

THREAT, THREAT, THREAT, THREAT OR THREAT?

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Since the Tuscon shootings, “threat assessment” has again become the buzzword of the moment. Everyone now knows that colleges and universities have behavioral intervention and/or threat assessment teams, are forming teams, or know they need to form teams. But, what threats are they supposed to assess?

NaBITA has identified five differing legal standards for threats, all of which need to be known to and understood by those who practice threat assessment on college and university campuses. This brief article will explain each type of threat, what teams need to know about it, and how it differs from the others.

THE TRUE THREAT

For public colleges and universities (and all colleges in California except those with religious affiliations), free speech and threatening speech are in dynamic tension with one another. Private colleges and universities face no such limitation, and may address threatening speech without legal concern for infringing upon the free speech rights of the threatener. All others must balance the rights of the threatener and the safety of the community by using the *true threat* standard. The courts have elaborated this standard to give us a (relatively) bright line for when threatening speech crosses the line and is no longer deserving of the protections afforded by the 1st Amendment. The most common formulation of this standard is found in the *Watts* case, which defines *true threat* as “one a reasonable person would interpret as a **serious** expression of intent to inflict bodily harm upon **specific** individuals.” When speech rises to this level, reasonable consequences may legally follow. When speech does not rise to the level of a true threat, the speaker is protected by the wide latitude the courts have interpreted the 1st Amendment to permit. An example of this may be the repeatedly and seriously disruptive student who tells his classmate, “I’ve been thinking about it for a while, and I intend to kill Professor Jones on Friday.”

THE DIRECT THREAT

Colleges and universities must also understand the *direct threat*. The *direct threat* is one that places the speaker (or actor) outside of the protections of disability law, such that a college or university can act to separate that threatener from the campus community on the basis of their threat. Not all disabled individuals are protected by federal disability law. Individuals with disabilities must be otherwise qualified to participate effectively in an institution’s educational program. At the point at which someone’s threats of harm to self and/or others reach the level of a *direct threat*, the law considers them to be no longer otherwise qualified to participate in an institution’s educational program and separation is, therefore, possible and permissible (at least until the individual is no longer a *direct threat*). A *direct threat* exists where there is:

- high probability of substantial harm based on an individualized assessment of the most recently available medical judgment or objective knowledge,
- that determines the nature, duration and severity of the risk, and
- the probability that the potentially threatening injury will actually occur, and
- whether the threat can be averted through the implementation of reasonable accommodations or modifications.

This is the suicidal student who indicates a willingness or desire to repeat their attempt, but is released from the hospital anyway. A campus or external mental health professional may provide the “most recent” objective evidence using clinical judgment and/or assessment tools.

THE TARASOFF-LEVEL THREAT

Mental health professionals are governed in most states by laws that frame either a duty to warn or a permissive ability to warn those who are at risk (“may” warn vs. “must” warn), or those who can help prevent a threat from being carried out. This duty or ability to warn is a functional limitation of the ethical and legal obligations of confidentiality owed by mental health professionals to their clients. When in the course of a confidential communication a client reveals information that the professional believes constitutes a serious and imminent threat of harm to an identified individual or group, the bounds of confidentiality ease to allow or require communication regarding the threat to prevent the harm. “When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger”. For courts applying a strict *Tarasoff* interpretation or statute, the duty applies to situations where the client is the potentially dangerous person. The duty to warn would not generally apply where a client discloses that a third party intends to harm another person, though in codifying this standard, some states have imposed this as a broader duty. This standard amalgamates aspects of the *true threat* and *direct threat* standards, but in its specificity approximates neither. Do you think this is generally interesting, but want to know more about your state and the specific duties of mental health professionals in your jurisdiction? NaBITA offers that information, too. Click [here](#) to learn more.

THE CRIMINAL THREAT

The criminal threat is one that is actionable by arrest and/or criminal conviction. State statutes vary on their definitions for this kind of threat. Some statutes explicitly address threats of death, or grievous bodily injury. Others define the offense by the intent to harm or the expectation of harm, such as in the immediate apprehension of an attack, which constitutes criminal assault (where the actual attack is the battery). Criminal threats are punishable by state action, and fall outside the protections of the 1st Amendment. California’s statute is a useful example:

- willful threat of a crime which would result in great bodily injury;
- specific intent that the statement be taken as a threat, whether or not the perpetrator intended to carry it out;
- the threat, under the circumstances, conveyed a “gravity of purpose and an immediate prospect of execution of the threat”;
- the threat actually caused the person threatened to be in sustained fear; and
- the threatened person’s fear was reasonable under the circumstances.

Thus, the criminal threat has similarities to the *true threat* -- and other recognized limitations of free speech – the immediate incitement to violence and the use of fighting words. The criminal threat can also be uniquely actionable based on the vulnerability or prominence of a target, as in threats of terrorist acts, or against politicians. This is not to be confused with a “threat” or “harassment” policy that might violate a campus conduct code, but is not criminal in nature. Cruel or racist messages on Facebook walls and wipe boards will generally not fall under this category, but may be addressed through your conduct system (or at least through a dialogue).

THE FERPA/CLERY THREAT

FERPA has a threat standard? Yes, it does. The amendments codified in 2008 offer a new standard for invoking the FERPA emergency health and safety exception. This exception permits college officials to release information from student education records to the public as needed, when those records would otherwise be protected from release by the institution under FERPA. When can those records be released? When college officials document an “articulable and significant threat to the health or safety of a student or other individuals.” Release can be made to anyone of any aspect of a student’s record as needed to prevent the threat. The FERPA statute gives colleges wide latitude on this, but federal law also mandates warning. The flip side of the permissive standard in FERPA is elaborated by the federal Clery Act. The 2008 amendments to the Clery Act require colleges and universities “to immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus.” Unlike the threats described above, there is no requirement that the threats need to be so precise as to identify specifically those at risk, and nothing speaks to how much danger to health or safety must be posed. In fact, the language of both these laws uses a “reasonable” standard, and campuses will likely have the same wide discretion mentioned above in cases of legal challenge (see, e.g., the *Havlik* case).

So, there you have it. Five distinguishable threats and five threat standards in a nutshell so that you know what they are, when they are to be applied, and how they function to limit the actions of campus threat assessment and behavioral intervention teams. In addition to these five kinds of threats that serve to limit and circumscribe the authority of behavioral intervention and threat assessment teams, threats come in many other forms. Our institutions face operational threats, personal threats, facilities threats, reputational threats, emotional threats, and financial threats. Our next NaBITA article will focus on distinguishing and addressing each of these. To get access, use your ACCA member status to get a [20% discount](#) on NaBITA membership today. All three levels of NaBITA membership are discounted for the month of March, only.

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