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►◄ Dean Trebesch, Maricopa County Public Defender ►◄

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Cross Examination/Bias and Motive Part II

By Russ Born
Training Director

In the June 2000 issue of *for The Defense*, part one of this article explained how courts of review closely scrutinize issues relating to bias and motive. It was noted that close scrutiny is warranted because the bias/motive inquiry is a Sixth Amendment confrontation issue, not governed by the rules of evidence that deal with impeachment. The second part of this article will explore other relevant areas for the bias and motive inquiry.

Accomplice, Co-Defendant, Informant (Cont.)

Penalty

State v. Melendez 121 Ariz. 1, 588 P.2d 294 (1978)

Melendez was found guilty of first-degree murder. The trial court refused to allow cross-examination which would elicit facts showing that a testifying witness was escaping the possibility of receiving the death penalty or life imprisonment. The Arizona Supreme Court reversed, holding that the cross-examination was unduly restricted and the jury

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When Is A Threat A "True Threat"?
Issues Raised by Statutes Prohibiting "Threatening"

By Vincent Troiano, Vicki Liszewski, and Theresa Armendarez
Defender Attorneys – SEF Juvenile

"I'm going home to get my mom's gun and I'm coming back to school to shoot you, teacher!"

For making this statement, your juvenile client is charged with threatening or intimidating, a class one misdemeanor under A.R.S. § 13-1202, or interference with or disruption of an educational institution, a class six felony under A.R.S. § 13-2911. But the juvenile's mother has no gun and has never owned a gun. In fact, the juvenile lives in a group home and does not even know where his mother is. Will this information get the petition dismissed? Don't count on it.

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When Is A Threat A "True Threat"?

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Both of these statutes prohibiting threats raise significant constitutional issues.

The first question is, when is a threat a "true threat?" In part, A.R.S. § 13-1202(A)(1) provides:

A. A person commits threatening or intimidating if such person threatens or intimidates by word or conduct:
1. To cause physical injury to another person or serious damage to the property of another . . .

Certainly the lack of any requirement of any degree of *mens rea* stands out. There is no language that refers to the mental state of the perpetrator. As we all know, the statutes that refer to intentional conduct all too often also allow lesser standards to suffice to criminalize human activity. Language such as "knowingly" and the even more amorphous "with reckless disregard" are used to criminalize human conduct. Perhaps A.R.S. § 13-1202 is a preview of future trends to finally reach the bottom of the evidentiary barrel and attempt to prohibit *malum in se conduct* as if it were *malum prohibitum*.

Crimes are generally categorized as either *malum in se* or *malum prohibitum*.

> "…An act is said to be *malum in se* when it is inherently and essentially evil, that is immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state. . . ." 2 Black's Law Dictionary 959 (6th Ed. 1990)

Malum Prohibitum is an act "… not inherently immoral, but becomes so because its commission is expressly forbidden by positive law … ." *Id.* at 960.

Similar to assault, threatening to cause physical injury to another arguably falls most appropriately within the classification of a *malum in se* crime. Therefore, the lack of any specific reference to a degree of *mens rea* causes concern and it may be argued that the statute is overbroad.

Additionally, the statute lacks the structure of language defining the effect of the conduct on a reasonable person. Language referring to conduct that threatens or intimidates when only a reasonable person would be threatened or intimidated by such conduct would add some structure to the standard of proof.

Therefore, arguably, this is a *malum in se* statute poorly written as a *malum prohibitum* law. Specifically, there is conduct prohibited without any designation as to the *mens rea* of the alleged actor. Additionally, there is no reference to any requirement as to the impact of the conduct on the recipient, the alleged victim.

The state may argue A.R.S. § 13-202(B) which provides:

> If a statute defining an offense does not expressly prescribe a culpable mental state that is sufficient for commission of the offense, no culpable mental state is required for the commission of such offense, and the offense is one of strict liability *unless the proscribed conduct necessarily involves a culpable mental state*. If the offense is one of strict liability, proof of a culpable mental state will also suffice to establish criminal responsibility. (Emphasis added.)

If the state argues that threatening or intimidating necessarily involves a culpable mental state – which one? There is still the vagueness and overbreadth argument.

Furthermore, the rationale that the proscribed conduct necessarily involves a culpable mental state raises the questions, what is the proscribed conduct, and when is a threat a threat? To be more explicit, practitioners involved with the factual underpinnings of the filings regarding this statute may see filings that involve "conditional" threats.

In *Watts v. United States* 89 S.Ct. 1399, 394 U.S. 705, 22 L.Ed.2d 664 (1969), a conditional threat was held not to be a true threat. Obviously, in attempting to define when a threat is actually a true threat, there will be an overlap with free speech concerns.

The threat in *Watts,* according to an investigator for the Army Counter Intelligence Corps, involved the defendant allegedly saying, "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. … ." 89 S.Ct. at 1401.

The U.S. Supreme Court noted that petitioner's counsel, in moving for a judgment of acquittal, advocated in part that the statement was expressly made conditional upon an event. The event would be induction into the Armed Forces, which petitioner vowed never would occur. Furthermore, both petitioner and the crowd laughed after the statement was made.

The statute in question in *Watts* was even more specific than A.R.S. § 13-1202 in that it did require knowingly or willfully making the prohibited threat. However, it still infringed on

protected speech. Additionally, the Supreme Court indicated that, whatever the willfulness requirement implies, the statute requires the government to prove a true threat. The statute prohibited any person from "knowingly and willfully (making) any threat to take the life of or to inflict bodily harm upon the President of the United States." 89 S.Ct. at 1400. As stated above, at least under the circumstances of this case, a true threat is not a conditional threat.

Most of our clients who are accused of threatening and intimidating, or accused under the new statute, A.R.S. § 13-2911, Interference with or Disruption of an Educational Institution, use speech that can be defined as nothing more than "blowing off steam." The First Amendment prohibits punishment for this type of speech because it normally does not amount to "fighting words."

In order to constitute "fighting words," the speech must be likely to provoke an ordinary citizen to a violent reaction." *See In re Louise*, 1999 WL 977053. The U.S. Supreme Court has stated that the state may only convict people whose speech disturbs the peace where there is a danger that the listener will be incited to violence. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942).

Since *Chaplinsky*, the Court has reflected the "desire to limit the broad implications of the doctrine," and narrow the meaning of "fighting words," in order to protect "a certain amount of provocative and challenging speech." *See* Rotunda and Nowack, Treatise on Constitutional Law, Section 20.39 (3d ed. 1999). In *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed.2d 1131 (1949), in holding that the defendant had the constitutional right to denounce certain minorities, the Court stated that the purpose of free speech was "to invite dispute" and that "[i]t may indeed best serve its high purpose when it induces a condition of unrest." *Id.* And in *Cohen v California*, 403 U.S. 15, 22, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), the Court held that protecting the sensibilities of others is not a sufficient justification for regulating speech, especially where the speech is easily avoidable. Moreover, the fact that the challenged speech included expletives did not strip it from constitutional protection because "one man's vulgarity is another's lyric." *Id.*

The Arizona Court of Appeals has held that intentional misbehavior at school, including cussing at the teacher in front of the class and kicking over school furniture, is not "imbued with elements of communication." *In re Julio*, 302 Ariz. Adv. Rep. 5, 990 P.2d 683 (Ct. App. 1999). It is clear that in *Julio*, the behavior that was punished was not the communicative aspect of the speech, but rather the disruptive impact that the tantrum had on the class. On the other hand, cursing at the school principal and assistant principal, coupled with storming out of the office against the administrator's orders, does not amount to "fighting words," and is not punishable. *In re Louise*, 1999 WL 977053.

Obvious hyperbole and ranting and raving, while possibly showing signs of immaturity, is constitutionally protected speech and may not be punished. So, arguably, are "conditional threats" such as those illustrated above. Again, these types of statements show a lack of maturity and may only be made to "blow off steam."

A.R.S. § 13-2911, as amended by the legislature in April 2000, makes it a felony to interfere with or disrupt an educational institution. The statute reads, in pertinent part:

A. A person commits interference with or disruption of an educational institution by doing any of the following:
   1. For the purpose of causing, or in reckless disregard of causing, interference with or disruption of an educational institution, threatening to cause physical injury to any employee of an educational institutional or any person attending an educational institution.
   2. For the purpose of causing, or in reckless disregard of causing, interference with or disruption of an educational institution, threatening to cause damage to any educational institution, the property of any educational institution, the property of any employee of an educational institution or the property of any person attending an educational institution.
   3. Knowingly going on or remaining on the property of any educational institution for the purpose of interfering with or disrupting the lawful use of the property or in any manner as to deny or interfere with the lawful use of the property by others.
   4. Knowingly refusing to obey a lawful order given pursuant to subsection C of this section.

A.

B. *To constitute a violation of this section, the acts that are prohibited by subsection A, paragraph 1 or 2 of this section are not required to be directed at a specific individual, a specific educational institution or any specific property of an educational institution.* (Emphasis added)

The issues presented by the enactment of this statute are numerous, but suffice it to say that overbreadth, vagueness and First Amendment concerns abound. As discussed above regarding A.R.S. §13-1202A(1), the new language added to

§13-2911 renders the statute both overbroad and vague. The statute is not narrowly tailored to balance First Amendment rights with the government's right to regulate. *Any* act is prohibited which disrupts or threatens, even if the threat is not specifically directed to any person or place at the educational institution. This gives rise to the question of how the statute will be enforced. Teachers and administrators are certainly given broad discretion to determine what type of act or speech violates the statute. The statute also violates First Amendment protections as discussed above.

Additionally, will this statute take away any argument regarding conditional threats? If the threat does not have to be communicated to anyone, how is anyone threatened? What if the threat is written, but not discovered until later, past the date of the threat? For example, the threat is "Everyone will die on March 10" and the writing is not discovered until March 17. Is this a threat and a violation of the statute? Isn't this type of threat an impossibility?

Counsel for juveniles and/or adults charged under A.R.S. § 13-2911 should explore not only the constitutional problems noted above, but also should consider the arguments of a "conditional threat" versus a "true threat."

One final question raised by these statutes: Is A.R.S. § 13-1202(A)(1) now a lesser-included offense of A.R.S. § 13-1204(A)(2)? Possibly!

State v. Morgan, 128 Ariz. 362, 625 P.2d 951 (Ariz. App. 1981) indicated that A.R.S. § 13-1202(A)(1) is not a lesser-included offense. However, A.R.S. § 13-1202 has been changed since that ruling. The *Morgan* court, using the older version of the statute, indicated that the distinction between the old threatening and intimidating statute and assault under A.R.S. § 13-1204(A)(2), was in the language of the old A.R.S. § 13-1202, which required the defendant's intent to terrify as part of the proof needed to convict. In 1994, the Arizona legislature deleted the requirement of proving the defendant's intent to terrify. Therefore, the rationale in *Morgan* no longer applies and A.R.S. § 13-1202 may be a lesser-included offense of A.R.S. § 13-1204.

Do you have an idea for an article? Would you be interested in writing an article for publication in *for The Defense*?

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