

16A Am. Jur. 2d Constitutional Law § 527

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Constitutional Law

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IX. Fundamental Rights and Privileges
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§ 527. Threats; terroristic threats

West's Key Number Digest

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[Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949](#)

[Validity, Construction, and Application of 18 U.S.C.A. § 879, Prohibiting Threats Against Former Presidents or Vice Presidents and Major Candidates for Such Offices, Members of Their Immediate Families, Members of Immediate Families of Presidents-Elect and Vice Presidents-Elect, and Certain Others Protected by Secret Service, 69 A.L.R. Fed. 2d 151](#)

[Validity, construction, and application of 18 U.S.C.A. sec. 875\(c\), prohibiting transmission in interstate commerce of any communication containing any threat to kidnap any person or any threat to injure the person of another, 34 A.L.R. Fed. 785](#)

Law Reviews and Other Periodicals

[Mason, Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty about the Constitutional Test for True Threats, 41 Sw. L. Rev. 43 \(2011\)](#)

[Romney, Eliminating the Subjective Intent Requirement for True Threats in United States v. Bagdasarian, 2012 B.Y.U. L. Rev. 639 \(2012\)](#)

The First Amendment free speech protections do not extend to certain types of speech, such as "true threats," because such speech is of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.¹ Stated somewhat differently, some categories of speech are likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest, and these categories include "true threats," which the states, consistent with the First Amendment, may prohibit.² A statement qualifies as a "true threat," unprotected by the First Amendment, if it is a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.³ A "true threat" is an expression of an intention to inflict evil, injury,

or damage on another and such speech receives no First Amendment protection.⁴ The First Amendment does not protect a "true threat," meaning a statement that a reasonable recipient would interpret as a serious expression of an intent to harm or cause injury to another.⁵ The First Amendment permits a state to ban "true threats," and the speaker need not actually intend to carry out the threat; rather, the prohibition on true threats protects individuals from fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.⁶ For First Amendment purposes, in the context of a threat of physical violence, whether a particular statement may properly be considered to be a threat is governed by an objective standard, that is, whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of the intent to harm or assault.⁷ A true threat, where a reasonable person would foresee that the listener will believe he or she will be subject to physical violence upon his or her person, is not protected by the First Amendment.⁸ A "threat," which is not protected speech under the free speech provision of the Constitution, instills in the addressee a fear of imminent and serious personal violence from the speaker, it is unequivocal, and it is objectively likely to be followed by unlawful acts; it excludes the kind of hyperbole, rhetorical excesses, and impotent expressions of anger or frustration that in some contexts can be privileged even if they alarm the addressee.⁹ Thus, the alleged threats and racial slurs made by a minor to the victim on a school bus, namely, calling the victim racial and gender-based epithets, threatening to shoot the victim because of her race, and threatening to punch the victim in the face, did not constitute protected speech under the First Amendment; in addition to threatening physical harm, the language was so personally and racially offensive that it was likely to provoke the average person to retaliation and thereby cause a breach of the peace.¹⁰

A state statute prohibiting the release of the residential address, telephone number, and other personal information of law enforcement officers and court employees with intent to harm or intimidate does not proscribe the "true threats" unprotected by the First Amendment where the term "threat" did not appear in the statute, and disclosing and publishing information obtained elsewhere are precisely the types of speech protected by the First Amendment.¹¹

A state statute does not violate the First Amendment insofar as it bans cross burning with intent to intimidate where the statute does not single out for opprobrium only that speech directed toward one of several specified disfavored topics, and the regulation of cross burning, rather than all the intimidating messages, is permissible, as cross burning is a particularly virulent form of intimidation that has a long and pernicious history as a signal of impending violence.¹²

Observation:

The Freedom of Access to Clinic Entrances Act, prohibiting the blocking of entrances to clinics providing reproductive services and counseling, does not directly apply to speech but rather prohibits three types of conduct, namely, the use of force, the threat of force, and physical obstruction, which are not protected by the First Amendment.¹³

Statutes punishing "terroristic threats" or acts have been sustained as not violative of the First Amendment right to free speech.¹⁴

While the government may outlaw threats, the First Amendment does not permit the government to punish speech merely because the speech is forceful or aggressive, since what is offensive to some is passionate to others.¹⁵ However, a statute may criminalize threats without violating the First Amendment, even without a requirement of immediacy or imminence, if it includes a requirement of specific intent and a present or apparent ability to carry out the threat.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

In distinguishing between true threats and protected speech, a court asks whether those who hear or read the threat reasonably consider that an actual threat has been made; it is not necessary to show that a defendant intended to or had the ability to actually carry out the threat. [U.S.C.A. Const.Amend. 1. U.S. v. Wheeler, 776 F.3d 736 \(10th Cir. 2015\)](#).

Statements which are made in jest, or communicated to a large audience, or political in nature, or conditioned on an event that would never happen are statements more likely to be found to be speech protected by the First Amendment rather than a true threat; whether a statement is made anonymously may, depending on the circumstances of the case, increase or decrease the likelihood that a reasonable listener would infer the existence of a true threat. [U.S.C.A. Const.Amend. 1. U.S. v. Dillard, 835 F. Supp. 2d 1120 \(D. Kan. 2011\)](#).

A threat that may cause a fear of economic loss, of unfavorable publicity, or of defeat at the ballot box is not a "true threat" that may be prohibited as civil "harassment." [U.S.C.A. Const.Amend. 1; M.G.L.A. Const. Pt. 1, Art. 16; M.G.L.A. c. 258E, § 1. O'Brien v. Borowski, 461 Mass. 415, 961 N.E.2d 547 \(2012\)](#).

Threats-to-kill provision of harassment statute is construed in light of the First Amendment to reach only true threats and therefore to require proof that defendant was at least negligent as to his threats' effect on listeners, i.e., that a reasonable person in the defendant's position would foresee that his statements or acts would be interpreted as a serious expression of intention to carry out the threat. [U.S.C.A. Const.Amend. 1; West's RCWA 9A.46.020\(1\)\(a\)\(i\), \(1\)\(b\), \(2\)\(b\)\(ii\). State v. Schaler, 236 P.3d 858 \(Wash. 2010\)](#).

[END OF SUPPLEMENT]

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AMJUR CONSTLAW § 527

Footnotes

- 1 [Levin v. United Airlines, 158 Cal. App. 4th 1002, 70 Cal. Rptr. 3d 535 \(2d Dist. 2008\)](#), as modified, (Jan. 14, 2008) and review denied, (Apr. 9, 2008).
True threats against flight attendant were not protected by the First Amendment. [U.S. v. Persing, 318 Fed. Appx. 152 \(4th Cir. 2008\)](#), cert. denied, 129 S. Ct. 1655, 173 L. Ed. 2d 1026 (2009).
A conviction for threatening a federal agent does not violate a defendant's First Amendment rights, inasmuch as a true threat is not protected by the First Amendment. [U.S. v. Fulmer, 108 F.3d 1486, 46 Fed. R. Evid. Serv. 411 \(1st Cir. 1997\)](#).
- 2 [In re Robert T., 307 Wis. 2d 488, 2008 WI App 22, 746 N.W.2d 564 \(Ct. App. 2008\)](#).
- 3 [Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 \(2003\)](#); [U.S. v. Parr, 545 F.3d 491 \(7th Cir. 2008\)](#), cert. denied, 129 S. Ct. 1984, 173 L. Ed. 2d 1083 (2009); [Corales v. Bennett, 567 F.3d 554, 244 Ed. Law Rep. 1045 \(9th Cir. 2009\)](#); [Levin v. United Airlines, 158 Cal. App. 4th 1002, 70 Cal. Rptr. 3d 535 \(2d Dist. 2008\)](#), as modified, (Jan. 14, 2008) and review denied, (Apr. 9, 2008).
- 4 [Corales v. Bennett, 567 F.3d 554, 244 Ed. Law Rep. 1045 \(9th Cir. 2009\)](#); [Fogel v. Collins, 531 F.3d 824 \(9th Cir. 2008\)](#).
- 5 [U.S. v. Jongewaard, 567 F.3d 336 \(8th Cir. 2009\)](#); [Riehm v. Engelking, 538 F.3d 952, 236 Ed. Law Rep. 65 \(8th Cir. 2008\)](#); [Fogel v. Collins, 531 F.3d 824 \(9th Cir. 2008\)](#).
- 6 [Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 \(2003\)](#).
- 7 [State v. Cook, 287 Conn. 237, 947 A.2d 307 \(2008\)](#), cert. denied, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008).
- 8 [State v. Cook, 287 Conn. 237, 947 A.2d 307 \(2008\)](#), cert. denied, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008).
- 9 [Goodness v. Beckham, 224 Or. App. 565, 198 P.3d 980 \(2008\)](#).
- 10 [In re Shane EE., 48 A.D.3d 946, 851 N.Y.S.2d 711 \(3d Dep't 2008\)](#).
- 11 [Sheehan v. Gregoire, 272 F. Supp. 2d 1135 \(W.D. Wash. 2003\)](#).
- 12 [Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 \(2003\)](#).
- 13 [Norton v. Ashcroft, 298 F.3d 547, 2002 FED App. 0257P \(6th Cir. 2002\)](#).
- 14 [Masson v. Slaton, 320 F. Supp. 669 \(N.D. Ga. 1970\)](#); [Lanthrip v. State, 235 Ga. 10, 218 S.E.2d 771 \(1975\)](#).

15 U.S. v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996).

16 People v. Dunkle, 36 Cal. 4th 861, 32 Cal. Rptr. 3d 23, 116 P.3d 494 (2005) (disapproved of on other grounds by, People v. Doolin, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209, 198 P.3d 11 (2009)).

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