Vermont's Criminal Statutes & Threatening Speech

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Vermont's Criminal Statutes & Threats

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Part I:
Executive Summary

VERMONT'S CRIMINAL STATUTES & THREATS

Executive Summary

Introduction:

- The current political environment (i.e. post-January 6, 2021) is volatile, with **a perfect storm** of intense partisanship, discontent over pandemic mitigation measures, and proliferation of social media and other platforms allowing for relative anonymity leading to **a greater threat environment**.

- Significant publicity of threats made to the Secretary of State's Office, and to local boards/municipal bodies around the State have been well documented – and has led to re-evaluation of Vermont's laws.

- **Vermont's current laws addressing threats leave gaps** between the ability to prosecute and the limits of such action set by the U.S. Constitution and Vermont Constitution. Put another way, current statutes leave gaps between enforceability and constitutional limits.

Key Considerations:

- U.S. Constitution and Vermont Constitution provide **broad protections for speech** – only "true threats" can be subject to criminal liability in this context.
- Important to note the distinction between **threatening *behavior*** versus **threatening *words***.
- Vermont has multiple statutes that address threats – by words, by conduct, or both – however, gaps remain. Some laws (e.g. false public alarms) place focus on the harm/societal impact.
- Under existing law, frequent challenges arise when prosecuting verbal "threats" that are:
  - Not directed at a particular person;
  - Conditional or indirect in their nature (e.g. "if you don't do as I wish, there will be hell to pay");
  - Limited to destruction of property, damage to reputation, or bodily harm (versus SBI or death);
  - Absence of imminence or immediacy, or current affirmative defense in criminal threatening.

Department of State's Attorneys and Sheriffs

VERMONT'S CRIMINAL STATUTES & THREATS

Executive Summary

Scope of Statutes:

	Basis of Criminal Liability				Nature of Threat / Fear			
Offense	**Words**	**Conduct**	**Presence Required**	**Third Party or Group**	**Bodily Injury**	**Death or SBI**	**Property**	**Affirmative Defense**
Disorderly Conduct	No*	Yes	Yes	Yes	Yes	Yes	Maybe	No
Agg. Disorderly Conduct	No*	Yes	Yes	No	Yes	Yes	Maybe	No
Dist. Peace by Phone, etc.	Yes	Yes**	No	Yes	Yes	Yes	Yes	No
Criminal Threatening	Yes	Yes	No	**No**	**No**	Yes	**No**	**Yes**
Agg. Assault Threat w/ Wpn	No^	Yes	Yes	No	No	Yes	No	No
False Public Alarms	No^	Yes	No	Yes	No	Yes	Yes	No

* The Vermont Supreme Court has substantially limited scope of "abusive and obscene" language under 13 V.S.A. §§ 1026(a)(3) & 1026a(a)(3)
** Repeated calls (with no actual communication/conversation) provides a basis for charging on the basis of conduct alone.
^ Intent element of offense may include words, but offense requires conduct.

- Criminal threatening may be based on words or conduct, but the scope is limited to the person receiving the threat, and there must be reasonable apprehension of death or serious bodily injury.
- Affirmative defense, once raised, requires State to prove that the person had the ability to carry out the threat at the time it was made.

Understanding "True Threats" under *Virginia v. Black*, 538 U.S. 343, 359 (2003):

- The U.S. Supreme Court has said that 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**." The Vermont Supreme Court follows this standard.

- However, the speaker need not actually intend to carry out the threat because the "**prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders**, in addition to protecting people from the possibility that the threatened violence will occur."

- *Watts v. United States*, 394 U.S. 705, 707-08 (1969) recognized that "[w]hat is a threat must be distinguished from what is constitutionally protected speech," and holding **political hyperbole is not "true threat"**. The U.S. Supreme Court concluded that the statement "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J."—was "political hyperbole" rather than a true threat. … The Court described defendant's statement as "**a kind of very crude offensive method of stating a political opposition** to the President."

Factors in determining a "True Threat:"

1. Serious expression?
2. Intent to commit unlawful violence?
3. Element of volition?
4. Gravity of purpose?
5. Likelihood of execution?

Finally, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing **imminent lawless action** and is likely to incite or produce such action."

- *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)

Excepts from November/December 2020 SoS Incidents

Message #1 – November 22, 2020 :

- "You guys are going to be in trouble … hope you all go to jail …" "For seditious treason, you cheating cocksuckers."

Message #2 – December 1, 2020:

- "You understand that all **you cheating bastards is the reason the firing squad was brought back**." The caller then describes other methods of capital punishment.

- "**If you are a cheating bastard**, regard this message with absolute terror." The caller then makes reference to conspiracy theory based assertions that Gina Haspell, Director of the Central Intelligence Agency (CIA) is in custody, and that President-Elect Joseph Biden is wearing an ankle bracelet (implying arrest, and monitoring by GPS).

- "Your days are numbered of cheating … destroying our fucking country. **People are going to come for you. By that I mean the authorities**."

Excepts from November/December 2020 SoS Incidents

Message #3 – December 1, 2020:

- "This is a general message for the general government of Vermont. All of you cocksuckers who are guilty of trying to cheat this fucking election, **you are going to pay, you are going to pay**." References to Gina Haspell are again made, and later to methods of imposing the death penalty.

- "You cocksuckers are done. **This might be a good time to put a pistol in your fucking mouth and pull the trigger if you are any part of this fucking fraud**. Do you understand?" … "If you motherfuckers are in on that shit, let me tell you what, your days are fucking numbered, I know some of you cocksuckers are in on it, so everybody else please disregard this message."

- "But listen, you dirty cocksuckers your days are fucking numbered. You can run and you can't fucking hide. You might as well put a gun in your mouth and suck on…"

Analysis of November/December 2020 SoS Incidents

- Do these statements amount to a "true threat?"

    1. Caller does not indicate he would do anything himself – evidence of volition or likelihood of execution?
    2. References to "the authorities" as taking action – evidence of unlawful violence?
    3. Is telling someone to kill themself a threat?
    4. Sufficient particularity as to threat against a person or discrete group of persons?
    5. Political hyperbole as defined in *Watts v. United States*, 394 U.S. 705 (1969)?

- If criminal threatening, could the State overcome **affirmative defense**?

- If disturbing the peace by phone, could extradition be effectuated for a misdemeanor punishable by three months imprisonment on an out of state caller/offender? Most likely no.

- Limits on prosecutor's ability to obtain search warrants or subpoenas if there is insufficient evidence of a crime – **V.R.Cr.P 41 standard** applicable.

- Key takeaway: proposed changes in S.265/H.513 and S.230 would not change legal standard or in anyway modify what is "protected speech." **Even if adopted, the State still could not charge this conduct**.

Part II:
Review of Proposed Bills / Other Considerations

S.265 / H.513 - Proposal to Modify 13 V.S.A. § 1702 by:

- Expanding scope of criminal liability to include groups, not just "another person."
- Establishing that reasonable apprehension of death or serious bodily injury may be directed toward "the other person, a person in the group of persons, or any other person."

  For example, threatening to harm someone's partner or child.

- Creates felony enhancement when threatened action will occur at a public accommodation.

Comments:

S. 265 & H.513 propose positive changes – none of which change or modify the Constitional protections available to Vermonters. Consideration of expanding facilities subject to enhancement is appropriate (e.g. Statehouse, state office buildings, places of worship, etc.).

See also discussion of Model Penal Code § 211.3. Terroristic Threats.

S. 230 - Proposal to Modify 13 V.S.A. § 1702 by:

- Creates felony enhancement when alleged victim is an "election official," "public employee," or "public servant."

Comments:

S. 230 proposes an enhancement for the persons noted above – the enhancement recognizes the aggravating factor that threats to these individuals may inhibit or impair the full and unfettered discharge of their duties – i.e. there is significant risk that threats will disrupt government operations. As a felony, collateral consequence of Brady disqualification is possible.

Although not set forth in statute, 13 V.S.A. § 1455 provides for enhancement of criminal threatening to a 2-year misdemeanor offense when such threatening is hate motivated.

See also discussion of Model Penal Code § 240.2. Threats and Other Improper Influence in Official and Political Matters.

§ 240.2. Threats and Other Improper Influence in Official and Political Matters.

(1) Offenses Defined. A person commits an offense if he:

(a) threatens unlawful harm to any person with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or

(b) threatens harm to any public servant with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion in a **judicial or administrative proceeding**; or

(c) threatens harm to any public servant or party official with purpose to influence him to **violate his known legal duty**; or

(d) privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, entreaty, argument or other communication with purpose **to influence the outcome on the basis of considerations other than those authorized by law**.

It is no defense to prosecution under this Section that a person whom the actor sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

§ 211.3. Terroristic Threats.

A person is guilty of a felony of the third degree if he **threatens to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience**, or in reckless disregard of the risk of causing such terror or inconvenience.

Discussion of S.265/H.513 & S.530 & Model Penal Code Provisions.

- S.265/H.513 integrate and **account for threats that cause disruptions to groups or public spaces** and recognizes harm from such threats (see also false public alarms).

- S.230 creates an enhancement for threats directed toward election officials, public officials, and public servants – but **criminal liability remains contingent on whether or not there is a "true threat."**

- The Model Penal Code § 240.2(d) **appears to inject a "behavior" or "conduct" element, which doesn't require a threat of harm** – which could allow for something less than a "true threat" to give rise to criminal liability (depending on the meaning of the term "threaten harm") – akin to an obstruction of justice or false public alarms situations.

- The broad nature of such term could include threats to property, reputation, etc. In plain terms, the **desire to unlawfully influence actions of government actions is the crime**, with any words communicated **relevant to intent** – much the same as in the context of the treatment of "threatening behavior" under disorderly or aggravated disorderly conduct.

Part III:
Review of Statutes & Legal Standards

13 V.S.A. § 1026. Disorderly conduct

(a) A person is guilty of disorderly conduct if he or she, with intent to cause **public inconvenience or annoyance**, or recklessly creates a risk thereof:

(1) engages in fighting or in violent, tumultuous, or **threatening behavior**; …

(3) in a public place, uses **abusive or obscene language**;

(4) without lawful authority, **disturbs any lawful assembly** or meeting of persons; or …

Punishment: imprisoned not more than 60 days or fined not more than $500.00, or both.

13 V.S.A. § 1026. Disorderly conduct (notes)

- The term public means that the area was open to common or general use, or that the conduct complained of affected the persons present at a particular place. An inconvenience or annoyance is an act which harasses, bothers, irritates or disturbs another person.

- Abusive language means coarse, insulting words... and they must be "fighting words" which are likely to incite an immediate breach of the peace. Caselaw substantially limits use of 1026(a)(3):

  "[I]f § 1026(a)(3) has any continuing force, it is necessarily exceedingly narrow in scope. **The use of foul language and vulgar insults is insufficient**. **A likelihood of arousing animosity or inflaming anger is insufficient**. The likelihood that the listener will feel an impulse to respond angrily or even forcefully is insufficient. 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**."

  State v. Tracy, 2015 VT 111, ¶ 38, 200 Vt. 216, 237 (2015)

13 V.S.A. § 1026a. Aggravated Disorderly conduct

(a) A person is guilty of aggravated disorderly conduct if he or she engages in **a course of conduct** directed **at a specific person with the intent to cause the person inconvenience or annoyance**, or to disturb the person's peace, quiet, or right of privacy and:

(1) engages in fighting or in violent, tumultuous, or **threatening behavior**;

(2) makes unreasonable noise;

(3) in a public place, uses abusive or obscene language; or

(4) **threatens bodily injury or serious bodily injury**, or threatens to commit a felony crime of violence as defined in section 11a of this title.

Punishment: imprisoned not more than 180 days or fined not more than $2,000.00, or both.

13 V.S.A. § 1026a. Aggravated disorderly conduct (notes)

- Offense requires actions/intent directed at a specific person, rather than the public generally, or a group/class of people. Offense contemplates offenses in presence of person, not by phone or electronic means.

- The term "course of conduct" is defined under 13 V.S.A. § 1021(b) as "a pattern of conduct composed of two or more acts over a period of time, however short, evidencing a continuity of purpose. **Constitutionally protected activity is not included** within the meaning of 'course of conduct.'"

- Reference to 13 V.S.A. § 11a is out of date, as that section was repealed in 2019.

13 V.S.A. § 1027. Disturbing peace by use of telephone or other electronic communications

(a) A person who, with **intent to terrify, intimidate, threaten, harass, or annoy**, makes contact by means of a telephonic or other electronic communication with another and … **threatens to inflict injury or physical harm to the person or property of any person**; or disturbs, or attempts to disturb, by repeated telephone calls or other electronic communications, whether or not conversation ensues, the peace, quiet, or right of privacy of any person at the place where the communication or communications are received…

(b) An intent to terrify, threaten, harass, or annoy may be inferred by the trier of fact from the … making of a threat or statement or repeated telephone calls or other electronic communications as set forth in this section and any trial court may in its discretion include a statement to this effect in its jury charge.

Punishment: imprisoned not more than three months or fined not more than $250.00, or both.

13 V.S.A. § 1027. Disturbing peace by use of telephone or other electronic communications (notes)

- Intent is measured at the time the communication is made, and the statute is focused on conduct, not speech (hence the critical role of the intent element):

  "[T]he plain meaning of the statutory language, like the statute's legislative history, indicates that intent should be measured at the time the person telephones. Accordingly, **we hold that the intent element of § 1027(a) is measured at the time the telephone call is made**."

  "[C]ourts have responded to overbreadth challenges by holding that the **statutes proscribe conduct rather than speech**. … By specifying the intent with which the call must be made and the nature of the language prohibited, the statute clearly demonstrates that **the prohibited activities find no protection under the First Amendment** [and] [w]e cannot conceive that the State is abridging anyone's First Amendment freedom by prohibiting telephone calls … that threaten physical harm, provided such calls are made with the intent specified in the statute."

  State v. Wilcox, 160 Vt. 271, 274-275 (1993)

13 V.S.A. § 1702. Criminal threatening

(a) A person shall not by words or conduct knowingly:

(1) **threaten another person**; and
(2) as a result of the threat, place the other person in **reasonable apprehension of death or serious bodily injury**. …

(d) As used in this section:

(1) "Serious bodily injury" shall have the same meaning as in section 1021 of this title.
(2) "Threat" and "threaten" **shall not include constitutionally protected activity**. …

(f) It shall be an affirmative defense to a charge under this section that the person **did not have the ability to carry out the threat**. The burden shall be on the defendant to prove the affirmative defense by a preponderance of the evidence.

Punishment: not more than one year or fined not more than $1,000.00, or both.

13 V.S.A. § 1702. Criminal threatening (notes)

- Vermont Supreme Court has included that criminal threatening may only punish constitutionally unprotected **"true threats."** *State v. Read*, 165 Vt. 141, 146 (1996) provides that the Court "**is obligated to narrow and limit the statute** [punishing speech] in light of the protections guaranteed by the United States and Vermont constitutions.").

- The U.S. Supreme Court has said that 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**." *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). However, the speaker need not actually intend to carry out the threat because the "**prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders**, in addition to protecting people from the possibility that the threatened violence will occur." *Id.*

13 V.S.A. § 1751. False alarms to agencies of public safety

(a) A person who willfully or knowingly gives, or aids or abets in giving, by any means **any false alarm of fire or other emergency to be transmitted** to or within any organization, official or volunteer, for dealing with emergencies involving danger to life or property shall be imprisoned for not more than one year or fined not more than $1,000.00, or both.

13 V.S.A. § 1753. False public alarms

(a) A person who initiates or willfully circulates or **transmits a report or warning of an impending bombing or other offense or catastrophe**, knowing that the report or warning is false or baseless and that it is likely to cause evacuation of a building, place of assembly, or facility of public transport, or to cause public inconvenience or alarm, shall, for the first offense, be imprisoned for not more than two years or fined not more than $5,000.00, or both.

In these offenses, the "willful" action, not the specific speech is the basis of criminal liability.

Assessing "True Threats" – from *State v. Blanchard*, 2021 VT 13, ¶¶ 8-22

- "We evaluate whether speech rises to the level of a true threat objectively—that is, **whether an ordinary, reasonable person familiar with the context of the communication would interpret it as a threat of injury**." In conducting this analysis, we must consider the context of the speech and the circumstances of the parties involved. …

- "[T]his Court has **rejected the argument that speech must be 'unequivocal, unconditional, immediate and specific**' to qualify as a true threat. … see also United States v. Turner, 720 F.3d 411, 424 (2d Cir. 2013) (" 'A threat of violence does not need to be imminent so long as it conveys a **gravity of purpose and likelihood of execution**.'").

- *Watts v. United States*, 394 U.S. 705, 707-08 (1969) recognized that "[w]hat is a threat must be distinguished from what is constitutionally protected speech," and holding **political hyperbole is not "true threat"**. The U.S. Supreme Court concluded that the statement "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J."—was "political hyperbole" rather than a true threat. … The Court described defendant's statement as "**a kind of very crude offensive method of stating a political opposition** to the President."

Assessing "True Threats"

- "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)

Analysis of *State v. Schenk*, 207 Vt. 423 (2018)

- Disorderly conduct "is really 'a criminal **public nuisance statute**.' This is shown by the statute's element of 'public inconvenience, or annoyance,' the statute's placement in the chapter on 'Breach of the Peace; Disturbances,' 13 V.S.A. ch. 19, and the name of the crime as 'Disorderly conduct.' Thus, **the statute's intent is less about protecting individuals from threats and more about protecting the public from breaches of the public order** caused by threats."

- "Our point is that a construction of § 1026(a)(1) that **limits the statute's coverage to threatening conduct and doesn't cover threatening speech** does not leave our law without a crime for speech that threatens personal violence. Indeed, the Legislature may have enacted § 1702 based on a concern that the disorderly conduct statute would not prohibit pure speech. Thus, **§ 1702 specifically addresses threatening speech and acknowledges that such a crime can extend only as far as the First Amendment allows**. The presence of this statute is an indication that 'threatening behavior,' as criminalized in § 1026(a)(1) should not extend to threatening speech.

Analysis of *State v. Schenk*, 207 Vt. 423 (2018) (continued)

- "We clarify …that **speech can be relevant to explain whether threatening behavior has occurred but only where the behavior is physical conduct and not speech**."

- **"[T]hreatening behavior [cannot] be composed of fighting words** despite the fact that the behavior is uttering speech."

- "Even if defendant's speech contained a true threat, it would not violate the [the disorderly conduct statute]. In reaching this conclusion, **we do recognize that any communication from the Ku Klux Klan complete with symbols of the Klan, particularly the burning cross, would raise concern and fear in a reasonable person who is a member of an ethnic or racial minority**. We are not ruling today whether the Legislature can make criminal such action or has done so in a different statute. Our ruling today is only that defendant's conduct does not violate the specific statute under which he was charged, 13 V.S.A. § 1026(a)(1)."

Other examples where Vermont Supreme Court limited scope of "threatening behavior"

- *State v. Johnstone*, 194 Vt. 230 (2013): defendant did not violate a probation condition by telling his girlfriend that his probation officer was going to "end up in a body bag" because there was **no evidence that the defendant knew the probation officer was in earshot**. The Court "acknowledged that the **statements were menacing** but concluded that there was **no evidence that the defendant intended to put his probation officer in fear of harm** or to convey an intent to harm her."

- *State v. Sanville*, 189 Vt. 626 (2011): defendant quarreled with his landlord, at times suggesting he would destroy or damage a mobile home, and on at least one occasion, said he was going "to kick [landlord and her husband's] butts." At no time did the defendant approach or make a physical gesture towards the landlord. The court described the **defendant's conduct as "mouthy and obnoxious,"** and reversed the revocation of the defendant's probation on the ground that the probation condition prohibiting "violent or threatening behavior" did not give the defendant adequate notice that the described conduct would constitute a violation.

Examples where Vermont Supreme Court limited scope of "threatening behavior"

- *State v. Albarelli,* 189 Vt. 293 (2011): defendant approached a voter registration table, began ranting about the Obama candidacy loudly with his hands in his pockets or arms crossed, and would not leave when a volunteer asked him to. Court overturned the defendant's conviction for threatening behavior under the disorderly conduct statute because, among other things, the defendant **did not direct his threats against anyone [in particular]**, threaten to touch anyone, use profanity or abusive language, **or convey any intent to harm another person**.