THREATS IN THE LINE OF DUTY: POLICE OFFICERS AND THE FIRST AMENDMENT IN *STATE V. VALDIVIA* AND *CONNECTICUT V. DELORETO*

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The relationship between civilian and police officer occupies a unique position in First Amendment jurisprudence. The Supreme Court has intimated that words intended solely to harass ("fighting words"), excluded from First Amendment protection under *Chaplinsky v. New Hampshire,* may enjoy broader tolerance when the only listener is a police officer.[1] Some state supreme courts have adopted this dual standard when applying their state harassment laws, due to a trained police officer's higher tolerance for verbal provocation, as well as the societal interest in expressing dissatisfaction with police behavior.[2] When speech constitutes a "true threat" on a citizen's person, however, neither federal courts nor many states have found that the First Amendment calls for a higher tolerance for law enforcement victims than for civilians.[3]

In 2001, however, the Hawaiian Supreme Court found just such an individualized standard. In *State v. Valdivia,* it overturned the trial court's refusal to instruct that a victim's status as police officer was relevant to whether a defendant's threat to kill the victim constituted terroristic threatening.[4] Last year, the Connecticut Supreme Court explicitly rejected the *Valdivia* analysis and held, in *Connecticut v. DeLoreto,* that no higher standard should protect true threats when made to police.[5] The court stated that, while officers' training to resist

1. *Compare* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) *with* Lewis v. New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring) (stating that "a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words") (internal citations omitted).

2. *See, e.g.,* State v. Nelson, 38 Conn. Sup. 349, 354 (1982); State v. John W., 418 A.2d 1097, 1104, 1106–07 (Me. 1980); In the Interest of Doe, 76 Haw. 85, 96 (1994).

3. *See, e.g.,* United States v. Orozco-Santillan, 903 F.2d 1262, 1265–66 (9th Cir. 1990); United States v. Fulmer, 108 F. 3d 1486, 1491–93 (1st Cir. 1997).

4. 95 Haw. 465, 474 (2001).

5. 265 Conn. 145 (2003).

provocation might warrant a narrower definition of unprotected "fighting words" when directed at them, they should be protected to the same degree as civilians from "serious expressions of intent to harm."[6] The Connecticut Supreme Court's decision is a positive shift from the dangerous ruling in Hawaii, which singled out the profession most commonly endangered by criminal violence for a lower degree of protection under the law.

I. CONNECTICUT V. DELORETO

A. Facts and Procedural History

In June of 2000, appellant Dante DeLoreto was involved in two separate incidents in which he threatened Connecticut police officers with bodily harm. During the first, on June 9, he drove by Sergeant Robert Labonte, who was off-duty and jogging, and made the statement "Faggot, pig, I'll kick your ass."[7] DeLoreto drove past Labonte on two other occasions—on the second, he shouted, "I'm going to kick your ass, punk" and on the third, he got out of his car and again shouted, "I'm going to kick your ass."[8] The incident ended with no physical altercation. On June 15, DeLoreto encountered Sergeant Andrew Power in a local convenience store. Power believed that DeLoreto was attempting to read his nametag, and said, "If you're trying to read my name, I'll tell you my name."[9] DeLoreto then stepped back and raised his fist, asking, "You have a problem with me?" As Power left the store, DeLoreto pursued him and stated, "I'm going to kick your punk ass."[10]

DeLoreto was charged with two counts of breach of the peace in the second degree in violation of section 53a-181(a)(3) of the Connecticut General Statutes.[11] He moved to dismiss on the grounds that the statute was vague and overbroad, and that, when directed at police officers, his statements were constitutionally protected speech. His motions were denied, as was his motion for a judgment of acquittal on the same grounds, and he was convicted on both counts.

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6. *Id.* at 162 (internal citations omitted).
7. *Id.* at 148.
8. *Id.* at 149.
9. *Id.* at 149.
10. *Id.*
11. CONN. GEN. STAT. § 53a-181(a)(3) (2003) provides that "a person is guilty of breach of the peace when that person, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof threatens to commit any crime against another person or such other person's property."

The trial court ruled that 1) the defendant's statements constituted fighting words and were not protected speech, and that 2) section 53a-181 of the Connecticut General Statutes is neither unconstitutionally vague nor overbroad.[12] DeLoreto appealed to the Appellate Court and his case was transferred to the Connecticut Supreme Court.

B. The Connecticut Supreme Court Decision

The Connecticut Supreme Court upheld DeLoreto's conviction, with Chief Judge Sullivan writing for the four-judge majority. The court began by stating that it need not address the appellant's claim that the Connecticut constitution bestows greater protection on "fighting words" than does the First Amendment, because it could dispose of the claim on the alternate ground offered by the state: that the defendant's statements constituted "true threats."[13] Quoting the Supreme Court in *Virginia v. Black*, the court defined true threats as "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" even when "the speaker need not actually intend to carry out the threat."[14] A state may punish such statements without violating the First Amendment because they are "of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[15] The court adopted the objective standard articulated by the Ninth Circuit: "whether a reasonable person would have believed the threats, taken in context, were mere hyperbole or jokes and thus protected by the First Amendment."[16] It held that DeLoreto's statements to both officers, in light of his threatening manner to which several witnesses testified, constituted "true threats."[17] It also rejected the claim that First Amendment protection applies to threats that are not "imminent," citing the "fear of violence" and the "disruption that fear engenders" as reasons for the prohibition that did not depend upon imminence of the threat.[18] The court also noted that section 53a-181 likewise lacked an

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12. *DeLoreto*, 265 Conn. at 151.
13. *Id.* at 152 n.10.
14. *Id.* at 154 (quoting Virginia v. Black, 123 S. Ct. 1536, 1547–48 (2003)).
15. *Id.*
16. 265 Conn.. at 156 (quoting *Orozco-Santillan*, 903 F.2d at 1265–66).
17. *Id.* at 157, 158.
18. *Id.* at 159 (internal citations omitted).

imminency requirement.[19]

Finally, the court examined the defendant's claim that when an alleged threat is made to a police officer, a narrower standard should be necessary for conviction than would be the case for threatening remarks made to ordinary citizens. DeLoreto argued that the "true threats" doctrine is analogous to the "fighting words" doctrine, under which the Connecticut Supreme Court held in *State v. Nelson* that an officer's training to resist provocation, and a public interest in free speech in the face of law enforcement, demanded a higher tolerance of "fighting words" directed at police.[20] The court, while citing Justice Powell's *Lewis* concurrence for the proposition that the "thick-skinned" nature of officers might support a higher standard for "fighting words," stated that no authority supported this interpretation in cases of true threats.[21] It acknowledged the Hawaii Supreme Court's determination to the contrary in *Valdivia,* but rejected such an interpretation on the grounds that "a police officer has no greater duty than a civilian to submit to the threat of a criminal assault," even if they might be expected to resist mere "provocation" in the form of fighting words.[22]

Judge Katz dissented in part and concurred in part. He argued that it was unnecessary for the court to invoke the true threats doctrine with respect to the incident involving Labonte, because it could have affirmed on the narrower ground that DeLoreto violated the subsection of 53a-181 prohibiting "threatening behavior in public."[23] Katz also disagreed with the majority's application of the true threats doctrine to the incident with Power. Although he agreed that it applied, he thought its application required a fact-intensive inquiry that was the purview of the trial court.[24]

II. STATE V. VALDIVIA

A. *Facts and Procedural History*

On November 3, 1999, Jose Luis Valdivia was involved in a police pursuit following a hit-and-run accident, which culminated in his

19. *Id.*
20. 265 Conn. at 160 (quoting *Nelson*, 38 Conn. Sup. at 354).
21. *Id.* (citing *Lewis*, 415 U.S. at 135).
22. *Id.* at 162. The majority also determined that the trial court had not erred in finding that section 53a-181 was neither unconstitutionally vague nor overbroad. *Id.* at 164–68.
23. *Id.* at 170 (Katz, J., concurring in part and dissenting in part).
24. *Id.* at 171.

pinning Officer Brad Heatherly against the steering wheel of his moving vehicle and dragging him thirty yards.[25] During this encounter, Heatherly used pepper spray on Valdivia, to no apparent effect.[26] When Valdivia's pursuit ended in a crash, it took four officers to subdue and arrest him, one of whom also used pepper spray, again to no effect. Officers Shannon Kawelo and Samantha Kailihou drove Valdivia, handcuffed and restrained by a metal bar in a patrol car, to a hospital for treatment after his arrest.[27] While handcuffed and seated between the two officers in the hospital, Valdivia turned to Kawelo and stated "I'm gonna kill you and your police uniform."[28]

Valdivia was charged and convicted by the First Circuit Court of Hawaii of kidnapping and first degree terroristic threatening, in violation of section 707-716(1)(c) of the Hawaii Revised Statutes.[29] He appealed to the state supreme court on the grounds that insufficient evidence was presented to support his convictions, that the trial court erroneously instructed the jury with respect to what constituted a "true threat," and that he was deprived of a fair trial due to prosecutorial misconduct.[30]

B. *The Supreme Court of Hawaii Decision*

Judge Levinson wrote the unanimous opinion upholding Valdivia's conviction of kidnapping and vacating his conviction of first degree terroristic threatening on the grounds that the trial court's jury instruction with respect to what constituted a "true threat" was prejudicially erroneous. With respect to the terroristic threatening charge, the court first considered the defendant's claim that there was insufficient evidence to support his conviction. The court stated that the prosecution was required to prove, first, "that, under the circumstances, Valdivia's remark threatened to cause bodily injury to Officer Kawelo —that is, that his words (the conduct element) bore

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25. *Valdivia*, 95 Haw. at 470.

26. *Id.*

27. *Id.*

28. *Id.* at 471.

29. HAW. REV. STAT. § 707-716(1)(c) (1993) provides that "[a] person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening ... against a public servant[.]" HAW. REV. STAT. § 707–715 (1993) defines "terroristic threatening" as follows: "A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person ... with the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person[.]"

30. *Valdivia*, 95 Haw. at 468.

the attributes of a 'true threat' (the attendant circumstances element)" and second, "that he recklessly disregarded the risk that his remark would terrorize Officer Kawelo (the requisite state of mind)."[31] Hawaiian case law mandates that for a remark to rise to the level of "true threat," it must convey to the victim, unlike under Connecticut law, "a gravity of purpose and imminent prospect of execution."[32] The court held, however, that the imminency requirement need not be shown by "temporal immediacy" alone, but by any proof that the speaker has the "apparent ability" to carry the threat out.[33] It found, therefore, that although Valdivia was handcuffed at the time of the utterance, a jury could have found that he possessed the "apparent ability" to carry out his threat at some point in the future, rejecting Valdivia's claim of insufficiency of evidence.[34]

With respect to the defendant's challenge of the jury instructions, the court held that the trial court erred by failing to instruct on the imminency requirement, and that there was a reasonable possibility that the error contributed to Valdivia's conviction.[35] The court also agreed with Valdivia's proposed instruction that "where a threat is directed at a police officer, you may consider that police officers are trained to a professional standard of behavior that ordinary citizens might not be expected to equal."[36] In so holding, the court relied on its decision in *In the Interest of Doe*, where the defendant was tried for harassment of a police officer.[37] In that case, the Hawaii Supreme Court declared, in line with the U.S. Supreme Court's dicta in *Lewis* and *Houston v. Hill*, that "where abusive speech is directed at ... a police officer, it must generally be coupled with ... outrageous physical conduct, ... which exacerbates the risk that the officer's training and professional standard of restrained behavior will be overcome such that the officer will be provoked into a violent response."[38]

Although the court acknowledged the distinction between the crime of harassment, which requires a "likely" response from the victim, and the instant case of terroristic threatening, which does not require that the victim actually be terrorized, it held that the "gist" of *Doe*

31. *Id.*. at 474.
32. *Id.* at 476 (quoting State v. Chung, 75 Haw. 398, 416–17 (1993)).
33. *Id.*
34. *Id.* at 477.
35. 95 Haw. at 478.
36. *Id.* at 479.
37. 76 Haw. 85 (1994).
38. *Id.* (quoting *Doe*, 76 Haw. At 96).

applied to threats.[39] It held, then, that the jury "should have been instructed that it could consider relevant attributes of both the defendant and the subject of the allegedly threatening utterance in determining whether the subject's fear of bodily injury, as allegedly induced by the defendant's threatening utterance, was objectively reasonable under the circumstances in which the threat was uttered."[40] The court determined this error to be alternate grounds for remand.

III. COMMENT: THE HAWAII SUPREME COURT'S MISTAKEN APPLICATION OF THE FIRST AMENDMENT

On the surface, the difference between *DeLoreto* and *Valdivia* cannot lie in their interpretations of the First Amendment because both cases classify the conduct at issue as outside the realm of constitutional protection. The *DeLoreto* court cited *U.S. v. Orozco-Santillan* for the proposition that true threats, "considered in light of their...factual context(s)" are not constitutionally protected speech.[41] Likewise the *Valdivia* court held that the First Amendment does not require temporal imminence for a threat to be criminalized, rejecting the appellant's claim of insufficiency of evidence. Both courts then considered the application of statutory language to constitutionally unprotected speech—speech characterized, in both cases, as "true threats" rather than "fighting words." In truth, however, both courts shaped their decisions in light of Justice Powell's *Lewis* concurrence, suggesting that the training of police officers mandates a higher standard of tolerance for "fighting words" directed at them. By highlighting why these standards should apply only to speech, the *DeLoreto* court's analysis underscores the weaknesses of the *Valdivia*'s application in the "true threats" context. Thus, *DeLoreto* provides the more rational example for future state courts in interpreting their own threat laws.

In finding that "the particular attributes of the defendant and the subject of the threatening utterance are...relevant in assessing whether the induced fear of bodily injury, if any, is objectively reasonable" under section 707-716(1)(c) of the Hawaii Revised Statutes, the *Valdivia* court relies solely on "the gist" of *Doe*.[42] In that

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39. *Id.*

40. *Id.* The court also held that any prosecutorial conduct was harmless beyond a reasonable doubt. *Id.* at 479–84.

41. 265 Conn.. at 156 (quoting United States v. Orozco-Santillan, 903 F.2d 1262, 1265–66 (9th Cir. 1990)).

42. 95 Haw. at 479.

case, the court found that to constitute the crime of harassment under section 711-1106(1)(b), "where abusive speech is directed at ... a police officer, it must generally be coupled with ... outrageous physical conduct, ... which exacerbates the risk that the officer's training and professional standard of restrained behavior will be overcome such that the officer will be provoked into a violent response[.]"[43]

This analogy between *Doe* and *Valdivia* is flawed in two respects. The court acknowledged the first in its opinion: the harassment statute requires a "likely" response from the listener, while the victim of terroristic threatening need not feel threatened in actuality.[44] After noting this distinction, the court did nearly nothing to justify ignoring it, aside from repeating that the objective standard is one of a reasonable person familiar with the circumstances in which the threat is uttered.[45] The court did not explain how the requirement of familiarity with the circumstances of the threat transforms an objective standard into an individuated standard based upon personal characteristics. Where a violent response must be "likely" for speech to be criminalized, a defendant's intent as to the element of likelihood depends partially upon the characteristics of the listener of which he has reason to know. Where no actual response is necessary to establish a true threat, however, there is no basis upon which to construe an objective standard as requiring individuation. The appellant's proposed instructions, the omission of which the court held to be alternate grounds for remand, are particularly irrelevant: "where a threat is directed at a police officer, you may consider that police officers are trained to a professional standard of behavior that ordinary citizens might not be expected to equal."[46] Unlike harassment, the crime of terroristic threatening requires no probability whatsoever of a particular result. An officer's training—even assuming it somehow made him less likely to view threats against his life as threats—is irrelevant to whether the comment "*could* induce fear of bodily injury in a reasonable recipient."

In addition to the differing likelihoods of response required for the two crimes, a second flaw in the application of *Doe* to *Valdivia* is the difference in the *content* of the required responses. To constitute harassment, a defendant's words must be "likely to provoke a violent

43. 76 Haw. at 96 (emphasis, internal quotation signals, and citations omitted).
44. 95 Haw. at 479.
45. *Id.*
46. *Id.*

response."[47] An officer's "training and professional standard of restrained behavior" may well be expected to modify his or her physical response to taunting words, and if the purpose of outlawing harassment is to prevent *violent responses* then applying a different standard to those trained to remain stalwart against harassment is sound.[48] As the *DeLoreto* court points out, however, an officer is not innately less sensitive to the expressed intent to do him harm than a civilian is.[49] Indeed, a reasonable officer often has *more* cause to feel threatened by words, as the police profession as a whole is the frequent target of criminal violence. In gang situations, for example, the statement of intent to kill a police officer might elevate the speaker's status, which will be diminished in the eyes of his criminal community if he fails to follow through. In addition, officers are more likely to be aware of the close correlation between verbal resistance and physical resistance during an encounter with a suspect, where the two often go hand in hand.[50] As such, the motivations for the disparate standard outlined in *Doe* do not establish a basis for the *Valdivia* court's expansion of the standard to the true threats doctrine.

With *Doe* such a weak analogy, then, what exactly was the "gist" upon which the *Valdivia* court relied in applying it? The answer can be found, perhaps, in the commentary to section 250.4(2) of the Model Penal Code—which served as a prototype for the Hawaii Penal Code—from which the *Doe* court quoted extensively: "advocates of a special standard for fighting words addressed to a peace officer also confess to a fear of abusive prosecution if no such adjustment is made. Insult and challenge by an arrestee are so frequent and so commonly disregarded that the occasional reliance on such conduct as a basis for arrest raises the specter of selective enforcement and discriminatory application of the laws."[51] In other words, the "gist" of *Doe* is the need to protect a First Amendment right to verbal disagreement and protest from the threat of arbitrary arrest.

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47. HAW. REV. STAT. § 711-1106(1)(b) (1985).

48. The commentary on MPC § 250.4(2) (which was a model for HRS § 711-1106(1)(b)) states, "It is the prospect of *violence and disorder* that the provision seeks to avoid and not merely unwelcome or unfriendly conversation. The scope of the offense must be determined in light of its underlying purpose to prohibit speech that is likely to *precipitate unlawful action*" (emphasis added).

49. 265 Conn. at 162.

50. In one recent study of arrest incidents, 46% of suspects who eventually physically resisted the arresting officer through violence also confronted him with verbal noncompliance. Darrell L. Ross, *Assessing the Patterns of Citizen Resistance During Arrests*, FBI LAW ENFORCEMENT BULLETIN, June 1999, at 7.

51. 76 Haw. at 98–99 (quoting Commentary on MPC § 250.4(2) at 365–66).

This fits with the Supreme Court's unique treatment of the relationship between peace officer and citizen in the "fighting words" doctrine. The Court has distinguished between police and citizens not simply because of an officer's heightened resistance to taunting, but because, as the Supreme Court articulated in *Houston v. Hill,* "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."[52] The application of *Doe* to the context of terroristic threatening may not make sense in terms of statutory interpretation, but it is a logical extension if the goal is to pre-empt sham arrests, or to give aggressors more robust First Amendment protection specifically when their victims are police officers.

In *DeLoreto,* the court prudently rejected this ill-fitting doctrine: "By their very nature, true threats have no communicative value but, rather, are 'words [used] as projectiles where no exchange of views is involved.'"[53] The distinction between true threats and protected speech is well-founded. Making a threat of bodily harm upon an individual police officer is not an exercise of the right to "challenge police action" but a violation of the officer's own right to be free from fear of criminal assault, and importing free-speech protections into this situation undermines the ability to protect police officers from harm. The policy concern that criminalizing threats will provide bad cops with an excuse for unlawful arrests is a legitimate one, but it cannot be used to expand free-speech protections to unprotected speech. Legislatures should be able to take this into account when drafting threat laws, of course, but they need the flexibility to base these laws primarily on the nature of threats, such as the magnitude and the probability of harm.[54]

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52. 482 U.S. 451, 462–63 (1987). The *Doe* court also endorses Kent Greenawalt's argument in favor of an individuated standard, which also envisions an adversarial relationship between police and citizen: "This direction fits comfortably with the general distaste for content-based restrictions and with the modern treatment of the hostile-audience problem, which is to insist that the first duty of government for unpalatable speech is to protect speakers." 76 Haw. at 97 (quoting KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 295–96 (1989)).

53. 265 Conn. at 163 (quoting Shackelford v. Shirley, 948 F. 2d 935, 938 (5th Cir. 1991)) (internal citations omitted).

54. Indeed, statutes like HAW. REV. STAT. § 707-716(1)(c) (1993), which treats a threat against a peace officer as more serious than one against a civilian, demonstrate that the legislature intended precisely the opposite of what the court determined.

IV. CONCLUSION

The Supreme Court has never implied that the First Amendment requires more tolerance of verbal threats by a police officer than by a civilian for the simple reason that true threats are not speech. The very different paths taken in construing the threat laws in *DeLoreto* and *Valdivia* present a significant challenge for other states in determining their ability to protect police officers from threats to their person. The logic of *DeLoreto*, however, is the correct approach: when the "projectiles" hurled are threats and not speech, their target should not and cannot make a difference.