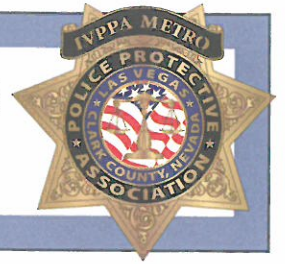


Las Vegas Police Protective Association Metro, Inc.



To: LVPPA Members
From: David Roger, General Counsel *DR*
Re: First Amendment and Threats to Police
Date: January 8, 2015

Anti-police rhetoric is becoming common in many communities. This memo will analyze the types of speech excluded from the protections of the First Amendment.

The courts have traditionally given citizens great latitude in criticizing law enforcement. "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 463, 107 S.Ct. 2502, 2510 (1987).

However, the protections of the First Amendment do not encompass certain categories of speech. *Virginia v. Black*, 538 U.S. 343, 358, 123 S.Ct. 1536, 1547 (2003).

For example, the court has held that speech that is, "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" is not constitutionally protected. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827 (1969).

Additionally, the First Amendment does not protect “true threats.” *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399 (1969). “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 speaker need not actually intend to carry out the threat.” *Virginia v. Black*, 538 U.S. at 360.

The Ninth Circuit Court of Appeals has struggled to define “true threats.” In *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990), the court applied an objective test to analyze a “true threat.” The court explained the standard is whether a reasonable person would foresee that their statement would cause people to believe the expressions were threats to injure them. The court later added that courts must examine the context of the threatening statement. *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

Subsequently, the court held that in “true threat” cases, the speaker must subjectively intend to threaten the individual. *United States v. Bagdasarian*, 652 F.3d 1113, 1117-18 (9th Cir. 2011). Most recently, the court analyzed a threat under both standards. *U.S. v. Keyser*, 704 F.3d 631 (2012). Practically, a true threat will usually satisfy both objective and subjective standards.

The following cases are examples of how the courts have viewed true threats:

- *U.S. v. Keyser*, Defendant’s convictions for threatening people by mailing packets of sugar, labeled “Anthrax” affirmed.
- *U.S. v. Dinwiddie*,¹ True threat found when a Pro-Life advocate sent over 50 messages to an abortion clinic director including, “Robert, remember Dr. Gunn... This could happen to you... Whoever sheds man’s blood, by man his blood shall be shed.”

- *NAACP V. Claiborne Hardware*ⁱⁱ, statement, “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck” was protected by the First Amendment.
- *Bauer v. Sampson*,ⁱⁱⁱ College professor’s statement, “I, for one, have etched the name... and others of her ilk on my permanent shit list, a two-ton slate of polished granite which I hope to someday drop in [the new college president’s] head” was protected speech.
- *Fogel v. Collins*,^{iv} Defendant found to be exercising his First Amendment rights by posting the following message on his car: I AM A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST! PULL ME OVER! PLEASE, I DARE YA. ALLAH PRAISE THE PATRIOT ACT...FUCKING JIHAD ON THE FIRST AMENDMENT! P.S. W.O.M.D. ON BOARD!”

ⁱ 76 F.3d 913, 925 (8th Cir. 1996)

ⁱⁱ 458 U.S. 886, 102 S.Ct. 3409 (1982).

ⁱⁱⁱ 261 F.3d 775 (9th Cir. 2001)

^{iv} 531 F.3d 824 (9th Cir. 2008)