy.²⁶⁷ Legal scholars note that the Sedition Act was ultimately a failure because the First Amendment—in guaranteeing freedom of speech—assures that Americans have “an indestructible right [to voice] political criticism.”²⁶⁸ Similarly, Poland has moderately maintained its Soviet era criminal defamation and insult laws, and the country is still arguably an emerging democracy when viewed by perennial democratic stalwarts that champion free speech.²⁶⁹ In both the early American and Polish experiences with democracy, the use of criminal law for defamation was employed as a mechanism “to protect a new, fragile form of government” from injurious public dissent.²⁷⁰

Realistically, Poland is unlikely to embrace the American approach to defamation law because the United States “continue[s] to develop a distinctively different vision of freedom of expression” when compared to the principles and methods applied in European courts.²⁷¹ The crux of this distinction between the American and European courts is the European courts' strong interest in “a person's right to protection of his or her reputation . . . as being part of the right to respect for private life.”²⁷² In contrast, the United States Supreme Court barred an individual's harmed reputation from being brought to court under the Due Process Clause of the Fourteenth Amendment, as plaintiffs and their

266. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (outlining American defamation law, which “delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct”).

267. Lisby, *supra* note 60, at 458.

268. *Id.* at 459.

269. See Sadurski, *supra* note 8, at 439.

270. Yanchukova, *supra* note 20, at 869.

271. Perry Keller, *Re-Opening the Door to the First Amendment*, 5 AMSTERDAM L.F. 115, 115 (2013). Nonetheless, American First Amendment jurisprudence has “become a significant point of reference in political and legal debate in Europe” because of the “gap[s] left by European supranational courts and law makers.” *Id.* at 116.

272. *Pfeifer v. Austria*, App. No. 12556/03, 48 Eur. Ct. H.R. 175, 182–83 (2007).

respective reputations are not deprived of liberty or property interests in a simple defamation action.²⁷³

ii. The British Approach

Although British and American law are based on the common law, the two legal systems diverge from one another because of the broad interpretation of the First Amendment and the *New York Times Co. v. Sullivan* holding with the application of an actual malice standard that is applied in cases involving public officials and public figures.²⁷⁴ Burden shifting between the parties of a defamation lawsuit is dissimilar in the United Kingdom because the defendant, not the plaintiff, must first prove the truth of his statement, whereas a plaintiff in the United States must initially prove the falsity of the alleged defamatory statement.²⁷⁵ Therefore, both countries' defamation regimes must be analyzed separately as potential solutions to the Polish criminal defamation and insult laws.²⁷⁶

The British system will likely pose additional procedural issues for Poland than it currently has with its criminal liability for defamation and insult because of the internal and external pressures the United Kingdom has endured due to the issue of libel tourism.²⁷⁷ Prior to 2013, the United Kingdom's laws regarding civil defamation had produced a "seriously chilling effect" by allowing foreign claimants to file lawsuits against citizen critics or journalists.²⁷⁸ This provoked foreign jurisdictions such as the United States to respond with legislative enactment and bar English libel judgments from having a binding judicial effect in the United States.²⁷⁹

273. See *Paul v. Davis*, 424 U.S. 693, 712 (1976).

274. *Bates*, *supra* note 204, at 241.

275. *Id.* at 246; see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 267, 282–83 (1964) (striking down an Alabama law that declared a publication was "libelous per se" if it harmed a person's reputation or brought him into public contempt, and the Supreme Court shifted the initial burden onto the plaintiff to show the publication in question was circulated with actual malice).

276. See *Bates*, *supra* note 204, at 241.

277. See *id.* at 234.

278. Lord Lester, *supra* note 98, at 136.

279. *Id.*

However, the British Parliament enacted a defamation law reform titled the 2013 Defamation Act, adding the defense of reasonable belief with respect to making a statement “on a matter of public interest.”²⁸⁰ The British defamation reform statute also curtails libel tourism in that an action for defamation is within British jurisdiction only when “England and Wales is clearly the most appropriate place” to hear the case.²⁸¹ Under this reform, however, an individual domiciled in a European Union or Lugano Convention country remains subject to a defamation suit from a plaintiff who lodges a complaint against the individual defendant in the United Kingdom.²⁸² This reform nonetheless narrowed British court jurisdiction in defamation suits against individual defendants in other foreign jurisdictions, such as the United States.²⁸³ While it appears “the worst of libel tourism is over,”²⁸⁴ the defamation law overhaul has still led to an increased number of cases brought before British courts, particularly statements made over the Internet.²⁸⁵ British defamation law continues to “put[] the onus on the defendant to prove that the statement at issue was true” as opposed to placing the burden of proof on the plaintiff who initially brought the action to prove that the statement was false.²⁸⁶ Therefore, the British defamation system would likely continue to hinder the Polish press, as the British system notoriously “mak[es] it easier to sue news outlets,” which would in turn further the potential of fostering self-censorship in Poland.²⁸⁷

280. Defamation Act 2013, c. 26, § 4(1)(a) (Eng.).

281. *Id.* § 9(2).

282. *Id.* § 9(1)(b)–(c), (5) (stating contracting parties to the Lugano Convention include the European Union Member States in addition to Iceland, Norway, and Switzerland).

283. *See id.* § 9(1)(a)–(c).

284. Jeff John Roberts, *Privacy Laws Pose New Threat to Free Speech*, FORTUNE (Jan. 19, 2016), <http://fortune.com/2016/01/19/libel-privacy-tourism/>.

285. *See United Kingdom, FREEDOM HOUSE*, <https://freedomhouse.org/report/freedom-world/2015/united-kingdom> (last visited Feb. 14, 2017).

286. Tom Kludt, *Donald Trump Says he Wants Libel Laws More like the UK's*, CNN (Oct. 24, 2016, 12:40 PM), <http://money.cnn.com/2016/10/24/media/donald-trump-sue-news-organizations/>.

287. *See id.*

VI. CONCLUSION

Criminal liability for defamation has no place in countries that advocate democratic ideas and values because freedom of expression guarantees individuals the right to participate in the political process, to hear adverse opinions, and to voice their own opinions.²⁸⁸ As the European Court of Human Rights once observed, “Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.”²⁸⁹ A democratic state ceases to exist each time a governmental entity imposes disproportionate and inconsistent restrictions or penalties on information or ideas articulated by citizens, regardless of whether those statements are perceived favorably or unfavorably.²⁹⁰

Although the European Court of Human Rights has not yet expressly condemned the application of criminal liability for defamation²⁹¹ because of the Court’s strong desire to protect and maintain an individual’s reputation,²⁹² these personal interests can be equally protected through the use of private law and without the use of criminal penalties.²⁹³ While protecting an individual’s reputation must be recognized, this duty may still be effectively remedied by ensuring the tort of defamation is accessible to harmed plaintiffs.²⁹⁴ The undemocratic features of defamation prosecutions largely outweigh the benefits because of the

288. See Yanchukova, *supra* note 20, at 893.

289. *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. 737, 754 (1976).

290. *Id.*; see also *Palko v. Connecticut*, 302 U.S. 319, 326–27 (1937) (holding that the freedoms of thought and speech are “the matrix, the indispensable condition, of nearly every other form of freedom”).

291. See *Lewandowska-Malec v. Poland*, App. No. 39660/07, Eur. Ct. H.R. ¶ 68 (2012). “In so far as the applicant contends that in criminal defamation cases the [Polish] domestic courts generally failed to distinguish between statements of fact and opinions and that Article 212 § 2 . . . was used by politicians to silence the media, the Court reiterates that in cases arising from individual petitions *the Court’s task is not to review the relevant legislation or practice in the abstract*; it must as far as possible confine itself . . . to examining the issues raised by the case before it.” *Id.* (emphasis added).

292. See FACTSHEET – PROTECTION OF REPUTATION, EUR. CT. OF HUM. RTS., http://www.echr.coe.int/Documents/FS_Reputation_ENG.pdf (last visited Jan. 15, 2017).

293. See Yanchukova, *supra* note 20, at 893.

294. See Lisby, *supra* note 60, at 482, 485.

slightest threat of self-censorship.²⁹⁵ Self-censorship creates a metaphoric *iron cage* because citizens, specifically the media,²⁹⁶ perceive its application as a mechanism to suppress and punish criticism of the government²⁹⁷ along with weakening the press's "powers of investigation and . . . dissemination of information to large audiences."²⁹⁸

Poland should adopt a system of defamation law similar to that of Ireland²⁹⁹ or, to a limited extent, the United Kingdom.³⁰⁰ The Irish defamation system embodies a statutory scheme that mandates the plaintiff, primarily public officials, to prove more than a harmed reputation in order to obtain a judgment against the defendant.³⁰¹ Subsequently, limiting defamation to civil judgments would allow for a freer flow of information and debate that more directly aligns with the objective of Article 10 of the European Convention on Human Rights.³⁰² More importantly, abolishing criminal defamation sanctions in Poland decreases the potential for "a 'chilling effect' on debates on matters of legitimate public interest."³⁰³ Civil judgments do not carry the same egregious consequences on a defendant's professional life³⁰⁴ because a defendant is not stamped with the same harmful social stigma following a civil judgment as opposed to when a criminal conviction is rendered.³⁰⁵ Thus, there is a "clear civil remedy" alternative in defamation cases

295. See Thorgeirsdottir, *supra* note 140, at 398.

296. *Id.*

297. See Lisby, *supra* note 60, at 482.

298. Stephen J. A. Tierney, *Press Freedom and Public Interest: The Developing Jurisprudence of the European Court of Human Rights*, 4 EUR. HUM. RTS. L. REV. 419, 420 (1998).

299. See generally Defamation Act 2009 (Act No. 31/2009) § 35 (Ir.), <http://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/pdf>.

300. See generally Defamation Act 2013, c. 26, § 1(1) (Eng.) (defining a "serious harm" with respect to a claimant in a civil action). The British system is proposed here simply because it redresses defamation similar to that of Ireland (i.e., civil litigation), not because the British system is necessarily ideal for Poland to adopt. Adoption of the British system is limited to the fact that its courts render only civil judgments against defendants in defamation actions; procedural issues remain problematic with the British system because the initial burden of proof to prove the truthfulness of the statement is with the defendant. See Kludt, *supra* note 286.

301. See BRÜGGEMEIER, CIACCHI & O'CALLAGHAN, *supra* note 179, at 264.

302. See The Convention, *supra* note 79, art. 10(1).

303. MCGONAGLE, *supra* note 114, at 24.

304. See *id.* at 60.

305. See Ball, *supra* note 260, at 139.

“unlike pedophilia or other [serious] criminal charges,” where alternative legal remedies for defendants are undoubtedly lacking.³⁰⁶ Commenting on criminal liability for defamation, Justice William Douglas of the United States Supreme Court once observed, “It is disquieting to know that one of [criminal libel’s] instruments of destruction is abroad in the land today.”³⁰⁷ Freedom of expression should be suppressed only to the extent that “it is so closely brigaded with illegal action as to be an inseparable part of it.”³⁰⁸ By recognizing prosecutions for defamation, an individual’s basic guarantee to freedom of expression would be rendered almost unrecognizable.³⁰⁹

306. Chapman, *supra* note 91, at 601.

307. Garrison v. Louisiana, 379 U.S. 64, 83 (1964) (Douglas, J., concurring). In making this assertion, Justice Douglas was commenting on the fact that some American jurisdictions continue to apply criminal liability for libel actions. *Id.*

308. *Id.* at 82 (quoting Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting)).

309. *Id.* at 80.