FREE SPEECH

Vagueness Challenge to N.H.'s Criminal Libel Statute Can Go Forward

An interesting court opinion, though I think on balance mistaken.

EUGENE VOLOKH | THE VOLOKH CONSPIRACY | 10.25.2019 1:00 PM

In *Frese v. MacDonald*, the ACLU of New Hampshire is challenging New Hampshire's criminal libel statute, which provides,

> A person is guilty of a class B misdemeanor [punishable by a fine of up to about $1500] if he purposely communicates to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule.

Because of the limited punishments that can be imposed, "[c]riminal defamation defendants are not entitled to a trial by jury" and "state law does not afford indigent criminal defamation defendants the right to court-appointed counsel." "Municipal police departments in New Hampshire have been empowered since colonial times to initiate prosecutions for misdemeanors like criminal defamation without input or approval from a state-employed and legally trained prosecutor." "[O]ver the past ten years, approximately 25 defendants [have apparently been] charged under the criminal defamation statute."

The ACLU is arguing that the statute is unconstitutionally vague, and today, U.S. District Judge Joseph N. Laplante held that the challenge could go forward (though he did not definitively rule on whether the statute was indeed unconstitutional):

> The court's vagueness concerns are two-fold. First, the criminal defamation statute arguably fails to provide "people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" and what speech is acceptable…. [A] statute cannot criminalize conduct "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application'" ….
>
> Briefly put, the statute repeats parts of the common law definition of defamation, see Restatement (Second) of Torts § 559, comment b, which the Alaska Supreme Court in *Gottschalk v. Alaska* found "falls far short of the reasonable precision necessary to define criminal conduct." 575 P.2d 289, 292 (Alaska 1978) (finding unconstitutional a statute making it a misdemeanor for "[a] person who willfully speaks, writes, or in any other manner publishes defamatory or scandalous matter concerning another with intent to injure or defame him," including any statement which would tend to hold another "up to public hatred, contempt or ridicule"). Even when construing the criminal defamation statute in line with its "knowing" scienter requirement, the statute may still not adequately delineate what speech must be known to have the tendency "to expose any other living person to public hatred, contempt or ridicule." *See Smith v. Goguen*, 415 U.S. at 580 (rejecting contention that limiting a statute criminalizing the contemptuous treatment of the U.S. flag to intentional conduct would "clarify what constitute[d] contempt, whether intentional or inadvertent")….
>
> [E]xactly what speech a person knows will "tend to expose any other living person to public hatred, contempt or ridicule" may not be so easily determined in a diverse, pluralistic nation. *See Ashton v. Kentucky*, 384 U.S. 195 (1966) (holding that Kentucky's common law crime of criminal libel was unconstitutionally void, as no court case had redefined the crime's sweeping language in understandable terms, leaving prosecution decisions to be made on a case to case basis); *see also Tollett v. United States*, 485 F.2d 1087, 1097 (8th Cir. 1973) (voiding as vague statute punishing "libelous, scurrilous, defamatory words" written on the outside of an envelope").

> Second, Frese has sufficiently pleaded that the criminal defamation statute may be prone to arbitrary enforcement. Frese alleges that, "[o]n information and belief, individuals throughout New Hampshire routinely violate the criminal defamation statute, but [he] was arrested and prosecuted because he criticized law enforcement officials." As clarified by his objection, Frese urges this court infer that because the statute "gives law enforcement far too much discretion in deciding whom to prosecute," the motivation to prosecute criminal defamation is often political. At the pre-discovery stage, this inference, though sparsely supported by the complaint, suffices.
>
> In assessing a facial challenge to a statute, courts may consider not just the "words of a statute," but also "their context" and "their place in the overall statutory scheme." … New Hampshire's distinctive criminal process [which allows prosecution directly by police officers, without participation by may exacerbate the potential for arbitrary or selective prosecutions. With his complaint, Frese incorporated records from the New Hampshire Judicial Branch evidencing how infrequently criminal defamation charges have been brought in each New Hampshire district court." Although these records do not identify the complained-about speech, Frese's case is not the first reported decision of a municipal police department that prosecuted an individual who criticized one of its officers. *See Nevins v. Mancini*, No. 19-cv-119, 1993 WL 764212, at *1–2 (D.N.H. Sept. 3, 1993) (McAullife, J.) (… actions in which the plaintiff alleged the Bennington Police Department unlawfully threatened and then prosecuted the plaintiff for criminal defamation after he sent complaints to state officials about the conduct of one of its officers).
>
> At oral argument, the Assistant State Attorney General could not provide more detail or substance to these records. Nor could he point to any formal guidance instructing state prosecutors, municipal police departments, or the courts on how to apply New Hampshire's criminal defamation statute to potentially violative speech. Answers to these questions may emerge on a more developed record. {At the hearing, the court further pressed the State's counsel on what kinds of proof would be necessary to prove a criminal defamation case before a judge (since individuals prosecuted for criminal defamation have no right to a jury). Counsel responded that it would depend on the case, and that while a defendant's admission that they knew their speech was false and defamatory would suffice, counsel could not rule out a criminal defamation case built on indirect evidence. The court then noted that in such cases, determining whether showed an utterance was defamatory would then depend on the unconstrained values of the factfinder.}
>
> Although some criminal defamation prosecutions may collapse on close scrutiny, as was the case with Frese in 2018, this fact does not negate the risk of an excessively discretionary scenario created by the statutory language challenged here. Frese's encounters with prosecutions under the statute highlight several of these risks. As such, the discretion afforded to police departments to prosecute misdemeanors, taken together with the criminal defamation statute's sweeping language, may produce more unpredictability and arbitrariness than the Fourteenth Amendment's Due Process Clause permits.
>
> This is not to say that New Hampshire's criminal defamation statute is unconstitutional on its face. But in this preliminary, pre-discovery procedural posture, the court declines to rule as a matter of law that it is not. It therefore denies the motion to dismiss Frese's void-for-vagueness claim….

I appreciate the judge's argument on this, but I'm inclined to think that criminal libel laws that punish knowing lies that damage reputation are constitutional; here's the analysis from my forthcoming *Anti-Libel Injunctions* article:

Criminal libel laws are constitutional if they are consistent with First Amendment libel law mens rea rules (generally speaking, if they require a showing of defendant's "actual malice"[1]). Civil and criminal libel cases "are subject to the same constitutional limitations," even when the speech is on a matter of public concern and is about a public figure or official.[2]

All the other First Amendment exceptions that the Court has explicitly recognized authorize criminal liability for speech, since such criminal liability is often the only viable way to punish and deter the unprotected speech: incitement, obscenity, child pornography, fighting words, fraud, threats, or speech that is an integral part of criminal conduct.[3] The Court has never suggested that the defamation exception, alone of the First Amendment exceptions, excludes such criminal liability.

True, many legislatures have repealed criminal libel laws, or declined to reenact them after old and overbroad criminal libel statutes have been struck down as inconsistent with the modern libel law rules. But thirteen states still have generally applicable criminal libel statutes,[4] and criminal libel prosecutions continue in most of those states.[5] Indeed, after the Minnesota criminal libel statute was struck down as overbroad in 2015,[6] the Minnesota legislature reenacted a properly narrowed statute.[7]

A 1978 Alaska Supreme Court decision struck down a criminal libel statute on the grounds that the definition of "defamatory"—"any statement which would tend to disgrace or degrade another, to hold him up to public hatred, contempt or ridicule, or to cause him to be shunned or avoided"—"falls far short of the reasonable precision necessary to define criminal conduct."[8] Those who agree that criminal libel statutes are unconstitutionally vague should take the same view about catchall anti-libel injunctions enforceable through criminal contempt law.

But it seems to me that, if a criminal libel law statute is limited to knowingly (or perhaps recklessly[9]) false and defamatory speech—the Alaska statute was not so limited—it should be clear enough to be constitutional, as several courts have indeed held.[10] The limitation to knowing or reckless falsehoods would limit the substantive reach of the statute, diminishing any concern that the vagueness of the law would chill a wide range

of speech.[11] The definition of libel also has a well-established "common law meaning," a matter that the vagueness precedents view as significant.[12]

And the line between falsehoods that tend to lead to disgrace, hatred, contempt, or ridicule and other falsehoods yields a good deal of black and white, though also some grey. "[T]he mere fact that close cases can be envisioned" doesn't "render[] a statute vague"—"[c]lose cases can be imagined under virtually any statute."[13] Rather, a statute is unconstitutionally vague only when an element is "indeterminate[]," as with statutes that criminalized "annoying" or "indecent" speech—"wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings."[14]

"Condemned to the use of words, we can never expect mathematical certainty from our language";[15] but the definition of libel seems no more uncertain than the constitutionally valid definitions of fighting words and of incitement, which also turn on the tendency of words to produce certain actions or beliefs among listeners.[16] And while it may be unclear whether an allegation is false, or spoken with knowledge of its falsehood, that sort of *factual* uncertainty isn't enough to render a statute unconstitutionally vague.[17]

[1] Gertz v. Robert Welch, Inc., 418 U.S. 323, 328 (1974), requires a showing of "actual malice" before punitive damages are recovered, even in lawsuits brought by private figures. It follows that criminal punishment should also require such a showing, even as to libels of private figures. *See* Myers v. Fulbright, 367 F. Supp. 3d 1171, 1174 (D. Mont. 2019) (holding as much); State v. Turner, 864 N.W.2d 204, 210 (Minn. Ct. App. 2015) (same).

A similar showing might not be required as a First Amendment matter as to speech about matters of purely private concern. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (allowing punitive damages without a showing of "actual malice" in such cases). But general principles of criminal liability would, in any event, usually call for a showing of at least recklessness as to attendant circumstances—such as the falsehood of a libelous statement—in criminal cases. *See, e.g.*, Model Penal Code § 2.02(3) (using language that roughly maps to actual malice). This may reasonably be viewed as a First Amendment requirement when it comes to criminal libel in particular.

[2] Herbert v. Lando, 441 U.S. 153, 157 n.1 (1979); *see also* Garrison v. Louisiana, 379 U.S. 64, 67 (1964) (taking the same view as *Herbert*); Phelps v. Hamilton, 59 F.3d 1058, 1073 (10th Cir. 1995) (upholding a narrowly drawn criminal libel statute); *In re* Gronowicz, 764 F.2d 983, 988 n.4 (3d Cir. 1985) (en banc) (following *Garrison* in rejecting a distinction between "criminal fraud and libel prosecutions on the one hand and civil fraud and libel actions on the other"); People v. Ryan, 806 P.2d 935, 941 (Colo. 1991) (upholding a narrowly drawn criminal libel statute, when limited to speech on matters of purely private concern); State v. Carson, 95 P.3d 1042 (unpublished table opinion), 2004 WL 1878312, at *2–3 (Kan. Ct. App. Aug. 20, 2004) (noting that the trial court had upheld a narrowly drawn criminal libel statute; the defendant did not raise the First Amendment argument on appeal).

[3] *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion) (giving this list of exceptions, together with "speech presenting some grave and imminent threat the Government has the power to prevent"); United States v. Williams, 553 U.S. 285, 307 (2008) (upholding criminalization of solicitation of crime, which was seen as integral to criminal conduct); Virginia v. Black, 538 U.S. 343, 359–62 (2003) (upholding criminalization of true threats); New York v. Ferber, 458 U.S. 747, 774 (1982) (upholding criminalization of child pornography); Smith v. United States, 431 U.S. 291, 309 (1977) (upholding Iowa's criminal obscenity law, despite Justice Stevens' argument in dissent, *id.* at 317, 321, that obscenity law should only be enforceable through civil remedies); Miller v. California, 413 U.S. 15, 36–37 (1973) (upholding criminalization of obscenity); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (describing when incitement may be criminalized); Chaplinsky v. New Hampshire, 315 U.S. 568, 573–74 (1942) (upholding criminalization of fighting words).

[4] Idaho Code §§ 18-4801–4809 (2019); Kan. Stat. Ann. § 21-6103 (2018); La. Stat. Ann. § 14:47–50 (2016); Mich. Comp. Laws § 750.370 (2018); Minn. Stat. § 609.765 (2018); N.H. Rev. Stat. Ann. § 644:11 (2019); N.M. Stat. Ann. § 30-11-1 (2019); N.C. Gen. Stat. §§ 14-47, 15-168 (2019); N.D. Cent. Code § 12.1-15-01 (2019); Okla. Stat. tit. 21, §§ 771-774, 776-778 (2019); Utah Code Ann. § 76-9-404 (2020); Va. Code Ann. § 18.2-417 (2019); Wis. Stat. § 942.01 (2017-2018); *see also* V.I. Code Ann. tit. 14, §§ 1171-1179 (2018). Two of these statutes have been held unconstitutional as to statements on matters of public concern, but remain in force as to statements on matters of private concern. State v. Snyder, 277 So. 2d 660, 668 (La. 1972), *rev'd on other grounds*, 304 So. 2d 334, 334 n.1 (La. 1974); State v. Powell, 839 P.2d 139, 147 (N.M. Ct. App. 1992).

A few states have libel statutes that are focused on libels of particular businesses, such as banks. *See, e.g.*, Ala. Code § 5-5A-46 (2016); Tex. Fin. Code Ann. § 119.202 (2019). Query whether that sort of content classification is constitutional given R.A.V. v. City of St. Paul, 505 U.S. 377, 384 (1992), which states that libel laws that distinguish among libels based on content may be unconstitutional, unless the content distinction focuses just on more damaging libels. *See, e.g.*, United Food & Commercial Workers Local 99 v. Bennett, 934 F. Supp. 2d 1167, 1196 (D. Ariz. 2013) (striking down a statute because it created special remedies for defamation of employers, as opposed to defamation of others).

[5] *See, e.g.*, David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 Comm. L. & Pol'y 303, 313 (2009) (finding, on average, four criminal libel prosecutions per year in Wisconsin from 2000 to 2007); Eugene Volokh, Criminal Libel: Survival and Revival (unpublished manuscript) (on file with author) (discussing prosecutions in other states).

[6] State v. Turner, 864 N.W.2d 204 (Minn. Ct. App. 2015).

[7] Minn. Stat. Ann. § 609.765 (2018).

[8] Gottschalk v. State, 575 P.2d 289, 292 (Alaska 1978)….

[9] "Reckless" here means writing something false "with a high degree of awareness of . . . probable falsity" or "entertain[ing] serious doubts as to the truth of [the] publication." Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 667 (1989).

[10] *See, e.g.*, How v. City of Baxter Springs, 369 F. Supp. 2d 1300, 1305–06 (D. Kan. 2005); Davis v. Weston, 501 S.W.2d 622, 623 (Ark. 1973); State v. Stephenson, No. 06CA0901, at 2–3 (Colo. App. Mar. 6, 2008) (upholding criminal libel law and relying on People v. Ryan, 806 P.2d 935 (Colo. 1991), which didn't expressly address a vagueness challenge but implicitly rejected the dissent's vagueness argument); Pegg v. State, 659 P.2d 370, 372 (Okla. Crim. App. 1983). *See also* Roberts v. State, 278 S.W.3d 778, 791 (Tex. Ct. App. 2008) (rejecting vagueness challenge to a theft by extortion statute that punished threats to "expose a person to hatred, contempt or ridicule"); State v. Gile, 321 P.3d 36 (Table), 2014 WL 1302608, *5 (Kan. Ct. App. 2014) (likewise, as to blackmail statute punishing threats to expose a person to "public ridicule, contempt, or degradation").

Ashton v. Kentucky struck down a common-law criminal libel rule on vagueness grounds, but only because the rule—inconsistently with modern libel law—extended to "any writing calculated to create disturbances of the peace." 384 U.S. 195, 198–99 (1966); *see also* Williamson v. State, 295 S.E.2d 305, 306 (Ga. 1982) (same). Likewise, Fitts v. Kolb, 779 F. Supp. 1502, 1515–18 (D.S.C. 1991), and Parmelee v. O'Neel, 186 P.3d 1094, 1104 (Wash. Ct. App. 2008), *rev'd only as to attorney fees*, 229 P.3d 723, 728 (Wash. 2010), struck down criminal libel statutes as unconstitutionally vague only because they banned "malicious" speech without making clear that this referred to the *New York Times* "actual malice" standard rather than to the normal English definition of the term. *See also* Tollett v. United States, 485 F.2d 1087, 1097–98 (8th Cir. 1973) (striking down a federal ban on defamatory mailings as unconstitutionally vague and overbroad because, among other things, the law made it unclear "whether truth would still be punishable unless coupled with good motives," "whether Congress deemed it necessary that 'malice' be an element of the offense for either private or public libels," "whether libel must be knowingly falsely made or may be 'negligently' made," and "whether the libelous or defamatory statements must necessarily lead to an immediate breach of peace").

[11] *See* Reno v. ACLU, 521 U.S. 844, 873 (1997) (concluding that a statutory criterion becomes less vague when other required elements of the offense "critically limit[] the uncertain sweep" of the overall statutory definition).

[12] *See, e.g.*, Winters v. New York, 333 U.S. 507, 518–19 (1948); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

[13] United States v. Williams, 553 U.S. 285, 305–06 (2008).

[14] *Id.* at 306 (citing Reno v. ACLU, 521 U.S. 844, 870–71 & n.35 (1997), and Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)).

[15] Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

[16] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (endorsing an incitement test limited to "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Chaplinsky v. New Hampshire, 315 U.S. 568, 573–74 (1942) (holding that a fighting words statute interpreted as limited to "words likely to cause an average addressee to fight" was not unconstitutionally vague).

[17] *Williams*, 553 U.S. at 306 ("What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.").

EUGENE VOLOKH is the Gary T. Schwartz Distinguished Professor of Law at UCLA.

FREE SPEECH LIBEL