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CRIMINAL LAW: VAGUENESS VERSUS COMMON LAW
CRIMINAL LIBEL

Ashton v. Kentucky, 86 Sup. Ct. 1407 (1966)

Petitioner, in response to a plea for help by unemployed miners, left school in Ohio to go to Hazard, Kentucky, which was the scene of a bitter labor dispute between union and nonunion miners. Attempting to aid in settling the dispute, he published a pamphlet entitled *Notes on a Mountain Strike*. The pamphlet had only limited circulation but contained statements that allegedly libeled the local chief of police, sheriff, and co-owner of the newspaper. Petitioner was indicted for the common-law crime of libel for publishing the allegedly false and malicious document. He was found guilty and sentenced to six months in jail and a 3,000 dollar fine. The Court of Appeals of Kentucky affirmed the trial court conviction.¹ On certiorari to the United States Supreme Court, HELD, common law criminal libel violates due process because the elements of the crime are too vague and indefinite. Judgment reversed.

Prior to the instant case, libel was punishable as a crime in all fifty states.² The crime at common law was based on the belief that persons who felt themselves injured by a defamation might become incited and seek revenge against the author. Because this revenge might constitute a breach of the peace, the libeler was punished as the source of the offense.³

Criminal libel jurisdictions can be separated into two groups. First, many states have enacted statutes that eliminate the "incitement to breach the peace" element.⁴ Second, many states utilize the common law as the basis of a prosecution for libel and include the "breach of the peace" element. Within this latter group, several states have enacted statutes that make libel a crime without further defining its elements.⁵ Other states merely punish the offense as at common law without legislative enactment.⁶

1. *Ashton v. Commonwealth*, 405 S.W.2d 562 (Ky. 1966).

2. *Beauharnais v. Illinois*, 343 U.S. 250, 255 (1952).

3. Note, *Constitutionality of the Law of Criminal Libel*, 52 COLUM. L. R. 521, 522 (1952).

4. DOUGLAS, *THE RIGHT OF THE PEOPLE* 42 (1958).

5. ALA. CODE, tit. 14, §347 (1958); D. C. CODE ANN. §22-2301 (1961); FLA. STAT. §836.01 (1965); MISS. CODE ANN. §2268 (1942); NEB. REV. STAT. §28-440 (1943); N. C. GEN. STAT. §14-47 (1943); OHIO REV. CODE ANN. §2739.99 (Page 1954); WIS. STAT. ANN. §942.01 (1958); WYO. STAT. ANN. §6-117 (1957).

6. *State v. Roberts*, Del. (2 Marv.) 450, 43 Atl. 252 (1896); *Robinson v. State*, 108 Md. 644, 71 Atl. 433 (1908); *Commonwealth v. Canter*, 269 Mass. 359, 168 N.E. 790 (1929); *State v. Burnham*, 9 N.H. 34 (1837); *State v. Spear*, 13 R.I. 324 (1881);

The Supreme Court in the principal case condemned the vagueness inherent in the definition of the crime of libel in Kentucky. The Court focused on the portion of the definition contained in the trial judge's instructions: "calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which when done, is indictable."⁷ The Court had previously held that the crime of breach of the peace was too vague to withstand the due process test. Therefore, the decision was consistent with the Court's prior holdings involving convictions for the crime of breach of the peace,⁸ and convictions for utterances which *themselves* constitute the crime of breach of the peace.⁹

Prior to the present decision there had been six state appellate decisions in Kentucky confirming the existence of the crime of libel.¹⁰ Three of these decisions contained the common law "breach of the peace" element, which was also contained in the trial judge's jury charge.¹¹ The instant case seemed to turn on the inclusion of "breach of the peace" as an element of the crime. The Kentucky Court of Appeals had excluded "breach of the peace" from the definition of the crime in affirming the trial court. The Supreme Court, however, refused to accept the court of appeals' limitation of the trial court's definition. The Court based this rationale on the principle of an earlier case, *Shuttlesworth v. City of Birmingham*,¹² which disallowed the upholding of a conviction by eliminating on appeal the unconstitutional aspects that were used at the trial. Reliance on this principle indicates that the Court might accept a definition of common law criminal libel which does not contain the "breach of the peace" element.¹³ The opinion, therefore, does not completely eliminate the crime of libel, but does eliminate "calculated to cause a breach of the peace" as an element of the crime.

The principal case has similar impact on the Florida law of criminal libel. The Florida Statutes punish criminal libel but con-

State v. Sutton, 74 Vt. 12, 52 Atl. 116 (1901); State v. Payne, 87 W. Va. 102, 104 S.E. 288 (1920).

7. Ashton v. Commonwealth, 405 S.W.2d 562 (Ky. 1966).

8. E.g., Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Cantwell v. Connecticut, 310 U.S. 296 (1940).

9. Terminiello v. Chicago, 337 U.S. 1 (1949).

10. Browning v. Commonwealth, 116 Ky. 282, 76 S.W. 19 (1963); Cole v. Commonwealth, 222 Ky. 350, 300 S.W. 907 (1927); Commonwealth v. Duncan, 127 Ky. 47, 104 S.W. 997 (1907); Provident Sav. Life Assur. Soc'y v. Johnson, 115 Ky. 84, 72 S.W. 754 (1905); Smith v. Commonwealth, 98 Ky. 437, 33 S.W. 419 (1895); Tracy v. Commonwealth, 87 Ky. 578, 9 S.W. 822 (1888).

11. Browning v. Commonwealth, note 10 *supra*; Provident Sav. Life Assur. Soc'y v. Johnson, note 10 *supra*; Tracy v. Commonwealth, note 10 *supra*.

12. 382 U.S. 87 (1965).

13. *Libel*, 35 U.S.L. WEEK 3056 (1966).

tain no definition of the crime.¹⁴ Florida also adopts the common law of criminal libel both by statute¹⁵ and by judicial decision.¹⁶ This dual adoption of the common law has not been altered or redefined to eliminate the unconstitutionally vague element of "breach of the peace."

There have been five appellate decisions in Florida defining the crime of libel.¹⁷ The earliest of these decisions presented the basic definition, which has been reiterated and recited by all subsequent decisions:¹⁸

[P]rosecution for libel is warranted only when the alleged libel affects the public, as when it corrupts the public morals, or incites to violations of the criminal law, or when the necessary or natural effect of the alleged publication is to cause an injury to a person or persons of such a nature and extent as to render a breach of the peace imminent or probable.

The Florida definition of the crime clearly goes beyond the acceptable standard as announced by the Supreme Court.

By relying on former Supreme Court holdings that condemned the vagueness of the crime of breach of the peace, the present decision requires that the "breach of the peace" element be excluded from a definition of criminal libel.¹⁹ Florida, by requiring such element, is necessarily in conflict with this constitutional standard. Other states, as previously suggested, may also fall within this proscription.²⁰

The case eliminates an antiquated concept from our law. The ancient notion that an individual is likely to use violence and force because he is insulted by a defamation is no longer a tenable theory. Procedures, such as civil remedies, are now provided that forego any necessity for this type of vengeance. The decision also rejects the

14. FLA. STAT. §836.01 (1965) provides: "Any person convicted of the publication of a libel shall be punished by imprisonment not exceeding one year, or by fine not exceeding one thousand dollars."

15. FLA. STAT. §2.01 (1965) provides: "The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this State; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state."

16. *Annenberg v. Coleman*, 121 Fla. 133, 163 So. 405 (1935); *Eberhardt v. Barker*, 104 Fla. 535, 140 So. 633 (1932); *Smith v. McClelland*, 99 Fla. 362, 126 So. 292 (1930); *State ex rel. Arnold v. Chase*, 94 Fla. 1071, 114 So. 856 (1927); *Kennerly v. Hennessy*, 68 Fla. 138, 66 So. 729 (1914).

17. *Ibid.*

18. *Kennerly v. Hennessy*, 68 Fla. 138, 66 So. 729 (1914).

19. *Ashton v. Kentucky*, 86 Sup. Ct. 1407, 1410 (1966).

20. DOUGLAS, note 4 *supra*; see statutes cited note 5 *supra*.

illogical idea that an individual is guilty of libel if the person libeled *might* use force against him. This possibility of the use of force has been the rationale behind criminal libel. Despite the rationale the courts have not allowed as a defense a showing that the libel has no probability of producing a breach of the peace.²¹ Using this standard "makes a man criminal simply because his neighbors have no self-control and cannot refrain from violence."²²

The principal decision leaves the law of criminal libel in serious doubt in many states. If Florida and other states do not accomplish a redefinition excluding the prohibited element, any convictions will necessarily be struck down as unconstitutional. The reformulation required can be accomplished either by judicial decision or by legislative enactment. If attempted by the judiciary, it will necessarily have to be accomplished at the trial level in order to avoid an application of the *Shuttlesworth* principle. The preferable means of redefinition would be accomplished by legislative enactment eliminating "breach of the peace" as an element of the crime. The elements of the common-law crime left remaining would be: (1) malice, (2) publication, (3) defamatory words, and (4) falsity,²³ which are essentially the elements of civil libel. This has been attempted in other states.²⁴ Until this redefinition occurs, the antiquated concept of "likely to incite a breach of the peace" as a standard of guilt will continue to add unnecessary confusion to the law.

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21. DOUGLAS, *supra* note 4, at 44.

22. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 151 (1941).

23. MILLER, *CRIMINAL LAW* 492 (1934). The issues of the constitutionality of these elements alone without distinction from civil libel or addition of other elements to distinguish from civil libel are beyond the scope of this comment.

24. DOUGLAS, note 4 *supra*. *E.g.*, MINN. STAT. §609.765 (1963) provides: "Defamatory matter is anything which exposes a person or a group, class or association to hatred, contempt, ridicule, degradation or disgrace in society, or injury to his or its business or occupation."