

## ACLU-NH targets libel laws in lawsuit

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It was a Facebook comment that led to an arrest warrant.

In May, Exeter resident and outspoken commentator Robert Frese took a swipe at a retiring police officer, calling him in a Facebook comment under a newspaper article “the dirtiest most corrupt cop that I have ever had the displeasure of knowing.”

Nineteen days later, the Exeter police department were pressing criminal charges. In a warrant, the police alleged that Frese “purposely communicated on a public website, in writing, information which he knows to be false and knows will tend to expose another person to public contempt,” and argued the post violated New Hampshire’s criminal libel law, a class B misdemeanor.

A public backlash followed and the charge was eventually dropped. But the law enabling it, RSA 644:11, remains on the books.

A lawsuit by the American Civil Liberties Union is seeking to change that. In a federal complaint filed Tuesday, the advocacy group argued that Frese’s arrest violated the First Amendment, and that the law invoked in the arrest is itself unconstitutional.

“Without a well-defined standard of criminal responsibility, law enforcement officials and juries are given nearly unfettered discretion to apply their own standards,” the organization said in a 12-page filing in the U.S. District Court in Concord. “Criminal defamation laws are thus susceptible to

arbitrary, uneven and selective enforcement.”

Frese’s arrest in May was not the first time he’s found himself on the other side of the criminal libel law. In 2012, after repeatedly calling a local life coach business a “scam” on Craigslist, Frese was arrested for the same offense by the Hudson Police Department. He pleaded guilty “without the benefit of an attorney to advise him of his legal rights,” the ACLU filing said.

The law was also invoked in a 2012 case against a Massachusetts woman, Kelsey Green, who was arrested by the Portsmouth Police Department for filing a fake report to the city’s health department against alleging health code violations at a café. After an inspection by that department, Green was found to have made the bogus report to take revenge against her friend’s firing, the Portsmouth Herald reported.

A judge fined Green \$1,200 for the charge, suspended on good behavior, and directed her to write a letter of apology to the shop.

But it was Frese’s latest police encounter, in May, that appeared to strike a chord, inviting national media coverage and public reaction. In an unusual memorandum, Attorney General Gordon MacDonald waded into the debate, asserting that the department had wrongfully applied the law, which relies on malicious intent from the defendant, and said the charges should not have been filed.

“Without probable cause of actual malice, Frese’s arrest and the subsequent charges against him raised First Amendment concerns,” the memorandum read. The police soon dropped the charge.

The ACLU – which is also helping Frese demand \$65,000 in damages against the department – argues the case points to the greater injustice of the law itself.

“Our client went to the internet to voice his grievances about the police only to be arrested by the police,” said Gilles Bissonnette, legal director of the state ACLU, calling the case a “a textbook example of the use and abuse of criminal defamation laws.”

The organization contends that while some speech qualifies for defamation, the better remedy against it is through civil lawsuits and not criminal charges.

“It is often almost impossible for a speaker to determine in advance whether their speech would be considered unprotected defamation or protected expression,” the filing states. “Civil law may permit such ambiguities, but criminal laws must be held to a higher standard of definition.”

In filing the lawsuit, the state ACLU, in conjunction with the national organization, is hoping to use Frese’s case as a trial balloon for challenges to other

state criminal defamation laws. New Hampshire is one of 25 states that still carry the statute, despite a 1964 Supreme Court decision that led many states to drop them.

An attorney with the national ACLU, Brian Hauss, called the laws “a relic from the days of the Star Chamber and the Sedition Act.”

Bissonnette called them unfairly vague.

“They’re bad statutes,” he said. “They give the public no guidance on what constitutes a crime, and they give law enforcement tremendous discretion in deciding who to prosecute.

“This case, we think, provides a good vehicle to address those constitutional concerns and the facts, we think, demonstrate exactly why these laws should be struck down.”

Tuesday’s lawsuit is filed against MacDonald, whose office is responsible for defending state laws. A spokeswoman for the Attorney General’s Office said the department could not comment on pending litigation.