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Here's a scary thought: an individual, unhappy with negative statements that have been made about him, sues for defamation and persuades the trial court to issue an injunction prohibiting the speaker from engaging in that speech again. An appellate court reviews the injunction and, in large measure, upholds it. This creepy scenario brings shudders to free speech and media advocates, who have long viewed such injunctions as prior restraints that the First Amendment forbids in all but the most extreme and extraordinary cases. As a recent decision from the Michigan Court of Appeals demonstrates, however, decades of United States Supreme Court opinions strongly condemning prior restraints have failed to drive a stake through the heart of injunctions in libel cases.

Michigan is not alone. Courts in other jurisdictions have joined the slow, zombie-like march toward prior restraints. The idea that an injunction is a constitutionally sound and practically viable remedy in defamation cases is, to borrow an image from Justice Scalia, "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."[1] This particular ghoul seems to have come back stronger than ever.

Dawn of the Dead on Arrival Injunction

Any campfire tale about prior restraints against libelous speech must begin with *Near v. Minnesota*.[2] In that case, the Supreme Court struck down a state statute that authorized injunctions against "malicious, scandalous and defamatory" publications. Relying on *Near*, the Court in *Bantam Books, Inc. v. Sullivan* declared that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[3] In light of the tone and thrust of the Court's decisions, it seemed unlikely that any defamation plaintiff would ever be able to overcome this heavy presumption.

This conclusion was reinforced by *New York Times Co. v. United States*.[4] That case involved an unsuccessful effort by the Nixon administration to enjoin publication of the *Pentagon Papers*, a comprehensive government study of the Vietnam War that military analyst Daniel Ellsberg had leaked to the *New York Times*. In an often quoted concurring opinion, Justice Brennan sweepingly declared that "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result."[5] Justice Brennan conceded that the rule was not absolute, and that there was an "extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden."[6] But he observed that the Court had "thus far indicated that such cases may arise only when the Nation is at war, during which times no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[7]

A "does-it-threaten-the-continued-existence-of-the-republic?" standard is obviously a tough one to satisfy, and it is almost impossible to imagine an instance where a defamation plaintiff could pass such a demanding test. The *New York Times* decision therefore strongly suggested that any effort to get an injunction against a libelous publication would be dead on arrival. Thus, "as late as the second half of the twentieth century, American courts considered it settled that libelous speech could not be enjoined, even after a finding of defamation."[8]

Injunctive Relief Resurrection

Nevertheless, in recent years "an increasing number of courts [have begun] granting and upholding injunctions in defamation cases."[9] This prompts questions about why courts have been inclined to unearth a long-entombed legal doctrine. And it prompts questions about whether the passage of time has rendered such injunctions any more constitutionally valid even if it has rendered them more popular.

In two excellent law review articles, two prominent legal scholars have offered similar explanations for the significant uptick in injunctions in defamation cases. Erwin Chemerinsky, in a brief but insightful article published in 2007,[10] and David Ardia, in an expansive and well-researched piece published in 2013,[11] both suggest that courts have been drawn toward injunctive relief because they are struggling with the challenges posed by defamation cases that arise from online speech. Indeed, Ardia shows that the dramatic rise in injunctions in defamation cases in recent years, particularly after 2000, has largely been driven by cases involving Internet-based speech.[12]

A variety of factors explain why the lure of injunctive relief may be particularly strong in cases of online defamation. As Chemerinsky observes, individuals defamed in a blog or elsewhere on the Internet are particularly likely to seek injunctions because damages may not be collectible from the defendant (who is often an individual without many assets) and the plaintiff, above all else, simply wants the injurious speech to stop.[13] A

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defamation plaintiff—and a court—may believe that an order enforceable through contempt proceedings will be more effective than a meaningless money judgment in discouraging future libels.

As Ardia points out, § 230 of the Communications Decency Act may also nudge courts toward the consideration of injunctive relief.[14] Because that provision affords broad immunity to the operators of websites, most defamation plaintiffs can sue only the initial speaker, even when the website continues to make the information available.[15] Absent a voluntary takedown by the website operator, defamatory statements may therefore "live indefinitely on the Internet, waiting to be pulled up and recycled by a search engine."[16] Given these considerations, a court may view an injunction that compels the initial speaker to remove or correct the defamatory statements he or she has made and to refrain from making such statements again as the only meaningful remedy available.

Courts may find themselves particularly drawn toward injunctive relief in online defamation cases that involve property interests. This makes no sense as a matter of constitutional doctrine; as Ardia notes, such interests "enjoy no special dispensation under the First Amendment."[17] But some plaintiffs, especially businesses, may in these cases be able to make out persuasive claims of loss of goodwill and economic opportunity—harms that are real, are difficult or impossible to measure and repair, and are therefore appropriate for injunctive relief in other contexts. Indeed, in intellectual property matters, like trademark and copyright cases, injunctions against the publication of words that are allegedly harmful to the plaintiff's economic interests are commonplace.[18] A court accustomed to entering injunctions against speech in trade secret, trademark, and copyright cases may not understand why its range of remedial alternatives becomes significantly narrower in defamation cases implicating analogous harms.

Courts may also believe that they have greater latitude to enjoin speech that involves matters of private interest, such as the sniping from ex-spouses, jilted lovers, alienated friends, estranged children, quarrelsome neighbors, unhappy customers, and begrudged former employees that appears regularly in online social media. This, too, makes little sense as a matter of constitutional doctrine; a prior restraint is a prior restraint, even if the forbidden speech does not concern a matter of monumental political importance. But a judge may intuitively feel that meaningful distinctions exist between the publication of the *Pentagon Papers* and the online spewing of false depictions of a private individual's sexual extravagances. And that judge may feel that the marketplace of ideas will not suffer much from an injunction intended to keep a wounding or vengeful lie from existing in perpetuity for everyone to see. Of course, none of these considerations matters if issuing an injunction in a defamation case violates the First Amendment. As noted above, for many years the vast majority of courts have concluded that they do. Chemerinsky wholeheartedly agrees, arguing that *Near* and its progeny settled this question and that injunctions are never proper remedies in defamation cases, period, full stop.[19]

Chemerinsky acknowledges that in recent decisions some courts have concluded that an injunction is not a prior restraint if it follows a judicial declaration that the speech in question is not constitutionally protected—for example, because it is defamatory. But this reasoning, Chemerinsky flatly declares, "is just wrong."[20] It is wrong, he argues, because it "confuses" two issues: (1) whether the First Amendment protects speech, and (2) which remedies are permissible. "Even if the speech is unprotected," Chemerinsky points out, "an injunction is still a prior restraint. The injunction prevents speech before it occurs. The injunction means that a person can only speak by going before the judge and getting permission. That is the very essence of a prior restraint."[21]

Chemerinsky raises practical concerns as well. He notes that damages serve as an appropriate and sufficient remedy for plaintiffs in most defamation cases. Injunctions, in contrast, offer little to recommend them from a pragmatic point of view. After all, if the injunction applies only to the specific words the court has judged defamatory, then the defendant remains free to make technically different, but equally defamatory, statements. Under those circumstances, the injunction will be ineffective. On the other hand, if the injunction is framed more broadly, then the "defendant [must] go to court any time he or she wants to say anything about the plaintiff and prove to the court that the intended statement is not defamatory. That brand of judicial clearance is what the Court in *Near* called 'the essence of censorship.'"[22] Under those circumstances, the injunction will be unconstitutional. An argument that shows a principle to be either useless or unconstitutional would appear to be a silver bullet.

As Ardia observes, however, the idea that injunctions are permissible in defamation cases continues to pop back to life. In most instances, courts have justified them by using the precise reasoning that Chemerinsky condemns as "wrong" and "confuse[d]." Thus,

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Ardia notes, most of the federal circuit courts that have reviewed the question have concluded that the prior restraint doctrine does not preclude an injunction against the repetition of speech that has been found to be defamatory and outside of the protections of the First Amendment.[23] Some courts, like the influential Second Circuit, have declined to endorse this approach.[24] But, for a doctrine that appeared to have been embalmed and mummified, it is looking awfully sprightly.

Ardia contends that if courts are to issue injunctions in this context, they should do so only if five conditions are met: (1) the injunction should be preceded by a judicial finding that the speech sought to be enjoined is defamatory; (2) the defendant must have the opportunity to have a jury decide whether the plaintiff has

established all of the elements of the defamation; (3) the injunction must be narrowly tailored so that it targets only speech that has been found to be defamatory; (4) the speech restrained must relate only to matters of private concern; and (5) the plaintiff must demonstrate that money damages are inadequate and an injunction will actually be effective in reducing his or her harm.[25] Ardia contends that an injunction issued with less process or less attention to tailoring would raise serious First Amendment concerns.

The question of whether a statement falls inside or outside the range of constitutional protection is complex and highly nuanced.

Rooks v. Krzewski

A recent decision from the Michigan Court of Appeals, *Rooks v. Krzewski*,[26] provides an excellent vehicle for exploring this issue and the competing positions of the courts. Jonathan Rooks was a real estate developer who was involved with a variety of condominium projects. One of those projects—called "Union Square"—was developed by Rooks and Bradley Gruizinga. In 2006 or so, Rooks encountered Joseph Krzewski at a home show and thought he might be a candidate for a sales position with one of his companies. After a few interviews and some background checking, however, Rooks decided to hire someone else. Rooks and Krzewski subsequently had some unpleasant interactions.[27]

The trial court found that Krzewski then engaged in an Internet campaign against Rooks and Gruizinga and their companies. The court concluded that on various websites, and using various identities, Krzewski had said (among other things) that Rooks was a pathological liar, that Rooks and Gruizinga would cut corners to save money, that Rooks used the lowest quality contractors in the area, that Rooks and Gruizinga drove several contractors out of business, that Rooks and Gruizinga had "screwed" so many people in one town that they had to pursue business projects in another, and that one of Rooks's developments had had a negative effect on a critical fishing habitat. The trial court concluded that Krzewski knew these statements were false when he made them or acted in reckless disregard of their falsity.[28]

On the strength of these findings, the trial court issued an injunction against Krzewski that required him to remove these posts or, where he could not do so, to add a supplemental post indicating that a court had found the statement to be false and had ordered him to take it down. Rooks and Gruizinga had also asked the court to enjoin Krzewski from making future offending statements about them. The trial court declined to do this, reasoning that it would be an unconstitutional prior restraint.[29]

The Michigan Court of Appeals affirmed in part and reversed in part. The appellate court affirmed the trial court's finding that Krzewski had made the statements in question.[30] It also agreed with the trial court's conclusion that some of those statements were ones of fact. The appellate court departed from the trial court's rulings, however, by holding that some other statements were not actionable because they amounted to subjective opinions or rhetorical hyperbole. As to the statements of fact, the appellate court agreed that they were untrue and had cast Rooks and Gruizinga in a false light.[31] It then turned to the question of whether the trial court erred in issuing an injunction.

Krzewski, relying heavily and expressly on the analysis of Chemerinsky noted above, argued that the trial court's injunction amounted to an unconstitutional prior restraint.[32] The appellate court disagreed. Relying on authority from other jurisdictions, including some of the cases cited by Ardia in his article, the court concluded that defamatory speech could be enjoined where two conditions were met. First, there needed to be a final judicial determination that the speech at issue was false and defamatory. Following the reasoning that Chemerinsky derided as "wrong" and "confuse[d]," the court opined that because such speech falls outside the protections of the First Amendment, enjoining it cannot raise constitutional concerns. Second, the injunction had to be narrowly tailored to restrict only that speech which has been determined to be false and defamatory.[33] The court essentially ignored Chemerinsky's observation that this remedy would, of necessity, be so narrow that it would not deter a defendant who was committed to defaming the plaintiff. Perhaps the court believed, as it might well, that a very specific injunction would probably chill a broader range of speech.

And, that's precisely the problem, or at least one of the problems. The question of whether a statement falls inside or outside the range of constitutional protection is complex and highly nuanced. This is reflected in the disagreements between the trial court and the appellate court in *Rooks*, which reached differing conclusions about which statements were and were not actionable. It is reflected in the length of the appellate court's opinion (35 pages). It is reflected in the fact that the appellate court evidently had so much concern about whether the trial court would properly craft the new injunction on remand that it provided in a lengthy footnote detailed guidance about which statements were unprotected.[34] How, then, is a layperson without vast constitutional expertise supposed to decide how far an injunction actually extends?

A variation on the facts of *Rooks* provides a compelling example of the problem. In that case, the trial court enjoined the defendant from saying that Rooks and his companies "used all the lowest bidders."[35] (The appellate court found this statement unprotected by the First Amendment and upheld this part of the injunction.) It seems reasonable to assume that, from this ruling, Krzewski would have concluded that he had no constitutional right to say that Rooks and his companies used "the lowest quality contractors in Grand Rapids." The injunction almost certainly would have chilled him from making any such statement. But, in *Rooks*, the appellate

court held that *this* statement *was* protected by the First Amendment and could *not* be enjoined.[36]

There are other problems as well. As Chemerinsky points out, "even if the injunction is limited to particular statements already found false, defamatory, and uttered with the requisite mental state, a prospective prohibition on the same comments cannot guarantee satisfaction of the elements of defamation at every point in the future."[37] That which was once false can become true, things once thought shameful can come to be viewed as benign, and mental states around utterances can shift. Of course, under these circumstances the defendant could return to court and ask for a modification of the injunction so he or she can say something otherwise prohibited—but that is, to borrow a phrase from *Near*, "the essence of censorship." Courts and commentators seem to have little difficulty recognizing that preliminary injunctions against defamations are unconstitutional because, well, they are preliminary—preliminary to full and final adjudication of whether speech is protected. They need also to recognize that final injunctions are unconstitutional because, well, they are final—they threaten longstanding and overly broad chilling effects and may end up forbidding speech that the First Amendment shields.

With all of that said, it seems regrettably likely that lower courts will continue to experiment with injunctions in defamation cases unless and until the Supreme Court tells them to stop—or, more accurately, tells them *again*. The gravitational pull toward a remedy that has at least some efficacy in an online social media environment may, at least in the short term and in the lower courts, be more than our First Amendment jurisprudence can resist. For the time being, we will have to learn to live and litigate in a land where an undead legal principle roams unpredictably and troubles our sleep.

The End?

Until help comes, we are left in a nightmarish state of affairs. The parameters of freedom of speech and the contours of the prior restraint doctrine will not be decided against a backdrop of the great public issues of our time, like the debate over the *Pentagon Papers*. They will be decided against a backdrop of petty personal grievances and business spats strewn across the Internet. And these matters do not lie in the hands of our professional journalists and institutional media. They lie in the hands of the people who share cat videos, post pictures of their high school reunion, and, for a bit of additional amusement, libel the guy who did not give them a job offer.

Stay tuned. This horror feature may have some scary sequels. And they may be played out in a jurisdiction near you. ◘

Endnotes

1. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).
2. 283 U.S. 697 (1931).
3. 372 U.S. 58, 70 (1963).
4. 403 U.S. 713 (1971).
5. *Id.* at 725–26 (Brennan, J., concurring).
6. *Id.* at 726.
7. *Id.* (citations omitted) (internal quotation marks omitted).
8. David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 Wm. & Mary L. Rev. 1, 42 (2013).
9. *Id.*
10. Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 Syracuse L. Rev. 157 (2007).
11. Ardia, *supra* note 8.
12. *Id.* at 5.
13. Chemerinsky, *supra* note 10, at 158.
14. Ardia, *supra* note 8, at 16.
15. *Id.* at 16–17.
16. *Id.* at 17.
17. *Id.* at 45.
18. *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1998).
19. Chemerinsky, *supra* note 10, at 166. In addition to *Near*, Chemerinsky cites *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (striking down injunction against picketing and pamphleteering), and *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (striking down statue allowing injunctions based on past obscene speech).
20. *Id.* at 163.
21. *Id.*
22. *Id.* at 172 (quoting Near v. Minnesota, 283 U.S. 697, 713 (1931)).
23. Ardia, *supra* note 8, at 51. Ardia points out that "[o]f the five federal circuit courts of appeal to have addressed this issue, three have held that injunctions are permissible if there has been a finding of defamation." *Id.* (citing San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters, 125 F.3d 1230, 1238 (9th Cir. 1997); Brown v. Petrolite Corp., 965 F.2d 38, 51 (5th Cir. 1992); Lothschuetz v. Carpenter, 898 F.2d 1200, 1206, 1208–09 (6th Cir. 1990)).
24. *See* Metro. Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 239 F.3d 172, 178 (2d Cir. 2001).
25. Ardia, *supra* note 8, at 58–59.
26. No. 306034 (Apr. 3, 2014) (unpublished decision), *available at* http://publicdocs.courts.mi.gov:81/opinions/final/coa/20140403_c306034_96_306034.opn.pdf.
27. *Id.*, slip op. at 1–2.
28. *Id.*, slip op. at 16–17.
29. *Id.*, slip op. at 18.
30. *Id.*, slip op. at 19–22.
31. *Id.*, slip op. at 22–30.
32. *Id.*, slip op. at 34–35.
33. *Id.*, slip op. at 30–35.
34. *Id.*, slip op. at 35 n.16.
35. *Id.*, slip op. at 16, 18.
36. *Id.*, slip op. at 23.
37. Chemerinsky, *supra* note 10, at 171.