

ANTI-LIBEL INJUNCTIONS AND THE CRIMINAL LIBEL CONNECTION

*Eugene Volokh**

(forthcoming 167 U. PA. L. REV. __ (2019))

Introduction	2
I. The First Amendment and Criminal Libel Law.....	8
II. The First Amendment and the Catchall Permanent Injunction	11
A. The Catchall Injunction as a Narrower Criminal Libel Provision.....	11
B. The Prior Restraint Objection	16
C. The “Adequate Remedy at Law” Objection.....	17
D. The “Equity Will Not Enjoin a Libel” Objection.....	18
E. The Vagueness Objection	18
F. The Singling Out Objection	19
G. The “No Obey-the-Law Injunctions” Objection.....	19
III. The First Amendment and the Specific Preliminary Injunction	21
IV. The First Amendment and the Specific Permanent Injunction ...	24
A. How the Specific Injunction Underprotects Speech	24
B. Proof Beyond a Reasonable Doubt.....	27
C. Jury Factfinding	28
D. Assistance of Counsel	30
E. Lack of Provision for Changing Circumstances and Changing Context.....	31
V. The First Amendment and the Hybrid Permanent Injunction ...	33
A. The Hybrid Permanent Injunction.....	33
B. The Futility-or-Vagueness Objection.....	36
C. The Discretion Objection	36
D. Restricting Injunctions to Libels on Matters of Private Concern?	37

* Gary T. Schwartz Professor of Law, UCLA School of Law (volokh@law.ucla.edu). Many thanks to Enrique Armijo, Samuel Bray, Aaron Caplan, Joan Meier, Mark Lemley, Grant Nelson, David Pritchard, Ramsey Ramerman, Fred Schauer, and Henry Smith; Amy Atchison (UCLA Law Library); Paul Alan Levy (Public Citizen); and Matthew Chan. And special thanks to Adam Holland and Wendy Seltzer of the Lumen Database, my source for many of the unpublished and unappealed injunctions that I cite in this article.

Disclosure: I participated as lawyer either for a party or an amicus in several of the cases cited in this Article: *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (representing myself and a colleague); *Sindi v. El-Moslimany*, 896 F.3d 1 (1st Cir. 2018) (representing myself); *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284 (9th Cir. 2014) (representing defendant); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997 (E.D. Cal. 2017) (representing plaintiff); *State v. Burkert*, 174 A.3d 987, 1000 (N.J. 2017) (representing amici); *State v. Turner*, 864 N.W.2d 204 (Minn. Ct. App. 2015) (representing amici).

E.	The Limited Role of Mens Rea.....	40
VI.	The First Amendment and the Hybrid Preliminary Injunction	42
A.	The Hybrid Preliminary Injunction.....	42
B.	The Hybrid Ex Parte Temporary Restraining Order	44
VII.	Beyond the First Amendment: Injunctions and Prosecutorial Discretion	45
VIII.	Beyond the First Amendment, in States That Have Repealed Criminal Libel Laws.....	49
IX.	Beyond the First Amendment: <i>Erie</i> and Federal Courts	53
X.	Beyond Libel: False Light, Interference with Business Relations, Disclosure of Private Facts, and More	55
A.	Nondefamatory Falsehoods About People	55
B.	Slander, Trade Libel, Slander of Title, and Injurious Falsehood.....	58
C.	Interference with Business Relations.....	58
D.	Disclosure of Private Facts.....	59
	Conclusion.....	62
	Appendix A: States' Views on Anti-Libel Injunctions.....	63
	Appendix B: Sample Catchall Injunctions	72
	Appendix C: Sample Preliminary Anti-Libel Injunctions.....	74
	Appendix D: Sample Injunctions Enforced Through Threat of Jail.....	76

INTRODUCTION

An injunction against libel, which carries the threat of prosecution for criminal contempt,¹ is like a miniature criminal libel law—just for a particular defendant, and just for statements about a particular 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 were

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

² See OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 8 (1978) (making a similar point about injunctions generally).

³ See, e.g., MODEL PENAL CODE t.d. no. 13, § 250.7 cmt. (1961) (discussing “the paucity of prosecutions and the near desuetude of private criminal libel legislation”).

seen as unavailable in libel cases,⁴ whether because “equity will not enjoin a libel,” because anti-libel injunctions were unconstitutional prior restraints, or for some related reason. My sense is that many people still assume this is so.

When one considers the libel cases from the mainstream First Amendment casebooks—*New York Times Co. v. Sullivan*, *Gertz v. Robert Welch, Inc.*, *Dun & Bradstreet v. Greenmoss Builders*—focusing on damages makes sense. For libels by a newspaper, magazine, or credit rating agency, damages are likely both a fair remedy and a reasonable deterrent.⁵ Criminal liability seems like overkill, and an injunction is usually pointless: The defendants there aren’t likely to keep saying false things about the plaintiff in any event, especially after a libel judgment, so nothing will need enjoining. Print defamation is generally a short sharp shock, which causes damage in a way that an injunction can’t stop, but that damages might deter. 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, has become still more common—and more dangerous—in the Internet age. The Internet lets speakers publish libels at little cost to a potentially broad audience, and these libels can cause enduring damage. Every time someone types a plaintiff’s name into Google, 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.⁶ In any practical sense, damages awards do not leave plaintiffs in such cases with “an adequate remedy at law”;⁷ 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.

⁴ *E.g.*, 3 RONALD D. ROTUNDA, JOHN E. NOWAK & J. NELSON YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 163 n.8 (1986) (“Enjoining Defamation. It has long been established that courts simply cannot enjoin a libel. Such an injunction would be contrary to equitable principles, *American Malting Co. v. Keitel*, 209 F. 351 (2d Cir.1913), and would violate the first amendment, *Parker v. Columbia Broadcasting System, Inc.*, 320 F.2d 937 (2d Cir.1963); *Konigsberg v. Time, Inc.*, 288 F. Supp. 989 (S.D.N.Y.1968).”); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 861–86, 1039–61 (2d ed. 1988) (not mentioning 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 people who have libel insurance don’t want to risk losing the ability to renew it.

⁶ *See, e.g.*, *McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015) (noting this); *Balboa Island Vill. Inn, Inc. v. Lemen*, 40 Cal. 4th 1141, 1158, 156 P.3d 339, 351 (2007) (likewise).

⁷ *See, e.g.*, *Hill v. Petrotech Resources Corp.*, 325 S.W.3d 302, 308 (Ky. 2010).

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:

Criminal libel: Paula goes to the prosecutor, who tells Don, "We still have a criminal libel law in this state; 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 (especially since prosecutors can prosecute under such statutes even without giving warning).

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 it's proved beyond a reasonable doubt at the criminal contempt trial that his post-injunction statements really were libelous. At the same time, such injunction may be inadvisable, because they chill speech too much, and appellate courts generally frown on them (though some trial courts have imposed them).

The specific preliminary injunction: Paula goes to court, and 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." Appellate courts generally condemn such injunctions (though again some trial courts have imposed them). Though the injunction is less chilling than criminal libel law, it fails to offer some of the important procedural protections than 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.

The specific permanent injunction: Paula goes to court, and 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." More than thirty states have allowed such injunctions, at least in some situations, and only six have generally rejected them.⁸ If "equity will not enjoin a libel"⁹ was ever a firm rule, it isn't so now. But, I'll argue in Part IV, that 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

⁸ See Appendix A.

⁹ *E.g.*, *Austin Congress Corp. v. Mannina*, 196 N.E.2d 33, 41 (Ill. Ct. App. 1964).

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 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:

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 properly crafted criminal libel laws and catchall injunctions are constitutional, though probably too broad as a policy matter; that specific injunctions, permanent or preliminary, are unconstitutional; and that 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

courts¹⁰ and state legislatures¹¹ have done. (I set aside here injunctions that forbid more than just the libelous statements; those are generally unconstitutionally overbroad, and I discuss them in a separate article.¹²) But a court considering whether to allow such injunctions requires a difficult judgment about state law, again precisely because the injunctions effectively create 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.¹³ A properly crafted anti-libel injunction would thus cut out the prosecutor's role, and 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.¹⁴

In Part VIII, I'll turn to the many other 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?¹⁵ 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.

As I'll discuss in Part IX, many libel cases end up in federal court because of diversity of citizenship between the parties. 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*) consider whether

¹⁰ See *infra* note 37 and accompanying text.

¹¹ See, e.g., ARIZ. CODE § 12-1809.A, .S (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” do “seriously alarm[], annoy[] or harass[]” and “serve[] no legitimate purpose,” expressly “includ[ing]” defamation of an employer); ARIZ. CODE § 23-1325 (authorizing “injunctive relief from . . . defamation” of an employer), *held unconstitutional* by United Food & Comm. 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).

¹² See Eugene Volokh, *Overbroad Injunctions Against Libel and Other Speech* (draft).

¹³ See *infra* note 23.

¹⁴ See *infra* Part VII.

¹⁵ See *infra* Part VIII.

such an injunction is consistent with state law, or with how it expects state courts will develop that law.¹⁶

Finally, in Part X, I'll talk about how this analysis can apply to injunctions in other tort cases: false light, slander, trade libel, slander of title, interference with business relations, and the disclosure of private facts.

* * *

The Article is addressed to five separate, though related, audiences.

1. Judges deciding whether or when the First Amendment lets them uphold or issue an injunction, and lawyers arguing the matter to those judges. The U.S. Supreme Court has not yet decided the matter, so it is arising in state and federal courts throughout the country.
2. Judges deciding whether to interpret their state constitutions to allow such injunctions (and, again, lawyers who are arguing in such cases). The Pennsylvania Supreme Court, for instance, has held—without even having to consider the First Amendment—that the Pennsylvania Constitution forbids such injunctions.¹⁷ Many state constitutions contain language that has sometimes been seen as categorically foreclosing injunctions, at least in certain cases,¹⁸ so state courts may not feel bound by decisions reading the First Amendment as allowing such injunctions.
3. Judges and lawyers dealing with whether such injunctions are precluded (whether in general or in a specific case) by state law principles of equity.
4. Legislators deciding whether to authorize, or even require, anti-libel injunctions.
5. Of course, academics, lawyers, and law students who are writing about the subject.¹⁹

I hope the article will offer something for each of these groups.

¹⁶ See *infra* Part IX.

¹⁷ *Willing v. Mazzocone*, 393 A.2d 1155, 1157–58 (Pa. 1978).

¹⁸ Compare, e.g., *Willing*, 393 A.2d at 1157 (reading Pennsylvania Constitution as foreclosing injunctions), with *Hill v. Petrotech Resources Corp.*, 325 S.W.3d 302, 312 (Ky. 2010) (reading nearly identical language in Kentucky Constitution as allowing injunctions after a jury finding that certain speech is libelous).

¹⁹ Am. Law Inst., <https://www.ali.org/projects/show/torts-defamation-and-privacy/>.

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 that are consistent with First Amendment libel law rules—generally speaking, ones that require a showing of defendant’s “actual malice”²⁰—are constitutionally permissible: Civil and criminal libel cases “are subject to the same constitutional limitations,” including when the speech is on a matter of public concern and is about a public figure or official.²¹

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.²² The Court

²⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (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 also* *Myers v. Fulbright*, 2019 WL 1244081, *1 (D. Mont. Mar. 18).

A similar showing might not be required as a First Amendment matter as to speech about matters of purely private concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (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 in criminal cases, *see, e.g.*, MODEL PENAL CODE § 2.02(3), which roughly maps to actual malice; and this may reasonably be viewed as a First Amendment requirement when it comes to criminal libel in particular.

²¹ *Herbert v. Lando*, 441 U.S. 153, 157 & n.1 (1979); *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964) (taking the same view as *Herbert*); *In re Gronowicz*, 764 F.2d 983, 988 & n.4 (3d Cir. 1985) (en banc) (likewise); *Phelps v. Hamilton*, 59 F.3d 1058, 1073 (10th Cir. 1995) (upholding a narrowly drawn criminal libel statute); *State v. Carson*, 95 P.3d 1042, 2004 WL 1878312, *2 (Kan. App. Aug. 29, 2004) (noting that the trial court had upheld a narrowly drawn criminal libel statute; the defendant did not argue the First Amendment on appeal); *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).

²² *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality op.) (giving this list of exceptions, together with “speech presenting some grave and imminent threat the Government has the power to prevent”); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (describing when incitement may be criminalized); *Miller v. California*, 413 U.S. 15 (1973) (upholding criminalization of obscenity); *Smith v. United States*, 431 U.S. 291 (1977) (same, despite Justice Stevens’ argument in dissent, *id.* at 317, 321, that obscenity law should only be enforceable

has never suggested that the defamation exception, alone of the First Amendment exceptions, doesn't authorize such criminal liability.

True, many legislatures have repealed criminal libel laws, or declined to reenact them after overbroad criminal libel statutes have been struck down. But fourteen states still have generally applicable criminal libel statutes,²³ and criminal libel prosecutions continue in most of those states;²⁴ indeed, after the Minnesota criminal libel statute was struck down as overbroad in 2015,²⁵ the Minnesota legislature reenacted a properly narrowed statute.²⁶

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

through civil remedies); *New York v. Ferber*, 458 U.S. 747 (1982) (upholding criminalization of child pornography); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (upholding criminalization of fighting words); *Virginia v. Black*, 538 U.S. 343 (2003) (upholding criminal punishment for true threats); *United States v. Williams*, 553 U.S. 285 (2008) (upholding criminal punishment for certain speech that was seen as integral to criminal conduct).

²³ IDAHO CODE §§ 18-4801 to 18-4809 (2016); KAN. STAT. ANN. § 21-6103 (2017 Supp.); LA. REV. STAT. ANN. § 14:47-14:50 (2016); MICH. COMP. LAWS § 750.370 (2004); MINN. STAT. ANN. § 609.765 (2016); MONT. CODE ANN. § 45-8-212 (2017); N.H. REV. STAT. ANN. § 644:11 (2016); N.M. STAT. ANN. § 30-11-1 (2004); N.C. GEN. STAT. §§ 14-47, 15-168 (2017); N.D. CENT. CODE § 12.1-15-01 (2012); OKLA. STAT. tit. 21, §§ 771-774, 776-778 (2011 & 2017 Supp.); UTAH CODE ANN. § 76-9-404 (2017); VA. CODE ANN. § 18.2-417 (2014); WISC. STAT. ANN. § 942.01 (2015-16); *see also* 14 V.I. CODE §§ 1171-1179 (2012). Two of these statutes have been held unconstitutional as to statements on matters of public concern, but remain valid as to statements on matters of private concern. *State v. Snyder*, 277 So. 2d 660, 668 (La. 1973), *rev'd on other grounds*, 305 So. 2d 334 (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 § 5-5A46; TEX. FIN. CODE § 119.202. 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 & Comm. Workers, Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 1196 (D. Ariz. 2013) (striking down statute because it created special remedies for defamation of employers, as opposed to defamation of others).

²⁴ *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* (in draft) (discussing prosecutions in other states).

²⁵ *State v. Turner*, 864 N.W.2d 204 (Minn. Ct. App. 2015).

²⁶ MINN. STAT. ANN. § 609.765 (2016).

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.”²⁷ Those who agree that criminal libel statutes are unconstitutionally vague should take the same view about catchall anti-libel injunctions enforceable through criminal contempt law.

But it seems to me that, if a criminal libel law statute is limited to knowingly (or perhaps reckless) false and defamatory speech (as the Alaska statute was not), it should be clear enough to be constitutional, as several courts have indeed held.²⁸ 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.²⁹ The definition of libel also has a well-established “common law meaning,” a matter that the vagueness precedents view as significant.³⁰

²⁷ *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. Complaint, *Frese v. McDonald*, No. 1:18-cv-01180 (D.N.H. Dec. 18, 2018).

²⁸ *See, e.g.*, *How v. City of Baxter Springs*, 369 F. Supp. 2d 1300, 1305–06 (D. Kan. 2005); *Pegg v. State*, 659 P.2d 370, 372 (Okla. Ct. Crim. App. 1983); *Davis v. Weston*, 501 S.W.2d 622, 623 (Ark. 1973); *State v. Stephenson*, No. 06CA0901, at 2–3 (Colo. Ct. App. Mar. 6, 2008) (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).

Ashton v. Kentucky, 384 U.S. 195 (1966), struck down a common-law criminal libel rule on vagueness grounds, but only because the rule—inconsistently with modern libel law—extended to “any writing calculated to create disturbances of the peace.” *Id.* at 198–99; *see also Williamson v. State*, 295 S.E.2d 305, 306 (Ga. 1982) (same). Likewise, *Parmelee v. O’Neel*, 186 P.3d 1094, 1104 (Wash. Ct. App. 2008), *rev’d only as to attorney fees*, 229 P.2d 723, 728 (Wash. 2010), and *Fitts v. Kolb*, 779 F. Supp. 1502, 1515, 1518 (D.S.C. 1991), 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”).

²⁹ *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”).

³⁰ *See, e.g.*, *Winters v. N.Y.*, 333 U.S. 507, 519 (1948); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

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 amount of 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.”³¹ Rather, a statute is unconstitutionally vague only when an element is “indeterminate[],” as with statutes that criminalized “annoying” or “indecent” speech—“wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.”³²

“Condemned to the use of words, we can never expect mathematical certainty from our language”;³³ 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.³⁴ 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.³⁵

II. THE FIRST AMENDMENT AND THE CATCHALL PERMANENT INJUNCTION

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

Properly defined criminal libel laws, then, are constitutional. But one can certainly be worried about their potential chilling effect. If they are enforced, after all, any time anyone writes anything potentially derogatory about anyone else, the writer should worry about the risk of prosecution. Though they 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. This may help explain why they have largely fallen out of favor.

³¹ *United States v. Williams*, 552 U.S. 285, 305 (2008).

³² *Id.* (giving examples drawn from *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971), and *Reno v. ACLU*, 521 U.S. 844, 870–71 & n.35 (1997)).

³³ *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

³⁴ *Chaplinsky v. N.H.*, 315 U.S. 568, 574 (1942) (holding that a fighting words statute interpreted as limited to “words likely to cause an average addressee to fight” was not unconstitutionally vague); *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”).

³⁵ *Williams*, 552 U.S. at 306.

Let's imagine, then, that a legislature tries to come up with a narrower statute: Before anyone (call him Don) can be prosecuted for criminal libel, it concludes, the alleged victim (call her Paula) should first go to court and get a judicial decision that Don has already said something libelous about her. Only once Paula has that decision in hand, 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.” Here's one sample out of many:

Defendants . . . are hereby restrained and ordered to remove, and no longer disseminate, any scandalous or defamatory statements . . . to include posting of defamatory articles on any . . . media whatsoever³⁶

Indeed, the rules of one Ohio court categorically call for such injunctions in divorce cases:

In all cases, upon the filing of the initial Complaint for divorce, annulment or legal separation, both spouses shall be restrained from . . . [u]sing the Internet . . . for the purpose of posting . . . electronically written words, images and/or videos which threaten, harass or defame and/or slander the other spouse³⁷

A much older Pennsylvania statute, enacted in 1937 but still occasionally used today,³⁸ provides that all injunctions arising out of a labor dispute must order

That complainant and/or the employer and their or either of their agents or employes 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.³⁹

To be sure, these injunctions are imperfectly worded—the prohibition shouldn't cover “scandalous” statements or “harass[ing]” posts or “molestation.” But if limited to prohibiting future libelous statements (i.e., statements that are knowingly⁴⁰ 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

³⁶ See *infra* Appendix B.

³⁷ Cuyahoga County (Ohio) Com. Pl. Domestic Rels. R. 24.A.1.c.

³⁸ Br. of Appellants, *Turner Construction v. Plumbers Local 960*, Nos. 2754 EDA 2014, 2421 EDA 2014, 2422 EDA 2014, at 3 (Pa. Super. Ct. Dec. 23, 2014) (quoting trial court order).

³⁹ 43 PA. STATS. § 206n.

⁴⁰ See *supra* note 160 and accompanying text for why these injunctions are limited to knowing falsehoods.

operate through the means of threat of punishment for criminal contempt rather than through the threat of punishment for criminal libel.

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

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, the libelousness of any future statements by Don must be proved at the criminal contempt trial. Because that's a criminal trial, there must be proof beyond a reasonable doubt, and 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 determine in any binding way 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 is that a jury must be provided in most criminal cases—including criminal libel cases—if the *maximum statutory authorized sentence* is over 6 months (or some lower

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, 440 (2011).

threshold set by state law), but a jury must be provided in criminal contempt cases only if the *actual sentence* is over 6 months.⁴³ In practice, all but one of the existing criminal libel statutes that allow for jail time also provide for a right to trial by jury.⁴⁴

But this difference could be eliminated if the judge simply makes 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.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

Jailing someone for civil contempt as a coercive measure—generally until he removes posts that the court has found to be false and defamatory⁴⁷—would, I think, violate the First Amendment, precisely because it would lack the protections provided by the criminal justice process.⁴⁸ 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.”⁴⁹ I have found only one case expressly upholding such a catchall

⁴³ *Codispoti v. Pennsylvania*, 418 U.S. 506, 512–13 (1974).

⁴⁴ *See supra* Part IV.C.

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; *see also* UTAH STATS. § 34-19-9 (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. STAT. § 48-1-304 (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).

⁴⁷ *See, e.g., Enovative Techs., LLC v. Leor*, 110 F. Supp. 3d 633, 637 (D. Md. 2015). “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 on Behalf of Feiock v. Feiock*, 485 U.S. 624, 632 (1988) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911)).

⁴⁸ *See infra* text accompanying note 126. 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 in order for jail time to be imposed.

⁴⁹ *Hill v. Stubson*, 420 P.3d 732, 744 n.7 (Wyo. 2018); *see also Karnaby v. McKenzie*, 54 Conn. L. Rptr. 71 (Super. Ct. 2012); *Metropolitan Opera Ass’n, Inc. v. Local 100*, 239 F.3d 172, 176–78 (2d Cir. 2001); *D’Ambrosio v. D’Ambrosio*, 610

injunction against a 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 contentious divorce, and barred the ex-husband from defaming his ex-wife.⁵⁰

Yet many trial courts do issue such injunctions, without discussing the First Amendment. Moreover, these are close analogs of the modern “anti-harassment” injunctions, in which a finding of “harassment”—often involving speech—leads to an injunction against all repetition of such 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.⁵¹ 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.⁵²

S.E.2d 876 (Va. Ct. App. 2005); *Royal Oaks Holding Co. v. Ready*, No. C4-02-267, 2002 WL 31302015, *4 (Minn. Ct. App. 2002) (rejecting such an order because it isn't limited to statements that had already been specifically found defamatory); *cf. Hill v. Petrotech 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)).

⁵⁰ *In re Marriage of Olson*, 850 P.2d 527 (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 Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restriction*, 81 NYU L. REV. 631, 640–41 (2006).

Loden v. Schmidt, No. M2014-01284-COA-R3-CV, 2015 WL 1881240, *8–*9 (Tenn. Ct. App. Apr. 24, 2015), upheld an injunction forbidding defendant from “making any untrue or defamatory statements regarding” plaintiff, *id.* at *3, but specifically noted that the plaintiff hadn't argued that the injunction was too broad, *id.* at *9 n.11, and that the court was therefore not discussing the question.

⁵¹ *See, e.g., R.D. v. P.M.*, 202 Cal. App. 4th 181, 191 (2011); *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal. App. 4th 1228, 1250 (2005).

⁵² *See State v. Burkert*, 174 A.3d 987, 1000 (N.J. 2017) (“[T]here is no categorical ‘harassment exception’ to the First Amendment.”) (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.)).

B. The Prior Restraint Objection

Nor is there any basis for treating hybrid 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.

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 anyone.⁵³

“The special vice of a prior restraint is that communication will be suppressed . . . *before an adequate determination that it is unprotected* by the First Amendment.”⁵⁴ *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.”⁵⁵ “An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint.”⁵⁶

Indeed, the Court has held that courts may properly enjoin the continued distribution of material that had been found to be obscene⁵⁷ or to be unprotected commercial speech.⁵⁸ Other courts have held the same as

⁵³ See John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 427–29 (1983) (making this point as to speech-restrictive injunctions more broadly); Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 550–51 (1977) (likewise); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 93 (1984) (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.

⁵⁴ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.*, 413 U.S. 376, 390 (1973) (emphasis added); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993) (quoting *Pittsburgh Press* on this point).

⁵⁵ *Pittsburgh Press*, 413 U.S. at 390.

⁵⁶ *Auburn Police Union*, 8 F.3d at 903.

⁵⁷ *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 443–44 (1957).

⁵⁸ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973).

to other unprotected speech.⁵⁹ The Court’s occasional dicta labeling all injunctions as prior restraints are therefore somewhat erroneous over-generalizations.⁶⁰

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 practically empty.⁶¹ 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.

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 “poor people . . . have their speech enjoined, while the rich are allowed to speak so long as they pay damages”;⁶² “Conditioning the right of free speech upon the monetary worth of an individual is inconsistent” with constitutional principles.⁶³ Yet while this reasoning has

⁵⁹ *See, e.g.*, *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993) (unprotected charitable solicitation); *Lassalle v. Daniels*, 673 So. 2d 704 (La. Ct. App. 1996) (unprotected true threats of criminal attack).

⁶⁰ *Compare Alexander v. United States*, 509 U.S. 544, 550 (1993) (“permanent injunctions . . . are classic examples of prior restraints”), *with Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 764 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).

⁶¹ *See, e.g.*, *Willing v. Mazzone*, 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 that is the determining factor. ‘The fact, if it be so, that this remedy may not be successful in realizing the fruits of a recovery at law, on account of the insolvency of the defendants, is not of itself [a] ground of equitable inference.’”) (citations omitted); *see also* Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYR. L. REV. 157, 170 (2007) (taking the same view).

⁶² Chemerinsky, *supra* note 61, 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).

⁶³ *Willing*, 393 A.2d at 1158; *see also* *Kinney v. Barnes*, 443 S.W.3d 87, 100 (Tex. 2014); *Reyes v. Middleton*, 17 So. 937, 939 (Fla. 1895); *Life Ass’n of Am. v. Boogher*, 3 Mo. App. 173, 176 (1876).

sometimes been used to reject injunctions against both poor and rich defendants,⁶⁴ it can also be a reason to allow properly crafted injunctions as to both.

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.⁶⁵ And 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 plaintiff’s business.⁶⁶ 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).⁶⁷ 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.⁶⁸

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.

⁶⁴ See sources cited in the last two footnotes.

⁶⁵ See, e.g., *Hill v. Petrotech Resources Corp.*, 325 S.W.3d 302, 306, 308 (Ky. 2010) (quoting this maxim but ultimately authorizing such injunctions); *In re Conservatorship of Turner*, No. M2013-01665-COA-R3-CV, 2014 WL 1901115, *20 (Tenn. Ct. App. May 9, 2014) (likewise); *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 349 (Cal. 2007) (likewise).

⁶⁶ E.g., *Carter v. Knapp Motor Co.*, 11 So. 2d 383 (Ala. 1943); *Menard v. Houle*, 11 N.E.2d 436 (Mass. 1937).

⁶⁷ E.g., *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 . . .”); *Palmer v. Travers*, 20 F. 501, 501 (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.”). Some such cases limited themselves to defamation that damages plaintiff’s business, on the theory that this affects property rights and not just personal rights. E.g., *Menard v. Houle*, 11 N.E.2d 436, 437 (Mass. 1937) (“equity will take jurisdiction where there is a continuing course of unjustified and wrongful attack upon the plaintiff motivated by actual malice, and causing damage to property rights as distinguished from ‘injury to the personality affecting feelings, sensibility and honor’”).

⁶⁸ See, e.g., *Prucha v. Weiss*, 197 A.2d 253, 256 (Md. 1964); *Warren House Co. v. Handwerker*, 213 A.2d 574, 576 (Md. 1965); *Organovo Holdings, Inc. v. Dimitrov*, 162 A.3d 102, 125–26 (Del. Ct. Ch. 2017); *Francis v. Flinn*, 118 U.S. 385, 389 (1886).

But in this respect they are no more vague than criminal libel statutes; 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.”⁶⁹ 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;⁷⁰ similarly targeted injunctions should not be, either.

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,”⁷¹ 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

⁶⁹ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1042 n.2 (2nd ed. 1988).

⁷⁰ 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* did bar 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.

⁷¹ *Spreadbury v. Bitterroot Pub. Library*, 2011 WL 7462038, *12 (D. Mont. Nov. 30) (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). See also *SEC v. Goble*, 682 F.3d 934 (11th Cir. 2012) (condemning obey-the-law injunctions more broadly, outside defamation law); *Perez v. Ohio Bell Tel. Co.*, 655 F. App’x 404, 411 (6th Cir. 2016) (likewise); *Gaddy v. Abex Corp.*, 884 F.2d 312, 318 (7th Cir. 1989) (likewise); *EEOC v. Auto-Zone, Inc.*, 707 F.3d 824 (7th Cir. 2013).

acts.”⁷² Catchall injunctions are generally issued precisely when a defendant has engaged in a campaign of defaming plaintiff, and they restrain only future defamation of the same plaintiff—a continuation of the same campaign of “related [libelous] acts.”

To be sure, some obey-the-law injunctions in other areas have also been condemned as being too vague, and as not giving defendants enough notice of what is forbidden.⁷³ That makes sense when an injunction categorically bans a defendant from, say, “violat[ing] the Clean Water Act” or “violating First Amendment rights.”⁷⁴ 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

⁷² NLRB v. Express Pub. Co., 312 U.S. 426, 436–37 (1941); EEOC v. Auto-Zone, Inc., 707 F.3d 824, 842–43 (7th Cir. 2013) (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 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; it also found that Spurlino was likely to refuse to negotiate with the Union on the terms and conditions of employment in the future. Given these specific findings, supported by evidence in the record, paragraphs 1 and 2 do not exceed the scope of the court’s authority to enjoin similar actions by the company.” *Id.* at 504.

⁷³ See, e.g., *Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999) (“Appellants seek to enjoin the City from discriminating on the basis of race in its annexation decisions. As this injunction would do no more than instruct the City to ‘obey the law,’ we believe that it would not satisfy the specificity requirements of Rule 65(d) and that it would be incapable of enforcement.”).

⁷⁴ See, e.g., *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1530 (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”); *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 op.) (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”).

knowingly false and defamatory statements—like criminal libel statutes that ban such statements—are sufficiently clear.⁷⁵

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 understood to be 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 trial (which could be years or at least many months in the future).⁷⁶ 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. . . .”⁷⁷

⁷⁵ *Metro. Opera Ass'n., Inc. v. Local 100*, 239 F.3d 172, 174-78 (2d Cir. 2001), held that an injunction barring a union from making “defamatory representations” was too vague, 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 any more vague than similar bans in constitutionally permissible criminal libel statutes.

⁷⁶ For examples of such injunction, see Appendix C.

⁷⁷ 156 P.3d 339, 350 (2007) (quoting 1 HANSON, LIBEL AND RELATED TORTS 139-40 (1969)).

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. We are mindful that the rule announced herein delays the availability of injunctive relief during the time it takes to litigate the issue. Thus, while 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.⁷⁸

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 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.⁷⁹

Or in the words of the Alaska Supreme Court, “Preliminary 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.”⁸⁰ 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.⁸¹ The few cases that

⁷⁸ Hill v. Petrotech Resources Corp., 325 S.W.3d 302, 311 (Ky. 2000).

⁷⁹ Sid Dillon Chevrolet v. Sullivan, 559 N.W.2d 740, 747 (Neb. 1997).

⁸⁰ Alsworth v. Seybert, 323 P.3d 47, 57 n.34 (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.”).

⁸¹ *See also* Mishler v. MAC Systems, Inc., 771 N.E.2d 92, 98–99 (Ind. Ct. App. 2000) (condemning a preliminary injunction issued “after only the most preliminary of determinations by the trial court”); St. Margaret Mercy Healthcare Centers, 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”); Hartman v. PIP-Group, LLC, ___ S.E.2d ___ (Ga. Ct. App. 2019) (“We have found no Georgia case upholding an interlocutory injunction prohibiting speech. Our Supreme Court has noted that although ‘it has never been held that all injunctions against publication are impermissible,’ such an injunction has been upheld only when it ‘was entered subsequent to a verdict in which a jury

have upheld preliminary injunctions against libel have not squarely responded to this criticism.⁸²

More generally, the Supreme Court likewise held in *Vance v. Universal Amusements, Inc.*⁸³ that alleged obscenity cannot be enjoined simply based on a pretrial showing that the speech was likely to be obscene—at

found that statements made by [the defendant] were false and defamatory.”); *Anagnost v. Mortgage Specialists, Inc.*, 2016 WL 10920366, *3 (N.H. Super. Ct.) (“[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.”); *Paradise Hills Assocs. v. Procel*, 1 Cal. Rptr. 2d 514, 519 (Cal. Ct. App. 1991) (“A preliminary injunction is a prior restraint.”); *Cohen v. Advanced Med. Group*, 496 S.E.2d 710, 710-11 (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. Marlenne Fashions, Inc.*, 357 S.E.2d 576, 577 (Ga. 1987))); *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”).

⁸² *But see* *Gillespie v. Council*, 2016 WL 5616589, *3 (Nev. Ct. App. Sept. 27) (reluctantly allowing preliminary injunction in libel case, because a 1974 Nevada Supreme Court had allowed such injunctions); *San Antonio Community Hosp. v. Southern Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1233–39 (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”); *Bingham v. Struve*, 591 N.Y.S.2d 156, 158-59 (Sup. Ct. App. Div. 1992) (ordering a preliminary injunction against a libel on a matter of private concern, concluding that the libel was constitutionally unprotected but not considering the prior restraint problem); *Parland v. Millennium Const. 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”).

⁸³ 445 U.S. 308 (1980); *see also* *Blount v. Rizzi*, 400 U.S. 410, 420 (1971) (holding that a determination by a judge of “probable cause” that speech is obscene is insufficient to justify a restriction); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 240 (1990) (reaffirming this principle as to “prior restraint[s] in advance of a final judicial determination on the merits”); *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. 1996) (overturning down 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 v. Maryland*, 380 U.S. 51, 59 (1965)).

least absent the procedural protections offered by *Freedman v. Maryland*⁸⁴—even though it could be enjoined after a finding of obscenity on the merits.⁸⁵ 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.”⁸⁶

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. Perhaps for this reason, many courts have treated permanent injunctions against libel as generally permissible, at least in certain classes of cases.⁸⁷

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 offer.⁸⁸ Consider:

⁸⁴ 380 U.S. at 59.

⁸⁵ *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

⁸⁶ 413 U.S. 376, 390 (1973).

⁸⁷ See *infra* Appendix A.

⁸⁸ 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”).

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 falsehood of the allegation 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.⁸⁹ Under the “collateral bar” rule (applicable 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.⁹⁰

⁸⁹ See DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 218 (1991) (noting this as a consequence of allowing injunctions in libel cases).

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., *DiBella v. Hopkins*, 403 F.3d 102, 111 (2d Cir. 2005) (applying New York law); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2 (1989) (noting but not resolving “debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence”). This, though, does not affect my general argument.

⁹⁰ See *Walker v. City of Birmingham*, 388 U.S. 307, 314–21 (1967). 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 that an enjoined defendant may still “speak out, notwithstanding the injunction, and as-

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, because it makes repeating a statement a crime regardless of changed circumstances and context.⁹¹ Yet “[u]ntrue statements may later become true; unprivileged statements may later become privileged.”⁹² 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.⁹³

Relatedly, a statement may be libelous in one context, but hyperbole in another. Yet an injunction simply barring repetition of a statement will prohibit the statement regardless of context.⁹⁴ The catchall injunction, which requires a jury finding of libelousness at the criminal contempt hearing, based on whether the statement was libelous at the time it was

sert 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 Center, Inc.*, 512 U.S. 753, 793 (1994), 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.”

⁹¹ See, e.g., *Friedman v. Schiano*, No. 9:16-cv-81975-BB, at 5 (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”).

⁹² *Kinney*, 443 S.W.3d at 98 (giving this as a reason to reject anti-libel injunctions); Chemerinsky, *supra* note 61, at 171 (likewise).

⁹³ 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, at 3 (E.D. Mich. May 29, 2018).

⁹⁴ This is the basis on which the First Circuit reversed the injunction in *Sindi v. El-Moslimany*, 896 F.3d 1, 31–34 (1st Cir. 2018), and the California Supreme Court dissenters would have reversed the injunction in *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339, 356 (Cal. 2007) (Kennard, J., concurring and dissenting). Likewise, *Griffis v. Luban*, 2002 WL 338139 (Minn. Ct. App. Mar. 25), set aside a provision that banned defendant from calling plaintiff a liar, partly “because this provision is not restricted to any particular context,” so tha, “[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.

repeated (rather than at the time it was initially said), 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 deters speech, but incapacitates speakers, given that their speech rights are sharply limited when they're in jail. Criminal libel law provides this protection when threatening jail for allegedly false and defamatory statements; a civil injunction, which has the same effect, should embody the same protection.⁹⁵

The Supreme Court has rejected this argument in obscenity cases (*California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*⁹⁶), though Justices Brennan, Marshall, and Stewart had urged it in *McKinney v. Alabama*.⁹⁷ 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, found to be of lesser constitutional value. (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,⁹⁸ for which the quantum of proof is less significant than for factual judgments.) In libel

⁹⁵ See also Jonathan C. Medow, *The First Amendment and the Secrecy State: Snapp v. United States*, 130 U. PA. L. REV. 775, 807 n.210 (1982) (likewise observing, though as to injunctions against speech that falls within an asserted narrow national security exception, that "the shift from a criminal to an anticipatory proceeding is not result-neutral. The probability that the government will succeed is much greater in the latter. For one thing, an attempt to secure civil injunctive relief does not trigger a presumption of innocence or a requirement that the government prove its case beyond a reasonable doubt. Moreover, injunctive defendants are not guaranteed the assistance of counsel and cannot have their case tried to a jury.").

⁹⁶ 454 U.S. 90, 93 (1981).

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

⁹⁸ 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 application of law to fact that is to "be weighed independently by an appellate court after a de novo review of the relevant evidence").

cases, factfinder error risks restricting accurate statements of fact, including in many cases statements on matters of public concern.⁹⁹ 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 cases to the jury; and 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 Brothers*,¹⁰⁰ because such a standard was needed “to protect particularly important interests” in free speech. The speaker’s interest in libel cases is at least as important as in obscenity cases.

C. Jury Factfinding

In criminal libel cases, the 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.¹⁰¹ It’s a state constitutional requirement under the state constitutions that provide jury trials for all criminal libel cases.¹⁰² And it’s a state law requirement in all the other states (except Louisiana) that authorize jury trials for all misdemeanors.¹⁰³

This 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

⁹⁹ As I argue in Part V.D, I think the public/private concern line is flawed, in libel cases as well as others; but I must acknowledge that the Court has held that, in libel cases, speech on matters of private concern is indeed treated as less valuable and less protected. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

¹⁰⁰ *People ex rel. Cooper v. Mitchell Brothers’ Santa Ana Theater*, 128 Cal. App. 3d 937, 940 (1982).

¹⁰¹ *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 (2017 Supp.); MINN. STAT. ANN. § 609.765 (2016); N.M. STAT. ANN. §§ 30-1-6, 30-11-1 (2004); N.D. CENT. CODE §§ 12.1-15-01 (2012), 12.1-32-01 (2012 & 2017 Supp.); WISC. STAT. ANN. §§ 939.51, 942.01 (2015–16).

¹⁰² MONT. CONST. art. II, § 7; OKLA. CONST. art. II, § 22; UTAH CONST. art. I, § 15.

¹⁰³ IDAHO CRIM. R. 23(b); MICH. CT. R. 6.401; N.C. GEN. STAT. § 15A-1201 (2017). New Hampshire criminal libel law does not authorize jail time. N.H. REV. STAT. ANN. §§ 644:11 (2016), 651:2(III) (2016 & 2017 Supp.).

the judge decided whether a statement was libelous, and then the criminal jury decided only whether the defendant had published the statement.¹⁰⁴ 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.¹⁰⁵ The law should likewise take the same approach to anti-libel injunctions, given that they are enforced through criminal prosecution.¹⁰⁶

Some may be skeptical about whether juries are indeed great protectors of free speech. But American libel law has long treated jury decisionmaking as important; this historical judgment should not be lightly set aside. And jury decisionmaking coupled with judicial gatekeeping may provide better protection than either jury decisionmaking or judicial decisionmaking alone¹⁰⁷—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

¹⁰⁴ See, e.g., 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); *Kramer*, 947 F.2d at 672 n.15 (likewise). The jury was also asked to decide whether the statement was about the plaintiff, but that detail is irrelevant here.

¹⁰⁵ E.g., *Montee v. Commonwealth*, 26 Ky. 132, 151 (1830) (denouncing the older English approach—leaving the jury to only decide the fact of publication—as “odious” and “subversive of personal security”); *People v. Croswell*, 3 Johns. Cas. 337, 364–65 (N.Y. 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, An Act Concerning Libels, ch. 90, 1805 N.Y. Laws 232, and in American law more broadly.

¹⁰⁶ See *Willing*, 393 A.2d at 1159 (Roberts, J., concurring) (“One of the underlying justifications for equity’s traditional refusal to enjoin defamatory speech is that . . . [an injunction] deprives appellant of her right to a jury trial on the issue of the truth or falsity of her speech.”); *Organovo Holdings, Inc. v. Dimitrov*, 162 A.3d 102, 124–25 (Del. Ct. Ch. 2017) (refusing to enjoin libel because of the “longstanding preference for juries addressing defamation claims”); see also, e.g., *Kwass v. Kersey*, 81 S.E.2d 237, 247 (1954) (taking the same view); *Marlin Firearms Co. v. Shields*, 64 N.E. 163, 165 (Mass. 1902) (taking the same view); *Citizens’ Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, 171 F. 553, 556 (M.D. Ala. 1909) (taking the same view); *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 793 (1994) (Scalia, J., dissenting in relevant part) (noting the absence of a jury as a reason to reject injunctions against speech).

¹⁰⁷ LAYCOCK, *supra* note 89, at 166.

states, the law).¹⁰⁸ 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.¹⁰⁹ 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.

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.¹¹⁰ This too is an important protection for speech.

Speakers who lack a lawyer will often be unable to effectively defend themselves. They aren't expert at proving facts. They don't know how to get 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.¹¹¹ The injunctions

¹⁰⁸ See, e.g., 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. Bill of Rights § 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; WISC. CONST. art. 1, § 3; WYO. CONST. art. 1, § 20. These provisions date back to the Pennsylvania Constitution of 1790. PENN. CONST. OF 1790 art. IX, § VII.

¹⁰⁹ 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 Siegel, *infra* note 124, at 731 n.420; Robert Allen Sedler, *Injunctive Relief and Personal Integrity*, 9 ST. LOUIS U. L.J. 147, 154 (1964).

¹¹⁰ This requirement only applies if I am to be sentenced to jail, rather than just a fine; but the discussion in the text focuses on the special procedures required before a people can be jailed for their speech.

¹¹¹ See, e.g., *Baker v. Kuritzky*, 95 F. Supp. 3d 52, 59 (D. Mass. 2015) (entering anti-libel injunction following default judgment).

may also be entered far from where they live, making it even harder for them to effectively litigate the case.¹¹² And when a defendant is absent, unrepresented, or practically unable to appeal, the factfinding at the initial civil injunction hearing is especially likely to be inaccurate.¹¹³

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 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 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,¹¹⁴ but that is expensive and time-consuming. Or a defendant could ask the court to exercise its discretion not to initiate criminal contempt proceedings in

¹¹² See *id.* (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).

¹¹³ See, e.g., *Baker*, 95 F. Supp. 3d at 56–59 (issuing 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)); *Khang v. Chambers*, No. 1684CV03642, at 6 (Mass. Super. Ct. Suffolk Cnty. May 17, 2018) (issuing injunction following default judgment banning defendant from repeating claim that plaintiff was “shady”); *Murphy v. Gump*, No. 2016-CC-002126-O (Fla. Cnty. Ct. Orange Cnty. July 18, 2016) (“unprofessional,” “loose cannon”); *Grant Atlantic, Ltd. v. Doe*, No. cv-16-870991, at 7 (Ohio Ct. Com. Pl. Cuyahoga Cnty.) (“foolish,” “a narcissist”); *DeJager v. Burgess*, No. 112CV219299, ¶ 6 (Cal. Super. Ct. Santa Clara Cnty. Aug. 6, 2012) (“dysfunctional, hypocrite[], fake, and [a] bad parent[]”).

¹¹⁴ See *Balboa Island Vill. Inn*, 156 P.3d at 353; *Sindi*, 896 F.3d 1, 47–48 (1st Cir. 2018) (Barron, J., dissenting).

light of the changed facts,¹¹⁵ 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.”¹¹⁶

* * *

Judge David Barron’s recent First Circuit dissent argues, in response to an earlier version of the argument in this paper, 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 “criminalizing defamation as primary conduct (as in the case of criminal libel).”¹¹⁷ 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.”¹¹⁸ An injunction banning specific instances of alleged defamation thus is indeed tantamount to a statute “criminalizing defamation as primary conduct.”

To be sure, as that 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.¹¹⁹ But those cases upheld narrow content-neutral restrictions on the time, place, and manner of speech.¹²⁰ 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

¹¹⁵ See, e.g., *Brandt v. Gooding*, 636 F.3d 124, 135 (4th Cir. 2011).

¹¹⁶ *Kinney v. Barnes*, 443 S.W.3d 87, 98 (Tex. 2014); see also *Sindi*, 895 F.3d at 35 (“A decree that requires a judicial permission slip to engage in truthful speech is the epitome of censorship.”).

¹¹⁷ *Sindi*, 896 F.3d at 48 n.31 (Barron, J., dissenting) (responding to an amicus brief I filed in the case).

¹¹⁸ *United Transp. Union v. Michigan Bar*, 401 U.S. 576, 581 (1971).

¹¹⁹ *Id.*

¹²⁰ *Madsen v. Women’s Health Ctr.*, 512 U.S. 753 (1994); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997); see also *Sindi*, 896 F.3d at 35 (distinguishing *Madsen* and *Schenck* on these grounds).

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 specific injunction), the injunction instead says, “Don may not libelously accuse Paula of cheating him”? Like the specific injunction, the injunction has a narrow chilling effect. But like the catchall injunction, the 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	... 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		provides that any criminal contempt trial will be before jury
... and prohibits only future statements that are libelous when spoken	... and prohibitions future statements even without a showing that they are libelous when spoken	... and prohibits only future statements that are libelous when spoken

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.

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.¹²¹ 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.¹²²

¹²¹ See generally Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1113–19 (2014).

¹²² 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 (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). 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 wouldn't hurt for the injunction to be explicit about the consequences of including this element; the injunction might expressly say something like,

If 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.¹²³

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.¹²⁴ As noted above, there is precedent for this in the Norris-LaGuardia Act, which provides for jury trial in criminal contempt prosecutions stemming from labor injunctions.¹²⁵ 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.

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.¹²⁶ 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.¹²⁷ (Fines as civil contempt penalties should be permissible, so long as the initial injunction

¹²³ See *Advanced Siding & Window Co. v. Kenton*, No. 218-2013-CV-1155, at 7–8 (N.H. Super. Ct. Rockingham County Dec. 30, 2013) (expressly providing that “If 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 of fact about the plaintiff to a third party”).

¹²⁴ See also Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 *BUFF. L. REV.* 655, 729–30 (2008); Ardia, *supra* note 105, at 63. 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 (Fla. Ct. App. 1995).

¹²⁵ See *supra* note 46.

¹²⁶ See *supra* note 1.

¹²⁷ 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).

was issued following a jury finding that the speech was libelous;¹²⁸ 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 all 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.¹²⁹ 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.¹³⁰ 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.¹³¹ 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.¹³² Presumably the argument would be even stronger as to anti-libel injunctions.

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,

¹²⁸ See *infra* Appendix D.

¹²⁹ *Kinney*, 443 S.W.3d at 97.

¹³⁰ See *supra* Part I.

¹³¹ *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (Scalia, J., dissenting in relevant part).

¹³² *Id.* at 794–95 (Scalia, J., dissenting in relevant part); see also *Lawson v. Murray*, 515 U.S. 1110, 1114 (1995) (Scalia, J., dissenting from 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”).

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.¹³³

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.¹³⁴

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.¹³⁵

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

Some courts allow injunctions only as to speech on matters of "private concern";¹³⁶ Professor Ardia has recently argued the same.¹³⁷ 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

¹³³ *Id.* at 794.

¹³⁴ *Id.* at 794.

¹³⁵ 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 rightly treated as similar to restriction on speech based on its "noncontent element[s]." 505 U.S. 377, 386 (1992).

¹³⁶ See *supra* notes 258, 256, and 285.

¹³⁷ Ardia, *supra* note 105, at 68.

can lead to punitive and presumed damages even without a showing of “actual malice”;¹³⁸ 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 falsity.¹³⁹

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,¹⁴⁰ and I have as well in a more recent piece.¹⁴¹)

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;¹⁴² it also held the same for a claim that a mobile home park operator charged unduly high rents.¹⁴³ Other courts have taken a similar view.¹⁴⁴ But others disagree.¹⁴⁵

The same is so for 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 generally are speech on a matter of public concern,” in a case where a solo blog-

¹³⁸ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

¹³⁹ See, e.g., *Parrish v. Allison*, 656 S.E.2d 382, 391–92 (S.C. Ct. App. 2007). *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986), held that 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.

¹⁴⁰ Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category*, 65 MO. L. REV. 597 (2000).

¹⁴¹ 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).

¹⁴² *Gardner v. Martino*, 563 F.3d 981, 989 (9th Cir. 2009).

¹⁴³ *Manufactured Home Cmtys., Inc. v. Cnty. of San Diego*, 544 F.3d 959, 965 (9th Cir. 2008).

¹⁴⁴ *Neumann v. Liles*, 369 P.3d 1117, 1125 (Ore. 2016) (consumer criticism of wedding venue); *Gilbert v. Sykes*, 147 Cal. App. 4th 13 (2007) (consumer criticism of plastic surgeon); *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 898–900 (2004) (author’s criticism of life insurance policy broker).

¹⁴⁵ *Vern Sims Ford, Inc. v. Hagel*, 713 P.2d 736, 741 (Wash. Ct. App. 1986) (consumer criticism of car dealer); *Gosden v. Louis*, 687 N.E.2d 481 (Ohio Ct. App. 1996) (resident criticism of construction company); *Mackin v. Cosmos Broadcasting, Inc.*, 2008 WL 2152188, *5 (W.D. Ky. May 21) (TV station criticism of home seller who allegedly wrongfully took advantage of blind buyer).

ger accused a court-appointed trustee of tax fraud in a bankruptcy reorganization of a company.¹⁴⁶ The California Court of Appeal likewise held that including plaintiff's name in a leaflet containing a list of alleged rapists was speech on a matter of public concern.¹⁴⁷ 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;¹⁴⁸ the Iowa Supreme Court held likewise in a similar case.¹⁴⁹

Likewise, consider three cases dealing with allegations of substance abuse. *Ayala v. Washington* held that a letter to an airline alleging that one of its pilots—the defendant's ex-boyfriend—was a marijuana user was merely on a subject of "private concern."¹⁵⁰ *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.¹⁵¹ 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."¹⁵²

What's more, many cases seem to suggest that the public/private concern line should turn on "context, form, and content," 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.¹⁵³ 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, 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.

¹⁴⁶ *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1292 (9th Cir. 2014).

¹⁴⁷ *Carney v. Santa Cruz Women Against Rape*, 271 Cal. Rptr. 30, 32, 37 (Ct. App. 1990) (allegation in a leaflet that plaintiff had tried to rape a woman); see also *Forrester v. WVTM TV, Inc.*, 709 So. 2d 23, 26 (Ala. Civ. App. 1997) (concluding that 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").

¹⁴⁸ *W.J.A. v. D.A.*, 43 A.3d 1148, 1157 (N.J. 2012).

¹⁴⁹ *Bierman v. Weier*, 826 N.W.2d 436, 455 (Iowa 2013).

¹⁵⁰ 679 A.2d 1057, 1068 (D.C. 1996).

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

¹⁵² 206 F.3d 92, 134 (1st Cir. 2000).

¹⁵³ 472 U.S. 749, 761–63 (1985) (lead op.).

Similarly, *Connick v. Myers* concluded that questions about whether prosecutors had lost confidence in the D.A. and his top assistants were on not on a matter of public concern.¹⁵⁴ 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. But again it's not obvious how courts 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.¹⁵⁵ 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.

E. 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).¹⁵⁶ This is because the Court's *mens rea* decisions aimed 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 up front by the mere risk that my speech will lead to an injunction; the injunction itself won't send me to

¹⁵⁴ 461 U.S. 138, 147–48 (1983).

¹⁵⁵ See, e.g. *Dun & Bradstreet*, 472 U.S. at 761 n.7 (lead op.) (giving such an accusation as an example of speech on matters of purely private concern).

¹⁵⁶ See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

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.

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 pretty close to assuring that that I have “actual malice” (in the sense of knowledge or recklessness as to falsehood). More importantly, the injunction will only chill statements that have indeed been found to be false.¹⁵⁷

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).¹⁵⁸ 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.¹⁵⁹ And the principles of *New York*

¹⁵⁷ It’s possible, of course, that, despite the court’s finding that the statement was false, I would still lack knowledge or recklessness as to the falsehood—whether because I delusionally believe that the statement is true (or almost certainly true) even though the court rightly found that it was false, or because I know that it’s true, perhaps from personal experience, and that the court erred. But from the perspective of the legal system, and its desire to minimize the chilling effect on true statements while still imposing liability on false statements, it should be adequate to treat the judicial finding of falsehood as a substitute for a finding of actual malice.

¹⁵⁸ This continuing chilling effect is one reason why Justices Black, Douglas, and Goldberg would have imposed a rule of absolute immunity in public concern libel cases. See *New York Times Co. v. Sullivan*, 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.

¹⁵⁹ See, e.g., RESTATEMENT (SECOND) OF TORTS div. 5 ch. 27 spec. note (1977); David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135, 1155 & n.12 (2014) (citing David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847, 847 (1986)); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809, 812 (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).

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."¹⁶⁰ 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 knows the statements were false.

And that showing should usually be easy to make, given that the injunction places the speaker on notice 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.

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 with less of a chilling effect on nonlibelous speech—then hybrid preliminary injunctions should be constitutional, too. They would adequately protect defendants, while giving plaintiffs the opportunity to deter libels starting shortly after they file a lawsuit, rather than having to wait until after the lawsuit is adjudicated.

Let us return to Paula and Don, and imagine that Paula gets a preliminary injunction. 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 true.

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"; and, as with the hybrid permanent injunction, the injunction provides that any criminal contempt trial for violating it shall be before a jury,

¹⁶⁰ O'Rourke v. O'Rourke, 337 S.W.3d 189, 197 (2009) (quoting 17 C.J.S. Contempt § 14) (cleaned up).

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. They 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.¹⁶¹

Also like with the hybrid permanent injunction, Don would also be exposed 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 have less of a chilling effect than a catchall injunction or than a criminal libel law, which would put Don in jeopardy as to *any* libelous statements.

But unlike with the hybrid permanent injunction, the hybrid preliminary injunctions 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 does seem to lean in this direction. In *2 Sons Plumbing, LLC v. Herring*, 2 Sons claimed that Romare Herring had criticized 2 Sons only while falsely claiming to be a customer (in some places) and a former employee (in others); they sued for, among other things, violating California law that bars such impersonation.¹⁶² The District Court concluded that there was enough to their 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 his preliminary conclusion as binding in such a hearing:

(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;

¹⁶¹ See *supra* Part III.

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

(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.¹⁶³

If it turns out that Herring is indeed 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 conclusively finding 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; and whether any particular statement is unprotected and therefore forbidden would have to be determined at an adversary criminal contempt hearing.¹⁶⁴

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 speech that a judge has concluded is likely false and defamatory. This judicial conclusion doesn't itself suffice for forbidding the speech 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); but the conclusion is still an important protection for speakers. Any injunction should be entered 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.¹⁶⁵

¹⁶³ *Id.*

¹⁶⁴ This makes such hybrid orders unlike 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.

¹⁶⁵ *See id.*

Sometimes, of course, such an adversary presentation is impossible, for instance 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.¹⁶⁶ And in some states, the litigants could initiate the criminal contempt prosecution themselves,¹⁶⁷ or move for contempt and ask for the court to appoint their lawyers as the prosecutors.¹⁶⁸

¹⁶⁶ See, e.g., FED. R. CRIM. P. 42(a)(2); COLO. S. CT. R. PRAC. 107(d)(1); WISC. § 785.03(1)(B).

¹⁶⁷ See, e.g., MICH. CT. R. 3.606(A); *DeGeorge v. Warheit*, 741 N.W.2d 384 (Mich. Ct. App. 2007); ALASKA R. CIV. P. 90(b); N.Y. FAM. CT. ACT § 846 (McKinney 2010); 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 Cnty. 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); 23 PA. CONSOL. STATS. ANN. § 6113.1; 16 PA. CONSOL. STATS. ANN. § 1409; 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).

¹⁶⁸ See, e.g., *Gordon v. State*, 960 So. 2d 31, *clarified on denial of rehearing*, 967 So.2d 357 (Fla. Ct. App. 2007); *Gay v. Gay*, 485 S.E.2d 187 (Ga. 1997); *Wilson v. Wilson*, 984 S.W.2d 898, 903 (Tenn. 1998) (partly on the grounds that “there is no fund in Tennessee from which to compensate private counsel appointed to prosecute criminal contempt actions”). In the federal system, the judge may not appoint the plaintiff's lawyer as prosecutor, *Young v. United States ex rel. Vuitton et Fils SA*, 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.*

Indeed, in states that still have criminal libel laws, the injunction's cutting out of the prosecutor is especially vivid.¹⁶⁹ 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 only works because the target is worried 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 opt for spending 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 people. 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.¹⁷⁰ And the injunction bypasses that prosecutorial decision.

The question for judges, then, is whether they see prosecutorial discretion as an advantage or a disadvantage in such cases. Prosecutorial discretion is sometimes touted as an important protector for 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.¹⁷¹ In the words of then-Judge Kavanaugh,

at 806 n.17). But that is a principle of federal contempt procedure, not a constitutional mandate.

¹⁶⁹ 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).

¹⁷⁰ A few states authorize judicial review of prosecutorial decisions to reject victims' demands to prosecute, but only a few. 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*, 2000 PA Super. 402, ¶¶ 12-19; *State ex rel. Clyde v. Lauder*, 90 N.W. 564, 569 (N.D. 1902), quoted favorably in *Olsen v. Kopyy*, 593 N.W.2d 762, 765–67 (N.D. 1999)).

¹⁷¹ This doesn't describe the historical rule in the states, where private prosecutions were common in the early Republic; but it describe the general modern practice, in which private prosecutions have been largely rejected. See Brown, *supra* note 170, at 870. Even the rare private prosecutions that remain allowed are often 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).

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.¹⁷²

Judge Kavanaugh was speaking of prosecutorial discretion as a check on the legislative power, but it could equally be seen as a check on the judicial power.¹⁷³ 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.¹⁷⁴ Justice Scalia's concurrence in *Young v. United States ex rel. Vuitton et Fils SA*, 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."¹⁷⁵

On the other hand, prosecutorial discretion is sometimes seen as unduly favoring those victims who have the prosecutors' ear—indeed, one criticism of criminal libel laws has been that they are disproportionately used to punish speech critical of political officials and law enforcement.¹⁷⁶ And people sometimes fault prosecutors for being not attentive enough to particular crimes that are seen as too hard (or too unglamorous) to prosecute; that, for instance, was part of the criticism of prosecutors in domestic violence cases, which led many states to enact statutes specifically authorizing injunctions against continued domestic violence.¹⁷⁷

¹⁷² *In re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013).

¹⁷³ See, e.g., AKHIL REED AMAR, *AMERICAN'S UNWRITTEN CONSTITUTION* 429–30 (2012) (likewise characterizing prosecutorial discretion as an important protection for liberty, and an important check on Congress and the judiciary, at least in the federal system).

¹⁷⁴ See, e.g., *Warren County Community College v. Warren County Bd. of Chosen Freeholders*, 796 A.2d 257, 272 (N.J. App. Div. 2002).

¹⁷⁵ 481 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).

¹⁷⁶ See, e.g., ACLU, *ACLU Files First Amendment Challenge to Criminal Defamation Law* (Dec. 18, 2018), <https://www.aclu.org/news/aclu-files-first-amendment-challenge-criminal-defamation-law>.

¹⁷⁷ See Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85 (1992) (generally defending the private party initiation of criminal contempt proceedings).

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”¹⁷⁸ means simply that equity “would not enjoin violation of . . . criminal law *as such*,” but would only enjoin acts that harmed the particular plaintiff in some legally cognizable way.¹⁷⁹ Injunctions against trespass are issued without concern that this will undermine prosecutorial discretion not to prosecute trespasses as crimes; likewise with injunctions against copyright infringement, even though willful copyright infringement for commercial gain is also criminal.¹⁸⁰

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.”¹⁸¹

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,¹⁸² and enforcement of injunctions without a prosecutorial veto would decrease this risk.

Judges in injunction cases often write opinions explaining why they exercise their discretion 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.¹⁸³ The absence of prosecutorial discretion should not invalidate a narrowly crafted injunction.

¹⁷⁸ See, e.g., *Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004).

¹⁷⁹ See *United States v. Dixon*, 509 U.S. 688, 695 (1993).

¹⁸⁰ 17 U.S.C. §§ 501, 506.

¹⁸¹ *Bachowski v. Brennan*, 502 F.2d 79, 87 (3d Cir. 1974), *aff’d on this sub nom.* *Dunlop v. Bachowski*, 421 U.S. 560, 567 n.7 (1975), *overruled as to unrelated matters*, *Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers*, 467 U.S. 526, 549 n.22 (1984).

¹⁸² Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 *Tex. L. Rev.* 984, 984–86 (1956).

¹⁸³ *United States v. Stevens*, 559 U.S. 460, 480 (2010).

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”;¹⁸⁴ state courts may choose to take a similar approach. Such 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 statute¹⁸⁵).

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?¹⁸⁶ 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, “the 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.”¹⁸⁷ 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

¹⁸⁴ *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 329 (1999).

¹⁸⁵ *E.g.*, CAL. CODE CIV. PROC. § 527.6.

¹⁸⁶ *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, ch. 4 § 526; 2002 Md. Laws 686; 1978 N.J.L. ch. 95, § 2C:98-2; 1985 Or. Laws 759; *Commonwealth v. Mason*, 322 A.2d 357, 359 (1974) (Jones, C.J., concurring and dissenting) (noting that the Pennsylvania criminal libel law was repealed by 1972 Pa. Laws 1611, Act No. 334); 1998 R.I. Pub. Laws 324-25; 2009 Wash. Sess. Laws 597-98.

¹⁸⁷ 1991 Cal. Legis. Serv. Ch. 186 (A.B. 436), sec. 1 (West)..

him to maintain a civil suit.”¹⁸⁸ And the New Jersey Supreme Court relied on this 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 criminal law would not be used as a weapon against defamatory remarks, thereby aligning our new criminal code with the Model Penal Code.¹⁸⁹

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,” would 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.”

To offer an analogy: Say that a state legislature repeals the state’s criminal adultery statute (as most 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.¹⁹⁰ 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

¹⁸⁸ MODEL PENAL CODE § 260.7 cmt. 2 (t.d. no. 13, 1961); *see also* *Burkert*, 174 A.3d at 197 (quoting this passage as a reason to reject criminal harassment liability for falsehoods said with the intent to harass); *State v. Browne*, 206 A.2d 591 (N.J. App. Div. 1965) (concluding that mere “personal calumny” should not be the target of criminal law).

¹⁸⁹ *State v. Burkert*, 174 A.3d 987, 996–97 (N.J. 2017).

¹⁹⁰ 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* Data from N.C. Administrative Office of Courts, 2000–08; Eugene Volokh, *Alienation of Affections—Still Alive*, VOLOKH CONSPIRACY, July 28, 2009, <http://volokh.com/posts/1248793691.shtml>. 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, where the alienation tort seem to thrive—most such adultery-based cases are brought as alienation of affections cases.

themselves would not directly reach the subject matter of the dispute before the court.”¹⁹¹ Texas courts, for instance, have so reasoned in refusing to authorize certain kinds of pre-suit depositions in libel,¹⁹² certain awards of prejudgment interest,¹⁹³ and certain kinds of piercing of the corporate veil.¹⁹⁴ 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.

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.”¹⁹⁵ 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.”¹⁹⁶

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.”¹⁹⁷ Congress, for instance,

¹⁹¹ *In re Elliott*, 504 S.W.3d 455, 483 (Tex. Ct. App. 2016).

¹⁹² *Id.*

¹⁹³ *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 529–31 (Tex. 1998).

¹⁹⁴ *Shook v. Walden*, 368 S.W.3d 604, 620–21 (Tex. Ct. App. 2012)

¹⁹⁵ *Naccache v. Taylor*, 72 A.3d 149, 155–56 (D.C. Ct. App. 2013); *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 494 (Conn. 2015); *Ivani Contracting Corp. v. New York*, 103 F.3d 257, 260 (2d Cir. 1997); *see also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1973–74 (2014).

¹⁹⁶ *Bernoskie v. Zarinsky*, 890 A.2d 1013, 1021 (N.J. Super. Ct. App. Div. 2006).

¹⁹⁷ *See, e.g., Rowe v. N.Y. State. Div. of Budget*, 2012 WL 4092856, *7 (N.D.N.Y. Sept. 17); *Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762, 771 (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*, 490 F.2d at 1370, about subjecting defendants to the risk of criminal contempt).

deliberately made employment discrimination, even repeated employment discrimination, a tort, not a crime.¹⁹⁸ Enjoining a particular employer from engaging in discrimination would make such discrimination into contempt of court, courts stress.¹⁹⁹ The courts generally don't explain just why "subject[ing] the defendants to contempt proceedings"²⁰⁰ in such cases is wrong. But the reason may be that such proceedings would interfere with the legislative judgment 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 answer the question: 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 view endorsed by the California Legislature (at least as to spoken words) and by the drafters of the Model Penal Code.²⁰¹ If so, then this suggests that anti-libel injunctions, enforceable by punishment for criminal contempt, should likewise be rejected.²⁰²

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

¹⁹⁸ Compare TEX. PENAL CODE § 39.03(a)(3), which does criminalize quid pro quo sexual harassment by government employers. *See, e.g.*, *Sanchez v. State*, 209 S.W.3d 117 (Tex. Ct. Crim. App. 2006).

¹⁹⁹ *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, *7; *see also Payne v. Travenol Laboratories, 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).

²⁰⁰ *Gaddy*, 884 F.2d at 318.

²⁰¹ 1991 Cal. Legis. Serv. Ch. 186 (A.B. 436), sec. 1 (West).

²⁰² 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 most criminal libel laws were repealed by various states, 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 reinstating criminal libel law for the defendant (at least when the defendant is speaking about the plaintiff).

accurate (so long as 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 injunctions, which warn speakers away from specific 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 both catchall injunctions and specific 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.²⁰³

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 them.) 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

²⁰³ Compare the statutory construction literature arguing that legislative intent ought not guide statutory interpretation because such intent generally can't be determined. See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 18–21 (2001); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

to a request for permanent injunctive relief in diversity cases.”²⁰⁴ “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.’”²⁰⁵

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 are permissible under 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 to such injunctions).²⁰⁶ Yet defendants sometimes fail to raise the *Erie* argument, even when state law would reject anti-libel injunctions.²⁰⁷

Likewise, the Seventh Circuit in *McCarthy v. Fuller* didn’t consider Indiana law, though defendants had argued that it should apply.²⁰⁸ Perhaps the Seventh Circuit concluded that considering Indiana law was un-

²⁰⁴ *Lord & Taylor, LLC v. White Flint, LP*, 780 F.3d 211 (4th Cir. 2015); see also *Titan Holdings Syndicate v. City of Keene*, 898 F.2d 265, 273 (1st Cir. 1990) (“[S]tate remedies are available in federal diversity actions.”).

²⁰⁵ *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; see 19 CHARLES ALAN WRIGHT, ARTHUR MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4513, for a more thorough analysis, and *id.* at n.73 & accompanying text for more case citations on the subject.

²⁰⁶ 947 F.2d 666, 676 (3d Cir. 1991).

²⁰⁷ See, e.g., *Sindi v. El-Moslimany*, 896 F.3d 1, 31 n.12 (1st Cir. 2018); *Int’l Profit Assocs. v. Paisola*, 461 F. Supp.2d 672 (N.D. Ill. 2006); *Gorman v. Steinborn*, No. 2:14-cv-00890-NS (E.D. Pa. May 20, 2015). In *Int’l Profit Assocs.*, the court ultimately entered an anti-libel injunction, without mentioning Illinois law, which limits such injunctions, see *supra* note 255; the same was so as to *Gorman* and Pennsylvania law, which forbids such injunctions. In *Sindi*, 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, see *supra* note 285.

²⁰⁸ See Reply Brief of Appellants, *McCarthy v. Fuller*, 2015 WL 4151888, at 17.

necessary, because the court ultimately concluded that the particular injunction in that case was overbroad.²⁰⁹ But its general endorsement, in dictum, of anti-libel injunctions should be viewed with caution, since ultimately this should be a question for Indiana 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.²¹⁰

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 Amendment, it should be struck down.”²¹¹ 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).²¹² One can see the same as to content-neutral injunctions on the time, place, or manner of speech, such as injunctions against residential picketing.²¹³ 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 they are said with knowledge or recklessness that they are false. One case, *Time, Inc. v.*

²⁰⁹ 810 F.3d at 462–63.

²¹⁰ 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).

²¹¹ *United Transp. Union v. Michigan Bar*, 401 U.S. 576, 581 (1971).

²¹² *See supra* Part I.

²¹³ *See, e.g., Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774–75 (1994).

Hill,²¹⁴ involved a lawsuit by crime victims over a magazine article that exaggerated how violent the crime was. 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.²¹⁵

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.²¹⁶ *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.²¹⁷ 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;²¹⁸ for this discussion, I’ll assume that *Time* and *Cantrell* are still good law.

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,”²¹⁹ the requirement that the material be “highly offensive” doesn’t seem to be a

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

²¹⁵ 419 S. 245, 248 (1974). The reporter responsible for the fictional quotes, Joe Eszterhas, moved to a field where fiction was allowed: He became a prominent screenwriter, writing the screenplays for, among other films, *Flashdance* and *Basic Instinct*.

²¹⁶ *Time*, 385 U.S. at 384 n.9.

²¹⁷ 567 U.S. 709, 717–18, 720 (2012) (plurality op.).

²¹⁸ 567 U.S. at 719 (plurality op.) (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 judgment) (likewise).

²¹⁹ RESTATEMENT (SECOND) OF TORTS §§ 652A, 652E. 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.* § 652E ill. 3–5.

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.²²⁰

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).²²¹

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, but can be constitutional despite that because libel can indeed be criminalized (assuming the statute or injunction is properly crafted). But the 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 livelihood or social standing—can be criminalized.²²² If they cannot be punished by a criminal statute, then they should not be punishable by an injunction that’s enforceable through the threat of criminal contempt.

²²⁰ 385 U.S. at 390–91. *Cantrell* involved a tort that was called “false light,” but it too didn’t discuss the offensiveness element.

²²¹ See RESTATEMENT (SECOND) OF TORTS § 652E; see also *id.* cmt. e (“When the false publicity is also defamatory so that either action can be maintained by the plaintiff, it is arguable that limitations of long standing that have been found desirable for the action for defamation should not be successfully evaded by proceeding upon a different theory of later origin, in the development of which the attention of the courts has not been directed to the limitations.”).

²²² *But see* *Rooks v. Krzewski*, 2014 WL 1351353 (Mich. Ct. App. Apr. 3) (concluding that a specific injunction against repeating statements that put plaintiff in a false light is constitutional, based on caselaw that involved defamatory statements); *Stockwire Research Group, Inc. v. Lebed*, 577 F. Supp. 2d 1262, 1269 (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).

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

Likewise, speakers accused of slander, trade libel,²²³ slander of title,²²⁴ or injurious falsehood²²⁵ 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.²²⁶

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.²²⁷ In such situations, the intentional interference claim is likely redundant of the libel claim, and should be analyzed the same way.²²⁸

²²³ See, e.g., RESTATEMENT (SECOND) OF TORTS § 626; Bose Corp. of Consumers Union of U.S., Inc., 466 U.S. 485 (1984).

²²⁴ RESTATEMENT (SECOND) OF TORTS § 624.

²²⁵ *Id.* § 623A.

²²⁶ 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.) (“[c]riminal false communication”); UTAH CODE ANN. § 76-9-404 (“criminal defamation”). To my knowledge, the constitutionality of such criminal slander bans has not been tested.

²²⁷ See, e.g., RESTATEMENT (SECOND) OF TORTS § 766B (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”).

²²⁸ For cases holding that the First Amendment principles applicable to defamation cases equally apply to the interference tort, see, e.g., *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); *Jefferson County School Dist. No. R-1 v. Moody’s Investor’s Services, Inc.*, 175 F.3d 848, 856-58 (10th Cir. 1999); *Farah v. Esquire Magazine*, 736 F.3d 528, 540 (D.C. Cir. 2013); *Fendler v. Phoenix 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 A3d 305, 310 (D.C. Ct. App. 2016); *Lakeshore Community Hosp. v. Perry*, 538 N.W.2d 24, 28 (Mich. Ct. App. 1995); *Dairy Stores, Inc. v. Sentinel Pub. Co.*, 465 A.2d 953, 961 (N.J. Super. Ct. 1983) *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1283-88, 1295 (Ohio 1995); *Lorton v. Dolfecino*, 986 SW.2d 69, 79 (Tex. Ct. App. 1999).

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. In *NAACP v. Claiborne Hardware Co.*, for instance, the Court 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.²²⁹ 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”²³⁰ should be unconstitutional, simply 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

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

²³⁰ *Chevaldina v. RK/FL Management, Inc.*, 133 So. 3d 1 086, 1090–91 (Fla. Ct. App. 2014) (overturning this injunction on the grounds that it is unconstitutionally overbroad); *see also Hutul v. Maher*, No. 1:12-cv-01811, at 18 (N.D. Ill. Dec. 10, 2012) (“Defendant shall . . . is hereby enjoined from . . . Interfering 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 Cnty. Aug. 6, 2012) (“[Burgess is] permanently enjoined and restrained from engaging in any conduct that interferes with Plaintiff Shelley DeJager’s Photography business,” 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.” *Id.* at 1091.

about people.²³¹ The Supreme Court has never resolved whether it is constitutional.²³² Most states have accepted it, though defining it quite narrowly;²³³ but a few have rejected it outright.²³⁴

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.²³⁵) 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”²³⁶—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).²³⁷

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

²³¹ See RESTATEMENT (SECOND) OF TORTS § 652D.

²³² See, e.g., *Florida 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).

²³³ Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 365–67 (1983),

²³⁴ *Brunson v. Ranks Army Store*, 73 N.W.2d 803 (Neb. 1955); *Howell v. New York Post Co.*, 612 N.E.2d 699 (N.Y. 1993); *Hall v. Post*, 372 S.E.2d 711 (N.C. 1988); *Anderson v. Fisher Broadcasting*, 712 P.2d 803 (Or. 1986); *Evans v. Sturgill*, 430 F. Supp. 1209 (W.D. Va. 1977); see also *Doe v. Methodist Hospital*, 690 N.E.2d 681 (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 Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop Others from Speaking About You*, 52 STAN. L. REV. 1049 (2000)

²³⁵ E.g., *Ex parte Jones*, 2018 WL 222888 (Tex. Ct. App. May 16), *rev. granted* (July 25, 2018) *State v. VanBuren*, ___ A.3d ___ (Vt. 2018).

²³⁶ *Dunham v. Roer*, 708 N.W.2d 552, 565 (Minn. Ct. App. 2012).

²³⁷ 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).

with third parties,”²³⁸ is unconstitutionally overbroad and vague.²³⁹ It doesn’t define what qualifies as “personal information.”²⁴⁰ It covers information even if it is “of legitimate concern to the public.”²⁴¹ And it covers information that comes from public records (such as criminal history information) and is therefore categorically constitutionally protected.²⁴²

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?²⁴³ Or a ban on publishing plaintiff’s “home address and unlisted telephone number” as well as “Plaintiff’s employment history at OfficeMax”?²⁴⁴

I think such speech cannot be criminalized, and thus cannot be enjoined; and indeed three district court cases have held that publishing people’s home addresses is constitutionally protected.²⁴⁵ Those cases, though, involved the addresses of government officials, and noted that

²³⁸ *Hull v. Lund*, No. BS147482, att. 10 (Cal. Super. Ct. filed Apr. 14, 2014); *see also* Petition for Injunction [signed by judge], *id.* at 2 (Apr. 2, 2014) (declining to find “credible threats on petitioner’s life” but finding that “the e-mails are unnecessarily disturbing to the petitioner”); *see also* *Cardoza v. Ortiz*, No. FAMSS 1707719 (Cal. Super. Ct. San Bernardino Cnty. Sept. 28, 2017) (no “posting of information on any social media website,” including “city of residence or past residences of petitioner”),

²³⁹ *See, e.g., Evans v. Evans*, 76 Cal. Rptr. 3d 859, 869–70 (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).

²⁴⁰ *See, e.g., 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.

²⁴¹ *See* RESTATEMENT (SECOND) OF TORTS § 652D(b).

²⁴² *Gates v. Discovery Commc’ns, Inc.*, 101 P.3d 552 (Cal. 2004).

²⁴³ *Carag v. Kellogg*, No. 27-2015-CV-00371 (N.D. Dist. Ct. McKenzie Cnty. Mar. 24, 2016).

²⁴⁴ *Murphy v. Gump*, No. 2016-CC-002126-O (Fla. Cnty. Ct. Orange Cnty. July 18, 2016).

²⁴⁵ *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, 1139 n.2 (W.D. Wash. 2003).

they were connected to disputes on matters of public concern;²⁴⁶ 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 for me 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 a libel case, 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 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 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, 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).

CONCLUSION

Anti-libel injunctions threaten repeat libelers with criminal punishment. This may be necessary, especially in an age when judgment-proof

²⁴⁶ *Publius*, 237 F. Supp. 3d at 997; *Brayshaw*, 709 F. Supp. 2d at 1249; *Sheehan*, 272 F. Supp. 2d at 1139 n.2.

defendants can badly damage people's personal and professional reputations more easily than ever before. And, if done right, such injunctions can be no more speech-restrictive than are constitutionally permissible criminal libel statutes.

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

And courts also need to consider whether the injunctions are consistent with state law principles, even apart from the First Amendment. They need to consider whether the injunction's ability to provide criminal remedies without the assent of a prosecutor is consistent with state notions of separation of powers. They need to consider whether the injunction's criminal remedies are consistent with the legislative judgment to repeal criminal libel statutes, in the many states that have repealed those statutes. 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

Thirty-one states and five federal circuits seem to generally allow anti-libel injunctions, at least in some situations. I include five states, Arizona, 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 the 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).²⁴⁷

²⁴⁷ *Riley v. Shuler*, Nos. 2013-236 & -237, 2013 WL 12376646, *2 (Ala. Cir. Ct. Shelby Cnty.); *see also* *Griffis v. Luban*, 2002 WL 338139, *6-*7 (Minn. Ct. App. Mar. 25) (discussing a similar injunction imposed by an Alabama court, though concluding that the injunction extended beyond defamatory statements and therefore needed to be narrowed).

- Alaska (Supreme Court statement so leaning).²⁴⁸
- Arizona (practice in trial court decisions).²⁴⁹
- California (Supreme Court holding).²⁵⁰
- Colorado (practice in trial court decisions).²⁵¹
- Connecticut (trial court holdings).²⁵²
- Florida (appellate holdings, but limited to statements that damage business).²⁵³
- Georgia (Supreme Court holding, but limited to statements are part of a sustained campaign).²⁵⁴

²⁴⁸ *Alsworth v. Seybert*, 323 P.3d 47, 57 n.34 (Alaska 2014).

²⁴⁹ *See, e.g.*, *Calvary Community Church v. Blogger Brother Tafari*, No. CV2015-009060 (Ariz. Super. Ct. Maricopa Cnty. Mar. 2, 2016); *Eckley & Assocs v. Tobias*, No. CV2013-009316 (Ariz. Super. Ct. Maricopa Cnty. June 3, 2015); *CS&P Fiduciare SA v. RC Arden*, No. CV2014-094963 (Ariz. Super. Ct. Maricopa Cnty. June 29, 2015). I have many other Arizona anti-libel injunctions in my files.

²⁵⁰ *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 349 (Cal. 2007).

²⁵¹ *See, e.g.*, *Clark v. Doe*, No. 15CV31615 (Colo. Dist. Ct. Denver Cnty. Jan. 22, 2016); *Woodbridge Structured Funding, Inc. v. Doe*, No. 13CV31613 (Colo. Dist. Ct. Denver Cnty. Feb. 14, 2014); *Woodbridge Structured Funding, Inc. v. Doe*, No. 14CV33028 (Colo. Dist. Ct. Denver Cnty. Dec. 9, 2014); *Madwire Media, LLC v. Newman*, No. 2014CV030162 (Colo. Dist. Ct. Larimer Cnty. May 6, 2014). *Degroen v. Mark-Toyota Volvo, Inc.*, 811 P.2d 443, 445–46 (Colo. Ct. App. 1991), took the view that injunctions against libel are categorically unconstitutional, but it seems to have left no mark on Colorado law; I could find no cases that cite it.

²⁵² *Borg v. Cloutier*, 2018 WL 4441101, *4–*7 (Conn. Super. Ct. Aug. 23, 2018) (issuing permanent injunction, presumably concluding that it was consistent with the First Amendment, given that an earlier decision in the same case, 2017 WL 3613494 (Conn. Super. Ct. July 17, 2017), refused to issue preliminary injunction on First Amendment grounds); *SBD Kitchens, LLC v. Jefferson*, 2013 WL 6989409, *9–*10 (Conn. Super. Ct. Dec. 16, 2013), *aff'd as to other matters*, 118 A.3d 550 (Conn. App. Ct.). *But see* *Whitnum v. Robinson*, 2012 WL 1511376 (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).

²⁵³ *Murtagh v. Hurley*, 40 So. 3d 62 (Fla. Ct. App. 2010) (actual harm to business must be shown before injunction is issued); *Murtagh v. Hurley*, 40 So.3d 62 (Fla. Ct. App. 2010); *Zimmerman v. D.C.A. at Welleby, Inc.*, 505 So. 2d 1371 (Fla. Ct. App. 1987); *DeRitis v. AHZ Corp.*, 444 So. 2d 93, 94–95 (Fla. Ct. App. 1984).

²⁵⁴ *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62-63 (Ga. 1975); *Ga. Soc'y of Plastic Surgeons, Inc. v. Anderson*, 363 S.E.2d 140, 144 (Ga. 1987); *Ellerbee v. Mills*, 422 S.E.2d 539, 541 (Ga. 1992). Georgia courts generally reject *preliminary* injunctions in libel cases. *Pittman v. Cohn Communities, Inc.*, 239 S.E.2d 526 (1977); *Brannon v. American Micro Distributors, Inc.*, 342 S.E.2d 301 (Ga. 1986); *High Country Fashions, Inc. v. Marlenna Fashions, Inc.*, 357 S.E.2d 576 (Ga.

- Illinois (appellate dictum, limited to statements that damage business, coupled with practice in trial court decisions).²⁵⁵
- Indiana (appellate holding, as to speech on matters of private concern).²⁵⁶
- Iowa (nonprecedential appellate holding).²⁵⁷
- Kentucky (Supreme Court holding, as to speech on matters of private concern).²⁵⁸

1987); *Fernandez v. North Georgia Regional Medical Center, Inc.*, 400 S.E.2d 6 (Ga. 1991); *Cohen v. Advanced Medical Group of Ga., Inc.*, 496 S.E.2d 710 (Ga. 1998). 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, 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 184 (citing *High Country Fashions*, 357 S.E.2d at 267); *see also* *Hartman v. PIP-Group, LLC*, __ S.E.2d __, 2019 WL 1069640 (Mar. 7) (concluding that preliminary injunctions are unconstitutional, but permanent injunctions may be). This Article is discussing just the permanent, post-verdict injunctions.

²⁵⁵ *Allcare, Inc. v. Bork*, 531 N.E.2d 1033, 1038 (Ill. Ct. App. 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, e.g.*, *Kaupert v. Kim*, No. 12 CH 28082 (Ill. Cir. Ct. Cook Cnty. Dec. 13, 2012) (issuing anti-libel injunction); *Reschke v. Lee*, No. 2016-L-008399 (Ill. Cir. Ct. Cook Cnty. Aug. 30, 2016) (same); *Houlihan Smith & Co. v. Forte*, No. 10 CH 16477 (Ill. Cir. Ct. Cook Cnty. Apr. 16, 2010) (same).

²⁵⁶ *Barlow v. Sipes*, 744 N.E.2d 1, 10 (Ind. Ct. App. 2001) (so holding both as to preliminary and permanent injunctions); *Eppley v. Iacobelli*, No. 1:09-cv-386-SEB-JMS, at 9 (S.D. Ind. Apr. 17, 2009) (applying *Barlow*). *But see* *Mishler v. MAC Systems, Inc.*, 771 N.E.2d 92, 98 (Ind. Ct. App. 2002) (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 Centers, 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”).

²⁵⁷ *DeWaard v. Anderson*, 1999 WL 1136475, *1 (Iowa Ct. App. Dec. 13); *see also* *Bierman v. Weier*, 2009 WL 9152625, *4 (Iowa Dist. Ct. Polk Cnty. Apr. 29) (same).

²⁵⁸ *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.

- Louisiana (appellate dictum).²⁵⁹
- Maryland (appellate dicta, plus practice in trial court decisions).²⁶⁰
- Maine (Supreme Judicial Court holding).²⁶¹
- Michigan (nonprecedential appellate holdings).²⁶²
- Minnesota (Supreme Court holding).²⁶³
- Missouri (appellate holding, though not reaching First Amendment defense because of waiver).²⁶⁴

²⁵⁹ *Vartech Systems, Inc. v. Hayden*, 951 So. 2d 247, 262 & n.22 (La. Ct. App. 2006) (“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).

²⁶⁰ *Prucha v. Weiss*, 197 A.2d 253 (Md. 1964), and *Warren House Co. v. Handwerker*, 213 A.2d 574 (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 25; *Warren House*, 213 A.2d at 576. Many Maryland courts have indeed recently issued anti-libel injunctions. *See, e.g.*, *Hanna v. Qin*, 2018 WL 3953864, *1 (Md. Cir. Ct. Baltimore City June 13, 2018); *Callender v. Anthes*, No. C13-1616 (Md. Cir. Ct. Calvert Cnty. Nov. 15, 2013), *available at* *Callender v. Anthes*, No. 8:14-cv-00121-DKC, ECF No. 4 (D. Md. Jan. 15, 2014); *Muzani v. Trankle*, No. 02-C-13-182491 (Md. Cir. Ct. Anne Arundel Cnty. Nov. 15, 2013) (docket entry); *McCauley v. Caveo Network Solutions, Inc.*, 2011 WL 8908026 (Md. Cir. Ct. Frederick Cnty. Feb. 9, 2011); *Am. Global Holdings Corp. v. Dayton*, No. 135416V (Md. Cir. Ct. May 3, 1995) (docket entry).

²⁶¹ *Truman v. Browne*, 788 A.2d 168, 172 (Maine 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).

²⁶² *Gerald L. Pollack & Associates, Inc. v. Pollack*, 2015 WL 339715 (Mich. Ct. App. Jan. 27); *Rooks v. Krzweski*, 2014 WL 1351353 (Mich. Ct. App. Apr. 3); *Dupuis v. Kemp*, 2006 WL 401125 (Mich. Ct. App. Feb. 26).

²⁶³ *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984).

²⁶⁴ *MB Town Center, LP v. Clayton Forsyth Foods, Inc.*, 364 S.W.3d 595, 603–04 (Mo. Ct. App. 2012); *see also* *Boemler Chevrolet, Inc. 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”); *Boyd v. Does*, No. 14BA-CV03038 (Mo. Cir. Ct. Boone Cnty. Jan. 20, 2015) (issuing anti-libel injunction); *Jim Butler Chevrolet, Inc. v. Cooney*, No. 14SL-CC00556 (Mo. Cir. Ct. St. Lous Cnty. Feb. 24,

- Montana (Supreme Court holding in related context).²⁶⁵
- Nebraska (Supreme Court holding).²⁶⁶
- Nevada (Supreme Court holding, but limited to statements that damage business).²⁶⁷
- New Jersey (nonprecedential appellate holding).²⁶⁸
- New Mexico (appellate holdings so suggesting, but limited to statements that are part of a “continue[d pattern of] attacks”).²⁶⁹
- New York (appellate holdings, but limited to statements are part of “a sustained campaign”).²⁷⁰

2014) (same); *Maxx Media, Inc. v. Lieu*, No. 15CG-CC00222 (Mo. Cir. Ct. Cape Girardeau Cnty. Dec 9, 2016) (same).

²⁶⁵ *St. James Healthcare v. Cole*, 178 P.3d 696 (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).

²⁶⁶ *Sid Dillon Chevrolet v. Sullivan*, 559 N.W.2d 740, 747 (Neb. 1997) (dictum), *followed in Nolan v. Campbell*, 690 N.W.2d 638, 652 (Neb. Ct. App. 2004) (holding).

²⁶⁷ *Guion v. Terra Marketing of Nevada, Inc.*, 523 P.2d 847 (Nev. 1974), *adhered to by Gillespie v. Council*, 2016 WL 5616589 (Nev. Ct. App. Sept. 27).

²⁶⁸ *Chambers v. Scutieri*, 2013 WL 1337935, *13 (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. 1974), *aff’d on other grounds*, 378 A.2d 1148 (N.J. 1977).

²⁶⁹ *Kimbrell v. Kimbrell*, 306 P.3d 495, 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 Father wish to persist in his publication efforts”), *rev’d as to other matters*, 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.

²⁷⁰ *LoPresti v. Florio*, 71 A.D.3d 574, 575 (2010); *Ansonia Assocs. Ltd. Partnership v. Ansonia Tenants’ Coalition, Inc.*, 253 A.D.2d 706 (1998); *Bingham v. Stuve*, 184 A.D.2d 85 (1992); *Trojan Elec. & Mach. Co., Inc. v. Heusinger*, 162 A.D.2d 859 (1990); *see also Dennis v. Napoli*, 148 A.D.3d 446 (2017) (applying this to interference with employment).

- North Carolina (appellate holding, but limited to statements that damage business).²⁷¹
- Ohio (Supreme Court holding).²⁷²
- South Carolina (practice in trial court decisions).²⁷³
- Tennessee (nonprecedential appellate holdings).²⁷⁴
- Utah (practice in trial court decisions, though more for orders to take down speech than for order banning repetition of the speech).²⁷⁵
- Washington (appellate holding).²⁷⁶
- Wisconsin (practice in trial court decisions).²⁷⁷

²⁷¹ *Burke Transit Co. v. Queen City Coach Co.*, 47 S.E.2d 297, 299 (N.C. 1948); see also 17A N.C. INDEX 4TH Injunctions § 33 (2019) (continuing to cite *Burke Transit* as authoritative).

²⁷² *O'Brien v. Univ. Cmty. Tenants Union, Inc.*, 327 N.E.2d 753, 755 (Ohio 1975).

²⁷³ *Monster T-Shirts, LLC v. Reed*, No. 2015-CP-32-01803, at 4 (S.C. Ct. Com. Pl. 11th Dist. Aug. 18, 2016); *52 Apps Inc. v. SmartPhoneRecordsLLC*, No. 2016CP4001016, at 3 (S.C. Ct. Com. Pl. 5th Dist. Aug. 11, 2016); *Vacation Station, LLC v. Doe*, No. 2013-CP-10-2036 (S.C. Ct. Com. Pl. 9th Dist. Apr. 19, 2013); *Everest Wealth Mgmt., LLC v. Doe*, No. 12-CP-08-2583 (S.C. Ct. Com. Pl. 9th Dist. Oct. 29, 2012); *Adili v. Yarnell*, No. 2017-CP-08-552 (S.C. Ct. Com. Pl. 9th Dist. Feb. 27, 2017).

²⁷⁴ *In re Conservatorship of Turner*, No. M2013-01665-COA-R3-CV, 2014 WL 1901115, *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 *Loden v. Schmidt*, No. M2014-01284-COA-R3-CV, 2015 WL 1881240, at *8-*9 (Tenn. Ct. App. Apr. 24, 2015) (following *Turner*); *Gider v. Hubbell*, No. M2016-00032-COA-R3-JV, 2017 WL 1178260, at *10-12 (Tenn. Ct. App. Mar. 29, 2017) (likewise).

²⁷⁵ *Vision Bankcard v. Hruska*, No. 150401307 (Utah Dist. Ct. Utah Cnty. Aug. 26, 2015) (banning repetition); *Salt Lake City Mack Sales & Serv. v. Stoker*, No. 110918085 (Utah Dist. Ct. Salt Lake Cnty. Aug. 16, 2012) (ordering removal); *Legally Mine, LLC v. Doe*, No. 150400521 (Utah Dist. Ct. Utah Cnty. Dec. 4, 2015) (ordering removal); *Living Scriptures, Inc. v. Rafahi*, No. 160902584 (Utah Dist. Ct. Salt Lake Cnty. July 12, 2016) (ordering removal); *Stern v. Lindsey*, No. 160902290 (Utah Dist. Ct. Salt Lake Cnty. Oct. 4, 2017) (ordering removal).

²⁷⁶ *In re Marriage of Meredith*, 201 P.3d 1056, 1064 (Wash. Ct. App. 2009); *In re Guardianship of Janzen*, 2015 WL 6395663, *6 (Wash. Ct. App. Oct. 22); *Arnesto v. Rosolino*, 2014 WL 3360238, *85 (Wash. Ct. App. July 7).

²⁷⁷ *E.g.*, *Petitioner v. Alvarado*, No. 2017CV002741 (Wisc. Cir. Ct. Milwaukee Cnty. Apr. 14, 2017) (docket entry); *Jokinen v. Alldredge*, No. 2015CV00074 (Wisc. Cir. Ct. Ashland Cnty. Sept. 1, 2015) (docket entry); *Petitioner v. Brandon*, No. 2010CV014072 (Wisc. Cir. Ct. Milwaukee Cnty. Sept. 8, 2010) (docket entry), *vacated* Oct. 22, 2010; *Stuckey-Osthoff v. Dobbs*, No. 2007CV000202 (Wisc. Cir.

- Second Circuit (nonprecedential appellate holding, though in some tension with a discussion in an earlier case).²⁷⁸
- Third Circuit (statement so leaning).²⁷⁹
- Sixth Circuit (holding).²⁸⁰
- Seventh Circuit (statement so leaning).²⁸¹
- Ninth Circuit (holding).²⁸²

I have also seen such injunctions from courts in Arkansas, Hawaii, Idaho, Vermont, and Virginia, but not enough to show a pattern.²⁸³

Ct. Richland Cnty. Oct. 5, 2007) (docket entry); *Bell v. Maday*, No. 2005CV000009 (Wisc. Cir. Ct. Ashland Cnty. Feb. 8, 2005) (docket entry). All these were harassment restraining order cases, but the injunctions specifically banned libeling or slandering the plaintiff.

²⁷⁸ *Ferri v. Berkowitz*, 561 F. App'x 64, 65 n.2 (2d Cir. 2014) (“the district court remains free to craft a narrow injunction that applies only to Appellee’s unprotected [defamatory] speech, should the court so choose”). *Metropolitan Opera Ass’n, Inc. v. Local 100, Hotel Employees and Restaurant Employees 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.

²⁷⁹ *Kramer v. Thompson*, 947 F.2d 666, 676 (3d Cir. 1991)

²⁸⁰ *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206, 1208–09 (6th Cir. 1990)

²⁸¹ *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.

²⁸² *San Antonio Community 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 Community Hosp. v. So. Cal. Council of Carpenters*, 137 F.3d 1090, 1090, 1092 (9th Cir. 1998) (Reinhardt, J., dissenting from denial of rehearing en banc)).

²⁸³ See *Kuettel v. Steward*, No. CV-2012-270-5 (Ark. Cir. Ct. Benton Cnty. June 28, 2012), *rev’d on other grounds*, 450 S.W.3d 762 (Ark. 2014); *Sulla v. Horowitz*, No. 12-1-0417 (Haw. Cir. Ct. 3d Cir. May 23, 2013); *Blom v. Callan*, No. CV-OC-2011-16232 (Idaho Dist. Ct. Ada Cnty. Apr. 9, 2012); *DM Signs, LLC v. Dunn*, No. CL00588 (Va. Cir. Ct. Mecklenburg Cnty. Jan. 18, 2012); *Tellier Family, Inc. v. Ely*, No. CL14-000952-00 (Va. Cir. Ct. Montgomery Cnty. May 16, 2014); *Hyperkinetics Corp. v. Flotec, Inc.* No. 247-11-02 (Vt. Super. Ct. Orange Cnty. Nov. 26, 2002), *available at* *Hyperkinetics Corp. v. Flotec, Inc.*, No. 1:03-cv-00033-jgm, ECF No. 12 (D. Vt. Feb. 5, 2003); see also *Karats Jewelers, Inc. v. Dugan*, No. 09CV10771 (Kan. Dist. Ct. Johnson Cnty. July 9, 2013) (takedown order only).

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).²⁸⁴
- Massachusetts (Supreme Judicial Court holding, but possibly with exception for speech on private matters).²⁸⁵
- New Hampshire (Supreme Court holding, though some lower courts have recently been dissenting from it).²⁸⁶
- Oklahoma (Supreme Court holding).²⁸⁷

²⁸⁴ *Richardson v. Easterling*, 878 A.2d 1212 (D.C. 2005) (“Moreover, an order prohibiting Easterling from making representations to others regarding Richardson’s allegedly culpable conduct at least arguably constitutes constitutionally impermissible prior restraint of speech; ordinarily, ‘equity does not enjoin a libel or slander.’”) (citation omitted).

²⁸⁵ *Nyer v. Munoz-Mendoza*, 430 N.E.2d 1214, 1217 (Mass. 1985), categorically says, though in dictum, that “even allegedly false and defamatory statements are protected from prior injunctive restraint by the First Amendment and [the Massachusetts Constitution].” *See also* *Clay Corp. v. Colter*, 30 Mass. L. Rptr. 536 (2012) (following *Nyer* to reject an anti-libel injunction in a private dispute); *Clement v. Sheraton Boston Corp.*, 1 Mass. L. Rptr. 579 (1993) (same); *Shawsheen River Estates Assocs. Ltd. P’ship v. Herman*, 3 Mass. Rptr. 475 (1995) (same, though possibly limited just to preliminary injunctions). But *Krebiozen Research Foundation v. Beacon Press, Inc.*, 134 N.E.2d 1 (Mass. 1956), on which *Munoz-Mendoza* chiefly relies, 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. And 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.*

²⁸⁶ *Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, 999 A.2d 184, 197 (N.H. 2010). *But see* *Advanced Siding & Window Co. v. Kenton*, No. 2018-013-CV-1155, at 3–5 (N.H. Super. Ct. Rockingham Cnty.) (Delker, J.) (holding that *Mortgage Specialists* didn’t apply “when a defendant has engaged in a continuous course of conduct of making statements which have been found to be defamatory,” even after an earlier libel verdict and damages award); *Walker v. Gill*, 2017 WL 9807400, *2 (N.H. Super. Ct. Rockingham Cnty. Apr. 10) (Delker, J.); *Anagnost v. Mortgage Specialists, Inc.*, 2017 WL 7693151, *1–*2 (N.H. Super. Ct. Merrimack Cnty. Nov. 9) (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 494850 (N.H. Sept. 25).

²⁸⁷ *House of Sight & Sound, Inc. v. Faulkner*, 912 P.2d 357 (Okla. Ct. App. 1995) (with a narrow exception for “conspiracy, intimidation, or coercion”); *First American Bank & Trust Co. v. Sawyer*, 865 P.2d 347 (Okla. Ct. App. 1993) (same,

- Pennsylvania (Supreme Court holding).²⁸⁸
- Texas (Supreme Court holding, though with exception for orders to take down already posted material).²⁸⁹
- West Virginia (holding).²⁹⁰
- First Circuit (holding).²⁹¹
- D.C. Circuit (holding).²⁹²

One court, the Idaho Supreme Court, has held that injunctions are unavailable in libel cases brought by “public officials,”²⁹³ but didn’t have occasion to opine on the much more common cases brought by other plaintiffs.

“coercion” element not satisfied simply by speech being aimed at pressuring business to give speaker a refund or similar benefit).

²⁸⁸ *Willing v. Mazzocone*, 393 A.2d 1155, 1157–58 (Pa. 1978) (applying state constitution’s free expression guarantee).

²⁸⁹ *Kinney v. Barnes*, 443 S.W.3d 87, 97–100 (Tex. 2014).

²⁹⁰ *Kwass v. Kersey*, 81 S.E.2d 237, 242 (W.Va. 1954); *see also* *Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791 (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).

²⁹¹ *Sindi v. El-Moslimany*, 896 F.3d 1, 31–34 (1st Cir. 2018).

²⁹² *Comm. for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987).

²⁹³ *Nampa Charter School, Inc. v. DeLaPaz*, 89 P.3d 863, 867 (Idaho 2018).

Courts in four states (Arkansas,²⁹⁴ Delaware,²⁹⁵ Virginia,²⁹⁶ and Wyoming²⁹⁷) have briefly discussed the question but have not resolved it.

The remaining eight states (Hawaii, Kansas, Mississippi, North Dakota, Oregon, Rhode Island, South Dakota, and Vermont) have apparently not dealt with the question.

Focusing on just the largest three-quarters of states—the ones that are most likely to yield publicly available decisions on the subject—twenty-eight (75%) seem to fall in the pro-libel-injunction camp (at least in part),²⁹⁸ four fall in the anti-libel-injunction camp,²⁹⁹ and five have not spoken.³⁰⁰

APPENDIX B: SAMPLE CATCHALL INJUNCTIONS

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

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

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

²⁹⁴ *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. I couldn't find any more recent cases resolving this uncertainty, though I have found one recent case issuing such an injunction. *Kuettel v. Steward*, No. CV-2012-270-5 (Ark. Cir. Ct. Benton Cnty. June 28, 2012), *rev'd on other grounds*, 450 S.W.3d 762 (Ark. 2014).

²⁹⁵ *Organovo Holdings, Inc. v. Dimitrov*, 162 A.3d 102, 125–26 (Del. Ct. Ch. 2017), generally speaks out against anti-libel injunctions, and holds that Delaware's chancery courts don't have jurisdiction over libel cases in the first instance, but leaves open the question whether an injunction following a judgment on the merits would be permissible. *See also* *CapStack Nashville 3 LLC v. MACC Venture Partners*, 2018 WL 3949274, *4 (Del. Ct. Ch. Aug. 16) (likewise leaving the question open).

²⁹⁶ *D'Ambrosio v. D'Ambrosio*, 610 S.E.2d 876, 885 n.3 (Va. Ct. App. 2005), expressly declines to “reach [the] constitutional argument that [an] injunction [against libel] constitutes an impermissible prior restraint.”

²⁹⁷ *Hill v. Stubson*, 420 P.3d 732, 744 n.7 (Wyo. 2018), concluded that a “request for ‘a permanent injunction barring the Defendant from engaging in defamatory conduct toward Mrs. Hill’” “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.

²⁹⁸ California, Florida, New York, Illinois, Ohio, Georgia, North Carolina, Michigan, New Jersey, Washington, Arizona, Tennessee, Indiana, Missouri, Maryland, Wisconsin, Colorado, Minnesota, South Carolina, Alabama, Louisiana, Kentucky, Connecticut, Utah, Iowa, Nevada, New Mexico, Nebraska.

²⁹⁹ Texas, Pennsylvania, Massachusetts, Oklahoma.

³⁰⁰ Virginia, Oregon, Arkansas, Mississippi, Kansas.

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

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

ViaView v. Retzlaff, No. 114CH005460, ¶ 1 (Cal. Super. Ct. Santa Clara Cnty. Apr. 8, 2014), https://www.lumendatabase.org/file_uploads/files/4352007/004/352/007/original/2014-04-08.pdf?1532470595, *rev'd on personal jurisdiction grounds*, 1 Cal. App. 5th 198 (2016).

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

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

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

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

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 Cnty. Dec. 5, 2016).

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

Hanna v. Qin, 2018 WL 3953864, *1 (Md. Cir. Ct. Baltimore City June 13, 2018).

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

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

Spivak v. Erskine, No. 17CV001045 (Ohio Ct. Com. Pl. Lake Cnty. Nov. 28, 2018), https://www.lumendatabase.org/file_uploads/files/4440233/004/440/233/original/11-28-2018%20-%2017CV001045%20-%20JE%20-%20JE%20FILED.pdf?1549584983.

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

Jim’s Transmission & Auto Center v. Carson, No. CJ-2015-1160 (Okla. Dist. Ct. Cleveland Cnty. Oct. 9, 2015).

Adili v. Yarnell, No. 2017-CP-08-552 (S.C. Ct. C.P. Berkeley Cnty. Feb. 27, 2017).

52 Apps Inc. v. SmartPhoneRecordsLLC, No. 2016CP4001016 (S.C. Ct. C.P. Richland Cnty. Aug. 11, 2016), https://www.lumendatabase.org/file_uploads/files/4363961/004/363/961/original/Form%204%20Order%20with%20executed%20Order%20re%20damages%20_A0927769xA08D7_.PDF?1535500193 (any “false statements”).

Icon Building Sys., LLC v. Newland, No. 17-2267-CV-A (Tex. Dist. Ct. Guadalupe Cnty. Sept. 19, 2018), https://www.lumendatabase.org/file_uploads/files/4377813/004/377/813/original/2018.09.19%20Newland-Dyer%20-%20Final%20

Default%20Judgment%20against%20Amber%20Ni-
cole%20Ne....pdf?1538513623.

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

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

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

Derma Pen, LLC v. 4EverYoung Ltd., 2017 WL 2258362, *19 (D. Utah May 22).

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

Ramunno Law Firm, Inc. v. Swannick, No. 42-2017-CA-418, at 2 (Fla. Cir. Ct. Marion Cnty. Sept. 20, 2018), https://www.lumendatabase.org/file_uploads/files/4427454/004/427/454/original/20180925184600257.pdf?1545357553.

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, 2013 WL 12376647 (Ala. Cir. Ct. Sept. 20, 2013) (TRO).

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

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

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

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

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

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

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

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

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

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

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

Muzani v. Trankle, No. 02-C-13-182491 (Md. Cir. Ct. Anne Arundel Cnty. Nov. 15, 2013) (docket entry)..

Callender v. Anthes, No. C13-1616 (Md. Cir. Ct. Calvert Cnty. 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 Cnty. July 28, 2017).

Lewis v. Lewis, No. 25CH1:15-cv-000927 (Miss. Ch. Ct. Hinds Cnty. Aug. 25, 2015),, <http://ftpcontent4.worldnow.com/wlbt/PDF/LewisTRO.pdf>

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

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

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

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

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

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

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

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

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

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

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

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

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

Opulent Jewelers v. Leo, No. 2014-00109 (Pa. C.C.P. Bucks Cnty. Feb. 12, 2014) (TRO).

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

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

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

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

Hyperkinetics Corp. v. Flotec, Inc., No. 247-11-02 (Vt. Super. Ct. Orange Cnty. 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).

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

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).

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).

Qatar Investment & 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 Cnty. 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 Cnty. 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). Order, Rath v. Martin, No. 15-21701 CACE (04) (Fla. Cir. Ct. Broward Cnty. 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 “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, *id.* (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, id. (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), https://www.lumendatabase.org/file_uploads/files/4332651/004/332/651/original/Brim%20v%20Lewis%20Alaska%20Judge%20Woodman%20ruling%202018.pdf?1527036414.

Contempt Order, *Appel v. Zona*, No. PSC1802924, att. 1 (Cal. Super. Ct. Riverside Cnty. Aug. 8, 2018), https://www.lumendatabase.org/file_uploads/files/4357868/004/357/868/original/contempt%20order%20tracy%20zona.pdf?1534181588.

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

Heafey Bentley Mgm't, LLC v. Dinter, No. 2015-012685-CA-01, ¶ 7 (Fla. Cir. Ct. Miami-Dade Cnty. 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. C.P. Lucas Cnty. Apr. 12, 2012) (domestic restraining order).

In re McConnell, 2015 WL 6125649, *6–*7 (Bankr. C.D. Cal. Oct. 8).

And here are 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, 2013 WL 12376646, *2 (Ala. Cir. Ct. Shelby Cnty.).

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

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