



TO: Members of the House Committee on Judiciary
FROM: Jay Diaz, Staff Attorney / Public Advocate, ACLU of VT
DATE: April 13, 2016
SUBJECT: S. 154 (2016) – Section 2: Criminal Threatening

On behalf of the ACLU of Vermont, I submit my written testimony in opposition to S. 154.

S. 154's addition of the new crime of Criminal Threatening is unnecessary, duplicative, potentially unconstitutional, likely to disproportionately impact marginalized populations, and antithetical to Vermont's stated incarceration policy goals.

New Criminal Threats Statute

A. Duplicative, Unnecessary, and Expensive

Regarding the new Criminal Threats statute that S. 154 would create, the ACLU of Vermont believes the language is unnecessary and duplicative because it is already illegal to threaten another person under Vermont's disorderly conduct, aggravated disorderly conduct, and simple assault statutes. 13 V.S.A. §§ 1023, 1026, 1026a. Such incidents have even appeared before the Vermont Supreme Court. Moreover, the current statutes are already thoroughly enforced. Public Order cases, of which threatening disorderly conduct is included, make up the largest category of filing in Vermont's criminal courts.¹ Such incidents have even appeared before the Vermont Supreme Court.

B. Constitutional Challenges Should Be Expected

S. 154 is likely to be challenged as unconstitutional under the First Amendment because it is overly vague and does not require subjective intent to threaten. In *Virginia v. Black*, the Supreme Court of the United States said, "true threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. 359 (2003). Thus, a true threat can only be a statement made with the intent to threaten.

To avoid constitutional challenge, Vermont should return to the intent requirement of the originally proposed S. 154 to ensure that it will only criminalize those statements that are made with the intent to threaten. ACLU-VT's suggested language to S. 154's proposed 13 V.S.A. 1702(a) is as follows:

- (a) A person shall not by words or conduct knowingly, with the intent to place another person in immediate fear of death or serious bodily injury:
- (1) Threaten the other person with death or serious bodily injury; and
 - (2) As a result of the threat, place the other person in reasonable fear of death or serious bodily injury.

¹ See Criminal Division Statistics, attached to testimony (Page 10, DC – Chart 1)

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Please contact jdiaz@acluvt.org with questions or comments.

Statutes criminalizing threats have long raised free speech concerns, and therefore are heavily scrutinized by courts. While intentional threats against specific individuals are not protected speech under the First Amendment, courts have found that the speech or conduct must intentionally threaten another person to be banned. Vermont courts have specifically and repeatedly stated that hyperbolic statements and expressions of frustration are protected utterances. But, this new crime, without the suggested changes, will likely criminalize and chill such speech protected by the First Amendment. If it must pass, the bill's language should be amended as suggested in order to be in line with Vermont and U.S. Supreme Court precedents.²

C. Likely Disproportionate Impact on People of Color

The bill is likely to be particularly harmful to marginalized groups who are already disproportionately arrested and imprisoned in Vermont. Substantial research has conclusively demonstrated that although a white person and a person of color may do or say the same things, a person of color is more likely to *appear* threatening.³ In particular, research suggests that young African-American men are both implicitly and explicitly associated with threat in the minds of the general public, and are often misperceived, suspected, automatically evaluated, and misremembered as aggressors.⁴ Because persons of color are generally misperceived as more threatening, they will be unfairly and disproportionately charged under a law that further criminalizes perceived threatening behavior or words. Vermont should not propose a criminal statute that will have such an obviously discriminatory impact because it is based on the perceptions of others instead of the intent of the speaker.

D. Will Increase the Prison and Juvenile Delinquent Populations

Finally, a new criminal statute will not further Vermont's goal to reduce the prison and juvenile detention populations. The bill is particularly likely to be used against children, who often push boundaries with their use of language and idle threats, particularly with court-appointed service providers. As is well known, criminalizing childhood behavior leads children down the path to prison and poverty. Vermont should avoid increasing the chances for such possibilities.

Conclusion

In conclusion, the courts have made clear that the 1st Amendment affords people the right to zealously, hyperbolically, and even aggressively advocate their positions on any topic. Any statute that criminalizes speech and expressive conduct should be narrowly tailored to ensure that it does not criminalize or chill protected speech. The bill's current language is far too broad and likely to inspire unconstitutional arrests and prosecutions.

The bill should be opposed or significantly narrowed as suggested above.

Thank you for the opportunity to testify and provide written comment on this proposed legislation.

² See *State v. Albarelli*, 189 Vt. 293 (2011); *Virginia v. Black*, 538 U.S. 343 (2003).

³ Shapiro, et. al., Following in the Wake of Anger: When Not Discriminating is Discriminating, *Pers. Social Psychology Bull*, Vol. 35 No. 10, 1356-1367 (2009)(<http://psp.sagepub.com/content/35/10/1356>); See also, <http://www.psmag.com/business-economics/black-male-faces-3571>

⁴ Trawalter, et. al., *Attending to Threat: Race-based Patterns of Selective Attention*, *Journal of Exp. Social Psychology*, Volume 44(5), 1322-1327 (2008)(<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2633407/>)

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