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Criminal Court, New York County People v. Yablov

Daniel Henthorne

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CRIMINAL COURT, NEW YORK COUNTY

People v. Yablov[1]
(decided February 24, 2000)

Defendant Shiela Yablov was arrested for and charged with aggravated harassment in the second degree in violation of New York Penal Law ("NYPL") § 240.30(1).[2] The people subsequently amended the charge to include harassment in the second degree, a violation of NYPL Section 240.26(1).[3] Defendant moved to dismiss challenging the sufficiency of the accusatory instrument. She argued that the communication in issue did not meet the requisite of the crime of harassment or aggravated harassment[4] and therefore, the speech must be afforded the protections of both the Federal[5] and New York State Constitutions.[6] The New York City Criminal Court found defendant's actions not to be criminal within the meaning of the penal statute because the speech was "too

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[1] 183 Misc. 2d 880, 706 N.Y.S.2d 591 (N.Y. Crim. Ct., New York County 2000).

[2] N.Y. PENAL LAW § 240.30(1) (Mckinney 1999). This statute provides in pertinent part:

> A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten, or alarm another person, he or she: Communicates, or causes a communication to be initiated by mechanical or electrical means or otherwise, with a person, anonymously or otherwise, by telephone, or by telegraph, mail, or any form of written communication, in a manner likely to cause annoyance or alarm.

Id.

[3] N.Y. PENAL LAW § 240.26(1) (Mckinney 1999). This statute proves in pertinent part:

> A person is guilty of harassment in the second degree when, with intent to harass, annoy alarm another person: He or she strikes, shoves, kicks, or otherwise subjects such person to physical contact, or attempts or threatens to do the same.

Id.

[4] *Yablov*, 183 Misc. 2d at 881, 706 N.Y.S.2d at 592.

[5] U.S. CONST. amend. I. This amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ." *Id.*

[6] N.Y. CONST. art. I, § 8. This section provides in pertinent part: "Every citizen may freely speak, write or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.*

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vague to pose an immediate threat of physical harm."[7] Therefore, defendant's motion to dismiss the accusatory instrument for insufficiency to support the charge was granted.[8]

The complainant and defendant were involved in a romantic relationship that ended in March of 1998.[9] Following complainant's termination of the relationship, the defendant left "a series of annoying, threatening, and unsolicited phone communications" on the complainant's answering machine, over a seven-month period.[10] The communications began in March 1998 and continued until August 1999.[11]

The complainant claimed that in March 1998, he received a phone message from the defendant stating, "If I don't get the money you make tomorrow I'll [sic] go to the next step. I have so many irons in the fire, you don't know what . . . is going on! You'll be vulnerable and we'll get you!"[12] In April 1998, the complainant received another phone message from the defendant stating, "Pay me or see me! I laid it right on the line for you!"[13] Furthermore, the complainant claimed that on July 25, 1999 the defendant called the complainant's home at least twenty-two times in a twelve hour period.[14]

In determining whether the defendant's speech constituted harassment in the second degree or if it was protected speech under the Federal and New York State Constitutions, the court looked to the decision in *People v. Dietz*.[15] In *Dietz*, the defendant was charged with harassment after she confronted the complainant in her doorway and called her a "bitch" and her son a "dog."[16] She also stated, that she would "beat the [sic] out of [the complainant] some day or night out on the street."[17] Although the court found

[7] *Yablov*, 183 Misc. 2d at 888, 706 N.Y.S.2d at 596.
[8] *Id.* at 883, 706 N.Y.S.2d at 592.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Yablov*, 183 Misc. 2d at 883, 706 N.Y.S.2d at 593
[14] *Id.*
[15] 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595(1989).
[16] *Dietz*, 75 N.Y.2d at 50, 549 N.E.2d 1167, 550 N.Y.S.2d at 596.
[17] *Id.*

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the words to be "abusive,"[18] the New York Court of Appeals held that the vulgar and offensive words were protected speech under the New York State and Federal Constitutions.[19] Speech may only be forbidden or penalized if it manifests a fear in the individual of immediate danger of severe harm.[20] The court held that defendant's words did not fall within the penal statute without any acts or speech establishing a threat of immediate bodily harm.[21]

Moreover, in *People v. Todaro*[22] the defendant was charged with harassment when he told an officer, "I'll get you for this," after being arrested.[23] The New York Court of Appeals held that words uttered in annoyance or anger are not enough to be considered harassment.[24] The *Yablov* court agreed and emphasized that behavior that annoys another "is not enough to cause the actor to suffer criminal sanctions."[25] The court reasoned that in a free society a degree of rude, immature, annoying behavior will not be condoned but, "the court will not criminalize behavior where to do so would exceed the fair import of the statutory language defining the offense of harassment." [26]

In discussing the crime of aggravated harassment in the second degree the court relied on *People v. Price*[27] and *People v. Miguez*.[28] In *Price*, the defendant was convicted of aggravated harassment in the second degree for sending a letter, to his attorney

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[18] *Id.* at 51, 549 N.E.2d at 1168, 550 N.Y.S.2d at 597. The court applied the "common dictionary definition" of "abusive" as "course," "insulting and "harsh." *Id.*

[19] *Id.* at 51, 549 N.E.2d at 1169, 550 N.Y.S.2d at 597 (citing Terminiello v. Chicago, 33 U.S. 1, 4-5, which held that, "unless speech presents a clear and present danger of some serious substantial evil, it may neither be penalized nor forbidden").

[20] *Id.*

[21] *Id.* at 47, 549 N.E.2d at 1166, 550 N.Y.S.2d at 598-599.

[22] 26 N.Y.2d 325, 258 N.E.2d at 712, 310 N.Y.S.2d 303 (1970).

[23] *Id* .at 327, 258 N.E.2d at 712, 310 N.Y.S.2d at 305

[24] *Id.*

[25] *Yablov*, 183 Misc. 2d at 885- 886, 706 N.Y.S.2d at 594 (citing People v. Malausky, 127 Misc. 2d 84, 86, 485 N.Y.S.2d 925 (Rochester City Ct. 1985)).

[26] *Id.*

[27] 178 Misc. 2d 778, 683 N.Y.S.2d 417 (N.Y. Crim. Ct., New York County 1998).

[28] 147 Misc. 2d 482, 556 N.Y.S.2d 231 (N.Y. Crim. Ct., New York County 1990).

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which stated, "I'm going through all this shit with you, you better be careful, I won't be responsible if you talk to me like that again."[29] Later that day he communicated to the complainant that "you will be . . . sorry, you're playing with fire . . . ."[30] Two days later, on the date and location stated in the letter defendant stated to the complainant, "I'll get you," while "shaking his hand at her."[31] The court held that the defendant's use of the mail to communicate his threats and the content of the two communications which included a date and location of the threatened harm, "evince[d] an intention to harass, annoy, threaten or alarm the complainant"[32]

By contrast, in *Miguez*, the defendant repeatedly made phone calls and pages to the complainant allegedly interfering with complainant's medical practice.[33] Similarly, the case involved the termination of a romantic relationship.[34] Defendant was charged with three counts of aggravated harassment for three separate phone calls to the defendant on August 14, 1989, June 30, 1989, and October 2, 1989.[35] The first count was based on the phone call made on August 14, 1989 where the defendant spoke directly to the complainant and stated, "[p]lease don't hurt me anymore, [y]ou've hurt me enough, I still love you."[36] The second count was based on the phone call made June 30, 1989, where defendant left a message on the complainant's answering machine stating, "[y]our girlfriend is a mean, ugly selfish [sic]."[37] The third count was another message left on the complainant's answering machine where defendant stated, Eddie I want to give you my number; even if you don't call me, I want you to have it."[38] The *Yablov* court

[29] *Price,* 178 Misc. 2d at 779, 683 N.Y.S.2d at 417. (N.Y. Crim Ct., New York County 1998).
[30] *Id.*
[31] *Id.*
[32] *Id.* at 781-82, 683 N.Y.S.2d at 420.
[33] *Miguez,* 147 Misc. 2d at 482, 556 N.Y.S.2d at 231.
[34] *Id.* at 483, 556 N.Y.S.2d at 232.
[35] *Id* at 483, 556 N.Y.S.2d at 232.
[36] *Id.*
[37] *Id.*
[38] *Miguez,* 147 Misc. 2d at 483, 556 N.Y.S.2d at 232.

concluded that in the absence of a communication and a specific threat, there was no aggravated harassment.[39]

The *Yablov* court held that the statements made by the defendant were ambiguous.[40] No specific statement was ever made which could be construed as an immediate threat of severe harm.[41] The phone calls did not "suggest a violence provoking or substantial injury-inflicting utterance."[42] Moreover, she did not state a time or place or what would happen to the complainant if they ran into each other.[43] Therefore, the court properly held that the statements were too vague to pose an immediate threat of physical harm to constitute harassment within the meaning of the penal statute."[44]

The New York State Constitutional protections with respect to freedom of speech parallel those of the Federal Constitution. The *Yablov* court's analysis relied mostly upon the New York State Constitution, but the outcome would have been the same under a Federal analysis. Both the State and Federal Constitutions forbid the government from passing any laws abridging the freedom of speech. The Federal Constitution's protection extends to "speech which does not present a clear and present danger,"[45] while the Court of Appeals, applying the New York State Constitution, would void or reconstruct the language of NYPL § 240.25 and similar statutes by "limiting its reach to constitutionally proscribable fighting words," thus excluding any questions about the vagueness and constitutionality of the statute.[46] However, the New York Constitution goes a step further by including that citizens are responsible for abusing that right and includes oral written and published speech as protected. Freedom of speech is a

[39] *Yablov*, 183 Misc. 2d at 886, 706 N.Y.S.2d at 595.
[40] *Id.* at 885, 706 N.Y.S.2d at 595.
[41] *Id.*
[42] *Id.* at 888, 706 N.Y.S. at 596.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Terminiello v. Chicago*, 33 U.S. at 4-5.
[47] People v. Dietz 75 N.Y.2d 47, 59, 549 N.E.2d 1166, 1174, 550 N.Y.S.2d 595, 603 (1989).

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highly valued freedom in a free society but, it is not an absolute freedom, as not all speech is protected.

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