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Ban on speech 'about a person' that negligently causes 'significant mental suffering, anxiety or alarm' struck down

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Illinois "stalking" and "cyber-stalking" statutes criminalize (among other things),

1. "knowingly engag[ing] in [2 more or acts] directed at a specific person,"
2. including "communicat[ing] to or about" a person,
3. when the communicator "knows or should know that this course of conduct would cause a reasonable person to"
4. "suffer emotional distress," defined as "significant mental suffering, anxiety or alarm."

The statute expressly excludes, among other things, "an exercise of the right to free speech or assembly that is otherwise lawful."

This morning, the Illinois Supreme Court struck down these provisions (which it referred to as "subsection (a)"), in *People v. Releford*. (I should note that my students Brandon Amash, Sarah Burns and Emily Michael, and I — with the invaluable help of pro bono local counsel Steven W. Becker — filed an amicus brief on behalf of the Cato Institute and the Marion B. Brechner First Amendment Project supporting this result.) Here are some key conclusions from the court:

1. The statute is a content-based speech restriction, and thus presumptively unconstitutional:

The proscription against "communicat[ions] to or about" a person that negligently would cause a reasonable person to suffer emotional distress criminalizes certain types of speech based on the impact that the communication has on the recipient. Under the relevant statutory language, communications that are pleasing to the recipient due to their nature or substance are not prohibited, but communications that the speaker "knows or should know" are distressing due to their nature or substance are prohibited. Therefore, it is clear that the challenged statutory provision must be considered a content-based restriction because it cannot be justified without reference to the content of the prohibited communications.

2. The statute isn't limited to speech that falls within the exception for true threats of illegal conduct. (A separate subsection of the statute covers such threats, but Walter Relerford was convicted under the causes-emotional-distress section, not the threats subsection.) The court therefore had no occasion to decide one of the issues argued in the case, which is whether the government may punish statements that negligently put someone in fear of being attacked by the

speaker, or whether the threats exception extends only to statements that recklessly, knowingly, or purposefully put someone in fear.

3. The statute isn't limited to speech that falls within the exception for "speech integrally related to criminal conduct":

Although … subsection (a) prohibits a "course of conduct," each of the actions identified in that subsection stand alone as actions that can form the basis of the course of conduct. Among the particularly specified actions are "communicat[ions] to or about" a person that the defendant knows or should know would cause a reasonable person to suffer emotional distress. The communications need not be accompanied by any other action to form the predicate for a prohibited course of conduct. As subsection (a) is written, two or more such communications are sufficient to form a course of conduct and warrant prosecution under subsection (a)….

In light of the fact that a course of conduct can be premised exclusively on two communications to or about a person, this aspect of subsection (a) is a direct limitation on speech that does not require any relationship — integral or otherwise — to unlawful conduct. Under subsection (a), the speech *is* the criminal act.

4. The statute is unconstitutionally overbroad, because it potentially covers a wide range of constitutionally protected speech. This includes political speech:

For example, subsection (a) prohibits a person from attending town meetings at which he or she repeatedly complains about pollution caused by a local business owner and advocates for a boycott of the business. Such a person could be prosecuted under subsection (a) if he or she persists in complaining after being told to stop by the owner of the business and the person knows or should know that the complaints will cause the business owner to suffer emotional distress due to the
economic impact of a possible boycott.

And this includes nonpolitical speech as well:

The Supreme Court has acknowledged that "*most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from Government regulation." Given the wide-ranging scope of the first amendment, its protection presumptively extends to many forms of speech that would fall within the broad spectrum of speech restricted by subsection (a).

5. The statute isn't limited "to one-to-one communications," which might be restrictable under *Rowan v. United States Post Office Dep't*(which holds "that nonconsensual one-to-one communications that impinge on the privacy rights of the recipient are not protected under the first amendment").

6. The statute can't be saved by the exception for "exercise of the right to free speech or assembly that is otherwise lawful." First, the exemption is simply "an affirmative defense that must be raised by a defendant at trial after a prosecution has been initiated. As such, the exemption cannot eliminate the chilling effect on protected speech and resulting self-censorship."

Second,

The exemption does not prevent unwarranted prosecutions under a case-by-case application of the “communicates to or about” language. Nothing in the language of subsection (a) explicitly differentiates between distressing communications that are subject to prosecution and those that are not — and the State has not offered any guidance as to how Illinois citizens should tease out that difference. A case-by-case discretionary decision by law enforcement officers and prosecutors does not solve the problem of the chilling effect on innocent speakers who fear prosecution based on negligently made distressing communications to or about a person. We conclude that [the exemption] is insufficient to remediate the extreme overbreadth of subsection (a) and cannot by itself make the terms of that provision constitutional.

Quite right.