No. 35652-0

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ALLAN PARMELEE,

Appellant,

v.

ROBERT O'NEEL, et al.,

Respondent.

BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION IN SUPPORT OF APPELLANT

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I. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington Foundation (ACLU) is a statewide, nonpartisan, nonprofit organization with over 25,000 members, dedicated to the preservation and defense of constitutional and civil liberties. The ACLU is opposed to all criminal prosecutions for libel. It believes that the civil tort of defamation provides adequate redress for libeled individuals, and that criminal libel laws pose an unnecessary and impermissible threat to free expression. The threat posed by such laws is clearest where, as here, they are used to punish statements that criticize government officials.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The State punished Allan Parmelee, an inmate at Clallam Bay Corrections Center, for sending a letter to the Secretary of the Department of Corrections complaining about prison conditions. His letter also claims to have heard that the prison Superintendent was "anti-male – a lesbian."[1] The State determined that the letter constituted a "serious infraction," for which Mr. Parmelee was held in isolation for 10 days. The sole basis for punishing Mr. Parmelee was that his letter allegedly constituted a gross misdemeanor under Washington's criminal libel law, which makes it a

[1] The full text of Mr. Parmelee's letter is included in the Addendum to this brief.

crime – punishable by up to one year in jail and a $5,000 fine[2] – to utter words that tend (1) "[t]o expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse"; (2) "[t]o expose the memory of one deceased to hatred, contempt, ridicule or obloquy"; or (3) "[t]o injure any person, corporation or association of persons in his or their business or occupation." RCW 9.58.010.[3]

Under the statutory scheme, the three categories of speech set forth in RCW 9.58.010 are prima facie malicious and, therefore, libelous and subject to prosecution. RCW 9.58.020, in turn, provides that such speech "shall be deemed malicious unless justified or excused." Proof that the challenged statement was true is not a complete defense. Rather, to be "justified," a statement must not only be true, but also "fair" and "published with good motives and for justifiable ends." *Id.* To be "excused," the speaker must have had reasonable grounds to believe the statement's "truth" and "fairness" "after a fair and impartial investigation." *Id.* Taken together, the statute allow prosecutors to establish a prima facie case of criminal libel by showing that an individual said something unflattering about another person, at which point the

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[2] RCW 9.92.020 (setting forth punishment for gross misdemeanors).
[3] The full text of RCW 9.58.010 and .020 is provided in the Addendum.

burden shifts to the defendant to prove, as an affirmative defense, that his or her speech was "justified" or "excused."

Over 40 years ago, the U.S. Supreme Court held that a very similar criminal libel law violated the First Amendment of the federal Constitution because the statute, on its face, permitted liability (i) for speech that was true, or (ii) for a false statement made without "actual malice," *i.e.*, knowledge of the statement's falsity or reckless disregard for whether it was false or true. *Garrison v. Louisiana*, 379 U.S. 64, 74, 78, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). Washington's criminal libel statute contains both of these facially unconstitutional features: it excuses truthful statements ***only if*** the defendant spoke "with good motives and for justifiable ends," and it allows for criminal liability for false statements made with a lesser degree of fault than actual malice, such as negligence. RCW 9.58.020. In fact, in *Garrison*, the Court cited Washington's criminal libel law as an example of the type of statute that failed constitutional scrutiny. 379 U.S. at 70 n.7.

Following *Garrison*, almost every court to consider the issue has held that criminal libel statutes like Washington's are unconstitutional on their face. Washington's law has escaped the same fate only because it has fallen into virtual disuse; there have been no reported libel prosecutions in Washington since 1925. It is therefore unsurprising that

the State has declined to defend the statute here. Criminal libel laws have an ignominious and indefensible history as a means of oppression, serving as a tool for officials – kings and presidents, as well as bureaucrats – to punish disfavored speech in a manner that is recognized as clearly unconstitutional today.

Because Washington's criminal libel statute purports to criminalize a substantial amount of speech protected by the First Amendment, it is facially overbroad and invalid in its entirety.

III. WASHINGTON'S CRIMINAL LIBEL STATUTE IS FACIALLY UNCONSTITUTIONAL BECAUSE IT PURPORTS TO CRIMINALIZE PROTECTED SPEECH.

Washington's criminal libel statute is a relic of the nineteenth century. It was first enacted in 1869, long before statehood, and its most recent amendment was in 1935, decades before *Garrison* and other decisions recognizing constitutional limitations on defamation liability. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). The last reported prosecution under the statute was in 1925, when the Washington Supreme Court reversed the dismissal of criminal libel charges against an individual for signing a recall petition for a public official that allegedly contained untrue and malicious accusations.

State v. Wilson, 137 Wash. 125, 128, 241 P. 970 (1925).[4] Yet the law still remains on the books. The statute owes its post-*Garrison* survival simply to the fact that no one's speech has been punished under the statute – until now. The time for burying Washington's criminal libel statute has long since passed.

A. Under The First Amendment, Truthful Speech – Regardless Of The Speaker's Motives – Is Not Actionable.

Washington's criminal libel statute permits the State to prosecute true speech if the speaker failed to act "with good motives and for justifiable ends." RCW 9.58.020. The U.S. Supreme Court has spoken on precisely this issue, holding that a Louisiana statute was unconstitutional because – just like Washington's statute – it immunized truthful statements from prosecution ***only*** if the speaker acted "with good motives and for justifiable ends." *Garrison*, 379 U.S. at 70. Washington's statute must meet the same fate, as the Court suggested when it noted that RCW

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[4] In the other two reported prosecutions, the Washington Supreme Court upheld a libel conviction for a man who authored an article "tending to expose the memory of George Washington to hatred, contempt, and obloquy," *State v. Haffer*, 94 Wash. 136, 137, 162 P. 45 (1916), and would have upheld the libel conviction of the author of a newspaper editorial that questioned a prosecutor's handling of a rape trial, but reversed because of instructional error on a separate issue, *State v. Sefrit*, 82 Wash. 520, 534-35, 144 P. 725 (1914). These decisions are flatly inconsistent with *Garrison* and its progeny, cited herein.

9.58.020 shared the unconstitutional features of the Louisiana statute. *Garrison*, 379 U.S. at 70 n.7.

In *Garrison*, the Court held that the statute's focus on the "motives" and "ends" of the speech violated the First Amendment. Were it otherwise, "[d]ebate on public issues will not be uninhibited" because "the speaker must run the risk that it will be proved in court that he spoke out of hatred." *Id.* at 73.[5] The Court properly recognized that a speaker's motives are irrelevant: the First Amendment "***absolutely prohibits*** punishment of truthful criticism." *Id.* at 78 (emphasis added). Because Washington's criminal libel statute immunizes truthful statements from liability only if the defendant spoke "with good motives and for justifiable ends," RCW 9.58.020, it, too, cannot pass constitutional muster.

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[5] *Garrison*'s holding pertained to speech involving a public official, a designation that encompasses, "at the very least," those government employees who have or appear to have "substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966). Since Washington's criminal libel law allows for prosecution of truthful speech about public officials (nothing in the statute limits criminal punishment to speech involving private individuals), it is facially unconstitutional, and it does not matter whether the speech at issue in this case concerns a public official. Nevertheless, a prison superintendent is, in fact, a "public official." *See Beeton v. District of Columbia*, 779 A.2d 918, 924 (D.C. 2001) (correctional officer "public official"); *Stewart v. Sun Sentinel Co.*, 695 So. 2d 360, 361 (Fla. Dist. Ct. App. 1997) (same); *see also St. Amant v. Thompson*, 390 U.S. 727, 730 (1968) (deputy sheriff is "public official"); *Clawson v. Longview Publ'g Co.*, 91 Wn.2d 408, 416, 589 P.2d 1223 (1979) (administrator of county motor pool); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 65-66 (1st Cir. 2003) (police officer).

Moreover, under Washington's statute, once the prosecution alleges that a speaker's words fall into one of the three categories of RCW 9.58.010, the burden shifts to the defendant to prove that the speech was true (or that another affirmative defense applies). RCW 9.58.020. The U.S. Supreme Court has flatly rejected putting this burden on defendants. Even in the civil context, the First Amendment requires that "the ***plaintiff*** bear the burden of showing falsity, as well as fault." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986) (emphasis added). Washington's statute fails on this ground, as well.

B. The First Amendment Also Protects False Statements That Are Not Made With "Actual Malice."

In addition to sanctioning prosecution for true statements, Washington's criminal libel statute also fails constitutional scrutiny because it permits punishment for false statements that were not made with "actual malice," a standard of fault under which the speaker acted "with knowledge of [the statement's] falsity or in reckless disregard of whether it was false or true." *Garrison*, 379 U.S. at 74. The First Amendment prohibits criminal punishment for false speech under statutes that do not require a showing of actual malice. *Id.*

As the Supreme Court stated in *Garrison*, "even where the

utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood." *Id.* at 73. "[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the breathing space that they need . . . to survive." *New York Times*, 376 U.S. at 271-72 (quotations omitted).

Under Washington's statute, however, a speaker can face prosecution for a false statement unless it was "honestly made in belief of its truth and fairness and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of any person in respect of public affairs, made after a fair and impartial investigation." RCW 9.58.020. This statute runs afoul of the First Amendment on three separate grounds:

First, Louisiana's criminal libel statute, held unconstitutional in *Garrison*, also provided that an individual could defend against a libel charge if he made the purportedly libelous statement in "reasonable belief of its truth." 379 U.S. at 65 n.1. This defense is too narrow to satisfy the constitutionally required "actual malice" standard. A statement made without a "belief of its truth and fairness," RCW 9.58.020, could be

subject to prosecution regardless of whether the speaker knowingly or recklessly disregarded the truth, *i.e.*, acted with "actual malice."

Under RCW 9.58.020, the State could prosecute an individual for a ***negligent*** falsehood, which the First Amendment prohibits. "It would violate all sound and fundamental principles of justice to have a merely negligent statement an occasion for the imposition of criminal penalties, and the First Amendment . . . forbids such a result." *Commonwealth v. Armao*, 286 A.2d 626, 632 (Pa. 1972). Indeed, even a statement meeting the common law definition of "malice" – "ill will or spite" – does not satisfy *Garrison*'s "actual malice" standard, but it would be subject to prosecution under Washington's statute. *See, e.g.*, *Rosenblatt v. Baer*, 383 U.S. 75, 84, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966) ("ill will, evil motive, [or] intention to injure" does not amount to "actual malice"); *I.M.L. v. State*, 61 P.3d 1038, 1044 (Utah 2002) ("common law definition of 'malice' is quite different from the 'actual malice' contemplated by the United States Supreme Court").

Second, in order to be excused from liability under Washington's statute, the defendant's speech must "consist[] of ***fair comments***." RCW 9.58.020 (emphasis added). Which comments are "fair" and which comments are not is anyone's guess. The Constitution requires that criminal statutes be drafted with "sufficient definiteness that ordinary

people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); *accord City of Bellevue v. Lorang*, 140 Wn.2d 19, 30, 992 P.2d 496 (2000). A statute is unconstitutional when its terms are "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 2d 322 (1925).

The problems associated with vagueness are magnified "where a vague statute abuts upon sensitive areas of basic First Amendment freedoms," because it "inhibit[s] the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were closely marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (citations, quotations omitted); *accord Lorang*, 140 Wn.2d at 31. The vagueness in RCW 9.58.020 renders it constitutionally infirm.

Third, Washington's statute provides safe harbor for a false statement if it was "made after a fair and impartial investigation." RCW 9.58.020. In cases involving the actual malice standard, however, there is no requirement to investigate before publishing: "reckless conduct is not

measured by whether a reasonably prudent man would have . . . investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). Thus, a "[f]ailure to investigate does not in itself establish bad faith." *Id.* at 732. Because the "actual malice" standard does not require a speaker to investigate the truth of his remarks, the fact that Washington will excuse speech from liability if the speaker investigated cannot save the statute.

C. Because Washington's Criminal Libel Statute Punishes Protected Speech It Is Facially Overbroad.

A statute that restricts the exercise of free speech rights "must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

A criminal statute that "sweeps within its prohibition free speech activities protected under the First Amendment" is facially overbroad. *State v. Halstien*, 122 Wn.2d 109, 122, 857 P.2d 270 (1993). "In determining overbreadth, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Lorang*, 140 Wn.2d at 26-27 (quotations omitted).

As explained above, under *Garrison*, which is on all-fours here, RCW 9.58.010-.020 sweeps within its prohibition substantial amounts of protected speech – namely, (i) speech that is true, and (ii) speech that is false but that was made without "actual malice."

Since *Garrison*, numerous courts have held criminal libel statutes to be unconstitutional on their face for one or both reasons:

- *Tollett v. United States*, 485 F.2d 1087, 1097-98 (8th Cir. 1973) (defamation statute unconstitutionally overbroad because it did not immunize truthful speech or include "actual malice" requirement);

- *Fitts v. Kolb*, 779 F. Supp. 1502, 1514-16, 1518 (D.S.C. 1991) (criminal libel law unconstitutionally overbroad for lack of "actual malice" requirement);

- *United States v. Handler*, 383 F. Supp. 1267, 1280 (D. Md. 1974) (defamation statute unconstitutionally overbroad because it did not immunize truthful speech or include "actual malice" requirement);

- *I.M.L.*, 61 P.3d at 1044 (Utah criminal libel law unconstitutionally overbroad because it "provide[d] no immunity for truthful statements" and lacked "actual malice" standard);

- *Ivey v. State*, 821 So. 2d 937, 949 (Ala. 2001) (criminal libel statute facially unconstitutional because it lacked "actual malice" requirement);

- *State v. Helfrich*, 922 P. 2d 1159, 1162 (Mont. 1996) (criminal libel statute unconstitutionally overbroad because it "impermissibly requires the defendant to prove that the material, even if true, was communicated in good faith and for justifiable ends");

- *Gottschalk v. State*, 575 P.2d 289, 296 (Alaska 1978) (statute facially unconstitutional because "the accused must show not only that what he said was true, but that his intentions were good when he said it");

- *Weston v. State*, 528 S.W.2d 412, 415 (Ark. 1975) (criminal libel statute facially unconstitutional because it "fail[ed] to prohibit punishment for truthful criticism" and for false statements unless made with "actual malice");

- *Armao*, 286 A.2d at 632 (Pennsylvania criminal libel statute facially unconstitutional because it lacked "provision for truth being an absolute defense" and "actual malice" requirement);

- *Eberle v. Municipal Ct. of Los Angeles Jud. Dist.*, 55 Cal. App. 3d 423, 432-33 (Cal. Ct. App. 1976) (criminal libel statute that presumed malice "if no justifiable motive for making [the statement] is shown" and limited defense of truth to publications "with good motives and for justifiable ends" held facially unconstitutional).[6]

This Court should join these courts and invalidate Washington's criminal

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[6] A handful of courts, rather than invalidating a criminal libel statute in its entirety for lacking an "actual malice" requirement or failing to immunize truthful statements, have struck down such statutes as applied to public officials, public figures, or matters of public concern, leaving for another day the question whether such statutes could be constitutionally applied to defamation of a private individual on private matters. *Mangual*, 317 F.3d at 66-67; *State v. Powell*, 839 P.2d 139, 147 (N.M. Ct. App. 1992); *see also People v. Ryan*, 806 P.2d 935, 939-40 (Colo. 1991) (invalidating statute as applied to public officials, public figures, or matters of public concern for failure to include "actual malice" requirement, but upholding statute as applied to defamation by private person about another private person on private issue). Here, however, there is no principled way to read RCW 9.58.010-.020 as distinguishing between public officials, figures, and matters, on the one hand, and private individuals and matters, on the other. *See Tollett*, 485 F.2d at 1097. Rather, the statute, as written, sweeps in a substantial amount of protected speech and, thus, fails on overbreadth grounds.

libel statute.[7]

Notably, the State here has offered ***no*** justification for Washington's criminal libel statute and, for good reason, has refused to defend it on the merits. Given that the statute has sat dormant for decades, any attempt by the State to show that libel is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest," *Lorang*, 140 Wn.2d at 27 (quotations omitted), would lack any credibility.

Even if the State were to argue that the criminal libel statute is constitutional as applied to Mr. Parmelee, the statute would still fail on its face. "An overbreadth challenge is facial, and will prevail ***even if*** the statute could constitutionally be applied to" Mr. Parmelee. *Lorang*, 140 Wn.2d at 26 (emphasis added); *accord Houston v. Hill*, 482 U.S. 451, 459, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) (criminal statutes "that make

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[7] A small minority of courts have upheld criminal libel laws in circumstances not applicable here, such as where the statute was aimed at "fighting words" and neither a public plaintiff nor a public issue was involved, *People v. Heinrich*, 470 N.E.2d 966, 968, 972 (Ill. 1984), or after finding the statute "ambiguous" and rewriting it to include an "actual malice" requirement based on the assumption that the state legislature "only intend[ed] to criminalize unprotected speech." *Phelps v. Hamilton*, 59 F.3d 1058, 1072-73 (10th Cir. 1995) (Kansas law). In *Phelps*, the court also relied on state court decisions that had "long required actual malice" as part of the statutory showing for defamation. *Id.* at 1072. While the appeal in *Phelps* was pending, the Kansas Legislature amended its statute explicitly to require "actual malice." Kan. Stat. Ann. § 21-4004.

unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application").

Similarly, a court cannot save a statute by reading it narrowly or adding new requirements when the text does not support such an interpretation. "It is not the judiciary's job to rewrite" a constitutionally invalid statute – "without limiting ***legislative*** terms[,] the statute must be declared void for substantial overbreadth." *Tollett*, 485 F.2d at 1099 (emphasis added); *see also Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518, 46 S. Ct. 619, 70 L. Ed. 1059 (1926) ("a court may not exercise legislative functions to save the law from conflict with constitutional limitation"). Thus, not surprisingly, "the vast majority of courts which have addressed the constitutionality of criminal defamation statutes . . . have declined to judicially narrow the statutes." *Helfrich*, 922 P.2d at 1161.[8]

The Washington Supreme Court recently rejected a similar entreaty to save a statute by reading into it a requirement that the text did not support. In *Rickert v. Public Disclosure Comm'n*, 161 Wn.2d 843, 168 P.3d 826 (2007), the Court invalidated as facially unconstitutional a statute that prohibited sponsoring, with actual malice, a political advertisement containing a false statement of material fact about a

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[8] *Accord Tollett*, 485 F.2d at 1099; *Ivey*, 821 So. 2d at 948-49; *Armao*, 286 A.2d at 632; *I.M.L.*, 61 P.3d at 1045, 1048; *Gottschalk*, 575 P.2d at 296; *Weston*, 528 S.W.2d at 415-16; *Eberle*, 55 Cal. App. 3d at 433.

candidate for public office because the statute did not require a plaintiff to prove the defamatory nature of the statement. *Id.* at 848-49. The Court refused to read into the statute such a requirement, despite the fact that the "legislature may have intended to limit the scope of its prohibition to the unprotected category of political defamation speech." *Id.*

Because "separation of powers requires a court to resist the temptation to rewrite an unambiguous statute . . . and to recognize that the drafting of a statute is a legislative, not a judicial, function," *In re Parentage of L.B.*, 155 Wn.2d 679, 718, 122 P.3d 161 (2005) (quotations omitted),[9] this Court cannot "save" Washington's criminal libel statute by rewriting it to satisfy the Constitution's requirements.

D. Criminal Libel Statutes Have A Dubious History, Chill Protected Speech, And Are Ripe For Abuse By Overzealous Prosecutors.

The "ignominious" history of criminal libel statutes should inform this Court's review of RCW 9.58.010-.020. *Tollett*, 485 F.2d at 1094-99. "Criminal libel is notoriously intertwined with the history of governmental attempts to suppress criticism," with roots that wind through the Star Chamber and ruthless nobles who punished libel – even if true – by

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[9] *Accord In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 69, 109 P.3d 405 (2005) (a court "show[s] greater respect for the legislature by preserving the legislature's fundamental role to rewrite the statute rather than undertaking that legislative task [itself]").

cutting off the offender's tongue. *Fitts*, 779 F. Supp. at 1506; *see also* Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. LAW & POL'Y 433, 438-64 (2004). "The history of libel law leaves little doubt that it originated in soil entirely different from that which nurtured [this Nation's] constitutional values." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 151, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

The benign justification proffered for criminal libel laws has been to maintain public order by "avert[ing] the possibility that the utterance would provoke an enraged victim to a breach of peace." *Garrison*, 379 U.S. at 68. "This kind of criminal libel," however, "makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence." *Ashton v. Kentucky*, 384 U.S. 195, 200, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966) (quotations omitted).

But even taken at face value, this justification no longer holds weight. In fact, even in "earlier, more violent[] times, the civil remedy [for libel] had virtually preempted the field of defamation; except as a weapon against seditious libel, the criminal prosecution fell into virtual desuetude." *Garrison*, 379 U.S. at 69. Indeed, "under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace

requires a criminal prosecution for private defamation." *Id.* (quotations omitted); *see also State v. Powell*, 839 P.2d 139, 143 (N.M. Ct. App. 1992) ("One message of *Garrison* is that criminal libel laws serve very little, if any, purpose."). Recognizing this, the drafters of the Model Penal Code did not include a criminal libel provision. They concluded that because the criminal law is "reserve[d] . . . for harmful behavior which exceptionally disturbs the community's sense of security," libel "is . . . inappropriate for penal control." MODEL PENAL CODE § 250.7, cmt. at 44, *quoted in Garrison*, 379 U.S. at 70.

But, like a zombie that will not pass on to the next world, criminal libel statutes occasionally rear their unconstitutional heads as overzealous prosecutors invoke them to punish speech. For example, in 2002, two reporters were convicted under Kansas's criminal libel law for writing that the mayor of Kansas City and her husband, a county judge, did not reside in Wyandotte County, as required by law to hold their political offices. Lisby, *supra*, at 435-36. Each reporter was fined and sentenced to one year of unsupervised probation. *Id.* at 436; *see also* Reporters Committee for Freedom of the Press, *Newspaper Editor, Publisher Get Fines and Probation for Criminal Libel* (Dec. 4, 2002), *available at* http://rcfp.org/news/2002/1204kansas.html. They could have received up to seven years in prison and a $17,500 fine. Lisby, *supra*, at 436.

Or, take the facts in *Fitts v. Kolb*, 779 F. Supp. 1502 (D.S.C. 1991), in which a newspaper editor and publisher wrote a column, titled "My Vote is Not for Sale," in which he accused the community's legislative representatives of corruption and theft. *Id.* at 1505. Rather than filing a civil lawsuit, two representatives signed arrest warrants, charging Mr. Fitts with criminal libel. *Id.* Mr. Fitts was arrested, and a local magistrate set a surety bond for $40,000, which was "eight times the maximum fine provided for in the criminal libel statute," instead of a more common personal recognizance bond. *Id.* The magistrate also required, as a condition of release, that Mr. Fitts refrain from writing any further derogatory articles about the elected officials. *Id.* at 1505-06. Mr. Fitts remained in jail for three days before he could raise money for the bond and the clerk of court became available to receive it. *Id.* at 1506; *see also* Lisby, *supra*, at 469. A federal court eventually declared South Carolina's criminal libel statute to be unconstitutional, but the fact that the statute could be invoked in such circumstances, resulting in both imprisonment and a plainly unconstitutional order of prior restraint, demonstrates its chilling effect. Even though lightning strikes are rare, the consequences are so severe that a would-be speaker will take precautions to avoid them.

Thus, even though Washington prosecutors have exercised restraint in invoking the State's criminal libel law, the simple fact that the

law remains on the books – and that less-scrupulous prosecutors in other jurisdictions have relied on similar statutes to punish speech – results in the chilling of protected speech. Where the First Amendment is concerned, "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). Because Washington's criminal libel statute does not provide speech with the "breathing space" required by the First Amendment, it cannot stand. *Broadrick*, 413 U.S. at 611.

IV. CONCLUSION

For the foregoing reasons, this Court should hold that Washington's criminal libel statute is facially unconstitutional and reverse the judgment of the trial court.

RESPECTFULLY SUBMITTED this 28th day of February, 2008.

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ADDENDUM

RCW 9.58.010. Libel, what constitutes

Every malicious publication by writing, printing, picture, effigy, sign, radio broadcasting or which shall in any other manner transmit the human voice or reproduce the same from records or other appliances or means, which shall tend:--

(1) To expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or

(2) To expose the memory of one deceased to hatred, contempt, ridicule or obloquy; or

(3) To injure any person, corporation or association of persons in his or their business or occupation,

shall be libel. Every person who publishes a libel shall be guilty of a gross misdemeanor.

RCW 9.58.020. How justified or excused—Malice, when presumed

Every publication having the tendency or effect mentioned in RCW 9.58.010 shall be deemed malicious unless justified or excused. Such publication is justified whenever the matter charged as libelous charges the commission of a crime, is a true and fair statement, and was published with good motives and for justifiable ends. It is excused when honestly made in belief of its truth and fairness and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of any person in respect of public affairs, made after a fair and impartial investigation.

Text of Parmelee's Letter (with original spellings)

Allan Parmelee
CBCC 793782
1830 Eagle Crest Way
Clallam Bay WA 98326

7-20-05

Harold W. Clarke, Secretary
Dept. of Corrections
P.O. Box 41110
Olympia, WA 98504-1110

Re: A Lesbian as a Superintendent Is A Solution For Disaster.

Dear Mr. Clarke:

I have been puzzled by the widespread hostilities growing ever tense at CBCC since I've been here. I have finally discovered that the formula has to do with a verified reliable source indicating Superintendent Sandra Carter is anti-male – a lesbian, and John Aldana is an antagionist. I wanted your thoughts on this so I can conclude a series of media releases I have planned about CBCC. Through Sandra Carter's silence, she has already confirmed several hot topics that should result in negative publicity against the DOC.

Several of these topics include the fraud the DOC is committing against Washington's taxpayers with fraudulently represented programs such as RNRT, Anger Mgmt, Victim Awareness, etc. At CBCC they appear to have started a bigger fraud on the public and community with something they call a "Parellel Community Organization/Orientation Program." It amazes me the public has been kept in the dark so long about how you people make up fancy names that sound idealistic, but lack anything realistic.

Although I've brought widespread retaliation issues to you previously, and you take the ostrich approach. You simply make excuses to ignore it and faced with evidence, you people are [PAGE BREAK] just too easy to expose as liars: Eldon Vail's recent letter to me is a prime example.

But at CBCC, it is clear something greater is wrong and all these idealistic programs are nothing but a fraud. The place stays locked down most of the time while prisoner's hostilities, anger and frustration grow. Sandra

Carter and John Aldana are distrusted by anyone whom gets to know them, including low level staff. Guards get beat up (like guard Moore recently) because as a common practice and policy, they – the prisoners – are treated terribly, disrespectfully, arbitrarily and capriciously. In other words, your own staff set bad examples and then don't understand why there's trouble. Perhaps a "Do as I say, not as I do" practice should be abandoned. My inquiries continue.

When I discovered such administration down hostilities and contempt for prisoners, I became curious as to why. Having a man-hater lesbian as a superintendent is like throwing gas on already smoldering fire. But before I begin my series of press releases, I believe a comment and exchange of ideas from you is only fair. I anticipate your response.

Best Regards,

Allan Parmelee

cc: file

PROOF OF SERVICE

I hereby certify that on the 28th day of February, 2008, I caused to be filed the original and one copy of the BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF APPELLANT by overnight mail to the following:

Clerk of the Court
Washington State Court of Appeals, Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454

I further certify that on the 28th day of February, 2008, I caused to be served one copy of the BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF APPELLANT to the following by overnight mail and legal messenger, respectively:

Amanda Migchelbrink, Esq.
Assistant Attorney General
Attorney General's Office
Criminal Justice Division
P.O. Box 40116
Olympia, WA 98504-0116

Counsel for Defendants-Appellees

Hank Balson, Esq.
Public Interest Law Group
705 Second Ave., Ste. 501
Seattle, WA 98104

Counsel for Plaintiff-Appellant

Declared under penalty of perjury under the laws of the state of Washington dated at Seattle, Washington this 28th day of February, 2008.

Denise Ratti