Allen Gilbert, ACLU-VT, Testimony on H. 818, Stalking, March 9, 2016

My job often involves defending people who are offensive, angry or crude; people who are marginalized, maybe because of a disability or mental illness; and people who aren't polite and can be very direct – yet hold the same freedoms of speech and behavior as everyone else.

I field calls from people who think Donald Trump should be silenced, that Trump supporters should be silenced, that protestors protesting supporters of Trump should be silenced.

Clearly, words have impact. Expressive actions have impact. Sometimes even un-actions have impact. Burlington has been debating a mask ordinance; people are disturbed by people who are silent and want their anonymity preserved through the wearing of a mask.

In some ways, the spoken word, the digital word, and other forms of expression seemed to have gained greater power. Why is that? And why is there often also a corresponding desire to control words?

One of the most interesting opinions issued recently by the Vermont Supreme came last year in a case, *State v. Tracy*, about forbidden language. Justice Beth Robinson wrote the court's unanimous decision that overturned a lower court conviction of a man who used abusive language against his daughter's basketball coach.

Justice Robinson traced the U.S. Supreme Court's narrowing of speech that can be prohibited. In her recounting of such narrowing, Justice Robinson notes that today "children are admonished to 'use your words' rather than respond to anger and frustration by physically lashing out." She concludes this history by saying that if the "abusive or obscene language" section of the state's disorderly conduct statute "has any continuing force, it is necessarily exceedingly narrow in scope….The provision only reaches speech that, in the context in which it is uttered, is so inflammatory that it is akin to dropping a match into a pool of gasoline."

The regulation of speech between intimate partners or others is not the same as regulation of speech between Trump supporters and Trump detractors, or between an angry father and his daughter's basketball coach. But what *is* the same is the difficulty presented to the judiciary in determining who deserves what protection from which words or other expressive activity.

This determination is made more difficult when not just the action but also the effect of the allegedly noxious speech on the target must be judged.

If H. 818 passes in its current form (v. 4.1), it is almost certain that it will be challenged on constitutional grounds. The challenge will likely arise in these areas:

- The definition of stalking, particularly the addition of the provision that a person should have known the effect that his or her conduct would have on a person ("constructive knowledge").
- The provision that no express or overt threat is needed to establish that a threat was made.
- The definition of emotional distress. The definition relies on a subjective determination of whether significant mental suffering or distress occurred that required, or didn't require, medical or other professional treatment or counseling. We endorse the addition of a "trigger" consequence in the new sub-section (A) of the bill on page 2 at line 16, but the sub-section (B) consequence is over-broad and could likely apply to anyone who has experienced a range of unpleasantries ("detrimentally impacts a person's personal, family, or business affairs"). We note also that the definition of "emotional stress" in the 12 VSA 5131 section of the bill (page 2, beginning at line 13) differs from the definition in the 13 VSA 1061 section (page 8, line 12) of the bill; we do not understand why these would not be consistent.
- The removal of lack of intent to cause the victim fear or emotional distress in the defenses section (page 10, line 12).

Additionally, we prefer the language Judge Grearson has proposed for the definition of stalking, that there must be a course of conduct of "two or more acts over a period of time, however short, with a continuity of purpose, in which a person intentionally…." (page 2 of testimony) and later, "'Stalk' means to purposefully and intentionally engage in a course of conduct…." (page 4 of testimony).

We do not believe that "purposefully" and "intentionally" (or other forms of these words) are synonymous and that therefore one of the words can be excluded with no loss of meaning. "Purposefully" and "intentionally" have different meanings and are important in judging whether stalking conduct has occurred. "Purposefully" relates to the goal or purpose someone has in doing something while "intentionally" relates to the belief one has that taking a certain action will result in a certain result.

We are also concerned that some actions by people with developmental disabilities or facing mental health issues could be viewed as stalking when the action is a manifestation of their disability or mental health issue.

Finally, we note that H. 818 could run contrary to the legislature's goal of reducing the state's prison population. If more stalking protection orders are issued under the bill's broadened guidelines and the percentage of orders that are violated remains the same, more individuals will be incarcerated, resulting in increased corrections expenses. Additionally, the speech or behavior violation will result in a felony conviction on the violator's criminal record, a black mark that can have long-term adverse consequences.