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ANTI-LIBEL INJUNCTIONS

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INTRODUCTION

An injunction against libel, backed by the threat of prosecution for criminal contempt,[1] is like a miniature criminal libel law—just for this defendant, and just for statements about this plaintiff.[2] That is its virtue. That is its danger. And that is the key to identifying how the First Amendment and equitable principles should constrain such injunctions.

From the 1960s to the 1990s, libel was conventionally understood to be controlled (to the extent that it can be controlled) by the threat of civil damages. Criminal libel was seen as an anachronism.[3] Injunctions against libel were seen as unavailable.[4] Many still assume this is so.[5]

When one considers the famous libel scenarios, focusing on damages makes sense. For libels by a newspaper, magazine, or credit rating agency,[6] damages are likely both a fair remedy and a reasonable deterrent.[7] Criminal liability seems like overkill, and an injunction is usually pointless: those defendants aren't likely to keep saying false things about the plaintiffs in any event, especially after a libel judgment, so nothing will need enjoining. Print defamation is generally a short, sharp shock, which causes harm that an injunction can't stop.[8]

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1 For examples of such injunctions enforced through threat of jail, see *infra* Appendix D.

2 *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 8 (1978) (making a similar point about injunctions generally); Doug Rendleman, *The Defamation Injunction*, 56 SAN DIEGO L. REV. 615 (2019).

3 *See, e.g.*, MODEL PENAL CODE § 250.7 cmt. (AM. LAW INST., Tentative Draft No. 13, 1961) (discussing "the paucity of prosecutions and the near desuetude of private criminal libel legislation").

4 *E.g.*, RONALD D. ROTUNDA, JOHN E. NOWAK & J. NELSON YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 163 n.8 (1986) ("It has long been established that courts simply cannot enjoin a libel. Such an injunction would be contrary to equitable principles and would violate the first amendment." (citations omitted)); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 861-86, 1039-61 (2d ed. 1988) (failing to mention the possibility of injunctions in the defamation section of the treatise, while discussing damages in great detail, and not mentioning defamation in the injunction section of the treatise).

5 Even some sources that recognize that there's a split of authority say that "the majority view" is "that, absent extraordinary circumstances, injunctions should not ordinarily issue." NYC Med. Practice, P.C. v. Shokrian, No. 19-cv-162 (ARR) (RML), 2019 WL 1950001, at *3 (E.D.N.Y. May 1, 2019) (quoting Miller v. Miller, No. 3:18-cv-01067 (JCH), 2018 WL 3574867, at *2 (D. Conn. July 25, 2018) (quoting in turn Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 239 F.3d 172, 177 (2d Cir. 2001))). As Appendix A shows, this is now a minority view, and a small minority at that.

6 *E.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

7 Even people who have libel insurance don't want to risk losing it.

8 Even defamation in a credit report will usually stop when the credit agency is shown its error (and especially when it is ordered to pay damages).

But the judgment-proof libeler, always a hazard,[9] has become still more common—and more dangerous—in the Internet age.[10] The Internet lets speakers publish libels to a potentially broad audience at little cost, and these libels can cause enduring damage. Every time someone Googles a plaintiff's name, the libels pop up again.

Moreover, 47 U.S.C. § 230(c)(1) generally immunizes intermediaries, such as search engines or online service providers, that do have money. In any practical sense, damages awards do not leave plaintiffs in such cases with an "adequate remedy at law"[11]—damages cannot be collected from the judgment-proof, and cannot effectively deter them. If libelers who lack money are to be deterred, criminal punishment is the one tool that can do the job.

Consider, then, several different ways that such criminal punishment can be threatened. Assume that judgment-proof Don says Paula cheated him in business, and Paula thinks he's lying. We can imagine several possible responses:

The criminal libel prosecution: Paula goes to the prosecutor, who tells Don, "Our state has a criminal libel law; I think your statements about Paula are lies, and if you keep libeling her, I'll prosecute you for criminal libel." That doesn't violate the First Amendment, as I'll discuss in Part I, though it may be condemned as too likely to chill speech and too likely to be abused by prosecutors.

The catchall injunction: Paula goes to court and gets an injunction against Don saying, "You may not libel Paula, or you will be prosecuted for criminal contempt." That, I'll argue in Part II, also doesn't violate the First Amendment, because Don can't be convicted of violating the injunction unless his post-injunction statements are proved libelous beyond a reasonable doubt at the criminal contempt trial. At the same time, such injunctions may be inadvisable, because they chill speech too much; appellate courts generally frown on them.

The specific preliminary injunction: Paula goes to court and quickly gets a preliminary injunction against Don saying, "You may not say that Paula has cheated you in business, or you will be prosecuted for criminal contempt." Though the injunction is less chilling than criminal libel law, it fails to offer some of the important procedural protections that criminal libel law does (as Part III discusses). In particular, such a specific preliminary injunction lets speech be suppressed based on just a likelihood-of-success-on-the-merits preliminary finding, rather than a full decision on the merits, following a trial. Because of this, appellate courts generally condemn such injunctions.

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9 "[M]ost libellers are penniless," an 1881 treatise author wrote, "and a civil action has no terrors for them." 1 W. BLAKE ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER 390 (1881).

10 *See, e.g.*, McCarthy v. Fuller, 810 F.3d 456, 462 (7th Cir. 2015) (recognizing this danger); Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 351 (Cal. 2007) (same).

11 *See, e.g.*, Hill v. Petrotech Res. Corp., 325 S.W.3d 302, 308 (Ky. 2010).

The specific permanent injunction: Paula goes to court, and after a full trial gets a permanent injunction against Don saying, "You may not say that Paula has cheated you in business, or you will be prosecuted for criminal contempt." Thirty-four states allow such injunctions, at least in some situations, and only six have generally rejected them (Appendix A documents this). If "equity will not enjoin a libel"[12] was ever a firm rule, it isn't so now. But, I'll argue in Part IV, these injunctions also fail to provide certain important procedural protections.

The hybrid permanent injunction: Paula goes to court and gets a permanent injunction against Don saying, "You may not *libelously* say that Paula has cheated you in business, or you will be prosecuted for criminal contempt." This sort of injunction, I'll argue in Part V, can provide the procedural protections that criminal libel law and catch-all injunctions offer, chiefly because the injunction by its terms only punishes speech if it's found libelous *both* at the injunction hearing *and* at the ultimate criminal contempt trial. But at the same time, the hybrid permanent injunction has the narrower chilling effect that characterizes the specific permanent injunction.

The hybrid preliminary injunction: Paula goes to court and gets a preliminary injunction against Don saying, "You may not libelously say that Paula has cheated you in business, or you will be prosecuted for criminal contempt." I'll argue in Part VI that this also provides the constitutionally required procedural protections (unlike the widely condemned specific preliminary injunctions), but at the same time protects Paula against libel more quickly.

One way of understanding this is by focusing on exactly what kind of speech each remedy actually criminalizes:

12 *E.g.*, Austin Congress Corp. v. Mannina, 196 N.E.2d 33, 41 (Ill. App. Ct. 1964) (Burke, P.J., dissenting).

Criminal libel law	All statements found by jury to be libelous beyond a reasonable doubt
Catchall injunction	All statements by Don about Paula found by jury at contempt trial to be libelous beyond a reasonable doubt
Specific preliminary injunction	Specific statements by Don about Paula found by judge, based on abbreviated hearing, to probably be libelous
Specific permanent injunction	Specific statements by Don about Paula found by judge at trial to be libelous by a preponderance of the evidence
Hybrid permanent injunction	Specific statements by Don about Paula found by judge at trial to be libelous by a preponderance of the evidence and then found by jury at contempt trial to be libelous beyond a reasonable doubt
Hybrid preliminary injunction	Specific statements by Don about Paula found by judge, based on abbreviated hearing, to probably be libelous and then found by jury at contempt trial to be libelous beyond a reasonable doubt

I will argue that:

1. Properly crafted criminal libel laws and catchall injunctions are constitutional, though probably too broad as to be a good idea.

2. Specific injunctions, permanent or preliminary, are unconstitutional (whether under the First Amendment or under state constitutions).

3. Hybrid injunctions, permanent or preliminary, are constitutional and may indeed be well-advised.

Properly crafted anti-libel injunctions are thus permissible under the First Amendment, if a state chooses to implement them, as some state courts[13] and state legislatures[14] have done. (I set aside here injunctions that forbid more than just the libelous statements; those are generally unconstitutionally

13 *See infra* note 39 and accompanying text.

14 *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-1809(A), (S) (2019) (authorizing injunctions against "harassment," defined to include at least two acts "directed at a specific person . . . that would cause a reasonable person to be seriously alarmed, annoyed or harassed," that do in fact "seriously alarm[], annoy[] or harass[]" and that "serve[] no legitimate purpose," expressly "includ[ing]" defamation of an employer); *id*. at § 23-1325 (authorizing "injunctive relief from . . . defamation" of an employer), *invalidated by* United Food & Commercial Workers Local 99 v. Bennett, 934 F. Supp. 2d 1167, 1196 (D. Ariz. 2013) (striking down the statute because it created special remedies for defamation of employers, as opposed to defamation of others).

overbroad, and I discuss them in a separate article.[15]) Such properly crafted anti-libel injunctions should also be seen as constitutional under state constitutions, even those that contain language that has sometimes been seen as categorically foreclosing injunctions.[16]

But deciding whether to allow such injunctions also requires a difficult judgment about state remedies law, again precisely because each injunction effectively creates a mini criminal libel law.

For instance, about a dozen states have criminal libel laws, and most of those states at least occasionally use them.[17] A properly crafted anti-libel injunction would thus cut out the opportunity for prosecutors to use their discretion to decline to launch a criminal libel prosecution: a contempt-of-court prosecution for violating an injunction can be started by the court itself—or, in some states, even by the plaintiff—with no need for prosecutorial approval. As I'll discuss in Part VII, courts need to decide whether this is a feature or a bug.[18]

In Part VIII, I'll turn to states that have repealed their criminal libel laws. Should courts view the legislative judgment behind repealing criminal libel laws as condemning all criminal punishment for libel, in which case even the narrow injunctions should be unavailable? Or should they view the legislative judgment as condemning only the broad chilling effect of normal criminal libel laws, in which case the narrow injunctions would be permissible?[19] These are hard questions to answer, but state courts need to ask them when deciding whether to recognize a novel remedy that seems to recriminalize what the legislature decriminalized.

In Part IX, I'll shift to federal courts, since many libel cases end up in federal court because of the parties' diversity of citizenship. I'll argue that, even if a federal court concludes that an injunction in such a case would be consistent with the First Amendment, it should also (following *Erie*[20]) consider whether such an injunction is consistent with state law, as set forth by state courts or as predicted by the federal court.[21]

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15 *See* Eugene Volokh, Overbroad Injunctions Against Libel and Other Speech (unpublished manuscript) (on file with author).

16 *Compare, e.g.*, Willing v. Mazzocone, 393 A.2d 1155, 1157 (Pa. 1978) (reading the Pennsylvania Constitution as foreclosing injunctions), *with Petrotech Res. Corp.*, 325 S.W.3d at 312 (reading nearly identical language in Kentucky Constitution as allowing injunctions after a "judicial determination of falsity").

17 *See infra* note 25.

18 *See infra* Part VII.

19 *See infra* Part VIII.

20 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

21 *See infra* Part IX.

I. THE FIRST AMENDMENT AND CRIMINAL LIBEL LAW

The threat of jail has historically been one potential deterrent to libelers—though under the rubric of criminal libel rather than anti-libel injunctions—and it remains a potential deterrent in some states.

Criminal libel laws are constitutional if they are consistent with First Amendment libel law's mens rea rules (generally speaking, if they require a showing of defendant's "actual malice"[22]). 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.[23]

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.[24] The Court has never

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22 *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.

23 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).

24 *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).

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,[25] and criminal libel prosecutions continue in most of those states.[26] Indeed, after the Minnesota criminal libel statute was struck down as overbroad in 2015,[27] the Minnesota legislature reenacted a properly narrowed statute.[28]

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."[29] 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.

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25 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).

26 *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).

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

28 MINN. STAT. ANN. § 609.765 (2018).

29 Gottschalk v. State, 575 P.2d 289, 292 (Alaska 1978). The ACLU of New Hampshire has likewise challenged the New Hampshire criminal libel law on vagueness grounds. See Complaint at 9, Frese v. MacDonald, No. 1:18-cv-01180 (D.N.H. Dec. 18, 2018).

But it seems to me that, if a criminal libel law statute is limited to knowingly (or perhaps recklessly[30]) 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.[31] 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.[32] The definition of libel also has a well-established "common law meaning," a matter that the vagueness precedents view as significant.[33]

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."[34] Rather, a statute is unconstitutionally vague only when an element is "indeterminate[]," as with statutes that criminalized

30 "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).

31 *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* State v. Gile, 321 P.3d 36 (unpublished table opinion), 2014 WL 1302608, at *5 (Kan. Ct. App. Mar. 28, 2014) (rejecting a vagueness challenge to a blackmail statute punishing threats to expose a person to "public ridicule, contempt, or degradation"); 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");.

Ashton v. Kentucky struck down a common-law criminal libel rule on vagueness grounds, but only because the rule—inconsistent 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. June 19, 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").

32 *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).

33 *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).

34 United States v. Williams, 553 U.S. 285, 305-06 (2008).

"annoying" or "indecent" speech—"wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings."[35]

"Condemned to the use of words, we can never expect mathematical certainty from our language";[36] 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.[37] 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.[38]

II. THE FIRST AMENDMENT AND THE CATCHALL PERMANENT INJUNCTION

A. *The Catchall Injunction as a Narrower Criminal Libel Provision*

Properly limited criminal libel laws, then, are constitutional. But one can certainly be worried about their potential chilling effect. If they are enforced, then any time anyone writes anything potentially derogatory about anyone else, the writer should worry about the risk of prosecution. Though criminal libel laws generally require the prosecutor to prove that the speaker made a knowingly or recklessly false statement of fact, some speakers might worry that the prosecutor and the factfinder will misjudge this; and even the threat of an unsuccessful prosecution can deter many speakers.

Criminal libel laws also give prosecutors broad power to suppress criticism of their political allies; many speakers could be silenced just by the threat of criminal prosecution for something that the prosecutor claims (even unsoundly) to be libelous. In theory, of course, the threatened prosecution could not succeed unless the prosecutor persuades the judge on the law and the jury on the facts. But in practice, many speakers might not want to face the risk of conviction, or even just of the arrest and the expense of a criminal lawyer. All this may help explain why criminal libel laws have largely fallen out of favor.

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35 *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)).

36 Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

37 *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).

38 *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.").

Let's imagine, then, that a legislature enacts a narrower statute: Before anyone (again, call him Don) can be prosecuted for criminal libel, the alleged victim (Paula) must first go to court and get a judicial decision that Don has already said something libelous about her. Only once Paula has that decision, and Don is aware of this (indeed, he may have been in court to object to any such decision), could any future libelous statements by Don about Paula lead to a libel prosecution. This would be a less chilling variant of criminal libel law—a one-free-bite-at-the-apple version—and would thus be constitutional, as criminal libel law itself is.

And this hypothetical law, it turns out, is very much like one variety of permanent injunction—what we might call a "catchall permanent injunction," such as "Defendants . . . are prohibited from any further acts of defamation . . . [of] Plaintiffs . . . on the Internet."[39] To be sure, some of these injunctions are imperfectly worded. But if limited to prohibiting future libelous statements (i.e., statements that are knowingly[40] false, defamatory, and unprivileged), these injunctions would essentially mirror the hypothetical only-after-a-finding-of-past-libel criminal libel statute that I described above; they just operate by threatening punishment for criminal contempt rather than punishment for criminal libel.

Let's compare criminal libel laws with these catchall permanent injunctions:

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39 Boyd v. Does, No. 14BA-CV03038, ¶ a (Mo. Cir. Ct. Jan. 20, 2015); *see also* Appendix B (citing many more cases that involve such catchall injunctions).

Some jurisdictions authorize such injunctions in some circumstances even in the absence of a finding of past defamation. One Ohio court categorically orders such injunctions in divorce cases: "In all cases, upon the filing of the initial Complaint for divorce, . . . both spouses shall be restrained from . . . [u]sing the Internet . . . for the purpose of posting . . . [materials] which threaten, harass or defame and/or slander the other spouse . . . ." CUYAHOGA CTY., OHIO DOM. REL. CT. R. 24(A)(1)(c). And a Pennsylvania statute, enacted in 1937 but still occasionally used today, provides that all injunctions arising out of a labor dispute must order that "complainant and/or the employer . . . shall be enjoined from any and all . . . acts or threats of violence, intimidation, coercion, molestation, libel or slander against the respondents or organizations engaged in the labor dispute." 43 PA. STAT. & CONS. STAT. ANN. § 206n (West 2019); Brief of Appellants at 3, Turner Constr. v. Plumbers Local 960, Nos. 2754 EDA 2014, 2421 EDA 2014, 2422 EDA 2014 (Pa. Super. Ct. Dec. 23, 2014) (quoting trial court order).

40 *See infra* note 184 and accompanying text for why these injunctions are limited to knowing falsehoods.

Criminal libel law	Catchall permanent injunction
Deters derogatory speech about everyone	Deters derogatory speech only about the plaintiff
Deters derogatory speech at any time	Deters derogatory speech only after the injunction is entered
Speech punished only if found to be false beyond a reasonable doubt	Same[41]
... at a criminal trial where an indigent defendant would have a court-appointed lawyer	Same[42]
... and where finding is by jury	Same, if judge or legislature provides that any criminal contempt trial will be before jury

Note that the last three rows all stem from the injunction by its terms prohibiting only libelous statements. Because that's an element of the injunction, any future statements by Don must be proved to be libelous at the criminal contempt trial. And as at any criminal trial, there must be proof beyond a reasonable doubt, and (if there's a risk of jail time) a court-appointed lawyer.

The initial finding that Don had libeled Paula is only made by a preponderance of the evidence, and with no entitlement to a lawyer, because the *entry* of the injunction (as opposed to its enforcement) is a civil proceeding. But that finding doesn't bind the jury at the criminal contempt hearing—that jury must itself separately find that Don's post-injunction statements (or his post-injunction repetitions of his pre-injunction statements) were libelous. The injunction only opens the door to the criminal courthouse; it doesn't itself conclusively determine that certain specific statements can't be repeated.

The one possible difference between the criminal libel trial and the criminal contempt trial in a catchall injunction case has to do with whether a jury is available. A jury must be provided in most criminal cases—including criminal libel cases—if the *maximum statutory authorized sentence* is over six months (or some lower threshold set by state law); all but one of the states that have criminal libel statutes either provide for such a punishment or otherwise provide for a right to trial by jury under state law.[43] A jury must be

41 Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911); Matanuska Elec. Ass'n v. Rewire the Bd., 36 P.3d 685, 701 (Alaska 2001).

42 Turner v. Rogers, 564 U.S. 431, 442 (2011).

43 *See infra* Part IV.C.

provided in criminal contempt cases, on the other hand, only if the judge expects to impose an *actual sentence* of over six months.[44]

But even if juries aren't normally available in such criminal contempt cases, the judge can simply make clear that any criminal contempt trial for violating this particular injunction will be before a jury, at least unless the prosecutor and the defense both agree to waive a jury trial.[45] Indeed, this could be provided by statute or by rule, as it is, for instance, under the Norris-LaGuardia Act for certain labor injunctions[46] and under some state laws for various kinds of contempt cases.[47]

Jailing someone for civil contempt as a coercive measure—generally until he removes posts that the court has found to be false and defamatory[48]—would, I think, violate the First Amendment precisely because it would lack the protections provided by the criminal justice process.[49] But criminal contempt sanctions would be as permissible as criminal libel prosecutions.

This having been said, catchall permanent injunctions have not enjoyed much success in appellate courts. Several courts have expressly struck down such injunctions, in part because they are so "broad and general."[50] I have found only one case expressly upholding such a catchall injunction against a

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44 *See* Codispoti v. Pennsylvania, 418 U.S. 506, 512-13 (1974).

45 This assumes, of course, that state law doesn't mandate bench trials when shorter terms are involved, but I don't know of any laws that impose such mandates.

46 18 U.S.C. § 3692 (2018).

47 *See, e.g.*, UTAH CODE ANN. § 34-19-9 (West, Westlaw through 2019 first spec. sess.) (same); VT. R. CRIM. P. 42(b) (3) (providing for jury trial in all contempt cases, regardless of the length of punishment or of the subject matter); W. VA. CODE ANN. § 48-1-304 (West, Westlaw through Aug. 1, 2019) (providing for jury trial in criminal contempt cases for violations of orders in family law cases, even though the maximum sentence is set at only six months).

48 *See, e.g.*, Enovative Techs., LLC v. Leor, 110 F. Supp. 3d 633, 637 (D. Md. 2015) (ordering that defendant "be held in jail as a coercive sanction for civil contempt, unless and until he purges himself of contempt and complies with the preliminary injunction"). "If the relief provided [in a contempt hearing] is a sentence of imprisonment, it is remedial [and thus civil contempt] if 'the defendant stands committed unless and until he performs the affirmative act required by the court's order.'" Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 632 (1988) (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442 (1911)).

49 *See infra* note 147 and accompanying text. Note that financial sanctions for violating an anti-libel injunction, imposed in a civil contempt proceeding, *see, e.g.*, Schwartz v. Rent-a-Wreck of Am., 261 F. Supp. 3d 607, 621-22 (D. Md. 2017), should be permissible (at least if the injunction follows a civil jury trial), just as damages liability for libel is permissible. The criminal procedure protections that I discuss here are required, I think, only when jail time is imposed.

50 Hill v. Stubson, 420 P.3d 732, 744 n.7 (Wyo. 2018); *see* Metro. Opera Ass'n. v. Local 100, 239 F.3d 172, 176-78 (2d Cir. 2001); Karnaby v. McKenzie, 54 Conn. L. Rptr. 71 (Conn. Super. Ct. 2012); Royal Oaks Holding Co. v. Ready, No. C4-02-267, 2002 WL 31302015, at *4 (Minn. Ct. App. Oct. 7, 2002); D'Ambrosio v. D'Ambrosio, 610 S.E.2d 876, 886 (Va. Ct. App. 2005); *see also* Gold & Diamond Buyers, LLC v. Friedlich, No. 11-21843, 2011 WL 13322791, at *3 (S.D. Fla. Sept. 26, 2011); *cf.* Hill v. Petrotech Res. Corp., 325 S.W.3d 302, 311 n.5 (Ky. 2010) (condemning "wide-sweeping language" in anti-libel injunctions, apparently including the prohibition of "publishing . . . [any defamatory] public comments pertaining in any way to the Plaintiffs" (alteration in original)).

First Amendment challenge, and there the decision was heavily influenced by the interest in protecting the parties' children—the injunction had been entered as a result of a contentious divorce, and barred the ex-husband from defaming his ex-wife.[51]

Yet many trial courts do issue such injunctions, without discussing the First Amendment.[52] Moreover, these are close analogs of the modern "antiharassment" injunctions, in which a finding of "harassment"—often involving speech—leads to an injunction against all further harassment, rather than just repetition of specific conduct or speech that had been found to be harassing. Many courts have upheld such catchall anti-harassment injunctions.[53] Whether or not those decisions are correct as to "harassment" (given the vagueness and potential breadth of that term), their logic would apply even more forcefully to prohibitions of defamation, which is more clearly established as falling within a First Amendment exception than harassment is.[54]

B. *The Prior Restraint Objection*

Nor is there any basis for treating catchall anti-libel injunctions as forbidden "prior restraints" while criminal libel laws impose mere "subsequent punishments." Both punish speakers only after they speak. Both deter speech before it is said.[55]

Indeed, anti-libel injunctions that ban repeating specific statements deter less speech than criminal libel law does: they forbid defendants only from saying particular things about the plaintiffs, while criminal libel law threatens defendants with punishment for any false and defamatory statements about

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51 *In re* Marriage of Olson, 850 P.2d 527, 532 (Wash. Ct. App. 1993). Rightly or wrongly, courts have been considerably more open to restricting speech when they view the restrictions as necessary to protect the speaker's children, especially against speech that seems likely to interfere with the children's relationship with the other parent. *See generally* Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 640-41 (2006).

In *Loden v. Schmidt*, the Tennessee Court of Appeals upheld an injunction forbidding the defendant from "making any untrue or defamatory statements regarding" plaintiff. No. M2014-01284-COA-R3-CV, 2015 WL 1881240, at *3 (Tenn. Ct. App. Apr. 24, 2015). But the court specifically noted that the plaintiff hadn't argued that the injunction was too broad and that the court was therefore not discussing the question. *Id.* at *9 n.11.

52 *See infra* Appendix B.

53 *See, e.g.*, R.D. v. P.M., 135 Cal. Rptr. 3d 791, 799-800 (Ct. App. 2011); Huntingdon Life Sci., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 29 Cal. Rptr. 3d 521, 538-39 (Ct. App. 2005).

54 "There is no categorical 'harassment exception' to the First Amendment . . . ." State v. Burkert, 174 A.3d 987, 1000 (N.J. 2017) (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.)).

55 *See, e.g.*, Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 11 (1981); Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 278 (1971); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 728 (1978).

anyone.[56] In this respect, they are much narrower than the prior restraints that the Court has struck down in its classic prior restraint cases—injunctions barring all future publication of a newspaper,[57] requiring all movies to be submitted for administrative review before being shown,[58] barring all speech about a particular person,[59] and the like.

The premise behind the prior restraint doctrine, the Court has held, is that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand."[60] But catchall anti-libel permanent injunctions do not throttle all speakers before they break the law—they threaten only that defendants will be punished after they have been found to have to have libeled the plaintiff.

Indeed, the Court "has never held that all injunctions [against speech] are impermissible"; "[t]he special vice of a prior restraint is that communication will be suppressed . . . *before an adequate determination that it is unprotected* by the First Amendment."[61] *After* speech is conclusively judicially determined to be unprotected, a permanent injunction should be no more troubling on constitutional grounds than a civil or criminal penalty, because "the order will not have gone into effect before [the court's] final determination that the [speech was] unprotected."[62] "An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final

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56 *See* Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 550-51 (1977) (making this point as to speech-restrictive injunctions more broadly); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 427–29 (1983) (same); William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 270 (1982) (likewise); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 93 (1984) (likewise); Schauer, *supra* note 55, at 728-29 (likewise). To be sure, the injunctions can deter particular statements more strongly. "[B]ecause an injunction can be drawn more precisely than a criminal statute, it can have a greater deterrent effect by removing any doubt in the mind of the enjoined party that particular conduct is forbidden." FTC v. Accusearch, Inc., 570 F.3d 1187, 1202 (10th Cir. 2009). But if the injunction specifically covers statements that the court has found to be false, it is likely good that it will especially deter repetition of those statements—and also good that it won't deter other statements.

57 *See* Near v. Minnesota, 283 U.S. 697, 722-23 (1931).

58 *See* Freedman v. Maryland, 380 U.S. 51, 54-55 (1965).

59 *See* Org. for a Better Austin v. Keefe, 402 U.S. 415, 419-20 (1971).

60 Vance v. Universal Amusement Co., 445 U.S. 308, 316 n.13 (1980).

61 Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973) (emphasis added); *see also* Auburn Police Union v. Carpenter, 8 F.3d 886, 903 (1st Cir. 1993) (quoting *Pittsburgh Press* on this point). The injunction in N.Y. Times Co. v. United States (the *Pentagon Papers* case), 403 U.S. 713 (1971), for instance, was a preliminary injunction issued a few days after the government asked for it, United States v. N.Y. Times Co., 328 F. Supp. 324, 326 (S.D.N.Y. 1971), not following a trial at which the speech was found to be unprotected.

62 *See Pittsburgh Press*, 413 U.S. at 390.

adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint."[63]

The Court has held that courts may properly enjoin the continued distribution of material that has been found to be obscene[64] or to be unprotected commercial speech.[65] Other courts have held the same as to other unprotected speech.[66] The logic of those cases extends to libel as well, and the Court's occasional dicta labeling all injunctions as prior restraints are somewhat erroneous overgeneralizations.[67]

C. *The "Adequate Remedy at Law" Objection*

Some courts have said that the mere theoretical availability of a libel damages claim makes it a legally adequate remedy, even if it's a practically useless remedy.[68] But that seems more to assume the conclusion—injunctions should not be allowed because damages are the legally exclusive remedy (whether or not they are practically adequate)—than to justify it.[69]

When injunctions are available, they should be equally available whether or not damages are also practically available (for instance, even when the libel defendants do have assets or insurance). There can't be a rule under which

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63 *See Auburn Police Union*, 8 F.3d at 903.

64 *See* Kingsley Books, Inc. v. Brown, 354 U.S. 436, 443-44 (1957).

65 *See Pittsburgh Press*, 413 U.S. at 390.

66 *See, e.g.*, *Auburn Police Union*, 8 F.3d at 903 (allowing an injunction against unprotected charitable solicitation); Lassalle v. Daniels, 96-0176 (La. App. 1 Cir. 5/10/96); 673 So. 2d 704, 710 (upholding an injunction against unprotected true threats of criminal attack).

67 *Compare* Alexander v. United States, 509 U.S. 544, 550 (1993) ("[P]ermanent injunctions . . . are classic examples of prior restraints."), *with* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 763 n.2 (1994) (holding that certain content-neutral injunctions are not prior restraints), *Pittsburgh Press*, 413 U.S. at 389-90 (same as to injunction barring sex-segregated want ads), *and Kingsley Books*, 354 U.S. at 441-45 (same as to injunction against obscenity).

68 *See, e.g.*, Willing v. Mazzocone, 393 A.2d 1155, 1157-58 (Pa. 1978) ("In deciding whether a remedy is adequate, it is the remedy itself, and not its possible lack of success [when a defendant is insolvent] that is the determining factor." (citations omitted)); *see also* Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 170 (2007) (taking the same view). *But see* DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES 346 (5th ed. 2019) ("Does it make any sense at all to say that a damage judgment is adequate if it can never be collected? The Pennsylvania rule is in a tiny minority; it might not even be the rule in Pennsylvania if the issue were squarely presented outside a free speech context.").

69 Outside libel cases, courts have in practice abandoned the theory that injunctions are available only when there is no adequate legal remedy. *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 4-5 (1991) ("Courts have escaped the irreparable injury rule by defining adequacy in such a way that damages are never an adequate substitute for plaintiff's loss. Thus, our law embodies a preference for specific relief if plaintiff wants it."). And in cases involving continuous distribution of libelous allegations—for instance, on the Internet—damages seem especially inadequate. "Both because the thing lost is irreplaceable and because the loss is hard to measure, damages are a seriously inadequate remedy for defamation." *Id.* at 165; *see also* Rendleman, *supra* note 2, at 37.

"poor people . . . have their speech enjoined, while the rich are allowed to speak so long as they pay damages":[70] "Conditioning the right of free speech upon the monetary worth of an individual is inconsistent" with constitutional principles.[71] Yet while this reasoning has sometimes been used to reject injunctions against both poor and rich defendants,[72] it can also be a reason to allow properly crafted injunctions as to both.[73]

D. *The "Equity Will Not Enjoin a Libel" Objection*

Many past cases do say that "equity will not enjoin a libel," but that was a descriptive claim, describing a rule that no longer applies in many states.[74]

Indeed, even in the past it had not been an entirely accurate description. Historically, some courts had been willing to enjoin libels if the defendant's libels affected the plaintiff's business.[75] Some have been willing to enjoin libels if the defendant was engaging in a pattern of repeated defamatory speech (which would be the very scenario where an injunction would be most useful).[76]

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70 Chemerinsky, *supra* note 68, at 170. Though Dean Chemerinsky had argued that this was a reason to reject anti-libel injunctions entirely, *id.*, he later concluded that there was no "reason to continue the traditional rule that there can never be an injunction in defamation cases," at least when the injunction is "limited to specific speech that is proven to be false." Erwin Chemerinsky, *Tucker Lecture, Law and Media Symposium*, 66 WASH. & LEE L. REV. 1449, 1460 (2009).

71 *Willing*, 393 A.2d at 1158; *see also* Reyes v. Middleton, 17 So. 937, 939 (Fla. 1895) ("[T]he alleged insolvency of the libellant . . . will not, of itself, authorize the interference of the court of equity."); Kinney v. Barnes, 443 S.W.3d 87, 100 (Tex. 2014) ("[T]he constitutional protections afforded Texas citizens are not tied to their financial status."). This principle dates back at least to 1876:

> [I]f this remedy be given on the ground of the insolvency of the defendant, the freedom to speak and write, which is secured, by the Constitution of Missouri, to all its citizens, will be enjoyed by a man able to respond in damages to a civil action, and denied to one who has no property . . . .

Life Ass'n of Am. v. Boogher, 3 Mo. App. 173, 176 (Ct. App. 1876).

72 *See supra* notes 70-71.

73 *See* LAYCOCK & HASEN, *supra* note 68, at 346.

74 *See, e.g.*, Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 349 (Cal. 2007) (quoting this maxim but ultimately authorizing such injunctions); Hill v. Petrotech Res. Corp., 325 S.W.3d 302, 308 (Ky. 2010) (same); *In re* Conservatorship of Turner, No. M2013-01665-COA-R3-CV, 2014 WL 1901115, at *20 (Tenn. Ct. App. May 9, 2014) (same).

75 *E.g.*, Carter v. Knapp Motor Co., 11 So. 2d 383, 385 (Ala. 1943); Menard v. Houle, 11 N.E.2d 436, 437 (Mass. 1937).

76 *E.g.*, Palmer v. Travers, 20 F. 501, 501 (C.C.S.D.N.Y. 1884) ("Courts of equity have no jurisdiction of . . . slander or libel, unless threatened or apprehended repetition makes preventive relief proper and necessary."); M. Steinert & Sons Co. v. Tagen, 93 N.E. 584, 585 (Mass. 1911) ("The case does not come within the doctrine that equity will not enjoin the publication of a libel. There is here a wrongful act maliciously done, continuing and repeated day by day . . . ."). Some such cases limited themselves to defamation that damages the plaintiff's business, on the theory that this affects property rights and not just personal rights. *E.g.*, *Menard*, 11 N.E.2d at 437 ("[E]quity will take jurisdiction where there is a continuing course of unjustified and wrongful attack upon the plaintiff

And some decisions, rendered when the states still had separate law and equity courts, said that equity will not enjoin a libel only in the sense that any injunctions would have to be ancillary to damages claims filed on the law side.[77]

E. *The Vagueness Objection*

Unlike specific injunctions, catchall injunctions leave future prosecutors and juries to decide which statements are false and defamatory, and thus leave speakers to guess what those prosecutors and juries would do.[78] But in this respect they are no more vague than criminal libel statutes: if an injunction bars you from knowingly saying false and defamatory things about me, you may be uncertain about what is factually false and about what might be found to be legally defamatory—but that is also true if a criminal libel statute bars you from knowingly saying false and defamatory things about anyone. And, as Part I explained, criminal libel statutes are indeed not unconstitutionally vague.

F. *The Singling Out Objection*

Nor should injunctions be rejected on the grounds that they especially deter speech by "affirmatively singling out the would-be disseminator."[79] The same effect would flow from a prosecutor accurately warning a speaker that continuing to make a particular statement would lead to a criminal libel charge. Such prosecutorial threats are not unconstitutional;[80] similarly targeted injunctions should not be either.[81]

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motivated by actual malice, and causing damage to property rights as distinguished from 'injury to the personality affecting feelings, sensibility and honor . . . .'").

77 *See, e.g.*, Francis v. Flinn, 118 U.S. 385, 389 (1886); Organovo Holdings, Inc. v. Dimitrov, 162 A.3d 102, 125-26 (Del. Ch. 2017); Warren House Co. v. Handwerger, 213 A.2d 574, 576 (Md. 1965); Prucha v. Weiss, 197 A.2d 253, 256 (Md. 1964).

78 *See* Rendleman, *supra* note 2, at 60 (arguing that catchall anti-libel injunctions are "both too broad and too vague," because they "forbid[] the defendant's expression that had not already been found to be defamatory" and "provide[] the defendant with insufficient notice of expressions that would violate it").

79 TRIBE, *supra* note 4, at 1042 n.2.

80 *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 71-72 (1963); State Cinema of Pittsfield, Inc. v. Ryan, 422 F.2d 1400, 1402 (1st Cir. 1970). *Bantam Books* barred a scheme through which a state commission tried to pressure booksellers to stop selling books that the commission found "objectionable" by threatening the booksellers with obscenity prosecutions. 372 U.S. at 61-63. But the Court expressly said that "law enforcement officers" are free to engage in "informal contacts with persons suspected of violating valid laws . . . . with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them . . . ." *Id.* at 71-72. A prosecutor in a state where libel is a crime is thus free to warn a speaker that, if the speaker continues saying things that the prosecutor believes to be false and defamatory, the prosecutor will file charges—just as prosecutors are free to do the same as to other crimes.

81 Frederick Schauer suggests that some very prominent speakers—for example, publishers of the *New York Times*—may feel they have little to fear from prosecutors, but more to fear from judges

G. *The "No Obey-the-Law Injunctions" Objection*

A catchall anti-libel injunction forbidding defendant from making any libelous statements about plaintiff essentially orders the defendant to comply with libel law. But while courts sometimes say that "[i]njunctions that broadly order the enjoined party simply to obey the law . . . are generally impermissible,"[82] there is an important limitation on that principle: "[W]hen one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts."[83] Catchall anti-libel injunctions are generally issued precisely when a defendant has engaged in a campaign of

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who have specially targeted them in an injunction, at least when it comes to national security injunctions:

> Those who are both highly visible and at the same time socially or politically or culturally unlikely to serve time in prison will have special reason to fear the prior restraint, for disobedience to such a restraint may create a possibility of punishment where for all practical purposes none existed before.

Frederick Schauer, *Parsing the Pentagon Papers* 4 (Joan Shorenstein Barone Center Research Paper R-3, 1991). But I'm not sure this is so, at least as to the anti-libel injunctions we're discussing—newspaper publishers may assume that they won't be sent to jail for violating an anti-libel injunction any more than for violating a criminal libel statute. And in any event, even if this is so for a few speakers, it is unlikely to be so for most.

82 Spreadbury v. Bitterroot Pub. Library, No. CV 11-64-M-DWM-JCL, 2011 WL 7462038, at *12 (D. Mont. Nov. 30, 2011) (cleaned up) (applying this principle to reject a proposed catchall anti-libel injunction); Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781, 817 (2013) ("However they are phrased, orders that amount to 'no more harassment' without specifying the acts to be avoided violate the rule against 'obey the law' injunctions."); *see also generally* Perez v. Ohio Bell Tel. Co., 655 F. App'x 404, 411 (6th Cir. 2016) (condemning obey-the-law injunctions more broadly, outside defamation law); EEOC v. AutoZone, Inc., 707 F.3d 824, 841-42 (7th Cir. 2013) (same); SEC v. Goble, 682 F.3d 934 (11th Cir. 2012) (same); Gaddy v. Abex Corp., 884 F.2d 312, 318 (7th Cir. 1989) (same).

83 NLRB v. Express Publ'g Co., 312 U.S. 426, 436 (1941); *see also AutoZone*, 707 F.3d at 842-43 (holding that obey-the-law injunctions can be proper "where the evidence suggests that the proven illegal conduct may be resumed"). Both these cases are often cited as precedents against obey-the-law injunctions, but even they recognize that such injunctions may be proper when the defendant is engaging in a pattern of illegal behavior. For an illustration, see Lineback v. Spurlino Materials, LLC, 546 F.3d 491 (7th Cir. 2008), which upheld an injunction banning all illegal retaliation by an employer against union members, even though the employer had been found only to have discriminated against three particular members.

> [T]he district court reasonably found a continuous and deliberate effort on the part of Spurlino to undermine the Union organization effort. Accordingly, it concluded that there was a likelihood that the company would act further to thwart the Union's efforts . . . . Given these specific findings, . . . paragraphs 1 and 2 do not exceed the scope of the court's authority to enjoin similar actions by the company.

Id. at 504.

defaming a plaintiff, and they restrain only future defamation of the same plaintiff—a continuation of the same campaign of "related [libelous] acts."[84]

To be sure, some obey-the-law injunctions in other areas have been condemned as being too vague, and as not giving defendants enough notice of what is forbidden.[85] That makes sense when an injunction categorically bans a defendant from, say, "violat[ing] the Clean Water Act"[86] or "violating First Amendment rights."[87] Those legal rules may be well-defined enough for civil liability, but not for criminal punishment for contempt of court. But, for reasons given above in Part II.B, orders that ban knowingly false and defamatory statements—like criminal libel statutes that ban such statements—are sufficiently clear.[88]

III. THE FIRST AMENDMENT AND THE SPECIFIC PRELIMINARY INJUNCTION

Let's now shift from an anti-libel injunction that I argue is constitutionally permissible (even if perhaps unsound in other ways)—the catchall injunction—to one that is broadly viewed as unconstitutional: the specific preliminary injunction. Paula sues Don for libel, arguing that Don lied when he said that Paula had cheated him in business. She gets a preliminary injunction, just weeks after filing, or even a temporary restraining order (whether or not ex parte) just days after filing. That injunction says, "Don shall not accuse Paula of cheating him," and lasts until

84 *Express Publ'g Co.*, 312 U.S. at 436; *see also Autozone*, 707 F.3d at 841 ("[I]njunctions should prohibit no more than the violation established in the litigation or similar conduct reasonably related to the violation.").

85 *See, e.g.*, Burton v. City of Belle Glade, 178 F.3d 1175, 1201 (11th Cir. 1999) (rejecting a proposed injunction barring "the City from discriminating on the basis of race in its annexation decisions," because it "would do no more than instruct the City to 'obey the law'" and thus "would not satisfy the specificity requirements of Rule 65(d) and . . . it would be incapable of enforcement").

86 *See, e.g.*, Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1531-32 (11th Cir. 1996) (rejecting injunction barring defendant from "discharg[ing] stormwater into the waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place *if such discharge would be in violation of the Clean Water Act*" (emphasis added)).

87 *See, e.g.*, Elend v. Sun Dome, Inc., 370 F. Supp. 2d 1206, 1211 (M.D. Fla. 2005) (rejecting "prohibition against violating First Amendment rights"); *cf.* Screws v. United States, 325 U.S. 91, 97-98 (1945) (plurality opinion) (rejecting interpretation of criminal statute that would criminalize any "act which some court later holds deprives a person of due process of law," because "[t]he enforcement of a criminal statute so construed would indeed cast law enforcement agencies loose at their own risk on a vast uncharted sea").

88 *Metro. Opera Ass'n. v. Local 100*, held that an injunction barring a union from making "defamatory representations" was too vague. 239 F.3d 172, 174-78 (2d Cir. 2001). But that analysis rested largely on how broadly the trial court had interpreted the prohibition—for instance, including statements such as "Shame On You" and "No More Lies," *id.* at 176, 178, which are pretty clearly opinion. The Second Circuit didn't discuss why the ban on defamatory statements is inherently any more vague than similar bans in constitutionally permissible criminal libel statutes.

trial (which could be years, or at least many months, in the future).[89] It is specific rather than catchall because it bans only the repetition of a specific allegation or set of allegations (here, of cheating).

Such specific preliminary injunctions have been sharply condemned by most appellate courts that have seriously considered them—even by courts that authorize specific permanent injunctions—because those injunctions suppress speech *without* a finding on the merits that the speech is unprotected. In the words of the California Supreme Court in *Balboa Village Island Inn, Inc. v. Lemen*, the most influential recent decision allowing permanent injunctions against libel,

> In determining whether an injunction restraining defamation may be issued, . . . it is crucial to distinguish requests for preventive relief prior to trial and post-trial remedies to prevent repetition of statements judicially determined to be defamatory. . . . The attempt to enjoin the initial distribution of a defamatory matter meets several barriers, the most impervious being the constitutional prohibitions against prior restraints on free speech and press. . . . In contrast, an injunction against continued distribution of a publication which a jury has determined to be defamatory may be more readily granted.[90]

Likewise, when the Kentucky Supreme Court authorized permanent injunctions against libel, it expressly rejected preliminary injunctions:

> [T]he speech alleged to be false and defamatory by the Respondents has not been finally adjudicated to be, in fact, false. Only upon such a determination could the speech be ascertained to be constitutionally unprotected, and therefore subject to injunction against future repetition . . . . [W]hile the rule may temporarily delay relief for those ultimately found to be innocent victims of slander and libel, it prevents the unwarranted suppression of speech of those who are ultimately shown to have committed no defamation, and thereby protects important constitutional values.[91]

The Nebraska Supreme Court took the same view:

> A jury has yet to determine whether Sullivan's allegations about Dillon and his business practices are false or misleading representations of fact. For these

89 For examples of such injunctions, see Appendix C.

90 156 P.3d 339, 350 (2007) (quoting 1 HANSON, LIBEL AND RELATED TORTS 139-40 (1969)) (cleaned up); *see also* LAYCOCK & HASEN, supra note 68, at 346-48 (interpreting the precedents as drawing the same line); Redish, *supra* note 568, at 55 (same); David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 Wm. & Mary L. Rev. 1, 59-60 (2013). *But see* Rendleman, *supra* note 2, at 41-42 (arguing that preliminary injunctions should be allowed, so long as the judge concludes that "success on the merits is 51% likely").

91 Hill v. Petrotech Res. Corp., 325 S.W.3d 302, 311 (Ky. 2010).

> reasons, we conclude that the temporary restraining order, as well as the permanent injunction restraining Sullivan's speech, constitute unconstitutional prior restraints in derogation of Sullivan's right to speak.[92]

Or in the words of the Alaska Supreme Court, "[p]reliminary injunctions are almost always held to be unconstitutional burdens on speech because they involve restraints on speech before the speech has been fully adjudged to not be constitutionally protected."[93] And while the court went on to say that "[a] preliminary injunction barring speech may be permissible only if the trial court has fully adjudicated and determined that the affected speech is not constitutionally protected," the injunction that it was authorizing this way isn't really so preliminary.[94] The few appellate cases that have upheld preliminary injunctions against libel have not squarely responded to this criticism.[95]

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92 Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan, 559 N.W.2d 740, 747 (Neb. 1997).

93 Alsworth v. Seybert, 323 P.3d 47, 57 (Alaska 2014); *see also id.* at 57 n.36 ("The U.S. Supreme Court has suggested that a preliminary injunction against speech might be permissible if special procedural safeguards are in place to ensure that no protected speech is enjoined, but the injunction in this case contains no safeguards whatsoever.").

94 *Id.* at 57; *see also* Auburn Police Union v. Carpenter, 8 F.3d 886, 903 (1st Cir. 1993) (stressing that an injunction of charitable solicitation was permitted only "after a final adjudication on the merits that the speech is unprotected"); Paradise Hills Assocs. v. Procel, 1 Cal. Rptr. 2d 514, 519 (Ct. App. 1991) ("A preliminary injunction is a prior restraint."); Cohen v. Advanced Med. Grp. of Ga., Inc., 496 S.E.2d 710, 711 (Ga. 1998) (overturning a preliminary injunction against libel on the grounds that the injunction was not "entered subsequent to a verdict in which a jury found that statements made by [defendant] were false and defamatory" (quoting High Country Fashions, Inc. v. Marlenna Fashions, Inc., 357 S.E.2d 576, 577 (Ga. 1987))); Hartman v. PIP-Grp., LLC, 825 S.E.2d 601, 606 (Ga. Ct. App. 2019) ("We have found no Georgia case upholding an interlocutory injunction prohibiting speech . . . . [A]n injunction [against publication] has been upheld only when it 'was entered subsequent to a verdict in which a jury found that statements made by [the defendant] were false and defamatory.'" (internal citation omitted)); Mishler v. MAC Sys., Inc., 771 N.E.2d 92, 98-99 (Ind. Ct. App. 2002) (condemning a preliminary injunction issued "after only the most preliminary of determinations by the trial court"); St. Margaret Mercy Healthcare Cent., Inc. v. Ho, 663 N.E.2d 1220, 1223-24 (Ind. Ct. App. 1996) (dissolving a preliminary injunction on First Amendment grounds, because speech cannot be restricted "before an adequate determination that it is unprotected by the First Amendment"); Anagnost v. Mortg. Specialists, Inc., No. 216-2016-CV-277, 2016 WL 10920366, at *3 (N.H. Super. Ct. Aug. 4, 2016) ("[B]y asking for a preliminary injunction, the plaintiffs seek to enjoin Gill from making statements that have not yet been found to be unprotected.") (emphasis omitted).

95 *But see* San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters, 125 F.3d 1230, 1239 (9th Cir. 1997) (concluding that a preliminary injunction in a labor union libel case was not a prior restraint because the statements were so misleading as to be fraudulent, and "[t]he First Amendment does not protect fraud"); Parland v. Millennium Constr. Servs., LLC, 623 S.E.2d 670, 673 (Ga. Ct. App. 2005) (allowing a preliminary injunction so long as there is a showing of irreparable harm); Barlow v. Sipes, 744 N.E.2d 1, 10 (Ind. Ct. App. 2001) (allowing preliminary injunction as to speech on matters of "primarily private concern"); Gillespie v. Council, No. 67421, 2016 WL 5616589, at *3 (Nev. Ct. App. Sept. 27, 2016) (allowing preliminary injunction in libel case because a 1974 Nevada Supreme Court opinion had allowed such injunctions); Bingham v. Struve, 591 N.Y.S.2d 156, 158-59 (App. Div. 1992) (ordering a preliminary injunction against a libel on a matter of private concern,

More generally, the Supreme Court likewise held in *Vance v. Universal Amusement, Co.*[96] that alleged obscenity cannot be enjoined simply based on a pretrial showing that the speech was likely to be obscene—at least absent the procedural protections offered by *Freedman v. Maryland*[97]—even though it could be enjoined after a finding of obscenity on the merits.[98] Likewise, in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, the Court upheld an injunction against an illegal advertisement only "because no interim relief was granted," so that "the order will not have gone into effect before our final determination that the actions of Pittsburgh Press were unprotected."[99]

The problem with the specific preliminary injunction, then, is that it doesn't just lead to punishment of speech that a jury has found libelous beyond a reasonable doubt (or even by a preponderance of the evidence). It leads to punishment of speech that a judge has found will likely be shown to be libelous, and this finding may have been based on a highly abbreviated (and sometimes even ex parte) adjudicative process.

IV. THE FIRST AMENDMENT AND THE SPECIFIC PERMANENT INJUNCTION

A. *How the Specific Injunction Underprotects Speech*

Specific permanent injunctions, unlike specific preliminary injunctions, do follow a civil trial on the merits at which the speech has been found to be libelous. In fact, the trial might even be a jury trial. If a jury has found that speech is libelous and therefore constitutionally unprotected, why then shouldn't a court enjoin the defendant from repeating the speech? "Once specific expressional acts are properly determined to be unprotected by the first amendment, there can be

after concluding that the libel was constitutionally unprotected but without considering the prior restraint problem).

96 445 U.S. 308 (1980); *see also* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 239-40 (1990) (reaffirming the principle that a judicial finding of "probable cause" that speech is obscene is insufficient to justify a restriction, and applying this principle to "prior restraint[s] in advance of a final judicial determination on the merits"); Blount v. Rizzi, 400 U.S. 410, 420 (1971) (same); State v. Book-Cellar, Inc., 679 P.2d 548, 553-55 (Ariz. Ct. App. 1984) (upholding a statute that authorized preliminary injunctions against the distribution of obscenity by requiring "that a final judicial determination [be] made by the end of 60 days from the issuance of a preliminary injunction," a safeguard compelled by Freedman v. Maryland, 380 U.S. 51 (1965)); City of Cadillac v. Cadillac News & Video, Inc., 562 N.W.2d 267, 270 (Mich. Ct. App. 1997) (overturning a preliminary injunction of obscenity on the grounds that the injunction would permit "removal of allegedly obscene materials from circulation before a judicial determination whether the material is obscene, with none of the safeguards" established in *Freedman*).

97 380 U.S. 51, 59 (1965).

98 Kingsley Books, Inc. v. Brown, 354 U.S. 436, 440-43 (1957).

99 413 U.S. 376, 390 (1973).

no objection to their subsequent suppression or prosecution,"[100] and many courts have therefore indeed treated permanent injunctions against libel as generally permissible, at least in certain classes of cases.[101]

But while such specific injunctions are indubitably narrower than criminal libel laws, and even than catchall injunctions, they also fail to provide some of the key procedural protections that even criminal libel laws and catchall injunctions offer.[102] Consider:

Catchall permanent injunction	**Specific permanent injunction**
Deters derogatory speech only about the plaintiff	Same
Deters derogatory speech only after the injunction is entered	Same
Deters all derogatory speech about the plaintiff	Deters only particular derogatory statements about the plaintiff
Speech punished only if found to be false beyond a reasonable doubt	Speech punished based on finding of falsehood by preponderance of the evidence
... at a criminal trial where an indigent defendant would have a court-appointed lawyer	... at a civil hearing where an indigent defendant would generally not have a lawyer
... and where finding is by jury, if judge provides that any criminal contempt trial will be before jury	... and where no jury would be present

Because the injunction categorically forbids Don from repeating the cheating allegation (in our hypothetical), the criminal contempt hearing will determine only whether that allegation was repeated. The allegation's falsity was conclusively determined at the injunction hearing, where the judge only had to find the allegation to be false, defamatory, and unprivileged by a preponderance of the evidence.[103] Under the "collateral bar" rule (applicable

100 Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 349 (Cal. 2007) (quoting LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1054-55 (2d ed. 1988)).

101 *See infra* Appendix A.

102 *Cf.* Jonathan C. Medow, *The First Amendment and the Secrecy State:* Snepp v. United States, 130 U. PA. L. REV. 775, 807 n.210 (1982) (noting that Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), which upheld an injunction against distributing obscenity, "relied heavily on the fact that the [New York] statute provided injunctive defendants with procedural safeguards on a par with those afforded criminal defendants").

103 *See* LAYCOCK, *supra* note 69, at 218 (noting this as a consequence of allowing injunctions in libel cases).

in most states and in federal courts) the only question at the contempt trial would be whether Don violated the injunction by repeating the statements, not whether the injunction had been properly issued.[104]

Likewise, while Don could get a lawyer at the criminal contempt hearing, that lawyer would be unable to argue to the factfinder that the statement was true, was opinion, was privileged, or was otherwise not libelous. And at the initial civil hearing, when truth, opinion, and privilege were debated, Don had no right to a court-appointed lawyer.

The specific injunction is also more speech-restrictive than the catchall injunction in one important respect: it makes repeating a statement a crime regardless of changed circumstances and context.[105] Yet "[u]ntrue statements may later become true; unprivileged statements may later become privileged."[106] Even if after Don's first false statement that Paula had cheated him, Paula did end up cheating him, he'd still be barred from repeating the statement despite its now being true.[107]

Relatedly, a statement may be libelous in one context but hyperbole in another. Yet an injunction simply barring repeating a statement will prohibit

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Some courts conclude that statements on matters of public concern about public figures or public officials must be proved false by clear and convincing evidence in civil cases. *See, e.g.*, Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 661 n.2 (1989) (noting, but not resolving, the "debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence"); DiBella v. Hopkins, 403 F.3d 102, 111 (2d Cir. 2005) (applying New York law, which required "clear and convincing proof"). This, though, does not affect my general argument.

104 *See* Walker v. City of Birmingham, 388 U.S. 307, 320 (1967) ("[Petitioners] could not bypass orderly judicial review of the injunction before disobeying it."). Three of the five California Supreme Court justices who voted to approve injunctions against libel in Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339 (Cal. 2007), stressed that California doesn't follow the collateral bar rule, and thus, an enjoined defendant may still "speak out, notwithstanding the injunction, and assert the present truth of those statements as a defense in any subsequent prosecution for violation of the injunction." *Id.* at 353 (Baxter, J., concurring). Likewise, Justice Scalia's dissent in Madsen v. Women's Health Ctr., Inc, condemns speech-restrictive injunctions in part because, "Normally, when injunctions are enforced through contempt proceedings, only the defense of factual innocence is available. The collateral bar rule . . . eliminates the defense that the injunction itself was unconstitutional." 512 U.S. 753, 793 (1994) (Scalia, J., dissenting).

105 *See, e.g.*, Friedman v. Schiano, No. 16-cv-81975, 2017 WL 2901211, at *3 (S.D. Fla. Jan. 9, 2017) (ordering defendants not to publish "any statement that accuses, claims, states, or implies that Plaintiffs have engaged in, are engaging in, or will engage in any crime, fraud, scam, or other act of misconduct").

106 Kinney v. Barnes, 443 S.W.3d 87, 98 (Tex. 2014) (giving this as a reason to reject anti-libel injunctions); *see also* Chemerinsky, *supra* note 69, at 171 (likewise).

107 This is especially likely if the original injunction bans not just a specific, detailed accusation but, for instance, any claim that plaintiff is "either directly or indirectly engaged, affiliated or connected with, illegal activity," *e.g.*, Irving v. Palmer, No. 18-cv-11617, 2018 BL 351936, at *2 (E.D. Mich. Sept. 27, 2018), or any claim that "[a] court of law found that [plaintiff] is liable in damages." Power Places Tours, Inc. v. Free Spirit, No. 16-cv-02725, 2017 WL 2718473, at *4 (D. Colo. June 23, 2017).

the statement regardless of context.[108] The catchall injunction requires a jury finding of libelousness at the criminal contempt hearing, based on whether the statement was libelous at the time it was repeated (rather than at the time it was initially said), and thus doesn't suffer from this problem.

And each of these defects, I think, is of constitutional significance.

B. *Proof Beyond a Reasonable Doubt*

Before people go to jail for their speech, there should be proof beyond a reasonable doubt that their speech is indeed constitutionally unprotected. This is especially true because jail time not only powerfully deters speech but also incapacitates speakers, given that their speech rights are sharply limited when they're in jail. Criminal libel law mandates proof beyond a reasonable doubt before sending someone to jail for allegedly false and defamatory statements. A civil injunction, which likewise threatens jail, should embody the same protection.[109]

The Supreme Court has rejected this argument in obscenity cases (*California* ex rel. *Cooper v. Mitchell Bros.' Santa Ana Theater*[110]), though Justices Brennan, Marshall, and Stewart had urged it in *McKinney v. Alabama*.[111] To enjoin a theater from showing a film, the Court held in *Mitchell Bros.*, a judge need not find it obscene beyond a reasonable doubt, but could use a lower quantum of proof.[112] But proof beyond a reasonable doubt is more important in libel injunctions cases than it is in obscenity cases.

In obscenity cases, factfinder error generally risks restricting only nonobscene pornography, which the Court has, rightly or wrongly, treated as

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108 This is the basis on which the First Circuit reversed the injunction in Sindi v. El-Moslimany, 896 F.3d 1, 33-34 (1st Cir. 2018), and on which Justice Kennard on the California Supreme Court, writing for the dissenters, would have reversed the injunction in Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 356 (Cal. 2007) (Kennard, J., concurring in part and dissenting in part). Likewise, Griffis v. Luban, No. CX-01-1350, 2002 WL 338139 (Minn. Ct. App. Mar. 5, 2002), set aside a provision that banned defendant from calling plaintiff a liar, partly "because this provision is not restricted to any particular context," so that, "[f]or example, the injunction prohibits Luban from calling Griffis 'a liar' even if Griffis were to say that 'John F. Kennedy was never President of the United States.' On its face, the injunction prohibits speech even if non-defamatory and protected by the First Amendment." *Id.* at *6.

109 *See also* Medow, *supra* note 102, at 807 n.210 (observing similarly, though as to injunctions against speech that falls within an asserted narrow national security exception, that "an attempt to secure civil injunctive relief [as opposed to criminal punishment] does not trigger a presumption of innocence," and "injunctive defendants are not guaranteed the assistance of counsel and cannot have their case tried to a jury" (citations omitted)).

110 454 U.S. 90, 93 (1981) (per curiam).

111 424 U.S. 669, 683-87 (1976) (Brennan, J., concurring in the judgment).

112 454 U.S. at 93.

being of lesser constitutional value.[113] (To the extent that the controversy in a case is whether the work has serious literary, artistic, scientific, or political value, that standard is in essence a legal judgment,[114] for which the quantum of proof is less important than for factual judgments.) In libel cases, factfinder error risks restricting accurate statements of fact, including in many cases statements on matters of public concern.[115] And, as noted in the next section, there is a long tradition of reading constitutional free expression guarantees as leaving the finding of truth and falsehood to the jury. Until libel injunctions came to be broadly accepted in the last few decades, such findings would generally yield criminal punishment for libel only in criminal cases, where proof beyond a reasonable doubt is required.

Finally, even if courts do rely on the obscenity precedents, those precedents should cut in favor of requiring at least a showing of clear and convincing evidence: this is what the California Court of Appeal held on remand in *Mitchell Bros.* because such a standard was needed "to protect particularly important interests" in free speech.[116] The speaker's interest in libel cases is at least as important as in obscenity cases.

C. *Jury Factfinding*

In criminal libel cases, a finding that the statements are false must generally be made *by a jury*. That's a Sixth Amendment requirement in those states where the criminal libel statute authorizes more than six months in jail.[117] It's a state constitutional requirement under the state constitutions that

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113 *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 529 (2009) (concluding that there was little need to be concerned with the possible unconstitutionality of a regulation of broadcast indecency because "any chilled references to excretory and sexual material 'surely lie at the periphery of First Amendment concern'" (citation omitted)); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1665 n.50 (2013).

114 *See, e.g.*, Athenaco, Ltd. v. Cox, 335 F. Supp. 2d 773, 781 (E.D. Mich. 2004) (characterizing this as "a mixed question of law and fact," which is to say of the application of a legal standard to the facts); State v. Harrold, 593 N.W.2d 299, 312 (Neb. 1999) (likewise treating it as a question of the application of law to fact that is to "be weighed independently by an appellate court after a de novo review of the relevant evidence").

115 As I argue in Part V.D, I think the public/private concern line is flawed in libel cases as well as others. I must acknowledge, however, that the Court has held that, in libel cases, speech on matters of private concern is indeed treated as "of less First Amendment concern" and less protected (though "not totally unprotected"). *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759-60 (1985) (lead opinion).

116 People *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 180 Cal. Rptr. 728, 728 (Ct. App. 1982).

117 Duncan v. Louisiana, 391 U.S. 145, 159 (1968). The criminal libel statutes that authorize such punishments are KAN. STAT. ANN. §§ 21-6103, 21-6602 (2018); MINN. STAT. ANN. § 609.765 (2018); N.M. STAT. ANN. §§ 30-1-6, 30-11-1 (2019); N.D. CENT. CODE §§ 12.1-15-01 (2019), 12.1-32-01 (2012 & Supp. 2017); OKLA. STAT. tit. 21, § 773; WIS. STAT. ANN. §§ 939.51, 942.01 (2017-2018).

provide jury trials for all criminal libel cases.[118] And it's a state law requirement in all the other states that have criminal libel statutes (except Louisiana) because those states authorize jury trials for all misdemeanors.[119]

These jury trials should be seen as a First Amendment requirement, and American free speech traditions support this view. Leaving the question of truth entirely to a judge is much like the pattern in pre-Revolutionary libel prosecutions, such as in the notorious John Peter Zenger trial. There, too, the judge decided whether a statement was libelous, and then the criminal jury decided only whether the defendant had published the statement.[120] American law roundly rejected this approach for criminal libel, even when criminal libel prosecutions were common, and instead insisted that the criminal jury must determine whether the statement was indeed false.[121] The law should likewise take the same approach to anti-libel injunctions, given that they are enforced through criminal prosecution.[122]

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118 OKLA. CONST. art. II, § 22; UTAH CONST. art. I, § 15. The Oklahoma Constitution also expressly requires jury trial in all criminal cases except ones punishable just by a fine, OKLA. CONST. art. II, § 19, and the Utah Constitution has been read as requiring jury trial in all criminal cases "punishable by more than thirty days of imprisonment." South Salt Lake City v. Maese, 2019 UT 58 (2019). The Oklahoma criminal libel authorizes jail time, OKLA. STATS. tit. 21, § 773, and the Utah statute authorizes penalties of up to six months in jail. UTAH CODE ANN. §§ 76-3-204, 76-9-404(2).

119 N.C. GEN. STAT. § 15A-1201 (2019); IDAHO CRIM. R. 23(b); MICH. CT. R. 6.401. New Hampshire criminal libel law does not authorize jail time. N.H. REV. STAT. ANN. §§ 644:11, 651:2(III) (2019).

120 *See, e.g.*, Kramer v. Thompson, 947 F.2d 666, 672 & n.15 (3d. Cir. 1991) (noting the importance of the jury in libel determinations); David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 23 (2013) (describing this history); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 107 n.93 (1984) (likewise). The jury was also asked to decide whether the statement was about the plaintiff, but that detail is irrelevant here.

121 *E.g.*, Montee v. Commonwealth, 26 Ky. (3 J.J. Marsh.) 132, 151 (1830) (denouncing the older English approach—leaving the jury to decide only the fact of publication—as "odious" and "subversive of personal security"); People v. Croswell, 3 Johns. Cas. 337, 364-65 (N.Y. Sup. Ct. 1804) (Kent, J.) (likewise concluding that jurors must determine whether the defendant's publication was libelous, not just whether the defendant had published it). Though Chancellor Kent's position in *Croswell* lost because the court was equally divided, it quickly prevailed both in the New York Legislature and in American law more broadly. An Act Concerning Libels, ch. 90, 1805 N.Y. Laws 232.

122 *See* Organovo Holdings, Inc. v. Dimitrov, 162 A.3d 102, 124-25 (Del. Ch. 2017) (refusing to enjoin libel because of the "longstanding preference for juries addressing defamation claims"); Willing v. Mazzocone, 393 A.2d 1155, 1159 (Pa. 1978) (Roberts, J., concurring) ("One of the underlying justifications for equity's traditional refusal to enjoin defamatory speech is that . . . [a court-imposed injunction] deprives appellant of her right to a jury trial on the issue of the truth or falsity of her speech."); *see also, e.g.*, Madsen v. Women's Health Center, Inc., 512 U.S. 753, 793 (1994) (Scalia, J., dissenting in relevant part) (noting the implications of allowing a single judge to affect free speech rights as a reason to reject injunctions against speech); Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co., 171 F. 553, 556 (M.D. Ala. 1909) (taking the same view); Marlin Firearms Co. v. Shields, 64 N.E. 163, 165 (N.Y. 1902) (same); Kwass v. Kersey, 81 S.E.2d 237, 247 (W. Va. 1954) (same).

One could reasonably be skeptical about whether juries are indeed great protectors of free speech.[123] But American libel law has long treated jury decisionmaking as important, and this historical judgment should not be lightly set aside. Jury decisionmaking coupled with judicial gatekeeping may provide better protection than either jury decisionmaking or judicial decisionmaking alone[124]—among other things, dispensing with a jury verdict would leave the defendant's right to speak at the mercy of a single governmental decisionmaker.

Indeed, twenty-nine state constitutions expressly provide that in prosecutions for libel, the jury shall determine the facts (and, in many states, the law).[125] The same principle should apply to prosecutions for violating anti-libel injunctions, even if they are labeled criminal contempt prosecutions. And, for the reasons given above, this principle should be understood as a facet of federal First Amendment law as well.

Note that, if a specific injunction is entered following a civil jury trial, the jury requirement would likely be satisfied.[126] But the other three elements would still be lacking: proof of falsehood beyond a reasonable doubt before speakers are jailed for their speech, the assistance of counsel, and the requirement that speech be found to be false at the time and in the context in which it is repeated.

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123 *See, e.g.*, David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 540 (1991); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 428 n.60 (1983); Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 529 (1970) ("The jury may be an adequate reflector of the community's conscience, but that conscience is not and never has been very tolerant of dissent."); Redish, *supra* note 56, at 65-66 (raising a similar concern); Rendleman, *supra* note 2, at 45 (likewise).

124 LAYCOCK, *supra* note 69, at 166.

125 *See* ALA. CONST. art. I, § 12; ARK. CONST. art. 2, § 6; COLO. CONST. art. 2, § 10; CONN. CONST. art. 1, § 6; DEL. CONST. art. 1, § 5; IOWA CONST. art. 1, § 7; KAN. CONST. Bill of Rights, § 11; KY. CONST. § 9; ME. CONST. art. 1, § 4; MICH. CONST. art. 1, § 19; MISS. CONST. art. 3, § 13; MO. CONST. art. 1, § 8; MONT. CONST. art. 2, § 7; NEV. CONST. art. 1, § 9; N.J. CONST. art. 1, ¶ 6; N.M. CONST. art. 2, § 17; N.Y. CONST. art. 1, § 8; N.D. CONST. art. 1, § 4; OHIO CONST. art. I, § 11; OKLA. CONST. art. 2, § 22; PA. CONST. art. 1, § 7; S.C. CONST. art. I, § 16; S.D. CONST. art. 6, § 5; TENN. CONST. art. 1, § 19; UTAH CONST. art. 1, § 15; TEX. CONST. art. 1, § 8; W. VA. CONST. art. 3, § 8; WIS. CONST. art. 1, § 3; WYO. CONST. art. 1, § 20. These provisions date back to the Pennsylvania Constitution of 1790. PA. CONST. of 1790 art. IX, § VII.

126 For decisions that suggest this view, see Kramer v. Thompson, 947 F.2d 666, 675-77 (3d. Cir. 1991); Retail Credit Co. v. Russell, 218 S.E.2d 54, 62 (Ga. 1975); Advanced Training Sys. v. Caswell Equip. Co., 352 N.W.2d 1, 11 (Minn. 1984); *see also* Robert Allen Sedler, *Injunctive Relief and Personal Integrity*, 9 ST. LOUIS U. L.J. 147, 154 (1964); Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of* 1868, 56 BUFF. L. REV. 655, 732 n.420 (2008).

D. *Assistance of Counsel*

In criminal libel cases, defendants who can't afford lawyers will get court-appointed lawyers who can argue that their statements are true, are opinions, are privileged, or are otherwise not libelous.[127] This, too, is an important protection for speech.

Speakers who lack a lawyer will often be unable to effectively defend themselves. They aren't experts at proving facts. They don't know how to conduct discovery. They don't know the details of various libel law privileges. They don't know the precedents that help distinguish, say, facts from opinions.

If they lose at trial, they would find it very hard to effectively appeal. Indeed, they might feel so hamstrung by the lack of a lawyer that they might not contest the injunctions in the first place.[128] The injunctions may also be entered far from where the speakers live, making it even harder for them to effectively litigate the case.[129] And when a defendant is absent, unrepresented, or practically unable to appeal, the fact-finding at the initial civil injunction hearing is especially likely to be inaccurate.[130]

This might be an unavoidable reality in the everyday operation of the civil justice system. Defendants who lack the resources to defend themselves may find themselves subject to civil judgments—though this is constrained, at

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127 This requirement only applies if I am to be sentenced to jail, rather than just a fine, Scott v. Illinois, 440 U.S. 367 (1979); but the discussion in the text focuses on the special procedures required before a person can be jailed for their speech.

128 *See, e.g.*, Baker v. Kuritzky, 95 F. Supp. 3d 52, 59 (D. Mass. 2015) (entering anti-libel injunction following default judgment).

129 *See id.* at 55-56 (lawsuit brought in Massachusetts against poster who apparently lived in Georgia). Courts in the state where plaintiff resides will sometimes have personal jurisdiction even over faraway defendants. *See, e.g.*, Abiomed, Inc. v. Turnbull, 379 F. Supp. 2d 90, 95 (D. Mass. 2005).

130 For examples of such unsound injunctions, *see, e.g.*, *Baker* 95 F. Supp. 3d at 56-59 (issuing an injunction following default judgment banning defendant from stating, among other things, that the plaintiff is "dishonest," though such allegations would often be seen as nonactionable opinion, *see, e.g.*, Kerr v. Marshall Univ. Bd. of Governors, 824 F.3d 62, 75 (4th Cir. 2016); Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1440 (9th Cir. 1995)); Baker v. Joseph, 938 F. Supp. 2d 1265, 1269-70 (S.D. Fla. 2013) (vacating an injunction, entered after a default judgment, that barred a journalist from "publishing any 'future communications' regarding" the Prime Minister of Haiti and a prominent South Florida businessman "in either their professional, personal, or political lives"); *see also* Johnson v. Lewis, No. 1:08-cv-06269, ¶ 2.b (N.D. Ill. Dec. 12, 2008) (describing statements made about a pastor, which included "unethical" and "engages in 'sinister schemes and behavior,'"); DeJager v. Burgess, No. 112CV219299, ¶ 6 (Cal. Super. Ct. Santa Clara Cty. Aug. 6, 2012) ("dysfunctional, hypocrite[], fake, and [a] bad parent[]"); Murphy v. Gump, No. 2016-CC-002126-O (Fla. Cty. Ct. Orange Cty. July 18, 2016) ("unprofessional," "loose cannon"); Khang v. Chambers, No. 1684CV03642, at 6 (Mass. Super. Ct. Suffolk Cty. May 17, 2018) (issuing injunction following default judgment banning defendant from repeating claim that plaintiff was "shady"); Grant Atlantic, Ltd. v. Doe, No. cv-16-870991, at 7 (Ohio Ct. Com. Pl. Cuyahoga Cty. Sept. 6, 2017) ("foolish," "a narcissist").

least when it comes to lawsuits for damages, by the reluctance of most plaintiffs to spend money suing judgment-proof defendants.

But when courts issue injunctions against libel, they turn that reality into something with criminal law consequences: defendants might be threatened with jail for repeating certain statements without ever having had lawyers who could effectively argue that the statements were not actually libelous. That should not happen.

E. *Lack of Provision for Changing Circumstances and Changing Context*

Specific permanent injunctions ostensibly bar only statements that have been found libelous. But, as discussed in Part IV.A, a statement that was libelous when first said, and that was found libelous at the injunction hearing, might not be libelous if repeated when the facts and the context have changed.

True, a defendant could go to court to modify the injunction,[131] arguing that the circumstances had changed,[132] but any such motion, like all legal proceedings, will necessarily be expensive and time-consuming. Or a defendant could ask the court to exercise its discretion not to initiate criminal contempt proceedings in light of the changed facts,[133] but the judge may of course not agree that the facts have changed, or may think that in any event the defendant should have complied with the injunction. And, more generally, speakers should not have to "request the trial court's permission to speak truthfully in order to avoid being held in contempt."[134]

* * *

Judge David Barron's recent First Circuit partial dissent argues, in response to an earlier version of the argument in this article, that "criminalizing the violation of an injunction that has been issued as a properly predicated prophylactic protection against the future expression of unprotected speech found likely to recur" ought not be equated with

131 *See* Sindi v. El-Moslimany, 896 F.3d 1, 47-48 (1st Cir. 2018) (Barron, J., concurring in part, dissenting in part); Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 353 (Cal. 2007); *In re* Conservatorship of Turner, No. M2013-01665-COA-R3-CV, 2014 WL 1901115, at *16 (Tenn. Ct. App. May 9, 2014).

132 *See, e.g.*, Horne v. Flores, 557 U.S. 433, 447 (2009) (discussing this option as to injunctions generally); Rendleman, *supra* note 2, at 65-66 (concluding that anti-libel injunctions are permissible in part because they can be modified as circumstances change).

133 *See, e.g.*, Brandt v. Gooding, 636 F.3d 124, 135 (4th Cir. 2011).

134 Kinney v. Barnes, 443 S.W.3d 87, 98 (Tex. 2014); *see also Sindi*, 895 F.3d at 35 (majority opinion) ("A decree that requires a judicial permission slip to engage in truthful speech is the epitome of censorship."); McCarthy v. Fuller, 810 F.3d 456, 465 (7th Cir. 2015) (Sykes, J., concurring) (arguing that, when "the person enjoined must risk contempt or seek the court's permission to speak . . . . This is the essence of censorship" (citation omitted)).

"criminalizing defamation as primary conduct (as in the case of criminal libel)."[135] Yet the two are very similar: both involve threat of criminal punishment for speech that the legal system finds to be false and defamatory. If we think that certain procedural safeguards—proof beyond a reasonable doubt, jury decisionmaking, a defense lawyer—are important to determining whether a statement is false in criminal libel cases, we should think the same in injunction cases, when the injunction is enforceable through the threat of criminal punishment.

An injunction, "like a criminal statute, prohibits conduct under fear of punishment. Therefore, we look at the injunction as we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment, it should be struck down."[136] An injunction banning specific instances of alleged defamation thus is indeed tantamount to a statute "criminalizing defamation as primary conduct."[137]

To be sure, as Judge Barron's partial dissent notes, "there were no criminal safeguards provided for in the injunctions [upheld in whole or in part] in *Madsen* and *Schenck*," the Court's abortion clinic protest cases.[138] But those cases upheld narrow content-neutral restrictions on the time, place, and manner of speech.[139] The injunctions there didn't purport to criminalize the making of particular statements, nor did they rest on judicial determination of whether certain statements were false. Here, as elsewhere in First Amendment law, content-based restrictions on speech that the government believes to be wrong and valueless should be subject to more constraint than content-neutral restrictions on loud speech or speech that blocks building entrances.

V. THE FIRST AMENDMENT AND THE HYBRID PERMANENT INJUNCTION

A. *The Hybrid Permanent Injunction*

What if, instead of saying either "Don may not libel Paula" (as in the catchall injunction) or "Don may not accuse Paula of cheating him" (as in the

135 *Sindi*, 896 F.3d at 48 n.31 (Barron, J., concurring in part, dissenting in part) (responding to an amicus brief I filed in the case); *see also* Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533, 1580 (2017) ("To be sure, violations of [injunctions against speech] could and would produce convictions for criminal contempt. But criminality of that kind is founded not so much on speech itself as on disobedience of the judicial decree.").

136 United Transp. Union v. State Bar of Mich., 401 U.S. 576, 581 (1971).

137 *Sindi*, 896 F.3d at 48 n.31 (Barron, J., concurring in part, dissenting in part).

138 *Id.*

139 Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 361 (1997); Madsen v. Women's Health Ctr., 512 U.S. 753, 768-76 (1994); *see also Sindi*, 896 F.3d at 35 (distinguishing *Madsen* and *Schenck* on these grounds).

specific injunction), the injunction instead says, "Don may not libelously accuse Paula of cheating him"? Like the specific injunction, such a hybrid injunction has a relatively narrow scope. But like the catchall injunction, the hybrid injunction requires that Don not be punished for criminal contempt unless, at the contempt hearing, his speech is found to be libelous. Thus, we have this comparison:

Catchall permanent injunction: "Don may not libel Paula"	**Specific permanent injunction: "Don may not accuse Paula of cheating him"**	**Hybrid permanent injunction: "Don may not libelously accuse Paula of cheating him"**
Deters derogatory speech only about the plaintiff	Same	Same
Deters derogatory speech only after the injunction is entered	Same	Same
Deters all derogatory speech about the plaintiff	Deters only particular derogatory statements about the plaintiff	Deters only particular derogatory statements about the plaintiff
Speech punished only if found to be false beyond a reasonable doubt	Speech punished based on finding of falsehood by preponderance of the evidence	Speech punished only if found to be false beyond a reasonable doubt
... at a criminal trial where an indigent defendant would have a court-appointed lawyer	... at a civil hearing where an indigent defendant would generally not have a lawyer	... at a criminal trial where an indigent defendant would have a court-appointed lawyer
... and where finding is by jury, if judge provides that any criminal contempt trial will be before jury	... and where no jury would be present	... and where finding is by jury, if judge provides that any criminal contempt trial will be before jury
... and prohibits only future statements that are libelous when spoken	... and prohibits future statements even without a showing that they are libelous when spoken	... and prohibits only future statements that are libelous when spoken[140]

140 *CertainTeed Corp. v. Seattle Roof Brokers*, offers a helpful (albeit imperfect) analogy. In that case, the court enjoined the defendant from "making . . . three specified false statements" about

As with the catchall injunction, the hybrid injunction thus just opens the door to the possibility of criminal punishment for continued libels—it doesn't purport to authoritatively decide that a particular statement is libelous, but leaves the matter to the jury in any future criminal contempt prosecution. But unlike with the catchall injunction, the hybrid injunction only opens that door for particular statements, and thus has less of a chilling effect.[141]

In a sense, then, the hybrid injunction is close to the opposite of a declaratory judgment. A declaratory judgment that a particular statement is false and defamatory, for instance, wouldn't be a court order, and thus wouldn't criminalize any repetition of the statements. But it would conclusively decide that the statement is false and defamatory, in a way that likely has a binding effect on future civil litigation.[142] A hybrid injunction does criminalize behavior—the repetition of a particular statement—but it doesn't conclusively decide that the statement is false and defamatory, at least in any way that would bind the jury in any future criminal contempt hearing.

Let's be a bit more specific about what the hybrid injunction should say.

First, it should ban only "libelous" repetition of certain statements. Any injunction that lacks this extra element should be seen as unenforceable—or, alternatively, courts could hold that such an element is necessarily implicit in any anti-libel injunction.[143]

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plaintiff's product "in any advertising promoting his roofing business." No. C09-563RAJ, 2011 WL 13354031, at *1 (W.D. Wash. Feb. 14, 2011). Defendant eventually reposted the statements, and plaintiff moved for contempt sanctions; but defendant responded that he had closed his roofing business, and his continued speech would no longer violate the terms of the injunction. *Id*. The court agreed on that score, noting that the defendant could not have violated the injunction if he had indeed been out of the roofing business since the injunction was issued. Likewise, if an injunction by its terms bans only "false" or "libelous" statements, and a formerly false and libelous statement becomes true and nonlibelous, then the injunction would no longer forbid it.

141 *See* Rendleman, *supra* note 2, at 697 (similarly arguing that even specific permanent injunctions are less chilling than the threat of criminal libel prosecution).

142 *See, e.g.*, Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1113-19 (2014).

143 A state would not be able to satisfy this element simply by abrogating the collateral bar rule. *See, e.g.*, Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 353-54 (Cal. 2007) (Baxter, J., concurring) (noting the absence of a collateral bar rule under California law as an argument in favor of allowing anti-libel injunctions); Barnett, *supra* note 56, at 552-53 (noting the presence of the collateral bar rule as an argument against allowing injunctions against speech); Rendleman, *supra* note 2, at 688 (arguing that anti-libel injunctions should be permissible, but that "[a] state that adheres to the collateral bar rule should suspend it" in contempt trials for violating such injunctions). Without the collateral bar rule, a defendant would be able to argue to *the court* at the contempt hearing (and on appeal) that the injunction was legally invalid; but, for the reasons given in the text, the defendant must be able to argue to *the jury* that (among other things) the enjoined statements were true, or at least that there was a reasonable doubt about their falsehood.

Second, it would help if the injunction were explicit about the consequences of including this element. The injunction might expressly say something like:

> If a defendant is prosecuted for contempt of court for making statements that violate this injunction, at any contempt proceeding it must be proved beyond a reasonable doubt that those statements are indeed false, defamatory, and unprivileged, and that the defendant knew that they were false.[144]

Third, the law of anti-libel injunctions should expressly provide that any criminal contempt prosecutions should be conducted with a jury, unless the defendant waives the jury trial at the time of the criminal contempt hearing.[145] As noted above, one precedent for this is the Norris-LaGuardia Act, which provides for jury trial in criminal contempt prosecutions stemming from labor injunctions.[146] The jury should be expressly instructed that it's not bound by any prior judicial finding that the speech is libelous—a finding that was in any event made only by a preponderance of the evidence—and that its task is to decide the question for itself, beyond a reasonable doubt.[147]

Fourth, the law of anti-libel injunctions should provide that such injunctions cannot be enforced through the threat of jail for civil contempt. Civil contempt would otherwise be a common means of coercing speakers to take down past posts, if the injunctions order such takedowns.[148] But when it comes to libel cases, courts should require that any remedy involving loss of liberty go through the criminal contempt process, so as to enforce the principle that speakers can only be jailed for their speech if the full protections of the criminal law are provided.[149] (Fines as civil contempt

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144 *See* Advanced Siding & Window Co. v. Kenton, No. 218-2013-CV-01155, at 7-8 (N.H. Super. Ct. Rockingham Cty. Dec. 30, 2013) (expressly providing that, "[i]f Mr. Kenton repeats one of these statements, at any contempt proceeding, Mr. Kenton shall have the opportunity to demonstrate that changed circumstances mean he has not 'failed to exercise reasonable care in publishing, without a valid privilege, a false and defamatory statement . . . .'" (citation omitted)).

145 *See* Ardia, *supra* note 90, at 63-64; Siegel, *supra* note 126, at 729-30. Without this provision, criminal contempt trials could be held without a jury, so long as the sentence is six months in jail or less. *See, e.g.*, FLA. R. CRIM. P. 3.840; Wells v. State, 654 So. 2d 146, 147 (Fla. Dist. Ct. App. 1995).

146 *See supra* note 46.

147 *Cf., e.g.*, DONALD G. ALEXANDER, 1 MAINE JURY INSTRUCTION MANUAL § 7-76 (2018) (explaining to the jury that, though a "prelitigation [medical malpractice] screening panel reached a unanimous finding" allowing the case to go forward, "[t]hat hearing was not a substitute for a full trial," and "[y]ou are not bound by the panel findings"); State v. Peeples, 64 A.3d 370, 378 n.10 (Conn. App. Ct. 2013) (noting that jury had been instructed that "If the court has expressed . . . any opinion as to the facts, you are not bound by that opinion.").

148 *See infra* Appendix D.

149 *Cf.* Kramer v. Thompson, 947 F.2d 666, 668-69 (3d Cir. 1991) (describing the trial judge's use of civil contempt proceeding to jail the libel defendant until he wrote a confession and apology); Sayer v. Mont. Fourth Judicial Dist. Ct., No. OP 12-0551 (Mont. Oct. 9, 2012) (describing the trial

penalties should be permissible, so long as the initial injunction was issued following a jury finding that the speech was libelous;[150] just as monetary damages awards in libel cases may be issued without the protections of the criminal justice process, so monetary sanctions for violating anti-libel injunctions may be as well.)

With these protections, hybrid anti-libel injunctions would provide speakers with the First Amendment protections that they would have in criminal libel prosecutions. Given that criminal libel prosecutions are constitutional, such anti-libel injunctions should be as well.

B. *The Futility-or-Vagueness Objection*

The Texas Supreme Court has held that anti-libel injunctions were impermissible, partly because the injunctions would either be pointlessly narrow (if they are read as forbidding only the literal repetition of particular statements) or unconstitutionally vague, if read as forbidding paraphrased repetition as well.[151] But criminal libel laws can be constitutional if they include the constitutionally mandated mens rea requirements, even though they ban all knowingly false and defamatory statements.[152] An injunction that bans repeating, or even paraphrasing, particular statements would be less broad and less vague than those laws.

C. *The Discretion Objection*

Justice Scalia has argued that allowing injunctions against speech leaves judges with too much discretion.[153] Even facially content-neutral injunctions, Justice Scalia argued, may stem from judges' hostility to the content of the speech—judges know the targeted speakers' ideas and may enjoin the speakers because of those ideas, when they would not have enjoined speakers who had engaged in the same conduct but expressed other ideas.[154] Presumably the argument would be even stronger as to anti-libel injunctions.

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judge's use of civil contempt proceeding to try to coerce the libel defendant into removing online posts).

150 *See infra* Appendix D.

151 Kinney v. Barnes, 443 S.W.3d 87, 97 (Tex. 2014).

152 *See supra* Part I.

153 *See generally* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 794-95 (1994) (Scalia, J., dissenting in relevant part).

154 *Id.*; *see also* Lawson v. Murray, 515 U.S. 1110, 1114 (1995) (Scalia, J., concurring in the denial of certiorari) (condemning injunctions under which "speech may be quashed, or not quashed, in the discretion of a single official, who necessarily knows the content and viewpoint of the speech subject to the injunction").

Yet discriminatory enforcement is possible with any speech restrictions imposed through criminal statutes: a prosecutor could, after all, apply such a statute equally selectively. Justice Scalia argued,

> Although a [facially content-neutral] speech-restricting injunction may not attack content *as content* . . ., it lends itself just as readily to the targeted suppression of particular ideas. When a judge, on the motion of an employer, enjoins picketing at the site of a labor dispute, he enjoins (and he *knows* he is enjoining) the expression of pro-union views. Such targeting of one or the other side of an ideological dispute cannot readily be achieved in speech-restricting general legislation except by making content the basis of the restriction; it is achieved in speech-restricting injunctions almost invariably.[155]

But precisely the same thing can be said about the enforcement of constitutionally permissible content-neutral statutes:

> Although a [facially content-neutral] speech-restricting [statute] may not attack content *as content* . . . , it lends itself just as readily to the targeted suppression of particular ideas. When a [prosecutor], on the [request] of an employer, [enforces a noise regulation or a crowd size restriction] at the site of a labor dispute, he [restricts] (and he *knows* he is [restricting]) the expression of pro-union views. Such targeting of one or the other side of an ideological dispute cannot readily be achieved in speech-restricting general legislation except by making content the basis of the restriction; it is achieved in [enforcement of] speech-restricting [laws] almost invariably.[156]

Yet that danger is not reason to require strict scrutiny of content-neutral speech-restrictive statutes, or of prosecutorial decisions related to such statutes. Indeed, the danger doesn't even invalidate narrowly defined criminal libel statutes, though of course they may well be enforced (like all statutes may be enforced) in surreptitiously viewpoint discriminatory ways. The danger should likewise not require heightened scrutiny of content-neutral injunctions (as in *Madsen*) or of injunctions limited to forbidding constitutionally unprotected speech, such as defamation.[157]

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155 *Madsen*, 512 U.S. at 794 (Scalia, J., dissenting in relevant part).

156 *Id.* at 793.

157 As Justice Scalia noted in *R.A.V. v. City of St. Paul*, restrictions on speech based on its falling within the unprotected categories (such as fighting words or libel) are generally treated as similar to restrictions on speech based on its "noncontent element[s]." 505 U.S. 377, 386 (1992).

D. *Restricting Injunctions to Libels on Matters of Private Concern?*

Some courts allow injunctions only as to speech on matters of "private concern";[158] David Ardia has recently argued the same.[159] Such a rule would at least diminish the risk of criminal punishment (via contempt) for speech on public matters. And indeed speech on matters of supposedly private concern is already treated differently by libel law: such speech can lead to punitive and presumed damages even without a showing of "actual malice."[160] It's also possible that states may require defendants in private-concern cases to prove their statements were true rather than requiring plaintiffs to prove their falsity.[161]

But unfortunately, despite decades of trying, courts have done a poor job of defining what constitutes a matter of public concern. (Nat Stern discussed this in detail in a 2000 article,[162] and I have as well in a more recent piece.[163])

And that is so in the very class of cases where injunctions against libel seem most common: claims that businesses or professionals have defrauded or mistreated consumers. The Ninth Circuit, for instance, has held that a jet ski seller's supposed refusal to give a refund for an allegedly defective product was a matter of public concern;[164] it also held the same for a claim that a mobile-home-park operator charged unduly high rents.[165] Other courts have taken a similar view, for instance as to consumer criticism of a plastic surgeon, a life-insurance-policy broker, and a wedding venue.[166] But some disagree, treating as a matter of private concern a TV station's criticism of a home seller who allegedly wrongfully took advantage of a blind buyer, consumer criticism of a construction company, and consumer criticism of a car dealer.[167]

Courts are likewise divided on another common category of libels that often lead to injunctions: accusations of crime. The Ninth Circuit, for instance, has held that, "[p]ublic allegations that someone is involved in crime

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158 *See infra* notes 298, 296, & 329.

159 Ardia, *supra* note 90, at 68.

160 *See generally* Dun & Bradstreet, Inc. v. Greenmoss Builders Inc., 472 U.S. 749, 761 (1985).

161 *See, e.g.*, Parrish v. Allison, 656 S.E.2d 382, 391-92 (S.C. Ct. App. 2007). *Phila. Newspapers, Inc. v. Hepps*, held that the plaintiff must prove falsity when the statements were on matters of public concern, but didn't resolve whether this is required for private concern statements. 475 U.S. 767, 775 (1986).

162 Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category*, 65 MO. L. REV. 597 (2000).

163 Eugene Volokh, *The Trouble with the "Public Discourse" Test as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567 (2011); *see also* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 2-3 (1990).

164 Gardner v. Martino, 563 F.3d 981, 989 (9th Cir. 2009).

165 Manufactured Home Cmtys., Inc. v. Cty. of San Diego, 544 F.3d 959, 965 (9th Cir. 2008).

166 *See* Gilbert v. Sykes, 53 Cal. Rptr. 3d 752 (Ct. App. 2007); Wilbanks v. Wolk, 17 Cal. Rptr. 3d 497, 506-08 (Ct. App. 2004); Neumann v. Liles, 369 P.3d 1117, 1125 (Or. 2016).

167 *See* Mackin v. Cosmos Broad., Inc., No. 3:05-CV-331-H, 2008 WL 2152188, at *5, *9 (W.D. Ky. May 21, 2008); Gosden v. Louis, 687 N.E.2d 481, 490 (Ohio Ct. App. 1996); Vern Sims Ford, Inc. v. Hagel, 713 P.2d 736, 741 (Wash. Ct. App. 1986).

generally are speech on a matter of public concern," in a case where a solo blogger accused a court-appointed trustee of tax fraud in a bankruptcy reorganization of a company.[168] A California Court of Appeal likewise held that including a plaintiff's name in a leaflet containing a list of alleged rapists was speech on a matter of public concern, and a Texas Court of Appeals reached the same result as to allegations that a youth pastor had, more than ten years before, seduced a seventeen-year-old parishioner.[169] The New Jersey Supreme Court, on the other hand, held that a person's online allegation that his uncle had molested him when the person was a child was a matter of purely "private concern" for libel law purposes;[170] the Iowa Supreme Court held likewise in a similar case.[171]

Similarly, consider three cases dealing with allegations of substance abuse. *Ayala v. Washington* held that a letter to an airline alleging that one of its pilot—the defendant's ex-boyfriend—was a marijuana user was merely on a subject of "private concern."[172] *Starrett v. Wadley*, on the other hand, held that an allegation that a supervisor at a tax assessor's office had an alcohol problem was a matter of "public concern," because it revealed improper behavior by a government official.[173] And *Veilleux v. NBC* expressly rejected liability for true reports of drug use by a truck driver under the disclosure-of-private-facts tort, concluding that the named driver's "drug test results were of legitimate public concern."[174]

What's more, many cases seem to suggest that the public/private concern line should turn on "context, form, and content,"[175] without much elaboration of how those factors should be evaluated. Thus, for instance, *Dun & Bradstreet v. Greenmoss Builders* concluded that an allegation in a credit report that a small business had declared bankruptcy was not a matter of public concern, partly because the report was sent only to a handful of subscribers.[176] Perhaps, then, the same report posted to the world at large, even just on a gripe site, might be on a matter of public concern—or would it be? What if the business were larger,

168 Obsidian Fin. Grp., LLC v. Cox, 740 F.3d 1284, 1292 (9th Cir. 2014).

169 Carney v. Santa Cruz Women Against Rape, 271 Cal. Rptr. 30, 32, 37 (Ct. App. 1990); Crews v. Galvan, No. 13-19-00110-CV, 2019 WL 5076516 (Tex. Ct. App. Oct. 10, 2019) (precedential); *see also* Forrester v. WVTM TV, Inc., 709 So. 2d 23, 26 (Ala. Civ. App. 1997) (concluding that a depiction of a man slapping his child at the child's baseball game, included in a broadcast about excessive pressure on children in youth sports, "brought up a matter of public concern, i.e., whether adults put too much pressure on children in sports").

170 W.J.A. v. D.A., 43 A.3d 1148, 1158 (N.J. 2012).

171 Bierman v. Weier, 826 N.W.2d 436, 455 (Iowa 2013).

172 679 A.2d 1057, 1068 (D.C. Cir. 1996).

173 876 F.2d 808, 817 (10th Cir. 1989).

174 206 F.3d 92, 134 (1st Cir. 2000).

175 *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (lead opinion) (internal quotation marks omitted).

176 *Id.* at 761-63 (lead opinion).

so that more creditors, employees, and consumers might be affected by the supposed bankruptcy? It's not clear how courts are to draw this line.

Similarly, *Connick v. Myers* concluded that questions about whether prosecutors had lost confidence in the district attorney and his top assistants were not on a matter of public concern.[177] Surely, though, if a newspaper had published a story about the same matter, few people would be surprised. The underlying topic is indeed a public matter since it bears on the conduct of a powerful government department and the competence of important government officials.

Rather, the Court's focus seemed to be on the speakers being employees rather than outsiders, and on their motivation apparently stemming from their own personal interests. Perhaps, then, the same statements posted by someone else, with a different motive, might be seen as matters of public concern.[178] But again, it's not obvious how courts should draw such distinctions.

In some situations, courts might be able to confidently say that speech is just a matter of private concern—allegations of promiscuity, noncriminal adultery, and the like might qualify.[179] But in many cases, deciding whether particular accusations are on a matter of private concern may be quite hard, not just because the law is unsettled but because the vagueness of the underlying test is likely to continue leading to uncertainty.[180]

It's not just that the line is hard to draw, or risks slipping over time. Rather, courts have been trying to draw the line in related areas for thirty-five years (at least since *Connick v. Myers*), and they have failed to come up with a rule that works predictably in the very cases where it's needed. That should counsel against expanding the rule to a new field.

E. *Restricting Injunctions Against Libels of Public Officials or Public Figures?*

Perhaps there might be a rule categorically forbidding injunctions against libel of public officials or public figures. The Idaho Supreme Court has so held as to public officials,[181] though it didn't have occasion to opine on the much more common cases brought by other plaintiffs. A Tennessee court

177 461 U.S. 138, 147-48 (1983).

178 *See* Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1335, 1377-78 (2016).

179 *See, e.g.*, *Dun & Bradstreet*, 472 U.S. at 761 n.7 (lead opinion) (giving such an accusation as an example of speech on matters of purely private concern).

180 *See* Rendleman, *supra* note 2, at 670 ("Public [concern] versus private [concern] is not a workable or useful distinction. It is unstable, indeterminate, meaningless, and subject to manipulation.").

181 Nampa Charter Sch., Inc. v. DeLaPaz, 89 P.3d 863, 867 (Idaho 2018).

likewise suggested that injunctions against libels of public figures (and not just public officials) might be especially hard to get.[182]

A New York court, on the other hand, was willing to issue even a preliminary anti-libel injunction in a case brought by a high-level appointed public official (a water district superintendent).[183] Courts in Arkansas temporarily enjoined alleged libels against a state supreme court justice who was running for reelection, though the injunctions were later vacated.[184] A court in North Carolina likewise temporarily enjoined alleged libels against a judicial candidate.[185] And a court in Mississippi temporarily, and then permanently, enjoined alleged libels against a sheriff who had been ousted in an election that may have been affected by the libels.[186]

I think such a distinction might make sense as a policy matter. A legislature, for instance, might be well-advised to enact it as a statute, and a state court might articulate it as a judge-made limitation on judges' equitable powers.

But I don't think there's a basis to view such a distinction as mandated by the First Amendment. Knowing or reckless falsehoods about public figures and public officials can be criminally punished;[187] it's hard to see why criminal punishment through criminal contempt prosecutions for violating an injunction should be any more unconstitutional.

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182 *In re* Conservatorship of Turner, No. M2013-01665-COA-R3-CV, 2014 WL 1901115, at *8 (Tenn. Ct. App. May 9, 2014); *see also* Brummer v. Wey, 89 N.Y.S.3d 11, at 2 (App. Div. 2018) (seeming to make the same suggestion).

183 Carey v. Ripp, 60 Misc. 3d 1016, 1018-19 (N.Y. Sup. Ct. 2018), *appeal pending*.

184 *See* Tegna, Inc. v. Goodson, 2018 Ark. App. 611, at 1, 567 S.W.3d 99, 101 (Ark. Ct. App. 2018) (vacating one such order as moot); Eugene Volokh, *Arkansas Judge Issues Temporary Restraining Order Against Allegedly Libelous Political Ad*, VOLOKH CONSPIRACY (REASON) (May 14, 2018, 10:13 pm), https://reason.com/2018/05/14/arkansas-judge-issues-temporary-restrain/ [https://perma.cc/AZJ7-VCHR] (discussing another such order); Eugene Volokh, *Arkansas Prior Restraint Saga—One Court Says Yes, One Says No*, VOLOKH CONSPIRACY (REASON) (May 18, 2018, 7:24 pm), https://reason.com/2018/05/18/arkansas-prior-restraint-saga-one-court/ [https://perma.cc/M32E-PU2S] (discussing yet another such order, as well as a different judge's vacating an earlier order).

185 *See* Lewis v. Rapp, No. 10 CVS 932, 2010 WL 9598800 (N.C. Super. Ct. Brunswick Cty. Apr. 19, 2010) (discussing the temporary restraining order in that case); *see also* Moore v. Doe, No. 01-JC-10-227 (Tex. Just. Ct. Collin Cty. May 11, 2010) (issuing injunction ordering removal of YouTube videos about a sitting judge).

186 Lewis v. Lewis, No. 25CH1:15-cv-00927, 2019 WL 1245272, at *15, *17, *22 (Miss. Ch. Ct. Hinds Cty. Aug. 25, 2015 & Feb. 13, 2019). *See also* MacKinnon v. Light, No. CV201800186, at 3-4 (Ariz. Super. Ct. Cochise Cty. July 23, 2018) (issuing injunction against speech that defamed city attorney, and noting that the court had earlier issued a temporary restraining order); Burfoot v. May4thCounts.com, 80 Va. Cir. 306 (2010) (noting that the court had issued an ex parte temporary restraining order against speech that allegedly defamed a city councilman who was running for reelection, but then vacating the order, because the alleged defamation "does not justify the *ex parte* closing of the website").

187 Herbert v. Lando, 441 U.S. 153, 157 n.1 (1979) (citing Garrison v. Louisiana, 379 U.S. 64, 67 (1964), for the proposition that the rules for criminal libel and civil libel are generally the same).

Indeed, knowing or reckless falsehoods about public officials, public figures, and private figures are treated the same way even for civil liability.[188] The First Amendment distinction between the classes of figures is that *negligent* falsehoods can lead to proven compensatory damages for private figures but not for others (whether public officials or non-official public figures); as the next subsection notes, injunctions would generally not punish merely negligent falsehoods in any event. And, unlike with speech on matters of private concern, the Court has never suggested that speech about private figures is less constitutionally valuable than speech about public figures.

F. *The Limited Role of Mens Rea*

So far, I've said virtually nothing about speaker mens rea, though that's normally quite important in libel damages actions (and in criminal libel prosecutions).[189] This is because the Court's mens rea decisions aim to solve a problem that is largely absent in hybrid injunction cases: the "chilling" of speakers caused by the risk of liability where the facts are uncertain.

Say that I'm contemplating writing about Bob Builder, because I think he has cut corners in making his building earthquake-safe. I think this is true, but I can't be completely certain, and, even if I'm certain of the facts, I can't be certain that the jury will agree. I may therefore be deterred from making my allegations, because I'm afraid of a massive damages verdict or even of a criminal verdict in those states that have criminal libel statutes. Mens rea requirements (sometimes actual malice, sometimes negligence) are meant to diminish this chilling effect of civil and criminal liability.

But hybrid anti-libel injunctions don't create this hazard. First, I'm unlikely to be deterred from speaking before an injunction is entered by the mere risk that my speech will lead to an injunction; the injunction itself won't send me to jail or cost me money. To be sure, few people are enthusiastic about being enjoined, and fighting an injunction does cost money. But that prospect is not as likely to be chilling as the prospect of jail or ruinous damages.[190]

Second, once the court finds that my allegations were false and defamatory and issues the injunction, I will indeed face jail or fines if I keep making the allegations. But at that point, the court will already have found that the statements were false. I would know they were false, or at least very likely false. The injunction itself would thus come close to assuring that I have "actual malice" (in the sense of knowledge or recklessness as to

188 Gertz v. Robert Welch, Inc., 418 U.S. 323, 347, 350 (1974).

189 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); *see also Gertz*, 418 U.S. at 349-50.

190 *See* Rendleman, *supra* note 2, at 57-58 (taking the same view).

falsehood). More importantly, the injunction will only chill statements that have indeed been found to be false.

Indeed, recall that liability based on "actual malice" is tolerated even though it has *some* chilling effect on true speech (since a speaker might fear that the jury will misjudge both the truth of the statement and the speaker's mental state).[191] The much smaller potential chilling effect on true speech from injunctions should be tolerable too.

It might thus be constitutional to allow specific anti-libel injunctions based on a finding of falsehood, even without a showing of culpable mental state—just as some have suggested that a declaratory judgment should be allowable in such cases.[192] And the principles of *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.* shouldn't necessarily require a showing of mens rea as to falsehood in any contempt proceeding for violating the injunction.

But a showing of a culpable mental state might in any event be required by criminal contempt law principles, at least if I'm right that (as Part V.A argues) any anti-libel injunction must by its terms ban only libelous statements. To be guilty of criminal contempt for violating a court order, the defendant generally has to have acted "with knowledge that the act was in violation of the court order, as distinguished from an accidental, inadvertent or negligent violation of an order."[193] If the injunction expressly bars only libelous statements, which is to say only false, defamatory, and unprivileged statements, then a defendant shouldn't be criminally punished for violating the injunction unless he knew that the statements were false.

And that showing should usually be easy to make, given that the injunction alerts the speaker that the judge or jury has found the speech to be false. In principle, the speaker might be able to evade punishment by persuading the criminal contempt jury that he was sincerely certain the statement was true, even despite that earlier finding. But in practice that is a claim that many juries will be unlikely to believe.

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191 This continuing chilling effect is one reason why Justices Black, Douglas, and Goldberg in *N.Y. Times Co. v. Sullivan* would have imposed a rule of absolute immunity in public concern libel cases. *See* 376 U.S. 254, 293, 295 (1964) (Black, J., concurring in the judgment); *id.* at 300 (Goldberg, J., concurring in the judgment). But the majority was willing to tolerate this danger.

192 *See, e.g.*, RESTATEMENT (SECOND) OF TORTS div. 5, ch. 27 special note (1977); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809, 812 (1986); David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135, 1155 n.112 (2014) (citing David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847, 847 (1986)); Pierre Leval, *The No-Money, No-Fault Libel Suit: Keeping* Sullivan *in Its Proper Place*, 101 HARV. L. REV. 1287, 1288 (1988); Rodney A. Smolla & Michael J. Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25, 33-34 (1989)).

193 O'Rourke v. O'Rourke, 337 S.W.3d 189, 197 (Tenn. Ct. App. 2009) (quoting 17 C.J.S. *Contempt* § 14, 2019) (cleaned up).

VI. THE FIRST AMENDMENT AND THE HYBRID PRELIMINARY INJUNCTION

A. *The Hybrid Preliminary Injunction*

If I am right that the hybrid permanent injunction is constitutional—because it gives defendants all the First Amendment protections offered by valid criminal libel laws, and does so while chilling less nonlibelous speech—then hybrid preliminary injunctions should be constitutional, too. They would adequately protect defendants, while protecting plaintiffs by letting courts deter libels starting shortly after a lawsuit is filed rather than only after the lawsuit is adjudicated.

Let us return to Paula and Don, and imagine that Paula gets a preliminary injunction against Don. Shortly after she files her lawsuit, a judge concludes that she is likely to succeed on the merits: Don's statement that Paula cheated him is likely untrue.

This is just a tentative decision, the judge acknowledges, based on limited time for briefing and likely no discovery. But that's what the judge thinks, so the judge issues an injunction: "Don shall not libelously state that Paula cheated him"; as with the hybrid permanent injunction, the injunction provides that any criminal contempt trial for violating it shall be before a jury.

Like the hybrid permanent injunction, the hybrid preliminary injunction would provide all the procedural protections offered by criminal libel law: Don can't be convicted of criminal contempt unless the criminal jury finds, beyond a reasonable doubt, that his post-injunction statements about Paula are indeed libelous; and Don would be entitled to a court-appointed defense lawyer to argue that the statements weren't libelous. Such hybrid preliminary injunctions thus lack the primary defect of specific preliminary injunctions—the punishment of speech without a prior finding on the merits that the speech is actually constitutionally unprotected.[194]

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194 *See supra* Part III.

In Vance v. Universal Amusement Co., 445 U.S. 308 (1980), Justice White argued in dissent that the Court wrongly struck down a statute that authorized anti-obscenity injunctions. On its face, the statute appeared to authorize injunctions banning distribution of "obscene material" generally, and Justice White argued that such an injunction

> would not by its terms forbid the exhibition of any materials protected by the First Amendment and would impose no greater functional burden on First Amendment values than would an equivalent—and concededly valid—criminal statute. It simply declares to the exhibitor that the future showing of obscene motion pictures will be punishable.

Id. at 321-22 (White, J., dissenting). This would suggest that, under the holding of *Vance*, catchall preliminary injunctions would be unconstitutional, and hybrid preliminary injunctions might be too.

Also like the hybrid permanent injunction, the hybrid preliminary injunction exposes Don to criminal punishment only for repeating specific statements. Unlike with the hybrid permanent injunction, those would be statements that the judge found libelous based on the abbreviated preliminary injunction process rather than after a full trial. But despite that, the hybrid preliminary injunction would still be less chilling than a catchall injunction or than a criminal libel law, which would put Don in jeopardy as to *any potentially* libelous statements. And unlike the hybrid permanent injunction, the hybrid preliminary injunction opens the door to criminal punishment—and therefore helps deter future libels—near the start of the lawsuit, rather than years later.

Hybrid preliminary injunctions, like hybrid permanent injunctions, haven't yet been tested in appellate courts, or even issued by trial courts. But I think they would be consistent with the First Amendment, and often a good idea.

Indeed, one recent preliminary injunction seems to lean in this direction. In *2 Sons Plumbing, LLC v. Herring*, 2 Sons claimed that Romare Herring had criticized 2 Sons while falsely claiming to be a customer (in some places) and a former employee (in others). The company sued for, among other things, violating California law that bars such impersonation.[195] The District Court concluded that there was enough to the claim to justify a temporary restraining order, but it crafted the injunction so that any impersonation would still have to be shown at a criminal contempt hearing, rather than treating this preliminary conclusion as binding in such a hearing:

But the court of appeals in *Vance* had read the statute as authorizing *specific* preliminary injunctions, and not just catchall injunctions: "the state can obtain, ex parte, a 10-day temporary restraining order against the showing of an allegedly obscene film," without "a final judicial determination of obscenity," and "[o]n appeal from the temporary injunction, the theater operator who has been enjoined cannot argue that the suppressed film is not obscene." Universal Amusement Co. v. Vance, 587 F.2d 159, 169-70 (5th Cir. 1978) (en banc). And the Supreme Court followed the Court of Appeals' interpretation:

> Presumably, an exhibitor would be required to obey such an order pending review of its merits and would be subject to contempt proceedings even if the film is ultimately found to be nonobscene. Such prior restraints would be more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited, since nonobscenity would be a defense to any criminal prosecution.

Vance, 445 U.S. at 316. The Court thus condemned these injunctions because, unlike with true catchall (or hybrid) injunctions, they allowed speech to be criminally punished without a final determination that it was constitutionally unprotected. Indeed, Justice White himself (joined by Justices Brennan and Marshall, who had been in the *Vance* majority) later stressed that, "Fatal to that statute [in *Vance*] were particular procedural infirmities of the Texas nuisance scheme whereby the subject of an abatement order or injunction 'would be subject to contempt proceedings even if the film (was) ultimately found to be nonobscene.'" Ave. Book Store v. City of Tallmadge, 459 U.S. 997, 998 (1982) (White, J., dissenting from denial of certiorari) (quoting *Vance*, 445 U.S. at 316).

195 2 Sons Plumbing, LLC v. Herring, No. CV 19-1868 SVW-MRW (C.D. Cal. Mar. 20, 2019), ECF No. 15.

> (2) Defendant Romare Herring is barred, prohibited, and restrained from posting reviews of 2 Sons Plumbing, LLC and/or Joe's Plumbing Co. claiming that Defendant was a customer of such business when Defendant was not actually a customer; . . .
>
> (4) Defendant Romare Herring is barred, prohibited, and restrained from posting on the Internet a webpage claiming to be affiliated with 2 Sons Plumbing, LLC and/or Joe's Plumbing Co. if Defendant is not affiliated with those businesses.[196]

If it turns out that Herring is affiliated with 2 Sons or Joe's, and he repeats that statement, the terms of provision (4) wouldn't make him liable; likewise, if he was indeed a customer, and posts reviews of 2 Sons or Joes so stating. The order isn't as precise as it could be; for instance, the "when" in (2), unlike the "if" in (4), could be read as a statement that the court is deciding that Herring wasn't actually a customer, rather than a provision that the order applies only under the circumstances (to be found conclusively later) that Herring wasn't a customer. Moreover, provisions (1) and (3) require the takedown of earlier posts without any such condition. Still, the order, and especially provision (4), points towards the approach that I describe here.

B. *The Hybrid Ex Parte Temporary Restraining Order*

In principle, even temporary restraining orders—including ones obtained ex parte—could be permissible so long as they only ban libelously repeating certain statements. Such an order would, as with the hybrid preliminary injunction, punish no more speech than a criminal libel law would, since any criminal contempt punishment would be contingent on the jury finding (after a full trial) that the statements were indeed libelous. By its very terms, it would be limited to constitutionally unprotected speech; whether any particular statement is unprotected and therefore forbidden would have to be determined at an adversarial criminal contempt hearing.[197]

But while such hybrid ex parte TROs may be constitutional, they should be avoided. The advantage of hybrid injunctions over catchall injunctions is that they are limited to specific statements that a judge has concluded is likely false and defamatory. This judicial conclusion doesn't itself suffice for

196 *Id.* at 2.

197 This distinguishes such hybrid orders from the ex parte order in *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968), which by its terms prohibited speech that would generally be constitutionally protected, without an adversarial hearing at which the defendants could respond to the plaintiffs' arguments that this protection should be lost on the facts of the case. *See id.* at 183-84 (criticizing "the failure to invite participation of the party seeking to exercise First Amendment rights").

forbidding the statements outright, since the defendant should have an opportunity to argue his case to a jury (which is the advantage of hybrid injunctions over specific injunctions). Still, this conclusion is still an important protection for speakers—and for the conclusion to be relatively reliable, it has to be made based on the judge's hearing both sides' factual theories, both sides' legal analyses, and both sides' analyses of how the injunction should be crafted.[198]

Sometimes, of course, such an adversary presentation is impossible, for example if the defendants are anonymous and can't be identified using reasonable pre-injunction discovery, or if they simply refuse to show up. But plaintiffs should be required to at least try to serve defendants and give them an opportunity to be heard before even a hybrid injunction is issued.

VII. BEYOND THE FIRST AMENDMENT: INJUNCTIONS AND PROSECUTORIAL DISCRETION

I've argued that criminal contempt prosecutions for violating anti-libel injunctions are similar to criminal libel prosecutions. But they are missing one important feature of most prosecutions—the normal prosecutor.

In criminal libel prosecutions, a prosecutor exercises discretion about whether to prosecute. In criminal contempt proceedings, a judge would normally refer the case to the prosecutor's office, but if that office declines to act, the judge may appoint a special prosecutor.[199] And in some states, the litigants could initiate the criminal contempt prosecution themselves,[200] or move for contempt and ask for the court to appoint their lawyers as the prosecutors.[201]

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198 *See id.* ("The participation of both sides is necessary . . . .").

199 *See, e.g.*, FED. R. CRIM. P. 42(a)(2); COLO. R. CIV. P. 107(d)(1); WIS. STAT. § 785.03(1)(b)(2019).

200 *See, e.g.*, ALASKA R. CIV. P. 90(b); MICH. COMP. LAWS 3.606(A); N.Y. FAM. CT. ACT § 846 (McKinney 2010); DeGeorge v. Warheit, 741 N.W.2d 384, 387 (Mich. Ct. App. 2007); Note, *Permitting Private Initiation of Criminal Contempt Proceedings*, 124 HARV. L. REV. 1485, 1506 (2011). For an example, see Motion for Issuance of Order, Injunction, and Order to Show Cause for Criminal Contempt, Rath v. Martin, No. 15-21701 CACE (04) (Fla. Cir. Ct. Broward Cty. Oct. 30, 2017); this ultimately did lead to the defendant, faced with the threat of jail, taking down the enjoined material. *See infra* Appendix D.

In some jurisdictions, a party can institute criminal contempt proceedings for violation of a protection order, *see, e.g.*, D.C. CODE ANN. § 16-1002; MICH. COMP. LAWS § 764.15b(7); 16 PA. CONS. STAT. ANN. § 1409; 23 PA. CONS. STAT. ANN. § 6113.1. Those orders sometimes include provisions that expressly or implicitly ban defamation; *see, e.g.*, Best v. Marino, 404 P.3d 450, 459-60 (N.M. Ct. App. 2017); *In re* Marriage of Meredith, 201 P.3d 1056, 1064 (Wash. Ct. App. 2009).

201 *See, e.g.*, Gordon v. State, 960 So. 2d 31, 33, (Fla. Dist. Ct. App. 2007) *clarified on denial of reh'g*, 967 So.2d 357, 358 (Fla. Dist. Ct. App. 2007); Wilson v. Wilson, 984 S.W.2d 898, 903 (Tenn. 1998). In the federal system, the judge may not appoint the plaintiff's lawyer as prosecutor, Young v. United States *ex rel*. Vuitton et Fils S.A., 481 U.S. 787 (1987), which may make it hard to find a lawyer willing to take the task (which would presumably be at most lightly compensated, *see id.* at 806 n.17). But that is a principle of federal contempt procedure, not a constitutional mandate.

Indeed, in states that still have criminal libel laws, the injunction's cutting out of the prosecutor is especially vivid.[202] Why, after all, would a person who is being libeled seek an anti-libel injunction in that state? Why not just ask the prosecutor to threaten the defendant with a criminal libel prosecution? After all, an injunction works in large part because it makes the target worry about the threat of a criminal contempt prosecution; why wouldn't a prosecutor's threat of a criminal libel prosecution work as well?

Presumably the defamed person would spend the time and money to get an injunction precisely because the prosecutor is not inclined to act. Maybe prosecuting libels is a low prosecutorial priority, compared to violent crimes, property crimes, or drug crimes. Or maybe the prosecutor thinks the criminal libel law is archaic, and that people shouldn't be jailed merely for lying about others. Or maybe the prosecutor wants to prosecute only the most egregious libels (such as the ones that most threaten reputation), and this libel isn't one. The prosecutor is thus using prosecutorial discretion to choose not to prosecute a particular kind of crime.[203] And the injunction bypasses that prosecutorial decision.

The question for judges, then, is whether leaving the matter to prosecutorial discretion in such cases is a virtue or a vice. Prosecutorial discretion is sometimes touted as an important protector of liberty: before a person goes to jail for something, the theory goes, all three branches must agree—the legislature must criminalize the action, the executive must prosecute, and the judiciary must convict.[204] In the words of then-Judge Kavanaugh,

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202 In the early 1900s, labor injunctions were likewise often used in part to cut out the discretion of local officials (though mainly police departments rather than prosecutors) who supported strikers. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 101-05 (1991) (describing ways in which labor injunctions operated on various categories of local actors).

203 Only a few states authorize judicial review of prosecutorial decisions to reject victims' demands to prosecute. *See* Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 882 n.125 (2018) (citing COLO. REV. STAT. § 16-5-209 (2017); MICH. COMP. LAWS § 767.41 (2017); NEB. REV. STAT. § 29-1606 (2017); PA. R. CRIM. P. 506(B)(2), *discussed in In re* Hickson, 765 A.2d 372, 376-77 (Pa. Super. Ct. 2000); State *ex rel*. Clyde v. Lauder, 90 N.W. 564, 569 (N.D. 1902), *quoted favorably in* Olsen v. Koppy, 593 N.W.2d 762, 765-67 (N.D. 1999)).

204 This doesn't describe the historical rule in the states, where private prosecutions were common during the early Republic; but it describes the general modern practice, in which private prosecutions have been largely rejected. *See* Brown, *supra* note 203, at 870. Even the rare private prosecutions that remain are subject to the state prosecutor's power to enter a *nolle prosequi* that would lead to a dismissal. *See* Cronan *ex rel*. State v. Cronan, 774 A.2d 866, 874-75 (R.I. 2001); Eugene Volokh, *How I Was a Criminal Defendant in a N.J. Harassment Case*, VOLOKH CONSPIRACY (REASON) (Aug. 22, 2019, 8:01 am), https://reason.com/2019/08/22/how-i-was-a-criminal-defendant-in-a-n-j-harassment-case/ [https://perma.cc/4DR5-BV7D].

> The Executive's broad prosecutorial discretion . . . illustrate[s] a key point of the Constitution's separation of powers. One of the greatest unilateral powers a President possesses . . . is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior . . . . The Framers saw the separation of the power to prosecute from the power to legislate as essential to preserving individual liberty.[205]

Judge Kavanaugh was writing of prosecutorial discretion as a check on the legislative power, but it may also be seen as a check on the judicial power.[206] Indeed, such a check may be especially necessary to rein in criminal contempt prosecutions, in which judges might be unduly skewed by the sense that the violation of an injunction is a "personal affront" to their own authority.[207] Justice Scalia's concurrence in *Young v. United States* ex rel. *Vuitton et Fils S.A.*, for instance, argued that federal contempt prosecutions must always be initiated by the Executive Branch, partly because Justice Scalia saw a threat to liberty in "judges in effect making the laws, prosecuting their violation, and sitting in judgment of those prosecutions."[208]

On the other hand, prosecutorial discretion is sometimes seen as unduly favoring those victims who have the prosecutors' ears—indeed, one criticism of criminal libel laws has been that they are disproportionately used to punish speech critical of political officials and law enforcement.[209] And people sometimes fault prosecutors for not paying enough attention to crimes that are seen as too hard (or too unglamorous) to prosecute. This was, for instance, part of the criticism of prosecutors' attitudes towards domestic violence cases, which led many states to enact statutes specifically authorizing injunctions against continued domestic violence.[210]

More broadly, injunctions are available in many other contexts where torts are also crimes. The occasional assertion that "equity will not enjoin the commission of a crime"[211] means simply that equity "would not enjoin

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205 *In re* Aiken Cty., 725 F.3d 255, 264 (D.C. Cir. 2013) (emphasis removed).

206 *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 429-30 (2012) (likewise characterizing prosecutorial discretion as an important protection for liberty and an important check on Congress and the federal judiciary).

207 *See, e.g.*, Warren Cty. Cmty. Coll. v. Warren Cty. Bd. of Chosen Freeholders, 796 A.2d 257, 272 (N.J. Super. Ct. App. Div. 2002).

208 481 U.S. 787, 822 (1987) (Scalia, J., concurring in the judgment); *see also* Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489 (2017).

209 *See, e.g.*, *ACLU Files First Amendment Challenge to Criminal Defamation Law*, ACLU (Dec. 18, 2018), https://www.aclu.org/news/aclu-files-first-amendment-challenge-criminal-defamation-law [https://perma.cc/BL4V-SW8J].

210 *See generally* Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85 (1992) (defending the private party initiation of criminal contempt proceedings).

211 *See, e.g.*, Baker v. IBP, Inc., 357 F.3d 685, 691 (7th Cir. 2004).

violation of . . . criminal law *as such*," but would only enjoin acts that harmed the particular plaintiff in some legally cognizable way.[212] Injunctions against trespass are issued without concern about undermining prosecutorial discretion not to prosecute trespasses as crimes; the same is true for injunctions against copyright infringement, even though willful copyright infringement for commercial gain is also criminal.[213]

And perhaps the availability of criminal contempt proceedings in such cases, even without the opportunity for prosecutorial discretion, might be especially justified by the need to vindicate a particular victim's interest. The Third Circuit, for instance, has taken the view—expressed, to be sure, as to administrative enforcement proceedings rather than as to criminal contempt of court prosecutions—that "the doctrine of prosecutorial discretion[] should be limited to those civil cases which, like criminal prosecutions, involve the vindication of societal or governmental interest, rather than the protection of individual rights."[214]

I don't think that the availability of prosecutorial discretion should be seen as a necessary First Amendment protection that renders invalid injunctions that cut out such discretion. Indeed, prosecutorial discretion may introduce an extra risk of viewpoint discrimination,[215] and enforcement of injunctions without a prosecutorial veto would decrease this risk.

Judges issuing injunctions often write opinions explaining why they exercise their discretion in a particular way, which constrains their discretion in some measure; prosecutors don't. Judges' decisions not to issue injunctions are reviewable on appeal (even if under the relatively deferential abuse-of-discretion standard); prosecutors' decisions not to prosecute are generally not reviewable. Prosecutorial discretion cannot save an overbroad law.[216] The absence of prosecutorial discretion should not invalidate a narrowly crafted injunction.

This having been said, though, courts might still choose to consider whether separation of powers concerns should counsel against injunctions that evade prosecutorial discretion, especially in those states where criminal libel statutes exist. The Court has spoken of its "cautious approach to equitable powers," especially when the powers involve "substantial expansion of past practice";[217] state courts may choose to take a similar approach. Such

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212 United States v. Dixon, 509 U.S. 688, 695 (1993).

213 17 U.S.C. §§ 501, 506 (2018).

214 Bachowski v. Brennan, 502 F.2d 79, 87 (3d Cir. 1974), *aff'd sub nom.* Dunlop v. Bachowski, 421 U.S. 560, 567 n.7 (1975), *overruled on other grounds*, Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers v. Crowley, 467 U.S. 526, 549 n.22 (1984).

215 Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEX. L. REV. 984, 984-86 (1956) (finding that many American criminal defamation cases from 1922 to 1955 stemmed from political disputes).

216 United States v. Stevens, 559 U.S. 460, 480 (2010).

217 Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 329 (1999).

caution may be reason to avoid an end-run around prosecutorial judgment, especially with a remedy that has historically been frowned on—which makes anti-libel injunctions different from, for instance, anti-trespass injunctions—and in the absence of specific legislative authorization (which makes anti-libel injunctions different from, say, anti-harassment or anti-stalking injunctions issued pursuant to a specific statute[218]).

VIII. BEYOND THE FIRST AMENDMENT IN STATES THAT HAVE REPEALED CRIMINAL LIBEL LAWS

So far, I have argued that the First Amendment does not preclude properly crafted anti-libel injunctions, in part because they are similar to constitutionally valid properly crafted criminal libel laws.

But should courts essentially recreate such mini-criminal-libel laws in states that have repealed their criminal libel laws?[219] Or would that improperly contradict the legislature's judgment embodied in that repeal?

When the California Legislature, for instance, repealed its criminal slander law, it specifically said, "[t]he Legislature finds and declares that every person has the right to speak out, to poke fun, and to stir up controversy without fear of criminal prosecution."[220] It likely had much the same motivation for repealing its criminal libel law five years before. Likewise, in the words of the Model Penal Code drafters, who called for decriminalizing libel, "penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit."[221] The New Jersey Supreme Court relied on this reasoning in refusing to read the state's criminal harassment statute as punishing defamation:

> At the time the Legislature passed the New Jersey Code of Criminal Justice [which was based on the Model Penal Code], it repealed New Jersey's last criminal libel statute. . . . In doing so, the Legislature signaled that the

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218 *E.g.*, CAL. CIV. PROC. CODE § 527.6 (2018).

219 *See, e.g.*, 1978 Alaska Sess. Laws 118–19; 2005 Ark. Acts 7469-72, § 512; 1986 Cal. Stat. 311; 2012 Colo. Sess. Laws 391-92; 2015 Ga. Laws 390, Act 70 § 3-1; 1976 Iowa Acts ch. 1245 § 526; 2002 Md. Laws 686; 1978 N.J. Laws ch. 95, § 2C:98-2; 1985 Or. Laws 759; 1998 R.I. Pub. Laws 324-25; 2009 Wash. Sess. Laws 597-98; Commonwealth v. Mason, 322 A.2d 357, 359 (Pa. 1974) (Jones, C.J., concurring and dissenting) (noting that the Pennsylvania criminal libel law was repealed by 1972 Pa. Laws 1611, Act No. 334).

220 1991 Cal. Legis. Serv. ch. 186 (A.B. 436), § 1 (West).

221 MODEL PENAL CODE § 250.7 cmt. 2 (AM. LAW INST., Tentative Draft No. 13, 1961); *see also* State v. Burkert, 174 A.3d 987, 996-97 (N.J. 2017) (quoting this passage as a reason to reject criminal harassment liability for speaking falsehoods with the intent to harass); State v. Browne, 206 A.2d 591, 596 (N.J. Super. Ct. App. Div. 1965) (concluding that mere "personal calumny" should not be the target of criminal law).

> criminal law would not be used as a weapon against defamatory remarks, thereby aligning our new criminal code with the Model Penal Code.[222]

It makes sense for courts to likewise look to legislative judgment in deciding whether criminal contempt law should "be used as a weapon against criminal remarks," should limit people's "right to speak out, to poke fun, and to stir up controversy without fear of criminal prosecution," and should lead to "penal sanctions" for "defamation."[223]

To offer an analogy: say that a state legislature repeals the state's criminal adultery statute (as many states have), but the state courts continue to recognize the tort of "alienation of affections," under which a spouse can sue the other spouse's lover.[224] And say that a plaintiff in a criminal conversation case not only seeks damages against the defendant, but an injunction ordering the defendant not to have sex with the plaintiff's spouse. A court should be reluctant, I think, to issue such an injunction—an injunction that would threaten to punish the lover with criminal contempt for any continued adultery—when the legislature has generally concluded that adultery should not be criminally punished.

And indeed courts sometimes do take the view that "judicial application of equity-rooted remedies should be informed by—and, sometimes, altered significantly in deference to—the legislative policy judgments reflected in intervening statutory enactments, even where the statutes themselves would not directly reach the subject matter of the dispute before the court."[225] Texas courts, for instance, have so reasoned in refusing to authorize certain kinds of pre-suit depositions in libel,[226] certain awards of prejudgment interest,[227] and certain kinds of piercing of the corporate veil.[228] In all those cases, courts looked closely at legislative judgments reflected in statutes that deal with similar questions, and tried to avoid judicial innovations that would conflict with those judgments.

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222 *Burkert*, 174 A.3d at 996-97.

223 1991 Cal. Legis. Serv. ch. 186 (A.B. 436), § 1 (West).

224 The alienation of affections tort remains commonly used in North Carolina (with over 200 filings per year, and with the pattern in appellate cases suggesting that the filings are evenly split among men and women), and continues to exist in several other states. *See* Eugene Volokh, *Alienation of Affections—Still Alive*, VOLOKH CONSPIRACY, (July 28, 2009), http://volokh.com/posts/1248793691.shtml [https://perma.cc/XL7L-8UZ7]; DATA FROM N.C. ADMINISTRATIVE OFFICE OF COURTS, 2000–08. The alienation of affections tort can theoretically cover nonsexual behavior as well as adultery; to be precise, the criminal conversation tort is the one that focuses just on sex. But in the few jurisdictions where at least one of the torts survives—including in North Carolina—most such adultery-based cases are brought as alienation of affections cases.

225 *In re* Elliott, 504 S.W.3d 455, 483 (Tex. App. 2016).

226 *Id.*

227 Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 529-31 (Tex. 1998).

228 Shook v. Walden, 368 S.W.3d 604, 620-21 (Tex. App. 2012).

Likewise, many courts have limited the equitable laches defense in light of a legislatively enacted statute of limitations, on the grounds that, "[t]o import laches as a defense to actions at law would pit the legislative value judgment embodied in a statute of limitations . . . against the equitable determinations of individual judges," and thus "would alter the balance of power between legislatures and courts regarding the timeliness of claims."[229] Conversely, where a legislature has expressly authorized some tolling of statute of limitations, courts can rely on that legislative judgment in interpreting their own equitable principles: "[A] legislative policy judgment may be properly considered in determining the application of a common law [i.e., 'judge-made'] doctrine such as equitable tolling."[230]

Indeed, some court opinions rejecting "obey-the-law" injunctions seem to reflect this concern with subjecting "defendants to contempt rather than [the] statutorily prescribed sanctions."[231] Congress, for instance, deliberately made employment discrimination, even repeated employment discrimination, a tort, not a crime.[232] Enjoining a particular employer from engaging in discrimination would make such discrimination into contempt of court, courts stress.[233] The courts generally don't explain just why "subjecting the defendants to contempt proceedings"[234] in such cases is wrong. But the reason may be that such proceedings would depart from the legislative decision to keep the criminal law out of employment discrimination cases.

Of course, a court that is open to considering legislative judgments when deciding whether to create an innovative remedy must decide: just what judgment did the legislature make when repealing a criminal libel statute, beyond the necessary judgment that there ought not be such a statute?

Perhaps the legislature took the view that false and defamatory statements don't merit criminal punishment. As I noted above, that seemed to be the

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229 Naccache v. Taylor, 72 A.3d 149, 155-56 (D.C. Ct. App. 2013); *see also* Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 678 (2014); Ivani Contracting Corp. v. New York, 103 F.3d 257, 260 (2d Cir. 1997); Doe v. Hartford Roman Catholic Diocesan Corp., 119 A.3d 462, 494 (Conn. 2015).

230 Bernoskie v. Zarinsky, 890 A.2d 1013, 1021 (N.J. Super. Ct. App. Div. 2006).

231 Rowe v. N.Y. State. Div. of Budget, No. 1:11-CV-1150 (LEK/DRH), 2012 WL 4092856, at *7 (N.D.N.Y. Sept. 17, 2012); *see also* Epstein Family P'ship v. Kmart Corp., 13 F.3d 762, 770–71 (3d Cir. 1994) (striking down a "catch-all" prohibition on "violating any of the terms of the Declaration of Easements," because that leaves defendant unable to "effectively use the land for fear of violating the provisions of the Declaration of Easements," and citing the concern expressed in Davis v. Romney, 490 F.2d 1360, 1370 (3d Cir. 1974), about subjecting defendants to the risk of criminal contempt).

232 *See* TEX. PENAL CODE ANN. § 39.03(a)(3) (criminalizing quid pro quo sexual harassment by government employers), Sanchez v. State, 209 S.W.3d 117 (Tex. Crim. App. 2006).

233 *See, e.g.*, EEOC v. Autozone, Inc., 707 F.3d 824, 843 (7th Cir. 2013); Gaddy v. Abex Corp., 884 F.2d 312, 318 (7th Cir. 1989); *Rowe*, 2012 WL 4092856, at *7; *see also* Payne v. Travenol Labs., Inc., 565 F.2d 895, 897-98 (5th Cir. 1978) (overturning injunction banning employment discrimination by employer against any member of plaintiff class, as impermissible "obey the law" injunction).

234 *Gaddy*, 884 F.2d at 318.

view endorsed by the California Legislature (at least as to spoken words) and by the drafters of the Model Penal Code.[235] If so, then this suggests that anti-libel injunctions, enforceable by punishment for criminal contempt, should likewise be rejected.[236]

But perhaps the legislature took the view that criminal libel law is too likely to chill a broad range of speech, because speakers know that they can be punished for any factual allegation, even one they think is accurate (if the jury errs, as juries might, about the speaker's mens rea). If so, then that suggests that catchall injunctions, which likewise ban all knowing falsehoods about a particular person, should be rejected—but perhaps specific or hybrid injunctions, which are limited to particular claims that courts have already found to be false, might be permissible.

Or perhaps the legislature thought that people shouldn't be imprisoned just for an isolated lie about someone, even a damaging lie, because such lies are so common—but the legislators might not have been contemplating what should be done about sustained campaigns of defamation. This would suggest that injunctions, which are aimed at preventing such repeated defamation, would be consistent with that legislative judgment.

And, finally, perhaps the legislature lacked any widely shared judgment at all about the subject, other than that the criminal libel statute ought to be repealed. Maybe some legislators thought one thing, some thought another, and some simply voted for the repeal because it was part of a legislative package that gave them something else they wanted.[237]

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235 1991 Cal. Legis. Serv. Ch. 186 (A.B. 436), sec. 1 (West).

236 Of course, if the legislature's judgment repealing criminal libel law had been made in a legal regime where injunctions were commonplace, one could have inferred that the legislators were leaving the possibility of criminally enforceable prohibitions on libel to the discretion of judges in civil cases. Say, for instance, that the legislature criminalizes nuisances and then repeals that criminal ban. In a system where injunctions against nuisance are routine, we shouldn't infer that the legislature meant to preempt these traditionally accepted injunctions.

But when criminal libel laws were repealed in the states that repealed them, the conventional wisdom was that courts would *not* be enjoining libel. The legislature thus couldn't reasonably be presumed to be preserving such a remedy. And the decision to repeal the criminal libel statute should be seen as barring "obey the [tort] law" injunctions that have the effect of reinstituting criminal libel law for the defendant (at least when the defendant is speaking about the plaintiff).

237 Compare the statutory construction literature arguing that legislative intent ought not guide statutory interpretation because such intent generally can't be determined or even just doesn't exist. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable."); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 18 (2001) ("Because statutory details may reflect only what competing groups could agree upon, legislation cannot be expected to pursue its purposes to their logical ends."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) ("[T]he quest for the 'genuine' legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all.").

Still, so long as courts take the view that judge-made principles should be developed in light of legislative decisions (rather than just that such principles shouldn't outright violate express legislative commands), courts will have to infer something about the underlying legislative judgment. Perhaps the courts might err in their reading of what judgment the legislature made, but then the legislature can correct them. (A legislature can of course expressly forbid anti-libel injunctions; and, if my analysis in Part V is right, then it can expressly permit certain kinds of such injunctions.) In the meantime, if courts believe that the legislature has expressly rejected criminal punishments for libels, they shouldn't recreate those criminal punishments through the route of injunctions and criminal contempt.

IX. BEYOND THE FIRST AMENDMENT: *ERIE* AND FEDERAL COURTS

Finally, when libel lawsuits are brought in federal courts—almost always under the federal courts' diversity jurisdiction—federal courts should consider whether the relevant state courts would allow anti-libel injunctions. "*Erie* doctrine requires courts to apply state substantive law to a request for permanent injunctive relief in diversity cases."[238] "Allowing different remedies in state law cases heard in federal courts on pendent jurisdiction would undermine the 'twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.'"[239]

And this is especially so because, as Parts VII and VIII discuss, the decision whether to allow anti-libel injunctions should turn in part on state law judgments—there, about the proper role of state prosecutors and of state legislative decisionmaking. If a federal court concludes that anti-libel injunctions violate the First Amendment, then of course it must adhere to that decision about federal law. But if it concludes that such injunctions do not violate federal law, it also has to consider whether they are authorized under state law (whether by referring to state appellate cases or by certifying the question to a state court).

The Third Circuit's decision in *Kramer v. Thompson* followed this principle, ultimately following Pennsylvania law (which rejects anti-libel injunctions) rather than its own stated preferences (which were sympathetic

238 Lord & Taylor, LLC v. White Flint, LP, 780 F.3d 211, 215 (4th Cir. 2015); *see also* Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 273 (1st Cir. 1990) ("[S]tate remedies are available in federal diversity actions.").

239 LaShawn A. by Moore v. Barry, 144 F.3d 847, 853 (D.C. Cir. 1998) (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965)). This is something of an oversimplification; for a more thorough analysis, see 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4513 (3d. ed. 2008), and *id.* at n.73 & accompanying text for more case citations on the subject.

to such injunctions).[240] Yet defendants sometimes fail to raise the *Erie* argument, even when state law would reject anti-libel injunctions.[241] And courts sometimes issue ex parte injunctions, where no defendant is present to raise the *Erie* objection, even when state law forbids anti-libel injunctions.[242]

Likewise, the Seventh Circuit in *McCarthy v. Fuller* didn't consider the Indiana law of anti-libel injunctions, though defendants had argued that it should apply.[243] Perhaps the court thought that such consideration was unnecessary, because it ultimately concluded that the particular injunction in that case was overbroad.[244] But its general endorsement, in dictum, of anti-libel injunctions should be viewed with caution, since ultimately this should be a question for state courts, not for the Seventh Circuit.

X. BEYOND LIBEL: FALSE LIGHT, INTERFERENCE WITH BUSINESS RELATIONS, DISCLOSURE OF PRIVATE FACTS, AND MORE

So far we've focused on anti-libel injunctions, but in principle the same analysis may help in evaluating injunctions against other speech, and especially against other communicative torts: false light, interference with business relations, disclosure of private facts, and the like.[245]

The problem, of course, is that the constitutional rules related to the criminal punishment of such speech—or even civil damages liability for such speech—are not well settled. Recall that the core premise of the analysis in this Article is that, "[an] injunction, like a criminal statute, prohibits conduct under fear of punishment. Therefore, we look at the injunction as we look at a statute, and if upon its face it abridges rights guaranteed by the First

240 947 F.2d 666, 676 (3d Cir. 1991); *see also* Graboff v. Am. Ass'n of Orthopaedic Surgeons, No. 12-5491, 2013 WL 1875819, at *5 (E.D. Pa. May 3, 2013), *aff'd on other grounds*, 559 F. App'x 191 (3d Cir. 2014).

241 *See, e.g.*, Sindi v. El-Moslimany, 896 F.3d 1, 31 n.12 (1st Cir. 2018); Gorman v. Steinborn, No. 2:14-cv-00890-NS (E.D. Pa. May 20, 2015); Rodriguez v. Nat'l Freight, Inc., 5 F. Supp. 3d 725, 729-30 (M.D. Pa. 2014); *see also* Int'l Profit Assocs. v. Paisola, 461 F. Supp. 2d 672 (N.D. Ill. 2006). In *Int'l Profit Assocs.*, 461 F. Supp. 2d at 679-80, the court ultimately entered an anti-libel injunction, without mentioning Illinois law, which limits such injunctions, *see infra* note 295; the same was so in *Gorman*, *Rodriguez*, and Pennsylvania law, which forbids such injunctions. In *Sindi*, 896 F.3d at 31 n.12, the court concluded that "Massachusetts law and federal law seem to place substantially similar burdens on a party seeking a permanent injunction," but there is at least a plausible case to be made that Massachusetts law more clearly condemns such injunctions. S*ee infra* note 329.

242 *See* Palmaz Sci., Inc. v. Harriman, No. SA-15-CA-734-FB, 2015 WL 13298400, at *2 (W.D. Tex. Oct. 27, 2015) (TRO).

243 *See* Reply Brief of Appellants at 17, McCarthy v. Fuller, Nos. 14-3308, 15-1839, 2015 WL 4151888 (7th Cir. July 29, 2015).

244 810 F.3d 456, 462-63 (7th Cir. 2015).

245 My coauthor Mark Lemley and I have discussed copyright, trademark, and right of publicity cases in Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998).

Amendment, it should be struck down."[246] One can see how this would be done for injunctions against libel, because the Court has told us that criminal statutes punishing libel are constitutional (though only if they implement the various First Amendment limits on libel law).[247] One can see the same as to content-neutral injunctions on the time, place, or manner of speech, such as injunctions against residential picketing.[248] But the Court has never made clear, for instance, just how one should evaluate a criminal statute punishing disclosure of private facts, or interference with business relations. What I say below is thus necessarily quite tentative.

A. *Nondefamatory Falsehoods About People*

The Court has twice held that even nondefamatory falsehoods about particular people can lead to liability, at least if the speakers knew the statements were false, or were reckless about that possibility. One case, *Time, Inc. v. Hill*, involved a lawsuit by crime victims over a magazine article that exaggerated the violence of the crime.[249] Another, *Cantrell v. Forest City Publishing Co.*, involved a lawsuit brought by the widow of a man who had died in a then-recent disaster, over a magazine article that included a fabricated quote from her.[250]

Such statements are actionable because of the "mental distress" caused by knowing that some aspect of one's life has been falsely reported, rather than because of damage to reputation.[251] *United States v. Alvarez* casts some doubt on whether such liability is constitutional, since it doesn't fit within the traditionally recognized First Amendment exceptions, such as defamation, fraud, and perjury.[252] Still, it seems unlikely that *Alvarez* was silently overruling *Time* and *Cantrell*, and some language in both the *Alvarez* plurality and the concurrence suggests that knowing nondefamatory falsehoods about particular third parties can indeed be punished;[253] for this discussion, I'll assume that *Time* and *Cantrell* are still good law.

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246 United Transp. Union v. State Bar of Mich., 401 U.S. 576, 581 (1971).

247 *See supra* Part I.

248 *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 774-75 (1994).

249 385 U.S. 374, 390-91 (1967). This was the only case argued before the Supreme Court by then-ex-Vice-President Richard M. Nixon.

250 419 U.S. 245, 248 (1974). The reporter responsible for the fictional quotes, Joe Eszterhas, moved to a field where fiction was encouraged: he became a prominent screenwriter, writing the screenplays for, among other films, FLASHDANCE (Paramount Pictures 1983) and BASIC INSTINCT (TriStar Pictures 1992).

251 *Time*, 385 U.S. at 384 n.9.

252 567 U.S. 709, 717-18, 720 (2012) (plurality opinion).

253 *Id.* at 719 (treating "some other legally cognizable harm associated with a false statement, such as an invasion of privacy"—likely referring to the false light tort—as comparable to "defamation" and "fraud" for First Amendment purposes); *id.* at 734 (Breyer, J., concurring in the

The common rubric for such claims is the "false light" tort. This is sometimes misleadingly labeled "false light invasion of privacy," but—as *Time* and *Cantrell* show—it is not limited to "private" information in the sense of highly personal details, such as sexual, medical, or financial details that are usually kept confidential. And though the Restatement summarizes the tort as covering knowingly or recklessly false statements about a person that "unreasonably place[] the other in a false light before the public" that "would be highly offensive to a reasonable person,"[254] the requirement that the material be "highly offensive" doesn't seem to be a constitutional mandate: *Time* concluded that liability was allowed, assuming "knowing or reckless falsehood" was shown, even under a statute that didn't require a showing of offensiveness.[255]

Speakers should be at least as protected against anti-false-light injunctions as they are against anti-libel injunctions. In particular, just as they shouldn't be sent to jail for allegedly defamatory falsehoods without a jury finding beyond a reasonable doubt that the statements really are false (and with a lawyer available to argue to the jury and judge about that), so they shouldn't be sent to jail for allegedly offensive falsehoods without such a finding. This is especially so because most knowing or reckless defamation claims could alternatively be brought as false light claims (since defamatory falsehoods will usually be highly offensive as well).[256]

The harder question—which I will generally leave for others to explore—is whether speakers should be *more* protected against anti-false-light injunctions. Anti-libel injunctions, I've argued, criminalize libelous statements, and can be constitutional because libel can indeed be criminalized (assuming the statute or injunction is properly crafted). But the Supreme Court has never opined on whether statements that merely put someone in a false light—and thus only harm feelings rather than damaging one's

judgment) (likewise); *see also* Araya v. Deep Dive Media, LLC, 966 F. Supp. 2d 582, 593 (W.D.N.C. 2013); Holloway v. Am. Media, Inc., 947 F. Supp. 2d 1252, 1263 (N.D. Ala. 2013) (seeming to take the view that tortious knowing falsehoods about particular people remain actionable after *Alvarez*; *Holloway* itself involved knowing falsehoods that intentionally inflict emotional distress, but its logic would apply equally to falsehoods that are actionable under the false light tort).

254 RESTATEMENT (SECOND) OF TORTS §§ 652A, 652E (AM. LAW INST. 1977). The Restatement also offers, as illustrations, publishing a poem knowingly misattributed to a particular poet (regardless of whether the poem is so bad that the attribution is defamatory), knowingly mischaracterizing a person's political endorsements, or knowingly inserting a fictional romance into a supposedly factual biography. *Id.* at § 652E cmt. b, illus. 3-5.

255 *Time*, 385 U.S. at 390-91. *Cantrell* involved a tort that was called simply "false light," but it too didn't discuss the offensiveness element. *Cantrell*, 419 U.S. at 248.

256 *See* RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977); *see also id.* cmt. e (suggesting that, "[w]hen the false publicity is also defamatory so that either action can be maintained by the plaintiff, . . . limitations of long standing that have been found desirable for the action for defamation" should likewise apply).

livelihood or social standing—can be criminalized.[257] I'm inclined to see no reason why they can't be criminalized, at least so long as they are civilly actionable. If, though, the Court disagrees on that, and concludes that they cannot be punished by a criminal statute, then they should not be punishable by an injunction that is enforceable through the threat of criminal contempt.

B. *Slander, Trade Libel, Slander of Title, and Injurious Falsehood*

Likewise, speakers accused of slander, trade libel,[258] slander of title,[259] or injurious falsehood[260] should be at least as protected from injunctions as are speakers accused of ordinary libel. As with false light, the only question should be whether such injunctions are categorically forbidden, on the theory that such speech (unlike ordinary libel) cannot be criminalized.[261]

C. *Interference with Business Relations*

Plaintiffs often sue for interference with business relations alongside libel. Libelous statements about a business or a businessperson, after all, are often actionable precisely because they damage the target's business prospects; they may therefore fall within both torts.[262] In such situations, the intentional interference claim is likely redundant of the libel claim, and should be analyzed the same way.[263]

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257 *But cf.* Stockwire Research Grp., Inc. v. Lebed, 577 F. Supp. 2d 1262, 1270 (S.D. Fla. 2008) (issuing a catchall injunction against "casting Adrian James in any false light, or publicizing anything regarding Adrian James that is misleading, false, or untruthful," without discussing the First Amendment objections at all); Rooks v. Krzewski, No. 306034, 2014 WL 1351353, at *29-31 (Mich. Ct. App. Apr. 3, 2014) (concluding that a specific injunction against repeating statements that put plaintiff in a false light is constitutional, based on caselaw that involved defamatory statements).

258 *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503-04 (1984) (applying First Amendment principles in trade libel case); RESTATEMENT (SECOND) OF TORTS § 626 (AM. LAW INST. 1977) (extending the "rules on liability for the publication of an injurious falsehood . . . to the publication of matter disparaging the quality of another's land, chattels or intangible things").

259 *See* RESTATEMENT (SECOND) OF TORTS § 624 (AM. LAW INST. 1977).

260 *Id.* at § 623A.

261 Historically, slander has not been criminalized, even when libel was. Two modern criminal defamation statutes, though, include spoken words as well as written ones. KAN. STAT. ANN. § 21-6103 (2017 Supp.) (forbidding "[c]riminal false communication"); UTAH CODE ANN. § 76-9-404 (West 2017) (forbidding "criminal defamation"). To my knowledge, the constitutionality of such criminal slander bans has not been tested.

262 *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 766B (AM. LAW INST. 1979) (defining the interference tort as generally making actionable "intentionally and improperly interfer[ing] with another's prospective contractual relation" through "inducing or otherwise causing a third person not to enter into or continue the prospective relation").

263 For cases holding that the First Amendment principles applicable to defamation cases equally apply to the interference tort, see, e.g., Farah v. Esquire Magazine, 736 F.3d 528, 540 (D.C. Cir. 2013); Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Inv'r's Servs., Inc., 175 F.3d 848, 856-58

But while the interference tort may be triggered by constitutionally unprotected speech, such as defamation or perhaps true threats, there is no general "interference with business relations exception" to the First Amendment. Indeed, in *NAACP v. Claiborne Hardware Co.*, the Court expressly held that speech urging a boycott of various businesses was protected against interference liability—though the speakers specifically intended to interfere with the businesses' economic prospects, and to use that interference and its threat as a political lever.[264] Thus, for instance, an injunction banning a disgruntled ex-tenant from "directly or indirectly interfering . . . via any . . . material posted on the internet or in any media with [the ex-landlords'] advantageous or contractual business relationships"[265] should be unconstitutional, because even civil liability (and certainly criminal liability) on such a theory should be unconstitutional.

D. *Disclosure of Private Facts*

The disclosure of private facts tort—unlike the constitutional applications of the interference with business relations tort, and unlike the other torts discussed above—specializes in restricting *true* statements about people.[266] The Supreme Court has never resolved whether it is constitutional.[267] Most

(10th Cir. 1999); Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655, 39 F.3d 191, 196 (8th Cir. 1994); Unelko Corp. v. Rooney, 912 F.2d 1049, 1058 (9th Cir. 1990); Fendler v. Phx. Newspapers, 636 P.2d 1257, 1262-63 (Ariz. Ct. App. 1981); Blatty v. New York Times Co., 728 P.2d 1177, 1182, 1184 (Cal. 1986); Thompson v. Armstrong, 134 A.3d 305, 310 (D.C. Ct. App. 2016); Lakeshore Cmty. Hosp. v. Perry, 538 N.W.2d 24, 28 (Mich. Ct. App. 1995); Dairy Stores, Inc. v. Sentinel Publ'g Co., 465 A.2d 953, 961 (N.J. Super. Ct. Law Div. 1983); A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council, 651 N.E.2d 1283, 1283-88, 1295 (Ohio 1995); Evans v. Dolcefino, 986 S.W.2d 69, 79 (Tex. App. 1999).

264 458 U.S. 886 (1982); *see also, e.g.*, Moore v. Hoff, 821 N.W.2d 591, 599 (Minn. Ct. App. 2012).

265 Chevaldina v. R.K./FL Mgmt., Inc., 133 So. 3d 1086, 1091 (Fla. Dist. Ct. App. 2014) (overturning this injunction on the grounds that it is unconstitutionally overbroad); *see also* Hutul v. Maher, No. 12-cv-01811, 2012 WL 13075673, at *18 (N.D. Ill. Dec. 10, 2012) ("Defendant . . . is hereby permanently enjoined from . . . [i]nterfering with Plaintiff's business relationships and maligning her professional and business reputations."). *But see* DeJager v. Burgess, No. 112CV219299, ¶ 6 (Cal. Super. Ct. Santa Clara Cty. Aug. 6, 2012) (enjoining defendant "from engaging in any conduct that interferes with Plaintiff Shelley DeJager's Photography business," as part of an injunction that generally stems from defendant's speech rather than any physical conduct). The injunction in *Chevaldina* went beyond just defamatory speech; indeed, a separate provision of the injunction already banned speech "calculated to defame." *Chevaldina*, 133 So. 3d at 1091.

266 *See* RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

267 *See, e.g.*, Fla. Star v. B.J.F., 491 U.S. 524, 539 (1989) (striking down a statute that banned the publication of the names of rape victims, but suggesting that it was unconstitutional in part because it lacked some of the limitations contained in the disclosure tort).

states have accepted it, though defining it quite narrowly;[268] but a few have rejected it outright.[269]

I know of no cases generally discussing when speech that discloses private facts may be criminally punished or when it may be enjoined. A few recent cases have dealt with narrow statutes that criminalize the distribution of nonconsensual pornography but have not discussed the disclosure of private facts more broadly.[270] One Minnesota case did uphold a statute that allows restraining orders against "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another"[271]—but it wasn't clear whether the "privacy" there referred to disclosure of private facts or to other meanings of privacy (such as intrusion on seclusion).[272]

Some injunctions against disclosure of private facts are clearly unconstitutional. For instance, an order stating, "Respondent shall not reveal any personal information about Petitioner in any communications with third parties,"[273] is unconstitutionally overbroad and vague.[274] It doesn't define what qualifies as "personal information."[275] It covers information even if it is

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268 *See, e.g.*, Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 365-67 (1983).

269 *See, e.g.*, Evans v. Sturgill, 430 F. Supp. 1209, 1213 (W.D. Va. 1977); Brunson v. Ranks Army Store, 73 N.W.2d 803 (Neb. 1955); Howell v. N.Y. Post Co., 612 N.E.2d 699 (N.Y. 1993); Hall v. Post, 372 S.E.2d 711, 717 (N.C. 1988); Anderson v. Fisher Broad., 712 P.2d 803, 814 (Or. 1986); *see also* Doe v. Methodist Hosp., 690 N.E.2d 681, 693 (Ind. 1997) (splitting 2–2–1 on whether the tort should be recognized, with one Justice expressing no opinion). I tend to agree with the minority view here. *See generally* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000).

270 *E.g.*, *Ex parte* Jones, No. 12-17-00346-CR, 2018 WL 2228888, at *8 (Tex. Ct. App. May 16, 2018), *review granted* (July 25, 2018); State v. VanBuren, 214 A.3d 791, 794-95 (Vt. 2019).

271 Dunham v. Roer, 708 N.W.2d 552, 564 (Minn. Ct. App. 2006).

272 For more on the case and some follow-up cases, see Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 NW. U. L. REV. 731, 755-57 (2013).

273 Hall v. Lund, No. BS147482, attachment 10 (Cal. Super. Ct. Apr. 14, 2014); *see also* Petition for Injunction [signed by judge], *id.* at 1 (Apr. 2, 2014) (declining to find "credible threats on petitioner's life" but finding that "the e-mails are unnecessarily disturbing to the petitioner"); Cardoza v. Ortiz, No. FAMSS 1707719 (Cal. Super. Ct. San Bernardino Cty. Sept. 28, 2017) (forbidding "posting of information on any social media website," including "city of residence or past residences of petitioner").

274 *See, e.g.*, Evans v. Evans, 76 Cal. Rptr. 3d 859, 865 (Ct. App. 2008) (holding that even a ban on "publishing . . . confidential personal information about [plaintiff] on the internet"—slightly narrower than the ban quoted in the text—was unconstitutionally vague and overbroad).

275 *See id.* at 870. The order does not contain a definition of "confidential personal information" and it is not reasonably possible to determine the scope of this prohibition from any other source. Without a definition, the injunction is not sufficiently clear to determine whether Thomas's privacy rights to the information substantially outweigh Linda's free speech rights. Moreover, the reference to "confidential personal information" did not provide Linda with a reasonable basis to understand what she was prohibited from placing on the Internet.

"of legitimate concern to the public."[276] And it covers information that comes from public records (such as criminal history information) that is therefore categorically constitutionally protected.[277]

But what about more specific injunctions, such as an order barring revealing that a plaintiff has diabetes, that plaintiffs met via a "mail order bride" site, or that plaintiff husband isn't the biological father of plaintiff wife's son?[278] Or a ban on publishing plaintiff's "home address and unlisted telephone number" as well as "[p]laintiff's employment history at OfficeMax"?[279] Or a ban on a defendant's publishing statements discussing his molestation of plaintiff many years before?[280]

I generally think such speech cannot be criminalized, and thus cannot be enjoined (with one exception I note below); indeed, three district courts have held that even publishing people's home addresses is constitutionally protected.[281] Those cases, though, involved the addresses of government officials and noted that they were connected to disputes on matters of public concern;[282] query whether courts would take a different view as to addresses of ordinary citizens, and, if so, how they would or should decide cases involving addresses of people who are involved in public debates, such as activists, businesspeople, journalists, and the like. Perhaps in some situations, a court would conclude that the speech is substantively unprotected by the First Amendment, and would then need to turn to the question at the heart of this article: can this speech be restricted through the procedural device of an injunction, or only through damages liability?

This is too complicated a question to discuss fully here. But I do think that the hybrid injunction model—in which the defendant's speech must be found to be constitutionally unprotected at the criminal contempt hearing, and not just at the initial injunction hearing—is at least necessary here (whether or not it's sufficient).

This is particularly so because of the importance of having a lawyer argue for the defendant that the speech is constitutionally protected. Just as in libel cases, a defendant in a disclosure-of-private-facts injunction case will often lack a lawyer. A plaintiff who is really interested in damages will likely sue

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276 RESTATEMENT (SECOND) OF TORTS § 652D(b) (AM. LAW INST. 1977).

277 Gates v. Discovery Commc'ns, Inc., 101 P.3d 552, 562 (Cal. 2004).

278 Carag v. Kellogg, No. 27-2015-CV-00371, at 2-3 (N.D. Dist. Ct. McKenzie Cty. Mar. 24, 2016).

279 Murphy v. Gump, No. 2016-CC-002126-O, at 2 (Fla. Cty. Ct. Orange Cty. July 18, 2016).

280 Pelc v. Nowak, No. 8:11-cv-00079, at 2 (M.D. Fla. Oct. 3, 2012); Pelc v. Nowak, No. 8:11-cv-00079, 2012 WL 2568150, at *3 (M.D. Fla. July 2, 2012).

281 Publius v. Boyer-Vine, 237 F. Supp. 3d 997, 1016 (E.D. Cal. 2017); Brayshaw v. City of Tallahassee, 709 F. Supp. 2d 1244, 1249 (N.D. Fla. 2010); Sheehan v. Gregoire, 272 F. Supp. 2d 1135, 1150 (W.D. Wash. 2003).

282 *Publius*, 237 F. Supp. at 1016; *Brayshaw*, 709 F. Supp. 2d at 1249; *Sheehan*, 272 F. Supp. 2d at 1139 n.2.

only if the defendant can pay the damages and, thus, likely can pay for a lawyer; but a plaintiff seeking an injunction might sue even a defendant who lacks money. And the unrepresented defendant might not know how to make an argument that the speech isn't a tortious disclosure of private facts—perhaps because it's on a matter of legitimate public concern—or more broadly that the speech is constitutionally protected.

The injunction might thus be issued with no real adversary argument on the matter, and if the injunction is a specific injunction (e.g., "defendant shall not discuss the plaintiff's employment history"), the defendant will be bound by the trial court's decision, and could go to jail for criminal contempt if he repeats the forbidden statements. A hybrid injunction—"defendant shall not discuss the plaintiff's employment history if that constitutes tortious disclosure of private facts"—would at least require that the tortious nature of the statement be proved at the criminal contempt hearing. And because that is a criminal hearing, at that hearing a poor defendant would be entitled to a lawyer, who can argue that the particular statement is indeed constitutionally protected (at least so long as the defendant is facing the risk of jail time).

E. *Nonconsensual Pornography*

I do think that narrowly focused bans on distributing nonconsensual pornography (often labeled "revenge porn") are constitutional.[283] If I'm right, then one implication of this Article's analysis is that hybrid preliminary and permanent injunctions against distributing such material should be constitutional as well.[284]

CONCLUSION

Anti-libel injunctions threaten repeat libelers with criminal punishment. This may be necessary, especially when the Internet makes it easier than ever before for judgment-proof defendants to badly damage people's personal and professional reputations. And, if drafted properly, such injunctions can be no more speech-restrictive than are constitutionally permissible criminal libel statutes.

But they need to be drafted properly. Most current anti-libel injunctions lack the procedural protections that even criminal libel law provides. If courts are to issue such injunctions, they need to make sure that those protections

283 *See* Volokh, *supra* note 178, at 1405-06.

284 Courts have been willing to issue injunctions in some such cases, though some of the injunctions have been overbroad or procedurally defective. *See, e.g.*, Beatty v. Haro, No. 15-003711-1 (Ariz. Temp. Mun. Ct. Feb. 11, 2015); Black v. Starzlife, Inc., No. 2:09-cv-05380-RGK-RC (C.D. Cal. Nov. 6, 2009) (stipulated).

are present: any criminal punishment for violating an injunction should require that

(1) a jury find that the statements were false

(2) when read in context and at the time they were posted, and

(3) this finding must be made beyond a reasonable doubt

(4) with a court-appointed defense lawyer available to argue the matter, if the defendant can't afford a lawyer.

Courts also need to consider whether the injunctions are consistent with state law principles, even apart from the First Amendment:

(a) They need to consider whether injunctions' ability to provide criminal remedies without the assent of a prosecutor is consistent with state notions of separation of powers.

(b) They need to consider whether the criminal remedies are consistent with the legislative judgment to repeal criminal libel statutes, in those states that have repealed those statutes.

(c) And federal courts considering such injunctions need to follow *Erie* by making sure that the injunctions are consistent with state remedies law as well as the First Amendment.

APPENDIX A: STATES' VIEWS ON ANTI-LIBEL INJUNCTIONS

Courts in thirty-four states and nine federal circuits seem to generally allow anti-libel injunctions, at least in some situations. I include six states—Arizona, Arkansas, Colorado, South Carolina, Utah, and Wisconsin—where many state courts have issued such injunctions without expressly discussing any First Amendment objections, since such a pattern seems to reflect custom among judges. In all the other states, courts have authorized such injunctions with an express holding that the injunctions don't violate the First Amendment, or at least with statements that suggest the injunctions are likely constitutional.

- Alabama (trial court holding, Supreme Court dictum).[285]
- Alaska (Supreme Court statement so leaning).[286]

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285 Ex parte *Wright*, 166 So. 3d 618, 633 (Ala. 2014) (dictum) (stating that, "If the trial court finds that the plaintiffs or their attorneys have made false or deceptive statements, it has the authority to proscribe such statements," because "demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements," citing one non-libel case, Brown v. Hartlage, 456 U.S. 45, 60 (1982), and one libel case, Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)); Riley v. Shuler, Nos. 2013-236 & 2013-237, 2013 WL 12376646, at *2-3 (Ala. Cir. Ct. Shelby Cty. Nov. 15, 2013); Griffis v. Luban, No. CX-01-1350, 2002 WL 338139, at *6-7 (Minn. Ct. App. Mar. 25, 2002), *vacated on other grounds*, 646 N.W.2d 527 (Minn. 2002) (discussing a similar Alabama injunction, though concluding that the injunction extended beyond defamatory statements and therefore needed to be narrowed).

286 Alsworth v. Seybert, 323 P.3d 47, 57 n.34 (Alaska 2014).

- Arizona (trial court practice).[287]
- Arkansas (trial court practice).[288]
- California (Supreme Court holding).[289]
- Colorado (trial court practice).[290]
- Connecticut (trial court holdings).[291]
- Delaware (Court of Chancery holding as to statements that probably damage business, dictum as to other statements).[292]

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287 *See, e.g.*, CS&P Fiduciare SA v. RC Arden, No. CV2014-094963, at 3 (Ariz. Super. Ct. Maricopa Cty. May 2, 2016); Calvary Cmty. Church v. Blogger Brother Tafari, No. CV2015-009060, at 2 (Ariz. Super. Ct. Maricopa Cty. Mar. 2, 2016); Eckley & Assocs v. Tobias, No. CV2013-009316, at 3 (Ariz. Super. Ct. Maricopa Cty. June 3, 2015). I have many other Arizona anti-libel injunctions in my files.

288 Mascagni v. McAlister, No. 60CV-19-5451 (Ark. Cir. Ct. Pulaski Cty. Sept. 10, 2019); Absolute Pediatric Servs., Inc., No. 04CV-18-2961 (Ark. Cir. Ct. Benton Cty. Nov. 9, 2018); Peretti v. Ellis, No. 60CV-18-2524 (Ark. Cir. Ct. Pulaski Cty. Sept. 11, 2018); Thomas v. Wray, No. 04CV-2018-1484-5 (Ark. Cir. Ct. Benton Cty. May 24, 2017); Hill v. Charvei', No. 60CV-17-4839 (Ark. Cir. Ct. Pulaski Cty. Sept. 8, 2017); Kuettel v. Steward, No. CV-2012-270-5 (Ark. Cir. Ct. Benton Cty. June 28, 2012), *rev'd on other grounds*, 450 S.W.3d 762 (Ark. 2014). In the appellate courts, Esskay Art Galleries v. Gibbs, 172 S.W.2d 924, 927 (Ark. 1943), generally rejects injunctions against libel, but Webber v. Gray, 307 S.W.2d 80, 83 (Ark. 1957), appears to change course.

289 Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 349 (Cal. 2007).

290 *See, e.g.*, Clark v. Doe, No. 15CV31615 (Colo. Dist. Ct. Denver Cty. Jan. 22, 2016); Woodbridge Structured Funding, Inc. v. Doe, No. 13CV31613, at 2 (Colo. Dist. Ct. Denver Cty. Feb. 14, 2014); Woodbridge Structured Funding, LLC v. Doe, No. 14CV33028, at 2 (Colo. Dist. Ct. Denver Cty. Dec. 5, 2014); Madwire Media, LLC v. Niemann, No. 2014CV030182, at 2 (Colo. Dist. Ct. Larimer Cty. May 6, 2014). Degroen v. Mark Toyota-Volvo, Inc., 811 P.2d 443, 445-46 (Colo. App. 1991), took the view that injunctions against libel are categorically unconstitutional, but it seems to have left no mark on Colorado law; apparently no cases cite it.

291 Borg v. Cloutier, No. FST-CV-166028856S, 2018 WL 4441101, at *7 (Conn. Super. Ct. Aug. 23, 2018) (issuing a permanent injunction, presumably concluding that it was consistent with the First Amendment, given that an earlier decision in the same case, *Borg*, 2017 WL 3613494 (Conn. Super. Ct. July 17, 2017), refused to issue a preliminary injunction on First Amendment grounds); SBD Kitchens, LLC v. Jefferson, No. FST-CV-126014447S, 2013 WL 6989409, at *9-10 (Conn. Super. Ct. Dec. 16, 2013), *aff'd on other grounds*, 118 A.3d 550 (Conn. App. Ct. 2015). *But see* Whitnum v. Robinson, No. FST-CV-125013822S, 2012 WL 1511376, at *6-7 (Conn. Super. Ct. Apr. 10, 2012) (stating that injunctions against libel are unconstitutional, though in a case involving a preliminary injunction; *SBD Kitchens, LLC*, which upheld a permanent injunction, distinguished *Whitnum* on this ground).

292 *See* Perlman v. Vox Media, Inc., No. CV 10046-VCS, 2019 WL 2647520, at *6 (Del. Ch. June 27, 2019) (discussing libelous statements generally); Organovo Holdings, Inc. v. Dimitrov, 162 A.3d 102, 122 (Del. Ch. 2017) (discussing libelous statements that interfere with prospective economic advantage, by producing concrete loss of business). *Organovo* held that Delaware's chancery courts generally don't have jurisdiction over libel cases in the first instance (unless there is a showing of interference with prospective economic advantage). *Organovo*, 162 A.3d at 122-23. But it expressly left open the possibility that, once the law court concludes—after a jury trial, if the parties don't choose a bench trial—that a statement is libelous, an injunction can then be issued. *Id.* at 124-26 & n.105. *See also Ritchie CT Opps, LLC v. Huizenga Managers Fund, LLC*, No. 2018-0196-SG, 2019 WL 2319284, at *14, n.158 (Del. Ch. May 30, 2019) (following *Organovo*, though expressing more skepticism about injunctions unrelated to injury to business); CapStack Nashville 3 LLC v.

- Florida (appellate court holdings, but limited to statements that damage business).[293]
- Georgia (Supreme Court holding, but limited to statements that are part of a sustained campaign).[294]
- Illinois (appellate court dictum, but limited to statements that damage business, coupled with practice in trial court decisions).[295]
- Indiana (appellate court holding, as to speech on matters of private concern).[296]
- Iowa (nonbinding appellate court holding).[297]

MACC Venture Partners, No. 2018-0552-SG, 2018 WL 3949274, at *4 (Del. Ch. Aug. 16 2018) (leaving the question open, as was the case in *Organovo*).

293 *See, e.g.*, Murtagh v. Hurley, 40 So. 3d 62, 67 (Fla. Dist. Ct. App. 2010) (holding that actual harm to business must be shown before an injunction is issued); Zimmerman v. D.C.A. at Welleby, Inc., 505 So. 2d 1371, 1376 (Fla. Dist. Ct. App. 1987); DeRitis v. AHZ Corp., 444 So. 2d 93, 94-95 (Fla. Dist. Ct. App. 1984).

294 *See, e.g.*, Ellerbee v. Mills, 422 S.E.2d 539, 540-41 (Ga. 1992); Ga. Soc'y of Plastic Surgeons, Inc. v. Anderson, 363 S.E.2d 140, 144 (Ga. 1987); Retail Credit Co. v. Russell, 218 S.E.2d 54, 62-63 (Ga. 1975). Georgia courts generally reject *preliminary* injunctions in libel cases. Cohen v. Advanced Med. Grp. of Ga., Inc., 496 S.E.2d 710, 711 (Ga. 1998); Fernandez v. N. Ga. Reg'l Med. Ctr., Inc., 400 S.E.2d 6, 8 (Ga. 1991); High Country Fashions, Inc. v. Marlenna Fashions, Inc., 357 S.E.2d 576, 577 (Ga. 1987); Brannon v. Am. Micro Distribs., Inc., 342 S.E.2d 301, 302-03 (Ga. 1986); Pittman v. Cohn Cmtys., Inc., 239 S.E.2d 526, 528-29 (Ga. 1977). But while some of the cases repeat "the general rule that 'equity will not enjoin libel and slander,'" *Brannon*, 342 S.E.2d at 303 (quoting *Pittman*, 239 S.E.2d at 528), that appears to be limited to preliminary injunctions: the court has expressly distinguished permanent injunctions entered "subsequent to a verdict in which a jury found that statements by [defendant] were false and defamatory," which the court has allowed. *Cohen*, 496 S.E.2d at 711 (quoting *High Country Fashions*, 357 S.E.2d at 577); *see also* Hartman v. PIP-Grp., LLC, 825 S.E.2d 601, 606 (Ga. Ct. App. 2019) (concluding that preliminary anti-libel injunctions are unconstitutional, but permanent injunctions may be constitutional).

295 *See, e.g.*, Allcare, Inc. v. Bork, 531 N.E.2d 1033, 1038 (Ill. App. Ct. 1988) (stating that an injunction can be issued to bar "commercial disparagement" following "a long standing and persistent pattern by defendants of defaming plaintiff or of disparaging its products or services"); *see also* Reschke v. Lee, No. 2016-L-008399, at 1 (Ill. Cir. Ct. Cook Cty. Aug. 30, 2016) (issuing anti-libel injunction); Kaupert v. Kim, No. 12 CH 28082, at 2 (Ill. Cir. Ct. Cook Cty. Dec. 13, 2012) (same); Houlihan Smith & Co. v. Forte, No. 10 CH 16477 (Ill. Cir. Ct. Cook Cty. Apr. 16, 2010) (same).

296 *See* Barlow v. Sipes, 744 N.E.2d 1, 10 (Ind. Ct. App. 2001) (holding both preliminary and permanent injunctions constitutionally permissible); *see also* Eppley v. Iacovelli, No. 1:09-cv-386-SEB-JMS, at 4 (S.D. Ind. Apr. 17, 2009) (applying *Barlow*). *But see* Mishler v. MAC Sys., Inc., 771 N.E.2d 92, 98-99 (Ind. Ct. App. 2000) (holding that the Indiana Constitution forbids preliminary injunctions against speech entered "after only the most preliminary of determinations by the trial court"); St. Margaret Mercy Healthcare Ctrs., Inc. v. Ho, 663 N.E.2d 1220, 1223-24 (Ind. Ct. App. 1996) (dissolving a preliminary injunction on First Amendment grounds, because speech cannot be restricted "before an adequate determination that it is unprotected by the First Amendment").

297 DeWaard v. Anderson, 1999 WL 1136475, at *1 (Iowa Ct. App. Dec. 13, 1999); *see also* Bierman v. Weier, No. CL 112139, 2009 WL 9152625, at *4 (Iowa Dist. Ct. Polk Cty. Apr. 29, 2009).

- Kentucky (Supreme Court holding, as to speech on matters of private concern).[298]
- Louisiana (appellate court dictum).[299]
- Maine (Supreme Judicial Court holding).[300]
- Maryland (appellate court dicta, plus practice in trial court decisions).[301]
- Michigan (nonbinding appellate court holdings).[302]
- Minnesota (Supreme Court holding).[303]
- Mississippi (trial court decision).[304]
- Missouri (appellate court holding, though not reaching First Amendment defense because of waiver).[305]

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298 *See* Hill v. Petrotech Res. Corp., 325 S.W.3d 302, 313 (Ky. 2010). The court "emphasize[d]" that it was not discussing "injunctions that may relate to media defendants, public figures, and matters of public interest," which may be treated differently. *Id.* at 309 n.2.

299 Vartech Sys., Inc. v. Hayden, 2005-2499, pp. 17-18 (La. App. 1 Cir. 12/20/06); 951 So. 2d 247, 262 & n.22 ("In addition to damages, the remedy of a permanent injunction . . . relative to the making of untrue, disparaging, or false comments or remarks concerning VarTech . . . is also available after a trial on the merits"). The court noted that "[c]ourts are generally reluctant to issue an injunction to restrain torts such as defamation or harassment," *id.* at 261, citing cases such as Greenberg v. DeSalvo, 229 So. 2d 83, 86 (1969), but this reluctance is apparently not seen as a categorical prohibition; *see also* Goldenberg v. Dirty World, LLC., No. 16-12002 (La. Dist. Ct. Orleans Parish Dec. 8, 2016) (issuing anti-libel injunction).

300 Truman v. Browne, 2001 ME 182, ¶ 15, 788 A.2d 168, 172 (2001) (holding that an anti-libel injunction was overbroad, because it could apply to statements that the speaker believed were true, but remanding so the trial court could impose a narrower injunction).

301 Prucha v. Weiss, 197 A.2d 253, 257 (Md. 1964), and Warren House Co. v. Handwerger, 213 A.2d 574, 576 (Md. 1965), held that anti-libel injunctions couldn't be issued by equity tribunals (Maryland hadn't merged law and equity then), but they also noted that a libel plaintiff "may claim an injunction as ancillary relief in an action at law," *Prucha*, 197 A.2d at 256; *Warren House*, 213 A.2d at 576. Many Maryland courts have indeed recently issued anti-libel injunctions. *See, e.g.*, Hanna v. Qin, No. 24-C-16-007000, 2018 WL 3953864, at *1 (Md. Cir. Ct. Baltimore City June 13, 2018); Callender v. Anthes, No. C13-1616 (Md. Cir. Ct. Calvert Cty. Jan. 15, 2014), *available at* Callender v. Anthes, No. 8:14-cv-00121-DKC, at 23 (D. Md. Apr. 18, 2014), ECF No. 4; Docket Entry, Muziani v. Trankle, No. 02-C-13-182491 (Md. Cir. Ct. Nov. 15, 2013); McCauley v. Caveo Network Sols., Inc., No. C09-1062, 2011 WL 8908026, at *3 (Md. Cir. Ct. Frederick Cty. Feb. 9, 2011); Docket Entry, Am. Global Holdings Corp. v. Dayton, No. 135416V (Md. Cir. Ct. Montgomery Cty. May 3, 1995).

302 Gerald L. Pollack & Assocs., Inc. v. Pollack, Nos. 319180, 320917, 320918, 320919, 2015 WL 339715, at *24 (Mich. Ct. App. Jan. 27, 2015); Rooks v. Krzweski, No. 306034, 2014 WL 1351353, at *31 (Mich. Ct. App. Apr. 3, 2014); Dupuis v. Kemp, No. 263880, 2006 WL 401125, at *3 (Mich. Ct. App. Feb. 21, 2006).

303 Advanced Training Sys., Inc. v. Caswell Equip. Co., 352 N.W.2d 1, 11 (Minn. 1984).

304 Lewis v. Lewis, No. 25CH1:15-cv-000927, 2019 WL 1245272, at *10 (Miss. Ch. Hinds Cty. Aug. 25, 2015 & Feb. 13, 2019).

305 MB Town Ctr., LP v. Clayton Forsyth Foods, Inc., 364 S.W.3d 595, 604 (Mo. Ct. App. 2012); *see also* Boemler Chevrolet, Co. v. Combs, 808 S.W.2d 875, 880-81 (Mo. Ct. App. 1991) (describing picketing as protected against an injunction when "the messages are not false"); Maxx Media, Inc. v. Lieu, No. 15CG-CC00222 (Mo. Cir. Ct. Dec 9, 2016) (issuing an anti-libel injunction); Boyd v. Does, No. 14BA-CV03038 (Mo. Cir. Ct. Boone Cty. Jan. 20, 2015) (same); Jim

- Montana (trial court holding, plus Supreme Court holding in related context).[306]
- Nebraska (Supreme Court dictum and appellate court holding).[307]
- Nevada (Supreme Court holding, but limited to statements that damage business).[308]
- New Jersey (nonbinding appellate court holding).[309]
- New Mexico (appellate court holdings so suggesting, but limited to statements that are part of a "continue[d pattern of] attacks").[310]
- New York (appellate court holdings, but limited to statements that are part of "a sustained campaign").[311]
- North Carolina (appellate court holding, but limited to statements that damage business).[312]

Butler Chevrolet, Inc. v. Cooney, No. 14SL-CC00556, at 1 (Mo. Cir. Ct. St. Louis Cty. Feb. 24, 2014) (same).

306 St. James Healthcare v. Cole, 178 P.3d 696, 705 (Mont. 2008) (holding that speech "intended to embarrass, annoy, harass or threaten" can be enjoined, and repeatedly favorably citing Balboa Island Village Inn v. Lemen, 156 P.3d 339 (Cal. 2007), which upheld injunctions against libel); *see also* Geiszler v. Sayer, No. DV101586, 2012 WL 11981118 (Mont. Dist. Ct. Missoula Cty. June 25, 2012) (issuing preliminary anti-libel injunction and expressly rejecting constitutional defense), *injunction made permanent*, 2012 WL 11981120, at *1 (Mont. Dist. Ct. Missoula Cty. Sept. 5, 2012).

307 Sid Dillon Chevrolet-Oldsmobile-Pontiac v. Sullivan, 559 N.W.2d 740, 747 (Neb. 1997) (stating the principle in dictum); Nolan v. Campbell, 690 N.W.2d 638, 651-52 (Neb. Ct. App. 2004) (holding the dictum in *Sid Dillon* to be binding).

308 Guion v. Terra Mktg. of Nev., Inc., 523 P.2d 847, 848 (Nev. 1974); Gillespie v. Council, No. 67421, 2016 WL 5616589, at *3 (Nev. Ct. App. Sept. 27 2016) (following *Guion*).

309 Chambers v. Scutieri, No. A-4831-10T1, 2013 WL 1337935, at *13, *16 (N.J. Super. Ct. App. Div. Apr. 4, 2013); *see also* Barres v. Holt, Rinehart & Winston, Inc., 330 A.2d 38, 51 (N.J. Super. Ct. Law Div. 1974), *aff'd on other grounds*, 378 A.2d 1148 (N.J. 1977).

310 Kimbrell v. Kimbrell, 306 P.3d 495, 499, 507–08 (N.M. Ct. App. 2013) (reversing anti-libel injunction but only "[b]ecause the district court did not make factual findings regarding defamation," and remanding "for the district court to consider the . . . arguments and evidence regarding defamation in light of the facts of this case, should [defendant] wish to persist in his publication efforts"), *rev'd on other grounds*, 331 P.3d 915 (N.M. 2014); Best v. Marino, 404 P.3d 450, 457–60 (N.M. Ct. App. 2017) (holding that an injunction banning speech that would "caus[e] Petitioner to suffer severe emotional distress" was constitutional, using logic that would equally apply to injunctions banning libelous speech). Mescalero Apache Tribe v. Allen, 469 P.2d 710, 711 (N.M. 1970), concluded that an injunction is unavailable when "[t]he complaint does not allege that appellee will continue his attacks upon the tribe, and there is nothing to support the contention that further libelous letters will be written," but did not decide what would happen if there was indeed evidence of an ongoing campaign of defamation.

311 LoPresti v. Florio, 71 A.D.3d 574, 575 (N.Y. App. Div. 2010); Ansonia Assocs. Ltd. P'ship v. Ansonia Tenants' Coal., Inc., 253 A.D.2d 706, 707 (N.Y. App. Div. 1998); Bingham v. Struve, 591 N.Y.S.2d 156, 158 (App. Div. 1992); Trojan Elec. & Mach. Co., Inc. v. Heusinger, 557 N.Y.S.2d 756 (App. Div. 1990); *see also* Dennis v. Napoli, 148 A.D.3d 446, 446-47 (N.Y. App. Div. 2017) (applying this limitation to interference with employment).

312 Burke Transit Co. v. Queen City Coach Co., 47 S.E.2d 297, 299 (N.C. 1948); *see also* Place v. Doe, No. 12-CV-04196 (N.C. Super. Ct. Buncombe Cty. Oct. 1, 2012) (issuing injunction in such a case); Lewis v. Rapp, No. 10 CVS 932, 2010 WL 9598800, at *1 (N.C. Super. Ct. Brunswick Cty. Apr.

- Ohio (Supreme Court holding).[313]
- South Carolina (trial court practice).[314]
- Tennessee (nonbinding appellate court holdings).[315]
- Utah (trial court practice, though more clearly for orders to take down speech than for orders banning repetition of the speech).[316]
- Washington (appellate court holding).[317]
- Wisconsin (trial court practice).[318]
- Second Circuit (nonbinding appellate court holding, though in some tension with discussion in an earlier case).[319]
- Third Circuit (appellate court statement so leaning).[320]

19, 2010) (noting that a TRO had been entered in the case, even though it did not involve damage to business); 17 N.C. INDEX 4TH *Injunctions* § 33 (2019) (citing *Burke Transit* as authoritative).

313 O'Brien v. Univ. Cmty. Tenants Union, Inc., 327 N.E.2d 753, 755-56 (Ohio 1975).

314 Adili v. Yarnell, No. 2017-CP-08-552, at 2 (S.C. Ct. Com. Pl. Feb. 27, 2017); Monster T-Shirts, LLC v. Reed, No. 2015-CP-32-01803, at 4 (S.C. Ct. Com. Pl. Aug. 18, 2016); 52 Apps Inc. v. SmartPhoneRecordsLLC, No. 2016-CP-40-1016, at 2-3 (S.C. Ct. Com. Pl. Aug. 11, 2016); Vacation Station, LLC v. Doe, No. 2013-CP-10-2036, at 2-3 (S.C. Ct. Com. Pl. Apr. 19, 2013); Everest Wealth Mgmt., LLC v. Doe, No. 12-CP-08-2583, at 2-3 (S.C. Ct. Com. Pl. Oct. 29, 2012).

315 *In re* Conservatorship of Turner, No. M2013-01665-COA-R3-CV, 2014 WL 1901115, at *20 (Tenn. Ct. App. May 9, 2014). Unpublished opinions are potentially persuasive precedent in Tennessee courts, *see* Watts v. Watts, 519 S.W.3d 572, 579 n.5 (Tenn. Ct. App. 2016), and *Turner* has indeed proved persuasive. *See* Gider v. Hubbell, No. M2016-00032-COA-R3-JV, 2017 WL 1178260, at *10-12 (Tenn. Ct. App. Mar. 29, 2017) (following *Turner*); Loden v. Schmidt, No. M2014-01284-COA-R3-CV, 2015 WL 1881240, at *8–9 (Tenn. Ct. App. Apr. 24, 2015) (same).

316 Stern v. Lindsey, No. 160902290, at 6-7 (Utah Dist. Ct. Oct. 4, 2017) (ordering removal); Living Scriptures, Inc. v. Rafahi, No. 160902584, at 1 (Utah Dist. Ct. July 12, 2016) (same); Legally Mine, LLC v. Doe, No. 150400521, at *10 (Utah Dist. Ct. Dec. 4, 2015) (same); Vision Bankcard v. Hruska, No. 150401307, at 2 (Utah Dist. Ct. Utah Cty. Aug. 26, 2015) (banning repetition); Salt Lake City Mack Sales & Serv. v. Stoker, No. 110918085, at 2 (Utah Dist. Ct. Salt Lake Cty. Aug. 16, 2012) (ordering removal).

317 *In re* Marriage of Meredith, 201 P.3d 1056, 1064 (Wash. Ct. App. 2009); *see also In re* Guardianship of Janzen, No. 33272-1-III, 2015 WL 6395663, at *6 (Wash. Ct. App. Oct. 22, 2015); Armesto v. Rosolino, No. 70424-9-I, 2014 WL 3360238, at *5 (Wash. Ct. App. July 7, 2014).

318 *E.g.*, Docket Entry No. 7, Petitioner v. Alvarado, No. 2017CV002741 (Wis. Cir. Ct. Milwaukee Cty. Apr. 14, 2017); Docket Entries Nos. 6-8, Jokinen v. Alldredge, No. 2015CV000074 (Wis. Cir. Ct. Ashland Cty. Sept. 1, 2015); Docket Entries Nos. 8-11, Petitioner v. Brandon, No. 2010CV014072 (Wisc. Cir. Ct. Milwaukee Cty. Sept. 8, 2010), *vacated* Oct. 22, 2010; Docket Entries Nos. 7-8, Stuckey-Osthoff v. Dobbs, No. 2007CV000202 (Wisc. Cir. Ct. Richland Cty. Oct. 5, 2007); Docket Entries Nos. 1-3, Bell v. Maday, No. 2005CV000009 (Wis. Cir. Ct. Ashland Cty. Feb. 8, 2005). All these were harassment restraining order cases, but the injunctions specifically banned libeling or slandering the plaintiff.

319 Ferri v. Berkowitz, 561 F. App'x 64, 65 n.2 (2d Cir. 2014) ("[T]he district court remains free to craft a narrow injunction that applies only to Appellee's unprotected [defamatory] speech, should the court so choose."); *see also* D'Addio v. Kerik, No. 15-cv-597, 2019 WL 4857320 (S.D.N.Y. Oct. 2, 2019). Metro. Opera Ass'n. v. Local 100, Hotel Emps. and Rest. Emps. Int'l Union, 239 F.3d 172 (2d Cir. 2001), is sometimes cited as rejecting anti-libel injunctions, and it did express skepticism about them, *id.* at 177. But the court expressly declined to hold that such injunctions, if narrowly crafted, were categorically unconstitutional. *Id.* at 179.

320 Kramer v. Thompson, 947 F.2d 666, 676 (3d Cir. 1991).

- Fourth Circuit (district court opinions).[321]
- Fifth Circuit (appellate court holding, though in a case that could be read as limited to commercial speech).[322]
- Sixth Circuit (appellate court holding).[323]
- Seventh Circuit (appellate court statement so leaning).[324]
- Ninth Circuit (appellate court holding).[325]
- Tenth Circuit (district court opinions).[326]

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321 Brennan v. Stevenson, Civ. No. JKB-15-2931, 2015 WL 7454109, at *5 (D. Md. Nov. 24, 2015) (dictum) (taking the view that an anti-libel injunction would be a permissible injunction against "unprotected speech," and thus consistent with the First Amendment); Maye v. Worrell, No. 13-cv-00510, 2013 WL 5545077, at *3 (M.D.N.C. Oct. 8, 2013) (issuing anti-libel injunction and rejecting First Amendment objection); *see also* Wengui v. Li, Civ. No. PWG-18-259, 2019 WL 2288348, at *4 (D. Md. May 29, 2019) (issuing anti-libel injunction without discussing any First Amendment objection); Barfi v. Malekolkottabkhiabani, No. 8:16-cv-01418-PX (D. Md. June 24, 2016) (likewise).

322 Brown v. Petrolite Corp., 965 F.2d 38, 50-51 (5th Cir. 1992).

323 Lothschuetz v. Carpenter, 898 F.2d 1200, 1206, 1208-09 (6th Cir. 1990).

324 McCarthy v. Fuller, 810 F.3d 456, 462 (7th Cir. 2015). An earlier opinion, *e360 Insight v. Spamhaus Project*, 500 F.3d 594, 606 (7th Cir. 2007), briefly discussed the question but ultimately "express[ed] no opinion on the constitutional validity" of a suitably narrow anti-libel injunction.

325 San Antonio Cmty. Hosp. v. So. Cal. Council of Carpenters, 125 F.3d 1230, 1235, 1239 (9th Cir. 1997). The court characterized the enjoined speech as "fraud," *id.* at 1239, but the plaintiffs' claim was essentially defamation, and the court elsewhere so labeled it, *id.* at 1235 (notwithstanding the dissent's argument that this would make the injunction an unconstitutional prior restraint, *id.* at 1240 (Kozinski, J., dissenting)); *see also* San Antonio Cmty. Hosp. v. So. Cal. Council of Carpenters, 137 F.3d 1090, 1090, 1092 (9th Cir. 1998) (Reinhardt, J., dissenting) (dissenting from denial of rehearing en banc). On the other hand, despite this seemingly binding precedent, the matter in the Ninth Circuit appears not to be entirely settled. *In re* Dan Farr Prods., 874 F.3d 590, 596 n.8 (9th Cir. 2017), noted that "[s]ubsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context" (quoting CBS, Inc. v. Davis, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers)), but did not discuss *San Antonio Cmty. Hosp.*, and recent district court decisions reflect this tension. *Compare* Andreas Carlsson Prod. AB v. Barnes, No. CV 15-6049 DMG (AJWx), 2016 WL 11499656, at *5 (C.D. Cal. Oct. 11, 2016) (concluding that "'Injunctions against any speech, even libel, constitute prior restraints' and are therefore presumptively unconstitutional" (internal quotation and citation omitted)), *and* New Show Studios LLC v. Needle, No. 2:14-cv-01250-CAS (MRWx), 2016 WL 7017214, at *9 (C.D. Cal. Dec. 1, 2016) (concluding that "injunction[s] against defamatory statements" are only allowed in "exceptional circumstances"), *with* Vachani v. Yakovlev, No. 15-cv-04296-LB, 2016 WL 7406434, at *7 (N.D. Cal. Dec. 22, 2016) (concluding that "an injunction [to remove defamatory allegations and not to repeat them] is permissible"), *and* aPriori Technologies, Inc. v. Broquard, No. 2:16-cv-09561, 2017 WL 11319740, at *1 (C.D. Cal. Nov. 22, 2017) (enjoining defendant from "[m]aking any statement that refers to both aPriori or its officers, customers, investors, or affiliates, and Mr. Frank Iacovelli with respect to his alleged acts of child endangerment, child abuse or child molestation"), *and with* List Industries, Inc. v. List, No. 2:17-CV-2159 JCM (CWH), 2017 WL 3749593, at *3 n.1 (D. Nev. Aug. 30, 2017) (citing various opinions but "tak[ing] no position" on the dispute). The issue is now pending before the Ninth Circuit in *Ferguson v. Waid*, No. 18-36043 (oral arg. scheduled for Dec. 13, 2019).

326 Wagner Equip. Co. v. Wood, 893 F. Supp. 2d 1157, 1160-64 (D.N.M. 2012); Natural Wealth Real Estate, Inc. v. Cohen, No. 05-cv-01233-LTB-MJW, 2006 WL 3500624, at *9-10 (D. Colo. Dec. 4, 2006); *see also* Derma Pen, LLC v. 4EverYoung Ltd., No. 2:13-cv-00729-DN-EJF, 2017 WL 2258362, at *19 (D. Utah May 22, 2017) (issuing injunction but not discussing the First Amendment

- Eleventh Circuit (district court opinions).[327]
- Courts in six states plus D.C., as well as two federal circuits, have concluded that such injunctions are unconstitutional:
- District of Columbia (high court decision so suggesting).[328]
- Massachusetts (Supreme Judicial Court dictum, but possibly with exception for speech on private matters).[329]
- New Hampshire (Supreme Court holding, though some trial courts have recently been dissenting from it).[330]

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question); Whole Living, Inc. v. Tolman, No. 2:03-CV-272 TS, 2004 WL 2733614, *2 (D. Utah Nov. 29, 2004) (discussing preliminary injunction that had been issued, but not discussing the First Amendment question).

327 Ward v. Triple Canopy, Inc., No. 8:17-cv-802-T-24 MAP, 2017 WL 3149431, at *8-9 (M.D. Fla. Jul. 25, 2017); Int'l Auto Logistics, LLC v. Vehicle Processing Ctr. Of Fayetteville, Inc., No. 2:16-CV-10, 2016 WL 6609189, at *14-15 (S.D. Ga. Nov. 7, 2016); Holmes v. Dominique, No. 1:13-cv-04270-HLM, 2015 WL 11236539, at *6 (N.D. Ga. Jan. 20, 2015) (entering permanent injunction after having denied a preliminary injunction on First Amendment grounds, 2014 WL 12115947, at *2 (N.D. Ga. May 5, 2014)); Gold & Diamond Buyers, LLC v. Friedlich, No. 11-21843-CIV-JORDAN, 2011 WL 13322791, at *3 (S.D. Fla. Sept. 26, 2011); Saadi v. Maroun, No. 8:07-cv-1976-T-24-MAP, 2009 WL 3617788, at *23 (M.D. Fla. Nov. 2, 2009); *see also* Friedman v. Schiano, No. 9:16-cv-81975-BB, 2017 WL 2901211, at *5 (S.D. Fla. Jan. 9, 2017) (issuing an injunction but without any First Amendment discussion); Webimax v. Johnson, No. 3:11-cv-993-J-34JBT (M.D. Fla. Dec. 7, 2011) (same). District Judge Steven D. Merriday has issued several opinions that state that injunctions against speech are only allowed in "extraordinary circumstances," but does not elaborate further on that. McGowan v. CSPS Hotel, Inc., No. 8:09-cv-2311-T-23MAP, at *2 n.1 (M.D. Fla. Apr. 29, 2010) (dictum); Valdez v. T.A.S.O. Props., Inc., No. 8:09-cv-2250-T-23TGW, 2010 WL 1730700, at *3 n.1 (M.D. Fla. Apr. 28, 2010) (dictum); Gunder's Auto Ctr. v. State Farm Ins., 617 F. Supp. 2d 1222, 1225 n.4 (M.D. Fla. 2009).

328 Richardson v. Easterling, 878 A.2d 1212, 1217-18 (D.C. 2005).

329 Nyer v. Munoz-Mendoza, 430 N.E.2d 1214, 1217 (Mass. 1982) (noting in dictum that such an injunction would be unconstitutional). *See also* Clay Corp. v. Colter, No. NOCV1201138, 2012 WL 6928132, at *5-6 (Mass. Super. Ct. Sept. 12, 2012) (following *Nyer* to reject an anti-libel injunction in a private dispute); Shawsheen River Estates Assocs. Ltd. P'ship v. Herman, No. 95-1557, 1995 WL 809834, at *5-7 (Mass. Super. Ct. Apr. 11, 1995) (same, though possibly limited just to preliminary injunctions); Clement v. Sheraton Boston Corp., No. 930909F, 1993 WL 818763, at *3-4 (Mass. Super. Ct. Dec. 17, 1993) (same). *But see* Krebiozen Research Found. v. Beacon Press, Inc., 134 N.E.2d 1, 5 (Mass. 1956), on which *Nyer* chiefly relies, and which holds that "that equity jurisdiction does extend to cases of libel and slander" but that "the constitutional protection of free speech and public interest in the discussion of many issues greatly limit the area in which the power to give injunctive relief may or should be exercised in defamation cases." *Id.* at 6. The *Krebiozen* Court expressly declined to offer a "more precise definition than our cases now afford of the line dividing the special situations in which equity should exercise its jurisdiction to restrain the use of words from those in which public policy or constitutional provisions stay its hand," because in that case the subject—the efficacy (or not) of a proposed cancer cure—was of such great "public interest." *Id.*

330 Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc., 999 A.2d 184, 197 (N.H. 2010). *But see* Anagnost v. Mortg. Specialists, Inc., No. 2162016CV00277, 2017 WL 7693151, at *1-2 (N.H. Super. Ct. Nov. 9, 2017) (declining to apply *Mortgage Specialists*, seemingly because the trial court was more persuaded by out-of-state authorities than by the binding N.H. Supreme Court precedent), *aff'd on other grounds*, No. 2017-0311, 2018 WL 4940850 (N.H. Sept. 25, 2018); Walker v. Gill, No. 2162016CV00316, 2017 WL 9807400, at *2 (N.H. Super. Ct. Apr. 10, 2017) (declining to apply *Mortgage Specialists* on the grounds that it did not consider "whether an injunction may issue

- Oklahoma (Supreme Court holding).[331]
- Pennsylvania (Supreme Court holding).[332]
- Texas (Supreme Court holding, though with exception for orders to take down already posted material).[333]
- West Virginia (Supreme Court holding).[334]
- First Circuit (appellate court holding).[335]
- D.C. Circuit (appellate court holding).[336]
- Ten states have not resolved the matter, and the cases are likewise sparse in the Eighth and Federal Circuits:
- The Idaho Supreme Court has held that injunctions are unavailable in libel cases brought by "public officials,"[337] but didn't have occasion to opine on the much more common cases brought by other plaintiffs.
- Courts in Virginia[338] and Wyoming[339] have briefly discussed the question but have not resolved it.

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when a defendant has engaged in a continuous course of conduct of making statements which have been found to be defamatory"); Advanced Siding & Window Co. v. Kenton, No. 218-2013-CV-1155, at 3-5 (N.H. Super. Ct. Rockingham Cty. Dec. 17, 2013) (likewise).

331 House of Sight & Sound, Inc. v. Faulkner, 912 P.2d 357, 361 (Okla. Civ. App. 1995) (recognizing a narrow exception for "conspiracy, intimidation, or coercion"); First Am. Bank & Trust Co. v. Sawyer, 865 P.2d 347, 352 (Okla. Civ. App. 1993) (recognizing the same exception and holding that the "coercion" element is not satisfied simply by speech being aimed at pressuring a business to give the speaker a refund or similar benefit).

332 Willing v. Mazzocone, 393 A.2d 1155, 1157-58 (Pa. 1978) (applying state constitution's free expression guarantee). One more recent Pennsylvania trial court decision, though, allowed an injunction and distinguished *Willing* on the grounds that (1) the injunction only ordered the removal of past statements rather than prohibiting posting future statements, and (2) online statements have a much greater reach than the picketing in *Willing*. Klehr, Harrison, Harvey, Branzburg v. JPA Dev., Inc., No. 2095 EDA 2004, 2004 WL 5175146 (Pa. Ct. Com. Pl. Aug. 27, 2004).

333 Kinney v. Barnes, 443 S.W.3d 87, 97-101 (Tex. 2014).

334 Kwass v. Kersey, 81 S.E.2d 237, 242-43 (W. Va. 1954); *see also* Roberts v. Stevens Clinic Hosp., Inc., 345 S.E.2d 791, 808 (W. Va. 1986) (citing *Kwass* favorably for the broad proposition that the West Virginia Constitution preserves traditionally recognized rights to trial by jury, a proposition that *Kwass* relied on in concluding that anti-libel injunctions were unconstitutional).

335 Sindi v. El-Moslimany, 896 F.3d 1, 31-36 (1st Cir. 2018).

336 Cmty. for Creative Non-Violence v. Pierce, 814 F.2d 663, 672 (D.C. Cir. 1987).

337 Nampa Charter Sch., Inc. v. DeLaPaz, 89 P.3d 863, 867 (Idaho 2004).

338 *D'Ambrosio v. D'Ambrosio*, expressly declined to "reach [the] constitutional argument that [an] injunction [against libel] constitutes an impermissible prior restraint." 610 S.E.2d 876, 885 n.3 (Va. Ct. App. 2005).

339 *Hill v. Stubson*, concluded that a "request for 'a permanent injunction barring the Defendant from engaging in defamatory conduct toward Mrs. Hill'"—a catchall injunction—"is so broad and general" "that it is difficult to see how such relief would not run afoul of the First Amendment as a prior restraint on protected speech"; but it did not discuss the more common injunctions that ban repetition of specific statements. 420 P.3d 732, 744 n.7 (Wyo. 2018).

- I have seen anti-libel injunctions (with no First Amendment discussion) from courts in Hawaii,[340] Idaho,[341] Kansas,[342] North Dakota,[343] Oregon,[344] Rhode Island,[345] Vermont,[346] and Virginia,[347] but not enough to show a solid pattern in any of those states.
- I have seen nothing on the subject from courts in South Dakota.
- Focusing on just the largest three-quarters of states—the ones that are most likely to yield publicly available decisions on the subject—thirty (over eighty percent) seem to fall in the pro-libel-injunction camp (at least in part),[348] four fall in the anti-libel-injunction camp,[349] and three have not spoken.[350]

APPENDIX B: SAMPLE CATCHALL INJUNCTIONS

PayPal, Inc. v. Doe, No. cv2016-013343, at ¶ 2 (Ariz. Super. Ct. Maricopa Cty. Apr. 20, 2017).

Mascagni v. McAlister, No. 60CV-19-5451 (Ark. Cir. Ct. Pulaski Cty. Sept. 10, 2019).

Absolute Pediatric Servs., Inc., No. 04CV-18-2961 (Ark. Cir. Ct. Benton Cty. Nov. 9, 2018).

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340 Perrone v. Gao, No. CAAP-12-0001008, 2014 WL 399063, at *5, *9 (Haw. Ct. App. Jan. 30, 2014) (noting such an injunction and reversing it on other grounds); Walch v. Does, No. 11-0699-04 BIA (Haw. Cir. Ct. July 6, 2017); Sulla v. Horowitz, No. 12-1-0417, at 1 (Haw. Cir. Ct. June 17, 2013).

341 Blom v. Callan, No. CV-OC-2011-16232, at 2 (Idaho Dist. Ct. Ada Cty. Apr., 9, 2012).

342 Karats Jewelers, Inc. v. Dugan, No. 09CV10771, at 1 (Kan. Dist. Ct. Johnson Cty. July 9, 2013) (ordering removal of web pages); Selim v. Khawaja, No. 12CV06711 (Kan. Dist. Ct. Johnson Cty. Aug. 23, 2012); Quinn v. Waters, No. 12CV01028 (Kan. Dist. Ct. Johnson Cty. Feb. 7, 2012); HEV-Overland Park, Ltd. v. Keeler, No. 06CV8401 (Kan. Dist. Ct. Johnson Cty. Oct. 25, 2006). Unlike the other orders I cite in this Appendix, the *Karats Jewelers* order was entered pursuant to a stipulation between the plaintiffs and the defendant. Docket, *Karats Jewelers*, No. 09cv10771 (Kan. Dist. Ct. Johnson Cty. July 9, 2013) (July 7, 2013 entry). But the order purported to bind "search engines," plus presumably the hosting companies, and not just the consenting parties.

343 Carag v. Kellogg, No. 27-2015-CV-00371, at 2 (N.D. Dist. Ct. McKenzie Cty. Mar. 24, 2016).

344 Castillo v. Donovan, No. CV205-1725 (Or. Cir. Ct. Umatilla Cty. Dec. 28, 2005).

345 Sara Zarrella Photography, LLC v. Reyes, No. PC-2019-9209 (R.I. Super. Ct. Sept. 9, 2019); Narcisi v. Turtleboy Digital Mktg., Inc., No. WC-2019-52, 252 (R.I. Super. Ct. May 16, 2019), *available in* Notice of Removal, exhibit D, Narcisi v. Turtleboy Digital Mktg., Inc., No. 1:19-cv-00329 (D.R.I. June 18, 2019).

346 Hyperkinetics Corp. v. Flotec, Inc. No. 247-11-02 (Vt. Super. Ct. Orange Cty. Nov. 26, 2002), *available at* Hyperkinetics Corp. v. Flotec, Inc., No. 1:03-cv-00033 (D. Vt. Feb. 5, 2003), ECF No. 12.

347 Tellier Family, Inc. v. Ely, No. CL14-000952-00, at 2 (Va. Cir. Ct. May 16, 2014); DM Signs, LLC v. Dunn, No. CL00588, at 2 (Va. Cir. Ct. Jan. 18, 2012).

348 Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Utah, Washington, Wisconsin.

349 Texas, Pennsylvania, Massachusetts, Oklahoma.

350 Virginia, Oregon, Kansas.

Hill v. Charvei', No. 60CV-17-4839 (Ark. Cir. Ct. Pulaski Cty. Sept. 8, 2017).

Wang v. Lee, No. BC573818 (Cal. Super. Ct. L.A. Cty. July 16, 2016).

Cardoza v. Ortiz, No. FAMSS 1707719 (Cal. Super. Ct. San Bernardino Cty. Sept. 28, 2017).

DeJager v. Burgess, No. 112CV219299, at ¶ 4 (Cal. Super. Ct. Santa Clara Cty. Aug. 1, 2012).

ViaView v. Retzlaff, No. 114CH005460, at ¶ 1 (Cal. Super. Ct. Santa Clara Cty. Apr. 8, 2014), *rev'd on personal jurisdiction grounds*, 204 Cal. Rptr. 3d 566 (Ct. App. 2016).

Goodfellow v. Calantog, No. 56-2016-00487128-CU-HR-VTA, attachment 11 (Cal. Super. Ct. Ventura Cty. Mar. 17, 2017).

Pullman Sugar, LLC. v. Valdivia, No. 2018-0431-SG, 2018 WL 3349724, at ¶ 9 (Del. Ch. July 5, 2018).

Stuart v. Grabey, No. 12-15474 CA 15 (Fla. Cir. Ct. Miami-Dade Cty. May 8, 2012).

Meathe v. Wezensky, No. CACE14-012425 (Fla. Cir. Ct. Broward Cty. Apr. 23, 2015).

Ramunno Law Firm, P.A. v. Swanick, No. 42-2017-CA-418, at ¶ 3 (Fla. Cir. Ct. Marion Cty. Sept. 20, 2018).

Simmonds v. McConologue, No. 2017-CA-008830-O (Fla. Cir. Ct. Orange Cty. Nov. 16, 2017).

Oxendine v. Ramirez, No. 502017CA011274XXXXMB (Fla. Cir. Ct. Palm Beach Cty. Nov. 9, 2017).

Sulla v. Horowitz, No. 12-1-0417 (Haw. Cir. Ct. 3d Cir. May 23, 2013).

Lewis v. Doe, No. 49D13-1608-MI-030796 (Ind. Super. Ct. Marion Cty. Dec. 5, 2016).

Family Puppies v. "Jason Kaylor," No. 75CO1-1704-CC-141 (Ind. Cir. Ct. Starke Cty. July 10, 2018).

HEV-Overland Park, Ltd. v. Keeler, No. 06CV8401 (Kan. Dist. Ct. Johnson Cty. Oct. 25, 2006).

Callender v. Anthes, No. C13-1616 (Md. Cir. Ct. Calvert Cty. Nov. 15, 2013), *available in* Callender v. Anthes, No. 8:14-cv-00121-DKC (D. Md. Jan. 15, 2014) ECF No. 4.

Hanna v. Qin, No. 24-C-16-007000, 2018 WL 3953864, at *1 (Md. Cir. Ct. Balt. City June 13, 2018).

Revision Legal, PLLC v. Oskouie, No. 17-32312-CZ, at ¶ 7.b (Mich. Cir. Ct. Grand Traverse Cty. Mar. 2018).

Boyd v. Does, No. 14BA-CV03038, at ¶ a (Mo. Cir. Ct. Boone Cty. Jan. 20, 2015).

Docket Entry, Innovative Tech. & Beyond LLC v. Johnston, No. A-16-745005-B (Nev. Dist. Ct. Clark Cty. Oct. 17, 2016).

Docket Entry, Barilla v. Driscoll, No. A-17-762777-CIVIL (Nev. Dist. Ct. Clark Cty. Oct. 9, 2017).

Hickey v. Doe, No. 153873/2017, at 7 (N.Y. Sup. Ct. N.Y. Cty. Aug. 21, 2017).

Spivak v. Erskine, No. 17CV001045 (Ohio Ct. Com. Pl. Lake Cty. Nov. 28, 2018).

Nationwide Biweekly Admin., Inc. v. Hayes, No. 2014 CV 0061, at ¶¶ 2, .b-.c. (Ohio Ct. Com. Pl. Green Cty. July 3, 2014).

Sky v. Westhuizen, No. 2016 CV 01676, 2018 WL 4698154, at *38 (Ohio Ct. Com. Pl. Stark Cty. Aug. 1, 2018), *aff'd*, No. 2018 CA 00127, 2019 WL 2181911 (Ohio Ct. App. May 20, 2019).

Dan-Ere Home Improvement Co. v. Coe, No. CV 2010-04-437 (Ohio Ct. Com. Pl. Summit Cty. July 27, 2011).

Jim's Transmission & Auto Ctr. v. Carson, No. CJ-2015-1160 (Okla. Dist. Ct. Cleveland Cty. Oct. 9, 2015).

Adili v. Yarnell, No. 2017-CP-08-552 (S.C. Ct. Com. Pl. Berkeley Cty. Feb. 27, 2017).

52 Apps Inc. v. SmartPhoneRecordsLLC, No. 2016CP4001016 (S.C. Ct. Com. Pl. Richland Cty. Aug. 11, 2016).

CK Creations v. Pease, No. 2019-CI-13562 (Tex. Dist. Ct. Bexar Cty. Aug. 12, 2019).

Icon Bldg. Sys., LLC v. Newland, No. 17-2267-CV-A (Tex. Dist. Ct. Guadalupe Cty. Sept. 19, 2018).

Ox Specialized Transps., Inc. v. Goodrick, No. 201547082 (Tex. Dist. Ct. Harris Cty. Aug. 12, 2015).

PTSD Found. v. Goodner, No. 201763236 (Tex. Dist. Ct. Harris Cty. Sept. 25, 2017).

Villareal v. Garcia, No. C3569-18-G (Tex. Dist. Ct. Hidalgo Cty. Oct. 4, 2018).

Tellier Family, Inc. v. Ely, No. CL14000952-00, 2014 Va. Cir. LEXIS 231 (July 31, 2014).

Holmes v. Dominique, No. 1:13-cv-04270-HLM, 2015 WL 11236539, at *6 (N.D. Ga. Jan. 20, 2015).

Wengui v. Li, Civ. No. PWG-18-259, 2019 WL 2288348, at *4 (D. Md. May 29, 2019).

Maye v. Worrell, No. 13-cv-00510, at 3 (M.D.N.C. Oct. 8, 2013).

Palmaz Scientific, Inc. v. Harriman, No. SA-15-CA-734-FB, 2015 WL 13298400 (W.D. Tex. Aug. 27, 2015) (TRO).

Derma Pen, LLC v. 4EverYoung Ltd., No. 2:13-cv-00729-DN-EJF, 2017 WL 2258362, at *19 (D. Utah May 22, 2017).

Whole Living, Inc. v. Tolman, 2004 WL 2733614, at *2 (D. Utah Nov 29, 2004) (preliminary injunction).

Hisey v. Ellis, No. C17-5543RBL, 2017 WL 3447900 (W.D. Wash. Aug. 10, 2017).

Appendix C: Sample Preliminary Anti-Libel Injunctions

Riley v. Shuler, Nos. 2013-236, 2013-237, 2013 WL 12376647 (Ala. Cir. Ct. Sept. 20, 2013) (TRO).

Werz v. Signorelli, No. CV2014-008870 (Ariz. Super. Ct. Maricopa Cty. Aug. 19, 2014).

Mascagni v. McAlister, No. 60CV-19-5451 (Ark. Cir. Ct. Pulaski Cty. July 31, 2019) (TRO).

Peretti v. Ellis, No. 60CV-18-2524 (Ark. Cir. Ct. Pulaski Cty. Sept. 11, 2018).

Thomas v. Wray, No. 04CV-2018-1484-5 (Ark. Cir. Ct. Benton Cty. May 24, 2017) (TRO).

Hill v. Charvei', No. 60CV-17-4839 (Ark. Cir. Ct. Pulaski Cty. Sept. 8, 2017) (TRO).

Steep Hill v. Moore, No. RG17886732 (Cal. Super. Ct. Alameda Cty. Jan. 4, 2018).

Annuel Holdings, Inc. v. Jennings, No. 13CV39813 (Cal. Super. Ct. Calaveras Cty. Mar. 19, 2014).

Pham v. Watts, No. 1-13-CV-258390 (Cal. Super. Ct. Santa Clara Cty. Mar. 4, 2014) (TRO).

Power Payment v. Colvig, No. 114 CV 270785 (Cal. Super. Ct. Santa Clara Cty. Apr. 17, 2015).

Littman v. Mann, No. 13-00498 CA 23 (Fla. Cir. Ct. Miami-Dade Cty. Jan. 24, 2013).

Trevisani v. Doe, No. 2018-CA-009902-O (Fla. Cir. Ct. Orange Cty. Oct. 4, 2018) (TRO).

Oxendine v. Ramirez, No. 502017CA011274XXXXMB (Fla. Cir. Ct. Palm Beach Cty. Nov. 9, 2017).

Schaefer v. Gerrish, No. 12-CA-4135-16-W (Fla. Cir. Ct. Seminole Cty. Aug. 16, 2012).

Sulla v. Horowitz, No. 12-1-0417 (Haw. 3d Cir. Ct. June 17, 2013).

Interventional Pain Consultants v. Walmart, Inc., No. 19-CH-0258 (Ill. Cir. Ct. St. Clair Cty. May 15, 2019) (TRO), *available in* Interventional Pain Consultants v. Walmart, Inc., 3:19-cv-00535-SMY-RJD (S.D. Ill. May 23, 2019).

Reschke v. Lee, No. 2016-L-008399 (Ill. Cir. Ct. Cook Cty. Aug. 30, 2016).

HEV-Overland Park, Ltd. v. Keeler, No. 06CV8401 (Kan. Dist. Ct. Johnson Cty. Oct. 25, 2006) (TRO).

Quinn v. Waters, No. 12CV01028 (Kan. Dist. Ct. Johnson Cty. Feb. 7, 2012) (TRO).

Selim v. Khawaja, No. 12CV06711 (Kan. Dist. Ct. Johnson Cty. Aug. 23, 2012) (TRO).

Docket Entry, 6-13, Muzani v. Trankle, No. 02-C-13-182491 (Md. Cir. Ct. Anne Arundel Cty. Nov. 15, 2013).

Callender v. Anthes, No. C13-1616 (Md. Cir. Ct. Calvert Cty. Nov. 15, 2013), *available in* Callender v. Anthes, No. 8:14-cv-00121-DKC, ECF No. 4 (D. Md. Jan. 15, 2014).

Rucki v. Evavold, No. 19A-CV-17-1950 (Minn. Dist. Ct. Dakota Cty. July 28, 2017).

Lewis v. Lewis, No. 25CH1:15-cv-000927, 2019 WL 1245272 (Miss. Ch. Ct. Hinds Cty. Aug. 25, 2015) (TRO).

Jim Butler Chevrolet v. Cooney, No. 14SL-CC00556 (Mo. Cir. Ct. St. Louis Cty. Feb. 24, 2014) (TRO).

Impey v. Clithero, 553 S.W.3d 344, 348 (Mo. Ct. App. 2018) (describing injunction issued by lower court).

Geiszler v. Sayer, No. DV101586, 2012 WL 11981118 (Mont. Dist. Ct. Missoula Cty. June 25, 2012).

Xyience Inc. v. Bergeron, No. A 544781 (Nev. Dist. Ct. Clark Cty. Sept. 6, 2010).

Docket Entry, Innovative Techs. & Beyond LLC v. Johnston, No. A-16-745005-B (Nev. Dist. Ct. Clark Cty. Oct. 17, 2016) (TRO).

Docket Entry, Barilla v. Driscoll, No. A-17-762777-CCIVIL (Nev. Dist. Ct. Clark Cty. Oct. 9, 2017).

Wang v. Cucinotta, No. 18PO0734 (Nev. Just. Ct. Las Vegas Twp. May 23, 2018).

Pace v. Proler, No. BER-L-7667-18 (N.J. Super. Ct. Bergen Cty. Oct. 24, 2018).

Chung v. Google, Inc., No. 508016/2014 (N.Y. Sup. Ct. Kings Cty. Oct. 6, 2014).

Guardians of Rescue, Inc. v. Bobbie Rats, No. 22223/2016E (N.Y. Sup. Ct. Bronx Cty. Apr. 25, 2016).

White House Capital LLC v. Concerned Consumer, No. 21489/2016E (N.Y. Sup. Ct. Bronx Cty. Dec. 15, 2016).

Earth Pledge Found. v. Truth About Earth Pledge, No. 159159/14 (N.Y. Sup. Ct. N.Y. Cty. Nov. 12, 2014).

Taylor v. Defense Against Evil, No. 062738/2013 (N.Y. Sup. Ct. Suffolk Cty. Sept, 4, 2013) (TRO).

Carey v. Ripp, 77 N.Y.S.3d 863 (Sup. Ct. 2018).

Place v. Doe, No. 12CV 04196 (N.C. Super. Ct. Buncombe Cty. Oct. 1, 2012) (TRO).

Lewis v. Rapp, No. 10 CVS 932, 2010 WL 9598800 (N.C. Super. Ct. Brunswick Cty. Apr. 19, 2010) (noting that a TRO had been entered in the case).

Escalera v. Fagin, No. 16 CvD 141 (N.C. Watauga Cty. Gen. Ct. Just. Mar. 24, 2016) (TRO).

Jim's Transmission & Auto Ctr. v. Carson, No. CH-2015-1160 (Okla. Dist. Ct. Cleveland Cty. Oct. 9, 2015).

Castillo v. Donovan, No. CV205-1725 (Or. Cir. Ct. Umatilla Cty. Dec. 28, 2005).

Opulent Jewelers v. Leo, No. 2014-00109 (Pa. Ct. Com. Pl. Bucks Cty. Feb. 12, 2014) (TRO).

Sara Zarrella Photography, LLC v. Reyes, No. PC-2019-9209 (R.I. Super. Ct. Sept. 9, 2019) (TRO).

CK Creations v. Pease, No. 2019-CI-13562 (Tex. Dist. Ct. Bexar Cty. Aug. 12, 2019).

Pearson v. Pearson, No. 417-00143-2017 (Tex. Dist. Ct. Collin Cty. Jan. 24, 2017).

Ox Specialized Transps., Inc. v. Goodrick, No. 2015 47082 (Tex. Dist. Ct. Harris Cty. Aug. 12, 2015).

Villareal v. Garcia, No. C3569-18-G (Tex. Dist. Ct. Hidalgo Cty. Oct. 4, 2018) (TRO).

Barette v. Hous. Forensic Sci. Ctr., Inc., No. 2018-81317 (Tex. Dist. Ct. Harris Cty. Dec. 6, 2018).

T.S. v. Reyes, No. D-1-GN-12-003616 (Tex. Dist. Ct. Travis Cty. Nov. 15, 2012) (TRO).

Whole Living, Inc. v. Tolman, No. 2-03-CV-272 TS, 2004 WL 2733614, *2 (D. Utah Nov 29, 2004).

Vision BankCard, Inc. v. Hruska, No. 150401307 (Utah Dist. Ct. Utah Cty. Aug, 26, 2015) (TRO).

Tellier Family, Inc. v. Ely, 2014 Va. Cir. LEXIS 231 (July 31, 2014).

Hyperkinetics Corp. v. Flotec, Inc., No. 247-11-02 (Vt. Super. Ct. Orange Cty. Nov. 26, 2002), *available in* Hyperkinetics Corp. v. Flotec, Inc., No. 1:03-cv-00033-jgm, ECF No. 12 (D. Vt. Feb. 5, 2003).

Webimax v. Johnson, No. 3:11-cv-993-J-34JBT (M.D. Fla. Dec. 7, 2011).

Int'l Auto Logistics, LLC v. Vehicle Processing Ctr. of Fayetteville, Inc., No. 2:16-CV-10, 2016 WL 6609189, at *14-15 (S.D. Ga. Nov. 7, 2016).

Friedman v. Schiano, No. 9:16-cv-81975-BB, 2017 WL 2901211, at *5 (S.D. Fla. Jan. 9, 2017).

Columbus Radiology Corp. v. McCoy, No. 1:11-cv-00071-DAE-BMK (D. Haw. Jan. 28, 2011) (TRO).

Johnson v. Lewis, No. 1:08-cv-06269 (N.D. Ill. Dec. 12, 2008).

Svanaco v. Brand, No. 1:15-cv-11639 (N.D. Ill. June 8, 2016).

Eppley v. Iacovelli, No. 1:09-cv-386 SEB-JMS (S.D. Ind. Mar. 30, 2009).

Harshaw Research, Inc. v. Tyler, No. 2:10-cv-02437-JAR-DJW (D. Kan. Nov. 29, 2010).

Shannon v. Ghosh, No. 15:cv-13010-PBS (D. Mass. Aug. 10, 2015).

Barfi v. Malekolkottabkhiabani, No. 8:16-cv-01418-PX (D. Md. June 24, 2016).

Irving v. Palmer, No. 18-cv-11617 (E.D. Mich. May 29, 2018).

Maye v. Worrell, No. 13-cv-00510, at 3 (M.D.N.C. Oct. 8, 2013).

Rodriguez v. Nat'l Freight, Inc., 5 F. Supp. 3d 725, 729-30 (M.D. Pa. 2014).

Palmaz Sci., Inc. v. Harriman, No. SA-15-CA-734-FB, 2015 WL 13298400 (W.D. Tex. Aug. 27, 2015) (TRO).

Qatar Inv. & Projects Dev. Holding Co. W.L.L. v. Doe, No. 3:17-cv-00553-jdp (W.D. Wis. Sept. 6, 2017) (TRO).

APPENDIX D: SAMPLE INJUNCTIONS ENFORCED THROUGH THREAT OF JAIL

Just as one extended illustration, consider the case of Stephanie Martin and the Raths. Martin had apparently had a brief affair with the husband at some time in the past, Order of Protection, Rath v. Martin, No. SK1401024, at 2 (Ohio Ct. Com. Pl. Hamilton Cty. Dec. 19, 2014), and this prompted her to start posting various defamatory statements about both the husband and the wife. The Raths sued, and got a judgment for over $500,000 in September 2015. Rath v. Martin, No. A1406457 (Ohio Ct. Com. Pl. Hamilton Cty. Sept. 4, 2015). They tried to enforce it in Florida, where Martin was living, with little success—until the judge started threatening Martin with jail for criminal contempt (and possibly civil contempt). *See* Order, Rath v. Martin, No. 15-21701 CACE (04) (Fla. Cir. Ct. Broward Cty. Feb. 8, 2017) (threatening, in bold, underlined, capital letters, that "Defendant's failure to comply with this order shall result in the court proceeding with a show cause hearing against the defendant as to why the defendant should not be found guilty of indirect criminal contempt for failure to comply with the court's June 30, 2016 order" and that "defendant is warned that failure to comply with this order shall result in an order of arrest of the defendant"); Order to Show Cause and Directing Clerk of Court to Assign Criminal Case Number Consistent with This Order, *Rath*, No. 15-21701 CACE (04) (July 28, 2017).

Finally, some months later, the Raths' lawyer certified that Martin had indeed removed the defamatory materials listed in the injunction. Notice of Compliance with Feb. 7, 2016 & Dec. 22, 2017 Orders, *Rath*, No. 15-21701 CACE (04) (Jan. 16, 2018). Naturally, this is just one example, and one that took the defendants years. But it offers evidence of what we would normally assume: the threat of jail may work even when the threat of damages doesn't.

Here are some more cases that involved threat of jail for criminal contempt:

Civil Contempt Order & Judgment, Brim v. Lewis, No. 3PA-16-01814 CI, at 23 (Alaska Super. Ct. May 2, 2018) (threatening criminal contempt as well as civil contempt).

Contempt Order, Appel v. Zona, No. PSC1802924, att. 1 (Cal. Super. Ct. Riverside Cty. Aug. 8, 2018).

Judgment & Sentence for Contempt, Computer Sci. Res. Ed. & Applications v. Prasad, No. 2013 CA 582 (Fla. Cir. Ct. Leon Cty. Apr. 9, 2018).

Heafey Bentley Mgm't, LLC v. Dinter, No. 2015-012685-CA-01, ¶ 7 (Fla. Cir. Ct. Miami-Dade Cty. Sept. 6, 2018) (expressly threatening that "Defendant's failure to comply with the mandates of this Final Judgment shall result in Defendant being held in direct or indirect criminal contempt which may result in incarceration.").

Order to Show Cause, Tilley v. Slater, No. G-4801-CI-201201793-000 (Ohio Ct. Com. Pl. Lucas Cty. Apr. 12, 2012) (issuing domestic restraining order).

In re McConnell, No. 2:14-AP-01420-BB, 2015 WL 6125649, at *6–7 (Bankr. C.D. Cal. Oct. 8).

And some that involved the threat of jail for civil contempt, so long as the defendant refused to take down libelous material:

Brim, noted above.

Riley v. Shuler, Nos. 2013-236, 2013-237, 2013 WL 12376646, at *2 (Ala. Cir. Ct. Shelby Cty. Nov. 15, 2013).

Incareration Order, Absolute Pediatric Servs v. Humphrey, No. 04CV-18-2961-5 (Ark. Cir. Ct. Benton Cty. Oct. 3, 2019).

Rucki v. Evavold, No. 19AV-CV-17-1950, at ¶ 2 (Minn. Dist. Ct. Dakota Cty. Mar. 1, 2018) (restraining order case, but based in part on the apparently defamatory nature of some of the posts).

Sayer v. Mont. Fourth Judicial Dist. Ct., No. OP 12-0551 (Mont. Oct. 9, 2012)

Blake v. Carter, No. 6:15-cv-02085 (M.D. Fla. Dec 11, 2015).

* * * * *