

SUPREME COURT OF THE STATE OF WASHINGTON

PAUL TRUMMEL,
Petitioner,

v.

STEPHEN MITCHELL and COUNCIL HOUSE, INC.,
Respondents.

BRIEF OF AMICUS CURIAE

AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS
NATIONAL UNION OF JOURNALISTS/
LONDON FREELANCE BRANCH

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I. IDENTITY AND INTEREST OF AMICUS

The American Society of Journalists and Authors is the national organization for leading independent non-fiction writers. The Society's mission is the professional welfare of journalists and authors, and a vital part of that mission is the Society's active, long-standing defense of the First Amendment. The National Union of Journalists is a bi-national trade union representing 35,000 journalists working in all media, including about 6000 freelancers. The London Freelance Branch of the NUJ is directly interested in this case insofar as one of its members, Paul Trummel, has suffered infringement of his freedom of expression through the trial and appellate court rulings – not to mention imprisonment stemming from exercising his journalistic and personal freedom of expression.

II. STATEMENT OF THE CASE

The relevant facts and procedural history are set forth in the brief and Petition for Review filed by petitioner Paul Trummel.

III. ARGUMENT

The Court of Appeals opinion in *Trummel v. Stephen Mitchell and Council House, Inc.* is cause for serious concern among journalists and others who respect the First Amendment and depend on it for their livelihood. The opinion is deeply problematic for many reasons.

A. The finding of harassment and resulting anti-harassment order were based on constitutionally protected speech.

The Court of Appeals decision labors to create the impression that the trial court's finding of harassment and anti-harassment order were based on harassing "conduct" allegedly engaged in by Trummel inside Council House. But a review of the petition filed by respondent Mitchell and the transcript of the hearing on April 19, 2001 clearly shows that the trial court's decision was primarily based on Trummel's constitutionally protected publications. The lower courts' after-the-fact reliance on Trummel's alleged "conduct" cannot change the fact that Trummel was evicted, censored and incarcerated based on the content of his speech.

The Court of Appeals' analysis of harassment (Op. at 10-13) rests on two fundamental logical fallacies. First, the analysis logically begs the question.¹ The opinion notes that "Harassment is not protected speech." Op. at 11.² However useful that statement may appear as a truism, it has the effect of logically begging the question here. The question is not

¹ See Irving M. Copi, *Introduction to Logic* (7th ed. 1986), 101 ("If one assumes as a premise for an argument the very conclusion it is intended to prove, the fallacy committed is that of *petitio principii*, or begging the question.")

² The opinion cites two telephone harassment cases, *Alexander* and *Dyson*, and then blandly analogizes those cases to newsletters. Op. at 11. But both cases emphasize that the telephone is "a unique instrument through which to harass" others. *State v. Alexander*, 76 Wn. App. 830, 837, 888 P.2d 175 (1995) (quoting *State v. Dyson*)(emphasis added). While telephones may be uniquely intrusive, newsletters are no more intrusive than junk mail.

whether harassment is protected speech, but rather whether any particular speech falls within the protections of the First Amendment and therefore cannot be considered harassment.

The analysis is also a classic instance of the fallacy of equivocation.³ The term “harassment” means one thing in everyday language and another thing within the technical framework of First Amendment analysis. The court based its conclusion on the former meaning, not the latter. Consider the difference between the following two arguments.

No harassment is constitutionally protected.
This speech was harassment.
Therefore this speech is not constitutionally protected.

Constitutionally protected speech can never be harassment.
This speech was not constitutionally protected.
Therefore this speech can be harassment.

The second premise of the first argument invites a free-floating and conclusory assessment of whether particular speech is “harassment,” where the term “harassment” means anything that seems sufficiently annoying or detrimental. Under that analysis, if particular speech fits the

³ See Copi, Introduction to Logic, 113 (Noting that most words have more than one meaning, but that words cannot shift meaning within a valid argument. “When we keep these different meanings apart, no difficulty arises. But when we confuse the different meanings a single word or phrase may have, using it in different senses in the same context, we ... commit the Fallacy of Equivocation.”)

ordinary meaning of harassment, then one may summarily conclude it is not constitutionally protected. This is the analysis the Court of Appeals engaged in. The second premise of the second argument, in contrast, requires that one engage in an analysis of the law governing what kinds of speech are constitutionally protected before proceeding to a conclusion about whether any particular speech can be legally characterized as harassment. That is the analysis required by any recognized First Amendment jurisprudence.⁴

Under ordinary First Amendment jurisprudence, one cannot start from the premise that particular speech is harassment and conclude that therefore it is not protected. That puts the cart before the horse, because whether speech is harassment to begin with depends on whether it is protected, not vice versa. One has to start with an analysis of whether the speech is protected by the First Amendment. If it is, it cannot be considered harassment, regardless of whether it descriptively seems annoying or alarming. Here, instead of engaging in a First Amendment

⁴ The same analysis is required by the harassment statute itself. “Unlawful harassment” is expressly defined in terms of a course of conduct. RCW 10.14.020(1). “Course of conduct,” in turn, expressly excludes “constitutionally protected activity.” RCW 10.14.020(2). Even under the statute, one must determine the scope of constitutionally protected speech first before proceeding to characterize speech as harassing.

analysis of whether Trummel's speech was protected, the Court summarily concluded it was harassment and therefore not protected speech.

This Court expressly recognized the difference in *Suggs*. "Labeling certain types of speech 'unprotected' is easy. Determining whether specific instances of speech actually fall within 'unprotected' areas of speech is much more difficult." *In re Marriage of Suggs*, 152 Wn.2d 74, 82, 93 P.3d 161 (2004). Here, the Court of Appeals shirked the more difficult task and settled for conclusory labeling.

The Court of Appeals opinion emphasizes the "vitriolic" quality of some of Mr. Trummel's newsletters. Op. at 11. But there is no "vitriol" exception to the rule against content-based limitations on free speech. Vitriol in a newsletter is just as protected under the First Amendment as the dispassionate analysis of Kant in his *Critique of Pure Reason*. Screeds and philosophical treatises are protected alike. Similarly, the court emphasizes Mr. Trummel's "repeated inflammatory rhetoric" coupled with posting names and addresses on his website. Op. at 19 (quoting the trial court's written findings on the contempt motion). Under that analysis, the inflammatory pamphlets of Thomas Paine or the articles of H.L. Mencken would be legitimately subject to prior restraint. But the First Amendment unquestionably protects inflammatory rhetoric. And publishing identifying information, including names, has been expressly

protected under the First Amendment at the very least since the Supreme Court's decision in *Florida Star*. *Florida Star v. B.J.F.*, 491 U.S. 524, 541, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989).

Finally, the Court of Appeals opinion slides easily and unconsciously between speech and conduct. Of the four examples the court gives of Trummel's "alarming behavior" (Op., at 4-5 [emphasis added]), two involve nothing more than verbal name-calling, and the other two involve spoken insults combined with Trummel allegedly being too close to the persons he was insulting.

The Court of Appeals' First Amendment analysis is more than merely defective. It rests on fundamental fallacies, and its First Amendment analysis is vitiated by those fallacies. This Court should accept review, reverse the Court of Appeals, and restore correct First Amendment jurisprudence in this state.

B. Trummel was denied due process at the hearing where his publications were found to constitute harassment.

This case also raises important and disturbing due process questions. There is something more than a little scandalous about a 68-year old journalist spending four months in jail for contempt, in solitary confinement, after the trial court denied him the benefit of an attorney at the original hearing on an antiharassment order.

The court's refusal to grant a short continuance of the hearing meant that Mr. Trummel could not obtain an attorney. Without an attorney, Mr. Trummel could not object to the introduction of large amounts of inadmissible evidence. Mr. Trummel was inundated with over 40 declarations only one week before the hearing. CP 139. He had no meaningful opportunity to respond to the allegations filed so near to the April 19th hearing. In addition, the antiharassment petition never even requested the summary eviction imposed by the trial court.

At a minimum due process requires that he be given notice that he risked being deprived of a protected property right in his public housing. As to his right to a meaningful pre-deprivation hearing, even the Court of Appeals conceded that this right includes an opportunity to confront and cross-examine adverse witnesses. Op. at 16.

The Court of Appeals brushes aside the trial court's refusal to continue the hearing so that Mr. Trummel could obtain an attorney, claiming that the court "had a tenable basis to go ahead with the hearing despite Mr. Trummel's lack of representation." Op. at 15. Yet in the very next paragraph the court notes that even though much of the evidence at the hearing may have been "technically inadmissible," the court need not consider that issue because Mr. Trummel "waived the right to argue its admissibility" by not objecting to the evidence at the time. Op. at 16.

In short, the Court of Appeals simply conjured away the due process issue by making an unsupportable finding that Mr. Trummel “waived any right” to a trial-type hearing required by due process. But black-letter law requires that any waiver of a constitutional right must be knowing, intelligent, and voluntary. Even a cursory review of the materials filed by Mr. Trummel *pro se* and the transcript of the hearing on April 19, 2001 show that Mr. Trummel did not knowingly, intelligently and voluntarily waive his due process rights. On the contrary, Trummel clearly stated that he was unprepared to respond to the allegations and needed the assistance of an attorney to defend his First Amendment rights.

The Court of Appeals also refused to consider the inadmissibility of the evidence because Mr. Trummel “waived” any objection by failing to act like a trained attorney. This is patently absurd. As this Court insisted in another context, “The court is part of the proceeding and is not a potted-palm functionary, with only the attorneys having a defined purpose.” *State v. Ford*, 125 Wn.2d 919, 924-25, 891 P.2d 712 (1995). Here, the trial court should have allowed Mr. Trummel the benefit of an attorney. Its failure to do so is abuse of discretion, and the resulting introduction of large amounts of inadmissible evidence – evidence which formed the basis for the original anti-harassment order – makes that all the more apparent and transparent.

C. The content-based restrictions on Mr. Trummel’s website are unconstitutional prior restraint.

While the Court of Appeals opinion focuses on Mr. Trummel’s alleged harassing “conduct,” the fact remains that Mr. Trummel was sent to jail for violating content-based restrictions on his website. The record is absolutely clear—the trial court imposed explicit restrictions on the content of Mr. Trummel’s website. Such restrictions on pure speech amount to unconstitutional “prior restraint” even if they are imposed after a finding that a party has committed harassment. *Suggs*, 152 Wn.2d at 184. As the petitioner points out, the Court of Appeals completely failed to address this issue, and these unconstitutional restrictions on the Internet are still in effect today.

D. A journalist must never be found in contempt for violating an unconstitutional prior restraint.

The most egregious and disturbing violation of free speech in this case was the trial court’s decision to jail Mr. Trummel when he refused to comply with the trial court’s unconstitutional censorship. This Court has recognized a First Amendment exception to the collateral bar rule. A finding of contempt cannot be based on a court order that amounts to unconstitutional prior restraint. *State v. Coe*, 101 Wn.2d 364, 369-70, 679 P.2d 353 (1984); *Bering v. SHARE*, 106 Wn.2d 212, 234, 721 P.2d 918 (1986). The Court of Appeals’ failure to correctly apply this exception to

the collateral bar rule was based on that court's erroneous conclusion that the restrictions on Mr. Trummel's website were not prior restraints. *See Suggs*, 152 Wn.2d at 184.

The "prior restraint" exception to the collateral bar rule is essential to the prohibition on prior restraint itself. Journalists, newspapers, and all other persons who publish on the Internet must never be forced to choose between waiting for an appellate court to vacate an unconstitutional order and incurring a finding of contempt that cannot be vacated later.

This Court should grant review and reaffirm its holdings in *Coe* and *Bering* that the collateral bar rule does not apply to prior restraint of speech. This Court cannot go back in time and release Trummel from jail. But it can and must vacate the unconstitutional finding of contempt that sent Mr. Trummel to jail.

IV. CONCLUSION

The trial court's actions in this case manifest a profound and troubling disregard for Mr. Trummel's freedom of speech. And the Court of Appeals' reasoning represents a real and direct threat to the freedom of thought and expression on which journalism depends. A free press, in turn, forms an integral part of the very foundation of democratic institutions. For these reasons, this Court should accept review of the Court of Appeals' decision and reverse it.

RESPECTFULLY SUBMITTED this _____ day of October, 2004.

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MOTION OF AMICI
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MEMORANDUM IN
SUPPORT OF PETITION
FOR REVIEW

I. IDENTITY AND INTEREST OF AMICUS

The American Society of Journalists and Authors is the national organization for leading independent non-fiction writers. The Society's mission is the professional welfare of journalists and authors, and a vital part of that mission is the Society's active, long-standing defense of the First Amendment together with a deep concern for censorship issues. The livelihood of the Society's members depends on the free exercise of speech and of the press.

The National Union of Journalists (United Kingdom and Ireland) is a bi-national trade union representing 35,000 journalists (including writers, editors, photographers, cartoonists, public relations workers, etc.) working in all media, including about 6000 freelances. The London

Freelance Branch is the branch (in United States labor parlance, the “local”) of which Paul Trummel is a member. It is composed of about half of the total number of freelances in the union, and its members may be based anywhere in the United Kingdom, Ireland, or the rest of the world. The London Freelance Branch of the NUJ is directly interested in this case insofar as one of its members, Paul Trummel, has suffered infringement of his freedom of expression through the trial court’s rulings – not to mention imprisonment stemming from exercising his journalistic and personal freedom of expression.

A. Statement of the National Union of Journalists, London Freelance Branch.

This now internationally notorious case presents the appalling spectacle of an elderly journalist thrown in jail and forced to endure several weeks in solitary confinement for exercising rights guaranteed by the United States’ First Amendment, the United Nations’ Universal Declaration of Human Rights, and the United Kingdom’s Human Rights Act.

The case also raises troubling questions about freedom of expression in relation to the Internet, a new medium with per se international reach, in which the right of free expression has yet to be

clearly established and in which, therefore, that right may be especially vulnerable.

Paul Trummel is a veteran journalist, public relations worker, media academic, and member of our union of journalists. He worked for many years in London and then moved to America.

Please note that as journalists, not lawyers, we are concerned with the principles of the practice of our profession and with our members' welfare. As we understand this case, Paul was jailed last year because he refused to acquiesce to a court order to remove various statements and items of information from his website, and so was held in contempt of court. We contend that it was a gross error to restrict his freedom of expression and then to jail him because he would not submit to that restriction.

As British people, but as journalists in particular, we greatly appreciate the fundamental protection of freedom of speech afforded to all Americans by the First Amendment to the Constitution. By that straightforward criterion it is very hard for us to understand how the court could have treated Mr. Trummel as it did, in America of all places.

However, since this case is in large part about freedom of expression on the Internet, a medium which is by its very nature affords automatic global access to everything published on it, we feel it is also

relevant to refer to civilized standards of freedom of expression that transcend national boundaries. For those standards protect the essential human aspiration to that freedom which is held dear by people in every country no matter what regime prevails currently. And those standards are enshrined in documents universally recognized by the civilized world. For example, the United Nations' Universal Declaration of Human Rights declares:

Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR 3d Sess., at 71, U.N. Doc. A/810 (1948), art. 17 (emphasis added).

The United Kingdom Human Rights Act addresses the same issue in nearly the same terms:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Human Rights Act of 1998, c. 42 (Eng.), art. 10.

Freedom of expression seems to us to be the crucial and overarching concern in this case.¹ But we would like to address several other points of detail arising from Mr. Trummel's case.

It appears that Mr. Trummel's bona fides as a journalist and his lack of a publisher other than himself became issues in the trial court. It was argued at the trial court that because he was publishing himself Mr. Trummel was not a journalist and therefore somehow not entitled to write what he chose, whether fact or opinion. If this characterization is even remotely accurate, the underlying notion seems far removed from national and international standards governing freedom of speech and journalism. It takes little imagination to notice just how very damaging the implications would be for all publishing media. But it would especially damaging in the realm of the Internet, where many more people, professional or amateur, are finding a new outlet to put their material in front of the public at relatively low cost. This change in the very way

¹ We say this with full regard to the second part of Article 10 of the Act:

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ideas can be expressed and promulgated enhances individual freedom of expression itself and provides alternative voices to the corporate giants that increasingly control the “traditional” media in the UK, Ireland, the US, and worldwide. And it would be tragic to hobble this new medium just at the moment when it has emerged as the first eminently practical vehicle for implementing the Universal Declaration of Human Rights’ recognition of the “right to freedom of opinion and expression ... regardless of frontiers.”

Further, the strange logic of the original judgment seemed to imply that if a purported journalist is not a journalist he or she possesses even fewer rights than the ordinary citizen. That is, restrictions were imposed on Mr. Trummel’s publication partly because the court, by its own criteria, deemed him not to be a journalist and then further deemed that this meant he did not have an ordinary citizen’s right to express his or her ideas and publish them. Even by the standards of legal logic, this seems very strange thinking indeed.

In regard to the content of Mr. Trummel’s site, we do not have the comprehensive knowledge to argue that any given part of it is accurate, fair, and so on. But it seems undeniable that his freedom of expression was restricted by the court (first by order and then by incarceration) on the

basis, in part, of statements by individuals that what he wrote caused them offence or pain.

Again we do not have the knowledge to argue that any given part of the case presented by Mr. Trummel's accusers is accurate, fair, and so on. But if this line of thinking is to be any part of judicial response to journalistic or other expression in any country, then freedom of expression is in deep trouble. It is evident that journalists often cause offence to all sorts of people, including politicians, by telling the truth. But the court's judgment in Mr. Trummel's case would suggest that if anyone complains that, in some fashion, they are offended by anything they read then its publication could be restricted or terminated. This would lead to constant prior restraint of publication, the limitation of existing publications, and, generally, the dominance of what might be called "the official version" of any set of events. It would lead only to a travesty of the whole principle of freedom of expression.

It appears that the original judgment resulted from an almost farcical—yet for Mr. Trummel quite appalling—confusion of an anti-harassment action with all sorts of other concerns that should never have been on the same table. Whatever the necessary limits on freedom of expression in a democracy—one thinks of the law of defamation—they

simply cannot include the unconscionable sorts of abuses to which Paul Trummel was subjected by the trial court in this case.

B. Statement of the American Society of Journalists and Authors.

The American Society of Journalists and Authors is the national organization for leading independent non-fiction writers. We would like to present our views in this amicus curiae brief because the issues in this case bear directly on the concerns of all writers.

One issue appears to be whether Mr. Trummel was serving as a “journalist” when he wrote or posted the texts in question. We believe it is important for the court to note that in none of the fifty states in the United States is there a licensing requirement for journalists. Nor are there other legal or quasi-legal requirements for becoming a journalist. That is because, under the prevailing interpretation of the First Amendment, it would be a de facto violation of that amendment for the government to impose a journalism license or other requirement. The act of writing – whether or not the writer is a member of any association or union – is sufficient. No person and no organization can decide who is or is not a journalist.

The trial court noted that Mr. Trummel did not have a publisher. But even a publisher is not necessary to serve as a journalist. Some of the most important statements in the history of our nation have been self-

published or have appeared in small, private newsletters or broadsides. Tom Paine and I.F. Stone are notable examples, but the list could go on and on.

The trial court's ruling seems to saying that because it did not consider Mr. Trummel to be a journalist, he is not entitled to protection under the First Amendment. But that amendment protects free speech for all people, regardless of whether the words are committed to paper. Even if Mr. Trummel had simply stood on his porch and spoken his opinions, he would have the right to do so under the First Amendment. That applies to the respondents as well. They would have done better to respond to him with more speech rather than with an attempt to gag him. They would have done better to use permissible tools, such as libel law, rather than attempt to exercise prior restraint against his free speech.

II. FAMILIARITY WITH ISSUES

Counsel for the amici curiae has read the parties' briefs and filed a brief on behalf of amici curiae in the Court of Appeals. Counsel is familiar with the scope of the arguments presented by the parties, and has not unduly repeated arguments raised by the parties.

III. ISSUES TO BE ADDRESSED BY AMICUS

1. Whether the finding of harassment and anti-harassment order were impermissibly based on Mr. Trummel's constitutionally-protected speech.

2. Whether Mr. Trummel was denied due process at the hearing where his publications were found to constitute harassment.

3. Whether the content-based restrictions on Mr. Trummel's website are unconstitutional prior restraint.

4. Whether the findings of contempt against Mr. Trummel must be vacated under the prior restraint exception to the collateral bar rule.

IV. WHY AMICUS BRIEFING WILL ASSIST THE COURT

The journalists' groups participating in the amicus brief possess in-depth familiarity and expertise concerning journalistic practices and freedom of expression. Just as appellate courts traditionally defer to administrative agencies because of their specialized expertise, so may this Court benefit from the cumulative and in-depth expertise of these journalists' groups in deciding a case, such as this one, with profound national and international ramifications for the practice of journalism and for institutions founded on freedom of expression. In addition, the views of the journalists' groups participating in this amicus provide some index

of national and international professional opinion regarding the treatment of Paul Trummel by the lower courts of this state.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the date written below, a true and correct copy of the *Motion of Amici Curiae to File Memorandum in Support of Petition for Review* and the *Memorandum of Amici Curiae in Support of Petition for Review* were served on each of the parties below as follows:

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